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University  
Institute

DEPARTMENT  
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# **Economic, Social and Cultural Rights of Civilians in Contexts of Armed Conflict and Occupation: an International Law Perspective**

Chiara Altafin

Thesis submitted for assessment with a view to obtaining  
the degree of Doctor of Laws of the European University Institute

Florence, March 2015



European University Institute  
**Department of Law**

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This thesis was submitted for language correction.

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## Abstract

This dissertation examines the role, function and adequacy of public international law to deal with civilians' access to, enjoyment and progressive realisation of economic, social and cultural rights (ESC rights) as controversially affected during and in the aftermath of contemporary scenarios of armed conflict, other situations of massive violence, and contexts of occupied territories. Over the course of the past three decades the nature of armed conflicts, their causes and consequences have undergone major changes. Similarly, current-day military occupations have assumed polymorphic features, including forms of prolonged occupation or forms of interim administrations to carry out "regime change" in the occupied territory.

It is argued that relevant implications against civilians' vulnerability may derive from a more integrated and holistic approach of international law to issues pertaining to the respect, protection, and fulfilment of ESC rights. In particular, the position taken is that certain branches of international law have progressively come to represent valuable legal tools enabling to delineate and clarify the core substance and uncertain boundaries of outstanding connections emerging between civilians' ESC rights and conflict-affected or occupation-related settings.

The evolution of the international legal framework invites, indeed, a reconsideration of the normative responses advanced under international humanitarian law in tandem with the functional development of other applicable international legal regimes, such as international criminal law and international human rights law. Through an extensive review of legal instruments and practice, this study investigates the following: which international norms have progressively *supported* developments in the normative content of ESC rights and favour a more precise understanding of the nature and scope of ensuing obligations to be addressed for the imperative of civilian protection; which international norms have *tackled* questions of accountability for their violations as committed during the conduct of hostilities and its aftermath or the administration of occupied territories; which international norms have also *advanced* the availability of remedies to ensure the basic right to effective remedy and reparation for the violations concerned. Accordingly, emerging trends alongside relevant gaps, weaknesses and limits in the legal branches concerned are addressed by suggesting a number of conclusive basic remarks.





## TABLE OF CONTENTS

<b>Acknowledgments</b> .....	<b>5</b>
<b>Abstract</b> .....	<b>7</b>
<b>List of Main Abbreviations</b> .....	<b>14</b>
<b>Introduction</b> .....	<b>17</b>
<b>1. The context of the study</b> .....	<b>17</b>
<b>2. The scope of the study and the significance of the research topic</b> .....	<b>20</b>
<b>3. Defining the approach to the research focus</b> .....	<b>22</b>
<b>4. Methodology</b> .....	<b>29</b>
<b>5. Roadmap</b> .....	<b>30</b>
<b>Chapter I: Civilian immunity under the law on the conduct of hostilities and ESC rights</b> .....	<b>33</b>
<b>1. Introduction</b> .....	<b>33</b>
<b>2. The binary qualification framework in the twenty-first century</b> .....	<b>35</b>
<b>3. The evolution of the IHL protection of civilian persons and objects</b> .....	<b>38</b>
<b>4. The definition of civilians under AP I and AP II</b> .....	<b>44</b>
<b>5. Civilian objects and the definition of military objective</b> .....	<b>47</b>
5.1. Some remarks on military objectives under AP I .....	50
5.1.a. The condition of effective contribution to the enemy's military action .....	52
5.1.b. The negative presumption in favour of immunity from armed attack .....	56
5.1.c. The condition of definite military advantage .....	57
5.1.d. Dual-use objects .....	59
5.2. Civilian objects under AP II .....	61
<b>6. The scope of civilian immunity against the effects of hostilities</b> .....	<b>62</b>
6.1. The prohibitions of direct and deliberate attacks .....	63
6.2. The prohibition of indiscriminate attacks .....	78
6.2.a. Some remarks on the principle of proportionality .....	83
6.2.a.i. The issue of long-term and indirect effects of attacks .....	89
6.3. The obligation to adopt precautionary measures in attack and in defence .....	96
6.4. Prohibitions or limitations on use and attacks on certain objects .....	104
6.5. Cultural property .....	107
6.5.a. Remarks on the scope of the protective regime .....	109
6.5.b. Remarks on IHL rules regulating the targeting of cultural property .....	120
6.5.c. Remarks on the criminalisation of acts against cultural property .....	125
6.6. Education .....	130
6.6.a. Preliminary remarks on the protection of the right to education .....	133
6.6.b. Remarks on the protection of educational facilities .....	136
6.6.c. Remarks on the criminalisation of education-related violations .....	141
6.6.d. Remarks on the international law potential in deterring attacks .....	144
6.7. Objects indispensable to the survival of the civilian population .....	147
<b>7. The prohibition of starvation in relation to siege and blockade</b> .....	<b>156</b>
7.1. Siege .....	157
7.2. Blockade .....	160
7.2.a. <i>An atypical case of blockade: the connection with occupation and military operations</i> .....	163
<b>Chapter II: International cooperation and humanitarian assistance to civilians</b> ..	<b>175</b>
<b>1. Some remarks on relief assistance and access to civilians</b> .....	<b>175</b>

<b>Chapter III: The “welfare of the civilian population” under the laws of occupation and ESC rights.....</b>	<b>184</b>
<b>1. Introduction.....</b>	<b>184</b>
<b>2. The protective purpose of the law of occupation and its scope for ESC rights.....</b>	<b>186</b>
2.1. The protective purpose as an <i>intrinsic function</i> of the existing regime .....	186
2.1.a. The Hague Regulations .....	187
2.1.b. The Forth Geneva Convention .....	189
2.1.c. Additional Protocol I.....	192
2.1.d. Basic remarks .....	192
2.2. The protective purpose as an <i>evolving function</i> of the challenged regime.....	193
2.2.a. The rare, rejected or failed application of the laws of occupation .....	194
2.2.b. The (alleged) inadequacy of the conservationist principle .....	196
2.2.c. Substantial developments of international law.....	198
2.2.c.i. The principle of self-determination of peoples .....	199
2.2.c.ii. Modern international human rights law .....	201
2.2.d. The legal relevance of the temporal dimension of the laws of occupation .....	206
<b>3. The prohibition to change the legal status of the occupied territory.....</b>	<b>218</b>
<b>4. The obligation to restore and ensure public order and life in occupied territory .....</b>	<b>222</b>
4.1. The meaning of the expression “ <i>vie publique</i> ” .....	223
4.2. Restoring and ensuring civil life: nature and implications for ESC rights .....	227
4.2.1. The occupier’s legislative competence and the context .....	229
4.2.1.a. Control over the territory .....	229
4.2.1.b. Resources available in the occupied territory .....	229
4.2.1.c. Time period of occupation .....	230
<b>5. The obligation to respect pre-existing legal system and admissible exceptions .....</b>	<b>235</b>
5.1. The meaning of “ <i>les lois en vigueur</i> ” and “ <i>empêchement absolu</i> ” .....	236
5.1.a. Case study: the planning and building authority in Area C of the West Bank.....	239
5.2. The necessity exceptions.....	243
5.2.1. Necessity on security grounds .....	243
5.2.2. Necessity for maintaining the orderly government of the occupied territory .....	244
5.2.3. Necessity for fulfilling the obligations under the Geneva Conventions .....	248
5.3. Necessity for implementing international human rights law .....	250
<b>6. The seizure and use of enemy property .....</b>	<b>258</b>
6.1. The prohibition on seizure and use of public property .....	258
6.1.1. Movable State property .....	259
6.1.2. Immovable State property, particularly natural resources .....	261
6.1.2.a. Case study: the quarrying activity in the occupied territory .....	267
<b>7. Concluding Remarks.....</b>	<b>276</b>
<b>Chapter IV: Civilians’ protection in the area of ESC rights under international human rights law .....</b>	<b>278</b>
<b>1. Introduction.....</b>	<b>278</b>
<b>2. Theoretical and practical grounds for reliance on human rights law .....</b>	<b>278</b>
2.a. Elaborating upon legal preservation of civilians’ human dignity .....	278
2.b. Approaching coherently the integral and holistic vision of human rights.....	281
2.c. Taking seriously the evolution of the international protection of ESC rights .....	285
2.c.i. Reflecting on the nature and typologies of State obligations .....	296
2.c.ii. Focusing on the obligations stemming from the ICESCR.....	299
2.d. Inquiring as to the relationship with other branches of international law .....	304
<b>3. The applicability of human rights treaties on ESC rights .....</b>	<b>305</b>
3.1. Preliminary consideration on the effects of armed conflicts on treaties .....	306
3.2. The relevance of <i>ad hoc</i> derogation clauses.....	309
3.2.a. The European Convention on Human Rights .....	310
3.2.b. The American Convention on Human Rights.....	312
3.2.c. The Arab Charter on Human Rights .....	313

3.2.d. The International Covenant of Civil and Political Rights .....	313
3.2.e. Overall preliminary remarks .....	316
3.3. Derogability from ESC rights under treaties without <i>ad hoc</i> derogation clause .....	320
3.3.1. The ICESCR and the debate on derogability .....	322
3.3.2. Derogability from ESC rights in international and regional jurisprudence .....	324
3.3.2.a. The Committee on Economic, Social and Cultural Rights .....	324
3.3.2.b. The International Court of Justice .....	327
3.3.2.c. The Committee on the Rights of the Child .....	329
3.3.2.d. The Committee on the Elimination of Discrimination against Women .....	331
3.3.2.e. The African Commission on Human and Peoples' Rights .....	334
3.3.3. Additional remarks in the light of general international law .....	339
3.4. The relevance of <i>ad hoc</i> limitation clauses .....	341
3.5. The ICESCR's general limitation clause and its implications in conflict-affected situations .....	343
3.5.1. The scope of admissible limitations on ESC rights .....	344
3.5.1.a. Article 4 as a protective clause of ESC rights .....	345
3.5.1.b. Article 4 as a clause intrinsically linked to "progressive realisation" .....	346
3.5.1.c. Article 4 as a clause not appealing to "public order" .....	347
3.5.1.d. The significance of "the general welfare" under Article 4 .....	349
3.5.1.e. Further implications from the qualifications under Article 4 .....	352
3.5.1.f. The required compatibility "with the nature of these rights" .....	353
3.5.2. <i>De facto</i> derogations from ESC rights? .....	356
3.6. The relationship with international humanitarian law .....	358

**Chapter V: The protection of civilians *via* extraterritorial reach of treaties on ESC rights .....** **371**

**1. Introduction .....** **371**

**2. Extraterritoriality under international human rights law in legal scholarship: preliminary considerations of research .....** **374**

**3. The potential of soft-law norm-setting efforts on extraterritorial obligations .....** **378**

3.1. The UN Guiding Principles: normative contributions to conflict-affected situations and evolving implications .....

382

3.1.a. Some remarks on the State's duty to protect .....

384

3.1.b. Some remarks on subsequent States' policy options .....

389

3.1.b.i. Reflecting on evolved forms of extraterritorial jurisdiction as tools to influence corporate conduct

overseas .....

390

3.1.c. Some remarks on the corporate responsibility to respect .....

393

3.1.c.i. Elaborating on businesses' respect for international humanitarian law .....

394

3.2.c.ii. Reflecting on businesses' approach to risks of gross human rights abuses as "a legal compliance

issue" .....

397

3.2. The Maastricht Principles: contributions to the normative framework of human rights obligations

of foreign States .....

399

3.2.a. A twofold conceptual foundation of extraterritorial obligations .....

399

3.2.b. A progressive interpretation of the notion of jurisdiction .....

400

3.2.c. The general obligation to avoid causing harm .....

400

3.2.c.i. The foreseeability rule .....

401

3.2.c.ii. The precautionary principle .....

402

3.2.c.iii. The prior assessment requirement .....

403

3.2.d. The normative content of extraterritorial obligations on ESC rights .....

404

3.2.d.i. Respecting ESC rights .....

404

3.2.d.ii. Protecting ESC rights .....

405

3.2.d.iii. Fulfilling ESC rights .....

413

3.2.e. The accountability dimension of extraterritoriality .....

414

**4. The general scope of application of treaties on ESC rights in view of their textual vacuum or ambiguity .....** **416**

4.a. The ICESCR .....

418

4.b. The ICERD and CEDAW .....

419

4.c. The CRC .....

422

<b>5. Looking at treaties on ESC rights through a threefold lens of extraterritorial application in conflict-affected situations</b> .....	<b>422</b>
5.1. The concept of jurisdiction: which role and content for the extraterritorial application of treaties on ESC rights? .....	423
5.1.1. State jurisdiction: a revised traditional basis for extraterritorial obligations on ESC rights.....	425
5.1.2. Preliminary remarks on the scope of the ICESCR.....	429
5.1.2.a. The “exclusive” use of the term jurisdiction in the OP-ICESCR.....	431
5.1.2.b. The practice of the Committee on economic, social and cultural rights .....	433
5.1.2.c. The approach of the International Court of Justice .....	433
5.1.2.d. The position within the UN Special Procedures mechanisms .....	436
5.1.3. A progressive interpretation of the scope of State obligations relating to ESC rights .....	436
5.1.3.1. Effective control and authority over people or foreign territories.....	437
5.1.3.1.a. The doctrine of effective control as developed in international jurisprudence .....	438
5.1.3.1.b. The effective control criterion in cases of occupied territories.....	441
5.1.3.1.b.i. <i>Critical missing cases</i> .....	442
5.1.3.1.b.ii. <i>The Israeli/Palestinian case</i> .....	443
5.1.3.2. Foreseeability as to the effects on the enjoyment of ESC rights.....	456
5.1.3.3. Decisive influence or measures to realise ESC rights.....	457
5.2. The concept of “international cooperation”: which relevance for the extraterritorial application of treaties on ESC rights? .....	459
5.2.1. “International cooperation”: an emerging basis for extraterritorial obligations on ESC rights .....	460
5.2.1.1. International cooperation as a general principle of international law .....	460
5.2.1.2. International cooperation as referred to in human rights treaties .....	462
5.2.1.3. International cooperation on the right to food and the right to health.....	465
5.2.1.4. Some remarks under customary international law .....	466
5.3. Sanctions or equivalent measures as acts giving rise to the extraterritorial application of treaties on ESC rights.....	466
<b>Chapter VI: Testing corporate liability for breaches of international law having direct or indirect relevance for civilians’ ESC rights</b> .....	<b>471</b>
<b>1. Introduction</b> .....	<b>471</b>
<b>2. Civil litigation in national legal orders</b> .....	<b>476</b>
2.1 The Jerusalem Light Rail case.....	476
2.1.1 The legal basis for actions against the two French companies.....	479
2.1.2 The reasoning of the Versailles Court of Appeal.....	481
2.1.2.a ..on the locus standi of the appellants.....	481
2.1.2.b ..on the basis of the action brought by the OLP .....	482
2.2 <i>Bil’in</i> Village case .....	498
2.2.1. The suits before Canadian courts and the controversial viability of civil claims for war crimes allegedly committed abroad .....	498
2.2.2. The petitions before the Israeli Supreme Court .....	503
2.2.3. The individual complaint before the United Nations Human Rights Committee.....	504
<b>3. Criminal litigation in national legal orders</b> .....	<b>506</b>
3.1. The Riwal Group/Lima Holding B.V. case for corporate complicity in international crimes .....	506
3.2. The Lahmeyer case .....	508
<b>4. Concluding remarks</b> .....	<b>512</b>
<b>Conclusions</b> .....	<b>514</b>
<b>1. The object of this study</b> .....	<b>514</b>
<b>2. The main findings of this study</b> .....	<b>515</b>
<b>2.1</b> .....	<b>515</b>
<b>2.2</b> .....	<b>521</b>
<b>2.3</b> .....	<b>522</b>
<b>2.4</b> .....	<b>525</b>
<b>2.5</b> .....	<b>529</b>
<b>2.6</b> .....	<b>530</b>

**Bibliography..... 532**

## **List of Main Abbreviations**

ACHR	American Convention on Human Rights
AfrCHPR	African Charter on Human and Peoples' Rights
AfrCommHPR	African Commission on Human and Peoples' Rights
AP I	Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts
AP II	Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EurCommHR	European Commission of Human Rights
ESC Rights	Economic, Social and Cultural Rights
GCIV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War
GCs	Geneva Conventions of 1949
HRC	Human Rights Committee
HRs	Hague Regulations
IACtHR	Inter-American Court on Human Rights
IACommHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCSt.	Statute of the International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICL	International Criminal Law

ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILA	International Law Association
ILC	International Law Commission
OHCHR	Office of the High Commissioner for Human Rights
OPICESC	Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights
PCIJ	Permanent Court of International Justice
SCSL	Special Court for Sierra Leone
RPE	Rules of Procedure and Evidence
UNCC	United Nations Compensation Commission
UN GA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
UN SC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties





# INTRODUCTION

## 1. The context of the study

Over the course of the past three decades the nature of armed conflicts, their causes and consequences have undergone major changes, such as those in the Balkans region and in the Persian Gulf or in the cases of Central African Republic, the Democratic Republic of the Congo, Lebanon, Libya, Mali, Nigeria, Syria, Somalia, Sudan and South Sudan. Similarly, current-day military occupations have assumed polymorphic features, including forms of prolonged occupation, such as in the case of the Palestinian territories, or forms of interim administrations to carry out “regime change” in the occupied territory, such as in the cases of Afghanistan and Iraq. These (r)evolutions have favoured the perception that the international community must assume and arrange itself for “*new protection needs*” of civilian victims of such complex scenarios.<sup>1</sup>

In this context, issues pertaining to the respect, protection, and fulfilment of economic, social and cultural rights (ESC rights) ever more constitute unavoidable components of any comprehensive appraisal of the evolving legal framework for the protection of civilians in international law. The ESC rights as enshrined in various international instruments essentially provide guarantees to individuals of their fundamental rights to physical and mental health, to an adequate standard of living for oneself and one’s family (comprising water, food, clothing, housing, and the improvement of living conditions), to education, to work, to protection and assistance to the family, and to take part in cultural life.

Contemporary conflict-related situations are indeed acknowledged among the *major obstacles* to the progressive realisation of the ESC rights of civilians, particularly these of vulnerable categories such as children, women, members of racial, ethnic or religious groups, minority communities, refugees and internally displaced persons.<sup>2</sup> For instance, all human nutrition phases (*i.e.* production,

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<sup>1</sup> See J. Kellenberger, President of the International Committee of the Red Cross, “Strengthening legal protection for victims of armed conflicts”, Official Statement, 21 September 2010.

<sup>2</sup> For instance, issues related to the enjoyment of ESC rights were considered fully relevant to the Chechen conflict, see CESCR, *List of issues to be taken up in connection with the consideration of the fourth periodic report of the Russian Federation concerning the rights referred to in Articles 1-15 of the International Covenant on Economic, Social and Cultural Rights (E/C.12/4/Add.10)*, UN Doc. E/C.12/Q/RUS/2, 14 January 2003, para. 7 (“*What is the position of the State party regarding the self-determination of all the peoples of the Russian Federation and what measures are being taken by the State party to ensure that all those people affected by conflict, including the Chechens, enjoy the economic, social and cultural rights contained in the Covenant?*”), para. 9 (“*What steps are being taken by*

procurement, preparation, distribution, consumption, and biological utilisation of food) are likely to be impaired in such situations, resulting in malnutrition, disease and death. Then, collapsed health care systems are aggravated by delays or denials of access to basic health services as caused, for instance, by restrictions on movement imposed during the conduct of military operations or by military checkpoints, curfews, blockades and other methods and means of warfare employed. Additionally, not only the vast majority of dead and injured are civilians, but also the bulk of damage produced by warfare, military occupations and aftermath contexts mainly affect infrastructures *vital* for civilian well-being: pertinent examples concern the demolitions of houses and forced evictions or the destruction of schools.

Conversely, failures to realise ESC rights as well as violations of these rights may be - and generally are - among the *root causes* of conflict-affected situations, principally in respect to gross and systematic discrimination and inequality *vis-à-vis* access to natural resources, to land tenure and distribution, to housing, to work, limited access to education, identity conflict, corruption.

In this regard, the importance of safeguarding *ESC rights* as *core elements* of post-conflict justice mechanisms in the pursuance of social justice and sustainable peace based upon the rule of law has started to be emphasised in the light of largely neglected inclusion of serious abuses of economic and social rights within post-conflict criminal prosecutions as well as truth and reconciliation processes.<sup>3</sup> In this vein, a sort of “*marginalization*” of *ESC rights* has been addressed *within the transnational justice discourse*<sup>4</sup> and *practice*.<sup>5</sup> On the one hand, the “*omission*” of crimes concerning systemic violations of ESC rights, despite their strategic role in maintaining regimes of abuse, has been critically noticed in the prosecutorial strategies developed in international, hybrid and regional tribunals. On the other hand, few truth and reconciliation commissions have engaged with ESC rights violations, and

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*the State party to ensure that Chechens who have been displaced from Chechnya, especially to Ingushetia, enjoy all economic, social and cultural rights under the Covenant.”*); CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, UN Doc. E/C.12/1/Add.94, 12 December 2003, paras. 10, 28, 30, 56, 58.

<sup>3</sup> See C. Chinkin, “The Protection of Economic, Social and Cultural Rights Post-conflict”, *paper series commissioned by the Office of the High Commissioner for Human Rights*, 2009, available at:

[http://www2.ohchr.org/english/issues/women/docs/Paper\\_Protection\\_ESCR.pdf](http://www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf). The author’s contention is that “*the failure to deliver economic, social and cultural rights through national legal frameworks in accordance with international standards undermines the sought-after stability and human security post-conflict, which in turns lessens the ability or willingness of victims and witnesses to participate in the formal processes of post-conflict justice*”. See also S.C. Agbakwa, “A Path Least Taken: Economic and Social Rights and the Prospects of Conflict Prevention and Peacebuilding in Africa”, 47 *Journal of African Law*, 2003, pp. 38-64; M.A. Drumbl, “Accountability for Property Crimes and Environmental War Crimes, Prosecution Litigation, and Development”, *International Centre For Transitional Justice*, 2009.

<sup>4</sup> See *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 23 August 2004, S/2004/616, para. 8, which defines transitional justice as “*the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation*”.

<sup>5</sup> See OHCHR, “Rule of Law Tools for Post-Conflict States: Truth Commissions”, 2006, UN Doc. HR/PUB/06/1, p. 9.

sometimes even with “*economic crimes*”:<sup>6</sup> the Commission of Inquiry into the Crimes and Misappropriations Committed by the ex-President Habré, his Accomplices and/or Accessories in Chad,<sup>7</sup> the Commission for the Historical Clarification of Human Rights Violations and Acts of Violence which Caused Suffering to the Guatemalan People,<sup>8</sup> the Commission for Reception, Truth and Reconciliation in Timor-Leste,<sup>9</sup> the Truth and Reconciliation Commission in Liberia,<sup>10</sup> the Truth and Reconciliation Commission in Sierra Leone,<sup>11</sup> and the Truth, Justice and Reconciliation Commission in Kenya.<sup>12</sup>

Hesitation displayed by these bodies has been interpreted as an extension of the old and larger ideological dichotomy in human rights discourse.<sup>13</sup> Whereas civil and political rights violations have been deemed as justiciable and susceptible to being redressed through transitional justice initiatives,

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<sup>6</sup> See *Final Report of the Truth and Reconciliation Commission of Liberia*, Vol. 2, sect. 9.9.1, which defines “*economic crimes*” as (1) any forbidden action directed to create economic gain by a State or non-State actor whose economic activities fuelled the conflict, or contributed to gross human rights and/or humanitarian law violations, or who benefited economically from the conflict; or (2) public or private person’s actions directed to create illicit profit by engaging in certain conduct (e.g. money laundering, looting, tax evasion, human trafficking and child labour). Various economic crimes and perpetrators (especially companies) were considered within diverse economic sectors (i.e. timber, logging and mining; and also looked at the role of corruption). Significantly the Commission concluded that “*the appalling number and scale of economic crimes in Liberia ... grossly deprived Liberia and Liberian citizens of their economic rights and ... obstructed the economic development and policy of the State*”, see *ibid.*, para. 138.

<sup>7</sup> See *Chad: Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by ex-President Habré, his Accomplices and/or Accessories: Investigation of Crimes Against the Physical and Mental Integrity of Persons and their Possessions*, 7 May 1992.

<sup>8</sup> See *Acuerdo sobre el Establecimiento de la Comisión para el Esclarecimiento Histórico de las Violaciones a los Derechos Humanos y los Hechos de Violencia que han Causado Sufrimientos a la Población Guatemalteca*, 23 June 1994. It focused on violations of civil and political rights, but it observed that acts of genocide occurred against the indigenous Mayan communities, affecting their traditions, and accordingly it investigated violations of cultural rights and their impact, including on the Mayan population’s enjoyment of adequate standards of living. See *Guatemala: Memoria del silencio*, Vol. III, Chap. XVIII, 1994, paras. 2866-2950. A noteworthy conclusion was that, during the internal conflict, their survival and culture was impacted by the State, as they were forced into conditions of extreme poverty, deprived of traditional economic activities, and forced to displacement, see *ibid.*, paras. 2887-2901 and 2904-2909.

<sup>9</sup> See *Chega! The report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, 2005. On its considerations on ESC rights violations as well as recommendations on ESC rights, see paras. 7-12.

<sup>10</sup> The 2005 Act to Establish the Truth and Reconciliation Commission of Liberia mandated it to investigate gross human rights violations, violations of international humanitarian law and “*economic crimes, such as the exploitation of natural or public resources to perpetuate armed conflicts*”, and determining those responsible. See *Final Report of the Truth and Reconciliation Commission of Liberia, Vol. I: Findings and Determinations*. Its report is the first of any truth commission to extensively explore “*economic crimes*” as a key factor in fuelling conflict. Furthermore, violations of ESC rights were deemed the principal causes of the war in Liberia. It also provides historical information about Liberia’s socio-economic, cultural, and political past, and how certain practices generated the conflict.

<sup>11</sup> It studied the role of mineral resources, in particular diamonds, in fuelling the conflict, see *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Vol. 3 B, Chap. 1. The categories of violations adopted in order to carry out its human rights mandate also included “*economic violations*” (i.e. looting, destruction of property and extortion); further, the economic, social and cultural dimensions of some violations were explored as affecting women and children. See *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Vol. 3 A, Chap. 4, paras. 14 and 19.

<sup>12</sup> See *Report of the Truth, Justice and Reconciliation Commission of Kenya*, 2013, Vol. II B. The three chapters of this volume focus on certain aspects of the Commission’s mandate regarding, respectively, government policy of economic marginalization and violations of socio-economic rights, historical injustices related to land, economic crimes and grand corruption.

<sup>13</sup> See R. Carranza, “Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?”, 2 *The International Journal of Transitional Justice*, 2008, pp. 310-330.

ESC rights have generally been perceived as “*aspirational policy goals*” rather than legal entitlements by governments, donor agencies and practitioners. In this sense, the misconception of socio-economic abuses as non-justiciable has been reflected in their references in “catch-all” development programs. However, a move away from this narrow view has been long advocated.<sup>14</sup> In making this move, at least two aspects must be considered. The first one concerns *the extent to which ESC rights should be integrated in post-conflict justice settlements*, so underpinning the concept of transitional justice. The importance of this aspect is linked to *the potential enhancement of human security after conflicts*, since failures of such an integration could otherwise exacerbate tensions, contribute to renewed conflict, and result in further violations of civil and political rights. Furthermore, its significance is linked to the potential of facilitating the debate on *how to substantially redress complex and interrelated violations of past conflicts* as well as on *how to prevent their recurrence in the future*.<sup>15</sup> Conversely, a second aspect concerns the implications that may derive under international law from *a more integrated and holistic approach to such contexts*, which would take into account different dimensions of conflict by incorporating more seriously the full range of violations committed.

## **2. The scope of the study and the significance of the research topic**

The present dissertation positions itself within the current wave of scholarship attempting to address the aforementioned aspects, albeit in a much more focused manner. In the present study, ESC rights during and in the aftermath of contemporary scenarios of armed conflict, other situations of massive violence, and contexts of occupied territories are explored through the lens of public international law. The purpose is to determine whether and how its evolution has allowed for them to be addressed in relation to *civilians’ vulnerability*. In other words, this thesis aims at discussing the evolution of the international legal order and examining *the suitability of existing international law to deal with several controversial ways affecting the access to, enjoyment and progressive realisation of, ESC rights by civilians*.

The proposed inquiry on the relevance and adequacy of international law for handling the

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<sup>14</sup> See also L. Arbour, “Economic and Social Justice for Societies in Transition”, (Second Annual Transitional Justice Lecture, New York University School of Law Center for Human Rights and Global Justice and the International Center for Transitional Justice, New York, 25 October 2006), *CHRGJ Working Paper No. 10*, 14, emphasising that “*Transitional justice should take up the challenge that mainstream justice is also reluctant to rise to: acknowledging that there is no hierarchy of rights and providing protection for all human rights, including economic, social and cultural rights ... A comprehensive transitional justice strategy would therefore want to address the gross violations of all human rights during the conflict and, I suggest, the gross violations that gave rise or contributed to the conflict in the first place*”.

<sup>15</sup> In the case of Liberia, the Truth and Reconciliation Commission did not address ESC rights sufficiently in its legal analysis and recommendations, despite its innovative and broad mandate (*i.e.* addressing all gross human rights violations, violations of international humanitarian law and economic crimes).

protection of civilians in the area of ESC rights will be conducted under a preventive alongside remedial perspective. It will offer the chance to analyse a number of significant developments that have occurred in the last decades in different branches of public international law in relation to ESC rights. The *applicability of various legal regimes* will be investigated in view of the practice emerged in conflict-affected situations, shedding light on the role played by a *plurality of international norms* that interact with one another and gradually reshape the interpretation of the rules representing the traditional point of reference for assessing such practice. This gives the opportunity to examine whether the latter has confirmed, enhanced, weakened or challenged what international law provides for as it stands. Accordingly, emerging trends alongside existing gaps and limits in the international legal protection afforded to civilians' ESC rights regarding particular dimensions of their realisation will be addressed. In the same regard, the potential for further clarification and appropriate elaboration of the norms concerned will be highlighted, with a view to contributing to greater coherence within the international law system (rather than to fragmentation resulting from its expansion).

Specifically, the present thesis inquires the normative responses advanced under international humanitarian law along with the contributions developed from other applicable international legal regimes, such as international human rights law and international criminal law. Indeed, the thesis takes the position that each of these branches has progressively come to represent *valuable legal tools* enabling to delineate the core substance and clarify the uncertain boundaries of outstanding connections emerging between civilians' ESC rights and conflict-torn or occupation-related settings.

This approach is pertinent to the wide acknowledgement in legal doctrine and jurisprudence that contemporary patterns of armed conflict as well as modern forms of belligerent occupation have growingly impacted the *law* applicable in these scenarios, the *institutions* competent to monitor the implementation of existing norms to be complied with, the *mechanisms appropriate to ensure accountability* for violations of binding legal obligations incumbent upon relevant actors and to possibly contribute to prevent them in the future, and the *requirements of remedial justice suitable to provide reparation* to victims of such violations.

All the just mentioned points are taken into due account in the present study. They offer important insights for assessing the extent to which *public international law* has progressively provided for rules that (i) *support* developments in the normative content of ESC rights and favour a more precise understanding of the nature and scope of ensuing obligations to be addressed for the imperative of civilian protection, (ii) *tackle* questions of accountability for their violations as

committed during the conduct of hostilities and its aftermath or the administration of occupied territories, and (iii) *advance* the availability of remedies to ensure the basic right to effective remedy and reparation for the violations concerned.

This approach to international law relies on the assumption that the protection of civilians in the field of ESC rights requires reliance on *a legal framework that recognises the many facets of each right that has to be considered comprehensively*. Therefore, questioning the role and function of international law means investigating no longer only - or mainly - the adequacy of basic principles and values that have guided the elaboration of the law of war and the law of occupation, primarily to handle the humanitarian consequences of such scenarios. Rather, it turns out to be also a matter of reflecting on functional development of other branches of international law capable of addressing the direct/indirect and short/long-term detrimental effects of such scenarios for ESC rights. Indeed, they have present and future serious implications for preserving the human dignity and securing the human development of individuals who do not take part in hostilities or “*find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals*”. In other words, a primary question arises as to *whether and if so how the applicable international law takes into account such effects and contributes to their mitigation*.

Another basic consideration justifies the proposed inquiry on the evolving legal framework addressed in the course of this study. The *partial evolution of the traditional notion of State sovereignty* - mainly consequent to the progresses in the protection of the human being as favoured under United Nations auspices - has led to emphasise the discourse about *the legal obligations of the State which is regarded as an entity functionally organised to protect the individuals under its jurisdiction*.<sup>16</sup> Although the relevant State obligations may vary under the different applicable branches of international law, and notwithstanding the growing involvement of other entities such as international organizations and transnational corporations, that basic understanding of State’s function will shape the present research on the ESC rights of civilians in contexts of armed conflict and military occupation.

### **3. Defining the approach to the research focus**

It will be primarily argued that the contributions of customary law and treaty-based law as set forth in *international humanitarian law* (IHL) no longer exclusively base the existing international legal framework relevant to deal with the protection of civilians in the area of ESC rights.

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<sup>16</sup> Conversely, the traditional Westphalian concept of sovereignty put emphasis on the nation-state’s ‘right’ to dominate exercises of power in regard to its territory and citizens.

Nevertheless, the normative responses progressively provided under this branch of international law represent the starting point of the present study. Relevant IHL rules are mostly enshrined in the 1949 Fourth Geneva Convention and the 1977 Additional Protocols<sup>17</sup> and they basically respond to two distinct situations.

On the one hand, these rules aim at *protecting the civilian population or individual persons under the control of the enemy against violent or arbitrary actions*. These are rules against the misuse of power. Some of them refer to all civilians,<sup>18</sup> but most of them are set for “*protected civilians*” only (*i.e.* those who fall into the hands of the enemy<sup>19</sup>); precisely, according to a tripartite framework, the rules on the treatment of protected civilians apply to those who find themselves on enemy territory,<sup>20</sup> then to those whose territory is occupied by the enemy,<sup>21</sup> and finally to those in the enemy’s own territory as well as occupied territories.<sup>22</sup>

On the other hand, these rules aim at *protecting the civilian population against the effects of military operations and individual acts of hostility*. These are rules limiting admissible methods and means of warfare.<sup>23</sup> They are mostly set forth in the 1977 Additional Protocol I and customary law (in part grounded on the 1907 Hague Regulations);<sup>24</sup> they apply to all civilians who are on the territory of the parties to the conflict.<sup>25</sup>

Such an extensive IHL regime set down several obligations for those into whose hands civilians have fallen as well as for the belligerents opposing the party in whose hands civilians are.

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<sup>17</sup> The adoption of the 1977 Additional Protocols have blurred the borders between two subsections of the laws of armed conflict: the “Law of the Hague” concerning the means and methods of warfare, and the “Law of Geneva” or “Red Cross Law” concerning the protection of victims of war (*i.e.* wounded and sick, shipwrecked, prisoners of war, civilians, persons *hors de combat*). As corroborated by the International Court of Justice, “*these two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the 1977 Additional Protocols give expression to the unity and complexity of that law*”, see ICJ, *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 9 July 1996, ICJ Reports 1996, para. 75. Nonetheless, important differences are noteworthy: *e.g.*, while the “Law of the Hague” applies *also* in enemy territory, the “Law of Geneva” *only* applies in the belligerents’ own territory and occupied territory; further, the notion of “*protected persons*” features only the “Law of Geneva” (Article 4 GC IV).

<sup>18</sup> Articles 13-26, Part II, GC IV; Articles 72-79; Article 4 AP II.

<sup>19</sup> Consistent with the inter-State structure of international humanitarian law, this term in Article 4 GC IV does not protect those in the hands of a belligerent party of which they are nationals; the rules on the treatment of protected civilians cover only enemy civilians who are on the territory of a belligerent party or on an occupied territory.

<sup>20</sup> Articles 35-46 GC IV.

<sup>21</sup> Articles 47-78 GC IV, which contain further detailed and protective rules.

<sup>22</sup> Articles 27-34 GC IV.

<sup>23</sup> In treaty law the rules on the conduct of hostilities goes back to the 1868 St. Petersburg Declaration, the 1899 and 1907 Hague Conventions, the 1925 Geneva Gas Protocol, the 1972 Biological Weapons Convention, the 1977 Additional Protocols, the 1980 Convention on Certain Conventional Weapons and its five Protocols, the 1993 Chemical Weapons Convention, and the 1997 Ottawa Convention banning anti-personnel landmines. The 1954 Hague Convention and its two Protocols regulate the protection of cultural property in the event of armed conflict. Then, the 1998 Statute of the International Criminal Court include a list of war crimes subject to its jurisdiction.

<sup>24</sup> Articles 48-71 AP I; Article 13 AP II.

<sup>25</sup> Articles 49(2) and 50(1) API; Article 13 AP II.

Conversely, they ultimately protect individual or collective interests of civilians. This aspect is more evident when terms such as “rights”, “benefits” and “entitlements” occasionally appear in the treaties concerned, mainly in provisions defining the treatment of civilians;<sup>26</sup> nonetheless, this is also illustrated in certain provisions regulating the methods and means of warfare.<sup>27</sup> In indicating them as subjects entitled to protection and specifying the ways in which it shall be provided, IHL rules inevitably address *certain aspects of ESC rights* relating to health, food, relief assistance, work and employment, family, education, culture, resources, environment. Actually, not only these rules are of primary relevance for ensuring that civilians are not denied, or have access to, *basic needs*, but also they contribute to generate positive conditions for peace as well as restoration of the affected situation, so supporting more generally the progressive realisation of civilians’ ESC rights.

In this regard two main areas covered by *ius in bello* - namely the legal regime governing the conduct of military hostilities (in international and non-international armed conflicts) and the law of belligerent occupation - will be critically appraised in light of the practice of present-day warfare and administration of occupied territories in relation to the protection of civilians, the civilian population as such, and civilian objects. In doing so a comprehensive question is explored as to *whether and to what extent normative developments of international humanitarian law have marked, thanks to gradual codifications or evolutionary interpretations, adequate steps forward in the sphere of ESC rights against the effects of military operations as well as against civilians’ mistreatment when in the hands of the enemy*, which may include a party to a conflict or an occupying power. Therefore, two sub-questions may be articulated as follows: first, *whether and to what extent IHL has come to deal with the ESC rights of civilians*; second, *whether violations of its norms have resulted in a loss of their enjoyment or other related consequences*.

While the traditional reference to international law and armed conflicts primarily focused on international humanitarian law as regulating the use of force in such contexts, other legal regimes have been gradually taken into consideration to cover situations controversially classified as armed conflicts. Legal scholarship has especially examined the use of international human rights law, international criminal law as well as environmental law in order to regulate warfare or interfere with certain IHL norms by, for instance, “*humanising*”,<sup>28</sup> “*criminalising*”,<sup>29</sup> or “*greening*”<sup>30</sup> them. Each of

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<sup>26</sup> In addition to direct references, several provisions of the Law of Geneva indirectly refer to the notion of ‘rights’: e.g. Article 30 GC IV provides for all protected persons the right to file a complaint with the Protecting Powers, the ICRC or National Red Cross Societies concerning breaches of this Convention.

<sup>27</sup> Article 51 AP I (which is one of the cornerstones of the Hague Law); Article 54 AP I, prohibiting starvation as a method of warfare; Article 53 AP I protecting cultural objects and places of worship from the effects of hostilities.

<sup>28</sup> See T. Meron, “The Humanization of Humanitarian Law”, *American Journal of International Law (AJIL)*, 2000, pp. 239-278. See also ICTY, *Prosecutor v. Tadic* (IT-94-1-AR72), Appeals Chamber, Decision of 2 October 1995, para. 97.



these branches of international law have a potential to advance ESC rights and represent avenues of specific character that could offer further solutions to conflict-related issues. However, environmental law is beyond the scope of this study.

In this regard it will be posited, in the first place, that **human rights law** have ended up constituting an integral part of international law (rather than an autonomous and self concluded branch of the law). They are enshrined in treaties at a global and regional level, a certain number of customary norms, general principles of law and peremptory norms of *jus cogens*. In this sense the normative concept of human rights - understood as *establishing legal entitlements for one or more beneficiaries* and *imposing legal obligations for one or more duty bearers* - has increasingly acquired relevance in looking at public emergencies induced by armed conflict, military occupation or post-conflict collapse. This use as an essential lens through which framing relevant behaviours/ conducts occurring in such contexts relies on the idea that human rights are *fundamental standards* to preserve the dignity of human beings as well as *functional tools* to develop the human person at any time as a matter of principle.

Moreover, it will be considered that the relevance gradually acquired by the normative concept of human rights has concerned either traditional vertical relationships of individuals *vis-à-vis* States or horizontal relationships between private actors,<sup>31</sup> although the state-centric approach still remains the main rationale of the existing international legal order.

Then, it will be taken into account that international human rights law has progressively become part of the academic studies against the backdrop of complex contemporary conflict-related situations, especially when debating its relationship with international humanitarian law. This has been done by questioning whether it continues to apply and how the two regimes interact when they are simultaneously applicable, or by focusing on the role played by human rights bodies to seek

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<sup>29</sup> See A. Cassese, "On the Currents Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law", *European Journal of International Law (EJIL)*, 1998, pp. 2-17; Y. Beigbeder, *Judging War Criminals. The Politics of International Justice*, Basingstoke, Palgrave MacMillan, 1999, pp. 1-26.

<sup>30</sup> See E.F.J. Yuzon, "Deliberate Environmental Modification Through the Use of Chemical and Biological Weapons: 'Greening' the International Laws of Armed Conflicts to Establish an Environmentally Protective Regime", *AUJILP*, 1996, pp. 793-846.

<sup>31</sup> See N. Rodley, "Can Armed Opposition Groups Violate Human Rights?", in K.E. Mahoney et al. (eds.), *Human Rights in the Twenty-First Century: A Global Challenge*. 1993, p. 297 ff.; A. Clapham, *Human Rights in the Private Sphere*, 1996; M. Gibney and D. Emerick, "Human Rights: Holding Multinational Corporations Accountable to Domestic and International Standards", 10 *Temple International and Comparative Law Journal*, 1996, p. 123 ff.; S. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility", 11 *Yale Law Journal*, 2001, p. 443 ff.; F. Francioni, "Four Ways of Enforcing the International Responsibility for Human Rights Violations by Multinational Corporations", in M.A. Moreau and Francioni (eds.), *La Dimension Pluridisciplinaire de a Responsabilité Sociale de l'Entreprise*, 2007, p. 155 ff.

remedies against States which violate the laws of war.<sup>32</sup> The hitherto conducted academic analysis supporting its applicability has primarily tended to explain *why it should apply* during armed conflicts as well as *how* in such situations the two international law branches may *concur* and *complement* or at times *converge towards each other* on specific issues.<sup>33</sup> Subsequently, scholars' focus has shifted to exploring *how human rights law applies*, addressing certain issues encountered in its application regarding the *extraterritorial scope of ensuing legal obligations*, regarding the *mandate and expertise of human rights monitoring bodies*, and the *terminological and conceptual distinctions between legal regimes having different paradigms*. However, these studies have generally focused more on civil and political rights, especially dealing with arbitrary deprivation of life and liberty, torture, and the use of force. Conversely, internationally recognised economic, social and cultural rights have been mostly and undeservedly reduced to a silent role.<sup>34</sup>

In view of all these points, the present thesis will look at international human rights law to inquire either limits or opportunities to upholding socio-economic and cultural justice in contemporary public emergencies prompted by situations of armed conflict, military occupation and post-conflict collapse. It will be argued that *the challenges for the imperative of civilian protection in the socio-economic and cultural spheres* may be better addressed under international law even in light of this developing regime. In particular, it is its potential as *twofold normative and accountability framework* that has been mostly underestimated. This matters either for contemporary understanding of civilians' needs in such complex situations and the elaboration upon legal validity and content of obligations resulting from ESC rights, or the provision for effective and adequate remedies to civilian victims of corresponding violations. Moreover, the potential of international human rights law gains specific

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<sup>32</sup> On the renewed interest for the interactions between international humanitarian law and human rights, see O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford, 2011; R. Arnold and N. Quéniwet (eds.), *International Humanitarian Law and Human Rights Law*, Martinus Nijhoff, 2008; C. Green, "Human Rights and the Law of Armed Conflict", in L.C. Green (ed.), *Essays on the Modern Law of War*<sup>2</sup>, Transnational Publishers, 1999.

<sup>33</sup> See Draper, "The relationship between the human rights regime and the laws of armed conflict", 1 *IYHR*, 1971, p. 71 ff.; L. Doswald-Beck and S. Vité, "International humanitarian law and human rights law", *International Review of the Red Cross (IRRC)*, 1993, p. 94 ff.; R.E. Vinuesa, "Interface, correspondence and convergence of human rights and international humanitarian law", 1 *Yearbook of International Humanitarian Law (YIHL)*, 1998, pp. 69-110; R. Provost, *International Human Rights and Humanitarian Law*, Cambridge, 2002; H. Heintze, "On the relationship between human rights law protection and international humanitarian law", 86 *IRRC*, 2004, p. 789 ff.; A. Orakhelashvili, "The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?", 19 *EJIL*, 2008, p. 161 ff.

<sup>34</sup> Few scholars have noticed this issue, see N. Lubell, "Challenges in Applying Human Rights Law to Armed Conflict", *IRRC*, 2005, pp. 751-3; I. Schobbie, "Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict", *JCSL*, 2009, pp. 449-457. For some further exceptions in discussing their relevance, see M. Dennis, "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", *AJIL*, 2005, pp. 139-141; S. Vité, "The interrelation of the law of occupation and economic social and cultural rights: the examples of food, health and property", *IRRC*, 2008, pp. 629-651; E. Mottershaw, "Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law", *International Journal of Human Rights (IJHR)*, 2008, pp. 449-470.

relevance from the perspective of articulating its manifold relationship with the law of armed conflict as well as the laws of occupation in the area of ESC rights.

With regard to such a potential and its various dimensions, it is noted that modern dynamic contexts of armed conflicts and military occupation, in which a multiplicity of actors may play various roles affecting ESC rights, raise open questions on a number of aspects.

The *applicability regime of human rights treaties setting out ESC rights* and the *implications of ensuing obligations* deserves primary scrutiny, in particular for the rationale behind omitted derogation clauses or included specific and general limitation clauses. In the same vein, the concept of *justiciability of ESC rights* may affect (enabling/favouring) both compliance with, and enforcement of, international norms enshrining ESC rights when breached in such contexts. Then, the *availability of remedies*, both judicial and non-judicial,<sup>35</sup> *before an independent authority for violations of civilians' ESC rights* may be difficult: the enjoyment of the right to an effective remedy<sup>36</sup> and the corresponding state obligation to provide appropriate remedies may be challenged regarding possible mechanisms to holding relevant actors (*e.g.* governments, insurgents, corporations) to account for involvement in such violations, especially in view of existing underdeveloped accountability mechanisms under international law. These include the accountability gaps to respond to “international interdependent structures” (States as parties of intergovernmental institutions and private international actors) that may impair the enjoyment of human rights beyond national borders in conflict-related settings.

Furthermore, *the legal effect of applicable international human rights law* is examined *in relation to international humanitarian law*. A major question is *whether and how such relationship positively affects the imperative of civilian protection in the socio-economic and cultural spheres*. Relevant aspects include its impact on the appraisal of applicable IHL rules as well as its ability to afford further normative content of the ESC rights which civilians are entitled to. The *function of IHL in understanding the ESC rights and ensuing human rights obligations* is also important to define such relationship.

Conversely, in light of the absence of provisions specifying the general scope of application of treaties on ESC rights, the *extraterritorial scope and applicability of ensuing human rights obligations* gain relevance for situations in which State parties' conduct (whether carried out wholly beyond their sovereign territory or producing effects overseas) could impair the access to, and enjoyment of, ESC

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<sup>35</sup> Non-judicial remedies may include *access to complaints mechanisms* established under the auspices of international organizations, national human rights institutions and ombudspersons; other accountability measures available at the national level (*i.e.* access to parliamentary bodies tasked with monitoring governmental policies) and international level.

<sup>36</sup> It is widely recognised that remedies, to be effective, must be capable of leading to *a prompt, though and impartial investigation*; to the *cessation of the violation* if it is ongoing; and to *adequate reparation*, including, as necessary, restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition.

rights of civilian individuals, groups and peoples (non-nationals) located in foreign territories affected by armed conflicts or periods of occupation. In other words, relevant acts or omissions may put to question whether and under which conditions they entail obligations on States due to their international commitments in the area of ESC rights (so giving rise, possibly, to state international responsibility).

Nonetheless, due account will be given also to the contentious issue that the recognition of, and compliance with, human rights extraterritorial obligations pose theoretical challenges to the approaches conventionally assumed in international law. In debating on the phenomenon of globalisation and the ever-greater interactions between various actors having considerable imbalanced powers within the international community, legal scholarship has addressed the need to *revise some key concepts* in order to “operationalise” extraterritorial human rights obligations. Particularly, the notions of *State jurisdiction*,<sup>37</sup> *State responsibility* and *accountability* have been at stake of the debate over the obstacles to recognise extraterritorial obligations.<sup>38</sup> In considering such attempt to “*re-conceptualise*” the basic tenet of international human rights law that places obligations primarily on the territorial State, *two recent soft-law norm-setting efforts* elaborating principles, policy and regulatory options to develop a multi-duty-bearer framework will be examined.

In the same vein, the issue of *corporate liability* for breaches of international law that directly or indirectly may inhibit the exercise of, or adequate access to, ESC rights will be explored. This is functional to highlight existing limits of international law.

A further perspective for research presents itself if we considers that *certain violations of ESC rights may be interpreted to amount to certain dimensions of international crimes* that are defined in treaties and in customary international law and give rise to individual criminal responsibility.<sup>39</sup> Therefore,

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<sup>37</sup> The notion of jurisdiction in the provisions of human rights treaties relates to the issue of *whether a State* (that was or not entitled to exercise jurisdiction under international law) *is to be held accountable for a human rights violation resulting from its conduct*. If referred to the interstate relationships then it relates to the issue of *which State has, pursuant to international law, sovereign jurisdiction over a certain subject or area*.

<sup>38</sup> See M. Langford, W. Vandenhoe, M. Scheinin, and W. van Genugten (eds.), *Global Justice, State Duties: the extra-territorial scope of economic, social and cultural rights in international law*, Cambridge University Press, 2012. F. Coomans, “The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights”, *Human Rights Law Review (HRLR)*, 2011, pp. 1-35. S. Skogly and M. Gibney (eds.), *Universal Human Rights and Extraterritorial Obligations*, University of Pennsylvania Press, 2010. M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, Intersentia, 2009, pp. 56 and 168. R. Higgins, *Problem and Process - International Law and How We Use It*, Clarendon Press, 1994, p. 146.

<sup>39</sup> The principle of individual criminal responsibility forms the basis of international criminal law. This was acknowledged by the International Military Tribunal in the context of the issue of criminal accountability of some Nazi organizations, holding that “*one of the most important (legal principles) ... is that criminal guilt is personal, and that mass punishments should be avoided*”, see Judgment of the International Military Tribunal for The Trial of German Major War Criminals,

**international criminal law** will be considered inasmuch as it can highlight if and how international law *de lege lata* includes violations of ESC rights within the substantive definitions of international crimes, in doing so providing additional instruments for the enforcement of international humanitarian law and human rights law addressing the rights in question. Thus, pertinent references will be made to the extent of its potential according to the purposes of the present research.

This choice also relies on two significant aspects of the relationship between these three legal regimes.<sup>40</sup> On the one hand, “*cross-fertilization*” between them has strengthened possible interactions and complementarity of relevant norms. On the other hand, increased attention to accountability for human rights and humanitarian law violations at the national and international level has produced a wealth of case law in which elements of the three regimes can be recognised. Both these aspects concern not only international supervisory bodies such as courts and tribunals, but also United Nations agencies such as the OHCHR, United Nations organs such as the Security Council and the Human Rights Council and its procedures, and several human rights treaty bodies.

#### **4. Methodology**

In order to answer the research question(s) discussed above, the thesis adopts a method of positive law and an integrated approach, examining all the primary sources relevant for ESC rights in war-torn situations (including treaties and resolutions, judgments, decisions, reports, *travaux préparatoires*) as well legal doctrine on the topic. The relevant practice will be considered with a critical approach that aims at identifying gaps and limits in international law alongside ways to overcome them.

The evolution of the international legal framework in relation to civilians’ vulnerability in the socio-economic and cultural spheres is investigated under a preventive alongside remedial perspective. The normative responses advanced under the aforementioned legal regimes are initially examined separately so as to appraise their specific relevance and adequacy for affording effective protection to civilians in view of the emerging practice. This allows shedding light on their divergence in nature and purposes, the testing of which is basically important to evaluate their applicability and inter-operability to enhance legal protection. Then, this multi-layered approach

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Nuremberg, 30 September and 1 October 1946, in *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany*, Part 22 (1950), p. 469. See also A. Cassese, *International Criminal Law*<sup>2</sup>, 2008, p. 33 ff.

<sup>40</sup> See “Report of the Office of the High Commissioner on the outcome of the expert consultation on the issue of protecting the human rights of civilians in armed conflict”, UN Doc. A/HRC/14/40, 2 June 2010.

contributes to greater coherence within the new international legal frame concerned.

## 5. Roadmap

The present thesis is divided into six chapters crowned with a conclusion.

*Chapter I* will investigate the role of *international humanitarian law* as a *restraint* on armed violence having economic, social and cultural implications for civilian persons and objects. *The scope of civilian immunity* enshrined in the principles and rules aimed at protecting civilians against the effects of hostilities in international and non-international armed conflict is explored in the light of controversial cases emerged in the practice that have severely affected specific dimensions of ESC rights. This is functional to assess their adequacy and effectiveness to deal with the threats and challenges posed by warfare to ESC rights, especially in view of the basic fact that contemporary conflicts are not always foreseen as such by IHL. In the same vein, it contributes to identify gaps or weaknesses in the existing regime, which have required or might demand further clarification and elaboration even in light of other developed branches of international law.

*Chapter II* will deal with the existing normative framework regulating humanitarian assistance and access in situations of armed conflict as well as within an occupied territory.

*Chapter III* will consider the phenomenon of occupation as defined and regulated by contemporary international law and focus on the traditional concept of “*welfare of the civilian population*” narrowly in the sphere of ESC rights. Since modern practice has included both classical and atypical situations of exercise of effective control/authority over a foreign territory, the *protective purpose of the laws of occupation* is inferred not only as an *intrinsic function* of the existing regime but also as an *evolving function* of the challenged regime. On the one hand, the *scope* and *adequacy* of IHL to meet the occupied civilian population’s socio-economic and cultural entitlements are examined, also questioning the contingency of relevant obligations placed on the occupant to contextual factors. The rules and institutions of occupation law are investigated by addressing the intensity and modalities of application to contentious issues that arise in impacting ESC rights in practice, so as to gain a better understanding of its role in newly emerging realities and policies in occupied territories. On the other hand, in view of changed international expectations following several developments consolidated in international law, normative as well as factual aspects challenging the foundations and viability of occupation law are taken into account. In particular, the *impact of modern*

*international human rights law* gains significance in inquiring the safeguarding of the socio-economic and cultural entitlements of the civilian population. Similarly, the *time factor of prolonged occupation* deserves consideration for its implications on the enjoyment of ESC rights as functional to preserve or pursue civilian welfare.

*Chapter IV* will firstly clarify the theoretical and practical grounds funding the importance of exploring the role of modern international human rights law as further normative regime contributing to safeguard civilians in the area of ESC rights under international law. These include elaborating upon legal preservation of civilians' human dignity, approaching coherently the integral and holistic vision of human rights, taking seriously the evolution of the international protection of ESC rights, and inquiring the interconnection with other branches of international law.

Before considering the significant relationship with international humanitarian law in the sphere of ESC rights, basic procedural issues on the applicability regime of human rights treaties on ESC rights will be inquired. The question of general derogability from such treaties alongside the issue of admissible limitations on ESC rights enshrined therein will be examined, particularly reflecting on the implications of the rationale behind omitted derogation clauses or included specific and general limitation clauses for States affected by times of public emergency induced by situations of armed conflict, military occupation and post-conflict collapse.

*Chapter V* will look at the extraterritorial dimensions of the protection of civilians' ESC rights under human rights treaties, mostly exploring *on the basis of what criteria* and *to what extent* the obligations ensuing from States' international commitments in this area can apply to foreign territories as well as to civilians (non-nationals) placed therein as affected by situations of armed conflict and periods of military occupation which involve non territorial States parties to such treaties. Key soft law norm-setting efforts, as recently emerged on the subject of *extraterritorial obligations of States in the area of ESC rights*, will be preliminarily considered. The aim is exploring their potential implications and actual relevance for the protection of civilians within the evolving practice of war-torn situations, including also their weight in shaping the legal discourse on effective and adequate remedies in favour of civilian victims of related violations.

*Chapter VI* will examine a number of recent lawsuits about companies' involvement in serious breaches of international law norms that directly or indirectly inhibit the exercise of, and adequate access to, ESC rights in conflict-related contexts. The evaluation of emerging judicial approaches to

the legal determinations of corporate liability for such breaches will inquire whether and to what extent national and international judicial mechanisms have started to translate the theoretical corporate legal liability into tangible accountability for wrongs regarding ESC rights. Accordingly, looking at the ways courts have handled corporate liability will allow assessing which realistic prospects exist for legal redress at national or international level, whether action on the part of criminal prosecution and law enforcement bodies is attractive, or whether the possibility of civil liability towards affected persons is effective, and whether the scope of basic liability concepts has acquired a certain legal certainty.



# CHAPTER I: CIVILIAN IMMUNITY UNDER THE LAW ON THE CONDUCT OF HOSTILITIES AND ESC RIGHTS

## 1. Introduction

Consistent with one of its main purposes, namely minimising human suffering in times of armed conflict, modern international humanitarian law comprises general principles and specific rules that have been progressively developed for the protection of civilians. Indeed, besides the principles of humanity and military necessity,<sup>41</sup> the fundamental tenets of this body of norms include the principle that the parties to the conflict are not entitled to choose and adopt unlimited means and methods of warfare,<sup>42</sup> and the principle of civilian immunity from being the target of offensive or defensive armed attacks - with its corollary, namely the principle of distinction.

The clearest codification of the norm on civilian immunity is found in Protocol I of 1977, which reaffirms the customary law principle obliging the parties to an international armed conflict to distinguish between civilians and combatants as well as between civilian objects and military targets at all times (and to direct their operations only against military objectives).<sup>43</sup> Originally set forth in the Preamble of the 1868 St. Petersburg Declaration, this principle represents a cornerstone of the codification of the laws and customs of war. As emblematically recognised in the UN General Assembly Resolution 2444 of 1968, its scope entails that *“the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; it is prohibited to launch attacks against the civilian populations as such; a distinction must be made at all times between persons taking an active part in the hostilities and members of the civilian*

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<sup>41</sup> In the words of one of its distinguished commentators, *“International humanitarian law in armed conflicts is a compromise between military and humanitarian requirements. Its rules comply with both military necessity and the dictates of humanity”*, see C. Greenwood, “Historical Development and Legal Basis”, in D. Fleck (ed.), *The Handbook of International Humanitarian Law*<sup>2</sup>, 2008, p. 37. See M.N. Schmitt, “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance”, 50 *Virginia Journal of International Law*, 2010, pp. 795-839.

<sup>42</sup> It was stated in the first comprehensive code on the laws of armed conflict, *i.e.* the 1874 Brussels Declaration (although never ratified), and in the 1880 Oxford Manual; it was formally codified in the 1899 Hague Regulations, and reaffirmed in the 1907 version thereof (Art. 22). It was subsequently expressed in 1977 Protocol I (Art. 35(1)) and in other instruments (*e.g.* the Preamble of the 1980 Conventional Weapons Convention).

<sup>43</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) [hereinafter Protocol I or API], Article 48.

*population to the effect that the latter be spared as much as possible*".<sup>44</sup> In the same vein, the entire system designed in The Hague in 1899 and 1907 and in Geneva from 1864 to 1977 has been deemed "founded on this rule of customary law".<sup>45</sup> Nevertheless, the change of modern warfare during the course of the twentieth century and the growing frequency of collateral casualties and damage have led to renewed attention on non-combatant immunity. In this sense, the International Court of Justice has authoritatively recognised the principle of distinction as a "cardinal" principle of international humanitarian law as well as one of the "intransgressible principles of international customary law",<sup>46</sup> despite the fact that it was only codified in Protocol I (which itself has not been adopted by every State<sup>47</sup>).

The present chapter is intended to examine the *scope of civilian immunity for the safeguarding of ESC rights against the effects of military operations and individual acts of violence in warfare*. Accordingly, it questions not only *whether and to what extent the law on the conduct of hostilities has dealt with the ESC rights of civilians*, but also *whether violations of its norms have resulted in a loss of their enjoyment or other related consequences*. In other words, international humanitarian law is explored as a restraint on armed violence which has economic, social and cultural implications. The development of governing principles and rules is analysed in view of international practice that have significantly affected specific dimensions of ESC rights. In this regard the assessment by several recent fact-finding missions and commissions of inquiry will be taken into account in particular.

In order to determine the field of analysis, it is essential to first clarify the legal categories of conflicts envisaged in international humanitarian law and to briefly reflect on the special nature of contemporary conflicts as they are not always foreseen as such in IHL rules. Subsequently, an

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<sup>44</sup> See GA Res. 2444 (XXIII), Respect for Human Rights in Armed Conflicts, para. 50, UN Doc. A/7433, 19 December 1968. This resolution was adopted unanimously and borrowed its provisions from a resolution adopted in 1965 by the International Red Cross (see 20<sup>th</sup> International Conference of the Red Cross, Resolution XXVIII, *Protection of Civilian Populations Against the Dangers of Indiscriminate Warfare*, Vienna, Austria). It represented a turning point and a milestone for the activities of UN and ICRC. It contained a request to the General Assembly to invite the Secretary General to undertake a study, in concert with the ICRC and other international organizations, to discuss "the need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants and the prohibition and limitation of the use of certain methods and means of warfare" (see Report of the Secretary General on Respect for Human Rights in Armed Conflicts, UN Doc. A/8370, 2 September 1971, para. 5).

<sup>45</sup> See Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), *op. cit.*, paras. 1863-1866. For the historical antecedents of the principle and its status prior to adoption of the Additional Protocols, see also L. Doswald-Beck, "The value of the 1977 Geneva Protocols for the Protection of Civilians", in M.A. Meyer (ed.), *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, London: British Institute of International and Comparative Law, 1989, p. 137. See J.G. Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, Martinus Nijhoff, 1993, pp. 16-27.

<sup>46</sup> See *Legality of the Threat and Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, at 257, paras. 78-79, where the prohibition of unnecessary suffering is viewed as the other cardinal principle. For the recognition of the customary nature of the principle of distinction, see ICTY, *Prosecutor v. Blaškić* (IT-95-14), Appeal Chamber, 29 July 2004; ICTY, *Prosecutor v. Galić* (IT-98-29), Trial Chamber, 5 December 2003.

<sup>47</sup> See also J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, pp. 3-8 and 25-29, Rules 1 and 7.

overview of the historical developments of the IHL framework dealing with the protection of civilians is necessary for a comprehensive appraisal of its role concerning ESC rights. In the same vein, a brief focus on the definition of civilians and civilian objects, followed by a consideration of some controversial aspects of the definition of military objectives, will precede the aforementioned inquiry into the scope of civilian immunity.

Since the development of international criminal law has the potential to play a decisive role for the implementation and enforcement of international humanitarian law norms, the analysis undertaken in this chapter will also make some pertinent references to this legal regime, even though individual criminal responsibility does not influence the normative discourse on States' responsibility to comply with their obligations under the laws of war.

## 2. The binary qualification framework in the twenty-first century

The legal categories envisaged in international humanitarian law refer to armed conflicts having an international<sup>48</sup> or non-international nature.<sup>49</sup> Notably, with regards to the latter, the 1977 Protocol II applies only to “*conflicts of a certain degree of intensity*”<sup>50</sup> and it does not have the same scope of application as common Article 3 GCs (which requires the existence of a sufficiently organised non-State armed group and a minimum level of intensity of hostilities, which are to be determined on a

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<sup>48</sup> The definitions of *international armed conflicts* are set out in common Article 2 GCs and Article 1(4) API. The situations referred to are, respectively, inter-State conflicts and wars of national liberation between governmental armed forces and non-governmental armed groups fighting in the exercise of their right to self-determination. As regards customary international law, the definition of an international armed conflict reflects the one contained in the Geneva Conventions, while there is no customary rule regulating the conflicts defined according to Article 1(4) API, since the scenario defined in this article has not been recognised officially (and the States potentially concerned did not ratify Protocol I).

<sup>49</sup> The category of *non-international armed conflict* falls either within the definition of Article 1 APII (which covers conflicts taking place in the territory of a Contracting Party, between governmental armed forces and organised armed groups intended to take power over the whole State or a part of it, so excluding the fighting that involves only rebel groups) or within the scope of common Article 3 GCs (which applies to conflicts occurring in the territory of a Contracting Party, either between its armed forces and armed insurgents or between rebel groups). In both cases certain criteria must be fulfilled.

<sup>50</sup> See Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, paras. 4447 ff. The criteria required for the application of APII include: continuous confrontation between governmental armed forces and “*opposing*” armed forces who have to be under a responsible command and control part of the territory of the State in question, so as to be able to “*carry out sustained and concerted military operations*” and implement Protocol II. See ICTR, *Prosecutor v. Akayesu* (ICTR-96-4-T), Trial Chamber Judgment, 2 September 1998, para. 626 (“*operations must be continuous and planned*”; a non-state entity able to “*dominate a sufficient part of the territory*” and “*impose discipline in the name of a de facto authority*”). For the control criterion, see ICTY, *Prosecutor v. Boskoski* (IT-04-82-T), Trial Chamber II Judgment, 10 July 2008, paras. 242-249 (“*indicative factors*” of territorial control have been considered the setting up of alternative structures of authority and liberated territories, zones, cities, and villages).

case-by-case basis).<sup>51</sup>

In recent legal scholarship on the application of IHL treaties to contemporary conflicts, two basic limitations have been highlighted. Firstly, *IHL treaties are applicable to belligerent States that have ratified them*. In this regard, the four Geneva Conventions of 1949 have been endorsed by almost all States, although this is not the case with Protocol I, the consequent limited efficacy of which can only be counteracted by recognising its rules as custom. The same logic is followed in relation to Protocol II, which is applicable to non-international armed conflicts occurring on the territory of a State that has ratified it, since it has not been endorsed universally (some 167 States have ratified it). In this regard, common Article 3 GCs may in fact be the sole applicable treaty provision. Conversely, legal norms that may fill the gap may also come from other branches of international law (which apply as either general law or as the relevant *lex specialis*).

The second aspect commonly discussed is that *IHL treaties do not cover a broad spectrum of contemporary armed conflicts in sufficient detail*. In fact, there has been a proliferation of internal armed conflicts, which are covered by treaty rules that are less numerous and less detailed in terms of definitions and requirements in comparison to those provided for in relation to international conflicts. In the following section this issue will emerge in relation to the IHL protection of civilians. Modern conflicts do not easily fit within the aforementioned legal categories since they are often characterised by weakened formality at the initial and final phases of conflict, or they are difficult to classify due to the existence of a combination of international and internal elements. As such, difficulties arise in identifying the applicable law and questions emerge as to the ability of IHL to regulate every kind of contemporary conflicts. Furthermore, some lesser forms of armed violence

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<sup>51</sup> For indicative factors set out in the ICTY jurisprudence, see *Prosecutor v. Tadic* (IT-94-1-T), Trial Chamber, Judgment, 1 May 1997, para. 70 (“*protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*”) and para. 562; *Prosecutor v. Limaj* (IT-03-66-T), Trial Chamber, Judgment, 30 November 2005, para. 84; *Prosecutor v. Boskoski and Tarculovski* (IT-04-82-T), Trial Chamber, Judgment, 10 July 2008, paras. 175, 177 (sufficiently serious attacks and increased and spread armed clashes over territory and over time), para. 199 (existence of a command structure), paras. 200-203 (capability to perform military operations in an organized way and control territory; logistics and communications capabilities; level of discipline and ability to implement common Article 3; ability to “*speak with one voice*” in the political negotiations to conclude agreements). Both criteria have been examined extensively, see S. Vité, “Typology of armed conflicts in international humanitarian law: legal concept and actual situations”, 91 *IRRC*, 2009, pp. 76-77; Sivakumanaran, “Identifying an armed conflict not of an international character”, in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, 2009, pp. 363-380; La Haye, *War Crimes in Internal Armed Conflicts*, Cambridge, 2008, pp. 9-13; J. Pejić, “Status of Armed Conflicts”, in Wilmshurst and Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge, 2007, pp. 85-86. On the distinction between international armed conflicts and non-international armed conflicts, see L.C. Green, *The contemporary law of armed conflict*<sup>2</sup>, Manchester University Press, 2000, pp. 54 ff.; N. Ronzitti, *Diritto Internazionale dei conflitti armati*<sup>5</sup>, Giappichelli, 2014, pp.139-142; R. Kolb and R. Hyde, *An introduction to the International Law of Armed Conflicts*, Hart Publishing, 2008, p. 65 ff., in which the unreasonable approach emerging from the traditional distinction is underlined regarding situations of “*mixed armed conflicts*” where both rules apply, since it often determines diverse standards of protection, especially for civilians; to the author, the process of “*bridging the gap between the two types of conflict*” is supported by Article 8 ICC Statute, which includes a list of war crimes applicable to both type of armed conflicts.

mentioned as “*internal tensions*”, “*internal disturbances*”<sup>52</sup> or “*banditry, unorganised and short-lived insurrections, or terrorist activities*” do not meet the threshold for IHL to apply, and often fall instead within the scope of other normative frameworks (such as municipal criminal law and applicable international human rights law).

Such difficulties have been deemed partly related to the imprecise content of the dual legal categories in IHL treaties. If this is indeed the case, international practice becomes increasingly important since it allows such categories to be progressively and substantially articulated by measuring them in view of concrete situations.<sup>53</sup>

In the same vein, the notion and typology of armed conflict have been called into question. Commentators have questioned the determinative criteria for international armed conflicts and the *adequacy* of the traditional dichotomy to encompass new factual scenarios.<sup>54</sup> In view of prevalent internal armed conflicts, the expansion of their typology, as governed by common Article 3 GCs, has been discussed by commentators who have examined the application or applicability of international humanitarian law to contemporary forms of armed violence. For instance, two “*conflict environments*” increasingly pose challenges for the implementation of rules on the protection of civilians, namely *urban* and *asymmetrical* warfare.

It is worth mentioning, however, the widely-held opinion that the innumerable breaches of international humanitarian law are not a matter of inadequacy of its rules, but rather result from a lack of inclination to respect the rules, the scarcity of ways and means to address their violations and to enforce them, the ambiguity as to their application in certain circumstances, or ignorance on the part of relevant actors (including commanders, combatants, political leaders and people in general).

Despite the apparent reasonableness of this opinion, the IHL framework on the protection of civilians raises questions in the area of ESC rights with regard to either the *implementation* of IHL principles and rules or their *adequacy* with respect to contemporary conflicts. In this sense, there is a clear need, on one hand, to clarify those principles and rules and elucidate how they apply in

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<sup>52</sup> This term is interpreted by the ICRC as serious acts of violence carried out by “*more or less organized groups*” and that “*call upon extensive police forces, or even armed forces, to restore internal order*”, see Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, paras. 4475-4477.

<sup>53</sup> On this point and in general on the IHL qualification of armed conflicts, see S. Vité, “Typology of armed conflicts in international humanitarian law: legal concepts and actual situations”, 91 *IRRC*, 2009, pp. 69-84. See also R.S. Schondorf, “Extra-State Armed Conflicts: Is there a Need for a New Legal Regime?”, 37 *New York University Journal of International Law and Politics*, 2004, pp. 61-75; G.S. Corn, “Hamdan, Lebanon, and the Regulation of Armed Conflict: The Need to Recognize a Hybrid Category of Armed Conflict”, 40 *Vanderbilt Journal of Transnational Law*, 2007, pp. 295-355; M.J. Hopkings, “Regulating the conduct of urban warfare: lessons from contemporary asymmetric conflicts”, 92 *IRRC*, 2010, pp. 470-493.

<sup>54</sup> See the ICRC report of the 31<sup>st</sup> International Conferences of the Red Cross and Red Crescent, December 2011, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts”, pp. 7-13.

practical circumstances. However, on the other hand, there is also a clear need to clarify the applicable legal regimes and to define the relationship between IHL and other relevant branches such as human rights law. Indeed, IHL applicable to the main form of conflict, namely internal conflicts, may appear to be of little relevance to economic, social and cultural rights, being presumed to pertain to the governmental functions of the territorial State.

### **3. The evolution of the IHL protection of civilian persons and objects**

Looking at the codification process of international humanitarian law from an historical perspective, the emphasis on protection of civilians as victims of armed conflict has represented a relatively recent development, as the oldest rules codified in this regard were elementary in nature. Most of the early codifications were primarily concerned with the treatment of combatants rather than civilians whose term emerged gradually.<sup>55</sup> Although during the period between 1846 and 1907, the term “*civilian*” entered the laws of war as opposed to “*soldier*”,<sup>56</sup> it did not appear with an intact identity and clear legal protection. The 1907 Hague Conventions,<sup>57</sup> which applied through the First and the Second World Wars,<sup>58</sup> provided for some relevant rules on means of combat as well as detailed, though isolated, rules on certain aspects of the occupation of enemy territory,<sup>59</sup> without affording civilians general protection against the effects of hostilities and the risks arising from warfare.<sup>60</sup>

Specifically, more attention was given to the protection of objects than persons during the

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<sup>55</sup> The term “*civilians*” was not used in the first Geneva Convention drawn up on 22 August of 1864, which focused on the wounded and linked the term “*inhabitants*” and of medical personnel to their human conduct. Then, the 1868 St. Petersburg Declaration on explosive projectiles implicitly supported the view of leaving out of war most members of society in affirming: “*That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy*”. Even in the 1880 Oxford Manual Article 7 states “*it is prohibited to maltreat inoffensive populations*”.

<sup>56</sup> See ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, Geneva, 2009, n. 11, p. 20.

<sup>57</sup> Hague Convention No. IV of 18 October 1907, Respecting the Laws and Customs of War on Land, 36 Stat. 2227, T.S. No. 539 [hereinafter Hague Convention No. IV] and the Annex thereto, embodying the Regulations Respecting the Laws and Customs of War on Land, 36 Stat. 2295 [hereinafter Hague Regulations or HRs]; Hague Convention No. V of 18 October 1907, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 36 Stat. 2310, T.S. No. 540 [hereinafter Hague Convention No.V]; Hague Convention No. IX of 18 October 1907, Respecting Bombardment by Naval Forces in Time of War, 36 Stat. 2351, T.S. No. 542 [hereinafter Hague Convention No. IX].

<sup>58</sup> The provisions of the Hague Regulations annexed to Hague Convention No. IV of 1907 served as the customary law basis for the International Military Tribunal in Nuremberg to convict those responsible for atrocities committed during the Second World War.

<sup>59</sup> No distinction was drawn between different categories of civilians by the Hague Regulations, which simply addressed “*inhabitants of occupied territory*” or the “*population*” in general, rather distinguishing between private and State property, see Articles 44, 45, 46, 50, 52, 53 and 56 HRs.

<sup>60</sup> The actual term civilian is used only in Article 29 (2) about spies: “... *the following are not considered spies: soldiers and civilians, entrusted with the delivery of dispatches, intended either for their own army or for the enemy army*”.

conduct of hostilities. The Hague Regulations recognised as unnecessary (and thus prohibited) the attack or bombardment of undefended “towns, villages, dwellings or buildings” such as places open to occupation without resistance (Art. 25). The officer in command of an attacking force was required to warn the authorities before bombarding - unless the element of surprise was necessary - so that civilians might leave or take shelter (Art. 26). For sieges and bombardments of defended towns, precautions were required to spare buildings either “*dedicated to religion, art, science*” or existing for “*charitable purposes*”, “*historic monuments, hospitals, and places where the sick and wounded were collected*” (Art. 27). The pillaging of a place or town was prohibited even if seized by assault (Art. 28).<sup>61</sup> In the same vein, the Hague Convention IX concerning Bombardment of Naval Forces in Time of War prohibited naval bombardment of undefended ports, town, villages, dwelling and buildings (Art. 1), and urged that precautions be taken to avoid or minimise collateral civilian casualties that might result (Art. 2). Conversely, aerial bombardment “*for the purpose of terrorizing the civilian population*” was prohibited in the Rules concerning the Control of Wireless Telegraphy in Times of War and Aerial Warfare,<sup>62</sup> which never entered into force. Similarly, a statement on the illegality of intentional bombing of civilians and civilian objects was contained in a resolution passed in 1938 by the Assembly of the League of Nation.<sup>63</sup>

The heavy bombardments and destructions perpetrated during World War II, however, showed the inadequacy of those provisions for the protection of civilians against widespread atrocities, strategic requirements and extreme ideologies of belligerents, revealing in a very real way that the existing prohibitions did not exclude that the morale of the enemy could become a military objective. This led to a broad international consensus on the need to refine and elucidate the rules of warfare to afford suitable respect for and protection of civilian populations.

A step forward was taken in the 1949 codification of international humanitarian law. The Fourth Geneva Convention was adopted to protect “*persons taking no active part in the hostilities*” and “*who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals*”.<sup>64</sup> Nonetheless, the rules

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<sup>61</sup> Arts. 25, 26, 28 HRs. The Hague codification was inspired by the Final Protocol of the Brussels conference on the Rules of Military Warfare of 27 August of 1874, which dealt with sieges, bombardments as well as military occupation, but which never enter into force.

<sup>62</sup> Arts. 22, 24, 25, which were drafted at the Hague (December 1922 - February 1923), used the expressions “*air bombardment*” and “*bombardment by aircraft*” for the first time.

<sup>63</sup> See *Protection of Civilian Populations against Bombing From the Air in Case of War*, Resolution of the League of Nations Assembly, 30 September 1938, reproduced in D. Schindler and J. Toman, *The Laws of Armed Conflicts*<sup>4</sup>, Leiden/Boston, 2004, p. 329.

<sup>64</sup> Articles 3-4 GC IV. As already noted, Article 4 GC IV defines in detail the categories of persons protected by this Convention, namely *nationals of an enemy State who find themselves in the territory of a belligerent State as well as the inhabitants of*

embodied in Part II provide for general protection against certain consequences of war to “*the whole of the civilian populations of the countries in conflict*”, regardless the nationality, race, religion or political allegiance.<sup>65</sup> Notably, the protected persons were deemed entitled to be treated humanely at all times, “*to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs*”; this was explicitly affirmed along with the entitlement to be protected particularly “*against all acts of violence or threats thereof and against insults and public curiosity*”.<sup>66</sup>

While the main purpose is protecting civilians under the control of an enemy authority against its offensive and arbitrary action, *very few of its rules offer protection to the civilian population residing in enemy territory against the perils of warfare*.<sup>67</sup> For instance, it provided for the conclusion by the belligerents of local agreements for the evacuation, “*from besieged and circled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas*” (Art.17). Further, it provided for the possibility to establish (either before or after the beginning of hostilities) hospital and safety zones and areas to protect “*wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven*” (Art. 14).

A further attempt to fill this lacuna was undertaken in the context of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which took place in Geneva between 1974 and 1977. As anticipated, the customary principle obliging belligerents to *distinguish between civilians and combatants as well as between civilian objects and military objectives at all times*, and then to *direct their operations only against military objectives*, was codified in Protocol I (Art. 48).<sup>68</sup> A number of provisions embodied in Part IV set down rules on the methods and means of warfare intended to *protect civilian persons and objects against the risks and effects of hostilities* (Arts. 51 to 60). In particular, by prohibiting certain attacks (*i.e.* direct and deliberate, indiscriminate, or by way of reprisals)<sup>69</sup> these rules essentially rely on the principles of *distinction*, *proportionality*, and *precaution*. Subsequently, a special regime of protection is set down for certain

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*occupied territory*. However, nationals of a neutral State or nationals of a co-belligerent State are not deemed protected persons by this Convention while their own State has diplomatic relations with the State that exercises control over them.

<sup>65</sup> See Articles 13-26 GC IV.

<sup>66</sup> See Article 27(1)(2) GC IV. Article 27(3) grants special protection to women. Under Article 27(4), “*without prejudice to the provisions relating to their state of health, age and sex, all protected persons are entitled to be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion*”. Nonetheless, Article 27(5) established that “*the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war*”.

<sup>67</sup> See N. Ronzitti, *Diritto internazionale dei conflitti armati*<sup>5</sup>, Giappichelli, 2014, p. 260.

<sup>68</sup> In 2005, the Eritrea-Ethiopia Claims Commission found this provision reflected customary international law, see Eritrea-Ethiopia Claims Commission, Partial Award, Western front, Aerial Bombardment and related Claims, Eritrea’s Claims 1, 3, 5, 9-13, 14, 21, 25 and 26 (2005), 45 *ILM* 396, 417, 425, (2006).

<sup>69</sup> As to civilian persons, Arts. 51 (2), (4), (5), (6), 85 (3) AP I. As to civilian objects, Arts. 52-56 AP I and 85 (3) AP I.



property (e.g. “cultural property”, “objects indispensable to the survival of the civilian population”, “installations containing dangerous forces”) as well as certain areas such as non-defended localities and demilitarised zones.<sup>70</sup> Further rules focus on the relief of the civilian population (Arts. 68 to 71) or afford protection to all civilians against arbitrary treatment (Arts. 72-79).<sup>71</sup>

Remarkably, the field of application of all these provisions is established to cover “*any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land*” as well as “*all attacks from the sea or from the air against objectives on land*”, but specifying that they “*do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air*”.<sup>72</sup>

As for the *protection of the civilian population in non-international armed conflicts*, a basic step was common Article 3 GCs. Setting out a general obligation on the parties to a non-international armed conflict, followed by specific prohibitions, common Article 3(1) primarily requires them to treat humanely in all circumstances, without any adverse distinction, all persons taking no active part in hostilities.<sup>73</sup> Next, Article 3(2) specifically binds parties to “*collect and care*” for the wounded and sick of the belligerent parties as well as the civilian population. While it represented a “*convention in miniature*”, Article 3 does not contain an explicit prohibition of attacks against it or rules on the conduct of hostilities aimed at sparing it, nor regulates relief operations during such conflicts; it nevertheless encouraged the parties to the conflict to stipulate “*special agreements*” bringing into force all or parts of the Geneva Conventions.<sup>74</sup>

Conversely, ‘general protection’ for the civilian population and individual civilians against threats stemming from military operations, alongside the prohibition of attacks on civilians, were provided in the 1977 Protocol II.<sup>75</sup> The latter supplemented and advanced the norms outlined in common Article 3 GCs. In particular, the fundamental guarantees included in Article 4 AP II are more detailed about the human treatment of all persons who do not or no longer take part in

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<sup>70</sup> For the former, see Arts. 53, 54, and 56 AP I; for the latter, see Arts. 59 and 60 AP I.

<sup>71</sup> Fundamental guarantees are provided in Art. 75, Section II of Part IV, AP I. See also Art. 78 (2) (“*Whenever an evacuation occurs ... 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*”).

<sup>72</sup> Article 49 (3) API.

<sup>73</sup> Without defining what constitutes “*human treatment*”, specific prohibitions are provided in sub-paragraphs (a)-(d) at all time and anywhere: “(a) *violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized peoples*”.

<sup>74</sup> The ICRC is granted to offer services to them, and their legal status is not affected by the application of these rules.

<sup>75</sup> Article 13 (1) and (2) AP II. As highlighted in legal scholarship, “*pre-existing rules of conventional international law applicable in non-international armed conflict did not provide explicit protection for the civilian population against attacks or the effects of attacks*”, in M. Bothe, K.J. Partsch, W.A. Solf (eds.), *New rules for victims of armed conflicts: Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, 1982, p. 667.

hostilities, also providing special protection for children and women.<sup>76</sup> Further, Part IV of Protocol II contains few rules prohibiting the starvation and attacks on “objects indispensable to the survival of the civilian population”, attacks on places of worship and cultural objects, attacks on “works and installations containing dangerous forces”, and the forced movement of civilians.<sup>77</sup> However, apart from the absence of provisions on the general protection of civilian objects,<sup>78</sup> persistent deficiencies in Protocol II result from the removal of rules that had been proposed on methods and means of warfare (such as the prohibition of indiscriminate attacks) and on activities of humanitarian organizations.<sup>79</sup> Similarly, no enforcement mechanism equivalent to the grave breaches norm in Protocol I is provided.

However, an expansion of treaty law (*i.e.* common Article 3 GCs and Protocol II) and the customary rules applicable to non-international conflicts has occurred over the last century. To elaborate, the former follows from amendments to old instruments<sup>80</sup> or new treaties altogether,<sup>81</sup>

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<sup>76</sup> Article 4 (1) and (2) AP II reads: “1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors. 2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever: (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) slavery and the slave trade in all their forms; (g) pillage; (h) threats to commit any of the foregoing acts”. Further, Article 4(3) provides specific protection for children (*e.g.* (a) “Children ... shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care”).

<sup>77</sup> Articles 14-17 AP II.

<sup>78</sup> See Y. Sandoz, C. Swinarski, B. Zimmermann, *op. cit.*, paras. 4759, 4794, 4817.

<sup>79</sup> For full accounts of the drafting process of Protocol II, especially the concerns behind those removal, namely States’ concern to see their armed forces becoming legitimate targets in non-international armed conflicts and to be abused for interventions into their internal affairs, see M. Bothe, K.J. Partsch, W.A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, *op. cit.*, 1982, pp. 406-703; Y. Sandoz, C. Swinarski, B. Zimmermann, *op. cit.*, paras. 4410-4418; Moir, *The Law of Internal Armed Conflicts*, Cambridge, 2002, pp. 89-96; D. Momtaz, “Le droit international humanitaire applicable aux conflits armés non internationaux”, *Recueil des Cours de l’Académie de Droit International de La Haye*, 2001, p. 95.

<sup>80</sup> See Article 1 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW Convention, adopted on 10 October 1980, entered into force on 2 December 1983), which was amended at the second review conference on 21 December 2001, also making its existing protocols applicable to non-international armed conflict: Protocol I (that prohibits weapons leaving undetectable fragments in the human body) and Protocol III (that restricts the use of incendiary weapons) and Protocol IV (that prohibits the use and transfer of blinding laser weapons). Conversely, the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II to the 1980 CCW Convention) was amended at the first review conference on 3 May 1996, see Article 1(2) “*This Protocol shall apply, in addition to situations referred to in Article 1 of this Convention, to situations referred to in Article 3 common to the four Geneva Conventions of 12 August 1949. This Protocol shall 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, as not being armed conflicts*”).

<sup>81</sup> See Protocol on Blinding Laser Weapons (Protocol IV to the CCW Convention) adopted on 13 October 1995. See Article 1 of the Ottawa Convention, which bounds all State parties to “*never under any circumstances*” use, produce, acquire, stockpile anti-personnel mines. See Article 22(1) of the Second Hague Protocol for the Protection of Cultural Property of 1954. See Article 1 of the Convention on Cluster Munitions of 30 May 2008, which hold that each State party undertake “*never under any circumstance*” to use, produce, acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions.

while the latter has been supported in the jurisprudence of international criminal tribunals<sup>82</sup> (and also in the ICRC Study on Customary International Humanitarian Law<sup>83</sup>).

While such expansion has certainly narrowed the gaps between the IHL rules applicable to the two legal categories of conflicts, factual differences persist and their relevance has been cautiously addressed in legal scholarship.<sup>84</sup> A substantive difference is surely that the rules applicable to international conflicts apply to States and national liberation movements, while the rules applicable to non-international conflicts also apply to - and have to be respected by - armed groups. However, a number of treaty law rules still apply only to international conflicts; for instance important provisions of Protocol I without any equivalent in Protocol II relate to the methods and means of warfare as well as to the protection of civilians.<sup>85</sup> Crucially, Article 8 of the Rome Statute distinguishes war crimes applicable in one or the other type of conflict, with the list applicable to international armed conflicts being far more extensive than the other one.<sup>86</sup>

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<sup>82</sup> The ICTY and the ICTR have recognised that at least the core Protocol II is part of customary international law; see the detailed explanations given by the Appeals Chamber of the ICTY in its first decision, ICTY, *Prosecutor v. Tadić* (IT-96-I), Appeals Chamber, 2 October 1995, paras. 100-118; the ICTY also held that the “general essence” of the rules applicable in international armed conflicts have become applicable to non-international armed conflicts as a matter of custom (*ibid.*, paras. 98 and 126). In its practice, the ICTY has applied IHL governing the conduct of hostilities in both categories of conflicts without distinction: see, for instance, ICTY, *Prosecutor v. Martić* (IT-95-11-I), Trial Chamber I, Review of the Indictment Pursuant to Rule 61, 8 March 1996, paras. 8-14; ICTY, *Prosecutor v. Kupreskić et al.* (IT-95-16), Trial Chamber II, Judgment, 23 October 2001, paras. 525-536. As for the ICTR, see *Prosecutor v. Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998, para. 608.

<sup>83</sup> According to this Study, 136 (possibly even 141) rules out of 161 were found to apply to both international and internal armed conflicts. Among them, the majority of customary rules relating to means and methods of warfare (66 rules out of 72) were found to apply similarly to all types of armed conflicts; of the residual six rules that have not yet reached customary status, two apply only to international conflicts (Rule 49 on seizure of military equipment of the enemy, and Rule 51 on treatment of public and private property in occupied territory); four rules were found to apply contentiously to internal conflicts: Rule 44 (on precautions to prevent or minimise incidental damage to the natural environment), Rule 45 (on prohibition to cause severe, long-term and widespread damage to the natural environment), Rule 62 and 63 (on prohibition of “improper use” of flags, emblems, uniform of the enemy or of a State not party to the conflict). However, the ICRC conclusions remain controversial either for the methodology used or the content of the rules; for instance, it did not take into account the practice of armed opposition groups in order to evaluate the formation of customary law, as clearly results from the formulation of these rules as rather State-centred.

<sup>84</sup> For critics on the rejection of the traditional distinction, see Cryer, “Of custom, treaties, scholars and the gavel: the impact of the International Criminal Tribunals on the ICRC customary law study”, 11 *JCSL*, 2006, pp. 253-254; Turns, “Weapons in the ICRC study on customary international humanitarian law”, 11 *JCSL*, 2006; M. Bothe, “Customary international humanitarian law: some reflection of the ICRC Study”, 8 *YIHL*, 2005, pp. 174-176; Bellinger and Haynes, “A US government response to the International Committee of the Red Cross Study on Customary International Humanitarian Law”, 89 *IRRC*, 2007, p. 448; Wilmshurst and Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge, 2007, pp. 401-414. For scholars arguing for the elimination of the differences, see Crawford, “Unequal before the law: the case for the elimination of the distinction between international and non-international armed conflicts”, 20 *LJIL*, 2007, p. 441 ff.; MacLaren and Schwendimann, “An exercise in the development of international law: the new ICRC Study on Customary International Humanitarian Law”, 6 *German Law Journal*, 2005, p. 1230; Willmott, “Removing the distinction between international and non-international armed conflict in the Rome Statute of the International Criminal Court”, 5 *Melbourne Journal of International Law*, 2004, p. 196 ff.

<sup>85</sup> *E.g.*, Article 35 AP I and Article 59 AP I.

<sup>86</sup> Notwithstanding the absence of a criminal law enforcement mechanism under AP II or common Article 3 GCs, prohibited acts committed in non-international armed conflicts have been criminalised on the basis of customary

As has implicitly emerged from this overview (and as we will see in greater detail in the following sections), subsequent treaties that are relevant for the protection of civilians include the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols, the 1980 CCW Convention and its five Protocols, the 1997 Ottawa Convention on the Prohibition of Anti-Personnel Landmines, the 1998 Statute of the International Criminal Court, and the 2000 Optional Protocol on the Involvement of Children in Armed Conflict.

#### 4. The definition of civilians under AP I and AP II

For the purpose of the law governing the conduct of hostilities in an international armed conflict, a civilian is any person who is not a combatant. As clearly highlighted in the negative definition laid down in Article 50(1) API, what counts in protecting civilians against the dangers of military actions is the *inoffensive nature* of both the persons to be spared and the situation in which they find themselves. More precisely, it is provided that civilian is any individual who does not fall into one of the categories indicated in Article 4 (A)(1)(2)(3) and (6) GC III<sup>87</sup> and in Article 43 API<sup>88</sup>; in this sense, civilians have been defined as “*persons who are not, or no longer, members of the armed forces*”.<sup>89</sup>

This definition covers civilians collectively, when referred as “*the civilian population*”, as well as individually.<sup>90</sup> It is also presumed that in case of doubt about a person’s status, the latter should be viewed as civilian.<sup>91</sup> Furthermore, the presence of combatants does not transform the civilian character of a population.<sup>92</sup> As discussed below, since Article 50 does not prevent civilians’

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international law and deemed to give rise to criminal individual responsibility firstly in the jurisprudence of the ICTY (while Article 3 ICTY Statute empowered it to prosecute grave breaches of the 1949 Geneva Conventions and “*violations of the laws or customs of war*”, in *Tadic* Article 3 was recognised applicable to both international and internal armed conflicts, see para. 94), in Article 4 ICTR Statute, then in Article 8(2)(c) ICC Statute (*i.e.* violations of common Article 3 GCs) and Article 8(2)(e) ICC Statute (*i.e.* other serious violations of the law of internal armed conflict).

<sup>87</sup> Article 4 GC III refers to those who, upon capture, have prisoner of war status (POW) as they are lawful combatants (members of regular armed forces or members of resistance movements) and it includes the *levée en masse*.

<sup>88</sup> Article 43 AP I defines the armed forces of the parties to a conflict, whose members are entitled to POW status if they fall into the hands of the enemy. As addressed in the ICRC study on customary IHL, “*the armed forces of a party to the conflict consist of all organized armed forces, groups and units, which are under a command responsible to that party for the conduct of its subordinates*”, see J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, pp. 14-17, Rule 4.

<sup>89</sup> ICTY, *Prosecutor v. Blaškić*, Trial Chamber, 2000, para. 751.

<sup>90</sup> No reservations have been made to Article 50. As addressed in the ICRC Study on Customary IHL, this definition is included in many military manuals, and it is reflected in reported practice, including “*that of States not, or not at the time, party to Additional Protocol I*”, see J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, p. 18, Rule 5.

<sup>91</sup> Article 50 (1) API. However, some countries have declared that this presumption cannot override the commander’s obligation to protect his subordinates’ safety.

<sup>92</sup> Article 50 (3) API. In the same vein, Article 58 prescribes belligerents to take away “*from the vicinity of military objectives*” the civilian population, civilian persons and objects which are *under their control*”.

exposition to the hazard of a military action against combatants, the principle of proportionality plays the uncertain but important role as the point of reference for assessing collateral damage suffered by civilians.<sup>93</sup>

As for a non-international armed conflict, a definition of civilians or the civilian population is not included in Protocol II, despite the fact that it employs these terms in a number of provisions.<sup>94</sup> As aptly stated in legal scholarship, civilians can be all persons who are not members of “*dissident armed forces or other organized armed groups ... under responsible command*” indicated in Article 1 APII.<sup>95</sup> Equally, later treaties applicable to non-international armed conflicts have employed those terms without defining them.<sup>96</sup>

Beyond negatively defining who can be classified as civilians, international humanitarian law focuses on certain members of the civilian population who are seriously affected by the conduct of hostilities without taking part in fighting and so without threatening the enemy. In this regard, *special protection* is granted to selected subjects like women and children in view of their exceptional vulnerability in both international and non-international armed conflicts.

A number of provisions are designed to give *civilian women* a preferential treatment in certain circumstances.<sup>97</sup> Special protection is granted to pregnant women and maternity situations against the consequences of war under Articles 14, 16, 21 and 22 GCIV. Then, Article 27(2) GCIV affords specific protection “*against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault*”.<sup>98</sup> A reiteration is contained in Article 76(1) API. However, the latter provision

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<sup>93</sup> Suffice it here to mention three implications of being combatants in an international armed conflict: i) they have the privilege to fight and a consequent immunity from prosecution for fighting according to the laws of armed conflict; ii) they benefit from the status of prisoners of war if captured by the adversary; iii) the adversary may legitimately target them unless they are *hors de combat*.

<sup>94</sup> Articles 13-15 and 17-18 APII.

<sup>95</sup> See M. Bothe, K.J. Partsch, W.A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, *op. cit.*, 1982, p. 672.

<sup>96</sup> *E.g.*, Article 3(7)-(11) amended Protocol II to the CCW; Article 2 Protocol III to the CCW; the Preamble of Ottawa Convention; Article 8(2)(e)(i), (iii) and (viii) Rome Statute.

<sup>97</sup> Overall, see Articles 14, 16, 21-27, 38, 50, 76, 85, 89, 91, 97, 124, 127 and 132 GC IV; Articles 70 and 75-76 API; Articles 5(2) and 6(4) AP II.

<sup>98</sup> The list of acts constituting grave breaches of the Convention (Art. 147 GC IV) includes “*wilful causing great suffering or serious injury to body or health*”. Rape is the most serious form of sexual violence against women during hostilities; the list of war crimes provided in the Statutes of the ICTR and the ICC also include rape and other forms of sexual violence: Article 4(e) ICTR Statute; Article 8(2)(b)(xxi) Rome Statute brands as a war crime outrages upon personal dignity, while Article 8(2)(b)(xxii) defines as war crimes the perpetration of sexual slavery, rape, forced pregnancy, enforced sterilization, enforced prostitution “*or any other forms of sexual violence*”. Conversely, rape is not explicitly mentioned as a war crime in the ICTY Statute, but in the *Celebici* case it was affirmed that rape could qualify as torture, so being equal to a grave breach of the Geneva Conventions (see also *Prosecutor v. Delalic et al.*, Judgment (IT-96-21-T), Trial Chamber, 16 November 1998, paras. 475-477; further, the ICTY condemned rape as a crime against humanity (see *Prosecutor v.*

covers all women without exception, while the former clause applies only to civilian women who are “protected persons” in the sense of the Geneva Convention.<sup>99</sup> Conversely, Article 4(2)(e) APII forbids “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”.<sup>100</sup> Notably, the special protection accorded to women has been acknowledged to have customary status.<sup>101</sup>

As for *children*, certain rules aim at affording them special protection from the effects of hostilities, any kind of offensive attack, or any further threat stemming from the conflict. In particular, seventeen provisions of the Fourth Geneva Convention are of specific concern, although the principle on which they rely is not explicitly established.<sup>102</sup> This gap is filled by Article 77 AP I, providing 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, whether because of their age or for any other reason”.<sup>103</sup> Similar protection for children is established under Article 4(3) APII.<sup>104</sup>

Conversely, certain rules aim at impeding the participation of children in hostilities. Belligerents are bound not to recruit persons under the age of fifteen years into their armed forces as well as to take all feasible measures to guarantee that they “do not take a direct part in hostilities”.<sup>105</sup> The threshold of fifteen, which is established in both the 1977 Protocols and in Article 38(2) CRC,<sup>106</sup> has been

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*Kunarac, Kovac and Vukovic* (IT-96-23 IT-96-23/1-A), Appeals Chamber, Judgment, 12 June 2002, paras. 127-186); notably, the young age of victims was found to be an aggravating circumstances in the sentencing of rape (see *Prosecutor v. Kunarac et al.*, Appeals Chamber, 2002, para. 355).

<sup>99</sup> See W.A. Solf, “Article 76”, in M. Bothe, K.J. Partsch, W.A. Solf (eds.), *op. cit.*, pp. 469-470.

<sup>100</sup> See, e.g., F. Krill, “The Protection of Women in International Humanitarian Law”, *IRRC*, 1985, pp. 337-363; J. Gardam and H. Charlesworth, “Protection of Women in Armed Conflict”, *Human Rights Quarterly (HRQ)*, 2000, pp. 148-166; C.R. Carpenter, *Innocent Women and Children: Gender, Norms and the Protection of Civilians*, Ashgate, 2006.

<sup>101</sup> See also Rule 134 and Rule 93 of the ICRC Study on Customary IHL.

<sup>102</sup> See Articles 14, 17, 23, 24, 38(5), 50, 51, 68, 76, 82, 89, 94 and 132 GC IV.

<sup>103</sup> See Articles 70, 77 and 78 AP I. See, e.g., D. Plattner, “Protection of Children in International Humanitarian Law”, 24 *IRRC*, 1984, pp. 140-152; G. van Bueren, “The International Legal Protection of Children in Armed Conflicts”, *ICLQ*, 1994, p. 811; J. Kuper, *International Law concerning Child Civilians in Armed Conflict*, 1997.

<sup>104</sup> Article 4(3) AP II reads: “Children shall be provided with the care and aid they require, and in particular: (a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care; (b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated; (c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities; (d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured; (e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being”.

<sup>105</sup> See Article 77(2) API; Article 4(3)(c) AP II. Under Article 77 API, when children participate in hostilities, they nevertheless benefit from preferential treatment if they are captured. Conversely, when children are members of armed forces (notwithstanding the aforementioned prohibitions), they benefit from the status of combatant or prisoner of war.

<sup>106</sup> Convention on the Rights of the Child, 1989, 28 *I.L.M.* 1448, at 1470. On the interaction among the two texts, see A.J.M. Delissen, “Legal Protection of Child Combatants after the Protocols: Reaffirmation, Development or a Step Backwards?”, in A.J.M. Delissen and G.J. Tanja, *Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honour of Frits Kalshoven*, 1991, pp. 153-164.

raised to eighteen in its Optional Protocol on the involvement of children in armed conflict, but it is also provided that States may consent voluntary recruitment of persons under the age of eighteen into military schools, so producing a difference between governmental armies and non-State armed groups.<sup>107</sup> Notably, the recruitment of child soldiers, whether compulsory or not, is criminalised under the Rome Statute in Article 8(2)(b)(xxvi), which includes “*conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities*” among war crimes.<sup>108</sup>

## 5. Civilian objects and the definition of military objective

According to the negative formulation laid down in Article 52(1) AP I *civilian objects include all the ones which are not military*. Guidance for the attacker is provided to distinguish between the two concepts via an explicit broad definition of military objective set out in Article 52(2) AP I.

Despite the failure of earlier efforts, given that such a definition was mainly deemed inappropriate in a humanitarian instrument,<sup>109</sup> it is worth briefly considering *the evolution of the notion “military objective”* to better understand the subsequent codified criteria. Notably, this is important not only for grasping the meaning of the rule prohibiting attacks against civilian objects, but is also necessary in light of contemporary warfare where objects normally considered to be of a civilian nature turn into legitimate military targets due to their role in the conduct of hostilities. While some targets have an inherent military character, most objects turn into military objectives as a result of the circumstances of their location, use by the adversary or possible use by the attacking party, and purpose.

An operational definition dates back to 1923 Hague Rules of Air Warfare.<sup>110</sup> The distinction between civilian objects and military objectives was not clarified in the 1949 Geneva Conventions

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<sup>107</sup> See Articles 1, 2, 3 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000. Under Article 2 the States parties guarantee that children under the age of eighteen years must not be “*compulsorily recruited into their armed forces*”. Article 3 obliges to take all feasible measures to ascertain that members of the armed forces below the age of eighteen years “*do not take a direct part in hostilities*”.

<sup>108</sup> See M. Cottier, “Article 8(2)(b)(xxvi)”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*<sup>2</sup>, 2008, pp. 466-472. While conscription involves compulsory mustering, enlistment implies any form of signing up for military service; failure to refuse the voluntary enlistment of children to the armed forces is a war crime.

<sup>109</sup> Some of the moral difficulties to codify “*a valid object of attack*” are described in ICRC commentary to Protocol I: “[S]hould a humanitarian treaty describe objects which may be attacked? After a great deal of thought it seemed impossible to ensure effective protection for the civilian population without indicating what objectives could legitimately be attacked”, see Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), *op. cit.*, para. 2015.

<sup>110</sup> According to Article 24 (1), this is the object “*of which the destruction or injury would constitute a distinct military advantage to the belligerent*”. The non-binding 1923 Rules of Air Warfare was drawn up at The Hague by a Commission of Jurists set up in 1922 by the Washington Conference on the Limitation of Armament.

for the protection of war victims, even though two provisions make an explicit reference to the risks to which medical establishments may be subjected by being situated near “*military objectives*”.<sup>111</sup> Furthermore, the drafters of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict partially developed the list of legitimate military objectives (as discussed below) in granting special protection to certain cultural property. The 1954 Hague Convention provides that the latter must be “*situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point*”.<sup>112</sup> However, this reference to “*military objective*” became relatively significant since it lacked the criteria for defining what convert an object into a lawful target or for establishing how other objects might be exposed to attack.

Conversely, a specific definition was proposed in the ICRC “Draft Rules for the Limitation of Danger Incurred by the Civilian Population in Time of War” of 1956,<sup>113</sup> which attempted to clarify the principle of distinction and followed the efforts to encourage the adoption of treaty rules safeguarding civilian populations from the effects of bombardment, in view of new advanced methods and means of warfare since 1920.<sup>114</sup> A further definition was included in a resolution of the

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<sup>111</sup> Article 19 (2) GC I requires the “responsible authorities” to guarantee that medical establishments and units are, to a feasible extent, positioned in a way that the targeting of military objectives cannot endanger them; similarly Article 18(5) GCIV protects civilian hospitals, see Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, para. 1999.

<sup>112</sup> Article 8 (1)(a) of the 1954 Hague Convention. This convention makes examples of “*vulnerable points*” (e.g. “*aerodrome, a broadcasting station, an establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication*”). The term is contained in Articles 6(a), 8, 13(1)(b) of its 1999 Second Hague Protocol. The term is also present in the Rome Statute, see Article 8(2)(b)(ii), (v), (ix).

<sup>113</sup> Article 7 ICRC Draft Rules reads: “*In order to limit the dangers incurred by the civilian population, attacks may only be directed against military objectives. Only objectives belonging to the categories of objective, which, in view of their essential characteristics, are generally acknowledged to be of military importance, may be considered as military objectives. [...] However, even if they belong to one of those categories, they cannot be considered as a military objective where their total or partial destruction, in the circumstances ruling at the time, offers no military advantage*”.

According to Article 7 (2) ICRC Draft Rules, the categories of military objectives (as reprinted in the *Commentary to the Additional Protocols*, *op. cit.*, para. 2002) are: “[...] (1) *Armed forces, including auxiliary or complementary organisations, and persons who, though not belonging to the above-mentioned formations, nevertheless take part in the fighting.* (2) *Positions, installations or constructions occupied by the forces indicated in sub-paragraph 1 above, as well as combat objectives (that is to say, those objectives that are directly contested in battle between land or sea forces including airborne forces).* (3) *Installations, constructions and other works of a military nature, such as barracks, fortifications, War Ministries (e.g. Ministries of Army, Navy, Air Force, National Defence, Supply) and other organs for the direction and administration of military operations.* (4) *Stores of arms or military supplies, such as munitions dumps, stores of equipment or fuel, vehicles parks.* (5) *Airfields, rocket launching ramps and naval base installations.* (6) *Those of the lines and means of communication (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance.* (7) *The installations of broadcasting and television stations; telephone and telegraph exchanges of fundamental military importance.* (8) *Industries of fundamental importance for the conduct of the war: (a) industries for the manufacture of armaments such as weapons, munitions, rockets, armoured vehicles, military aircraft, fighting ships, including the manufacture of accessories and all other war material; (b) industries for the manufacture of supplies and material of a military character, such as transport and communications material, equipment for the armed forces; (c) factories or plant constituting other production and manufacturing centres of fundamental importance for the conduct of war, such as the metallurgical, engineering and chemical industries, whose nature or purpose is essentially military; (d) storage and transport installations whose basic function it is to serve the industries referred to in (a)-(c); (e) installations providing energy mainly for national defence, e.g. coal, other fuels, or atomic energy, and plants producing gas or electricity mainly for military consumption.* (9) *Installations constituting experimental, research centres for experiments on and the development of weapons and war material. [...]*”.

<sup>114</sup> In order to “*protect civilian populations efficiently from the dangers of atomic, chemical and bacteriological warfare*”, Draft Rules were drawn up by the ICRC and submitted to the XIX<sup>th</sup> Conference of the Red Cross in New Delhi in 1957. The



*Institut de Droit International* in 1969.<sup>115</sup>

Instead, Article 52(2) API overcomes the traditional objections to codifying the distinction between civilian and military objects<sup>116</sup> by providing a relatively broad definition of “*military objective*”. It is constructed around carefully negotiated standards allowing interpretations in view of the conditions present at the time, in searching of a balance between military considerations and humanitarian exigencies. Under the so-called two-pronged test, *legitimate military targets* are circumscribed to those which by use, nature, purpose or location “make an effective contribution” to the enemy’s military action and whose partial or total neutralisation, capture or destruction - “in the circumstances ruling at the time” - “offers a definite military advantage”.<sup>117</sup>

Notably, Article 52(2) integrates an element of The Hague Air Rules definition, namely the determination of a military advantage, plus elements of the definition set forth by the *Institut de Droit International*, namely the criteria of use, nature, and purpose. Nonetheless, the characterization of the expected military advantage as “*definite*” establishes a higher threshold than the term “*distinct*” proposed in 1923, but it is less strict than the adjectives “*substantial, specific and immediate*” preferred in 1969. Besides, Protocol I introduces two new elements, namely the “*location*” for ascertaining that an object effectively contributes to the military action of the enemy and the concepts of “*capture*” and “*neutralisation*”. Moreover, whereas according to former definitions “*the destruction or injury*” of the object<sup>118</sup> or “*the partial or total destruction*” of the object<sup>119</sup> constituted the conduct to gain a military advantage, more broadly Article 52(2) covers the acts that do not produce destruction but that exclude the use of an object by the adversary.<sup>120</sup>

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subsequent Governments’ failure to follow up on these Draft Rules was mainly due to the reference to nuclear weapons (Chapter IV of the Draft Rules circumscribed the use of “*weapons with uncontrollable effects*”).

<sup>115</sup> According to Article 2 of the Resolution (entitled “The Distinction between Military Objectives and Non-Military Objectives in General and Particularly the Problems Associated with Weapons of Mass Destruction”), adopted in Edinburgh on 9 September 1969, “[...] *only those objects which, by their very nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognised military significance, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them*”.

<sup>116</sup> See also Robertson, “The Principle of the Military Objective in the Law of Armed Conflict” in M.N. Schmitt, ed., *The Law of Military Operations - Liber Amicorum Professor Jack Grunawalt*, vol. 72, U.S. Naval War College International Law Studies, 1998, p. 208, noting: “*Since this approach was a departure from the traditional practice of writing prohibitory rules specifying which objects were to be spared, it met considerable opposition at the outset of the negotiations in the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*”.

<sup>117</sup> Article 52(2) API was adopted by 79 votes in favour, 7 abstentions, and none against. No reservations have been made to it.

<sup>118</sup> See Article 24 (1) of the 1923 Hague Rules.

<sup>119</sup> See Article 7 ICRC Draft Rules; Article 2 Edinburgh Resolution.

<sup>120</sup> See W. Solf, “Article 52”, in M. Bothe, K. Partsch, W.A. Solf (eds.), *op. cit.*, para. 2.4.5. The author’s example concerns an area of land that effectively contributes to the military action of the enemy; “*mining the area and denying its use to the enemy*” might give a military advantage, but the attacker might use landmines only under the obligation to “*minimise their indiscriminate effects, to record their placement, and, at the end of hostilities, to render them harmless to civilians, or facilitate their removal*”. See also Rules 81-83 on Landmines, in J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, pp. 280-286.

It is worth also referring to the declarations formulated by a number of States and aimed at interpreting the concept of “military objective” defined in Article 52(2). Besides providing that “(a)ttacks shall be limited strictly to military objectives”, several States have affirmed that the first sentence of paragraph 2 only proscribes *direct* attacks against civilian objects and is not meant to sort out the issue of collateral or incidental damage arising from an attack against a military target.<sup>121</sup>

### 5.1. Some remarks on military objectives under AP I

It is commonly agreed that *the dual conditions under Article 52(2) must be satisfied cumulatively*. However, some authors believe that in practice duplication may emerge to a certain extent: once a party to a conflict has determined that an attack has a “*definite military advantage*”, not much effort is needed to argue that finally the objective effectively contributed to the enemy’s military action, and vice versa.<sup>122</sup> However, the logic of *presuming* that the target made an effective contribution insofar as the definite military advantage was fulfilled through its capture, destruction or neutralisation risks reducing the two conditions into one, and in doing so making the demonstration of such “*effective contribution*” by virtue of its use, location, nature or purpose merely abstract.

Notably, the importance of preserving the distinction between them, even if it may often be slight, clearly arises *if the military status of an object is uncertain* but the neutralisation, capture or destruction of the same object would provide a definite military advantage. An important case has been cited regarding an empty factory located on a hill overlooking the enemy’s quarters, so implying that controlling it would give the attacker a definite advantage. In this example whereas one prong of the text is fulfilled, the attacker has nevertheless to ascertain that the factory contributes to the military action of the enemy. This point becomes relevant to the civilian workers who may be in the factory and may lose their status if the attacker assumes that the building is a lawful target.<sup>123</sup>

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<sup>121</sup> The first one was formulated by Australia, Canada, France, Germany, Italy, the Netherlands, New Zealand, Spain and the United Kingdom, adding that: “*In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage*”. Except Australia, they have also stated that “*a specific area of land*” can be a military objective within the meaning of Article 52(2). The second declaration was made by Australia, Canada, France, Italy, New Zealand and the United Kingdom. See ICRC *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, paras. 1955 and 2025-2026.

<sup>122</sup> In the words of two commentators, “[O]ne cannot imagine that the destruction, capture, or neutralization of an object contributing to the military action of one side would not be militarily advantageous for the enemy; it is just as difficult to imagine how the destruction, capture, or neutralisation of an object could be a military advantage for one side if that same object did not somehow contribute to the military action of the enemy”, see M. Sassòli and A. Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*<sup>2</sup>, ICRC, 2006, p. 152.

<sup>123</sup> See A. Bouvier, “The legal regime applicable to targeting military objective in the context of contemporary warfare”, *Research Paper Series*, 2/2006, p. 16, laying down a contrary example of a factory in which the enemy stores ammunition

The significance of the twofold condition also stems from the commander's need to explain any resulting damage to persons and property in view of a correct application of proportionality and precautionary measures, as detailed in the following sections.

Remarkably, although Article 52(2) deals with what can be attacked, it has been aptly stressed that *limiting damage to what is militarily necessary* appears a function included in the two-pronged test.<sup>124</sup> In this regard, the seizure and destruction of the enemy's property are prohibited "*unless imperatively demanded by the necessities of war*" in the 1907 Hague Regulations<sup>125</sup>. Even though the drafters could have made this point more explicit, Protocol I builds on *the prevention of unnecessary destruction* as a fundamental paradigm of the laws of armed conflict in the light of its underlying purpose, namely protecting persons and objects not engaged in military action should the latter relate to those militarily involved. An instance of how *the principle of military necessity contributes to any understanding of a lawful military objective* is found in the context of the 1990-1991 Gulf War. Specifically, the coalition forces avoided attacking an Iraqi military aircraft located next to the archaeological monuments at the ancient Sumerian site of Ur, since it would have disrespected the cultural property unlawfully exploited to shield that aircraft as well as because an attack was not deemed militarily necessary. The United States Department of Defense alluded to a lack of military necessity, emphasising the limited value of the target and its ineffective contribution to the action of the Iraqi armed forces, so determining an unfulfilled first condition of Article 52(2), without recognising that the aircraft was not a legitimate target.<sup>126</sup>

According to several reliable sources, *the 1977 definition of military objective has reached the status of customary international law*,<sup>127</sup> implying that all States are bound by both the rule allowing attacks only

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and from which it fires against the attacker, so presenting evidence that its use effectively contributes to the enemy's action and that its neutralisation, capture or destruction may afford a definite military advantage.

<sup>124</sup> E. David, *Principes de droit des conflits armés*<sup>4</sup>, Bruylant, 2008, p. 311, para. 2.49: "*Le principe de l'immunité des biens de caractère civil peut donc aller au-delà de son objet spécifique qui est la protection des seuls biens civils: il implique l'illicéité de toute destruction inutile, même si celle-ci porte sur des biens qui ne sont pas civils stricto sensu*".

<sup>125</sup> Article 23(g) HRs. The prohibition has reached customary status applicable in both types of armed conflict (see *ICRC Study on Customary IHL, Vol. I*, Rule 50, p. 175); Article 8(2)(b)(xiii) Rome Statute codifies its breach among the "serious violations of the laws and customs applicable in international armed conflicts".

<sup>126</sup> See U.S. Department of Defense, Report to Congress on the Conduct of the Persian Gulf War, in *International Law Materials*, 1992, p. 623, in which it is stated that: "*The central command (CINCCENT) elected not to attack the aircraft on the basis of respect for cultural property and the belief that positioning of the aircraft adjacent to Ur (without servicing equipment or a runway nearby) effectively had placed each out of action, thereby limiting the value of their destruction by Coalition air forces when weighed against the risk of damage to the temple*".

<sup>127</sup> See ICC, *Prosecutor v. Abu Garda*, ICC-02/05-02/09, Decision on the confirmation of charges, 8 February 2012, paras. 85-89; Eritrea-Ethiopia Claims Commission, Partial Award, Western Front, Aerial Bombardment and related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 and 26, 19 December 2005, 45 I.L.M. 396 (2006), para. 113. See also J.M.

against military objectives and the criteria for determining a legitimate target, regardless whether or not they ratified Protocol I.<sup>128</sup> Despite its customary nature, Article 52(2) is one of the most discussed provisions of this treaty.<sup>129</sup> Legal scholarship has critically considered it to be “*abstract and generic*”,<sup>130</sup> less than constructive<sup>131</sup> and “*so sweeping that it can cover practically anything*”.<sup>132</sup> Conversely, that definition has been deemed to offer the possibility of a “*flexible and future-oriented interpretation*”<sup>133</sup> that may result ever more essential as warfare has surpassed traditional battlefield, although the codified definition amplifies the value of good faith implementation.

Some of the criticisms and interpretations concerning the notion of military objective emphasise *certain limits of the definition* that are particularly relevant for the purpose of the present thesis. They are discussed below.

### **5.1.a. The condition of effective contribution to the enemy’s military action**

As observed above, a legitimate military target is the one making an effective contribution to the enemy’s military action by virtue of the use, location, nature, or purpose of the objective in question.<sup>134</sup> As underlined in legal scholarship, this requirement “*relates to military action in general*” without the need for “*a direct connection with any specific combat operations*”.<sup>135</sup> However, the *actual relation* of the targeted objective to the enemy’s military action remains of greater concern: its irrelevance would excuse the view that civilian persons and objects which financially, politically (or even

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Henckaerts and L. Doswald-Beck, *op. cit.*, pp. 29-32, Rule 8, which, *inter alia*, counts on the practice of States not, or not at the time, parties to Protocol I. See also T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press, 1989 pp. 64-65; Robertson, “The Principle of the Military Objective in the Law of Armed Conflict”, in M.N. Schmitt (ed.), *The Law of Military Operations - Liber Amicorum Professor Jack Grunawalt*, vol. 72, U.S. Naval War College International Law Studies, 1998, p. 204. Furthermore, the definition contained in Article 52(2) was deemed part of customary law in the *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 13 June 2000, reprinted in A.E. Wall, p. 504, para. 42. For an advanced line of reasoning on the customary nature of the criteria in Article 52(2), see M. Sassòli, “Targeting: Scope and Utility of the Concept of ‘Military Objectives’ for the Protection of Civilians in Contemporary Armed Conflicts”, in D. Wippman and M. Evangelista (eds.), *New Wars, New Laws?*, Transnational Publishers, 2005, p. 187. On the customary character of the same definition, see also M. Sassòli and L. Cameron, “The Protection of Civilian Objects”, in N. Ronzitti and G. Venturini, *The Law of Air Warfare. Contemporary Issues*, Eleven International Publishing, 2006, pp. 49-50.

<sup>128</sup> This is important for States such as the United States of America, Israel, Iran, which are not parties to Protocol I.

<sup>129</sup> S. Oeter, “Methods and Means of Combat”, in Fleck D. (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford, 1995, para. 442.5.

<sup>130</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2010, p. 90.

<sup>131</sup> E. Rosenblad, “Area Bombing and International Law”, *The Military Law and Law of War Review*, 1976, p. 90.

<sup>132</sup> A. Cassese, *International Law*, Oxford, 2001, p. 339.

<sup>133</sup> O. Bring, “International Humanitarian Law after Kosovo: Is *lex lata* Sufficient?”, *Nordic Journal of International Law*, 2002, p. 42.

<sup>134</sup> A restrictive interpretation was given in the *Galić* case. According to the ICTY Trial Chamber, a civilian object “*shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action*”. See ICTY, *Prosecutor v. Galić* (IT-98-29), Appeals Chamber, 2006, para. 51.

<sup>135</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2010, p. 95, quoting and agreeing with W.A. Solf, “Article 52”, in M. Bothe, K.J. Partsch, W.A. Solf (eds.), *op. cit.*, p. 324, para. 2.4.3.

psychologically) strengthen an armed conflict should be deemed military targets. Indeed, the issue of dealing with military strategies using the legal fiction of considering “*immaterial goals*” (e.g. “*civilian morale*” and “*political will*”) as military objectives and striking doubtful military targets (e.g. ministries, radio and television stations), in order to break down civilians’ support, has not been so rare in recent conflicts. Regrettably, targeting theories seeking to include objectives having political, financial or psychological influences do result in increased risks for civilian persons and properties. In any case, as emphasised in the ICRC commentary to the 1977 Protocols, *only tangible and material objects may become military targets*; it is well documented how the intent to exclude immaterial objectives such as victory inspired the use of the term “*object*” in Article 52(2).<sup>136</sup> It is worth emphasising that belligerents, when drawing up their list of targets, are indisputably required to consider the two-pronged test in its entirety. At the same time, the *justification* under which civilian objects are included into the category of military objectives seems to acquire more importance.

Notably, the required connection of the effective contribution of a certain target to the enemy’s conduct was challenged by the United States’ attempt to substitute the term “*military action*” with the expression “*war-fighting or war sustaining capability*”.<sup>137</sup> Nevertheless, the “*war-sustaining*” portion has been deemed to go too far and to be too lax; according to the generally accepted view “*for an object to qualify as a military objective, there must exist a proximate nexus to military action or ‘war-fighting’*”, being the latter equivalent to military action.<sup>138</sup>

In this regard, one of the largest partial awards of the Eritrea-Ethiopia Claims Commission, in which Ethiopia was held responsible for looting, burning, and destroying private and public buildings (including police stations) and livestock, is noteworthy. In particular, the majority in the Claims Commission decided that an Eritrean power station under construction in Hirgigo “*to provide*

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<sup>136</sup> See M. Sassòli, “Targeting: Scope and Utility of the Concept of ‘Military Objectives’ for the Protection of Civilians in Contemporary Armed Conflicts”, in D. Wippman and M. Evangelista (eds.), *New Wars, New Laws?*, Transnational Publishers, 2005, p. 185. See also M. Sassòli and A. Bouvier, *How Does Law Protect in War? Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law*<sup>2</sup>, ICRC, 2006, p. 161, highlighting that “*It is the basic idea of International Humanitarian Law that political objectives may be achieved by a belligerent with military force only by directing the latter against material military objectives*”.

<sup>137</sup> In the US Commander’s Handbook on the Law of Naval Operations, it is sustained that “*economic targets of the enemy that indirectly but effectively support and sustain the enemy’s war-fighting capability may also be attacked*”. It gives as example the destruction of raw cotton within Confederate territory by Union forces in the American Civil War on the ground that sale of cotton provided funds for purchasing arms. See A.R. Thomas, J.C. Duncan (eds.), *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations*, Vol. 73, Naval War College’s International Law Studies, 1999, para. 8.1.1; US Department of Defense, *Military Commission Instruction No. 2*, 30 April 2003, Section 5 (D), available on [www.decefcenselink.mil](http://www.decefcenselink.mil).

<sup>138</sup> See Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2010, pp. 95-6, quoting J.J. Busuttill, *Naval Weapons System and Contemporary Law of War*, 1998, at 148; additionally, the author notes that the San Remo Manual rejected an attempt to insert into the text the wording “*war-sustaining effort*”, see L. Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 1995, p. 150.

power for an area including a major port and naval facility certainly would seem to be an object the destruction of which would offer a distinct military advantage”<sup>139</sup> and, as such, the Ethiopian aerial bombing against it was lawful. The Commission supported an apparently contrary position by upholding the lawfulness of such attack against the power plant because it was, *inter alia*, “of economic importance to Eritrea”: this fact was “evidence that damage to it, in the circumstances prevailing in late May 2000 when Ethiopia was trying to force Eritrea to agree to end the war, offered a definite advantage”.<sup>140</sup> A further view expressed by the majority of the Commission was that “the infliction of economic losses from attacks against military objectives is a lawful means of achieving a definite military advantage, and there can be few military advantages more evident than effective pressure to end an armed conflict that, each day, added to the number of both civilian and military casualties on both sides of the war”.<sup>141</sup>

In light of this finding, legal scholarship has observed that such a decision does not constitute a precedent to accept the “war-sustaining” as a companion to “war-fighting”.<sup>142</sup> Indeed, striking a military objective of economic importance to the country’s military capacity (*e.g.* war-supporting economic installations or industries) is allowed under international law, but attacking an object on account of the effect its neutralisation might have on the enemy’s economy is not permitted; the general industrial and agricultural potential of the enemy is excluded from the definition of military objectives.

Remarkably, the dissenting opinion by the President of the Claims Commission expressed disagreement with the majority’s view that the power plant was certainly of great importance and its legitimate destruction was confirmed by the fact that it led Eritrea to accept the cease-fire. According to his more restrictive position, since the power plant under construction could *not* effectively contribute to the military action, its destruction had *no* definite military advantage at a moment of the war, when Ethiopians were advancing into Eritrean territory and the end of the war was in sight; *if power supply was a military target, the actual operating power plant (and not the one under construction) could have been bombed.* The fact that, because of the economic damage caused, its destruction contributed to the cease-fire, did not change his opinion.<sup>143</sup>

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<sup>139</sup> Eritrea-Ethiopia Claims Commission, Partial Award, Western Front, Aerial Bombardment and related Claims, Eritrea’s Claims 1, 3, 5, 9-13, 14, 21, 25 and 26, 2005, (19 December 2005), 45 I.L.M. 396 (2006), para. 121, p. 936.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

<sup>142</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2010, p. 96.

<sup>143</sup> Eritrea-Ethiopia Claims Commission, Partial Award, Western Front, Aerial Bombardment and related Claims, Eritrea’s Claim No. 112-121 and Separate opinion of the President in fine of Award. See also Hans Van Houtte, “The Eritrea-Ethiopia Claims Commission and International Humanitarian Law”, in Venturini and Bariatti (eds.), *Liber Fausto Pocar*, Giuffrè, 2009, pp. 383-398.

Focusing on the *criteria* established in Article 52(2) to ascertain that an object contributes effectively to the enemy's military action, it is worth giving some details. "Use" concerns its present function, "nature" concerns the intrinsic character of the object,<sup>144</sup> "location" concerns an object that can turn into a military objective if it is placed in an area recognised as a lawful target,<sup>145</sup> and "purpose" concerns the party's envisioned use of an object.<sup>146</sup> Furthermore, the present tense employed to require that the object must effectively contribute to military action (rather than the conditional 'would' or 'could') delineates to what extent a party may count on the "purpose" of an object in determining its military status, as "an intended future use may be sufficient, but not a possible future use".<sup>147</sup> However, the concept of "intended use" poses the intrinsic difficulty that it is based on the knowledge of the defender's intention, whose existence has to be demonstrated. The level of proof is that of "reasonable belief in the circumstances ruling at the time", but caution is required given that so much depends on the reliability of obtainable intelligence.<sup>148</sup>

Whilst every object may potentially be a lawful military target on account of use, location or purpose, *certain objects benefit from special protection*. The regime in question aims, *inter alia*, at *prohibiting or limiting attacks against them* even when they turn into military objects, besides *prohibiting their use for military purposes*. This is detailed in subsequent sections, taking into consideration some of the

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<sup>144</sup> The ICRC Commentary includes in this category any object that is directly used by the armed forces, such as "weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters, communication centers, etc.", see Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), *op. cit.*, para. 2020. For a non-exhaustive list of military objectives by nature, see Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2010, pp. 96-97.

<sup>145</sup> A central issue has been linked to the fact that a certain land can be deemed *per se* a military objective "due to its special location, regardless even of use or purpose", see Y. Dinstein, *ibid.*, p. 101. According to Rogers, "[d]enyng land to enemy forces is often a principal consideration in military operations" and "[i]f an area of land has military significance for whatever reason, it becomes a military objective", see A. Rogers, *Law on the Battlefield*, Manchester University Press, 1996, p. 39. Even the ICTY agreed that a specific land could constitute a military target, noting that "the Grbavica hill had a certain strategic importance, which enabled the AbiH, if it occupied it, to block the HVO and the Croatian civilians' access to the main Travnik-Busovača road", see ICTY, *Prosecutor v. Tihomir Blaskic* (IT-95-14-T), Judgment, 3 March 2000, para. 551.

<sup>146</sup> See Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), *op. cit.*, para. 2020.

<sup>147</sup> M. Sassòli, "Targeting: Scope and Utility of the Concept of 'Military Objectives' for the Protection of Civilians in Contemporary Armed Conflicts", in D. Wippman and M. Evangelista (eds.), *New Wars, New Laws?*, Transnational Publishers, 2005, p. 199. See also E. David, *Principes de droit des conflits armés*<sup>4</sup>, Bruylant, 2008, para. 2.52, p. 312-313, in which the author addresses how "Prise à la lettre, la définition de l'objectif militaire est extrême mement restrictive car elle interdit toute destruction préventive: tant qu'un bien n'apporte pas une réelle contribution à l'action militaire de l'adversaire, il ne peut, en principe, être détruit".

<sup>148</sup> The dilemma raised by the "purpose" criterion in Article 52(2) has been debated in legal scholarship. For instance, if the intelligence obtained by a commander indicates the enemy's intention of utilise a school as munitions depot, Adam Rogers suggests that the school would not become a lawful military target until the weaponries were inside it. However, it seems controversial that the only possibility is attacking the school. Inasmuch as the commander's belief is reasonable, his troops can primarily arrange themselves to avoid that the school being used by the adversary as intended. Instead, according to the author a preventive attack would be lawful and less damaging than avoiding it until the school has made by the enemy expose to be fully attacked. See A. Rogers, *Law on the Battlefield*, Manchester University Press, 1996, p. 36.

specially protected objects in light of their basic significance for the safeguarding of civilians' ESC rights.

### **5.1.b. The negative presumption in favour of immunity from armed attack**

Article 52(3) API establishes a negative presumption in favour of immunity from armed attack for certain objects that are “*normally dedicated*” by their intrinsic nature to civilian purposes, such as *schools, hospitals, places of worship, houses or other civilian residences*.<sup>149</sup> In cases of doubt whether an object devoted to civilian purposes is actually employed to effectively contribute to the military action, it is to be assumed that the object is not used for military purposes by the adversary, and as such it cannot be treated as a military target.

Although the customary character of this presumption is contentious, a higher standard of verification based on the intrinsically civilian nature of such objects is widely deemed to be imposed under Article 52(3).<sup>150</sup> Only *very strong signs* that a school, a place of worship, or a house is effectively contributing to military action may raise doubts about their civilian character. In such cases, a duty to do everything feasible to obtain information and “verify the target” seems to derive from the principle of distinction.<sup>151</sup>

Nonetheless, a controversial implementation of Article 52(3) has emerged in the context of combat in urban environments, where the attacker is faced with a particularly difficult task in trying to establish the military character of a target with certainty because civilian and military objects tend to “*commingle*”. In fact, it may be that the defender alters the purpose of buildings such as key ministries and communication centres to prevent the enemy from launching an attack. In such cases any failures to implement the principle of distinction may result in violation of the defender's obligations to take precautions against the effects of attack, as examined in one of the following sections. However, such a violation does not alter the attacker's customary obligation to do

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<sup>149</sup> See Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), *op. cit.*, paras. 2031-2038. This presumption was extensively discussed during the negotiation of Protocol I. According to some delegations, its inclusion did not reflect the case of “*civilian buildings situated on the front line*” and used as defensive areas, which should be assumed to be military objectives. Notwithstanding such a critical view and even the proposed exception for objects situated in “*the area where the most forward elements of the armed forces of both sides are in contact with each other*” (*ibid.*, para. 2268), the presumption of civilian use in case of doubt was favorably voted.

<sup>150</sup> In the ICRC Study on Customary IHL, the “*rule of doubt*” was not found to be customary in nature, but it is stated: “[...] it is clear that, in case of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. It cannot automatically be assumed that any object that appears dubious may be subject to lawful attack”, see J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, p. 36, Rule 10.

<sup>151</sup> In this last regard, see W.G. Schmidt, “The protection of Victims of International Armed Conflicts: Protocol I Additional to the Geneva Convention”, *The Air and Force Law Review*, 1984, p. 235.



everything feasible to verify the use for military purpose of the intended target.<sup>152</sup> Furthermore, in case the status of the object in question cannot be properly clarified, the presumption of civilian use is deemed to prevail.

In this context, debatable positions have been expressed by some States with higher intelligence capabilities. According to them, an unfair burden on the attacker is imposed by Article 52(3) since doubt may still subsist even after in-depth investigation.<sup>153</sup> This view has led these States, which are not parties to Protocol I, to dispute the customary nature of the rule.<sup>154</sup> However, contrary to what such an argument would seem to imply, the drafters of Protocol I did not intend Article 52(3) to claim certainty by the attacker. As the ICTY confirmed in the *Galić* case, a “reasonable belief” that the target is a military objective is required.<sup>155</sup> In line with this interpretation, a truthful (though incorrect) belief by a military commander about the status of a military objective is possible, without (wrongly) arguing that the defender would have the burden of explaining the status of controlled objects or introducing new adjectives (e.g. “significant”) in the interpretation of Article 52(3).

Finally, the significance of *the presumption of civilian use in case of uncertainty* lies in the fact that the status of an object is dynamic and any civilian object may in effect turn into a military objective because of its military use,<sup>156</sup> with its subsequent exposure to lawful attacks regulated and limited according to the principles of proportionality and precaution.

### 5.1.c. The condition of definite military advantage

Legitimate military objectives are only those whose “*destruction, capture or neutralization*” also give the

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<sup>152</sup> Article 57(2)(a)(i) AP I. See J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, p. 55, Rule 16.

<sup>153</sup> In responding to claims that the U.S. attack on the Al-Firdus Bunker in Baghdad violated “the rule of doubt”, the United States maintained that the latter was not in line with the traditional law of war since it transferred from the defender to the attacker the burden of verifying the exact use of an object. In particular, it was argued that: “*This imbalance ignores the realities of war in demanding a degree of certainty of an attacker that seldom exists in combat. It also encourages a defender to ignore its obligation to separate the civilian population, individual civilians and civilian objects from military objectives*”, see U.S. Department of Defense, *Report to Congress on the Conduct of the Persian Gulf War*, 1992, p. 627. For a critical view, see E. David, *Principes de droit des conflits armés*<sup>4</sup>, Bruylant, 2008, pp. 315-316, paras. 2.55-2.56.

<sup>154</sup> Israel has understood the presumption of civilian use to apply only “*when the field commander considers that there is a ‘significant’ doubt and not if there is merely a slight possibility of being mistaken*”, see J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, p. 36.

<sup>155</sup> The ICTY confirmed this standard of proof, see *Prosecutor v. Galić* (IT-98-29-T), Judgment of 5 December 2003, para. 51 (“*[...] an object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action*”).

<sup>156</sup> See M. Sassòli and A. Bouvier, *How Does Law Protect in War? Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law*<sup>2</sup>, ICRC, 2006, p. 201; P. Rowe, “Kosovo 1999: The air campaign - Have the provisions of Additional Protocol I withstood the test?”, *IRRC*, 2000, pp. 151-152, warning about the risk of considering that “*merely because the military may make use of an object (and they are unlikely to do so unless it is necessary) that object becomes a military objective and, as such, a legitimate target. Were this argument to be taken to its logical conclusion, every civilian object that could possibly be used by the military would become a military objective*”.

attacker a definite military advantage, which has been identified as “*concrete and perceptible*” (instead of “*hypothetical and speculative*”).<sup>157</sup>

As discussed below, the provisions dealing with the principle of proportionality similarly refer to the military advantage anticipated, but this is evaluated against the probability of civilian losses and damage,<sup>158</sup> and in doing so introduces an additional element of specificity.<sup>159</sup> As commonly explained, at the stage of target selection an attacker has to establish if the object can generate such an advantage, but in the evaluation of proportionality more certitude is required to determine the military advantage anticipated along with probable collateral damage. However, in both formulations the use of “*definite*” or “*concrete and direct*” indicates a high standard, practically requiring the responsible commander’s ability to formulate the type of the military advantage predictable from the attack and to attest such an expectation.

As for the definition of “*definite military advantage*”, Protocol I relies on a precise concept of “*attack*” in Article 49(1) whereby “*Attacks mean acts of violence against the adversary, whether in offence or in defence*”. In this regard, a controversial point is whether such an advantage must result from a specific attack; it is uncertain whether it is necessary to verify that destroying, capturing or neutralising the targeted objective provided for a definite military advantage, or, instead, whether it is enough to verify that attacking the objective contributed to gain such advantage. In reality a number of States have declared that they regard the advantage to be anticipated from *an attack deemed as a whole*.<sup>160</sup> It has been observed that a rather restricted interpretation of “*definite military advantage*” derives from considering as necessary that the advantage arise from a specific military operation constituting the “*attack*” under Article 49. As significantly stressed, however, “[*s*]uch a construction [...] would ignore the problems resulting from modern strategies of warfare, which are invariably based on

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<sup>157</sup> See W.A. Solf, “Article 52”, in M. Bothe, K.J. Partsch and W.A. Solf (eds.), *op. cit.*, p. 326, para. 2.4.6.

<sup>158</sup> The proportionality concerns the collateral damage that “*would be excessive in relation to the concrete and direct military advantage anticipated*”, see Article 51(5)(b) AP I and Article 57(2)(a)(iii) AP I.

<sup>159</sup> There is no indication about why different expressions were chosen, see Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), *op. cit.*, para. 2027.

<sup>160</sup> To elaborate, States including Australia, Belgium, Canada, France, Germany, Italy, the Netherlands, New Zealand, Spain, and the United Kingdom have declared that “*military advantage*” used in Article 51 (protection of the civilian population), Article 52 (general protection of civilian objects) and Article 57 (precautions in attack) refers to “*the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack*”. In clarifying the legal standard in relation to the rule on proportionality, Australia, like New Zealand, has added that: “[...] the term ‘*military advantage*’ involves a variety of considerations including the security of attacking forces. It is further the understanding of Australia that the term ‘*concrete and direct military advantage anticipated*’, used in Articles 51 and 57, means a *bona fide* expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved”.

*an integrated series of separate actions forming one ultimate compound operation*".<sup>161</sup> Nonetheless, following the view that "attack" may cover a sequence of acts increases the risk of making it so wide as to weaken the notion of "definite military advantage" and the duties stemming from it.

#### **5.1.d. Dual-use objects**

The definition embodied in Article 52(2) deserves particular attention for certain contentious targets which potentially widen the category of legitimate military objectives but whose impact on the access to, and enjoyment of, ESC rights of civilians may turn to be substantially severe, above all concerning the rights to health, food, and safe and drinking water.

International humanitarian law identifies certain civilian objects that may be attacked insofar as they have a *dual-use nature*, in other words they can be used for civilian aims besides serving military purposes. Instances include manufacturing yards, petrochemical facilities, oil-refining facilities, electricity-generating installations, transportation infrastructures, telecommunications and computer networks, insofar as belligerents used them during hostilities, in addition to the civilian population. Accordingly, if any such an object effectively contributes to the enemy's military action, the "secondary military use" turns it into a potential legitimate military objective.<sup>162</sup>

However, such attacks remain extremely controversial. In particular, a basic issue is *whether the dual-use nature modifies or not the applicability of Article 52(2)*, since the targeting of such objects inevitably affects the civilian population being the double purpose served in an indivisible manner. An example may be a *power station* that is crucial for the functioning of water systems and sewage treatment, hospitals, food-producing factories (and consequently vital for civilian access to safe drinking water and sanitation, health care, adequate food) but which also serves the war industry.<sup>163</sup> Indeed, a number of aspects are thorny. Firstly, it is difficult to calculate the extent of the "effective contribution to military action" by the facility concerned in view of the concurrent use by civilians. Equally, it is complicated to evaluate the "definite military advantage" resulting from its neutralisation, capture or destruction. Then, assessing the consequences of its damage or destruction on civilians is

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<sup>161</sup> S. Oeter, "Methods and Means of Combat", in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford, 1995, para. 444. To the author, although States' interpretation aimed to explain the legal standard in the rules on the principle of proportionality, it also applies to Article 52(2) API.

<sup>162</sup> See M. Sassoli, *Legitimate targets of attacks under international humanitarian law*, p. 7.

<sup>163</sup> For instance, this concerned the Iraqi electricity grid in the context of the Gulf War, see Rogers, *Law on the Battlefield*<sup>2</sup>, 2004, pp. 71-76; C. Greenwood, "Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict", in Rowe (ed.), *The Gulf War 1990-91 in International and English Law*, Routledge, 1993, pp. 63 and 73; Kuehl, "Airpower vs. Electricity: Electric Power as a Target for Strategic Air Operations", 18 *Journal of Strategic Studies*, 1995, pp. 251-252. *E.g.*, see U.S. Department of Defence Office of General Counsel, *An Assessment of International Legal Issues In Information Operations*, 1999, at 8-9, discussing the controversy surrounding the bombing of Baghdad power plants in the Gulf War I.

complex; while the harm may seem unpredictable and incidental case-by-case, there is a high probability that the cumulative effect of attacks against such facility have medium and long-term negative consequences that are foreseeable.

Nevertheless, as stressed in legal scholarship,<sup>164</sup> dual-use facilities are not identified as a distinct group and are covered by Article 52(2) irrespective of potential challenges of determining the effective contribution to military action. Thus, once the two-pronged test has been passed, *IHL rules limiting collateral damage become of fundamental importance*.<sup>165</sup> In essence, the legality of its destruction is subject to the prohibition of causing disproportionate collateral damage. In particular, the principle of proportionality has a significant role to play when an attack on a dual-use object is highly likely to origin extensive and long-term damage to the civilian population. This may occur when it serves the military while it is *vital* for civilians, so raising the issue as to whether proportionality should be applied by taking into due account the *indirect effects* of such an attack or, in other words, whether and to what extent medium and long-term damage connected to such an attack should flow into the assessment of “*excessive*” collateral damage. Even rules on precautionary measures do play a very useful role for dealing with dual-use objects.

Notably, such basic conditions of legality were made clear in several examinations of bombings of big cities which put power grids out of use, such as the attack causing the inability of hospitals to continue to function in Baghdad in 1991, so resulting in civilian suffering and deaths. More recently, during the hostilities that took place in Lebanon from 12 July to 14 August 2006, these aspects were emphasised by the high-level Commission of Inquiry on Lebanon concerning major attacks on civilian infrastructure and other objects, including the destruction or damage of the land transportation network (with a huge impact on humanitarian assistance and on the free movement

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<sup>164</sup> See A. Bouvin, *op. cit.*, p. 24.

<sup>165</sup> In this vein, a critical observation has been raised in relation to the lawfulness of the attack on the Serbian radio and TV station in Belgrade, as analysed in the report of the Committee established by the Prosecutor of the ICTY to review the NATO air campaign in 1998. Specifically, only the question of whether the radio and TV station was a military objective was reviewed and the Committee concluded, although with caveats and caution, that the building was a legitimate military target, stating in para. 15: “*If the media is the nerve system that keeps a warmonger in power and thus perpetuates the war effort, it may fall within the definition of a legitimate military objective*”. However, it has been criticised that, given that the NATO bombing caused the death of civilian persons, even assuming that the radio and TV station was a military target, the Committee had to examine whether the death of civilians had to be considered collateral damage within the meaning of Article 51(5)(b) API (*i.e.* damage which would not be “*excessive in relation to the concrete and direct military advantage anticipated*”), see N. Ronzitti, “Is the non liquet of the Final Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia acceptable?”, *IRRC*, 2000, pp. 1017-1027. The views on the legality of targeting the Belgrade TV and radio station have differed, see G. Aldrich, “Yugoslavia’s television studios as military objectives”, *International Law FORUM du droit international*, Vol. I, No. 3, 1999, pp. 149-150; H. McCoubrey, “Kosovo, NATO and international law”, *International Relations*, Vol. XIV, No. 5, 1999, p. 40; P. Rowe, “Kosovo 1999: The air campaign. Have the provisions of Additional Protocol I withstood the test?”, *IRRC*, 2000, pp. 156-157; Amnesty International, *NATO/Federal Republic of Yugoslavia, “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, June 2000, pp. 46-53.

of displaced civilians), water facilities, transmission stations, economic infrastructures, and agricultural lands. According to the Commission, Israel's justification for such attacks by invoking "their hypothetical use by Hezbollah" could not be put forward "for each individual object directly hit during this conflict".<sup>166</sup>

Another recent contentious case regards the shutdown of Gaza's sole electrical power plant on 29 July 2014 during a heavy Israeli bombardment of the Al-Nusseirat area, where it was located, in the context of Operation Protective Edge. This has worsened the ongoing humanitarian crisis involving close to 1.8 million people, in particular causing hospitals and other essential civilian infrastructure to intensify their reliance on precarious generators as well as curtailing the pumping of water to households and the treatment of sewage. In view of the predictable devastating knock-on effects of the lack of electricity - especially given the chronic shortage of fuel, the absence of sustainable alternative power supplies, the lack of material for repair which could take at least twelve months, and the ongoing closure of the territory - it is highly unlikely that such an attack could be deemed lawful and proportionate even if that power plant also served a military purpose.<sup>167</sup> In other words, the expected harm to civilians was greater than the military gain achieved.

## 5.2. Civilian objects under AP II

Neither common Article 3 GCs nor Protocol II contain a definition of military objectives or include rules on the general protection of civilian objects. Nonetheless, additional treaties applicable to internal conflicts include the principle of distinction as well as the aforementioned definition (as set forth in Article 52(2) API), also containing the prohibition on directing attacks against civilian

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<sup>166</sup> *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1, A/HRC/32, 23 November 2006, paras. 136-148. In para. 147 it noticed: "Even if some claims were true, the collateral harm to the Lebanese population caused by these attacks would have to be weighed against their military advantage, to make sure that the rule on proportionality was being observed. For example, cutting the roads between Tyre and Beirut for several days and preventing UNIFIL from putting up a provisional bridge cannot be justified by international humanitarian law. It jeopardized the lives of many civilians and prevented humanitarian assistance from reaching them. Injured persons needing to be transferred to hospitals north of Tyre could not get the medical care needed". In paragraph 148 it concluded: "By using this argument, IDF simply changed the status of all civilian objects by making them legitimate targets because they might be used by Hezbollah. The principle of distinction requires the Parties to the conflict to carefully assess the situation of each location they intend to hit to determine whether there is sufficient justification to warrant an attack. Further, the Commission is convinced that damage inflicted to some infrastructure was done for the sake of destruction". The commission's mandate comprised, inter alia, "... (b) to examine the types of weapons used by Israel and their conformity with international law; and (c) to assess the extent and deadly impact of Israeli attacks on human life, property, critical infrastructure and the environment". See also Report of four UN Special Rapporteurs on their Mission to Lebanon and Israel, UN Doc. A/HRC//2/7, 2 October 2006, paras. 62-64.*

<sup>167</sup> See ICRC, "Gaza: power plant destroyed, electricity and water supplies collapse", 30 July 2014; Human Rights Watch, "Gaza: Widespread Impact of Power Plant Attack", 10 August 2014, available at <http://www.hrw.org/news/2014/08/10/gaza-widespread-impact-power-plant-attack>

objects, as detailed hereafter.<sup>168</sup>

Therefore, every civilian object (even a hospital, church, school or cultural object) may become a military objective as a result of use (or abuse) by the enemy for military purposes, but any attack against it will be qualified by proportionality; or as far as its location, nature or purpose effectively contributes to the adversary's military action. However, the advantage anticipated from an attack must be military in character, while *a purely psychological, economic, social, political, or moral advantage would not meet the test.*

In the case of dual-use objects, the proportionality principle should guide attacks on them and so prohibit attacks whose expected collateral effects causing injury or death to civilians as well as damage or destruction to civilian objects are “excessive” with regard to the military advantage anticipated. Moreover, although it is commonly said that extensive consequences do not automatically mean “*excessive*” ones, the issue of substantial medium and long-term effects (reverberating) on civilians remains even in non-international armed conflicts. As mentioned above, a basic aspect is *whether they are foreseeable in view of the information reasonably available to the attacker*, it being somewhat problematic and unrealistic to expect the planner or executer to consider all likely future consequences.<sup>169</sup>

## **6. The scope of civilian immunity against the effects of hostilities**

Several provisions aim at implementing civilian immunity. Civilian casualties and damage to civilian objects may result from *non-compliance with IHL rules* on prohibited attacks against civilian persons and objects or from an *overly broad definition of military objectives*. This may occur from a failure to respect the principle of distinction or two other basic standards: the principle of proportionality whereby expected “collateral damage” to non-combatants as a result of an attack on a military target must be proportional to the expected military gain; and the principle of precaution, which requires attention to the options that would guarantee a military advantage while preventing or reducing civilian harms and damages “in the circumstances ruling at the time”.

In other words, international humanitarian law frames the protection of civilians according to a

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<sup>168</sup> See Articles 2(6) and 3(7) of Protocol II to the CCW as amended on 3 May 1996. See Articles 1(3) and 2(1) of Protocol III to the CCW (applicable to non-international armed conflicts through amendment of Article 1 of the CCW of 21 December 2001). See Articles 1(f) and 6(a) of Second Protocol to the Hague Convention for the Protection of Cultural Property.

<sup>169</sup> This position is detailed by Schmitt, Garraway, Dinstein, *Manual on the Law on Non-International Armed Conflict*, the International Institute of Humanitarian Law, 2006, pp. 24-25, noting that this question “*can only be decided on a case-by-case basis taking into account all the surrounding circumstances*”.

threefold rationale: military objectives can be targeted; attacks against the latter are prohibited inasmuch as the foreseeable incidental effects on civilians are excessive; and all feasible measures must be taken in order to minimise the effects of legitimate attacks.

### **6.1. The prohibitions of direct and deliberate attacks**

In the contexts of *international armed conflict*, directly and deliberately attacking civilians and civilian objects is prohibited under Articles 51(2)(6) and 52(1) API respectively. Notably, Article 85(3)(a) API regards as a grave breach making the civilian population or individual civilians (if their status is known) the object of an attack when the latter was wilfully directed against them and when it caused death or severe injury to health or body.<sup>170</sup> From an international criminal law perspective, notably the Rome Statute labels as a war crime the “*intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities*” and the “*intentionally directing attacks against civilian objects, that is, objects which are not military objectives*”.<sup>171</sup> The absolute nature of the prohibition was affirmed in the *Blaškić case*<sup>172</sup> and then reiterated in the *Galić* judgment<sup>173</sup> by the ICTY, which held that no exceptions to this prohibition exist and that military necessity is invocable as a justification.

With regard to these war crimes, the crucial element of “*intention*” to target civilian persons or objects and the related concept of “*lawful collateral damage*” deserve further consideration. Since belligerents are required to limit attacks to strictly military targets, civilian casualties are likely to emanate from an attack directed against a lawful target not intended to injured civilians or civilian objects, or they are likely to derive from “*a human error or a mechanical malfunction*” - which would prevent the attack be categorised as “*direct*”.<sup>174</sup> Nonetheless, the significance of the absence or presence of the “*intention to attack civilians or civilian objects*” can be assessed regardless of whether any damage has occurred or not. In particular, some commentators have construed Article 8(2)(b)(i) as meaning that any premeditated attack directed against civilians or civilian objects would constitute a war crime under the ICC Statute, regardless of whether the attack was successful or not.<sup>175</sup>

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<sup>170</sup> Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, paras. 3475-6.

<sup>171</sup> Article 8 (2)(b)(i) and Article 8 (2)(b)(ii) of the ICC Statute.

<sup>172</sup> In 2004 the Appeals Chamber pointed out that “*there is an absolute prohibition on the targeting of civilians in customary international law*”, see ICTY, *Prosecutor v. Blaškić* (IT-95-14) Appeals Chamber, Judgment of 29 July 2004, para. 109. Such a statement of law followed to a previous articulation of the same rule by the Trial Chamber, noting that “*targeting civilians or civilian property is an offence when not justified by military necessity*”, see ICTY, *Prosecutor v. Blaškić*, Trial Chamber, Judgment of 3 March 2000, para. 180.

<sup>173</sup> ICTY, *Prosecutor v. Galić* (IT-98-29), Appeals Chamber, Judgment of 30 November 2006, para. 130.

<sup>174</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2010, p. 125.

<sup>175</sup> K. Dormann, “Article 8 (2)(b)(i)”, *Commentary on the Rome Statute of the International Criminal Court*<sup>2</sup>, 2008, pp. 323, 325.

Conversely, in the *Kordić case* the ICTY Appeals Chamber has held that, under Protocol I and customary international law, there is no grave breach *unless* the act was carried out in practice with the result of “*causing death or serious injury to body or health*”.<sup>176</sup>

Article 51(2) API specifically *prohibits “acts and threats of violence” whose major purpose is spreading terror among the civilian population*. This provision sheds light on how the intention behind the commission of an attack (rather than its outcome) matters. In this sense, not only has this second paragraph been regarded to reflect customary international law,<sup>177</sup> but also the *aim of spreading terror* among civilians has been deemed *more critical* than the actual infliction of terror.<sup>178</sup> Significantly, the view that the morale of the enemy is no longer a military objective has emerged in contrast to the utilitarian argument that was fashionable during World War II, which supported the possibility of launching attacks (mainly aerial bombardments) to frighten the civilian population and shatter the enemy’s morale and its determination to carry on hostilities. This view has only occasionally been repeated since then as military operations directed exclusively at civilian morale have been deemed unproductive and inefficient<sup>179</sup> and, more significantly, the prohibition of deliberate attacks against civilians has been progressively considered applicable without utilitarian compromises.<sup>180</sup> Furthermore, the terminology used in Protocol I makes clear that only a tangible, visible and material object may be a legitimate target of attack,<sup>181</sup> thus *excluding intangible things* like public will, victory or morale.

With regard to the same proscription, legal scholars have also questioned whether under the terms of Article 51(2) the prohibition of intimidating or causing panic is applicable only when this is the “*primary purpose*” of the attack. If this is the case, then large-scale aerial bombardments striking military objectives are not prohibited by this norm, although they may cause panic in civilians and shock the civilian population, so leading to the collapse of civilian morale.<sup>182</sup> Conversely, the aforementioned requirement of “a definite military advantage” seems to imply the unlawfulness of attacking a military objective when the main purpose is affecting the morale of the civilian

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<sup>176</sup> ICTY, *Prosecutor v. Kordić et al.* (ICTY-95-14/2-A), Appeals Chambers, Judgment, 17 December 2004, paras. 58-66.

<sup>177</sup> ICTY, *Prosecutor v. Galić* (IT-98-29), Appeals Chamber, Judgment, 30 November 2006, paras. 87-90.

<sup>178</sup> ICTY, *Prosecutor v. Galić* (IT-98-29), Appeals Chamber, Judgment, 30 November 2006, paras. 103-4.

<sup>179</sup> H. Parks, “The Protection of Civilians from Air Warfare”, *IJHR*, 1997, pp. 77-84.

<sup>180</sup> J.M. Meyer, “Tearing down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine”, *The Air Force Law Review*, 2001, p. 182; W.J. Fenrick, “Attacking the Enemy Civilian as a Punishable Offense”, *DJCL*, 1996, pp. 547-8.

<sup>181</sup> Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, paras. 2007-2008.

<sup>182</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2010, p. 126; Greenwood, *Essays on War in International Law*, 2006, p. 644.



population without reducing the military strength of the enemy.<sup>183</sup>

In exploring IHL as a restraint on armed violence causing economic, social and cultural harm for civilians, the issue of *belligerent reprisals* is also relevant. It was a UN General Assembly Resolution that in 1970 primarily banned them against civilians during the conduct of hostilities as a basic principle for the protection of populations in armed conflict.<sup>184</sup> Subsequently, Protocol I strictly prohibited reprisals against the wounded, sick, shipwrecked, medical and religious personnel (Art. 20), as well as civilians (Art. 51(6)) - affording general protection as opposed to the one provided for civilians in the hands of a party of which they are not nationals and for their property under Article 33(3) GCIV. Notably, both the original and amended versions of Protocol II to the 1980 CCW Convention also ban reprisals against civilians (Art. 3(2)).

Despite States' general commitment not to make civilians the object of reprisals,<sup>185</sup> the unambiguous and widespread practice in favour of a specific ban on the use of reprisals against all civilians is not yet uniform. Indeed, Article 51(6) API has been the object of several declarations and reservations by NATO members upon ratification of Protocol I, even though subsequent practice appears to support the prohibition.<sup>186</sup> Crucially, on numerous occasions the United States has emphasised that it does not accept the overall prohibition, although it voted in favour of Article 51 API (to which is not a party) and ratified Protocol II to the CCW Convention without making a reservation on this issue. In the 1980s a noteworthy series of reprisals were made by the Islamic Republic of Iran and Iraq, neither party to Protocol I, against each other.

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<sup>183</sup> In the case of Kosovo, this view was expressed by Meyer, see J.M. Meyer, "Tearing down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine", *The Air Force Law Review*, 2001, p. 176.

<sup>184</sup> See GA Res. 2675 (XXV) of 9 December 1970, adopted by 109 votes in favour, none against and 8 abstentions, para. 766.

<sup>185</sup> Article 51 API as a whole was adopted by 77 votes in favour, 1 against (France), and 16 abstentions (Afghanistan, Algeria, Cameroon, Colombia, Federal Republic of Germany, Italy, Kenya, Republic of Korea, Madagascar, Mali, Monaco, Morocco, Senegal, Thailand, Turkey and Zaire), but 10 of them became party to Protocol I without entering a reservation (Algeria, Cameroon, Colombia, Democratic Republic of the Congo, Kenya, Republic of Korea, Madagascar, Mali, Monaco and Senegal); nonetheless, Indonesia, Malaysia and Morocco (which did not ratify Protocol I) support such prohibition on reprisals, as shown in their military manuals.

<sup>186</sup> *E.g.*, a reservation to Article 51 made by the United Kingdom indicates a list of strict conditions for resorting to reprisals against an adversary's civilians in line with the British military handbook; notably, in ratifying Protocol II to the CCW Convention the U.K. did not make a reservation to the prohibition on reprisals against civilians enclosed therein. Conversely, the declarations by Egypt, France, Germany and Italy concerning the articles affording protection to the civilian population indicate that "*they will react to serious and repeated violations with means admissible under international law to prevent further violations*". As to related subsequent practice: in its submissions before the International Court of Justice, in the *Nuclear Weapons case*, Egypt deemed such prohibition to be customary; the military manuals of France and Germany proscribe reprisals against civilians, referring Article 51(6) API; the Italian military code recites that "*reprisals cannot be directed against the civilian population, except in case of absolute necessity*". See ICRC Study on Customary IHL, Rule 146, at 520-522.

Remarkably, the emergence of a customary rule prohibiting any form of reprisal against civilians was acknowledged in the *Kupreškić* case.<sup>187</sup> According to the ICTY, the intrinsic brutality of reprisals, their absolute incompatibility with fundamental human rights, the contemporary establishment of national and international systems of repression of war crimes and crimes against humanity, and State practice “*seem to support the contention that the demands of humanity and the dictates of public conscience, as manifested in opinio necessitatis, have by now brought about the formation of a customary rule also binding upon those few States that at some stage did not intend to exclude the abstract legal possibility or resorting to reprisals [against civilians]*”.<sup>188</sup>

It is worth anticipating that Protocol I also introduced a series of strict prohibitions on taking reprisals against: civilian objects (Art. 52(1)); “historic monuments, works of art or places of worship” which are the spiritual or cultural heritage of peoples (Art. 53(a)); “objects indispensable to the survival of the civilian population” (Art. 54(4)); the natural environment (Art. 55(2)); and “works and installations containing dangerous forces” (*i.e.* “*dams, dykes, and nuclear electrical generating stations*”) (Art. 56(4)).<sup>189</sup> States’ general commitment to not take reprisals against all these objects has been affirmed in light of a very limited contrary practice.<sup>190</sup>

The general protection and immunity from attacks enjoyed by civilians applies “*unless and for such time as they take a direct part in hostilities*”.<sup>191</sup> As noted above, civilian objects may lose their protection when an effective contribution to enemy military action derives from their use, purpose, location, or nature, and when a definite military advantage is offered by their destruction, capture, or neutralisation.<sup>192</sup> Thus, belligerents are allowed to target only those civilians who are directly participating in hostilities or those civilian objects that have become military objectives as long as they do so.

Conversely, attacks not directed against dual use or military objectives contravene international humanitarian law, without regard to how “*favourable*” the attacker evaluates them from a strategic, economic or political perspective. In fact, the rationale behind the limitation on military objectives

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<sup>187</sup> ICTY, *Prosecutor v. Žoran Kupreškić et al.* (IT-95-16-T), Trial Chamber, Judgment of 14 January 2000, para. 513.

<sup>188</sup> *Ibid.*, paras. 526-536.

<sup>189</sup> Article 52 API (adopted by 79 votes in favour, none against and 7 abstentions), Article 53 API (adopted by consensus), Article 54 API (adopted by consensus), Article 55 API (adopted by consensus), and Article 56 API (adopted by consensus).

<sup>190</sup> See ICRC Study in Customary IHL, Rule 147, at 525, albeit indicating that “*it is difficult to conclude that there has yet crystallised a customary rule specifically prohibiting reprisals against these civilian objects in all situations.*”

<sup>191</sup> Article 51(3) AP I. See J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, Rule 6. In 2009 the ICRC released the Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.

<sup>192</sup> Article 52(2) AP I.

is anchored in the principle of military necessity, which acts as a restraint on warfare and limits “total war”.<sup>193</sup> As pertinently pointed out in legal scholarship, although in theory more efficient to seized the adversary, “acts of violence against persons or objects of economic, political, or psychological importance ... are never necessary, because any enemy can be overcome by weakening sufficiently its military forces”.<sup>194</sup>

This latter consideration has acquired novel weight in relation to recent practice. It has been discussed in similar terms by the UN Human Rights Council Fact-Finding Mission mandated “to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations conducted in Gaza during the period from 27 December 2008 to 18 January 2009, whether before, during and after” (i.e. “Operation Cast Lead”), and launched by Israel in response to continuing rocket attacks on Israeli towns from the Gaza Strip.<sup>195</sup> In particular, the Mission considered the strikes on government buildings (i.e. the Legislative Council building and the principal prison in Gaza)<sup>196</sup> as attacks on civilian objects in breach of customary international humanitarian law. It was rejected the Israeli officials’ analysis that the principle of distinction was no longer applicable to the conflict against Hamas (considered as a terrorist organization as opposed to an insurrectional movement) as well as the argument of “putting pressure” on Hamas by targeting civilian political infrastructure for military purposes.<sup>197</sup> Notably, the cardinal relevance of the principle of distinction was emphasised by referring to a meaningful scholarly consideration on whether “new wars” require “new laws”: if attacks on financial, political, or even psychological targets were definitively argued to be more effective than those against dual-base or military objectives, then “in some societies - in particular in democracies - it may be hospital maternity wards, kindergartens, religious shrines, or homes for the elderly whose destruction would most affect the willingness of the military or of the government to continue the war”.<sup>198</sup>

Regrettably, these observations appear to be challenged even by the latest developments of the Israeli-Palestinian conflict. In the context of “Operation Protective Edge” as a response launched

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<sup>193</sup> G. Venturini, *Necessità e proporzionalità nell'uso della forza militare in diritto internazionale*, Milano, 1988, pp. 45-150.

<sup>194</sup> M. Sassòli and L. Cameron, “The Protection of Civilian Objects”, in N. Ronzitti and G. Venturini, *The Law of Air Warfare. Contemporary Issues*, Eleven International Publishing, 2006, p. 52.

<sup>195</sup> See “*Human Rights in Palestine and other occupied territories*”, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48, para. 1.

<sup>196</sup> UN Doc. A/HRC/12/48, Chapter VII, paras. 365-438.

<sup>197</sup> In this regard, the generic statement that the targeted political infrastructures was part of Hamas’ mechanism of control of the area is not sustainable and it seems to refer to the dubious thesis aimed at expanding the notion of military objective also to those contributing “to the opposing force’s war fighting and war-sustaining capability”. On the principle of distinction, see also N. Ronzitti, *Diritto Internazionale dei conflitti armati*<sup>5</sup>, 2014, pp.187-188; G.E. Bisharat et al., “Israel’s Invasion of Gaza in International Law”, 38(1) *Denver Journal of International Law and Policy*, 2010, pp. 70-71; L.R. Blank, “The Application of IHL in the Goldstone Report: a Critical Commentary”, 12 *YIHL*, 2009, pp. 354-356.

<sup>198</sup> The reference was to M. Sassòli, “Targeting: the scope and utility of the concept of ‘military objectives’ for the protection of civilians in contemporary armed conflicts”, in D. Wippman and M. Evangelista (eds.), *New Wars, New Laws? Applying the Laws of War in 21<sup>st</sup> Century Conflicts*, Transnational Publishers, 2005, p. 196.

since 8 July 2014 to stop Hamas' rocket attacks from the Gaza Strip, the latter has been heavily subjected to bombardments of civilian areas from the air, sea and land - with wanton destruction of homes, schools, medical facilities and other public properties - which seemingly lacked acceptable military justification and, instead, terrorised the civilian population.<sup>199</sup>

In this regard, it is worth addressing the following issue. While Hamas's methods have tended to be deliberately and openly designed to affect the Israeli civilian population with the aim of spreading terror, the Israeli response has tended to be characterised by a sort of "representation and acceptance" of the possibility that the same effect is produced. This raises the issue as to whether the acceptance of systematic involvement of the civilian population of Gaza in the conflict constitutes a *conduct in radical contrast to the rationale underlying the IHL system*,<sup>200</sup> as Israel's military reaction is somehow symmetrical to Hamas's direct attacks against its civilians. Beyond the quantitative disproportion between the losses inflicted by its bombings and those resulting from Hamas' military actions, such symmetry may be seen as a disturbing trend in the adoption of conduct contrary to IHL on a reciprocal basis. Indeed, this trend - justified by the parties according to the peculiarities of the theatre of the conflict (*e.g.* overpopulation, reduced extension of the Strip, promiscuity between military sites and civilian settlements, the presence of underground tunnels) - remains far from the objective character of relevant IHL obligations.

In any case, it is worth looking more at the investigation undertaken by the UN Fact-Finding Mission on the Gaza conflict in 2009 to review the two main phases (the air phase and the air-land phase) of Operation Cast Lead. For the purpose of the present thesis, three aspects are noteworthy in the context of this section.

**1.** Multiple incidents under investigation were characterised by serious allegations of direct and deliberate, fatal attacks against civilians. The major conclusions were that *no justifiable military objectives were pursued in any of them*,<sup>201</sup> thus implicating the delicate issue of accountability for possible breaches of international law, including State responsibility<sup>202</sup> and individual criminal liability.<sup>203</sup>

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<sup>199</sup> See Resolution adopted by the Human Rights Council, *Ensuring respect for international law in the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. A/HRC/Res/S-21/1, 24 July 2014, particularly para. 2.

<sup>200</sup> Thus, not simply compatible or not with the principle of military necessity, which in any case gives way to the need to respect binding IHL principles, including the prohibition of grave breaches, see L. Condorelli and L. Boisson de Chazourness, "Quelques remarques a propos de l'obligation des Etats de 'respecter et faire respecter' le droit international humanitaire en 'toutes circonstances'", in Swinarski (ed.), *Etudes and essais sur le droit international humanitaire at sur les principes de la Croix Rouge, en l'honneur de Jean Pictet*, Genève, 1984, p. 23.

<sup>201</sup> See UN Doc. A/HRC/12/48, Chapter XI, paras. 704-885.

<sup>202</sup> Article 91 AP I reads: "[a] Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces". See also

In particular, the incidents concerned alleged attacks against houses in the al-Samouni neighbourhood of Gaza during the initial ground invasion, alleged shelling with white phosphorous which killed or injured civilians, allegedly intentional attacks against a mosque during the early evening prayer and subsequent death of fifteen civilians, alleged denial to evacuate wounded civilians or medical emergency services.<sup>204</sup> It was highlighted that wilful killings and wilfully causing great suffering to protected persons are grave breaches of the Fourth Geneva Convention. Furthermore, a violation of the right to life was stressed in relation to the direct targeting and arbitrary killing of civilians. Of note, in reviewing an incident on the bombing of a family house and the subsequent death of 22 family members, Israel was at pains to argue that this was an “operational error” as the planned target was an adjacent house storing weapons. If this case was a mistake, it could not amount to wilful killing, but the issue of State responsibility for an internationally wrongful act would be relevant.<sup>205</sup> In this regard, the silence of the ILC’s Draft Articles on such a

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Rules 149, 150 and 158 of ICRC Study on Customary IHL; particularly, according to Rule 149 “[a] State is responsible for violations of international humanitarian law attributable to it, including: (a) violations committed by its organs, including its armed forces; (b) violations committed by persons or entities it empowered to exercise elements of governmentality; (c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and (d) violations committed by private persons or groups which it acknowledges and adopts as its own conduct”. Then, Rule 150 provides that responsible States are required to make reparations for injury or loss caused. Finally, Rule 158 imposes a duty to investigate and prosecute war crimes committed by their own nationals or armed forces, or those that occurred upon their territory.

<sup>203</sup> See UN International Law Commission, *Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, Principle 1, A/1316 (1950), stating that “[a]ny person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment”. See also Arts. 7, 8, 25 ICC Statute, although its application to the conflict in Gaza is still not possible. The Palestinian Authority issued a declaration under Article 12(3) accepting the ICC jurisdiction over crimes committed on “the territory of Palestine since 1 July 2002”; in deeming Palestine’s status at the United Nations as “observer entity” crucial to the issue of the Court’s jurisdiction (the entry into the Rome Statute system is through the UN Secretary General acting as treaty depositary), on April 2012 the ICC Prosecutor concluded that its status at that time meant Palestine could not either join the Statute or validly lodge the aforementioned declaration. Apparently he did not consider Palestine’s acceptance as a full member in the UNESCO in October 2011. After the upgraded status to “non-member observer state” by GA Res. 67/19 of 29 November 2012, the legal implications of such development were examined by the OPT, concluding for a non retroactive validation of the 2009 declaration as well as for the ability of Palestine to accede to the Rome Statute. See OTP, *Report on Preliminary Examination Activities for 2013*, November 2013, paras. 234-238, finally highlighting that “at this stage, the Office has no legal basis to open a new preliminary examination”. Notably, the customary nature of rules on individual criminal liability has been acknowledged in the ICRC Study of Customary IHL; see Rule 151 for perpetrated war crimes, Rule 152 on command responsibility for crimes “committed pursuant to their orders”, Rule 153 on command responsibility for “failure to prevent or punish with knowledge of a war crime”, and Rule 155 on subordinate responsibility if the unlawfulness of an act is knowledge (irrespective of the superior order).

<sup>204</sup> See UN Doc. A/HRC/12/48, Chapter XI, paras. 732-735. Under Article 10 (2) API, which reflects customary international law, “in all circumstances (the wounded) shall be treated humanely and shall receive, the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition”. The Mission recalled Rule 110 of the ICRC Study on Customary IHL, according to which “the obligation to protect and care for the wounded ... is an obligation of means” and it applies whenever circumstances permit; however, “each party to the conflict must use its best efforts to provide protection and care for the wounded, ... , including permitting humanitarian organizations to provide for their protection and care”.

<sup>205</sup> The obligation concerned was to guarantee to the civilian population general protection against the threats stemming from hostilities (Article 51(1) API). According to the Mission, the firing was deliberate as it was arranged (by Israel’s admission) to attack the al-Daya house, although the selection had gone wrong at the preparation stage and the effects may have been unintentional. In view of further facts (e.g. no effective warning) and the nature of the “intransgressible

mistake was referenced whilst stressing the controversial status of the requirement of fault in international law.<sup>206</sup>

It is worth underlining that the alleged violations just mentioned highlight at least three basic dimensions, including the State responsibility for conduct taken by State officials and armed forces, the State obligation to investigate and prosecute any crimes perpetrated by its own nationals or its officials and military force or those that occurred upon their territory, and the State obligation to make reparations for loss and injury caused.

**2.** Another aspect critically emphasised in Operation Cast Lead regards the concrete difficulty in reaching *acceptable equilibrium* between *respecting the principles of distinction, precautions and proportionality* and *conducting urban warfare according to lax rules of engagement*. Indeed, the employment of overly-liberal rules of engagement was viewed as one the main failures to which reconnecting the violation of the duty of distinction.<sup>207</sup> This serious issue was referred to in the reported investigations on alleged direct attacks against civilians. According to the reviewed incidents, the instructions provided to the armed forces moving into Gaza allowed “*a low threshold for the use of lethal fire against the civilian population*”.<sup>208</sup> Although they faced clear risks in the context of conducting urban warfare and Hamas’s conduct of hostilities was often in breach of the rule of distinguishing itself from civilians (as the Mission also noted), the controversial flexibility of the employed rules of engagement underlines the necessity of *more strict standards in context of urban warfare* to guarantee military conduct which respect the cardinal principle of distinction.

Despite Israel’s rejection of the Mission’s report, the international criticism it provoked and the severe scrutiny that followed led the Israel Defense Forces (IDF) to issue a new document defining rules of engagement in urban warfare in May 2010. For instance, it deals with the efforts to induce civilians to evacuate areas where combat is expected and some non-combatants stay behind: after efforts have been made to warn the civilian population to leave, the incoming troops are firstly required to fire warning shots and give the remaining civilians a chance to leave safely. Then, in

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*obligation*” to protect civilian life, it was concluded that, “although a fault element is needed”, existing information proved “*substantial failure of due diligence*”, see UN Doc. A/HRC/12/48, Chapter XI, paras. 861-866.

<sup>206</sup> J. Crawford and S. Olleson have noted how “*if a State deliberately carries out some specific act, there is less room for it to argue that the harmful consequences were unintended and should be disregarded. Everything depends on the specific context and on the content and interpretation of the obligation said to have been breached*”, see J. Crawford and S. Olleson, “The nature and forms of international responsibility”, in M. Evans (ed.), *International Law*, Oxford, 2003.

<sup>207</sup> See G.E. Bisharat, “Israel’s Invasion of Gaza in International Law”, *Denver Journal of International Law and Policy*, 2009-2010, pp. 70 and 75-77.

<sup>208</sup> A solid confirmation of this trend was found in Israeli soldiers’ testimonies found in two publications reviewed by the Mission, noting that the instructions to the soldiers convened two “*policies*” aimed at eliminating any risk to their lives, see UN Doc. A/HRC/12/48, paras. 802-808.

order to minimise casualties among civilians who nevertheless choose to stay, IDF fighters and commanders are required to use the most accurate weapons at their disposal and choose munitions that have a relatively low impact. Broadly, the number of changes in policy and doctrine for fighting in built-up areas include not only modifying the way soldiers fight in urban areas, but also teaching relatively low-level combat officers the nuances in the laws of war, attaching humanitarian liaison officers to active forces and making media relations a priority.<sup>209</sup>

Regrettably, the hostilities in the context of Operation Protective Edge have been still controversial in this regard. Significantly, the warnings issued before air strikes against targets in Gaza (e.g. text messages, phone calls, and “knocks on the roof”), having a central relevance in Israel’s claim to obey the bounds of international law,<sup>210</sup> raise significant concerns. It is worth highlighting that a warning before an attack does not affect the status of persons or objects as civilian; in addition, it does not have any legal implications for the attacker’s other legal obligations. In particular it does not weaken the obligation to weight envisaged collateral damage against the anticipated military advantage and to ensure the former is not “excessive”. Although the IDF has not maintained that warnings reduce further legal requirements upon the attacker, during Operation Protective Edge the significant amount of civilian residences attacked and the high percentage of civilian casualties<sup>211</sup> appear to suggest a misunderstanding of Article 57 API, as detailed hereafter,

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<sup>209</sup> These steps were reported as follows. Firstly, detailed study of international law with special reference to the rules of war is included in the officer training courses at company, battalion and brigade levels. Further, it is provided that the Military Advocate General’s Office and the Foreign Ministry consult regularly with foreign governments and international organizations to ensure that all IDF operations conform to accepted legal norms. Secondly, the practice of instructing commanders to consult with legal advisers not only in the preparation of military operations, but also during the actual fighting is standardised: legal advisers from the Military Advocate General’s Office will be sent to divisional headquarters in order to serve with combat forces and advise commanders in real time of what might constitute a breach of law. Thirdly, in order to minimise civilian casualties and humanitarian distress on the other side, humanitarian liaison officers are attached to troops in the field; the officers come from a pool set up by the Coordinator of Government Activities in the Territories and are in regular contact with the Palestinian Authority in the West Bank and international aid organizations in Gaza. In the event of hostilities their task is to help coordinate humanitarian needs on the Palestinian side and to point out locations of sensitive facilities like hospitals, schools and UN aid centres in order to ensure that they are not mistakenly targeted. See L. Susser, “Goldstone Fallout: IDF makes major changes in policy, doctrine”, *The Jewish Press online*, 13 April 2011; *Ibid.*, “Pushed by Goldstone, IDF embraces new ‘smart’ warfare”, *Jewish Tribune*, 27 April 2011.

<sup>210</sup> See “Exclusive Interview With IAF Pilots: How They Limit Casualties”, 20 July 2014, in which it is maintained as follows: “While the IDF goes to extraordinary lengths to avoid civilian casualties, Hamas deliberately puts civilians in the line of fire. The terrorist organization bases command centers, weapons storage facilities and concealed rocket launchers inside civilian neighborhoods, sometimes even inside houses. Lt. Or and Lt. Omer are two pilots in the Israel Air Force whose work reduces harm to civilians in Gaza”, official blog available at <http://www.idfblog.com/blog/2014/07/20/exclusive-interview-iaf-pilots-limit-casualties/>

<sup>211</sup> Human Rights Watch estimates around 77%, see “Israel/Palestine: Unlawful Israeli Airstrikes Kill Civilians. Bombings of civilian infrastructures suggest illegal policy”, 16 July 2014, available at <http://www.hrw.org/news/2014/07/15/israelpalestine-unlawful-israeli-airstrikes-kill-civilians>; the UN estimates around 74%, see Assistant Secretary-General for Humanitarian Affairs and Deputy Emergency Relief Coordinator, Kyung-Wha Kang, “Statement to the Human Rights Council, Special Session on Gaza”, 23 July 2014; see also OCHA,

or at least an incorrect use of warnings as a mean to justify disproportionate victimisation of civilians in urban warfare.

**3.** A further aspect investigated in the two main phases of Operation Cast Lead offers the chance to reflect on the role of the principle of distinction as an effective restraint on military action causing devastating impact on civilians in the sphere of ESC rights. It concerns cases of alleged “*deliberate attacks on the foundations of civilian life*”.<sup>212</sup> In particular, several of the reported incidents involved the destruction of industrial infrastructures, water installations, farms, food production, sewage treatment plants, and private houses. The legal analysis elaborated in such cases deserves attention for several reasons.

3.a. Firstly, it sheds light on the pressing need to inquire into military operations carried out in the context of urban warfare from the perspective of the *serious implications it could have for specific ESC rights of the civilian population*. In fact, such conduct in urban environments cannot be classified *per se* as a violation of the basic IHL principles, even if the latter are easily breached in cases of attacks in the vicinity of civilians or protected buildings. In addition, analysis from this perspective has the potential to favour a more sensitive evaluation of collateral effects of hostilities against several basic dimensions of civilian life, leading to a better articulation of the ways to prevent or repair them.

3.b. Secondly, the relevance of this type of attack is directly linked to the IHL meaning of civilian immunity. Alleged violations of Article 147 GCIV were found since the destruction in question was deemed to be carried out *without* any military justification or any further effective contribution to military action, and as such was unlawful and wanton, amounting to war crimes.

Specifically, in a series of air strikes on the el-Bader flourmill on 9 January 2009 the Mission concluded that “*no plausible military justification for the extensive damage to the flourmill*” had appeared “*if the sole objective was to take control of the building*”.<sup>213</sup> In addition to considering those strikes as wanton and unlawful, their nature (particularly the targeting of key machinery) suggested *the purpose of disabling the productive capacity of that flourmill* in the Strip. A related query addressed in the report was “*whether such a destruction of the sole remaining local capacity of producing flour*” could be explained as being “*done for the purpose*

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“Occupied Palestinian Territory: Gaza Emergency. Humanitarian Snapshot”, 24 July 2014, available at [http://www.ochaopt.org/documents/humanitarian\\_Snapshot\\_24July2014\\_oPt\\_V1.pdf](http://www.ochaopt.org/documents/humanitarian_Snapshot_24July2014_oPt_V1.pdf)

<sup>212</sup> See UN Doc. A/HRC/12/48, Chapter XIII, paras. 913-1031.

<sup>213</sup> In this regard, the Mission considered that apparently the owners were not a threat for the Israeli authorities before or after the military operations, in light of “*unrestricted issuance of their Businessman Cards and their ability to travel to Israel afterwards*”; further, if the flour mill was attacked to gain control of it “*for observation and control purposes*” then bombing the principal machinery and destroying the upper floors did not make sense; thirdly, there were no suggestions to consider “*the building as a source of enemy fire*”, see UN Doc. A/HRC/12/48, Chapter XIII, paras. 927-937.



*of denying sustenance to the civilian population*". The affirmative answer led the Mission to recognise a violation of customary international law as reflected in Article 54(2) API and a possible configuration of a war crime. The irrelevance of the motive for denying the sustenance value of the flourmill was emphasised, as expressed in Protocol I;<sup>214</sup> a comment on this aspect will be laid down below in discussing the IHL special protection of certain objects (next section 6.7).

Similar legal findings related to the destruction of other civilian infrastructures. In relation to the Sawafeary chicken farms in the Zeytoun neighbourhood south of Gaza City, the absence of a military objective was linked to the fact that the area was controlled in a few hours and "*the destruction of the land was not necessary to move tanks or equipment or gain any particular visual advantage*".<sup>215</sup> Still, no justification was found for the striking of "*a wall of one of the raw sewage lagoons of the Gaza wastewater treatment plant*" with a missile sufficient to produce "*a breach 5 metres deep and 22 metres wide*" causing "*the outflow of more than 200,000 cubic metres of raw sewage onto neighbouring farmland*".<sup>216</sup> In the same way, the Mission deemed questionable that "*a target the size of the Namar wells could have been hit by multiple strikes in error given the nature of the deployment systems and the distance between the wells and any neighbouring buildings*"; they occurred the first day of the aerial attack and destroyed this complex comprising "*two water wells, pumping machines, a generator, fuel storage, a reservoir chlorination unit, buildings and related equipment*".<sup>217</sup>

Furthermore, the destruction of residential housing "*by air strikes, mortar and artillery shelling, missile strikes, the operation of bulldozers and demolition charges*" was reviewed. In view of soldiers' testimonies and several reports different phases were identified,<sup>218</sup> such as those carried out for "*operational necessity*" of advancing armed forces in the areas concerned.<sup>219</sup> Other neighbourhoods were allegedly destroyed systematically during the last three days of operations, when the ground forces were

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<sup>214</sup> See also J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, Rule 54.

<sup>215</sup> To the Mission, the destruction of the plant and machinery of the farms (in addition to the coops with the chickens) was deemed "*a deliberate act of wanton destruction not justified by military necessity*", see UN Doc. A/HRC/12/48, Chapter XIII, paras. 956-961.

<sup>216</sup> UN Doc. A/HRC/12/48, Chapter XIII, paras. 962-974.

<sup>217</sup> See UN Doc. A/HRC/12/48, Chapter XIII, paras. 975-986.

<sup>218</sup> In some cases residential neighbourhoods were reportedly "*subjected to air-launched bombing and to intensive shelling apparently in the advance*", and the related damage or destruction was deemed "*incidental*" to the actual combat or to the firing directed at locations from which rockets were launched (paras. 992-993). In others cases the destruction of houses was allegedly carried out without "*any link to combat engagements with Palestinian armed groups or any other effective contribution to military action*" (paras. 994-995). In the last three days, Israeli forces reportedly engaged in "*systematic destruction of civilian buildings*" in view of the imminent withdrawal (paras. 996-997), see UN Doc. A/HRC/12/48, Chapter XIII, paras. 990-1007.

<sup>219</sup> See UN Doc. A/HRC/12/48, Chapter XIII, para. 1000. "*Operation necessity*" reportedly embraced two different destructions: first, the deliberate destructions of "*houses from which fire had been opened on Israeli soldiers or which were suspected of being body-trapped, containing tunnels or being used for weapons storage*"; second, "*the destruction of houses which obstructed visibility for the armed forces or had a strategic advantage for them*".

arranging their withdrawal;<sup>220</sup> such conduct was deemed to amount to the grave breach of “*extensive destruction ... of property, not justified by military necessity and carried out unlawfully and wantonly*” under Article 147 GCIV.

3.c. Thirdly, another reason for looking at the legal analysis in the Fact-Finding Mission to evaluate alleged “*deliberate attacks on the foundations of civilian life*” in Gaza concerns the comprehensive approach adopted in reviewing the incidents. Its legal findings on the conduct of military operations indicated *a meaningful interest in identifying violations of fundamental provisions of human rights law*, in addition to those relating to international humanitarian law. In doing so, its report appears to propose - although implicitly - the characterisation offered by the International Court of Justice of the relationship between these two branches of international law in the context of armed conflict. In particular, an overlap becomes apparent, with parallel violations arising from the same conduct, even though international humanitarian law plays a predominant role in this analysis. Indeed, in the final legal findings the simultaneous violation of similar provisions of human rights tended to be merely noted, without a further examination of the facts in light of the principles set by such norms.

In particular, a violation of the right to adequate housing of the families concerned was found in the last cases analysed above, and Article 11 ICESCR was referenced by highlighting that it “*requires the right of everyone to an adequate standard of living for himself, and his family, including adequate ... housing*”.<sup>221</sup> A denial of the right to have adequate access to water was acknowledged in respect of the people served by the Namar wells;<sup>222</sup> taking the view that the right to drinking water is a dimension of the right to food, the Mission reached similar legal findings concerning the destruction of the e-Bader flourmill. A number of norms were deemed to have been violated as a result of the military action carried out to destroy food and water supplies and infrastructures such as: Article 1 ICCPR stating that “*in no case may a people be deprived of its own means of subsistence*”, Article 11 ICESCR, and Article 12

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<sup>220</sup> See UN Doc. A/HRC/12/48, Chapter XIII, para. 1001. According to the reports by the Operational Satellite Applications Programme (UNOSAT) of the United Nations Institute for Training and Research (UNITAR), “*in al-Samouni, out of 114 severely damaged or completely destroyed buildings, 60 were destroyed between 27 December 2008 and 10 January 2009 (air face and the ground invasion), only 4 between 10 and 16 January and 50 between 16 and 19 January 2009; in al-Atatra, out of 94 severely damaged or completely destroyed buildings, 36 were destroyed between 27 December 2008 and 10 January 2009, only 6 between 10 and 16 January, and 52 between 16 and 19 January 2009*”.

<sup>221</sup> UN Doc. A/HRC/12/48, Chapter XIII, para. 1007. It is worth noting that, similarly, in the aftermath of the 2006 international armed conflict in Lebanon and in the context of a mission carried out by a group of UN Special Rapporteurs, the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living looked at issues related to the armed conflict dealing with land confiscation, forced eviction and displacement, dispossession of property, as well as destruction of homes. In particular, the joint report recalled that the demolition of homes in violation of international humanitarian law, and subsequent displacement, amounted to forcible eviction, called into question numerous international human rights requirements and, as stated by the Commission on Human Rights in Resolution 1993/77, constituted gross violations of human rights, particularly the right to adequate housing. See *Report of four UN Special Rapporteurs on their Mission to Lebanon and Israel*, UN Doc. A/HRC//2/7, 2 October 2006.

<sup>222</sup> UN Doc. A/HRC/12/48, Chapter XIII, paras. 988-989.

(2) CEDAW requiring States parties to ensure to women “adequate nutrition during pregnancy and lactation”. In relation to the destruction of the local capacity to produce flour, the right to food was understood to require the right to food security (“through either self-production or adequate income”) and the right to be free from hunger.<sup>223</sup>

Definitively this analysis on alleged cases of attacks on the foundations of civilian life confirms the great importance of taking *the long-term consequences of military operations carried out in urban warfare and affecting ESC rights of the civilian population* more seriously. Crucially, the lasting effects of the aforementioned destruction of el-Bader flourmill were considerable. As noted by the Mission, it made its entire personnel unemployed and critically reduced the production capacity of milled flour (the primary ingredient of the local diet) in Gaza; it also increased the population’s dependence on the authorizations for the entrance of flour and bread into the Strip. In the same vein, the Sawafeary chicken farms, whose destruction occurred for several days through the armed forces’ armoured bulldozers, reportedly supplied “over ten per cent of the Gaza egg market”. Besides, 5.5 hectares of land, including agricultural land, were damaged by the strike against the raw sewage lagoons of the Gaza wastewater treatment plant.

Further implications may be expected to derive from subsequent analysis at the end of this part of the report. Particularly, all those investigated attacks were deemed part of “an overall deliberate and systematic policy” of economic infrastructural targets,<sup>224</sup> including the only cement-packaging plant of the Atta Abu Jubbah, the ready-mix concrete factories of Abu Eida,<sup>225</sup> more than a third of chicken farms, the al-Wadiyah Group’s factories<sup>226</sup> and water installations.<sup>227</sup> In all investigated cases both

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<sup>223</sup> UN Doc. A/HRC/12/48, Chapter XIII, paras. 938-941.

<sup>224</sup> In UN Doc. A/HRC/12/48, Chapter XVII, at 218, the Mission also concluded that “the systematic destruction of food production, water services and construction industries was related to the overall policy of disproportionate destruction of a significant part of Gaza’s infrastructure”.

<sup>225</sup> UN Doc. A/HRC/12/48, Chapter XIII, paras. 1012-1017. The Mission used the expression of “a very deliberate strategy of attacking the construction industry”, as nineteen of the twenty-seven factories reportedly were destroyed, namely the eighty-five percent of the productive capacity. It noted that “the ability to produce and supply concrete in a context where external supplies are entirely controlled by Israel is a matter not only of economic importance but arguably one of human necessity to satisfy the basic need for shelter. In fact, although the population can get by in makeshift accommodation or by living in cramped conditions with their extended families, the capacity to repair the massive damage done to buildings without internally produced concrete is severely reduced. To the extent that concrete is allowed to enter at all, it is significantly more expensive than domestically produced concrete”.

<sup>226</sup> UN Doc. A/HRC/12/48, Chapter XIII, paras. 1018-1022. The al-Wadiyah Group’s factories employed approximately 170 people and produced food and drinks since 1954. The Mission estimated the demolition of over 30 hectares of greenhouses, and the destruction of 11.2 hectares in Gaza City and 9.5 hectares in north Gaza.

<sup>227</sup> UN Doc. A/HRC/12/48, Chapter XIII, paras. 1022-1025, reporting that “all types of water installations appeared to have been damaged to some extent during the Israeli military operations”, but noted that “in some areas, particularly Beit Lahia, Jabaliyah, Beit Hanoun, part of Zeytoun, south of Rafah and the villages in the east, buildings, water and wastewater infrastructures and other facilities have been totally destroyed”. It also stressed that “the strikes on plants, pipes, wells and tanks had put considerable pressure on the sanitation and water-supply system” according to a number of reports.

acts and consequences were found to be being intended. In relation to such military operations, the general obligation enshrined in Article 52 API to ensure that civilian objects are not attacked as well as the obligation to protect objects indispensable to the population's survival were considered. The customary norms expressed in Article 54(2) API were also mentioned. Having recognised that "*Israel displayed a premeditated determination to achieve the objective of destruction*", the Mission found that it was "*responsible for the internationally wrongful acts it perpetrated in breach of the duties specified above*".

As far as ***non-international armed conflicts*** are concerned, lawful direct attacks are limited to "*persons taking active/direct part in hostilities*" and against military objectives provided the following considerations are met.

The parties to the conflict are bound to *distinguish* between civilians and persons who are taking an "*active/direct part in hostilities*".<sup>228</sup> The specific prohibition of directing attacks against the population as such as well as individual civilians is embodied in Article 13(2) APII.<sup>229</sup> In the same vein, common Article 3(1) GCs requires parties to treat humanely all "*persons taking no active part in hostilities*" in every circumstance. For the purpose of the present thesis, it is worth underlining that directing attacks against civilians is also prohibited under other treaties applicable to non-international armed conflicts, including the Amended Protocol II to the CCW,<sup>230</sup> Protocol III to the CCW on Prohibitions or Restrictions on the Use of Incendiary Weapons,<sup>231</sup> the Ottawa Convention banning anti-personnel landmines.<sup>232</sup> Remarkably, under the Rome Statute "*intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities*" is a war crime in non-international armed conflicts under Article 8(2)(e)(i).

Conversely, State parties to internal conflicts are bound to distinguish between civilian objects and military objectives (so including the definition of the latter) and are prohibited from directing attacks against civilian objects as a matter of customary international humanitarian law.<sup>233</sup> As for non-state armed groups, it seems reasonable to argue that, as a minimum, they may be expected to

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<sup>228</sup> Article 3 GCIV refers to "*persons taking no active part in hostilities*"; Articles 4(1) and 13(3) AP II refer to civilians who "*enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities*".

<sup>229</sup> Article 13(2) APII also provides that "*Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited*".

<sup>230</sup> Article 3(7) of the Amended Protocol II to the CCW.

<sup>231</sup> Article 2(1) of Protocol III to the CCW, which become applicable to non-international armed conflicts with an amendment of Article 1 of the Convention approved by consensus in 2001.

<sup>232</sup> See its Preamble ("*the principle that a distinction must be made between civilians and combatants*" is one of those founding the Convention).

<sup>233</sup> This has been recognised in J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, Rules 7-10, pp. 25-36.

be able to adhere to the core of the principle of distinction in relation to objects.<sup>234</sup> Nevertheless, directing attacks against civilian objects is also prohibited under other treaties applicable to non-international armed conflicts, including the Amended Protocol II to CCW Convention and the Protocol III to the CCW.<sup>235</sup> In addition, in the Second Protocol to the Hague Convention for the Protection of Cultural Property the principle of distinction is used as a basis to define the protection due to cultural property in non-international armed conflicts.<sup>236</sup>

Notably, support for the application of distinction between civilian objects and military objectives as custom has emerged in the jurisprudence of the ICTY,<sup>237</sup> and also in the findings of the 2005 International Commission of Inquiry on Darfur,<sup>238</sup> the 2011 Panel of Experts on Accountability in Sri Lanka,<sup>239</sup> and the 2012 International Commission of the Inquiry on Libya.<sup>240</sup> In legal scholarship the principle of distinction and the prohibition on directing attacks against civilian objects in non-international armed conflicts have been understood as being applicable as

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<sup>234</sup> Their obligation to apply the principle of distinction was supported in the *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General*, 25 January 2005, see para. 166 (vi) in conjunction with para. 172. This obligation has been recognised by non-state armed groups, see e.g. the Code of Conduct of the National Liberation Army in Colombia and the Code of Conduct of the National Transition Council in Libya, reprinted in 93 *IRRC*, 2011, p. 490 and p. 500.

<sup>235</sup> Article 3(7) of the Amended Protocol II to the CCW; Article 2(1) of Protocol III to the CCW.

<sup>236</sup> Article 6(a) of the Second Protocol to the Hague Convention for the Protection of Cultural Property.

<sup>237</sup> See ICTY, *Prosecutor v. Dusko Tadić* (IT-94-1-AR72), Appeals Chamber, 2 October 1995, paras. 100-119 and 127; *Prosecutor v. Kupreskić* (IT-95-16-T), Trial Chamber, Judgment, 14 January 2000, para. 521; *Prosecutor v. Martić* (IT-95-11), Review of Indictment Pursuant to Rule 61, Trial Chamber, 8 March 1996, paras. 10-18; *Prosecutor v. Galić* (IT-98-29-T), Trial Chamber, Judgment, 5 December 2003, para. 57.

<sup>238</sup> See *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council resolution 1564 of 18 September 2004*, 25 January 2005. In para 166 (vi), it explicitly deemed the customary rule on the prohibition of attacks against civilian objects as relevant and applicable to the internal armed conflict in Darfur; in note it referred to para. 5 of GA Res. 2675 (XXV) of 9 December 1970 that was adopted unanimously and paragraphs 15-16.2 of the 2004 British Manual of the Law of Armed Conflict whereby can be regarded as evidence of State practice “*dwellings and other installations that are used only by the civilian population should not be the object of military operations*”.

<sup>239</sup> See *Report of the Secretary General’s Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, para. 196, confirming, *inter alia*, that “*parties may not direct an attack against a zone established to shelter the wounded, the sick and civilians from the effects of hostilities*” (as Rule 35 of the ICRC Study on Customary IHL).

<sup>240</sup> See *Report of the International Commission of the Inquiry to Investigate all Alleged Violations International Human Rights Law in the Libyan Arab Jamahiriya*, UN Doc. A/HRC/17/44, 12 January 2012, paras. 146-147, referring in detail to “*escalating attacks against journalists and media professionals*”. In this first report, in relation to attacks on civilians, civilian objects, protected persons and objects (see paras. 162-179), the Commission laid down the following conclusions: that it did not have “*access to full information allowing it to definitively evaluate allegations of these violations of international humanitarian law*”; that there were “*at least indiscriminate attacks against civilians by Government forces and a failure to take sufficient precautionary steps to protect civilians*” but that “*further investigation*” were necessary to determine if there was intentional targeting of civilians; that protected objects such as mosques and cultural objects definitely were damaged during conflict but it was unable to determine if attacks on such objects were intentional; that there were certainly “*instances of the deliberate destruction of objects indispensable to the civilian population*”; that some attacks on medical transports and facilities appeared to have been “*targeted attacks*”, along with some other instances requiring further investigation; that Libyan authorities failed to facilitate access for humanitarian agencies to address the needs of civilian populations in Libya; that “*attacks on humanitarian units*” occurred but it was not able to establish whether intentional or not; and that “*a failure to take precautionary steps to minimise damage to civilian/protected objects*” was recognisable (see para. 180). In the second phase of the Commission’s work, over 75 interviews were conducted to look at this issue and destruction in towns across Libya was inspected. See also *Report of the International Commission of the Inquiry on Libya*, UN Doc. A/HRC/16/68, 2 March 2012, paras. 539-545.

custom<sup>241</sup> or by implication from the concept of “*general protection*” in Article 13(1) AP II being it wide enough to include the same principle.<sup>242</sup>

Notwithstanding that under the Rome Statute deliberate attacks on civilian objects do not directly constitute a war crime in relation to non-international armed conflicts, Article 8(2)(e)(xii) criminalises *the seizure or destruction of the property of an adversary* unless it is “*imperatively demanded by the necessities of the conflict*”. Further, Article 8(2)(e)(iii) defines as a war crime as “*attacks against ... installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the UN Charter*” provided that these objects “*are entitled to the protection given to ... civilian objects under the international law of armed conflict*”.

Remarkably, in the evaluation of the deliberate and massive destruction of whole villages by deliberate demolitions as well as burning by the Janjaweed and the Government forces, on the basis of international humanitarian law and international criminal law, the International Commission of Inquiry on Darfur deemed such a “devastation” not justified by military necessity despite the presence of some rebels therein.<sup>243</sup> It also affirmed that those attacks against property may have amounted to persecution as a crime against humanity if done on discriminatory grounds, besides constituting a war crime. In view of the fact that the major villages destroyed belonged to African tribes and that such destruction had “*a detrimental effect on the liberty and livelihood of those people, being deprived of all necessities of life in the villages*”, it concluded that it was carried “*unlawfully, wantonly and discriminatorily*”.<sup>244</sup>

## 6.2. The prohibition of indiscriminate attacks

Protocol I strengthens the basic principle of distinction by forbidding the indiscriminate targeting of military objectives. Therefore, the lack of intention to harm civilians or civilian objects does not excuse the attacker when the relevant military action is in wanton disrespect of the duty of distinction. In particular, Article 51(4) defines *indiscriminate attacks* as (a) those which are *not aimed at a*

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<sup>241</sup> *E.g.*, see M. N. Schmitt, C. H. B. Garraway and Y. Dinstein, *Manual on the Law of Non-International Armed Conflicts: With Commentary*, San Remo, 2006, p. 6 (para. 1) for the definition of military objectives and p. 11 (para. 3) and 19 (para. 3) for the principle of distinction between civilian objects and military objectives. See D. Fleck, “The law of non-international armed conflicts”, in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, OUP, 2008, p. 614; La Haye, *op. cit.*, 2008, pp. 57-67; M. Sassoli and L. Cameron, “The protection of civilian objects - current state of the law and issues *de lege ferenda*”, in N. Ronzitti and G. Venturini (eds.), *The Law of Air Warfare - Contemporary Issues*, Eleven International Publishing, 2006, pp. 45-46, arguing the difficulty to expect the respect of the prohibition of direct attacks against the civilian population and individual civilians without limiting attacks to military objectives.

<sup>242</sup> M. Bothe, K.J. Partsch and W.A. Solf (eds.), *op. cit.*, p. 677.

<sup>243</sup> *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, op. cit.*, paras. 318-321.

<sup>244</sup> *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, op. cit.*, paras. 305 and 320-321. In paragraph 148, the Commission listed several affected ESC rights: the rights to adequate food and water, the right to health, the right to adequate housing and not to be subject to force eviction.

precise military objective,<sup>245</sup> (b) those which use *a means or method of combat that cannot be aimed at a precise military objective*,<sup>246</sup> or (c) those which use *a means or method of combat whose consequences cannot be restricted* as required by this Protocol (so in line with the various restrictions on the use of force).<sup>247</sup>

Notably, the prohibition of indiscriminate attacks has evolved with particular reference to the *use of explosive weapons* (e.g. bombs, rockets, mortar and artillery shells) in cities, towns, villages or other populated areas.<sup>248</sup> This prohibition is also included in Protocol II and Amended Protocol II to the on CCW Convention.<sup>249</sup> Conversely, the frequent use of cluster munitions, namely “*area weapons*” raising serious problems of accuracy and reliability, led the ICRC to call upon States to prohibit directing such weapons against military targets placed in inhabited areas.<sup>250</sup> Indeed, cluster weapons are prohibited by the Convention on Cluster Munitions, whose preamble addresses them as causing “*unacceptable harm*” to the civilian population, although this treaty is not considered as declaratory of customary international law. However, this prohibition does not apply if the sub-munitions released after the blast contain a self-destructive mechanism or are aimed at hitting a single military target.<sup>251</sup>

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<sup>245</sup> For instance, it is prohibited “firing blindly” into enemy territory or “releasing bombs over enemy territory” when the target originally chosen has been missed, see S. Oeter, “Methods and Means of Combat”, in Fleck D. (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*<sup>3</sup>, Oxford, 2013, para. 457.2, p. 192.

<sup>246</sup> The drafters aimed to forbid *the use of “remotely controlled weapons” characterised by very low target accuracy*. Examples concern the missiles launched on Iranian and Iraq cities in the Gulf War and the scud missiles fired by Iraq against Israel during the Kuwait War of 1991; these imprecise weapons were pointed in the general direction of the metropolitan area of Tel Aviv, thus rendering the attacks indiscriminate under Article 51(4)(a). In this regard, a prohibited method of combat would be attacking when visibility inhibits precise targeting, see S. Oeter, “Methods and Means of Combat”, in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*<sup>3</sup>, Oxford, 2013, para. 457.3, p. 193; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2010, p. 128.

<sup>247</sup> Article 51(c) refers to cases “*where the attacker is unable to control the effects of the attack [...] or where the incidental effects are excessive*”, see A. Rogers, *Law on the Battlefield*, *op. cit.*, p. 21. They can concern the *objects targeted* (e.g. installations having dangerous forces), the *means used* (e.g. weapons whose effects spread over an extensive area, such as cluster bombs), or the *methods applied* (e.g. poisoning wells). In particular, several weapons that can origin indiscriminate attacks are banned by the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980 and its Protocols; nevertheless, the possible extent for invoking Article 51(4)(c) as a *general principle to prohibit the use of weapons not covered by the 1980 CCW Convention* remains to be determined.

<sup>248</sup> For a survey and reference work of existing legal and policy standards on explosive weapons, see M. Brehm, “Protecting Civilian from the Effects of Explosive Weapons. An Analysis of International Legal and Policy Standards”, UNIDIR - United Nations Institute for Disarmament Research, Geneva, 2012, pp. 1-185.

<sup>249</sup> Article 3(3) of the 1980 Protocol II to the CCW on the Use of Mines, Booby Traps and Other Devices; Article 3(8) of the 1996 Amended Protocol II to the CCW on the Use of Mines, Booby Traps and Other Devices.

<sup>250</sup> See ICRC, Official Statement, 6 November 2006, available at <http://www.icrc.org/eng/resources/documents/statement/cluster-munition-statement-061106.htm>

<sup>251</sup> See N. Ronzitti, *Diritto Internazionale dei conflitti armati*<sup>5</sup>, Giappichelli, 2014. The treaty banning cluster weapons was agreed in Dublin in May 2008 and it was opened for signature on 3 December 2008; according to Article 1(1) of the Convention on Cluster Weapons: “*Each State Party undertakes never under any circumstances to: (a) Use cluster munitions; (b) Develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions; (c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention*”. Notably, the Preamble draws a connection between cluster munitions generally and economic and social development in areas that have seen armed conflict that included the use of cluster munitions (para. 3). The Preamble makes repeated reference to creating and protecting rights “*for all cluster munitions victims*” (para. 6) including healthcare and rehabilitative services (para. 7).

As to nuclear weapons, although highly indiscriminate by their very nature, it remains to be seen whether their use is lawful or forbidden in circumstances of extreme necessity of self-defence.<sup>252</sup>

Regarding the customary nature of the rule in question, in its advisory opinion on nuclear weapons, the prohibition of weapons unable to distinguish between civilian and military targets was acknowledged to be an “*intransgressible*” principle of customary international law. As the ICJ stated, in line with this principle, at a very early stage international humanitarian law banned certain types of weapons “*because of their indiscriminate effect on combatants and civilians*”. Similarly, the ICTY looked at the legitimacy of the use of cluster bombs under customary international law, taking account of the prohibition of indiscriminate attacks engaging a method or means that cannot be aimed at a precise military target.<sup>253</sup>

Two types of attacks are mentioned as indiscriminate under Protocol I. The first one is “*an attack by bombardment which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects*”;<sup>254</sup> therefore, this is *per se* contrary to the principles of proportionality and distinction.

Further, any attack which “*may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated*” is also deemed to be indiscriminate. As commonly underlined in relation to Article 51(5)(b), where the concept of proportionality is clearly laid down, any evaluation focuses very much on *what is expected* and *what is initially anticipated* (rather than on what the outcome of the attack will be). If an attack is indiscriminate, any resulting losses of civilians or destruction to civilian property cannot be justified as collateral damage. Therefore, what makes an attack indiscriminate is the “*state of mind*” of the attacker,<sup>255</sup> rather than the number of resulting casualties. Conversely, its lawfulness will be evaluated in view of the principle of proportionality if the methods (*e.g.* inaccurately aimed missiles) or the means (*e.g.* biological weapons) used do not indicate an

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<sup>252</sup> See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para. 105.

<sup>253</sup> In reviewing the indictment in the *Martić* case, the ICTY examined the use of a cluster munitions type (*i.e.* the M-87 Orkan rocket) in relation to attacks on the city of Zagreb (specifically, it “*was fired on 2 and 3 May 1995 from the Vojnić area, near Slavsko Polje, between 47 and 51 kilometres from Zagreb*”). It noted that “*the area of dispersion*” of the rocket’s submunitions on the ground was about two hectares; it termed the rocket a “*high dispersion weapon*” incapable of hitting specific targets and concluded that “*the M-87 Orkan is an indiscriminate weapon, the use of which in densely populated civilian areas, such as Zagreb, will result in the infliction of severe casualties*”. See ICTY, *Prosecutor v. Martić* (IT-95-11-T), Trial Chamber, Judgment of 12 June 2007, para. 463.

<sup>254</sup> Article 51(5)(a) API; before the adoption of this rule, a prohibition of “*target area*” bombings was not clearly accepted in the practice. Such attacks may also fall within the prohibition on targeting that is not aimed at a precise military objective, as expressed in paragraph 4(a), see Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), *op. cit.*, para. 1973.

<sup>255</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*<sup>2</sup>, Cambridge, 2010, p. 127.



irresponsible state of mind.<sup>256</sup>

Focusing on recent relevant practice, the indiscriminate firing of rockets and mortars by Hamas and other Palestinian armed groups into Israeli civilian areas were repeatedly condemned.<sup>257</sup> Similarly, the use of certain weapons constituting indiscriminate attacks aimed at centres heavily populated during the three-weeks Operation Cast Lead was also criticised.<sup>258</sup> In this vein, the air strikes against the Rafah refugee camp, even when allegedly targeting militants, caused “*indiscriminate death and destruction*” to the civilian population, including many women and children hit in their own homes.<sup>259</sup>

Further, with regard to the 33 day international armed conflict that took place in Lebanon, “*a significant pattern of excessive, indiscriminate, and disproportionate use of force by the IDF against Lebanese civilians and civilian objects*”, which failed to respect the principle of distinction and also went “*beyond reasonable arguments of military necessity and of proportionality*”, was highlighted by the Commission on Inquiry on Lebanon.<sup>260</sup> This referred specifically to the destruction or damage of civilian houses and residential buildings in southern Lebanon, South Beirut, and civilian convoys.<sup>261</sup> Remarkably, it also found ample evidence of indiscriminate use of cluster munitions, underlining that “*many towns and villages were littered with the bomblets as well as large tracts of agricultural land*” (which turned into “*no go*” areas for the civilian population) and that “*Tibnin, Nabatiyeh, Yahmor, Ain Ibel, Yaroun, Bent J’beil, Qfar Tibnit and Swane were also deliberate targets of cluster bombings*”. Consequently the use of such cluster weapons was deemed excessive and not capable of being justified by military necessity “*in the absence of any reasonable explanation from IDF*”; in view of the foreseeable ineffective rate, it was also considered as

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<sup>256</sup> The primary nature of the principle of proportionality as founded by a joint reading of Articles 51(5)(b), 57(2)(a)-(b) and 85(3)(b) AP I, is stressed by A. Bouvin, *op. cit.*, p. 34.

<sup>257</sup> See, e.g., the statement by UN High Commissioner for Human Rights in respect to the hostilities carried out since 13 June 2014, “Human Rights Council 21<sup>st</sup> special session: Human Rights Situation in Occupied Palestinian Territory, including East Jerusalem”, 23 July 2014.

<sup>258</sup> According to Marc Garlasco, Senior Military Analyst at Human Rights Watch, “*Firing 155 mm shells into the center of Gaza City, whatever the target, will likely cause horrific civilian casualties*”, adding that “*by using this weapon in such circumstances, Israel is committing indiscriminate attacks in violation of the laws of war*”, see Human Rights Watch, “Israel: Stop shelling in crowded Gaza City”, 16 January 2009. These shells have “*a margin of error of thirty meters*” and a blast radius of 300 meters”, see B. Hubbard and A. de Montesquieu, “Rights Groups says Laws of War violated in Gaza”, The Associated Press, 4 February 2009. The choice of less precise weaponry has raised the question of intent: “*When you have an alternative that is GPS-guided and very accurate, why would you use a shell that is much less accurate and has a much larger kill radius?*”, see Fred Abrahams of Human Rights Watch, *ibid.*

<sup>259</sup> See Human Rights Watch, “Israel/Hamas: Civilians must not be targets”, 30 December 2008.

<sup>260</sup> *Report of the Commission on Inquiry on Lebanon*, UN Doc. A/HRC/32, 23 November 2006, paras. 13, 25 (in which it openly expressed the view that, “*cumulatively, deliberate and lethal attacks by the IDF on civilians and civilian objects amounted to collective punishment*”), para. 110.

<sup>261</sup> *Report of the Commission on Inquiry on Lebanon, ibid.*, para. 319.

amounting “to a *de facto* scattering of anti-personnel mines across wide tracts of Lebanese land”.<sup>262</sup>

As noted above, *indiscriminate attacks are not expressly prohibited in Protocol II*, although two sections of the definition contained in Article 51(4) API have been deemed to fall within the prohibition on making the civilian population the object of attack under Article 13(2) APII: attacks carried out without identifying specific military objectives and attacks treating several visibly separate military targets placed together with civilians or civilian objects as a single entity.<sup>263</sup> Amended Protocol II to the CCW Convention, which is applicable to non-international armed conflicts, prohibits these attacks as other relevant instruments do.<sup>264</sup>

Looking at recent practice, in the findings by the Independent International Commission of Inquiry on the Syria Arab Republic in the context of the non-international armed conflict between government forces and pro-government militia and non-State armed groups, unlawful indiscriminate and disproportionate attacks - mostly shelling and aerial bombardments - were reported to cause mass civilian death and injuries as well as large-scale arbitrary displacement.<sup>265</sup> With regard to government forces and pro-government militia, civilian areas were shelled with artillery, mortars and tank fire; highly imprecise and lethal barrel bombs were dropped into urban areas from helicopters at high altitudes and such use was deemed indiscriminate. Contested civilian-inhabited areas of strategic importance such as Aleppo, Damascus, Dara’a, Idlib and Ar Raqqa governorates were brutally bombarded and came under intense and sustained, often daily, attacks that were not directed at distinct military objectives and spread terror among civilians. Conversely, armed groups besieged and indiscriminately shelled civilian neighbourhoods, using mortars, artillery shells and home-made rockets in a manner that made no distinction between civilian and military objectives.<sup>266</sup>

Therefore, it is worth stressing that it would be illogical to admit that what is provided for in the context of international armed conflicts is not applicable also in internal armed conflicts.

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<sup>262</sup> *Report of the Commission on Inquiry on Lebanon, ibid.*, para. 253. It is reported that they were both ground-based (M483A1 155mm artillery shells, M 395 and M 396 155 mm artillery shells and the Multiple Launch Rocket System (MLRS)) and air-dropped (CBU-58 munitions), that 90 per cent of them were fired into South Lebanon during the last seventy-two hours of the armed conflict, and that many of them “*littered the ground with the potential to explode at any time*”, see paras. 249-256.

<sup>263</sup> M. Bothe, K.J. Partsch, W.A. Solf (eds.), *op. cit.*, p. 677.

<sup>264</sup> Article 3(8) of the 1996 Amended Protocol II to the CCW, on the Use of Mines, Booby Traps and Other Devices; Y. Dinstein, C. Garraway and M. Schmitt, *Manual on the Law on Non-International Armed Conflict*, the International Institute of Humanitarian Law, 2006, pp. 20-21, para. 2.1.1.3.

<sup>265</sup> *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/25/65, 12 February 2014. This report covers investigations conducted from 15 July 2013 to 20 January 2014.

<sup>266</sup> *Ibid.*, paras. 86-106.

### 6.2.a. Some remarks on the principle of proportionality

The relevance of this principle lies in the fact that it measures the lawfulness of any armed attack causing incidental civilian casualties, so expressing the constant and delicate exigency of the law on the conduct of hostilities to “equitably balance” between humanitarian requirements and military necessity.<sup>267</sup> According to the rationale of this principle, an attack against a legitimate target may provoke “*incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof*”, but remain lawful. Specifically, collateral damage that “*may be expected*” to be caused by such attack must not be “*excessive*” in relation to the direct and concrete military advantage intended, otherwise it must be suspended or cancelled on account of being it prohibited. Therefore, “*even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military advantage to be gained from the attack*”.<sup>268</sup>

While the origins of proportionality date back to the principle forbidding superfluous injury and unnecessary suffering,<sup>269</sup> Articles 51(5)(b) and 57(2)<sup>270</sup> API contain the primary codifications of proportionality, even though it is not specifically mentioned.<sup>271</sup> Some controversial implications have been outlined for the way through which Article 51(5)(b) prohibits disproportionate collateral damage under the heading of indiscriminate attacks. In fact, proportionality is emphasised as an interpretative criterion to assess the indiscriminate nature of a military attack; conversely, the view that a violation of this principle cannot be assimilated to an indiscriminate attack or that a proportionate attack is not inevitably selective is not fully supported.<sup>272</sup> In favour of such a position,

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<sup>267</sup> See Articles 14-16 of the 1863 Lieber Code, see Francis Lieber, U.S. War Department, General Orders No.100: Instructions for the Government of Armies of the United States in the Field, reprinted in D. Schindler and J. Toman (ed.), *the Laws of Armed Conflicts: A Collection of Conventions; Resolution and Other Documents*<sup>4</sup>, 2004; see M. McDougal and F. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, 1961, pp. 525-530; see M. Bothe, K.J. Partsch, and W.A. Solf (eds.), *op. cit.*, pp. 194-5.

<sup>268</sup> ICJ, *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, Dissenting Opinion of Judge R. Higgins, para. 20, at 587.

<sup>269</sup> The concept of *maux superflus* was not formulated as such until 1899 in Article 23(e) HRs. However, it may be traced back to the Preamble of the Declaration of St. Petersburg. The 1977 Protocol I broadened its scope of application to include methods of warfare and significantly narrowed the definition of military objectives that may be lawfully attacked, see H. Meyrowitz, “The principle of superfluous injury or unnecessary suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol 1 of 1977”, *IRRC*, 1994, pp. 98-122.

<sup>270</sup> In Article 57, the concept of proportionality occurs twice: subparagraph 2(a)(iii) instructs “*those who plan or decide upon an attack*” to refrain from launching an attack that is likely to produce excessive casualties, and subparagraph 2(b) requires to cancel or suspend an attack if it seems that it does not respect proportionality. Then, Article 85(3)(b) API labels the launching of an *indiscriminate disproportionate attack* as a “grave breach”, also referring to Article 57(2)(a)(iii).

<sup>271</sup> In these provisions the terms ‘proportionate’ and ‘disproportionate’ are absent, so attesting the difficult negotiations of Protocol I regarding the concept of proportionality, see Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, paras. 2204-2218; W.A. Solf, *op. cit.*, pp. 309-310.

<sup>272</sup> The opposite view that an attack giving rise to proportionate collateral damage can never be regarded as indiscriminate is supported, see F. Kruger-Sprengel, “Le Concept de Proportionalité dans le Droit de la Guerre. Rapport présenté au Comité pour la protection de la vie humaine dans les conflits armés, VIIIe Congrès de la Société internationale de droit pénal militaire et de droit de la guerre”, 19 *Review de Droit Militaire et de Droit de la Guerre*, 1980, p.

it has been noted that the use of a biological or chemical weapons with undetermined consequences may harm a whole civilian population or no one at all, but their use is considered indiscriminate regardless of the concrete effect on civilians.<sup>273</sup>

Focusing on the interpretation of a legitimate military advantage, the terms “*concrete and direct*” under Articles 51(5)(b) and 57(2)(a)(iii) highlight the need to *measure the intended advantage from any single attack*:<sup>274</sup> especially the textual references to ‘attack’ which apparently imply that the intended advantage and collateral damage cannot be determined from the whole military operation concerned. In this regard, the ICRC commentary has been called into question.<sup>275</sup> As a consequence of supporting a contrary interpretation, the proportionality principle would start to play a role only at the end of the conflict,<sup>276</sup> risking being evaluated *ex ius ad bellum*, which is conceptually distinct from a principle that operates *durante bello*.

A wide interpretation of proportionality was adopted in the report of the Committee set up by the Prosecutor of the ICTY to review the NATO bombing campaign against the Federal Republic of Yugoslavia and to advise whether there was sufficient basis to start an investigation. The Committee refused to adopt the doctrine favoured by the Trial Chamber in the *Kupreskic* judgment, which found that the pattern of cumulative effects of “*repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness*” “*may turn out to jeopardise excessively the lives and assets of*

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192. See also A. Rogers, *Law on the Battlefield*, *op. cit.*, pp. 21-23. The significance of considering an attack as indiscriminate is questioned in case civilians are not killed: “*This is a curious provision because it takes no account of the actual consequences of an attack. On a strict construction, if the attack were indiscriminate by its nature it would seem to matter not whether any civilians are actually killed as a result. It is suggested that this would be an absurd and unintended result of the drafting. Certainly, to amount to a grave breach the indiscriminate attack must affect the civilian population*” (*ibid.*, p. 21). Nevertheless, the British Manual of the Law of Armed Conflict provides that “*an attack can be indiscriminate even if no civilians are killed or injured by it, but a grave breach only occurs if the civilian population or civilian objects are knowingly and actually affected*”, see United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford, 2004, p. 69, para. 5.23.3.

<sup>273</sup> A. Bouvin, *The Legal Regime applicable to targeting military objectives in the context of contemporary warfare*, 2006, p. 34.

<sup>274</sup> Under Articles 51 and 57 API, the notion of ‘attack’ is more restrictive than the notion contained in Article 49, since it does not referred to any act of violence against the enemy, but it requires a certain level of preparation and extension, see W. Fenrick, “The rule of proportionality and Protocol I in Conventional Warfare”, *Military Law Review*, 1982, at 102. For another interpretation of “*concrete and direct*” as requiring to assess proportionality for a singular attack or military operation (rather than cumulatively) see J.G. Gardam, “Proportionality and Force in International Law”, *AJIL*, 1993, p. 407.

<sup>275</sup> According to the ICRC, “*The expression ‘concrete and direct’ was intended to show that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded*”, see C. Pilloud and J. Pictet, “Article 57”, *op. cit.*, at 684. However, this paraphrase has been deemed questionable by some scholars, because “*substantial*” is not synonymous with “*concrete*” and because long-term effects may be direct and concrete, see Y. Dinstein, *op. cit.*, p. 134, quoting K. Dörmann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge, 2003, at 161 n. 36.

<sup>276</sup> For an evaluation of the interpretation of the military advantage to be calculated against the whole military operation, see L. Vierucci, “Sulla nozione di obiettivo militare nella guerra aerea: recenti sviluppi della giurisprudenza internazionale”, *Rivista di diritto internazionale*, 2006, p. 700 ff.

civilians, contrary to the demands of humanity”.<sup>277</sup> Rejecting such a conclusion, the Committee argued that, under the rule of proportionality, the lawfulness of the attacks should be determined in view of an “overall assessment of the totality of civilian victims as against the goal of the military campaign”.<sup>278</sup> Notably, this is evocative of the interpretative declarations made by the majority of NATO members ratifying Protocol I, according to which the military advantage anticipated concerns the one gained from a whole attack (and not from separated or specific portions of it).<sup>279</sup>

However, these findings have not been completely accepted in legal scholarship. In particular, a portion of the attack may result in more victims than others, although the number of victims and the military advantage anticipated should take into account the attack in its entirety, as the military advantage is expected by the military commander while the actual accomplishment of the operation as well as the extent of collateral damage may only be ascertained *a posteriori*.<sup>280</sup> In this regard, the approach undertaken by the Fact-Finding Mission on the Gaza conflict assessed the existence of proportionality<sup>281</sup> as well as precautionary measures<sup>282</sup> for every single incidents and every single

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<sup>277</sup> ICTY, *Prosecutor v. Žoran Kupreškić et al.* (IT-95-16-Y), Trial Chamber, Judgment of 14 January 2000, para. 526.

<sup>278</sup> *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 13 June 2000, para. 52. To the Committee, the victims of the bombing of the radio TV station in Belgrade should have been assessed against the total civilian losses caused during the entire military campaign.

<sup>279</sup> See A. Roberts and R. Guelff, *Documents on the Laws of War*<sup>3</sup>, Oxford, 2000, for the text of the declaration, e.g. by Belgium (at 501), Germany (at 504), Italy (at 506), the Netherlands (at 508) or the United Kingdom (at 510). Canada, Australia, France, New Zealand, Nigeria, and Spain made analogous statements; the declarations and reservations by signatory States are available at the ICRC IHL Database. The States concerned have not officially explained the meaning of “attack as a whole”, see K. Dörmann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge, 2003, pp. 170-171.

<sup>280</sup> See N. Ronzitti, “Is the non liquet of the Final Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia acceptable?”, *IRRC*, 2000, pp. 1017-1027; N. Ronzitti, “Civilian Population in Armed Conflict”, *Max Planck Encyclopedia of Public International Law* online.

<sup>281</sup> E.g., see UN Doc. A/HRC/12/48, Chapter X, paras. 687-703, reviewing the shelling in al-Fakhura Street in view of two key issues: the proportionality in the military advantage gained and the weapons used. In stressing that the military advantage was to stop the claimed firing of mortars posing a risk to the lives of Israeli forces, the Mission noted that, “even if there were people firing mortars near al-Fakhura Street, the calculation of the military advantage had to be assessed bearing in mind the chances of success in killing the targets as against the risk of firing into a street full of civilians and very near a shelter with 1,368 civilians and of which the Israeli authorities had been informed” (para. 696). It considered this case not among the ones in which proportionality decisions present very genuine dilemmas. It concluded that “the deployment of at least four mortar shell to attempt to kill a small number of specified individuals in a setting where large numbers of civilians were going about their daily business and 1,368 people were sheltering nearby cannot meet the test of what a reasonable commander would have determined to be an acceptable loss of civilian life for the military advantage sought” (para. 703).

<sup>282</sup> See UN Doc. A/HRC/12/48, Chapter IX, paras. 499-652, examining the precautions taken in three attacks launched on 15 January 2009. Regarding the fact that the field office compound of the UNRWA for Palestine Refugees in the Near East in Gaza City “came under shelling with high explosive and white phosphorous munitions”, the Mission concluded that “the Israeli armed forces violated the requirement under customary international law to take all feasible precautions in the choice of means and method of attack with a view to avoiding and in any event minimising incidental loss of civilian life, injury to civilians and damage to civilian objects as reflected in article 57 (2) (a) (ii) of Additional Protocol I of the Geneva Conventions” (para. 595). Further, Israeli forces were allegedly found to attack “directly and intentionally” the al-Quds hospital in Gaza city and the adjacent ambulance depot with white phosphorus shells, violating Article 18 GCIV and customary international law on proportionality, as they knew that the hospital was dealing with a big number of injured and wounded and was sheltering several hundred civilians (para. 926). Moreover, the recklessness of the use of white phosphorous in and around al-Wafa hospital in eastern Gaza City (which was for patients suffering from serious injuries and in need of long-

attack. If the events described in the report did in fact occur, particularly the incidents dealing with inaccurate gunfire and the use of white phosphorus against hospital or humanitarian assistance structures in which reserves of fuel were located, for purposes of obscuring the areas or for the alleged presence of militants in the structures or in their proximity, are critical.

The need for an “overall assessment” of the military advantage, without confining the appraisal to an isolated attack, has been reaffirmed in view that “military advantage cannot be seen through the eyes of an individual soldier, tank crew or aviator”.<sup>283</sup> Nonetheless, it may be emphasised that the adjective “direct” appears not to exclude the option of examining the broader context of a tactical operation, but the “concrete” advantage needs to be “causally connected” to the particular operation or attack. With regard to the related individual criminal responsibility, the ICC Statute lessens the significance of “concrete and direct” criteria by establishing that the excessive nature is to be assessed on the basis of the “overall” military advantage.<sup>284</sup>

The customary nature of the proportionality principle has been recognised only<sup>285</sup> in recent decades<sup>286</sup> and confirmed in the ICRC study on customary international humanitarian law.<sup>287</sup> The debate on the customary nature has featured those who view proportionality as inherent in the principle of

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term care) was considered and its inadmissibility for any military advantage sought in the specific circumstances was underlined (paras. 648-650).

<sup>283</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*<sup>2</sup>, Cambridge, 2010, p. 134.

<sup>284</sup> Article 8(2)(b)(iv) ICC Statute. At the Rome Conference, the ICRC clarified that the term “overall” added to the definition of the crime could not be understood to amend existing law (Statement of 8 July 1998, A/CONF.183/INF/10). According to a footnote to the Elements of Crimes accompanying Article 8(2)(b)(iv), “the expression ‘concrete and direct overall military advantage’ refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack”. See T. Stein, “Collateral Damage, Proportionality and Individual International Criminal Responsibility”, in W. Heintschel von Heinegg, V. Epping (ed.), *International Humanitarian Law Facing New Challenges: Symposium in Honour of Knut Ipsen*, Springer, 2007, pp. 158-161.

<sup>285</sup> In the past, an attack against an unquestionable military objective was deemed to imply any incidental injury or damage to civilian persons or objects as “acceptable” collateral damage, see S. Oeter, “Methods and Means of Combat”, *op. cit.*, p. 198. On proportionality in attack as not recognised in customary international law, see also A.P.V. Rogers, “The Principle of Proportionality”, in H.M. Hensel (ed.), *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict*, 2007, pp. 189-218.

<sup>286</sup> See ICTY, *Prosecutor v. Dusko Tadic* (IT-94-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, para.127; ICTY, *Prosecutor v. Zoran Kupreskic et al.* (IT-95-16-Y), Judgment of 14 January 2000, para. 524; for a comment, see E. Cannizzaro, *Il principio della proporzionalità nell’ordinamento internazionale*, Milano, 2000, pp. 310-11. For recent case law in which its customary character has not been contested, see also HCJ 2056/04, *Beit Sourik Village Council v. The Government of Israel et al.*, Judgment of 30 June 2004, para. 37; HCJ 5100/94, *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, Judgment of 13 December 2006, paras. 41-43.

<sup>287</sup> J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, p. 46, Rule 14. On the customary nature of the principle, see G. Venturini, *Necessità e proporzionalità nell’uso della forza militare in diritto internazionale*, Giuffrè, 1988, pp. 127-132; W. Solf, in M. Bothe, K.J. Partsch and W.A. Solf (eds.), *op. cit.*, p. 309; L. Doswald-Beck, “The Value of the Geneva Protocols for the Protection of Civilians”, in M. Meyer, *Armed Conflict and the New Law: Aspects of 1977 Geneva Protocols and 1981 Weapons Convention*, 1989, p. 156.

distinction<sup>288</sup> and those who contest that a consensus exists with regard to its meaning.<sup>289</sup> However, this appears to be without significance to the extent that proportionality remains a “*necessary part of any decision making process which attempts to reconcile humanitarian imperatives and military requirements during armed conflict*”.<sup>290</sup>

Nevertheless, the difficulties in the evaluation of the military advantage were discussed by the Committee instituted to review the NATO bombing campaign of 1999. In relation to unsettled issues on the implementation of the proportionality principle,<sup>291</sup> the Committee reflected on the necessity to explain them case-by-case, expecting different solutions according to the values and background of the commander. It noted how “*it is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and to injury of non-combatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases*”.<sup>292</sup> Its consequent suggestion that “*the determination of relative values must be that of the ‘reasonable military commander’*” is in line with its consideration of proportionality in attack as a principle dictating “*an acceptable relation between the legitimate destructive effect and undesirable collateral effects*” of an attack.

This latter perspective sheds light on the complications of interpreting proportionality in practice, especially because the balance between divergent values that cannot be easily measured

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<sup>288</sup> The ICTY acknowledged the customary nature of the proportionality principle as codified in Articles 57 and 58 API, considering these provisions as “*part of customary international law, not only because they specify and flesh out general pre-existing norms, but also because they do not appear to be contested by any State, including those which have not ratified the Protocol*”, see ICTY, *Prosecutor v. Zoran Kupreskic et al.* (IT-95-16-Y), Judgment of 14 January 2000, para. 524. In the Nuclear Weapons Advisory Opinion, Judge Higgins referred to the customary nature of the proportionality principle, highlighting that this principle, “*even if finding no specific mention, is reflected in many provisions of Additional Protocol I to the Geneva Conventions of 1949. Thus even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack*”, see Dissenting Opinion of Judge Higgins, para. 20.

<sup>289</sup> For a critical view of the customary status of the principle of proportionality, see W.H. Parks, “Air War and the Law of War”, 32(1) *Air Force Law Review*, 1990, p. 168 ff.

<sup>290</sup> W.J. Fenrick, “The Rule of Proportionality and Protocol I in Conventional Warfare”, *Military Law Review*, 1982, p. 125. See also J.F. Murphy, “Some Legal (And A Few Ethical) Dimensions of the Collateral Damage Resulting from Nato’s Kosovo Campaign”, in A.E. Wall (ed.), *Legal and ethical lessons of NATO’s Kosovo campaign*, vol. 78, U.S. Naval War College International Law Studies, 2002, p. 248, stating: “*In my view, it is not necessary to decide whether ‘proportionality’ is part of customary international law or simply a policy consideration or a ‘principle’ that commanders should take into account during the course of armed conflict*”.

<sup>291</sup> *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 13 June 2000, paras. 47-50. The following four questions were outlined by the Committee: 1. “*What are the relative values to be assigned to the military advantage gained and the injury to non-combatants and / or the damage to civilian objects?*”; 2. “*What do you include or exclude in totalling your sums?*”; 3. “*What is the standard of measurement in time or space?*”; 4. “*To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian casualties or damage to civilian objects?*” (*ibid.*, at 508, para. 49). They are explored by W.J. Fenrick, “The Law Applicable to Targeting and Proportionality After Operation Allied Force: A View from the Outside”, *YIHL*, 2000, p. 75 ff.

<sup>292</sup> *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 13 June 2000, at 507, para. 48.

(such as humanitarian considerations and military advantages) implies a broad margin of appreciation. The vagueness inherent in this principle has been well illustrated by the Public Committee against Torture, according to which “*proportionality is not a standard of precision. At times there are a number of ways to fulfil its conditions. A zone of proportionality is created. It is the borders of that zone that the Court guards. The decision within the borders is the executive branch’s decision*”.<sup>293</sup>

Indeed, the required assessment of any attack in order to compare the military advantage with damage to civilian objects or civilian losses remains complex and variable for each concrete case. In this regard, honesty and proficiency are needed in the decision-maker’s action in light of the prevailing circumstances.<sup>294</sup> Further, the idea that “*the attacker has to act reasonable and in good faith*” without simply turning “*a blind eye on the facts of the situation*”, being obliged to evaluate all available information, is commonly supported in legal scholarship.<sup>295</sup> Similarly, rules of engagement are expected to be reasonably adapted to the situation in the battlefield and the related training is expected to take into due consideration possible alterations to the proportionality calculation. As one scholar has suggested, belligerents’ choice to record and make public their proportionality assessment after a certain time would support the conduct of potential war crimes trials as well as generally strengthening the role played by the laws of war in the targeting process.<sup>296</sup>

Remarkably, in dealing with attacks against civilians and framing how to evaluate whether the proportionality estimation of the attacker respected legal bounds, the ICTY set forth a helpful minimum standard that is slightly higher than a mere “reasonable person” test. The Trial Chamber noted that “*in determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack*”.<sup>297</sup> In pointing this out, the Trial Chamber also held that the proportionality rule refers to “*expected*” damage and “*anticipated*” advantage (instead of actual damage produced or military advantage attained) from an attack. Furthermore, it considered that “*certain apparently disproportionate attacks may give rise to the inference that civilians were actually the object of the attack. This is to be determined on a case-by-case basis in light of the available*

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<sup>293</sup> *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, Judgment, 13 December 2006, para. 58.

<sup>294</sup> A. Solf, “Article 51”, in M. Bothe, K.J. Partsch and W.A. Solf (eds.), *op. cit.*, at 310, para. 2.6.2.

<sup>295</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2010, p. 133, quoting K. Dormann (*Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, ICRC, 2003, p. 165), and L.C. Green (“Aerial Considerations in the Law of Armed Conflict”, *AASL*, 1980, p. 104).

<sup>296</sup> M. Sassòli, “Targeting: Scope and Utility of the Concept of ‘Military Objectives’ for the Protection of Civilians in Contemporary Armed Conflicts”, *op. cit.*, pp. 204-205.

<sup>297</sup> ICTY, *Prosecutor v. Galic* (IT-98-29-T), Trial Chamber, Judgment of 5 December 2003, para. 58. For a comment, see M. Sassòli and L. Cameron, “The Protection of Civilian Objects”, in N. Ronzitti and G. Venturini (eds.), *The Law of Air Warfare. Contemporary Issues*, Eleven International Publishing, 2006, pp. 63-65.



evidence”.<sup>298</sup>

Regrettably, highly controversial patterns of action seemingly violating the principle of proportionality have been reported in the context of the 2014 Operation Protective Edge. The attacks concerned were carried out on densely populated residential areas of the Gaza Strip (e.g. Shuja’ia neighbourhood) both through the use of precision weaponry (such as drone-fired missiles) and artillery that cannot be aimed accurately and whose power derives from the quantity of fired shells and their massive impact. In addition, direct attacks included thousands of houses occupied as residencies by entire families but deemed legitimate targets because of the presence of several members of Hamas’ military wing. Further, numerous school institutions, medical facilities and non-military governmental buildings were seriously damaged or destroyed; in particular, six UN-operated schools acting as civilian shelters for thousands of internally displaced people in the al-Maghazi refugee camp in central Gaza, in Beit Hanoun, in Zaitoun, in Jabalia, and in Rafah were critically reported to be hit by direct shelling at least seven times.<sup>299</sup> Thus, an important issue arises as to whether contemporary IHL requires States with well-funded and equipped armies an arsenal of precision weapons at least to use them exclusively, since broad and general use of weaponry that is not precise tends to show a controversial *animus* of the attackers.

### **6.2.a.i. The issue of long-term and indirect effects of attacks**

Broadly, proportionality has been labelled as the “*true guarantee of robust civilian protection for effects of attacks in wartime*”.<sup>300</sup> While the intended military advantage must be limited to what is “concrete” and “direct”, however, *the damage is only described as produced by the attack*. This raises the issue of *how to balance* such advantage against incidental harm to civilian persons and objects. Notwithstanding that a direct connection between a certain action and its effects is entailed in the legal concept of causality, *de facto* certain kinds of damage become manifest over time or occur beyond the field of military

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<sup>298</sup> ICTY, *Prosecutor v. Galic* (IT-98-29-T), Trial Chamber, Judgment of 5 December 2003, para. 60.

<sup>299</sup> See *Statement by UNRWA Commissioner-General Pierre Krähenbühl*, 30 July 2014; *Statement by Leila Zerrougui, Special Representative of the Secretary General for Children and Armed Conflict*, 30 July 2014; UN News Centre, “Gaza: Ban condemns latest deadly attack near UN school as ‘moral outrage and criminal act’”, 3 August 2014; see “UNRWA condemns Israeli strikes next to UNRWA school killing civilians”, 3 August 2014. On one side, a basic question arises as to whether the alleged origin of one or more rockets from a school sheltering thousands of DIPs may justify (in the light of the proportionality principle and the duty to take necessary precautions in attack) the response to fire at the same school whose location and nature were known. On the other side, past and sporadic use of a civilian object for military aims does not turn it into a military target; in case of doubt it cannot be deemed a military objective. The discovery of rockets in three UNRWA structures, probably deposited when abandoned in the summer break, cannot transform them into military objective for the future, especially because this fact was promptly denounced by UNRWA. Of course the location of rockets in such facilities remains a violation of the IHL principle imposing to take feasible precautions to protect civilian persons and objects against the consequences of attacks.

<sup>300</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflicts*<sup>2</sup>, Cambridge, 2010, p. 130.

operations. In this regard, substantial debate remains about whether and to what extent medium and long-term civilian damage connected to the attack on a certain military objective flow into the assessment of “*excessive*” collateral damage (in addition to the direct effects).<sup>301</sup> As mentioned above, this is especially important in relation to attacks on dual-use objects.

The suggestion of considering proportionality as a dynamic requirement<sup>302</sup> has been helpful in dealing with certain practice regarding attacks on dual-use infrastructure as crucial to successful war campaigns.<sup>303</sup> Indeed, scholars have increasingly argued that the actual or latent possibility for long-term damage following from targeting certain types of objects (*e.g.* electricity) necessitates the contemplation of including “*reverberating effects*” in the proportionality calculation.<sup>304</sup> By arguing that “*derivative harm*” is a necessary part of such computation, the possible predictability of medium and long-term civilian casualties within the action of targeting certain key facilities of the enemy has been maintained. Notably, “*foreseeable effects of attack*” must be taken into account by commanders under the British Manual on the Law of Armed Conflicts.<sup>305</sup>

In this regard, since the Gulf War the risk that neutralising the national power grid as well as targeting sewage plants or water treatment facilities results in the collapses of basic health services, so weakening the exposed civilian population, has been stressed.<sup>306</sup> However, the Eritrea Ethiopia Claims Commission did not generally find indiscriminate or disproportionate bombing where it was foreseeable that civilian losses would be excessive relative to the military advantage anticipated. This

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<sup>301</sup> *E.g.*, the 2010 Commentary to the HPCR Manual on International Law on Air and Missile Warfare, p. 91.

<sup>302</sup> See Wedgwood, “Propositions on the Law of War after the Kosovo Campaign”, in AE. Wall, (ed.), *Legal and ethical lessons of NATO’s Kosovo campaign*, vol. 78, US Naval War College International Law Studies, 2002, p. 440.

<sup>303</sup> In military doctrines attacks against infrastructures such as the national power grid have been emphasised “*as an essential means to degrade an enemy’s air defense, telecommunications, and command and control capabilities*”, see J.W. Crawford, “The Law of Non-combatant Immunity and the Targeting of National Electric Power Systems”, *Fletcher Forum of World Affairs*, 1997 pp. 108-109.

<sup>304</sup> See J. Crawford, “The Law of Non-combatant Immunity and the Targeting of National Electric Power Systems”, 1997, in *Fletcher Forum of World Affairs*, pp. 114-115, noting that “*in essence, the planner’s function does not change or become unduly burdensome merely because an additional level of cognition is required in order to fulfil faithfully the obligations of discrimination and proportionality relative to collateral costs. Neither would it require some hypothetical collateral casualty assessment*”. See also M.N. Schmitt, “Wired Warfare: Computer Network Attack and *jus in bello*”, *IRRC*, 2002, p. 393; H. Shue and D. Wippman, “Limiting Attacks on Dual Use Facilities Performing Indispensable Civilian Functions”, *Cornell International Law Journal*, 2002, pp. 569-570; M.L. Cook, “Strategic Theory, Military Practice and the Laws of War: The Case of Strategic Bombing”, in A. Lang Jr., A.C. Pierce and J.H. Rosenthal (eds.), *Ethics and the Future of International Conflict*, Carnegie Council on Ethics and International Affairs, 2004, p. 14 ff.

<sup>305</sup> UK Manual of Armed Conflicts, 2004, para. 5.33-4, p. 86, in which it also details that an attack on a military fuel storage depot where there is a “*foreseeable risk of the burning fuel flowing into a civilian residential area and causing injury to the civilian population*” should not be performed if such damage were “*excessive*” in respect to the military advantage anticipated.

<sup>306</sup> *E.g.*, these kind of attacks reportedly “contributed to the deaths of 70.000-90.000 Iraqis” since the end of the 1990-1991 Persian Gulf War, see W.M. Arkin, “Tactical Bombing of Iraqi Forces Outstripped Value of Strategic Hits, Analyst Contends”, *Aviation Week and Space Technology*, 27 January 1992.

was the case even though in one instance the Claims Commission condemned the bombing of a reservoir that was *vital* to the water supply for a city in an extremely hot and dry area: the belief that this water would also serve the military, so becoming a legitimate military target, was dismissed.<sup>307</sup> What seems important in fact is that *the causal link between attack and damage*, as codified in Protocol I, limits the consideration of “derivative damage” into the proportionality calculation by requiring that it be *foreseeable* or may be *reasonably expected*.

Nonetheless, when long-term civilian casualties result from a sequence of strategic operations against State infrastructure (rather than resulting from one single attack) the cumulative criterion in the proportionality calculation has turned out to be still more problematic in view of the requirement codified in Protocol I (*i.e.* evaluation for each attack individually). For instance, this has been debated in relation to the modern U.S. Air Force doctrine whereby the military advantage pursued from targeting a national infrastructure was gained through “*the cumulative effect of parallel strikes*”.<sup>308</sup> As stressed in legal scholarship, even though this approach of “*effects-based targeting*” is distant from traditional military operations as intended by the drafters of the rules on proportionality, it seems reasonable to assume that, if such an approach is deemed more effective in warfare and able to prevent direct casualties, it should be applied *with the aim of limiting “derivative” harm and damage*, which should be *also computed on a cumulative basis*.<sup>309</sup> In fact, it is likely that a State having the capacity to neutralise a power plant without damaging adjacent dwellings or injuring civilians not far from this facility will appeal to such abilities to support its assertion that this object was a legitimate military target. Since challenging such a claim may be very difficult given the rising intermingling of civilian and military activities, the option of introducing *greater humanitarian considerations through the proportionality principle* may be more valuable. In particular, as far as the

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<sup>307</sup> Eritrea-Ethiopia Claims Commission, Partial Award, Western Front, Aerial Bombardment and related Claims, *Eritrea’s Claim*, Nos. 98-103. As underlined in legal scholarship, regarding bombardment raids, the Commission regretted the targeting and delivery errors that led to civilian casualties and property losses, *i.e.* because civilian and military objectives had not been kept sufficiently apart and not sufficient preliminary reconnaissance missions had taken place; however, “*these casualties were a tragic consequence of the war but did not in themselves establish liability under international law*”, see H. Van Houtte, “The Eritrea-Ethiopia Claims Commission and International Humanitarian Law”, in G. Venturini, Bariatti (eds.), *Liber Fausto Pocar*, Giuffrè, 2009, p. 391.

<sup>308</sup> This approach emerged in the U.S. Air Force Doctrine Document entitled “Strategic Attacks”, indicating that the goal was “*to cripple the enemy’s national political and military leadership’s ability to act and bring elements of the national infrastructure and, resources permitting, operational and tactical targets under attack*”. It also expressed the view that “*through overwhelming parallel attack of critical centers, the enemy’s strategy is defeated by reducing or removing its capability to conduct military operations. No longer must air forces serially destroy each target class before moving on to the next*”. See Air Force Doctrine Document 2-1.2, 20 May 1998, at 13.

<sup>309</sup> See A. Boivin, “The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare”, *Research Paper Series* 2006, at 51.

technology enabling highly precise strikes against a power plant can reduce reverberating effects, *the reasoning on “derivative damage” to medical or water treatment facilities seems all the more relevant*, even in spite of the harm to the civilian population is intended or not. An example concerns Operation Allied Force conducted by NATO; the Yugoslav electrical grids and conversion yards were neutralised by employing a new weapon that spread “chemically treated carbon wires” causing short-circuits and related disruption, so as to cut off seventy per cent of the electricity for over a day.<sup>310</sup>

The issue of medium and long-term consequences or damage connected to attacks on dual-use objects remains particularly relevant in relation to the access to, and the enjoyment of, ESC rights by civilians. For instance, a pertinent question arises as *to what extent respecting the proportionality principle runs beyond the battlefield and entails a duty to minimise further casualties after the end of hostilities possibly with positive impacts on the progressive realisation of ESC rights*.

In this regard, ‘adaptations’ of the principle of proportionality to the targeting of certain dual-use facilities have emerged in legal scholarship. A proposal has referred to “*protective proportionality*” and relies on the idea of establishing a special protection regime for certain dual-use facilities performing *vital* civilian functions.<sup>311</sup> More precisely, an analogy has been drawn between *the facilities supplying the power required for fundamental needs of life* and those objects which cannot be attacked “for the specific purpose of denying” them the “sustenance value” to civilians or the adversary under Article 54 API. Indeed, basic infrastructures contributing to the survival of civilians are hardly attacked with the exact purpose of starving them, rendering it unfeasible to cover such objects by Article 54. Therefore, in light of the serious potential harm connected to the targeting of indispensable dual-use objects, a more stringent proportionality test has been called for; in particular, attacks against basic infrastructure should be treated as “*impermissible unless the expected incidental civilian harm would not be excessive in relation to an anticipated military advantage that was compelling*,”

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<sup>310</sup> Apparently the “CBU-94” or “graphite bomb” was offered up by the U.S. because of France’s refusal to regard the Serbian electrical network as a legitimate target for NATO, see D. Priest, “Bombing by Committee; France Balked at NATO Targets”, *The Washington Post*, 20 September 1999. See A. Boivin, “The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare”, 2006, p. 52, noting that similar effect is achievable by “computer network attacks” without using aircrafts; such means would *prevent* material damage and *limit* potential long-term harm to civilians; according to the author, available technology should be employed according to the “*principle of minimum feasible damage*”.

<sup>311</sup> See H. Shue and D. Wippman, “Limiting Attacks on Dual Use Facilities Performing Indispensable Civilian Functions”, 35 *Cornell International Law Journal*, 2002, pp. 559-579. The authors’ concern derives from the permissive reading of the definition of military objective in Article 52(2) API concerning a dual-use facility since no attention is paid to its contribution to civilian life and “*its civilian function does not figure into whether the object is a ‘military objective’*”, stressing that “*whatever contribution the facility makes to civilian life drops out of the equation, subject only to application of the principle of proportionality*”.

not simply concrete and direct”.<sup>312</sup> However, such an additional criterion is not generally deemed applicable.

A second policy-oriented proposal - relevant especially in cases of an “interventionist conflict” such as in Kosovo, Afghanistan and Iraq - has focused on the importance of committing the winning States and their allies to reduce the long-term damage resulting from their attacks, especially by supporting the economy of those countries and the reparation of relevant infrastructures at the conclusion of hostilities.<sup>313</sup> Such a post-conflict assistance does not retroactively excuse conduct that violated *jus in bello*. However, the perspective highlighted in this proposal may be useful when considering the developing role of international law in defining the requirements of remedial justice even for violations of ESC rights committed in such contexts.

Conversely, *greater humanitarian considerations* in the application of the proportionality principle may have some positive implications in the targeting process on certain core dual-use facilities which is highly likely to cause incidental long-term impacts on civilians’ ESC rights and their progressive realisation. In particular, proportionality could be applied with a view to *preventing “derivative damage”, also estimated on a cumulative basis, which influences access to and enjoyment of ESC rights*. This could entail a duty to minimise casualties which significantly impact on these rights and extend beyond the combat zone. Accordingly, an application of proportionality as a real guarantee of civilian protection from armed attacks may require taking into account *the resonant effects of attacking an object that serves the military while it simultaneously plays a vital role for civilians*, according to a twofold meaning. Firstly, ‘vital’ may refer to what is *necessary to the survival of the civilian population*, in doing so indicating the urgency of protecting the realisation of minimum level of ESC rights. Secondly, ‘vital’ may refer to what is *functional to the sustainable human development of the civilian population*, in doing so indicating the value of protecting civilians’ opportunity to engage in economic, social and cultural activities.

Indeed, the relevance of taking into account the concept of “*sustainable human development*” relies on its evolution under international law, particularly under the normative framework of human rights law,<sup>314</sup> as the primary development paradigm, and its inevitable implications even in the way

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<sup>312</sup> See H. Shue and D. Wippman, *ibid.*, p. 574.

<sup>313</sup> See R. Wedgwood, “Propositions on the Law of War after the Kosovo Campaign”, in A.E. Wall (ed.), *Legal and Ethical Lessons of NATO’s Kosovo Campaign*, Newport, Naval College 2002, p. 440.

<sup>314</sup> The relevant normative framework includes UN resolutions adopted in the form of declarations: the UDHR (1948), the Declaration on the Right to Development (1986), the Vienna Declaration on Human Rights and Programme of Action (1993), the ILO Declaration on Fundamental Social Rights (1997), the Millennium Declaration and Millennium Development Goals (2000), as well as to a certain extent, the Rio Summit Declaration and Agenda 21 (1992), the Final

of looking at conflicts. This concept has emerged under *the rights-based approach to development* as advocated and increasingly put into practice by the UN development programmes and agencies. In particular, the proclamation of the right to development by the General Assembly<sup>315</sup> has been strengthened by the 1993 Vienna World Conference on Human Rights (alongside various world conferences and summits under United Nations auspices during the 1990s<sup>316</sup>) which culminated with the Millennium Declaration and the Millennium Development Goals that were based on an integrated and interdependent set of human rights and were acknowledged as founding the process of economic and social development.<sup>317</sup> A redefinition of the process of development as such has led to shifting away from the entirely “economic” approach to development towards its definition as concerning “*human development*” (*i.e. a comprehensive, people centred, economic, social, cultural and political process through which all the human rights and fundamental freedoms of all individuals and entire populations can be realised*).<sup>318</sup> Conversely, the concept of sustainability, originally formulated in the Brundtland Report (*i.e. “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”*<sup>319</sup>), has been further defined in the final declaration of the “Earth Summit” setting Agenda 21 for its implementation.<sup>320</sup> In its gradual expansion, the concept of sustainability no longer covers solely environmental considerations under an intergenerational perspective;<sup>321</sup>

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Declaration of the Barbados World Conference on SIDS (1994), the Johannesburg Declaration on Sustainable Development and its Plan of Implementation (2002), and the Mauritius Strategy for the further implementation of the Programme of Action for the sustainable development of Small Island Developing States (2005).

<sup>315</sup> Article 1 of the Declaration on the Right to Development (GA Res. 41/128, 4 December 1986), reading “*The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised*”.

<sup>316</sup> For a brief analysis of the UN Summits of the 1990s, see *The World Conferences: Developing Priorities for the 21st Century*, UN Briefing Papers, DPI, 1997.

<sup>317</sup> UN Millennium Declaration, A/55/L.2, 8 September 2000. It sets out the key challenges facing humanity at the threshold of the new millennium, outlining a response to them and establishing concrete measures for judging performance through a set of inter-related commitments, eight goals and eighteen targets on development, governance, peace, security and human rights. The MDGs have been considered “*the quantified targets for addressing extreme poverty in its many dimensions (i.e. income poverty, hunger, disease, lack of adequate shelter, and exclusion) while promoting gender equality, education, and environmental sustainability*”. Since their endorsement by the General Assembly in 2001, the MDGs have risen to the top of the development agenda and constitute the common focus of priorities for the development community.

<sup>318</sup> For the conceptual evolution of the human development paradigm, see Cornia G., Jolly R. Stewart F. *Adjustment with a Human Face*, vol. II and II, Oxford Clarendon Press, 1986. See also the annual Human Development Reports published by UNDP since 1990, particularly *The Human Development Report 2000* on the relationship between human rights and human development.

<sup>319</sup> World Commission on Environment and Development (Brundtland Commission), *Our Common Future*, Oxford, 1987, at 43.

<sup>320</sup> See “Report of the United Nations conference on Environment and Development”, A/CONF.151/26, 12 August 1992. For an explanation of the lengthy preparatory process to Rio and “*disentangles the complex web of UN resolutions and other official documentation*” that emerged from the “Earth Summit”, see S.L. Halpern, *Environment and Development: Process and Documentation*, 1992. For a summary of the outcomes of the UN Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), see UN Briefing Papers, at 21-27.

<sup>321</sup> In the Johannesburg World Summit on Sustainable Development, see Resolution 1, *Political Declaration*, and Resolution 2, *Plan of Implementation*, World Summit on Sustainable Development, A/CONF.199/20, 4 September 2002.

accordingly, the basic idea of *sustainable development* has encompassed other essential requirements such as “*clean water and sanitation, adequate shelter, energy, health care, food security and the protection of biodiversity*”.<sup>322</sup> Significantly, the human dimension in the pursuit for sustainable development has come to constitute the main vector and core element. In this sense, “*sustainable human development*” has been deemed achievable through enduring integration and realisation of basic human rights and fundamental human freedoms. It seems that for countries affected by armed conflicts these concepts do assume increasing significance in the light of special vulnerabilities affecting civilians during and in the aftermath of hostilities.

Finally, it is worth referring to existing instances of constructive approaches undertaken by the law to hold the parties to a conflict accountable for conduct posing long-term risks to civilians.

A first example relates to *damage inflicted on the environment*. The long-standing consequences of particular weapons or of certain methods of combat on the ecosystem have been progressively acknowledged. In advancing environmental considerations States agree on the necessity to balance military and humanitarian considerations in view of the latent damage to the environment that is not directly evident.<sup>323</sup> In this vein, belligerents are required to exercise *care in attacks* to protect the environment; attacks that may produce “*widespread, severe and long-term damage to the natural environment*” are prohibited regardless of military necessity or potential proportional collateral damage.<sup>324</sup> Notably, attacks deliberately carried out in the awareness that they origin “*widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to concrete and direct overall military advantage anticipated*” may give rise to individual criminal responsibility under the Rome Statute.<sup>325</sup>

Another example relates to *risks posed by unexploded remnants of war*. The latter may be antipersonnel landmines, anti-vehicle mines, cluster bombs sub-munitions and other unexploded ordnances. The risks of post-conflict damage, ensuing from their failure to explode on impact (as they are planned to do), exist notwithstanding that antipersonnel landmines are widely

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<sup>322</sup> Article 18, WSSD Resolution 1, *Political Declaration* and Resolution 2, *Plan of Implementation*, A/CONF.199/20, Johannesburg, 4 September 2002.

<sup>323</sup> Y. Dinstein, *The conduct of hostilities under the law of international armed conflicts*, 2010, p. 198.

<sup>324</sup> See Article 55 AP I and Article 35(3) API (that protect the natural environment from the perspective of unnecessary injury).

<sup>325</sup> Article 8(2)(b)(iv) ICC Statute. In view of the term “*clearly*” (in conjunction with the required intention to cause harm), individual criminal responsibility arises if the excessive damage to the environment is evident and deliberate, see W.J. Fenrick, “Article 8(2)(b)(iv)”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Court: Observer’s Notes, Article by Article*, Nomos, Baden-Baden, 2008, p. 341. For an effort to restrict the standard according to which a certain environmental damage is deemed “*excessive*” or “*clearly excessive*”, see *Final Report of the ICTY Review Committee*, para. 22.

prohibited.<sup>326</sup> The 2003 Fifth Protocol to the 1980 Convention deals with the use and clearance of unexploded munitions,<sup>327</sup> by providing as one of its core principles that States employing such munitions are responsible to assist in clearance. Significantly, the underlying reasoning is that *the duty to respect the principle of proportionality continues beyond the battlefield* and requires minimising future casualties after the end of the conflict.<sup>328</sup> This approach to avoiding downgrading the peril to civilians posed by unexploded ordnances appears powerful and useful, even in light of the less effective arguments that stress the indiscriminate nature of sub-munitions against the insistence by the military on the related ability to be aimed at a specific military objective.

### **6.3. The obligation to adopt precautionary measures in attack and in defence**

Despite the fact international humanitarian law does not clearly guide on the evaluation of proportionality in attack, a comprehensive regime of precautionary measures exists with the purpose of avoiding or minimising the risk of collateral damage. This regime has a certain relevance to assessing the evolution of the protection afforded to civilian persons and objects under international humanitarian law in the area of ESC rights against the effects of military operations. As we will explore in detail, specific considerations in this regard may be addressed in relation to the protection of adequate housing and shelter, healthcare, and education.

A comprehensive list of precautionary measures in attack was laid down for the first time in a treaty with the adoption of Article 57 API. In fact, “*no express rules existed [...] and the need to take precautions could only be inferred from customary law and treaty language, especially the principles of proportionality, identification of the target (or the rule of distinction), warning and the choice of methods and means*”.<sup>329</sup> A duty to take precautions, in order to prevent damage to protected objects, was initially codified in the 1923 Hague Air Rules<sup>330</sup> and then in the 1956 Draft Rules by the ICRC.<sup>331</sup>

The general precept underlying precautionary measures in attack consists of taking constant

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<sup>326</sup> See Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II to the 1980 Convention) of 3 May 1996. See Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997.

<sup>327</sup> Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), 28 November 2003.

<sup>328</sup> As meaningfully stated in legal scholarship, “*the post-war clearance of unexploded munitions, though not a legal requirement as such, can also limit direct civilian damage. Proportionality in war fighting should be seen as a joint responsibility of the civilian and military sectors together, extending into the post-conflict period*”, see R. Wedgwood, “Propositions on the Law of War after the Kosovo Campaign”, in A.E. Wall (ed.), *Legal and ethical lessons of NATO’s Kosovo campaign*, vol. 78, U.S. Naval War College International Law Studies, 2002, p. 440.

<sup>329</sup> A. Rogers, *Law on the Battlefield*, at 56, referring to an ICRC Report presented to the Conference of Government Experts in 1971, entitled “Protection of the Civilian Population Against the Dangers of Hostilities”.

<sup>330</sup> Hague Air Rules, Article 25.

<sup>331</sup> ICRC Draft Rules, Articles 8-10.



care to spare civilians and civilian objects; it is an integral part of customary international law.<sup>332</sup> More specific obligations include: *taking* all feasible measures to verify that the targets are military objectives;<sup>333</sup> *choosing* methods and means that avoid and “in any event” *minimising* “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof”;<sup>334</sup> and *refraining* from any attack that may be “expected to cause” collateral civilian casualties or damage to civilian objects “excessive in relation to the concrete and direct military advantage”.<sup>335</sup>

These codified precautions are designed for “*those who plan or decide upon an attack*”. It has been noted how this “*should be understood to address primarily commanders and staff officers who are directly responsible for specific operations, and only to a lesser degree the individual soldiers participating directly in the attack*”.<sup>336</sup> However, the level at which targeting decisions are taken is influenced by the nature of combat or the proportions of armed forces engaged in a certain conflict; as far as individual soldiers are employed to organise and execute attacks, they may be expected to comply with Article 57. Finally, the obligations concerned apply at all levels in which such functions are being exercised.<sup>337</sup>

The required feasible precautions are commonly deemed restricted to the ones “*that are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations*”.<sup>338</sup> Conversely, the duty of due diligence and acting in good faith exists<sup>339</sup> and applies to all those involved in the targeting phase.<sup>340</sup> If it becomes evident that an attack is prohibited - for possible excessive collateral damage or the civilian status of the object concerned or the special

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<sup>332</sup> Article 57(1) AP I. To the ICRC, this codified principle of precautions in attack establishes a rule of customary international law, see J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, pp. 51-52, Rule 15. On its customary nature, see also Eritrea-Ethiopia Claims Commission, Partial Award, Western front, Aerial Bombardment and related Claims, Eritrea’s Claims (2006), 45 ILM 326, at 417, 425.

<sup>333</sup> Article 57 (2) (a) (i) AP I.

<sup>334</sup> Article 57 (2) (a) (ii) AP I.

<sup>335</sup> Article 57 (2) (a) (iii) AP I.

<sup>336</sup> S. Oeter, “Methods and Means of Combat”, in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, 1995, para. 457.2.

<sup>337</sup> Switzerland’s declaration that the obligations related to the precautionary measures of Article 57(2) are imposed upon the commanders at battalion and higher levels shows States’ concern that the burden of responsibility on subordinate officers (as set by this norm) was too heavy, see W.A. Solf, “Article 57”, in M. Bothe, K.J. Partsch, W.A. Solf (eds.), *op. cit.*, at 363, para. 2.4.3, note 9; see Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, para. 2197.

<sup>338</sup> These terms are present in Protocols II and III and Amended Protocol II to the 1980 Weapons Convention: Article 3(4) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) of 10 October 1980; Article 1(5) of the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) of 10 October 1980; Article 3(10) of the Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II) of 3 May 1996. According to the Eritrea-Ethiopia Claims Commission feasible precautions are “*not precautions that are practically impossible*”, see Eritrea-Ethiopia Claims Commission, Partial Award, Central Front, Claims, Ethiopia’s Claims 2 (2004), 43 ILM 1275, at 1295.

<sup>339</sup> See M. Bothe, “Legal Restraints on Targeting: Protection of Civilian Population and the Changing Faces of Modern Conflicts”, *IYHR*, 2001, p. 45.

<sup>340</sup> A. Rogers, *Law in the Battlefield*, *op. cit.*, p. 69.

protection in force for it - such an attack must be cancelled or suspended<sup>341</sup> (this includes the case of a pilot incapable to distinguish a target with sufficient accuracy).<sup>342</sup>

Those making targeting decisions are required to take *feasible precautions* based on means and information existing at the relevant time, and a commander who disregards such information is considered at fault. The way in which the aforementioned ICTY Review Committee substantiated such obligation is extremely significant.<sup>343</sup> However, controversial situations may arise if information is inconsistent or scarce, or time is limited, or the most technologically higher and available means are not used. Indeed, feasibility implies a factual assessment of existing circumstances.

Nonetheless, among multiple military objectives from which would produce a similar advantage, a *careful selection of targets* is also required in order to choose the option that is estimated “*to cause the least danger*” to civilian lives or objects.<sup>344</sup>

Importantly, in evaluating the destruction or damage of civilian infrastructures and finding frequent violations of international humanitarian law and human rights law, the Commission of Inquiry on Lebanon deemed the attack on the Jiyeh power plant leading “*to a massive oil spill that polluted most of the Lebanese coast*” as an IHL violation based on the failure to take precautionary measures as well as “*human rights obligations to protect the natural environment and the right to health*”. This oil spill particularly damaged the Byblos archaeological site, included in the UNESCO World Heritage list, similarly contravening the same international obligation.<sup>345</sup>

An additional precautionary measure concerns “*effective advanced warning*”,<sup>346</sup> which is required when an attack against a military objective may affect the civilian population “*unless circumstances do not permit*” and is aimed at minimising harm to civilians. This precautionary requirement is

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<sup>341</sup> Article 57 (2) (b) AP I.

<sup>342</sup> For instance, during the 1990-1991 Persian Gulf War, “[a]ircrews attacking targets in populated areas were directed not to expend their munitions if they lacked positive identification of their targets. When this occurred, aircrews dropped their bombs on alternate targets or returned to base with their weapons”, see *Report to Congress on the Conduct of the Persian Gulf War*, *op. cit.*, p. 622.

<sup>343</sup> *ICTY Final Report*, *op. cit.*, at 498, para. 29, stating that: “*A military commander must set up an effective intelligence gathering system to collect and evaluate information concerning potential targets. The commander must also direct his forces to use available technical means to properly identify targets during operations. Both the commander and the aircrew actually engaged in operations must have some range of discretion to determine which available resources shall be used and how they shall be used*”.

<sup>344</sup> Article 57 (3) AP I. See C. Pilloud and J. Pictet, *op. cit.*, at 687.

<sup>345</sup> *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1*, 23 November 2006, UN Doc. A/HRC/3/2, para. 321.

<sup>346</sup> Article 57 (2)(c) AP I, whose predecessor is Article 26 HRs under which the officer in command of an attacking force should, “*before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities*”.

customary in nature.<sup>347</sup> This obligation is not applied when the military target is located in a remote area. Nonetheless, the circumstances that make a warning not possible may be controversial.<sup>348</sup> In this regard, it is commonly noted that whether the circumstances allow for a warning must be determined in good faith in order to *minimise injury to civilians or damage to civilian objects*. A limit on the application of the rule may be considered when the military advantage to be achieved by surprise would be challenged by a warning. Thus, making a computation of proportionality, the issue becomes whether the damage or injury to civilian objects or persons by not giving a warning is “excessive” in respect to the advantage concerned. However, Article 57 sets up an undisputable obligation (although not absolute) to *warn before attacks that involve the civilian population*, such as air strikes against a highly populated territory. In other words, warnings do not constitute acts of charity.

In order to meet the *effectiveness of a warning* in case of attacks various means are commonly viewed as appropriate, such as dropping leaflets, radio broadcasts or by internet, but it is also necessary to give the warning in advance to allow the civilian population to evacuate the area or to take safe haven. On this issue, a high standard was used in the aforementioned report mentioned above on the military operations conducted in Gaza during December 2008 and January 2009. The requirement of “*effective advanced warning*” was deemed satisfied only if “*it must reach those who are likely to be in danger from the planned attack, it must give them sufficient time to react ... it must clearly explain what they should do to avoid harm and it must be a credible warning. The warning also has to be clear so that the civilians are not in doubt that it is indeed addressed to them. As far as possible, warnings should state the location to be affected and where the civilians should seek safety. A credible warning means that civilians should be in no doubt that is intended to be acted upon, as a false alarm of hoax may undermine future warnings, putting civilians at risk*”.<sup>349</sup> On this basis, in examining Israeli armed forces’ discharging of the obligation to take all feasible precautions to protect the population of Gaza, the Fact-Finding Mission acknowledged their significant efforts via phone calls, radio broadcasts and leaflets, but also noted certain factors that weakened the efficacy of the warnings issued or diminished the reliability of instructions to move to city centre for safety (e.g. the lack of specificity of pre-recorded text messages and leaflets; the intense attacks which city centres were subjected to during the military air operations; the practice of “*roof knocking*”, which was

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<sup>347</sup> In view of State practice this rule is a norm of customary international law applicable in both international and internal armed conflicts, see J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, pp. 62-63, Rule 20.

<sup>348</sup> For instance, according to the British Manual of the Law of Armed Conflict, the element of surprise can be required for an attack to be successful to avoid that the enemy has the time to enhance its defence and further its response.

<sup>349</sup> See UN Doc. A/HRC/12/48, Chapter IX, para. 530. A relevant point made at the conclusion of its legal findings is that “*the effectiveness of the warnings has to be assessed in light of the overall circumstances that prevailed and the subjective view of conditions that the civilians concerned would take in deciding upon their response to the warning*” (paras. 537-542).

deemed a form of attack against the civilians residing in the buildings concerned).<sup>350</sup>

Similarly, the practice of evacuation warnings issued as part of Operation Protective Edge have been central in the critical narrative that Israel has not regularly complied with international law in its care for civilians in Gaza city during the hostilities throughout July and August 2014. In particular, a constant ineffectiveness of the warnings has been put into question as counterproductive to avoid spreading terror among the civilian population. This seems especially associated with missing key elements of effective warning, such as “*timeliness, informing civilians where it is safe to flee, and providing safe passage and sufficient time to flee before an attack*”.<sup>351</sup> Indeed, the controversial circumstance in which civilians had no means to leave, to get to safety and to flee to neighbouring countries has followed the enduring military blockade on the Gaza Strip and the closure of the Rafah crossing by the Egyptian authorities.

Notably, in the 2009 report referred to above, the reading of the effectiveness of the warning was more advanced than the traditional interpretation of the concerned provision, which refers to “*warnings ... made by radio or by means of pamphlets*” and underlines how “*warnings may also have a general character. A belligerent could, for example, give notice by radio that he will attack certain types of installations or factories. A warning could also contain a list of the objectives that will be attacked*”.<sup>352</sup> Similarly, the ICRC study refers to the general nature of warnings.

As far as *passive precautionary measures* are concerned, Article 58 AP I also requires the warring parties to *adopt certain precautions to protect the civilian population, civilians and civilian objects, which are under their control, against the effects of attacks by the adversary*. Specifically, the party is required to discharge three obligations “*to the maximum extent feasible*”: the evacuation of civilians and removal of civilian objects “*from the vicinity of military objectives*”; the avoidance of positioning military objectives “*within or near densely populated areas*”; and any additional precautions, such as providing for shelters and civilian defence programs, to protect civilian persons and objects “*against the dangers resulting from military*

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<sup>350</sup> As to the content of the text messages, they advised that “*the IDF will strike and destroy every site or building in which weapons or smuggling tunnels are found. Following this announcement, anyone located in a building containing weapons or where there are smuggling tunnels, is thereat his/her own risk and it is his/her responsibility to exit and evacuate hi/her family*”, see *Palestinian Centre for Human Rights*, [www.pchrgaza/files/PressR/English/2008/53-2099.html](http://www.pchrgaza/files/PressR/English/2008/53-2099.html). The lack of effectiveness in such warnings has been criticised by focusing on two issues: firstly, the presumption in this message that individuals knew about the military use of these buildings was not always the case; secondly, the leaflets did not contain indication about the direction or the place where civilians would have moved or about the time available to evacuate. The conformation of the Gaza Strip as well as the closure of borders did not let escape to the civilians that would have moved away from the area, see L. Vierucci, “*Sul principio di proporzionalità a Gaza, ovvero quando il fine giustifica i mezzi*”, *Diritti Umani e Diritto Internazionale*, 2009, pp. 327-328.

<sup>351</sup> See UN, *Statement attributable to the Spokesman for the Secretary General on Gaza*, 28 July 2014; Amnesty International, *Israel/Gaza Conflict*, 25 July 2014; Human Rights Watch, *HRW critical of Israel's Gaza evacuation warnings*, 1 August 2014.

<sup>352</sup> Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, at 686-7, paras. 2222-2225.

*operations*".

Although this provision reflects customary international law,<sup>353</sup> the nature of recommendations (rather than obligations) has been questioned.<sup>354</sup> However, as explained by the authoritative ICRC commentary on this provision, the use of the term "feasible" is used to illustrate "*the fact that no one can be required to do the impossible. In this case it is clear that precautions should not go beyond the point where the life of the population would become difficult or even impossible*"; it is further posited how "*a Party to the conflict cannot be expected to arrange its armed forces and installations in such a way as to make them conspicuous to the benefit of the adversary*".

Notably, in the recent armed conflict in Georgia, the obligation upon the defender to minimise civilian losses and casualties or damage to civilian objects was specifically underlined in relation to the houses located in Tskhinvali, where South Ossetian forces reportedly violated international humanitarian law by firing from residential buildings at Georgian ground troops, using them as defensive positions and putting at risk the life of civilians who were sheltering in the basements of the same buildings.<sup>355</sup>

The ability to respect the obligations on feasible precautions in attack is affected by an infinite number of *variables* to be evaluated by the planner and decision maker of the attacks so as to minimise the risk of collateral damage. These factors include the position of the military objectives, the presence civilians, the nature of the surrounding terrain and the meteorological conditions, the accuracy and kind of weapons, the technical training of combatants, their mental and physical condition.<sup>356</sup> For instance, when military operations occur in urban populated areas the obligations regarding feasible precautions in attack play a very important role especially to take all possible steps to minimise harm to civilian and not damage civilian objects. However, the fact that in such urban contexts hostilities involve very mobile forces makes highly problematic compliance with these rules.<sup>357</sup>

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<sup>353</sup> See Eritrea-Ethiopia Claims Commission, Partial Award, Western front, Aerial Bombardment and related Claims, Eritrea's Claims (2006), 45 ILM 326, at 417, 425. See ICTY, *Kupreskic case*, Judgment, Trial Chamber, 14 January 2000, paras. 524-525. See also ICRC Study on Customary IHL, 2005, p. 68, Rules 22-24.

<sup>354</sup> See P. Bretton, "Le problème des "méthodes et moyens de guerre ou de combat" dans les Protocoles additionnels aux Conventions de Genève du 12 août 1949", *R.G.D.I.P.*, tome LXXXII, 1978, p. 69.

<sup>355</sup> See Independent International Fact-Finding Mission on the conflict in Georgia, *Report September 2009*, Volume II, Chapter 7, at 350-351, affirming that Human Rights Watch also raised the same issue. In particular, it is reported that several members of the interviewed Ossetian militia confirmed that the militias used many of the school and nursery school buildings as gathering points and defence positions.

<sup>356</sup> W.A. Solf, "Article 57", in M. Bothe, K.J. Partsch, W.A. Solf (eds.), *op. cit.*, at 364, para. 2.6.1.

<sup>357</sup> See, *e.g.*, Independent International Fact-Finding Mission on the conflict in Georgia, *Report September 2009*, Volume II, Chapter 7, pp. 346-350. In the context of the Russia-Georgia conflict in August 2008, during the offensive

Among those variables, the requirement of *being attentive to the potential impact of diverse available weapons*<sup>358</sup> seems extremely relevant from the perspective of their indirect effects on the civilian population, in particular for the protection of *the right to health of civilians*. The focal point seems not the State duty to employ the means of warfare enabling accurate targeting.<sup>359</sup> Rather, there is a practical perception that *the progress and the use of weapons* represent *areas where the interface between the law and issues of health and safety of civilians result growingly important*.

It is worth underlining that, while some weapons are prohibited regardless specific categories of individuals (*e.g.* biological or chemical weapons), other types are prohibited exactly because they may affect civilians (*e.g.* antipersonnel land mines),<sup>360</sup> whereas the use of other kind of weapons is permitted by belligerents except if there is the risk of hitting the civilian population (*e.g.* in the case of the prohibition of booby-traps when directed against the civilian population).<sup>361</sup> Regrettably, the use of incendiary weapons - including white phosphorus, napalm and flamethrowers - against military targets is not proscribed under international law provided that the rules established by the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons<sup>362</sup> are respected. However, the practice of recent military operations challenges the sense of permitting its use without further degree of control. In this regard, it appears that the customary international law obligation that is

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on Tskhinvali and other villages in South Ossetia, it is reported that Georgian forces raised serious concerns in relation to their obligations to take the precautions required under international humanitarian law. While the identification of legitimate military targets and the efforts made to minimise those located in the city or near populated areas were viewed as respectful of such rules, some controversial issues included the choice of artillery for conducting the attacks, the list of targets "*identified during hostilities*", the intelligence used to select targets, the presence of the civilian population in Tskhinvali at the time of the offensive. Nevertheless, in several cases the Russian forces also reportedly failed to comply with their IHL obligations with regard to precautions before attacks.

<sup>358</sup> Oeter, "Methods and Means of Combat", in Fleck D. (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, 1995, p. 209.

<sup>359</sup> On the use of precision weaponry, it has been argued that the duty to use precision-guided munitions in urban warfare is emerging as a customary norm, see S.W. Belt, "Missiles Over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas", *Naval Law Review*, 2000, pp. 115-174, noting the ambiguity of Article 57 for imposing such a duty and so turning to customary law to prove its existence. For a critical analysis, see J.F. Murphy, "Some Legal (And Few Ethical) Dimensions of the Collateral Damage Resulting from Nato's Kosovo Campaign", in A.E. Wall, *op. cit.*, pp. 229-243. Conversely, it has been pointed out that "*the availability of precision-guided munitions by no means foreclose recourse to precautionary options*", see Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*<sup>2</sup>, Cambridge, 2010, p. 143.

<sup>360</sup> See Convention on the Prohibition of the Use, Stockpiling, Production and Transfers of Anti-Personnel Mines and on their Destruction, concluded 18 September 1997, entered into force on 1 March 1999, 2056 UNTS 211. The prohibition is absolute as States parties undertake to "*never*" use them "*under any circumstances*"; such a prohibition is reinforced by the prohibition of reservations to the provisions of the Convention.

<sup>361</sup> Article 7 (1) of Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II) (as amended on 3 May 1996), Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects.

<sup>362</sup> Article 2 of Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons (10 October 1980), additional to the 1980 UN Convention on the Prohibition or Restrictions on the Use of Certain Conventional Weapons, which prohibits the use of incendiary weapons against civilians.

reflected in Article 57(2)(a)(ii) API (*i.e. the duty to take “all feasible precautions” in the selection of means and methods of warfare so as to avoid and “in any event” minimise incidental loss of civilian life, injury to civilians and damage to civilian objects*) does deserve great attention in relation to the serious consequences of using weapons with incendiary properties in proximity of civilian persons and objects.

The reportedly misuse of white phosphorus in the practice of recent military operations has been criticised as a specific violation of that rule, and it raises the outstanding need for re-consideration of the use of such especially hazardous materials. In general, white phosphorus is used in grenades and shells to mark targets, to provide smokescreens for troop movement, to “trace” the path of bullets, and as an incendiary.<sup>363</sup> For instance, the choice of deploying it during the ground phase of Operation Cast Lead in build-up areas, in and around zones reserved to civilian health and safety, has been deemed systematically “reckless and not justifiable for any military advantage sought in the particular circumstances”.<sup>364</sup> This issue received great scrutiny on account of analysis by various organizations.<sup>365</sup> A particular concern about such a use was linked to the caused damage, since white phosphorus keeps burning until it is in contact with oxygen; medical experts who treated wounded patients were “impressed by the severity and sometimes untreatable nature of the burns caused by the highly toxic substance”; further, an actual health threat to doctors dealing with patients was posed by its extensive use in civilian settings.<sup>366</sup>

As far as white phosphorus is not prohibited by international law as it stands, its use can be evaluated only in light of the principles of proportionality and precautions. However, the very substantial risks carried from its repeated misuse by armed forces calls into question the absence of further degree of control. Indeed, its military capabilities might be supplied by “other screening and

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<sup>363</sup> For an explanation of the uses and effects of white phosphorus in weapons, see Federation of American Scientists, “White Phosphorus Fact Sheet”, available at:

<http://www.fas.org/biosecurity/resource/factsheets/whitephosphorus.htm>

<sup>364</sup> UN Doc. A/HRC/12/48, Chapter IX, paras. 587-595, paras. 624-629, paras. 648-652. In some recounted incidents the Mission had specific concern about “the choice to use white phosphorous in the proximities of civilian premises”. These incidents regarded the field office compound of the UN Relief and Work Agency for Palestine Refugees in the Near East of Gaza City, the attacks on al-Quds and Wafa hospitals with “vulnerable patients receiving long-term care and suffering from particularly serious injuries”, and its use “in the attack on the Abu Halima family to the north of al-Atatra and in Khuz’a”.

<sup>365</sup> Physicians for Human Rights-Israel, *Report of the Independent Fact Finding Mission into violations in the Gaza Strip during the period 27.12.08-18.01.09*; Human Rights Watch, *Rain of Fire: Israel’s Unlawful Use of White Phosphorous in Gaza*, March 2009; Amnesty International, *Fuelling conflict: Foreign arms supplies to Israel/Gaza*, February 2009; Report of the Independent Fact-Finding Committee on Gaza, “No safe place . . .”, paras. 206-207; UNRWA, *Summary of the Report of the United Nations Headquarters Board of Inquiry*, paras. 46-56. See I.J. MacLeod and A.P.V. Rogers, “The use of white phosphorous and the Law of War”, in T.L.H. McCormack (ed.), *Yearbook of International Humanitaria Law*, Asser Press, 2009, 123-139.

<sup>366</sup> See UN Doc. A/HRC/12/48, Chapter XII, paras. 895-900; *inter alia*, it is reported how several doctors “believed they had dealt with a wound successfully only to find unexpected complications developing as a result of the phosphorous having caused deeper damage to tissue and organs than could be detected at the time”. According to doctors, several patients died because of organ failure resulting from the burns. According to medical staff, “even working in the areas where the phosphorous had been used made them feel sick, their lips would swell and they would become extremely thirsty and nauseous”.

*illuminating means which are free from the toxicities, volatilities and hazards that are inherent in the chemical white phosphorus*”.<sup>367</sup> In this vein, banning its use as an obscurant has been called into question.

An additional detrimental effect on the enjoyment of the right to health, “*beyond the impact generally associated with being affected by anti-personal weapons in an armed conflict*”, has been stressed in relation to the use of other weapons, such as Dense Inert Metal Explosive (DIME) munitions or flechette missiles, and the use of depleted uranium.<sup>368</sup> Nonetheless, the use of these weapons was not expressly qualified as a violation of Article 12 ICESCR.

#### **6.4. Prohibitions or limitations on use and attacks on certain objects**

During the conduct of hostilities civilian immunity is further enhanced by a special protection regime provided for certain objects, most of which are civilian in any case. Essentially, those who control such objects cannot use them for military purposes; even if they were somehow manipulated to be used in this way, they can only be attacked under limited circumstances. Furthermore, rigorous evidence of their modified status and a higher degree of precautionary measures apply. As will be shown, this special protection regime may have a basic importance in safeguarding certain dimensions of civilians’ ESC rights against the effects of warfare. Accordingly, an in-depth reflection on the suitability of the rules in question as an adequate response to relevant challenges posed by contemporary warfare will be conducted.

In relation to some of these objectives the special protection regime is strongly connected to *their inherent humanitarian value to society*, as attacking them would correspond to harming the civilian population, which the law seeks to prevent. The prohibitions on targeting *medical transports*<sup>369</sup> or *medical units*<sup>370</sup> are pertinent examples; such protection may cease only when the concerned vehicles

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<sup>367</sup> See UN Doc. A/HRC/12/48, Chapter IX, para. 901.

<sup>368</sup> See UN Doc. A/HRC/12/48, Chapter IX, paras. 902-912. Particularly, materials on specific health concerns for the survivors of DIME weapon injuries were submitted by the expert witness Lt. Col Lane; it is reported that “*the tungsten alloy particles are suspected to be highly carcinogenic and so small that they cannot be extracted from the patient’s body. Dr. Mads Gilbert noted that there had been no follow-up studies on the survivors of this type of amputation observed in Gaza and Lebanon since 2006 following Israeli military operations. Some research suggests that these patients might be at increased risk of cancer. These concern apply equally to missile*”.

<sup>369</sup> They refer to military or civilian means of medical transportation, whether temporary or permanent, controlled by a competent authority of a belligerent party (e.g. means of transportation by air, land, or water, like medical aircraft ambulances, or hospital ships). See Art. 21 GCIV; Art. 21 API; Art. 35 GCI. See also J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, p. 98, Rule 29.

<sup>370</sup> They refer to military or civilian establishments and units arranged for medical purposes, whether temporary or permanent, mobile or fixed (e.g. *hospitals, preventive medicine centres and institutes, blood transfusion centres, medical depots, pharmaceutical stores*). See Art. 18 GCIV; Art. 8 (e) API; Art. 19 GCI; Art. 23 GCII. See also J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, p. 91, Rule 28.



and facilities are utilised to execute “acts harmful to the enemy”.<sup>371</sup> Illustrations of the activity that removes protection include their use as military observation posts, as ammunitions dumps, as shelters for fugitives or combatants, as impediments to the enemy’s conduct,<sup>372</sup> or the use of a medical unit or vehicle to “shield” a military objective from an attack.<sup>373</sup> Nevertheless, the loss of such protected status through the adversary’s misuse does not negate the fact that the principle of proportionality must be respected and a warning issued as an explicit safeguard to ensure humane treatment of both patients and medical staff.<sup>374</sup> Notably, in the context of the Cast Lead military operation, the serious IHL violations referred to in several reports reviewing those events also included firing upon medical units and medical personnel (which made the collection of and care of the wounded more difficult) as well as failing to allow access to the wounded.<sup>375</sup>

A similar special regime provides for the protection of medical transports and units in armed conflict of non-international character.<sup>376</sup> This regime has been blatantly disrespected in war-torn Syria, which was recently declared as “an enduring and underreported trend” of attacks on hospitals in certain areas by anti-Government armed groups and the denial by the Government of “medical care to those from opposition-controlled and affiliated areas as a matter of policy”.<sup>377</sup> The multiple accounts detailed by the Independent International Commission of Inquiry include attacks on medical units, the destruction of hospitals or their use for hostile purposes, the targeting of medical personnel and

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<sup>371</sup> For medical units and transport on land, see Art. 19 GCIV; Art. 13(1) API; Art. 21 GCI; for medical ships, see Art. 34; for medical aircrafts, see Art. 28(1) API. The meaning of “acts harmful to the enemy” is limited by providing the acts that do not remove protection: for medical units and transport on land, see Art. 19 GCIV; Art. 13(2) API; Art. 22 GC I; for medical ships, see Art. 35 GC II; for medical aircrafts, see Art. 28(3) API.

<sup>372</sup> See J. Pictet (ed.) *Commentary to the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1952, pp. 200-201. However, commentary to Article 21 GCI specifies that during the negotiations of the 1949 Geneva Conventions “it was considered unnecessary to define ‘acts harmful to the enemy’, whose meaning is self-evident and which must remain quite general”. The alternative and more explicit expression set by the ICRC was “acts the purpose or effect of which is to harm the adverse Party, by facilitating or impeding military operations”.

<sup>373</sup> Pursuant to Article 12(4) API, “Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety”. This prohibition is deemed applicable to medical vehicles (Art. 21 API) and medical aircrafts; the latter cannot be employed “to acquire any military advantage over the adverse party”, “to collect or transmit intelligence data” and they cannot carry any armament (apart from small arms gained from the sick, wounded or shipwrecked) (Art. 28 API).

<sup>374</sup> Art. 21 GCI; Art. 19 GCIV; Art. 13(1) API. The warning is required “where appropriate”, covering cases when it is not possible to establish a “time-limit” (e.g. heavy fire from a hospital or an ambulance), see Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), *op. cit.*, para. 556.

<sup>375</sup> Press Release, ICRC, “Gaza: ICRC Demands Urgent Access to Wounded as Israeli Army Fails to Assist Wounded Palestinians”, 8 January 2009; Press Release, ICRC, “Gaza: Life-Saving Ambulances Must be Given Unrestricted Access to the Wounded”, 8 January 2009.

<sup>376</sup> Art. 11 AP II.

<sup>377</sup> See “Assault on medical care: a distinct and chilling reality of the civil war in Syria”, 8 October 2013. See *Report of the independent international commission of inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/25/65, 2 February 2014, paras. 107-115. See Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/S-17/2/Add.1, 23 November 2011, paras. 50, 58, 80-81.

transport,<sup>378</sup> and the interference with the care of patients believed to support the opposition. In the words of the chair of the Commission, Paulo Sérgio Pinheiro, an alarming feature of this conflict has been “*the discriminatory denial of the right to health as a weapon of war*”. As explicitly noted by the Commission, intentional attacks directed against medical transports and units using the Red Cross or Red Crescent emblem or against hospitals and places sheltering the wounded and the sick constitute war crimes.

Indeed, regarding the numerous primary IHL norms protecting health, which have been transposed to international criminal law and codified as war crimes in the ICC Statute, specific provisions criminalise the “*intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law*” as well as the “*intentionally directing attacks against buildings dedicated to ... hospitals and places where the sick and wounded are collected, provided they are not military objectives*”.<sup>379</sup> Notably, in the context of preliminary examinations on the situation of Afghanistan, attacks on hospitals and Medevac helicopters as perpetrated since May 2003 by armed groups were included among attacks on protected objects.<sup>380</sup>

Conversely, in other situations *the intrinsic value of the object* determines a shift in the law, whose aim becomes protecting it for what it is and represents to future generations. This may be the case of cultural property, but also of the natural environment.<sup>381</sup> In this sense, some treaty rules supplement the customary norms and principles that regard the *natural environment* as a “civilian object” and prohibit the parties to a conflict from causing it disproportionate damage. They require to “*take care in warfare to protect the natural environment against widespread, long-term and severe damage*”, specifically prohibiting means or methods of conduct of hostilities which are aimed or estimated to produce such damage and “*to prejudice the health or survival of the population*”.<sup>382</sup> Additional rules prohibit

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<sup>378</sup> This has been declared as one of the most “*insidious trends*” of the war, with incidents in which ambulance drivers, nurses, doctors and medical volunteers have been attacked, arrested, unlawfully detained, and disappeared. According to the Commission, “*the clearly established pattern indicates that Government forces deliberately target medical personnel to gain military advantage by depriving the opposition and those perceived to support them of medical assistance for injuries sustained*”; the situation is so awful that the general populace often elected not to seek help for “*fear of arrest, detention, torture or death*”.

<sup>379</sup> Art. 8(2)(b)(xxiv) and Art. 8(2)(e)(ii) as well as Art. 8(2)(b)(ix) and Art. 8(2)(e)(iv) ICC Statute are identical for both international and non-international armed conflicts.

<sup>380</sup> ICC OTP, *Report on Preliminary Examination Activities 2011*, 13 December 2011, para. 28; ICC OTP, *Report on Preliminary Examination Activities 2012*, 22 November 2012, para. 31. Since Afghanistan deposited its instrument of ratification to the Rome Statute on 10 February 2003, the ICC has jurisdiction over Rome Statute crimes committed on its territory or by its nationals from 1 May 2003 onwards.

<sup>381</sup> The ICJ confirmed the indissoluble relation between the natural environment and human beings by stating that “*the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn*”, see *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, at 241, para. 29.

<sup>382</sup> Arts. 35 (3) and 55 API.

the use of the environment as a weapon.<sup>383</sup>

As anticipated, special protection is set down for certain property. For instance, in the case of *works and installations containing dangerous forces*, attacks on these objects as well as attacks on military targets found in their vicinity (when these would cause enough damage and risk of great casualties to endanger the civilian population) are prohibited and a higher threshold for targeting is provided.<sup>384</sup> *Cultural property* and *objects indispensable to the survival of the civilian population* deserve more detailed scrutiny for the purposes of the present research. In the following sections, they will be considered in tandem with the protection afforded to an additional element; namely *education*.

## 6.5. Cultural property

Since the earliest codifications of the laws of war, the protection of culture has been recognised both in its physical manifestations as cultural heritage and cultural property and in its practice and enjoyment as cultural rights in contexts of armed conflict alongside military occupation.<sup>385</sup> Focusing on the conduct of hostilities, the special regime progressively providing for civilian objects falling within this category essentially prohibits the targeting of cultural property as well as its use for military purposes, allowing immunity to be waived on account of imperative military necessity.

One of the main challenges remains, however, the determination of *what precisely constitutes cultural property*. Indeed, as the scrutiny of the scope of application of the relevant *ius in bello* framework will show, two aspects significantly influence that challenging determination: *the spiritual and cultural value of certain objects are often established according to subjective criteria*, and, additionally, within a given community *the relative importance of an object may change over time as well as under certain circumstances*. A typical example may be the case of a school having little historic or artistic value, but whose destruction is part of a campaign aimed to damage places of education so as to eliminate the opportunity for a people to study its own history and language. In light of the function served by schools in preserving the identity of a “targeted” group, such acts may be considered as an attack on

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<sup>383</sup> Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 2 September 1976.

<sup>384</sup> Their special protection ceases only under limited circumstances, see Art. 56 (2) API. See Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), *op. cit.*, pp. 665-675. See M. Sassòli and L. Cameron, “The Protection of Civilian Objects”, in N. Ronzitti and G. Venturini (eds.), *The Law of Air Warfare. Contemporary Issues*, Eleven International Publishing, 2006, p. 47.

<sup>385</sup> A.F. Panzera, *La tutela internazionale dei beni culturali in tempo di guerra*, Torino, 1993; F. Francioni, “Patrimonio culturale, sovranità degli Stati e conflitti armati”, in G. Feliciani (ed.), *Beni culturali di interesse religioso*, Bologna, 1995, p. 149 ff.; A. Gioia, “La protezione dei beni culturali nei conflitti armati”, in F. Francioni, A. Del Vecchio, P. De Caterini (eds.), *Protezione internazionale del patrimonio culturale: interessi nazionali e difesa del patrimonio comune della cultura*, Milano, 2000, p. 71 ff.; R. O’Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge, 2006; L. Zagato, *La protezione dei beni culturali all’alba del secondo protocollo 1999*, Torino, 2007; C. Forrest, “Cultural Heritage and Armed Conflict”, in *International law and the protection of cultural heritage*, Routledge, 2010, pp. 56-131.

cultural property. Thus, subjectivity as well as contextual analysis appear inevitably involved establishing when an object may constitute cultural property. This makes it extremely important to reflect on *the extent to which* these two aspects influence the ability of the law to be predictable and to be capable of elevating certain objects to a higher realm of protection according to emerging exigencies in connection to the changing nature of warfare.

Conversely, for the purpose of the present research, another basic issue to consider is that the targeting, destroying, plundering or any other form of damage to cultural heritage and cultural property during the conduct of hostilities may be deemed to impair the enjoyment of the cultural rights of civilians, particularly *the right of everybody to take part in cultural life* as enshrined in Article 15(1)(a) ICESCR and Article 27(1) UDHR.<sup>386</sup> In this vein, the contribution deriving from the protection of cultural property during armed conflicts to the full enjoyment of cultural rights has been emphasised by the Human Rights Council.<sup>387</sup> Significantly, the normative content of the right of everyone to take part in cultural life has been interpreted as entailing States' obligations to respect and protect cultural heritage in times of war, including "*the care, preservation and restoration of historical sites, monuments, works of art and literary works, among others*".<sup>388</sup> Furthermore, the same right has been interpreted as being closely related to the other cultural rights set out in Article 15, as intrinsically linked to the right to education enshrined in Articles 13 and 14, and as interdependent on other rights guaranteed under this Covenant, including the right of all peoples to self-determination (Article 1) and the right to an adequate standard of living (Article 11).<sup>389</sup>

In actual fact, several human rights instruments may afford protection to cultural rights of civilians and cultural heritage in the context of armed conflict or belligerent occupation. In addition to the right to education and full development of human personality of Article 26(2) UDHR, they

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<sup>386</sup> ICESCR, GA Res. 2200A (XXI), UN Doc. A/6316 (1966), 16 December 1966, in force 3 January 1976. In its revised reporting guidelines, the CESCR requires States Parties to advise of "[T]he measures taken to protect cultural diversity, promote awareness of the cultural heritage of ethnic, religious or linguistic minorities and of indigenous communities, and create favourable conditions for them to preserve, develop, express and disseminate their identity, history, culture, language, traditions and customs", see "Guidelines on Treaty-Specific Documents to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights", 13 January 2009, E/C.12/2008/2, at 14, para.68.

<sup>387</sup> In 2007 the Human Rights Council recognised the mutually reinforcing protection afforded to cultural rights and cultural heritage by international humanitarian law and human rights law, see UN Doc. A/HRC/RES/6/1, 27 September 2007, "Protection of cultural rights and property in situations of armed conflict". See also E/C.12/1/Add.90; see A/HRC/RES/6/19, 28 September 2007, "Religious and cultural rights in the Occupied Palestinian Territory, including East Jerusalem".

<sup>388</sup> CESCR, *General Comment No. 21: Right of everyone to take part in cultural life (Art. 15, para. 1 (a))*, 21 December 2009, UN Doc. E/C.12/GC/21, para. 50 (a).

<sup>389</sup> CESCR, *General Comment No. 21, ibid.*, para. 2-3.

refer to the right to equal participation in cultural activities,<sup>390</sup> the right to participate in all aspects of social and cultural life,<sup>391</sup> the right to participate fully in cultural and artistic life,<sup>392</sup> the right of access to and participation in cultural life,<sup>393</sup> and the right to take part on an equal basis with others in cultural life.<sup>394</sup> Important provisions are also included in instruments on political and civil rights,<sup>395</sup> on the rights of individuals belonging to minorities to enjoy their own culture, to use their own language, to practise and profess their own religion, in private and in public,<sup>396</sup> and to participate effectively in cultural life,<sup>397</sup> on the rights of indigenous peoples to their cultural institutions, ancestral lands, natural resources and traditional knowledge,<sup>398</sup> and on the right to development.<sup>399</sup>

It is in view of these considerations that the following two sub-sections look at the international legal regime protecting cultural property during the conduct of hostilities and discuss its ability to address and mitigate their adverse affects.

### **6.5.a. Remarks on the scope of the protective regime**

The conventions on the laws and customs of war concluded at The Hague Peace Conferences in 1899<sup>400</sup> and 1907<sup>401</sup> codified primary formal rules affording a certain degree of protection to

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<sup>390</sup> Article 5 (e) (vi) of the International Convention on the Elimination of All Forms of Racial Discrimination.

<sup>391</sup> Article 13 (c) of the Convention on the Elimination of All Forms of Discrimination against Women.

<sup>392</sup> Article 31 (2) of the Convention on the Rights of the Child.

<sup>393</sup> Article 43 (1) (g) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

<sup>394</sup> Article 30 (1) of the Convention on the Rights of Persons with Disabilities.

<sup>395</sup> *E.g.* Articles 17, 18, 19, 21 and 22 ICCPR.

<sup>396</sup> Article 27 ICCPR.

<sup>397</sup> Article 2 (1) and (2) of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. See also Article 15 of the Framework Convention for the Protection of National Minorities (Council of Europe, ETS No. 157).

<sup>398</sup> UN Declaration on the Rights of Indigenous Peoples, principally Arts. 5, 8, and 10-13 ff. See also ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, principally Arts. 2, 5, 7, 8, and 13-15 ff.

<sup>399</sup> Article 1 of the Declaration on the Right to Development (GA Res. 41/128). See CESCR, *General Comment No. 4*, para. 9, in which the Committee considers that rights cannot be viewed in isolation from other human rights contained in the ICCPR and the ICESCR and other applicable international instruments.

<sup>400</sup> Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 29 July 1899, 32 Stat. 1803. Although the 1907 Hague Convention was intended to replace the 1899 Hague Convention, eighteen State parties to the latter (*e.g.* Turkey) did not ratify the former. See particularly Articles 23, 28, and 47 which prohibit pillage and seizure by invading forces, and Article 27 which requires belligerents to take “*all necessary steps*” in sieges and bombardments “*to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected*” as long as they are not used for military purposes, marked with the distinctive sign, and notified to the enemy.

<sup>401</sup> Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, 36 Stat. 2277, TS 539, in A. Roberts and R. Guelff, (eds.) *Documents on the Laws of War*, 1989, at 46. In addition to relevant provisions on civilian private property (Art. 23(g) and Art. 28 prohibiting pillage), three provisions of the 1907 Hague Regulations annexed to this Convention were

cultural objects. They were applicable to international armed conflicts only according to the *si omnes clause*. Protecting cultural heritage was nonetheless a mutual concern of the international community, as shown by preceding provisions such as those contained in the Lieber Code of 1863<sup>402</sup> or in the Brussels International Declaration of 1874 concerning the Laws and Customs of war.<sup>403</sup>

Although the Hague Regulations proved not sufficient to avoid the destruction and the loss of cultural property during the First World War, it was not until the large-scale cultural looting and indiscriminate destruction of art during the Second World War that thoughtful considerations were given to the shortcomings of international law.<sup>404</sup> The significance of the protection of cultural heritage as a value related to the international community as a whole was then proclaimed in the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (the 1954 Hague Convention).<sup>405</sup> This set up the first international comprehensive protective regime moving beyond the nature and purpose approach of earlier instruments.<sup>406</sup> Several of its sections have been clarified by the 1999 Second Hague Protocol, which is explicitly applicable to both international and civil armed conflicts and which provides the possibility of increasing the protective regime by raising the threshold for military use of cultural objects, as well as significantly setting out a list of

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specifically drawn to protect cultural heritage: Article 27 (“1. In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. 2. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand”); Article 47, which prohibits pillage during belligerent occupation; and Article 56, which regards cultural heritage (movable and immovable property) in occupied territory as private property.

<sup>402</sup> It was the first codification of provisions governing the protection of cultural property during armed conflict. These army regulations were drafted at the request of President Abraham Lincoln in the context of the Civil War. They provided for a determination of ownership of cultural property by treaty after the war in situations where the code allowed seizure of art objects. They also provided additional protection from damage for art and libraries.

<sup>403</sup> Adopted in the context of an intergovernmental conference sponsored by Russia, it contained Articles VIII and XVII which prohibited belligerents from attacking and looting the property and the buildings dedicated to religion, education, art and science, and which influenced the evolution of successive practice and law, although it remained not legally binding. Article 34 and 53 of the Oxford Manual on Land Warfare of 1880 confirmed similar prohibitions.

<sup>404</sup> A notable earlier initiative was the Roerich Pact, namely the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Washington, 15 April 1935), available at [www.icrc.org/ihl.nsf](http://www.icrc.org/ihl.nsf). It was a regional treaty between the United States and other American countries, which acknowledged for the first time cultural property as the common heritage of all peoples’ culture (according to its preamble, “*immovable monuments ... form the cultural treasure of peoples*”). Another noteworthy project was undertaken by the League of Nations to adopt a general Convention on the protection of cultural objects in view of the Spanish Civil War, but it was never implemented.

<sup>405</sup> Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, 249 U.N.T.S. (1954) 215, in force 7 August 1956. The Convention is accompanied by a Regulation for its execution that form an integral part of it, and by a First Protocol aimed at impeding the export of cultural objects from an occupied territory as well as assuring their return when they are in protective custody abroad.

<sup>406</sup> It applies to international and non-international armed conflicts. Each of the parties to the internal conflict is bound to the convention’s obligations “*as a minimum*”, see Article 19(1). This application of the Convention has been recognised to form part of customary international law, see *Prosecutor v. Dusko Tadic* (IT-94-1-A), Interlocutory Appeal Judgment, 2 October 1995, paras. 98 and 127.

serious violations of the Protocol itself.<sup>407</sup>

According to the Preamble of the 1954 Hague Convention, “... *damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world*” and “*the preservation of the cultural heritage is of great importance for all peoples of the world and [...] it is important that this heritage should receive international protection*”.<sup>408</sup> The language of such a “*universalist message*”<sup>409</sup> visibly highlights that in the context of armed conflict cultural property is protected for what it symbolises and represents, against incidental damage arising from the exigencies of war as well as against intentional destruction harming the population whose identity is bound to its preservation. As has been stated, the systematic destruction of such objects during hostilities inflicts damage on existing generations so as “*to orphan future generations and destroy their understanding of who they are and from where they come*”.<sup>410</sup>

Notably, this Convention has been applied to Contracting Parties involved in several armed conflicts in the past sixty years. Regrettable practice has emerged in the Levant region since the 1960s, particularly in Afghanistan after to the Soviet invasion, in the Israeli-Palestinian conflict, in the Iran-Iraq war in the 1980s with the significant damage to the eleventh-century Jomeh Mosque, in the Persian Gulf Wars and during the Iraqi occupation of Kuwait,<sup>411</sup> in the Israeli-Lebanese war of 2006; in the conflict in Cambodia in the early 1980s and in the Vietnamese occupation; and in the war between Ethiopia and Eritrea with the considerable deliberate damage caused by explosion at the 2,500 year old Stela of Matara.

A deplorable instance of deliberate destruction of cultural property as part of the identity-based violence can be seen in the conflicts in the Balkans in the 1990s and early 2000s, where belligerents often directly attacked the enemy’s cultural property without the justification of military necessity. The most extensive attacks committed against such property during the 1991-1995 armed conflicts were those that destroyed the Mostar Bridge in Bosnia-Herzegovina and the Old Town of Dubrovnik in Croatia. Other instances of cultural aggressions as tools to erase the manifestation of the enemy’s identity concerned, *inter alia*, the Croatian city of Vukovar, where ancient and medieval

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<sup>407</sup> Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999, in force 9 March 2004, 38 *I.L.M.* (1999), at 769.

<sup>408</sup> A.F. Panzera, *La tutela internazionale dei beni culturali in tempo di guerra*, Torino, 1993, pp. 30 and 72. See A. Gioia, “La protezione dei beni culturali nei conflitti armati”, in F. Francioni, A. Del Vecchio, and P. De Caterini (eds.), *Protezione internazionale del patrimonio culturale: interessi nazionali e difesa del patrimonio comune della cultura*, Milano, 2000, p. 76.

<sup>409</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2010, p. 175.

<sup>410</sup> H. Abtahi, “The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia”, *Harvard Human Rights Journal*, 2001, p. 2.

<sup>411</sup> P. Gerstenblith, “From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21<sup>st</sup> Century”, 2006, 37 *Georgetown Journal of International Law*, pp. 245-351.

sites and the eighteenth-century Eltz Castle (with its museum) were vandalised by Serb-controlled Federal troops; the city of Split, where Roman villas were attacked and the sixteenth-century Fortress of Stara Gradiška overlooking the Sava River was damaged by the same troops; the city of Osijek, where the Assumption and St. Dimitrius Churches were attacked; in Bosnia-Herzegovina also Bašćaršija and Stari Most, the historic centres of Sarajevo and Mostar were targeted; and in Croatia the Jasenovac memorial complex came under attack.<sup>412</sup>

As will be highlighted hereafter, the recent armed conflicts in Libya, Mali, and Syria have further raised specific concern in relation to cultural property.

The 1954 Hague Convention and the 1999 Second Hague Protocol do not cover the entire scale of cultural property.<sup>413</sup> According to three legal criteria laid down by this Convention to define cultural property, it includes publicly or privately owned, movable and immovable property that is considered of “*great importance to the cultural heritage of every people*”, buildings preserving or exhibiting cultural objects, and historical centres containing a huge quantity of cultural heritage.<sup>414</sup> The textual reference to a subjective concept like “*great importance*” is counterbalanced by the subsequent phrase “*of every people*” which has been interpreted as referring to “*each respective people*”.<sup>415</sup> Accordingly, protection does not extend to every object deemed of cultural significance or part of the national heritage by the country location; instead, those items considered *part of the inherent cultural value and heritage of each people (because they are a representative part of the heritage of the entire world)* are covered.<sup>416</sup>

The use of a universally recognised distinctive emblem is required to ensure the identification of

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<sup>412</sup> J. K. Detling, “Eternal Silence: The Destruction of Cultural Property in Yugoslavia”, *Maryland Journal of International Law and Trade*, 1993, pp. 66-68.

<sup>413</sup> See Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, signed on 14 May 1954 in The Hague, and on other instruments of international law concerning such protection*, 1996, pp. 45-56; R. O’Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge, 2006, pp. 101-111.

<sup>414</sup> These three categories of properties are detailed in Article 1 of the 1954 Hague Cultural Property Convention, which recites: “(a) *movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as ‘centres containing monuments’*”. This definition is also applicable to its Protocols, see Article 1 of the 1954 First Protocol and Article 1 (b) of the 1999 Second Protocol.

<sup>415</sup> R. O’Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge, 2006, p. 103. Dinstein agrees to such interpretation in light of the explanation contained in the Preamble and previously mentioned, see Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2010, p. 175.

<sup>416</sup> See L. Green, *The Contemporary Law of Armed Conflict, Melland Schill Studies in International Law*<sup>3</sup>, Manchester University Press, 2008, p. 179, making some examples: the Taj Mahal, the Sphinx, the Colosseum, Picasso’s “Guernica”, the Chagall windows at the Hadassah Hospital in Jerusalem, da Vinci’s “Mona Lisa”, and the like.



such privileged status during armed conflicts and to favour international control.<sup>417</sup> However, this system has been abused to a certain extent and, ironically, has enabled belligerents to target cultural property deemed valuable to the enemy much sooner. One example is Croatia's report about the deliberate targeting by the then Yugoslav people's army of its immovable cultural heritage which it had marked with the blue shield prior to the outbreak of hostilities in 1991, including the old town of Dubrovnik.<sup>418</sup> States' reluctance to employ the emblem for fear of experiencing similar consequences in other armed conflicts has been noted.<sup>419</sup>

The protection afforded to all objects falling under the aforementioned definition entails a twofold obligation to safeguard and respect cultural property. The forms for *safeguarding* such property located within the States parties' own territory against the foreseeable effects of warfare are not specified, Article 3 of the 1954 Hague Convention only requires to take "*such measures as they consider appropriate*" in time of peace.<sup>420</sup> In this regard, Article 5 of the 1999 Second Protocol elucidates the concept in question: States may take preventive measures such as preparing inventories, removing movable cultural property, and providing protection *in situ*. Further, related precautions to safeguard it against the effects of hostilities are established in the 1999 Second Protocol.<sup>421</sup>

Conversely, the forms for *respecting* cultural property situated in the territory of all States parties are more detailed in Article 4 of the 1954 Hague Convention; they include the obligation to desist "*from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict*", the obligation to refrain "*from any act of hostility directed against such property*", and the obligation to "*prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property*". Moreover, States must refrain "*from requisitioning movable cultural property situated in the territory of another High Contracting Party*" as well as "*from any act directed by way of reprisals against cultural*

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<sup>417</sup> See Articles 6, 10, 16, 17 of the 1954 Hague Convention.

<sup>418</sup> Sulc, B. "The Protection of Croatia's Cultural Heritage During War 1991-95", in R. Layton, P. G. Stone, and J. Thomas (ed.), *Destruction and Conservation of Cultural Property*, Routledge, 2001, pp. 161.

<sup>419</sup> J. Hladik, "Marking of Cultural Property with the Distinctive Emblem of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict", 86 *IRRC*, 2004, p. 383.

<sup>420</sup> According to the *travaux préparatoires* of the 1954 Hague Convention, "*measures to safeguard cultural property*" comprise protection against possible fire or collapse of buildings or measures to relocate movables to special refuges, see R. O'Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge, 2006, pp. 113.

<sup>421</sup> Article 8 the 1999 Second Protocol reads: "*The Parties to the conflict shall, to the maximum extent feasible: a. remove movable cultural property from the vicinity of military objectives or provide for adequate in situ protection; b. avoid locating military objectives near cultural property*". It is based on Art. 57 (2)(a)-(b) AP I.

property”.<sup>422</sup> Further measures are required as precautions in attack against damage and destruction in the Second Protocol.<sup>423</sup>

In line with the rationale of affording protection to cultural property as a higher collective interest of the international community - rather than exclusively in favour of the territorial State - any breach of the duty to safeguard it does not automatically release States parties from their required compliance with the duty to respect such property.

Nonetheless, the comprehensive regime laid down in these treaties creates two categories of protected cultural objects and sites. To elaborate, the line drawn between them makes a *restricted category of cultural property of the greatest importance to humankind* benefiting from *enhanced protection* as long as it is marked and registered as such.<sup>424</sup> The registration of an object has been viewed as analogous to “*an internationally recognised declaration establishing a non-defended locality*”.<sup>425</sup> Essentially, the property

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<sup>422</sup> Article 4 (1) and (3) of the 1954 Hague Convention. Article 4 (2) reads (emphasis added): “*The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where the military necessity imperatively requires such a waiver*”. Article 4 (5) reads: “*No High Contracting Party may evade the obligations incumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the measures of safeguard referred to in Article 3*”.

<sup>423</sup> Article 7 of the 1999 Second Protocol reads: “... *a. do everything feasible to verify that the objectives to be attacked are not cultural property protected under Article 4 of the Convention; b. take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, incidental damage to cultural property protected under Article 4 of the Convention; c. refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated; and d. cancel or suspend an attack if it becomes apparent: i. that the objective is cultural property protected under Article 4 of the Convention; ii. that the attack may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated*”. It is based on Art. 57(2)(b) AP I.

<sup>424</sup> Under the 1954 Hague Convention (articles 8-11), *special protection* is granted for a limited number of refuges aimed to shelter either movable cultural property or centres having immovable cultural property, on the basis of two conditions: (i) be located at an “adequate distance” from any relevant military target (e.g. airport or big industrial center) and (ii) not be used for military purposes. In order to register the property a request to the Director-General of UNESCO must be addressed by a State party. The property concerned will be inserted in the “*International Register of Cultural Property under Special Protection*”. However, the abject failure of this special regime is well known: just the Vatican City and four place of safety for movable cultural property (one in Germany and three in the Netherland) have been registered.

As regards the changed procedure of registration, under Article 10 of the 1999 Second Protocol, *enhanced protection* is granted as long as three criteria are met: (i) the object concerned is cultural heritage “*of the greatest importance for humanity*”, (ii) it is covered by national administrative and legal measures which recognise its “*exceptional*” historic and cultural value, and (iii) it is not used for shielding military sites or for military purposes (the Party which controls the object concerned must declare that it will not be so used). A *Committee for the Protection of Cultural Property in the Event of Armed Conflict* is competent for forming, maintaining and promoting the “*List of Cultural Property under Enhanced Protection*”, and it can grant, suspend or cancel such enhanced protection. See particularly Arts. 11, 24, 27 of the Second Protocol.

<sup>425</sup> See J.M. Henckaerts, “New Rules for the Protection of Cultural Property in Armed Conflict: The Significance of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict”, *IRRC*, 1999, p. 611, referring to Article 59 AP I. While no differences emerge in the level of protection and in the manner in which cultural property can become a military target, the author highlights that the main difference between enhanced protection and general protection concerns *the duties upon the holder of cultural property included in the aforementioned List* (and not in the obligations of the attacker), who is *not allowed to convert it into a military objective by using it for military action*: doing so would amount to a serious violation of the 1999 Second Protocol, and the offender would be liable to criminal sanction as a war criminal. Thus, the registration entails the State party to consider whether it would ever be in need of that property for military purposes and to answer negatively.

holder of cultural property included in the List “certifies” a commitment not to convert it into a military objective by using it for military purposes or shielding military sites under any circumstance, so indicating to potential adversaries the need to be aware about such immunity.

Although other States parties may recommend the inclusion of potential properties on the List, the actual request of the nomination for enhanced protection cannot be imposed on an unwilling territorial State,<sup>426</sup> which might engage in destroying cultural property located within its borders. This may be regarded a regrettable gap in the law in view of the universal significance of certain sites and objects; it tragically allows events such as the devastation of the Buddhas of Bamiyan by the military and paramilitary forces of the Taliban government in March 2001.

However, as extensively analysed in legal scholarship, *an obligation “to prevent acts of systematic destruction of cultural heritage”* exists upon the government that effectively controls the territory; it stems from two norms shaped by the international practice concerning the protection of cultural heritage. In particular, the customary principle that cultural heritage is in the common and general interest of the international community as a whole alongside the customary principle according to which acts of violence against cultural heritage are prohibited in times of armed conflict.<sup>427</sup>

Following this tragic event - in which the vulnerability of invaluable cultural property was mostly due to ideologically driven and bellicose actors (going beyond the bounds of an armed conflict) - a reiteration of the expanding international norms encompassing the necessity for all States to protect the common cultural heritage of mankind has been made by the 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, which has also encouraged States to take “*appropriate measures to prevent, avoid, stop, and punish any acts of (such) intentional destruction*”.<sup>428</sup> Notably, in applying this Declaration, States have been considered to acknowledge

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<sup>426</sup> Article 11(3), Second Hague Protocol of 1999.

<sup>427</sup> See F. Francioni and F. Lenzerini, “The destruction of the Buddhas of Bamiyan and International Law”, *EJIL*, 2003, pp. 619-651. This devastation was considered a very dangerous precedent, not only for its discriminatory intent as reflected in the determination to eliminate cultural expressions unrelated to the Taliban ideology (particularly substantial traces and historical memory of the pre-Islamic past of the country), but also for being a deliberate “act of defiance” towards the United Nations and international public opinion, since it occurred following sanctions against Afghanistan as adopted in 1999 and 2000 for the training and sheltering of terrorists as well as planning of related conduct. By evaluating the adequacy of international law, identifying gaps along with principles and rules applicable in situations of this kind, the authors conclude that “*extreme and discriminatory forms of intentional destruction of cultural heritage of significant value for humankind constitutes a breach of general international law applicable both in peacetime and in the event of armed conflicts, entailing international responsibility of the acting State and the possibility to make recourse to international sanctions against it, as well as criminal liability of the individuals who materially order and/or perform the acts of destruction*”. See also F. Francioni and F. Lenzerini, “The obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq”, in B.T. Hoffman, *Art and Cultural Heritage: Law, Policy and Practice*, Cambridge, 2006, pp. 28-40.

<sup>428</sup> Declaration Concerning the Intentional Destruction of Cultural Heritage, Paris, adopted by the thirty-second session of the UNESCO General Conference on 17 October 2003, III (1). Intentional destruction was meant as “*act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes a violation of international law or*

“the need to respect international rules related to the criminalization of gross violations of human rights and international humanitarian law, in particular, when intentional destruction of cultural heritage is linked to those violations”.<sup>429</sup>

The significance of these considerations has recently emerged in relation to the military operations involving Libya, which is not a party to the 1954 Hague Convention, and the coalition of States involved in the implementation of UN Security Council Resolution 1973 (2011) imposing a no-fly-zone and other necessary measures to protect civilians.<sup>430</sup> In keeping with Article 23(g) of the Hague Convention, UNESCO issued an appeal to all sides to respect the country’s cultural heritage by refraining from committing any damage to its heritage sites, keeping military operations away from them, and preserving the country’s ancient treasures, given that “*from a cultural heritage point of view, Libya is of great importance to humanity as a whole*”.<sup>431</sup> Particular concern emerged for at least three sites due to their proximity to Tripoli and other strategic areas. Among the five Libyan sites on the World Heritage’s list,<sup>432</sup> the Roman ruins of Leptis Magna and the ancient Phoenician trading post of Sabratha, within 130 km (80 miles) west of the Libyan capital Tripoli, were principally threatened. Another vulnerable site was the ancient mountain of Cyrene, which faces the Mediterranean Sea east of Benghazi. Conversely, since October 2011 attacks on and destruction of Sufi religious sites in Tripoli continued across the country in 2012 and 2013, including prominent Sufi shrines such as the Sidi Abdul-Salam al Asmar al-Fituri Mosque in Zliten and the al-Shaab Mosque in central Tripoli,<sup>433</sup> in addition to the desecration of tombs of Sufi leaders and the targeting against libraries.

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*an unjustifiable offence to the principles of humanity and dictates of public conscience, in the latter case in so far as such acts are not already governed by fundamental principles of international law”.*

<sup>429</sup> *Ibid.*, point IX of the Declaration, entitled “Human rights and international humanitarian law”.

<sup>430</sup> Of the ten States in the coalition involved in military operations in Libya (Belgium, Canada, Denmark, France, Italy, Qatar, Spain, United Arab Emirates, the United Kingdom and the United States), eight are party to the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its two protocols, except of the United Kingdom and the United Arab Emirates.

<sup>431</sup> This was stated by Irina Bokova, Director-General of the Paris-based UNESCO, in a letter to the Permanent Representatives to UNESCO of each of the countries concerned. See *Reuters News online*, “UNESCO urges all sides to preserve Libyan treasures”, 23 March 2011; *Earthtimes online*, “Prolonged conflict a threat to Libyan heritage sites - Feature”, 25 March 2011.

<sup>432</sup> The World Heritage sites include the Old Town of Ghadames, one of the oldest pre-Saharan cities; the Rock-Art Sites of Tadrart Acacus, which features thousands of cave paintings dating from 12,000 B.C. to A.D. 100; the Archaeological Site of Cyrene, ruins of what was once a province of the Roman Empire; the Archaeological Site of Leptis Magna, which represents an early artistic realisation of urban planning; and the Archaeological Site of Sabratta, a Phoenician trading post that was once part of the Numidian Kingdom of Massinissa. See *HolaVerde online*, “Libya must refrain from endangering cultural heritage”, 30 March 2011.

<sup>433</sup> According to UN experts (Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief, Rita Izsák, Expert on minority issues, and Farida Shaheed, Special Rapporteur in the field of cultural rights), these events amounted to violations of the right to freedom of religion and belief, the right to enjoy and access cultural heritage, and the rights of religious minorities to the protection of their places of worship.

The armed violence in the ongoing non-international armed conflict in Syria has also taken a heavy toll on the Ancient Cities of Aleppo and Damascus, particularly since August 2012. Other sites of archaeological or cultural importance, which have suffered “*considerable and sometimes irreversible damage*” in the words of UNESCO Director General, include the Site of Palmyra, the Ancient City of Bosra, and Raqqa. The 12<sup>th</sup> century crusader castle located near Homs, the *Crac des Chevaliers*, was occupied by Syrian rebel forces and bombarded by Bashar forces in the summer of 2013, and most of its towers have been destroyed. Additional properties in which looting has been extensive include Apamea, Ebla Dura-Europos, and Mari, which are on the Syrian Tentative List of world heritage.<sup>434</sup> At the beginning of 2014, Resolution 2139 of the UN Security Council called on all parties to the conflict to “*save Syria’s rich societal mosaic and cultural heritage, and take appropriate steps to ensure the protection of Syria’s World Heritage Sites*”.<sup>435</sup>

It is worth noting that, already in 2013, the World Heritage Committee decided to inscribe all the six Syrian world heritage properties on the List of World Heritage in Danger, after having expressed “*its utmost concern at the damage occurred and threats facing these properties*”.<sup>436</sup> Already at that time, all parties associated with the situation in Syria were urged “*to refrain from any action that would cause further damage to cultural heritage of the country and to fulfil their obligations under international law by taking all possible measures to protect such heritage, in particular the safeguarding of World Heritage properties and those included in the Tentative List*”.<sup>437</sup> Furthermore, the same Committee elaborated a threefold appeal to the State of Syria. First, the latter was requested “*to invite the World Heritage Centre and the Advisory Bodies to undertake a mission to Syria as soon as the security conditions permit in order to assess the state of conservation of the properties and elaborate, in consultation with the State Party, an action plan for their recovery*”. Second, the latter was requested to prepare, in consultation with the World Heritage Centre and the Advisory Bodies, “*the corrective measures as well as a Desired state of conservation for the removal of the properties from the*

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<sup>434</sup> See the Statement by UN Secretary General Ban Ki-moon, UNESCO Director-General Irina Bokova and UN and League of Arab States Joint Special Representative for Syria Lakhdar Brahimi, “The destruction of Syria’s cultural heritage must stop”, 12 March 2014. See A. Cheikhmous, “Syrian Heritage Under Threat”, 1 *Journal Of Eastern Mediterranean Archaeology and Heritage Studies*, 2013, pp. 351-366, describing Syria as “*an open air museum*”. See UNESCO, “Regional training on Syrian cultural heritage: addressing the issue of illicit trafficking, Final Report and Recommendations”, Amman, 10-13 February 2013, at 6, in which the Syrian Directorate General of Antiquities and Museums (DGAM) stressed the difficulty of protecting “*the immovable heritage in the country, especially for those archaeological and world heritage sites that are located in conflict areas and cannot be accessed*”.

<sup>435</sup> See SC Res. 2139 (2014), S/RES/2139, 22 February 2014, para. 8.

<sup>436</sup> See World Heritage Committee, Decision 37.COM/7B.57, “World Heritage Properties of Syria”, adopted at its 37<sup>th</sup> session, July 2013. They are indicated in para. 5, namely “the Ancient City of Damascus, Ancient city of Bosra, Site of Palmyra, Ancient City of Aleppo, Crac des Chevaliers and Qal’at Salah El-Din, and Ancient Villages of Northern Syria”.

<sup>437</sup> *Ibid.*, para 7.

*List of World Heritage in Danger, once a return to stability is effective in the country*". Third, Syria was requested "to submit to the World Heritage Centre, by 1 February 2014, a detailed report on the state of conservation of the World Heritage properties in Syria for examination by the World Heritage Committee at its 38th session in 2014". The same Government was also suggested to consider ratifying the 1999 Second Protocol.<sup>438</sup> Indeed, Syria is party only to the 1954 Hague Convention and its First Protocol, plus the 1972 Convention concerning the Protection of World Cultural and Natural Heritage.

Differently from what is the scope of the 1954 Hague Convention and the 1999 Second Hague Protocol, Article 53 API and Article 16 AP II afford special protection to three types of objects (*i.e. places of worship, historic monuments, works of art*) on condition that they "constitute the cultural or spiritual heritage of peoples". Of note, the spirituality criterion was inserted so as to protect "objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people".<sup>439</sup> Thus, although these provisions do not cover each place of worship, they undoubtedly include buildings that represent the religious nature of the people and "express the conscience of the people".<sup>440</sup> For instance, they apply to prominent religious establishments such as the St Peter's Basilica in Rome, St Paul's Cathedral in London, the Blue Mosque in Istanbul, the Dome of the Rock in the Old City of Jerusalem. In this regard, the official commentary to Protocol I refers to the 'nation', but it also highlights that its drafters purposely used the more inclusive term 'people' in this provision, rather than 'country', to describe the relative meaning of the 'spirituality' - within the meaning of Article 53(1) API - of a privileged building.

Even though both provisions function without prejudice to the obligations contained in 1954 Hague Convention and other relevant international instruments including the Hague Regulations, the reference to the "cultural or spiritual heritage of peoples" is not identical to that contained in the preamble of the Hague Convention. As highlighted in the ICRC commentary, that phrase is deliberately distinguishable: "all objects of sufficient artistic or religious importance to constitute the heritage of peoples are protected, including those which have been renovated or restored".<sup>441</sup> The ICRC study on customary international humanitarian law has reinforced this point.<sup>442</sup> Such interpretation has also been

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<sup>438</sup> *Ibid.*, paras. 8-12.

<sup>439</sup> Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, para. 2064, p. 646.

<sup>440</sup> According to the commentary on Protocol I, "the Conference rejected the idea which was put forward by some delegations of including any and all places of worship, as such buildings are extremely numerous and often have only a local renown of sanctity which does not extend to the whole nation. Thus, the places referred to are those which have a quality of sanctity independently of their cultural value and express the conscience of the people", See Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, p. 647.

<sup>441</sup> Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, pp. 646-647, paras. 2063-2068.

<sup>442</sup> J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, pp. 130 and 132, noting that "as underlined by numerous statements of at the Diplomatic Conference leading to the adoption of the Additional Protocols", Article 53 was "meant to cover only a limited amount of very

confirmed by the ICTY Appeals Chamber<sup>443</sup> as well as the Eritrea-Ethiopia Claims Commission, which has observed that the negotiating history of Article 53 “*suggests that it was intended to cover only a few of the most famous monuments, such as the Acropolis in Athens and St. Peter’s Basilica in Rome*”.<sup>444</sup>

Nevertheless, certain objects perceived to be purely cultural may neither reach “the threshold of great importance” recognised by the 1954 Hague Convention nor plausibly fall under the cultural objects that are specially protected by the 1977 Protocols. In spite of this, in war-torn contexts that challenge ethnic or religious identities attacks on non-secular objects may raise certain scepticism. In the *Kordic* case, indeed, the Trial Chamber of ICTY did define educational institutions broadly as “*undoubtedly immovable property of great importance to the cultural heritage of peoples in that they are without exception centres of learning, arts, and sciences, with their valuable collections of books and works of arts and science*” (emphasis added), without going to great lengths to substantiate its assumption and referring to the Roerich Pact, “*which requires respect and protection to be accorded to educational institutions in time of peace as well as in war*”.<sup>445</sup> However, the Appeals Chamber in the same case could not see how all educational buildings fulfil those criteria, noting that the Trial Chamber erred in such a far-reaching classification, since it “*did not consider whether and under which conditions the destruction of educational buildings constituted a crime qua custom at the time it was allegedly committed*”. Nevertheless, even when educational buildings do not meet that high criteria, their destruction as civilian objects was deemed to constitute a war crime under customary international law.<sup>446</sup>

Thus, a question arises as to whether adopting a generous definition of cultural property may have the inconvenient effect of reducing the regime drawn for objects whose cultural value is acknowledged more extensively. Specifically in relation to the risk of attenuating the higher protection afforded by the 1954 Hague Convention (through a broad category of the objects concerned), the necessity of making a distinction between the Masjid Al-Aqsa (Bayt al-Maqdis) or the Florentine Cathedral of Santa Maria del Fiore and several other places of worship may be posited and the importance of reflecting such a distinction in related protective measures may be

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*important cultural property, namely that which forms part of the cultural or spiritual heritage of ‘peoples’ (i.e. mankind)”.*

<sup>443</sup> ICTY, *Prosecutor v. Dario Kordic and Mario Cerkez* (IT-95-14/2), Appeals Chamber, Judgment, 17 December 2004, para. 91.

<sup>444</sup> Partial Award: *Central Front*, Eritrea’s Claims 2, 4, 6, 7, 8 and 22, (28 April 2004), at 1270; also at 1249, para.113.

<sup>445</sup> ICTY, *Prosecutor v. Dario Kordic and Mario Cerkez* (IT-95-14/2-T), Trial Chamber, Judgment, 26 February 2001, para. 360.

<sup>446</sup> ICTY, *Prosecutor v. Dario Kordic and Mario Cerkez* (IT-95-14/2-T), Appeals Chamber, Judgment, 17 December 2004, para. 92. In particular, the Appeal Chamber noted that Article 52(3) API designates schools as civilian property, thus their destruction is criminalised by the *lex generalis* concerning the destruction of civilian property; yet, in certain cases, as far as an educational institution amounts to a cultural object it can fall under the *lex specialis*.

stressed as ways to guarantee that existing rules are taken seriously even during intense phases of an armed conflict.<sup>447</sup>

### **6.5.b. Remarks on IHL rules regulating the targeting of cultural property**

As observed above, the 1907 Hague Regulations require belligerents to undertake all basic steps in military operations “*to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected*” provided that they “*are not being used at the time for military purposes*”, marked with the distinctive sign and notified to the enemy.<sup>448</sup>

In the case of *property of great importance to the inherent cultural value and heritage of each people*, the 1954 Hague Convention and the 1999 Second Protocol prohibit any hostile act against it as well as any use of it and its direct surroundings for aims which presumably damage or destroy it, except that military necessity *imperatively* requires to do so.<sup>449</sup> The absence of a definition of “military necessity” and the lack of clarity of the Hague Convention’s provisions on military necessity<sup>450</sup> have been partly remedied by its Second Protocol. In particular, Article 6(a) spells out the cumulative conditions under which a State may invoke a waiver based on imperative military necessity to direct an hostile act against cultural property, while Article 6(b) clarifies the circumstances for invoking a waiver based on imperative military necessity to use cultural property; nonetheless, the invocation of this exception is further limited.<sup>451</sup> As for cultural property under enhanced protection, Article

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<sup>447</sup> On these points, see A. Bouvin, “The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare”, *Research Paper Series UCHL*, 2006, p. 64, highlighting the challenging task “*of identifying what rules apply to what object for which party*” in view of that “*the relevant instruments neither enjoy universal ratification nor are ratified by the same parties*”.

<sup>448</sup> Article 27 HRs covers immovable heritage, while movables are protected solely if housed within such buildings. This norm reflects customary international law, so applicable in internal and international armed conflicts, see J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, pp. 127 and 131, Rule 38 A and Rule 39.

<sup>449</sup> Article 4 of 1954 Hague Cultural Property Convention and Article 6 of the 1999 Second Hague Protocol. These two prohibitions are deemed norms of customary international law applicable in both types of armed conflicts, see J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, pp. 127 and 131, Rule 38 B and Rule 39.

<sup>450</sup> Pursuant to Article 4(2) immunity may be waived in situations “*where military necessity imperatively requires such a waiver*”, while under Article 11(2) special protection of cultural property may be withdrawn “*only in exceptional cases of unavoidable military necessity*” and “*only for such time as that necessity continues*”. See J. Hladík, “The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the notion of military necessity. The review of the 1954 Convention and the adoption of the Second Protocol thereto (26 March 1999)”, 8 *IRRC*, 1999, 621-635.

<sup>451</sup> Article 6 recites (emphasis added): “With the goal of ensuring respect for cultural property in accordance with Article 4 of the Convention: a. a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property *when and for as long as*: i. that *cultural property has, by its function, been made into a military objective*; and ii. there is *no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective*; b. a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage *when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage*; c. the decision to invoke imperative military necessity shall



13(1)(b) regulates the loss of such status, namely “*if, and for as long as, the property has, by its use, become a military objective*”, while Article 13(2) set down a number of criteria to legitimately subject it to eventual attack.<sup>452</sup>

Conversely, *immunity for cultural property covered by the 1977 Protocols* is afforded without referring to military necessity. Article 53 API and Article 16 APII essentially proscribe any hostile act against places of worship, historic monuments or works of art which define “*the cultural or spiritual heritage of peoples*”. As a basic counterpart, they prohibit their use “*in support of the military effort*” and in doing so they enhance the protection against targeting as afforded to all civilian buildings. Inasmuch as the violation of this prohibition determines the turning into a military objective, the principle of proportionality does however remain applicable.<sup>453</sup> Furthermore, reprisals against this property are prohibited under Article 53(c) API (as under the 1954 Hague Convention).

Regarding the “*without prejudice*” formula contained in Article 53 and the consequent possibility of relying on military necessity for those Contracting Parties to Protocol I that are simultaneously Parties to the 1954 Hague Convention, the need to read the waiver provision of Article 4(2) of the Hague Convention in light of contemporary customary international law, which allows to target only military objectives, has been argued.<sup>454</sup> Furthermore, notwithstanding the fact that Article 53 is “*unique*” in not specifying the cessation of protection when breached, other protective clauses of Protocol I incorporate an exception to that effect.<sup>455</sup> However, *a loss of immunity* may occur *only in case of military “use”* by the enemy of the specially protected cultural objects, and this is a key feature of

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*only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise; d. in case of an attack based on a decision taken in accordance with sub-paragraph (a), an effective advance warning shall be given whenever circumstances permit”.*

<sup>452</sup> Article 13 recites (emphasis added): “1. Cultural property under enhanced protection shall only lose such protection: a. if such protection is suspended or cancelled in accordance with Article 14; or b. if, and for as long as, the property has, by its use, become a military objective. 2. In the circumstances of sub-paragraph 1(b), such property may only be the object of attack if: a. the attack is the only feasible means of terminating the use of the property referred to in sub-paragraph 1(b); b. all feasible precautions are taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimising, damage to the cultural property; c. unless circumstances do not permit, due to requirements of immediate self-defence: i. the attack is *ordered at the highest operational level of command*; ii. *effective advance warning* is issued to the opposing forces requiring the termination of the use referred to in sub-paragraph 1(b); and iii. Reasonable time is given to the opposing forces to redress the situation”.

<sup>453</sup> Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, at 648, para. 2079; Henckaerts and Doswald-Beck, *op. cit.*, vol. II, at 779-790, paras. 282-354.

<sup>454</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, 2010, pp. 178-179, quoting the view of the ICTY Trial Chamber in the *Strugar* case, according to which “*military necessity may be usefully defined for present purposes with reference to the widely acknowledged definition of military objectives in Article 52 of Additional Protocol I*”; the case was related to the destruction of buildings in the Old Town of Dubrovnik, see *Prosecutor v. Strugar*, Trial Chamber, 31 January 2005, para. 295.

<sup>455</sup> W.A. Solf, “Cultural Property, Protection in Armed Conflict”, *Encyclopaedia of Public International Law*, p. 896.

the “*complementary protection from attack*” provided for in Article 53.<sup>456</sup>

It is worth reflecting on the fact that “*use*” is considered “*a customary law criterion*” in the regime applicable to targeting cultural property. While the criteria of “*nature*” and “*purpose*” established in Article 52(2) API are viewed as inapplicable to cultural property,<sup>457</sup> “*location*” has been deemed unclear because some objects are part of infrastructure that are seized or destroyed during the conduct of hostilities to avoid the adversary’s occupation of a site.<sup>458</sup> However, some of the most valuable objects belonging to the inherent cultural heritage of mankind are placed in tactically relevant areas or constitute sites that could be occupied as their control could effectively contribute to military action.<sup>459</sup> Indeed, the concern about “*location*” emerged during the negotiations of the 1999 Second Protocol and it was finally rejected for being too broad according to the majority of delegates. In that context, since the criterion of “*use*” was considered too narrow, “*function*” was introduced in Article 6(a)(i) (“*a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as: i. that cultural property has, by its function, been made into military objects; ...*”).

Still, the issue of attacks on cultural property even when it is not used for military action, or the issue of indiscriminate attacks against it, has been widely discussed in legal scholarship. As aptly stated by a distinguished expert, “*in real life the rule should be simple: cultural property which is not used to make an effective contribution to military action and whose destruction, seizure or neutralization does not offer a definite military advantage cannot be attacked. It is difficult to imagine how military commanders could teach their soldiers anything else*”.<sup>460</sup> In the same vein, the ICRC commentary to Protocol I explicitly stresses that “*if protected objects were used in support of the military effort, this would obviously constitute a violation of Article 53 of the Protocol, though it would not necessarily justify attacking them*”; it further explains that “*it is not permitted to destroy a cultural object whose use does not make any contribution to military action, nor a cultural object which has temporarily served as a refuge for combatants, but is no longer used as such*”.<sup>461</sup> Conversely, the taking of some military measures in anticipation of the potential action of the adversary has been considered

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<sup>456</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2010, p. 181.

<sup>457</sup> The consensus on this point among the delegations has been underlined, see J.M. Henckaerts, “New Rules for the Protection of Cultural Property in Armed Conflict: The Significance of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict”, *IRRC*, 1999, p. 603.

<sup>458</sup> See Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), *op. cit.*, para. 2021. However, in case of use of an historic bridge, which turns it into a military objective, the attack against it only comes to be imperatively necessary once it is being used by the adversary, see J.M. Henckaerts, *ibid.*, p. 605.

<sup>459</sup> See A. Bouvin, *op. cit.*, p. 66, stressing that an “*abusive*” interpretation of “*location*” would critically diminished the protection afforded to cultural property.

<sup>460</sup> J.M. Henckaerts, *op. cit.*, p. 605.

<sup>461</sup> Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), *op. cit.*, para. 2079.

admissible.<sup>462</sup>

Once the protective status of an object of cultural property has been lost, the fulfilment of certain conditions is required before legitimately targeting such an object. In this regard, Article 6 of the 1999 Hague Protocol is useful to identify some general rules applicable to property of great importance to the inherent cultural heritage of each people.<sup>463</sup> In relation to Article 53 API, the necessity to take all preventive measures to terminate the use of the object concerned “*in support of the military effort*” is underlined in the ICRC commentary so as to prevent the damage or destruction of cultural objects. Yet, any attack against such an objective will be qualified by the principle of proportionality, meaning that the damage should not be “excessive” in respect to the direct and concrete military advantage anticipated, as well as by all the precautions required in Article 57.

However, for certain cultural and spiritual sites a mechanical application of existing rules may result very difficult and impracticable without acknowledging the additional necessity of adapting those rules for taking into serious account the value of the cultural and spiritual site in question, notwithstanding the fact that this has turned into a legitimate military objective through use. The case of the Church of the Nativity in Bethlehem and its takeover by a group of Palestinian combatants in 2002 is instructive in this regard. Given that its undeniable importance to the Christian world and its indisputable value for the spiritual and cultural heritage of mankind could not be ignored by the Israeli Defence Force, the latter resorted mainly to siege tactics and refrained from storming the site: sporadic exchanges of fire led to some minor damage to the Church, but no direct attacks against this site were launched. Thus, in situations like the Church of the Nativity in Bethlehem it seems reasonable to argue that *the imperative military necessity of targeting what has become a legitimate military objective demands proportionality to be calculated by taking into special account the significant impact of its possible destruction, given the persistence of its indisputable value for the spiritual and cultural heritage of mankind*. Conversely, if a cultural or spiritual site is of minor value and has lost its protection, the lower threshold for a potential attack will not affect its legitimacy, which will still rely on the respect of the proportionality principle. These remarks appear in accordance with the rationale behind the law, namely the setting apart certain categories of objects warranting special protection because of

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<sup>462</sup> A. Rogers, *Law on the Battlefield*<sup>2</sup>, 2004, p. 156. Laying detonating charges are taken as example, but they cannot be exploded until the object concerned is used by the enemy.

<sup>463</sup> See A. Bouvin, *op. cit.*, pp. 67-68. The author takes the example of “*a church used to shield combatants*” and underlines the attacker’s obligation to guarantee the following: (a) that attacks against the church are carried out for as long as it is being utilised by the combatants; (b) no feasible alternative are possible to gain an analogous military advantage; (c) that the decision regarding the imperative military necessity of attacking the church is taken “*at a certain level of command*”; (d) that “*an effective advance warning*” is given before targeting the church and “*whenever circumstances permit*”.

their inherent value and general importance for humanity.

Focusing on *places of worship*, two significant aspects are noteworthy for the purposes of the present study in light of the previous considerations. The first concerns the relevant shift in the law for having established equally shared *obligations of all military forces*, including attackers as well as defenders, *not to use religious buildings for military purposes*, instead of exclusively limiting military attackers in targeting as it was in the past.

The second aspect regards *some remaining ambiguities in the determination of which religious buildings are covered by special protection*. Whereas not every place of worship meets the threshold of Article 53 API, all religious buildings representing the “*people*” do, thus most of churches, mosques, synagogues, and temples are covered. As already stressed, Article 53 prohibits to make these objects into military objectives and to destroy them. Such special protection is additional to the immunity assigned to all places of worship (irrespective of their significance) by Article 52. Hence, while the latter merely establishes that ordinary civilian objects “*shall not be the object of attack or of reprisals*”, Article 53 specifically prohibits States from using places of worship belonging to the spiritual heritage of peoples “*in support of the military effort*”. However Protocol I does not add to the practical means for armed forces to identify special protected religious sites. As for cultural religious sites, it perhaps refers to the 1954 Hague Convention’s typical white and blue emblem. However, Protocol I does not designate a separate emblem for those religious buildings covered by Article 53 but not falling under the 1954 Hague Convention. In any event, as a matter of common sense, identifying a religious building is less problematic than identifying other civilian buildings: most religious buildings have exterior markings such as a cross, star, or crescent indicating their spiritual purpose. Furthermore, although Protocol I does not include an explicit prohibition against misuse of religious symbols, such a restriction may be implicit in the prohibition against using protected religious buildings for military purposes (Article 53).

Finally, it is noteworthy that international humanitarian law does not specifically address whether abandonment affects the status or the lawfulness of military use of a religious building. The 1954 Hague Convention and the 1977 Protocol I contain no derogations from the prohibition on using protected religious sites to support the military effort. In this regard, it is arguable that a religious building never loses its status through abandonment: a religious site remains sacred whether worshipers continue to pray there or not.

### 6.5.c. Remarks on the criminalisation of acts against cultural property

As already underlined throughout the previous sections, provisions describing offences against cultural heritage and cultural property in times of armed conflict have been integrated into the statutes of several international criminal tribunals.<sup>464</sup>

In particular, it is worth mentioning Article 6 of the Nuremberg Charter establishing the International Military Tribunal, which listed “*plunder of public and private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity*” among those acts which constitute war crimes; and which were deemed to represent the customary law of war by the Tribunal. This provision echoed Articles 46 and 56 HRs and constituted one of the bases for establishing the guilt of Alfred Rosenberg.

Subsequently, other relevant provisions have echoed the rule contained in Article 27 HRs. For instance, Article 3(d) of the ICTY Statute comprises acts of “*seizure, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science*” among the violations of the law or customs of war. Later, a similar approach was adopted in the ICC Statute, Articles 8(b)(ix) and 8(e)(iv) of which concern international and internal armed conflicts respectively and qualify as war crimes attacks intentionally directing “*against buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments, provided they are not military objectives*”. In contrast to the language of Article 27 HRs, they positively refer to “education”, in addition to including an updated reference to “*military objectives*”, which is defined in greater detail than broader notions such as “military purposes” or “military necessity”. However, several lacunas have been addressed. Firstly, decision to include a traditional general list of protected property in these two provisions of the ICC Statute is open to criticism.<sup>465</sup> The omission of any explicit

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<sup>464</sup> See Article 6 of the Nuremberg Charter establishing the International Military Tribunal. See Article 3(d) ICTY Statute. See Article 4(f) ICTR Statute. See Article 7 of the Law on the Extraordinary Chambers of Cambodia, reading: “[t]he Extraordinary Chambers shall have the power to bring to trial all Suspects responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from 17 April 1975 to 6 January 1979”. See Article 3(f) of the Statute of the Special Court for Sierra Leone, which openly indicate only pillage as a war crime related to cultural property. See Article 8(2)(b)(ix) and Article 8(2)(e)(iv) ICC Statute. See Articles 13(b)(10) and 13(d)(14) of the Statute of the Iraqi Special Tribunal.

<sup>465</sup> See M. Bothe, “War Crimes”, in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2001, 379, pp. 409-410. See also M. Frulli, “The criminalisation of offences against cultural heritage in times of armed conflicts: the Quest for consistency”, 22 *EJIL*, 2011, pp. 203-2017, critically addressing how the broadly recognised need to take into account “*a cultural-value approach*” for criminalising conduct against cultural property of universal importance was totally overlooked in the ICC Statute. Conversely, she appraises the attempts of Protocol II to the 1954 HC to move forward and - building on the definition of cultural property included in the 1954 HC - to set down serious violations of the Protocol itself alongside attaching greater seriousness to acts against cultural heritage, so resulting more consistent with one of the core functions of criminal law, namely the articulation of the degree of the wrong-doing.

criminalisation of acts against movable cultural property is an additional gap in this Statute<sup>466</sup>, especially in view of relevant destructions perpetrated in previous armed conflicts such as those in the Balkans region and in the Persian Gulf.<sup>467</sup> Nevertheless, the preamble of the ICC Statute reflects the significance of culture for humanity by mentioning States parties' consciousness "*that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time*".

Therefore, the 1999 Second Protocol to the 1954 Hague Convention remains the most valuable and suitable existing intentional instrument for pursuing war crimes against cultural property. In particular, five "serious violations" are defined in Article 15(1) as acts intentionally committed in breach of the Protocol itself or the Hague Convention.<sup>468</sup> Notably, only the first three offences - among which the first two concern property under enhanced protection - correspond to the grave breaches established in the 1949 Geneva Conventions and Additional Protocols. Significantly, States parties' duty to adopt legislation making those acts criminal offences punishable under domestic sanctions is set in Article 15(2), which also clarifies that this implementation has to be done in compliance "*with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act*". Further, States parties are required to adopt measures to suppress "*other violations*" of the Protocol or the Convention inasmuch as they are committed intentionally, including "*any use of cultural property*" or "*any illicit export, other removal or transfer of ownership of cultural property, other removal or transfer of ownership of cultural property from occupied territory*".<sup>469</sup>

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<sup>466</sup> See M. Frulli, *ibid.*, p. 213, who notes that Article 8(2)(a)(iv), Article 8(2)(b)(xiii), Article 8(2)(b)(xvi) and Article 8(2)(e)(v) ICC Statute could be employed to address seizure or appropriation of property, but considers that only the latter two prohibiting pillage are more likely to be used for this purpose, although they regrettably include "*military necessity*" in a footnote to the elements of crime ("*[a]s indicated by the use of the term 'private or personal use', appropriations justified by military necessity cannot constitute the crime of pillaging*", see Elements of Crimes, ICC-ASP/1/3(part II-B), n. 47, p. 28, and n. 61, p. 39), differently from absolute prohibitions of pillage or plunder as established in previous provisions such as Article 3(e) ICTY Statute.

<sup>467</sup> Emblematically, the looting of part of the collection of the National Museum in Kuwait during the Iraqi occupation, as well as the destruction of unique vestiges of ancient Arab culture (*e.g.* a 3,000 year-old Hellenic column from Faylakah Island and a fourteenth century engraved wooden door from Morocco), the destruction of the planetarium and the looting of university laboratories; the damage and looting of the Bagdad Museum during the Second Gulf War; the destruction of thousands of manuscripts of the National Library in Sarajevo.

<sup>468</sup> Article 15 (1) of the 1999 Second Protocol reads: "*1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts: a. making cultural property under enhanced protection the object of attack; b. using cultural property under enhanced protection or its immediate surroundings in support of military action; c. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol; d. making cultural property protected under the Convention and this Protocol the object of attack; e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention*".

<sup>469</sup> Article 21 of the 1999 Second Protocol.

For the purpose of the present research, it is worth considering that the jurisprudence of the ICTY includes cases related to the looting and destruction of cultural and religious institutions, treasures and monuments in the conflict-torn contexts of the Balkans. In particular, several charges based on Article 3(d) of the Statute were brought forward in a number of cases.<sup>470</sup> Furthermore, certain prosecutions indirectly dealt with cultural property as they concerned damage to civilian property in general or the targeting of cultural property amounted to the *actus reus* of the crime of persecution on political, racial and religious grounds. Indeed, due to the nature of these conflicts, with ethnicity and religion being prominent issues, most of the offences against cultural property were related to educational and religious targets. In this context cultural property was principally protected for what it represented for particular groups or communities. Damage to cultural property and even acts of rape were seen as forms of “*ethnic cleansing*” and instruments to destroy the adversary’s identity. In a persuasive passage of the *Kordic and Cerkez* decision, the Trial Chamber of the ICTY found that the act of “*destruction and wilful damage of institutions dedicated to Muslim religion or education, coupled with the requisite discriminatory intent, may amount to an act of persecution*”, ultimately amounted “*to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of ‘crimes against humanity’, for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects*”.<sup>471</sup> This view confirmed a statement of one of its earlier judgments.<sup>472</sup> Notably, the *ad hoc* Tribunal also dealt with the impact that such prosecutions and punishments may have on the traditional division between crimes against property and crimes against persons.<sup>473</sup>

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<sup>470</sup> *E.g.*, *Prosecutor v. Miodrag Jokić* (IT-01-42/1-S), Judgment of 18 March 2004; *Prosecutor v. Strugar* (IT-01-42-T), Judgment of 31 January 2005, concerning the two commanders of the Yugoslav National Army that attack on the Old Town of Dubrovnik on 6 December 1991. For other prosecutions, see *Prosecutor v. Tihomir Blaškić* (IT-95-14-T), Judgment of 3 March 2000, para. 185; *Prosecutor v. Plavišić* (IT-00-39-40/1), Judgment of 27 February 2003; *Prosecutor v. Naletilić and Martinović* (IT-98-34-T), Judgment of 31 March 2003, paras. 603-605; *Prosecutor v. Brdanin* (IT-99-36-PT), 9 December 2003. See T. Meron, “The Protection of Cultural Property in the Event of Armed Conflict within the case-law of the International tribunal for the Former Yugoslavia”, 2005, 57 *Museum International*, pp. 41-59.

<sup>471</sup> See ICTY, *Prosecutor v. Dario Kordic and Mario Cerkez* (IT-95-14/2-T), Judgment of 26 February 2001, paras. 206-207. On the connection between the crime of persecution and damage to cultural property in the Tribunal’s work, see H. Abtahi, “The Protection of Cultural Property in Times of Armed conflict: the practice of the International Criminal Tribunal for the Former Yugoslavia”, *Harvard Human Rights Journal*, 2001, p. 20 ff.

<sup>472</sup> ICTY, *Prosecutor v. Tihomir Blaškić* (IT-95-14-T), Trial Chamber, Judgment of 3 March 2000, para. 227. The Trial Chamber held that the attacks must be directed against a civilian population, be widespread or systematic, and perpetrated on discriminatory grounds for damage inflicted to cultural property to qualify as persecution, see *ibid.*, para. 207. It convicted Blaškić of having ordered a crime against humanity, namely persecutions against the Muslim civilians of Bosnia, *inter alia*, through attacks on towns and villages and the plunder and destruction of property and in particular of institutions dedicated to education and religion, see *ibid.*, Part VI Disposition. See also *Prosecutor v. Žoran Kupreskic et al.* (IT-95-16-T), Trial Chamber, Judgment of 14 January 2000, para. 544.

<sup>473</sup> See H. Abtahi, “The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia”, *Harvard Human Rights Journal*, 2001, pp. 31-32. Noting that the ICTY equated a crime against property to a grave breach of the 1949 Geneva Conventions, a violation of the laws or customs

This jurisprudence built on the legacy of the Nuremberg International Military Tribunal<sup>474</sup> and the International Law Commission.<sup>475</sup> Since Nuremberg, the crime of persecution has been included in all relevant international criminal law instruments,<sup>476</sup> although none of them contain such a detailed definition as that found in the Rome Statute. To elaborate, while Article 7(2)(g) defines persecution as the “*intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity*”<sup>477</sup>, Article 7(1)(h) extends it to include “*any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognised as impermissible under international law*”, despite requiring that persecution be committed “*in connection with*” any other crime within the ICC jurisdiction.<sup>478</sup>

Nonetheless, the charges included in several indictments brought before the ICTY for the damage or wanton destruction of cultural property related to religious or ethnic groups referred not only to persecution, but also to genocide. Although such acts are not included in the definition of genocide under Article 4 of the ICTY Statute, they were used to establish the defendant’s *mens rea*, namely the discriminatory intent required for proving persecution as well as genocide.<sup>479</sup> The *Kristic* case is instructive in this regard. After having emphasised that it was not individual members of the group that were to be targeted but the group itself, the Trial Chamber focused its attention on the

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of war, especially the crime against humanity of persecution, the author stressed how such a practice might “*collapse in the long term*” the distinction between crimes against property and crimes against persons “*at least for religious cultural property*”. The ICTY showed its willingness to issue indictments charging crimes against forms of cultural property different from religious symbols with the indictment on the destruction of heritage in Dubrovnik; since Nuremberg and Tokyo, this was the first time that a crime against cultural property registered under the 1954 Hague Convention was sanctioned by an international tribunal.

<sup>474</sup> IMT, Judgment, 1 October 1946, *The Trial of Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22, 1950, at 248 and 302 (quoted by the ICTY in *Prosecutor v. Dario Kordic and Mario Cerkez*, para. 206). The crime against humanity of persecution against racial, religious or political grounds was articulated in Article 6 (c) of the Nuremberg Charter, annexed to the Agreement by France, United Kingdom, United States and USSR for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945), 82 *UNTS* 279. See also District Court of Jerusalem, Criminal Case 40/61, *The Attorney General v. Adolf Eichmann*, Judgment, 11 December 1961, para. 57.

<sup>475</sup> Report of the International Law Commission on the work of its forty-third session (29 April-19 June 1991), UN Doc. A/46/10/Suppl.10, at 268, according to which the “*systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group*” is included in the concept of persecution.

<sup>476</sup> *E.g.*, Article II (1)(c) of Control Council Law No. 10, Article 5 (c) of the Tokyo Charter, Article 5 (h) ICTY Statute, and Article 3(h) ICTR Statute.

<sup>477</sup> This definition is based on the precedent set by the ICTY in the *Tadic* case and it is oriented around Article 18 of the 1996 Draft Code.

<sup>478</sup> For a summary on the historical development of the crime of persecution, see K. Roberts, in H. Abtahi and G. Boas (eds.), *The Dynamics of International Criminal Justice*, 2006, p. 258 ff. The definition under Article 7(2)(g) is based on the precedent set by the ICTY in the *Tadic* case, but the ICTY judgments have further clarified the characterisation of the crime of persecution under customary international law.

<sup>479</sup> Article 4 ICTY Statute contains the same definition of genocide as Article II of the Genocide Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, in force 12 January 1951, GA Res. 260A(III), 78 *UNTS* 277. The acts must have been perpetrated with a *dolus specialis* “*to destroy, in whole or in part, a national, ethnic, racial or religious group as such ...*”.



*travaux préparatoires* of the Genocide Convention to highlight that the list of groups contained in Article II “*was designed more to describe a single phenomenon, roughly corresponding to what was recognised, before the Second World War, as “national minorities”, rather than to refer to several distinct prototypes of human groups*”.<sup>480</sup> In taking the opportunity to re-examine the question of whether acts directed at cultural aspects of a group constituted genocide as a crime in international law, the Trial Chamber noted how “*the physical destruction of a group is the most obvious method, but one may also conceive of destroying a group through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community*”.<sup>481</sup> This observation was significantly followed by the consideration that - unlike genocide - persecution is not limited to the biological or physical destruction of a group, but rather extends to include “*all acts designed to destroy the social and/or cultural bases of a group*”. In contrast, the Trial Chamber stressed that the drafters of the Genocide Convention expressly considered and rejected the inclusion of the cultural elements in the list of acts constituting genocide.<sup>482</sup> The Appeals Chamber then confirmed that the Genocide Convention and customary international law limit genocide to the biological or physical destruction of the group.<sup>483</sup> Nonetheless, the Trial Chamber used evidence of the destruction of mosques and the houses of Bosnian Muslims to prove the *mens rea* or the specific intent element of genocide.<sup>484</sup> The International Court of Justice has referred to and confirmed this interpretation.<sup>485</sup>

Further, although no formal cases have been filed in the International Criminal Court that may indicate how the Chamber, the Office of the Prosecutor, or Defence teams will interpret the Statute in relation to crimes against cultural property, it is worth referring to the situation in Mali.

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<sup>480</sup> ICTY, *Prosecutor v. Radislav Krstic* (IT-98-33), Trial Chamber, Judgment of 2 August 2001, paras. 551-553 and 556. General Krstic - the later Deputy Commander and Chief of Staff of the Drina Corps within the Bosnian Serb Army - was charged with and sentenced of genocide, or complicity to commit genocide, murder in violation of the laws and customs of war and certain crimes against humanity (*i.e.* persecution, murder, inhumane treatment, forced deportation, terrorizing civilian populations and destruction of Bosnian Muslim property) for his involvement in the massacre of seven to eight thousand Bosnian Muslims and forced deportation at Srebrenica in 1995.

<sup>481</sup> ICTY, *Prosecutor v. Radislav Krstic* (IT-98-33), Trial Chamber, Judgment of 2 August 2001, para. 574.

<sup>482</sup> ICTY, *Prosecutor v. Radislav Krstic* (IT-98-33), Trial Chamber, Judgment of 2 August 2001, paras. 576 ff. The international community has consistently reaffirmed this position: Article 2 ICTR Statute; Article 6 ICC Statute; Article 9, Statute of the Special Court for Cambodia; Article 4, Law on the Establishment of Cambodian Extraordinary Chambers.

<sup>483</sup> ICTY, *Prosecutor v. Radislav Krstic* (IT-98-33-A), Appeals Judgment of 19 April 2004, para. 25.

<sup>484</sup> ICTY, *Prosecutor v. Radislav Krstic* (IT-98-33), Trial Judgment of 2 August 2001, para. 580. See *Prosecutor v. Radislav Krstic* (IT-98-33-A), Appeals Chamber, Judgment of 19 April 2004, dissenting judgment of Judge Mohamed Shahabuddeen, para. 50.

<sup>485</sup> ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, paras. 191-201 (particularly para. 194). In its submission during the Merits phase, Bosnia and Herzegovina presented only two witnesses to the Court: regarding the *destruction of cultural, religious and architectural heritage* of Bosnia and Herzegovina, the expert testimony was made by András J. Riedlmayer and his evidence was used to prove the specific intent element of genocide, which distinguishes it from other crimes.

Following its referral by the Malian State on 13 July 2012, Prosecutor Bensouda formally opened an investigation into alleged crimes committed on the territory of Mali since January 2012; at the beginning of 2013 she included “*intentionally directing attacks against protected objects under Article 8(2)(e)(iv)*”, by members of Ansar Dine and possibly by members of AQIM, among the war crimes for which there are reasonable grounds to believe they have been committed during this internal conflict.<sup>486</sup> As to the scale of the attacks concerned, the information available to the Prosecutor indicated that, in the period between 4 May 2012 and 10 July 2012, attacks against at least nine mausoleums and two great mosques, both inscribed under the UNESCO World Heritage List, and two historical monuments in the city of Timbuktu have been intentionally perpetrated by those insurgent groups.<sup>487</sup> With regard to the nature of the war crime allegedly committed, the acts in question have been deemed to violate the special protection of cultural objects reflected in Article 53 AP I, given that the religious and historical buildings in Timbuktu belong to World’s Heritage since 22 December 1988. In this vein, as further reported, such destruction “*appears to have shocked the conscience of humanity*”, and the African Union has strongly condemned it.<sup>488</sup> In relation to the manner of the attacks, it is reported that they were intentionally destroyed or damaged, “*in some cases repeatedly and pursuant to the ideology of alleged perpetrators that these objects had to be destroyed*”,<sup>489</sup> and that the religious and historical sites were “*demolished with axes, hatches and picks*”, while the wooden parts were burned.<sup>490</sup>

## 6.6. Education

The special regime of protection designed under the law of armed conflict for certain objects does not cover education. However, a dramatic increase of the number of reported *attacks on educational establishments in armed conflicts* has taken place in the twenty-first century. The scale of this problem has been well documented by UNESCO since its first initiative in 2007,<sup>491</sup> denouncing in 2010 the

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<sup>486</sup> ICC OTP, *Situation in Mali Article 53(1) Report*, 16 January 2013, paras, 109-113.

<sup>487</sup> It referred to the UN Report of the Secretary General on the situation in Mali, S/2012/894, 29 November 2012, p. 3. It is also highlighted that, on 28 June 2012 the World Heritage Committee placed Timbuktu and the Tomb of Askia on UNESCO’s List of World Heritage in Danger “*to raise cooperation and support for the sites threatened by the armed conflict in the region*”, see UNESCO, “Heritage sites in Northern Mali placed on List of World Heritage in Danger”, 28 June 2012.

<sup>488</sup> AU, *Solemn Declaration on the Situation in Mali*, 19<sup>th</sup> ord. sess. of the Assembly of the Heads of State and Government of the African Union, Addis Ababa, Ethiopia (15-16 July 2012), 19 July 2012, particularly para. 5.

<sup>489</sup> It referred to the Guardian, “Timbuktu World Heritage site attacked by Islamists”, 1 July 2012.

<sup>490</sup> ICC OTP, *Situation in Mali Article 53(1) Report*, 16 January 2013, paras. 154-160.

<sup>491</sup> See B. O’Malley, “Education Under Attack”, *Global study on targeted political and military violence against education staff, students, teachers, union and government officials, and institutions, commissioned by UNESCO, Education Sector, Division for the Co-ordination of United Nations Priorities*, 27 April 2007. According to this first global study on this issue, the number of reported attacks on education had increased in the preceding three years (rising since 2000 and increased six-fold between 2003 and 2006) and some of the worst affected countries were Afghanistan, Colombia, Iraq, Nepal, the

systematic targeting of students, education staff and institutions which has been reported in a greater number of countries since then. In particular, such attacks intensified dramatically in Afghanistan, Pakistan, India, Thailand and Nigeria,<sup>492</sup> and several incidents occurred during short military operations in Georgia and Gaza.<sup>493</sup> Attacks on teachers, students and teacher trade unionists continued to be a matter of grave concern also in Colombia, Iraq, Nepal, Thailand, and Afghanistan.<sup>494</sup> In addition to putting at risk the life of those individuals, they have led to a dramatic decrease in the school attendance rate. In 2006 an estimated 43 million of the approximately 115 million of children of primary school age in conflict-affected countries were reportedly not attending school.<sup>495</sup> This “*hidden crisis in education*” was denounced by UNESCO again in 2011 who connected it to “*institutionalised failures*” in conflict prevention and reconstruction, highlighting the underestimated impact of warfare on the opportunities to exploit “*the potential for education to act as a*

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occupied Palestinian territory, Thailand and Zimbabwe.

<sup>492</sup> See B. O'Malley, *Education under attack*, UNESCO, 2010. The number of attacks on schools, students and staff reportedly tripled in Afghanistan from 2007 to 2008, up from 242 to 670; in Pakistan, 356 schools were destroyed or damaged in one small region at the centre of the battle between the Army and the Taliban; in India, nearly 300 schools were blown up by Maoist rebels between 2006 and 2009; in Thailand the number of attacks on schools quadrupled between 2006 and 2007 to 164, then fell right back in 2008, although killings of teachers, students and security escorts for teachers continued; since 2009 the Islamic group Boko Haram has attacked several schools, opposing secular education as associated to Western society.

<sup>493</sup> With regard to Georgia, 127 education institutions were destroyed or damaged in August 2008, see Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG), *IIFFMCG Report*, Council of European Union, 30 September 2009, at 328-9. As to the Gaza Strip, around 250 students and 15 teachers died, 856 students and 19 teachers were injured, 214 UNRWA schools and 346 government schools, 18 schools and kindergartens were destroyed and 262 schools were damaged during the bombardments of the Strip in the three weeks “Operation Cast Lead” at the turn of 2008-09, see *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48, 25 September 2009, para. 1271 (damage or destruction of school buildings in Gaza) and para. 1659 (damage or destruction of school buildings in Israel). See also “Psychological Assessment of Education in Gaza and Recommendations for Response”, Report on the findings conducted by K. Kostelny and Wessells, September 2010. The eight days “Operation Pillar of Defense” in November 2012 cost the lives of 11 students and four teachers, with around 300 students injured, nearly 300 educational facilities damaged, see [http://www.ochaopt.org/documents/ochaopt\\_education\\_cluster\\_gaza\\_escalation\\_20\\_12\\_2012.pdf](http://www.ochaopt.org/documents/ochaopt_education_cluster_gaza_escalation_20_12_2012.pdf). As to the recent “Operation Protective Edge” in July and August 2014, “at least 219 schools have been damaged, 22 of which so severely that they can no longer be used” and “among those still standing, 103 have been turned into collective shelters for some 330,000 displaced people, half of whom are children”, see UNESCO, “Gaza’s Education System in Crisis”, 25 August 2014, available at [http://www.unesco.org/new/en/media-services/single-view/news/gaza\\_school\\_year\\_hit\\_by\\_resumption\\_in\\_hostilities/#.U\\_9krhbd7ww](http://www.unesco.org/new/en/media-services/single-view/news/gaza_school_year_hit_by_resumption_in_hostilities/#.U_9krhbd7ww).

<sup>494</sup> In Iraq, 71 academics, two education officials and 37 students were killed in assassinations and targeted bombings between 2007 and 2009, see *ibid.* In Colombia, 90 teachers were murdered from 2006 to 2008. *Report of the Secretary-General on Children and Armed Conflict in Colombia*, S/2009/434, 28 August 2009, para. 44. In southern Thailand, more than 280 schools were burned, at least 92 educational personnel were killed and 88 injured, teachers were threatened or harassed, and many other schools were closed down as of January 2009. According to the Ministry of education in Afghanistan the closure of approximately 570 schools as of March 2009 followed attacks and resulted in hundreds of thousand of students being denied an education, see UNICEF Afghanistan, *Education in emergencies and post-crisis transition*, 2010 report evaluation, March 2011.

<sup>495</sup> See Save the Children, *Rewrite the future: Education for Children in Conflict-Affected Countries*, 2006.

*force for peace*".<sup>496</sup>

The ways through which conflict-torn societies have widely affected education concern either harassment and threats against teachers, parents and students, or the forced displacement of civilians within or outside their respective States' territory, the recruitment of children into regular militaries and irregular armed groups, the use of educational infrastructure for military purposes, and their damage or destruction. Using education as a means for war propaganda or a tool for discrimination or incitement to aversion represents a further aspect that has emerged in such settings.

A broad interpretation of attacks on schools which encompasses the full range of violations that place students at risk and deny their access to education has not yet comprehensively emerged in the UN Security Council's response aimed at addressing severe abuses experienced by children in armed conflict.<sup>497</sup> Following the identification of such attacks among the six grave violations against children in armed conflict, in Resolution 1998 (2011) the Security Council urged parties to conflict "*to refrain from actions that impeded children's access to education*",<sup>498</sup> and explicitly requested the Secretary-General to continue monitoring and reporting on *the military use of schools*. On this issue it also added "*attacks and threats of attacks on schools, hospitals and protected persons in relation to schools and hospitals*" to the criterion for listing in the annexes of the Secretary-General's Annual Report on Children and Armed Conflict.<sup>499</sup>

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<sup>496</sup> See EFA Global Monitoring Report, *The hidden crisis: armed conflict and education*, UNESCO, March 2011, particularly Chapter 3. According to this report, 28 million children were out of school in conflict-torn countries (*i.e.* 42% of the global out of school total), child death rates were more than double, and only 79% of young people were literate.

<sup>497</sup> For a decade, the Security Council's response has included a number of resolutions (Res.1261 (1999) of 25 August 1999, Res.1314 (2000) of 11 August 2000, Res.1379 (2001) of 20 November 2001, Res.1460 (2003) of 30 January 2003, Res.1539 (2004) of 22 April 2004, and Res.1612 (2005) of 26 July 2005, and 1882/2009), the creation of a specialized working group issuing sets of conclusions on country situations, and the initiation of a reporting and monitoring mechanism on violations against children in armed conflict, which is active in sensitive countries. See also the Statements of its President on 24 July 2006 (S/PRST/2006/33), 28 November 2006 (S/PRST/2006/48), 12 February 2008 (S/PRST/2008/6), 17 July 2008 (S/PRST/2008/28) and 29 April 2009 (S/PRST/2009/9). The Special Representative to the Secretary General on children and armed conflict has followed up on the working group's conclusions by making regular field visits to engage with parties to armed conflict responsible for violations against children, like in the case of Chad, Nepal, Philippines and Uganda. Although the international focus has been primarily on the recruitment and use of child soldiers, much larger number of children is affected by other grave violations resulting in severe and long-lasting consequences.

<sup>498</sup> SC Res. 1998, S/Res/1998 (2011), 12 July 2011, para. 4. The same concept was previously expressed by explicitly referring to "*in particular the use of schools for military operations*", see Statement by the President of the Security Council, S/PRST/2009/9, 29 April 2009.

<sup>499</sup> Office of the Special Representative of the Secretary-General for Children and Armed Conflict, Leila Zerrougi, "The Six Grave Violations Against Children During Armed conflict: The Legal Foundation", Working Paper n. 1, 7 November 2013, p. 20, emphasising that "*the use of schools for military purposes puts children at risk of attack and hampers children's right to education, resulting in reduced enrolment and high drop out rates, especially among girls and may also may lead to schools being considered targets for attack*".

Nonetheless, in expressing “*deep concern at the military use of schools in contravention of applicable international law*” in resolution 2143 (2014), the Security Council recognised that “*such use may render schools legitimate targets of attack, thus endangering children’s and teachers’ safety as well as children’s education and in this regard: (a) Urge[d] all parties to armed conflict to respect the civilian character of schools in accordance with international humanitarian law; (b) Encourage[d] Member States to consider concrete measures to deter the use of schools by armed forces and armed non-State groups in contravention of applicable international law; (c) Urge[d] Member States to ensure that attacks on schools in contravention of international humanitarian law are investigated and those responsible duly prosecuted*”.<sup>500</sup>

The disturbing picture of escalating attacks on education raises basic questions about the effectiveness and adequacy of the international legal framework concerning issues of education-related violations in conflict-torn situations. In the context of the present chapter, the international legal protection of the conditions necessary for education or the prohibition of conduct interfering with education is particularly relevant in relation to educational facilities; an issue to which we shall return.

### **6.6.a. Preliminary remarks on the protection of the right to education**

Before articulating some pertinent considerations in the context of the IHL rules governing the conduct of hostilities, it is worth briefly addressing the right to education as enshrined in Article 26 UDHR establishing the right to free compulsory elementary education, in Articles 13 and 14 ICESCR<sup>501</sup> as well as in Article 28(1) CRC.<sup>502</sup> Interpreted as an empowerment right, it constitutes the key vehicle “*by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities*”; accordingly, its vital role in “*empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth*” has been acknowledged. As such, education is practically understood as one of the greatest financial investments States can make, as

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<sup>500</sup> SC Res. 2143, S/Res/2143 (2014), 7 March 2014, para. 18.

<sup>501</sup> Article 13 ICESCR defines its scope: “*States Parties ... recognise the right of everyone to education... [W]ith a view to achieving the full realisation of this right: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms ... shall be made generally available and accessible to all by every appropriate means ... [and] (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means ...*”.

<sup>502</sup> Article 28(1) CRC reads: “*States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (b) Encourage the development of different forms of secondary education, ... [and] make them available and accessible to every child... (c) Make higher education accessible to all on the basis of capacity by every appropriate means; ... (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates*”.

well as representing the tool allowing for enlightenment and “*ability to wander freely and widely*”<sup>503</sup>. Further relevant international guidance for conflict-torn situations has emerged in a number of Concluding Observations of the Committee on the Rights of the Child regarding Colombia<sup>504</sup>, Sri Lanka<sup>505</sup>, Thailand<sup>506</sup>, Israel<sup>507</sup>, Syria<sup>508</sup>, and Yemen.<sup>509</sup>

In examining the enjoyment of the right to education within conflict-related emergencies that *impair or seriously violate it, impede its development or hold back its realisation*, the Special Rapporteur Vernor Muno Villalobos has affirmed basic points.<sup>510</sup> The right “*inheres*” in every person no matter legal status, whether refugee, child soldier or internally displaced person. States parties to relevant human rights treaties are deemed under an obligation to respect, protect, and fulfil such a right, “*whether or not an emergency situation prevails*”. Insofar as the existing legal undertakings of the international community include the provision of international cooperation in educational matters, as provided in Article 28(3) CRC, States also have main responsibility for guaranteeing education “*even if they lack the capacity needed to do so*”.

The need for care and effort to secure the right to education is highlighted with special notice to *the aims of education* as interpreted by the Committee on the Rights of the Child. These efforts go beyond access to formal schooling and embrace a far-reaching life experiences and learning processes that support the development of children’s personalities, abilities and talent, individually

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<sup>503</sup> CESCR, *General Comment No. 13: The right to education (Art. 13)*, E/C.12/1999/10, 12 August 1999, para. 1.

<sup>504</sup> CRC, *Concluding Observations: Colombia*, UN Doc. CRC/C/OPAC/COL/CO/1, 2010, paras. 39-40 (“*[M]ilitary presence in the vicinity of schools significantly increases the risk of exposing school children to hostilities and retaliations by illegal armed groups... The Committee urges the State party to immediately discontinue the occupation of schools by the armed forces and strictly ensure compliance with humanitarian law and the principle of distinction. The Committee urges the State party to conduct prompt and impartial investigations of reports indicating the occupation of schools by the armed forces and ensure that those responsible within the armed forces are duly suspended, prosecuted and sanctioned with appropriate penalties*”).

<sup>505</sup> CRC, *Concluding Observations: Sri Lanka*, UN Doc. CRC/C/OPAC/LKA/CO/1, 2010, para. 25 (“*Immediately discontinue military occupation and use of the schools and strictly ensure compliance with humanitarian law and the principle of distinction ... Ensure that school infrastructures damaged as a result of military occupation are promptly and fully restored*”).

<sup>506</sup> CRC, *Concluding Observations: Thailand*, UN Doc. CRC/C/THA/CO/3-4, 2012, para. 85 (“*Ensure that schools are not disrupted by State military and paramilitary units and are protected from attacks by non-state armed groups*”).

<sup>507</sup> CRC, *Concluding observations: Israel*, UN Doc. CRC/C/ISR/CO/2-4, 2013, para. 64 (“*Cease ... use of schools as outposts and detention centres ...*”).

<sup>508</sup> CRC, *Concluding Observations: Syria*, UN Doc. CRC/C/SYR/CO/3-4, 2012, para. 52 (“*[S]top using schools as detention centres, and ... strictly ensure compliance with humanitarian law and the principle of distinction*”).

<sup>509</sup> CRC, *Concluding Observations: Yemen*, UN Doc. CRC/C/OPAC/YEM/CO/1, 2014, para. 30 (“*[E]nsure that ... national legislation explicitly prohibits the occupation and use of ... schools ... , in line with international humanitarian law; expedite the reconstruction of these facilities as appropriate; take concrete measures to ensure that cases of unlawful ... occupation of schools ... are promptly investigated, and that perpetrators are prosecuted and punished*”).

<sup>510</sup> See *Report to the Special Rapporteur on the right to education, Vernor Muno Villalobos, Right to education in emergency situations*, A/HRC/8/10, 20 May 2008, particularly paras. 36-40. The report focuses on the period from early response to an emergency to the initial stages of reconstruction, during which the worst violations of the right to education may occur since “*educational systems and opportunities are destroyed*”, humanitarian agencies pay partial attention, and well-defined programmatic principles, indicators or funding are relatively lacking. The Special Rapporteur refers to a legal framework comprising several branches of international law, *ibid.*, paras. 41-56.

and collectively.<sup>511</sup> In this vein, States are required to assure that children seeking refugee status receive appropriate protection and humanitarian assistance under Article 22 CRC, including the provision of prompt and full access to education and rapid integration into a regular education system.<sup>512</sup> Further Article 38 calls on States parties to respect and ensure respect for IHL rules relevant to the child, while Article 39 requires them to “*take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of armed conflicts*”.

An attempt to reduce the number of children recruited into regular and irregular militaries and to moderate the implications for their educational opportunities can be seen in the Optional Protocol to the CRC on the involvement of children in armed conflict,<sup>513</sup> which has been followed by several Security Council resolutions, such as Resolution 1612 (2005), establishing a monitoring and reporting mechanism.<sup>514</sup> Notwithstanding weak accountability mechanisms provided for in relation to the treaty-based body under the CRC - which consists of no more than States parties’ reports and a new complaint procedure that has still not entered into force<sup>515</sup> - its special interest in, and commitment to, the issue of *education in emergencies*, is reflected in its guidelines for submission of reports, written and oral questions and recommendations.

Notably, the Convention relating to the Status of Refugees requires States parties to accord refugee children the same treatment afforded to nationals as regards elementary education (Art. 22 (1)) and treatment no less favourable than that accorded to foreigners as regards education other than elementary education (Art. 22 (2)).<sup>516</sup> However, the underdevelopment of accountability mechanisms for member States remains critical; much of the work of UNHCR is geared towards the protection of displaced persons, notwithstanding the fact that its Statute provides no specific

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<sup>511</sup> *Ibid.*, para. 43, referring to CRC, *General Comment No. 1: The aims of education*, UN Doc. CRC/GC/2001/1, 17 April 2001. See Article 29 CRC.

<sup>512</sup> *Ibid.*, para. 44, referring to CRC, *General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin*, UN Doc. CRC/GC/2005/6, 3 June 2005, paras. 41 ff.; CRC, *Concluding Observations: Kyrgyzstan*, CRC/C/OPAC/KGZ/CO/1, 2 May 2007, para. 16 (b); CRC, *Concluding Observations: Norway*, UN Doc. CRC/C/15/Add.126, 28 June 2000, para. 50.

<sup>513</sup> In addition to the API and APII and the ICC Statute, other international law sources prohibiting the recruitment of children include the African Charter on the Rights and Well-Being of Children, and the ILO Convention No. 182 on the prohibition of the Worst Forms of Child Labour and the Immediate Action for its elimination of 1999.

<sup>514</sup> See Security Council Res. 1261 (1999) condemning all attacks on “*objects protected under international law*”, including schools, and calling on all parties concerned to put an end to such practices; Res. 1314 (2000); Res. 1379 (2001); Res. 1539 (2004).

<sup>515</sup> The third Optional Protocol to the Convention on the Rights of the Child on a communications procedure, (19 December 2011, entry into force on 14 April 2014), UN Doc. A/RES/66/138, allows for individual children to submit complaints regarding specific violations of their rights under the Convention and its first two Protocols. It opened for signature in 2012 and it will enter into force upon ratification by ten UN member States.

<sup>516</sup> According to a guiding principle of the policy on refugee children, *in all actions regarding refugee children, the primary consideration should be the best interests of the child*, see UNHCR, *Refugee Children: Guidelines on Protection and Care*, 1994, at 73.

mandate for such work.<sup>517</sup> Despite the decision of the Inter-Agency Standing Committee's Education Cluster in 2005 to create a group to improve the predictability and accountability of responses within the United Nations, the UNHCR still lacks sufficient resources to perform that role notwithstanding its leading role in some components.<sup>518</sup>

The Guiding Principles on Internal Displacement<sup>519</sup> affirm *the right to free compulsory education*, in particular the *full and equal participation of women and girls* (principle 23). Although not legally binding, their wide dissemination among States and international agencies has favoured their increasing use to guide protection and assistance strategies.

### **6.6.b. Remarks on the protection of educational facilities**

As aptly addressed in legal scholarship, the right to education provides "*the individual with control over the course of his or her life, and in particular, control over [...] the State*"; it specifically enables an individual to experience the benefit of other rights, to which it is strongly linked: "*the key to social action in defence of rights, ... , is an educated citizenry, able to spread its ideas and to organize in defence of its rights*".<sup>520</sup> In this sense, freedom of expression, freedom of association and political participation, acquire substance when a person is educated. The same may be said for the right to take part in cultural life; as to ethnic and linguistic minorities the right to education represents a basic means to preserve and reinforce their cultural identity. Similarly, education contributes to prevent discrimination founded on social status and it enhances social mobility. Furthermore, it advances the fulfilment of other ESC rights such as the rights to food, to health, to work. In general, it supports the realisation of the right to an adequate standard of living. Concisely, it essentially contributes to a person's ability to live with dignity.

Its significance as an empowerment right - rather than disappearing when an armed conflict spreads out - entails exploring concrete ways to strengthen *the international legal protection of the educational function in conflict and post-conflict situations* in order to favour and support its enjoyment, particularly continuing to provide education. This may then positively condition the long-term impacts of the degradation of related systems or the long-term compromises needed to make education an integral factor in building peace.

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<sup>517</sup> The General Assembly has progressively attributed the competence on issues regarding displaced persons, relying on Article 9 of the Statute of UNHCR.

<sup>518</sup> In 2007 the UNHCR drew a strategy in order to lead the areas of protection, refuge of emergency, coordination of camps and administration, see EC/58/SC/CRP.18.

<sup>519</sup> They developed as a response to the rising number of displaced persons and the lack of specific legal protection, and rely on international humanitarian law and international human rights law, see UN Doc. E/CN.4/1998/53/Add.2.

<sup>520</sup> See J. Donnelly and R.E. Howard, "Assessing national human rights performance: a theoretical framework", *HRQ*, 1988, p. 215, pp. 234-235.



As such, *the disruption and destruction of educational facilities* in conflict-torn contexts do represent a considerable factor affecting the realisation of the right to education. *Indirect protection* may derive from certain international human rights provisions since attacks on any related structures or materials on which the provision of education depends is likely to violate not only this right but also the right to freedom from discrimination, the right to private property and the right to health as enshrined in human rights treaties. Further elements that may be covered include computers, books, and sanitation services. However, the rules governing the conduct of hostilities deserve detailed consideration hereafter. Crucial IHL obligations of the parties to a conflict are intended to preserve core components of the right to education in conflict-torn circumstances such as internment of civilians,<sup>521</sup> where children are separated from their parents or orphaned,<sup>522</sup> and situations of occupation.<sup>523</sup> Nonetheless, it is *the intrinsic educational value of school facilities* that often makes them the first public structures built in new settlements and determines their essential importance to a community's future growth and development in post-conflict scenarios. Accordingly, the largely monitored and reported grave extent of attacks on education during military operations inspires a specific reflection on the IHL protection of educational facilities. A pertinent question arises as to *whether the need to emphasise the inherent humanitarian value of additional objects* - whose unique role within civilian communities affected by armed conflicts has progressively become more manifest in practice - *should be taken more seriously and lead to them being accorded a privileged status in contemporary international law.*

Previous sections have shown that the 1907 Hague Regulations require military forces to take “*necessary steps*” during sieges and bombardments to spare buildings “*dedicated to religious, art, science, or charitable purposes*” without explicitly covering the category of school buildings (Art. 27). A vague prohibition on the seizure of civilian buildings, comprising also institutions dedicated to education, is also provided (Art. 56).<sup>524</sup> The Geneva Conventions of 1864, 1929, and 1949 indirectly enhance

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<sup>521</sup> Article 94 GCIV sets forth the detaining party's obligations on the education of internees (especially young people and children). This provision is not examined in the ICRC study on customary IHL, but relevant rules include Rule 135 (protection of children), Rule 104 (respect of convictions and religious practices), Rule 118 (further basic necessities of internees including clothing, food and medical treatment).

<sup>522</sup> Article 24 GCIV requires the parties to an international conflict to “*take the necessary measures to ensure that [the education of] children under fifteen, who are orphaned or are separated from their families*” is facilitated. “*Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition*”. This rule has reached the status of customary international law, so applying to all children in the territory of the belligerent party (see ICRC Study on Customary IHL, Rule 150). Further, ‘education’ is viewed broadly, including “*moral and physical education as well as school work and religious instruction*”, see J. Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4, *op. cit.*, at 187.

<sup>523</sup> Article 50 GCIV sets forth the occupying power's obligations on the education of children, in cooperation with the local and national authorities. See ICRC Study on Customary IHL, Rule 135 (children) and Rule 104 (convictions and religious practices).

<sup>524</sup> The ineffectiveness of the language contained in 1899 and 1907 Hague Conventions in providing adequate

the protection of school buildings to the extent that they may be used for sheltering wounded and sick persons. All buildings used for such purposes are entitled to be marked with distinctive medical emblems, such as the Red Cross or Red Crescent. However, these conventions exclusively concern the attacking force's choice of targets.

Conversely, the 1954 Hague Convention and its 1999 Protocol elevate the status of some historic schools on the basis of their inherent cultural value to society. Although school buildings are not specifically included in the definition of cultural property as provided by this convention (which then would not apply to most ordinary grammar schools or high schools) certain relevant aspects relating to the battlefield are addressed for protected historic school buildings. As underlined above, States parties are required to respect such property by refraining from using it in any manner that might expose it to damage or destruction during armed conflict, unless imperatively required by military necessity. In addition, these buildings may be marked with the blue and white emblem. Nonetheless, while some historic universities and school buildings may be easily qualified as being of “*great importance to the cultural heritage of every people*”, this definition may be open to diverging interpretations and consequently possible abuses by opposing conflicting parties.<sup>525</sup>

In those rare cases in which educational institutions may be deemed of great importance to the spiritual or cultural heritage of peoples, as when they are located within buildings of such significance, they enjoy further special protection under the 1977 Protocols. This entails the prohibition of their use in favour of military effort and of acts of hostility against them, including their targeting as measures of reprisal. However, in contrast with the aforementioned shift in the law towards certain shared responsibilities by attacking and defending armed forces in their treatment of certain historic school buildings under the 1954 Hague Convention, the subsequent 1977 Protocol I did not contained any further evolution by *granting schools and universities the general protection against direct and deliberate targeting that is recognised to all civilian buildings*<sup>526</sup>. Accordingly, the possible conversion of such buildings into legitimate military objectives entails the negative presumption in favour of immunity from attack if it is doubtful whether “*a school is being used to make an effective contribution to*

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protections for school buildings was emblematically represented by the shelling by the German Army on the University of Louvain under the alleged premise that French forces were using the university for military purposes during World War I, see M.D. Thrlow, “Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law”, *Yale Human Rights and Development Law Journal*, 2005, p. 158.

<sup>525</sup> A lack of clarity of the 1954 Convention in defining the school buildings to which it might provide a privileged status during armed conflict has been critically raised, noting that, while the definition of Article 1 might apply to the ancient buildings of Oxford and Cambridge Universities, the question becomes what is sufficiently ancient to receive the benefit of the privilege: “*American universities are relatively new compared to the established educational institutions of Europe; conceivably, then, no American universities are eligible*”, see G. Bart, “The ambiguous protection of schools under the law of war: time for parity with hospitals and religious buildings”, 40 *Georgetown Journal of International Law*, 2009, p. 211.

<sup>526</sup> Articles 48 and 52(2) AP I. See C. Pilloud et al., *op. cit.*, p. 647.

*military action*”, as it is ordinarily employed for civilian purposes. As such, this implies *a potential use by armed forces of any unoccupied civilian buildings for military purposes, especially those near combat areas*.<sup>527</sup> Nevertheless, basic positive implications would derive from the belligerents’ obligation to take (passive) precautions against the effects of attack “*to the maximum extent feasible*”, including: avoiding placing military objectives within, or in close proximity of, highly populated areas where schools and universities are possibly found; removing civilian objects and persons under their control from surrounding military areas; and taking further essential precautions to protect education buildings under their control against the risks arising from hostilities.

Therefore, Protocol I apparently limits the military use of schools to the extent that they are functioning and civilians and non-combatants are present.<sup>528</sup> Such use includes, for instance, converting unoccupied school buildings into bases for soldiers or command posts for military operations, supply depots, or artillery sites. This may render them military objectives subject to lawful attack, although they would still of course be subject to the obligations upon the belligerents to respect proportionality and to adopt the well-known precautionary measures in attack.<sup>529</sup>

In this regard, as articulated by a recent soft-law initiative, *all feasible alternative measures* should be considered by the parties to a conflict before attacking a school or university that has become a military objective, including advanced warning to the enemy about a forthcoming attack unless such use ceases; in particular, two notable aspects are emphasised: (a) prior to any attack, they should take into account “*the duty of special care for children, and the potential long-term negative effect on a community’s access to education posed by the damage or destruction of the school*”; (b) the military use “*should not serve as justification for an opposing party that captures it to continue to use it in support of the military effort*”, adding that “*as soon as feasible, any evidence or indication of militarization or fortification should be removed and the facility returned to civilian authorities for the purpose of its educational function*”.<sup>530</sup> Another pertinent remark

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<sup>527</sup> See C. Pilloud et al., *op. cit.*, pp. 636-7.

<sup>528</sup> The prohibition contained in Articles 51 and 58 about placing military objects in locations where civilians are present has already been discussed. These acts include the use of human shields to inhibit an opposing army from targeting those military objects. Accordingly, if civilian students are still using a school building, an army may not lawfully use the building for military purposes.

<sup>529</sup> As outlined above, under Article 57 API those planning or authorizing an attack must do everything feasible to establish whether the targets are civilians or civilian objects. Further, legal advisers must be available and advise commanders on the lawfulness of the attack when it is being planned or authorised; then, those who carry out the operation must stop the attack if it appears that the targets are civilians or civilian objects.

<sup>530</sup> Guideline 4 of the 2012 Lucens Guidelines. They have been developed by an expert group of Member States, regional organizations, military experts, child protection actors, education specialists, and international humanitarian and human rights lawyers. They aim at reducing the use of schools and universities by the parties to armed conflict in support of their military effort and to minimise the negative impact on students’ safety and education. They are intended “*to serve as guidance for those involved in the planning and execution of military operations, in relation to decisions over the use and targeting of institutions dedicated to education*”; “*they may also serve as a tool for inter-governmental and non-governmental organizations engaged in monitoring, programming, and advocacy related to the conduct of armed conflict*”. Thus, they might be included in military

concerns abandoned schools and universities: they should not be used for any purpose in support of the belligerents' effort "*except only when, and for as long as, no choice is possible between such use of the school or university and another feasible method for obtaining a similar military advantage*". The rationale in this case is to presume "*appropriate alternative premises*" as a better option even though they are not as "*convenient*" or as "*well positioned*" for the military purpose being pursued. It is indeed emphasised how the potential negative consequences of the use of a school, including its effect on a civilian population's willingness to return to an area, cannot be fully known by the parties to armed conflict.<sup>531</sup>

Further, since international humanitarian law does not strictly provide a general prohibition on the use or the occupation of educational buildings for military purposes if the criteria of Article 52(2) are satisfied, it is reasonable to question *whether such a "derivative" and indirect level of protection of most educational facilities - which focuses exclusively on the duties of armed forces to discriminate in targeting - should be considered anachronistic*. In view of its significance as an empowerment right and the alarming escalation of military attacks, their military use may result in an absolute denial of students' right to education, creating a serious conflict between international human rights and humanitarian law. The recognition of *an autonomous privileged status to schools buildings* on the basis of their intrinsic educational, and therefore humanitarian, value to society is arguably pertinent. Supporting such 'integral' protection would imply expanding the focus of existing IHL rules on the conduct of hostilities, which should not only limit military forces' choice of targets but also prohibit both attackers and defenders from converting educational buildings for military purposes. In this sense, the practice of placing military objectives in school facilities or using them to advance military goals would become unlawful, regardless their ordinary functioning and use by civilian students and educational staff.

Within scholarly critiques of the ambiguous IHL protection of educational facilities, *the banning of their use for military purposes* has been strongly advocated in light of the controversial point that "perceived" military use is often exploited to justify attacks.<sup>532</sup> Stressing that a school is currently no

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training and doctrine. See Global Coalition to Protect Education From Attack (GCPEA), *Draft Lucens Guidelines for Protecting Schools and Universities From Military Use during Armed Conflict*, 2012.

<sup>531</sup> Guideline 2, in which articulates the following three guidelines: "(a) Any such use of abandoned schools and universities should be for the minimum time necessary; (b) Abandoned schools and universities that are used by the fighting forces of parties to armed conflict in support of the military effort should always remain available to allow educational authorities to re-open them as soon as practicable, provided this would not risk endangering the security of students and staff, (c) Any evidence or indication of militarization or fortification should be completely removed following the withdrawal of fighting forces, and any damage caused to the infrastructure of the institution should be promptly and fully repaired. All munitions and unexploded ordnance or remnants of war must be cleared from the site."

<sup>532</sup> See G. Bart, "The Ambiguous Protection of Schools under the Law of War: Time for Parity with Hospitals and Religious Buildings", *Georgetown Journal of International Law*, 2009. He stresses how during the heat of battle confusion over the evidence of the military use of a certain building can too easily be exploited to justify attacks. In this regard, the official reason for a high number of attacks on schools in contexts of armed conflict has been reported to be exactly their

more protected than a cinema or a hotel, it has been shown how the military use of a school in a combat zone increases the risk of attack on educational facilities, since commanders will likely argue that if one building has been converted others must have also been.<sup>533</sup> Thus, an outright ban on military use has been proposed alongside supporting the use of a recognisable symbol in order to render compliance easier. Although somewhat difficult to achieve, this ban would also require vetting on the purposes of course curriculums and research programmes within school buildings. As such, this would also potentially prohibit the use of schools for political programmes designed to recruit child soldiers or the use of university laboratories to develop weapons of war.<sup>534</sup>

Strengthening the protection of education facilities would be in line with the IHL special protection regime afforded to other categories of objects including hospitals and medical establishments for their inherent humanitarian value and religious buildings representing the spiritual conscience of a people or community. Furthermore, this would be also in accordance to those IHL principles and rules affording special protection to children in armed conflicts, as already examined above. The partial or total use of education establishments for military purposes may actually put at risk the life and physical integrity of children, as well as restricting or even impeding access to education, either because pupils stop going to school for fear of being killed or injured or because they are deprived of premises on which to be educated. Further, the significance of education as a means of resilience of conflict-affected children and young people to protect and develop their full capabilities also supports this perspective.

### **6.6.c. Remarks on the criminalisation of education-related violations**

Aside from the lack of a ban on military use of education buildings, within the debate on attacks on education in armed conflicts, significant concerns have been expressed in relation to the *widespread impunity for perpetrators of such attacks*, which is commonly deemed to result from failures to implement relevant existing norms, rather than from deficiencies in the law itself. As such, international humanitarian and human right law may be considered comprehensive enough to empower States' investigations on situations relating to this specific field. Moreover, there is a certain scope to coordinate those legal regimes with international criminal law, to ensure a broader response to

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use by military and security forces or armed opposition groups. For instance, on 7 and 8 August 2008, shelling by Georgian forces hit civilian buildings, including the university and several schools and nursery schools in Tskhinvali and outlying villages in South Ossetia and that some of the buildings were being used as defensive positions by South Ossetian forces, see Human Rights Watch, *Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict Over South Ossetia*, New York, 2009.

<sup>533</sup> *Ibid.*, p. 441.

<sup>534</sup> *Ibid.*, p. 438.

education-related violations, which also attracts individual criminal responsibility.

It is worth noting that the Rome Statute does not deal with the protection of education itself and does not define ‘attacks on schools’, although several criminal acts may result under certain circumstances. In particular, *an attack intentionally directed at an educational facility as well as against the civilians inside it* may be investigated and prosecuted as a war crime under the general offence of attacking civilians and civilian objects<sup>535</sup> as well as under the specific offence of targeting buildings dedicated to education.<sup>536</sup> In light of previous remarks, a limiting condition would be that such facilities must not be used in support of the belligerents’ effort at the time of the attack, either lawfully or unlawfully, and that the civilians must not be directly taking part in hostilities. The war crime of “*extensive destruction and appropriation of property, not justified by military necessity and carried out wantonly and unlawfully*” may provide a further measure to protect educational facilities.<sup>537</sup> Furthermore, the attacking on educational buildings may amount to the crime against humanity of persecution or “*other inhuman acts*” if the acts concerned reach a certain level of gravity and if the *mens rea* of special persecutory intent is proven.<sup>538</sup> As addressed in relation to cultural property, in the *Kordic and Cerkez* case the destruction of institutions “*dedicated to Muslim religion or education*” were deemed to constitute persecution of equivalent gravity to other crimes enumerated in Article 5 ICTY Statute.<sup>539</sup> This reasoning may apply to facilities where secular education takes place or where students of other faiths are educated; if the prosecutor can prove that the attack in question was carried out in the awareness of students’ belonging to particular national, ethnic, racial, religious or political groups. Moreover, an attack on educational facilities may arguably be evidence of other crimes, such as genocide.

It is noteworthy that a number of cases in which the Office of the ICC Prosecutor has conducted investigations and prosecutions contain references to crimes that deal with attacks on

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<sup>535</sup> Article 8(2)(b)(i), Article 8(2)(b)(ii), and Article 8(2)(e)(i) ICC Statute prohibit the intentional direction of attacks against the civilian population and against civilian objects in times of international and non-international armed conflict respectively.

<sup>536</sup> A textual reference of such prohibition is in Article 8 (2)(b)(ix) and Article 8 (2)(e)(iv) ICC Statute. Conversely, for cases in which the destruction of buildings dedicated to education constituted a war crime, see ICTY, *Prosecutor v. Blaskic* (IT-95-14), Trial Chamber, Judgment, 3 March 2000, para. 185; ICTY, *Prosecutor v. Naletilic and Martinovic* (IT-98-38), Trial Chamber, Judgment, 31 March 2003, paras. 603-605 (“*The damage or destruction must have been committed intentionally to institutions ... which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts*”). Concerning the destruction of educational facilities during the attack on Dubrovnik, see ICTY, *Prosecutor v. Miodrag Jokic* (IT-01-42/1-S), Judgment of 18 March 2004, (sentenced to seven years’ imprisonment following a guilty plea for his involvement in such attack); ICTY, *Prosecutor v. Pavle Strugar* (IT-01-42-T), Judgment of 31 January 2005 (sentenced to 7 1/2 years upon conviction for, *inter alia*, destruction and wilful damage to educational institutions).

<sup>537</sup> Article 8 (2)(a)(iv) ICC Statute.

<sup>538</sup> Article 7 (1)(h) ICC Statute.

<sup>539</sup> ICTY, *Prosecutor v. Kordic and Cerkez*, Trial Chamber, Judgment of 26 February 2001, paras. 206-207. See also ICTY, *Prosecutor v. Kordic and Cerkez* (IT-95-14/2-A), Appeals Chamber, Judgment of 17 December 2004, para.108.

education. In the situation of Afghanistan, the preliminary investigations have concerned, inter alia, the “*persistent attacks on girls’ schools by means of arson, armed attacks and bombs*”.<sup>540</sup> In the proceedings opened in relation to the situations in Sudan<sup>541</sup> and the Central African Republic,<sup>542</sup> relevant charges have concerned the commission of mass crimes (such as killings, rapes and pillaging against the civilian population, including children) and community leaders such as teachers were often targeted by such acts. Other reports under consideration at the office of the Prosecutor concern similar grave violations against children, including killing, maiming, and attacks on schools, such as those targeted by Zaraguinas, or armed bandits, for the purpose of abducting children for ransom, and resulting in parents refusing to send children to school. Indeed, it is worth mentioning the significant attention to the crime of using children under the age of 15 to actively participate in hostilities,<sup>543</sup> and some abductions have been taken place in schools. Related charges have been brought in several cases concerning the situation in the Democratic Republic of the Congo between July 2002 and the end of 2003 and the situation in Uganda during 2003 and 2004.<sup>544</sup>

Notwithstanding the fact that international criminal law has a certain potential to protect education itself, the absence of explicit treaty provisions or case law in this regard strengthens the need, at an international level, to acknowledge the actual impact of armed conflicts on education. In this regard, there is scope to deem relevant breaches of international criminal law as education-related violations. Examples may include the crime against humanity of persecution or the crime of incitement of genocide. In particular, a real and intentional deprivation of education could amount

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<sup>540</sup> ICC OTP, *Report on Preliminary Examination Activities*, 13 December 2011, para. 28; ICC OTP, *Report on Preliminary Examination Activities 2012*, 22 November 2012, para. 31.

<sup>541</sup> ICC, *Prosecutor v. Omar Hassan Al Bashir*, ICC-02/05-01/09, Situation in Darfur, Sudan. The Sudanese President Omar al-Bashir has been accused of multiple attacks that took place from March 2003 to 14 July 2008 “as part of the counter-insurgency campaign”: the attacks on the civilian population of Darfur - belonging largely to the Fur, Massalit and Zaghawa groups - included the bombing of schools, with children representing the large proportion of victims. Notably, in the application for al-Bashir’s arrest warrant, the bombing at schools was referred as evidence of genocide, crimes against humanity along with the rape by Janjaweed militias of schoolgirls and the murder of a school head teacher, see *Prosecutor v. Omar Hassan Ahmad Al Bashir: Public Redacted Version of the Prosecutor’s Application Under Article 58*, ICC-02/05-157-AnxA, 14 July 2008, paras. 14, 112, 140, 232, 234.

<sup>542</sup> ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Situation in the Central African Republic. The former vice president of the DRC, Bemba has been charged as a military commander allegedly responsible for his troops’ conduct in the Central African Republic from late October 2002 to mid-March 2003; in particular, two counts as crimes against humanity (murder and rape) and three counts as war crimes (murder, rape, and pillaging).

<sup>543</sup> They are punishable under Article 8(2)(b) (xxvi) and/or Article 8(2)(e)(vii) ICC Statute.

<sup>544</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on confirmation of charges, 29 January 2007; ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on confirmation of charges, 30 September 2008; ICC, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Decision on prosecutions’ application under Art. 58, 18 July 2012; *The Situation in Uganda*, ICC-02/04-56, Warrant of Arrest for Okot Odhiambo, 8 July 2005; *The Situation in Uganda*, ICC-02/04-54, Warrant of Arrest for Vincent Oti, 8 July 2005; *The Situation in Uganda*, ICC-02/04-53, Warrant of Arrest for Joseph Kony, 8 July 2005, amended on 27 September 2005. On 11 July 2007 the proceedings against Laska Lukwiya were terminated due to his death, and the OTP also submitted information to Chamber on the reported death of Vincent Oti.

to persecution under the Rome Statute if also the other elements are fulfilled.<sup>545</sup> From the ICTY jurisprudence we can already note that the exclusion of members of an ethnic or religious group from educational institutions has been deemed as being capable of amounting to persecution under the ICTY Statute, even though it is not explicitly set out therein.<sup>546</sup> Conversely, to the extent that educational materials and contents constitute direct and public incitement to genocide (*e.g.* through lessons or textbooks) which are taught to students with an intent to directly induce or provoke them to commit genocide, this may amount to the international crime provided for in Article 25(3)(e) Rome Statute. However, so far the application of this crime has been limited to broadcasts by mass media and public speeches by government officials.<sup>547</sup>

#### **6.6.d. Remarks on the international law potential in deterring attacks**

The drafting of an international treaty that would provide new legal rules specifically dealing with attacks on education has also been considered. However, this option is commonly deemed risky as it implies giving States the opportunity to unpick some of the safeguards that already exist for students, staff and educational buildings as civilians and civilian objects. In particular, the negotiating process could actually leave education targets with less protection in law rather than improving it. Nonetheless, the Security Council Resolution 1738 (2006) protecting journalists has been referred to as a precedent for pushing for a resolution which would deal with a specific group such as academics, in order to complement the existing protection provided for children,

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<sup>545</sup> Article 7(1)(h) and (2)(g) ICC Statute; ICC, Elements of Crimes, at 10. The criteria include: education defined as a “*fundamental right*”; its deprivation contrary to international law (so, not consistent with lawful limitations); its denial in relation to a certain group on discriminatory grounds (*i.e.* based on a group’s national, political, religious, cultural, ethnic, racial, or gender identity) or other grounds universally accepted by international law; its deprivation as part of a systematic or widespread attack against any civilian population or in connection with any other act prohibited by the Rome Statute; and the knowledge by the perpetrator that this was part of such attack.

<sup>546</sup> ICTY, *Prosecutor v. Kupreskic*, Trial Chamber, 14 January 2000, para. 612, referring to the *Justice Case* before the U.S. Nuremberg Military Tribunal (Case No. 3, *The United States of America v. Josef Altstotter et al.*, Indictment, pp.1063-1064), in *Trials of War Criminals (Vol. III)*, in which the passing of decrees expelling Jews from educational institutions (or public services and business enterprises) was deemed to constitute a form of persecution. See Judgment of the International Military Tribunal for The Trial of German Major War Criminals, Nuremberg, 30 September and 1 October 1946, *Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22, 1950, at 248 and 302.

<sup>547</sup> See ICTR, *Prosecutor v. Ruggiu* (ICTR-97-32-I), Trial Chamber, 1 June 2000; ICTR, *Prosecutor v. Nahimana, Barayagwiza, and Ngeze* (ICTR-99-52-T), Trial Chamber, 3 December 2003 (the *Media Case*). On relevant elements of incitement, see ICTR, *Prosecutor v. Akayesu* (ICTR-96-4-T), Trial Chamber, Judgment of 2 September 1998, para. 555 (incitement referred to as encouraging, persuading, or directly provoking a number of individuals or the public in general to commit genocide); ICTR, *Prosecutor v. Kalimanzira* (ICTR-05-88-T), Trial Chamber, 22 June 2009, para. 515 (public incitement occurring through “*speeches, shouting or threats uttered in public places or public gatherings, or through the sale or dissemination ... of written material or printed matter in public places ...*”); ICTR, *Prosecutor v. Akayesu*, *ibid.*, para. 557, and ICTR, *Prosecutor v. Kalimanzira*, *ibid.*, para. 514 (direct incitement to be assessed in view of cultural and linguistic context); ICTR, *Prosecutor v. Nahimana, Barayagwiza, and Ngeze*, *ibid.*, paras. 1000-1010 (the required intention that the incitement generates in others a certain state of mind necessary to commit genocide), para.1012 (while the context and the purpose of the message is relevant, the effect on the audience is not), and para. 678 (the commission of genocide or the proof that anyone in fact attempted to commit it as a result of the incitement is not required).



educational facilities and staff in its previous Resolution 1612 (2005).<sup>548</sup>

Notably, UNESCO has identified several aspects necessary to realise “*the potential of international law and national laws to help deter attacks*”.<sup>549</sup> Firstly, it has highlighted the importance of the consideration of cases on perpetrators and commanders by national prosecutors and by the Office of the Prosecutor of the ICC. Secondly, it has emphasised the need to research and monitor the efficacy of accountability mechanisms against impunity for such attacks. Thirdly, it has stressed the need of legal training of officers, troops and military lawyers in the conduct of hostilities for protecting education from attack and the right to education. Fourthly, it has noted the importance of monitoring and reporting on compliance with relevant national and international law. Fifthly, it has considered the option of entering into specific agreements between belligerents not to perpetrate attacks on education. Sixthly, it has underlined the necessary improvement of the recognition of the value of education and its protection by advocacy and development of “*an internationally recognisable symbol denoting safe sanctuary status*” and “*public education on the right to education and the laws of war*”. Finally, victims’ reparation and assistance as well as the recovery of relevant facilities are deemed consistent with the duty to protect the right to education.

It is worth noting that the political responsibilities of the international community have been taken into consideration within the overall debate. The relevance of *international cooperation* (as recognised in Articles 4 and 28 CRC) to implement the right to education has been emphasised; despite its partial and sometimes vague translation into international political responsibilities, some relevant developments have emerged.

Although the importance of establishing minimum standards in basic education was addressed at the 1990 World Conference on Education For All, held in Jomtien, Thailand, *education in emergencies received scant attention*. Conversely, the Dakar Framework for Action on Education For All (adopted at the 2000 World Education Forum, held in Dakar) paid much consideration to educational consequences of emergencies: emphasis was placed on children affected by conflict, natural disasters and instability, and on educational programmes to advance “*mutual understanding*,

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<sup>548</sup> Deputy Director of the Centre for North African Studies at the Cambridge University, Saad Jabbar, 18 March 2009.

<sup>549</sup> B. O’Malley, “Education Under Attack”, Commissioned by Mark Richmond, Director, Division for the Coordination of United Nations Priorities in Education, Education Sector, UNESCO, 2010. According to a conclusion shared in such study, “*while action should be taken to correct any weak places in the law, most of the work to strengthen protection will have to go to solving other dimensions of the problem*” (quoting the Office of HH Sheikha Mozah Bint Nasser Al-Missned, Planning and Programming Directorate, “International Law and the Protection of Education System”, 2010).

*peace and tolerance*”, supporting the prevention of violence. According to a statement in the Dakar Framework for Action “*no countries seriously committed to education for all will be thwarted in their achievement of this goal by a lack of resources*”; for the Special Rapporteur on the right to education, this implies that *any State wanting to ensure primary education, but incapable of doing so, should be able to obtain the funds essential for that purpose*. Critically, the MDG assigned *educational goals* to a development agenda (rather than to a rights one). Precisely, the narrow view of quantifiable access to a full primary education that is free, compulsory and of good quality by the year 2015 (Goal 2) and the promotion of gender parity by the year 2005 (Goal 3) has implied to divert attention from other educational goals, which are crucial in emergency situations. As aptly stressed by the Special Rapporteur, such commitment to long-term development goals risk to be ineffective from the perspective of prioritizing education as a human right in emergencies as well as holding States accountable.

Focusing on the growing coordination among all the actors involved in the protection of the right to education in emergencies, *the creation of qualitative standards and indicators* has resulted, *inter alia*, in broadening the legal and political framework under which those actors are expected to operate. Precisely, the Minimum Standards for Education in Emergencies, Chronic Crises and Early Reconstruction, developed since 2004 by the Inter-Agency Network for Education in Emergencies (INEE), offer a consistent basis of principles and paths of action to all actors involved in the provision of education during emergencies, in order to coordinate their educational activities and to promote the acceptance of responsibilities. However, the efforts for strengthening the INEE Minimum Standards should be intensified.<sup>550</sup>

Overall, despite the growing awareness about the necessary delivery of education in emergencies and the progress made in that respect, *a huge gap between the legal and political responsibilities of the international community and its action and funding priorities* persists. A range of reasons for, and consequences of, this gap has been spelled out, stressing certain general recommendations for States, donors, intergovernmental organizations and civil society organizations, which result particularly relevant for the present research.

Precisely, insofar as the implementation of the right to education in emergencies should be an essential and unequivocal commitment of the international community, *this right should be primarily acknowledged as an integral part of the humanitarian response to conflicts and natural disasters*. In this regard, measures that may guarantee its immediate priority include: placing greater emphasis on this right during emergencies (as attention tends to focus on post-conflict situations); ending impunity of those

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<sup>550</sup> See Report to the Special Rapporteur on the right to education, Vernor Muno Villalobos, *Right to education in emergency situations*, A/HRC/8/10, 20 May 2008, paras. 57-67.

attacking schools, students and teachers; further researching into the effectiveness of some of the measures prompted by the increased violence against them (such as armed responses in defence of communities and the promotion of resistance); assigning more resources, specifically to fragile States (despite of the increased interest in the allocation and effectiveness of assistance in emergencies); prompting attention to the consequences of emergencies for girls and female adolescents, and strategic measures developed to give physical and emotional protection; researching specific programmes for young people and adolescents, including the needs of persons with disabilities; greater attention to the understanding and development of education for peace; greater use of qualitative methodologies to determine the degree of psychosocial care during emergencies.<sup>551</sup>

As far as States are specifically concerned, the development of “*a plan that prepares for education in emergencies*” as part of States’ general educational programmes has been recommended, including measures for continuity of education at all levels and during all the phases of the emergency. A *programme of studies* to be drawn up in a way to be “adaptable, non-discriminatory, gender-sensitive and of high quality”, with attention of children’s and young people’s needs, has been suggested. The *involvement of children, parents and civil society in planning school activities* has been recommended so as provide “safe spaces for students” throughout the emergency. The design of *specific plans to avoid exploitation of girls and young women* in the wake of emergencies has been also considered.

## **6.7. Objects indispensable to the survival of the civilian population**

Both 1977 Protocols afford special protection to objects that are indispensable to the survival of the civilian population by prohibiting the *destroying, attacking, removing or rendering them useless*. This protection is intended to cover all eventualities, counting the destruction of harvests by defoliant or the pollution of water supplies by chemical or other agents.<sup>552</sup> This represents a corollary to the prohibition of starvation of civilians as a method of warfare aimed at weakening or destroying the population,<sup>553</sup> which is established for both internal and international armed conflicts and is deemed

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<sup>551</sup> *Ibid.*, paras. 68-73. In subsequent sections, the Special Rapporteur’s attempt is that of outlining the priorities of “actor” agencies and donors who are involved in realising the right to education in emergencies, and identifying the main education providers; then he deals with the affected populations.

<sup>552</sup> C. Pilloud and J. Pictet, “Article 54”, in Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, para. 2101; also para. 4801.

<sup>553</sup> As detailed in the commentary on the 1977 Protocols, Article 54 (2) AP I “*develops the principle formulated in paragraph 1 of prohibiting starvation of the civilian population; it describes the most usual ways in which this may be applied*”, see Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, para. 2098. Similarly, it is stated that Article 14 AP II “*develops the principle prohibiting starvation from being used against civilians by pointing out the most usual ways in which starvation is brought about*”, see Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, para. 4800.

to be customary in nature in both situations.<sup>554</sup> In the same vein, reprisals against such objects are forbidden.<sup>555</sup>

In the case of international armed conflicts, Article 54(2) API proscribes the aforementioned acts if they are committed “*for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse party*”, “*whatever the motive, them to move away, or for any other motive*”.<sup>556</sup> While in several military manuals the unlawfulness of the attack is determined according to its *intent to impede* the civilian population being supplied, many others do not specify this requirement and prohibit it as such.<sup>557</sup> Similarly, attacks against objects indispensable to the survival of the civilian population are prohibited in military manuals applicable to non-international armed conflicts and they also constitute an offence under several national legislations.<sup>558</sup>

With regard to internal armed conflicts, Article 14 APII prohibits *starvation of civilians* as a method of combat as well as the *destruction, attack, removal or making useless, for that purpose, objects essential to the civilian population’s survival*. As clearly explained in the official commentary, no measure of military necessity justifies the starvation of civilians; thus no exceptions are foreseen under this provision.<sup>559</sup>

A noteworthy issue relates to the ***types of damage*** caused. Under Article 54(2) the unlawfulness of the prohibited acts relies on that their *purpose* is identified in *the denial of the sustenance value* to the affected civilians. Here, a distinction between incidental and foreseeable damage is unhelpful. When the damage caused is incidental and so unintended, it is clear that it cannot fall within the prohibition set out in Article 54(2). Conversely, when the damage is foreseeable, the problem remains of the textual reference to the “*purpose*” of the attack, rather than to its effects. In fact, this regrettably appears to imply that situations of *indirect damage hampering the survival of the population (even if they are foreseeable)* do not fall perfectly within Article 54(2). As aptly noted, the term

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<sup>554</sup> Article 54 (1) AP I, Article 14 AP II. See Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, para. 2090. See J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, Rule 53, p. 186.

<sup>555</sup> Article 54 (4) AP I.

<sup>556</sup> Article 54 (2) AP I. See J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, Rule 54, p. 189.

<sup>557</sup> For detailed indication of manuals and national legislation, see J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, p. 190, Rule 54 (particularly notes 33-35).

<sup>558</sup> For detailed indication of manuals and national legislation, see J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, p. 191, Rule 54 (particularly notes 39-40).

<sup>559</sup> See Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, at 1456, para. 4795: “*The prohibition on using starvation against civilians is a rule from which no derogation may be made. A form of words whereby it would have been possible to make an exception in case of imperative military necessity was not adopted*”.

“effect” is used elsewhere in Protocol I (*e.g.* in relation to indiscriminate attacks)<sup>560</sup> but it is not referred to define the scope of the prohibition set out in Article 54(2).<sup>561</sup> The unfortunate result is that actions indirectly impairing the population’s survival - *e.g.* targeting power supply installations - do not amount to a breach of this provision.

As for the **definition** of this specially protected category of objects, both Article 54(2) API and Article 14 APII contain an illustrative list including irrigation works, drinking water installations and supplies, agricultural areas for the production of livestock and crops. As recognised in the official commentary, “it cannot be excluded that as a result of climate or other circumstances, objects such as shelter or clothing must be considered as indispensable to survival” of civilians.<sup>562</sup> In this sense, a widely shared view on the ordinary meaning of “starvation” - as expressed by the delegations participating in the negotiations of the Elements of Crimes for the International Criminal Court - equates to killing either by denial of food and water, or, more broadly, by denial or inadequate delivery of other indispensable items (*e.g.* medicines or blankets) which are crucial to survival.<sup>563</sup> In this regard, under both 1977 Protocols *medical supplies* and *foodstuff* are considered essential to the civilian population’s survival, but only Protocol I refers to “clothing, bedding and means of shelter”.<sup>564</sup>

Remarkably, what the expression “drinking water installations and supplies” exactly encompasses has been questioned in legal scholarship. While literally it surely means water reservoirs, wells and pumps, the special protection afforded by the 1977 Protocols seems reasonably capable of being expected to cover “electricity-generating plants that supply the power necessary for the purification and pumping of drinking water” because they are essential to the functioning of drinking water installations<sup>565</sup> although this is perhaps not self-evident.<sup>566</sup> However, the “for the specific purpose” caveat weakens the

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<sup>560</sup> In outlining three situations as indiscriminate attack, Article 51(4) deals at sub-paragraph (c) with attacks that “employ a method or means of combat the effects of which cannot be limited as required by the Protocol”.

<sup>561</sup> F. Hampson, “Means and Methods of Warfare in the Conflict in the Gulf”, in P. Rowe (ed.), *The Gulf War 1990-91 in International and English Law*, Routledge, 1993, at 99.

<sup>562</sup> C. Pilloud and J. Pictet, “Article 54”, in Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, para. 2103, p. 655.

<sup>563</sup> See K. Dormann, “Preparatory Commission for the International Criminal Court: The Elements of War Crimes - Part II: Other Serious Violations of the Laws and Customs Applicable in International and Non-International Armed Conflicts”, 83 *IRRC*, 2001, pp. 475-476.

<sup>564</sup> Article 69 (1) AP I requires the occupying power to provide for the civilian population living in the occupied territory “basic needs, such as clothing, bedding, means of shelter, other supplies essential to their survival”; Article 18 (2) AP II.

<sup>565</sup> See H. Shue and D. Wippman, “Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions”, *CILJ*, 2002, p. 573, in which the authors emphasise that “consequently, if Article 52(2) is read in conjunction with Article 54, attacks upon the power source for the delivery of potable water, in other words water clean enough to drink without contracting illness, are prohibited subject to the ‘for the specific purpose’ caveat in Article 54(2) quoted above”.

<sup>566</sup> See Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, CUP, 2010, p. 219.

prohibition as applied to dual-use facilities.<sup>567</sup> In addition, on the ambiguity in the definition of “water installations”, it has been underlined that “*practice seems to indicate that the term does not include smallest elements of the fresh water network, but only the largest entities in so far as they are vital to prevent starvation of the civilian population, both by lack of fresh water itself and lack of fresh water for agriculture*”.<sup>568</sup>

Turning to the **exceptions**, one stems from Article 54(3) API, concerning the possibility of targeting *objects fundamental to the population’s survival as far as they turn into military objectives when they are used as sustenance uniquely for combatants or otherwise in direct support of military action by the enemy*.<sup>569</sup> Numerous military manuals, some legislation and official statements set forth this exception<sup>570</sup> and, significantly, they also acknowledge the *basic caveat* in Article 54(3)(b): when those objects do not serve as sustenance uniquely for combatants but nonetheless in direct support of military action, *the prohibition of starvation will still prohibit on attack on them if the attack is likely to cause starvation among the civilian population*.<sup>571</sup> However, since Article 14 APII does not set forth this exception and there is no practice supporting it, its applicability to non-international armed conflicts remains uncertain.<sup>572</sup>

With regard to Article 54(3)(a), this exception may also represent a clear-cut case inasmuch as the civilian population has been already deprived by the objects concerned, which are no longer available for their sustenance; an attack against them or their destruction would be lawful if they serve solely for the sustenance of combatants. For instance, it would be possible to demolish a drinking water installation solely supplying an enemy’s military base.<sup>573</sup>

In relation to 54(3)(b), concrete examples have been debated regarding cases of armed forces using an object indispensable to the civilian population’s survival in manners directly supporting military action, so legitimising the attack against it. They include the destruction of an irrigation

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<sup>567</sup> On this aspect, see J. Crawford, “The Law of Noncombatant Immunity and the Targeting of National Electrical Power Systems”, 21 *Fletcher Forum of World Affairs*, 1997, p. 110, noting that “*The United States accepts as customary international law the prohibition against intentionally targeting drinking-water installations, foodstuffs, crops, livestock and other objects indispensable to the survival of the civilian population. However, in the case of Iraq, these crucial items were lost to the noncombatant populace as a result of the reverberating effects of the aerial bombardment of electricity*”.

<sup>568</sup> N. Jorgensen, “The Protection of Freshwater in Armed Conflicts”, 3 *Journal of International Law and International Relations*, 2007 pp. 57-96.

<sup>569</sup> Article 54 (3) AP I: “*The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party: (a) as sustenance solely for the members of its armed forces; or (b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement*”.

<sup>570</sup> For details on the military manuals, see J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, p. 192, Rule 54 (particularly note 47).

<sup>571</sup> This is acknowledged even in military manuals of States not party to Protocol I, such as Israel and the United States.

<sup>572</sup> See J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, p. 192, Rule 54.

<sup>573</sup> See F. Kalshoven, *Reflections on the Law of War: Collected Essays*, Martinus Nijhoff Publishers, 2007, p. 229.

canal serving as defensive line,<sup>574</sup> the bombardment of a food-producing area if the purpose is to prevent the advance of enemy troops (rather than the growing of food for civilian consumption),<sup>575</sup> and the razing of a railroad line that is a military objective, even if it serves “*to transport food needed to supply the population of a city*”.<sup>576</sup> In these cases, however, the aforementioned caveat clearly entails that *the attack will still remain forbidden if it would cause civilians to starve* according to Article 54(1). Similarly, attacking a water tower that functions as an observation post would be lawful provided that it did not deny access to water to the population in a way causing its starvation or pushing it to flee.

Nevertheless, the utility of this second dimension of the exception may be questioned in view of the textual prohibition of *acts specifically intended to deny the “sustenance value” of the object concerned* for whatsoever reason (including starvation and forced displacement). For instance, an option for the belligerent seeking to target a water tower would be to argue that such an attack solely attempted to deny the adversary’s direct support to military action through use of the tower, without any intention to deny its sustenance value to the civilian population. Under this line of argument, such an attack would be legitimate to the extent that the targeted object fulfils the definition of military objective under Article 52(2) and the proportionality principle is respected alongside precautionary measures.

Leaving aside any military use of objects indispensable to the civilian population’s survival, *imperative military necessity may also entitle a belligerent to destroy them provided they are situated within the territory under its own control*. This exception is codified in Article 54(5), and in numerous military manuals as well.<sup>577</sup> In particular, it refers to a belligerent facing a situation of imperative military necessity (such as an invasion) and resorting to the so-called “*scorched earth policy*” by, for instance, demaging its crops.<sup>578</sup> Further, it requires either that the territory in question be the national territory of the party acting in its defence and wishing to appeal for the exception, or that the affected areas of national territory be controlled by the party concerned.<sup>579</sup> This rule has two significant implications. An occupying power withdrawing from occupied territories cannot invoke this exception. Then, even in case of a party’s own territory, the latter may decide to resort to the “*scorched earth*” policy only when

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<sup>574</sup> W.A. Solf, “Article 54”, in M. Bothe, K.J. Partsch and W.A. Solf (eds.), *op. cit.*, p. 341.

<sup>575</sup> F. Kalshoven, *Reflections on the Law of War: Collected Essays*, 2007, p. 229.

<sup>576</sup> W.A. Solf, *op. cit.*, p. 339.

<sup>577</sup> For details on the military manuals, see J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, p. 193, Rule 54 (particularly notes 50-51).

<sup>578</sup> According to Article 54(5) AP I this exception is allowed “*in recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion ... where required by imperative military necessity*”.

<sup>579</sup> Therefore, it must not be the enemy’s territory or an area of the national territory controlled by the enemy, see C. Pilloud and J. Pictet, “Article 54”, *op. cit.*, pp. 658-59.

it is in evacuation or retreat from its own territory and resort cannot be had to such a policy when it is “*seeking to expel the enemy or reoccupy its own territory*”.<sup>580</sup> Nonetheless, scorched earth measures have *enormous potentially long-lasting negative effects on the civilian population*. However, again, since Article 14 APII does not set forth this exception, its applicability to non-international armed conflicts remains uncertain.<sup>581</sup>

Reflecting on the status of these provisions in international law, as generally argued in legal scholarship, Article 54 makes it clear that *attacks against foodstuffs and other objects essential to the population’s survival is covered by customary law*.<sup>582</sup> In this regard the determination by the Eritrea-Ethiopia Claims Commission is noteworthy: aerial bombing attacks by Ethiopia against a water reservoir considered essential to the civilian population’s survival were acknowledged to be in violation of customary international law. In particular, regarding this article as declaratory of customary law at the time of the Eritrea-Ethiopia conflict, the Commission held that “*the provisions of Article 54 that prohibit attack against drinking water installations and supplies that are indispensable to the survival of the civilian population for the specific purpose of denying them for their sustenance value to the adverse Party, had become part of customary international law by 1999*”. The Commission reconstructed the content of this rule effectively through the detection of the State practice, also highlighting the compelling humanitarian nature of the norm. Based on this interpretation of the rule, it considered unlawful the shelling carried out against the reservoir of Harsile, which was considered fundamental to the survival of the population of the city of Assab.<sup>583</sup>

Similarly, the Commission of Inquiry on Darfur included the prohibition to destroy objects indispensable to the civilian population’s survival under Article 14 among the customary rules on non-international armed conflicts which were deemed “*relevant and applicable*” to the conflict in Darfur.<sup>584</sup> In finding large-scale destruction of villages in all South, West and North Darfur “*by the*

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<sup>580</sup> See L. Green, *The Contemporary Law of Armed Conflict, Melland Schill Studies in International Law*<sup>3</sup>, Manchester University Press, 2006, at 169. This policy was employed as a screening tactic during massive retreats in the course of the World War II. In relation to the *Hostage case*, where General Rendulic was acquitted of the charge of having devastated enemy-held territory in Norway to deny it to advancing Soviet forces, the author notes that this would probably not be legal for those ratifying the Protocol.

<sup>581</sup> See J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, p. 193, Rule 54.

<sup>582</sup> See Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2010, at 218. In the same vein, Antonio Cassese stressed how “[i]his is an area where there exists great confusion and uncertainty concerning the content of [the] law”, claiming that custom proscribes “*any attack upon means of subsistence which serves solely the civilian population*”, see A. Cassese, “The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law”, *UCLA Pacific Basin Law Journal*, 1984, pp. 90-91.

<sup>583</sup> See Partial Award, *Western Front, Aerial Bombardment and Related Claims*, Eritrea’s Claims 1, 3, 5, 9-13, 14, 21, 25 and 26 (19 December 2005), 45 I.L.M. 396 (2006), at 416, paras. 100-101, and 104-105.

<sup>584</sup> *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General*, 25 January 2005, para. 166.



*Janjaweed during attacks, independently or in combination with Government forces*”, it explicitly mentioned that “*objects indispensable to the survival of civilian population were deliberately and wantonly destroyed*”.<sup>585</sup>

Notably, the relevance of customary intentional law has been also addressed as a “*fertile soil*” to root the definitions of “*famine crimes*”.<sup>586</sup>

Previous considerations shed light on a certain complexity of the system laid down in Article 54 though. In actual fact *its effectiveness in providing protection to the civilian population may be called into question*. The main rationale is safeguarding survival, but the relevant rules are formulated in a way that may obstruct concrete application. Prior analysis in fact shows that the prohibitions set out in Article 54 cover cases of deliberate denial of sustenance, while *other acts hampering the survival of the population through indirect damage - even when foreseeable - are left up to other rules*, precisely those prohibiting indiscriminate attacks and requiring precautions to avoid tragic collateral damage.

Some well-known instances of alleged violations of Article 54(2) API, as condemned by the United Nations and other international organizations, concerned the conflicts in Bosnia and Herzegovina and in the Democratic Republic of the Congo. As observed above, an explicit reference to this provision was articulated in the Fact-Finding Mission’s investigation on Operation Cast Lead in relation to “*deliberate attacks on the foundations of civilian life in Gaza*”, which reviewed numerous incidents implicating the destruction of industrial infrastructures, water installations, farms, food production, sewage treatment plants, and private houses.<sup>587</sup> However, in order to determine a violation of Article 54(2) API, the specific intent of inhibiting the use of the attacked objects to the population for their sustenance value has to be proved alongside the absence of military necessity. In this regard, the reported outcomes remain uncertain. In reviewing the incidents concerned the Mission touched on and discussed exactly these aspects, but the accuracy of

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<sup>585</sup> *Ibid.*, para. 315. See also para. 235 (“*There is an abundance of sites with evidence of villages burnt, completely or partially, with only shells of outer walls of the traditional circular houses left standing. Water pumps and wells have been destroyed implements for food processing wrecked, trees and crops were burnt and cut down, both in villages and in the wadis*116, which are a major source of water for the rural population. Rural areas in Darfur are not the only scenes of destruction. Several towns also show signs of damage to homes and essential infrastructure such as hospitals, schools, and police stations”) and para. 305 (“... *During the attacks Janjaweed are reported to have destroyed utensils, equipment for processing food, water containers and other household items essential for the survival of the inhabitants. Wells were reportedly poisoned by dropping the carcasses of cattle into the wells. In addition, as noted below, the destruction seems to have been consistently combined with looting of personal valuables, cash and, above all, live-stock*”).

<sup>586</sup> D. Marcus, “Famine Crimes in International Law”, *AJIL*, 2003, at 269, quoting an observation by Theodor Meron: “*Given the scarcity of actual practice, it may well be that, in reality, tribunals have been guided, and are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more the tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law*”, see T. Meron, “The Geneva Conventions as Customary Law”, *AJIL*, 1987, p. 361.

<sup>587</sup> See UN Doc. A/HRC/12/48, Chapter XIII, paras. 913-1031. See previous section 6.1 of the present Chapter.

the reconstruction of the facts remains crucial, and they have been strongly contested by Israel with photographic evidence.<sup>588</sup>

Finally, focusing briefly on the prohibition of starvation as reflected in Article 54(1) API, it is noteworthy that the official commentary to Protocol I considers the possibility that “*an action aimed at causing starvation [...] be a crime of genocide if it were undertaken with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, according to the terms of the Genocide Convention*” and specifically Article 2(c),<sup>589</sup> which refers to the deliberate infliction of life conditions “*calculated to bring about its physical destruction in whole or in part*”. As noted by the Preparatory Commission in drafting the Elements of Crimes that fall within the ICC’s jurisdiction and as confirmed in the related footnote, “*the term ‘conditions of life’ may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes*”.<sup>590</sup> The narrow focus of the *mens rea* requirement of genocide<sup>591</sup> - namely the *dolus specialis* that a perpetrator specifically intended to destroy in whole or in part certain protected groups<sup>592</sup> - appears to limit the possibility of characterising starvation as genocide, although some commentators have argued that deliberately perpetrated famines are genocide.<sup>593</sup>

From an international criminal law perspective, it is worth mentioning the position taken by the ICTR whereby the *means* of a deliberate infliction of life conditions intended to bring about physical destruction include “*methods of destruction which do not immediately lead to the death of members of the group*”.<sup>594</sup> Similarly, as to the situation in Darfur, the ICC Prosecutor charged President Al-Bashir

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<sup>588</sup> See Israeli Ministry of Foreign Affairs, “Gaza Operations Investigations: An Update”, 29 January 2010.

<sup>589</sup> See Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *op. cit.*, para. 2097. See Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, entered into force on 12 January 1951.

<sup>590</sup> See Elements of Crimes, Article 6(c)(4), footnote n. 4. See also Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II, Finalized Draft Text of the Elements of Crimes, PCICC/2000/1/Add.2, Art. 6 (c) n. 4. Equally, the Elements of Crimes of Article 7(1)(b) expressly indicate that the crime against humanity of extermination may cover “*the deprivation of access to food and medicine*” as infliction of the pertinent conditions, see footnote n. 9.

<sup>591</sup> A *mens rea* of recklessness does not suffice: see ICTY, *Prosecutor v. Krstic* (IT-98-33-T), Judgment of 2 August 2001, para. 561, 40 ILM 1346 (2001), para. 571.

<sup>592</sup> A certain criticism of the Genocide Convention is that “*it is clear from both the text and the travaux of the Convention that it does not include political, economic, or professional groups*”, see S. Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 1997, at 32.

<sup>593</sup> See K. Jonassohn and K.S. Bjornson, *Genocide and Gross Human Rights Violations in Comparative Perspective*, 1998.

<sup>594</sup> See ICTR, *Prosecutor v. Jean-Paul Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998, paras. 505-506 (506, “... For purposes of interpreting Article 2(2)(c) of the Statute, the Chamber is of the opinion that the means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, include, inter alia, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement”); ICTR, *Prosecutor v. Clément Kayishema and Obed Ruzindana* (ICTR-95-1-T), Judgment, 21 May 1999, paras. 115-116 (116, “... the conditions of life envisaged include rape, the starving of a group of people, reducing required medical services below a minimum, and

with (indirect) “*methods of destruction other than direct killings and the causing of serious bodily and mental harm*” which were deemed “*an integral and prominent part*” of a genocidal policy and of the commission of crimes against humanity.<sup>595</sup> Notably, the contamination of wells and water pumps was also explicitly considered in the second arrest warrant against Al-Bashir.<sup>596</sup> In this regard, it seems reasonable to argue that the choice of counting such measures in criminal accusations represents *a meaningful way of integrating socio-economic dimensions in the prosecution of existing crimes*, particularly severe deprivation of food, water, healthcare and housing - rather than a direct criminalisation of related ESC rights.

Starvation of civilians is not considered as a “grave breach” in Article 85 API. Conversely, Article 8(2)(b)(xxv) ICC Statute includes in the list of war crimes in international armed conflict “*intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions*”<sup>597</sup>. These terms are relevant as they explicitly label the deliberate refusal of humanitarian assistance in violation of these Conventions as a war crime. Conversely, the starvation of civilians in non-international armed conflicts is not labelled in the same way under the Rome Statute.<sup>598</sup>

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*withholding sufficient living accommodation for a reasonable period, provided the above would lead to the destruction of the group in whole or in part.”)*

<sup>595</sup> ICC, *Prosecutor v. Al-Bashir* (II-02/05-01/09), Second Decision on the Prosecution’s Application for a Warrant of Arrest, 12 July 2010, para. 34 (“... *These methods of destruction included: (i) subjecting the group to destruction of their means of survival in their homeland; (ii) systematic displacement from their homes into inhospitable terrain where some died as a result of thirst, starvation and disease; (iii) usurpation of the land; and (iv) denial and hindrance of medical and other humanitarian assistance needed to sustain life in IDP camps.*”).

<sup>596</sup> ICC, *Prosecutor v. Al Bashir* (ICC 02-/05-01/09), Second warrant of arrest issued by Pre-Trial Chamber I, 12 July 2012, at 7, in which the Trial Chamber considered that “*there are also reasonable grounds to believe that in furtherance of the genocidal policy, as part of the GoS’s unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces throughout the Darfur region (i) at times, contaminated the wells and water pumps of the towns and villages primarily inhabited by members of the Fur, Masalit and Zaghawa groups that they attacked; (ii) subjected hundreds of thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups to acts of forcible transfer; and (iii) encouraged members of other tribes, which were allied with the GoS, to resettle in the villages and lands previously mainly inhabited by members of the Fur, Masalit and Zaghawa groups*”.

<sup>597</sup> It is worth underlining the shared view expressed by the delegations participating in the negotiation of the Elements of Crimes for the ICC, according to which the ordinary meaning of “*starvation*” encompasses either the restrictive connotation of killing by depriving food and water, or the general connotation of depriving or insufficiently supplying basic goods such as medicines and blankets “*indispensable for survival owing to the very low temperature in a region*”, see K. Dörmann, “Preparatory Commission for the International Criminal Court: The Elements of War Crimes - Part II: Other Serious Violations of the Laws and Customs Applicable in International and Non-International Armed Conflicts”, *IRRC*, 2001, p. 475. This is a broader understanding of “*starvation*”, which also corresponds to the concept of “*supplies essential to the survival of the civilian population*” used for belligerent occupation by Article 69 API.

<sup>598</sup> See C. Rottensteiner, “The Denial of Humanitarian Assistance as a Crime under International Law”, 81 *IRRC*, 1999, pp. 568, noting that the omission was not accidental.

## 7. The prohibition of starvation in relation to siege and blockade

Historically, starvation of civilians was permitted as a means of inducing surrender<sup>599</sup>. An emblematic reflection of military strategies that valued the tactical possibilities of starvation was the Lieber Code, which, in recognising that “[w]ar is not carried on by arms alone”, considered legitimate “to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy”.<sup>600</sup> Justification of mass hunger created by blockades or sieges was found by arguing that the military gain ultimately achieved outweighed the collateral damage inflicted on civilian populations.<sup>601</sup>

For a comprehensive understanding of the examined restrictions posed by Article 54 API in favour of civilians, it seems pertinent to discuss them in relation to two ancient methods of warfare that are not completely forbidden under the law of armed conflict, namely siege and blockade. Indeed, the latter inevitably impact the possibility for the population of abandoning the besieged locality and receiving supplies. Consequently severe cumulative effects on the realisation of a wide range of ESC rights of the civilian population are likely to result.

These two methods of warfare have been not so remote in recent practice. For instance, during the Balkans war the cities of Sarajevo and Dubrovnik were besieged, while instances of legitimate Governmental naval blockades of ports controlled by rebels include the blockade of confederate ports during the American civil war of 1861, the Nigerian blockade in 1967 of Biafra ports, which led to a humanitarian disaster when it emerged that there was widespread civilian hunger and starvation in the besieged areas;<sup>602</sup> then, in 1991 the Yugoslav navy renewed the blockade of Croatian ports. More recently, blockade was resorted to by Israel in the context of its military campaign against Hezbollah in 2006. Controversial aspects emerged concerning the blockade imposed as part of Israel’s military-security “*dual strategy*” against Hamas, along with the “*closure policy*”, focusing on the prevention of “*weapons, ammunition, military supplies, terrorists and money from*

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<sup>599</sup> See Waxman, “Siegecraft and Surrender: The Law and Strategy of Cities as Targets”, *Va. J. Int’l L.*, 1999, at 408-409. For a general discussion of sieges and blockades, see M. Waltzer, *Just and unjust wars*, 1977, pp. 160-75.

<sup>600</sup> See Article 17, U.S. War Department, *General Orders No. 100*, 24 April 1863, reprinted in D. Schindler and J. Toman (eds.), *The Laws of Armed Conflicts*<sup>3</sup>, 1988.

<sup>601</sup> C.A. Allen, “Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law”, *Georgia Journal of International and Comparative Law*, 1989, noting that: “*Acts directed at starvation of people, including the impediment of relief efforts on behalf of starving populations, have long roots in the history of warfare*”. For a thorough discussion of the history of siege craft, see generally Waxman, *op. cit.*, pp. 357-401.

<sup>602</sup> After the end of the war, a Nigerian commission, including British doctors, visited Biafra and concluded that the evidence of deliberate starvation was overplayed, caused by confusion between the symptoms of starvation and various tropical illnesses. They did not doubt that starvation had occurred, but were unsurprisingly not clear of the extent to which it was a result of the Nigerian blockade or the restriction of food to the civilians by the Biafran government. See R.B. Alade, *The Broken Bridge: Reflections and Experience of a Medical Doctor during the Nigerian Civil War*; see M.I. Draper, *Shadows: Airlift and Airwar in Biafra and Nigeria 1967-1970*.

entering the Gaza Strip, and the need to prevent the departure of terrorists, vessels filled with explosives and other maritime borne threats from Gaza”.<sup>603</sup> This blockade has also been effective during subsequent escalations of hostilities in 2012 and 2014. This practice is discussed after reviewing what exactly the law provides for.

### 7.1. Siege

Classical international law did not contest the lawfulness of siege as a method of warfare, and the legitimacy of an attempt to weaken a besieged area “through starvation” was not open to question.<sup>604</sup> Its legality was confirmed in one of the “*subsequent proceedings*” at Nuremberg, in the *High Command case*, in which the Nazi siege of Leningrad during World War II, which represented an outstanding tragedy with more than one million Russians dead, received an *imprimatur* of legality *ex post facto*<sup>605</sup> by the US Military Tribunal at Nuremberg.<sup>606</sup>

While a trend towards an explicit prohibition of civilian starvation began with the Geneva Conventions of 1949 by asserting that certain categories of people were protected from the ravages of hunger, the legitimacy of sieges and blockades was still recognised. In this vein, siege warfare is regulated under Article 17 GCIV in a marginal way, recommending that belligerents conclude agreements for removing only certain listed categories of civilians.<sup>607</sup> Further, Article 23(1) GCIV requires to allow free passage of medical consignments and “*objects necessary for religious worship*” for all civilians, while other items (like clothing and food) must be permitted “*for children under fifteen, expectant mothers and maternity cases*”. Although blockade is not explicitly referred to, it is the “background” of

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<sup>603</sup> See *Public Commission to Examine the Maritime Incident of 31 May 2010, The Turkel Commission, Report - Part One*, January 2010, pp. 53, 58.

<sup>604</sup> C.C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*<sup>2</sup>, vol. 3, Little Brown, 1945, p. 1803.

<sup>605</sup> See C.A. Allen, “Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law”, 19(1) *Georgia Journal of International and Comparative Law*, 1989, p. 32.

<sup>606</sup> In responding to the charges against the principal defendant in the trial, German Field Marshal Wilhelm Ritter von Leeb, who knew and approved orders to use artillery to prevent Russian civilians’ attempt to flee through the German lines “*by opening fire as early as possible, so that the infantry, if possible, is spared shooting on civilians*”, the US Military Tribunal considered if this was an unlawful order and quoted Hyde to admit that “[a] belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavor by a process of isolation to cause its surrender. The propriety of attempting to reduce it by starvation is not questioned. Hence, the cutting off of every source of sustenance from without is deemed legitimate. It is said that if the commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back so as to hasten the surrender”. Then, the same Tribunal remarked: “[W]e might wish the law were otherwise but we must administer it as we find it. Consequently, we hold no criminality attached on this charge”. See U.S. Military Tribunal, Nuremberg, *The United States of America v. Wilhelm von Leeb et Al.*, Judgment of 27 October 1948, 11 NMT 462, in *Law Reports of Trials of War Criminals*, Vol. XII, The German High Command Trial. See C.C. Hyde, *International Law*<sup>2</sup>, Little Brown and Co., 1945, pp. 1802-03.

<sup>607</sup> Article 17 GCIV reads: “*The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas*”. In the commentary to the Convention it is noted that “[T]he words “*The Parties to the conflict shall endeavour*” show that under the Convention evacuation is not compulsory”, see O. M. Uhler and H. Coursier (eds.), *Commentary, IV Geneva Convention*, 1958, pp. 138-139.

this norm.<sup>608</sup> In addition to the conditions elucidated in paragraph 2,<sup>609</sup> the limited reach of protection afforded by this provision has been remarked on in legal scholarship: “*even if Article 23 is applicable to sieges in land warfare, there is no requirement to allow the supply of essential foodstuffs to the civilian population in general, as distinct from certain groups deemed particularly ‘vulnerable’*”.<sup>610</sup> In this regard, the drafters of the Geneva Conventions acknowledged that too much discretion was left to warring parties but they “*had to bow to the harsh realities of war*”.<sup>611</sup> Some positive interpretations of Article 23 have described it as “*a nod towards special protection for civilians in non occupied areas against measures to deprive them of needed sustenance during armed conflict*”,<sup>612</sup> or deemed it not to be a blanket prohibition against starving civilians.<sup>613</sup>

While the rules on sieges and blockades in the Geneva Conventions tend to express the idea that international humanitarian law “*must achieve a compromise between military requirements and humanitarian considerations*”,<sup>614</sup> the previous examination of Article 54 API has shown that a stronger prohibition of civilians’ starvation is incorporated by changing the position of the law regarding the tactics available to a besieging force. Accordingly, this rule requires that a siege surrounding the enemy’s military fort be distinguished from one on a defended town inhabited by civilians. As observed above, systematic destruction of foodstuffs that can be consumed by the besieged is permissible as far as the sustenance at stake only regards the enemy armed forces; conversely it is forbidden when civilians are directly affected. In fact, as we have seen above, the special protection of food supply and drinking water installations essential for the civilian population does not drop when it is also utilised by belligerent forces and may become a military objective: the *exclusive* use by the latter remains functional to lose such immunity. Notably, in view that “*a true siege would no longer be feasible*” if civilians are affected, the prohibition of siege “*in the old meaning and function of the term*” has been

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<sup>608</sup> See O.M. Uhler, H. Coursier, “Geneva Convention relative to the Protection of Civilian Persons in Time of War”, in J. Pictet et al., *Commentary on the Geneva Conventions of 12 August 1949*, vol. IV, 1958, pp.178-179.

<sup>609</sup> According to Article 23(2) GCIV, the duty to protect young children and expectant mothers is conditioned on the absence of serious reasons for fearing that “*a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods*”.

<sup>610</sup> See Y. Dinstein, “Siege Warfare and the Starvation of Civilians, in Humanitarian Law of Armed Conflict: Challenges Ahead”, in A.J.M. Delissen, G.J. Tanja (eds.), *Humanitarian Law of Armed Conflict Challenges Ahead: Essays in Honour of Frits Kalshoven*, Dordrecht, Neth., and Boston: Nijhoff, 1991, p. 148. See E. Rosenblad, “Starvation as a Method of Warfare-Conditions for Regulation by Convention”, 7 *International Lawyer*, 1973, pp. 261-262.

<sup>611</sup> J. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, 1958, pp. 182-183.

<sup>612</sup> C. Allen, “Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law”, 19(1) *Georgia Journal of International and Comparative Law*, 1989, p. 39.

<sup>613</sup> Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *op. cit.*, p. 1457, para. 4797, observing that “*up to now there has been no express rule of law forbidding besieging forces to let civilians die of starvation*”.

<sup>614</sup> See P. Macalister - Smith, “Protection of the Civilian Population and the Prohibition of Starvation as a method of Warfare”, *IRRC*, 1991, p. 441.

pointed out.<sup>615</sup> However, even pursuant to Article 54 API, a possibility envisaged for the besieging belligerent party has been the one of preventing supplies from going through when “safe passage out of the besieged area” is ensured to civilians.<sup>616</sup>

For the purpose of the present research, a noteworthy case recently investigated concerns the non-international armed conflict in Syria, as the sieges employed have been examined explicitly in relation to economic, social and cultural rights.<sup>617</sup>

In particular, the tactics of siege warfare imposed by Government forces and pro-government militia on towns across the Syrian Arab Republic have been described as “*instrumentalizing basic human needs for water, food, shelter and medical care, as part of its military strategy*”. In addition to reporting that “*besieged areas have been relentlessly shelled and bombarded*”, Government forces’ restrictions of the distribution of humanitarian aid, including surgical supplies, have been found. Such tactics have been deemed in direct violation of international humanitarian law obligations to ensure that sick and wounded persons are collected and cared for, and to ensure unimpeded and rapid passage of humanitarian relief. Further, the denial of humanitarian food aid has been reported as protracted in many agricultural areas and leading to malnutrition and starvation; in particular, “*as the siege was tightened, government forces blocked access roads and systematically confiscated food, fuel and medicine at checkpoint*”. Significantly, the commission of inquiry not only put emphasis on the prohibited use of starvation of the population as a method of warfare, but also underlined that “*such acts also violate core obligations under the right to adequate food and the right to the highest attainable standard of health*”.

Similarly, the siege imposed by non-state armed groups, mainly regarding Aleppo, has been reported as including denial of access to humanitarian convoys, leading to dire humanitarian conditions, “*with residents digging wells for water and suffering illnesses due to the lack of sanitation*”, in violation of their IHL obligations. In this context, the commission of inquiry has also reported attacks against farmers (residents of Mirdash and Shatha) cultivating their land with the specific purpose of preventing them from having access to agricultural goods and so depriving them of their main source of income and sustenance, underlining that this is prohibited under international

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<sup>615</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2010, p. 222, quoting G.B. Roberts, “The New Rules for Waging War: The Case against Ratification of Additional Protocol I”, 26 *IJIL*, 1985-6, at 153; I. Detter, *Law of War*<sup>2</sup>, Cambridge, 2000, at 298.

<sup>616</sup> A.P.V. Rogers, *Law on the Battlefield*, Manchester University Press, 1996, p. 63.

<sup>617</sup> *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/25/65, 12 February 2014, paras. 132-143. It is reported that “*as at January 2014, 160,000 people were besieged in the towns of Dumah, Arbin, Zamalka, Kafir Batna, Harasta, Jisreen, Saqba and Al-Mliha in eastern Ghouta (Damascus countryside)*” (para. 133). Other areas concerned include Muadamiyah, Daraya, Yarmouk camp, and Homs (Old City).

humanitarian law.

## 7.2. Blockade

According to the San Remo Manual this method of warfare consists in “*the blocking of the approach to the enemy coast, or a part of it, for the purpose of preventing ingress and egress of vessels or aircraft of all States*”.<sup>618</sup>

Customary international law subjects the imposition of a blockade to five cumulative conditions. To elaborate, a blockade has to be properly declared and notified; the force concerned has to maintain an effective blockade, even if it is stationed at a certain distance; it has to be applied to all vessels of all States impartially; it cannot prevent the access to the ports and coast concerned to neutral States; and it has to comply with certain humanitarian obligations.<sup>619</sup>

Originally viewed as a naval measure, it has since encompassed land, technological, and air blockades.<sup>620</sup> Its relevance essentially relies on the power and control exercised by the blockading State or entity, without achieving immediate military results, rather isolating and exerting pressure on the blockaded State or entity by obstructing its trade and damaging its economy, so affecting its military resistance.

Being a method of warfare, its legality is plausible only during an armed conflict. However controversial practice exists, such as in the case of the blockade relating to the 34 day conflict between the Israeli military and Hezbollah paramilitary forces, which started on 12 July 2006 and continued until a United Nations-brokered ceasefire went into effect in the mid-August of the same year.<sup>621</sup> In that context, Israel decided to place the whole coast of Lebanon under air and naval blockade in order to defeat Hezbollah and preventing supplies from reaching it, even though Israel and Lebanon were not waging any war in the technical sense. The international community respected this blockade, which was lifted only on 8 September 2006.

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<sup>618</sup> L. Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (12 June 1994), CUP, 1995, at 176.

<sup>619</sup> The Declaration of London of 1909 laid down the conditions regulating the establishment of a blockade. Although it remained ungratified, its provisions are regarded as declaratory of customary law, e.g., *Annotated Supplement*, 7.7.2-4. See also San Remo Manual, respectively, paras. 93, 95, 100, 99, 102-104.

<sup>620</sup> See N. Ronzitti, “The 2006 Conflict in Lebanon and International Law”, 16 *Italian Yearbook of International Law*, 2007, pp. 3-19; G.E. Bisharat, T. Crawley, S. Elturk, C. James, R. Mishaan, A. Radharkrishnan and A. Sanders, “Israel’s Invasion of Gaza in International Law”, 38 *Denver Journal of International Law and Policy*, 2009-2010, p. 59.

<sup>621</sup> SC Res. 1701 (2006), S/RES/1701, 11 August 2006. The conflict began when militants from the group Hezbollah fired rockets at Israeli border towns as a diversion for an anti-tank missile attack on two armored Humvees patrolling the Israeli side of the border fence, see New York Times via the International Herald Tribune, “Clashes spread to Lebanon as Hezbollah raids Israel”, 12 July 2006.



As far as the blockade undertakes “to exclude all transit into and out of a defined area or location”,<sup>622</sup> in cases of a *persistent blockade*, interdicting any ingress and egress by vessels or aircraft carrying supplies, serious implications for the civilian population are likely to result in and affect *several dimensions of its enjoyment of basic levels of ESC rights*. In this sense, an effective blockade, if prolonged and extended to large areas, has the potential to entail enormous difficulties for civilians in getting healthy comestibles and resisting diseases. As aptly underlined, civilians are especially susceptible to the harmful consequences of a long blockade “since they may have the lowest priority in the distribution of food supplies”.<sup>623</sup> Emblematically, the so called “starvation blockade” or “hunger blockade” during and immediately after the First World War represented a policy resulting in the death of thousands of civilians in Germany, Austria and other occupied countries. The situation of Germany was described as that of a whole country “experiencing the uncontrolled effects of a rapidly accelerating famine”.<sup>624</sup>

As far as Protocol I is concerned, while the prohibition of starvation set up by Article 54 does not refer to blockade, a relevant issue may arise as to *whether to consider or not illegal under the law of armed conflict a blockade that deprives the enemy population of foodstuff and, in doing so, gives rise to civilians’ starvation*, in the hope that it will put pressure on the government to seek peace. It has been argued that a blockade cannot have starvation as its only purpose, adding that “lest the expected injury to civilians in the wake of a blockade will be ‘excessive’ in relation to the military advantage anticipated”.<sup>625</sup> In this regard, Article 49(3) is taken into account, stressing that its official comment sheds light on the original concern of the Diplomatic Conference not to revise the rules applicable to armed conflict in the air or at sea,<sup>626</sup> and hence not to affect existing law on blockades.<sup>627</sup> This interpretation has nevertheless been deemed “*untenable*”, in the face of the applicability of Article 54 to naval blockades affecting civilian persons and objects on land, and the unlawfulness of the case referred to.<sup>628</sup>

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<sup>622</sup> See M.N. Schmitt, *Blockade Law: Research Design and Sources*, 1991.

<sup>623</sup> See P. Macalister - Smith, “Protection of the civilian population and the prohibition of starvation as a method of warfare”, *IRRC*, 1991, p. 445.

<sup>624</sup> See C.P. Vincent, *The Politics of Hunger: The Allied Blockade of Germany, 1915-1919*, Ohio University Press, 1985. For a recent reconstruction on this case of prolonged blockade, see B. Bianchi, “L’arma della fame. Il blocco navale e le sue conseguenze sulla popolazione civile (1915-1919)”, *Deportate, Esuli e profughe - Rivista telematica di studi sulla memoria femminile*, 2010, pp. 1-33.

<sup>625</sup> See Y. Dinstein, *op. cit.*, 2010, p. 225.

<sup>626</sup> See C. Pilloud and J. Pictet, “Article 49”, in Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, p. 606, explaining that: “In general the Delegates at the Diplomatic Conference were guided by a concern not to undertake a revision of the rules applicable to armed conflict at sea or in the air. This is why the words “on land” were retained and a second sentence clearly indicating that the Protocol did not change international law applicable in such situations was added”. CDDH/215Rev. 1, para. 73.

<sup>627</sup> D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, OUP, 1995, p. 471.

<sup>628</sup> See Heintschel von Heinegg, “The Law of Armed Conflict at Sea”, in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed conflicts*, Oxford, 2013, pp. 535. M. Bothe, *Commentary on the 1977 Geneva Protocol I*, at 754. See also *San Remo Manual*, *op. cit.*, para. 102 (“The declaration or establishment of a blockade is prohibited if: (a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.”).

Indeed, Article 54(1) is part of Protocol I affording general protection to the civilian population against the effects of hostilities and Article 49(3) applies to all “attacks”, comprising those from the sea against the land. Conversely, “*violent action applied to frustrate an enemy blockade*” would amount to an “attack” under Article 49(1), which refers to any act of violence against the adversary, whether offensive or defensive in nature. Yet, Article 54(2) proscribes acts such as removing or destroying objects indispensable to the sustenance of the civilian population, without mentioning *acts of preventing such objects reaching the civilian population*. This is a meaningful issue due to the fact that the blockading State generally aims to condition the lifting of the blockade on guarantees that the concerned airports and ports are not used to transfer humanitarian cargoes together with weapons or similar materials. As aptly stressed, “*inhibition of entry would be for purposes wider than the starvation of the civilian population*”.<sup>629</sup>

Nonetheless, focusing on relief actions, it is worth stressing that *the blockading State is under an obligation to provide for and to permit free passage of supplies basic for the civilian population’s survival*<sup>630</sup>. However, significant security concerns can affect such passage and its right to prescribe technical arrangements is recognised.<sup>631</sup> Notably, in the context of the aforementioned military campaign against Hezbollah and notwithstanding the blockade imposed, Israel did grant immunity from attack to ships bringing medical and food supplies for the civilian population, as well as to vessels assisting in the evacuation of foreign nationals, although the majority of the latter held dual nationality, one of which was Lebanese.<sup>632</sup> Conversely, the incident regarding the ‘Mavi Marmara’, namely the boarding and seizing by Israeli naval forces of the main ship in an international aid flotilla that had sought to breach the Israeli naval blockade of the Gaza Strip, provoked a debate concerning the legality of the latter.<sup>633</sup> For the purpose of the present research, this merits specific

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<sup>629</sup> L. Green, *The contemporary Law of Armed Conflict*, 2008, pp. 205-206.

<sup>630</sup> Article 70 AP I, which reflects a customary law rule. See also San Remo Manual, para. 103 (“*If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to: (a) the right to prescribe the technical arrangements, including search, under which such passage is permitted; and (b) the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross.*”)

<sup>631</sup> M. Bothe, *Commentary on the 1977 Geneva Protocol I*, at 764. San Remo Manual, para. 104 (“*The blockading belligerent shall allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including search, under which such passage is permitted.*”)

<sup>632</sup> L. Green, *The contemporary Law of Armed Conflict*, 2008, p. 206.

<sup>633</sup> Subsequent investigations and findings circulated in various reports. The Israeli Turkel Commission set out evidence of Israel’s arguments on its compliance with the law, see *The Public Commission to Examine the Maritime Incident of 31 May 2010, The Turkel Commission*, Report, Part One, 23 January 2011. According to the Turkish National Commission of Inquiry Turkish, the occupation of the Gaza Strip precludes it from imposing a lawful naval blockade, also arguing Israel’s failure to comply with the conditions set forth in the San Remo Manual (no specification of the duration in the Official Notice and no provision of the extent of the naval blockade), see *Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010*, Turkish National Commission of Inquiry, 11 February 2011. The UN Palmer Report

attention.

### **7.2.a. An atypical case of blockade: the connection with occupation and military operations**

The complexity of the situation concerning the Gaza Strip is as a result of a number of factors. To elaborate, a blockade has been imposed as a military and security measure by a State against a territory occupied by the same blockading State, namely a territory under the enemy's control. Thus, the legal obligations that an occupying power has towards those living therein remain at issue. Further, the protracted combination of the naval blockade alongside land and air closures ("*the closure policy*") has called into question Israel's compliance with the required conditions under the law of naval warfare together with its humanitarian law obligations to protect the civilian population.

In actual facts, since January 2006 Israel has imposed economic and political constraints following the victory of the Hamas-affiliated party in the Palestinian Legislative Council elections.<sup>634</sup> However, as discussed in the next chapter, the status of the Gaza Strip from the perspective of international law constitutes the subject of political, judicial and academic debate in the light of several events.<sup>635</sup> They include Israel's disengagement in 2005,<sup>636</sup> its declaration of the Strip as a "*hostile territory*"<sup>637</sup> and its invocation of a "*closure policy*" entailing restrictions on the movement of goods in and out the Strip in September 2007,<sup>638</sup> the reduction in sea access in 2008, declaring a maritime zone off its coast, prohibiting all shipping, allowing possible transportation of

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deemed the circumstances of the Gaza Strip as unique, considering both it and Israel as "*distinct territorial and political areas*"; it argued to treat the conflict as an international conflict for the purposes of the law of the blockade and the imposition of the naval blockade was deemed "*a legitimate security measure*", exercised by Israel pursuant to its right to self-defence; little details in support of its conclusion were provided though, see *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*, 2 September 2011. See also Human Rights Council, *Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance*, 27 September 2010, A/HRC/15/21.

<sup>634</sup> UN Palmer Report, September 2011, p. 7.

<sup>635</sup> E.g., SC Res. 1860 (8 January 2009), S/RES/1860; GA Res. 63/96 (18 December 2008) A/RES/63/96; HRC Res. S-9/1 (12 January 2009), A/HRC/S-9/L.1; *Report of the United Nations High Commissioner for Human Rights on the implementation of the Human Rights Council resolution S-9/1*, "The Grave Violations of Human Rights in the Occupied Palestinian Territory, Particularly due to the Recent Israeli Military Attacks against the Occupied Gaza Strip", UN Doc. A/HRC/12/37, 13 August 2009.

<sup>636</sup> The "*disengagement plan*" was approved by the Israeli Cabinet on 4 June 2004 and was authorized by the Knesset on 26 October 2004. It authorised the unilateral evacuation from the Gaza Strip of Israeli civilians living in settlements and associated Israeli security forces. When this removal was considered concluded on 12 September 2005, the State of Israel affirmed that "*there will be no basis for claiming that the Gaza Strip is occupied territory*". Nonetheless, under this plan its armed forces' control over Gaza's airspace, borders and coastline persisted, and the State of Israel affirmed "*its inherent right of self-defence, both preventive and reactive, including where necessary the use of force, in respect of threats emanating from the Gaza Strip*". See Disengagement Plan, 4 June 2004.

<sup>637</sup> Israel Ministry of Foreign Affairs, "Security Cabinet Declares Gaza Hostile Territory", Press Release, 19 September 2007. See also C. Urquhart, "Israel Declares Gaza Strip Hostile Territory", *Guardian*, London, 20 September 2007, at 22. Israeli State officials have sometimes referred to the term "*enemy entity*".

<sup>638</sup> See Turkel Report, January 2011, pp. 67-69; UN Palmer Report, September 2011, p. 6-7.

humanitarian aid *via* land crossings,<sup>639</sup> and reducing to three-nautical miles sea access for local fishermen in respect of the twenty-nautical miles under the Oslo Accords. With the commencement of “Operation Cast Lead” the naval blockade of the Gaza Strip was announced and it has remained effective even since.<sup>640</sup> Conversely, the closure policy was eased to ban only goods with a military purpose in June 2010 and a plan on the export of goods from the Strip was announced in December 2010, although since February 2011 only the Kerem Shalom and Erez crossings between Israel and the Strip have been operative, for fuel and cargo and pedestrians respectively, while the Rafha crossing into Egypt has remained mostly closed.<sup>641</sup> Further, Israel’s control of the airspace over Gaza has continued through its aviation, drones, and aircrafts surveillance.<sup>642</sup>

After the occupation of the West Bank and Gaza Strip was instituted in June 1967, the position maintained by Israel has remained controversial. It has contended that the occupation came to an end when it withdrew its armed forces in 2005, that it is abiding by the humanitarian provisions of the Fourth Geneva Convention, but not by the entire convention or the 1977 Protocols, and that it exercises its rights regarding borders control while its authority does not amount to “*effective control*”. A negative position has also been expressed by the Israeli Supreme Court<sup>643</sup> which concluded that, since the territory is no longer occupied, *Israel’s obligations as party to the conflict are limited to not preventing humanitarian minimum supplies essential for the civilian population*, but it is no longer bound as an occupying power by the obligation to provide welfare to the latter.

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<sup>639</sup> See Notice to Mariners No. 6/2008, 13 August 2008; Turkel Report, January 2011, p. 34.

<sup>640</sup> See Notice to Mariners No. 1/2009, 6 January 2009.

<sup>641</sup> UN OCHA, “Easing the Blockade: Assessing the Humanitarian Impact on the Population of the Gaza Strip”, March 2011, p.14, 20.

<sup>642</sup> *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, 25 September 2009, UN Doc. A/HRC/12/48, p. 74.

<sup>643</sup> See Supreme Court of Israel sitting as the Court of Criminal Appeals, *A and B v. State of Israel*, 11 June 2008, para. 11, stating that “... *since the end of Israeli military rule in the Gaza Strip in September 2005, the State of Israel has no permanent physical presence in the Gaza Strip, and it also has no real possibility of carrying out the duties required of an occupying power under international law, including the main duty of maintaining public order and security. Any attempt to impose the authority of the State of Israel on the Gaza Strip is likely to involve complex and prolonged military operations. In such circumstances, where the State of Israel has no real ability to control what happens in the Gaza Strip in an effective manner, the Gaza Strip should not be regarded as a territory that is subject to a belligerent occupation from the viewpoint of international law, even though because of the unique situation that prevails there, the State of Israel has certain duties to the inhabitants of the Gaza Strip.*”. For the view that the Gaza Strip would not be subject to belligerent occupation, the Supreme Court quoted Yuval Shany (“Faraway So Close: The Legal Status of Gaza after Israel’s Disengagement”, 8 *YIHL*, 2005, p. 359), and the ICJ, *Democratic Republic of the Congo v. Uganda*, in which the relevance of military forces’ physical presence was stressed for the existence of occupation (*Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda*, 19 December 2005, para. 173). For the obligations upon Israel in the prevailing circumstances vis-à-vis the inhabitants of the Gaza Strip, the Supreme Court referred to HCJ 9132/07 *Al-bassiouni v. Prime Minister* (decision of 31 January 2008). The related petition to suspend fuel and electricity cuts to the Gaza Strip was issued on 28 November 2007, by some NGOs operating in Israel with Palestinian groups and arguing the inconsistency of the planned cuts with the State obligations ensuing from the GC IV. In affirming the lawfulness of such a reduction, the Supreme Court deemed the intended supply “*capable of satisfying the essential humanitarian needs of the Gaza Strip at the present*”; what would constitute “*essential humanitarian needs*” was not specified though, so leaving its determination to the authorities.

Notwithstanding the fact that it remains difficult to determine the precise structure of government on the territory of the Gaza Strip, it is reasonable to argue that *relevant powers are still exercisable* by Israel on the Strip; they concern primarily the control and supply of both water and electricity, almost totally dependent by Israeli infrastructures;<sup>644</sup> they are also manifested in its capacity to take control over the Strip any time, as emerged in relation to recent military operations in the context of a not consolidated governmental apparatus. Although ‘actual control’ may be lacking, such circumstances lead one to posit that either before or during recent hostilities, Israel has exercised *activities steadily likely to affect on the situation of people living therein and on their enjoyment of basic rights*. Regardless, the aforementioned withdrawal has not been as comprehensive as it should have been in order to terminate Israel’s position and ensuing obligations as occupying power.

Indeed, a positive view has been generally taken within the international community.<sup>645</sup> According to a recurring argument, since the 2005 disengagement Israel has no longer directly occupied Gaza, but it continues to have IHL duties as occupying power due to its complete control of the land crossings into and out of Gaza as well as the air spaces and costal access.<sup>646</sup> This is equivalent to *de facto* control, which is constitutive for an occupation under Article 42 HRs. Nonetheless, in the context of the present chapter, it is worth also considering that the imposition of a blockade has been critically seen to have “*profoundly affected the life and well-being of every single person in Gaza*”, such that “*regardless of the international status of the Occupied Palestinian Territory with respect of the use of force, the obligations of the Fourth Geneva Convention, as well as those of international human rights and international criminal law, are fully applicable*”.<sup>647</sup>

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<sup>644</sup> See the *legal opinion submitted to the Knesset Foreign Affairs and Defence Committee, by Prof. Avi Bell*, 14 July 2014, which approved the legality of possible Israeli plans to disconnect supply of water and electricity to the Gaza Strip. Contrary, see a subsequent expert opinion by Michael Bothe on the legality or illegality of such measures under international law, 18 July 2014. In particular, the cut of such supply is deemed to violate Israel’s obligation to provide for the welfare of the civilian population still under occupation. Further, the relief supplies undertaken by third parties do not relieve the occupant from that obligation under Article 60 GCIV. As to the disengagement, Bothe notes how a withdrawal that does not give back to the territory concerned its complete powers of government which would enable the territorial authorities to provide themselves for the welfare of the population “*is subject to that broad purpose defined invalid (in the sense of not affecting the protections of the population) status changes. Thus the change in status which Israel may have tried to achieve by its withdrawal could not deprive the population of the benefit of the law of occupation*”.

<sup>645</sup> See, e.g., *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, 25 September 2009, UN Doc. A/HRC/12/48, para. 276; *Report of the Independent Fact-Finding Committee on Gaza: No Safe Place*, presented to the League of Arab States 30 April 2009, at 16 (“*Gaza remains occupied territory and that Israel is obliged to comply with the Fourth Geneva Convention in its actions in Gaza*”). On the Spanish Court exploring issues of alleged Israeli war crimes under the principle of universal jurisdiction and holding that Gaza constitutes occupied territory, see S. Weill, “The Targeted Killing of Salah Shehadeh: From Gaza to Madrid”, *Journal of International Criminal Justice*, 2009, p. 631.

<sup>646</sup> E.g., *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, UN Doc. A/HRC/13/53/Rev.1, 7 June 2010, para. 4, n. 5.

<sup>647</sup> *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, UN Doc. A/HRC/10/20, 11 February 2009, para. 4.

A relevant issue considered in this latter regard is *the illegality of the naval blockade in itself*, to the extent that its effect alongside the closure policy is deemed disproportionate under international humanitarian law and/or in the persistence of unlawful methods of warfare. The aforementioned Turkel, Turkish and Palmer Reports looked at Israel's compliance with the principle of proportionality and the claims concerning its implementation of such methods. Highlighting that "considerable" damage are not the same as "excessive" damage, Israel's compliance with proportionality was argued for in view of its mitigation of the unintended suffering of the Gazan civilian population by monitoring and adjusting its policy concerning goods allowed through the crossings, subject to the review of the Israeli judicial system.<sup>648</sup> On the contrary, emphasising that the naval blockade has worsened an existing severe humanitarian crisis, its disproportionate impact has been contended; then its maintenance alongside the closure policy has been deemed to amount to collective punishment of the Gazan population.<sup>649</sup> Conversely, a difficulty in assessing the specific impact of such a blockade in isolation from the closure policy was affirmed in the Palmer Report, stressing *inter alia* the low amount of supplies entering the Gaza Strip by sea, prior the blockade. Accordingly, the consequences of the blockade - either alone or in combination with the restrictions relating to the border crossings - in the overall humanitarian situation were deemed "slight" and unrealistically disproportionate.<sup>650</sup> Despite the inability to determine that "*the combined effects of the naval blockade and the crossings policy*" rendered the former disproportionate, however the Palmer Report made the political consideration that Israel's procedures which applied to land access to Gaza was "unsustainable" and required change.

For the purposes of the present research, the issue of the blockade as examined by the Fact-Finding Mission on the Gaza conflict is also meaningful, as specific attention seems to derive from the implementation of its mandate. Two main aspects of its analysis are relevant.

1. It was highlighted that, besides controlling the airspace, borders and coastline, following the application of the disengagement plan, "*Israel continued to control Gaza's telecommunications, water,*

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<sup>648</sup> Turkel Report, pp. 90, 98-99, 100-102.

<sup>649</sup> Turkish Report, *op. cit.*, pp. 70-71, 78-81. As referred also in this report, the blockade combined with the closure policy was deemed to constitute collective punishment as prohibited under Article 33 GCIV by the UN Human Rights Council's report on the Flotilla incident (see UN Doc. A/HRC/15/21, 27 September 2010, p. 14), by the UN Office for the Coordination of Humanitarian Affairs (see "Easing the Blockade: Assessing the Humanitarian Impact on the Population of the Gaza Strip", March 2011, p. 22), and by the ICRC (see ICRC, *Gaza closure: not another year!*, Geneva/Jerusalem 14 June 2010).

<sup>650</sup> Palmer Report, *op. cit.*, p. 43-44, para. 78 ("*Smuggling weapons by sea is one thing; delivering bulky food and other goods to supply a population of approximately 1.5 million people is another. Such facts militate against a finding that the naval blockade itself has a significant humanitarian impact.*"). In considering the blockade as divisible from the closure policy, the Commission found no evidence that it aimed to starve or collectively punish the Gazan population.

*electricity and sewage networks, as well as the population registry, and the flow of people and goods into and out of the territory while the inhabitants of Gaza continued to rely on the Israeli currency*".<sup>651</sup> Accordingly, the "blockade" was referred to as the process of economic and political isolation, starting from Hamas' electoral success in February 2006 alongside some donor countries' withholding of financial support for the Strip and other actions endorsing the blockade explicitly or implicitly. Related measures comprise restrictions of importable goods, "*the closure of border crossings for people, goods and services*". Attention was also paid to the economy as strongly influenced by the reduction of Palestinians' fishing zone as well as the creation of a "buffer zone" along the frontier between Israel and Gaza and the resulting decrease of land accessible for industrial or agrarian activities. The damaging dimensions of the blockade led the Mission to hold that "*Israel continues to be duty-bound under the Fourth Geneva Convention and to the full extent of the means available to it to ensure the supply of foodstuff, medical and hospital items and others to meet the humanitarian needs of the population of the Gaza Strip without qualification*".<sup>652</sup>

2. A second aspect was addressed in relation to civilian immunity during the conduct of hostilities. The report criticised that the implementation of restrictive measures as part of the blockade, aside from creating an emergency situation, have "weakened the capacities of the health, water and other public sectors in Gaza" to react to a deteriorating situation created by the military operations.<sup>653</sup> The impact on the local economy has further decreased the coping capacities and resilience of the local population, so worsening the consequences of the conflict on living standards.

In relation to this second dimension of effects, the Mission's approach to examine the "cumulative impact" of military operations plus blockade on the enjoyment of human rights by the population<sup>654</sup> offers a chance to discuss *the extent to which different branches of international law have been used and interpreted to deal with the complexities and anomalies of such context*. Particularly, the report specified how at the beginning of such campaign the economy, family livelihoods and employment opportunities had already been affected. On the one hand, it emphasised how the restrictions on the exports from and imports to the Strip (via the airspace and naval blockade as well as the border crossings) have severely impacted the availability and accessibility of services and goods

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<sup>651</sup> See "Disengagement Plan - General Outline" and "Overall concept of the Disengagement Plan", 15 April 2004.

<sup>652</sup> UN Doc. A/HRC/12/48, Chapter V, paras. 311-326. Referring to the aforementioned case HCJ 9132/07, *Al-Bassiouni Ahmed et al. v. Prime Minister*, as decided on 31 January 2008, the Mission deemed that the wide discretion retained by Israel about the timing and manner of delivering the minimum levels of supplies of electricity and fuel (as set by the Supreme Court) was exercised "*capriciously and arbitrarily*" by Israel (para. 326). This observation evokes a precise aspect addressed in the official commentary of Article 70(1) API: in dealing with the limitations of this clause, the commentary interprets it by precluding a refusal to make an agreement on relief actions for arbitrary or capricious reasons.

<sup>653</sup> For instance, this impact was examined in the *Report of the High-Level Fact-Finding Mission to Beit Hanoun established under Human Rights Council resolution S-3/1*, A/HRC/9/26, paras. 55 ff.

<sup>654</sup> UN Doc. A/HRC/12/48, Chapter XVII, paras. 1217-1335.

indispensable to fully enjoy various social, economic and civil rights by children, women and men living therein.<sup>655</sup> On the other hand, the report emphasised how the pre-existing precarious situation regarding access to essential goods in combination with the effects of the four-week military operation have led to further restrictions on access to basic items and destruction of facilities, land and infrastructures vital for enjoying fundamental rights, so increasing food insecurity, poverty and unemployment. Critically, the “*beleaguered*” health sector was seen under additional strain by the military campaign.<sup>656</sup> In the words of the Fact-Finding Mission, the blockade (in connection with the hostilities) produced “*a situation in which most people are destitute*”. The overall situation was described as “*a crisis of human dignity*”.<sup>657</sup> As significantly stated by Justice Barak, “*a military commander’s obligation does not end with avoiding harm to the lives and the dignity of the local residents, ‘a negative obligation’, but his obligation is also ‘positive’ - he must protect the lives and dignity of the residents, within the constraining of the time and space ...*”.<sup>658</sup>

Remarkably, the entire legal analysis laid down in this regard dealt with the protection of specific economic and social rights of civilians living on the territory. In addition to referring to relevant IHL obligations as contained in the Fourth Geneva Convention and Protocol I and relevant customary international law,<sup>659</sup> the Mission focused specifically on human rights obligations as “*applicable to Israel with respect to its actions in the Gaza Strip since they apply also in situation of armed conflict*”.<sup>660</sup>

In particular, access to shelter, food and clothing were addressed as human rights enshrined in Article 11 ICESCR, in addition to the right to education and the right to the highest attainable standard of physical and mental health as enshrined in Article 12. A reference to the CESCR’s

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<sup>655</sup> In particular, “*insufficient supply of fuel for electricity generation has had a negative impact on industrial activity, on the operation of hospitals, on water supply to households and on sewage treatment. In addition, import restrictions and the ban on all exports from Gaza have affected the industrial sector and agricultural production. Unemployment levels and the percentage of the population living in poverty were rising*”.

<sup>656</sup> For instance, a source of great concern was “*the long-term health impact of patients’ early discharges during the hostilities as well as of weapons containing substances such as tungsten and white phosphorous*”; also the risk of suffering permanent disabilities regarded a huge number of persons; then, an increase of mental health problems was reported, including psychosomatic disorders, widespread “*state of alienation in the population*” and “*numbness as a result of severe loss*”, underlining that these conditions were likely to intensify violence and extremism.

<sup>657</sup> UN Doc. A/HRC/12/48, Chapter XVII, para. 1215.

<sup>658</sup> This is reported in the report A/HRC/12/48, indicating the case HCJ 764/04.

<sup>659</sup> In particular, Article 23 GCIV and Article 70 API. On relevant provisions concerning the occupant’s obligations, reference was made to Article 50 GCIV (duty to facilitate the working of institutions dedicated to the education and care of children), 55 GCIV (duty to guarantee medical and food supplies to the civilian population), Article 56 (duty to guarantee and preserve medical services and hospital establishments), Article 59 GCIV (duty to adopt relief schemes if the occupied territory is not well supplied) and Article 60 GCIV (duty to keep on fulfilling obligations even if third parties offer relief supplies).

<sup>660</sup> UN Doc. A/HRC/12/48, Chapter XVII, para. 1298.



activity was made in view of its clarification on the content of those rights and corresponding State duties. Further, the CRC was considered for the child's "right to life, survival and development" which is set out in Article 6, the child's right to be protected from "all forms of mental or physical violence" set out in Article 19, the child's right to the highest standard of health contained in Article 24, the child's right to an adequate standard of living in Article 27 and the child's right to education in Articles 28 and 29. Furthermore, the CEDAW was taken into account so as to add specificity and scope to the obligations concerning women.

The explicit reference to the concept of progressive realisation in the ICESCR was also articulated, stressing the potential achievement over time of the rights concerned as well as States parties' duty "to move as expeditiously and effectively as possible towards that goal". Some emphasis was put on retrogressive measures as permitted only under stringent conditions;<sup>661</sup> some strategies and objectives before and during the military operations were criticised.<sup>662</sup> In doing so, a view was expressed whereby "*the closure of, or the restrictions imposed on, border crossings by Israel in the immediate period before the military operations subjected the local population to extreme hardship and deprivations that are inconsistent with their protected status*". Specifically, "*the restrictions on the entry of foodstuffs, medical supplies, agricultural and industrial materials, including industrial fuel, together with the restrictions on the use of land near the border and on fishing in the sea have resulted in widespread poverty, intensified dependence on food and other assistance, increased unemployment and economic paralysis*". The related conclusion emphasised Israel's violation of its obligations as an occupying power under the Fourth Geneva Convention.

Notably, as regards the government's argument that the policy of closure was a form of sanction, they were deemed "*blanket sanctions*" forbidden under international law, relying on the view addressed by the CESCR that "*[...] whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights [and] [...] it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of the country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country*".<sup>663</sup>

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<sup>661</sup> See ICESCR, *General Comment No. 3: The nature of States Parties' obligations*, 14 December 1990, para 9.

<sup>662</sup> See UN Doc. A/HRC/12/48, Chapter XVI. Some official statements made by Deputy Prime Minister Eli Yishai on 6 January 2009 were evoked and reported: "*It [should be] possible to destroy Gaza, so they will understand not to mess with us*", adding that "*it is a great opportunity to demolish thousands of houses of all the terrorists, so they will think twice before they launch rockets*", see UN Doc. A/HRC/12/48, Chapter XVII, para. 1300. Further, the so-called '*Dahiya doctrine*' was identified as a tactics involving disproportionate use of force, requiring "*widespread destruction as a means of deterrence*", causing great damage to civilian property and suffering to civilians; it has been considered consistent with previous Israeli practice, such as during the Second Lebanon War against in July 2006.

<sup>663</sup> UN doc. A/HRC/12/48, Chapter XVII, paras. 1299-1302, and para. 1306. See also ICESCR, *General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights*, 12 December 1997, paras. 4 and

Focusing on the blockade, the duties “to respect, protect, facilitate or provide - to the extent possible - for the enjoyment of the whole range of economic, social and cultural rights in the Gaza Strip” were expressively referred to in view of the ICJ’s statement concerning Israel’s obligation “not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities”.<sup>664</sup> In particular, it was noted that its conduct led to a regression and deterioration in the realisation of those rights, so finding a failure to comply with those obligations.<sup>665</sup>

Specific considerations were addressed for the *right to water*, recalling the CESCR’s position that “States parties should refrain at all times from imposing embargoes or similar measures that prevent the supply of water, as well as goods and services essential for securing the right to water”; this was deemed to be applicable to food and health services or goods.<sup>666</sup> As anticipated, in looking at the type and extent of military operations conducted in Gaza, the right to water was further articulated in light of the CESCR’s observation whereby “the obligation to respect [the right to water] requires that States parties refrain from [...] limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law”.<sup>667</sup> Similarly, ICRC Resolution II of 1996 calls upon belligerent parties to “take all feasible measures to avoid in their military operations, all acts liable to destroy or damage water sources”.<sup>668</sup>

In investigating these operations, analogous considerations were applied to the *right to adequate housing*. The destruction of tanks or water wells, residential housing and pipe networks was not deemed “an inevitable or necessary incidence of military hostilities”, in view of the basic obligations to distinguish between military and civilian objects and not to aim attacks at civilian persons and objects.<sup>669</sup> In other cases private houses were allegedly demolished during the last days when the army fully controlled the areas concerned. Military necessity and the prevention of rockets fire were not deemed “plausible reasons for the widespread destruction”. Similar reflections were made for the damage of agricultural land and greenhouses in light of their importance for local food security. The

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16. See also ICRC, “Gaza closure: not another year!”, June 2010.

<sup>664</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, para. 112.

<sup>665</sup> UN Doc. A/HRC/12/48, Chapter XVII, para. 1308.

<sup>666</sup> UN Doc. A/HRC/12/48, Chapter XVII, para. 1303. See ICESCR, *General Comments No. 12: The right to food*, 12 May 1999, para. 8.

<sup>667</sup> UN Doc. A/HRC/12/48, Chapter XVII, para. 1317. See ICESCR, *General Comment No. 15: The right to water*, 20 January 2003, para. 21.

<sup>668</sup> ICRC Resolution II of 29 February 1996 (adopted by consensus, 26<sup>th</sup> international conference of the Red Cross and Red Crescent). See J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, p. 150.

<sup>669</sup> The Mission did not receive information suggesting that all the houses in question were “booby-trapped” or served as “hideouts” for Hamas’ fighters, and it did not assume that this was the case. According to the described patterns of destruction, the demolition or firing occurred after the orders to leave the houses was given, without clear necessity to occupy such properties or to destroy them, as the military forces effectively controlled the area. See UN Doc. A/HRC/12/48, Chapter XVII, para. 1319.

overall destruction was found to be in breach of “*the duties to respect the right of the people in the Gaza Strip to an adequate standard of living*”, including access to water, food and housing.

Focusing on several fundamental rights of the child, other alleged violations concerned State obligations under the CRC during the military operations in the Strip.<sup>670</sup> Attention was paid to Article 24(1) under which “*States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health-care services*”. Alleged violations related to Article 38(1) (“*States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child*”) as well as Article 38(4) (“*States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict*”). In addition, a violation of Article 39 was identified in the active prevention of reconstruction efforts, as it does not honour the obligations to “*take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: [...] armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child*”. Remarkably, children’s psychological learning difficulties were deemed amplified by the impact of the blockade alongside the damage on education infrastructures due to the conduct of hostilities.<sup>671</sup>

Focusing on the CEDAW, the Fact-Finding Mission concurred with the relevant Committee’s statement that “*the human rights of women and children in Gaza, in particular to peace and security, free movement, livelihood and health, have been seriously violated during this military engagement*”.<sup>672</sup> In addition, noting that Israel has signed, but not yet ratified, the CRPD (Article 11 of which requires States parties to take “*all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict*”) its obligation not to defeat the object and purpose of this Convention was underlined.<sup>673</sup>

Two questions explicitly articulated in the examination of the combined impact of military operations plus blockade on the Gaza population and its enjoyment of human rights deserve further attention, since they refer to aspects discussed throughout the present research.

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<sup>670</sup> See also Statement by the Committee on the Rights of the Child, “Effects of the Gaza conflict on children ‘devastating’”, 12 January 2009. See also UN Doc. A/HRC/12/48, Chapter XVII, paras. 1321-1322.

<sup>671</sup> Some 280 schools and kindergartens were reportedly destroyed in a context of restrictions on the implementation of construction materials and many educational buildings already in serious need of reparation, see UN Doc. A/HRC/12/48, Chapter XVII, para. 1267.

<sup>672</sup> UN Press release, “UN Committee says women’s rights were seriously violated during Gaza conflict”, 6 February 2009. See also A/HRC/12/48, paras. 1271-1278, 1323.

<sup>673</sup> UN Doc. A/HRC/12/48, Chapter XVII, paras. 1279-1287, 1323.

(1) Firstly there is the issue on *whether the population of Gaza was subject to collective punishment or penalty*. The relevant prohibitions established under the law of armed conflict are part of customary international law.<sup>674</sup> In particular, collective penalties and other similar measures of intimidation or terrorism are forbidden under Article 50 HRs and Article 33 GCIV which also proscribes reprisals against protected persons. In addition, Article 75(2)(d) API prohibits the act of collective punishment “*at any time and in any place whatsoever*”. Notably, the scope of collective penalties includes “*sanctions and harassment of any sort, administrative, by police action or otherwise*” and so exceeds physical or criminal sanctions.<sup>675</sup> In emphasising this observation, it was suggested that “*there was an intent to subject the Gaza population to conditions such that they would be induced into withdrawing their support from Hamas*” in light of the cumulative effect of blockade policies and military operations, in addition to statements regarding the whole Strip as “*hostile territory*”.<sup>676</sup> According to the Mission, the Palestinian armed groups operating in Gaza were not fought in a target way, while military, political and economic sanctions were taken against the local population.<sup>677</sup> In particular, “*the intention to inflict collective punishment*” was deemed to be cumulatively indicated by the examined facts, the conditions resulting from the armed forces’ deliberate actions, and the governmental policies on Gaza as declared by its representatives before, during and after the military operation.

(2) Secondly, there is the issue of “*whether the crime of persecution as a form of crime against humanity had been committed against the civilian population of the Strip*”. In referring explicitly to the ICTY Trial Chamber,<sup>678</sup> it was noted that the commission of a crime against humanity depends on whether it is determined that “*there was a widespread or systematic attack on a civilian population that blatantly discriminated and infringed a fundamental right recognised under international customary law or treaty, and was carried out deliberately with the*

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<sup>674</sup> See J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, p. 374, Rule 103.

<sup>675</sup> Y. Sandoz, C. Swinarski, B. Zimmerman (eds.), *op. cit.*, at 3055.

<sup>676</sup> To the Mission, a confirmation apparently came from the comments by the then Minister of Foreign Affairs on the aforementioned decision by the Supreme Court to uphold the fuel cuts, also in connection to the cited strategies before and during the military operations. The reported statement reads: “*The Palestinians need to understand that business is not usual, I mean there is no equation in which Israeli children will be under attacks by Kassam rockets on a daily basis and life in the Gaza Strip can be as usual*”, citing *Global Security*, “Israel’s Supreme Court upholds fuel cuts to Gaza”, 30 November 2007.

<sup>677</sup> In this sense, “*this has been seen and felt by many people with whom the Mission spoke as a form of collective punishment inflicted on the Palestinian because of their political choices*”, see UN Doc. A/HRC/12/48, Chapter XVII, para. 1325.

<sup>678</sup> ICTY, *Prosecutor v. Kunarac et al.*, Trial Chamber (IT-96-23-T and IT-96-23/1-T), Judgment of 22 February 2001, para. 431, reading: “*Only the attack, not the individual acts of the accused, must be “widespread or systematic”. A single act could therefore be regarded as a crime against humanity if it takes place in the relevant context: For example, the act of denouncing a Jewish neighbour to the Nazi authorities – if committed against a background of widespread persecution – has been regarded as amounting to a crime against humanity. An isolated act, however, - i.e. an atrocity which did not occur within such a context - cannot*”. See ICTY, *Prosecutor v. Kupreskic and Others* (IT-95-16-T), Judgment, 14 January 2000, para. 550. See ICTY, *Prosecutor v. Tadic* (IT-94-1-T), Opinion and Judgment, 7 May 1997, para. 649.

*intention so to discriminate*”.<sup>679</sup>

Additionally, a reference to the *Tadić* case was made, recalling the ICTY Trial Chamber’s finding that “*the crime of persecution encompasses a variety of acts, including, inter alia, those of a physical, economic or judicial nature, that violate an individual’s right to the equal enjoyment of his basic rights*”.<sup>680</sup> Notably, the Trial Chamber considered that the variety of acts constituting persecution had been discussed in the *Eichmann* case, underling a precise statement laid down by the Jerusalem District Court in its noting that paragraph 4 of the Programme of the National Socialist Party declared that Jews could not be citizens of the German State, since they did not belong to the German people, and that paragraph 8 demanded that all non-Germans, who had immigrated to Germany after 2 August 1914, leave the Reich territory immediately.<sup>681</sup>

A further reference to the ICTY jurisprudence concerned the *Kupreskic* case, in which the Trial Chamber described the acts that would constitute the crime of persecution, particularly by focusing on the following relevant terms: “[...] (c) *Persecution can also involve a variety of other discriminatory acts, involving attacks on political, social, and economic rights. [...] (d) Persecution is commonly used to describe a series of acts rather than a single act. Acts of persecution will usually form part of a policy or at least of a patterned practice, and must be regarded in their context. [...] (e) [...] discriminatory acts charged as persecution must not be considered in isolation. Some of the acts mentioned above may not, in and of themselves, be so serious as to constitute a crime against humanity. For example, restrictions placed on a particular group to curtail their rights to participate in particular aspects of social life (such as visits to public parks, theatres or libraries) constitute discrimination, which is in itself a reprehensible act; however, they may not in and of themselves amount to persecution. These acts must not be considered in isolation but examined in their context and weighed for their cumulative effect*”.<sup>682</sup>

In view of these references, the Fact-finding Mission’s position was that “*some of the actions of the Government of Israel might justify a competent court finding that crimes against humanity have been committed*”. This was articulated in light of several issues: the actions denying Palestinians “*from their means of subsistence, employment, housing and water*”; the denial of Palestinians’ freedom of movement and of the right to

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<sup>679</sup> A/HRC/12/48, Chapter XVII, para. 1326.

<sup>680</sup> ICTY, *Prosecutor v. Tadić*, Trial Chamber (IT-94-1-T), Judgment of 7 May 1997, para. 710.

<sup>681</sup> In particular, the Jerusalem District Court stated that: “[w]ith the rise of Hitler to power, the persecution of Jews became official policy and assumed the quasi-legal form of laws and regulations published by the Government of the Reich in accordance with legislative powers delegated to it by the Reichstag on March 24, 1933 (Session 14, at 71) and of direct acts of violence organised by the regime against the persons and property of Jews ... The purpose of these acts carried out in the first stage was to deprive the Jews of citizen rights, to degrade them and strike fear into their hearts, to separate them from the rest of the inhabitants, to oust them from the economic and cultural life of the State and to close to them the sources of livelihood. These trends became sharper as the years went by, until the outbreak of the war. Even before German Jewry suffered its first general shock on April 1, 1933, when Jewish businesses were boycotted, the arrest of Jews and their dispatch to concentration camps had begun ... On November 7, 1938, Hirsch Grynshpan shot the Counsellor of the German Embassy in Paris, vom Rath. After this act, the wave of persecution swelled up against the Jews in Germany”, see Notes on Judgments, paras. 56-57, referencing T/1403.

<sup>682</sup> ICTY, *Prosecutor v. Kupreskic et al.* (IT-95-16-T), Judgment of 14 January 2000, para. 615.

leave and enter their own country; and the limitation or denial of Palestinians' rights to access a court of law and an effective remedy by Israeli laws.<sup>683</sup>

All the previous considerations arise another relevant issue in the context of the present study, namely whether the lack of adequate basic supplies for civilians, especially when aggravated by a blockade, gives rise to an unquestionable entitlement to gain relief action from the outside and what is provided under the existing normative framework regulating humanitarian assistance and access in situations of armed conflict as well as within an occupied territory.<sup>684</sup> This will be addressed in the next chapter.

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<sup>683</sup> UN Doc. A/HRC/12/48, Chapter XVII, Chapter XXVII.

<sup>684</sup> See H. Spieker, "The right to give and receive humanitarian assistance", in H.J. Heintze and A. Zwitter (ed.), *International Law and Humanitarian Assistance: A Crosscut Through Legal Issues Pertaining to Humanitarianism*, Berlin/Heidelberg, 2011, pp. 7-31.

## CHAPTER II: INTERNATIONAL COOPERATION AND HUMANITARIAN ASSISTANCE TO CIVILIANS

### 1. Some remarks on relief assistance and access to civilians

The issue of ensuring indispensable needs of civilians in contexts of humanitarian emergencies as induced by armed conflicts may be taken into account as part of the comprehensive question concerning States' primary responsibility to meet the basic needs of affected civilian populations under their control along with the role of humanitarian assistance and access to be provided in line with humanitarian principles. This broader issue may be framed under different legal perspectives.

Embracing a human rights approach, such a primary responsibility of the State can be derived not only from its commitments as member of the United Nations<sup>685</sup> but also from its obligations as party to human rights treaties; pertinent rights relate, *inter alia*, to health care, shelter, clothing, food and water, livelihood, and the principle of non-discrimination.<sup>686</sup> The major human rights instruments do not deal with humanitarian assistance and related access, but some references are contained in Article 22(1) CRC, in Article 23(1) of the African Charter on the Rights and Welfare of the Child, the Article 5(6)(7) and Article 7(5b)(5g) of the African Union for the Protection and Assistance of Internally Displaced Persons in Africa.

Embracing an international humanitarian law perspective, the normative framework varies depending on the character of the conflict (international or internal) as well as the relationship between the belligerents and the civilians subject to their authority and control. Explicit provisions regulate the rapid and unimpeded consignments of relief supplies to civilians under the control to

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<sup>685</sup> The respect for human dignity is among the cornerstones of the Charter. As noticed by the *Institut de Droit International*, human rights are “a direct expression of the dignity of the human person. The obligation of States to ensure their observance derives from the recognition of this dignity as proclaimed in the Charter of the United Nations and in the Declaration of Human Rights”, see *The protection of human rights and the principle of non-intervention in internal affairs of states*, 1989, Article 1(1).

<sup>686</sup> As discussed in other sections of the present study, States parties have an obligation to ensure essential levels of ESC rights and to take the necessary action in times of public emergency even if induced by conflict-torn contexts. Although the General Assembly's resolutions do not explicitly connect the primary responsibility of the State to provide humanitarian exigencies to its own population with the respect of human rights, a link in this regard appears to emerge in the finding that abandoning victims constitute a threat to life and an offence to human dignity.

the party of a conflict (other than occupied territories) but subject them to the consent of the affected State.<sup>687</sup>

Indeed, humanitarian assistance and access play a role only when the concerned State is unable or unwilling to adequately assist<sup>688</sup> civilians adversely affected by warfare and being in the territory subject to its jurisdiction or under its effective control. Such a subsidiary role has been implicitly or explicitly affirmed through the constant reference to the primary role of the State in providing assistance in contexts of natural disasters<sup>689</sup> and similar emergencies situations occurring in its territory. The existence of a primary responsibility of the State was clearly re-affirmed in the three resolutions of the General Assembly, whose historical importance is due for having framed the legal regime of humanitarian assistance and for having explicitly recognised that “*it is up to each State first and foremost to take care of the victims of natural disasters and similar emergency situations occurring in its territory*”.<sup>690</sup> Since then, both the Security Council and the General Assembly have constantly affirmed such a principle, even though the common language used by UN organs in resolutions concerning humanitarian assistance has tended to recognise the “*primary responsibility*” (*rôle primaire* in the French version) of the State, without making explicit references to the international norm containing the corresponding obligation.<sup>691</sup> This reflects a sort of compromise to reconcile humanitarian exigencies and the prerogatives of the State.<sup>692</sup> Interestingly, as for the formation of a

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<sup>687</sup> See Arts. 23, 30, 55, 59(1), 142 GCIV; Arts. 68, 69, 70(1)-(5) API; Arts. 14(1)(2) API II.

<sup>688</sup> The reasons may vary: the case of a State that is unable to face an humanitarian emergencies because it does not have the necessary means and resources; conversely, the case of State’s authority lacking effective control on its territory, or the case of a so called “*destructured*” State where there is a situation of complete anarchy; nevertheless, the case of a State that wilfully do not provide humanitarian assistance.

<sup>689</sup> After being acknowledged in the Secretary General’s first report on assistance in cases of natural disaster, the primary role of the State has been highlighted in subsequent resolutions by the General Assembly, which has also appreciated efforts made to alleviate the consequences of natural disasters on its territory. See *Secretary General Comprehensive Report on Assistance in Cases of Natural Disaster*, E/4994 (1971), at 61. See GA Res. 36/225 (XXXVI) of 17 December 1981, Preamble and para. 2; see GA Res. 48/188, International Decade for Natural Disaster Reduction, 21 December 1993, Preamble, where the GA expressed the conviction that “*each country bears the primary responsibility for protecting its people, infrastructure and other national assets from the impact of natural disasters*”. As for the earthquake in Iran, see GA Res. 2378 (XXIII) of 23 October 1968, Preamble. As for the earthquake and cyclone in Yemen, see GA Res. 46/179 of 19 December 1991, Preamble. As for Pakistan, Gibuti affected by floods, see GA Res. 47/2 of 7 October 1992, Preamble and Art. 2, and GA Res. 49/21 of 20 December 1994, Preamble.

<sup>690</sup> See the two Resolutions on Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations, GA Res. 43/131 of 8 December 1988, Preamble, and GA Res. 45/100 of 14 December 1990, Preamble; the third resolution on Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nation, GA Res. 46/182 of 19 December 1991, para. 4.

<sup>691</sup> For specific reference of humanitarian assistance, see, *e.g.*, GA Res. 56/103 on International Cooperation on Humanitarian Assistance in the Field of Natural Disasters, from Relief to Development, 5 February 2002, Preamble. On the humanitarian emergency in Darfur, see SC Res. 1556 (2004), 30 July 2004, Preamble; interestingly, when this resolution was adopted, some delegates of States members of the Security Council affirmed the existence of a State’s obligation to assist and protect its own population, see some statements by Germany and United Kingdom on the “*sacred obligation to protect its citizens*” and “*that most basic of obligations, the duty to protect (its) citizens*”.

<sup>692</sup> The debates preceding the adoption of GA Res. 43/131 of 1988 are emblematic: victims’ needs were in tension with an obsolete notion of sovereignty that aimed at guaranteeing to the State an high level of liberty in its internal matters,



customary norm recognising the existence of a primary obligation of the State, almost all the members of the XVI Commission of the *Institut de Droit International* who drafted the resolution on Humanitarian Assistance<sup>693</sup> expressed their positive acknowledgement in this regard, while those expressing a contrary position admitted that the corresponding norm imposing such a duty can be considered as being in *statu nascendi*.<sup>694</sup> However, two remarkable aspects of that major acknowledgement concern the content and the addressees of the norm. The State or territorial authority is required to use all available resources to protect basic humanitarian exigencies, rather than an absolute protection. Then, the recognition of a duty to provide the necessary humanitarian assistance is extended upon “*any other authority exercising jurisdiction or de facto control over the victims of a disaster*”.<sup>695</sup>

Relief action in favour of the civilian population of the belligerent State has been firstly regulated in Article 23 GCIV, as already noted in the previous chapter. The enemy as well as a third country are equally obliged to allow such relief action, even in favour of the population of the adverse party. The party concerned is nonetheless entitled to check the real essentiality (for the population’s survival) of the items to be consigned, besides ensuring that their destination is not going to accrue the military strength or the economy of the belligerent.<sup>696</sup>

Making a step forward, Protocol I contains further rules relating to relief action in favour of the civilian population of the belligerent States. As a corollary to the prohibition of starvation contained in Article 54, additional protection is provided to the objects used for humanitarian relief operations, as their security and safety constitute basic conditions for such a delivery. In enlarging the obligation stemming from Article 23 GCIV, Article 70(1) API entitles the whole population to relief (and not only particularly vulnerable groups).<sup>697</sup> The modalities for safe passage of supplies are detailed and require not to consider the offer of relief as “*interference in the armed conflict*” or “*an unfriendly act*”. In particular, when the civilian population of any territory under belligerents’ control (other than occupied territory) is not appropriately provided with rudimentary supplies,

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within of voluntary accepted juridical limitations, see *Résolution su la reconnaissance du droit d’assistance humanitaire et du droit à dette assistance*, in M. Bettati, B. Kouchner (eds.), *Le devoir d’ingérence. Peut-on les laisser mourir?*, Paris: Denoel, 1987, pp. 291-292.

<sup>693</sup> Institut de Droit International, Sixteenth Commission, Resolution on Humanitarian Assistance, Bruges, Session 2003; see statements by J.A. Carrillo Salcedo, H.G. Schermers, F.H. Paolillo, B. Vukas, B. Jakovljevic, *AIDI*, p. 399 ff.

<sup>694</sup> Particularly, according to A. Cassese “*State practice has not yet evinced the birth of such a duty*”, *AIDI*, p. 533

<sup>695</sup> Institut de Droit International, Resolution on Humanitarian Assistance, *ibid.*, Art. III, paras. 1 and 2.

<sup>696</sup> See N. Ronzitti, “*Civilian Population in Armed Conflict*”, *MPEPIL*, 2010.

<sup>697</sup> See R. Provost, “*Starvation as a Weapon: Legal Implications of the United Nations Food Blockade against Iraq and Kuwait*”, *Columbia Journal of Transnational Law*, 1992, p. 612.

humanitarian and impartial relief actions from the outside “*shall be undertaken*”, so implying a duty to accept relief offers in line with this clause.<sup>698</sup> In this context, targeting humanitarian relief objects as well as destroying, misappropriating and looting them is prohibited. Indeed, the obligation to allow humanitarian assistance entails a certain passive behaviour by belligerents as well as certain actions to “*protect relief consignments and facilitate their transit and rapid distribution*” (Article 70(4) API).<sup>699</sup> Of note, an intentional attack against relief personnel as well as the wilful impediment of relief supply as stipulated in the Geneva Conventions constitute war crimes.<sup>700</sup>

However, Article 70(1) explicitly subjects the implementation of the obligation to allow relief actions to an agreement between the parties concerned. As a result, they are conditioned to the acceptance by belligerents, which can also decide on the modalities for their consignment and inspect the convoys or vessels concerned.<sup>701</sup> As mentioned at the end of previous chapter, a relevant question concerns *whether scarcity of supplies to civilians*, when aggravated by the imposition of a blockade used as a method of warfare, *gives rise to an unquestionable entitlement to gain relief action from the outside*. Article 70 API leads to an unsatisfying outcome, since relief efforts for civilians exposed to a blockade are still “*subject to the agreement of the Parties concerned*”. Nonetheless, in the official comment to Article 54 API, the obligation to ensure humanitarian relief is admitted when blockade is used as a method of warfare, noting that: “*(i)t should be emphasised that the object of a blockade is to deprive the adversary of supplies needed to conduct hostilities, and not to starve civilians*”. Insofar as a blockade leads to such a severe effect, Article 70 is understood to require relief actions when the provision of medical and food supplies, means of shelter, clothing and other goods indispensable to the population’s survival is not adequate.<sup>702</sup>

The sovereignty dimension emerging from Article 70(1) has been deemed to amount to a “*severe limitation*” on the affected populations’ right to receive relief.<sup>703</sup> Conversely, the contingency of relief actions on an agreement by all the parties concerned has led some scholars to argue that a “*genuine*” obligation to permit (or right to attain) free passage of humanitarian assistance to civilians does not

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<sup>698</sup> See M. Bothe, “Relief Actions”, *Encyclopedia of Public International Law*, Rudolf Bernhardt, 1982, p. 176.

<sup>699</sup> In the same vein, all States are required to protect relief supplies intended for an occupied territory (Art. 59 GCIV); see Art. 8(2)(b)(iii) Rome Statute. See J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, p. 109, Rule 32.

<sup>700</sup> See respectively Article 8 (2)(b)(iii) and Article 8 (2)(b)(xxv) Rome Statute.

<sup>701</sup> See Arts. 64 and 70(3) AP I. See Arts. 59-63, 108-109 GC IV. See also *Guiding Principles on the Right to Humanitarian Assistance*, adopted by the Council of the International Institute of Humanitarian Law (San Remo) in April 1993, Principle 12, in which it is recognised that the control of the territorial States must not “*unduly delay the providing of humanitarian assistance*”, *IRRC*, 1993, at 554.

<sup>702</sup> Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *op. cit.*, at 654, para. 2095.

<sup>703</sup> See M. Sassoli and A. Bouvier, *How Does Law Protect in War?*, 1999, p. 182.

exist,<sup>704</sup> noting however that Article 70(1) is officially interpreted to preclude a refusal to an agreement on relief actions for “*arbitrary or capricious*” reasons.<sup>705</sup> From this line of reasoning, a belligerent willing to refuse consent to such a delivery could invoke other practical reasons. As underlined by a commentator, the drafters of Article 70(1) apparently made “*the impression of an ironclad obligation, and at the same time took the bite out of that rule*”.<sup>706</sup>

Focusing on the *limitations* imposed upon the belligerent parties concerning *potential refusal of relief offers* from humanitarian organizations and the like, legitimate reasons may include cases in which the criteria of humanity, impartiality and neutrality are not met.<sup>707</sup> undoubtedly belligerents must permit and facilitate the “rapid and unimpeded passage of humanitarian relief” when the latter is impartial, carried out without unfavourable differences, and subject to their control; they must also guarantee the freedom of movement of related authorised personnel. Conversely, although *military necessity* or *security reasons* have been deemed legitimate reasons to oppose a refusal to relief actions,<sup>708</sup> they are not mentioned in any of the relevant articles.

As far as internal armed conflicts are concerned, besides Article 14 APII examined above, Article 18(2) APII requires non-discriminatory delivery of humanitarian assistance from the outside.

In situations of blockade, the ICRC commentary admits that it may “*remain legitimate*” and suggests to refer to the rule dealing with relief actions.<sup>709</sup> In this regard, the weak language of Article 18 APII permits them as “*subject to the consent of the High Contracting Party concerned*”.<sup>710</sup> Thus, a dilemma may arise when the party concerned is intended to starve its own civilian population and so such consent is unlikely. Nonetheless, the decision is not left to the belligerents’ discretion; if an impartial

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<sup>704</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2010.

<sup>705</sup> Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, p. 819, para. 2805, noting that this article does not mean that the parties concerned have “*an absolute and unlimited freedom to refuse their agreement to relief actions*”; rather, “*a party refusing its agreement must do so for valid reasons, not for arbitrary or capricious ones*”. In the same vein, see Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2010, p. 227; C.A. Allen, “Civilian Starvation and Relief during Armed Conflict: The Modern Humanitarian Law”, *Georgia Journal of International and Comparative Law*, 1989, p. 72.

<sup>706</sup> E. Rauch, *The Protocol Additional to the Geneva Conventions for the Protection of Victims of International Armed Conflicts and the United Nations Convention on the Law of the Sea: Repercussions on the Law of Naval Warfare*, Duncker and Humblot, 1984, pp. 91-2.

<sup>707</sup> See Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *op. cit.*, paras. 2797-2804.

<sup>708</sup> In this vein, M. Bothe, K.J. Partsch, A.W. Solf (eds.), *op. cit.*, p. 436. According to M. Bothe, *Relief Actions, Encyclopedia of Public International Law*, at 95, when legitimate military considerations clash with humanitarian exigencies, the principle of proportionality might be useful to solve the conflict. However, military necessity issues cannot allow the territorial State to indefinitely block humanitarian operations, see *ibid.*, pp. 93-94.

<sup>709</sup> See Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, at 1457-8, paras. 4796 and 4798.

<sup>710</sup> “Article 18 APII recites: “*If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as food-stuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned*”.

and non-discriminatory humanitarian organization is able to remedy to the vulnerable population's survival, then related relief actions are generally viewed as required. In this vein, the relevant rule is interpreted to preclude the competent authorities from refusing their consent "*without good grounds*"<sup>711</sup> and so implicitly breaching Article 14. Although plausible reasons for delaying or frustrating humanitarian assistance could be found, the military necessity of blockade must be measured in view of the prohibition on starving civilians.

Of note, Article 38(1) GCIV confers upon the aliens present in the belligerents' territory the right "*to receive the individual or collective relief that may be sent to them*". The latter has been interpreted to comprise consignments such as medical supplies, food and clothing coming from the country of origin or any other country, and sent by governments, humanitarian organizations or private individuals. Further, the country of residence is required to permit the entrance into its territory of such consignments and their integral arrival to the recipient.<sup>712</sup>

A crucial issue of humanitarian assistance remains *the unhampered access to civilians affected and in need*.<sup>713</sup> Often the denial of humanitarian access results from situations in which belligerents misuse their authority to supervise or channel humanitarian assistance within their respective territory under the veil of sovereignty, or they restrict the access to certain areas covered by the armed conflict for security concerns, or they refuse to grant the access by denying the humanitarian problem,<sup>714</sup> the deliberate displacement or the starvation of the civilian population.<sup>715</sup>

As already observed in relation to IHL rules on relief action, belligerent parties are obliged to "*allow and facilitate rapid and unimpeded passage of humanitarian relief*" offered by humanitarian organizations, even if the latter favours the civilian population of the adversary. In this regard, the UN Security Council has supported a certain development of *a subjective right to humanitarian access of humanitarian actors as part of the norm imposing such obligation*. Indeed, the implementation of this norm may depend on the Security Council's role in situations where the consent of the responsible authorities is lacking. Cases in which UN Member States and other relevant actors have been required to allow *immediate and unimpeded humanitarian access* (by a Security Council's authorization of several measures under Chapter VII of the UN Charter) have been frequent in the practice. In such contexts, the

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<sup>711</sup> See Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, at 1479, para. 4885.

<sup>712</sup> O.M. Uhler and H. Coursier (eds.), *Commentary: IV Geneva Convention*, 1958, pp. 246-7.

<sup>713</sup> See Report of the Secretary General on Strengthening of the Coordination of Emergency Humanitarian Assistance of the United Nations, A/45/587, 24 October 1990, at 7, para. 26.

<sup>714</sup> C. Phuong, *International Protection for Internally Displaced Persons*, 2004, p. 226.

<sup>715</sup> C. Rottensteiner, "The Denial of Humanitarian Assistance as a Crime under International Law", *IRRC*, 1999, p. 555.

humanitarian situation itself or the “*obstacles being created to the distribution of humanitarian assistance*”<sup>716</sup> have been declared to represent or contribute to a threat to international peace and security.<sup>717</sup>

As commonly known, resolution 688 (1990) on Iraq set the precedent,<sup>718</sup> and its subsequent decisions addressing difficult humanitarian emergencies have often included provisions to grant humanitarian access.<sup>719</sup> It is worth noting that, in the situation of the early 1990s concerning the former Yugoslavia, the provision of humanitarian relief represented a key objective for deciding mandatory measures and a constant issue throughout the armed conflict.<sup>720</sup> In resolution 752 (1992) the parties were called to guarantee the establishment of the conditions for “*the effective and unhindered delivery of humanitarian assistance*”.<sup>721</sup> When it imposed mandatory sanctions against the Federal Republic of Yugoslavia for failure to comply with its decisions, it aimed *inter alia* at overcoming the impasse for effective and unhindered delivery of humanitarian aid to refugees and IDPs, including safe and secure access to airports in Bosnia and Herzegovina.<sup>722</sup> As the ICTY Trial Chamber then recognised in the *Krstić* case, the blocking of aid convoys was part of the “*creation of a humanitarian crisis*”<sup>723</sup> which, along with acts of spreading terror and forcible transfers, gave rise to individual

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<sup>716</sup> *E.g.*, on Sierra Leone see S/RES/1132 (8 October 1997), preamble; on Somalia see S/RES/794 (3 December 1992), preamble; S/RES/751 (14 April 1992), paras. 7, 12, 13, 14; S/RES/767 (24 July 1992), preamble. 8, 9; on Kosovo see RES/1199 (23 September 1998), para. 2; on Rwanda see S/RES/918 (17 May 1994), preamble.

<sup>717</sup> According to the Secretary General, “[h]umanitarian emergencies, by causing the mass exodus of people, may constitute threats to international peace and security”. Report of the Secretary General on The Work of the Organization, A/48/1, 10 September 1993, para. 481.

<sup>718</sup> See S/RES/688 (5 April 1991), para. 3, in which it “[i]nsists that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq”. In previous paragraphs it “condemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas [...]” (para. 1) and “demands that Iraq ... immediately end this repression [...]” (para. 2).

<sup>719</sup> Among the initial decisions followed from the case of Iraq, for instance: on Somalia, see S/RES/794 (3 December 1992), preamble and para. 3. On Rwanda, see S/RES/929 (22 June 1994), para. 3, referring to S/RES/925 (8 June 1994), para. 4 (a) and (b). On Sierra Leone, see S/RES/1132 (7 October 1997), para. 2; S/PRST/1999/1 (7 January 1999). On Kosovo, see RES/1199 (23 September 1998), paras. 2 and 4 (c). On the Democratic Republic of Congo (DRC), see S/RES/1234 (9 April 1999), para. 9; S/RES/1355 (15 June 2001), preamble and para. 19. On Sudan, Chad and the Central African Republic, see S/RES/1778 (25 Sept. 2007), para. 17.

<sup>720</sup> In the early stages of the conflict, two prior commitments have been identified as the drivers of the Security Council’s policy: the universal mandate of UNHCR and its protection regime and the mandate of the UN Protection Force in Croatia. This response combined economic and military sanctions on Belgrade with military protection for the delivery of relief to Bosnians, first of the airport and later of land convoys, see S.L. Woodward, “The Security Council and the Wars in the Former Yugoslavia”, in V. Lowe et al. (eds.) *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, 2008, p. 425.

<sup>721</sup> See S/RES/752 (1992), para. 8.

<sup>722</sup> In Res. 757 (1992), acting under Chapter VII, it demanded the parties to “immediately create” the conditions for “*effective and unimpeded delivery of humanitarian assistance*” (para. 17). In Res. 770 (1992), acting under Chapter VII, it called upon States “*to take nationally or through regional agencies or arrangements all measures necessary to facilitate in coordination with the United Nation the delivery ... of humanitarian assistance to Sarajevo and wherever in need in other parts of Bosnia-Herzegovina*” (para. 2). In Res. 781 (1992) a ban on military flights in the airspace of Bosnia-Herzegovina was established, as this measure was deemed “*an essential element for the safety of the delivery of humanitarian assistance*”; the ban was reaffirmed in SC Res. 786 (1992).

<sup>723</sup> This crisis was the “*prelude to the forcible transfer of the Bosnian Muslim civilians*”, see ICTY, *Prosecutor v. Krstić* (IT-98-33), Judgment of 2 August 2001, para. 615, also paras. 88-90.

criminal responsibility for inhumane acts and persecution as crimes against humanity.<sup>724</sup>

Of note, in consideration of the Security Council's practice regarding access to humanitarian assistance, the *Institut de Droit International* has determined that it may undertake the required measures under Chapter VII of the UN Charter “[i]f the refusal to accept a bona fide offer of humanitarian assistance or to allow access to the victims leads to a threat to international peace and security”.<sup>725</sup> Then, a codification of such a practice has resulted in its resolutions on the protection of civilians in armed conflict.<sup>726</sup> For instance, in 2000 it called upon “all parties concerned, including neighbouring States, to cooperate fully with the United Nations Humanitarian Coordinator and United Nations agencies in providing ... access” of humanitarian personnel as well as confirming that the deliberate denial of humanitarian access is a violation of international law which may constitute a threat to international peace and security.<sup>727</sup> Similarly, explicitly referring to the Hague Regulations and the Geneva Conventions, in 2006 it urged “all those concerned to allow full unimpeded access by humanitarian personnel to civilians in need of assistance in situations of armed conflict”, and in so doing it extended this obligation to non-State actors.<sup>728</sup> Furthermore, extensive consideration of its comprehensive practice in this regard has been made in the ICRC study to investigate *the customary character acquired by the obligation to grant humanitarian access in international and internal armed conflicts*.<sup>729</sup>

Relevant recent situations have concerned, *inter alia*, Libya, Mali e Syria.<sup>730</sup> For instance, in

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<sup>724</sup> See ICTY, *Prosecutor v. Krstić* (IT-98-33), Judgment of 2 August 2001, para. 653.

<sup>725</sup> Institut de Droit International, Sixteenth Commission, *Humanitarian Assistance: Resolution*, Bruges Session 2003, at 8, Section XIII, para. 3. See also the “Guiding Principles on the Right to Humanitarian Assistance”, adopted by the Council of the International Institute of Humanitarian Law (San Remo) in April 1993, principle 7: “*The competent United Nations organs and regional organizations may undertake necessary measures, including coercion, in accordance with their respective mandates, in case of severe, prolonged and mass suffering of populations, which could be alleviated by humanitarian assistance. These measures may be resorted to when an offer has been refused without justification, or when the provision of humanitarian assistance encounters serious difficulties*”.

<sup>726</sup> S/RES/1265 (17 September 1999); S/RES/1296 (19 April 2000); S/RES/1674 (28 April 2006). For the purpose of adopting its first resolution on the protection of civilians, the Council took into account the report to the Security Council by the Secretary General on The Protection of Civilians in Armed Conflict (S/1999/957, 8 September 1999), but also his report on The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa (S/1999/308-A/52/871, 25 September 1997) and his report on The Protection for Humanitarian Assistance to Refugees and Others in Conflict Situations (S/RES/883, 22 September 1998). For a comprehensive overview, see Security Council's Report, “Cross-Cutting Report No. 2: Protection of Civilians in Armed Conflict”, October 2008.

<sup>727</sup> S/RES/1296 (19 April 2000), para. 8.

<sup>728</sup> S/RES/1674 (26 April 2006), para. 22. See also S/RES/1502 (23 August 2003), para. 4.

<sup>729</sup> See J.M. Henckaerts and L. Doswald-Beck, *op. cit.*, at 194-195, Rule 55. An emblematic reference concerns the situation in Somalia, S/RES/1772 (20 August 2007), paras. 18 and 20, in which it encouraged “*Member States whose naval vessels and military aircraft operate in international waters and airspace adjacent to the coast of Somalia to be vigilant to any incident of piracy therein and to take appropriate action to protect merchant shipping, in particular the transportation of humanitarian aid, against any such act, in line with relevant international law*”; additionally, it “*strongly support(ed) and encourage(d) the ongoing relief efforts in Somalia, ... , and call(ed) on all parties and armed groups in Somalia to take appropriate steps to ensure the safety and security of AMISOM and humanitarian personnel, and grant timely, safe and unhindered access for the delivery of humanitarian assistance to all those in need, and urge(d) the countries in the region to facilitate the provision of humanitarian assistance by land or via air and sea ports*”.

<sup>730</sup> See, e.g., S/RES/2139 (22 February 2014), approved unanimously, para. 4, in which it demanded all parties to the civil conflict in Syria to “*facilita(te) the expansion of humanitarian relief operations*” in accordance with the applicable provisions

relation to the situation of Libya, in the preamble of Resolution 1973 (2011) the Security Council recalled paragraph 26 of resolution 1970 (2011), expressing “*its readiness to consider taking additional appropriate measures, as necessary, to facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance in the Libyan Arab Jamahiriya*”, as well as “*its determination to ensure the protection of civilians and civilian populated areas and the rapid and unimpeded passage of humanitarian assistance and the safety of humanitarian personnel*”. Then, acting under Chapter VII, the Security Council demanded Libyan authorities to comply with their obligations ensuing from international law, including international humanitarian law, human rights law and refugee law and to “*take all measures to protect civilians and meet their basic needs and to ensure the rapid and unimpeded passage of humanitarian assistance*”.<sup>731</sup>

As in previous cases, the Security Council deals with this issue by primarily urging parties to consent the unimpeded provision of humanitarian supplies to civilians, and if they keep disregarding its appeal, it acts under Chapter VII.

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of IHL and the UN guiding principles of humanitarian emergency assistance; para. 6, in which it demanded all parties to promptly permit “*rapid, safe and unhindered humanitarian access*” for UN humanitarian agencies and partners; para. 7, in which it urged all parties to “*take all appropriate steps ... to provide immediate humanitarian assistance to all the affected people in Syria*”. See S/RES/2165 (14 July 2014), adopted unanimously, para. 2 in which it decided that the UN humanitarian agencies and implementing partners were “*authorised to use routes across conflict lines and the border crossings of Bab al-Salam, Bab al-Hawa, Al Yarubiyah and Al-Ramtha, in addition to those already in use, in order to ensure that humanitarian assistance*” (namely four border crossings that were not controlled by the Government of Syria); para. 3, in which it decided “*to establish a monitoring mechanism, under the authority of the United Nations Secretary-General, to monitor, with the consent of the relevant neighbouring countries of Syria, the loading of all humanitarian relief consignments*”; para. 6, in which it decided “*that all Syrian parties to the conflict shall enable the immediate and unhindered delivery of humanitarian assistance directly to people throughout Syria, by the United Nations humanitarian agencies and their implementing partners, on the basis of United Nations assessments of need and devoid of any political prejudices and aims, including by immediately removing all impediments to the provision of humanitarian assistance*”. See S/RES/2191 (17 December 2014), in which it renewed authorisation for cross-border humanitarian access until January 2015.

<sup>731</sup> S/RES/1973 (17 March 2011), Preamble and para. 3.

## CHAPTER III: THE “WELFARE OF THE CIVILIAN POPULATION” UNDER THE LAWS OF OCCUPATION AND ESC RIGHTS

### 1. Introduction

As one of the traditional possible follow-ups of warfare, belligerent occupation has been regulated through long-standing legal efforts dating back to the nineteenth century and having gradually provided for *several rules informed by a shift of concern to the welfare of local populations in the hands of occupying powers*.<sup>732</sup> But the relevance and adequacy of such efforts as a constantly firm basis in this last regard remains disputable.

It is submitted that *ESC rights* constitute an ever more *unavoidable component* of the on-going legal debate on *the protective scope of occupation law* and the unequivocal intentions of its drafters to safeguard the needs and interests of civilian populations living under occupation. In shaping this legal regime, the evolution of international law along with relevant contemporary practice have in fact brought up more critically the issue of *protecting this set of rights for the pursuit of the livelihood and well-being of the original inhabitants of occupied territories*. As such, they are entitled “to live as normal a life as possible”, in line with their own traditions, laws and culture; this entails continuing, *inter alia*, adequate standards of living, health, education and employment conditions in an uninterrupted manner as far as possible, and, in actual fact, considerable efforts on the ground orbit around this persistent concern.

Modern practice has included both classical and atypical situations of exercise of effective

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<sup>732</sup> It is commonly assumed that the term “*local population*” refers to the protected persons and original inhabitants of the occupied territory. On the origins and historical evolution of belligerent occupation, see Capotorti, *L'occupazione nel diritto della guerra*, Napoli, 1949; Migliazza, *L'occupazione bellica*, Milano, 1949; Appel Graber, *The Development of the Law of Belligerent Occupation, 1863-1914: a historical survey*, New York, 1949; Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, 1950 (trad. It., *Il nomos della terra nel diritto internazionale dello ius Publicum Europaeum*, Milano, 2003, p. 247 ff.); A. Roberts, “What is a military occupation?”, *BYIL*, 1984, pp. 249-305; Haggemacher, “L'occupation militaire en droit international: genèse et profile d'une institution juridique”, *Relations internationales*, 1994, p. 285 ff.; Bhuta, “The Anthinomies of Transformive Occupation”, *EJIL*, 2005, p. 721 ff.; R. Kolb, S. Vitè, *Le droit de l'occupation militaire. Perspectives historiques et enjeux juridiques actuelles*, Brussels, 2009; Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge, 2009; E. Benvenisti, *The International Law of Occupation*<sup>2</sup>, Oxford, 2012.



control/authority over a foreign territory.<sup>733</sup> Accordingly, *the protective purpose of the laws of occupation* is inferred not only as an *intrinsic function* of the existing regime but also as *an evolving function* of the challenged regime.

On the one hand, the *scope* and *adequacy* of IHL to meet the occupied civilian population's socio-economic and cultural entitlements may be examined.<sup>734</sup> Relevant obligations placed upon the occupant are to be considered, as is questioning their contingency to contextual factors. The rules and institutions of occupation law are investigated by addressing the intensity and modalities of application to contentious issues that arise in impacting ESC rights in practice. This perspective contributes to gaining a better understanding of its role in newly emerging realities of occupiers' policies affecting such rights. Indeed, occupation law provides for relevant standards to assess the lawfulness of the occupant's discretion in the exercise of authority, which may be distinguished from irrelevant and illegitimate discretion. One of the main objectives is commonly described as *searching for a delicate balance* between the *interests of the protected local population* against the *security needs of the military commander in the occupied territory*. Conversely, it does not allow the latter to take into account the economic, national and social interests of his own country to the extent that *no implications* exist for the interests of the local population or the security interest in the occupied area; indeed, only the army's military needs therein can be considered (which are different from those of national security in its broad sense).<sup>735</sup>

In assuming the welfare of the civilian population as the major reasonable standard among the interests to which occupation law affords protection, the present chapter essentially examines *whether and to what extent IHL has been - or ought be - adjudged for its benefit as related to ESC rights*. In particular, it explores *whether the delicate balance between the two cardinal points* - the security needs versus the civilian needs of the occupied population - *has been performed adequately in such an area*. In other words, it

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<sup>733</sup> For a recent examination of basic questions such as the provisional nature of the *de facto* authority exercised by the occupant, "*effective control*" on the occupied territory and the auxiliary criteria identified in jurisprudence, the delimitation of the rights and duties incumbent upon an occupying power, the conditions triggering the beginning and the termination of a situation of occupation, see ICRC reports submitted to the 28<sup>th</sup>, 30<sup>th</sup> and 31<sup>th</sup> International Conferences of the Red Cross and Red Crescent, in December 2003, November 2007 and December 2011, titled "*International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*". Additionally, the ICRC has addressed legal questions on the administration of occupied territories by coalitions, the potential application of occupation law for UN administration of foreign territory by coalitions of States, the use of force in occupied territory.

<sup>734</sup> A basic duty upon the occupant is related to upholding the laws of occupation and enhancing their objectives even by safeguarding the interests of the protected groups (such as the local population of the occupied territory, according to Article 4 GCIV).

<sup>735</sup> For a worthy and comprehensive determination as to this aspect, see HCJ 393/82, *Jami'at Ascan Elma'almoon Eltha'aoniah Elmahduda Elmaoolie v. Commander of IDF Forces* (also cited as: *A cooperative Society Lawfully registered in the Judea and Samaria Region v. Commander of IDF Forces in the Judea and Samaria region et al.*; or as: *A Teachers' Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region*), Judgment of 12 December 1983, in 37(4) PD 785, at 794-795, (English summary in 14 *Israel YbkHR*, 1984, 301) (hereinafter *Jami'at Ascan* case).

inquires as to whether and how far occupation law has been interpreted and refined to feasibly safeguard the ESC rights of civilians in view of the limits set by this legal regime. In doing so it investigates whether further considerations and objectives have been attached to such a balancing formula in ways leading to deviations from - and contradictions of - IHL rules covering ESC rights.

On the other hand, beyond occupation law as the benchmark for ruling, *the scope of IHL* is questioned in response to changed international expectations as have arisen by several developments consolidated in international law. In this vein, normative as well as factual aspects challenging the foundations and viability of occupation law are taken into account. In particular, the *impact of modern international human rights law* gains great significance and potential in the safeguarding of the socio-economic and cultural entitlements of the civilian population. Similarly, the *time factor of prolonged occupation* deserves explicit consideration for its implications on the enjoyment of ESC rights as functional to preserve or pursue civilian welfare.

## **2. The protective purpose of the law of occupation and its scope for ESC rights**

### **2.1. The protective purpose as an *intrinsic function* of the existing regime**

The protection of the occupied population has not equally informed all the relevant sources of the law of occupation. Facilitating States' interests was the primary focus of this regime, which was initially established to ensure their stability and security, their territorial integrity, and above all to protect their sovereignty. A clear shift of concern from governments to people only emerged in its evolution. The primary codification of the international law of occupation in the Regulations annexed to the 1907 Hague Regulations followed to a gradual development during the second half of the nineteenth century through deliberations among European governments - mainly in the context of the peace conferences held in Brussels (1874) and in the Hague (1899 and 1907); it was further developed by the 1949 Fourth Geneva Convention and the 1977 Protocol I. As far as cultural property is specifically concerned, several treaties provided for its protection in situations of occupation,<sup>736</sup> including the 1907 Hague Regulations<sup>737</sup>, the 1954 Hague Convention,<sup>738</sup> the 1970

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<sup>736</sup> See also Rule 41 of the ICRC Study on Customary IHL, which recognises customary law status to certain obligations under these treaties, including also that of “*returning illicitly exported property to the competent authorities of the occupied territories*”.

<sup>737</sup> Article 56 reads: “1. *The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. 2. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings*”.

UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,<sup>739</sup> and the 1999 Second Protocol to the 1954 Hague Convention.<sup>740</sup> In respect to such an evolution of this legal regime, certain considerations may be addressed as follows.

### 2.1.a. The Hague Regulations

The early perception of occupation as a *temporary* and *factual* situation within inter-State relationships<sup>741</sup> led to the codification of rules based on the principle of inalienability of sovereignty (Articles 42-56 HRs), which imposed the obligation to respect the interests of the former sovereign by *precluding* the occupant from unilaterally modifying the legal status of the occupied territory and by *requiring* the same occupant to respect and maintain the fundamental institutions and laws existing therein, with the responsibility to preserve *the status quo* in the territory concerned at the moment of occupation.

The 1907 Hague Regulations set the general framework for the occupant's duties and powers through the rather indistinct terms of Article 43, which legitimised his authority for administering the occupied territory to the extent that it was functional to comply with its positive obligation to “*restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country*”. As discussed hereafter, Article 43 and its objectives have been deemed a “mini-constitution” for such an administration, and its combination with other key provisions of occupation law represents the “DNA” of this regime. A structural connection with *the principle of trusteeship* has often been affirmed to explain the relationship between the occupant and the occupied territory administered in the interests of both the legitimate sovereign and the duly constituted successor in title and those of the local inhabitants.<sup>742</sup> It is worth noting that, although Article 43

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<sup>738</sup> Article 5 obliges a party occupying the territory of another party to support the competent national authorities in preserving and safeguarding the cultural property therein and, if necessary, to take “*the most necessary measures of preservation*” as damaged by military operations.

<sup>739</sup> Article 9 makes “*illicit*” “*the export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power*”.

<sup>740</sup> Article 9 specifically deals with the protection of cultural property in occupied territory; Article 11 bans “*any illicit export, other removal or transfer of ownership of cultural property*” in occupied territory, “*any archaeological excavation, save where this is strictly required to safeguard, record, or preserve cultural property (and) any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence*”, and additionally obliges the occupant to “*closely cooperate*” “*with the competent national authorities of the occupied territory*” when conducting “*any archaeological excavation of, alteration to, or change of use of, cultural property in occupied territory*”.

<sup>741</sup> The definition of occupation is set out in Article 42 HRs, according to which “*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*”.

<sup>742</sup> See Wilson, “The Laws of War in Occupied Territories”, 18 *Transactions of the Grotius Society*, 1933, 17, at 38 (“*enemy territories in the occupation of the armed forces of another country constitute ... a sacred trust*”); Roberts, “What is a Military

represents the cornerstone for determining the occupant's responsibility, the scope of the prescribed obligations have been affected by an *evolving concern over the protection of local inhabitants* and by an *evolving role of the occupying power* from a disinterested enemy to a full-term administrator.

In any case, at the time of codification the Hague Regulations confined at a subordinate level the occupier's responsibility *vis-à-vis* the local inhabitants living under its provisional and *de facto* authority. For instance, protection was provided without conferring an absolute nature as regards the obligation to respect for life, family honour and rights, religious convictions and practices.<sup>743</sup> In light of a marginal involvement in the life of the local inhabitants, two primary rules framed their legal relations at the turn of the nineteenth and twentieth centuries: the occupier's negative duty to refrain from infringing on most basic rights and the inhabitants' duty to obey (but not a bond of loyalty).<sup>744</sup>

Indeed, the Hague Regulations imposed the role of administrator as limited in its essence. In the words of Article 55, the task is necessarily that of the "*usufructuary*" of immovable public property, functioning consistently with the rules of "*usufruct*" and filling a provisional administrative position so as to preserve the "capital of assets" found in the occupied territory. While the occupier was permitted to use the revenues of that capital under certain circumstances, the literal interpretation of Article 55 definitely prohibited the use of the capital itself, so seemingly without admitting "reasonable" or "proportionate" use of the capital of natural resources such as "land", "forests", "rivers": these are resources whose exhaustion is irreversible. Notably, the occupier's obligation to safeguard the capital of assets embodies the negative content of refraining from harming the capital and the positive content of initiating measures to preserve the capital. This rule will be specifically considered later at section 6, having raised basic issues of interpretation regarding certain natural

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Occupation?", 55 *British Yearbook of International Law*, 1984, 249, at 295 ("the idea of 'trusteeship' is implicit in all occupation law ... all occupants are in some vague and general sense trustees"); G. Von Glahn, *Law Among Nations: An Introduction to Public International Law*, 1986, p. 686 (the "occupant ... exercises a temporary right of administration on a sort of trusteeship basis"); A. Gerson, "Trustee Occupant: The Legal Status of Israel's Presence in the West bank", 14 *Harvard International Law Journal*, 1973, pp. 1-49; Benvenisti, *The International Law of Occupation*, Princeton, 2004, p. 6 ("The occupant's status is conceived to be that of a trustee. Changes over time have affected both identity of the beneficiaries of this trust and the powers of the trustee, namely the occupant"). For a discussion of the principle of trust, see Ben-Naftali, Grass, Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory", *Berkeley Journal of International Law*, 2005, pp. 575-579. See also Separate Opinion of Judge Koroma, ICJ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 2.

<sup>743</sup> Pursuant to Article 46 HRs, "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated".

<sup>744</sup> The three possible sources of the duty of obedience included municipal law (*i.e.*, the population was to follow the laws of the land as they were the laws of the legitimate sovereign), international law (*i.e.*, the duties incumbent upon the sovereign gave rise to corollary rights), and the capacity of the occupant to enforce such obedience, see Oppenheim, "The Legal Relations between an Occupying Power and Inhabitants", 33 *L. Q. Rev.*, 363, pp. 365-69; R.R. Baxter, "The Duty of Obedience to the Belligerent Occupant", 27 *British Yearbook of International Law*, 1950, p. 235.

resources of occupied territories and their economic development - as evidenced in recent case law.

An additional relevant prohibition concerns the destruction or seizure of the property belonging to the enemy unless imperatively required by the necessities of hostilities (Article 23(g)).<sup>745</sup>

### **2.1.b. The Forth Geneva Convention**

The way of looking at the relations between the occupier and the local inhabitants was significantly impacted by the horrendous atrocities faced by civilians during World War II. Thus, the aforementioned codification process of 1949 included *rules geared more towards ensuring the basic needs and preserving the interests of civilians in occupied territories*. In particular, two essential innovations reflected the sharp shift of concern as regards occupied populations, namely the *codification of IHL-based rights* and the *expansion of the regulatory powers of the occupant*.<sup>746</sup> Such a conceptual shift - that was also underpinned by the thinking of the New Deal and the welfare State model - has become of vital relevance in the modern phenomenon of occupation.

As to the first innovation, Part III of GCIV comprised Section I (Arts. 27-34) concerning “*the status and treatment of protected persons*” and its core provision obliged the occupant to protect civilians against humiliations, violence or adverse discrimination, to treat them humanely at all times, to respect their honour, family rights, religious convictions and customs, while preserving the occupant’s right to protect his own security (Art. 27). Furthermore, Section III (Arts. 47-78) dealt with conditions in occupied territories, embodying additional positive duties upon the occupant.

It should be recognised that several of such positive obligations covered *a range of ESC rights of the local inhabitants*.<sup>747</sup> They specifically concern: humane and non-discriminatory treatment of people (Art. 27); education and minors’ protection (facilitating the proper functioning of institutions dedicated to the education and care of children, Art. 50); forced labour, requisitioning services and working at the behest of the occupying power (prohibiting any measures aimed at generating unemployment or limiting the opportunities for workers so as to encourage them to serve the occupant, Art. 51-52); property (prohibiting the destruction of personal or real property of individuals or groups except if it is absolute necessary for military purposes, Art. 53); food and medical supplies (ensuring the provision of them and prohibiting to requisite relief supplies and

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<sup>745</sup> See N. Corso, “Occupazione bellica e tutela della proprietà privata”, 6 *Diritti umani e diritto internazionale*, 2012, p. 5-44.

<sup>746</sup> See H-P. Gasser, “Protection of the Civilian Population”, in D. Feck (ed.), *Handbook of Humanitarian Law in Armed Conflicts*, 1995, paras. 525-578, 242-279; N. Ronzitti, *Diritto internazionale dei conflitti armati*<sup>3</sup>, Torino, 2014, pp. 270-274.

<sup>747</sup> For an analysis of the limited set of ESC rights embodied in IHL treaty-based rules, see “Economic, Social and Cultural Rights in Occupied Territory”, in Y. Arai-Takahashi, *The Law of Occupation. Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff Publishers, 2009, pp. 355-368.

immovable property belonging to relief societies, Art. 55); public health and hygiene (ensuring medical supplies and maintaining hospitals and certain public health services, particularly by adopting and applying “*the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics*”, even in view of the “*ethical*” and “*moral*” sensitivities of the population, Art. 56) (prohibiting the requisition of civilian hospitals alongside their material and stores, Art. 57); relief schemes and related agreements if the territory is inadequately supplied (Art. 59).<sup>748</sup> Furthermore, the grave breaches defined in Article 147 included, *inter alia*, the “*wilfully causing great suffering or serious injury to body or health*”, in addition to “*extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly*”.

As to the second innovation, Article 64 broadened the occupant’s regulatory authority by allowing for the suspension or repeal of existing local laws as well as the enactment of new legislation in certain exceptional situations. The first paragraph refers to threats to the occupier’s security and obstacles to the application of the Convention, whereas under the second paragraph the local population may be subjected to any laws “*essential*” to fulfil the occupier’s obligations under the same Convention, or to preserve the orderly government of the occupied territory, or to ensure its security (*i.e.* of the occupier, the property and members of the occupying forces or administration). It is generally agreed that these two paragraphs should be read together, thus considering “*the entire legal system*” of the occupied territory rather than only the reference to penal laws.<sup>749</sup> As detailed hereafter, Article 64 is deemed an “*amplification*” of Article 43 HRs, expressing more specifically its terms.<sup>750</sup> It has been extensively debated as regards the exception “*unless absolutely prevented*” / “*empêchement absolu*” contained in Article 43 HRs,<sup>751</sup> which is commonly

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<sup>748</sup> Then, Article 60 emphasises that relief consignments are not to relieve the occupier of its responsibilities relating to food and medical supplies, as they do not constitute the normal source of supply but only something additional for civilian population in large suffering, see *ICRC Commentary to GCIV*, at 323.

<sup>749</sup> See H-P. Gasser, “Protection of the Civilian Population”, in D. Feck (ed.), *Handbook of Humanitarian Law in Armed Conflicts*, 1995, p. 209, 255. In the words of the ICRC Commentary, “*there is no reason to infer a contrario that the occupation authorities are not also bound to respect the civil law of the country, or even its constitution*”, Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention relative to the Protection of Civilians Persons in Time of War*, ICRC, Geneva, 1956, p. 335. On the same opinion, Dinstein, “Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding”, *Harvard: Program on Humanitarian Policy, Occasional Papers Series*, Fall 2004, pp. 5-6. For a recent emphasis expressed on this point, see *Occupation and Other forms of Administration of Foreign Territories*, Report prepared and edited by Tristan Ferrero, ICRC, Geneva, April 2012, at 58, in which the occupant’s ability to suspend or repeal local laws is interpreted as extended to laws in general - ordinances, decrees, administrative regulations, court precedents, executive orders - because of the reference to “*the laws in force in the country*” (and not only to “*penal laws*”) in Article 43.

<sup>750</sup> R.T. Yingling and R.W. Ginnane, “The Geneva Conventions of 1949”, 46 *AJIL*, 1952, 393, p. 422.

<sup>751</sup> See J. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention relative to the Protection of Civilians Persons in Time of War*, ICRC, 1956, p. 335; Schwenk, *op. cit.*, pp. 399-402; Dinstein, “Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding”, *Harvard: Program on Humanitarian Policy, Occasional Papers Series*, Fall 2004, pp. 4-6. For an analysis of the scope of Article 64 and its relation

interpreted as the equivalent of “*necessity*” / “*nécessité*”. In elucidating what entitles the occupant to enact new legislation and to repeal, suspend or modify the local system, Article 64 details three dimensions of necessity, which are not all-inclusive however. In actual fact, this concept is deemed sufficiently elastic so as to permit amendments if reasonably required by the circumstances.<sup>752</sup> Remarkably, insofar as *necessity* is a broader concept *able to accommodate the diverging needs of local inhabitants living under occupation*, its “elusive” nature may leave abundant scope for its teleological construction to take into account the changing social and economic needs of the population. Certain implications for ESC rights shall be explained henceforth.

Finally, the Fourth Geneva Convention provided significant indications as to the intrinsic object and purpose of occupation law to ensure, at all times, the utmost protection of the civilian population. Article 2(2) *expanded the applicability of such rules*, providing that the occupation of the territory of a Contracting Party may take place even without a declaration of war or armed resistance.<sup>753</sup> Furthermore, Article 4 *expanded the duties on the occupant* by applying such rules to “*protected persons*” including individuals who find themselves in its hands and are not its own nationals.<sup>754</sup> Further, Article 6(3) *regulated the intensity and scope of the occupant’s obligations towards the occupied population*<sup>755</sup> by requiring the cumulative fulfilment of two criteria to “downgrade” them to a

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with Article 43, M. Sassòli, “Legislation and maintenance of public order and civil life by occupying powers”, 16 *EJIL*, 2005, 661, pp. 669-671, 674-674, 678-679.

<sup>752</sup> See Y. Dinstein, *The international law of belligerent occupation*, 2009, pp. 116 and 135-136. The author refers to the necessity of revising the laws in force in an occupied territory when they grant a right of appeal from local courts to a higher tribunal functioning in an unoccupied part of the country; he notes that the occupier does not have to submit to such dependence on enemy institutions, and that the comprehensive concept of necessity allows for the amendment of the laws in force in order to suspend the nexus to that higher tribunal for the duration of the occupation. Thus, transferring the authority to hear appeals from the local courts to another judicial instance operating within the occupied territory (citing C. Fairman, “Asserted Jurisdiction of the Italian Court of Cassation over the Court of Appeal of the Free Territory of Trieste”, 45 *AJIL*, 1951, p. 548).

<sup>753</sup> Article 2(2) GCIV reads: “*The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.*”. The ICRC Commentary affirms the application of the framework of the law of occupation *en bloc*, as set out in this provision, regardless of the type of occupation and/or the extent of the occupier’s control over the territory, see Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention relative to the Protection of Civilians Persons in Time of War (1958)*, “Article 2”, at 21. According to Eyal Benvenisti, the rationale for this inclusive definition of occupation is “*that at the heart of all occupations exists a potential - if not an inherent - conflict of interest between occupant and occupied. This special situation is the result of the administration of the affairs of a country by an entity that is not its sovereign government*”, see E. Benvenisti, *The International Law of Occupation*, Princeton, 1993, at 4.

<sup>754</sup> See Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention relative to the Protection of Civilians Persons in Time of War (1958)*, Article 4, p. 46, addressing that “*in the hands of*” applies to persons who are present in the territory of the occupant other than its own nationals or the nationals of its allies.

<sup>755</sup> Article 6(3) reads: “*In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143*”. The ICRC Commentary clarifies that “*general close of military operations*” means “*when the last shot has been fired*” and “*the final end of all fighting between all those concerned*”, Pictet (ed.), *ibid.*, Article 6. For a critique of the interpretation of Article 6 by the ICJ in the advisory opinion on the wall, see Ben-Naftali, “A la recherche du temps

partial set (limited to the provisions enumerated in Article 6): a year has passed since military operations have come to an end; the occupant continues to exercise some “functions of government” in such territory”.<sup>756</sup> The importance of the latter substantial condition relies on formalizing a link among the application of the Convention and the transfer of responsibilities;<sup>757</sup> as such, unless those requirements are fulfilled, occupation law continues to apply in its entirety throughout the occupation, from its beginning to its effective end.

### **2.1.c. Additional Protocol I**

Further protection of the local population was provided under Protocol I of 1977, including few supplementary measures such as those afforded under Article 55, Article 69 and Article 75 (1).<sup>758</sup>

### **2.1.d. Basic remarks**

As this brief overview clearly shows, not only has *the protective purpose of the laws of occupation gradually emerged in favour of the occupied population* but also a sceptical approach to the occupier’s intentions has been fostered on the basis of rules aimed at avoiding abuses of its power *vis-à-vis* the occupied territory and its inhabitants; while certain rights are conferred on the occupier, essential and strict limits on the scope of its powers are imposed too. As regards ESC rights, in covering a range of basic needs and interests of the civilian population, the examined sources - the Fourth Geneva Convention in particular - impose fundamental duties that do not have a purely negative nature, rather they consist of *due diligence obligations on the occupier according to its actual capacities and means*.

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perdu’: rethinking Article 6 of the Fourth Geneva Convention in the light of the legal consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion”, 38 *Israel Law Review*, 2005.

<sup>756</sup> The *travaux préparatoires* of Article 6 GCIV indicate that the third paragraph refers to occupations in which there has been a transfer of governmental functions by the occupying power to local authorities. Specifically, the first draft of the Convention stipulated that the treaty would remain applicable until the end of an occupation, see “Draft Convention for the Protection of Civilian Persons in Time of War”, in *Final Record of the Diplomatic Conference of Geneva of 1949*, Federal Political Department, Berne, Vol. I, at 114 (Art. 4). Then, an amendment proposed by the United States introduced the “one-year” time limit to the application of the Convention, under the justification that occupation leads to a gradual return of governmental responsibilities to local authorities and that, next to such a transfer, the Occupying Power should not be subject to the relevant obligations of the Convention, see *ibid.*, Vol. II-A, p. 623.

<sup>757</sup> Italy articulated clearly this aspect: “An occupation which lasted beyond the date of cessation of hostilities only entailed obligations which were to be lifted progressively, as and when the local authority took over administrative powers”, see *Final Record of the Diplomatic Conference of Geneva of 1949*, Federal Political Department, Berne, p. 625.

<sup>758</sup> Article 75(1) API reads: “In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.” Individuals covered by paragraph 1 fulfil three conditions: i) they must be in the power of a belligerent party; ii) they must be affected by armed conflict or by occupation; iii) they must not benefit from “more favourable treatment” under the GCs or API, see ICRC *Commentary on the Additional Protocols of 8 June 1977*, *op. cit.*, at 866-871.



However, they do not elaborate much as to the meaning of such duties.<sup>759</sup>

In considering *how far* IHL positive obligations addressing ESC rights may *extend*, the present thesis raises certain questions. On the one hand, it asks in which direction *the context* works. Does the context require *restrictive* or *expansive approaches* to interpret such obligations, so limiting or enlarging their normative content? Are the occupier's efforts and actions to implement them *contingent* on several *contextual factors*, such as the intensity of control exercised in the occupied territory, the resources available therein,<sup>760</sup> and the temporal dimension of occupation<sup>761</sup>? These questions will be explored particularly in relation to Article 43 HRs and generally in view of case law and practice. On the other hand, the scope of such IHL obligations is questioned in response to changed international expectations as arisen in several developments in international law as detailed hereafter.

## **2.2. The protective purpose as an *evolving function* of the challenged regime**

As anticipated, practices surfacing during the twentieth and twenty-first centuries have presented exceptional and polymorphic features. Besides classical forms of belligerent occupation, the concept of occupation has evolved and covered new types of situations.<sup>762</sup> In addition to the definition set out in Article 42 HRs, the legal discourse on the existence of a situation of occupation has developed the notion of "*effective control*" to illustrate the conditions and circumstances needed to determine such a situation. Conversely, distinct cases of authority (exercised by one or more States, or an international organization<sup>763</sup>) over a foreign territory, without any sovereign title, have

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<sup>759</sup> This aspect is mentioned in N. Lubell, "Human rights obligations in military occupation", 94 *IRCR*, 2012, pp. 329-334, referring to Arts. 55 and 56 GC IV and noting that this convention does not elaborate on the meaning of "ensuring the work of public health services".

<sup>760</sup> For instance, the healthcare duties embodied in the Fourth Geneva Convention are prefaced by the terms "*(t)he fullest extent of the means available to it*" (Arts. 55 and 56 GC IV).

<sup>761</sup> The overviewed treaties say little about inevitable issues arising in a prolonged occupation and concerning the safeguarding and promotion of the economic, social and cultural life of the local population under occupation.

<sup>762</sup> As Adam Roberts noticed, "*(t)he core meaning of the term (occupation) is obvious enough, but as usually happens with abstract concepts, its frontiers are less clear*", see A. Roberts, "What is a Military Occupation?", *BYIL*, 1984, p. 249. For a study on the origins and evolution of the concept of occupation in the Eighteenth and Nineteenth centuries, see E. Benvenisti, *The International Law of Occupation*<sup>2</sup>, Oxford, 2012, pp. 20-42. For an analysis on a new model of "*multilateral occupation*" as explicitly intended to create or rebuild a State (so focused more - but not exclusively - on regime change and humanitarian interventions), see G.T. Harris, "The Era of Multilateral Occupations", 24 *Berkley Journal of International Law* 1, 2006, pp. 1-79. Harris describes the emergence of a new regime of occupation and an emerging "*de facto modern law of occupation*", which break from past practice and the *de jure* occupation law, and in which nation-building would be the substantive norm and multilateralism would be the procedural norm; to the author, the assumptions and parameters of the *de jure* occupation law appear outdated and incapable of providing a meaningful legal framework for modern occupations, arguing that the resource and legitimacy needs of the latter generate an "*invisible hand*" pushing occupiers toward international cooperation and compliance with international norms of behaviour.

<sup>763</sup> *E.g.* the United Nations or the European Union have set up a territorial authority to oversee the management of a certain territory following the collapse of forms of public authority as a result of internal or external violence. For the

emerged.

Relevant practice includes, *inter alia*: the Israeli occupation of the Palestinian territories, including the West Bank, Gaza Strip and East Jerusalem, since the war of 1967; the Turkish occupation of the northern part of Cyprus since 1974; the Moroccan occupation of Western Sahara since 1975; the occupation of Bosnia and Herzegovina by forces controlled by Croatia and Serbia between 1992 and 1995; the Armenian occupation of Nagorno-Karabakh and seven other surrounding districts of Azerbaijan since 1992; the Ethiopian and Eritrean occupation forces in the context of the 1998-2000 Eritrea-Ethiopia war; the occupation of areas of Congo since 1998 by the armed forces of Burundi, Rwanda and Uganda; the occupation of Iraq by the United States of America and the United Kingdom in 2003-2004; Eritrea's occupation of a portion of Djibouti's territory (the Ras-Doumeira area) since a clash over a disputed border in 2008.

Legal scholars' debates on such practice have addressed various major aspects that have challenged the foundations and the viability of occupation law. They inevitably touch also the protective purpose of this regime. At least four of them are noteworthy for the present discourse dealing with the welfare of the occupied population in the sphere of ESC rights.

### **2.2.a. The rare, rejected or failed application of the laws of occupation**

Firstly, modern occupying powers have not generally acknowledged their status as occupiers nor invoked the laws of occupation as applicable to their actions in the foreign territories that came under their effective military control. In particular, in most of the occupations of the 1930s and those occurred during World War II, the occupying powers failed to apply the framework prescribed by the Hague Regulations for the military administration of occupied territories, and the ousted governments (from exile or upon their return) afforded slight respect to them too (by often refusing to acknowledge the validity of acts enacted by the occupants).<sup>764</sup> Even the occupations that

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two cases of Kosovo and East Timor, see O. Korhonen, J. Gras, and K. Creutz, *International Post-Conflict Situations: New Challenges for Co-Operative Governance*, Erik Castrén Institute Research Reports 18/2006, Helsinki, 2006, pp. 131-168. It is worth noting that the applicability of the law of occupation was not recognised by the UN post-conflict administrations regimes (such as in Kosovo and East Timor in 1999) or by the multilateral regimes endorsed by the United Nations (such as in Somalia in 1992, except for the Australian unit in Somalia).

<sup>764</sup> See E. Benvenisti, *The International Law of Occupation*<sup>2</sup>, Oxford, 2012, pp. 108-201. The author addresses this aspect in his review of the relevant practice. In particular, this occurred during and after World War I in relation to the two major occupations, namely the German occupation of Belgium and parts of France in 1914-18, and the Allied occupation of the German Rhineland area pursuant to the Armistice Agreement of November 11, 1918, see E. Benvenisti, *ibid.*, pp. 108-130. However, the occupants' recurring disregard of the Hague Regulations is mainly addressed for the occupations in the wake of World War II, including the practice of the three Axis Powers (Japan, Italy, Germany, which claimed exceptions to the applicability of the law of occupation) and the occupations by the Soviet Union in 1939-40 (proceeding with the invasion of Poland and the Baltic Republic of Estonia, Latvia and Lithuania), whose illegal status is highlighted under two grounds (the illegality of the war of aggression that led to occupation and

have taken place since 1970s are generally addressed as cases in which occupants did not invoke the laws of occupation as the source of authority or did not respect them as a guide to act or implemented them in ways that promoted their own interests at the expense of those of the occupied.<sup>765</sup> In this latter regard, the few cases in which occupation law was followed on “*a de facto basis*” - although not as model examples - are the aforementioned Israeli occupation since 1967 and the early stages of the Anglo-American occupation of Iraq in 2003-04.<sup>766</sup>

A recent explanation of States’ reluctance to be labelled as occupying powers and to have their conducts restrained by this branch of law has been linked to the pejorative connotation usually attached to the concept of occupation, which is contrary to the maintenance of international peace and security under the UN Charter.<sup>767</sup> As addressed hereafter, such a negative connotation has been reinforced by the ascendancy of the principle of self-determination of peoples and the condemnation of “foreign occupation” on the basis of this principle in a number of UN General Assembly resolutions that, equating it to colonialism, perceived it as anachronistic and (politically) illegal since the decolonization process.<sup>768</sup>

As far as reinforcing the mechanisms of compliance with occupation law remains a general requirement, it is reasonable to posit that an effective way to achieve it may be gaining a better understanding of the function of such mechanisms in newly emerging situations. The legal discourse

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the illegal mode of governance chosen by the occupying army in assuming control – their ideologies contradicted the basic principles of occupation law), see E. Benvenisti, *ibid.*, pp. 132-142. In particular, the author underlines that “*the occupations by the Axis powers before and during WWII were bent on establishing new orders in Europe and South-East Asia, imposed through cruel ruthlessness. Soviet aims during that war were also far removed from the parameters of the law of occupation*”. Conversely, as to the practice of the Allied occupations (*i.e.* the British occupations of Ethiopia and Madagascar, the US occupations of French North Africa and Italy, the occupations of Germany and Japan), the author discerns the occupants’ efforts to find legal justifications for failures to abide by the Hague Regulations, see E. Benvenisti, *ibid.*, pp. 143-166.

<sup>765</sup> Relevant State practice include the Iraqi invasion and annexation of Kuwait in 1990, the Moroccan annexation of Western Sahara in 1975, and the Indonesian invasion and annexation of East Timor in 1975-99; the Soviet intervention in Afghanistan in 1978-88, the United States’ intervention in Grenada in 1983-84, and the United States’ intervention in Panama in 1989; the Vietnamese occupation of Cambodia in 1979-89, the US-led coalition’s occupation of Afghanistan in 2001-02, India’s involvement in the creation of Bangladesh in 1971, the Turkish invasion and occupation of the northern part of the Republic of Cyprus and the establishment of the “Turkish Republic of Northern Cyprus” since 1974, the Russian occupation of Georgia since 2008. For a review of occupations since the 1970s, see E. Benvenisti, *ibid.*, 2012, pp. 167-202.

<sup>766</sup> The Palestine and Iraq occupations stand as the only examples since World War II where occupiers have “*established a distinct military government over occupied areas under the framework of the law of occupation*”, see E. Benvenisti, *ibid.*, p. 203.

<sup>767</sup> This aspect is emphasised in the ICRC reports submitted to the 28<sup>th</sup>, 30<sup>th</sup> and 31<sup>st</sup> international conferences of the Red Cross and Red Crescent, in December 2003, November 2007 and December 2011 respectively, titled *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*.

<sup>768</sup> See the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States, GA Res. 2625 of 24 October 1970, Annex, 25 UN GAOR, Supp. (No. 28), A/5217, first principle, para. 11, providing that “*(the) territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter*”, and it characterises “*foreign occupation*” as illegal. However, the IHL applicability is not excluded by this resolution, which does not seem to undermine the conceptual framework of occupation law as a temporary modality of administration during international armed conflicts. See also the Declaration of the Right to Development, GA Res. 41/128 of 4 December 1986, Article 5.

framed through out this chapter in relation to ESC rights aims at contributing to such an understanding.

### **2.2.b. The (alleged) inadequacy of the conservationist principle**

A second aspect challenging the foundations and viability of occupation law in the practice is related to the “*inactive custodian approach*”<sup>769</sup> or the *laissez-faire* governance to be assumed by the occupant, which is one of the rationales underpinning the 1907 Hague Regulations.<sup>770</sup> In particular, the emphasis on the preservation of the *status quo ante* in the occupied territory has been deemed scarcely adequate for regulating the occupier’s duties in dynamic situations in which institutional, economic, and social reconstructions are undertaken therein.<sup>771</sup>

Remarkably, the adequacy of the 1907 Hague Regulations to economic exigencies in time of military occupation was debated early on by the French Court of Nancy in its judgment of 3 March 1926 issued in the *Falck* case.<sup>772</sup> That Court extensively interpreted Article 55 concerning the occupier’s duty to use and administer the resources (immovable public properties) of the occupied territory in line with the rules of usufruct. While Article 55 originated under a conception of tactical warfare featured by quick movements of troops, the Court observed that it was to be understood broadly, as it would have been otherwise incompatible with modern warfare, being as the latter was characterised by considerable immobilized armies in the occupied territory with further requests of huge amounts of food and military provisions: “*in such circumstances the rights of mere usufruct are no longer sufficient and must give place to rights of disposition and appropriation*”.<sup>773</sup>

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<sup>769</sup> E. Benvenisti, *The International Law of Occupation*, 2004, Preface to under the law of occupation.

<sup>770</sup> It derives from the more general conservationist principle of values, which supports the development of international law, see G. Sperduti, *Lezioni di diritto internazionale*, Milano, 1958, p. 19 ff. It is confirmed in Article 4 AP I (“*The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflicts. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question*”).

<sup>771</sup> S. Silingardi, “Occupazione bellica e obblighi delle potenze occupanti nel campo economico”, *RDI*, 2006, pp. 998-999. The author highlights in this vein the significance of SC Res. 1483 of 2003, in which the Security Council - after the end of the military operations by the US-UK coalition, which led to the *debellatio* of the Ba’athista regime and the beginning of the occupation of Iraq - gave a catalogue as to the modalities to be followed by the Coalition Provisional Authority to achieve the objectives imposed in the economic field, which were defined in terms of “assistance” to the concerned population to favour “[*the*] economic reconstructions and the conditions for sustainable development”, see SC Res. 1483 (2003), para. 8 (e); similar wording is found in *Considerando n. 7* of its Preamble as well as in paras. 1, 2, 8 (d), 14, 15. See also S/2004/625, “Report of the Secretary General pursuant to paragraph 24 of the Security Council Resolution 1483”, 5 August 2004, paras. 87-88, in which “*the overarching term reconstruction*” is defined by indicating that it “*covers several key aspects: the repair of physical infrastructure, laying the foundations for economic recovery and rehabilitation, and, finally, longer term economic reform [...] comprehensive reforms associated with a transition to a market economy*”.

<sup>772</sup> See *International Law Reports*, 1926-27, p. 480 ff.

<sup>773</sup> On this point, see Feilchenfeld, *The International Economic Law of Belligerent Occupation*, Washington, Carnegie Endowment for International Peace, 1942, p. 13, noting that “*The Hague Regulations [...] do not safeguard coherently the whole economic life of a region. In accordance with the trends of the last century, their emphasis is ‘static’ rather than ‘dynamic’, on ‘having’ rather*

Thereafter, an emblematic concept has been used to debate the basis for departing from the conservationist principle behind occupation law, namely “*transformative occupation*”, whose definition has not been univocal among scholars though. While this has been referred to as an occupation “*whose stated purpose (whether or not actually achieved) is to change States that have failed, or have been under tyrannical rule*”,<sup>774</sup> it has been specified that “*l’expression «occupation transformative» a été utilisée par la doctrine pour décrire des formes d’occupation dont la caractéristique essentielle est de réorganiser le système administratif du territoire occupé, dans des proportions telles que cette réorganisation s’apparente à un changement de régime*”,<sup>775</sup> furthermore, it has been deemed a long-term process that implies modifying or rebuilding the political, social and cultural framework of a territory and tends to take the form of nation building.<sup>776</sup> Recently, several experts have agreed on describing the “transformative” occupant’s main objective as overhauling the institutional and political structures of the occupied territory, often bringing them in line with its own perspective.<sup>777</sup> In any case, in such situations a clear friction emerges between, on the one hand, *the legal requirements* expressing the conservationist principle (particularly the preclusion from annexing the occupied territory or otherwise unilaterally changing its legal status, and the respect for pre-existing institutions and laws in force therein unless absolutely necessary) and, on the other hand, *action for far-reaching changes* transforming local institutions as well as the occupied landscape and its economy (whether the affected structures be in collapse, weak, or posing a threat to international peace and security) as the latter should actually be the reserve only of a sovereign government. The legal debates as such evidence a clear tension, which has primarily emerged in relation to the occupation of Iraq by the United States and the United Kingdom in 2003-2004, and which has led to the question as to whether “*transformative occupation*” has any legal

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than ‘doing’ or even ‘obtaining’, on vested rights rather than on economic function or opportunity”; Ziccardi, “Occupazione bellica ed amministrazione della giustizia”, in *Temi*, 1948, p. 16 ff.

<sup>774</sup> A. Roberts, “Transformative Military Occupation: Applying the Laws of War and Human Rights”, *AJIL*, 2006, p. 580.

<sup>775</sup> See Koutroulis, V. “Mythes et réalités de l’application du droit international humanitaire aux occupations dites transformatives”, 40(2) *Revue belge de droit international*, 2007, p. 371, referring to N. Bhuta, “The Antinomies of Transformative Occupation”, 16 *EJIL*, 2005, pp. 733-739; E. Benvenisti, *The International Law of Occupation*, 2004, at x-xi; D.P. Goodman, “The need for Fundamental Change in the Law of Belligerent Occupation”, 37 *Stan. L. Rev.*, 1984-1985, pp. 1591-1596; K. Homi Kaikobad, “Problems of Belligerent Occupation: the Scope of Powers Exercised by the Coalition Provisional Authority in Iraq, April/May 2003 - June 2004”, 54 *ICLQ*, 2005, pp. 260-261; M. Ottolenghi, “The Stars and Stripes in Al-Fardos Square: the Implications for the International Law of Belligerent Occupation”, 72 *Fordham Law Review*, 2003-2004, pp. 2200-2218.

<sup>776</sup> See J.L. Payne, *Deconstructing Nation Building*, *The American Conservative*, 2005. In dealing with multilateral occupation, which implies multiple nation States assisting in the occupation of a territory, the author posits that it tends to be viewed as more politically legitimate, although it makes difficult issues of attribution and accountability given that multiple States share the role of occupant.

<sup>777</sup> See *Occupation and Other forms of Administration of Foreign Territories*, Report prepared and edited by Tristan Ferrero, ICRC, Geneva, 2012, p. 67.

basis, or, rather, whether it is completely at odds with the basic premises of occupation law.<sup>778</sup>

The conservationist premises of occupation law deserve consideration also in light of the relevance acquired by *the principle of self-determination* in international law since the latter half of the twentieth century. This will be articulated for the most part in section 3.

The temporal dimension of occupation represents a further challenge for the conservationist principle, the rules of which may be superseded by prolonged occupations exceeding the limits of the occupiers' legitimate powers. A flexible interpretation of the obligation to respect the *status quo* of the territory - as established in Article 43 HRs along with Article 64 GCIV - has indeed been extensively debated.<sup>779</sup> This point will be examined for the most part in sections 4 and 5. Nonetheless, the legal relevance acquired by the *time factor* in the practice as well as in legal scholarship requires us to examine it as the fourth determining aspect of the current viability of this regime (section 2.2.d).

### **2.2.c. Substantial developments of international law**

A third challenging aspect commonly addressed by scholars debating the foundations and viability of occupation law regards the evolution of international law in the latter half of the twentieth century. In particular, two meaningful developments were not duly reflected in the founding sources of that specific legal regime and have ended up requiring *a substantial review*; for instance, a review of its approach toward the effects of the collapse of the ousted government or toward the effects of the transition from an authoritarian regime to a new democratic order in the occupied territory. They include the rise of the principle of self-determination as well as international human rights law. They have indeed given new substance to the aforementioned shift in focus regarding the beneficiaries of the "*trust*" created by occupation, offering *additional normative contents* to the needs, interests and rights of the civilian population, thus supporting a further departure from the Hague Law as already determined by the Geneva Law regarding the protection provided to it.

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<sup>778</sup> "*Transformative*" changes such as the major institutional reforms introduced since May 2003 in occupied Iraq by the US and the UK, as occupying powers, were deemed to exceed the law of occupation and be *ultra vires*, and indeed they had required a specific authorization by the UN Security Council (see Res. 1483 of 23 May 2003); Roberts, "Transformative Military Occupation: Applying the Laws of War and Human Rights", 2006, 100 *AJIL*, p. 580; Benvenisti and Keinan, "The Occupation of Iraq: A Reassessment", 86 *International Law Studies*, 2010, pp. 270-271, 273. A similar argument was made as regards far-reaching institutional changes that the victorious Allies introduced during the occupation of Germany and Japan post World War II, see Y. Dinstein, *op. cit.*, 2009, p. 33.

<sup>779</sup> See M. Sassòli, "Legislation and maintenance of public order and civil life by Occupying Powers", 16 *EJIL*, 2005, pp. 663-680; Y. Dinstein, "Legislation under Article 43 of the Hague Regulations: belligerent occupation and peacebuilding", *Program on Humanitarian Policy and Conflict Research*, Harvard University, Occasional Paper Series, 2004, at 7-8; Schwenk, "Legislative power of the military occupant under Article 43, Hague Regulations", 54 *Yale Law Journal*, 1944-1945, p. 395 ff.

### 2.2.c.i. The principle of self-determination of peoples

This principle is widely accepted by reference to the UN Charter - Articles 1(2) and 55 - which has been followed by its recognition as a collective right of the peoples in subsequent sources, such as the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, the 1970 Friendly Relations Declaration, the 1975 Helsinki Final Act, and other similar non-legally binding instruments,<sup>780</sup> in addition to its inclusion in common Article 1 ICCPR and ICESCR.

Its perception as “*one of the essential principles of contemporary international law*” has grown in the latter half of the twentieth century,<sup>781</sup> although the parameters and the scope of its consequences are still not fully elaborated.<sup>782</sup> While “external” self-determination has increasingly acquired relevance and its *ius cogens* status has been widely acknowledged,<sup>783</sup> the international legal order has provided more

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<sup>780</sup> See UN GA Res. 1514 (XV) of December 1960; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, Annex to UN GA Res. 2625 (XXV) of 24 October 1970; Helsinki Final Act adopted on 1 August 1975 by the Conference on Security and Co-operation in Europe (Principle VIII of the Declaration on Principles Guiding Relations between Participating States refers to self-determination).

<sup>781</sup> See ICJ, *Case Concerning East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, ICJ Reports 1995, 4, at 102, para. 29. In two Advisory Opinions the ICJ has referred to the “*right to self-determination*” as a legal principle and not simply a political aspiration, see ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16, at 31; *Western Sahara, Advisory Opinion*, ICJ Reports 1975, p. 12, pp 31-33. For a general assessment of the principle, see Arangio-Ruiz, “Autodeterminazione (diritto dei popoli alla)”, *Enc. Giur.*, Vol. IV, Roma, 1988; Cass, “Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories”, *Syr. JILC*, 1992, 21 ff.; A. Cassese, *Self-determination of Peoples: A Legal Reappraisal*, Cambridge, 1995; Guarino, *Autodeterminazione dei popoli*, in *Digesto delle Discipline Pubblicistiche*, IV ed. Vol. II, Torino, 1987, 4 ff.; Palmisano, *Nazioni Unite e autodeterminazione interna. Il principio alla luce degli strumanti rilevanti dell’ONU*, Milano, 1977; Palmisano, “L’autodeterminazione interna nel sistema dei Patti sui diritti dell’uomo”, *RDI*, 1996, 365 ff.; Salmon, “Internal aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?”, in Toumuschat (ed.), *Modern Law of Self-determination*, Dordrecht, 1993, p. 253 ff.; K. Knop, *Diversity and Self-Determination in International Law*, 2002; McCorquodale, “Self-Determination: A Human Rights Approach”, 43 *ICLQ*, 1994, p. 857.

<sup>782</sup> For a reflection on the current state of international law regarding the concept of self-determination, see Duncan French, *Statehood and Self-determination, Reconciling tradition and Modernity in International Law*, CUP, 2013. See also D. Thürer and T. Burri, “Self-Determination”, *Max Planck Encyclopedia of Public International Law*, 2008. On the differences between external and internal self-determination, see also J. Crawford, “The Right to Self-Determination in International Law: Its Development and Future”, in P. Alston (ed.), *Peoples Rights*, Oxford, 2001, pp. 7-67.

<sup>783</sup> According to its *external dimension*, which invokes perceptions of independence and non-interference, self-determination implies the right of a population of a territory subject to colonial domination or racist regime or alien occupation to determine freely its future political status by originating a new State or integrating into an existing one. See ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, Separate Opinion of Judge Ammoun, at 89 ff.; ICJ *East Timor (Portugal v. Australia)*, ICJ Reports, 1995, p. 90 ff., at 266; ICJ, *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Judgment 3 February 2006, Separate Opinion of Judge ad hoc Dugard, paras. 4 and 10 (this was the first case in which the Court has provided support to the notion of *ius cogens*, see *ibid*, para. 64). See also ILC, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries”, *Report of the International Law Commission*, 53<sup>rd</sup> sess., A/56/10 (2001), at 85 (Commentary to Article 26 (5)), reproduced in J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, 2002. For scholars’ support of the *ius cogens* character of the external dimension of the principle, see Brownlie, *Principles of Public International Law*<sup>7</sup>, Oxford, 2008, p. 511; Doehring, “Self-Determination”, in Simma (ed.), *The Charter of the United Nations: A Commentary*, 2002, 48, 50; A. Cassese, *Self-Determination of Peoples - A Legal Reappraisal*, 1995, 320; Gross Espiell, “Self-Determination and Ius Cogens”, in A. Cassese (ed.), *U.N. Law Fundamental Rights: Two Topics in International Law*, 1979, p.

limited guarantees to “internal” self-determination by admitting interferences it considered necessary to maintain peace and international security.<sup>784</sup>

It is worth highlighting that, in addition to the (external/internal) political dimension of the right to self-determination, *its economic, social and cultural dimensions have been referred to*. A specific recognition of them as functional to the comprehensive implementation of this right is contained in the two Covenants of 1966. The scope of such recognition is indeed meaningful; common Article 1 refers not only to the right of peoples to “*pursue their own economic, social and cultural development*” (paragraph 1), but also to their right to “*freely dispose of their natural wealth and resources*”, and then to the right *not to be deprived of their “own means of subsistence”* (paragraph 2). These latter dimensions deserve attention in relation to the common acknowledgement that the advent of this principle - in reshaping international relations as well as impacting traditional international institutions - has also influenced occupation law.<sup>785</sup> Some scholars have already explored the impact on the scope of this legal regime by the right to self-determination of peoples.<sup>786</sup> The present research aims at contributing to this debate from the narrow perspective of ESC rights, taking into account the following aspects.

Primarily, *the right of peoples to freely pursue their economic, social and cultural development* under common Article 1(1) may acquire relevance in both external and internal dimensions: it may invoke perceptions of non-interference and a certain basic freedom to economic, social, cultural activities

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167; S. Wheatley, “The Security Council, Democratic legitimacy and Regime Change in Iraq”, 2006, 17 *EJIL* p. 531, 538.

<sup>784</sup> According to its *internal dimension*, self-determination implies the right of people of an existing State to choose freely their own political system and to pursue their own economic, social and cultural development (as such it refers to the principle of sovereign equality of States and the prohibition of intervention). See D. Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice*, Kluwer Law International, 2001, p. 170 ff. As for relevant practice, for instance, the Security Council’s interferences as to the internal dimension of the right to self-determination were made with regard to the Supreme National Council of Cambodia, which was instituted with a Joint Statement of Cambodian political factions (A/45/490-S21732 of 17 September 1990) and immediately recognised by the Security Council as the only depositary of Cambodia’s sovereignty (Res. 718 of 1991), see G. Cellamare, “L’Autorità transitoria delle Nazioni Unite in Cambogia”, in P. Picone (ed.), *Interventi delle Nazioni Unite e diritto internazionale*, Padova, 1995, p. 261 ff., 270 ff.

<sup>785</sup> For prominent changes in the traditional law of occupation as introduced by the principle of self-determination, see E. Benvenisti, *The International Law of Occupation*, 1993, at 187. The author identifies, firstly, the transformation of armed struggle based on self-determination of peoples under three forms of regimes (colonial, racist, or foreign occupation) into international armed conflict under Article 1(4) API, and, secondly, the situation of hostage taking pursuant to these regimes as placed outside the scope of application of the 1979 International Convention against the Taking of Hostages.

<sup>786</sup> On the principle of self-determination as a main limit to interventions by the occupying power regarding the laws in force in the occupied territory, see T. Meron, “Applicability of Multilateral Conventions to Occupied Territory”, *AJIL*, 1978, p. 542 ff. On the relevance of this principle concerning the conduct of the Coalition Provisional Authority in occupied Iraq, see E. Benvenisti, *The International Law of Occupation*, 2004, pp. 13-15; M. Sassoli, “Legislation and maintenance of public order and civil life by occupying powers”, 16 *EJIL*, 2005, p. 676 ff.; G. Fox, “The Occupation of Iraq”, *Georgetown Journal of Int. Law*, 2005, p. 262 ff.; C. McCarthy, “The Paradox of International Law of Military Occupation: Sovereignty and the Reformation of Iraq”, *Journal of Conflict and Security Law*, 2005, p. 49 ff. Conversely, in favour of the occupant’s intervention to adapt the laws in force in occupied territories to its own internal order, see Y. Dinstein, “The International law of belligerent occupation and human rights”, 4 *Israel YbkHR*, 1978, p. 104 ff.



independent from government policies undertaken by an occupying power.

Secondly, *the right of peoples to freely dispose of natural wealth and resources* under common Article 1(2) may challenge the related exploitation if it occurs against the rights and interests of the people concerned.<sup>787</sup> As detailed in the following section 3, holding only temporary administration powers of the occupied territory, the military commander is required to preserve the state of affairs existing on the eve of occupation and to refrain from changing the *status quo* of the territory in any manner that would create irreversible situations on the ground. This prevents the occupier from “colonising” the territory for its own purpose and from depriving the indigenous population of the right to enjoy local natural resources. This aspect will be discussed further in section 6 concerning the usufructuary rules laid down in Article 55 HRs as applied to natural resources.

Thirdly, *the free disposal of natural wealth and resources* is recognised in common Article 1(2) “without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law”; this provision may restrain States’ claims to nationalise and confiscate foreign property.<sup>788</sup>

Fourthly, the requirement *not to deprive people of their own means of subsistence* in common Article 2(1) reinforces a direct connection between the right to self-determination and basic rights such as the right to life, the right to an adequate standard of living, or property rights.

Finally, the acknowledgement in common Article 1(3) of the two Covenants of 1966 of *a responsibility upon all States to promote the realisation of the right to self-determination and respect it in accordance with the UN Charter*<sup>789</sup> acquires special relevance in view of the increased attention to the State’s collective responsibility to ensure respect for human rights standards and humanitarian principles.

## **2.2.c.ii. Modern international human rights law**

As anticipated, the second major concept evolved in public international law and not duly reflected in occupation law concerns human rights norms. The rise of this legal regime has considerably altered international expectations regarding the treatment of civilian populations living under the

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<sup>787</sup> The reference to the free disposition of natural wealth and resources is a weakened version of an earlier draft reference to “*permanent sovereignty*” over such resources, see M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, Kehl: N.P. Engel, 2005, at 24-25. The terms of the earlier draft were inspired by the 1962 General Assembly resolution on “Permanent Sovereignty over Natural Resources”, see GA Res. 1803 (XVII) of 14 December 1962.

<sup>788</sup> This reference has to be read also in light of Article 25 ICESCR (and Article 47 CCPR) according to which “*nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilise fully and freely their natural wealth and resources*”, see M. Novak, *op. cit.*, pp. 24-25, 628-629.

<sup>789</sup> This paragraph is to be read even in view of Article 28 UDHR whereby “*everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised*”, see A. Eide, “Article 28”, in G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, 1999, at 597-632.

administration of occupied territories, especially because this system has been extensively recognised as applicable in such situations.<sup>790</sup>

Significantly, the respect and protection of internationally recognised human rights have been addressed as possibly “*additional*” to the three objectives allowing *amendments to local laws in such administration* under occupation law, namely when it is “*essential*” for implementing international humanitarian law, or maintaining the orderly government of the territory, or ensuring the security of the occupier and local administration. For instance, the occupier could not tolerate the laws in force in the occupied territory when they discriminate on the basis of race, colour, national or ethnic origin, religion or faith, political belief; they could be abolished. Furthermore, the applicability of international human rights law to occupation as such has been deemed a *crucial cause of the shift in the policy goals of contemporary occupations*.<sup>791</sup> protecting fundamental rights would require - rather than simply allow - an occupier to engage in nation-building, so setting up institutions that fulfil human rights obligations on the eve of occupation.<sup>792</sup> This debatable reading will be considered henceforth, for the most part in section 5.3.

In addressing the relevance of international human rights law in situations amounting to occupation,<sup>793</sup> legal scholarship has started to examine its scope of application *ratione materiae* and *ratione loci* with regard to ESC rights.<sup>794</sup> Their interplay with occupation law has been explored for the preservation of minimum living conditions, their degree of realisation, and the respect of property. As aptly highlighted, unlike *the right to an adequate standard of living* and *the right to health*, occupation law affords more detailed regulation of *the right to property*, ruling on the treatment of movable and immovable goods, prohibiting their destruction (with some exceptions) and setting limits to their ownership or requisition by the occupying forces.<sup>795</sup>

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<sup>790</sup> See, e.g., ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, p. 240, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, pp. 178-181, paras. 106-113; ICJ, *DRC v. Uganda*, Judgment, 19 December 2005, ICJ Reports 2005, pp. 242-243, para. 216; ECtHR, *Loizidou v. Turkey* (Preliminary Objections), Appl. No. 15318/89, Judgment, 23 March 1995, paras. 62-64; ECtHR, *Loizidou v. Turkey*, Appl. No. 15318/89, Judgment, 18 December 1996, paras. 54, 57; ECtHR, *Al-Skeini and others v. The United Kingdom*, Appl. No. 55721/07, Judgment, 7 July 2011, paras. 138-142.

<sup>791</sup> T. Ferraro, “The Law of occupation and human rights law: some selected issues”, in R. Kolb and S. Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law*, 2013, pp. 273-293.

<sup>792</sup> Harris, *op. cit.*, 2006, pp. 1-78.

<sup>793</sup> E.g., A. Roberts, “Prolonged Military Occupations: the Israeli-Occupied Territories since 1967”, 84 *AJIL*, 1990, pp. 70-74; the report by Al-Haq, *The Applicability of Human Rights Law to Occupied Territories: The Case of the Occupied Palestinian Territories*, Ramallah, 2003; M. Dennis, “Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation”, 99 *AJIL*, 2005, pp. 119-141.

<sup>794</sup> R. Kolb and S. Vité, *Le droit de l'occupation militaire. Perspectives historiques et enjeux juridiques actuels*, Bruylant, 2009, pp. 303-335.

<sup>795</sup> R. Kolb and S. Vité, *ibid.*, pp. 391-440, exploring the articulation of IHL rules and ESC rights in times of occupation. See also S. Vité, “The interrelation of the law of occupation and economic, social and cultural rights: the

In examining such interactions, a certain enlargement as well as deepening of the relevant normative system is addressed throughout the present thesis. At times modern international human rights law establishes *new guarantees* in comparison to occupation law, or *its detailed normative content* “materialises” some provisions of the Hague Regulations or the Fourth Geneva Convention. Nevertheless, this potential varies according to the ESC rights concerned and the nature of ensuing obligations. Overall, several positive implications may derive from such applicability in periods of occupation. For instance, it may influence the interpretation of IHL, fill normative gaps in the scope of protection of ESC rights, redefine the occupants’ obligations towards the local inhabitants, serve as yardstick encouraging courts to take a more active approach in advancing the welfare of occupied civilian population, and advance legal culture of compliance via human rights supervisory mechanisms.

(1) An emblematic case regards *the impact on the right to food* as dealt with by the former Special Rapporteur Jean Ziegler in thematic reports and in various reports on missions to the occupied Palestinian territories. His analysis covered the causes of the food crisis therein (*i.e.* closures and movement restrictions; destruction, expropriation and confiscation of Palestinian land; the so-called strategy of “*Bantustanization*”; impeding humanitarian aid), considering the relevant legal framework and confirming the opinions on the applicability of the ICESCR to the OPT as expressed by other UN bodies.<sup>796</sup> Both legal regimes were taken into account to address the occupant’s responsibility to ensure the basic needs of the local population and to avoid violating the right to food.

In particular, following the CESCR’s interpretation expressed in General Comment no. 12, this right was referred to as “*primarily the right to be able to feed oneself through physical and economic access to food*”; further, it was summarised as “*the right to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear*”.<sup>797</sup> As underlined in the CESCR’s General Comment no. 15, it was also interpreted to include access to drinking water and irrigation water necessary for

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examples of food, health and property”, *IRRC*, 2008, pp. 629-651, in which the author considers whether IHL rules are “*confirmed, complemented, relativized or contradicted*” by those drawn from human rights law.

<sup>796</sup> See *Report of the Special Rapporteur on the right to food, Jean Ziegler, on his mission to the occupied Palestinian territories (3-12 July 2003)*, UN Doc. E/CN.4/2004/10/Add.2, 31 October 2003. On the causes of the food crisis, see *ibid.*, paras. 11-19, and on the legal framework, see *ibid.*, paras. 21-31.

<sup>797</sup> This refers to his previous thematic report, see *Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler, submitted in accordance with Commission on Human Rights resolution 2000/10*, UN Doc. E/CN.4/2001/53, 7 February 2001, para. 14.

subsistence agricultural production.<sup>798</sup>

In expressing concern for abundant violations of different obligations flowing from the right to food in the occupied territories, they were elaborated according to the traditional tripartite typology.<sup>799</sup> In this vein, the *obligation to respect this right* requires that the occupier not disrupt or destroy the Palestinians' existing access to food. This *immediate obligation* requires avoiding negatively affecting *existing availability* as well as *physical or economic access* to adequate food and water. Possible violations of such a duty included the imposition of closures and curfews, the destruction of Palestinian land, water and other resources, the expropriation of Palestinian land, water and other resources, and the security fence.<sup>800</sup> Conversely, the *obligation to protect the right to food* entails the occupier to protect the civilian population in occupied areas from third parties trying to restrict, deny or destroy existing access to food and water. As to violations of such a duty, impunity for settlers shooting at Palestinians in their fields for harvesting was referred to.<sup>801</sup> Finally, the *obligation to fulfil the right to food* imposes on the occupier to facilitate people's capacity to feed themselves and, as a last resort, to provide food assistance to people who cannot feed themselves for reasons beyond their own control. Accordingly, a treaty obligation was articulated as *facilitating and ensuring access to food* to the civilian Palestinian population as well as *facilitating humanitarian access* for impartial organizations providing emergency assistance.<sup>802</sup>

(2) It is worth noting that, to some extent, *IHL protective provisions on property* may be understood differently in view of human rights standards, such as the *right to housing* under Article 11 ICESCR and the *right to culture* under Article 15 ICESCR. For instance, attacks and destructions of homes may affect civilians beyond the ordinary right to property. As observed by the Human Rights Committee, the “*partly punitive nature of the demolition of property and homes in the Occupied Territories*” has contravened the freedom to choose one's residence under Article 12, the right not to be subjected to arbitrary interference with one's home under Article 17 ICCPR, the equality of all persons before the law and equal protection of the law under Article 26, and the freedom from inhuman and cruel

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<sup>798</sup> See *Preliminary report of the Special Rapporteur of the Commission on Human Rights on the right to food*, Jean Ziegler, A/56/210, 23 July 2001; on examples of linkages between the right to water and the right to food, see *Report submitted by the Special Rapporteur on the right to food*, Jean Ziegler, in accordance with Commission on Human Rights resolution 2002/25, UN Doc. E/CN.4/2003/54, 10 January 2003, para. 56.

<sup>799</sup> See *Report of the Special Rapporteur on the right to food*, Jean Ziegler, on his mission to the Occupied Palestinian Territories (3-12 July 2003), UN Doc. E/CN.4/2004/10/Add.2, 31 October 2003, paras. 40-56.

<sup>800</sup> *Ibid.*, paras. 41-52.

<sup>801</sup> *Ibid.*, para. 53.

<sup>802</sup> *Ibid.*, paras. 54-56.

treatment under Article 7.<sup>803</sup>

Notably, the occupier's obligation to *protect ESC rights from third parties' abuses* was addressed in relation to settlers' violence.<sup>804</sup> A similar approach featured a joint condemnation by Special Rapporteurs on the right to adequate housing, the right to food, and the right to safe and drinking water and sanitation, respectively. They emphasised that "*Palestinian property is not only destroyed by the Israeli Civil Administration authorities and military but also by Israeli settlers. In some places, there are nearly weekly burnings of Palestinian villagers' land, trees and crops by Israeli settlers*".<sup>805</sup>

**(3)** The significance of referring to human rights law in periods of belligerent occupation was also emphasised by the Special Rapporteur on the situation of human rights in Kuwait under Iraqi occupation (1990-1991). The grave breaches of human rights committed by occupying forces and consisting of devastation and pillaging of infrastructure (such as cultural and religious institutions, libraries, museums, schools, industrial structures, banks) were deemed to have critically challenged the enjoyment of ESC rights by the civilian population.<sup>806</sup>

Of note, the seriousness of the situation concerning the healthcare system (as destructed by occupying forces as well as undermined by the departure of many professionals due to attacks and intimidation, dismantling of health facilities, denials of access to hospitals) was considered as better evaluated through the concept of the right to health, rather than Articles 55 and 56 GCIV.<sup>807</sup>

As regards the attacks on oil wells by the withdrawing Iraqi forces which were deemed deliberate and systematic,<sup>808</sup> the extensive and considerable environmental damage (related to their burning producing smoke emissions and the oil spills polluting coastline and seawater) was

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<sup>803</sup> HRC, *Concluding Observations: Israel*, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 16; *Concluding Observations: Israel*, UN Doc. CCPR/C/ISR/CO/3, 29 July 2010, para. 18.

<sup>804</sup> See *Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian Territories occupied since 1967*, UN Doc. E/CN.4/2006/29, 17 January 2006, para. 29.

<sup>805</sup> The Special Rapporteur on the right to adequate housing, Ms. Raquel Rolnik; the Special Rapporteur on the rights to food, Oliver De Schutter; the Special Rapporteur on the human right to safe and drinking water and sanitation, Catarina de Albuquerque (see OHCHR, "West Bank: demolitions and attacks against Palestinians must stop – UN experts", press release, 27 September 2011). According to them, "*with no effective action by the police and security forces, there is neither accountability for nor effective protection against these serious crimes, which further encourages the perpetrators to continue committing them*"; then the necessity for Israeli authorities to "*take all necessary measures to prevent attacks by Israeli settlers against Palestinians property in the West Bank, including East Jerusalem, and investigate and prosecute criminal acts committed by settlers in an independent, impartial, effective, through and timely manner*" has been addressed (*Ibid.*). For additional condemnation of settlers' violence, see UNHRC Res. 16/31, UN Doc. A/HCR/16/31, March 2011, para. 4 (a).

<sup>806</sup> *Report on the situation of human rights in Kuwait under Iraqi Occupation, prepared by Mr. Walter Kälin, Special Rapporteur of the Commission on Human Rights in accordance with Commission resolution 1991/67*, UN Doc. E/CN.4/1992/26, 16 January 1992, 1.

<sup>807</sup> See W. Kälin, *Human Rights in Times of Occupation: The Case of Kuwait*, Bern, 1994, p. 28, noting that "*the true significance of these events was only elucidated by recourse to the concept of the right to health as guaranteed by the (ICESCR)*".

<sup>808</sup> UN Doc. E/CN.4/1992/26, 16 January 1992, *op. cit.*, paras. 203-204.

evaluated by relying solely on their “*effects on human rights*”, since Iraq was not party to AP I and its relevant rules on environmental protection had not reached customary status; nonetheless, the damage was finally deemed to violate the obligation to “maintain public health” under Article 56 GCIV.<sup>809</sup> Despite unavoidable detrimental environmental consequences by warfare, it was concluded that “*the deliberate causing of large-scale environmental damage which severely affects the health of a considerable portion of the population concerned, or creates risks for the health of future generations, amounts to a serious violation of the right to the enjoyment of the highest attainable standard of health as embodied in article 12 of the (ICESCR)*”.<sup>810</sup> However, “*because of the limited short-term consequences for the health of the civilian population and of the difficulties in determining the long-term impact on the health situation*” it was cautiously observed that it was “*too early*” for evaluating if the right to health would have been violated in the actual case.<sup>811</sup>

Focusing on the “*systematic dismantling and destruction of the major educational, scientific and cultural institutions*”, the grave impact of the devastation of the Kuwait Institute for Scientific Research was connected to the future impossibility of conducting “*applied research*”.<sup>812</sup> The relevance of Article 15(2) ICESCR was underlined for the scientific production stolen and taken to Iraq. These acts were deemed systematic and deliberate, in breach of the right to enjoy scientific progress and the right to education, besides violating Article 50 GVIV which calls for the occupant “*to facilitate the proper working of all institutions devoted to the care and the education of children*”.<sup>813</sup>

Conversely, the pillaging, demolishing and devastation of private property and public infrastructure were evaluated under the section on ESC rights by referring solely to Articles 16, 33 and 53 GCIV (rather than recurring to concept of the right to an adequate standard of living, including housing). Of note, it was noted that in certain circumstances international humanitarian law could have justified the related damage or confiscation for military necessity and use. Nonetheless, the mass destruction and damage was deemed “*deliberate, premeditated, systematic and large scale, in clear violation with international law*”.<sup>814</sup>

#### **2.2.d. The legal relevance of the temporal dimension of the laws of occupation**

A fourth aspect that has acquired - in a controversial way though - a certain legal relevance

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<sup>809</sup> UN Doc. E/CN.4/1992/26, 16 January 1992, *op. cit.*, paras. 205, 208.

<sup>810</sup> UN Doc. E/CN.4/1992/26, 16 January 1992, *op. cit.*, para. 206.

<sup>811</sup> UN Doc. E/CN.4/1992/26, 16 January 1992, *ibid.*, para. 208.

<sup>812</sup> UN Doc. E/CN.4/1992/26, 16 January 1992, *ibid.*, paras. 212-216.

<sup>813</sup> UN Doc. E/CN.4/1992/26, 16 January 1992, *ibid.*, paras. 211 and 218.

<sup>814</sup> UN Doc. E/CN.4/1992/26, 16 January 1992, *ibid.*, paras. 234-235. The SC Res. 687 of 3 April 1991 acknowledged the legal responsibility of Iraq for these losses. See also the UN Compensation Commission.

concerns *the time element of a situation of occupation*, or more exactly what is called “*prolonged*” occupation.<sup>815</sup> Indeed, many years may pass from the moment in which the occupant starts to exercise effective control of a territory and the end of such a situation (as determined by the withdraw from the foreign territory or by the stipulation of a valid agreement between the occupant and the sovereign authority of the occupied territory).

Although no time limits of effective control over a foreign territory are placed by the 1907 Hague Regulations or the 1949 Fourth Geneva Convention<sup>816</sup> or the 1977 Protocol I,<sup>817</sup> long-lasting occupations end up challenging the objects and purposes of this regime. Two basic principles are particularly tested, namely the *provisional nature of belligerent occupation* (occupation is temporary, thus it cannot be either permanent nor indefinite) and the *preservation of the status quo ante* (the conservationist principle).

In actual fact, the prolonged character of an occupation does not alter *per se* the occupier’s obligations set forth in the aforementioned legal sources. However, questions arise as to *whether* and to *what extent the time factor impacts the interpretation of IHL rules and their application on the ground in reality*. That is, how much the duration of an occupation influences the ordinary approach of subjecting those realities to the rule of law.

As far as the occupier’s authority is specifically concerned, an “*inherent dilemma*” is that the extended duration of an occupation may be invoked as an element in favour of a more *flexible* as

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<sup>815</sup> A. Roberts, “Prolonged military occupation: the Israeli-occupied territories since 1967”, 84 *AJIL*, 1990, p. 47, according to which this “*is taken to be an occupation that last no more than five years and extends into a period when hostilities are sharply reduced - i.e., a period approximating peacetime*”. See Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge, 2009, pp. 116-117, in which the author defines prolonged occupation only by referring to its duration and by making a distinction from “*semi-prolonged*” occupations - whose duration extends to “a number of years (rather than decades) and which lasted for a little more than three years.

<sup>816</sup> Article 6(3) GCIV reads: “*In case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143*”. However, many scholars considers the “one year” time limit as fallen into desuetude, see E. David, *Principes de droit des conflits armés*<sup>4</sup>, Bruylant, 2008, p. 263; M. Bothe, K.J. Partsch, W.A. Solf (eds.), “Article 3”, *op. cit.*, at 59; R. Kolb, “Deux questions ponctuelles relatives au droit de l’occupation de guerre”, 61 *Revue Hellénique de Droit International*, 2008, at 358-360; O. Ben-Naftali, “A la recherche du temps perdu’: rethinking Article 6 of the Fourth Geneva Convention in the light of the legal consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion”, 38 *Israel Law Review*, 2005, at 217; D. Alonzo-Maizlish, “When does it end? Problems in the law of occupation”, in R. Arnold and P.A. Hildbrand (eds.), *International Humanitarian Law and the 21<sup>st</sup> Century’s Conflicts, Changes and Challenges*, Editions Interuniversitaires Suisses – Edis, Lausanne, 2005, at 106 (expressing some doubts). See also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, Advisory Opinion, ICJ Reports 2004, at 185, para. 125.

<sup>817</sup> Pursuant to Article 3(b) AP I, “*(t)he application of the Conventions and of this Protocol shall cease ... in case of occupied territories, on the termination of occupation, except ... for those persons whose final release, repatriation or re-establishment takes place thereafter*”. For the 172 States that have ratified this Protocol (see the ICRC list of States parties to IHL treaties), the temporal limit of “one year after the general close of military operations” established in Article 6(3) GCIV has been abolished and the rules pertaining to occupation remain applicable until the “*termination of occupation*”.

well as more *restrictive* application of occupation law.<sup>818</sup> Scholarly opinions have either supported extensive powers of the occupant<sup>819</sup> or limited its autonomy and discretion.<sup>820</sup> An essential argument in favour of *permissive application* is avoiding freezing the legal situation, and to prevent certain adaptations to the realities on the ground, primarily to ensure the continuation of normal life of the local population. In line with the largely supported view that the benefit of the protected population should be acknowledged as a key principle guiding the policies and measures taken up by the occupier, *the importance to assume decisions concerning the social, economic and at times political realms to preserve normal life in the occupied territory as far as possible* has also been emphasised.<sup>821</sup> However, insofar as the *temporary* (non-sovereign) administration of this territory should generally entail no interferences with its original economic and social structures, organization, legal system or demography, a basic question emerges as *to what extent the protection of local inhabitants living under protracted occupation may also require far-reaching measures for the development of the occupied territory*.

Indeed, the longer an occupation continues and the wider the occupier's authority is exercised over the local population, the more the basic distinction between military and ordinary governments may become troubled and less perceptible. This brings forth opposing issues. For instance, an enduring occupier may be required to give supplementary guarantees on the reversibility of contentious measures adopted, as abstaining from introducing fundamental institutional changes or simply affirming their temporariness may be deemed not sufficiently

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<sup>818</sup> A. Roberts, "Prolonged military occupation: the Israeli-occupied territories since 1967", 84 *AJIL* 1, 1990, pp. 52-53, in which the author emphasises that "(i)n a prolonged occupation there may be strong reasons for recognising the powers of an occupant in certain specific respects - for example, because there is a need to make drastic and permanent changes in the economy or the system of government. At the same time, there may be strong reasons for limiting the occupant's powers in other respects. An examination of past occupations suggests that any variations in the rules may have a more complex and multifaceted character than simply the curtailment of the rights of one party or another". See C. Chinkin "Laws of occupation", in N. Botha, M. Oliver, D. Van Tonder (eds.), *Multilateralism and International Law with Western Sahara as a Case Study*, Unisa Press, Pretoria, 2010, p. 178, noting that "an inherent dilemma" features prolonged occupation: on one side, "the requirements under occupation law that inhibit the occupier from changing law must not be abused so that the occupied territory gets stranded in a form of legal vacuum whereby it becomes socially and economically underdeveloped"; on the other side, however, "allowing - even requiring - the occupier to undertake development, legal or other social programs may come too close to annexation". Thus, for the author "prolonged occupation may be a basis for limiting - at least legally - the occupier's powers".

<sup>819</sup> Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, 2009, at 120. The author stresses how "pressures for departures from the legal status quo in occupied territories proliferate over time, and there comes a moment when they cannot be put off", then highlighting that "if the constant transformations in everyday technology and communitarian life are ignored by the legislator, the inertia is liable to cause grievous social woes". He concludes by taking "as almost axiomatic that the military government must be given more leeway in the application of its lawmaking power if the occupation endures for many years".

<sup>820</sup> See, *inter alia*, O. Ben-Naftali, "'A la recherche du temps perdu': rethinking Article 6 of the Fourth Geneva Convention in the light of the legal consequences of the construction of a Wall in the Occupied Palestinian Territories Advisory Opinion", 38 *Israel Law Review*, 2005, pp. 218-219.

<sup>821</sup> See the speech of Philip Spoerri, Director of International Law and Cooperation of the International Committee of the Red Cross, concerning complex issues undermining the protection of the civilian population in the occupied territory, which is referred to in M. Mancini, "Report of the Conference 'New Conflicts and the Challenge of the protection of the Civilian Population'", *Documenti IAI 11 03*, February 2011, pp. 12-13.



adequate.<sup>822</sup> Conversely, a long-term occupier may have a reduced opportunity to assert an impossibility to act in favour of growth of the occupied territory and welfare of the local population, given the interdependence arising and enhanced over the years between the occupier and the population.<sup>823</sup> As such, State practice seems to suggest that in the case of a protracted occupation such an interdependence may lower the degree of control required for a State to be an occupying power: such a continuation may not entail full and exclusive control over the territory concerned.<sup>824</sup>

In examining the impact of the time element on the occupier's authority, a specific dimension concerns the application of *military necessity*.<sup>825</sup> As already highlighted, IHL treaties do not contain a definition of this concept, which is instead put forth by several military manuals.<sup>826</sup> The various exceptions to military necessity have a different scope from one rule to the other.<sup>827</sup>

What seems unequivocal is that the long duration of occupation cannot be evoked in order to fit political, demographic or economic considerations of the occupying power into the notion of military necessity.<sup>828</sup> Conversely, State practice, military manuals, and international or national case

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<sup>822</sup> Even though the ICJ did not explicitly refer to the long duration of the occupation, the Court was reluctant to accept the Israelis' repeated affirmations that the wall was a temporary measure and that Israel was "*ready and able ... to adjust or dismantle*" it, see ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004), Advisory Opinion, ICJ Reports 2004, para. 116. In this vein, the Court recognised that "*the construction of the wall and its associated régime create a 'fait accompli' on the ground that could well become permanent, in which case, and notwithstanding the formal characterisation of the wall by Israel, it would be tantamount to de facto annexation*", see the ICJ, Advisory Opinion on the wall, *op. cit.*, para. 121. Indeed, after the disengagement of 2005 the situation in the Gaza Strip has evidenced the difficulties in reversing the "*temporary*" measures adopted by Israel.

<sup>823</sup> This aspect is discussed in the following section 4 concerning the qualifications provided for in Article 43 "*all the measures in his power*" and "*as far as possible*".

<sup>824</sup> The fact that a very large majority of States consider Gaza still occupied, despite the 2005 Israeli disengagement, indicates this remark. The qualification of Gaza as occupied territory has been accepted by the majority of States, see GA Res. 64/94, 10 December 2009, paras. 4 and 10 (adopted by 162 votes in favour, 9 against, 5 abstentions); GA Res. 65/105, 10 December 2010, paras. 5 and 10 (165 votes in favour, 9 against, 2 abstentions); GA Res. 66/79, 9 December 2011, paras. 5 and 10 (159 votes in favour, 9 against, 4 abstentions).

<sup>825</sup> Basically, military necessity can be invoked only if the particular IHL rule provides for the relevant exception and, furthermore, that it cannot be invoked to justify acts contrary to international humanitarian law.

<sup>826</sup> See UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford, 2004, at 21-22, para. 2.2. Similarly, Canada, National Defence, Chief of Defence Staff, Office of the Judge Advocate General, *Law of Armed Conflict at the Operational and Tactical Levels*, 13 August 2001, B-GJ-005-104/FP-021, at 2-1, para. 202; United States, Department of the Army Field Manual, *The Law of Land Warfare*, FM 27-10, 1956, at 4; France, Ministère de la Défense, *Manuel de droit des conflits armés*, Secrétariat général pour l'administration, Direction des Affaires juridiques, Sous-direction du droit international et du droit européen, Bureau du droit des conflits armés, (undated), at 48. These definitions can be traced back to the 1863 Lieber Code, which defined military necessity as "*the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war*" (Article 14), with the additional remark that "*in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult*" (Article 16), see *Instructions for the Government of Armies Of the United States in the Field*, 24 April 1863.

<sup>827</sup> *E.g.*, under Article 52 HRs "*requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation*". Article 53 GCIV prohibits the destruction of public or private property inside the occupied territory by the occupying power "*except where such destruction is rendered absolutely necessary by military operations*". Article 48 GCIV allows the protected persons "*who are not nationals of the power whose territory is occupied*" to leave the latter, "*unless their departure is contrary to the national interests of the occupying power*" (Art. 35).

<sup>828</sup> These considerations are excluded from its scope, see N. Hayashi, "Requirements of military necessity in international humanitarian law and international criminal law", 28 *Boston University International Law Journal*, 2010, p. 64

law offer few indications regarding the possibility that the duration of the occupation may influence the interpretation of those exceptions.<sup>829</sup>

In considering *the implications of the temporal dimension of occupation in the spheres of ESC rights of the local population*, its legal relevance may be explored in view of the evolution of the concept itself. The regime of territorial occupation has been increasingly conceptualised in terms of *protecting the safety and welfare of the civilian population*. This has been even addressed as one of the developments favouring the questioning of the basic distinction between sovereignty and belligerent occupation.<sup>830</sup>

It is worth highlighting that *the transitoriness of the occupation is meant to enhance the local population's interests* by ensuring that, upon its termination, control over the territory will be gone back to the legitimate sovereign. Conversely, *the prolongation of the occupation is deemed to harm the local population*, because it remains subject to a provisional military regime rather than a sovereign ruler.<sup>831</sup> Accordingly, such a protraction is seen either as an element *imposing* increased and expanded obligations on the military commander<sup>832</sup> to safeguard the interests of the civilian population,<sup>833</sup> or

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ff. The author analyses the *Elon Moreh* decision of the Supreme Court of Israel, which concerned an order to requisition privately owned Palestinian land to establish a settlement. The order was deemed null and void since it was based on a mostly political decision and therefore it was outside the scope of the military necessity exception contained in Article 52 HRs. See HCJ 390/79, *Duweikat et al. v. Government of Israel et al.*, 22 October 1979, reproduced in 19 *ILM*, 1980, at 171-175. The Supreme Court of Israel has generally affirmed that “[t]he Military Commander may not consider the national, economic and social interests of his own State, so long as they do not affect his security interest in the Region or the interest of the local population”, see *Askan* Judgment, p. 13, para. 13. This was reaffirmed, in relation to Article 43 HRs, in the *Yesh Din* judgment (see p. 15, para. 8). See also H. McCoubrey, “The nature of the modern doctrine of military necessity”, 30 *Revue du droit pénal militaire et du droit de la guerre*, 1991, at 227; B.M. Carnahan, “Lincoln, Lieber and the laws of war: the origins and limits of the principle of military necessity”, 92 *AJIL* 2, 1998, p. 219 ff.

<sup>829</sup> For instance, among the States that intervened before the ICJ in the advisory proceedings on the separation wall, only Switzerland emphasised that the protracted duration of the Israeli occupation implied a more rigorous examination of necessity and proportionality, see Switzerland, Wall advisory proceedings, Written Statement of the Swiss Confederation, 30 January 2004, at 6, para. 26, in which it was stated that “(t)he law of armed conflict strikes a balance between humanitarian demands and military needs. ... Hence, every step taken in the context of hostilities, of a military, security or administrative character, must respect the principle of necessity, proportionality and humanity. ... Any examination of necessity and proportionality in circumstances of prolonged occupation when hostilities have ceased must be more rigorous, since stricter conditions govern the imposition of restrictions in such circumstances on the fundamental rights of protected persons”. Conversely, no other recommendations were made by States as to the fact that the exceptions to military necessity were excluded or they should be interpreted restrictively due to the duration of the occupation.

<sup>830</sup> M. Koskeniemi, “Occupation and Sovereignty - Still a Useful Distinction?”, in O. Engdahl and P. Wrangé (eds.), *Laws at War - The Law as it was and the Law as it Should Be*, Koninklijke Brill BV, 2008, pp. 166-169.

<sup>831</sup> These two aspects are explicitly addressed in the legal opinion submitted by Israeli international law scholars in the *Yesh Din* case.

<sup>832</sup> Y. Dinstein, *The international law of belligerent occupation*, Cambridge University Press, 2009, 49, 120; D.P. Goodman, “The Need for Fundamental Change in the Law of Belligerent Occupation”, 37(6) *Stanford Law Review*, 1573; A. Roberts, “Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967”, 84(1) *AJIL*, p. 44, 52; Y. Dinstein, *The Dilemmas Relating to Legislation under Article 43 of The Hague Regulations and Peace Building* 1, pp. 5-7 (Paper submitted to the informal high-level expert meeting on current challenges to International Humanitarian Law, Cambridge, 25-27 June 2004).

<sup>833</sup> A. Roberts, “Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967”, 84 *AJIL*, 1990, p. 44, 96; Y. Dinstein, *The international law of belligerent occupation*, Cambridge, 2009, 116-117; E. Benvenisti, *The international law of occupation*, Princeton, 1993, pp. 6, 27, 145, 147; G. Von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, University of Minnesota Press, 1957, pp. 31-33, 97.

as a factor *refining* and *reinforcing* the prohibition from using his authority in favour of unrelated interests of his own matters.<sup>834</sup> In fact, the risk is that of misusing such prolongation to inflate the authority concerned to levels that distort the difference between sovereign and occupier.

(1) Focusing on the most pertinent case of protracted occupation in modern times, *i.e.* the one that concerns the Palestinian territories, various decisions by the Israeli Supreme Court sitting as High Court of Justice on the OPT have explicitly recognised that *the protraction of occupation should not enhance the profits and benefits from such situation to the occupier's citizens*.<sup>835</sup> Instead, this Court has deemed it *a factor that must work in favour of the protected population*, emphasising that prolongation does *not* remove or shadow the nature of the military ruler, which remains temporary as well as non-sovereign.<sup>836</sup> Of remark is the view whereby *“the needs of the local population gain extra emphasis”* which has also led the same Court to recognise that certain legislative measures *“might become appropriate in a long-term military government”*.<sup>837</sup>

The understanding of the occupant acting as a *“trustee”* of the local inhabitants and charged to administer the occupied territory *in view of their benefit* has been affirmed in a series of judgments. According to this Court, the military commander's measures taken to secure the occupation *“must be properly balanced against the rights, needs and interests of the local population”*;<sup>838</sup> any intervention by the

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<sup>834</sup> D.P. Goodman, “The Need for Fundamental Change in the Law of Belligerent Occupation”, 37(6) *Stanford Law Review*, 1985, p. 1573, 1586; E. Benvenisti, *The international law of occupation*, Princeton University Press, 1993, p. 6, 27, 145, 147; A. Roberts, “Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967”, 84(1) *AJIL*, p. 44, 87; A. Cassese, “Powers and Duties of An Occupant in Relation to Land and Natural Resources”, in E. Playfair (ed.), *International Law and the Administration of Occupied Territories*, Clarendon Press Oxford, 1992, p. 419, 420.

<sup>835</sup> See HCJ 69/81, *Abu Aita et al. v. Commander of the Judea and Samaria Region et al.*, Judgment of 5 April 1983, 37(2) *PD* 197, at 213 (English excerpt in 13 *Israel YbkHR* 348) in which President Shamgar found that *“(t)he needs of any territory, whether it is under military occupation or otherwise, naturally change with the passage of time and the attending economic development. As explained above, the authors of the regulations were not satisfied with a definition of an obligation limited to restoring the previous condition. The duration of the military occupation might influence the nature of the needs, and the necessity of performing adjustments and a new deployment might grow the longer the duration... The time element influences the range of authorities, whether weighing the needs of the army or the needs of the territory, or when forging the balance between the two”*.

See also HCJ 69/81, *ibid.*, at 209, stating that *“(t)he provisions of the Hague Convention must be applied to the area in adjustment to the circumstances created in the territory as a result of the prolonged occupation thereof ... and with utmost consideration for the needs of the area”*.

<sup>836</sup> See HCJ 1661/05, *Gaza Coast Regional Council et al v. Israeli Knesset et al.*, at 230, in which it is found that: *“However, these developments do not divest the military government from that nature (see HCJ 500/72 Maryam Khalil Salem Abu al-Tin v. Defense Minister, 27(1) PD 481, 484). They do not blur ‘the difference between a military government and a regular government’ (Jam’iyat Iscan affair, 803). They do not extend Israeli law, jurisdiction and administration to those areas. The temporariness of the belligerent occupation and its actual difficulties do not cancel the belligerent occupation. Acting President Shamgar (as was his title at the time) noted correctly in the Abu Aita affair that the temporariness of the military governor's authority means that ‘its duration and validity are equal to the duration of the effective control of the area and the duration of the military government established in the territory”*.

<sup>837</sup> See HCJ 393/82, *Jami’at Ascan* case, at 800-801, in which Justice Barak held that *“(I)n a long-term military occupation, the needs of the local population gain extra emphasis ... Therefore, legislative measures that could be inappropriate in a short-term military government, might become appropriate in a long-term military government”*.

<sup>838</sup> HCJ 2056/04, *Beit Sourik Village Council v. The Government of Israel and the Commander of the IDF Forces in the West Bank*, Judgment of 30 June 2004, 58(5) *PD* 807, reproduced in *Israel Law Review*, 2005, para. 34.

occupying authority in the lives of the population must be strictly proportionate to the gained advantage; then, such balancing approach is not only “*well anchored in the humanitarian law of public international law*” (particularly Article 46 HRs and Article 27 GCIV), but even derives from “*general principles of law, including reasonableness and good faith*” as well as a “*general principle of international law*”.<sup>839</sup>

Even in light of the other three factors challenging the viability of occupation law as detailed above, the long-lasting duration of occupation has favoured uncertainties about the sufficiency of the traditional regime. In case of persistent occupation the Hague Regulations and the Fourth Geneva Convention do not indicate any lawful departure from existing law. Nonetheless, the need of *specific regulations to respond to practical issues arising in the context of enduring occupations* may be questioned; many experts agree on the establishment of monitoring and supervisory mechanisms, which would guarantee that the occupier is not entrusted with the final decision and which would contribute not to give him all the benefit of the doubt in acting for the welfare of the occupied population.<sup>840</sup>

In this regard, as far as the situation in the Palestinian territories is concerned, the improvements to the electricity grid and the construction of highways have been debated as two illustrations of the concrete need not to postpone *ad infinitum* certain decisions “for the benefit of the local population” when time and circumstances so demand. While this has been the only case of an enduring occupier openly recognising that status,<sup>841</sup> other situations that can be deemed prolonged include Turkey’s occupation of the northern area of Cyprus and Morocco’s occupation of Western Sahara.<sup>842</sup> It is worth highlighting at this juncture certain details on these two cases.

(2) As for the former, following the military invasion by Turkey in July and August 1974, the Republic of Cyprus has been *de facto* separated into two areas.<sup>843</sup> The northern area is under the

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<sup>839</sup> HCJ 2056/04, *ibid.*, para. 35 and para. 36. For a comment, see M. Koskenniemi, “Occupied Zone - a Zone of Reasonableness”, *Israel Law Review*, 2008, pp. 13-40.

<sup>840</sup> See “Second Meeting of Experts: Delimiting the Rights and Duties of an Occupying Power and the Relevance of Occupation Law for UN Administration of Territory”, 15-16 December 2008, Geneva, at 72-78.

<sup>841</sup> The Supreme Court of Israel has recognised this in several decisions on the interpretation and application of international humanitarian law and international human rights law in relation to belligerent occupation; some of its past and recent case law deals with the effect of the prolonged nature of occupation on the relevant norms.

<sup>842</sup> See GA Res. 34/37, 21 November 1979, preambular para. 9 and paras. 5 and 6 (85 in favour, 6 against, 41 abstentions); GA Res. 35/19 of 11 November 1980, preambular para. 7 and para. 3 (88 in favour, 8 against, 43 abstentions).

<sup>843</sup> The military invasion took place when the Greek military regime, as supported by the Cypriot military forces, carried out a *coup d'état* against the government of Archbishop Makarios, President of the Republic of Cyprus. On 20 July 1974 Turkey intervened militarily in Cyprus supposedly to “*re-establish the constitutional order*” and to protect the Turkish Cypriot community. SC Res. 353 (1974) of 20 July 1974 requested, *inter alia*, the withdrawal of foreign military personnel “*present otherwise than under the authority of international agreements*”. Under the UN auspices unsuccessful peace negotiations followed between the two communities until 14 August 1974, when Turkey began another military attack

unrecognised, illegitimate, and unilaterally proclaimed “Turkish Republic of Northern Cyprus”; whilst the southern area is under the (sole) legitimate government of Cyprus.<sup>844</sup> The status of the Republic of Cyprus has been reaffirmed, *inter alia*, by the European Union<sup>845</sup> and the Council of Europe.<sup>846</sup> In the same vein, in decisions on issues which have incidentally questioned the status of the TRNC, a number of international and national courts have not recognised its legitimacy and have qualified as an occupation the presence of Turkish forces engaged in Cyprus.<sup>847</sup>

In the context of such decisions, a number of human rights violations have been found to arise out of the enduring military occupation, the persistent division of the territory and the activities of

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against Cyprus and occupied 36.02 percent of its northern territory. GA Res. 3212 (XXIX) of 1 November 1974 on the “*Question of Cyprus*” urged all States to respect the sovereignty, independence, and territorial integrity of Cyprus and urged the “*speedy withdrawal*” of all foreign armed forces, military presence and personnel from Cyprus. SC Res. 365 (1974) of 13 December 1974 endorsed the same resolution and urged the parties to implement it immediately; SC Res. 367 (1975) of 12 May 1975 endorsed both of them. For the qualification of the presence of Turkish forces in the northern part of Cyprus as foreign occupation, see in particular GA Res. 33/15, 9 November 1978, preambular para. 6, (110 in favour, 4 against, 22 abstentions); GA Res. 34/30 of 20 November 1979, preambular para. 9, (99 in favour, 5 against, 35 abstentions); GA Res. 37/253 of 13 May 1983, preambular para. 8 and para. 8, (103 in favour, 5 against, 20 abstentions).

<sup>844</sup> In 1983 the local Turkish Cypriot authorities proclaimed the independence as the “*Turkish Republic of Northern Cyprus*” (TRNC) and adopted a Constitution, but only Turkey has recognised it as a separate State under international law. GA Res. 37/253 of 13 May 1983 deplored that “*part of the territory of the Republic of Cyprus is still occupied by foreign forces*” and demanded the immediate withdrawal, while the Security Council declared the secession invalid, null, and void in its Resolutions 541 (1983) and 550 (1984), in which it called upon the international community neither to recognise the TRNC nor to assist or in any way cooperate with it. See SC Res. S/RES/541 of 18 November 1983, and SC Res. S/RES/541 of 11 May 1984.

<sup>845</sup> On 16 November 1983, a statement was adopted by the European Community, which rejected the declaration of independence by the Turkish Cypriot leaders and expressed deep concern about the establishment of the TRNC; it also supported the sovereignty, unity, and independence of Cyprus. In the same vein, the European Parliament issued several resolutions on the political situation in Cyprus and Turkey (e.g., its resolution on the political situation following the UN-sponsored talks on Cyprus, 17 September 1997).

<sup>846</sup> In Resolution (83) 13 of 24 November 1983 the Committee of Ministers of the Council of Europe, *inter alia*: (a) deplored the declaration of the “*purported independence*” of the TRNC; (b) acknowledged the unilateral declaration as invalid; (c) reiterated its commitment to the Republic of Cyprus as the sole legitimate government.

<sup>847</sup> A number of cases have indeed appeared before national courts in the United States and Europe, as well as before the European Court of Justice and the European Court of Human Rights. See, e.g., Court of Justice of the European Communities, Case C-439/92, 5 July 1994, in which the sovereignty of the Republic of Cyprus was acknowledged over the whole island as regards its relations with the European Community. Moreover, four inter-state applications under Article 33 ECHR were initiated by Cyprus against Turkey, in addition to several individual applications under the same Convention. In particular, see ECtHR, *Loizidou v. Turkey (Preliminary Objections)*, No. 15318/89, Judgment, 23 March 1995, paras. 62-64; ECtHR, *Loizidou v. Turkey*, Judgment (merits), 18 December 1996, No. 15318/89, paras. 42-44, 56-57; ECtHR, *Cyprus v. Turkey*, No. 25781/94, Judgment (merits), 10 May 2001, paras. 75-76. Indeed, in a number of cases the European Court of Human Rights ruled that Turkey exercises “*effective control*” over the northern part of Cyprus, which engages its legal responsibility under the ECHR: the Court found that since it had “*effective overall control*” over northern Cyprus, Turkey’s responsibility could not “*be confined to the acts of its own soldiers or officials*” therein but was “*also engaged by virtue of the acts of the local administration*” which remained reliant on “*Turkish military and other support*”. In elaborating on this issue, the Court affirmed that, in terms of Article 1 ECHR, “*Turkey’s jurisdiction must be considered to extend to securing the entire range of substantive rights set out in this Convention and those additional protocols which it has ratified, and that violations of those rights are imputable to Turkey*” (see ECtHR, *Cyprus v. Turkey*, No. 25781/94, Grand Chamber, Judgment, 10 May 2001, para. 77).

the unrecognised TRCN.<sup>848</sup> Recurrent abuses have regarded the access, control, use and enjoyment of property rights of Greek Cypriots displaced from the occupied northern part of the island, and their right to respect for private and family life, home and correspondence; they have been often recognised as the legitimate owners of the abandoned and expropriated properties and as entitled to compensation for the lost use of such properties.<sup>849</sup> Moreover, Turkey's failure of conducting effective investigations into the fate and whereabouts of Greek Cypriot missing persons has been deemed a continuing violation of Articles 2, 3 and 5 ECHR.<sup>850</sup>

Some of these cases have regarded cultural objects.<sup>851</sup> Recently, the lack of access to, and enjoyment of, religious property belonging to the Greek Orthodox Autocephalous Church of Cyprus was claimed to be in violation of Article 1 of the first Protocol of the ECHR as well as in violation of Article 9 ECHR (freedom of religion) and Article 11 ECHR (freedom of assembly); this was complained in view that Turkish Cypriot authorities had constantly not permitted the Church and its parishioners to hold religious services in related places of worship and cemeteries located in the northern part of Cyprus. In the same vein, the applicant asserted that numerous properties had been vandalized, destroyed, looted or deprived of religious function and that ecclesiastical vessels had been damaged or sold.<sup>852</sup> However, the European Court found that the complaints regarding freedoms of religion and assembly were "closely linked" to the applicant's inability to enjoy the property in question and that domestic remedies had not been exhausted before the Immovable

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<sup>848</sup> See, e.g., European Commission of Human Rights, *Cyprus v. Turkey*, Nos. 6780/74 and 6950/75, 1976; European Commission of Human Rights, *Cyprus v. Turkey*, No. 8007/77, 1983; British Court of Appeal (Civil Division), *Apostolides v. Orams*, No. A2/2006/2114, 19 January 2010.

<sup>849</sup> See, e.g., ECtHR, *Xenides Arestis v. Turkey*, No. 46347/99, Judgment (merits) of 22 December 2005 and Judgment (just satisfaction) of 7 December 2006. After this case, Law No. 67/2005 established that all natural and legal persons asserting rights to immovable or movable property could bring a claim before the Immovable Property Commission, which was set up for the compensation, exchange and restitution of such properties (see [www.northcyprusipc.org](http://www.northcyprusipc.org)). See also ECtHR, *Demopoulos and 7 Others v. Turkey*, Nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04, Decision, 1 March 2010; in paragraph 127 of this decision, the ECtHR held that that Commission "provides an accessible and effective framework of redress in respect of complaints about interference with the property owned by Greek Cypriots".

<sup>850</sup> See, e.g., ECtHR, *Varnava and Others v. Turkey*, Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Grand Chamber, 18 September 2009. Recently, in delivering the judgment on just satisfaction in *Cyprus v. Turkey*, the Grand Chamber held (by a majority) that "Turkey was to pay Cyprus 30,000,000 euros (EUR) in respect of the non-pecuniary damage suffered by the relatives of the missing persons, and EUR 60,000,000 in respect of the non-pecuniary damage suffered by the enclaved Greek-Cypriot residents of the Karpas peninsula" (see ECtHR, *Cyprus v. Turkey (just satisfaction)*, Grand Chamber, Judgment, 12 May 2014, at 20-21).

<sup>851</sup> See, e.g., US Court of Appeals for the 7<sup>th</sup> Circuit, *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts Inc.*, 917 F.2d 278, Decision of 24 October 1990. It confirmed the decision of 3 August 1989 by the US District Court in Indianapolis. It concerned the ownership of sixth-century mosaics plundered from the Church of Kanakaria (located in the occupied northern area of the island). Turkish antiquities "smugglers" had removed these mosaics and sold them for \$1.2 million to an American art dealer. They were returned to the applicant as the legitimate owner.

<sup>852</sup> ECtHR, *Archbishop Chrysostomos II v. Turkey*, No. 66611/2009, Decision on admissibility, 4 January 2011. The Court held that the Immovable Property Commission "is able both to order restitution of property and to award pecuniary and non-pecuniary damages in respect of any loss of enjoyment of the property" (*ibid.*, at 4).

Property Commission; accordingly the Court rejected the application for non-exhaustion of domestic remedies under Article 35 ECHR. Of note, the inability to access to sites and icons of religious and cultural importance has concerned other religious communities, including Jews, Armenian Orthodox and Maronite Catholics.<sup>853</sup>

For the purpose of the present research, it is worth also considering that in the course of the aforementioned military invasion and during the following four decades of occupation several religious monuments or archaeological sites have been damaged.<sup>854</sup> In addition, historic and architectural buildings have been destroyed and artefacts taken from religious sites in the northern part of the island have been lost or stolen.<sup>855</sup> Regardless of the lawfulness or not of the 1974 conflict in Cyprus - the legality of resorting to armed conflict being subject to the UN Charter and *jus ad bellum* - the enduring military occupation and the resulting damage and destruction fall within the scope and application of international humanitarian law.

As regards the specific issue of illicit traffic and exportation of cultural property from such territorial area, two conventions may be particularly relevant. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (ratified by Turkey and Cyprus) regards as “illicit” “*the export or transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power*”.<sup>856</sup> Further, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (ratified only by Cyprus) may provide for uniform rules for return claims by States or restitution claims by individuals.

**(3)** As for Western Sahara, this is the last remaining colonial territory on the list of Non-Self-Governing Territories under Chapter XI of the UN Charter since 1963, until which time it had been a Spanish protectorate from 1884.<sup>857</sup> Certain aspects of its controversial status under

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<sup>853</sup> See *Report of the Office of the United Nations High Commissioner for Human Rights on the question of human rights in Cyprus*, UN Doc. A/HRC/19/22, 27 January 2012, paras. 32-37.

<sup>854</sup> Some hearings on the issue of destruction of cultural property were held at the European Parliament (e.g. a public hearing on “The protection of Cultural heritage in Cyprus” was organised by the Committee on Culture and Education on 11 April 2007, which led to the Motion for a Resolution of the European Parliament B6-0000/2007, 2 May 2007). In 2006 the European Parliament adopted a Declaration on the Protection and Preservation of the Religious Heritage in the northern part of Cyprus (EUR.PARL. DOC. P6\_TA (2006) 0335, 30 August 2006).

<sup>855</sup> See C. Chotzakoglou, *Religious Monuments in Turkish-occupied Cyprus. Evidence and Acts of Continuous Destruction*, Lefkosia 2012, 2008, pp. 28-29; *Flagellum Dei: The Destruction of the Cultural Heritage in the Turkish occupied part of Cyprus*, Nicosia, Cyprus: Press and Information Office, 2<sup>nd</sup>, 1989; M. Jansen, *War and Cultural Heritage: Cyprus after the 1974 Invasion*, Minnesota Mediterranean and Eastern European Monographs XIV, University of Minnesota, 2005.

<sup>856</sup> Article 11. Article 16 requires Contracting Parties to take steps to prevent illicit traffic via legal and administrative measures; Article 6 requires them to adopt an export certificate for any exported cultural object.

<sup>857</sup> See UN Doc. A/5514, Annex III. See Article 73 UN Charter.

international law are discussed here.

Spain assumed its role as administering power of Western Sahara until 26 February 1976, when it informed the Secretary General that it terminated its presence therein and relinquished its responsibilities and duties over the Territory, so leaving the latter to de facto administration of Morocco and Mauritania in their respective controlled areas.<sup>858</sup> Morocco and Mauritania's claims to the Territory under the right to territorial integrity were based on supposed historical ties to Western Sahara (prior to the Spanish colonization), but encountered the opposition from the *Frente Popular para la Liberación de Saguia el-Hamra y de Río de Oro* (Polisario Front), which began as an insurgent movement in 1973 representing the Saharawi people who claimed independence and have been internationally recognised as the political representative of the people of Western Sahara since 1979.<sup>859</sup> Then, following the withdrawal of Mauritania from the non-self governing territory in 1979, Morocco has remained the sole State exercising administrative authority in Western Sahara, maintaining *de facto* control over more than two-thirds of this Territory (which was *de facto* annexed). This formal system of external control appears as a situation of occupation of that area.<sup>860</sup>

The existence of any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom Morocco or the Mauritanian entity were firmly rejected by the ICJ in its advisory opinion in 1975. The Court affirmed the right of the people of Western Sahara to self-determination, whose “*essential feature*” was identified in the free choice of a people to determine its future territorial status.<sup>861</sup>

Regardless of this clear opinion, Morocco has undertaken several unilateral steps denoting a constant denial of such a right; its categorical insistence that Western Sahara constitutes an integral part of its territory still endures, despite the UN-sponsored solutions advanced over the years.<sup>862</sup>

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<sup>858</sup> According to the Declaration of Principles on Western Sahara, which was concluded in Madrid between Spain, Morocco and Mauritania (“*the Madrid Agreement*”) on 14 November 1975, the powers and responsibilities of Spain were supposed to be transferred to a temporary tripartite administration. However, the Madrid Agreement neither transferred sovereignty over the territory nor conferred upon any of the signatories the status of administering power (because Spain alone could not transfer unilaterally such authority). Thus, the international status of Western Sahara as a Non-Self-Governing Territory was not affected.

<sup>859</sup> In February 1976 the Polisario Front proclaimed the Sahrawi Arab Democratic Republic, which has become a party to the African Union since 1984, whereas Morocco revoked its membership from it in the same year. A guerrilla war for independence against Moroccan forces (and also against Mauritania until 1979) was run by the Polisario Front (with the support of Algeria) until 1991.

<sup>860</sup> GA Res. 34/37, 21 November 1979, para. 5, deploring the aggravated situation of “*continued occupation*” of Western Sahara.

<sup>861</sup> See ICJ, *Western Sahara case*, Advisory Opinion, 16 October 1975, paras. 161-162.

<sup>862</sup> For an overview of Morocco's actions severely impeding the exercise of this right (starting from the “*Green March*” of 350.000 unarmed civilians into Western Sahara on 17 October 1975) and of the UN-sponsored solutions, see M. Dawidowicz, “Trading fish or human rights in Western Sahara? Self-determination, non-recognition and the EC-



Indeed, since the withdrawal of Spain in 1976, a settlement in Western Sahara addressing the subsequent fighting between Morocco and the Polisario Front has been searched for. This issue has been dealt with both by the Security Council as a question of peace and security,<sup>863</sup> and by the General Assembly as a question of decolonisation. In particular, the inalienable right of the Sahrawi people to self-determination and independence has been consistently recognised by the latter, calling for the exercise of this right in accordance with the decolonization principles embodied in its two Resolutions 1514 (XV) and 1541 (XV).<sup>864</sup> They embody the requirements to give effect to Articles 73 and 74 of the UN Charter, which lays down the fundamental principles applicable to non-self governing territories.<sup>865</sup>

Even the subsequent General Assembly resolutions on the question of implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples are noteworthy for the purpose of clarifying the legal regime applicable to Western Sahara.<sup>866</sup> In particular, the administering Powers were demanded to guarantee that all economic activities in the Non-Self-Governing Territories concerned did not negatively affect the peoples' interests, but be directed towards assisting them in the exercise of their right to self-determination. They also included provisions intended to protect the "*inalienable rights*" of the peoples of those Territories to their natural resources, and to establish and maintain control over the future development of those

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Morocco Fisheries Agreement", in D. French (ed.), *Statehood and Self-Determination. Reconciling Tradition and Modernity in International Law*, Cambridge, 2013, 256-268.

<sup>863</sup> In its early SC Res. 377 (1975) of 22 October 1975 and SC Res. 379 (1975) of 2 November 1975 it requested the Secretary General to enter into consultations with the parties. Since 1988 the political process aiming at a peaceful settlement of the question of Western Sahara has been on the Security Council's agenda. SC Res. 690 (1991) established the UN Mission for the Referendum in Western Sahara (MINURSO), aimed at implementing a "*Settlement Plan*", including a referendum in which the people of Western Sahara would choose between independence and integration with Morocco. After years of failed initiatives, some positive developments followed UN-sponsored talks since 2007: negotiations started as requested by SC Res. 1754 (2007), the Polisario Front and Morocco submitted their own settlement proposals to the UN, though their positions remained far apart on the definition of self-determination. The meeting was held in February 2010, but there is still no solution on the core substantive issues. See the *Reports of the Secretary-General on the situation of Western Sahara*, S/2007/619 of 19 October 2007, S/2011/249 of 1 April 2011, S/2012/197 of 5 April 2012, S/2013/220 of 8 April 2013. Notably, SC Res. 1920 (2010) addressed the importance of "*making progress on the human dimension of the conflict as a means to promote transparency and mutual confidence*".

<sup>864</sup> See GA Res. 1514 (XV), Declaration of the Granting of Independence to Colonial Countries and Peoples, UNGAOR, 15<sup>th</sup> Sess., (1960); GA Res. 1541 (XV), *Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter*, UNGAOR, 15<sup>th</sup> Sess., (1960). See also GA Res. 1542 (XV), *Transmission of information under Article 73e of the Charter*, UNGAOR, 15<sup>th</sup> Sess., (1960). In this vein, GA Res. 2072 (XX) of 16 December 1965 requested Spain (as "*administering Power*" under Chapter XI of the UN Charter) to take immediate steps towards the decolonization of Western Sahara in accordance with the right to self-determination. Then, GA Res. 2229 (XXI) of 20 December 1966 called on Spain, Morocco, Mauritania and Algeria to organise a referendum in order to enable the Sahrawi people to freely exercise such a right.

<sup>865</sup> Particularly, the principle that the inhabitants' interests are prevalent, and that their wellbeing and development is the "*sacred trust*" of their respective administering Powers, which have accepted "*the obligation to promote to the utmost*" it.

<sup>866</sup> GA Res. 35/118, 11 December 1980; GA Res. 52/78, 10 December 1997; GA Res. 54/91, 6 December 1999; GA Res. 55/147, 8 December 2000; GA Res. 56/74, 10 December 2001.

resources.<sup>867</sup> They address the need to protect the peoples of Non-Self-Governing Territories from exploitation and plundering by foreign economic interests.<sup>868</sup> A significant distinction has been developed between economic activities detrimental to the peoples of such Territories and those directed to benefit them, particularly contributing to their socio-economic development.<sup>869</sup>

### 3. The prohibition to change the legal status of the occupied territory

One of the types of obligations resting upon the occupier regards the status of the territory and primarily arises under general principles of international law, including the prohibition of the use of force, equality of States, and non-intervention. In this vein, it is undisputed that *the occupation of a territory does not affect its legal status*: whatever the occupier might claim occupation does not stand for any change of status, nor annexation nor “*liberation*”.<sup>870</sup>

This principle is confirmed in Article 4 AP I,<sup>871</sup> besides underlying previous sources. It in fact

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<sup>867</sup> GA Res. 1803 (XVII) of 14 December 1962, *Permanent sovereignty over natural resources*, established the principle concerned as *the right of peoples and nations to use and dispose of the natural resources in their territories in the interest of their national development and well-being*. A reaffirmation is contained in the ICESCR, the ICCPR, and in subsequent resolutions, such as GA Res. 3201 (S-VI) of 1 May 1974 (Declaration on the Establishment of a New International Economic Order) and GA Res. 3281 (XXIX) of 12 December 1974 (Charter of Economic Rights and Duties of States).

The principle of “*permanent sovereignty over natural resources*”, as a corollary to the principle of territorial sovereignty or the right to self-determination, is unquestionably part of customary international law. However, its legal scope and implications have remained contentious. In the context of Western Sahara, the question discussed in this regard has been whether the principle of “*permanent sovereignty*” prohibits any activities related to natural resources undertaken by an administering Power in a Non-Self-Governing Territory, or only those which are undertaken in disrespect of the needs, interests and benefits of the people of that Territory.

Of note is that the 2002 legal opinion by the Under-Secretary General for Legal Affairs, requested by the Security Council to address the issue about “*the legality ... of actions allegedly taken by the Moroccan authorities consisting in the offering and signing of contracts with foreign companies for the exploration of mineral resources in Western Sahara*”. This issue was analyzed by analogy as part of the more general question of whether mineral resource activities in a Non-Self-Governing Territory by an administering Power are illegal, as such, or only if conducted in disregard of the needs and interests of the people of that Territory. The support for the latter conclusion was explained in the legal opinion in view of the analysis of relevant provisions of the UN Charter, GA resolutions, the ICJ case law and States’ practice.

<sup>868</sup> See also GA Res. 48/46 of 10 December 1992 and GA Res. 49/40 of 9 December 1994, adopted under the agenda item entitled “Activities of foreign economic and other interests which impede the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Territories under Colonial Domination”. It reiterated that “*the exploitation and plundering of the marine and other natural resources of colonial and Non-Self-Governing Territories by foreign economic interests, in violation of the relevant resolutions of the United Nations, is a threat to the integrity and prosperity of those Territories*”, and that “*any administering Power that deprives the colonial peoples of Non-Self-Governing Territories of the exercise of their legitimate rights over their natural resources ... violates the solemn obligations it has assumed under the Charter of the United Nations*”.

<sup>869</sup> GA Res. 50/33 of 6 December 1995, para. 2, asserting that “*the value of foreign economic investment undertaken in collaboration with the peoples of the Non-Self-Governing Territories and in accordance with their wishes in order to make a valid contribution to the socio-economic development of the Territories*”. This position was reaffirmed, see GA Res. 52/72 of 10 December 1997, GA Res. 53/61 of 3 December 1998, GA Res. 54/84 of 6 December 1999, GA Res. 55/138 of 8 December 2000, GA Res. 56/66 of 10 December 2001.

<sup>870</sup> See C. Greenwood, “The administration of occupied territory in international law”, in Greenwood, *Essays on war in international law*, 2006, at 353.

<sup>871</sup> Article 4 API reads: “*The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions*

resonates in several rules of the Hague and Geneva laws, in view of which the occupant is supposed to introduce as few changes (*i.e.* demographical, geographical, political) as possible in order to maintain the *status quo* of the territory at the beginning of occupation. The usufructuary rules embodied in Article 55 HRs are emblematic.<sup>872</sup> Similarly, Article 47 GCIV prohibits any deprivation of the benefits afforded to “protected persons” under the same Convention which could stem, in particular, from “*any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory*”, or from the annexation of the entire or part of this territory. Another significant example is the prohibition of any kind of transfer of the occupant’s population to such territory (regardless of whether it was voluntary or forced) under Article 49(6) GCIV, reflective of customary international law.

Occupation does not transfer sovereignty nor denote permanency. The obligation to *preserve the legal status of the occupied territory* primarily precludes the occupant from unilaterally modifying it, including by annexing the territory or dismembering it to constitute autonomous and independent state entities.<sup>873</sup> More generally, such preclusion covers any demographic or territorial modification susceptible to create a *fait accompli*, namely a factual situation on the ground that is irreversible and substantially equivalent to an annexation.<sup>874</sup>

As anticipated, the scope of this obligation requires consideration in light of the relevance acquired by the principle of self-determination in international law since the latter half of the

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*and this Protocol shall affect the legal status of the territory in question*”. See J. Pictet (ed.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, pp. 73-74, also highlighting that the principle follows from the inadmissibility of the use of force, as laid down in the UN Charter and elaborated in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the UN Charter (GA Resolution 2625 (XXV)).

<sup>872</sup> Article 55 HRs reads: “*The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied territory. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct*”.

<sup>873</sup> Any purported annexation, or agreement for annexation, would be ineffective and would not change the legal status of the territory. For example, the transfer of administrative authority over the Territory of Western Sahara to Morocco and Mauritania in 1975 did not affect the international status of Western Sahara as a Non-Self-Governing Territory: the 1975 Madrid Agreement between Spain, Morocco and Mauritania did not transfer sovereignty over that Territory, nor did it make any of the signatories the administering power of that territory - a status which Spain could not have transferred unilaterally: see S/2002/161, *Letter dated 29 January 2002 from the Under Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council*, 12 February 2002, para. 6. As appropriately highlighted by C. Chinkin, however, Morocco’s exercise of *de facto* administrative authority, assisted by its military control over more than two-thirds of the Western Sahara, represents “*a formal system of external control*”; Morocco occupies that area, see C. Chinkin, “Laws of occupation”, *op. cit.*, p. 199.

<sup>874</sup> See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 121 (“*the construction of the wall and its associated regime has creat(ed) a ‘fait accompli’ on the ground that could well become permanent, in which case, and notwithstanding the formal characterisation of the wall by Israel, it would be tantamount to de facto annexation*”).

twentieth century.<sup>875</sup> Before exploring what this means in relation to the *cultural, social and economic dimensions of the right to self-determination*, it is worth focusing on the general impact of this principle in its scope.

Primarily, the occupant's *de facto* control of the foreign territory implies *per se* an impediment to a full enactment of the right to self-determination of the local population.<sup>876</sup> This appears tolerated by the international community as far as the occupation is temporarily limited and does not permanently prejudice the legal status of the occupied territory. In this regard, it is worth mentioning that the legitimacy of the Ugandan occupation of the Congolese region of Ituri was assessed by the International Court of Justice exclusively under the *ius ad bellum* and the *ius in bello*, thus implicitly excluding the violation by Uganda of the right to self-determination of the local population.<sup>877</sup>

Conversely, the principle of self-determination may *enhance* the obligation to preserve the legal status of the occupied territory. While this duty was traditionally justified as necessary to protect the status of the sovereign State holding title to the territory prior to the occupation, under contemporary international law - and precisely in view of that principle - sovereignty is to be vested in the local population living under occupation. Accordingly, any attempts to annex the occupied territory or to impose a new legal status from the outside also constitutes, in general terms, a violation of its right to self-determination, and, in a more constricted fashion, a violation of an external or merely an internal self-determination.

In any case, it is precisely this principle that has substantiated the expansion of the scope of application of the obligation to preserve the legal status of the occupied territory and the related prohibition from annexing it (or equivalent practices) to the occupied Palestinian territories, notwithstanding the absence of State sovereignty exercised over them.<sup>878</sup> In this regard, it is worth

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<sup>875</sup> See L. Cardona, "Le principe du droit des peuples à disposer d'eux-mêmes et l'occupation étrangère", in *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon*, Bruxelles, 2007, p. 855 ff.

<sup>876</sup> Y. Jung, "In pursuit of Reconstructing Iraq: Does Self-Determination Matter?", 33 *Denver Journal of International Law and Policy*, 2005, p. 391 ff., at 404.

<sup>877</sup> Antonio Cassese appears to link the legitimacy of occupation, in light of the principle of self-determination, to the respect of the norms regulating the use of force; according to Cassese, "*self-determination is violated whenever there is a military invasion or belligerent occupation of a foreign country, except where the occupation - although unlawful - is of a minimal duration or is solely intended as a measure of repelling, under Article 51 of the UN Charter, an armed attack initiated by the vanquished Power and consequently is not protracted*". On these issues, see also O. Ben-Naftali, A. Gross, K. Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory", *Berkeley Journal of International Law*, 2005, p. 551 ff.; Y. Ronen, "Illegal Occupation and its Consequences", *Israel Law Review*, 2008, p. 201 ff.

<sup>878</sup> The land in question, however, was not open for title acquisition as *terra nullius*; in this case the sovereignty did reside with the Palestinian people, although latent until the time they might implement their want, so to say "*in abeyance*"; for

highlighting that the international community has recognised Israel as a legitimate party to the negotiations for the solution of the Palestinian question, considering the Israeli involvement as essential for any sustainable choice undertaken by the Palestinians. Accordingly, the conduct as occupying power has been deemed in violation of their right to the (external) self-determination as far as it has overcome the conditions agreed with them<sup>879</sup> by attempting to unilaterally affect one of the three factual conditions which define the potential State (*i.e.* permanent population, representative authority, defined territory).<sup>880</sup> Notably, several UN political organs have condemned the implicit annexation of East Jerusalem<sup>881</sup> and the practices and policy of settlements in the Palestinian and other Arab territories occupied since 1967, which have resulted “in changing the legal status and geographical nature” and substantially shaping the demographic composition of those territories;<sup>882</sup> resulting in a critical depletion of natural resources, especially water resources, thereby threatening an irreparably impoverishment of the soil on which the future State should stand.

Along with such settlements, the Israeli construction of the “security fence” since 2002 has been deemed to alter the demographic composition of those territories (inasmuch as it has contributed to the departure of Palestinians from certain areas), thus impeding severely the exercise of their right to self-determination. Besides censuring the wall as able to create a factual situation irreversible and substantially equivalent to an annexation, the International Court of Justice has deemed it an element that subtracts a part of the territory to the availability of Palestinians and prevents the maintenance of those links between different communities on which a developing union State relies, *de facto* unilaterally reducing the space within which the concerned population can exercise such right.<sup>883</sup>

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an analysis on this point, see N. Berman, “Sovereignty in Abeyance: Self-Determination and International Law”, 7 *Wisconsin International Law Journal*, 1988, pp. 51-91.

<sup>879</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 162, in which the Court refers to the Roadmap approved by SC Res. 1515 (2003).

<sup>880</sup> See F. Gareau, “Shouting at the Wall: Self-determination and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”, *LJI*, 2005, p. 489 ff., 507 ff.

<sup>881</sup> See *Basic Law: Jerusalem, Capital of Israel* of 30 July 1980, in [www.mfa.gov.il](http://www.mfa.gov.il), which declares Jerusalem “complete and united” capital of the State of Israel, though without explicitly establishing the annexation of the east part of the city.

<sup>882</sup> See SC Res. 446 (1979), particularly paras. 1 and 3, determining that “the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no legal validity and constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East”, and calling upon “Israel, as the occupying power, to abide scrupulously by the 1949 Fourth Geneva Convention, to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem, and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories”. See also SC Res. 452 (1979) and SC Res. 465 (1980), in particular paras. 5 and 8.

<sup>883</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 122. The Court recalled that “the planned route would incorporate in the area between the Green Line and the wall more than 16 per cent of the territory of the West Bank” according to the Secretary-General’s report, stressing that around 80 per cent of the

It is noteworthy that, even recently, the right to self-determination of the Palestinian people - viewed as “including the right to determine how to implement self-determination, the right to have a demographic and territorial presence in the Occupied Palestinian Territory and the right to permanent sovereignty over natural resources” - has been explicitly deemed violated through the existence and ongoing expansion of Israeli settlements.<sup>884</sup>

Thus, it appears that the practice of one of the most debated cases of long-standing occupation lays emphasis on the significance as well as the necessity of considering the scope of the obligation to preserve the legal status of the occupied territory *in light of the principle of self-determination as articulated in its economic, social and cultural dimensions* (rather than the political claim to independent statehood). Nonetheless, the legitimacy of measures and activities that are potentially capable of compromising the legal status of the occupied territory in view of such dimensions (*e.g.* the exploitation of natural resources, the settlements policies) can be examined even under other obligations ensuing from the law of occupation.

Conversely, it is worth noting that the principle of self-determination may *diminish* the rigidity of the conservationist premises of this regime.<sup>885</sup> In this vein, the respect for the will of the people living under a situation of protracted occupation should be taken into due account by the occupying power when reviewing whether the local laws in force ought to be reformed or modified to accommodate views of dynamic social, economic and political forces in the occupied territory.<sup>886</sup>

#### **4. The obligation to restore and ensure public order and life in occupied territory**

Not being the sovereign of the affected territory the occupant is allowed to exercise therein a *de facto*

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settlers (that is 320,000 individuals) would reside in that area, and also 237,000 Palestinians. The Court added that, as a result of such a construction, around 160,000 other Palestinians would live in almost entirely “encircled communities”. Therefore, the Court concluded that “*the route chosen for the wall gives expression in loco to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council*”. Furthermore, the Court highlighted the additional risk of “*further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing (as explained in paragraph 133) to the departure of Palestinian populations from certain areas*”. Thus, it was determined that such a construction, together with previously adopted measures, “*severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel’s obligation to respect that right*”.

<sup>884</sup> See *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. A/HRC/22/63, 7 February 2013, paras. 32-38.

<sup>885</sup> R. Kolb, “Étude sur l’occupation et sur l’article 47 de la IV<sup>ème</sup> Convention de Genève du 12 août 1949 relative à la protection des personnes civiles en temps de guerre: le degré d’intangibilité des droits en territoire occupé”, 10 *AfYbkIL*, 2002, 267, p. 313.

<sup>886</sup> See Y. Arai-Takahashi, *The Law of Occupation*, *op. cit.*, 2009, p. 67.

authority to satisfy its military exigencies as well as furthering civil life, provided that such exercise is not prohibited by the laws of occupation and is compatible with international law.

In restraining its legislative capacity that has been transferred, Article 43 HRs legitimises a limited authority of the military commander administering the occupied territory to comply with its positive obligations to restore, and ensure, as far as possible, “*l’ordre et la vie publique*” therein, while respecting, unless absolutely prevented, the laws in force in the country. In the precursors to this article, namely the Brussels Convention of 1874 (which never entered into force), these basic obligations were encompassed in two provisions (Arts. 2 and 3),<sup>887</sup> then combined into the single text of 1907; this integration corroborates that the occupant’s legislative powers and the obligation to respect local laws are part of general principles.<sup>888</sup>

Of note is that Article 43 HRs has been acknowledged as declaratory of customary international law.<sup>889</sup> Several legal scholars have confirmed this view.<sup>890</sup>

#### **4.1. The meaning of the expression “*vie publique*”**

The official French version of this provision refers to “*l’ordre et la vie publics*”, and criticisms that the first English translation, namely “*public order and safety*”, did not accurately convey the meaning of the original are well known.<sup>891</sup> The latter indeed embraces *all aspects of public or civil life*, rather than solely security and public order. Evidence of this wider interpretation is found in the legislative history of

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<sup>887</sup> These two provisions evoked the occupant’s extensive legislative authority and a limited possibility to modify the existing laws concerning circumstances of necessity.

<sup>888</sup> See E.H. Schwenk, “Legislative Power of the Military Occupant under Article 43, Hague Regulations”, 54 *Yale Law Journal*, 1945, p. 397; M. Sassoli, “Legislation and Maintenance of Public Order and Civil Life by Occupying Powers”, *EJIL*, 2005, pp. 663-664; Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge, 2009, pp. 90-91; Y. Arai-Takahashi, *The Law of Occupation*, *op. cit.*, 2009, pp. 93-96.

<sup>889</sup> See Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 30 September and 1 October 1946, p. 65 (reprinted in 41(1) *AJIL*, 1947, pp. 248-249). See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, paras. 89 and 124. The Israeli High Court of Justice has also acknowledged the applicability and justiciability of the 1907 Hague Regulations in view of their customary value, see the *Beth-El* case (HCJ 606/78, *Ayub et al. v. Minister of Defence et al.*) and the *Bekaot* case (HCJ 610/78, *Matawa et al. v. Minister of Defence et al.*), 33(2) *PD*, 113, both summarised in *Israel Yearbook on Human Rights*, 1979, pp. 337-342; see also HCJ 393/82, *Jami’at Ascan* case, 785, 793. See Shamgar (ed.), *Military Government in the Territories Administered by Israel: the Legal Aspects*, 1982.

<sup>890</sup> See G. Von Glahn, *The Occupation of Enemy Territory - A Commentary on the Law and Practice of Belligerent Occupation*, 1957, pp. 10-12; E. Benvenisti, *The International Law of Occupation*, 1993, p. 8; D. Kretzmer, *The Occupation of Justice - The Supreme Court of Israel at the Occupied Territories*, 2002, p. 57; M. Sassoli, “Legislation and Maintenance of Public Order and Civil Life by Occupying Powers”, *EJIL*, 2005, p. 663. For analysis of the recognition of the customary law status of the Hague Regulations by municipal Courts, see Morgenstern, “Validity of Acts of the Belligerent Occupant”, 28 *BYIL*, 1951, 291, p. 292.

<sup>891</sup> See E.H. Schwenk, “Legislative Power of the Military Occupant under Article 43, Hague Regulations”, 54 *Yale Law Journal*, 1945, 393, at 397, aptly suggesting that a more comprehensive phrase was “*public order and civil life*”. Such critique is endorsed by many scholars, see E. Benvenisti, *The International Law of Occupation*, 1993, p. 9; M. MacDougal and F. Feliciano, *Law and Minimum World Public Order*, 1961, p. 746; D. Kretzmer, *The Occupation of Justice - The Supreme Court of Israel at the Occupied Territories*, 2002, p. 58.

this article: according to the explanation proposed by Baron Lambermont at the time of the Brussels Conference of 1874, “*la vie publique*” encompasses “*des fonctions sociales, des transactions ordinaires, qui constituent la vie de tous les jours*” - “*social functions, ordinary transactions which constitute daily life*”.<sup>892</sup> Legal scholarship has also relied on this broad interpretation by referring to several elements concerning the welfare of the civilian population.<sup>893</sup>

Significantly, an extensive meaning of the French phrase “*l’ordre et la vie publics*” has been endorsed by several judicial bodies. After the World War II, it was interpreted as “*the whole social, commercial and economic life of the community*”.<sup>894</sup> Then, a similar approach was taken by the Israeli High Court of Justice. Primarily, the French version was deemed to imply that the occupier’s duty is not narrowed to *prevent breaches of public order*, rather *encompassing* the duty to *restore and ensure* “*the whole social, commercial and economic life of the community*”.<sup>895</sup> However, while a wide interpretation of public life was agreed, the judges disagree *on the way* to appraise whether the measures are truly adopted to ensure civil life.<sup>896</sup> In focusing on the *motive* behind the measure (*i.e.* if adopted for the good of the

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<sup>892</sup> Baron Lambermont was the Belgian representative at the negotiations for the “Brussels Declaration”, which codified several old norms of international humanitarian law, see Ministère des Affaires Etrangères de Belgique, *Actes de la Conférence de Bruxelles de 1874 sur le projet d’une convention internationale concernant la guerre, protocoles des séances plénières, protocoles de la Commission déléguée par la conférence, annexes*, 1874, at 23, reproduced in E.H. Schwenk, *op. cit.*, at 393.

<sup>893</sup> See E.H. Schwenk, “Legislative Power of the Military Occupant under Article 43, Hague Regulations”, 54 *Yale Law Journal*, 1945, at 393, and 400-401; G. Von Glahn, *The Occupation of Enemy Territory - A Commentary on the Law and Practice of Belligerent Occupation*, 1957, at 97; M. McDougal and F. Feliciano, *Law and Minimum World Public Order*, Yale University Press, 1961, reprinted as *idem*, *The International Law of War - Transnational Coercion and World Public Order*, 1994, at 746; L. Oppenheim, “International Law: A Treatise”, in H. Lauterpacht (ed.), Vol. II, *Disputes, War and Neutrality*<sup>7</sup>, Longmans Green and Co., 1963, at 434; T. Meron, “Applicability of Multilateral Conventions to Occupied Territories”, 72 *AJIL*, 1978, 542, at 549; E. Benvenisti, *The International Law of Occupation*, 1993, at 9; D. Kretzmer, *The Occupation of Justice - The Supreme Court of Israel and the Occupied Territories*, 2002, at 58-59.

<sup>894</sup> See Control Commission Court of Criminal Appeal, established at the British Zone of Control in Germany, *Grahame v. The Director of Prosecutions*, 26 July 1947, Case No.103, *Annual Digest and Reports of Public International Law Cases*, Vol. 14, 1947, 228, at 232. Nonetheless, this Tribunal clarified that the Military Government of Germany set up by the four Allied Powers was “*unprecedented*” as it represented “*the supreme organs of government in Germany*”, and that the legislative power of the Control Council and the Zone and Sector Commanders were not limited by the restrictions under the Hague Convention regarding belligerent occupation, see *ibid.*, at 233.

<sup>895</sup> See HCJ 337/71, *Christian Society for Holy Places v. Minister of Defence*, 26(1) PD 574, (case summarised in *Israel Yearbook on Human Rights*, 1972, p. 354). This was the first published decision dealing with the Occupied Palestinian Territories: it dealt with an amendment introduced by the military commander into the Jordanian Labour Law to facilitate mandatory arbitration of labour disputes. The petitioner, which was a charitable organization running a hospital in Bethlehem and implicated in a dispute with the hospital staff, argued to the Court that the amendment to the Jordanian Law exceeded the occupier’s powers under Article 43 HRs.

<sup>896</sup> This important aspect of the judgment will be considered hereafter. The majority agreed on focusing on the *motive* behind the measure (if it is adopted for the good of the population then it would be considered as necessary to ensure civil life); conversely, the minority highlighted the distinction between “restoring” and “ensuring” public order and civil life (the test for the legitimacy of the measures is the *situation existing before the occupation began*: the occupier cannot introduce innovations even if its motive is to advance the welfare of the local population, and “*ensuring measures must not change the nature of public order and civil life that were restored*”). These two perspectives reflect radically distinct approaches to the status and role of the military government in occupied territory. Both approaches seem tricky: the one of the “*benevolent occupant*” would cover far-reaching changes in occupied territory under the pretext of measures taken for the good of the protected population, while the “*maintenance*” approach would be plausible in a short occupation during



population then it would be deemed necessary to ensure civil life), the Court finally endorsed the view of the “*benevolent occupant*” who considers the changing circumstances in the occupied territory and adopts the measures needed to further the civil life of the local population (taken as its general welfare).

Notably, in a later decision the same High Court described the term “public life” to include “conducting a proper administration on all its branches accepted nowadays a well-functioning country, including security, health, education, welfare, and also, *inter alia*, quality of transportation ...”.<sup>897</sup> Furthermore, it was affirmed that Article 43 HRs “extends to the public order and life in all their aspects . . . such as economic, social, educational, hygienic [*sic*], medical, traffic and similar matters that are connected with life in a modern society”;<sup>898</sup> according to the Court’s theory, the military government may determine the notion of “*proper administration*” and of its powers as concepts that are suited to “*a modern and civilized state at the end of the twentieth century*”, rather than measured by the *laissez-faire* governance (traditionally prevalent at the time of the adoption of the Hague Regulations).<sup>899</sup>

Overall, the potential of widening the parameters of the concept “*vie publique*” should be noted. This may be a suitable way for adapting the occupant’s measures to meet specific needs and interests of the civilian population in the area of ESC rights. In this vein, it seems reasonable to contend the coherence of such approach with a contemporary interpretation of Article 43 HRs that aptly takes into serious account the evolution of the law. In particular, the Fourth Geneva Convention, Protocol I and international human rights law may require the occupier’s action in areas wider than the mere maintenance of public order and safety, eventually supporting the local authorities in the administration of the occupied territory, so as to protect the local population. Indeed, besides the duty to prevent, investigate and prosecute violations of civil rights,<sup>900</sup> *negative and*

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which social and economic conditions mostly remain as they were at the beginning of the occupation, but it would not endure in a protracted occupation with changing social, economic and political circumstances.

<sup>897</sup> See HCJ 202/81, *Tabib et al., v. (a) Minister of Defence, (b) Military Governor of Tulkarem*, 36(2) PD 622, at 629, English excerpt in 13 *Israel YbkHR*, 1983, 364. The case concerned the expropriation of land for construction of a road to circumvent a town.

<sup>898</sup> See HCJ 393/82, *Jami’at Ascan* case, para. 18, at 19 - English summary in 14 *Israel YbkHR*, 1984, 301, at 306. The case concerned the construction of high-speed motorways. The case law of the Supreme Court sitting as the High Court of Justice with regard the military commander’s power is anchored in this judgment, as is highlighted in the following sections.

<sup>899</sup> See HCJ 393/82, *Jami’at Ascan* case, at 800.

<sup>900</sup> This primarily implies the obligation to prevent, investigate and prosecute violations of the civil rights of local inhabitants as victims of crimes perpetrated by State and non-State organs in the occupied territory, see ICJ, *Congo v. Uganda*, *op. cit.*, para. 178 (“*The Court thus concludes that Uganda was the occupying Power in Ituri at the relevant time. 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*”).

*positive obligations concerning ESC rights are established upon the occupier*, as previously anticipated in section 2 and detailed in the following section 4.2.

In this context the jurisprudence of the Israeli High Court of Justice remains noteworthy. In assessing the public welfare of the Palestinian population, this Court has often taken into specific consideration their *substantial interests regarding economic and social welfare*. As far as the supply of electricity on the West Bank is concerned, however, two famous cases have shown different judicial approaches to the occupier's measures dealing with such interests, which ended up widening or restricting the scope of governmental powers under Article 43 HRs.<sup>901</sup> In one case the Court determined that attaching the West Bank city of Hebron to the Israeli national electricity network was a military commander's decision taken in respect of the welfare of the local population as it would assure a reliable source of electricity, thus deeming it an act taken to ensure "*civil life*".<sup>902</sup> Conversely, in another case the Court affirmed the unlawfulness of the military commander's decision to place the supply of electricity to East Jerusalem and part of the West Bank in the hands of a supplier from outside the occupied territories (*i.e.* the Israeli Electricity Company instead of the local Jerusalem company) since its implications were beyond economic and technical aspects.<sup>903</sup> Here, *the benefit of the local population* was not measured in sole terms of economic development and social welfare, but also took into account political interests (*i.e.* it could be worse off receiving a steady supply of electricity from a national company than it would be receiving an inferior supply from a local company). Moreover, it was addressed that the temporary nature of the military government in essence requires him to generally refrain from changes that have extensive and

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<sup>901</sup> For a broad discussion of the two models of judicial decision-making illustrated in these two cases in which the authorities claim that measures adopted to serve political interest of Israel further the welfare of the local population, see D. Kretzmer, *The Occupation of Justice. The Supreme Court of Israel and the Occupied Territories*, State University New York Press, 2002, pp. 64-68.

<sup>902</sup> See HCJ 256/72, *Electric Corporation for Jerusalem District Ltd. v. Minister of Defence et al.*, 27(1) PD 124, at 22, excerpted in 5 *Israel YbkHR*, 1975, 381 (herein after *Hebron Electricity* case). As aptly addressed by David Kretzmer, the Court followed the approach of the "*benevolent occupant*" primarily adopted in the *Christian society* case, but, as opposed to that case, there were clear political implications in the occupier's decision to make the residents of Hebron dependent on an Israeli supplier of electricity; not only was the occupier's decision not taken solely for the benefit of the population, but the latter was not the "*dominant factor*" either in that decision. Moreover, apart from the arguable economic benefits to the residents of Hebron, the effect of making them dependent on an Israeli supplier was certainly not in their political interests. See D. Kretzmer, *op. cit.*, at 65.

<sup>903</sup> HCJ 351/80, *Jerusalem District Electricity Company v. (a) Minister of Energy and Infrastructure, (b) Commander of the Judea and Samaria Region*, 35(2) PD 673, at 692, excerpted in 11 *Israel YbkHR*, 1981, 354. The local Palestinian company challenged the validity of the two acquisition orders issued by the military commander by arguing that they violated Article 43, given the duty upon him to preserve the *status quo* without introducing drastic changes. Moreover, the motive of the occupant was identified as being the intention to tie local residents to the Israel Electricity Company, rather than improve the supply of electricity.

lasting effects.<sup>904</sup>

Remarkably, both methods accepted that the legitimacy of those measures depended on *whether they were taken for the benefit of the population*; however, in one case the Court ignored the political reasons behind them and emphasised the short-term material benefit to the local population, while in the other case the temporariness of the military regime was deemed a serious limit to its governmental powers and the welfare of the local population was not relegated to questions of material benefit.<sup>905</sup>

#### **4.2. Restoring and ensuring civil life: nature and implications for ESC rights**

As is generally addressed in legal literature, *restoring and ensuring public order and civil life* is an obligation of means, since these two concepts represent just aims that the occupier pursues with lawful, available, and proportionate<sup>906</sup> measures. It demands positive actions, specifically by the executive and the judicial branch of the military government. The qualifications in Article 43 HRs “*all the measures in his power*” and “*as far as possible*” do corroborate this view.

A further relevant classification on this general obligation was laid down by Justice Shamgar of the Israeli High Court: the duty to “*restore*” public order and safety would be an “*immediate and primary*” duty, while the duty to “*ensure*” public order and safety would be “*subsequent and continuous*” during the occupation and would necessitate adjustment in accordance with changing social needs concerning security, economy, health and transport.<sup>907</sup> It is likely that the second obligation becomes mostly relevant as the occupation persists for a very long time and when the occupier faces matters mainly connected to the changeable needs and ordinary life of local inhabitants (rather than to combat-like situations).

The opinion that in certain instances an occupier is even “*obliged*” to enact legislation intended to “*ensure ... public order and civil life*” has been suggested in earlier legal scholarship.<sup>908</sup> Subsequent

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<sup>904</sup> As David Kretzmer commented, “*this decision was a voice in the wilderness*”, see Kretzmer, “The law of belligerent occupation in the Supreme Court of Israel”, 94 *IRRC*, 2012, at 219.

<sup>905</sup> See D. Kretzmer, *The Occupation of Justice*, 2002, p. 67-68.

<sup>906</sup> Proportion is particularly required as concerns the population’s interest to have civil life restored and maintained and the possible adverse impact of the occupier’s means on the same population.

<sup>907</sup> See HCJ 69/81, *Abu Aita et al. v. Commander of the Judea and Samaria Region et al.*, Judgment of 5 April 1983 37(2) *PD* 197, at 213, English excerpt in 13 *Israel YbkHR* 348, at 356-357. The twofold requirement (restoring public order/restoring and ensuring civil life) contained in the general obligation of Article 43 was actually highlighted even with respect to the first case on the Palestinian territories, see HCJ 393/82, *Jami’at Ascan* case, in *Israel YbkHR* 301, at 306.

<sup>908</sup> See A. Leurqui, “L’occupation allemande en Belgique et l’article 43 de la Convention de la Haye du 18 octobre, 1907”, 1916, 1 *International Law Notes*, at 54-55, observing that “... lorsque l’occupation se prologue, lorsque, par suite de la guerre, la situation économique et sociale du pays occupé subit des changements profonds, il est bien évident que les nouvelles mesures législatives doivent tôt ou tard s’imposer”. In the same vein, see Greenwood, “The Administration of Occupied Territory in

judicial practice confirms this, as is suggested in a dictum by the United States Military Tribunal at Nuremberg, which articulated the affirmative obligation on the occupant to implement good administration in the occupied territory.<sup>909</sup>

Several *specific prohibitions* laid down in the Fourth Geneva Convention *limit* the measures allowed for the occupier in the exercise of its powers. It proscribes collective punishments (Art. 33), deportations (Art. 49), coercion (Art. 31), torture (Art. 32), the taking of hostages (Art. 34), and the destruction of property belonging to the enemy such as house demolitions (Art. 53).<sup>910</sup>

Certain suggestions on what “*civil life*” represents and what measures may or must be adopted to restore and ensure it are found in occupation law. In the Hague Regulations, relevant provisions deal with family rights, property and religious practice (Art. 46), taxation, contributions and requisitions (Arts. 48-52), public property (Arts. 53, 55, 56). Relevant rules in the Fourth Geneva Convention have been detailed above (Art. 55 on food and medical supplies; Art. 56 on hygiene and public health; Art. 57 on hospitals; Arts. 59-62 on relief; Art. 58 on spiritual assistance; Arts. 51-52 on working conditions, labour market measures and related prohibitions; Art. 50(3) on certain dimensions of education). Protocol I includes Art. 69 on relief and Arts. 63-64(3) on civil defence.

In covering a range of the ESC rights of the protected local population, these IHL provisions impose fundamental duties that do not have a purely negative nature, rather they consist of *due diligence obligations on the occupier according to its actual capacities and means*, though their meaning is not elaborated much. Being the occupier not the sovereign ruler the required standards of action may appear lower than the ones States are expected to comply with under international human rights law. Nonetheless, the extension of such IHL obligations may be questioned in view of the context on the ground, in particular whether the latter requires restrictive or expansive approaches to interpret their normative content. Inevitably the answer is informed by Article 43 HRs alongside the emerging practice; indeed, those rules are properly interpreted in view of the principles and objectives anchored in this “mini-constitution” of occupation law.

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International Law”, in E. Playfair (ed.), *International Law and the Administration of Occupied Territories - Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, 1992, Ch. 7, 241, at 246.

<sup>909</sup> See US Military Tribunal, Nuremberg, 8 July 1947 - 19 February 1948, *Trial of Wilhelm List and Others (Hostage Trial)*, 1949, 8 LRTWC 34, at 57 (Section IV “*The Status of Yugoslavia, Greece, and Norway, and the Partisan Group Operating Therein, at the Relevant Time*”), in which the Tribunal held that “(t)he status of an occupant of the territory of the enemy having been achieved, International Law places the responsibility upon the commanding general of preserving order, punishing crime, and protecting lives and property within the occupied territory. His power in accomplishing these ends is as great as his responsibility. But he is definitely limited by recognised rules of International Law, particularly the Hague Regulations of 1907”.

<sup>910</sup> Pursuant to Article 53 GCIV, “(a)ny destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations”.

#### **4.2.1. The occupier's legislative competence and the context**

In the exercise of his legitimate powers, the interpretation of the *scope of positive measures, actions, policies or efforts* to restore and ensure civil life - including implementing the aforementioned due diligence obligations on ESC rights - appears *contingent to several contextual factors*, and, at a minimum, at least the following three.

##### **4.2.1.a. Control over the territory**

Firstly, the *intensity of control* plays an essential role in determining the scope of the occupier's measures or efforts. The presence of enemy troops or armed resistance movements therein may reduce its capacity to meet the needs of the local inhabitants, but a major commitment in the ordinary administration of the territory, *in the interest of the protected population*, may follow to a gradual pacification of the area concerned.<sup>911</sup> As long as the occupant shares the exercise of powers with independent local authorities, it appears that the due diligence nature of such obligations implies that the responsibility for omissions by the latter may arise to the extent it fails to supervise their conduct.

##### **4.2.1.b. Resources available in the occupied territory**

Secondly, the *actual availability of resources* constitutes another factor to which the occupier's positive measures or policies remain contingent. Besides the qualifications in Article 43 HRs "*all the measures in his power*" and "*as far as possible*", other major provisions covering ESC rights specifically require to implement its obligations "*to the fullest extent of the means available to it*".<sup>912</sup> Moreover, the occupant may rely on the proceeds of taxes imposed on behalf of the State, or even impose extraordinary contributions, so as to meet the needs of the protected local population, whose tax raising capacities might be seriously compromised by the contextual emergency that exists. If this is the case, the occupier is required to integrate available resources with its own, or to accept eventual offers coming from third-party States and international organizations.<sup>913</sup>

In any case, a *rational use of available resources is established*, taking into account all the exigencies to be met in the occupied territory, namely the needs of the local population and those of the

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<sup>911</sup> R. Kolb and S. Vité, *Le droit de l'occupation militaire*, Bruxelles, 2009, p. 392 ff.

<sup>912</sup> Arts. 55 and 56 GCIV; Art. 69 API. Article 2 ICESCR provides a similar formulation by requiring to States parties "*to take steps [...] to the maximum of (their) available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenants*".

<sup>913</sup> Arts. 59 ff. GCIV; Arts. 70 ff. API. On humanitarian assistance in the occupied territory, see Zorzi Giustiniani, "Responsabilità di governo dell'occupante e diritto all'assistenza umanitaria: il caso iracheno", *Dir. Pub. Comp. Eur.*, 2004, at 1589 ff.

occupying forces therein. The temporariness of occupation by nature does not allow it to undertake long-term projects that imply durable planning choices or legislative reforms,<sup>914</sup> rather it permits measures necessary and urgent to maintain a protection level similar to that previously guaranteed by the ousted government of the occupied State.

Even though certain circumstances of occupation (such as its prolonged duration) may raise the need of deeper improving and adjusting positive efforts and actions, their legitimacy would depend on their being strictly critical so as not to render meaningless the rights safeguarded under occupation law.<sup>915</sup> However, such circumstances may even controversially affect the use of natural resources in the occupied territory, as proven by certain issues of interpretation that have surfaced regarding the rules on the management of property. Relevant practice has particularly concerned the occupier's investments and projects whose supposed object was to benefit the local population for developing the economy in the occupied territory (and not strictly necessary for supplying the same population).<sup>916</sup> This will be examined in the following section 6.

#### **4.2.1.c. Time period of occupation**

Thirdly, *the temporal dimension* represents another factor to which the occupant's positive measures or policies remain contingent. The notions of public order, safety, and civil life are likely to evolve over time, especially when combat-like situations are followed by a quasi-absence of hostilities, so arises a need to *adjust the interpretation of the traditional laws of occupation to keep benefiting the protected local population*. Conversely, the occupier's authority remains limited by precise prohibitions and obligations under international law. As anticipated above (section 2.2.d.), an "*inherent dilemma*" on such an authority is that *the extended duration of an occupation* may be invoked to favour either a more *flexible* or more *restrictive* application of occupation law, thus recognising the extensive powers of the occupant or limiting its discretion.

A crucial consideration, however, is that the longer an occupier maintains its presence in the

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<sup>914</sup> R. Kolb and S. Vité, *op. cit.*, at 396. On the prohibition to modify existing laws, see next section 5.

<sup>915</sup> See S. Vité, "The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights: The Examples of Food, Health and Property", *IRCR*, 2008, at 629 ff., at 634. See also CESCR, *Comment No. 3*, paras. 10, 12.

<sup>916</sup> Of particular relevance is the approach followed by the Supreme Court of Israel in several cases. Article 43 HRs would allow the occupier *long-lasting investments* provided they are beneficial for the development of the economy in the occupied territory and they do not introduce changes into the basic institutions therein. In this vein, Article 43 would not only set up a minimum standard for the protection of public order and civil life, but it would also establish a maximum standard, in a way that only those initiatives taken by the occupier beyond the latter standard might be deemed as unlawful. The principal case in which the Court's approach was articulated is that of the *Jami'at Ascan* case, in which the building of a highway was deemed legitimate. Controversial case law has nonetheless surfaced concerning the issue of stone quarries in the West Bank, see HCJ 9717/03, *Naale v. Supreme Planning Council in Judea and Samaria*; HCJ 2164/09, *Yesh Din v. Commander of IDF Forces in Judea and Samaria et al.*, Judgment, 26 December 2011.

foreign territory and the more its policies and practices advance, the more the limits established by occupation law tend to weaken.<sup>917</sup> Accordingly, it remains controversial to which extent the long duration of occupation may be invoked to allow for a permissive application of this regime, especially of IHL provisions on the “preservation of the *status quo*” in this territory. A substantial risk of such an application in fact remains: adjusting those provisions in a way that accommodates the contextual peculiarities but simultaneously circumvents the basic boundaries set by occupation law.

Therefore, contending that the occupier “has to provide more” for the occupied population the longer it remains in the foreign territory poses a key issue: the *legal contours* of such an obligation and *the ways* in which it may be guaranteed that its conduct is in good faith and its intention is to serve “the benefit of local population”, without upholding the occupation indeterminately for its own benefits or undertaking measures otherwise prohibited in short-term occupations (*i.e.* measures insisting on “*development*” as opposed to “*maintenance*” in accordance with the conservationist principle).<sup>918</sup>

In this regard, in dealing (directly or indirectly) with the ESC rights of a protected population living under enduring occupation, certain case law before national courts deserves great attention. To be exact, the prolonged character of the Israeli occupation<sup>919</sup> has been invoked by the High Court of Israel to justify the implementation of *infrastructure projects with enduring effects* on the Palestinian territories, such as the construction of high-speed motorways (the *Jami’at Ascan* case)<sup>920</sup> or high capacity electrical lines (the *Hebron Electricity* case).<sup>921</sup> Recently the protraction of the occupation has been raised in another case concerning the activities for the exploitation of quarries therein (*i.e.* the *Yesh Din* case, which has been critically debated for reasons of judicial inaccurate

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<sup>917</sup> For this reason, Christopher Greenwood highlighted that international law’s regulation of belligerent occupations should be developed towards “*bringing about an end to the conflict which produced the occupation, not in trying to turn a body of law designed to ensure that a military regime observes basic standards of humanity into a device for establishing a liberal democracy or other long-term solution*”, see C. Greenwood, “The Administration of Occupied Territory in International law”, in E. Playfair (ed.), *International Law and the Administration of Occupied Territories*, Clarendon Press, 1992.

<sup>918</sup> The presumption of good faith may result very difficult to maintain in unstable and precarious situations in which trust between enemies in war is inevitably absent and which are featured by long-standing practice of domination and exploitation of foreign territory.

<sup>919</sup> For a recent contribution demonstrating the illegality of this occupation, see O. Ben-Naftali, “Pathological Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory and Other Legal Pathologies”, in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford, 2011, pp. 129-200. According to the author, who considers the Israeli occupation as “*a conquest in disguise*” (at 158), the annexation of East Jerusalem, the establishment and expansion of settlements in the West Bank, the extensive confiscation of Palestinian land, and the construction of the wall evidently indicate the intention of Israel to retain its control over the occupied territory *ad infinitum*.

<sup>920</sup> See HCJ 393/82, *Jami’at Ascan* case. The extent of legislation that could be adopted during prolonged occupation was an issue specifically raised.

<sup>921</sup> See HCJ 256/72, *Electric Corporation for Jerusalem District Ltd. v. Minister of Defence et al.*, *op. cit.*

interpretation (*i.e.* a misunderstanding) of the laws of occupation, as detailed in the section 6).<sup>922</sup>

Notwithstanding the final judgements, it is exactly from this case law that a clarification seems to emerge regarding the view that *the long duration of occupation does constitute a factor enhancing the obligations imposed by Article 43 HRs*. In other words, it contributes to show that the continuation of occupation in fact creates *new restraints* on the standard of action of the occupier. As such, the duration of occupation would allow for restrictive application of IHL provisions on the preservation of the *status quo* in the occupied territory. Accordingly, the impact of such a temporal dimension on the military commander's discretion concretely consists in establishing *further limits to his legitimate powers* and recognising *increased and expanded obligations on him for the benefit of the protected local population*.

Focusing on this case law, the following remarks deal mostly with *the use of the protracted character of occupation in the Court's legal reasoning*, while other considerations on the same cases will be articulated in other sections of the present chapter.

(1) In the *Jami'at Ascan* case, the central issue before the Court was whether the occupant could undertake a project "*that has permanent implications*" reaching "*beyond the time limits of the military government itself*".<sup>923</sup>

Referring primarily to Article 43 HRs, the Court stated that the distinction between short-term and long-term occupations influences the scope of "*the public order and life*"<sup>924</sup>, significantly admitting in the same paragraph that "*the time dimension can be taken into account when considering proper policy in cases in which there is room for policymaking within the Regulations themselves*". It is worth highlighting that this consideration does not mean that the duration would impose to adjust every rule of the Hague Regulations regardless of whether the phrasing of a specific rule allows for it or not.

Then, the Court explicitly asserted that "*(t)he life of a population, like the life of an individual, is not static but is in a perpetual movement that contains development, growth and change. A military government cannot ignore this. It may not freeze life. ... The Military Government's authority therefore extends to taking measures necessary for growth, change and progress. The conclusion is that a military government may develop industry, trade, agriculture, education, health and welfare services and similar matters of proper administration that are necessary for*

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<sup>922</sup> See HCJ 2164/09, "*Yesh Din*" - *Volunteers for Human Rights v. The Commander of IDF Forces in the West Bank and others*, Judgment of 26 December 2011.

<sup>923</sup> HCJ 393/82, *Jami'at Ascan* case, at 17, para. 16.

<sup>924</sup> See HCJ 393/82, *Jami'at Ascan* case, at 23-24, para. 22 affirming that "*military and security needs predominates in a short-term military occupation*" while "*the needs of the local population gain weight in a long-term military occupation*". Therefore for the Court, "*legislative measures (such as new taxation or a new rate of taxation for an existing tax) that might be improper for a short-term military government could be proper for a long-term military government*". However, the Hague Regulations do not foresee such a distinction.



*securing the changing needs of a population in an area subject to belligerent occupation*".<sup>925</sup>

Although limits to such measures rest on the temporary character of the military government, being the occupier not the sovereign ruler,<sup>926</sup> the Court asserted that *investments* favouring development and growth in the occupied territory but simultaneously leading to persisting changes therein "*are permitted if they are reasonably required for the needs of the local population*".<sup>927</sup> This margin of appreciation was deemed reflected in Article 43 HRs (under which the occupier has to take "*all measures in its power*" to ensure "*as far as possible*" public order and life).<sup>928</sup> To the Court, no obligation to adopt far-reaching measures for the development of the occupied territory exists upon the military commander, but the latter may choose to make fundamental investments and this option will rely on factors such as the occupier's "*physical capacity, the manpower (military and civilian) at its disposal and its monetary resources*".<sup>929</sup>

In linking Article 46 HRs (regarding expropriation of private property, as it cannot be confiscated) to Article 43 HRs, the Court found that the high-speed motorway construction plan, as well as the expropriations necessary for its realisation, were in compliance with the Hague Regulations.<sup>930</sup>

Remarkably, two relevant faults in the Court's reasoning and consideration about the time dimension of the occupation may be highlighted. Firstly, the influence of the prolonged character of occupation was not envisaged for the restraints on the occupier's authority (as imposed by the temporary - hence non-sovereign - character of the occupation). This may be problematic: the longer an occupation continues and the wider the occupier's authority is exercised, the more the difference between a military and an ordinary government is hard to perceive (too much authority may result in what some refer to as "*creeping annexation*"). Thus, the duration of an occupation seems to *demand* the occupier to offer *further assurances about the non-permanent or the reversible character of adopted measures*.

Secondly, the "*minimal standard*" identified by the Court for securing the public order and life of

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<sup>925</sup> HCJ 393/82, *Jami'at Ascan* case, at 28-29, para. 26.

<sup>926</sup> HCJ 393/82, *Jami'at Ascan* case, at 27, para. 23.

<sup>927</sup> HCJ 393/82, *Jami'at Ascan* case, at 30-31, para. 27, in which the Court acknowledged that the occupier's measures should not "*blur the distinction between a military and ordinary government*", citing as prohibited measures the "*institutional changes*" or those measures that "*bring about a substantial change in the fundamental institutions*" of the occupied territory.

<sup>928</sup> HCJ 393/82, *Jami'at Ascan* case, at 33, para. 29, in which the Court went on to assert that there is for the occupier "*a minimal standard with regard to securing the public order and life of the local population below which the military government functioning as a proper government may not descend, and that there certainly exists a maximal standard with regard to securing the public order and life of the population above which the military government functioning as a temporary government may not ascend, and that between these two there exists a field of authority within which there is permission and not duty to choose between various options ...*".

<sup>929</sup> HCJ 393/82, *Jami'at Ascan* case, at 33-34, para. 29.

<sup>930</sup> HCJ, 393/82, *Jami'at Ascan* case, at 34-37, para. 31, and at 39-41, paras. 35-37.

the local population - below which the military government functioning as a proper government cannot go - was the only dimension through which the impact of the prolonged character of occupation was analysed. This may be challenging: as far as the time element broadens the scope of “*public order and life*” it affects the overall obligations established in Article 43 HRs. In particular, the long duration of occupation affects, equally, the interpretation of “*as far as possible*” and “*all the measures in his power*”. Accordingly, the more extended is the occupation, the more tricky it becomes for the occupier to invoke that it has no power to adopt measures for the growth and development of the occupied territory, or submitting that it is an impossibility to do so. Thus, the interpretation of the “*minimal standard*” mentioned by the Court seems to *impose* on the persistent occupier *no less than certain positive obligations to act in favour of such development and growth*. This may prove particularly relevant in cases of the occupier’s refusal to apply human rights instruments in the occupied territory.

(2) In the *Yesh Din* case, the question of the prolonged character of occupation was again raised. The central issue was whether the policy to grant licenses to Israeli companies to open and operate stone quarries in the occupied territories of Judea and Samaria was lawful for the military authorities.<sup>931</sup> According to the petitioner, this policy was incompatible with the obligation to manage public property as usufruct under Article 55 HRs; moreover, permitting operation of the quarries could not be deemed to have been permitted for the welfare of the local population as the great majority of the quarried stone was used in Israel, rather than by Palestinians in the occupied territories.<sup>932</sup> Therefore, relying on Articles 43 and 55 HRs, the petitioner requested an order to cease such activities and stop the establishment of new quarries or the expansion of existing ones therein.<sup>933</sup>

Contrary to the approach adopted in the *Ascan* case, the Court interpreted *the time element as adjusting occupation law* irrespective of whether the wording of the rules concerned allows for it or not. However, it remains unclear whether the duration was regarded as directly altering the scope of

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<sup>931</sup> For a critical analysis of the case, see Guy Harpaz, Yuval Shany, Eyal Benvenisti, Amichai Cohen, Yael Ronen, Barak Medina, and Orna Ben-Naftali, Expert Legal Opinion, opinion with regard to the issues arising from the *Yesh Din* judgment in support of the petitioners’ motion for a review of the judgment (En Banc review), January 2012, at 38 ff. See also Kretzmer, “The Law of belligerent occupation in the Supreme Court of Israel”, 94 *IRRC*, 2012, at 220-222; I. Scobbie and A. Margalit, “The Israeli Military Commander’s power under the Law of Occupation in relation to Quarrying Activity in Area C”, Sir Joseph Hotung Programme for Law, Human Rights and Peace Building in the Middle East, SOAS, 4 July 2012, 1-11.

<sup>932</sup> HCJ 2164/09, *Yesh Din* case, para 1. The figures submitted to the Court by the authorities show that 94% of the stone from the quarries operated by Israeli companies was for use in Israel.

<sup>933</sup> HCJ 2164/09, *Yesh Din* case, paras. 2-3.

application of Article 55 or whether this modification derived from the link between Article 55 and Article 43. In any case, Article 55 does not foresee such an adjustment, as will be discussed in the section 6.

The Court then agreed with the view admitted by the Israeli governmental authorities that *the duration of the occupation creates positive obligations for the occupier*.<sup>934</sup> This would imply that the policy concerning the quarries could not be undertaken freely, being that it is covered by the general duty to ensure public order and civil life.

Notably, *the time element* was used to *promote an expanding interpretation* of Articles 43 and 55 HRs, which ended up eluding two basic legal boundaries enshrined in these rules and, paradoxically, articulated in the case law previously developed.<sup>935</sup> This aspect has been highlighted in a significant *amicus curiae* brief filed by seven leading Israeli international law scholars. They justifiably argue not only that the Court wrongly interpreted the laws of occupation and, in particular, the provisions on the management of public property in the occupied territories, but also that the Court's ruling stood in direct contradiction with those laws. As was clearly highlighted, "*the protraction of the occupation does broadly impact the appropriate interpretation of Article 43 and as such the powers of the Military Commander according to the laws of occupation as a whole, but this broad impact is subject to two strict and basic limitations: the first of which is that the expansion does not allow the Military Commander to factor in considerations that are prohibited by Article 43 or to act outside of the other provisions that apply to his powers, and the second is that the expansion must be exercised for the benefit of the local population and not against it*".<sup>936</sup>

## **5. The obligation to respect pre-existing legal system and admissible exceptions**

Not being the sovereign ruler of the controlled territory, the occupying power temporarily performs its functions and exercises *de facto* authority *with the duty to respect the laws existing therein at the time of the commencement of the occupation, unless prevented by certain admissible purposes*. Moreover, in view that the task

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<sup>934</sup> HCJ 2164/09, *Yesh Din* case, para. 12. See also Israel, Ministry of Justice, HCJ 2164/09 *Yesh Din*, *Response on Behalf of Respondents 1-2*, 20 May 2010, para. 52: "*in a state of prolonged belligerent occupation, the prevailing belief is that the military administration acquires additional positive duties in relation to the area it is administering*".

<sup>935</sup> HCJ 2164/09, *Yesh Din* case, para. 92.

<sup>936</sup> See Guy Harpaz, Yuval Shany, Eyal Benvenisti, Amichai Cohen, Yael Ronen, Barak Medina, and Orna Ben-Naftali, Expert Legal Opinion, HCJ 2164/09, *Yesh Din - Volunteers for Human Rights, et. al. v. Commander of the IDF Forces in the West Bank, et. al.*, (Judgment, 26 December 2011), 29 January 2012, para. 84, at 30. The opinion was submitted to the High Court of Justice in support of human rights organization, Yesh Din and its motion for an *en banc* review (an additional hearing in which all judges of the Court hear the case) of the quarries' petition.

of ensuring or restoring civil life and public order is limited *ratione temporis*<sup>937</sup> and in accordance with the maintenance of local laws as far as possible and restricted changes therein, *every legislative amendment should be matched with the transitional nature of the occupation.*

### **5.1. The meaning of “*les lois en vigueur*” and “*empêchement absolu*”**

Pursuant to Article 43 HRs the occupier’s legislative powers must be performed in compliance with the general principle of respecting “*les lois en vigueur*” in the occupied territory predating the occupation, except in cases of “*empêchement absolu*”. As articulated in the Brussels Declaration (“*les lois qui étaient en vigueur dans les pays en temps de paix*”), this entails maintaining the laws in force without modifying, suspending or replacing them with its own laws. It is widely recognised that “*les lois*” cover all the fields of legislation (*e.g.* tax collection, requisition, private property) and refers not only to promulgated laws.<sup>938</sup> Being that local institutions and constitutional order constitute aspects of “*the laws in force in the country*”, it has been reasonably argued that “*the occupant’s competence to establish and operate processes of governmental administration in the territory occupied does not extend to the reconstruction of the fundamental institutions of the occupied area*”.<sup>939</sup> Conversely, the occupier is not bound to respect the laws enacted by the “*absent*” legitimate sovereign after the beginning of occupation, although it may give effect in the occupied territory to such legislation “*whenever military and political conditions permit*”.<sup>940</sup>

The general prohibition on amending pre-existing legal system admits exceptions. The term “*empêchement absolu*” is commonly interpreted as corresponding to “*nécessité*” (the original language of Article 3 of the Brussels Declaration<sup>941</sup>), but various connotations have been expounded in scholars’

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<sup>937</sup> See L. Oppenheim, “International Law - A Treatise”, in H. Lauterpacht (ed.), Vol. II, *Disputes, War and Neutrality*<sup>7</sup>, London: Longman, 1952, at 436 and 437.

<sup>938</sup> In addition to the laws in strict sense (whether basic or trivial; national or municipal; civil or criminal; substantive or procedural), the term encompasses constitution (see UK Manual, *op. cit.*, para. 11.11), decrees, ordinances (see E.H. Schwenk, *op. cit.*, at 397), court precedents (particularly in territories of common law tradition, see E. Benvenisti, *op. cit.*, at 16), administrative regulations and executive orders (see G. Von Glahn, *op. cit.*, at 97 and 99; E.H. Feilchenfeld, *op. cit.*, at 89).

<sup>939</sup> M. McDougal and F. Feliciano, *Law and Minimum World Public Order*, Yale University Press, 1961, at 767.

<sup>940</sup> See E. Stein, “Application of the Law of the Absent Sovereign in Territory under Belligerent Occupation: The Schio Massacre”, 46 *Michigan Law Review* (1947-1948), 341, at 349, 362. On this point, Yoram Dinstein also takes into account that “*Article 43 does not purport to have any impact on the relations between the absent territorial sovereign and its own nationals living in the occupied territory*”, addressing the notion that a nationals’ commitments are not diminished by occupation, and referring to the *Haaland* case of 1945 in which the Supreme Court of Norway recognised that, despite its absence from the occupied territory, the territorial sovereign can enact criminal legislative measures concerning the conduct of its own nationals during occupation, but such measures will produce effects only after its end, see Y. Dinstein, “Legislation under Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding”, *Harvard: Program on Humanitarian Policy, Occasional Papers Series*, Fall 2004, at 4, citing *Public Prosecutor v. Reidar Haaland* (Norway, Supreme Court, Appellate Division, 1945), 12 *Annual Digest and Reports of Public International Law Cases* (1943-1945), 444, 445.

<sup>941</sup> “*Necessity*” in Article 3 of the Brussels Declaration was not intended a synonym for “*military necessity*” in the *travaux préparatoires*. See E.H. Schwenk, *op. cit.*, at 401.

opinions.<sup>942</sup> According to a broad interpretation of the exception contained in Article 43 HRs and confirmed in Article 64 GCIV, *the occupier may be prevented from applying local laws* not only because of the legitimate interests of the occupant's army, but also because of *the interests of the local civilian population*.<sup>943</sup> Such an interpretation is actually coherent with a wider reading of “*l'ordre et la vie publics*” as detailed previously.

A narrow interpretation of the necessity exception was instead given by the post-World War I practice of the Mixed Arbitral Tribunals, which were established under the Peace Treaties of 1919-1920.<sup>944</sup> But an extensive reading of the exception featured in the practice of allied occupying powers during Second World War suggests they strongly felt the necessity of drastic modifications of existing laws and institutional structures of the occupied States' systems permeated with the ideologies of Nazism, fascism and militarism; in any case, different legal justifications were provided for such radical departures from the conservationist premises of the Hague Regulations.<sup>945</sup> Similarly, the exception in Article 43 HRs was flexibly interpreted in subsequent judicial decisions.<sup>946</sup>

As has been noted heretofore, scholars' expansive reading of the necessity grounds of Article 43

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<sup>942</sup> Some authors refer to “military necessity”, see M. Greenspan, *The modern Law of Land Warfare*, 1959, at 224; M. Bothe, “Occupation, Belligerent”, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, 1997, iii, at 765. Conversely, certain scholars call for just sufficient justification to alter local laws, see E.H. Feilchenfeld, *The International Economic Law of Belligerent Occupation*, 1942, at 89, para. 325, in which he noticed that “[t]he term ‘absolutely prevented’ has never been interpreted literally” and he noted that the benefit of doubt should be given to the old laws rather than the new ones. According to Yoram Dinstein, “absolute prevention means necessity” and thus the adverb “absolutely” is of small significance, see Y. Dinstein, “The international of Belligerent Occupation and Human Rights”, *Israel YbkHR*, 1978, at 112, citing Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Vol. II: The Law of Armed Conflict*, 1967, at 193 (the author narrowly construes the exception).

<sup>943</sup> See E.H. Schwenk, *op. cit.*, at 400-401, who argues that narrowing the term to the occupier's military necessity would be undesirable, particularly when the occupation endures, as the duty to restore civil life and public order is primarily in the interests of the population. See also J. Pictet (ed.), *op. cit.*, at 274; G. Von Glahn, *op. cit.*, at 97. See A.D. McNair and A.D. Watts, *The Legal Effects of War*, 1966, at 369, mentioning three grounds for being “absolutely prevented” from respecting local laws, *i.e.* the maintenance of order, the occupant's safety, and the realisation of the legitimate purpose of occupation; this wider reading reflects the practice of the allied occupying powers in the course of World War II.

<sup>944</sup> See German-Belgian Mixed Arbitral Tribunal, *Milaire v. Etat allemande*, 2 RDTAM, 1923, 715, No. 168, at 719, in which the Tribunal ruled that “*article 43 a pour objet non de metre l'occupant au benefice d'un privilege ou d'un droit, mais, au contraire, de lui imposer une obligation*”. See German-Belgian Mixed Arbitral Tribunal, *Ville d'Anvers v. Germany*, 19 October 1925, 5 RDTAM, 1926, 712, at 716-717, in which the Tribunal maintained that the three measures (issued by the German Governor-General for reacting to acts of mob violence against German nationals in occupied Belgium) went beyond the necessities of war within the meaning of “absolutely prevented” and conflicted with Article 43 HRs.

<sup>945</sup> For an analysis of this period, see Y. Arai-Takahashi, *The Law of Occupation, op. cit.*, 2009, pp. 107-111. Notably, the British Military Manual reads: “*The occupying power may amend the existing law of the occupied territory or promulgate new law if this is necessitated by the exigencies of armed conflict, the maintenance of order, or the welfare of the population*”, see UK Ministry of Defence, *The Manual of the law of Armed Conflict*, 2004, para. 11.25.

<sup>946</sup> Following the two World Wars, courts have acknowledged as valid a variety of laws by occupying powers, see references to relevant cases in E. David, *Principes de droit des conflits armés*<sup>3</sup>, 2002, p. 511. For permissive practice on legislation in the occupied territories by the Israeli High Court of Justice, see D. Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories*, State University New York, 2002, pp. 61-72.

HRs started to emerge since the end of the Second World War,<sup>947</sup> with the *welfare of the local protected population* appropriately included in the related notion. An additional suggestion has been that of interpreting this exception more widely the longer an occupation continues.<sup>948</sup> Under such a circumstance, an occupant would be required - and not simply entitled - to adapt his legitimate powers to *the changeable pressing needs of local inhabitants*. In this manner, in the late twentieth century the welfare of civilian population has come to acquire relevance in the case law before the Supreme Court of Israel, which has endorsed such a view over time; in the words of Justice Sussman, “*a prolonged military occupation brings in its wake social, economic and commercial needs of the population*”.<sup>949</sup> Similarly, Justice Barak has taken this view.<sup>950</sup>

Focusing on *the occupier’s evaluation of the socio-economic interests of the local inhabitants of the occupied territory*, however, it seems reasonable to herald a warning light. A risk of abuse remains in the determination of what is necessary in complex and changeable circumstances.<sup>951</sup> In fact, the

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<sup>947</sup> See O. Debbash, *L’Occupation Militaire - Pouvoirs reconnus aux forces armées hors de leur territoire national*, 1962, at 172, in which he considers that “(l)a formule de l’article 43 du Règlement de la Haye ... permet à l’occupant d’exercer une compétence réglementaire limitée par ce double bt: la sécurité de l’armée et l’ordre public local. Pour rendre compte de ce qui est permis à l’occupant, et de ce qui lui est interdit, on peut faire appel aux deux notions implicitement visées par l’institution de l’occupation militaire: la compétence de «gestion» et la compétence de «disposition»”. See also A. Gerson, “War, Conquered Territory, and Military Occupation in the Contemporary international Legal System”, 18 *Harvard International Law Journal*, 1977, pp. 538-539, referring to “*the principles of self-determination and fundamental human rights*”.

<sup>948</sup> This is specifically suggested in R. Kolb, *Ius in bello, Le droit international humanitaire des conflits armés*, 2002, at 186. See also E.H. Schwenk, *op. cit.*, pp. 400-401.

<sup>949</sup> HCJ 337/71, *The Christian Society for Holy Places v. Minister of Defence*, 26(1) PD, English summary in 2 *Israel YbkHR*, 1972, 354, at 355; this was a labour dispute between the Christian Society for the Holy Places and hospital workers on strike who were employed by the Society. This case illustrates the delicate nature of the assessment of the changing social needs of the local population. Specifically, the local Jordanian Labour Law predating the Israeli occupation, provided a procedure for compulsory arbitration under which the arbitrators were to be appointed from among the employers’ and employees’ associations. Since the latter did not exist in Jordan, however, an order amending the Jordanian law was issued by the Israeli Regional Commander to permit the possibility of compulsory arbitration the appointment of an arbitrator by the Office in Charge of Labour Affairs. According to the majority of the Israeli Court, the occupant was entitled to modify the local law *in order to reflect changing social needs of the civilian population*. Conversely, as observed in the dissenting opinion of Justice Cohn, compulsory arbitration in labour disputes was yet to be introduced in Israel; this latter aspect is considered in Dinsteins’ argument that, in assessing the concept of necessity, the relevant military authorities exceeded their boundaries of discretion, see Y. Dinsteins, *op. cit.*, 2004, p. 10.

<sup>950</sup> See HCJ 393/82, *Jami’at Ascan Elma’almoon Eltha’aoniah Elmahduda Elmaoolie v. Commander of IDF Forces*, 37(4) PD 785 (*per* Justice Barak), English summary in 14 *Israel YbkHR*, 1984, 301, p. 309, in which Justice Barak maintained that “[t]he authority of a military administration applies to taking all measures necessary to ensure growth, change and development”, and hence that “*a military administration is ... required to ensure the changing needs of a population in a territory under belligerent occupation*”. Additionally, he held that “[i]n exercising this authority [governmental authority] cognizance must be taken of the fact that the military administration in question functions for a prolonged period, during which the local population undergoes fundamental changes”, so that “*a military administration is authorized to initiate underlying fundamental investments and long-range projects for the benefit of the local population*”, see, *ibid.*, pp. 312-313.

<sup>951</sup> See Zwanenburg, “Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation”, *IRRC*, 2004, 745, at 751. See also E. Benvenisti, *The International Law of Occupation*, Princeton, 2004, p. 11, warning that Article 43 HRs is “*an extremely convenient tool*” allowing the occupant to intervene when it suits and to hide behind claims of limitations when it does not.

occupant's interpretation of what is needed is infrequently subject to revision during occupation.<sup>952</sup> In the *Jami'at Ascan* case, for example, it was emphasised that the temporary nature of the military commander's powers entails that he must not be authorised to take into account any national, economic, or social interest of his own State, and even national security interests, but *only his own military needs and those of the local population*.<sup>953</sup> A recent reaffirmation of this view concerning Article 43 HRs is found in the *Yesh Din* judgment.<sup>954</sup>

In any case, the aforementioned necessity grounds demand careful examination even in the light of the rules embodied in Article 64 GCIV, as the next section aims to articulate.

### **5.1.a. Case study: the planning and building authority in Area C of the West Bank**

In the context of the present analysis, another recent case before the Israeli High Court of Justice is noteworthy. The petitioners demanded to re-transfer the planning authority in Area C of the West Bank from the Israeli Civil Administration to local institutions and district committees, principally on the basis Article 43 HRs.<sup>955</sup> It is worth highlighting that planning and building are matters of daily civil life; the legal and practical issues arising from such activities have implications for the Palestinians living in the area concerned.<sup>956</sup> The relevance for the present research lies in that such policies have been significant for the social and economic development of the region.<sup>957</sup>

In this regard, some preliminary clarifications on the scope of the Oslo Agreements and related implications for the law of occupation concerning the planning and building authority appear apt. Pursuant to the 1995 Israeli-Palestinian Interim Agreement, Israel's exclusive control includes the

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<sup>952</sup> See G. Von Glahn, *op. cit.*, at 100. Exceptionally, the International Court of Justice was able to give an opinion on whether certain measures adopted by an occupying power were necessary, see ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *ibid.*, para. 137.

<sup>953</sup> HCJ 393/82, *Jami'at Ascan* case, para.13 (English summary in 14 *Israel YbkHR*, 1984, at 304).

<sup>954</sup> HCJ 2164/09, Judgment of 26 December 2011, at 15, para. 8.

<sup>955</sup> *Head of Ad-Divat-Al-Rfai'ya Village and Others vs. the Israeli Minister of Defence, the Commander of the IDF Forces in the West Bank, the Head of the Civil Administration and the High Planning Council in the West Bank*, Petition to grant Order Nisi and Emergency Interim Order, 31 July 2011. The appeal was submitted by the council of this village (located in the southern district of Hebron, West Bank) together with a coalition of organisations, namely Rabbis For Human Rights, ICAHD, JLAC, St. Yves. The "Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip" divided the West Bank into Areas A, B and C with regard to issues on civil and security responsibility. In Area C (approximately 60% of the relevant territory) Israel's exclusive control has been retained over security, planning and construction matters, while the occupied population has not administered or participated in the institutions concerned. See *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip* (Washington D.C., 28 September 1995) reprinted in 36 *ILM*, 1997, especially Arts. XI, XIII, XVII.

<sup>956</sup> The Palestinians living in Area C has been estimated at around 150,000, see Bimkom: Planners for Planning Rights, *The Prohibited Zone - Israeli planning policy in the Palestinian villages in Area C*, June 2008, at 7, (Bimkom is an Israeli non-profit organization).

<sup>957</sup> See A. Coon, *Town Planning Under Military Occupation*, Dartmouth Publishing Company, London, 1992, at 3. See World Bank, "The Economic Effects of Restricted Access to Land in the West Bank", 2008, at iv-v, considering how land use and planning regulations in Area C have been "*detrimental to Palestinian economic development [as they] tend to limit development within the confines of existing villages, with too little suitable space for demographic growth*".

planning and construction in Area C. Nonetheless, the joint interpretation of Articles 7 and 47 GCIV confines the effects of the accords between an occupier and enemy authorities or those of the occupied territory; such accords must not “*adversely affect the situation of protected persons*”, “*nor restrict*” the rights conferred upon them, or deny them the benefits of the Fourth Geneva Convention “*by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory*”. Therefore, under the Oslo Agreements the transferred authority in planning and construction could not justify legislative powers beyond that which is allowed for by the boundaries of Article 43 HRs; so it could not deny Palestinian residents to benefit local laws in effect on the eve of occupation; the relevant 1966 Jordanian Law actually conferred a certain power in planning to the representative of local communities.<sup>958</sup> The 1995 Interim Agreement indeed confirms this aspect and refers to the respect of international law (under Article XVII “*the Israeli military government shall retain the necessary legislative, judicial and executive powers and responsibilities in accordance with international law*”). Overall, these agreements could confer the occupant some authority in planning and building insofar as it does not conflict with IHL protecting the local population; furthermore, they could not confer legitimacy to policies and practices already illegal under IHL before their signature.

Notably, two independent reasons have been addressed to claim the unlawfulness of the controversial changes made by the Israeli Civilian Administration; they reiterate that the occupant is not entitled to make unjustified amendments to local legislation, and that it is bound to respect local laws.<sup>959</sup>

As for the first reason, the Military Order No. 418 in 1971 and its subsequent revisions (2000-2009) have been seen to *exceed the admissible powers to suspend, abolish or amend local legislation and local administrative institutions* under Article 43 HRs.<sup>960</sup> In particular, they made changes as follows: the District Committees were abolished and their powers were transferred to the Higher Planning Council,<sup>961</sup> the possible appointment of a village council as a Local Planning Committee was

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<sup>958</sup> At the time Israel started to occupy the West Bank in 1967, these policies were under a Jordanian Law on *Towns, Villages, and Building Planning*, which had been enacted in 1966 (hereinafter Jordanian Law).

<sup>959</sup> See T. Boutruche and M. Sassòli, *Expert Opinion on International Humanitarian Law Requiring of the Occupying Power to Transfer Back Planning Authority to Protected Persons Regarding Area C of the West Bank*, 1 February 2011, pp. 1-34. The opinion was written at the request of the petitioners in the case concerned.

<sup>960</sup> On the ground that the inclusion of Jordanian representatives of the central government in the planning process was a legal requirement, Israel revised the Jordanian Law through Military Orders; in particular, the *Military Order Concerning Towns, Villages, and Building Planning Law (Judea and Samaria No. 418* of 1971, and its successive revisions, radically amended the entire planning system in the West Bank. It has been noted that some amendments of the law accommodated the different situation of the new authorities which effectively controlled the West Bank starting from 1967, but certain changes to the Jordanian Law did not meet the “necessity exception” of Article 43 HRs (including the maintenance of order, the exigencies of an armed conflict, or the welfare of the local population), see T. Boutruche and M. Sassòli, *op. cit.*, at 22-26.

<sup>961</sup> Military Order No. 418, Article 2(2), as cited by Bimkom, *op. cit.*, at 39.



eliminated<sup>962</sup> and local representatives were not included within the planning institutions; a separate planning framework for the settlements was created.<sup>963</sup> In this regard, it is reasonable to agree on *the participation of local representatives as an important prerequisite for addressing adequately the needs of the local communities*, especially in view of the nature of planning as well as the long-term impacts on the economic and social development of the areas concerned, in addition to the legal relationship between the occupant and the local inhabitants.<sup>964</sup> Further, as detailed in previous sections, radical changes often lack consistency with the basic principle *that changes may be allowed only for the duration of occupation*. In any case, planning and building were not made easier in comparison with the situation under the previous local laws (for instance, a new registration in the Israeli Engineers Register is required for drawing up plans in built-up locations).

As for the second reason, the planning regime as set up by the Israeli Civilian Administration has been seen to *fail to comply with its duty to ensure and restore public welfare in the occupied territory* under the authentic French text of Article 43 HRs. Such a concept of public welfare entails a system that meets the local exigencies to construct new buildings for health, demographic and economic considerations. In particular, *the construction of houses on these lands constitutes a valuable aspect of family rights* (Art. 27 GCIV) *and private property* (building for family expansion is a normal need of civil life), which the occupant is bound to respect under Article 46 HRs. Thus, insofar as the new planning process has proved insufficient and inadequate to satisfy “the planning needs of the local communities” in an area of the West Bank exclusively controlled by the occupant,<sup>965</sup> it seems reasonable to content that the changes made to the Jordanian Law should be repealed whilst the local and district committees should be reinstated, while safeguarding the security interests of the occupying forces. In this regard, what appears an indefensible claim is that the protection of such a security interest and the maintenance of “*orderly government*” in Areas C would be attained by Israel in

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<sup>962</sup> Military Order No. 418, Articles 2(4) and 4(A). See Bimkom, *ibid.*, at 40.

<sup>963</sup> Under Article 2A of Military Order 418 the commander can appoint a “Special Local Planning Committee” (SLPC) when the relevant planning area “*does not include the area of a city or village council*”. According to the UN Office for the Coordination of Humanitarian Affairs, with this “new Planning Area” (not in force before 1967) “*SLPCs can be appointed only for Israeli settlements*”; additionally, as “[*a*]ll settlement Local and Regional council areas were subsequently proclaimed new planning areas, virtually all settlements now have SLPCs” (see UN OCHA oPt, *Restricting Space: The Planning Regime Applied by Israel in Area C of the West Bank*, Special Focus, December 2009, at 11). Moreover, the Israeli Civil Administration has created a separate District Planning sub-Committee for Israeli settlements; the commander may allocate the authority of such committee to the SLPC.

<sup>964</sup> As noticed by Theo Boutruche and Marco Sassòli, Israel, as an occupying power, “*could only have ensured to be able to overturn decisions affecting the security of its occupying forces and take any measures indispensable to ensure that such local committees actually function*”, see *op. cit.*, at 26.

<sup>965</sup> In particular, this regime has reportedly abolished or limited the Palestinians’ representation and participation in the system, besides eliminating the condition for a public health representative in every planning committee of the West Bank.

it taking all decisions by itself as regards matters of planning and building.<sup>966</sup> Moreover, a different view would contradict the obligation to respect local legislation and institutions.

In waiting for the Court's ruling on this ongoing case, it is worth highlighting that it illustrates how *plausible and valid may become the needs of the local population in contexts of prolonged occupation*. This case shows nonetheless the risk that *the commercial, social, and economic changes brought in the wake of a protracted situation of occupation may not validly excuse the adaptation of local legislation according to the military orders by the occupier*. Rather than improving the planning system in respect to the natural growth of the civilian population in the West Bank, the amendments to the Jordanian Law appear to worsen it, and this been even more relevant in view of *the long term effects of planning and building policies*.

Significantly, it seems that, while enhancing civil life is “an obligation of means”, *the lawfulness of changes to local legal system as exceptionally justified by this purpose relies on that they really enhance public life* in comparison to the situation under earlier local laws. In this regard, the occupant has the burden of proof about such amelioration. Inasmuch as this improvement does not occur in a context of prolonged occupation, those changes remain not justified and should be repealed.

Moreover, this case offers the chance to emphasise a specific aspect of the concept of *welfare of the protected population as related to the planning and construction in an occupied territory*: such welfare is a concept encompassing the entitlement to participate to the planning process via formal representation which allows to consider the local inhabitants' exigencies as well as the effect of planning policies and corresponding outcomes for the same population.

Additionally, two delicate aspects that surface from this case concern possible discriminatory practices and the humanitarian impacts of the aforementioned system. Firstly, a great amount of rejected applications for a building permit has exposed Palestinians to demolition orders and “stop work” orders.<sup>967</sup> In this regard, inasmuch as these rejections are due to a planning process conflicting with the occupant's legitimate powers, the demolitions concerned may constitute a violation of Article 53 GCIV.<sup>968</sup> The intensification of “administrative demolitions” remains then a

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<sup>966</sup> On detailed considerations about public welfare and the new planning and building policies and their implications, in addition to their failure in respect of the needs of the local population, see T. Boutruche and M. Sassòli, *op. cit.*, at 27-31; UNOCHA oPt, *Restricting Space: The Planning Regime Applied by Israel in Area C of the West Bank*, Special Focus, December 2009; UNOCHA oPt, *“Lack of Permit” Demolitions and Resultant Displacement in Area C*, Special Focus, May 2008.

<sup>967</sup> Human Rights Watch, *Separate and Unequal Israel's Discriminatory Treatment of Palestinians in the Occupied Palestinian Territories*, 2010, at 11.

<sup>968</sup> House demolitions and forced evictions as originated by such a process raise the concern of constituting even abuses of the *right of everyone to a home* under Article 17 ICCPR and the *right to adequate housing* under Article 11 (1) ICESCR. See CESCR, *General Comment No. 4: The right to adequate housing, op.cit.*, 13 December 1991.

relevant consideration with its impact in terms of forced displacements of the inhabitants.<sup>969</sup> Secondly, the creation of a separate planning framework for Israeli settlements in the occupied territories has raised an issue related to the perception that amending available plans and getting building permits is much difficult for local residents than for those settlers. In this regard, if the process concerned diverges from the one valid for Palestinians, then this would represent an inadmissible practice, independent of the unlawfulness of the settlements as such.<sup>970</sup>

It is worth considering that, in the interim decision of 28 April 2014 the Supreme Court ordered the State to propose within ninety days “institutionalised ways” to enable participation of local Palestinians in Area C in the planning processes that affect their lives. Further, Justices Rubinstein, Handel, and Solberg expressed dissatisfaction with the planning situation and rejected Israel’s argument that Palestinians’ participation exists in the present system and thus the *status quo* ought to remain. The same judges also requested the State to explain the data provided by the petitioners concerning discrimination and inadequate planning for Palestinians in Area C.

## **5.2. The necessity exceptions**

The expansion of the occupant’s regulatory powers as laid down in Article 64 GCIV represents a basic innovation revealing *the sharp shift of concern with regard to the civilian population* by the international community since the Second World War. In reviewing the scope of the conservationist approach of the Hague Regulations, this provision allows for the suspension, modification or repeal of pre-existing local laws as well as the enactment of new legislation in the occupied territory under three special objectives that represent certain necessity grounds.<sup>971</sup>

### **5.2.1. Necessity on security grounds**

The least questionable case of legislation an occupier may enact is one whereby that is “*essential*” to ensure its security, though the discretion in deciding what is essential remains relatively broad,

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<sup>969</sup> They are carried out when building permits were not sought in advance of the related construction. See the Report on “OPT: The legality of house demolitions under International Humanitarian Law”, Harvard University, 31 May 2004.

<sup>970</sup> Article 49 (6) GCIV. It is worth noting that under international humanitarian law non-discrimination is addressed only between “protected persons”, while Israeli settlers are not included in this category; conversely, discrimination is prohibited under human rights law in respect to every individual under the State’s jurisdiction (so covering all residents of the Area C).

<sup>971</sup> Specifically, Article 64(1) refers to threats to the occupier’s security and obstacles to the application of GCIV, whereas under Article 64(2) the local population may be subjected to any laws “*essential*” to fulfil the occupier’s obligations under GCIV, or to maintain the orderly government of the occupied territory, or to ensure its own security. As already addressed in section 2 of the present chapter, scholars generally agree to read these two paragraphs together, so considering “*the entire legal system*” of the occupied territory rather with reference only to penal laws.

under both Article 43 HRs and Article 64(2) GCIV.<sup>972</sup> Nonetheless, under this criterion the occupant is not allowed to pass legislation prescribing any measure explicitly prohibited by international humanitarian law (*e.g.* collective punishment, house demolitions or deportations)<sup>973</sup> as well as legislation establishing adverse distinctions prohibited under Article 27 GCIV.

State practice related to the exercise of such a legislative power is ample and uniform. For instance, customary norms recognise the occupant may prohibit actions stimulating the spirit of opposition of the civilian population to its authority and strengthening the bond with the legitimate sovereign; the prohibition to display the national flag and to sing national hymns or other acts inciting revolt are generally deemed lawful.<sup>974</sup> In addition, the press and other means of mass communication may be subject to censorship so as to prevent the diffusion of information useful to the enemy and propaganda in favour of the occupied state or of the resistance.<sup>975</sup>

In accepting that ensuring security entitles the occupying powers to constraint or hold in abeyance several civil and political rights of local inhabitants of the occupied territory, the present thesis does not discuss these matters further. It is worth however adding that, beyond its own security, under the wording of Article 43 HRs a legitimate aim for legislation is *protecting the security of the local population*: the occupier is bound to maintain and restore public order, and as such has the authority also to legislate if absolutely necessary for this purpose.

### **5.2.2. Necessity for maintaining the orderly government of the occupied territory**

The maintenance of the orderly government is another “*essential*” ground allowing an occupant to legislate under Article 64(2) GCIV; it may be conceived as *a wider objective* dealing with the restoration and preservation of “*l’ordre public*” in an occupied territory. The occupier’s regulatory powers under this ground appear broad; related measures often are functional even in ensuring its armed forces’ security. The restrictions on the freedom of movement in the occupied territory (*e.g.* establishing curfews or prohibiting circulation of persons in certain areas) or measures intended to

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<sup>972</sup> It includes the occupying power’s security, the security of property and personnel of its armed forces or administration, besides lines of communication. Yoram Dinstein explains the *necessity on security grounds* as “*fundamental*” and “*unassailable*”, arguing that the occupant is given “*more than some latitude*” in taking legislative measures to limit the general welfare and rights of local inhabitants, which are considered as necessary for the security of the army and administration, see Y. Dinstein, “Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding”, *Harvard Program on Humanitarian Policy, Occasional Papers Series*, Fall 2004, p. 12.

<sup>973</sup> See Arts. 33(1), 53, 49(1) GCIV.

<sup>974</sup> During WWII, Germany prohibited the selling of orange flowers in the occupied territory of Holland, see De Jong, *Holland Fights the Nazis*, London, 1941, at 35.

<sup>975</sup> See Bernstein, “Freedom of Speech in the Israeli Occupied Territories; The Search for a Standard”, *NYUJILP*, 1988-89, at 527 ff.

avoid the risk of riots (*e.g.* banning unauthorized public meetings) are clear examples.<sup>976</sup> Indeed, the concept of maintaining orderly government has a flexible nature, with the potential of widening the occupier's legislative competence beyond mere measures designed to restore and ensure public order or to guarantee the security of the local population.

In this way, an occupier might choose to deal with *issues concerning the continuation of normal life under provisions relating to an "orderly government" which affect economic and social life*.<sup>977</sup> However, the boundaries of such legislative competence appear to remain contingent to an evaluation of the welfare of the local population. Practices in occupied Iraq are illustrative in this regard: the legality of several comprehensive economic measures adopted by the Coalition Provisional Authority reflecting neo-liberal economic attitudes are circumspect.<sup>978</sup> These measures have been essentially criticised for exceeding and disregarding the boundaries of necessity in breach of IHL.<sup>979</sup> Then, in affecting the enjoyment of the right of Iraqi people to freely dispose of their natural resources and wealth, such changes have appeared as not necessary neither for the sake of human rights or economic life.<sup>980</sup>

Besides exercising regulatory competence for claimed economy recoveries, since the occupier is bound to maintain and ensure civil life in the occupied territory, its legislative powers might be extended to *enhance the humanitarian guarantees of the local population* (especially when existing local laws or their absence absolutely precludes it from achieving that purpose)<sup>981</sup> or to *take into account allegedly mutable social and economic needs and interests of the same population*. In occupied Iraq, the CPA

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<sup>976</sup> See G. Von Glahn, *op. cit.*, at 140. As for the Palestinian occupied territories, see Shehadeh, "The Legislative stages of the Israeli Military Occupation", in Playfair (ed.), *op. cit.*, 151 ff, at 153.

<sup>977</sup> An example of change deemed necessary to maintain economic life occurred in the context of occupied Iraq, when the CPA dealt with the circulation of currency (see CPA Order No. 43: New Iraqi Dinar Banknotes, CPA/ORD/14 October 2003/43), as it addressed the issue that numerous different series of these dinar circulated: as such, the aim was to contribute to stabilizing the economy and instilling public confidence. The CPA also amended the traffic code (see CPA Order No. 86: Traffic Code with Annex A, CPA/ORD/19 May 2004/86).

<sup>978</sup> They encompassed the liberalisation of trade and foreign investment, the simplification of the procedure for the conclusion of public contracts, and the amendments of Iraqi company law. See CPA Order No. 39: Foreign Investment, CPA/ORD/19 September 2003/39 (amended by Order No. 46, CPA/ORD/20 December 2003/46), CPFR/ORD/20 December 2003/39; CPA Order No. 54: Trade Liberalization Policy 2004 with Annex A, 2004 CPA/ORD/24 February 2004/54; CPA Order No. 64: Amendment to the Company Law No. 21 of 1997, CPA/ORD/29 February 2004/64; CPA Order No. 56: Central Bank Law, CPA/ORD/1 March 2004/56; CPA Order No. 87: Public Contracts, CPA/ORD/14 May 2004/87. In this context, foreign investors were allowed to own Iraqi companies without being obliged to return profits into Iraq (while under the previous Iraqi Constitution this conversely allowed such a practice only to citizens of Arab countries), see CPA Order No. 39: Foreign Investment, CPA/ORD/19 September 2003/39, section 7(2)(d); CPA Order No. 46: CPA/ORD/20 December 2003/46 (as the revised order).

<sup>979</sup> See M. Zwanenburg, "Existentialism in Iraq: Security Council Resolution 1483 and the law of Occupation", *IRRC*, 2004, 745, pp. 757-759; M. Sassoli, "Legislation and maintenance of public order and civil life by occupying powers", 16 *EJIL*, 2005, 661, p. 679.

<sup>980</sup> See A. Roberts, "The End of Occupation of Iraq (2004)", *International Humanitarian Law Research Initiative, Monitoring IHL in Iraq*, p. 7; Catàn, "Iraq Business Deals May be Invalid, Law Experts Warn", *Financial times*, 2 November 2003; Eviatar, "Free-Market Iraq? Not So Fast", *New York Times*, 10 January 2004.

<sup>981</sup> See E.H. Schwenk, *op. cit.*, p. 401; Roberts, "Prolonged Military Occupation", *op. cit.*, p. 94.

implemented a wide range of reforms that led, for instance, to amend the Labour Code<sup>982</sup> and to set up the property reconciliation and claims institutions so as to decide property disputes mainly concerning the Kurdistan regional area,<sup>983</sup> in view of the forced displacement of huge amount of people with several religious and ethnic backgrounds from their properties in Iraq.

In this vein, an overall inertia could seriously harm ESC rights whose safeguard requires public authorities' active commitment.<sup>984</sup> Nevertheless, assessing mutable social and economic needs of the local population by reference to the 'necessity ground of maintaining orderly government' appears an extremely complex process, even objectionable for local inhabitants embracing different economic, social and cultural values and traditions. Accordingly, there is reason to contend that the measures enacted by the occupant in this regard entail, in any case, previous consultation with those inhabitants to avoid breaching the requirement of self-determination of peoples.<sup>985</sup>

According to certain legal scholars the necessity of "*l'ordre public*" may be tested and understood by relying on that the occupiers' measures are not dissimilar to those enacted in their home countries.<sup>986</sup> As noted by others, however, this may function when the answer is negative<sup>987</sup>. Indeed, in the light of multiple conflicting interests involved, *the occupant's good faith cannot warrant the legitimacy of the measure to be adopted*. Hence the necessity ground for any new piece of legislation deserves serious scrutiny.<sup>988</sup> The view that any concern shown for the local population's needs cannot be above

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<sup>982</sup> CPA Order No. 89 was adopted on 5 May 2004 to reform *the Iraqi Labour Code* (Amendment to the Labour Code Law No. 71 of 1987), setting a minimum age of recruitment and regulating labour conditions for persons under eighteen years old, in view that Iraq was party to ILO Convention Nos. 138 and 182 and so it had the obligation "*to take affirmative steps toward eliminating child labour*" (CPA/ORD/05 May 2004/89).

<sup>983</sup> CPA, Regulation No. 4: Establishment of the Iraqi Property Reconciliation Facility, CPA/REG/14 Jan. 2004/04; CPA; Regulation No. 8: Delegation of Authority Regarding Establishment of a Property Claims Commission (Amended by Reg. 12), CPA/REG/14 Jan. 2004/08; CPA, Regulation No. 12: Establishment of the Iraq Property Claims Commission (As Amended and Restated) with Annex A, CPA/REG/24 June 2004/12.

<sup>984</sup> See Original Civil Jurisdiction (Singapore), 21 February 1956, *Public Trustee v. Chartered Bank of India, Australia and China*, in ILR, vol. 23, p. 687 ff., at 694, holding that "*It was a practical necessity, and within their legal power and duty under Article 43, for the Japanese to provide for and regulate matters of currency and banking so that the population could live orderly lives*".

<sup>985</sup> Two persuasive examples have been proffered. One regards *labour regulations on hiring and firing* (which may be very flexible in Anglo-Saxon countries based on the neo-liberal attitudes while not in countries anchored in a social democratic model, such as continental European countries or Japan). The other example concerns *the right of fair trial* (whose standards and requirements may differ between the Anglo-Saxon common law and the civil law countries). See M. Sassoli, "Legislation and maintenance of public order and civil life by occupying powers", 16 *EJIL*, 2005, at 677.

<sup>986</sup> It is well known the "*litmus test*" articulated by Yoram Dinstein. See Dinstein, "The International Law of Belligerent Occupation and Human Rights", *IYHR*, 1978, at 113; Dinstein, "Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding", *Harvard: Program on Humanitarian Policy, Occasional Papers Series*, Fall 2004, at 9; Dinstein, *The International Law of Belligerent Occupation*, Cambridge, 2009, at 120-123.

<sup>987</sup> See T. Meron, "Applicability of Multilateral Conventions to Occupied Territories", 72 *AJIL*, 1978, 542, at 549-550, highlighting that "*(if legislative changes introduced by an occupant, ostensibly in order to benefit the local population, do not correspond to the law in force in the occupant's own territory, there may be an immediate case for suspecting the occupant's animus. One should, however, be wary of carrying such a test, inconclusive as it is, beyond this point. In practice the standard implicit in the test may be abused by an occupant interested in a gradual extension of its laws to the occupied territory under a strategy of creeping annexation*".

<sup>988</sup> Dinstein himself emphasises that any professed humanitarian motives by the occupier "*may serve as a ruse for a hidden agenda*", see Y. Dinstein, *op. cit.*, at 8.

suspicion has been addressed in discussing the occupier's trustee-like obligations.<sup>989</sup> Even a risk of “*ethnocentrism*” underlying occupation measures has been raised as a risk whereby it should be concluded that the lawfulness of the occupier's conduct is to be objectively assessed in relation to the sovereign rights of the people whose territory is occupied.<sup>990</sup>

In any case, it is reasonable to contend that the lawfulness of legislation enacted pursuant to the several interests of the “*orderly government*” of occupied territory relies on two caveats. On the one hand, the measure should be strictly necessary to ensure a level of protection of local population in accordance to international human rights standards relevant in such a territory, as articulated in the section 5.3. On the other hand, the measure should not disproportionately frustrate the interest of respecting the existing local legal system. The reference in Article 64(2) solely to the “*essential*” / “*indispensable*” legislative measures excludes the occupier's possibility to reform entire sectors of a pre-existing legal system.<sup>991</sup> Furthermore, respect for the criterion of proportionality under Article 64 imposes a restriction on adopting constitutional reforms that are likely to change permanently the occupied territory, reflecting the temporary nature of an occupation. Such reforms would end up sacrificing disproportionately the interests of the occupied State or affecting the free exercise of the right to self-determination of the occupied peoples.<sup>992</sup> In particular, the legitimacy of constitutional reforms aimed at changing the form of the state or government should be excluded, even when aimed at setting up a “*more democratic*” regime expected to guarantee better the rights concerned.<sup>993</sup>

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<sup>989</sup> See A. Gerson, “War, Conquered Territory, and Military Occupation in the Contemporary International Legal System”, 18 *Harvard International Law Journal*, 1976-1977, 525, at 538, noting that “... ‘humanitarian’ motives were suspect. The ease with which such an exception to the prohibition on institutional change could serve as a ruse for creation of fait accompli to the occupant's advantage was well known. Claims by occupants that such change as they initiated was humanitarian, dictated by ‘the imperative needs of the population’, would, during the course of occupation, be exceedingly difficult to disprove. To prevent this possibility of abuse the Hague Regulation adopted the measure of common law jurisprudence regarding trustees. An occupant, like a trustee, would be severely restricted in his authority, not because certain activities could not be honestly done, but because of the extreme difficulty of proving them to have been dishonest ...”.

<sup>990</sup> A. Pellet, “The Destruction of Troy Will Not Take Place”, in E. Playfair (ed.), *op. cit.*, at 169, observing that “... the occupier is not the territorial sovereign. He cannot legislate for the occupied people as he does within his own frontiers. [...] there is nothing to stop him taking into consideration the legislative and statutory evolution of the country whose territory is occupied and considering this evolution as worthy of note, it being understood that he is free to take into account or not. A solution of this type would have the advantage of countering the risk of opposition to progress entailed in an occupation which is excessively prolonged while not falling into the disadvantages of ethnocentrism subjectivity. [...] The lawfulness of the occupier's conduct ... can, and should, be judged in relation to a far more objective element, the criterion of the sovereign rights of the people whose territory is occupied”.

<sup>991</sup> In this vein, the reforms introduced by the Allied Military Government on the pensions regulation and on the regulation supporting births, which were in force in Venezia Giulia before the occupation of 1945-1947, are deemed unlawful in light of the applicable law at that time, see General Order No. 43, 11 Feb. 1946, in *Allied Military Government Gazzette*, 1946, vol.1, n. 14, at 3; General Order n. 281, 12 Dec. 1946, *Allied Military Government Gazzette*, 1946, vol.2, at 332.

<sup>992</sup> R. Kolb and S. Vitè, *Le droit de l'occupation militaire. Perspectives historiques et enjeux juridiques actuelles*, Bruylant, 2009, p. 272 f.

<sup>993</sup> C. Greenwood, “The Administration of Occupied Territory in International Law”, in C. Greenwood (ed.) *Essays on War in International Law*, London, 2006, p. 353 ff., at 378 f.

### 5.2.3. Necessity for fulfilling the obligations under the Geneva Conventions

Consistent with a further explicit dimension of the occupier's regulatory competence under Article 64(2) GCIV, *the local population may be subjected to any legislative measures deemed "essential" to discharge his obligations under the Fourth Geneva Convention.*<sup>994</sup> Significantly, this provision was inspired by the case concerning the Allies' occupation of the territories previously administered by the Reich.<sup>995</sup> Thus, legislative powers may be exercised to the extent necessary to *ensure the rights and benefits of the civilian population under that Convention.* For instance, Article 27 entitles protected persons to "*respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs*"; then, the occupier is bound to repeal by law "*any adverse distinction based, in particular, on race, religion or political opinion*", as this would be in conflict with Article 27(4).

Although Article 64 confers on the occupier the authority to alter pre-existing laws in language of entitlement ("*may*"), it sets up a specific obligation to waive pre-existing norms running counter to the Geneva Conventions, in accordance with common Article 1 ("*...to respect and to ensure respect for the present Convention in all circumstances*"). This is confirmed in the ICRC Commentary, highlighting the *prevalence of the humanitarian interests of civilian population* over the interest of the occupied State to safeguard the *status quo*.<sup>996</sup> Notably, this has concrete consequences when the occupant is intended to apply firmly certain legislation that was in force in the occupied territory at the beginning of the occupation but is incompatible with IHL obligations. In fact, the occupant is prevented from invoking predating local legislation to excuse its failure to perform to that Convention.<sup>997</sup>

A guiding example may be the Israeli practice to rely on local Emergency Regulations - dating

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<sup>994</sup> The French expression "*indispensable*" appears more restrictive than "*essential*" and also closer to the conservationist premises of the Hague Regulations. In any case, compared to the expression "*unless absolutely prevented*" of Article 43, the element in Article 64 GCIV expresses the authority to change existing legislation to "*fulfill its obligations under the [...] Convention*".

<sup>995</sup> Emblematic is the case of the anti-Jewish and other racial laws abolished because of their discriminatory nature, even before that the *Reich* was completely dismantled, in all the territories occupied by the United States, with the exception of the French colonies in North Africa, where General Eisenhower wanted to avoid the risk of a conflict between Jews and Muslims, see his message at Marshal on 8 December 1942 as reproduced in Coles, Weinberg, *Civil Affairs: Soldiers Become Governors*, Washington, 1992, at 45.

<sup>996</sup> See J. Pictet (ed.), *Commentary: IV Geneva Convention relative to the Protection of Civilians Persons in Time of War*, ICRC, 1958, at 360.

<sup>997</sup> See J. Pictet (ed.), *ibid.*, at 336. See also Y. Dinstein, "Legislation under Occupation and Peacebuilding", *Harvard: Program on Humanitarian Policy, Occasional Papers Series*, Fall 2004, at 7. According to the author, the prohibition to implement a predating norm that conflicts with an obligation contained in the Fourth Geneva Convention derives from the general rule, codified in Article 27 VCLT whereby the ineffectiveness of an international obligation cannot rely on its incompatibility with a domestic norm. For Dinstein, in fact, if Article 27 VCLT prohibits on the occupier to invoke the provisions of its internal law to justify its failure to perform an international norm of occupation law, then *a fortiori* it prohibits to invoke, under the same aims, a norm of the local legal system of the occupied territory to justify its failure to implement the Convention. However, Dinstein's thesis does not take into account the circumstance that - in contrast with the norms of the occupier's legal system - it is international law that imposes to respect the pre-existing legal system of the occupied territory.



back to the British Mandate for Palestine<sup>998</sup> and still in force in the West Bank and the Gaza Strip on the eve of Israeli occupation - which permitted military commanders to destroy private property as a punitive measure, and not only “*where such destruction is rendered absolutely necessary by military operations*” as provided in Article 53 GCIV (based on Article 23(g) HRs).<sup>999</sup> In this regard, the view articulated by the Israeli High Court of Justice in some case law on the punitive demolitions of houses inhabited by Palestinians guilty for having committed hostile acts against the occupying power (or for having violated security norms imposed by the occupier) and by their families cannot be shared.<sup>1000</sup> The lawfulness of those demolitions was affirmed by the Court insofar as they were carried out in conformity with the local Emergency Regulations. However, it is unquestionable that the demolition of houses as punitive measure is incompatible with Article 53 GCIV. Hence, the occupant could not legitimately rely on such regulations and it was bound to suspend or repeal them.<sup>1001</sup>

It should be noted that, in Article 64 GCIV, the reference to laws essential for (or which are an obstacle to) the occupant’s respect of this Convention is commonly deemed to encompass *any IHL obligations*. As long as this regime requires specific conduct and bounds to implement such obligations, the same regime could not prohibit the occupant to legislate for applying them. As a corollary, it is generally emphasised that, in order to accomplish several IHL duties in line with the principles of the rule of law, the occupant is allowed to *amend, repeal or suspend preexisting local laws at odds with the entire Geneva Conventions*, and even to *enact new legislation* if necessary to realise effective safeguards of the protected persons’ rights.

In the preparatory works of Article 64, examples for the “necessity ground to legislate” specifically concerned the *provisions in the fields of hygiene and public health, food, child welfare, and labour*.<sup>1002</sup>

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<sup>998</sup> Prior to the entry into force of the Mandate for Palestine, the Ottoman province of Palestine came under belligerent occupation by the British during World War I and shortly afterwards. See N. Bentwich, “The Legal Administration of Palestine under the British Military Occupation”, 1 *British Year Book of International Law*, 1920-1921, pp. 139-148.

<sup>999</sup> See Carroll, “The Israeli Demolition of Palestinian Houses in the Occupied Territories: An Analysis of Its Legality in International Law”, *MJIL*, 1989-90, at 1195 ff., in particular at 1206.

<sup>1000</sup> See HCJ 97/79, *Abu Awad v. Commander of the Judea and Samaria Region*, 33(3) *PD* 309, excerpted in 9 *Israel YbkHR*, 1979, at 343 ff.; HCJ 897/86, *Jaber v. IDF Central Area Commander et al.*, *Israel YbkHR*, 1988, at 252 ff.

<sup>1001</sup> On this issue, see Carroll, “The Israeli Demolition of Palestinian Houses in the Occupied Territories: An Analysis of Its Legality in International Law”, *MJIL*, 1989-90, at 1202 ff.; Dinstein, “The Israel Supreme Court and the law of Belligerent Occupation: Demolitions and Sealing off of Houses”, *IYHR*, 1999, at 285-304; Farrell, “Israel Demolition of Palestinian Houses as a Punitive Measure: Application of International Law to Regulation 119”, *BjIL*, 2002-2003, at 871 ff.; Simon, “The Demolition of homes in the Israeli Occupied Territories”, *IJIL*, 1994, at 1 ff.

<sup>1002</sup> See *Final Record of the Diplomatic Conference of Geneva of 1949*, Berne, 1950, vol. II-A, at 672 (19<sup>th</sup> meeting of Committee III, 19 May 1949, statement of Mr. Quentin-Baxter of New Zealand concerning the regulation on distribution of food supplies) and at 833 (*Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva*, which refers to “*the purpose of ensuring the conditions of living of the civilian population by the maintenance of the essential public utility, relief distribution and rescue services*”).

This is in line with the fact that the drafters of these Conventions, drawing on the welfare state concept and the Keynesian-interventionist economic model, envisaged a range of obligations relating to social and economic matters.<sup>1003</sup> Moreover, according to the ICRC Commentary, examples of abrogable laws include “*provisions which adversely affect racial or religious minorities*”.<sup>1004</sup> An occupier (as any State Party to GC IV) is also bound to legislate to bring to trial persons having committed grave breaches of law, if such law is not yet in force within the occupied territory.<sup>1005</sup>

In practice the necessity ground to legislate pursuant to the fulfilment of the Geneva Conventions has been widely interpreted in the case of the CPA occupation of Iraq. In confirming that the United States and United Kingdom were occupying powers in Iraq and in specifically calling upon them to comply fully with the obligations imposed by the 1949 Geneva Conventions and the 1907 Hague Regulations, the Security Council Resolution 1483 (2003) applied a concept of welfare whose nature was definitely wide-ranging. It called upon the CPA “*to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which Iraqi people can freely determine their own political future*”.<sup>1006</sup>

As emphasised in legal scholarship debating the legitimacy of changes of existing legislation or institutions in occupied territories, two aspects remain important. On one hand, the changes justified by the aim of restoring and ensure civil life would be lawful *only if they facilitate/improve civil life* in comparison with the previous system; on the other hand, the burden of proof about the amelioration relies on the occupier. In the context of long-lasting occupation, legislative change is not justifiable if its result is such that this enhancement does not occur; in which case it should be repealed.

### **5.3. Necessity for implementing international human rights law**

The three objectives heretofore reviewed are not all-inclusive. The concept of necessity under Article 64 GCIV has been deemed sufficiently comprehensive/elastic to permit amendments of pre-existing local legislation if reasonably required by the circumstances of occupation.<sup>1007</sup> As

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<sup>1003</sup> This aspect is highlighted in Y. Arai-Takahashi, *The Law of Occupation*, *op. cit.*, 2009, at 133.

<sup>1004</sup> See J. Pictet (ed.), *op. cit.*, at 335.

<sup>1005</sup> See UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford, 2004, para. 11.26, note 54.

<sup>1006</sup> SC Res. 1483, preamble, paras. 4 and 5, 22 May 2003 (adopted by a vote of 14-0, with one member (Syria) not present). This was endorsed by SC Res. 1500 (2003), which welcomed the establishment of the Governing Council of Iraq. It was a detailed resolution, containing 27 operative paragraphs and a long preamble. Under the present research, other paragraphs particularly relevant are 2, 7, 8, 12, 14, 15.

<sup>1007</sup> See Y. Dinstein, *The international law of belligerent occupation*, 2009, pp. 116 and 135-136. The author refers to the necessity to revise the existing laws in an occupied territory when they grant a right of appeal from local courts to a

anticipated, *international human rights standards are not explicitly mentioned as an additional exception* to the general principle prohibiting changes to local laws. At the time of the codification of the Hague Regulations, indeed, international human rights law did not yet exist, while the latter was just conceived of when the Fourth Geneva Convention was drafted in 1949.<sup>1008</sup>

Notwithstanding the position of certain occupying powers,<sup>1009</sup> further practice and judicial decisions have confirmed that *an occupant is bound to international human rights law concerning the treatment of local inhabitants living under occupation*.<sup>1010</sup> Notably, at the end of WWII the occupier was entitled to abrogate discriminatory or oppressive national legislation such as the National Socialist Nuremberg laws.<sup>1011</sup> In the occupied Iraq new legal texts were adopted to take Iraqi legislation towards international human rights standards, as detailed hereafter. Additionally, a relevant acknowledgment in this context has come from the ICJ in the *Case Concerning Armed Activities on the Territory of the Congo*; in examining Uganda's actions, the Court addressed the occupant's duties under Article 43 HRs and the entailment of human rights obligations in this regard.<sup>1012</sup>

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higher tribunal functioning in an unoccupied part of the country: Dinstein notices that the occupier does not have to submit to such dependence on enemy institutions and that the comprehensive concept of necessity allows to amend the laws in force to suspend the nexus to that higher tribunal for the duration of the occupation, so transferring the authority to hear appeals from the local courts to another judicial instance operating within the occupied territory (the author cites C. Fairman, "Asserted Jurisdiction of the Italian Court of Cassation over the Court of Appeal of the Free Territory of Trieste", 45 *AJIL*, 1951, p. 548).

<sup>1008</sup> Of note is the rejection of a proposal made by the Mexican Delegation to the effect that the occupier could modify local legislation only if it was in breach of the Universal Declaration of the Rights of Man. See *Final Record of the Diplomatic Conference of Geneva of 1949*, Berne, 1950, vol. II A, at 671.

<sup>1009</sup> See ICJ, Advisory Opinion on the wall, *op. cit.*, para. 102 and 110; A. Roberts, "Prolonged Military Occupations: the Israeli-Occupied Territories since 1967", 84 *AJIL*, 1990, 44, at 71-72. As regards the Coalition Provisional Authority Administrator in Iraq (CPA), Ambassador Paul Bremer is reported to have affirmed that "*the only relevant standard applicable to the Coalition's detention practices is the Fourth Geneva Convention of 1949*", see Amnesty International, *Iraq: Memorandum on concerns related to legislation introduced by the Coalition Provisional Authority*, 4 December 2003, (MDE 14/176/2003).

<sup>1010</sup> *E.g.*, see references in *Report on the situation of human rights in Kuwait under Iraqi Occupation, prepared by Mr. Walter Kälin, Special Rapporteur of the Commission on Human Rights in accordance with Commission resolution 1991/67*, E/CN.4/1992/26, 16 January 1992, paras. 50-59. As to the ICJ, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, paras. 107-112; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, paras. 216-217. As to Northern Cyprus, the European Court of Human Rights deemed it occupied by Turkey and applied the ECtHR, see *Loizidou v. Turkey* (Merits), 28 November 1996, para. 56) and *Cyprus v. Turkey* (10 May 2001, paras. 69-77). As to the Human Rights Committee, see *Concluding Observations: Israel*, UN Doc. CCPR/C/79/Add.93, 18 August 1998, para. 10; *Concluding Observations: Israel*, UN Doc. CCPR/C/ISR/CO/4, 21 November 2014, para. 5; *General Comment No. 31*, UN Doc. CCPR/C/74/CRP.4/Rev.6, 21 April 2004, para. 10. See *General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-conflict Situations*, CEDAW/C/GC/30, 18 October 2013, para. 9. See UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford, 2004, paras. 11.19.

<sup>1011</sup> See G. Von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, University of Minnesota Press, 1957, pp. 95, 107; M. Greenspan, *The Modern Law of Land Warfare*, University of California Press, 1959, p. 245.

<sup>1012</sup> See ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, paras. 178-179: "178. The Court thus concludes that Uganda was the occupying Power in Ituri at the relevant time. 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

Few scholars have specifically examined whether or not obligations stemming from international human rights law offer a distinct ground of exception to the general rule prohibiting changes to local legal system. In this respect, “*l’ordre et la vie publics*” in the Hague Regulations has been interpreted as “*encompass(ing) a requirement that the occupant respect and ensure ‘as far as possible’ the international human rights standards protected by customary international law and those treaties to which it is a party*”.<sup>1013</sup>

Distinct aspects as to *the occupant’s necessity to implement human rights obligations* may be articulated.

(1) Firstly, *fundamental rights as enshrined in peremptory norms of international law* would prevail over incompatible local legislation in force in the occupied territory.<sup>1014</sup>

(2) Secondly, as long as an occupant has to ensure law and order under occupation law, *his failure to abide by IHL obligations cannot justify a rejection of the applicability of human rights obligations in the occupied territory*. As to the substance, it may be contended a requirement not only to *respect the local population’s human rights as pertains to its negative sense*, thus refraining from interfering or curtailing with their enjoyment, but also a requirement to *positively protect them* without tolerating violations, as required, at the very last, by existing IHL obligations. A partial or total inability to act raises questions as to *what extent a minimum effort was nonetheless possible* and *whether it should have been made*. Thus, *due diligence* required may depend on the context.

Focusing on ESC rights, they regularly necessitate the State to take positive action, including adopting legislative measures, besides the negative tier of respecting them. Accordingly, an occupier would be allowed to adopt additional provisions “*genuinely necessary*” to safeguard such rights. Nevertheless, human rights treaties on ESC rights generally grant States latitude in the implementation of ensuing obligations: to the extent that local laws deal with such latitude, the

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*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. 179. The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, 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’.*

<sup>1013</sup> See S. Wills, “Occupation Law and Multinational Operations: Problems and Perspectives”, 77 *BYIL*, 2006, 256, at 267, mentioning the reasoning by Lord Justice Sedley in the UK Court of Appeal (civil division), *The Queen (on the application of Mazin Jumaa Gatteh Al-Skeini and Others) and the Secretary of State for Defence*, Judgment of 21 December 2005 EWCA Civ 1609, paras. 195-196. See also UK House of Lords, Opinions of the Lords of Appeal For Judgment in the Cause *Al Skeini and others (Respondents) v. Secretary of State for Defence (Appellant) Al Skeini and others (Appellants) v. Secretary of State for Defence (Respondent)*, (Consolidated Appeals), 13 June 2007, UKHL 26. See also M. Sassoli, “Legislation and Maintenance of Public Order and Civil Life by Occupying Powers”, 16 *EJIL*, 2005, p. 676.

<sup>1014</sup> On this aspect, the British Manual of Military Law, part III, London, 1958, para. 510, authorised derogation to local norms “*where the law of the occupied State is such as to shock elementary conceptions of justice and of the rule of law*”. The British Military Manual seems to admit ample derogations by affirming that the occupier’s powers “*may be sufficiently wide to enable repeal of laws, e.g., that violate human rights treaties*”, see UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford, 2004, at 278-279, para 11.11.

occupier may definitely not repeal them. As highlighted in the ICRC Commentary, indeed, occupying authorities may not modify local legislation “*merely to make it accord with their own legal conceptions*”,<sup>1015</sup> also if the latter are consistent with international norms on human rights.

(3) Thirdly, *the denial of applicability of human rights obligations might be argued on the basis of perceived restrictions under occupation law*.<sup>1016</sup> As observed above, the occupant’s regulatory competence is intended to minimise changes endangering the basic assumptions on the temporariness of occupation and his non-sovereign authority. As far as such legal restrictions are not absolute, however, an evolutionary approach has led to view the occupant as “*absolutely prevented*” from applying local legislation contrary to international law, and in doing so permitting certain changes consistent with the objectives of occupation law. The evolutionary reading of Article 43 HRs - along with its interplay with Article 64 GCIV - has led the “*empêchement absolu*” exception to acquire more flexibility than its negative formulation might evoke.<sup>1017</sup> *Changes of local laws have been deemed required* - not only exceptionally allowed - *to comply with the obligation to restore and ensure a wider notion of public life*. Significantly, combined interpretations of these articles have led to refer such exception to cases of either *material necessity* or “*legal necessity*”,<sup>1018</sup> namely the necessity to implement IHL obligations whether customary or conventional<sup>1019</sup> as well as obligations ensuing from non-derogable human rights norms.<sup>1020</sup> In any case, positive convergence between the distinct regimes may enable us to understand broadly the occupant’s requirement to fulfil IHL obligations and so give effect to civilians’ fundamental guarantees in occupied territories.

While the potential for occupants’ abuses in the form of legislative changes driven by self-interest

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<sup>1015</sup> J. Pictet (ed.), *Commentary: IV Geneva Convention relative to the Protection of Civilians Persons in Time of War*, ICRC, 1958, at 336.

<sup>1016</sup> For a case in which the restrictions placed by occupation law have been raised as impediments for fulfilling human rights obligations, see ECtHR, *Al Skeini and Others v. the United Kingdom*, Appl. No. 55721/07, Judgment of 7 July 2011, para. 114.

<sup>1017</sup> The notion of “*empêchement absolu*” has been traditionally identified only with cases of impossibility determined by the exigency to satisfy strict military necessities, see M. Bothe, “Occupation, Belligerent”, *Encyclopedia of Public International Law*, at 765; H. Kelsen, *Principles of International Law*<sup>2</sup>, New York, 1952, at 73; Oppenheim, “The Legal Relations between an Occupying Power and the Inhabitants”, 33 *LQR*, 1917, at 365.

<sup>1018</sup> See M. Sassoli, *Article 43 of the Hague Regulations and Peace operations in the Twenty-First century*, 2004, in [www.ihlresearch.org](http://www.ihlresearch.org), at 8.

<sup>1019</sup> See J. Pictet (ed.), *Commentary: IV Geneva Convention, op. cit.*, at 359, according to which Article 64 merely express “*sous une forme plus précise, le contenu de l'article 43 du Règlement de La Haye*”. In this vein, see Y. Dinstein, “Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding”, *Harvard: Program on Humanitarian Policy, Occasional Papers Series*, Fall 2004, at 6, in which the author stresses that “*the Geneva Convention must prevail over any conflicting local legislation in the occupied territory. That means that the laws in force in the occupied territory must be adapted where necessary to the Geneva Convention (and, indeed, to any other binding instrument of international humanitarian law)*”.

<sup>1020</sup> See M. Sassoli, “Article 43 of the Hague regulations and Peace operations in the Twenty-First century”, 2004, in [www.ihlresearch.org](http://www.ihlresearch.org), at 12-14. On the prevalence (on local laws) of human rights enshrined in peremptory norms of international law, see British Manual of Military Law, Part III, London, 1958, at 510: “*There is room for the view that the Allied Powers were, in the terms of Hague rule 43, “absolutely prevented” from administering law and principles the application of which in occupied territory was utterly opposed to the modern conceptions of the rule of law*”.

in such territories is foreseeable, it is reasonable to contend that there is certain room for *changes based on modern international human rights law and intended to benefit the civilian population living under occupation*. The main issue seems mostly related to the *way* to suspend, modify, repeal pre-existing local laws, or enact new legislation in an occupied territory featured by challenging circumstances on the ground. In the area of ESC rights, human rights treaties have either supported *normative clarification* or offered *further normative contents of fundamental rights*, as will be detailed in Chapter 4. Therefore, in providing for specific and contemporary understanding of immediate and long-term needs and the interests of the occupied civilian population in such areas, they have the potential to meet the ground of “necessity” (which would be more difficult to attain under IHL rules).

In particular, human rights law may become relevant where occupation law scarcely, if at all, addresses certain subjects such as regarding the *right to social security*, the *right to form trade unions*, and the *right to maternity leave with pay*, whose pertinence may rise during prolonged occupation.<sup>1021</sup> Articles 51 and 52 GCIV protect the *right to work*, although this scarcely beyond issues on compulsory labour, requisitioning services and work conditions of protected persons working at the request of the occupant.<sup>1022</sup>

The *right to education* may be illustrative as well. The occupant’s positive obligations under Articles 24 and 50 GCIV may be interpreted in conjunction with Article 13(2)(a) ICESCR, which categorically establishes that “*primary education shall be compulsory and available free to all*”;<sup>1023</sup> further *more detailed requirements* set forth by the CESCR gain relevance though.<sup>1024</sup> Thus, in providing a modern understanding of the educational needs of a child, *international human rights law may clarify and expand those comparatively vague occupation law rules*.<sup>1025</sup> Certain tensions may remain though. For instance,

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<sup>1021</sup> On the argument that the application of human rights standards is reinforced by a prolonged period of occupation or a “*stalemated situation*” of occupation, see Cohen, *Human Rights in the Israeli-Occupied Territories* 1967-1982, 1985, p. 29; A. Roberts, “Prolonged Military Occupation: The Israeli-Occupied Territories 1967-1988”, 84 *AJIL*, 1990, p. 71.

<sup>1022</sup> See ICJ, Advisory Opinion on the wall, *op. cit.*, paras. 130 and 133-134, in which the Court relied on the occupant’s duty not to interfere with the right to work of the population living under occupation, where the construction of the wall and its associated regime (*e.g.* the restrictions on movement) obstructed capacities to earn a livelihood.

<sup>1023</sup> Art. 50 (1) and (3) GCIV read: “*The Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children. [...] Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend*”.

<sup>1024</sup> See CESCR, *General Comment No. 13: The right to education*, 8 December 1999, E/C.12/1999/10, particularly para. 57 on core obligations.

<sup>1025</sup> In actual fact, authoritative interpretations of certain aspects of such rules are offered in the ICRC commentary, which set three grounds for defining “*children*” in terms of age: Article 50 GCIV grants protection to “*children and younger people up to the age of fifteen*”, but in some circumstances the “*degree of development of the physical and mental faculties of the persons concerned*” has to be taken into account, see Pictet (ed.), *Commentary: IV Geneva Convention, op. cit.*, p. 285-286. Then, the legislation of the occupied territory should be considered, see *Commentary to Additional Protocol I, op. cit.*, para. 3179. Further, “*local institutions*” are broadly deemed to include those for the “*care of children*” and those for their “*education*”, with possible

according to the ICRC commentary to Article 50(1) GCIV, the occupant is bound to *assist* educational institutions for children if needed, but *not allowed to interfere* with them; besides, such assistance can only be provided by “*mutual agreement*” with local and national authorities.<sup>1026</sup> This view about non-interference and cooperation may positively mitigate the occupant’s intention to replace old education system with a new one. Nonetheless it leaves a basic dilemma that concerns “*the extent to which an occupant could assist/interfere legitimately with the educational system of a territory under his control*”.<sup>1027</sup> State practice concerning occupying powers’ changes in the sphere of education has emerged since WWI; since they generally did not deem themselves bound by occupation law as embodied in the Fourth Geneva Convention, scarce information exists on their efforts to respect Articles 24 and 50 GCIV however.<sup>1028</sup> From a human rights perspective, further concerns may arise for *possible inconsistencies of the local education system with the normative content of right to education*, particularly with core positive obligations contained in its ‘availability’, ‘accessibility’, ‘acceptability’ and ‘adaptability’ components.<sup>1029</sup>

As far as *the rights to health and food* are concerned, the Fourth Geneva Convention and Protocol I provide for basic provisions to protect immediate needs, but human rights law entails looking beyond IHL rules. This point will be examined in next chapters. For instance, devising “*public health strategy and plan of action*” have been declared to form part of the basic obligations corresponding to the right to health.<sup>1030</sup> This may be relevant when occupation endures. Moreover, the CESCR has considered that “*the obligation to fulfil (facilitate) means the State must pro-actively engage in activities intended to strengthen people’s access to and utilisation of resources and means to ensure their livelihood, including food*

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overlaps. They include, *e.g.*, “*child welfare centres, orphanages, children’s camps, children’s homes and day nurseries, ‘medio-social’ reception centres, social welfare services, reception centres, canteens, etc.*”, *ibid.*, p. 286.

<sup>1026</sup> The occupying power “*must ensure by mutual agreement with the local authorities that the persons concerned receive food, medical supplies and anything else necessary to enable them to carry out their task. It is in that sense that the expression ‘the proper working’ of children’s institutions should be understood*”, see J. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, *op. cit.*, 1958, p. 286.

<sup>1027</sup> This dilemma was pointed out back in 1957 by G. Von Glahn, *The occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, University of Minnesota Press, 1957, pp. 62-63, noting that “*the accepted rules of international law are unfortunately silent*” on this problem.

<sup>1028</sup> They include the German occupation of Belgium (1914-1918), the US occupation of Italy, the Indonesian occupation of East Timor, the USSR in Afghanistan in the Seventies and Eighties, the Turkish occupation in Cyprus, Israel in the Palestinian Occupied Territories, and the US occupation of Iraq. See A. Solansky, *German Administration in Belgium*, Columbia University Press, 1928, at 163; E. Benvenisti, *The International Law of Occupation*, 1993, at 40-43, 91, 155, 162; A. Hyman, *Afghanistan under Soviet Domination, 1964-1981*, MacMillan, 1982, at 93-94. See also ECtHR, *Cyprus v. Turkey*, 25781/94, Judgment, 10 May 2001, para. 44 (“... *school textbooks for use in the Greek-Cypriot primary school were subjected to a “vetting” procedure in the context of confidence-building measures suggested by UNFICYP. The procedure was cumbersome and a relatively high number of school-books were being objected to by the Turkish-Cypriot administration*”).

<sup>1029</sup> For a detailed examination of this point, see J.T. Horowitz, “The right to education in occupied territories: making more room for human rights in occupation law”, *YIHL*, 2004, particularly at 249-274.

<sup>1030</sup> CESCR, *General Comment No. 14: The right to the highest attainable standard of health*, 11 August 2000, UN Doc. E/C.12/2000/4, para. 43 (f).

security”.<sup>1031</sup> This may entail an occupying power make sure the civilian population’s access to the resources and means guaranteeing its own livelihood, *beyond* the delivery of food during the emergency period. Similarly, the development of international human rights law has broadened States’ obligation to accept and to facilitate humanitarian assistance in both international and non-international conflicts, *even* where the denial of such assistance does not certainly threaten the survival of the civilian population.<sup>1032</sup>

(4) Fourthly, *local laws might appear incompatible or insufficient in respect to customary or conventional international human rights standards*. In actuality, situations of incompatibility with human rights treaties (as ratified by an occupying power but not in force in the occupied territory) might arise only to the extent that they express regional values extraneous to the cultural traditions and local customs existing therein. If this were to be the case, occupier’s claims to respect such standards, even in derogation from local laws, would end up representing a sort of “*human rights imperialism*”. Although the latter could inhibit such derogation, it does not seem reasonable to argue that it could impede entirely the application of human rights treaties ratified by the occupier.<sup>1033</sup> In the same way, insofar as the occupier exercises, discretionally and provisionally, in the occupied territory the general latitude granted to States for implementing human rights obligations, its non-sovereign status should be taken into serious account: *changes deemed absolutely necessary under binding human rights law might be introduced*, but it should remain *favourably careful to analogous local values as well as cultural, economic and legal customs existing in the occupied territory*.<sup>1034</sup> In any case, the occupier could refer to the procedure for derogation under the human rights treaty concerned in order not to apply provisions incompatible with local legislation, so avoiding responsibility for a breach of international law in respect to other States parties.

Focusing on relevant practice, in occupied Iraq the CPA carried out a far-reaching reform of

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<sup>1031</sup> CESCR, *General Comment No. 12: The right to adequate food*, 12 May 1999, UN Doc. E/C.12/1999/5, para. 15.

<sup>1032</sup> See R. Barber, “Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law”, 91 *IRRC*, 2009, pp. 371-397.

<sup>1033</sup> See House of Lords, *Al-Skeini and others v. The United Kingdom*, Appl. No. 55721/07, Judgment of 7 July 2011, para. 78. Indeed, not all the provisions contained in regional human rights treaties express “particular” values essentially extraneous to the legal order of non-party States. Regarding some human rights, it is worth noting *a substantial convergence* among the guarantees provided for under universal and regional treaties. Further, it is possible that the respect for a right enshrined in a regional treaty, but not at the universal level, might be safeguarded *infra* or *praeter legem*, thus without introducing changes to the existing legal system, see R. Wilde, “Completing Occupation Law? Selective Judicial Treatment of the suitability of Human rights Norms”, *Israel Law Review*, 2009, p. 80 ff. See also Judge Bonello’s concurring opinion at the ECtHR, House of Lords, *Al-Skeini et al.*, *ibid.*, paras. 37-39.

<sup>1034</sup> A noteworthy consideration is that, on the one side, the exercise of such discretion remains opposed to the right to self-determination and to the principle that legislation has to rely on the will of the people, but, on the other side, the exercise of such a discretion is “*inherent in the situation of occupation*” until the right to self-determination can be exercised, see M. Sassoli, *Article 43 of the Hague regulations and Peace operations in the Twenty-First century*, 2004, available at [www.ihlresearch.org](http://www.ihlresearch.org), at 14.



Iraqi laws for the claimed purpose of making it compatible with international human rights law. A Ministry of Human Rights was established to “*implement the rule of law and a system of protection for human rights and fundamental freedoms, as well as the adoption of fundamental standards of human rights and the revival of traditional Iraqi standards of human treatment*”.<sup>1035</sup> Related aspects also concerned the field of criminal and criminal procedural laws.<sup>1036</sup> Two cases in the area of ESC rights regarded the prohibition of child labour and the establishment of property reconciliation and claims institutions to decide property disputes mainly concerning the Kurdistan regional area, as previously mentioned in section 5.2.2.

It is worth adding that, insofar as occupation concerns *a territory part of an existing country*, the respect for the local legal system may be basically functional to restore the full sovereignty of the occupied State, hence in the interest of the legitimate sovereign and, more generally, in the interest of the international community in view of the conservationist principle of values, which supports the development of international law.<sup>1037</sup>

Conversely, insofar as occupation concerns *a territory not yet part of a sovereign State*, the respect of local legal system may impede the occupier to shape the free exercise of the right to self-determination of the people living under occupation, which the international community promotes. Indeed, an occupier’s attempt to legislate to advance such an exercise appears not possible because this right is intimately connected to the wishes of that people (it consists of the people’s right to make choices). For that reason, while the respect of pre-existing legal system bounds an occupier, local authorities representing that people may freely adopt reforms.<sup>1038</sup>

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<sup>1035</sup> CPA Order No. 60 adopted on 19 February 2004. In the following years it has implemented projects on human rights development and advancement, particularly in relation to prisons and detention centres teams, or the situation of women in Iraq. In 2008 the National Institution of Human Rights was set up as a specialised institute aimed at mainstreaming a human rights culture and capacity building of the personnel of the Ministry and other governmental institutions. In 2010 completed the UN Universal Periodic Review.

<sup>1036</sup> CPA Order No. 7 was adopted on 9 June 2003 to reform *the Iraqi Penal Code*, it suspended capital punishment, it prohibited torture and cruel, degrading or inhuman treatment or punishment as well as discrimination (CPA/ORD/9 June 2003/07 (Sections 3 and 4), amended by CPA Order No. 31, CPA/ORD/10 September 2003/31). As for the reforms of procedural criminal law, the rights to remain silence and the right to defence counsel (including the funded scheme) were recognised, besides the requirement for the advise of rights (see Memorandum No. 3: Criminal Procedures, CPA/MEM/27 June 2003/03, Section 4), and the guarantee of fundamental due process for detainees (see CPA Order No. 10: Management of Detention and Prison Facilities, CPA/ORD/8 June 2003/10; Memorandum No. 2: Management of Detention and Prison Facilities, CPA/MEM/8 June 2003/02). See M.J. Kelly, “Iraq and the Law of occupation: New Tests for an Old law”, 6 *YbkHL*, 2006, 127, at 139-142, highlighting how some aspects of political offences in the Iraqi Penal Code were suspended by the Administrator, while others were subjected to its approval. Under the CPA Orders, courts were required to apply the law in an impartial and non-discriminately manner.

<sup>1037</sup> See G. Sperduti, *Lezioni di diritto internazionale*, Milano, 1958, 19 ff.

<sup>1038</sup> While Israel is bound to respect the legislation dating back to the British Mandate as well as the administration by Egypt and Jordan, the Palestinian National Authority is free to shape the legal order of the future State of Palestine.

Focusing on the objective incompatibility of a situation of occupation with the right to self-determination, respecting the latter should imply to withdraw from the occupied territory, rather than simply not to legislate. Nonetheless, inasmuch as this constitutes an issue of *jus ad bellum*, it cannot serve to negate the occupant's authority to legislate therein under *jus in bello*. A reasonable possibility in this regard is the allowing for the abrogation of local laws that impede people's exercise of the right to self-determination and to generate conditions indispensable to such an exercise.<sup>1039</sup>

## **6. The seizure and use of enemy property**

In regulating the treatment of enemy property in the occupied territory, occupation law basically provides the primacy of private over public property. The occupant has different rights and duties regarding both types (in the forms of moveable and immovable property). The rigorous distinction between private and public property that featured the discipline of the Hague Regulations reflects the well-known *laissez affaire* approach of their drafters. As significantly highlighted in legal scholarship, however, since the 1920s decision-making policies on the regulations of the economy and property rights in occupied territories have been affected by the idea of *a welfare state based on public intervention and joint (public and private) titles*.<sup>1040</sup>

In focusing on the basic question of the use of public property under occupation, the following appraisal puts special emphasis on natural resources, particularly considering the development of relevant provisions over time. For the purposes of the present research, the treatment of public property is narrowly explored regarding its direct or indirect implications for the protection of the civilian population's ESC rights.

### **6.1. The prohibition on seizure and use of public property**

In accordance with the general principle endorsed in international law that the economic weight of the conflict should fall on the belligerent States' shoulders *rather than on their own people*, the public property of an occupied territory does not enjoy the same guarantees provided for private assets under occupation law.<sup>1041</sup> However, certain limits to an occupier's legitimate possibility to seize and

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<sup>1039</sup> On this point, see M. Sassoli, *op. cit.*, at 678.

<sup>1040</sup> On this aspect, see Y. Arai-Takahashi, *The Law of Occupation*, *op. cit.*, 2009, at 195.

<sup>1041</sup> See the statement of Arbitrator Hines in the 1921 Award in the *Cession of Vessels and Tugs for Navigation on the Danube Case*, which involved the confiscation of private property during World War I, Judgment of 2 August 1921, *RSA*, vol.1, 97 ff., at 107-108. According to Hines, "(t)he purpose of the immunity of private property from confiscation is to avoid throwing the burdens of war upon private individuals, and is, instead, to place those burdens upon States which are the belligerents", adding that "(i)n cases where a belligerent has employed private properties for military purposes under arrangements whereby the State undertakes to return the

use local public property remain functional to avoid the economic meltdown of such a territory, especially when occupation endures over time with serious detrimental effects for the civilian population. This consideration then supports the applicability of certain rules on public property to those properties not exclusively enjoyed by private individuals and placed in an occupied territory not yet part of a sovereign State;<sup>1042</sup> indeed they essentially ensure local people the resources necessary to build the new State in the exercise of its right to self-determination.

### 6.1.1. Movable State property

Under Article 53(1) HRs, the occupier's army may take possession of financial assets (*i.e.* “*cash, funds, and property liable to requisition belonging strictly to the (occupied) State*”) as well as of both movable property susceptible in nature to military use and movable property that is for dual use (“*depots of arms, means of transport, stores and supplies*”), in addition to all movable State property which may be used for military operations.<sup>1043</sup> Notably, the only generally accepted exception to this rule concerns movable properties belonging ex Article 56 HRs to “*institutions dedicated to religion, charity and education, the arts and sciences*”; this was confirmed by Nuremberg Military Tribunal regarding the “*wholesale seizure*” of art treasures, furniture, textiles, and similar articles, which was conducted in all the invaded countries.<sup>1044</sup>

A main issue raised by the formulation of Article 53(1) HRs is *whether it would merely allow the occupant to seize/appropriate such movable State properties, or, rather, whether it would entitle it to become the owner concerned*. Despite the word “*saisir*” being similarly contained in its second paragraph to qualify the occupier's temporary seizure of movable properties pertaining to private individuals and usable

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*property to its owner, the appropriation of the property by the Enemy State would not place the burden of the loss upon the private owner, but would place it upon the owner's State, which would be under an obligation to make compensation to the owner”.*

<sup>1042</sup> The relevance of the distinction between private and public property has been confirmed in relation to territories not yet part of a legitimate sovereign State in the case law of the Supreme Court of Israel: “*public property*” has been deemed the one qualified as such by local norms existing on the eve of occupation (see HCJ 2285/81, *El.Nazer et al. v. Commander of the Judea and Samaria Region et al.*, *IsrYHR*, 1983, at 368 ff.) and also the property belonging to the national liberation movement (see HCJ 574/82, *Al-Nawar v. Minister of Defence et al.*, *IsrYHR*, 1986, at 321 ff.)

<sup>1043</sup> Under Article 53(1) HRs “*(a)n army of occupation can only take possession of cash, funds, and realisable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations*”.

<sup>1044</sup> See Judgment of the International Military Tribunal for The Trial of German Major War Criminals, Nuremberg, 30 September and 1 October 1946, *Official Documents, 1947*, pp. 214-242, concerning the evaluation of the legitimacy or not of the operations by the German organization Einsatzstab Rosenberg (headed by the Ministry for the occupied territories of Eastern Europe, *i.e.* the Defendant Rosenberg), which was created in 1940 as a Centre for National Socialist Ideological and Educational Research, but which developed into seizing and appropriating a great amount of cultural assets of historical value pertaining to the occupied States in Eastern Europe (especially to the Soviet Union). The Military Tribunal rejected the thesis that “*the purpose of the seizure of art treasures was protective and meant for their preservation*”, addressing “*the intention to enrich Germany by the seizures, rather than to protect the seized objects*”. On the general practice of Germany in occupied territories during World War II in relation to public property, see Robinson, “*Transfer of Property in Enemy Occupied Territory*”, *AJIL*, 1945, at 216 ff.

for military operations,<sup>1045</sup> it is reasonable to contend that the occupier does not obtain the ownership of the public movable properties of which it takes possession under Article 53(1). Indeed, differently from the second paragraph, the first one does not provide for an obligation to return these assets upon the end of the conflict.<sup>1046</sup>

In any case, in view of the general principles of occupation law, such absence of allocation constraints in paragraph 1 cannot be deemed a suggestion of absolute freedom to dispose of the movable properties of the occupied State. The occupant's faculty to confiscate cannot result in a depletion of the occupied territory for the pursuit of its own benefit<sup>1047</sup> and detrimental for the welfare of the local population as well as for the recurrence of the *status quo ante*. Accordingly, the lawfulness of such seizures remains subordinated to a twofold legitimate use of these assets: as strictly necessary (directly or indirectly) to the immediate military exigencies of the occupying army,<sup>1048</sup> or, as functional to cover the expenses for implementing its duties concerning the protection of the local population.<sup>1049</sup>

This reading of Article 53(1) has been confirmed by subsequent international practice. According to the resolution of the London International Law Conference of 12 July 1943, “(t)he rights of the occupant do not include any rights to dispose of property, rights or interests for purposes other than the maintenance of public order and safety in the occupied territory. In particular, the occupant is not, in international law, vested with any power to transfer a title which will be valid outside that territory to any property rights or interests which he purports to acquire or create or dispose of; this applies whether such property, rights or interests are those of the

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<sup>1045</sup> Article 53(2) reads: “All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made”. In addition to these two types of movable State properties, Article 48 HRs give the occupier the power to seize “taxes, dues and tolls imposed for the benefit of the State” in the occupied territory.

<sup>1046</sup> See Huber, “La propriété publique en cas de guerre sur terre”, *RGDIP*, 1913, p. 657 ff., 662; G. Morelli, “Efficacia del bottino di guerra nell’ordinamento italiano”, *Foro italiano*, 1948, I, p. 533 ff.; F. Capotorti, *L’occupazione nel diritto di guerra*, Napoli, 1949, p. 123 f.; A. Marazzi, “Bottino di guerra e patrimonio indisponibile dello Stato occupato”, in *Il Foro padano*, 1953, I, p. 1071 ff.; G. Von Glanh, *The Occupation of Enemy Territory, A Commentary on the Law and Practice of Belligerent Occupation*, Minneapolis, 1957, p. 183; Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge, 2009, p. 219. See also the majority of military manuals and national laws implementing the Hague Regulations.

<sup>1047</sup> For movable property not of military use, two main consequences for the occupier can be inferred: he must respect the property and he cannot appropriate it. See A. Cassese, “Powers and Duties”, *op. cit.*, at 428. See also US Military Manual, *op. cit.*, para 404.

<sup>1048</sup> As addressed by the US Military Tribunal at Nuremberg, the assets seized cannot be used in other war contexts: “(j)ust as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their own country’s allies, so must the economic assets of the occupied territory not be used in such a manner”, see US Military Tribunal, Nuremberg, *The United States of America v. Alfred Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others*, Judgment of 31 July 1948, 15 AD 620, Case No. 214.

<sup>1049</sup> As a general principle, occupation law prohibits the occupant to dispose of the properties of the occupied State for the pursuit of his own particular aims, see G. Von Glanh, *op. cit.*, p. 183.

*State or of private persons or bodies*".<sup>1050</sup> A further corroboration has come from the International Military Tribunal in 1946, holding that "[Article 49 and 52 of the Hague Regulations], together with Article 48, dealing with the expenditure of money collected with taxes, and Articles 53, 55 and 56 dealing with public property, make it clear that under the rules of war, the economy of an occupied country can only be required to bear the expenses of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear".<sup>1051</sup> Another recent confirmation derives from some military manuals<sup>1052</sup> and from the Bruges Declaration on the use of force, adopted by the *Institut de droit international* on 2 September 2003, according to which "the occupying power can only dispose of the resources of the occupied territory to the extent necessary for the current administration of the country and to meet the essential needs of the population".<sup>1053</sup>

### **6.1.2. Immovable State property, particularly natural resources**

The treatment of immovable State property found in the occupied territory falls under Article 55 HRs, which applies the basic idea of the temporary nature of occupation to public buildings, real estates (land), forests, parks, agricultural estates and "permanent structures on land and other appurtenant to the real estate".<sup>1054</sup> As has emerged in practice the interpretation of Article 55 HRs endorses an extensive notion of "immovable" property, which includes *mineral* as well as *oil deposits* and *other natural resources* of an occupied territory, regardless of the qualification of these assets under the local laws.<sup>1055</sup>

Indeed, the occupant's utilisation of natural resources has been modified in the aftermath of the *principle of permanent sovereignty over natural resources*.<sup>1056</sup> This principle represents both an aspect of State sovereignty<sup>1057</sup> and a corollary of the principle of self-determination of people;<sup>1058</sup> as such it is

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<sup>1050</sup> The complete text of the resolution is reproduced in G. Von Glahn, *op. cit.*, p. 194 ff.

<sup>1051</sup> Judgment of the International Military Tribunal for The Trial of German Major War Criminals, Nuremberg, 30 September and 1 October 1946, *op. cit.*, pp. 238-9.

<sup>1052</sup> See, e.g., the US Field Manual, *op. cit.*, para. 364; the UK Manual, *op. cit.*, para. 11.30.

<sup>1053</sup> The integral text of the Declaration is available in <http://www.idi-iil.org>

<sup>1054</sup> In addition to such immovable State property which is essentially civilian in character, it is possible to distinguish the real property used for military purposes, albeit this distinction is not expressly provided in the Hague law. For instance, see UK Military Manual, *op. cit.*, 2004, p. 303, paras. 11.85-11.86.

<sup>1055</sup> For a detailed analysis on the exploitation of oil in State practice, see Y. Arai-Takahashi, *The Law of Occupation*, *op. cit.*, 2009, at 209-215; E.R. Cummings, "Oil resources in Occupied Arab Territories under the Law of Belligerent Occupation", *JILE*, 1974, 533 ff., at 557; A. Cassese, "Powers and Duties of an Occupant in Relation to Land and Natural Resources", in E. Playfair (ed.), *International Law and the Administration of Occupied Territories. Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, Oxford, 1992, p. 419 ff. On the qualification of the not yet lifted oil as immovable property, see Court of Appeal of Singapore, *N.V. De Bataafsche Petroleum Maatschappij and Ors. v. The War Damage Commission*, Judgment of 13 April 1956, reprinted in 51 *AJIL*, 1957, pp. 802-815.

<sup>1056</sup> See A. Gattini, "Occupazione bellica" in S. Cassese (ed.), *Dizionario di diritto pubblico*, Milano, 2006, pp. 3889 ff., 3895 f.

<sup>1057</sup> See, e.g., UN Doc. A/RES/S-6/3201, Declaration on the Establishment of a New International Economic Order, 1 May 1974, para. 4, lett. E; UN Doc. A/RES/29/3281, Charter of Economic Rights and Duties of States, 14 December 1974, para. 2.

relevant for territories not yet subject to the sovereignty of any State.<sup>1059</sup>

Despite the acknowledgement of the customary nature of such principle in *Democratic Republic of the Congo v. Uganda*, the ICJ has also contended that “*there is nothing in these General Assembly resolutions which suggests that they are applicable to the specific situation of looting, pillage and exploitation of certain natural resources by members of the army of a State military intervening in another State*”.<sup>1060</sup> Scholars’ related critiques highlight that the Court would have excluded the applicability of the principle concerned in *all* the situations of occupation.<sup>1061</sup> The coordination of the quoted statement with another one previously articulated in the same judgement,<sup>1062</sup> however, seems to indicate that the Court just excluded the relevance of this principle in cases in which the plundering and exploitation of natural resources are *not* part of a plan elaborated and systematically implemented by the occupant in order to deprive the occupied territory for the benefit of its own economy, and in which they are, instead, conducted by individuals for their own personal benefit, although they belong to its army.<sup>1063</sup>

In this context it is worth considering that *individual acts of exploitation of natural resources of the occupied State* may constitute the different conduct of *pillaging* as prohibited under Article 47 HRs and under Article 33(2) GCIV, which encompass duties of a positive nature. Accordingly, the occupier should respond to the violation of these provisions as to the unlawful conduct of members of its army, while it should also respond to a violation of Article 43 HRs in case of *negligence in preventing or repressing* looting, plundering and exploitation on the part of private persons.<sup>1064</sup> Conversely,

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<sup>1058</sup> See Article 1(2) of the two 1966 UN Covenants. See also SC Res. 1483 (2003), *The situation between Iraq and Kuwait*, in which it stressed “*the right of the Iraqi people freely to determine their own political future and control their own natural resources*” (*considerando* 4). The twofold nature of the principle of permanent sovereignty over natural resources is affirmed also in GA Res. 1803 (XVII) of 14 December 1962 on “Permanent Sovereignty over Natural Resources”.

<sup>1059</sup> See, *i.e.*, GA Res. 3175 (XXVIII) of 17 December 1973, entitled “Permanent sovereignty over national resources in the occupied Arab territories”, in which it recalled that “*the right of the Arab States and peoples whose territories are under foreign occupation to permanent sovereignty over all their natural resources*”. In this respect, see also the report of the Secretary General, *Implications Under International Law of the United Nations Resolutions on Permanent Sovereignty Over Natural Resources on the Occupied Palestinian and Other Arab Territories and on the Obligations of Israel Concerning its Conduct in These Territories*, A/38/265- UN Doc. E/1983/85, 21 June 1983.

<sup>1060</sup> See ICJ, *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, para. 244.

<sup>1061</sup> R. Kolb and S. Vitè, *Le droit de l'occupation militaire. Perspectives historiques et enjeux juridiques actuelles*, Bruylant, 2009, p. 433 ff.

<sup>1062</sup> See ICJ, *Democratic Republic of the Congo v. Uganda*, *op. cit.*, para. 242: “*Having examined the case file, the Court finds that it does not have at its disposal credible evidence to prove that there was a governmental policy of Uganda directed at the exploitation of natural resources of the DRC or that Uganda’s military intervention was carried out in order to obtain access to Congolese resources. At the same time, the Court considers that it has ample credible and persuasive evidence to conclude that quarters and soldiers of the UPDF, including the most high-ranking quarters, were involved in the looting, plundering and exploitation of the DRC’s natural resources and that the military authorities did not take any measures to put an end to these acts*”.

<sup>1063</sup> On this point, see Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge, 2009, p. 217 f.

<sup>1064</sup> The ICJ recognised that Uganda had to take adequate measures to ensure that the Uganda People’s Defence Force (whose actions were deemed imputable to Uganda) did not engage in plundering, looting and exploitation of natural

*systematic exploitation of economic resources of the occupied territory* may constitute a war crime.<sup>1065</sup> Notably, in dealing with the issue of extensive economic exploitation of occupied territories during the Second World War, a US Military Tribunal at Nuremberg did not give a definition of the war crime of “*plunder of public or private property*” by referring to specific provisions of the Hague Regulations (like the prohibition of pillage in Article 47 HRs); instead, it delivered in general terms “*the outside limits of permissible economic exploitation*” of occupied territories by belligerent occupants.<sup>1066</sup>

Refocusing on Article 55 HRs, as has been anticipated in the previous section 2, being as the occupant is a “*trustee*” of the occupied territory, its job consists of being the “*usufructuary*” of immovable public property placed therein, operating in accordance with the rules of “*usufruct*” and filling a provisional administrative role to preserve the “*capital of assets*” placed therein. In this regard, a certain notion of usufruct under Article 55 HRs has been consolidated through the practice surfaced over the years.<sup>1067</sup>

Therefore, without obtaining the title and the ownership of such property, the occupant only acquires possession; this means it is prohibited to alienate (sell or transfer) immovable State properties,<sup>1068</sup> even though it is permitted to *dispose of, and to sell, their wares* (e.g. crops and minerals) under certain circumstances.<sup>1069</sup> The occupant is nonetheless allowed to use immovable State properties in a way that *safeguards their capital* according to the basic idea of “*picking the fruits without*

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resources in the occupied territories, and it emphasised that the duty of preventing such conduct is extended to cover private persons (including commercial entities), see ICJ, *Democratic Republic of the Congo v. Uganda*, *op. cit.*, paras. 245-249.

<sup>1065</sup> See Article 6 (b) of the Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (usually referred to as the Nuremberg Charter or London Charter) refers to “*systematic plunder of public or private property*”; Article 3(e) ICTY Statute counts, among war crimes, “*plunder of public property*”; Article 8(2) ICC Statute refers to “[e]xtensive [...] appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”.

<sup>1066</sup> See U.S. Military Tribunal, Nuremberg, *The United States of America v. Alfred Felix Alwyn Krupp von Bohlen und Halbach*, Judgment of 31 July 1948, 15 AD 620, Case No. 214, at 622, holding that “(T)he Articles of the Hague Regulations ... are clear and unequivocal. Their essence is: if, as a result of war action, a belligerent occupies a territory of the adversary, he does not, thereby, acquire the right to dispose of property in that territory, except according to the strict rules laid down in the Regulations”. See also the post-World War II cases cited in B.M. Claggett and O.T. Johnson, “May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil resources of the Gulf of Suez?”, 72 *AJIL*, 1978, 558, at 584 (see note 126).

<sup>1067</sup> The application of the Roman law concept of usufruct to public immovable property under the international law of belligerent occupation was conceived in the Brussels Conference of 1874 that formulated the original draft of Article 55 HRs. The concept was then applied by the Franco-Chilean Arbitration Tribunal, which examined the effect of the Chilean occupation of the Peruvian territory of Tarapaca as to the legal position of the guano deposits in that occupied province. See *Guano* case (Chile/France), Award of 5 July 1901, 15 *Report of International Arbitral Awards*, at 367: according to the Tribunal, if the guano was treated as immovable State property, Chile was entitled as a “*usufructuary*” to “*les fruits, tant naturels que civils*” of the property; further, until Chile had extracted the guano, it remained Peruvian property.

<sup>1068</sup> The violation of this prohibition exposes the buyer of the relevant state property to the risk of eviction by the legitimate sovereign at the end of occupation. On this point, see G. Von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, 1957, at 178. Y. Dinstein, “The International Law of Belligerent Occupation and Human Rights”, 8 *IsrYbkHR*, 1978, 104, at 129.

<sup>1069</sup> See G. Von Glahn, *op. cit.*, at 177.

*cutting down the tree*”: any measures to decrease the value of such properties is hence prohibited.<sup>1070</sup>

This obligation to safeguard the capital of immovable public property embodies a negative aspect (*i.e.* refraining from harming the capital) and a positive one (*i.e.* initiating measures to preserve the capital). This rule may then raise basic and delicate issues of interpretation in relation to certain natural resources of occupied territories and their economic development. Indeed, the literal interpretation of Article 55 HRs definitely prohibits the use of the capital itself, thus not admitting “reasonable” or “proportionate” use of the capital of natural resources such as “land”, “forests”, “rivers”: these are exhaustible resources and their exhaustion is irreversible.

A restrictive interpretation of the duty to safeguard the capital would absolutely exclude an occupant’s possibility to exploit exhaustible resources of the occupied territory, as their appropriation determines necessarily a diminution of the capital.<sup>1071</sup> However, a more flexible interpretation has surfaced in practice, with the aim of guaranteeing upon a belligerent occupant a limited faculty to use or lease immovable public property and enjoy its fruits (*e.g.* use, consume or sell them) insofar as the capital is not depleted.<sup>1072</sup> In this manner it would be permitted to exploit mineral and oil deposits;<sup>1073</sup> in particular, the possibility to take over the exploitation of mines and oil wells already in use has been allowed for, but the option to open new ones has been excluded.<sup>1074</sup>

In view that such use must not be reckless and avoid wastage or the complete depletion of

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<sup>1070</sup> See J. Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes and War Law*, Rinehart, 1954, at 714, observing that the occupant’s power as governing authority *pro tempore* “is measured not by his own needs but by the duty to maintain integrity of the corpus”. See G. Von Glahn, *op. cit.*, at 176-177, in which it is explained that the occupant can exercise both the *jus utendi* (*i.e.* billeting of armies in buildings owned by the occupied State) and the *jus fruendi* (consumption of fruits, like the crops picked from agricultural lands belonging to the occupied State).

<sup>1071</sup> See Arbitral Tribunal, *Saudi Arabia v. Arabian American Oil Company*, *ILR*, vol. 27, 117 ff., at 157.

<sup>1072</sup> See Y. Dinstein, *op. cit.*, 2009, at 214.

<sup>1073</sup> On this issue, see A. Crivellaro, “Oil Operations by a Belligerent Occupant: The Israel-Egypt Dispute”, *IYIL*, 1977, p. 171 ff.; A. Gerson, “Off-Shore Oil Exploration by a Belligerent Occupant: The Gulf of Suez Dispute”, *AJIL*, 1977, p. 725 ff.; E.R. Cummings, B.M. Claggett, W.D. Rogers, A. Gerson, “Territories Occupied by Israel: Settlements and Exploration of Oil resources”, *ASIL Proceedings*, 1978, p. 118 ff.; B.M. Claggett and O.T. Johnson, “May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?”, *AJIL*, 1978, p. 558 ff.; D. Langernkamp and R. Zedalis, “What happens to the Iraqi Oil?: Thoughts on Some Significant, Unexamined International Legal Questions Regarding Occupation of Oil Fields”, *EJIL*, 2003, pp. 417-435.

<sup>1074</sup> See the position taken by the US State Department in relation to the decision by Israel to begin exploratory drilling in the Gulf of Suez at the time of its occupation of Sinai, *Memorandum of Law on Israel’s Right to Develop New Oil Fields in the Sinai and the Gulf of Suez*, 1 October 1976, 16 *ILM*, 1977, 733-752. For the positions of the doctrine on this issue, see A. Crivellaro, “Oil Operations by a Belligerent Occupant: The Israel-Egypt Dispute”, *IYIL*, 1977, p. 171 ff.; B.M. Claggett and O.T. Johnson, “May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?”, *AJIL*, 1978, p. 558 ff.; E.R. Cummings, B.M. Claggett, W.D. Rogers, A. Gerson, “Territories Occupied by Israel: Settlements and Exploration of Oil resources”, *ASIL Proceedings*, 1978, p. 118 ff. On the Israeli position (according to which Article 55 HRs would not impede the exploitation of resources that are for the benefit of the local population), see Israeli Ministry of Foreign Affairs, *Memorandum of Law on the Right to Develop New Oil Fields in Sinai and the Gulf of Suez*, 17 *ILM*, 1978, pp. 432-442. The Israeli position is supported by Yoram Dinstein, see Dinstein, *The International Law of Belligerent Occupation*, Cambridge, 2009, at 216; A. Gerson, “Off-Shore Oil Exploration by a Belligerent Occupant: The Gulf of Suez Dispute”, *AJIL*, 1977, p. 725 ff.



resources, the occupant is then required to *respect the laws in force* in the occupied territory and adhere to the rhythms of the preceding extraction or, in any case, to those characterising a “normal” exploitation of mineral resources.<sup>1075</sup> In this regard, the “moderate” approach over depleting the capital under the military manuals of the US, the UK, Canada and New Zealand is notable: they do not prohibit *any* use of property that decreases the capital, but at least a “wasteful or negligent” use or an “abusive exploitation” is proscribed.<sup>1076</sup> The manuals of the UK and New Zealand even forbid the occupant from entering into commitments (such as leasing or providing mining licenses) extending beyond the conclusion of the occupation, adding that “*mining must not exceed what is necessary or usual*”.

Bearing in mind the “conservative” starting point of the occupant’s authority to introduce changes in occupied territory, it may be said that Article 55 HRs “exceptionally” permits the use of public property (under certain limits) from the beginning of the occupation.

Despite no allocations constraining the use of wares explicitly referred in Article 55 HRs, the consideration articulated above regarding the treatment of movable State property suggests the unlawfulness of any use of immovable State property if not strictly necessary to cover the occupant’s military needs and the administration of the occupied territory.<sup>1077</sup> This seems a reasonable view, first of all, in accordance with a systematic reading: it would in fact be illogical that occupation law bounds the occupant to a certain use of movable State properties but not of the revenues of immovable State properties.<sup>1078</sup> Moreover, the use of natural resources for its own benefit would run directly counter to the principle of permanent sovereignty over natural resources.<sup>1079</sup> That view,

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<sup>1075</sup> See France Cour De Cassation, *Administration of Water and Forest v. Falk*, 11 February 1927, in AD, 1927-1928, at 563. See B.M. Clagett and O.T. Johnson, “May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?”, 72 *AJIL*, 1978, at 576; D. Langerkamp and R. Zedalis, “What happens to the Iraqi Oil?: Thoughts on Some Significant, Unexamined International Legal Questions Regarding Occupation of Oil Fields”, *EJIL*, 2003, p. 425 ff.; M. Voyame, “The Use of Hydrocarbon Resources under Belligerent Occupation, the Question of the Iraqi Oil”, *The Journal of Humanitarian Assistance*, 22 April 2004, available at <http://www.jha.ac>.

<sup>1076</sup> These manuals indicate the work of mines within a non-exhaustive list of immovable public property whose use and operation are allowed under Article 55 HRs. For the US Manual, see Department of the Army, *Field Manual No. 27-10: The Law of Land Warfare* (1956), ch. 6, sec. V, para. 402, [http://library.enlisted.info/field-manuals/series-1/FM27\\_10/TOC.PDF](http://library.enlisted.info/field-manuals/series-1/FM27_10/TOC.PDF). For the UK Manual, see MOD, *The Joint Service Manual of the Law of Armed Conflict* (2004), ch. 11, sec 11.86. For the Canadian Manual, see Quarter of the JAG, *Law of Armed Conflict at the Operational and Tactical Level* (2003), ch. 12, sec. 1243, <http://www.forces.gc.ca/jag/publications/oplaw-loiop/loac-ddca-2004/chap12-eng.asp>. For the New Zealand Manual, see the ICRC Database on Customary IHL: Practice, Rule 51(b), [http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule51\\_sectionb](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule51_sectionb).

<sup>1077</sup> See previous section 6.1.1; R. Kolb and S. Vité, *Le droit de l'occupation militaire. Perspectives historiques et enjeux juridiques actuels*, Bruylant, 2009, at 430 f.

<sup>1078</sup> See US Department of State Memorandum of Law on “Israel’s Right to Develop New Oil Fields in the Sinai and the Gulf of Suez”, 1 October 1976, *op. cit.*, at 742, holding that “*certainly there would be no basis for arguing that an occupant had greater freedom regarding the use or disposition of oil found in the ground (public immovable property) than of oil he found already lifted (public movable property)*”.

<sup>1079</sup> See I. Scobbie, “Natural Resources and Belligerent Occupation: Mutation through Permanent Sovereignty”, in Bowen (ed.) *Human Rights, Self-Determination and Political Change in the Occupied Territories*, The Hague/Boston/London, 1997, at 221 ff. See also A. Cassese, *op. cit.*, 1992, at 421, who clearly highlights that “*(i)n no case can it [the Occupying*

however, is not unanimously supported,<sup>1080</sup> as will be discussed below through the reference to a recent case law.

In this context, the question as to *whether the use of immovable public property must be for the benefit of the local population living in the occupied territory* under Article 55 HRs deserves specific attention. According to certain scholars, the occupant might enjoy the revenues of public immovable property at its discretion; it could be used in accordance with its own interest including transfer to its own market.<sup>1081</sup> This seems actually to conflict with the essence of occupation law (*i.e.* the occupant is a temporary administrator and trustee of the occupied territory) and with the “quasi-constitutional” nature of Article 43 HRs. Similarly, the aforementioned State practice permitting under Article 55 HRs the use of property that decreases the capital (see the four military manuals above) emphasises that the occupant is the “guardian” or “administrator” of the property, hence entailing that *the property should be used for the interest of the local population*. Therefore, it is reasonable to posit that, inasmuch as the use of immovable State property under Article 55 HRs is subject to the general rule of Article 43 HRs, such use remains carefully limited either to the occupant’s military and security needs or to the protection of the public welfare and the interests of the civilian population living under occupation.

In any case, an additional related question arises: *to what extent is the use of immovable public property to be for the benefit of the local population under Article 55 HRs as modified by the principle of self-determination of peoples?* As observed in section 2, various resolutions of the UN General Assembly have in fact provided rules which “deviate” from the ones derived from occupation law concerning the exploitation of natural resources. Along the lines of developing legal concepts of permanent sovereignty over natural resources<sup>1082</sup> and new international economic order,<sup>1083</sup> Article 16 of the

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*Power] exploit the inhabitants, the resources or other assets of the territory under its control for the benefit of its own territory or population”.* The jurisprudence of the Israeli High Court has also emphasised that “*an occupied territory is not an open field for economic or other exploitation*” and that “*the Military Commander is not permitted to consider the national, economic and social interests of his State insofar they do not affect its security interest in the occupied territory or the interest of the local population*”, see HCJ 393/82, *Jami’at Ascan* case, para. 13, and HCJ 2164/09, *Yesh Din* case, para 8.

<sup>1080</sup> See Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge, 2009, at 215; A. Gerson, “Off-Shore Oil Exploration by a Belligerent Occupant: The Gulf of Suez Dispute”, *AJIL*, 1977, at 730; G. Von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, 1957, at 177.

<sup>1081</sup> See G. Von Glahn, *op. cit.*, 1957, at 177; A. Cassese, *op. cit.*, 1992, at 428.

<sup>1082</sup> GA Res. 1803 (XVII) of 14 December 1962. For an analysis, see A. Anghie, *Imperialism, Sovereignty and the Making of International Law*, 2005, at 216; I. Brownlie, “Legal status of Natural Resources in International Law (Some Aspects)”, 162 *RdC*, 1979-I, 245, at 262.

<sup>1083</sup> See J.N. Bhagwati (ed.), *The New International Economic Order – The North-South Debate*, 1977; P.M. Dupuy (ed.), *The New International Economic Order: Commercial, Technological and Cultural Aspects*, Workshop, The Hague, 23-25 October 1980; J. Makarczyk, *Principles of a New International Economic Order: A Study of International Law in the Making*, 1988.

Charter of Economic Rights and Duties of States of 1974<sup>1084</sup> and the Declaration on the Right to Development<sup>1085</sup> are noteworthy. Even interpreting these resolutions as not overhauling the law of occupation, they make manifest the idea that the investments in an occupied territory to exploit the consumption of natural resources are allowed solely in a way that does *not* deprive the people living therein of *the effective exercise of their rights to development and self-determination in economic affairs*.

Focusing on relevant practice, scholars' concern as to the exploitation planned by the CPA in occupied Iraq (in favour of multinational companies associated with this coalition) have emphasised the crucial test ensuing from the right to self-determination of the Iraqis; namely guaranteeing that they would not have been divested of the substantial benefits of such exploitation.<sup>1086</sup> Conversely, for others the occupier would be permitted to rely on the talent and supplies of companies of its nationality "so long as the selection is economically sound, made in good faith, and not somehow inuring to the occupant's 'own enrichment'".<sup>1087</sup> In any case, however, the military commander's concern on the welfare of local inhabitants may result to be controversial and sometimes "may camouflage a hidden agenda".<sup>1088</sup> The following case law offers an opportunity to reflect more on both arguments.

#### **6.1.2.a. Case study: the quarrying activity in the occupied territory**

The occupant's use of natural resources has been disputed in a recent case concerning the Israeli administration of quarrying activity in the occupied Palestinian territories. While some related remarks have been spelled out in section 4.2.1.c. dealing with the use of the protracted character of occupation in the Court's legal reasoning, this case deserves further attention in view of its controversial reading of Article 55 HRs along with Article 43 HRs.

Primarily, it is worth mentioning that in the *Yesh Din* judgement the Israeli High Court examined specifically the lawfulness of the Israeli military commander's policy on the use and

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<sup>1084</sup> GA Res. 3281 (XXIX) of 12 December 1974, Article 16: "1. *It is the right and duty of all States, individually and collectively, to eliminate colonialism, apartheid, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination, and the economic and social consequences thereof, as a prerequisite for development. States which practise such coercive policies are economically responsible to the countries, territories and peoples affected for the restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and peoples. It is the duty of all States to extend assistance to them.* 2. *No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force*".

<sup>1085</sup> GA Res. 41/128 of 4 December 1986, Article 5.

<sup>1086</sup> See J.J. Paust, "The United States as Occupying Power over Portions of Iraq and Special Responsibilities under the Laws of War", 27 *Suffolk Transnational Law review*, 2003, 1, at 12-13, in which the author expressed concern with respect to a contract given to the US company Halliburton in order to control and operate the Iraqi oil fields and oil supply.

<sup>1087</sup> See R.D. Langenkamp and R.J. Zedalis, "What happens to the Iraqi Oil?: Thoughts on Some Significant, Unexamined International Legal Questions Regarding Occupation of Oil Fields", *EJIL*, 2003, at 434, noting that "an obligation to arbitrarily diversify contractors and supplies by nationality or otherwise simply does not appear in international law".

<sup>1088</sup> Y. Dinstein, *op. cit.*, 2009, p. 120.

operation of quarries in Area C of the West Bank.<sup>1089</sup> The Court rejected the appeal aimed at putting an end to the exploitation by Israeli companies of quarries placed therein.<sup>1090</sup> While acknowledging that the extracted raw materials are mostly for the domestic market or for Israeli settlements, the Court focused on the benefits that the exploitation of quarries would bring to the local population; a number of allegedly positive factors were addressed: some of the quarried stone was used by local Palestinians; the quarry companies paid royalties to the civil administration of the West Bank which were used for furthering local projects; a fair number of local Palestinians were employed in the quarries; and development of the quarries contributed to modernization in the area.

However, *several significant criticisms* have been made concerning this judgment, some of which deserve particular attention.<sup>1091</sup> More precisely, although in the context of prolonged occupation quarrying activity initiated and permitted by the military commander may not be prohibited *per se*, such activity is allowed only to the extent that is *proven essential for the benefit of the local population* and the related use is *not negligent or wasteful*. In fact, assuming that quarrying activity deviates from the general conservationist premises of preserving the *status quo* and avoiding changes with long-term impacts, the occupier has to demonstrate that activity is required to safeguard the welfare of the local population. Insofar as the military commander fails to demonstrate that this point, in the *Yesh Din* case such activity appears to remain inconsistent with the international law of belligerent

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<sup>1089</sup> HCJ 2164/09, “*Yesh Din*” - *Volunteers for Human Rights v. The Commander of IDF Forces in the West Bank and others*, Judgment of 26 December 2011. According to *Yesh Din* case, since the 1970 the Israeli military commander has enabled quarrying activity in the West Bank. Recently ten quarries in Area C2 have been operated by Israeli nationals and nine others by Palestinians, with most of the stone excavated (94% and 80% respectively) transferred to Israel for civilian use. Several quarries have been also placed in Areas A and B of the West Bank, they have been operated and/or owned by Palestinians and supervised by the Palestinian Authority. All quarries were opened *after* the beginning of the Israeli occupation in 1967; in the *Yesh Din* case the petitioners challenged only the quarrying activity in Area C operated by Israeli nationals.

<sup>1090</sup> According to the petitioner, this policy was incompatible with the occupier’s obligation under Article 55 HRs to manage public property as a usufruct. Further, permitting operation of the quarries could not be considered as having been conducted for the welfare of the local population because the great majority of the quarried stone is used in Israel, rather than by Palestinians in the occupied territories (see HCJ 2164/09, *Yesh Din* case, para. 1). The figures submitted to the Court by the authorities show that 94% of the stone from the quarries operated by Israeli companies was for use in Israel. Accordingly, by relying on Articles 43 and 55 HRs, the petitioner requested an order to cease these quarrying activities and to stop the establishment of new quarries or the expansion of already existing quarries in these territories, (see HCJ 2164/09, *Yesh Din* case, paras. 2-3).

<sup>1091</sup> This judgment has been strongly criticised among a good number of leading legal scholars. For an extensive a critical analysis of the case, see G. Harpaz, Y. Shany, E. Benvenisti, A. Cohen, Y. Ronen, B. Medina, and O. Ben-Naftali, *Expert Legal Opinion*, opinion with regard to the issues arising from the *Yesh Din* judgment in support of the petitioners’ motion for a review of the judgment (En Banc review), January 2012, 1-54. See also I. Scobbie and A. Margalit, “The Israeli Military Commander’s Powers under the Law of Occupation in relation to Quarrying Activity in Area C”, *Sir Joseph Hotung Programme for Law, Human Rights, and Peace Building in the Middle East*, SOAS University of London, 4 July 2012, 1-11. See also D. Kretzmer, “The law of belligerent occupation in the Supreme Court of Israel”, 94 *IRRC*, 2012, at 220-222.

occupation.<sup>1092</sup>

Focusing on the Court's reading of Article 55 HRs, a twofold interpretative error has been observed in relation to the objectives of occupation law generally and the "*narrow literal-objective-contextual plane of the article itself*".<sup>1093</sup> As anticipated, the Court emphasised experts' different opinions on Article 55 HRs, specifically on *whether an occupier may allow the opening and operation of new mines or quarries in occupied territories*.<sup>1094</sup> In this regard, one position argued was that there was a prohibition of such activity because the excavation and extraction of stone decrease the capital (namely the amount of stone available for future excavation):<sup>1095</sup> all quarrying activity in occupied territory would be barred *a priori* during occupation; in the *Yesh Din* case this would have covered both Israeli-operated quarries and the Palestinian owned and operated quarries in Area C (and perhaps in Areas A and B too). Conversely, another position permitted the use of mines but the main concern was for the needs of the local population (rather than for the capital): as to existing mines, the extraction in an unreasonable accelerated rate would risk to exhaust the capital in an premature fashion; nevertheless, the use of more efficient methods to increase the output would be possible in a protracted occupation; even the opening of new mines might be allowed in such a situation because "*as a minimum, one cannot ignore the burgeoning needs of the local inhabitants*".<sup>1096</sup> In this context, Article 55 HRs is not deemed to create a negative arrangement forbidding any use of public property that does not fall within this provision during a prolonged occupation. Specifically, compatibility of such use with the general authority granted to the military commander under occupation law is recognised, primarily under the "*quasi-constitutional*" Article 43 HRs. Indeed, the *duration of occupation* and a *compelling need to secure the wellbeing of the local population* end up as representing the two decisive

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<sup>1092</sup> As for the military commander's policy as a whole, from the petition and the Court's judgment it was found that 94% of the product of the Israeli-operated quarries and 80% of the product of the Palestinian-operated quarries were transferred to Israel. Thus, it is reasonable to posit that quarrying activity in Area C were basically not required so as to provide the needs of the Palestinian market (which was apparently self-supplied by Palestinian-operated quarries in Areas A and B), but, rather, that it was carried out for the benefit of the Israeli market.

<sup>1093</sup> See G. Harpaz, Y. Shany, E. Benvenisti, A. Cohen, Y. Ronen, B. Medina, and O. Ben-Naftali, *Expert Legal Opinion*, opinion with regard to the issues arising from the *Yesh Din* judgment in support of the petitioners' motion for a review of the judgment (*Motion for En Banc Review HCJ 2164/09*), 10 January 2012, 36-53.

<sup>1094</sup> On the disputed question on whether quarrying activity falls within the use permitted by Article 55, see I. Scobbie, "Natural Resources and Belligerent Occupation", in S. Akram et al. (eds.) *International Law and the Israeli-Palestinian Conflict: A Rights-based Approach to Middle East Peace*, Taylor and Francis, 2011, 229, at 234-236; Y. Arai-Takahashi, *The Law of Occupation*, *op. cit.*, 2009, at 210.

<sup>1095</sup> This view was taken (in *obiter*) by the Israeli High Court in the *Na'ale* case, para 6. The same position was also taken by the petitioners in the *Yesh Din* case, arguing the unlawfulness of quarrying activity; it was equally expressed in an expert opinion prepared by the mentioned Israeli scholars on the petitioners' behalf.

<sup>1096</sup> See Y. Dinstein, *op. cit.*, 2009, at 216, citing with approval the *Na'ale* judgment (*obiter*), para. 6: the Israeli High Court allowed the opening of a new quarry because "*it is an action which is taken for the benefit of the local population or for local needs*" and given the prolonged occupation of the territory, while the Court itself questioned whether the opening of a new quarry in the West Bank can be regarded as the permitted use of fruits under Article 55 HRs.

factors.<sup>1097</sup>

Basing its decision of the *Yesh Din* case on a number of grounds, the Court ruled in favour of the Israeli authorities' position that the quarries were lawful. Under a "dynamic" interpretation of the combined relevant rules (Arts. 43 and 55) the Court contended the need to expand the "duties of the military commander in the Area" (judgment, para. 10) and derived the existence of a State's right to the exploitation of natural resources of occupied territories for the benefit of its domestic market (judgment, para. 12). Relying on the premises that the quantity of the quarried stone did not substantially deplete the quarry potential of the area,<sup>1098</sup> the Court assumed that using such stone could be regarded as enjoying the fruits of the quarries, rather than exploiting their capital (judgment, para. 11). Accordingly, under the particular circumstances of the Area - especially the prolonged nature of occupation - the actual question was whether such activities were compatible with Article 43 HRs, hence *whether the exploitation of quarries brought benefits to the local population*. Especially in view of the common economic interests of the Israeli and Palestinian sides as well as the protracted nature of occupation, the Court rejected the petitioner's view that the operation of the quarries by Israeli companies had no relation with the welfare of the local population (judgment, para. 13).

However, the Court's interpretation of both Articles 43 and 55 HRs raises significant doubts. Its reading hardly appears consistent with the general purpose and the objectives enshrined in the Hague Regulations in light of general methods of interpretation as set out in the Vienna Convention on the Law and Treaties. As has been detailed throughout the current chapter, the occupant does not displace the legitimate sovereignty of the occupied territory but merely executes its *de facto* authority over it and is bound to administer it *primarily* in the interest of the local population while respecting the rights of the latter. This perspective appears at odds with the conclusion laid down by the Court, according to which the quarrying activities concerned would be in line with Article 55 and with the principle of reasonableness. According to official statistics the scope of such activities in the area is leading to the depletion of quarries, which will be complete within just thirty-eight years.

Additionally, the Court's conclusion seems to run contrary to a combined interpretation of these two provisions, in view of which a basic principle cannot be overlooked: in exercising powers under

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<sup>1097</sup> See A. Cassese, *op. cit.*, 1992, at 426-427. I. Scobbie and A. Margalit, *op. cit.*, 2012, at 9-10. See *Na'ale* case, para. 6.

<sup>1098</sup> An estimate submitted by the authorities contended that, even if the Israeli quarries were to continue to operate on the same scale for the next thirty years, they would only exploit 0.5% of the quarrying potential on the West Bank (see HCJ 2164/09, *Yesh Din* case, para. 1).

Article 55 HRs the military commander is not allowed to pursue the needs of the occupant's own territory, and, accordingly, it is not permitted to benefit from the quarrying activity for the national, social and economic interests of its own State *insofar as they do not affect the interest of the occupied population or its own security interests in the occupied territory*.<sup>1099</sup> In other words, the systematic interpretation of Article 43 along with Article 55 suggests that *a correct balance* has to be ensured between its own interests and the local inhabitants' rights. Therefore, the occupant's exploiting of the natural resources from occupied territories under the concept of "usufruct" cannot exist as a form of consumption that constitutes *permanent damage* to the local population. As such, the long-term effects of quarrying activity consist of the depleting of the stone deposits in Area C; in light of this, the burden imposed on the military commander remains substantial.<sup>1100</sup>

Along the same lines, as a corollary of these legal boundaries under Articles 43 and 55 HRs (especially the guarantee that the production derived from exploiting public property of the occupied territory is for the benefit of the civilian population), it might even be argued that the occupant is required not to interfere with the economic activity of such territory to gain economic benefits for itself.<sup>1101</sup> Here, there is a significant basis to contend that *the right of peoples to freely pursue their economic, social and cultural development* - under Article 1(2) common to the two 1966 Covenants - acquires relevance in both external and internal dimensions of the right to self-determination of the population living under occupation. As for the economic content of such a right, where an occupation endures the local population should be able to exercise sovereignty over the territory and to enjoy its natural resources: in particular, "*to confer on a people the right of 'free choice' in the absence of more substantive entitlements (to territory, natural resources, etc.) would simply be meaningless. Clearly, the right of self-determination cannot be exercised in a substantive vacuum*".<sup>1102</sup> Despite the aforementioned scarce attention in the Hague Regulations to the protection of the rights of the civilian population, and

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<sup>1099</sup> As detailed several times in the present chapter, the same Israeli Court has emphasised this basic principle in its own jurisprudence (see HCJ 393/82, *Jami'at Ascan* case, para. 13).

<sup>1100</sup> As articulated by two experts, the export of stone from the occupied territories to Israel may be permissible *inasmuch as* Palestinians may enjoy financial gain, as well as economic and professional development; however, it is for the respondent State to prove that this export is actually essential for the welfare of the local population (including that exported products are sold at fair prices; that the Palestinian population actually enjoys the revenues, and that exports are not forced by the military commander), see I. Scobbie and A. Margalit, *op. cit.*, at 10.

<sup>1101</sup> In this regard, see N. Corso, *op. cit.*, 2012, at 12 ff.; A. Cassese, "Powers and Duties of an Occupant in relation to Land and Natural resources", *op. cit.*, 1992, at 421; L. Condorelli and A. Cassese, "Is the Leviathan still holding sway over the international society?", in A. Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford, 2012, at 23 ff.; O. Ben Naftali, "Belligerent Occupation", in A. Cassese (ed.), *Realizing Utopia: The Future of International Law*, *op. cit.*, at 538 ff.

<sup>1102</sup> C. Drew, "The East Timor Story: International Law on trial", 12 *EJIL*, 2001, 651, at 663. See also GA Res. 1803 (XVII) of December 1962 on Permanent Sovereignty over Natural Resources. See also GA Res. 33/144 of December 1983, para. 5, in which it "(e)mphasises the right of the Palestinian and other Arab peoples whose territories are under Israeli occupation to full and effective permanent sovereignty and control over their natural and all other resources, wealth and economic activities".

even the absence of references to the self-determination of people, as a peremptory norm of international law this principle should not be overlooked.<sup>1103</sup>

From a more radical perspective, it may be noted that stone is a *non-renewable natural resource*, its exhaustion is irreversible, and as such it can hardly be regarded as fruit of property. Insofar as the Court was going to decide as to whether the issue consists of enjoying the revenues of public property or depleting the capital of such property, there was no logical reason for giving relevance (as the Court did in paragraph 11 of the judgment) to the scope of the quarried stone in relation to the quarrying potential.<sup>1104</sup>

Furthermore, it is worth highlighting that the Court's primary position was examining whether the declared purpose of the activity by the military commander was actually serving the welfare of the local population and maintaining good administration of public property in occupied territories in compliance with Article 43 HRs: by examining the accidental/unintended effects of economic activity (as the Court did in paragraph 13 of the judgment), instead of the declared purpose, the Court simply departed from its primary position on the issue.<sup>1105</sup>

Then, even assuming that a significant contribution to the local economy would derive from opening new quarries, no reason basis exists for the occupant's choice in allowing Israeli companies, rather than companies belonging to local Palestinian residents, to operate the quarries. Accrediting Palestinian companies to operate them could have made achievable certain benefits to the local population (*e.g.* employment, stone provision for the local construction industry, modernisation) in accordance to the basic duty of the military commander to ensure public welfare.<sup>1106</sup>

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<sup>1103</sup> For the basic principle concerning *the respect of the will of the people living under occupation in accordance with the right to self-determination*, see A. Carcano, *L'occupazione dell'Iraq nel diritto internazionale*, Giuffrè, 2009, at 106; A. Annoni, "L'applicazione del regime giuridico dell'occupazione nei Territori palestinesi occupati", *Deposte, esuli e profughe*, n. 13-14, 2010, at 165; A. Cassese, *Self-determination of Peoples - A Legal Reappraisal*, Cambridge, 1995, at 99; E. Benvenisti, "The Security Council and the Law of Occupation: Resolution 1483 on Iraq in Historical Perspective", *Israel Defence Forces Law Review*, 2003, p. 19 ff; O. Ben-Naftali, Gross, Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory", *Berkeley JIL*, 2005, p. 551 ff.; V. Tilley, *Human Occupation, Colonialism, Apartheid? A re-assessment of Israel's practices in the occupied Palestinian territories under international law*, A study coordinated by the Middle East Project of the Democracy and Governance Programme, Human Sciences Research Council of South Africa, 16 May 2009, p. 55 ff; Y. Arai-Takahashi, *The Law of Occupation*, *op. cit.*, 2009, p. 65 ff.

<sup>1104</sup> On this point, the petitioners claimed that the exploitation of quarries by the occupant could be allowed only exceptionally under the conservative principle - hence only in the event such property were subject to Israeli exploitation already before the occupation. Conversely, the respondent State claimed that this activity should be allowed on the basis of the principle of reasonableness: mining activities would have been lawful as long as they would not lead to excessive exploitation of the property constituting a damage (Judgment, para. 8).

<sup>1105</sup> On this aspect, David Kretzmer critically addressed that "*the Court's approach smacks of a colonial approach, under which the activities of the colonial power are claimed to bring benefit to the colonized peoples*", see D. Kretzmer, *op. cit.*, *IRRC*, 2012, at 222.

<sup>1106</sup> See Union of Stone and Marble Industry, *Report on Stone and Marble in Palestine: Developing a Strategy for the Future*, July 2011, at 18, 20. The Union (which was supported by the Office of the Quartet Representative) was in favour of the position that the military commander did not act to serve the interests of the local population in relation the quarrying activity in Area C. According to this report, Israel employed a permit system that restricted the operation of quarries by



A distinct critical aspect of the judgment concerns the Court's interpretation of "protected population" whose interests must be safeguarded under the Hague Regulations. According to the Court, the exploitation of quarries for implementing projects in Judea and Samaria, in relation to the settlements of *Naale* and *Givat Nili*, would consent the occupant to respect its basic duty to guarantee the benefits of the local population or the respect of local exigencies (judgment, para. 12). In view of its own established jurisprudence, however, the Court tends to include implicitly in the notion of "local population" even Israeli settlers living in the occupied territory, which runs contrary to Article 49(6) GC IV.<sup>1107</sup> This interpretative approach has often been criticised within the international community, including in a number of resolutions adopted at the United Nations and in the 2004 advisory opinion by the International Court of Justice.<sup>1108</sup> In this regard, it is reasonable to argue that the local population's interest under occupation law does not refer to the interests of settlers which are not entitled to the status of "protected persons", even considering that the establishment of settlements is in violation of international law. In actual fact, taking into account settlers' interests may frustrate the minimum protections granted to Palestinians under occupation law.<sup>1109</sup>

It is exactly the issue on the determination of the "local population" in the *Yesh Din* case that leads one to posit that it should have been examined even in view of Article 25 ICESCR which recognises "the inherent right of all peoples to enjoy and utilise fully and freely their natural wealth and resources", as well as Article 1(2) ICCPR under which "all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law".<sup>1110</sup>

A further critical profile of the judgment concerns the political nature of the 1995 Israeli-

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Palestinians owners. An additional issue was raised in relation to the unfair competition from several large Israeli companies operating in Area C. Furthermore, the report revealed Palestinians' obstacles in conducting geological surveys to assess the potential for stone deposits in Area C, an activity that remains essential for the planning of the industry from both economic and environmental aspects.

<sup>1107</sup> HCJ 281/11, *Head of Beit Iksa Local Council et al. v. Minister of Defense et al.*, Judgment, 6 September 2011, para. 7.

<sup>1108</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *op. cit.*, para. 89.

<sup>1109</sup> For development of the argument that in applying universal standards to all persons in the occupied territories the Court has weakened the special protection that an occupying power is supposed to extend to protected persons, see A. Gross, "Human Proportions: are human rights the emperor's new clothes of the international law of occupation?", 18 *EJIL*, 2007, pp. 1-35.

<sup>1110</sup> See HRC, *General Comment No. 12: The right to self-determination of peoples (art.1)*, HRI/GEN/1/ Rev.1, 13 March 1984. On this aspect, see *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, Richard Falk, 10 January 2011, UN Doc. A/HRC/16/72; A. Roberts, "Transformative military occupation: applying the laws of war and human rights", *AJIL*, 2006, p. 280 ff.; A. Carcano, "The Right to Self-determination of the Iraqi People in the Practice of the Security Council Concerning the Occupation of Iraq", in S. Bariatti and G. Venturini (eds.), *Diritti Individuali e giustizia internazionalne, Liber Fausto Pocar*, Milano, 2009, p. 95 ff.; E. Mottershaw, "Economic, social and cultural rights in armed conflict: International human rights law and international humanitarian law", *IJHR*, 2008, p. 449 ff.

Palestinian Interim Agreements, under which the two parties agreed to gradually transfer the rights on quarries to the Palestinian Authority.<sup>1111</sup> Despite having mentioned the commitment to such a transfer the Court ignored that it ever occurred and failed to conduct an evaluation as to Israeli mining activities being *ultra vires* in the occupied territories, although initially required of the Oslo Agreements.<sup>1112</sup> Moreover, emphasis was placed on the alleged main political-diplomatic nature of such Interim Agreements to highlight that “(t)he suitable framework for deciding the issue of the future activities of Israeli quarries in the Area is within the framework of diplomatic agreements” (judgment, para. 6), and accordingly that “the Petitioners would not be an eligible party to bring claims before the State”. However, the Court then opted for recognising that they prevail in respect to international law obligations incumbent upon the State. It seems that this solution ends up acknowledging of Israeli authorities certain powers that overstep the boundaries provided for under international law norms applicable in situations of occupation.

Overall, the *Yesh Din* case highlights the following points. Firstly, as far as the military commander holds merely administration powers of the territory, the preservation of the state of affairs existing on the eve of occupation is required along with a general duty to refrain from introducing changes therein. This prevents the occupant from settling the territory for its own market and from depriving the indigenous population of the right to enjoy local natural resources.

Secondly, in a situation of protracted occupation some legal uncertainty may arise concerning the precise scope of the occupant’s authority to advance new policies in the occupied territory, and a more flexible interpretation of such a power may be argued for; however, changes that are not compelled by security needs must serve the benefit of the local population.

Thirdly, in view that the long-term effects of quarrying activity consist of depleting the stone deposits, the burden imposed on the military commander to show the consistency of such activity with the interest of the local population remains substantial.

Fourthly, a serious implication of a distorted implementation of legal norms - as is actually argued by several scholars concerning the *Yesh Din* judgment - are the legitimising practices in the West Bank that appear exploitative. The aforementioned quarrying activity benefited primarily the

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<sup>1111</sup> On the provision concerning the utilisation of quarries and mines, see *Israeli-Palestinian Interim Agreements, First Addition to Annex 3/Civil Annex*, Article 31. The Palestinian Authority was constituted, by the same agreements, for the administration of the occupied territory.

<sup>1112</sup> See V. Azarov, “Exploiting A ‘Dynamic’ Interpretation? The Israeli High Court of Justice Accepts the legality of Israel’s quarrying Activities in the Occupied Palestinian Territory”, in [www.ejiltalk.org](http://www.ejiltalk.org), 7 February 2012. This point is raised also by G. Harpaz, Y. Shany, E. Benvenisti, A. Cohen, Y. Ronen, B. Medina, and O. Ben-Naftali, see *Expert Legal Opinion, op. cit.*

occupant's market and nationals rather than the civilian population.

Within the usufructuary legal framework detailed above, another relevant issue concerns the execution of *contractual arrangements that engage public real estate of the occupied territory*. A specific question regards the occupant's entitlement to grant new concessions to exploit the usufruct of immovable property therein. While it is generally suggested that the power to do so should be left to the legitimate sovereign, it is contended that *the Fourth Geneva Convention allows for the enhancement of welfare of the protected population as one of the legitimate objectives*. As articulated in previous sections, the welfare of local inhabitants has been included in the notion of necessity under Article 43 HRs, so constituting an exception to the conservationist premises of that rule.<sup>1113</sup> In Von Glahn's seminal work on occupation law it is observed that "*an occupant in principle ought to be free to grant [such] concessions ... with the obvious reservation that no such concession could exceed the duration of belligerent occupation*".<sup>1114</sup>

In view of the principles governing the administration of *la vie publics* under Article 43 HRs, the occupant's authority to subject State public buildings or real estate to long-term lease or other contractual arrangement intended to remain in force even after the end of the occupation is to be excluded normally; such contracts would be unlawful.<sup>1115</sup> As already highlighted, the obligation to ensure the continuation of (or to further) civil life entails, in fact, *a power to adopt only economic initiatives necessary to guarantee the level of protection required under relevant rules safeguarding the economic, social and cultural rights of the local population* (such as international humanitarian law and international norms guaranteeing fundamental rights). In any case, the conclusion of new contracts should comply with the substantive and procedural laws in force in the occupied territory. Furthermore, as for the concessions already in place in the occupied territory, the principles enshrined in Article 43 HRs imply the occupant's compliance with such concessions as long as they do not pose a risk to its security or impede the fulfilment of its own obligations under international humanitarian law and

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<sup>1113</sup> On this issue, see P. Bordwell, *The Law of War between Belligerents - A History and Commentary*, Chiacago, Callaghan & co., 1908, at 329, observing that "*Measures for the permanent benefit of the community should be left, when it is possible, to the legitimate power, but there may be cases where the needs of the community are so pressing as to admit of no delay, and if in such a case a contract is let for the work which extends beyond the period of occupation, such contract is valid even then, if it was reasonably within the scope of the occupant's essentially provisional powers*".

<sup>1114</sup> G. Von Glahn, *op. cit.*, at 209.

<sup>1115</sup> In this regard, see the aforementioned US, UK, Canada New Zeland Military Manuals. See A. Crivellaro, *op. cit.*, 1977, at 182 ff.; G. Von Glahn, *op. cit.*, at 209. See M.J. Kelly, "Iraq and the Law of Occupation: New Tests for an Old Law", 6 *YbkIHL*, 2003, at 158, noting that the occupant is allowed to subject such property to long-term lease or other contract which does not lead to the long-term alienation or disposal of the property. See also SC Res. 1483 (2003) on the situation between Iraq and Kuwait, 22 May 2003, S/RES/1483 (2003), in which the Security Council stressed in the Preamble that "*the right of the Iraqi people freely to determine their own political future and control their own natural resources*".

international human rights norms guaranteeing fundamental standards of the local population.<sup>1116</sup> Conversely, new concessions concluded by the legitimate sovereign during the period of occupation would not be enforceable against the occupant.<sup>1117</sup>

## 7. Concluding Remarks

The protection of ESC rights for the pursuit of the livelihood and well-being of the original inhabitants of occupied territories has become a significant dimension of the traditional concept of welfare of the civilian population under occupation law. However, this regime may not satisfactorily meet the socio-economic and cultural entitlements concerned in contemporary situations of occupations. On the one hand, relevant obligations upon the occupant remain contingent to contextual factors (such as the intensity of control exercised in the occupied territory, the resources available therein, and the temporal dimension of occupation). On the other hand, the scope of such obligations is influenced by changed international expectations as have arisen by several developments of international law.

It is reasonable to contend that the conventional division between the law of war and the law of peace may no longer be plausible in light of the changes surfaced in modern *de facto* realities of occupation, in which civilian populations may even live an entire lifetime under it or, in any case, may end up facing serious damage to the occupied economy as well as to human development, environmental consequences and lasting damage on the landscape, challenging the possibility for their own future generations to benefit from it. Moreover, the traditional international law of occupation has been often blatantly ignored and regularly violated.

The debated “*legal vacuum*” has definitively favoured claims for *an adaptation in occupation law to evolve its protective scope concerning the civilian population*. In this sense, *dual application* of modern international human rights law and international humanitarian law represents a valuable perspective to safeguard fundamental rights of civilians living in occupied territories. In fact, it may give new substance to the shift in focus regarding the beneficiaries of the ‘trust’ created by occupation, providing *normative clarification* as well as offering *additional and “long-term” normative contents to the needs, interests and rights of those civilians*, thus supporting a further departure from the Hague Law as already determined by Geneva Law in relation to the protection concerned. As noted in

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<sup>1116</sup> On this issue, see US Department of State Memorandum of Law of 1 October 1976, *op. cit.*, at 748 ff. See B.M. Clagett and O.T. Johnson, *op. cit.*, 1978, at 578 ff.; A. Crivellaro, *op. cit.*, 1977, at 182 ff.

<sup>1117</sup> In this respect, see the opinion of Judge Seferiades in the judgment of the Permanent Court of International Justice, *Lighthouse (France v. Greece)*, 17 March 1934, Series A/B No. 62, at 50.

academic literature, co-application lies on the legal principle of the evolution of the law.<sup>1118</sup>

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<sup>1118</sup> As early as the 1990s, Eyal Benvenisti emphasised that “*new occupations present new challenges. Some of these challenges called for more effective enforcement mechanisms ... Other challenges call for an adaptation of the law to contemporary perceptions and needs*”; another significant aspect highlighted was that “*the key factor for formulating an inquiry into legal criteria for recognising a status of occupation seems to be the attitude of the occupied population toward the changing circumstances*”. See, E. Benvenisti, *The International Law of Occupation*, Princeton University Press, 1993, p. 183.

## **CHAPTER IV: CIVILIANS' PROTECTION IN THE AREA OF ESC RIGHTS UNDER INTERNATIONAL HUMAN RIGHTS LAW**

### **1. Introduction**

In questioning the evolving legal framework for the imperative of civilian protection in the socio-economic and cultural spheres in international law, beyond that which is afforded under the principles and rules of the law of armed conflict and the law of occupation, the present chapter seeks to determine *the applicability of human rights treaties setting out ESC rights during public emergencies prompted by situations of armed conflict, military occupation and post-conflict collapse.*

### **2. Theoretical and practical grounds for reliance on human rights law**

The significance of exploring the role of modern human rights law as further normative regime contributing to safeguard civilians in the sphere of ESC rights under international law relies on several grounds.

#### **2.a. Elaborating upon legal preservation of civilians' human dignity**

The applicability of international human rights law in contemporary conflict-torn and occupation-related contexts may favour a *comprehensive determination of the legal preservation of civilians' human dignity*, which provides the very *raison d'être* and the common denominator of various relevant branches of international law. Indeed, the entire corpus of international humanitarian law as well as human rights law stems from *the general principle of respect for human dignity*, whose paramount importance permeates the whole body of international law.<sup>1119</sup> As such, in being nurtured by this principle

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<sup>1119</sup> See ICTY, *Prosecutor v. Furundžija* (IT-95-17/1-T), Trial Chamber, Judgment, 10 December 1998, para. 183, in which it was held that “(t)he essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from

human rights law and international humanitarian law are deemed to enjoy a symbiotic relationship.<sup>1120</sup>

As one of the underlying principles of the 1949 Geneva Conventions, the human dignity of all individuals must be respected at all times and everything possible must be done, without any kind of discrimination, to reduce the suffering of persons not actively engaged in the hostilities, including people who have been put out of action by sickness, wounds or captivity, whether or not they have taken direct part in the conflict.<sup>1121</sup> The most prominent textual incorporation of “dignity” is common Article 3 GCs, which prohibits *inter alia* “outrages upon personal dignity, in particular humiliating and degrading treatment”. Protocol I prohibits in Article 75 “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”, and then includes in Article 85 - among the acts to be regarded “as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol” - “(c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination”. A prohibition of “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault” is also contained in Article 4 AP II. Conversely, analogous references to “outrages upon personal dignity” are included in the Rome Statute as well as in the ones of other international criminal tribunals.<sup>1122</sup>

Similarly, the centrality of dignity to human rights is asserted in many international instruments having primary relevance for the present research. This is the case of the preambles and articles of several conventions, including the ILO Conventions,<sup>1123</sup> the ICESCR,<sup>1124</sup> the ICERD,<sup>1125</sup> the

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*outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person”.*

<sup>1120</sup> T. Meron, “Humanisation of Humanitarian Law”, 94 *AJIL*, 2000, 234, p. 245.

<sup>1121</sup> The significance of dignity as the basis of the approach adopted in drafting of the Geneva Conventions of 1949 emerged in the text proposed as the Preamble by the ICRC to the Powers assembled in Geneva: “*respect for the personality and dignity of human being constitutes a universal principle which is binding even in the absence of any contractual undertaking. Such a principle demands that, in time of war, all those not actively engaged in the hostilities and all those placed “hors de combat” by reason of sickness, wounds, capture, or any other circumstance, shall be given due respect and have protection from the effects of war, and that those among them who are in suffering shall be succoured and tended without distinction of race, nationality, religious belief, political opinion or any other quality ...*”. See “Remarks and Proposals submitted by the International Committee of the Red Cross”, Document for the consideration of Governments invited by the Swiss Federal Council to attend the Diplomatic Conference of Geneva (21 April 1949), Geneva, February 1949, p. 8.

<sup>1122</sup> See Article 8 ICC Statute, prohibiting “outrages upon personal dignity, in particular humiliating and degrading treatment”. See also *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994*, Article 4. See also *Agreement for and Statute of the Special Court for Sierra Leone*, 16 January 2002, Article 3, prohibiting “[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”.

<sup>1123</sup> ILO Conventions, especially C156 *Workers with Family Responsibilities Convention*, 1981; C122 *Employment Policy Convention*, 1964; *Equality of Treatment (Social Security) Convention*, 1962; C111 *Discrimination (Employment and Occupation) Convention*, 1958; C107 *Indigenous and Tribal Populations Convention*, 1957; C104 (*Shelved*) *Abolition of Penal Sanctions (Indigenous*

ICEDAW,<sup>1126</sup> the CAT,<sup>1127</sup> the CRC,<sup>1128</sup> the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,<sup>1129</sup> the CPED,<sup>1130</sup> and the CRPD.<sup>1131</sup> Furthermore, as a central organizing principle of the Vienna World Conference on Human Rights in 1993, the concept of dignity adopted in the Declaration and Programme of Action has been foundational either to human rights in general or to specific areas such as biomedical ethics, the prohibition of gender-based violence and harassment, the treatment of indigenous peoples, the abolition of extreme poverty and the prohibition of torture.<sup>1132</sup> Nonetheless, it was the reference of dignity in the 1948 UDHR that inspired its subsequent incorporations in both international and regional instruments, while the exercise culminated in a significant historical evolution of the concept.<sup>1133</sup>

Notably, a certain *vagueness* of the concept of dignity has been the object of academic

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*Workers) Convention*, 1955; *Social Security (Minimum Standards) Convention*, 1952; *Equal Remuneration Convention*, 1951.

<sup>1124</sup> International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27, 21 UN GAOR Supp (No. 16), at 49, A/6316 (1966), 993 UNTS 3. See Preamble and Article 13 on the right to education.

<sup>1125</sup> International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly Resolution 2106 (XX) of 21 December 1965, Annex, 20 UN GAOR Supp. (No. 14) at 47, A/6014 (1966), 660 U.N.T.S. 195, opened for signature at New York, 7 March 1966, 660 U.N.T.S. 195, entered into force 4 January 1969. See the Preamble.

<sup>1126</sup> Convention on the Elimination of All Forms of Discrimination against Women, adopted by General Assembly Resolution 34/180 of 18 December 1979, 34 UN GAOR Supp (No. 46) at 193, A/34/46 (1980), reprinted in 19 I.L.M. 33 (1980), entered into force on 3 September 1981. See Preamble.

<sup>1127</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by GA Res. 39/46 of 10 December 1984, entry into force on 26 June 1987, GA Res. 39/46, annex, 39 UN GAOR Supp (No. 51), at 197, A/39/51 (1984). See the Preamble.

<sup>1128</sup> Convention on the Rights of the Child, adopted by GA Res. 44/25, Annex, 44 UN GAOR, Supp. (No 49), at 1667, A/44/49 (1989), reprinted in 28 I.L.M. 1448 (1989), entered into force on 2 September 1990. See the Preamble.

<sup>1129</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, GA Res. 45/158, Annex, 45 UN GAOR Supp. (No. 49A), at 262, A/45/49 (1990). See Articles 17 and 70.

<sup>1130</sup> International Convention for the Protection of All Persons from Enforced Disappearance, E/CN.4/2005/WG.22/WP.1/Rev.4 (2005), adopted by GA Res. 61/177 of 20 December 2006, opened for signature on 6 February 2007, entered into force on 23 December 2010. See Article 19.

<sup>1131</sup> International Convention on the Rights of Persons with Disabilities, adopted in December 2006, entered into force on 3 May 2008 after having received its 20<sup>th</sup> ratification on 3 April 2008, GA Res. A/61/611 (2006). See Preamble and Articles 3, 8, 16, 24, and 25.

<sup>1132</sup> Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14 - 25 June 1993, A/CONF.157/24 (Pt 1), at 20 (1993), Preamble and Articles 11, 18, 20, 25, 55.

<sup>1133</sup> Universal Declaration of Human Rights, GA Res. 217 A (III), A/810, 10 December 1948. In mentioning it twice its Preamble declares that “*recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ...*”, also underlining that “*the people of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedoms ...*”. Then, specific textual uses are made, besides providing in Article 1 that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”. For instance, according to Article 22, “[e]veryone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”.



consideration, arguing that dignity provides a convenient language for adopting substantive interpretations of human rights guarantees that appear intentionally highly contingent on local circumstances.<sup>1134</sup> However, the same meaningful opinion has recognised an important role of this concept in contributing to develop particular methods of human rights interpretation and adjudication: apparently human dignity plays a role judicially by “*enabling rights to be interpreted in a way that domesticates them*”, so enabling local context to be incorporated under the appearance of using a universal principle and allowing each jurisdiction to develop its own practice of human rights.<sup>1135</sup>

In any case, these legal and judicial uses of the concept of human dignity do inspire an inquiry of the normative role of modern human rights law for strengthening legal protection of civilians’ ESC rights. This concept substantially corroborates the application of this branch of international law and its specific contribution in the safeguarding of ESC rights as indispensable to preserve human beings in conflict-affected situations. In this respect the present chapter relies on the basic assumption that upholding legal protection of civilians’ human dignity requires, *inter alia*, to implement the principle that *the right to live a dignified life can never be attained unless all basic necessities of life-work, food, housing, health care, education and culture are adequately and equitably available to everyone*, which is generally recognised as a fundamental principle of the global human rights system.<sup>1136</sup>

## **2.b. Approaching coherently the integral and holistic vision of human rights**

Exploring international human rights law as an essential normative framework to afford protection of civilians’ ESC rights under international law is consistent with *the integral and holistic vision of human rights at the historical origins of this regime*, which implies indivisible and interdependent norms aimed at maximising the wellbeing of the individual and peoples.<sup>1137</sup> In line with this vision the distinction between different generations of rights - which found its normative expression in the separate 1966 international covenants and provided philosophical foundations for several discussions on human rights ideology during the Cold War - has not ended up in justifying any hierarchical order between

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<sup>1134</sup> For an accurate reconstruction of the historical evolution of the concept, underlying the several main overlapping developments of dignity as a Western philosophical-cum-political concept, see C. McCrudden, “Human Dignity and Judicial Interpretation of Human Rights”, 19(4) *EJIL*, pp. 655-724.

<sup>1135</sup> See C. McCrudden, *op. cit.*, p. 720.

<sup>1136</sup> CESCR, *Human Rights Fact Sheet No. 16 (rev. 1)*, Introduction.

<sup>1137</sup> The relevance of this approach remains notwithstanding the current financial and economic instability of States in the global West, and brings to bare the importance of ESC rights to all individuals, not just those living in developing and least-developed States, mostly when austerity measures hit the most vulnerable members of societies.

rights that are fundamental to a dignified life of every individual.<sup>1138</sup> Although this division has marked the human rights discourse,<sup>1139</sup> the international system as formulated since the adoption of the UDHR in 1948<sup>1140</sup> has gradually postulated the principles of indivisibility, interdependence, equality and universality, which have been solemnly proclaimed during the 1993 Vienna World Conference on Human Rights<sup>1141</sup> and then included in international legal documents.<sup>1142</sup> Notably, the UDHR was rooted in the 1941 “*For Freedoms Address*” by President Franklin D. Roosevelt, which equally reflected socio-economic alongside civil and political rights<sup>1143</sup>.

Indeed, *the structures of most international human rights law sources* do not embrace the distinction between normative categories or generations of rights, rather *covering in their texts both sets*. They include the ICERD<sup>1144</sup> of 1965, the ICEDAW<sup>1145</sup> of 1979, the CRC<sup>1146</sup> of 1989, the ICRPD of 2006. As for regional instruments, they are not specifically delimited to the so-called first generation of human rights. This is evident for the African Charter on Human and Peoples’ Rights (AfrCHPR) of 1981, which comprehensively guarantees a full range of rights, without drawing distinction between implementation and justiciability of different categories.<sup>1147</sup> Notably, other

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<sup>1138</sup> The idea of human rights as indivisible and interdependent has gained credibility through the fact that both sets of rights deeply relate to the preservation of human dignity, see Commission on Human Rights, Res. 2004/29, 19 April 2004, para. 8 (d).

<sup>1139</sup> The two Covenants of 1966 were drafted with different kind of States’ obligations under each and different means for their implementation, without having the same enforcement mechanisms.

<sup>1140</sup> In the UDHR human rights are declared as “*common standards of achievement for all people and all nations*”, without making separations of any sort and, rather, they comprise in one consolidated text nearly the entire range of rights and fundamental freedoms.

<sup>1141</sup> See Vienna Declaration and Programme of Action, 25 June 1993, A/CONF.157/23, Part 1, para. 5 (“*All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms*”). See also GA Res. 32/130, 16 December 1977, para. 1 (a) and (b).

<sup>1142</sup> See Convention on the Rights of Persons with Disabilities, Preamble, para. (c): “*Reaffirming the universality, indivisibility interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination*”.

<sup>1143</sup> UDHR, Preamble, para. 2 (“*Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people*”). See A. Eide and W.B. Eide, “Article 25”, in G. Alfredsson and A. Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, Martinus Nijhoff Publishers, 1999, pp. 523-550. As explained by the authors, the inclusion of ESC rights in the UDHR was the result of Western action, rather than being simply the result of Socialist States as evoked by the Cold War discourse, see *ibid.*, pp. 527-528. On the opposite view as to the West responsible of a sort for the rejection of ESC rights, see J. Donnelly and D.J. Whelan, “The West, Economic and Social rights, and the Global Human Rights Regime: Setting the Record Straight”, 29 *HRQ*, 2007, pp. 908-949; T. Evans and A. Kirkup, “The Myth of Western Opposition to Economic, Social, and Cultural Rights? A Reply to Whelan and Donnelly”, 31 *HRQ*, 2009, pp. 221-237.

<sup>1144</sup> For international legal obligations on ESC rights, see in particular Article 5 (e).

<sup>1145</sup> For establishing international legal obligations on ESC rights, see in particular Articles 10, 11, 12 and 14.

<sup>1146</sup> For establishing international legal obligations on ESC rights, see in particular Articles 22-30.

<sup>1147</sup> African Charter on Human and Peoples’ Rights, adopted on 27 June 1981 in Nairobi, Kenya, OAU Doc. CAB/LEG/67/3/Rev. 5 (1981), entered into force on 21 October 1986, reprinted in 21 *ILM* 59 (1982).

African human rights instruments provide protection of more detailed ESC rights in relation to the child, the woman and youth.<sup>1148</sup> As for the European Convention on Human Rights (ECHR), this is predominantly concerned with civil and political rights,<sup>1149</sup> while it does not safeguard economic and social rights explicitly<sup>1150</sup>, with the exception of Protocol No. 1 to the ECHR protecting property rights and the right to education, and Protocol No. 12 extending the Convention to cover discrimination on the social and economic sphere. Indeed, the Council of Europe member States have agreed on a separate regime of economic and social rights, which are mostly addressed in the 1961 European Social Charter (ESC). As a sort of regional counterpart to the ICESCR, it covers a broad range of rights related to housing, health, education, employment, social protection and non-discrimination, introducing one of the few international remedies for violations of ESC rights through its Additional Protocol.<sup>1151</sup> Similarly, the IACHR emphasises civil and political rights, but its Additional Protocol of San Salvador focuses on ESC rights and introduces a partial system of individual complaints.<sup>1152</sup>

Remarkably, the integral vision of human rights at the historical origins of international human rights law bases the more recent notions of “*new rights*” or “*collective rights*”, including *the right to peace*, *the right to development* and *environmental rights*, which supplement the traditional categorisations. Of note is that the interdependence and universality of human rights as part of development - conceived as a multifaceted and participatory process - is emphasised in the 1986 Declaration on the Right to Development (DRD);<sup>1153</sup> then, the close relationship between the latter and the ICESCR are therefore confirmed.<sup>1154</sup> Although those new rights are still disputed as real human

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<sup>1148</sup> See African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force on 29 November 1999; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted by the African Union Assembly on 13 September 2000 in Maputo, CAB/LEG/66.6, entered into force on 25 November 2005; the African Youth Charter, adopted by the African Union Assembly on 2 July 2006.

<sup>1149</sup> See D.J. Harris et al., *Law of the European Convention on Human Rights*<sup>2</sup>, Oxford, 2009.

<sup>1150</sup> See C. Warbrick, “Economic and Social Interests and the European Convention on Human Rights”, in M. Banderin and R. McCorquodale (eds.), *Economic, Social and Cultural Rights in Action*, Oxford, 2007, p. 241, noting how the ECHR safeguards economic and social aspects of the rights explicitly enshrined in this Convention.

<sup>1151</sup> Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 22 June 1995, CETS no. 158. The Protocol entered into force on 1 July 1998. It opens the possibility for collective complaints alleging the unsatisfactory application of the Charter, which may be submitted by international and national non-governmental organizations, organizations of employers, and trade unions. For a review on the progress made in the first decade or so of its operation, see D.J. Harris, “Collective Complaints under the European Social Charter: Encouraging Progress?”, in K.H. Kaikobad and M. Bohlander (eds.), *International Law and Power: Perspectives on Legal Order and Justice. Essays in Honour of Colin Warbrick*, 2009, pp. 3-24.

<sup>1152</sup> See Article 19 (5). The Protocol of San Salvador was adopted in 1988 and entered into force in 1999.

<sup>1153</sup> Its Preamble highlights that, “*in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights*” and that, “*accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms*”.

<sup>1154</sup> See CESCR, “Statement on the importance and relevance of the right to development”, UN Doc. E/C.12/2011/2,

rights *per se*, they are perceived not in isolation but in relation to a number of internationally recognised fundamental rights.<sup>1155</sup> Moreover, their realisation is deemed to require global cooperation based on international solidarity.<sup>1156</sup> Significantly, these new collective dimensions of human rights do have certain implications for - and pose delicate challenges in - conflict-torn scenarios: they foreshadow a notion of human rights beyond the limited horizon of living generations, highlighting the long term effects of several policies on global public goods such as climate, water, clean air, forests. In this regard, *civilians' ESC rights affected by war-torn situations turn out to be cross-cutting issues related to the international protection of global public goods.*

In view of a progressive acknowledgment of human rights interdependence, unity in their normative structure and their broader scope acquired over time, it seems that the integral and holistic vision of human rights positively supports an attempt to settle the recognised application of international human rights law in conflict-related situations from the less debated perspective of ESC rights. This aspect is closely linked to the third ground articulated in the next section.

In this context, it is also remarkable that over the past fifteen years the interest in promoting and protecting ESC rights has grown significantly at the level of international and regional organizations. For instance, a crucial *leitmotiv* of several policies and programmes undertaken within the United Nations has become “*dismantling unworkable categorisations*” and moving towards an agenda treating civil, cultural, economic, political and social rights, together with the right to development, as truly equal, indivisible, interdependent and interrelated. Specific efforts to strengthen the integration of human rights standards and principles into UN policies and programmes have been

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12 July 2011. Substantive Articles 1 to 15 ICESCR inspired and shaped basic elements of the right to development. In paragraph 5 the complementarity between the rights in the Covenant and the right to development in the Declaration is highlighted, in view of the correspondence between Articles 3 and 4 DRD regarding national and international responsibilities and Article 2 ICESCR on the obligations of States parties, including the duty to provide international assistance and cooperation; and between Article 8 (1) DRD and those provisions of the Covenant concerning, *e.g.*, the empowerment and active participation of “*women, disadvantaged and marginalised individuals and groups*”; employment; basic resources and fair distribution of income; eradication of poverty; adequate standard of living, including food and housing; health services; education; and the enjoyment of culture.

<sup>1155</sup> See M. Scheinin, “Characteristics of human rights norms”, in C. Krause and M. Scheinin (eds.), *International Protection of Human Rights: A Textbook*, 2009, p. 25, noting that the right to peace can be “*tackled in the context of the right to life*”; that the right to development can be understood as “*an umbrella concept and a policy-oriented programme, which covers most of the existing human rights*”; that “*the right to a satisfactory environment can be broken down into specific environmental rights which can be dealt with in the context of rights such as the protection against inhumane and degrading treatment and the right to privacy, the right to health, the right to participate in public affairs, the right to property, etc.*”.

<sup>1156</sup> On the emergence of the notion of a ‘third generation’ of human rights, described as solidarity rights, see P. Alston, “A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?”, 29 *Netherlands International Law Review*, 1982, pp. 307-322; the growing support, manifested in various international fora, for such a notion and the principal assumptions behind this concept are considered: (1) first and second generation rights are not sufficiently flexible or dynamic to be able to respond adequately to present circumstances; (2) there is a set of more or less homogeneous demands that are distinguished primarily by the fact that solidarity is a prerequisite to their realisation; (3) these new demands are presently in the process of acquiring international recognition as human rights.

carried out in relation to development, humanitarian action, peace and security, economic and social issues; they remain critical in contexts of armed conflict though.<sup>1157</sup> From this perspective, a recent challenge has regarded as *necessary new efforts* to ensure *available legal remedies to victims of violations of ESC rights* and to enable *meaningful participation in development processes and social justice*. In this respect deeper integration of human rights-based approaches to development as well as human rights sensitive understandings of, and responses to, poverty have become common concerns.<sup>1158</sup>

## **2.c. Taking seriously the evolution of the international protection of ESC rights**

Testing the potential of international human rights law as a twofold normative and accountability framework to safeguard civilians in the sphere of ESC rights also relies on the fact of taking seriously the *significant developments occurred since the adoption of the UDHR*<sup>1159</sup> and the *UN Charter*.<sup>1160</sup> Since the middle of the nineteenth century ESC rights have been proclaimed at the global, regional and national levels; their further elaboration and comprehension has marked the last twenty years or so, strengthening their quality as *legal rights*.

They have been enshrined in several international conventions<sup>1161</sup> and declarations.<sup>1162</sup> The

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<sup>1157</sup> E.g., *OHCHR Report 2010*, p. 52. Its work is undertaken through human rights field presences and the development and implementation of policies and operational guidance for peacekeeping and special political missions. OHCHR closely cooperates with other components of peace missions, and maintains and fosters partnerships with UN agencies, funds and programmes to ensure the adoption of a human rights-based approach to UN engagement in conflict and post-conflict contexts.

<sup>1158</sup> See *OHCHR Report 2010*, at 43. An emblematic initiative is the establishment of a multi-agency UNDG human rights mainstreaming mechanism, co-chaired by OHCHR and UNDP, to complement its engagement with international financial institutions, the OECD Development Assistance Committee, and the World Trade Organization, as well as bilateral development actors.

<sup>1159</sup> See GA Res. 217A (III), A/810, at 71. Under Articles 21-29, the UDHR proclaims that “*everyone*” has the right to the following: social security; work; “*rest and leisure including reasonable limitation of working hours and periodic holidays with pay*”; adequate standard of living *including food, clothing, housing and medical care*; education; freedom to participate in the cultural life of the community; and “*a social and international order*” to realise the freedoms and rights concerned.

<sup>1160</sup> The UN Charter obliges States to take action, individually and jointly, for the promotion and respect of human rights and economic and social progress; Article 55 specifies that the promotion of full employment and development is integral to such efforts. See also the Preamble and Articles 1 and 56 UN Charter.

<sup>1161</sup> *Binding universal treaties on ESC rights* include the ICESCR, the CRC and the optional protocols thereto, the CEDAW; the ICERD, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the CRPD; the ILO Conventions; the 1989 Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169). Furthermore, *key regional treaties* include the 1948 American Declaration of the Rights and Duties of Man, the 1981 ACHPR (the Banjul Charter); the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the 1988 Protocol of San Salvador; the 1990 African Charter on the Rights and Welfare of the Child; the Arab Charter on Human Rights; the 1961 and 1996 (Revised) European Social Charter; the 1999 Inter-American Convention on The Elimination Of All Forms Of Discrimination Against Persons With Disabilities; the 2003 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. Others regional treaties that focus principally on civil and political rights, but include some ESC rights, or have been interpreted as protecting aspects of ESC rights, include the 1950 ECHR and its first Protocol of 1952; the 1969 ACHR and the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.

<sup>1162</sup> *I.e.*, Declaration on the Right to Development, GA Res. A/RES/41/128, 4 December 1986; Declaration on the

most comprehensive international legal framework to elaborate ESC rights is the ICESCR. Since 1987, the practice of the treaty body mandated to monitor States parties' implementation has contributed to delineate the scope and content of Covenant's rights.<sup>1163</sup> Its interpretative efforts have been mostly articulated in Reporting Guidelines and General Comments on the Covenant's obligations, as detailed in the next section. Good possibilities for normative developments of ESC rights through an institutionalised practice of legal interpretation of treaty obligations derive from the three functions provided in the new Optional Protocol (OPICESCR);<sup>1164</sup> they include: the receiving and considering individual and group communications claiming "*a violation of any of the economic, social and cultural rights set forth in the Covenant*";<sup>1165</sup> the dealing with interstate communications to the effect that a State party to this Protocol argues that another Contracting Party is "*not fulfilling its obligations under the Covenant*";<sup>1166</sup> the conducting of an inquiry in cases where the received "*reliable information*" indicates "*grave or systematic violations*" by a State party of one or more of the rights set forth in the Covenant.<sup>1167</sup>

The coming into force of the third Optional Protocol to the CRC increases the chance for outlining a child-specific ESC rights framework, as it provides for similar procedures against

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Rights of Indigenous Peoples, GA Res. A/RES/61/295, 13 September 2007. See Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, S. James Anaya, "*Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*", UN Doc. A/HRC/9/9, 1 August 2008.

<sup>1163</sup> For the function to receive and review State parties' reports in its Concluding Observations, see ECOSOC Res. 1985/17 of 28 May 1985. The CESCR is composed of 18 members (with recognised competence in this field) elected by ECOSOC for a renewable period of four years. Although nominated by States parties to the ICESCR, the members serve in their personal capacity as independent experts. The election process mirrors the UN practice of heeding the principle of geographical distribution and representation of different legal and social systems. Decisions are usually taken by consensus. It meets twice annually for three-week sessions.

<sup>1164</sup> The OPICESCR entered into force on 5 May 2013, three months after Uruguay became the tenth State to ratify the treaty, in accordance with Article 18. It was approved on 10 December 2008 (GA Res. A/RES/63/117) after the Human Rights Council adopted without a vote Resolution 8/2 including the text of the Optional Protocol on June 2008. It was opened for signature on 24 September 2009. To date, forty-five States have signed it, including ten European Union Member States (Belgium, Finland, Italy, Luxembourg, the Netherlands, Portugal, Slovakia, Slovenia, Spain and Ireland); twelve States are parties to the Protocol (Argentina, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Finland, Mongolia, Montenegro, Portugal, Slovakia, Spain, Uruguay); none of the permanent members of the Security Council have signed the Protocol yet (the United States signed but has not ratified the ICESCR, while all other permanent members have ratified it). See [http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3-a&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3-a&chapter=4&lang=en)

<sup>1165</sup> The State allegedly responsible must have ratified both the ICESCR and its Optional Protocol, according to Article 1(2) OP-ICESCR ("*No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol*").

<sup>1166</sup> The inter-State complaints procedure is set out in Article 10 OP-ICESCR: being an opt-in procedure it only applies if both the claimant and the defendant have declared to accept the competence of the CESCR to hear a communication of this nature. See also Article 11(1) OP-ICESCR. An inter-State complaints procedure is set out also in respect to the ICCPR and the CERD.

<sup>1167</sup> The inquiry procedure is set out in Article 11(2) OP-ICESCR and Rules 21-34 of the Rules of Procedure. The CESCR is not allowed to undertake an inquiry unless the State concerned has declared to accept its authority to make inquiries. An inquiry procedure is also set out in Articles 8 and 10 (1) OP-CEDAW, Article 20 (1) CAT, Article 6 (1) OP-CPRD.

violations of this Convention and its Protocols by States that have ratified this new instrument.<sup>1168</sup> So far children's ESC rights have not been extensively considered by the relevant treaty body, which has offered a comprehensive interpretation of the obligations stemming from the CRC in General Comment No. 5. The new Protocol enables children and their advocates to appeal experts on a broader range of children's rights than any other treaty and provides a further means of putting pressure on States, after having navigating the national systems to "*exhaust domestic remedies*".

Remarkably, the adoption of new complaint procedures under the ICESCR, the CRC, and the ICRPD<sup>1169</sup> represent a further step supporting the highly debated justiciability of ESC rights before international bodies,<sup>1170</sup> which so far has mostly developed *via* complaint procedures under treaties on civil and political rights; in particular, through the "*integrated approach*" in relation to the non-discrimination clause in the ICCPR<sup>1171</sup> and the right to a fair trial in the ECHR.<sup>1172</sup> Another relevant case concerns Article 6 ICCPR: in giving the "*inherent right to life*" a wider scope, it has been interpreted as a legal basis for positive social obligations on States parties. To be precise, the second sentence of this provision - establishing the obligation to protect by law the right to life in conjunction with Article 2 - has been deemed to call for positive measures in the protection of life, highlighting the importance of taking "*all positive measures to reduce infant mortality and to increase life expectancy, especially adopting measures to eliminate malnutrition and epidemics*".<sup>1173</sup> Some dimensions of the right to housing are also seen as suitable to receive protection under the ICCPR provisions

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<sup>1168</sup> The third OP-CRC on a communications procedure, 19 December 2011, which entered into force on 14 April 2014 after the tenth ratification (UN Doc. A/RES/66/138), allows for individual children to submit complaints alleging violations of their rights under the CRC and its two Protocols (the Optional Protocol on Children in Armed Conflict and the Optional Protocol on the Sale of Children); it also institutes inter-state complaints and an inquiry procedure "*for grave or systematic violations*" of children's rights.

<sup>1169</sup> The CRPD may consider individual communications relating to States parties to the Optional Protocol to the Convention on the Right of Person with Disabilities (13 December 2006, entered into force 3 May 2008). Under Article 1 of this Protocol the Committee has competence "*to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention*".

<sup>1170</sup> See M. Langford (ed.), "Perspectives on a New Complaint and Inquiry Procedure: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", 27 (1) *Special Issue of the Nordic Journal of Human Rights*, 2009; R. Kayess and P. French, "Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities", *HRLR*, 2008.

<sup>1171</sup> The International Covenant on Civil and Political Rights, GA Res. 2200 A (XXI) adopted 16 December 1966, UN GAOR, twenty-first session, Supp. No. 16, p. 52, A/6316 (1967). On the "*integrated approach*", see M. Scheinin, "Economic, Social and Cultural Rights as Legal Rights", in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights - A Textbook*<sup>2</sup>, Martinus Nijhoff Publisher, 2001, pp. 32-33. The Human Rights Committee has settled the applicability of the non-discrimination clause of Article 26 ICCPR even in respect to the enjoyment of ESC rights. Although Article 26 has been mostly applied in relation to discrimination because of sex, all the prohibited grounds for discrimination provided by this article, including '*other status*', may be applied in the area of economic and social rights.

<sup>1172</sup> The fair trial clause in Article 6(1) ECHR and its procedural safeguards have been suitable for extending the judicial protection of the European Convention to aspects related to ESC rights, see M. Scheinin, *ibid.*, p. 34.

<sup>1173</sup> See HRC, *General Comment No. 6: Right to life (art. 6)*, 30 April 1982, para. 5.

guaranteeing the right to life or the right to private and family life.<sup>1174</sup>

It is worth noting that almost all the UN human rights treaty bodies may receive individual complaints or communications from individuals, under certain circumstances.<sup>1175</sup> As observed above, regional human rights mechanisms monitoring States' compliance with ESC rights exist in Europe (the European Court of Human Rights and the European Committee of Social Rights<sup>1176</sup>), in the Americas (the Inter-American system of human rights, both the Court and the Commission), and in Africa (the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights).

Arguments countering the assumption that ESC rights do not lend themselves to judicial review and enforcement<sup>1177</sup> have aptly stressed how political reticence and political choices represent the major causes behind the judicial reticence to enforce the rights concerned. In any case, the adoption of complaints procedures for relevant treaties is in line with a trend emerging since the 1980s towards a direct recognition of *ESC rights as fundamental and justiciable legal rights in national systems*.<sup>1178</sup> This trend has concerned many Asian countries (e.g. East Timor, Indonesia, Afghanistan, Cambodia) and Latin American countries (e.g. Brazil, Argentina, Colombia, Bolivia, Peru, Costa

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<sup>1174</sup> On the Human Rights Committee's practice to read *issues on ESC rights* into specific rights enshrined in the ICCPR, see M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia, 2003, pp. 52-54 and 138 ff. See also M. Scheinin, *op. cit.*, 2001, pp. 40-41.

<sup>1175</sup> *I.e.*, the CESCR, the HRC, the Committee on the Elimination of Racial Discrimination (CERD), whose treaty provides individual communications relating to States parties who have made the necessary declaration under Article 14 (1) of the Convention on the Elimination of Racial Discrimination), the Committee against Torture (CAT), the Committee on the Elimination of Discrimination against Women (CEDAW, whose treaty provides individual communications relating to States parties to the Optional Protocol to the Convention on the Elimination of Discrimination Against Women), the Committee on the Rights of Persons with Disability (CRPD), the Committee on Enforced Disappearances (CED), the Committee on the Rights of the Child (CRC). The individual complaint procedure for the Committee on Migrant Workers (CMW) is not yet in force though.

<sup>1176</sup> A collective complaints procedure under the revised ESC entered into force in 1998, see Additional Protocol to the European Social Charter providing for a System of Collective Complaints, 1995, ETS No. 158.

<sup>1177</sup> For a discussion of the necessity to face up to the practical difficulties presented by ESC rights, see M. J. Dennis and D. P. Stewart, "Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?", 98 *AJIL*, 2004, at 462-464, where they stress how "*the issue that needs to be confronted, instead, is that these rights present genuinely different and, in many respects, far more difficult challenges than do civil and political rights ... [I]t is a much more complex undertaking to ascertain what constitutes an adequate standard of living, or whether a State fully respects and implements its population's right to education or right to work. Vexing questions of content, criteria, and measurement lie at the heart of the debate over 'justiciability', yet are seldom raised or addressed with any degree of precision*".

<sup>1178</sup> For a detailed analysis, see M. Langford, "Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review", 6 *IJHR*, 2009, pp. 91-122; M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press, 2008. T.J. Melish, "Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas", 39 *N.Y.U. Journal International Law and Politics*, 2006. F. Coomans (ed.), *Justiciability of Economic, Social and Cultural Rights: Experiences from Domestic Systems*, Intersentia, 2006. S. Lienberg, "The Protection of Economic and Social Rights in Domestic Legal Systems", in A. Eide, C. Krause, A. Rosas (eds.), *Economic, Social and Cultural Rights - A Textbook*<sup>2</sup>, Martinus Nijhoff Publisher, 2001, pp. 55-84.



Rica, Nicaragua, Venezuela).<sup>1179</sup> On the African continent several States have incorporated ESC rights in their bills of rights (e.g. Benin, Cape Verde, Sao Tome and Principe, Burkina Faso, Gabon, Madagascar, Mali, Niger, Togo, Seychelles, South Africa), while others such as Nigeria and Sierra Leone have included directive principles.<sup>1180</sup> In Eastern Europe, of the twenty States subject to reform since 1990, eleven have fully-fledged catalogues of ESC rights, seven have a limited number, and two have none.<sup>1181</sup> Overall, States have chosen three main modalities to the national implementation: providing specific constitutional provisions on ESC rights, laying down constitutional structural principles like the human dignity clause serving an umbrella function, leaving the realisation of the rights in question to the ordinary statutory level.<sup>1182</sup> The remarkable rise in the numbers of ESC rights judgements in several domestic legal systems over the last decades is also linked to a more intense work conducted by NGOs in fields relevant to the enjoyment of ESC rights.<sup>1183</sup>

In addition, serious reflection has been devoted to these rights in academic writing.<sup>1184</sup> Of particular note are the 2011 *Maastricht Principles on Extra-Territorial Obligations of States in the area of Economic, Social and Cultural Rights* attempt to clarify such obligations beyond their own borders, complementing the 1986 *Limburg Principles for the implementation of the International Covenant on Economic, Social and Cultural Rights* and on the 1997 *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*.<sup>1185</sup>

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<sup>1179</sup> See B. Simmons, “Should States Ratify - Process and Consequences of the Optional Protocol to the ICESCR”, in M. Langford (ed.), *27 Special Issue of the Nordic Journal of Human Rights*, 2009, pp. 64-81.

<sup>1180</sup> See C. Heyns and M. Van der Linde (eds.), *Human Rights Law in Africa, Vol. 5 International Human Rights Law in Africa and Vol. 2 Domestic Human Rights Law in Africa*, Martinus Nijhoff, 2004.

<sup>1181</sup> W. Sadurski, *Rights before Courts: A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe*, Springer, 2005, p. 177.

<sup>1182</sup> See E. Riedel, “Economic, Social and Cultural Rights”, in C. Krause and M. Scheinin (eds.), *International Protection of Human Rights: A Textbook, op. cit.*, pp. 146-147, seeing the next decades of ESC rights protection as focusing on national and regional implementation, in parallel to the universal monitoring mechanisms, reinforcing each other. For a debate of the various effects of using the courts to enforce socio-economic rights, see V. Gauri and D.M. Brinks (eds.), *Courting social justice: judicial enforcement of social and economic rights in the developing world*, Cambridge, 2008.

<sup>1183</sup> For a survey of cases evidencing a growing willingness to enforce ESC rights in domestic courts’ decision, see ESCR-Net online, available from [http://www.escr-net.org/caselaw/caselaw\\_list.htm](http://www.escr-net.org/caselaw/caselaw_list.htm); COHRE, *Leading Cases on Economic, Social and Cultural Rights: Summaries*, Working Papers No. 3, Geneva, 2006; International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*, Geneva, 2008.

<sup>1184</sup> See M. Ssenyonjo, *Economic, Social and Cultural Rights in International Law*, Hart Publishing, 2009, Chapter 4; M. Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press, 2008; M. Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia, 2003; A.R. Chapman and S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia, 2002.

<sup>1185</sup> The Maastricht Guidelines elaborate on the scope and nature of such violations and applicable remedies. They reflected the evolution of international law in respect to the earlier Limburg Principles. They primarily relate to the ICESCR, but they may be relevant to the implementation and application of other norms of international and domestic law in the field of ESC rights.

Relevant contributions have also come from the UN special procedures with specific related mandate.<sup>1186</sup> On the one hand, certain mandate-holders have outlined the content of different ESC rights and ensuing State obligations, while several Special Rapporteurs and Independent Experts have attempted to fill normative gaps by developing analytical legal frameworks or clarifying some aspects of a certain right, including the application to groups such as women,<sup>1187</sup> children, indigenous people, prisoners, and people with disabilities. Noteworthy cases include: the ‘4As’ scheme of the first Special Rapporteur on the right to education<sup>1188</sup> according to which “*governments are obliged to make education available, accessible, acceptable and adaptable*”;<sup>1189</sup> the project of the Independent Expert on water and sanitation to defining them from a human rights perspective and clarifying related State obligations;<sup>1190</sup> the normative development in the areas of extraterritorial obligations and international cooperation and assistance, addressed by the first Special Rapporteur on the right to food and the first Special Rapporteur on the right to health and their successors. On the other hand, international standards and other soft law documents have been proposed by mandate-holders to respond to contemporary challenges on the implementation of ESC rights.<sup>1191</sup>

Therefore, notwithstanding that internationally recognised civil and political rights have got more consideration and more judicial interpretation regarding application and enforceability into

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<sup>1186</sup> For an analysis on their impact, see I. Cisma, C. Golay, C. Mahon, “The impact of the UN Special Procedures on the development and implementation of economic, social and cultural rights”, 15(2) *International Journal of Human Rights*, 2011, 299-318.

<sup>1187</sup> Important policy frameworks contributing to the international regime of protection and advancement of women’s human rights in conflict and post-conflict situations have been set out in some resolutions of the UN Security Council. In SC Res. 1325 (2000), the Security Council acknowledged the critical role of women in global peace and security, calling on the international community to address the various impacts of conflict on women and to engage them fully in conflict resolution, peacekeeping and peacebuilding. Then, Res. 1820 (2008), Res. 1888 (2009), Res. 1889 (2009) broadened it and linked the prevention of sexual violence, peacemaking and mediation. Res. 1960 (2010) and Res. 1983 (2011) further strengthened the international legal framework on this issue.

<sup>1188</sup> See *Annual Report of the Special Rapporteur on the right to education, Katarina Tomasevski*, UN Doc. E/CN.4/1999/49, 13 January 1999, paras. 51-74; *Annual Report of the Special Rapporteur on the right to education, Katarina Tomasevski*, UN Doc. E/CN.4/2000/6, 1 February 2000, paras. 32-65; *Annual Report of the Special Rapporteur on the right to education, Katarina Tomasevski*, E/CN.4/2001/52, 11 January 2001, paras. 64-77; *Annual Report of the Special Rapporteur on the right to education, Katarina Tomasevski*, E/CN.4/2002/60, 7 January 2002, paras. 22-45.

<sup>1189</sup> K. Tomasevski, *Education Denied: Costs and Remedies*, Zed Books, 2003, at 51.

<sup>1190</sup> *Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Catarina de Albuquerque*, UN Doc. A/HRC/12/24, 1 July 2009.

<sup>1191</sup> Special procedures’ involvement has been different depending on the type of process that led to the development or adoption of these instruments. For a process led by States, see *The Voluntary Guidelines to support the progressive realisation of the right to adequate food in the context of national food security*, adopted by the 127<sup>th</sup> session of the FAO Council in November 2004. For a process led by the Special Rapporteur, see *The Draft General Guidelines on Foreign Debt and Human Rights, submitted by the independent expert on the effects of economic reform policies and foreign debt on the full enjoyment of all human rights, Bernards Mudho*, UN Doc. A/HRC/7/CRP.2, 4 March 2008; see the *Final draft of the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona*, A/HRC/21/39, 2012. For a process fostering wide consultations with all stakeholders on an equal or quasi-equal footing, see *The Basic Principles and Guidelines on Development-based Evictions and Displacement*, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, A/HRC/4/18, 5 February 2007.

domestic legal systems, *an increased focus on economic, social and cultural dimensions of human rights is evident*. Significantly, the wrong assumption that only the former can be subject to *violations*, to *measures of redress* and to *international legal analysis* has aptly lost credibility in the light of a progressive conceptual clarification of ESC rights.

All the previous considerations on such developments have certain *implications* in inquiring as to the potential of modern human rights law as regards the imperative of civilian protection in the socio-economic and cultural spheres under international law. Conflict-torn and occupation-related situations raise at least two relevant issues. The first one consists of developing a *contemporary understanding of civilians' needs in such evolving scenarios* and a *comprehensive elaboration of the obligations possibly incumbent upon several actors performing crucial roles therein* (e.g. territorial States, foreign States, States as members of international organizations, non-State actors such as private persons and organisations or multinational corporations). The second one consists of facing the challenges of *compliance with international norms enshrining ESC rights* and of *international enforcement mechanisms* able to supplement and support domestic enforcements of those norms when national systems do not or cannot pursue accountability because they are lacking or fail to function.

In this regard, *potential benefits* from international human rights law may be spelled out as follows.

1. Its application may entail a *better understanding of distinct dimensions of realisation of ESC rights* that warrant - or should deserve - more consideration. In this respect, the first benefit lies on the special aptitude of this legal regime to *tackle the normative content of the rights to be protected against the conduct of military operations or in periods of occupation*, clarifying the nature and scope of a range of ensuing State obligations (particularly through basic tools such as the concept of progressive realisation or the principles of equality and non-discrimination). This will be articulated in the next sub-sections 2.c.i. and 2.c.ii.

2. Its application may help framing *the legality of a variety of controversial actions/measures affecting civilians*: detrimental impacts may be addressed as stemming from the violations of obligations established by international law norms on ESC rights; in other words, the *link* between such impacts and relevant obligations may be discovered.<sup>1192</sup>

3. Its application may entail *the beneficial provision for enforcement mechanisms to redress breaches concerning ESC rights*. Notably, in the fight against impunity for gross violations of human rights law

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<sup>1192</sup> On significant attempts to study a '*violation approach*' or monitoring ESC rights, see A.R. Chapman, "A Violation Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights, 18 *HRQ*, 1996, pp. 23-66; V. Dankwa, C. Flinterman, S. Leckie, "Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights", 20 *HRQ*, 1998, pp. 705-730.

and international humanitarian law the principle of criminal or civil accountability before quasi-judicial bodies or courts has been acknowledged at the universal<sup>1193</sup> and regional<sup>1194</sup> levels. As to the various *administrative, civil, criminal or disciplinary sanctions for violations of ESC rights* a main concern is the aptitude to be adequately efficacious. As to the *victims of violations of ESC rights* a key issue regards the access to effective remedies to grant reparation and order cessation of such violations.

As observed above, the OPICESCR institutes new procedures for State accountability for breaches of the ICESCR.<sup>1195</sup> Besides offering a chance to advance the CDESCR's jurisprudence on the rights concerned, the *individual complaints procedure* makes possible to seek justice at the international level after access to justice at the national level was denied or after domestic remedies took unreasonably long time. It is worth highlighting the "progressive approach" of this Protocol in granting the Committee a mandate to receive information by a wide range of third parties sources (Art. 8(1) and 8(3)) and in requiring this body to consider whether reasonable steps have been taken by the State party and how its disputed policy measures affect the complainant as well as the groups that are not direct parties.<sup>1196</sup> Besides the significance of the follow-up procedure (Arts. 9 and 14), the provision for interim measures (Art. 5) to prevent "irreparable damage" to the victims of alleged

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<sup>1193</sup> Preamble to the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, E/CN.4/2005/L.10/Add.11, reading as follows: "... Recognising that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law ...".

<sup>1194</sup> See, e.g., *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*, adopted by the Committee of Ministers on 30 March 2011. The Preamble reads as follows: "Considering that a lack of accountability encourages repetition of crimes, as perpetrators and others feel free to commit further offences without fear of punishment". In para. III (7), States are recommended to "establish mechanisms to ensure the integrity and accountability of their agents. States should remove from office individuals who have been found, by a competent authority, to be responsible for serious human rights violations or for furthering or tolerating impunity, or adopt other appropriate disciplinary measures"; in para. VI the significance of public scrutiny of the investigation or its outcomes to ensure accountability is emphasised.

<sup>1195</sup> On the OPICESCR, see A. Vandenbogaerde and W. Vandenhoele, "The Optional Protocol to the International Covenant on Economic, Social and Cultural: An Ex Ante Assessment of its Effectiveness in Light of the Drafting Process", 10(2) *HRLR*, 2010, pp. 207-237. See C. De Albuquerque, "Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights-The Missing Piece of the International Bill of Human Rights", 32 *HRQ*, 2010, pp. 144-178. See C. Golay, "The Optional Protocol To The International Covenant On Economic, Social And Cultural Rights", CETIM, November 2008. See C. Mahon, "Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights", 8 *HRLR*, 2008, pp. 617-646.

<sup>1196</sup> Under Article 8(4) OP-ICESCR the standard by which the Committee decides complaints (and so determining whether an ESC right has been violated) concerns the *reasonable* character of the measures adopted by the State party in conformity with Article 2(1) ICESCR, while considering that the State party is allowed to implement the rights enshrined in this Covenant in a variety of ways. For the reasonableness test, the Committee could draw inspiration from existing jurisprudence at the national, regional and international levels, which has indeed used this test for assessing compliance with obligations to respect and protect ESC rights, but mainly for evaluating the degree of positive actions of fulfillment, or for founding a government responsible for having taken measures that discriminate in the enjoyment of ESC rights, or even for not having properly regulated the activities of transnational corporations. See generally, Porter, "The Reasonableness of Article 8(4) - Adjudicating Claims from the Margins", 27 *Nordic Journal of Human Rights*, 2009, pp. 39-53; Griffey, "The Reasonableness Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", 11 *HRLR*, 2011, pp. 275-327.

violations is helpful. Conversely, the *inquiry procedure* presents a confidential process to address effectively systematic and grave violations of ESC rights insofar it gives the CESCR a chance to respond promptly to serious abuses without waiting the State party's submission of periodic reports; it may be particularly helpful when individuals or groups are unable to submit complaints owing to constraints or fear of reprisals. The possibility to notify the findings on the investigation to the UN and other bodies (with the agreement of the State) and to indicate any need for technical advice or assistance has also basic importance (Art. 14).

Of note, meaningful jurisprudence on ESC rights in conflict-affected situations or transitional justice contexts has started to emerge from judicial or quasi-judicial proceedings.<sup>1197</sup>

Specifically, the Inter-American Court of Human Rights has decided cases involving large-scale abuses occurred during conflicts or repressions that were often brought before it when the States in question (*i.e.* Chile, Colombia, Guatemala and Peru) had undertaken or were undertaking a transition. In the *Mapiripán Massacre* case,<sup>1198</sup> in arguing the State obligation to adopt positive measures to ensure a dignified life, the Court interpreted expansively the right to life in order to protect, *inter alia*, the rights to food, health and housing of the victims of the massacre and vast displacement. Its examination of alleged violations of the rights of the child (Art. 19) and of freedom of movement (Art. 22) was also linked to the right to life (Art. 4); it argued Colombia's failure to discharge positive obligations to provide children and displaced people with the necessary conditions to live in dignity; vulnerable conditions in which victims had to survive were identified in the experiencing their families' disintegration, the witnessing of massacres, their being forced into poverty, the loss of their homes and jobs, the threat of serious illnesses and the lack of access to food, while the Court did not specify the positive obligations stemming from the right to life as relevant for ESC rights.

Another case, *Ituango Massacres v. Colombia*, illustrates more directly the justiciability of the rights

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<sup>1197</sup> See, *e.g.*, AComHPR, *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Comm. Nos. 279/03 and 296/05, decision of May 2009. See particularly paras. 9-14, 205, 209 and 212. This will be specifically discussed in one of the next sections.

Although not detailed here, relevant cases have been decided by the Colombian Constitutional Court, also developing its previous jurisprudence, within the implementation of the 2005 Justice and Peace Law; before the entry into force of this transitional justice framework, the Court decided on a case concerning the second highest population of IDPs in the world: in reviewing numerous legal issues related to the content, scope and limitation of the State policy for assisting the displaced population, it acknowledged internal displacement in Colombia in breach of multiple human rights, also determining that the lack of a coherent and holistic public policy to deal with such population constituted an unconstitutional state of affairs because of State authorities' failure to respect, protect and fulfill IDPs' rights. See Colombian Constitutional Court, Third Review Chamber, Decision T-025 of 22 January 2004, in particular sect. 9.

<sup>1198</sup> IACtHR, *Mapiripán Massacre v. Colombia*, Judgment of 15 September 2005, Ser C, No. 134; particularly paras. 96.30-96.67, 161-162, 175, 180 and 186.

concerned.<sup>1199</sup> Besides considering the executions of nineteen inhabitants of Aro and Granja by paramilitaries with the support of the army, the Court affirmed the State authorities' failure to protect the population during and after their incursions in Ituango in view of the forced displacement, the burning down of houses, and the stealing of between 800 and 1,200 head of livestock. Regarding the applicants' allegations of the violation of Article 6(2) ACHR for having being "*detained and compelled to herd the livestock stolen*", the Court interpreted it in the light of Article 2(1) of the ILO Force Labour Convention No. 29, which was ratified by Colombia in 1969. Accordingly, in recognising that the compulsory labour was exacted "*under the menace of penalty*" and performed "*involuntarily*" with the State participation or acquiescence, the Court found Colombia in breach of Article 6(2). Further violations concerned the right to property (Article 21), which was deemed to include all material and immaterial or movable and immovable possessions of an individual (*e.g.* houses, livestock, ancestral or communal land). An explicit reference to Article 14 APII was also made, as it proscribes the destruction or removal of objects indispensable to the survival of the civilian population.<sup>1200</sup>

It is also worth mentioning the Human Rights Chamber for Bosnia and Herzegovina,<sup>1201</sup> which dealt with several cases relating to the right to property and restitution as well as the rights to education, work, and social security.<sup>1202</sup> Indeed, the displacement of more than two million people during the Balkan war - effectively around half of the overall population at the time - resulted in the loss of occupied or owned property and seriously affected their housing and property rights.<sup>1203</sup> The significant role played by the Chamber in addressing these rights mostly derived from Article 8 ECHR on the right to respect for one's private and family life, home and correspondence, as well as

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<sup>1199</sup> IACtHR, *Ituango Massacres v. Colombia*, Judgment of 1 July 2006, Ser C, No. 148. See in particular paras. 125 (79), 125 (81)-125 (82), 125 (85), 133, 141, 156-157, 160, 174, 178, 180.

<sup>1200</sup> *Ibid.*, paras. 178 and 182. For the Court, the serious theft of livestock (due to the "*close relationship between the [victims] and their livestock, because their main means of subsistence was cultivating the land and raising livestock*") as well as the destruction of houses impaired the social framework of the community and produced "*an important financial loss*" affecting their "*basic living conditions*".

<sup>1201</sup> According to the Dayton Peace Agreement of 1995, the Chamber had jurisdiction over: violations of the ECHR and its Additional Protocols; alleged or apparent discrimination on any ground, where such violation is alleged or appears to have been committed by the Parties to the detriment of any of the rights or freedoms established in the appendix to annex 6, including relevant treaties on ESC rights such as the Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide; see Article II and the appendix, which provide for jurisdiction over discrimination "*on grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*". The Chamber ceased its functions in 2003.

<sup>1202</sup> See *Kličković et al. v. Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republika Srpska*, CH/02/8923, CH/02/8924 and CH/02/9364, Decision of 10 January 2003, para. 15; *Šecerbegović et al. v. and Herzegovina and the Federation of Bosnia and Herzegovina*, CH/98/706, CH/98/740 and CH/98/776, Decision of 7 April 2000; *Mile Mitrović v. the Federation of Bosnia and Herzegovina*, CH/98/948, Decision of 6 September 2002, para. 54.

<sup>1203</sup> Accordingly, annex 7 to the Dayton Peace Agreement, on refugees and displaced persons, included the right to return and to property restitution or, if that was not possible, to compensation.

Article 1 of its first Protocol incorporating the right to property.<sup>1204</sup>

Conversely, relevant jurisprudence of the European Court of Human Rights has been considered in other parts of the present study, particularly in Chapter III.

4. In addition to the role of States in ensuring compliance with obligations under international human rights law, the idea that *this legal regime may also create obligations for private actors* has emerged and been the bases for a wide-ranging attempt to shift the responsibility and accountability for violations of human rights from the State to private actors performing across national borders. This attempt has been elaborated in academic literature<sup>1205</sup> as well as in the practice of United Nations bodies,<sup>1206</sup> mostly asserting the relevance of corporate social responsibility and voluntary initiatives as well as the potential of effective standards of human rights compliance as delivered by business corporations.

Some scholars have observed, however, how such an attempt proves problematic. In essence, at least three reasons have been highlighted.<sup>1207</sup> Firstly, the direct application of international human rights norms to private actors entails difficulties from both the perspectives of transplanting primary obligations from the interstate system to non-state actors and adapting secondary rules on international responsibility for breaches as well as enforcement procedures.<sup>1208</sup> Secondly, no

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<sup>1204</sup> The importance of the Chamber's role in this field is illustrated in *M.Ĵ. v. Republika Srpska*, No. CH/96/28, Decision on the admissibility and merits, 7 November 1997, particularly paras. 6-11 and 32-33. The applicant, a citizen of Bosnia and Herzegovina, claimed "*occupancy rights*" over an apartment in Banja Luka, after he faced an illegal eviction in 1995 and then the failure to enforce a court order for possession despite initiated court proceedings. The Chamber deemed an occupancy right over property a "*valuable asset*" that "*constitutes a 'possession' within the meaning of Article 1 as interpreted by the European Commission and Court*"; it found a violation of such a right inasmuch as the non enforcement of a court's order for possession was a "*failure by the authorities to protect the applicant against unlawful interference with his possessions by private individuals*". For similar judgments, see *Kevešević v. the Federation of Bosnia and Herzegovina*, No. CH/97/46, Decision of 15 July 1998; *Onic v. the Federation of Bosnia and Herzegovina*, No. CH/97/58, Decision of 12 February 1999.

<sup>1205</sup> See A. Clapham, *Human Rights Obligations on Non-State Actors: The Collected Courses of the Academy of European Law*, Oxford University Press, 2006; P. Alston (ed.), *Non-State Actors and Human Rights*, Oxford, 2005; S. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility", 111 *Yale Law Journal*, 2001, pp. 443-545; M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, Kluwer Law International, 1999.

<sup>1206</sup> It includes the "*Global Compact*" launched by the UN Secretary General Kofi Annan in 1999, the draft "*Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises*" adopted by the former Sub-Commission for the Protection and Promotion of Human Rights in 2003, and the subsequent work of the Special Representative of the Secretary General, John Ruggie, within the institutional framework of the Human Rights Council.

<sup>1207</sup> See F. Francioni, "The Role of the Home State in Ensuring Compliance with Human Rights by Private Military Contractors", in F. Francioni and N. Ronzitti (eds.), *War by Contract*, Oxford, 2011, pp. 93-110.

<sup>1208</sup> In his first interim report, the new special representative John Ruggie recognised that the human rights norms elaborated by the Sub-Commission in 2003 "*cannot also directly bind business because, with the possible exception of certain war crimes and crimes against humanity, there are no generally accepted international legal principles that do so. And if the Norms were to bind business directly, then they could not merely be restating international legal principles; they would need, somehow, to discover or invent new ones*", see *Interim Report*, April 2006. Its subsequent reports admit more flexibly that certain international human rights norms are capable to create direct obligations for business entities.

abundant judicial practice supports this direct extension/shift of obligations,<sup>1209</sup> except the one related to the US Alien Tort Statute.<sup>1210</sup> Thirdly, the market's self-ability to generate forms of regulations to ensure respect for public goods (like human rights, social justice and environmental quality) appears not very promising, or at least not sufficiently effective, in light of recent outstanding failures concerning the global financial crisis, global warming, the fight against poverty.

In this regard, in dealing with the issue of extraterritoriality in the area of ESC rights, Chapter 4 will next examine the evolving weight and implications of the UN Guiding Principles on Business and Human Rights as a “*set of politically authoritative and socially legitimated norms and policy guidance*” within conflict-affected areas. Further, in Chapter 5 one discusses relevant cases of allegations of companies' involvement in serious breaches of international law that inhibit (directly or indirectly) the exercise of, or adequate access to, ESC rights by civilians.

### **2.c.i. Reflecting on the nature and typologies of State obligations**

Compliance with internationally recognised human rights imposes different levels of State obligations.<sup>1211</sup> Focusing on treaties setting out ESC rights, various formulations are contained in the general clauses about Contracting Parties' obligations: in Article 2 ICESCR each party “*undertakes to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation of*” the rights enshrined in the Covenant; Article 2 ICERD condemns racial discrimination and obliges parties to “*undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms*” and its Article 5 creates a specific obligation to ensure the right of everyone to equality before the law; Article 4 CRPD uses the formula “*to ensure and promote*”.

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<sup>1209</sup> The hearing and enforcement of human rights claims related to conduct of private actors has been systematically permitted only in the United States under the Alien Tort Statute (ATS), which grant US federal courts' jurisdiction over civil suits brought by aliens for torts committed in violations of international law. However, a controversial decision of the Court of Appeals recently denied the applicability of international law to corporations, so removing them from the reach of the ATS, see U.S. Court of Appeals for the Second Circuit, *Kiobel, et al. v. Royal Dutch Petroleum Co. et al.*, Docket Nos. 06-4800-cv, 06-4876-cv, (argued on 12 January 2009) (decided on 17 September 2010). The U.S. Supreme Court granted the petition for a writ of certiorari on 17 October 2011.

<sup>1210</sup> On ATS case law brought against corporations for their alleged involvement in human rights violations, see, e.g., *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009); *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008); *Sarei v. Rio Tinto, P.L.C.*, 550 F.3d 822 (9th Cir. 2008); *Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005); *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003); *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), vacated on other grounds, 403 F.3d 708 (9th Cir. 2005); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000); *Wüwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998). On ATS cases that have regarded armed conflicts, see, e.g., *Kadic v. Karadzic*, 70 F.3d, 232, (2d Cir. 1995) (bringing claims for abuses committed during conflict in Bosnia).

<sup>1211</sup> See O. De Schutter, *International Human Rights Law*, Cambridge University Press, 2010, pp. 242-253. M. Nowak, *UN Covenant on Civil and Political Rights - CCPR Commentary*<sup>2</sup>, *op. cit.*, pp. 37-41. See also OHCHR, “Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies”, 2005, paras. 47-48.



A trifold classification of obligations used to characterise and assess the conducts of State parties to treaties on ESC rights refers to the “*respect, protect and fulfil*” framework.<sup>1212</sup> The 1987 Special Rapporteur’s report on the right to food inspired this typology, which has then been employed and explained by the CESCR in its general comments in order to capture several aspects of the rights enshrined in the Covenant.<sup>1213</sup> This framework has been also elucidated by experts in the field, as the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* exemplify.<sup>1214</sup> Precisely, the obligation to respect requires States to “*refrain from interfering with the enjoyment of ESC rights*”; it is generally deemed to prohibit gross and systematic discrimination in relation to the right to food, health, education, housing and social security, intentional famine, forced sterilization, participation in cultural life, the satisfaction of favourable and fair conditions of work, forced labour, arbitrary forced evictions, destruction of houses and other property. Thus, States are required to *protect individuals from interference by third parties in the enjoyment of their ESC rights*; States’ failures to ensure that third parties comply with certain standards may amount to violations of those rights. The obligation to fulfil requires States to *take administrative, legislative, judicial, budgetary or other measures towards the full realisation of ESC rights*; States’ failures to provide essential standards to those in need may amount to violations of these rights.

Insofar as treaties on ESC rights are applied to conflict-affected situations by monitoring bodies, these types may offer valuable tools to raise awareness on the appropriate matrices of state obligations at each stage concerning different vulnerable groups of the civilian population. They may acquire specific relevance for extraterritorial State conduct, by framing State obligations as *refraining* from any action that might impede the realisation of ESC rights in conflict-affected countries, *ensuring* that all other actors subject to State control respect the enjoyment of civilians’ ESC rights therein, *providing* for some form of assistance to secure ESC rights to vulnerable civilians.

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<sup>1212</sup> See M. Craven, *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development*, Clarendon Press, 1995), at 147-150; Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia, 2003, at 373-375.

<sup>1213</sup> See A. Eide, *Report on the Right to Adequate Food as a Human Right*, UN Doc. E/CN.4/Sub.2/1987/23, 7 July 1987, especially paras. 66-70 and 112-116. See CESCR, *General Comment No.18: The right to work (art. 6)*, adopted on 24 November 2005, UN Doc. E/C.12/GC/18 (6 February 2006), para. 22; CESCR, *General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights*, UN Doc. E/C.12/2005/4, 11 August 2005, which explains the diverse level of obligations in the context of non-discrimination against women (paras. 18-19-21); CESCR, *General Comment No. 15: The right to water (art. 11 and 12)*, UN Doc. E/C.12/2002/11, 20 January 2003, paras. 21-29; CESCR, *General Comment No. 14: The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4, 11 August 2000, paras. 34-36; CESCR, *General Comment No. 13: The right to education*, UN Doc. E/C.12/1999/10, 8 December 1999, para. 47; CESCR, *General Comment No. 12: The right to food*, UN Doc. E/C.12/1999/5, 12 May 1999, para. 15.

<sup>1214</sup> See *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997), 20 *HRQ* 1998, pp. 691-705, paras. 6-7.

In view of the additional dichotomy as obligations of *conduct* and obligations of *result*,<sup>1215</sup> it is generally acknowledged that the duties to respect, protect and fulfil cover elements of both. The first one entails States' measure reasonably intended towards the satisfaction of a specific right, while the second one entails States' achievement of particular objectives to satisfy the content of a specific right. Conversely, in light of the more traditional distinction between *positive* and *negative* obligations,<sup>1216</sup> it is generally acknowledged that 'respect' entails negative State obligations, while 'protect' and 'fulfil' correspond to positive State obligations, where the latter plays a major role in the implementation of ESC rights, which often require an institutionalised infrastructure to be adequately materialised.

Furthermore, the normative framework of the ICESCR has been interpreted to include *provisions establishing obligations of immediate effect* and *provisions imposing obligations to be realised progressively*, so implying that its application goes through different stages by virtue of the very nature of the prescribed obligations.<sup>1217</sup>

Yet the terminology used in Article 2(1), such as “*each State Party to the present Covenant undertakes to take steps*”, “*to the maximum of its available resources*”, “*with a view to achieving progressively the full realisation of the rights recognised*”, “*by all appropriate means*”, has been subject to various interpretations. For certain scholars the alleged *relativity* of ESC rights would have a variable content.<sup>1218</sup> Others embrace a reading of Article 2 that have more practical implications: States start from different initial factual bases but such data about a certain country simply determine to what extent progression can be measured; moreover, no specific time-frame for the realisation of a certain ESC right can be made under Article 2, which basically requires States parties to take all measures necessary “*to the maximum*

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<sup>1215</sup> See G. Goodwin-Gill, “Obligations of Conduct and Result”, in P. Alston and K. Tomasevski (eds.), *The Right to Food*, Martinus Nijhoff, 1984. This typology has been then used by the CESCR (see its *General Comment No. 3: The nature of States Parties' obligations (Art. 2 (1))*, E/1991/23, 14 December 1990, para. 1).

<sup>1216</sup> For relevant case law, see, e.g., *Velasquez Rodriguez v. Honduras*, in which the IACtHR interpreted Article 1 IACHR (providing that “*States parties undertake to respect ... and to ensure*” the rights enshrined in the Convention) to include positive actions by States parties so as to prevent human rights violations and to investigate and punish related abusers. The ECtHR also declared positive obligations in several cases: in *Airey v. Ireland* the Court, asserting that human rights protection must be “*practical and effective*” (and not “*theoretical or illusory*”), obliged the State to take positive action to ensure their satisfaction; in *X and Y v. the Netherlands* the Court confirmed the same view by recognising the positive obligation upon States to modify criminal law and so remedy to an abuse suffered by a mentally disabled girl; in *Z and others v. UK*, the Court acknowledged the social services agencies' failure to protect children from parents' ill-treatment.

<sup>1217</sup> See CESCR, *General Comment No. 3: The nature of States Parties' obligations (Art. 2 (1))*, 14 December 1990, paras. 1 and 9. See Principles n. 21-22 of the *Limburg Principles on the Implementation of the International Convention on Economic Social and Cultural Rights*, June 1986, adopted by UN ESCOR, Commission on Human Rights, Agenda Item 8, UN Doc. E/CN.4/1987/17, Annex (1987), 8 January 1987. See Guideline no. 8 of the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, E/C.12/2000/13, 2 October 2000.

<sup>1218</sup> M. Dennis and D. Stewart, “Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?”, *AJIL*, 2004, pp. 462-515.

of its available resources” once they ratify the treaty, so acknowledging the constraints deriving from limited existing resources.<sup>1219</sup>

Accordingly, the next sub-section reviews the basic concepts, principles and obligations framing the discourse on the rights enshrined in the ICESCR, in view of a number of clarifications provided by its treaty-based monitoring body in General Comments as well as in its interpretation of Article 2 as emerged within the open-ended working group on the elaboration of the OPICESCR.<sup>1220</sup>

### **2.c.ii. Focusing on the obligations stemming from the ICESCR**

States parties to the ICESCR are not allowed to defer nor deviate from implementing certain obligations set forth in the Covenant *immediately* upon its ratification. This regards the obligation to respect the rights concerned, which is of immediate effect, as generally is also the obligation to protect. Conversely, only some immediate duties (*i.e.* complying with minimum core obligations and taking deliberate and targeted steps to realise the rights) are included in the obligation to fulfil ESC rights, which encompasses mainly progressive duties subject to gradual implementation standards and a test of “*reasonableness*” of State performances.<sup>1221</sup>

Some of the obligations having immediate effect and demanding immediate implementation on behalf of States parties are expressly referred in the Covenant.<sup>1222</sup> In this respect they are primarily obliged to ensure the *exercise of ESC rights without discrimination of any kind* under Article 2(2);<sup>1223</sup> being this guarantee is of immediate application it is deemed subject to judicial review and other recourse procedures.<sup>1224</sup>

As defined by the CESCR, the immediate and cross-cutting obligation not to discriminate under

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<sup>1219</sup> E. Riedel, “Economic, Social and Cultural Rights”, *op. cit.*, pp. 137-138.

<sup>1220</sup> *E.g.*, CESCR, Statement on “An evaluation of the obligation to take steps to the ‘maximum of available resources’ under an Optional Protocol to the Covenant”, E/C.12/2007/1, 21 September 2007.

<sup>1221</sup> See CESCR, *General Comment No. 3: The nature of States Parties’ obligations (Art. 2 (1))*.

<sup>1222</sup> *E.g.*, Article 10 (3) establishing that “*Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions*”. Other obligations having immediate effect are to be identified by means of interpretation.

<sup>1223</sup> For the principle of non-discrimination, see CESCR, *General Comment No. 3: The nature of States Parties’ obligations (Art. 2 (1))*, para. 1; CESCR, *General Comment No. 12: The right to adequate food*, para. 18, stating that “*any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant*”. See also CESCR, *General Comment No. 15: The right to water (arts. 11 and 12)*, paras. 13 and 16, where the requirement on discrimination is regarded as including an obligation to protect vulnerable members of society and those who have “*traditionally faced difficulties*” in exercising the right to water.

<sup>1224</sup> Under Article 2 (2) ICESCR States parties “*undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*”. Article 3 enshrines the equal rights of women and men to enjoy all rights prescribed in the Covenant. See *Limburg Principles on the Implementation of the International Convention on Economic Social and Cultural Rights* (hereinafter *Limburg Principles*), June 1986, E/CN.4/1987/17, Principle no. 35.

the ICESCR concerns “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”.<sup>1225</sup> While it entails a negative duty upon States parties (*i.e.* abstaining from discriminating against anyone on the grounds enunciated in Article 2), it also encompasses positive duties (*i.e.* preventing non-state actors from engaging in discriminatory acts, and taking “concrete, deliberate and targeted measures to ensure that discrimination in the exercise of Covenant rights is eliminated”).<sup>1226</sup> Remarkably, a useful concept to identify pertinent criteria for violations of ESC rights affected by conflict-related situations is that one of *systemic discrimination*, which refers to the existence of a general pattern of discrimination against a particular group of people (*e.g.* apartheid in South Africa).

Similarly, States parties are bound to adopt “appropriate measures” to promote the full application of the Covenant by virtue of Article 2(1), which imposes to *immediately start on taking concrete and targeted steps* to comply with their conventional obligations, although certain aspects of ESC rights may be achieved over time.<sup>1227</sup> In this regard, “*all appropriate means*” is deemed to include legislation, the provision of judicial or other remedies, plus financial, administrative, social and educational measures.<sup>1228</sup>

As emphasised by the CESCR, the existence of “*inherently self-executing*” obligations under the Covenant infers States parties are not able to refer to the programmatic nature of ESC rights to delay its application as a whole.<sup>1229</sup> This may have implications for the normative framework binding the authorities in place during a period of military occupation and exercising effective control over the concerned territory or in other conflict situations affecting States parties to the ICESCR. Particular attention is thus required as to the obligations of immediate effect in relation to

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<sup>1225</sup> See CESCR, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2 (2))*, UN Doc. E/C.12/GC/20, 25 May 2009, paras. 1 and 7. An analogous definition is contained in Article 1 ICERD, Article 1 CEDAW, and Article 2 CRPD. A similar position was embraced in previous General Comments of the CESCR. A similar interpretation is found in HRC, *General Comment No. 18: Non-discrimination*, 10 November 1989, paras. 6-7.

<sup>1226</sup> See CESCR, *General Comment No. 20*, para. 36.

<sup>1227</sup> CESCR, *General Comment No. 3: The nature of States Parties’ obligations (art. 2 (1))*, 14 December 1990, para. 2. See also CESCR, *General Comment No. 15: The right to water (arts. 11 and 12)*, 20 January 2003, para. 17, noting that the obligation to take steps refers to measures that are “*deliberate, concrete and targeted towards the full realisation of the right to water*”. See also *Limburg Principles*, para. 21; P. Alston and G. Quinn, “The Nature and Scope of State Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights”, *HRQ*, 1987, p.166.

<sup>1228</sup> CESCR, *General Comment No. 3*, paras. 4 and 7. See also UN Doc. E/C.12/2007/1, *op. cit.*, 21 September 2007.

<sup>1229</sup> CESCR, *General Comment No. 3*, para. 5 (“*Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain*”).

vulnerable civilian individuals and groups such as children, women, refugees and internally displaced persons.<sup>1230</sup>

While the notion of “*progressive realisation*” embodied in Article 2(1) does not apply to all the obligations flowing from the Covenant, it describes a central aspect of ESC rights enshrined in human rights treaties; clauses of this kind are included in Article 4 CRC and Article 4(2) CRPD. As detailed below, this concept has also influenced the drafting of Article 4 ICESCR.

In essence, the obligation to “*achieve progressively the full realisation of the rights*” signifies that the latter takes *resources* as well as *time*, though States parties are required to “*move as expeditiously as possible*” towards it. Thus a gradual advancement in the enjoyment of any right is acknowledged, but under no circumstances does this notion entail a prerogative to defer *ad infinitum* State parties’ efforts towards full implementation: they are precluded from deliberately halting or retrogressing on progress.<sup>1231</sup> Notably, the adoption of a deliberate retrogressive measure might not constitute an absolute violation if it is performed in the contexts of a limitation under Articles 4 and 5 ICESCR or if a State party is unable to enhance the implementation of the norm because of circumstances beyond its control.<sup>1232</sup>

A major challenge becomes *measuring and determining whether or not a State party has satisfied its conventional obligations*. Related issues that may acquire importance include: knowing what percentage of the population enjoys the right in question, to what extent individuals enjoy that right, and whether or not those percentages are increasing and the enjoyment of that right is improving over time.

Furthermore, the significance of the explicit reference to *resource availability* in Article 2(1) is at least threefold. Firstly, it reflects the acknowledgment that the realisation of ESC rights may be obstructed by lack of resources and achieved only over time. Equally, it suggests that a State party’s compliance with the obligation to take appropriate steps must be assessed in light of financial or any other existing resources. Nonetheless, it does not alter the immediacy of the obligation to take steps, and resource constraints alone do not excuse total inaction. Notably, the obligations flowing from

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<sup>1230</sup> To the CESCR, “*even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected*”, see CESCR, *General Comment No. 3, op. cit.*, para. 12.

<sup>1231</sup> CESCR, *General Comment No. 3*, para. 9. Also CESCR, *General Comment No. 13: The right to education*, para. 45 (“*There is a strong presumption against the permissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party’s maximum available resources*”).

<sup>1232</sup> Maastricht Guideline No.14 includes, among the violations of ESC rights, “*the adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed*” (lett. e) and “*the reduction or diversion of specific public expenditure, when such restriction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone*” (lett. g).

the CRC are qualified solely by “*within their means*”, so their immediate effect is even more arguable.<sup>1233</sup>

According to the CESCR, the drafters of the Covenant referred the wording “*to the maximum of its available resources*” to the existing resources of a State party as well as those offered by the international community through assistance and international cooperation.<sup>1234</sup> This position has been restated within a recent interpretation of Article 2 in the context of the OPICESCR’s elaboration; in assessing the obligation to “take steps to the maximum of available resources” under a complaint procedure, the Committee has stressed that “*where the available resources are demonstrably inadequate, the obligation remains for a State party to ensure the widest possible enjoyment of economic, social and cultural rights under the prevailing circumstances*”.<sup>1235</sup> In this regard although the concept of “*available resources*” is a basic qualifier of the obligation to take steps, serious efforts to improve protection are required and where they would prove impossible for States parties’ to meet their legal commitments, they still entail justifying how they have nevertheless performed to ameliorate the situation, besides requiring them to seek international cooperation and assistance. Additionally, *substantial criteria* have been identified for evaluating the “*adequacy*” of States parties’ measures.<sup>1236</sup> For assessing the “*reasonableness*” of their steps, significant is the relevance given to “transparent” and participatory national decision-making processes.<sup>1237</sup>

Additionally to the dichotomy of immediate/progressive obligations, the CESCR has determined in general terms that every State party has “*a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each rights*”, emphasising that “*if the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d’être*”.<sup>1238</sup> As meaningful example, the treaty-based body has consistently pointed out that “*a State Party in which any significant number of individuals is deprived of essential food stuffs, of essential primary health care, of basic shelter or housing, or of the most basic form of education is, prima facie, failing to discharge its obligations under the*

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<sup>1233</sup> Article 27 (3), Article 28 (c), Article 42. On this point, see A. Eide, “Economic, Social and Cultural Rights as Human Rights”, pp. 9-28, in A. Eide, C. Krause, A. Rosas (eds.), *Economic, Social and Cultural Rights - A Textbook*, Kluwer Law International, 2001, p. 22.

<sup>1234</sup> CESCR, *General Comment No. 3, op. cit.*, para. 13.

<sup>1235</sup> See “An evaluation of the obligation to take steps to the ‘maximum of available resources’ under an Optional Protocol to the Covenant”, Statement by the CESCR, UN Doc. E/C.12/2007/1, 21 September 2007, para. 4.

<sup>1236</sup> *E.g.*, the extent to which they were “*deliberate, concrete and targeted*” to fulfil ESC rights; whether States parties exercise “*discretion in a non-discriminatory and non-arbitrary manner*”; whether States parties’ choice not to assign available resources is consisted with international human rights standards; whether States parties adopt the available policy option that least limits the rights enshrined in the Covenant, see E/C.12/2007/1, *ibid.*, para. 8.

<sup>1237</sup> The role of States in formulating or adopting, funding and implementing laws and policies concerning ESC rights is addressed, emphasising that it “*always respects the margin of appreciation of States to take steps and adopt measures most suited to their specific circumstances*”, see UN Doc. E/C.12/2007/1, *ibid.*, para. 11.

<sup>1238</sup> CESCR, *General Comment No. 3: The nature of States Parties’ obligations (art. 2 (1))*, para. 10.

Covenant” unless a State can “demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations”.

The rationale behind the Committee’s choice to undertake this approach is that of preventing States’ use of the notion of progressive realisation of ESC rights according to available resources to escape any binding obligation under the ICESCR. In subsequent general comments, the minimum core approach has been further articulated. Core obligations stemming from the “*minimum essential levels*” of the rights to food,<sup>1239</sup> education,<sup>1240</sup> health,<sup>1241</sup> and water<sup>1242</sup> have been identified. Instead,

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<sup>1239</sup> See CESCR, *General Comment No. 12: The right to adequate food (art.11)*, 12 May 1999, para. 14, concluding that “every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger”. Relevant considerations are found in para. 6 (“States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters”); in para. 8 (“The Committee considers that the core content of the right to adequate food implies: The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights”); in para. 33 (“The incorporation in the domestic legal order of international instruments recognising the right to food, or recognition of their applicability, can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases. Courts would then be empowered to adjudicate violations of the core content of the right to food by direct reference to obligations under the Covenant”).

<sup>1240</sup> See CESCR, *General Comment No. 13: The right to education (Art.13)*, 8 December 1999, para. 57 (“this core includes an obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13 (1); to provide primary education for all in accordance with article 13 (2) (a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with “minimum educational standards (art. 13 (3) and (4))”).

<sup>1241</sup> See CESCR, *General Comment No. 14: The right to the highest attainable standards of health (art. 12)*, 11 August 2000, paras. 43-45. In para. 43 six core obligations are indicated: “(a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups; (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone; (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water; (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs; (e) To ensure equitable distribution of all health facilities, goods and services; (f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups”.

In para. 44 other five obligations are deemed of comparable priority: “(a) To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care; (b) To provide immunization against the major infectious diseases occurring in the community; (c) To take measures to prevent, treat and control epidemic and endemic diseases; (d) To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them; (e) To provide appropriate training for health personnel, including education on health and human rights”.

In para. 45 it is emphasised that “for the avoidance of any doubt ... it is particularly incumbent on States parties and other actors in a position to assist, to provide ‘international assistance and cooperation, especially economic and technical’ which enable developing countries to fulfill their core and other obligations indicated in paragraphs 43 and 44 above”.

<sup>1242</sup> See CESCR, *General Comment No. 15: The right to water (arts. 11 and 12)*, 20 January 2003, para. 37, identifying nine core obligations, but explicitly recognising that they are “of immediate effect”: “(a) To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease; (b) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalised groups; (c) To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household; (d) To ensure personal security is not threatened when having to physically access to water; (e) To ensure equitable distribution of all available water facilities and services; (f) To adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalised groups; (g) To monitor the extent of the realisation, or the non-realisation, of the right

concerning specific country situations the Committee has called on States parties to ensure the enjoyment of “*basic economic, social and cultural rights, as part of minimum standards of human rights*”,<sup>1243</sup> or to guarantee the provision of “*basic services, including the health and education infrastructure*”,<sup>1244</sup> or to respect minimum core obligations even in contexts of developmental policies.<sup>1245</sup>

In line with the Committee’s view, legal scholarship has emphasised that each right enshrined in the Covenant has - despite its inherent flexibility - *an irreducible normative content* to which basic minimum obligations correspond *under all circumstances*, in time of peace or war, irrespective of a State party’s political condition, institutional structure, economic level and scarcity of resources.<sup>1246</sup> It is reasonable to argue that *the essential content of each ESC right establishes a limit to the flexibility* allowed by virtue of Article 2(1), because such a core substance constitutes the starting point from which States parties may plan how to implement progressively the rest of their conventional obligations.

## **2.d. Inquiring as to the relationship with other branches of international law**

Assessing the potential of international human rights law as to the imperative of civilians’ protection in the area of ESC rights cannot leave aside an inquiry of its interconnection with other relevant branches of international law, in particular those whose rules representing the traditional point of reference of such protection. Thus, the perspective of articulating its manifold relationship with the law of armed conflict as well as the laws of occupation gains great relevance. Several rationales supporting possible interactions between these legal regimes in the sphere of ESC rights will be discussed at the end of the present chapter.

Notwithstanding that it is only infrequently explored in legal scholarship,<sup>1247</sup> international

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*to water; (h) To adopt relatively low-cost targeted water programmes to protect vulnerable and marginalised groups; (i) To take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation”.*

<sup>1243</sup> See, e.g., CESCR, *Concluding Observations on Israel*, 31 August 2001, E/C.12/1/Add.69, para.12; CESCR, *Concluding Observations on Lebanon*, 9 June 1993, E/C.12/1993/10, para. 13; CESCR, *Concluding Observations on Iraq*, 12 December 1997, UN Doc. E/C.12/1/Add.17, paras. 10 and 25; CESCR, *Concluding Observations on Zambia*, 23 June 2005, E/C.12/1/Add.106, para. 10.

<sup>1244</sup> CESCR, *Concluding Observations on the Russian Federation*, 12 December 2003, E/C.12/1/Add.94, para. 38.

<sup>1245</sup> CESCR, “Poverty and the International Covenant on Economic, Social and Cultural Rights”, *Statement to the Third United Nations Conference on Least Developed Countries*, 10 May 2001, E/C.12/2001/10, para. 17 (“*When grouped together, the core obligations establish an international minimum threshold that all developmental policies should be designed to respect*”).

<sup>1246</sup> This is emphasised in Maastricht Guideline No. 9, concluding that “*such minimum obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties*”. See also V. Dankwa, C. Flinterman and S. Leckie, “Commentary on the Maastricht Guidelines”, *SIM Special 20*, p. 23. In the same regard, see Chapman and Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia, 2002, p. 5.

<sup>1247</sup> For a discussion on whether ESC rights violations may give rise to individual criminal responsibility under the accepted definitions of international and transnational crimes, see E. Schmid, “War Crimes Related to Violations of Economic, Social and Cultural Rights”, 71(3) *Heidelberg Journal of International Law*, 2011, pp. 523-540; E. Schmid, *Violations of Economic, Social and Cultural Rights in International and Transnational Criminal Law*, Geneva: IHEID, 2012; S. Skogly, “Crimes against Humanity - Revisited: Is There a Role for Economic and Social Rights?”, 5(1) *IJHR*, 2001, pp.



criminal justice may be also instrumental for such protection. Indeed, several international crimes are related to violations of ESC rights, which then may give rise to individual criminal responsibility. As is in part observed in other sections of the present thesis, this has been reflected in certain jurisprudence of international and hybrid criminal tribunals, though this matter shall not be considered in depth.<sup>1248</sup>

As is generally acknowledged, the comprehensive debate on the aforementioned relationship have included issues such as to what degree human rights law applies, how to implement co-application, and how convergent application of these branches may increase State accountability in relation to civilians' protection. In this regard, *various basic procedural issues on the applicability of human rights treaties on ESC rights* deserve primary attention. The issue concerning the conditions (*e.g.* jurisdiction) under which the treaties concerned may apply within or beyond States parties' national borders will be investigated in the next chapter. Conversely, the *question of general derogability* of such treaties alongside the issue of *admissible (specific or general) limitations on ESC rights* (as principally relevant in non-international conflicts) will be extensively examined heretofore. Subsequently, in assuming that they cannot be generally suspended and freely restricted by States parties, we will look at the principles inspiring the determination of the applicable norms in order to spell out some remarks on the inquired relationship from a substantial perspective at the end of the present chapter.

### **3. The applicability of human rights treaties on ESC rights**

The occurrence of times of public emergency prompted by situations of armed conflict, belligerent occupation or post-conflict collapse raise some procedural issues for determining the applicability of treaties on ESC rights in force for the affected States. The concepts of *derogation* and *limitation* and *their own rationale* deserve primary consideration; the insertion of clauses consenting suspensions of, or restrictions on, the rights guaranteed in such treaties does affect and define their applicability regime

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58-80; D. Marcus, "Famine Crimes in International Law", 97(2) *AJIL*, 2003, pp. 245-281; M.A. Drumbl, "Accountability for Property and Environmental War Crimes: Prosecution, Litigation, and Development", *ICTJ Paper*, November 2009, pp. 1-33.

<sup>1248</sup> For an inquiry on four groups of war crimes (against persons, against property, the use of prohibited methods, and the use of prohibited weapons) which could constitute a violation of the right to food, housing, education or health, see E. Schmid, "War Crimes Related to Violations of Economic, Social and Cultural Rights", *op. cit.* The author concludes that no legal reasons exist to argue *a priori* that violations of ESC rights should not or cannot be addressed by dealing with the legacy of war crimes.

in such settings, so shaping the protection of civilians.<sup>1249</sup>

Several core conventions warranting ESC rights do not either allow or prohibit States parties to derogate in times of public emergency. Therefore, a basic issue arises as to *whether* and *what options* States parties have under international law to lawfully derogate from ESC rights in extraordinary circumstances, such as present-day scenarios of armed conflict and military occupation, notwithstanding the absence of an *ad hoc* clause in the human rights treaties concerned. In order to resolve this question properly, derogation regimes under human rights instruments codifying *ad hoc* provisions will be reviewed. Then, derogability from treaties on ESC rights will be investigated in the light of contributions emerged in legal scholarship, international jurisprudence and State practice, with additional remarks in view of relevant norms enshrined in the international law of treaties and general international law.

Conversely, core treaties on ESC rights contain clauses that permit specific limitations on certain rights for far-reaching reasons, such as in the interest of national security.<sup>1250</sup> Further, a general limitation clause in the ICESCR consents States parties to respond in a flexible way to extraordinary situations of tension within a democratic society. Thus, a relevant issue arises as to *what extent* States are allowed to limit ESC rights during public emergency induced by present-day scenarios of armed conflict and military occupation. In this regard the implications of Article 4 ICESCR will be addressed.

### **3.1. Preliminary consideration on the effects of armed conflicts on treaties**

Although the Vienna Convention on the Laws of Treaties generally regulates the termination and suspension of treaties, it expressly avoids ruling the effects of armed conflicts on treaties, with Article 73 declaring that the Convention “*shall not prejudice any question that may arise in regard to a treaty... from the outbreak of hostilities between States*”.<sup>1251</sup>

Practice and scholarly opinion have not provided a definitive answer to the basic question on *whether in the event of an armed conflict a treaty remains in force in whole or in part*. In noting heterogeneity in the practice of States about it, legal scholarship as expressed by the *Institut de Droit International* took

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<sup>1249</sup> At the 1993 World Conference on Human Rights, States were also called for limiting the extent of any *reservation* to international human rights instruments, formulating them as accurately and narrowly as possible, guaranteeing that none is incompatible with the purpose and object of the relevant treaty, and regularly reconsidering them with a view to withdrawing them.

<sup>1250</sup> See Article 8, lett. (a) and (c) ICESCR; Articles 10 (right to leave the country), 13 (free speech), 14 (free manifestation of religion), and 15 (assembly and association) CRC; Articles 11 (free assembly and association), 12 (freedom to live and return to own country) and 14 (right to property) AfrCHPR.

<sup>1251</sup> This echoed the International Law Commission’s view that “*the outbreak of hostilities between States must be considered as an entirely abnormal condition, and that the rules governing its legal consequences should not be regarded as forming part of the general rules of international law applicable in the normal relations between States*”, see ILC, “Draft Articles on the Law of Treaties with Commentaries”, *Yearbook of the International Law Commission*, 1966, Vol. II, commentary (2) to Draft Article 69 (then adopted as VCLT Article 73).

the opportunity to affirm some principles in international law.<sup>1252</sup> In particular, according to Article 4 of the resolution on the effects of armed conflicts on treaties adopted in 1985, unless a treaty otherwise provides, “*the existence of an armed conflict does not entitle a party unilaterally to terminate or to suspend the operation of treaty provisions relating to the protection of the human person*”.

Significantly, this has been confirmed by the International Law Commission in the Draft articles on the effects of armed conflicts on treaties adopted in 2011.<sup>1253</sup> Specifically, that clause was referred to by the first Special Rapporteur in the early comment on draft Article 7 that deals with “*the continued operation of treaties resulting from their subject matter*”.<sup>1254</sup> Departing from the scheme of the Vienna Convention, the Draft articles of 2011 propose that whether a treaty is “susceptible to termination, withdrawal or suspension” once an armed conflict has broken out is a matter not only of treaty interpretation but also of other factors extrinsic to the treaty, and eventually subsequent to it. In this regard, draft Article 6 refers to “*the nature of the treaty, in particular its subject matter, its object and purpose, its content and the number of parties to the treaty*”, together with “*the characteristics of the armed conflict, such as its territorial extent, its scale and intensity, its duration and, in the case of non-international armed conflict, also the degree of outside involvement*”.<sup>1255</sup>

The “*treaties for international protection of human rights*” are included within the list of categories of treaties presumed to survive an armed conflict.<sup>1256</sup> They are recognised as being such that the

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<sup>1252</sup> Institut de Droit International, *The Effects of Armed Conflicts on Treaties*, (Fifth Commission, Rapporteur: Mr Bengt Broms), *Annuaire IDI*, Session of Helsinki, 1985, vol. 61, tome II, pp. 219-221. For a comment on the resolution, see A. R. Brotons, “Los efectos del conflicto armado sobre los Tratados (consideraciones sobre la resolución aprobada por el Instituto de derecho Internacional en la Sesión de Helsinki, 1985)”, in *Liber Amicorum J. Pérez Montero*, Oviedo, 1988, vol. III, p. 1177 ff.

<sup>1253</sup> See “Draft articles on the effects of armed conflicts on treaties”, 2011, para. 100, in ILC, *Report on the Work of Its Sixty-third Session*, UN GAOR, 66<sup>th</sup> Sess., Supp. No. 10, A/66/10 and Add.1 (2011).

<sup>1254</sup> See *First Report on the Effects of Armed Conflict on Treaties by Mr. Ian Brownlie, Special Rapporteur*, International Law Commission, Fifty-seventh session, 2005, UN Doc. A/CN.4/552, draft Article 7, para. 84 stressing that Article 4 was adopted by 36 votes to none, with 2 abstentions.

<sup>1255</sup> According to the broad definition contained in the Draft Articles, which follows the ICTY jurisprudence (*Prosecutor v. Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY-94-1, 2 October 1995, para. 70), “*an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*”. The inclusion of non-international armed conflict reflects the development of international law, but was criticised by States. See ILC, *Third report on the Effects Of Armed Conflicts on Treaties, by Mr. Ian Brownlie, Special Rapporteur* (1 March 2007), UN Doc. A/CN.4/578, paras. 12-15; ILC, *Effects of Armed Conflicts on Treaties, Note on Draft Article 5 and the Annex to the Draft Articles, by Mr. Lucius Caflisch, Special Rapporteur* (18 May 2011), UN Doc. A/CN.4/645, para. 6. See also *Note on draft article 5 and the Annex to the Draft Articles, op. cit.*

<sup>1256</sup> These indicative categories include: “*treaties on the laws of armed conflict*”; “*treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries*”; “*multilateral law-making treaties*”; “*treaties on international criminal justice*”; “*treaties of friendship, commerce and navigation and agreements concerning private rights*”; “*treaties for the international protection of human rights*”; “*treaties relating to the international protection of the environment*”; “*treaties relating to international watercourses and related installations and facilities*”; “*treaties relating to aquifers and related installations and facilities*”; “*treaties which are constituent instruments of international organizations*”; “*treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement*”; “*treaties relating to diplomatic and consular relations*”.

subject matter implies that they continue to apply (in whole or in part) during armed conflict. Commentary to draft Article 7, however, highlights the eventuality that “*only the subject matter of particular provisions of the treaty carries the implication of continuance*”, despite the reference to the *categories* of treaties.<sup>1257</sup>

It is worth noting that the distinct issue of the applicability of human rights law in armed conflicts was separately endorsed by involved actors such as Governments,<sup>1258</sup> the Special Rapporteur on the topic,<sup>1259</sup> and the legal office of the UN Secretariat.<sup>1260</sup> In this regard, in introducing a new draft Article 6 *bis* (entitled ‘The law applicable in armed conflict’), the first Special Rapporteur specified that “[t]he application of ... treaties concerning human rights ... continues in time of armed conflict, but their application is determined by reference to the applicable *lex specialis*, namely, the law applicable in armed conflict”.<sup>1261</sup> As recommended by the working group, draft article 6 *bis* was deleted and this consideration was reflected in the commentaries.<sup>1262</sup>

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<sup>1257</sup> See “Draft articles on the effects of armed conflicts on treaties”, 2011, *op. cit.*, vol. II, Part Two, Annex on the indicative list of treaties referred to in Article 7, commentary (2).

<sup>1258</sup> UN GAOR, 60<sup>th</sup> Sess., Supp. No. 10 (A/60/10), para.172 (“*The view was expressed [by governments] that the category of treaties in subparagraph (d) [human rights treaties] was one in which there probably was a good basis for continuity [during armed conflict], subject to the admonition of the International Court of Justice, in the Nuclear Weapons Advisory Opinion, that such rights were to be applied in accordance with the law of armed conflict*”).

<sup>1259</sup> See *First report on the effects of armed conflict on treaties by Mr. Ian Brownlie, Special Rapporteur*, (ILC, 57<sup>th</sup> sess., 21 April 2005), UN Doc. A/CN.4/552, Draft Article 7 (1) and (2), stressing “*the incidence of an armed conflict will not as such inhibit their operation*”; *Second report on the effects of armed conflicts on treaties by Mr. Ian Brownlie, Special Rapporteur*, (ILC, 58<sup>th</sup> sess., 16 June 2006), UN Doc. A/CN.4/570, paras. 30, 41, draft Article 7 (2)(d).

<sup>1260</sup> *The Effects of Armed Conflict on Treaties: An Examination of Practice and Doctrine: Memorandum of the Secretariat* (1 February 2005), UN Doc. A/CN.4/550, para. 32, stating: “[I]t is well-established that non-derogable provisions of human rights treaties apply during armed conflict”. The applicability of human rights treaties in times of armed conflict was explained in paragraph 33: “*Although the debate continues whether human rights treaties apply to armed conflict, it is well established that non-derogable provisions of human rights treaties apply during armed conflict. First, the International Court of Justice stated in its Nuclear Weapons advisory opinion that the protection of the International Covenant of 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. The Nuclear Weapons opinion is the closest that the Court has come to examining the effects of armed conflict on treaties, including significant discussion of the effect of armed conflict on both human rights and environmental treaties. Second, the International Law Commission stated in its commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts that although the inherent right to self-defence may justify non-performance of certain treaties, ‘as to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct’. Finally, commentators are also in agreement that non-derogable human rights provisions are applicable during armed conflict. Because non-derogable human rights provisions codify jus cogens norms, the application of non-derogable human rights provisions during armed conflict can be considered a corollary of the rule expressed in the previous section that treaty provisions representing jus cogens norms must be honoured notwithstanding the outbreak of armed conflict*”.

<sup>1261</sup> See ILC, *Third report on the effects of armed conflicts on treaties, by Mr Ian Brownlie, Special Rapporteur* (59<sup>th</sup> sess., 1 March 2007), A/CN.4/578, para. 29. In introducing that Article 6 *bis*, the Special Rapporteur noted that its drafting was specifically motivated to respond to comments made by the United States on the prior set of draft articles in the Sixth Committee of the General Assembly, see *ibid.*, p. 11, para. 30, n. 58. In those comments the United States affirmed explicitly that “*certain human rights and environmental principles did not cease to apply in time of armed conflict*”, see UNGA, Sixth Cmt., Summary Record of the 20<sup>th</sup> mtg., 3 November 2005, Statement of the United States, 29 November 2005, A/C.6/60/SR.20, p. 6, para. 33.

<sup>1262</sup> See ILC, *Report of the Working-Group, Effects of Armed Conflicts on Treaties*, (59<sup>th</sup> sess., 24 July 2007), UN Doc. A/CN.4/L.718, at 4. It recommended that the material appear in the commentaries, so making clear that the legal principles themselves were viewed by the working group as correct; the move was motivated out of a feeling that the article was “*strictly speaking, redundant*”, see *Report of the International Law Commission*, 59<sup>th</sup> Sess., A/62/10, at 165, para. 299, reading:

The commentary relating to the precise category of human rights treaties underlines, indeed, how the Commission's task was focusing on *the effects of armed conflict upon "the operation or validity" of certain treaties* - rather than considering substantial matters on the applicability. In this regard, the inappropriateness of the derogability test is stressed in the same commentary, because it does not concern the termination or continuation (but rather the functioning of treaty provisions). It is noticed, however, that the competence to derogate "*in time of war or other public emergency threatening the life of the nation*" definitely confirms how "*an armed conflict as such may not result in suspension or termination*". Ultimately, draft Article 4 is deemed the one setting the appropriate criteria: if a treaty contains a provision on its operation in times of armed conflict, then it will continue to apply according to the terms of such norm and its scope. In any case, it is specified how "*the exercise of a competence to derogate by one Party to the treaty would not prevent another Party from asserting that a suspension or termination was justified on other grounds*".<sup>1263</sup>

The commentary relating to the precise category of human rights treaties also refers to the potential of draft Article 11 to "*moderate*" the implications of Articles 4 to 7 by allowing separated effects on a treaty. Specifically, in relation to draft Article 11, under which particular provisions of international human rights treaties may not be suspended or terminated, such a result is excluded for the other provisions of those treaties even if the requirements are met.<sup>1264</sup> Conversely, the human rights provisions contained in other categories of treaties may continue to apply albeit such treaties do not (or only partly) remain in force, provided that the "*separability tests*" of draft Article 11 are met.<sup>1265</sup>

### **3.2. The relevance of *ad hoc* derogation clauses**

Human rights treaties explicitly allowing States parties to derogate unilaterally and temporarily from *certain* rights - so to suspend *a part* of its corresponding legal obligations - in a legitimate state of

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"Draft article 6 bis was a new provision. It had been included in response to a number of suggestions made both in the Sixth Committee and the Commission that a provision be included to reflect the principle, stated by the International Court of Justice, in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion relating to the relation, in the context of armed conflict, between human rights and the applicable *lex specialis*, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. The Special Rapporteur noted that while the principle was, strictly speaking, redundant, the draft article provide a useful clarification in an expository manner".

<sup>1263</sup> See "Draft articles on the effects of armed conflicts on treaties", 2011, *op. cit.*, vol. II, Part Two, Annex on the indicative list of treaties referred to in Article 7, commentary (50).

<sup>1264</sup> Article 11 (entitled "Separability of treaty provisions") reads: "*Termination, withdrawal from or suspension of the operation of the treaty as a consequence of an armed conflict shall, unless the treaty otherwise provides or the Parties otherwise agree, take effect with respect to the whole treaty except where: (a) the treaty contains clauses that are separable from the remainder of the treaty with regard to their application; (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other Party or Parties to be bound by the treaty as a whole; and (c) continued performance of the remainder of the treaty would not be unjust*".

<sup>1265</sup> See "Draft articles on the effects of armed conflicts on treaties", 2011, *op. cit.*, commentary (51).

emergency that is publicly declared, include the ICCPR, the ECHR, the ACHR, and the ArCHR.<sup>1266</sup> Under these four treaties, situations of emergency may include, either explicitly or implicitly, an involvement in an armed conflict. Conversely, major human rights conventions setting out ESC rights do not contemplate any derogation; only the European Social Charter, in both its first and revised version, respectively in its Article 30 and Article F, provides the faculty for States to derogate “*in time of war or other public emergency threatening the life of the nation*” from *all* the human rights obligations imposed to the Contracting Parties.<sup>1267</sup>

The striking of a *balance* between the sovereign right of a government to maintain peace and order during public emergencies, and the protection of the individual’s rights from abuse by the State itself constitutes *the rationale for a derogation provision*. Accordingly, a State may be allowed to suspend individuals’ exercise of certain rights when it is necessary to deal with an emergency situation, provided it complies with certain safeguards against any abuse of the derogation provision itself. In particular, the four aforementioned human rights treaties set forth *substantial as well as procedural limits* (*i.e.* criteria to be met) *on the extent to which States are allowed to derogate* from their obligations.<sup>1268</sup> For the purposes of the present research, some consideration on these derogation regimes may be briefly articulated as follows.

### **3.2.a. The European Convention on Human Rights**

Including an explicit clause for the first time at the regional level, Article 15(1) ECHR allows any derogations from certain rights enshrined in this Convention “*in time of a war or other public emergency threatening the life of the nation*” but only “*to the extent strictly required by the exigencies of the situation*”, and without be “*inconsistent with other obligations under international law*”. A communication of any derogation

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<sup>1266</sup> For a comparative analysis of derogations clauses, see A. Vedaschi, *À la guerre comme à la guerre? La disciplina della guerra nel diritto costituzionale comparato*, Torino, 2007, p. 445 ff.; D. Kretzmer, “Emergency, State of”, *Max Planck Encyclopedia of Public International Law*.

<sup>1267</sup> European Social Charter, Turin, 18 October 1961. European Social Charter (Revised), Strasbourg, 3 May 1996. Article F reads: “*1. In time of war or other public emergency threatening the life of the nation any Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2. Any Party which has availed itself of this right of derogation shall, within a reasonable lapse of time, keep the Secretary General of the Council of Europe fully informed of the measures taken and of the reasons therefor. It shall likewise inform the Secretary General when such measures have ceased to operate and the provisions of the Charter which it has accepted are again being fully executed*”.

<sup>1268</sup> On the international system protecting rights during a state of emergency, see R. Higgins, “Derogations Under Human Rights Treaties”, *British Yearbook of International Law*, 1976-77, at 281; T. Buergenthal, “To Respect and Ensure: State Obligations and Permissible Derogations”, in L. Henkin, (ed.) *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, 1981, pp. 72-91; C. Schreuer, “Derogation of Human Rights in Situations of Public Emergency”, 9 *Yale Journal of World Public Order*, 1982, at 113; J.F. Hartman, “Working Paper for the Committee of Experts on the Article 4 Derogation Provision”, *HRQ*, 1985, at 89; D.J. Harris, M. O’Boyle, C. Warbrick, *Law of the European Convention on Human Rights*, London: Butterworths, 1995, pp. 489-507; Svensson-McCarthy, *The International Law of Human Rights and States of Exception*, Martin Nijhoff Publishers, 1998.

measures to the Secretary General of the Council of Europe, alongside the reasons for its adoption, is required to the Contracting Party availing itself of such power.<sup>1269</sup> However, a number of ECHR rights are declared as non-derogable under any circumstances, namely those most vital for the protection of the human dignity and most likely at risk of being violated during abusive emergencies. In particular, Article 15(2) includes the right to life, except in respect of deaths resulting from lawful acts of war; the right to be free from torture and other inhuman or degrading treatment or punishment; the right to be free from slavery and servitude; the principles *nullum crimen sine lege* and *nulla poena sine lege*. Furthermore, the principle of *ne bis in idem* and the prohibition of the death penalty have been added to the list of non-derogable rights.<sup>1270</sup>

Notably, the notion of war is deemed to include its different forms: doubts on its applicability have not been expressed as regards the hostilities preceded by a formal declaration of war as well as regards common cases of conflicts taking place without any declaration or cases in which the parties to the conflict deny the existence of a state of war.<sup>1271</sup> Despite the absence of a specific definition of a “*public emergency threatening the life of the nation*”, the European Court of Human Rights, and previously the related Commission, have extensively interpreted that term and provided jurisprudence to determine the meaning and scope of such essential condition for permissible derogations.<sup>1272</sup> Regarding another requirement of any derogating measures (i.e. be permitted only “*to the extent strictly required by the exigencies of the situation*”), the Strasbourg Court expressly differentiated the “*strictly required*” standard under Article 15 from the ordinary necessity or proportionality that is

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<sup>1269</sup> Article 15(3) ECHR. For comments, see Cataldi, “Art. 15”, in S. Bartole, B. Conforti, G. Raimondi (a cura di), *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2001, at 425 ff.; Cataldi, “Le deroghe ai diritti umani in stato di emergenza”, in L. Pineschi (a cura di), *La tutela internazionale dei diritti umani. Norme, garanzie, prassi*, Milano, 2006, at 752; M. El Zeidy, “The ECHR and States of Emergency: Article 15 - A domestic power from human rights obligations”, *San Diego ILJ*, 2003, at 277 ff.; Viarengo, “Deroghe e restrizioni alla tutela dei diritti umani nei sistemi internazionali di garanzia”, *RDI*, 2005, at 955 ff., 977 ff.

<sup>1270</sup> See Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, of 22 November 1984, Article 4 (3); Protocol No. 6 of 28 April 1983, which abolished the death penalty in peacetime, and Protocol No. 13 of 2 May 2002, which abolished the death penalty in wartime.

<sup>1271</sup> G. Cataldi, “Art. 15”, *op. cit.*, at 425 ff., 429; M. Mancini, *Stato di guerra e conflitto armato nel diritto internazionale*, Torino, 2010, at 286.

<sup>1272</sup> The first substantive interpretation of Article 15 was made in *Lawless v. Ireland case*, where the Court defined it as “*an exceptional situation of crisis or emergency which afflicts the whole population and constitutes a threat to the organised life of the community of which the State is composed*”, see ECtHR, *Lawless v. Ireland* (A/3), Appl. No. 332/57, Judgment on Merits, 1 July 1961, 1 EHRR 15, para. 28. The definition was further clarified in the *Greek case*, where the Commission described four elements featuring a public emergency under Article 15: it must be “*actual*” or at least “*imminent*”; its effects must involve the whole nation; the continuance of the organised life of the community must be threatened; and the danger or crisis must be “*exceptional*” in a way that the typical legitimate measures or restrictions for the maintenance of public safety, health and order, are clearly inadequate. See ECtHR, *Denmark, Norway, Sweden and the Netherlands v. Greece* (the “*Greek case*”), Appl. Nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission’s report of 5 November 1969, 12 *Yearbook ECHR* 1, at 81, para. 153; the Government of Greece did not convince the Commission regarding the existence of a public emergency threatening the life of the nation such as would justify derogation.

found in some provisions of the ECHR.<sup>1273</sup> In this regard, the stricter standard in Article 15 has been deemed justified by the nature of the measure that is to take a State outside the regime, rather than the importance of the right at stake as in Article 2.<sup>1274</sup> Thus, the scope of any derogation should be proportionally indispensable to the gravity of the emergency threatening the life of the nation, so as to be essential to cope with such a situation.

### **3.2.b. The American Convention on Human Rights**

Similarly, Article 27 of the ACHR allows each Contracting Party to derogate from specific obligations “*in time of war, public danger, or other emergency that threatens the independence or security of a State Party*”, “*to the extent and for the period of time strictly required by the exigencies of the situation*”.<sup>1275</sup> Nevertheless, the rights identified as non-derogable are more numerous than the European instrument. In addition to the right to life, the right to humane treatment, freedom from slavery, and the principle of non-retroactivity of penal laws, Article 27(2) includes all rights the suspension of which cannot conceivably be necessary during emergencies.<sup>1276</sup> It does not permit any suspension of the right to juridical personality, freedom of conscience and religion, the rights of the family, the right to a name, the rights of the child, the right to nationality, and finally the right to participate in government.

Focusing on the criteria to derogate from ACHR, under Article 27(1) emergency measures have to be taken “*to the extent and for the period strictly required by the exigencies of the situation*”, and they must not be “*inconsistent with other obligations under international law*”. Certain forms of discrimination are prohibited as well, namely the ones “*on grounds of race, colour, sex, language, religion or social origin*”.<sup>1277</sup> Besides, a State availing itself of the power of suspension is required to provide information, through

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<sup>1273</sup> See ECtHR, *Handyside v. United Kingdom*, Appl. No. 5493/72, 12 January 1976, 1 *EHRR* 737, para. 48, articulating three tiers of standards found in the Convention: “*reasonableness*” is put in relation to Articles 5 (3) and 6 (1), “*necessity*” to Article 10 (2), while “*indispensability*” is associated with “*strictly required*” in Article 15 and “*absolutely necessary*” in Article 2 (2).

<sup>1274</sup> See C. Michaelsen, “The Proportionality Principle in the Context of Anti-Terrorism Laws: An Inquiry into the Boundaries between Human Rights Law and Public Policy”, in M. Gani and P. Mathew (eds.), *Fresh Perspectives on the War on Terror*, ANU E Press, 2008, pp. 109-124. It is highlighted that in *McCann and Others v. United Kingdom*, the use of the term “*absolutely necessary*” in Article 2(2) was stated to indicate that “*a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is ‘necessary in a democratic society’ under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in subparagraphs 2(a), (b) and (c) of Article 2*”, see *McCann and Others v. United Kingdom* (1995) 21 *EHRR* 97, para. 149.

<sup>1275</sup> For comments on Article 27, see C. Grossman, “A Framework for the Examination of States of Emergency under the American Convention on Human Rights”, *American University Journal of International Law and Policy*, 1986, at 35 ff.; M. Ruiz, “The States of Emergency in the American Convention on Human Rights”, *IsrYHR*, 2003, at 105 ff.

<sup>1276</sup> See J. Fitzpatrick, *Human Rights in Crisis*, University of Pennsylvania Press, 1994, at 64.

<sup>1277</sup> The ECHR is silent on the issue; for a recognition of the respect for the same principle by the European Court, see ECtHR (Grand Chamber), *A and Others v. The United Kingdom*, Appl. No. 3455/05, Judgment, 19 February 2009, para. 187 ff.



the Secretary General of the Organization of the American States, to the other Contracting Parties about the provisions derogated, the reasons for its decision to suspend them as well as the date set for its termination.

### **3.2.c. The Arab Charter on Human Rights**

Even the new version of this treaty,<sup>1278</sup> specifically in Article 4(1), permits measures derogating from the obligations under the Charter “*in time of public emergency which threatens the life of the nation*” and “*to the extent strictly required by the exigencies of the situations*”. States parties are allowed to avail themselves of these measure only if such an emergency is officially proclaimed, on condition that they are “not inconsistent” with other obligations under international law and not applied in a discriminatory manner (i.e. “*solely on the grounds of race, colour, sex, language, religion or social origin*”). Conversely, a long list of non-derogable rights in Article 4(2) goes beyond the protection formally afforded by the regional conventions previously considered. In particular, it includes the right to life, freedom from slavery, freedom from torture, the right to a fair trial, the right to liberty and security of person, the right to access to an independent court, judiciary control of detention measures, human treatment of prisoners, the principle *nulla poena sine lege*, the right to not be imprisoned for inability to pay a debt arising from a contractual obligation; additionally, the inherent right to recognition as a person before the law, the right to leave and return to one’s country, the right to seek asylum abroad, and the right to nationality are included. As for the notification process required by Article 4(3), a State party has to *immediately inform* the other Contracting Parties of the derogated provisions and related reason as well as on the date of termination of such derogation, through the Secretary General of the League of Arab States.

### **3.2.d. The International Covenant of Civil and Political Rights**

At the universal level Article 4 ICCPR<sup>1279</sup> allows a State party to adopt measures derogating from its obligations under the Covenant “*in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed*”. A reason explaining why the initial reference to war “*was stuck in 1952*” has been the intention to prevent giving the impression that the United Nations accepted

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<sup>1278</sup> See M. Rishmawi, “The Arab Charter on Human Rights and the League of Arab States: An Update”, *HRLR*, 2010, pp. 169-178.

<sup>1279</sup> For comments on Article 4 ICCPR, see R. Lorz, “Possible Derogations from Civil and Political Rights under Article 4 of the ICCPR”, *IYHR*, 2003, p. 85 ff.; M. Nowak, *U.N. Covenant on Civil and Political Rights - CCPR Commentary*<sup>2</sup>, *op. cit.*, p. 83 ff.; I. Viarengo, *Deroghe e restrizioni alla tutela dei diritti umani nei sistemi internazionali di garanzia*, *RDI*, 2005, p. 977 ff.; N. Rodley, “Civil and Political Rights”, in C. Krause and M. Scheinin (eds.), *International Protection of Human Rights: a Textbook*, *op. cit.*, pp. 105-126.

war; in any case, this has not legitimised the conclusion that derogations are not permitted in times of war, since “*an armed, international conflict usually represents the prototype of a public emergency that threatens the life of the nation*”, as was emphasised in the course of drafting Article 4.<sup>1280</sup> As to the qualification, the contribution coming from the 1984 Siracusa Principles is noteworthy.<sup>1281</sup> According to paragraph 39, “*public emergency which threatens the life of the nation*” is a situation of exceptional and actual or imminent danger, where such a threat affects the physical integrity of the population, the political independence or the territorial integrity of the State, or the basic functioning of institutions indispensable to guarantee the rights enshrined in the Covenant. Then, according to paragraph 40, internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4 ICCPR. In the same regard, the Human Rights Committee has stressed that “*not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation*” and “*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*”.<sup>1282</sup>

Regarding the non-derogability recognised in Article 4(2), the ICCPR list of non-derogable rights is longer than the one under the ECHR, but does not equate with that under the ACHR or the ArCHR. It includes the right to life (Article 6), the prohibition of torture or cruel, inhuman or degrading treatment or punishment (Article 7), the prohibition of slavery (Article 8 (1) and (2)), and the principle of non-retroactivity of criminal offences and punishment (Article 15 (1)); additionally, no derogation may be authorized concerning non imprisonment for a contractual obligation (Article 11), recognition of legal personality (Article 16), and freedom of thought, conscience and religion (Article 18). As to the procedural guarantees inherently safeguarding such rights, the related treaty provisions may “*never be made subject to measures that would circumvent the protection of non-derogable rights*”.<sup>1283</sup> Further, the rights contained in Article 4(2) would not be exclusive, since other

<sup>1280</sup> See M. Nowak, *U.N. Covenant on Civil and Political Rights - CCPR Commentary*<sup>2</sup>, *op. cit.*, pp. 83 ff., 89 ff.

<sup>1281</sup> UN Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (Siracusa Principles), E/CN.4/1985/4, Annex, 1985, paras. 39-40. They were drafted by international law experts convened in Siracusa in 1984, by the International Commission of Jurists, the International Association of Penal law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights and the International Institute of Higher Studies in Criminal Sciences. They are contained in ILA, *Paris Minimum Standards of Human Rights Norms in a State of Emergency*, reproduced as “The Paris Minimum Standards of Human Rights Norms in a State of Emergency”, *AJIL*, 1985, p. 1072.

<sup>1282</sup> HRC, *General Comment No. 29: State of Emergency (art. 4)*, UN Doc. CCPR/C/21/Rev.1Add.11 (2001), para. 3. This second general comment on Article 4 was adopted two months before the 11 September 2001 attack on the United States.

<sup>1283</sup> HRC, *General Comment No. 29, ibid.*, para. 15, stressing that “*Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 and 15*”. See also HRC, *General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (art. 14)*,

obligations have been deemed not subject to permissible derogations during a state of emergency, although not explicitly stipulated under that provision. Firstly, the treatment of those deprived of liberty requires “humanity” and “respect for the inherent dignity of the human person”, since the right enshrined in Article 10 is interpreted as a norm of general international law. Secondly, there is a non-derogable prohibition of arbitrary detentions, since the absolute prohibitions against “taking of hostages, abductions or unacknowledged detention” are norms of general international law. Thirdly, it is considered that “the international protection of the rights of persons belonging to minorities includes elements that must be respected in all circumstances”. Then, the Committee finds unacceptable the restrictions from Article 12 as justifying measures of “deportation or forcible transfer of population without grounds permitted under international law, in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned are lawfully present”, since such measures constitute a crime against humanity as confirmed by the Rome Statute.<sup>1284</sup> A final illustrative example concerns the prohibition of “propaganda for war” or “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.<sup>1285</sup>

The conditions enumerated in Article 4 for permissible derogation measures coincide with those analysed for the ACHR, namely only “to the extent strictly required by the exigencies of the situation” and provided their consistency with States parties’ other obligations under international law. Similarly, derogations must not be discriminatory “on the ground of race, colour, sex, language, religion, or social origin”, although certain forms of discrimination are permissible as long as they are not arbitrary.<sup>1286</sup> Notably, the need to apply the element of strict necessity “in an objective manner” is highlighted in the Siracusa Principles, declaring that each measure has to “be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger”.<sup>1287</sup> Nonetheless, the “exceptional and temporary nature” of derogating measures has been openly stressed,<sup>1288</sup> implying that they may continue only if the threat to the life of the nation persists. Accordingly, they need to be scrutinised separately for each right and be accepted only if permissible limitations are no longer sufficient to control the situation.<sup>1289</sup> Conversely, in aligning itself with the European Court of

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CCPR/C/GC/32 (2007), para. 6; see also Article 4 (1) of the ArCHR.

<sup>1284</sup> See Article 7 (1) (d) and Article 7 (2) (d) ICC Statute.

<sup>1285</sup> HRC, *General Comment No. 29, op. cit.*, para. 13 (a)-(e).

<sup>1286</sup> Article 4 (1) is more limited than the round set out in Article 2 (1), which adds political or other opinion, national origin, property, birth or other status.

<sup>1287</sup> See Siracusa Principles, § 54.

<sup>1288</sup> HRC, *General Comment No. 29, op. cit.*, para. 2 (“measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature”).

<sup>1289</sup> See Siracusa Principles, § 15 f. Notably, although the European Court of Human Rights’ case law has not yet explicitly required that the emergency be temporary, according to that Court “the question of the proportionality of the response may be

Human Rights and the Inter-American Court of Human Rights' jurisprudence, the Human Rights Committee has interpreted the wording "*to the extent strictly required by the exigencies of the situation*" to mean that not only may States not derogate from more provisions than necessary, but also that they may only take the minimum necessary measures pursuant to any derogation.<sup>1290</sup>

In the same regard, the regime of international notification drawn up by Article 4(3) requires each Contracting Party to *immediately inform* the other parties on the derogated provisions through the UN Secretary General, to *justify* the proclaimed emergency and all related measures, and to *immediately notify* the date of their termination. This essentially permits the Human Rights Committee to discharge its function, and even other Contracting Parties to monitor compliance with the treaty. In light of many concise past notifications, the inclusion of complete information on the measures taken and related reasons, along with complete documentation concerning their law has been nonetheless emphasised. Moreover, subsequent derogating measures (*e.g.* extending the duration of the emergency situation) require additional notifications, although the Committee's duty to monitor the law and States' practice does not depend on the submission concerned.<sup>1291</sup> Notably, the official proclamation of any derogations from the Covenant aims to inform affected people about the exact material, territorial and temporal scope of application of such measures,<sup>1292</sup> and it allows legislative and judicial bodies to supervise their legality and implementation.<sup>1293</sup>

### **3.2.e. Overall preliminary remarks**

In view of the examined human rights treaties, three aspects may be spelled out and taken into account for the purposes of the present research.

**(1)** Even during an armed conflict, belligerents may derogate from human rights treaties to which they are party and which contain a derogations clause *only under the limits and the conditions established in such a clause*. Indeed, their derogation measures must conform to basic principles embodied in relevant treaties and refined through interpretation; these include the existence of an exceptional

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*linked to the duration of the emergency*", see ECtHR, (Grand Chamber), *A and Others v. The United Kingdom*, Appl. No. 3455/05, Judgment, 19 January 2009, para. 178, where it continues as follows: "*Indeed, the cases cited above, relating to the security situation in Northern Ireland, demonstrate that it is possible for a "public emergency" within the meaning of Article 15 to continue for many years. The Court does not consider that derogating measures put in place in the immediate aftermath of the al'Qaeda attacks in the United States of America, and reviewed on an annual basis by Parliament, can be said to be invalid on the ground that they were not "temporary"*".

<sup>1290</sup> See HRC, *General Comment No. 29, op. cit.*, para. 5; ECtHR, *Aksoy v. Turkey*, Judgment, 18 December 1996; IACtHR, *Castillo-Petruzzi et al v. Peru*, Ser C No. 59, Judgment, 17 November 1999. Referred instances include the right to a fair trial: while Article 14 guaranteeing this right is derogable, it does not mean that a State is permitted to engage in trials that do not even respect the "*fundamental principles of fair trial*" (see *General Comment No. 29, op. cit.*, para. 11).

<sup>1291</sup> HRC, *General Comment No. 29, op. cit.*, para. 17.

<sup>1292</sup> See, *e.g.*, M. Nowak, *U.N. Covenant on Civil and Political Rights - CCPR Commentary*<sup>2</sup>, *op. cit.*, at 92.

<sup>1293</sup> See, *e.g.*, T. Buergenthal, "To Respect and to Ensure: State Obligations and Permissible Derogations", in Henkin (ed.), *The International Bill of Rights*, Columbia University Press, 1981, at 80.

state of emergency, the principle of non-derogability of certain human rights, the principle of proportionality, the principle of non-discrimination, and the principle of consistency with other State obligations under international law.

As regards the exceptionality of the public emergency, *a derogation measure is regarded as a last resort to such situation*, hence permissible only when other restrictions of rights seem inappropriate to respond to the exceptional threat to the life of the nation and to maintain the functioning of States' institutions. International and non-international armed conflicts may qualify as such an exceptional situation, as also do serious environmental or natural disasters, or attempts to overthrow the constitutional order.<sup>1294</sup> Indeed, the proclamation of a state of emergency has a protecting nature because it is aimed at restoring normality and preserving democratic institutions, which constitute fundamental preconditions for protecting human rights.<sup>1295</sup>

As to the non-derogability principle, its extent may be assessed in the light of the *different number of non-derogable rights* contained in the human rights treaties concerned, which undertake divergent approaches to the principle itself. In particular, whether fair trial guarantees should be generally non-derogable is debatable, although procedural guarantees safeguarding non-derogable rights are in any case widely deemed not subject to permissible derogations.<sup>1296</sup>

Although the derogations clause theoretically affects all rights not falling under the list of the non-derogable ones - provided the other conditions are fulfilled - it is worth emphasising that *even in wartime belligerent States must respect the obligations that they have not expressly derogated from* as well as *the obligations qualified as non-derogable by the treaty itself*. This principle was affirmed with specific reference to the ICCPR in the advisory opinion on *the Legality of the Threat or Use of Nuclear Weapons*.<sup>1297</sup> Further, in the advisory opinion on *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the same principle was extended to human rights conventions generally.<sup>1298</sup>

As to the principle of proportionality, the terms used in the analysed derogation clauses are intended to ensure that governments not succumb to the temptation to assume authoritarian or

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<sup>1294</sup> See M. Nowak, *U.N. Covenant on Civil and Political Rights - CCPR Commentary*<sup>2</sup>, *op. cit.*, at 89-92; Fitzpatrick, *Human Rights in Crisis*, University of Pennsylvania Press, 1994, at 56.

<sup>1295</sup> See HRC, *General Comment No. 29*, *op. cit.*, para.1; *Final Report of Special Rapporteur Despouy*, UN Doc. E/CN.4/Sub.2/1997/19 (23 June 1997), para. 42.

<sup>1296</sup> See, e.g., HRC, *General Comment No. 29*, paras.13-16; *Siracusa Principles*, § 70.

<sup>1297</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, at 240, para. 25 (“*the protection of the International Covenant of 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*”).

<sup>1298</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *ibid.*, para.106 (“*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*”).

repressive powers, whether as a response to or by way of exploitation of public insecurity.<sup>1299</sup> Indeed, *the importance of proportionality in the context of derogation powers is evident in the necessity to assess the seriousness and scope of the State's interference to be taken in a public emergency threatening the life of the nation, which is to be limited to what is vital to overcome such a situation.*<sup>1300</sup> Then, in order to ensure derogable rights are not suspended arbitrarily once the state of emergency is declared, the principle of proportionality also requires a regular review of the temporal and territorial scope of derogating measures.<sup>1301</sup> Besides, the evaluation of a proportional measure entails to consider somehow all the obligations under relevant treaties; as stressed by the Human Rights Committee, “*no provision of the Covenant, however validly derogated from, will be entirely inapplicable to the behaviour of a State party*”.<sup>1302</sup>

(2) The specific condition contained in all human rights treaties analysed above (*i.e.* derogation measures must be consistent with States parties' other obligations under international law) implies a need to assess *which other obligations have been undertaken by the State concerned under international treaty law as well as customary international law, including any ius cogens norm.* This entails respecting the following additional formal requirements for permissible derogations.

As for the laws of war, a belligerent is precluded from adopting derogation measures leading to a compression of the rights granted to its nationals and to the enemies' nationals under binding international humanitarian law.<sup>1303</sup> Therefore, *derogation measures under human rights treaties cannot be invoked as a ground for not respecting international humanitarian law.* In particular, the rights enshrined in Article 75 AP I and in Article 4 AP II are relevant. As for human rights law, a belligerent is *precluded from adopting derogation measures leading to infringe the rights recognised as inviolable and non-derogable under another binding human rights treaty.* For instance, a derogation measure adopted under the ECHR cannot violate one of the rights identified as non-derogable under the ICCPR (*e.g.* freedom of thought, conscience and religion).<sup>1304</sup>

In evaluating State responsibility for failing to conform to *the obligations flowing from additional sources of international law*, notably these sources might also include provisions permitting their own

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<sup>1299</sup> See N. Rodley, “Civil and Political Rights”, in C. Krause and M. Scheinin (eds.), *International Protection of Human Rights: a Textbook*, *op. cit.*, at 107.

<sup>1300</sup> See *Siracusa Principles*, § 53; M. Nowak, *op. cit.*, 2005, at 97-98.

<sup>1301</sup> See M. Nowak, *op. cit.*, 2005, at 98; Fitzpatrick, *Human Rights in Crisis*, University of Pennsylvania Press, 1994, at 60.

<sup>1302</sup> See HRC, *General Comment No. 29*, *op. cit.*, para.4.

<sup>1303</sup> In this respect, according to the Human Rights Committee, “*States parties may in no circumstances invoke article 4 of the ICCPR as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence*”, see HRC, *General Comment No. 29*, para.11.

<sup>1304</sup> See D. Kretzmer, *Emergency, State of*, *Max Planck Encyclopaedia of Public International Law*.

suspension or provisions allowing the other States parties to agree to temporarily exonerate the derogating State from its obligations (Article 57 VCLT). Moreover, treaty obligations could be terminated or suspended if performing them proves impossible (Article 61 VCLT) or because of a fundamental change of circumstances (Article 62 VCLT).

**(3)** *The stringency of the conditions permitting derogation measures may be moderated in the practice.* In fact, treaty monitoring bodies have recognised that States parties bear the burden of proof in establishing the existence of a “public emergency”<sup>1305</sup> as well as that their organs have a “margin of appreciation”<sup>1306</sup> in establishing whether the measure taken to deal with an emergency threatening the life of the nation is “strictly required by the exigencies of the situation”, and, accordingly, whether it is proportionate and as such permissible. In this regard, the jurisprudence of the European Court is emblematic. On the one hand, the Court has assumed that national authorities have in principle a better position than international judges in assessing both the size of the threat and the type of derogation measures necessary to avert it.<sup>1307</sup> On the other hand, the Strasbourg Court has noted how the international body is well qualified to assess the proportionality of measures taken by the State concerned.<sup>1308</sup>

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<sup>1305</sup> See EurCommHR, *Greek Case*, *op. cit.*; HRC, *General Comment No. 29*, *op. cit.*, paras. 4 and 5.

<sup>1306</sup> The doctrine of margin of appreciation embodies the general approach of the European Court on Human Rights to the difficult task of balancing the sovereignty of Contracting Parties with their obligations under the Convention, see R. St. J. Macdonald, “The Margin of Appreciation”, in Macdonald, Matscher and Petzold (eds.), *The European System for the Protection of Human Rights*, Martinus Nijhoff, 1993, at 83, noting that this doctrine allows the Court to escape the dilemma of “how to remain true to its responsibility to develop a reasonably comprehensive set of review principles appropriate for application across the entire Convention, while at the same time recognising the diversity of political, economic, cultural and social situations in the societies of the Contracting Parties”.

<sup>1307</sup> See ECtHR, *Ireland v. the United Kingdom*, Appl. no. 5310/71, Series A No. 25, 18 January 1978, para. 207, which held as follows: “it falls in the first place to each Contracting State, with its responsibility for ‘the life of [its] nation’, to determine whether that life is threatened by a ‘public emergency’ and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15(1) leaves the authorities a wide margin of appreciation”. See also ECtHR, *Branigan and McBride v United Kingdom*, Appl. Nos. 14553/89 and 14554/89, Series A No 258-B (1993), 17 EHRR, 539, para. 43, repeating the same view and concluding that “in this matter a wide margin of appreciation should be left to the national authorities”. See also ECtHR, (Grand Chamber), *A and Others v. The United Kingdom*, Appl. No. 3455/05 (2009), para. 180. For an extensive analysis, see D. Harris, M. O’Boyle, E. Bates, and C. Buckley (ed.), *Harris, O’Boyle and Warbrick: Law of the European Convention on Human Rights*<sup>2</sup>, Oxford, 2009, pp. 11-14, and 626.

<sup>1308</sup> See ECtHR (Grand Chamber), *A and Others v. The United Kingdom*, Appl. No. 3455/05 (2009). In particular paragraph 184 reads: “when the Court comes to consider a derogation under Article 15, it allows the national authorities a wide margin of appreciation to decide on the nature and scope of the derogating measures necessary to avert the emergency. Nonetheless, it is ultimately for the Court to rule whether the measures were ‘strictly required’. In particular, where a derogating measure encroaches upon a fundamental Convention right, such as the right to liberty, the Court must be satisfied that it was a genuine response to the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse [...]. The doctrine of the margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level. As the House of Lords held, the question of proportionality is ultimately a judicial decision, particularly in a case such as the present where the applicants were deprived of their fundamental right to liberty over a long period of time. In any event, having regard to the careful way in which the House of Lords approached the issues, it cannot be said that inadequate weight was given to the views of the executive or of Parliament”.

### 3.3. Derogability from ESC rights under treaties without *ad hoc* derogation clause

As anticipated above, major conventions warranting ESC rights do not contemplate an *ad hoc* clause either allowing or prohibiting States parties to derogate from all or part of their corresponding obligations in times of public emergency or extraordinary circumstances such as in contexts of failed States, armed conflicts, military occupations, or institutional collapses post-conflict. They include the ICESCR, the CEDAW, the CRC, the ICERD, the Rights of Migrant Workers and their families (ICRMW), and, in the regional sphere, three African instruments, namely the AfrCHPR, the African Charter on the Rights and Welfare of the Child (ACRWC) and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.<sup>1309</sup>

It is generally agreed that the absence of a derogation provision in a treaty does not determine *per se* the permissibility or the prohibition to suspend the application and enjoyment of the rights enshrined in that treaty. However, reflecting on *the reasons for the basis of the choice not to incorporate such a clause* it proves meaningful to discuss the pertinence for States parties to avail themselves of extraordinary circumstances as valid excuses to *de facto* suspend the operation of certain treaty provisions. This remains a major concern, given that suspending a human right or one of its specific facets implies the complete or partial non-performance of corresponding obligations.<sup>1310</sup>

The next three sections are intended to shed light on the legal framework under such treaties for the question of derogability. They will inquire *whether a state of public emergency* - as induced by armed conflicts, military occupations or post-conflict situations such as institutional collapse - *can be invoked by States parties to suspend the ESC rights enshrined in human rights treaties that not envisage an ad hoc derogation clause*, or, conversely, *whether the treaty provisions remain fully binding anytime*, and, accordingly, which implications derive for the protection of civilians (particularly in view of the expected lack of resources). This question is a legal challenge that raises issues related not only to the nature of the obligations imposed on States parties to treaties on ESC rights, but also related to treaty law and State responsibility. It particularly entails looking at the existence of any rule in international law that may justify the non-performance of a legal obligation by resorting to certain pleas.

In examining the derogability issue for ESC rights, *the rationale of enabling States, through the operation of ad hoc clauses, to depart from their treaties obligations in times of public emergency* deserves primary consideration. As has emerged in previous discussion here, the *unique purpose* behind a derogation

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<sup>1309</sup> African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force on 29 November 1999. Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, adopted in Maputo on 13 September 2000, CAB/LEG/66.6, and entered into force on 25 November 2005.

<sup>1310</sup> On this aspect, see D. McGoldrick, "The Interface Between Public Emergency Powers and International Law", *International Journal of Constitutional Law*, 2004, p. 383.



clause permitting to suspend the exercise of certain rights consists in *protecting or restoring a democratic public order in cases of exceptional threats*, since the latter represents an essential precondition for safeguarding effective enjoyment of fundamental rights. Interestingly, references to such a rationale have been used to support arguments *for* as well as *against* the possibility of permitting derogations from human rights treaties that do not contain a specific derogation provision.<sup>1311</sup>

On one hand, *the risk of undermining the object and purpose of any human rights treaty* has been referred to as a good reason to allow derogations, notwithstanding the absence of a specific clause, in the light of the inherent protective function of derogations under a strict application of the principle of proportionality to each exceptional derogation measures, which would prevent abusive situations of emergency. In particular, derogations from human rights treaties with no clauses concerned have been viewed necessary to protect the nation or a special kind of *ordre public* without which no protection of human rights is possible; derogations are, in that sense, “preventive” even though they are allowed only in case of grave and imminent danger.<sup>1312</sup>

On the other hand, in looking at possible suspension of ESC rights in times of public emergency *the purpose of derogations* has been deemed a *scarcely justified and inherently less convincing* option<sup>1313</sup>. In this regard, the non-necessity of derogations is generally recognised in relation to *basic subsistence rights*, such as the rights to be free from hunger, basic health care, clothing and basic shelter. For instance, suspending the enjoyment of the right to food or the right to health appears in essence far less compelling than derogating from the right to peaceful assembly or the right to vote. In any times of emergency the suspension of basic subsistence rights hardly seems, in fact, crucial for the purpose of maintaining or restoring the public order essential to protect human rights, and even less for supporting a resolution of a conflict rather than exacerbating it.<sup>1314</sup>

Nonetheless, realistically, times of emergency prompted by armed conflict or military occupation are likely to undermine the availability of resources and related capacity of the State

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<sup>1311</sup> For a comment on this aspect, see A. Muller, “Limitations to and Derogations from Economic, Social and Cultural Rights”, *HRLR*, 2009, p. 592, noticing some agreement on the derogability of the right to strike, rights related to trade unions and the right to work in exceptional situations threatening the life of the nation.

<sup>1312</sup> This argument was prominent in the “Report of the Meeting of Experts on Rights Not Subject to Derogations During States of Emergency and Exceptional Circumstances”, 17-19 May 1995, in D. Premont, C. Stenresen, and I. Oseredczuk (eds.), *Non-derogable Rights and States of Emergency (Brussels: Association for International Consultants on Human Rights (CID))*, Bruylant, 1996, pp. 39-40, paras. 27-9.

<sup>1313</sup> See P. Alston and G. Quinn, *op. cit.*, p. 217; E. Mottershaw, “Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law”, *IJHR*, 2008, p. 451.

<sup>1314</sup> See M. Sepulveda, *The Nature of the obligations under the international covenant on economic, social and cultural rights*, Intersentia, 2003, p. 295; A. Muller, *op. cit.*, p. 593, noting how “*nor is it easily imaginable that derogations from rights to basic health care and basic food can ever be regarded as proportionate, however strong the threat to the nation is*”. Further, Article 15 ECHR only contains four non-derogable rights because they are crucial for safeguarding human dignity and almost certainly at risk of violation during abusive emergencies.

concerned to provide for the implementation of every single dimension of ESC rights under relevant treaties such as the ICESCR. In view of this, the prerogative to resort lawfully to derogation from conventional obligations might become more arguable, under certain conditions though. When a situation is suitably severe as to warrant derogation from the ICESCR, the absence of an *ad hoc* clause might not be interpreted to foreclose such a possibility provided that the *satisfaction of the principles and criteria regulating explicitly derogations to human rights treaties is required* to the State party that would decide to *de facto* suspend the rights enshrined in the Covenant.<sup>1315</sup> In particular, the principle that a hard core of fundamental aspects of ESC rights cannot be suspended any time has crucial importance. Moreover, the modalities of derogation have to be shaped by the aforementioned principles of *proportionality* (measures strictly required by the exigencies of the situation), *non-discrimination*, and *consistency* with State's other obligations under international law, which supposedly prevent abusive situations of emergency. As for the last requirement, this implies that the State party to the ICESCR ensures the conformity of derogation measures with the obligations established therein, in addition to further obligations stemming from customary international law or international treaty law. Relevant possible sources include other universal or regional human rights treaties (with attention to their provisions designed to be specifically applied in situations of emergency - e.g. Article 11 CRPD; Article 23 of the African Charter on the Rights and Welfare of the Child), international humanitarian law, international criminal law, refugee law treaties (1951 Convention of the Status of Refugees and its 1967 Protocol), ILO Conventions, UN Charter and binding UN Security Council resolutions, and any rule of international law with *ius cogens* status.

However, the option to react to extraordinary situations of emergency without derogating from treaties on ESC rights may prove more reasonable. Valuable scholarly remarks in this regard, along with the emerging jurisprudence of relevant monitoring bodies, are now addressed.

### **3.3.1. The ICESCR and the debate on derogability**

The omission of a derogation provision in the Covenant has been commented upon mostly in the light of three basic aspects: the *nature of the rights* ensured under this treaty; the *flexibility of the obligations established in Article 2(1)*; and the *presence of a general limitation clause* in Article 4.<sup>1316</sup>

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<sup>1315</sup> This is confirmed by the CESCR as detailed below. See, e.g., P. Alston and G. Quinn, *op. cit.*, p. 219; M. Sepulveda, *The Nature of the obligations under the international covenant on economic, social and cultural rights*, Intersentia, 2003, pp. 302-304.

<sup>1316</sup> See "Report of the Meeting of Experts on Rights Not Subject to Derogations During States of Emergency and Exceptional Circumstances", 17-19 May 1995, in D. Premont, C. Stenresen, and I. Oseredczuk (eds.), *Non-derogable Rights and States of Emergency*, *op. cit.*, p. 36, para. 20.

Specifically, even in view of the *travaux préparatoires* of the ICESCR, which do not reveal discussions on the necessity or the appropriateness of derogations from the Covenant, scholars for the most part conclude that the treaty drafters might have seen the case for derogation “*less compelling*” because of the nature of ESC rights, also noting that a derogation clause was regarded as *unnecessary* given that Article 2(1) was “*sufficiently flexible*” or even “*more flexible and accommodating*”.<sup>1317</sup> As detailed above, Article 2(1), in fact, requires a “*progressive*” realisation of such rights and recognises potential problems arising from limited resources by calling States parties to do no more what the maximum available resources permit.

Then, the adequacy of the general limitations clause to enable States to respond to public emergencies such as armed conflicts is commonly highlighted.<sup>1318</sup> Article 4 allows limitations provided that they are “*determined by law*”, “*compatible with the nature of these rights*” and “*solely for the purpose of promoting the general welfare in a democratic society*”. In this regard, however, emphasis is put on that *States’ power to limit ESC rights has not been interpreted extensively* and only under a “*creative*” interpretation Article 4 would permit their suspensions during armed conflicts, also considering that this would still not be equal to the satisfaction of substantial and procedural criteria regulating explicitly derogations to human rights treaties such as the ICCPR. Despite that “*no clear allowance for derogation or restriction in such times*” appears to be arguable,<sup>1319</sup> it may be reasonable to contend that *in conflict-related situations Article 4 ICESCR does not allow further restrictions than those ones permitted outside such contexts* as no limitations on these rights may be grounded on the existence of an armed conflict. This aspect will be discussed in detail in section 3.5.

In any case, the lack of reference in the ICESCR to any derogation prerogative specifically provided for in times of armed conflict has not led generally to the conclusion that such an absence would grant evidence that certain treaty provisions would be automatically suspended in these circumstances or that States parties would be allowed to derogate from their conventional obligations. This latter point has actually appeared a quite isolated differing opinion.<sup>1320</sup>

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<sup>1317</sup> P. Alston and G. Quinn, *op. cit.*, p. 217; M. Craven, *The International Covenant of Economic, Social and Cultural Rights: A Perspective on its Development*, Clarendon Press 1995, p. 27.

<sup>1318</sup> See P. Alston and G. Quinn, *op. cit.*, at 217-19; Rosas and Sandvik-Nylund, “Armed Conflicts”, in Eide, Krause, Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, Martinus Nijhoff, 2001, p. 347; Rosas, “Emergency Regimes: A Comparison”, in Gomien (ed.), *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjorn Eide*, Scandinavian University Press, 1993, p. 181 (including n. 41).

<sup>1319</sup> See N. Lubell, “Challenges in applying human rights law in armed conflict”, *IRRC*, 2005, p. 752.

<sup>1320</sup> See M.J. Dennis, “Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation”, 1 *AJIL*, 2005, 99, p. 140. According to the author, “*the negotiation history of article 4 strongly suggests*” States’ possibility to be free to derogate from their treaty obligations under the ICESCR during armed conflicts since the treaty do not contain provisions.

At least three main considerations may be articulated concerning the ICESCR's silence. A primary suggestion might be that *derogations are not permissible*, because they are not provided for and they would appear less persuasive given the nature of ESC rights. Another meaning might be that derogations are *allowable only for non-core obligations* where situations result so grave as to allow them, because they are not unequivocally prohibited.<sup>1321</sup> Thirdly, the ICESCR's silence is mainly interpreted as the Covenant generally continues to apply in times of public emergencies induced both by armed conflict or natural disaster<sup>1322</sup> and - at a minimum - States are not allowed to derogate from their core obligations, while the concept of *derogability from non-core obligations on ESC rights* enshrined in the Covenant has not received attention. As detailed hereafter, in actuality the CESCR has not made a general reference to the Covenant's derogability, rather focusing on the *non-derogable nature of minimum core obligations* arising from ESC rights.

### **3.3.2. Derogability from ESC rights in international and regional jurisprudence**

The opportunity to affirm the application of human rights treaties without an *ad hoc* derogation clause in extraordinary circumstances prompted by armed conflict and military occupation has been undertaken by judicial and quasi-judicial monitoring bodies, which have expressed positive views, in addition to less clear views, about the non-permissibility of derogations from those treaties.

#### **3.3.2.a. The Committee on Economic, Social and Cultural Rights**

The human rights treaty body mandated to monitor the implementation of the ICESCR has left unclear the question on the scope of the *permissibility* or *prohibition* of *derogations* in times of emergency such as armed conflict and belligerent occupation.

The CESCR has not generally referred to the issue of derogability of the Covenant, while it has recognised *the non-derogable nature of the minimum core obligations arising from the rights enshrined in this treaty*. In this respect the existence upon States parties of a core obligation to guarantee *at least* "minimum essential levels" of each right enshrined in the Covenant (*i.e.* the "*survival kit*" or "*existential minimum*" for everyone, including essential foodstuff, health care, water and sanitation, basic shelter and housing, and basic forms of education) has been posited in its General Comment No. 3.<sup>1323</sup> However, the Committee has rarely found that the minimum core obligations under every ESC

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<sup>1321</sup> See M. Ssenyonjo, "Economic, Social and Cultural Rights", in M.A. Baderin and M. Ssenyonjo (eds.), *International Human Rights Law. Six Decades after the UDHR and Beyond*, p. 76.

<sup>1322</sup> See E. Mottershaw, *op. cit.*; Barber, "Protecting the Right to Housing in the Aftermath of Natural Disaster: Standard in International Human Rights Law", *International Journal of Refugee Law*, 2008, pp. 432-468.

<sup>1323</sup> CESCR, *General Comment No. 3 (1990): The nature of States Parties' obligations (art. 2, para. 1)*.

rights are *per se* non-derogable.<sup>1324</sup> This view has been referred also to *the right to health*<sup>1325</sup> and *the right to water*,<sup>1326</sup> but in other general comments the Committee has remained silent on this issue.<sup>1327</sup>

Apart from subsistence rights, a position against derogations from the ICESCR has been recently articulated in relation to *the right of everyone to take part in cultural life*. After having underlined the frequent interconnection among the duties “to respect and to protect freedoms, cultural heritage and diversity”, the Committee has addressed the States parties’ duty to “*respect and protect cultural heritage in all its forms, in times of war and peace, and natural disasters*”,<sup>1328</sup> adding that “*cultural heritage must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations, in order to encourage creativity in all its diversity and to inspire a genuine dialogue between cultures. Such obligations include the care, preservation and restoration of historical sites, monuments, works of art and literary works, among others*”.<sup>1329</sup>

Remarkably, the Committee’s position on the scope of the permissibility or prohibition of *de facto* derogations in extraordinary circumstances such as conflict and occupation does not seem entirely clarified in its concluding observations issued regarding States parties’ periodic reports. Pertinent cases in this regard concern the Democratic Republic of Congo, Cambodia, Afghanistan, Nepal, Sri Lanka,<sup>1330</sup> Turkey and Cyprus.

In monitoring the controversial situation of the Democratic Republic of Congo, the CESCR did not specify whether a State party is allowed to derogate from the obligations stemming from the Covenant, even though it acknowledged that “*the persistent instability and recurrent armed conflicts in some of the provinces in the State party ... pose great challenges to the ability of the State to fulfil its obligations under the Covenant*”.<sup>1331</sup> Similarly, no reference to permissible derogations from treaty obligations was made

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<sup>1324</sup> In its 2001 Statement on poverty and the ICESCR, the Committee held that “*core obligations are non-derogable, they continue to exist in situations of conflict, emergency and natural disaster*”. See CESCR, “Poverty and the International Covenant on Economic, Social and Cultural Rights”, *Statement to the Third UN Conference on Least Developed Countries*, 10 May 2001, UN Doc. E/C.12/2001/10, para. 18.

<sup>1325</sup> CESCR, *General Comment No. 14: The right to “the highest attainable standard of health, (art. 12)*, 11 August 2000, para. 47 (“*it should be stressed, however, that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable*”).

<sup>1326</sup> CESCR, *General Comment No. 15: The right to water, (art. 11 and 12)*, 20 January 2003, para. 40 (“*A State party cannot justify its non-compliance with the core obligations set out in paragraph 37, which are non-derogable*”).

<sup>1327</sup> E.g., CESCR, *General Comments No. 17, 18 and 19*.

<sup>1328</sup> CESCR, *General Comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a))*, 21 December 2009, para. 50 (a).

<sup>1329</sup> Article 7 of the Universal Declaration of Cultural Diversity, adopted by the General Conference of UNESCO on 2 November 2001.

<sup>1330</sup> *List of issues to be taken up in connection with the consideration of the combined, second, third and fourth periodic reports of Sri Lanka concerning articles 1 to 15 of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C.12/LKA/2-4, 14 June 2010.

<sup>1331</sup> CESCR, *Concluding Observations on the Democratic Republic of Congo*, UN Doc. E/C.12/COD/CO/4, 20 November 2009, para. 6, where the Committee has also considered, however, that “*impunity for human rights violations and the illegal*

during its monitoring of Cambodia, though the CESCR addressed that “*the State party’s emergence from the isolation and devastation brought about by more than two decades of war, has been a slow and difficult process*”<sup>1332</sup>. In the case of Nepal, the Committee noted how “*the State party’s efforts to comply with some of its obligations under the Covenant are impeded by the consequences of the divisive and violent conflict, namely a large numbers of victims and families of victims, a large numbers of displaced persons, and a severely damaged physical infrastructure that hinders the mobility of persons, goods and essential public services*”.<sup>1333</sup> In the case of Afghanistan, the Committee acknowledged that this is a country in transition that faces a wide range of challenges and has been ravaged by armed conflicts for over three decades, during which it has experienced destruction of institutions and infrastructure that seriously impede the implementation of the rights enshrined in the Covenant.<sup>1334</sup>

Further, the Committee’s silence as to derogation extends also to Turkey’s initial periodic report<sup>1335</sup>, which does not make reference to the unresolved conflict on the island of Cyprus and the related military occupation. As far as the situation in the northern area is specifically concerned, however, it is worth highlighting that significant examples of Turkey’s actions affecting the cultural heritage (both tangible and intangible) of Cyprus were reported by the Association of Cypriot Archaeologists, which criticised Turkey’s report on the implementation of Article 15 ICESCR as not reflecting the post 1974 situation; the association then emphasised the necessity that Turkey put an end to the destruction of such cultural heritage and allowed the conduct of the necessary saving interventions, coordinated and monitored by the competent authorities, for the preservation of the cultural property that survived the thirty-seven year Turkish occupation.<sup>1336</sup> Remarkably, in commenting on the CESCR’s Concluding Observations on Cyprus, the Government of Cyprus observed that “*the division of the country that resulted from the 1974 Turkish invasion and subsequent continued military occupation is not merely “a major difficulty which hinders the ability of the State party to ensure the*

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*exploitation of the country’s natural resources, including by foreign companies, constitute major obstacles to the enjoyment of economic, social and cultural rights in the State party. The Committee reiterates the primary responsibility of the State party for ensuring security in its territory and protecting its civilians with respect to the rule of law, human rights and international humanitarian law”.*

<sup>1332</sup> CESCR, *Concluding Observations on Cambodia*, UN Doc. E/C.12/KHM/CO/1, 12 June 2009, para. 11. Notably in paragraph 12, the Committee regrets how “*despite the constitutional guarantees, Cambodia has not been established that Covenant provisions can in practice be invoked before or directly enforced by the State party’s national courts, tribunals or administrative authorities*”. In this regard, the Committee is concerned as to “*the lack of effective remedies for violations of human rights including economic, social and cultural rights, thereby undermining the State party’s ability to meet its obligations under the international human rights treaties that it has ratified including the International Covenant on Economic, Social and Cultural Rights*”.

<sup>1333</sup> CESCR, *Concluding Observations on Nepal*, UN Doc. E/C.12/NPL/CO/2, 16 January 2008, para. 10.

<sup>1334</sup> CESCR, *Concluding Observations on Afghanistan*, UN Doc. E/C.12/AFG/CO/2-4, 7 June 2010, para. 12.

<sup>1335</sup> CESCR, *Concluding Observations on Turkey*, UN Doc. E/C.12/TUR/CO/1, 12 July 2011.

<sup>1336</sup> See “Document With the Comments of the Association of Cypriot Archaeologists concerning Turkey’s Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights”, 10 March 2011.

implementation of the Covenant throughout the country” but also generates new obstacles to its effective implementation”.<sup>1337</sup>

### 3.3.2.b. The International Court of Justice

In its advisory opinion on *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ ruled for the applicability and relevance of a number of rights contained in the ICESCR, CRC and ICCPR, stating 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*”.<sup>1338</sup> This wording appears to support the view that, *in the absence of any provisions allowing for derogation, the guarantees provided under human rights treaties remain in force*. In this sense, the Court observed that Israel is bound to respect the ICESCR as well as the CRC (both ratified on 3 October 1991), in addition to its obligation to respect the ICCPR with the exception of Article 9 whose derogation had been notified by Israel at the time of the ratification of the ICCPR.<sup>1339</sup>

As far as ESC rights are specifically concerned, the Court recognised that the construction of the wall and its associated regime “*impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the ICESCR and in the CRC*”,<sup>1340</sup> besides restricting the freedom of movement of local inhabitants (excepting Israeli citizens and those assimilated thereto) under Article 12(1) ICCPR, destroying or rendering inaccessible property belonging to those Palestinians, interfering with their privacy, family, home or correspondence under Article 17.<sup>1341</sup> Significantly, the use of the verb “*impede*” entails that the rights in question were applicable in the occupied territory in the first place. It remains regrettable, however, that,

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<sup>1337</sup> *Comments by the Government of Cyprus on the Concluding Observations* (E/C.12/CYP/CO/5), E/C.12/CYP/CO/5/Add.1, 24 March 2009, paras. 5-6, additionally noting that “*approximately 99% of illegal immigrants and asylum seekers arrive to the Government controlled area, through the part of the Republic that is under occupation by another State party to the Covenant, Turkey. The Declarations and Reservation made by the latter when ratifying the Covenant, does not exonerate it from its obligations under the Charter of the United Nations and the provisions of the Covenant, the Geneva Conventions and international law. In addition, the continuing presence of its occupation army on the territory of the Republic of Cyprus is by itself the source of systematic violations of the human rights of the island’s population*”.

<sup>1338</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, at 178, para. 106, and at 192, para. 136.

<sup>1339</sup> ICJ, *ibid.*, at 180, paras. 111-113, and at 187, para. 127. According to the Court, the ICESCR applies to the territories over which a Contracting Party has sovereignty as well as to ones over which that State exercises territorial jurisdiction; it invoked especially Article 14 of the Covenant on the right to education, which provides for transitional measures (para. 112).

<sup>1340</sup> ICJ, *ibid.*, at 191, para. 134. From the perspective of the relationship between international human rights law and international humanitarian law, the Court’s analysis of the impact of the wall on a number of ESC rights enshrined in the ICESCR is indicative of the fact that there are no rights that can be defined by international humanitarian law in the way that the ICJ indicated that the right to life could be in the nuclear weapons opinion. Paragraph 134 makes clear that the Court gives more weight to the ICESCR as a means of defining these rights.

<sup>1341</sup> ICJ, *ibid.*, at 192-93, para. 136.

after acknowledging the applicability and relevance of ESC rights as guaranteed under the ICESCR (Articles 6 and 7 relating to work, Article 10 on the protection and assistance to families and children, Article 11 concerning an adequate standard of living, Article 12 on health, Articles 13 and 14 on education) as well as dealing with the relevance of analogous rights enshrined in the CRC (Articles 16, 24, 27 and 28),<sup>1342</sup> the advisory opinion ended up being less helpful in revealing which of these rights have actually been violated. Notably, a right to a cultural identity was not mentioned in the advisory opinion; however, the Court referred to certain elements that somehow allow the cultural dimension to emerge.<sup>1343</sup>

It is worth briefly highlighting that the legality of the construction of the wall was assessed in view of both human rights law and international humanitarian law, although the Court analysed separately the relevant rules and limitation clauses. In addition to the aforementioned human rights law sources, it observed that international humanitarian law contains rules “*enabling account to be taken of military exigencies in certain circumstances*”.<sup>1344</sup> By referring to Article 46 HRs and Articles 47, 49 and 53 GCIV, the Court considered the possible deportation of protected persons and the possible destruction of personal property exclusively for “*imperative military reasons*” or as “*absolutely necessary by military operations*”; nevertheless it stressed the prohibition to transfer the occupant’s population into occupied territory; then it determined that the destruction of property was not justified by the claimed defence of military exigency. The Court concluded that the route chosen for the wall was not justified by military exigencies,<sup>1345</sup> but this finding was not substantiated according to a proper legal reasoning; it did not detail the criteria fitting the meaning of military necessity, particularly the proportionality criteria and what it requires in such situation.<sup>1346</sup>

A second opportunity taken by the ICJ to acknowledge the application in times of armed conflict of human rights treaties that do not contain a derogation clause was in its judgment

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<sup>1342</sup> ICJ, *ibid.*, at 189, paras. 130-131.

<sup>1343</sup> ICJ, *ibid.*, para.133, citing the Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, 22 August 2003, para. 26, which refers to practices related to “*olive trees, fruit trees, water wells, citrus groves and hothouses upsands*”; also citing the Special Rapporteur on the situation of human rights in the Palestinian territories (E/CN.4/2004/6, 8 September 2003, para. 9) alongside the Report by the Special Rapporteur of the UN Commission on Human Rights, Jean Ziegler, *The Right to Food*, Addendum, Mission to the Occupied Palestinian Territories (E/CN.4/2004/10/Add.2, 31 October 2003, para. 49), which pointed out that “*many fruit and olive trees had been destroyed in the course of building the barrier*”.

<sup>1344</sup> ICJ, *ibid.*, para. 126, referring to Articles 43, 46, 52 HRs and 47, 49, 52, 53 GC IV.

<sup>1345</sup> ICJ, *ibid.*, paras. 135 and 137.

<sup>1346</sup> As stated by Judge Buergenthal, “*Lacking is an examination of the facts that might show why the alleged defences of military exigencies, national security or public order are not applicable to the wall as a whole or to the individual segments of its route*”, see Declaration of Judge Buergenthal, para. 7. Conversely, according to Judge Owada “*no justification based on the ‘military exigencies’; even if fortified by substantial facts, could conceivably constitute a valid basis for precluding the wrongfulness of the act on the basis of the stringent conditions of proportionality*”, see Separate Opinion of Judge Owada, para. 24.



concerning the territory of eastern DRC occupied by Uganda.<sup>1347</sup> The Court in fact cited and applied the same principle affirmed in the advisory opinion on the wall, by deeming applicable to this case the AfrCHPR, the CRC and its Optional Protocol on the Involvement of Children in Armed Conflict of 25 May 2000, in addition to the ICCPR, which have been all ratified by both the Democratic Republic of the Congo and Uganda.<sup>1348</sup> Therefore the ICJ found that Uganda violated Articles 4 and 5 AfrCHPR, Article 38(2) and (3) CRC as well as Articles 1, 2, 3(3), (4), (5), (6) of its Optional Protocol, in addition to Articles 6(1) and 7 ICCPR.<sup>1349</sup> These treaties include ESC rights, but the Court did not find direct violations of these rights. Conversely, it examined the exploitation of natural resources by Ugandan officers and soldiers and the failure of the Ugandan forces to respect the applicable provisions of international humanitarian law and human rights law,<sup>1350</sup> finding that the looting, plundering and exploitation of Democratic Republic of the Congo's natural resources constituted concurrent violations of Article 21 (1) (2) ACHPR.

Of particular note in both cases is that the ICJ analysed human rights law separately from international humanitarian law as applicable to the same situation. It found violations of the relevant provisions of both branches of law. This illustrates that they may rule out equivalent conducts without influencing each other in the determination of unlawfulness.

### **3.3.2.c. The Committee on the Rights of the Child**

The CRC is another universal human rights treaty without a general derogation clause. The application in its entirety during peacetime and war has been acknowledged by its treaty-based monitoring body, addressing the relevance of all its provisions - not only Article 38 and 39 relating specifically to the protection and care of children in armed conflicts - at all times. By covering a broad range of civil, economic, social and cultural rights, the CRC is roughly equivalent to the combined content of the 1977 Covenants. In this vein, the comprehensive set of rights enshrined in the CRC and stressed by the Committee includes basic care and assistance, access to health, food and education, the protection of the family environment, the protection of the child's cultural environment, the prohibition of torture, abuse or neglect, the right to a name and a nationality, the need for protection in cases of deprivation of liberty, access to and provision of humanitarian

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<sup>1347</sup> ICJ, *Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005.

<sup>1348</sup> ICJ, *ibid.*, para. 217.

<sup>1349</sup> ICJ, *ibid.*, para. 219.

<sup>1350</sup> ICJ, *ibid.*, paras. 178-179, 242, 245. It relied on Article 47 HRs and Article 33 GC IV relating to the prohibition of pillage and reprisals against protected persons and their property; and on Article 21 (1) (2) ACHPR.

assistance and relief, the prohibition of the death penalty.<sup>1351</sup> As has underlined by the Committee, the most positive interpretation of this Convention is implemented with a view to guaranteeing the widest possible respect for children's rights. Nonetheless, emphasis is put on the provisions containing the four general principles underpinning the CRC and that do not allow for any kind of derogation: Article 2 (prohibiting discrimination of any kind), Article 3 (requiring the best interests of the child as main consideration) and Article 6 (the right to life, survival and development), Article 12 (the right of children to have their views heard and given due weight in all decisions affecting them). As was clearly expressed by its former vice-President Hammarberg, "*the child has a right to a family environment, to go to school, to play, to get health care and adequate nutrition also during the armed conflict. The principles of the Convention are valid as well: that all children without discrimination should enjoy their rights, that the best interests of the child be a primary consideration in decisions, that the right to life, survival and development be protected*".<sup>1352</sup>

Notably, the Committee considers IHL protection as interconnected with, and forming an integral part of, that which is afforded under the CRC. In this sense, its monitoring of violations of children's rights in conflict-torn situations has also relied on certain rules and principles concerning the means and methods of warfare, ending up contributing to the determination of their scope. A clear example of such a monitoring approach concerns *the right to education*. Generally, States parties to the CRC has been recommended to protect schools from military attacks or seizures alongside from use as centres of recruitment, and to criminalise such attacks as a war crime according to the Rome Statute.<sup>1353</sup> Specifically, in situations concerning Burundi, Israel, Ethiopia, and Afghanistan, the Committee has considered a range of interferences with the right to education in accordance to what is addressed in the Forth Geneva Convention and the Additional Protocols of 1977.<sup>1354</sup>

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<sup>1351</sup> See *Impact of Armed Conflict on Children, Report of the Export of the Secretary-General, Ms. Grac'a Machel, submitted pursuant to General Assembly Resolution 48/157*, UN Doc. A/51/306, 26 August 1996, p. 52, paras. 227-229, citing the annual Report of the Committee on the Right of the Child to the General Assembly, 49<sup>th</sup> Session, UN GAOR Suppl. No. 41, A/49/41, 19 May 1994.

<sup>1352</sup> See C. Hamilton and T. Abu El-Haj, "Armed Conflict: The Protection of Children under International Law", *International Journal of Children's Rights*, 5, Kluwer, 1997, p. 38. On the application of the CRC even in armed conflict, see also Maslen, "Relevance of the Convention on the Rights of the Child to Children in Armed Conflict", *TLCP*, 1996, p. 329 ff.

<sup>1353</sup> As previously discussed in Chapter I, Article 8(2)(b)(i), Article 8(2)(b)(ii), and Article 8(2)(c)(i) ICC Statute prohibit the intentional direction of attacks against the civilian population and against civilian objects in times of international and non-international armed conflict respectively. A textual reference to the prohibition of intentionally directing attacks against buildings dedicated to education is contained in Article 8(2)(b)(ix) and Article 8(2)(e)(iv).

<sup>1354</sup> See CRC, *Concluding Observations: Burundi*, UN Doc. CRC/C/15/Add.133, 16 October 2000, paras. 64-65; CRC, *Concluding Observations: Israel*, UN Doc. CRC/C/15/Add. 195, 9 October 2002, para. 52; CRC, *Concluding Observations: Ethiopia*, UN Doc. CRC/C/ETH/CO/3, 1 November 2006, paras. 27-28; CRC, *Concluding Observations: Afghanistan*, UN Doc. CRC/C/AFG/Co/1, 8 April 2011, paras. 60-61.

### **3.3.2.d. The Committee on the Elimination of Discrimination against Women**

CEDAW's objective consists in removing all forms of discrimination against women on the basis of gender. In particular, women are safeguarded in the equal recognition, enjoyment and exercise of "*human rights and fundamental freedoms in the political economic, social, cultural, civil, domestic or any other field*", regardless of marital status and in view of equality with men.

The application of CEDAW during conflicts or states of emergency has been affirmed and clarified by its treaty-based monitoring body. Indeed, the Committee's concerns have been reiterated as to the gendered impacts of such situations alongside women's exclusion from conflict prevention efforts, post-conflict transition and reconstruction processes. Additional critical concerns have regarded the insufficient information provided in States parties' reports on the application of the Convention in such contexts.

A basic recognition of this view is contained in General Recommendation no. 28 aimed at clarifying the scope and meaning of Article 2.<sup>1355</sup> In providing ways for States parties to implement domestically CEDAW substantive provisions, Article 2 prohibits discrimination against women caused directly or indirectly by States parties and, additionally, it enacts a due diligence obligation to prevent such discrimination by private actors. Appropriate measures in this regard have been deemed to comprise the regulation of private actors' activities regarding education, employment and health policies and practices, working conditions and work.<sup>1356</sup> As affirmed in paragraph 11, "*the obligations of States parties do not cease in periods of armed conflict or in states of emergency resulting from political events or natural disasters*". These contexts have a serious impact on, and wide consequences for, the equal satisfaction and exercise of women's fundamental rights; the Committee has expressly called for States parties to adopt strategies and measures addressed to their specific needs in such times. Of note, in paragraph 12, the application of CEDAW obligations is understood as covering without discrimination both citizens and non-citizens (including refugees, asylum-seekers, migrant workers and stateless persons) who are within States parties' territory or under effective control, even when not situated within the territory. As further elaborated in the same paragraph, "*States parties are responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territory*".

This position has been broadly articulated in General Recommendation no. 30,<sup>1357</sup> whose

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<sup>1355</sup> See *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/GC/28, 16 December 2010.

<sup>1356</sup> *Ibid.*, para. 13.

<sup>1357</sup> See *General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-conflict Situations*, UN Doc. CEDAW/C/GC/30, 18 October 2013.

significant purpose deserves particular attention.<sup>1358</sup> It aims at providing authoritative guidance to States parties to the CEDAW on “*legislative, policy and other appropriate measures to ensure full compliance with their obligations under the Convention to respect, protect and fulfil women’s human rights*” during times of international and non-international armed conflict, situations of foreign occupation as well as other forms of occupation, and the post-conflict phase including various peace-building processes.<sup>1359</sup> A number of the points addressed to determine the application of the CEDAW are noteworthy.

Firstly, States are deemed bound to apply the Convention and other sources of international human rights and humanitarian law “*comprehensively in the exercise of territorial or extraterritorial jurisdiction*”, whether acting individually (*e.g.* in unilateral military action) or as members of international or intergovernmental organizations and coalitions (*e.g.* as part of an international peacekeeping force) (see paragraph 9). In this regard, CEDAW is deemed *applicable to a broad range of situations*, including: occupation and other forms of administration of foreign territory; national contingents as part of an international peacekeeping or peace-enforcement operation; persons detained by State agents, such as the military or mercenaries, outside its territory; lawful or unlawful military actions in another State; situations of bilateral or multilateral donor assistance for conflict prevention and humanitarian aid, mitigation or post-conflict reconstruction; cases of involvement as third parties in peace or negotiation processes; and finally in the formation of trade agreements with conflict-affected countries.

Secondly, States parties are recommended to regulate the activities of domestic non-State actors who are within their effective control and operate extraterritorially, ensuring they respect the Convention entirely. In this regard, States parties are required to “*exercise due diligence to prevent, investigate, punish and ensure redress*” for acts of private individuals or entities that impair vested rights; in addition to constitutional and legislative measures, adequate administrative and financial support for treaty implementation are emphasised (see paragraph 15).

Thirdly, States as occupying powers are recommended to respect, protect and fulfil the rights

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<sup>1358</sup> The debate for elaborating this recommendation relied on certain CEDAW provisions: Articles 2 (a - g) on the core obligations of States parties to the Convention; Article 4 on temporary special measures; Article 5 (a) on the modification of social and cultural patterns of conduct of women and men; Article 6 on the suppression of trafficking and exploitation of women; Article 7 and 8 on women’s participation in political and public life and their representation in government and at the international level; Article 9 on women’s rights to a nationality; Article 10 on the right to education; Article 11 on the right to work; Article 12 on the right to health; Article 15 (1) on women’s equality with men before the law. See Concept Note, *General Discussion on the protection of women’s human rights in conflict and post-conflict contexts*, July 2011, [www.peacewomen.org](http://www.peacewomen.org). See also Committee on the Elimination of Discrimination against Women, *Summary of the General discussion on the protection of women’s human rights in conflict and post-conflict contexts*, [www.peacewomen.org](http://www.peacewomen.org)

<sup>1359</sup> See Part IV entitled “Convention and conflict prevention, conflict and post-conflict situations”, paras. 29-81.

enshrined in the CEDAW that applies extraterritorially in situations of foreign occupation.<sup>1360</sup>

Notably, guidance has been specifically given in relation to certain issues directly addressing the socio-economic dimensions of conflict-related situations. They include gender-based violence under Articles 1-3 and 5(a) (see paras. 34-38), access to education, employment and health, and rural women under Articles 10-12 and 14 (see paras. 48-52), displacement, refugees and asylum-seekers under Articles 1-3 and 15 (see paras. 53-57), marriage and family relations under Articles 15-16 (paras. 62-65), access to justice under Articles 1-3, 5(a) and 15 (see paras. 74-81). Indeed, in drafting phase the Committee was called to explicitly recognise in the document the relevance of ESC rights as an integral part of protecting women's rights in conflict and post-conflict situations.<sup>1361</sup> As for the guidance given for constitutional and electoral reforms within post-conflict situations, in paragraph 73 (c) States parties are recommended to “*ensure that new constitutions provide for temporary special measures, apply to citizens and non-citizens, and guarantee that women's human rights are not subject to derogation in states of emergency*”.

Focusing on the Committee's elaboration of the *application of CEDAW in respect to different actors* within conflict and post-conflict processes, the following points are noteworthy. The Convention applies to States parties acting individually (*e.g.*, “*as the State within whose borders the conflict arises, neighbouring States involved in the regional dimensions of the conflict or States involved in unilateral cross-border military manoeuvres*”) or to States parties acting as members of international or intergovernmental organizations (*e.g.*, “*by contributing to international peacekeeping forces or as donors giving money through international financial institutions to support peace processes*”).

As to *non-state actors* such as armed groups, paramilitaries, corporations, private military contractors, organized criminal groups and vigilantes, they cannot become parties to the CEDAW. Nonetheless, according to the Committee they are obliged to respect international human rights under certain circumstances, especially “*where an armed group with an identifiable political structure exercises*

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<sup>1360</sup> The factors deemed most pertinent to the realisation of women's rights under occupation, as reinforced in the seminal SC Res. 1325 (2000) on women and conflict, include, *inter alia*: accessing ESC rights, ensuring the rights of internally displaced persons and refugees, protection from violence and the absolute prohibition of sexual exploitation by those in occupation with criminal sanction, prosecuting sexual violence, facilitating participation in political dialogue. See WILPF, Written Statement to the CEDAW Committee prior to 18 July 2011, “General discussion on women in armed conflict and post-conflict situations”.

<sup>1361</sup> During the discussion the Women's International League for Peace and Freedom (WILPF) emphasised that one of key factors in the continued under representation of women in political life is the highly gendered nature of family and work relations: women are the main caregivers in society, are more likely to work in the informal sector, and have less access to remunerated employment. Access to ESC rights (particularly health, education, access to land and employment) was viewed as fundamentally important in providing women with the possibility of participating in systems of governance. As far as international financial institutions play a vital role in post-conflict reconstruction and the reactivation of economic activities, these actors should ensure that women are fully included in the design, development and benefits of financial support given.

significant control over territory and population”. Emphasis is put on “gross violations of human rights and serious violations of humanitarian law could entail individual criminal responsibility, including for members and leaders of non-State armed groups and private military contractors”.<sup>1362</sup> In this respect explicit recommendations have regarded the respecting women’s rights in conflict-affected areas in line with the Convention and the performing under codes of conduct on human rights, particularly stressing the prohibition of all forms of gender-based violence (see paragraph 18).

As openly underlined by the same treaty-based body, State responsibility under the CEDAW arises insofar as a non-State actor’s act or omission may be attributed to a State party under international law. Conversely, in cases of a State party acting as member of international or intergovernmental organizations, it remains responsible for its obligations under the Convention *within its territory and extraterritorially*, and also for adopting measures that make the policies and decisions of those organizations conformed to its treaty obligations.<sup>1363</sup>

### **3.3.2.e. The African Commission on Human and Peoples’ Rights**

At the regional level, the African Commission has repeatedly endorsed the view that the occurrence of an international or civil war as well as other emergency situations in the territory of a State party is not invocable as a justification for violations of any of the rights set forth in the AfrCHPR.<sup>1364</sup>

Besides insisting explicitly that, in the absence of a derogation clause from the African Charter, no derogations by States parties are allowed at any time,<sup>1365</sup> the African Commission has also expressed the position that “*limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances*”.<sup>1366</sup> Significantly, this view has been expressed not only in its

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<sup>1362</sup> See *General Recommendation No. 30, ibid.* para. 16.

<sup>1363</sup> See *General Recommendation No. 30, ibid.* para. 14.

<sup>1364</sup> See, e.g., AfComHPR, *Article 19 v. The State of Eritrea*, Comm. No. 275/2003, May 2007, AHRLR 73 (ACHPR 2007), para 87. On the application of the African Charter in armed conflict, see F. Ouguergouz, “L’absence de clause de dérogation dans certains traités relatifs aux droits de l’homme: Les réponses du droit international general”, *Revue générale de droit international public*, 1994, p. 289 ff.

<sup>1365</sup> See AfComHPR, *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, Comm. No. 74/92, (1995), (2000) AHRLR 66 (ACHPR 1995), para. 21, observing that “*the African Charter, unlike other human rights instruments, does not allow for States parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter*”. The African Commission has then confirmed that view in *Malawi African Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164/97 - 196/97 and 210/98, (2000) AHRLR 149 (ACHPR 2000), para. 84. See also AfComHPR, *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Comm. Nos. 279/03- 296/05, (2009) AHRLR 153 (ACHPR 2009), paras. 165 and 167. Conversely, in other jurisprudence it seems to have moved closer to the position under general international law, see AfComHPR, *Amnesty International and Others v. Sudan*, Comm. Nos. 48/90, 50/91, 52/90, 89/93 (1999), (2000) AHRLR 297 (ACHPR 1999), paras. 42 and 79 ff.

<sup>1366</sup> See AfComHPR, *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v. Nigeria*, Comm. No. 105/93, 12<sup>th</sup> Activity Report 1999/2000, at 64; Comm. No. 104/94, 141/94, 145/95, (2000) AHRLR 227 (ACHPR 1999), para. 41, reading: “[I]n contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances.

decisions on communications but also in its Resolution on Rights to Fair Trial and Legal Assistance in Africa.<sup>1367</sup>

For the purpose of the present study, an important case concerns the armed conflict in the Darfur western region of Sudan and the engagement of *Janjaweed* militia in raping, forcibly evicting and displacing, indiscriminately killing thousands of black indigenous people and destroying their property since February 2003. In *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v. Sudan*, the complainants alleged that those acts constituted a failure of the government of Sudan to respect and protect the rights of the people of Darfur and particularly violated Articles 4, 5, 6, 7, 9, 12 (1), 14, 16, 18 (1) and 22 AfrCHPR. The Republic of Sudan had been under a state of emergency since 1989 but whether derogations from specific provisions of the Charter had been undertaken is not clear from the case.<sup>1368</sup> At any rate, in quoting its decisions in earlier communications (para. 41, *Constitutional Rights Project et al v. Nigeria*; para. 21, *Commission Nationale des Droits de l'Homme et Libertes v. Chad*), the African Commission reminded States that they have a duty to respect human and peoples' rights under the Charter at all times including armed conflict.<sup>1369</sup>

Of particular note is that this decision offers seminal jurisprudence on violations of certain ESC rights under the AfrCHPR in situations of armed conflict. Firstly, the Commission ruled that the forced eviction of thousands of indigenous tribes breached the implicit *right to adequate housing* as enshrined in Article 14 (right to property), Article 16 (right to the best attainable state of mental and physical health) and Article 18(1) (rights of the family).<sup>1370</sup> Additionally, it ruled that forced evictions and destruction of housing amounted to a violation of Article 4 (right to integrity of the person) and also Article 5 (prohibiting cruel, inhuman or degrading treatment or punishment); in this regard, the

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*The only legitimate reasons for limitation of the rights and freedoms of the African Charter are found in Article 27(2), that is, that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest'.* See also AfComHPR, *Media Rights Agenda and Others v. Nigeria* (2000) AHRLR 200 (ACHPR 1998), para. 67.

<sup>1367</sup> See Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), para. R, entitled "Non-derogability clause" ("*No circumstances whatsoever, whether a threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency, may be invoked to justify derogations from the right to a fair trial*").

<sup>1368</sup> The Sudanese government challenged the case on admissibility, contending that the claimants failed to resort to "existing legal, judicial or administrative means within the Respondent State to address the allegations" (see *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v. Sudan*, *ibid.*, para. 75) and asserting that other international mechanisms (*i.e.* SC Res. 1509, 1591, 1592 on the situation in Darfur; the UN Commission on Human Rights Res. 2005/85 that assigned a Special Rapporteur on the situation of human rights in Sudan) had settled the case, which was as such inadmissible. According to Sudan's counterclaims, the conflict in Darfur resulted from the "*instability in neighboring countries*", the intensified violence and increased influx of IDPs and refugees were attributable to the armed conflicts in Chad, Congo, and Central African Republic, and claimants' allegations were disputable as determined in several resolutions of Security Council.

<sup>1369</sup> See also AComHPR, *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v. Sudan*, Comm. Nos. 279/03-296/05, (2009) AHRLR 153 (ACHPR 2009), paras. 165 and 167.

<sup>1370</sup> It confirmed its early jurisprudence in *SERAC and CESR v. Nigeria*.

respondent State was found to have actively participated in the forced eviction of the civilian population from their homes and villages and to have failed to protect the victims against those violations as perpetrated by its agents or third parties,<sup>1371</sup> also failing to “provide immediate remedies to victims”.<sup>1372</sup>

Secondly, the Commission confirmed the *right to water and sanitation* as an implicit right enshrined in Articles 4, 16 and 22 AfrCHPR.<sup>1373</sup> In looking at the obligations to respect and to protect upon Sudan, it ruled that “the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells” rose to a violation of Article 16 (right to the highest attainable standard of health).<sup>1374</sup> This was elaborated by referring to the CESCR’s General Comment No. 14, in which the right to health is interpreted as extended “not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and portable water, an adequate supply of safe food, nutrition, and housing ...”. In relying on the obligations articulated in the aforementioned general comment, the African Commission underlined not only that “violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States”, but also that “States should ... refrain from unlawfully polluting air, water and soil, ... during armed conflicts” and “should also ensure that third parties do not limit people’s access to health-related ... services”, noting that “failure to enact or enforce laws to prevent the pollution of water [amount to a violation of the right to health]”.<sup>1375</sup>

Thirdly, the Commission held Sudan accountable for a violation of the *collective right to all peoples to their economic, social and cultural development*, which is set forth in Article 22.<sup>1376</sup> In this regard, in determining whether the victims constituted a “people” under the African Charter, the Commission admitted that the jurisprudence defining the content of “peoples’ rights” is “still very fluid” and that “in defining the content of the peoples’ rights, or the definition of ‘a people’, it [was] making a contribution to Africa’s acceptance of its diversity”.<sup>1377</sup> According to the Commission, “it is unfortunate that Africa tends to deny the

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<sup>1371</sup> It relied on the Committee Against Torture jurisprudence to the effect that “forced evictions and destruction of housing carried out by non-state actors amounts to cruel, inhuman and degrading treatment or punishment, if the State fails to protect the victims from such a violation of their human rights” (*Hijrizi v. Yugoslavia*, Communication No. 161/2000: Yugoslavia, CAT/C/29/D/161/2000 (2 December 2002); and on the ECtHR jurisprudence to the effect that “even in the most difficult circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment” (*Selcuk and Asker v. Turkey*, Judgment, 24 April 1998, paras. 27-30).

<sup>1372</sup> AComHPR, *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v. Sudan*, *ibid.*, para. 168.

<sup>1373</sup> In *Free Legal Assistance Group and Others v. Zaire*, the African Commission ruled that the failure to provide essential services such as electricity and safe drinking water amounted to a violation of the right to health enshrined in Article 16.

<sup>1374</sup> AComHPR, *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v. Sudan*, para. 212.

<sup>1375</sup> AComHPR, *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v. Sudan*, para. 210.

<sup>1376</sup> Article 22 AfrCHPR reads: “All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States shall have the duty, individually or collectively, to ensure the exercise of the right to development”.

<sup>1377</sup> AComHPR, *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v. Sudan*, para. 220. A relevant aspect for defining “a people” was represented by the characteristics that a particular people may use to identify



existence of the concept of a 'people' because of its tragic history of racial and ethnic bigotry by the dominant racial groups during the colonial and apartheid rule"; its position, however, was that "racial and ethnic diversity on the continent contributes to the rich cultural diversity which is a cause for celebration" and should not be "seen as a source of conflict"<sup>1378</sup>. In this regard, Article 19 AfrCHPR guarantees "the right of all people to equality, to enjoy same rights, and that nothing shall justify a domination of a people by another". Under a combined reading of Article 2 and Article 19 AfrCHPR, the Commission acknowledged that the Charter "protects the rights of every individual and peoples of every race, ethnicity, religion and other social origins" and found that "the people of Darfur in their collective are 'a people', as described under Article 19". Then, in establishing that the respondent State, "while fighting the armed conflict, targeted the civilian population, instead of the combatants", the Commission decided that this rose to "a form of collective punishment, which is prohibited by international law". Significantly, it ruled that "the attacks and forced displacement of Darfurian people denied them the opportunity to engage in economic, social and cultural activities", that "the displacement interfered with the right to education for their children and pursuit of other activities", and that "instead of deploying its resources to address the marginalisation in the Darfur, which was the main cause of the conflict, the Respondent State instead unleashed a punitive military campaign which constituted a massive violation of not only the economic, social and cultural rights, but other individual rights of the Darfurian people".<sup>1379</sup>

It is worth mentioning that criticisms have made of the African Commission jurisprudence as well as the African Charter. Despite appraisal for the Commission's position on derogation, the absence of an ad hoc clause has been seen as decreasing States parties' powers only in theory: by failing to set any standards, the Charter provides States with more discretion.<sup>1380</sup> For others, the treaty silence on derogation cannot be understood as a prohibition to derogate from the Charter<sup>1381</sup> and States parties are "reserved the right to invoke the derogations which may be possible under general international law"<sup>1382</sup>, arguing that they could invoke fundamental change of circumstances to suspend provisions of the African Charter<sup>1383</sup> and rely on the rules relating to termination and suspension of treaties under international law.<sup>1384</sup> Conversely, the weakness that results from the

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themselves, "through the principle of self identification, or be used by other people to identify them". The Commission identified characteristics such as race, ethnicity, language, religion, culture, territory they occupy in a State, common history, and ethno-anthropological factors.

<sup>1378</sup> AComHPR, *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v. Sudan*, para. 221.

<sup>1379</sup> AComHPR, *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions v. Sudan*, para. 223.

<sup>1380</sup> Murray, *The African Commission on Human and Peoples' Rights and International Law*, Hart Publishing, 2000, p.

<sup>1381</sup> Ouguergouz, *op. cit.*, p. 477.

<sup>1382</sup> Ouguergouz, *op. cit.*, p. 427.

<sup>1383</sup> Ouguergouz, *op. cit.*, p. 449.

<sup>1384</sup> Ouguergouz argues that fundamental change of circumstances (Art. 62 VCLT) would be most applicable for African States derogating from the Charter obligations, see Ouguergouz, *op. cit.*, p. 467. Hartman argues that the doctrine of necessity would prove the best fit to describe the derogation concept.

omission of an *ad hoc* clause has led to the recommendation that an amendment of the Charter be made to incorporate it, calling upon the African Commission and the African Court on Human and Peoples' Rights to lay down “*the conditions for legitimate derogation*”.<sup>1385</sup> In the same regard, it has been stressed that, while “*the system of derogation brings with it specific guarantees of protection*”, its deficiency in the Charter “*renders exceptional circumstances commonplace, leading to their improper perpetuation*”.<sup>1386</sup>

Nevertheless, the failure of these previous arguments to take into account relevant factors that may explain that omission has also been highlighted. They concern the expansion of non-derogable rights in human rights treaties adopted before the African Charter, the inclusion of ESC rights under the AfrCHPR (which further expanded non-derogable rights), and the failure of many African States to comply with the stringent requirements of derogation under the ICCPR alongside their misuse of the tool of emergency to retain extraordinary powers and their regular invocation of domestic provisions allowing for a state of emergency.<sup>1387</sup>

Moreover, it is apt to note that both specific and general limitation clauses included in many provisions of the AfrCHPR have been considered broad enough to explain the absence of a derogation clause in the Charter.<sup>1388</sup> Thus, the use of specific limitation clauses taking the form of right-specific claw-back clauses (*e.g.* Articles 6, 8, 9(2), 10(1), and 12(1)) would allow for far-reaching restrictions of the protected rights, thereby making a derogation clause superfluous.<sup>1389</sup> The confusion that a limitation clause could serve the purpose of derogation under the AfrCHPR has been criticised however.<sup>1390</sup> In any case, notable in the African Charter is that the economic and social rights are formulated neither with claw-back clauses nor with such core modifiers/restraints as “*progressive realisation*” or “*within available resources*”.

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<sup>1385</sup> Heyns, “Civil and political rights in the African Charter”, in M. Evans and R. Murray (eds.), *The African Charter on Human and Peoples' Rights. The system in practice, 1986-2000*, Cambridge, 2002, pp.139 and 162.

<sup>1386</sup> L. Sermet, “The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion”, 7 *African Human Rights Law Journal*, 2007, pp. 153-154. To the author, jurisprudential inclusion of a derogation clause might remedy that deficiency, see *ibid.*, p. 155. In the same regard, see Allo A.K., “Derogation or limitation? Rethinking the African human rights system of derogation in light of the European system”, 2 *Ethiopian Journal of Legal Education*, 2009, p. 52.

<sup>1387</sup> A.J. Ali, “Derogation from Constitutional Rights and Its Implication Under the African Charter on Human and Peoples' Rights”, 17 *Law, Democracy and Development*, 2013, pp. 84-89. The author refers to the practice of misusing the state of emergency in relation to Nigeria, Sierra Leone, Côte d'Ivoire, Egypt, Zambia and Ethiopia.

<sup>1388</sup> See “Report of the Meeting of Experts on Rights Not Subject to Derogations During States of Emergency and Exceptional Circumstances, 17-19 May 1995”, in D. Premont, C. Stenresen, and I. Oseredczuk (eds.), *Non-derogable Rights and States of Emergency*, *op. cit.*, at 36, para. 21.

<sup>1389</sup> See Wessels, “Derogation from human rights: a possible dispensation for Africa and Southern Africa”, *African Yearbook of International Law*, 2002, pp. 132-133. See also R. Murray, *The African Commission on Human and Peoples' Rights and International Law*, Hart Publishing, 2000, p. 126.

<sup>1390</sup> According to Ouguergouz the limitation clause cannot be used as a derogation clause, see F. Ouguergouz, *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa*, Martinus Nijhoff Publishers, 2003, p. 434.

### 3.3.3. Additional remarks in the light of general international law

The determination of the obligations of States parties to human rights treaties not encompassing an *ad hoc* derogation clause and affected by a situation of public emergency, such as conflict or occupation, also entails taking into consideration the existence of any rule in international law that would permit State parties' suspension of the rights concerned and thus non-compliance with the corresponding obligations.<sup>1391</sup>

At first glance, the *pacta sunt servanda* rule suggests that no derogations should be allowed from a treaty that does not expressly provide for such a possibility, and State parties should unconditionally respect its terms and perform it in good faith.<sup>1392</sup> Nevertheless, general international law allows States to resort to certain justifications to excuse non-compliance with their international obligations. In this respect, circumstances precluding the wrongfulness of States' conduct that would otherwise not conform to States' international obligations have been recognised in Chapter V (Article 20-27) of the ILC's Draft Articles of 2001.<sup>1393</sup> For the present study, state of necessity and *force majeure* are of pertinence.<sup>1394</sup>

In this regard, some practice may be found in the ILO's jurisprudence on Conventions No. 87 and No. 49, which do not encompass provisions permitting derogation in times of public emergency. In two complaints brought against Greece and Poland respectively, ILO monitoring bodies used the doctrine of *force majeure* as the principal source for justifying the adoption of measures incompatible with the obligations stemming from these treaties, by also referring to key principles of international treaty law on derogation (*i.e.* temporariness, exceptional threat and proportionality).<sup>1395</sup>

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<sup>1391</sup> See *Report of the Meeting of Experts on Rights Not Subject to Derogations During States of Emergency and Exceptional Circumstances*, 17-19 May 1995, in D. Premont, C. Stenresen, I. Oseredczuk (eds.), *op. cit.*, paras. 36-39; Oraà, *Human Rights in State of Emergency in International Law*, Oxford University Press, 1992, Part II, Chapters 8-10; Rosas, Sandvik, Nylund, "Armed Conflicts", in *Economic, Social and Cultural Rights: A Textbook*, Martinus Nijhoff Publisher, 2001, p. 414; P. Alston and G. Quinn, *op. cit.*, p. 218, where they do not exclude such a possibility.

<sup>1392</sup> Article 26 VCLT. In support of this conclusion is the mentioned savings clause common to all the major human rights treaties expressly allowing derogations, which provides that the emergency measures authorized by those provisions must not be inconsistent with their other obligations under international law, see Article 4 (1) ICCPR, Article 15 (1) ECHR, Article 27 (1) ACHR.

<sup>1393</sup> "Draft Articles on Responsibility of States for Internationally Wrongful Acts", A/56/10 (Suppl. 10), *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two), pp. 71-86.

<sup>1394</sup> On the doctrine of *force majeure* in public international law, see ILC, "Survey on 'Force Majeure' and 'Fortuitous Events'", *Yearbook of the International Law Commission*, 1978, Vol. II, (Part One); Article 23 and accompanying commentary of the ILC 2001 Draft Articles, *op. cit.*, at 76. On the doctrine of necessity, see Article 25, *ibid.*, at 80; and ICJ, *Case concerning the Gabckovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 September 1997, paras. 51-52.

<sup>1395</sup> See also *Report of the Meeting of Experts on Rights Not Subject to Derogations During States of Emergency and Exceptional Circumstances*, 17-19 May 1995, in D. Premont, C. Stenresen, and I. Oseredczuk (eds.), *op. cit.*, pp. 38-9, para. 26-28.

Specifically, in 1971 the ILO Special Commission of Inquiry, established to examine the observance of ILO's Freedom of Association Conventions by Greece, observed that “(t)he position of pleas of emergency or necessity in international custom may be said to correspond essentially, within the peculiar framework of the international community, to the place given to pleas of force majeure or legitimate self-defence in national systems of law. A plea of force majeure generally requires a showing of irresistible force of circumstances. A plea of legitimate self-defence requires a showing both of imminent danger and of a proportionate relationship between the danger and the measures adopted for defence. Both the general principles of law derived from national practice and international custom are based on the assumption that the non-performance of a legal duty can be justified only where there is impossibility of proceeding by any other method than the one contrary to law. It must also be shown that the action sought to be justified under the plea is limited, both in extent and in time, to what is immediately necessary”.<sup>1396</sup> The Commission concluded that measures incompatible with those conventions would be acceptable if they were “strictly necessary given the exigencies of the situation”. Even the Commission of Inquiry investigating violations of the same Conventions by Poland recognised that in principle *force majeure* could have been invoked, but Poland was required to prove that the derogation measures had been justified by “circumstances of extreme gravity” and were “limited in scope and duration to what is strictly necessary given the exigencies of the situations”.<sup>1397</sup>

Legal scholarship commenting on these cases has pointed out that the doctrine of necessity may fit better as excuse for non-compliance with human rights obligations in situations of public emergency.<sup>1398</sup> Reliance on *force majeure* is appropriate when there is a material impossibility to comply (*i.e.* when the State, in facing the occurrence of “an irresistible force” or “an unforeseen event”, beyond its control, has no other option but to act in violation of an international obligation).<sup>1399</sup> In this regard, during public emergencies States may however be in the position to opt for different policies to handle serious situations, and that there may exist no material possibility to perform

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<sup>1396</sup> See *Report of the Commission appointed under Article 26 of the Constitution of the International Labour Organization to examine the Complaints concerning the Observance by Greece of the Freedom of Association and Right to Organise Convention 1948 (No. 87, and of the Right to Organise and Collective Bargaining Convention 1949 (No. 98)*, International Labour Office Official Bulletin, Special Supplement Vol. LVI. No. 2 (1971), p. 26, para. 110.

<sup>1397</sup> See *Report of the Commission appointed under Article 26 of the Constitution of the International Labour Organisation to examine the Complaints concerning the Observance by Poland of the Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87), and the Rights to Organise and Collective Bargaining Convention 1949 (No. 98)*, made by a member of the delegates to the 52<sup>nd</sup> sess. of the ILO Conference, International Labour Office Official Bulletin, Special Supplement LXVII, Series B (1984), at 126-127, para. 479.

<sup>1398</sup> See Oraà, *op. cit.*, pp. 221-6; the author also refers to other cases under the supervision of ILO monitoring organs that confirms the ILO position. See Svensson-McCarthy, *The International Law of Human Rights and States of Exception*, Martinus Nijhoff Publishers, 1998, p. 348.

<sup>1399</sup> See Article 23 ILC's Draft Articles of 2001.

certain human rights obligations may be easily invoked.<sup>1400</sup> Conversely, reliance on the plea of necessity is possible where failure to comply with an international obligation is the only way a State has “to safeguard an essential interest against a grave and imminent peril” and “does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole”<sup>1401</sup>.

Nonetheless, a public emergency prompted by a situation of armed conflict may well make it impossible for the State concerned to conform to certain positive human rights obligations, particularly those calling for the provision of goods and services. Indeed, the relevance of the plea of *force majeure* has been admitted among scholars.<sup>1402</sup> In this vein, the Maastricht Guideline 14(f) includes among the examples of violations of ESC rights “(t)he calculated obstruction of, or halt to, the progressive realisation of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure”. Yet it is noteworthy that, as formulated in the ILC’s Draft Articles of 2001, *force majeure* cannot be invoked if the unforeseen event “is due either alone or in combination with other factors, to the conduct of the State invoking it; or [...] the State has assumed the risk of that situation occurring”.

In any case, if a State decides to refer to the notion of *force majeure* to justify non-compliance with its legal human rights commitments, an obligation to do the utmost to remedy the situation still remains in force, and compliance with this obligation may include asking and receiving foreign assistance.

### **3.4. The relevance of *ad hoc* limitation clauses**

Several core human rights conventions openly grant States parties the possibility to subject them to certain limitations for far-reaching reasons. These clauses are legally distinct from derogation provisions in terms of *nature*, *scope*, and *conditions* justifying their use. Limitation clauses represent an usual component of the human rights treaties system, allowing States parties to restrict flexibly the free exercise of enshrined rights in order to *safeguard certain public interests* or to *solve possible conflicts between rights* - rather than constituting a response to narrowly determined situations of public emergency that threaten the life of the nation. In serving such a distinct purpose, the concept of limitation also emphasises that rights are not absolute and must be balanced between individual and

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<sup>1400</sup> See *Report of the Meeting of Experts on Rights Not Subject to Derogations During States of Emergency and Exceptional Circumstances*, Annex I, in E/CN.4/Sub.2/1995/20, 26 June 1995, para 27.

<sup>1401</sup> See Article 25 ILC’s Draft Articles of 2001. Necessity “does not involve conduct which is involuntary or coerced”, see Commentary, p. 80.

<sup>1402</sup> For authors admitting the relevance of force majeure, see Rosas-Sandvik-Nylund, “Armed Conflicts”, in *Economic, Social and Cultural Rights: A Textbook*, Martinus Nijhoff Publisher, 2001, p. 414. M. Sepulveda, *The Nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia, 2003, pp. 297-298.

public interests. As to the scope of application, limitation measures refer to one-off restrictions on the right in question, while derogation measures entail a temporary total suspension or exclusion of the operation of the right in question.

In fact, limitation and derogation clauses may resemble each other when a limitation is based on national security, as will be further analysed below. Nevertheless, the protection of *a strictly limited set of well-defined public interests* is required for justifying States' imposition of a limitation, including public safety or national security, public morals, public order, public health, or the respect for fundamental rights of others.<sup>1403</sup> As such, *three different conditions are necessary to substantiate a limitation*: it has to be established by law, compatible with the nature of the rights in question, and designed to further the general welfare. Moreover, a proportionate relationship between the restriction on the right as such and the reason behind that restriction is required where imposing such a limitation: *the faculty of limiting a protected right is given only in accordance with clearly established criteria preventing States' arbitrariness*. Therefore, as in the case of derogations, the proportionality principle ensures that limitations may not permit States to disregard their human rights obligations altogether.<sup>1404</sup> Furthermore, it is noteworthy that, consistently with the object and purpose of human rights treaties to protect the individual, the burden falls upon States parties to prove the legitimacy of a limitation imposed upon the enjoyment of a certain right.

Relevant instances of *ad hoc limitation clauses* are those permitting States parties to *restrict the free exercise of a specific right in the interest of national security*, which might be invoked in war-torn situations. Specifically, the ICESCR includes a clause for *the limitation of the right of everyone to form trade unions and join the trade union of his choices* (Article 8, lett. a) as well as the *right of trade unions to function freely* (Article 8, lett. c), which explicitly allows for restrictions imposed by law and necessary “*in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others*”. As it will further be discussed below, this is the only case in which the ICESCR explicitly permits limitations of some of the enshrined ESC rights for far-reaching reasons. Articles 13 and 15 CRC allows for laws limiting the rights of the child to *freedom of expression* and to *freedom of association* when this would be

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<sup>1403</sup> See Article 29(2) UDHR, and Articles 12(3), 13, 14, 18(3), 19, 21 and 22(2) ICCPR, concerning respectively the right to freedom of movement, limitations on expulsions of aliens, due process guarantees, the right to freedom of religion, freedom of expression, the right to peaceful assembly, and freedom of association. For instance, limitations for reasons of public order have often affected the right to freedom of movement when a society faces threats of terrorist attacks or non-international armed conflicts in order to guarantee people's safety; and the imposition of curfews may be justified, see M. Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary*<sup>2</sup>, *op. cit.*, p. 278; Lockwood, Finn and Jubinsky, “Working Paper for the Committee of Experts on Limitation Provisions”, *HRQ*, 1985, pp. 56-63; Siracusa Principles, paras. 22-24 on public order.

<sup>1404</sup> See H.J. Steiner, P. Alston, R. Goodman (eds.), *International Human Rights in Context: Law, Politics, Morals*<sup>3</sup>, Oxford, 2008, p. 358. The authors point out some similarities between limitations and derogations.

necessary for, *inter alia*, national security. Finally, according to Articles 11 and 12 AfrCHPR, restrictions on the exercise of, respectively, the *right to assemble freely with others* and the *right to leave any country including his own, and to return to his country*, are allowed only if they are provided by law and they function with respect to certain interests, including national security.

Conversely, Article 4 ICESCR contains a *general limitations clause* deserving attention. It does not openly consent States parties to avail themselves of permissible restrictions on the rights guaranteed in the Covenant during extraordinary circumstances such as armed conflict and belligerent occupation. Nevertheless, in these contexts the protection of civilians' ESC rights may be challenged by certain measures that restrict - or even *de facto* suspend - them or by certain policies resulting in gross and systematic abuses. Special concern exists for violations of the *right to an adequate standard of living*, which entails, at a minimum, that everyone shall enjoy the necessary subsistence rights, such as adequate food and nutrition, clothing, housing and the necessary conditions of care when required.<sup>1405</sup> Equal concern is for violations of the *right to health*,<sup>1406</sup> which includes a range of socio-economic determining factors of health, such as nutrition, potable water, housing, safe and healthy working conditions, as well as healthy environment. Similarly, of great concern are violations of the *right to education*,<sup>1407</sup> or violations of the *right to social security and social protection*.<sup>1408</sup>

These concerns support a careful examination of Article 4 ICESCR to address its implications in conflict-related settings in the light of the most common understanding that this limitation clause permits States to respond “flexibly” to extraordinary circumstances of tension within a democratic society.

### **3.5. The ICESCR's general limitation clause and its implications in conflict-affected situations**

The literal interpretation of the general limitation provision of Article 4 ICESCR allows States parties to subject the rights set forth in the Covenant “*only 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*

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<sup>1405</sup> Article 11 ICESCR. The CESCR has issued several General Comments explaining the components of this right including the right to adequate housing (*General Comments Nos. 4 and 7*), the right to food (*General Comment No. 12*), the right to water (*General Comment No. 15*) as well as the right to social security (*General Comment No. 19*). The Committee has elaborated on the criteria to be met to fulfil the rights to housing, food and water, providing comprehensive interpretation of these rights under international law. For the adequate standard of living in periods of occupation, see *Report of the Special Committee to investigate Israeli practices affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, UN Doc. A/58/311, 22 August 2003, paras. 44 ff.

<sup>1406</sup> Article 12 ICESCR, stating that everyone has the right to “*the highest attainable standard of physical and mental health*”. Article 12 (b) identifies four steps the State has to take so as to promote conditions for an healthy life, including *inter alia* the improvement of environmental hygiene, preventive health care and the prevention of occupational diseases.

<sup>1407</sup> Article 13 and 14 ICESCR.

<sup>1408</sup> Article 9 ICESCR.

*welfare in a democratic society*". For the purposes of the present research relevant issues arising in this regard are at least twofold. Firstly, it seems crucial to explore *the extent to which States parties are permitted under the ICESCR to limit ESC rights in conflict-affected situations*; accordingly, the scope of admissible limitations under Article 4 will be examined. Secondly, it seems pertinent to scrutinise States parties' *possibility to resort to derogations* from some of the obligations stemming from the Covenant, notwithstanding the absence of an *ad hoc* clause.

Aside from interesting aspects featuring the *travaux préparatoires* of ICESCR, these issues are inquired mainly in view of various approaches undertaken by the CESCR as well as States in the reporting procedure under the ICESCR.<sup>1409</sup> In actual fact, the available information as to the CESCR and States' interpretations of Article 4, or about their opinion and practice on possible derogations from the Covenant is not so abundant. This is essentially due to the fact that the first version of the Committee's general guidelines did not mention Article 4;<sup>1410</sup> thus was absent a requirement of States parties to report on limitations eventually imposed on ESC rights and any reference to derogations alongside the related national and international legal basis. Nonetheless, positive developments derive from the new guidelines.<sup>1411</sup> States parties are currently required to include, in core documents sent to all treaty bodies, information explaining the scope of "*derogations, restrictions or limitations; the circumstances justifying them; and the timeframe envisaged for their withdrawal*".<sup>1412</sup>

### **3.5.1. The scope of admissible limitations on ESC rights**

As anticipated, the three explicit requirements legitimising restrictions under Article 4 ICESCR include *determination by law*, *compatibility with the nature of the rights*, and *promotion of general welfare as the sole purpose*. In order to shed light on the scope of admissible limitations, some features of this general clause are discussed below.

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<sup>1409</sup> In accordance with Article 17 ICESCR, the ECOSOC (by Resolution 1988 (LX) of 11 May 1976) established a programme under which the States parties to the Covenant would furnish in stages the reports referred to in Article 16; at the Human Rights Council's request the Secretary General subsequently drew up a set of general guidelines.

<sup>1410</sup> CESCR, *Revised general guidelines regarding the form and contents of reports to be submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, 17 June 1991, UN Doc. E/C.12/1991/1. In response to the introduction of a new reporting cycle, at its fifth session (26 November - 14 December 1990) it adopted revised general guidelines that replaced the Secretary General's original ones.

<sup>1411</sup> ECOSOC, *The Guidelines on Treaty Specific Documents to be submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, E/C.12/2008/2, Annex, 24 March 2009. The Committee in fact decided to replace the revised general guidelines with the harmonised guidelines on reporting under human rights treaties (see *The Compilation of Guidelines on the Form and Content of Reports*, HRI/GEN/2/Rev.5, 29 May 2008) as well as its evolving practice on the application of the ICESCR as reflected in Concluding Observations, General Comments and Statements.

<sup>1412</sup> See UN Doc. E/C.12/2008/2., *ibid.*, para. 14, as read in conjunction with HRI/GEN/2/Rev.5., para. 40 (c).



### 3.5.1.a. Article 4 as a protective clause of ESC rights

Article 4 was intended to function as a *protective clause of the individuals' ESC rights*, rather than as a permissive provision in relation to States parties' power to impose limitations. Furthermore, it was not meant to refer to limitations prejudicing the “*subsistence or survival*” of the person or her/his integrity.<sup>1413</sup> In comparison with the specific limitation clause of Article 8, the terminology used in Article 4 reduces *the reasons* as well as *the way* under which a restriction may generally affect the ESC rights enshrined in the Covenant.<sup>1414</sup> Valuable considerations in this regard may be determined in the light of the *travaux préparatoires* of the ICESCR.

In particular, Article 4 was not meant to apply to “*retrogressive measures*” (*i.e.* restrictions imposed by a State for reasons of lack of resources) since they fell under Article 2(1) ICESCR.<sup>1415</sup> As underlined by the Committee, a State party has the burden to prove that any retrogressive measure was adopted only after having cautiously considered all the alternatives, having substantially justified it for all the rights enshrined in the Covenant (an impact assessment), and having fully used its maximum available resources.<sup>1416</sup> Indeed, a “*deliberate retrogressive measure*” is understood to imply a step back in the protection afforded to these rights and result from an intentional decision of a State party.<sup>1417</sup>

Therefore, the protective function of Article 4 ICESCR may lead us to argue that a State party seeking to excuse the adoption of a retrogressive measure is required to guarantee that *the decrease in resources does not give rise to a violation of its obligations under the Covenant, above all those under Article 4*. In fact,

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<sup>1413</sup> This is clarified by the Limburg Principles No. 46-47.

<sup>1414</sup> The difference may be understood in light of the character of the rights protected under Article 8, which resembles civil and political rights than any of the other rights protected in this Covenant. A relevant question is whether the far-reaching reasons enumerated in Article 8 (*public order, national security, and the protection of the rights and freedoms of others*) might permit limitations of any other rights protected under the ICESCR, beyond the promotion of general welfare that is actually the sole purpose explicitly stated in the general limitation clause of Article 4. For extensive discussion on this point, see A. Muller, *op. cit.*, at 557-601.

<sup>1415</sup> The issue on the possible ways to limit ESC rights for legitimate interests of the community was a focus during the debates of the 234<sup>th</sup>-236<sup>th</sup> and 306<sup>th</sup>-308<sup>th</sup> meetings of the UN Commission on Human Rights in 1951 and 1952. See, *e.g.*, the explicit statement made by the UK representative that “*Article 32 [now Article 4] solved the problem of limitation which was not solved by Article 1 [now Article 2]*”, see *Summary Record of the 308<sup>th</sup> meeting of the UN Commission on Human Rights*, 6 June 1952, UN Doc. E/CN.4/SR.308, at 5. Other States' representatives made similar statements: for example, Australia, *ibid.*, at 5; Chile, *ibid.*, at 6; USSR, *Summary Records of the 306<sup>th</sup> meeting of the UN Commission on Human Rights*, 6 June 1952, UN Doc. E/CN.4/SR.306, at 11; France, *Summary Record of the 307<sup>th</sup> meeting of the UN Commission on Human Rights*, 6 June 1952, UN Doc. E/CN.4/SR.307, at 5; and Pakistan, *ibid.*, at 13.

<sup>1416</sup> See CESCR, *General Comment No. 3*, para. 9.

<sup>1417</sup> Examples may include: the adoption of any legislation/policy having a direct or collateral negative effect on the enjoyment of ESC rights or any legislation discriminating the enjoyment of these rights; the abrogation of any legislation or policy in accordance with these rights (unless obsolete) without replacing it with equally or more consistent laws or remedial measures; the unjustified reduction in public costs devoted to realising ESC rights without adequate compensatory measures intended to safeguard the injured individuals.

insofar as a retrogressive measure results in a limitation on an ESC right, it may be posited that compliance with the requirements set forth in Article 4 is still required upon that State.<sup>1418</sup>

### **3.5.1.b. Article 4 as a clause intrinsically linked to “progressive realisation”**

The drafting of Article 4 was intrinsically related to the notion of “*progressive realisation*” embodied in the general implementation clause of Article 2(1), hence to the specific nature of ESC rights,<sup>1419</sup> which is deemed partly programmatic since they set objectives that may be achieved in stages and over time. As highlighted in section 2.c.ii., however, the notion of “*progressive realisation*” entails a “*continuous improvement*” approach. While this is a necessarily flexible tool reflecting possible difficulties of States parties in ensuring ESC rights, the same notion must be interpreted in view of the general object (the *raison d’être*) of the ICESCR, namely setting up States parties’ obligations towards a full realisation of the rights in question. Accordingly, “*progressive realisation*” has been deemed a concept requiring them *to move promptly and efficiently towards that aim*.<sup>1420</sup>

Remarkably, the decision to include a general limitations clause into the Covenant was adopted by a narrow majority within the Commission on Human Rights during the drafting process.<sup>1421</sup> Moreover, other reasons such as “*public order*”, “*public morals*” and “*the respect for rights and freedoms of others*” were rejected by States representatives, because they were deemed *inappropriate* for limitations on ESC rights, despite their relevance for limitations on civil and political rights.<sup>1422</sup>

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<sup>1418</sup> Among the violations of ESC rights that arise through direct action of States, Maastricht Guideline No. 14 includes, in lett. (f), “*the calculated obstruction of, or halt to, the progressive realisation of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure*”.

<sup>1419</sup> For an analysis of the *travaux préparatoires* of Article 4, see P. Alston and G. Quinn, *op. cit.*, at 194.

<sup>1420</sup> See CESCR, *General Comment No. 3*, *op. cit.*, para. 9, which concludes by stressing that “*any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources*”.

<sup>1421</sup> The issue on whether the UN Commission on Human Rights wanted to incorporate a general limitation clause into the ICESCR (rather than clauses for specific rights) was determined favourably by nine votes to eight, and one abstention, see *Summary Record of the 308<sup>th</sup> meeting of the Commission on Human Rights*, 6 June 1952, E/CN.4/SR.308, at 8. Specifically, at that session, the Commission, at request of the USSR representative, cast a vote as to the suitability of including a general limitation clause: by a compact roll-call vote, the Commission decided to include it, see *UN Commission on Human Rights, report of the Eighth Session (14 April to 14 June 1952), ECOSOC, Final Records: Fourteenth Session, Supplement No. 4*, E/2256, at 24, para.159. *In favour*: Australia, Belgium, China, France, Greece, India, Sweden, United Kingdom, United States of America. *Contra*: Chile, Egypt, Lebanon, Pakistan, Poland, Ukraine, USSR, Yugoslavia. *Abstention*: Uruguay. At the same meeting, draft Article 32 (present Article 4) as a whole was adopted in a roll-call vote by ten votes to six, with 2 abstentions, see *ibid.*, at 25, para.160. *In favour*: Australia, Belgium, China, France, Greece, India, Sweden, United Kingdom, United States of America, Uruguay. *Contra*: Chile, Lebanon, Poland, Ukraine, USSR, Yugoslavia. *Abstentions*: Egypt, Pakistan.

<sup>1422</sup> For Lebanon, see *Summary Record of the 234<sup>th</sup> meeting of the UN Commission on Human Rights*, 2 July 1951, UN Doc. E/CN.4/SR.234, at 20; for India, *ibid.*, at 23; for Yugoslavia, *Summary Record of the 235<sup>th</sup> meeting of the UN Commission on Human Rights*, 2 July 1951, UN Doc. E/CN.4/SR.235, at 5; for U.S.S.R., *ibid.*, at 7; for Pakistan, *ibid.*, at 17; for Chile, *Summary Record of the 307<sup>th</sup> meeting of the UN Commission on Human Rights*, 6 June 1952, UN Doc. E/CN.4/SR.307, at 6; for Poland, *ibid.*, at 8; for Egypt, *ibid.*, at 12. See also P. Alston and G. Quinn, *op. cit.*, at 202.

Thus, it may be argued that a State party seeking to excuse a failure to comply with the obligation to take steps due to resources constraints is still required to guarantee that it is acting within a limitation allowed under Article 4.

### **3.5.1.c. Article 4 as a clause not appealing to “public order”**

The notion of “*national security*” was *never* suggested as a reason for possible restrictions under the general limitation clause of the ICESCR. Furthermore, the rejection of the wording of Article 29(2) UDHR<sup>1423</sup> led Article 4 of the Covenant *not to* allow explicitly limitations “*for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order*”.<sup>1424</sup>

All the previous considerations regarding the *travaux préparatoires* of the ICESCR inspire a further reflection on the rejected reason of “*public order*”, which may be significant in war-torn contexts where several human rights treaties may be applicable at the same time. It may be the case that the ICESCR applies to a certain situation in which the applicability of another relevant human rights treaty such as the ICCPR may be legitimately restricted. In such a situation, the issue arises as *to what extent a permissible limitation of a right protected under the ICCPR (such as freedom of movement) may negatively affect the people’s ability to enjoy certain rights protected under the ICESCR (such as basic subsistence rights to food, health, housing or clothing) to which no limitations seem justifiable under this Covenant beyond the promotion of general welfare*. In facing such a problematic interplay between different rights, the widely accepted interdependence of human rights gains relevance even where we might reflect upon a further observation. On the one hand, the promotion of general welfare is the sole purpose explicitly incorporated in Article 4 ICESCR, and, on the other hand, the protection of human life may base certain restrictions of the rights enshrined in the ICCPR. Thus, such interplay entails acknowledging the importance of *conformity to the fundamental principles of necessity and proportionality*, as general welfare certainly does not exclude the protection of human life.

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<sup>1423</sup> Article 29(2) UDHR limits the exercise of rights in the following manner: “(2) *In the exercise of his (sic) rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society*”.

<sup>1424</sup> In this respect, the US proposal based on Article 29 UDHR (UN Doc. E/CN.4/610/Add.2) was amended, see *Summary Record of the 236<sup>th</sup> meeting of the UN Commission on Human Rights*, 2 July 1951, UN Doc. E/CN.4/SR.236, at 14. Moreover, the terms “*respect for the rights and freedoms of others*” and “*legitimate requirements of morality and public order*” were reintroduced by France as reasons for limitations of ESC rights, but this proposal was withdrawn as it was not broadly supported, see *Summary Record of the 308<sup>th</sup> meeting of the UN Commission on Human Rights*, 6 June 1952, UN Doc. E/CN.4/SR.308, at 7.

Relevant practice includes the case of the “security wall” separating Israel and the occupied Palestinian territories, from which has arisen the delicate issue of the *impact* of the limitations to freedom of movement *on the enjoyment of a number of ESC rights (health, education, work, adequate standard of living including food, clothing and housing) of Palestinians living therein*. As recognised by the ICJ, the construction of the wall, the established closed area between the latter and the Green Line, and the created enclaves have “*imposed substantial restrictions on the freedom of movement*” of local inhabitants (excepting Israeli citizens and those assimilated thereto); serious repercussions for agricultural production have also emerged, alongside “*increasing difficulties for the population concerned regarding access to health services, educational establishments and primary sources of water*”.<sup>1425</sup>

In considering the applicability of exceptions provided for in applicable human rights conventions, examining the provisions permitting derogation from them or qualifying the rights enshrined therein, the ICJ found that *the conditions laid down by the relevant norms were not met in this case*.<sup>1426</sup> Israel was deemed bound to respect all the provisions of the ICCPR, except Article 9 on the right to freedom and security of person. Further, although Article 12(3) permits some restrictions on freedom of movement, to the ICJ the latter not only must be “*directed to the ends authorized*” (*i.e.* the protection of public health or morals, public order, national security), but also be “*necessary for the attainment of those ends*”. Besides, they “*must conform to the principle of proportionality*” and “*must be the least intrusive instrument*” available. In its conclusion, these conditions were not met in this case<sup>1427</sup>.

Focusing on ESC rights, *the restrictions* following the construction of the wall and placed on their enjoyment by the Palestinians living in the occupied territories were deemed to *fail to meet the condition specified in Article 4 ICESCR (i.e. they must be “solely for the purpose of promoting the general welfare in a democratic society”)*.<sup>1428</sup> On this point, however, it is worth observing that the ICJ could have articulated that *the restrictions (resulting from a wall aimed at protecting life and limb of civilians) would not contradict Article 4 ICESCR*: accepting the view that promoting general welfare does not exclude protecting life, in actual fact, would not acknowledge the legitimacy of restrictions under the ICCPR, but any limitations on ESC rights (even if meeting the condition of Article 4) would

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<sup>1425</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, paras. 133-134.

<sup>1426</sup> As highlighted in other parts of the present study, the ICJ declared, “*on the basis of the information made available to it*”, the applicability of the ICCPR and the ICESCR to the OPT by restating and supporting the long-standing positions of the corresponding treaty-based bodies. Furthermore, in using their views as the basis for its statement on the matter, this advisory opinion has reinforced their status as basic sources for the understanding of international human rights law, though not as judicial bodies.

<sup>1427</sup> ICJ, *ibid.*, para. 136, referring to the HRC, *General Comment No. 27: Freedom of movement (art. 12)*, UN Doc. CCPR/C/21/Rev.1/Add.9, para. 14.

<sup>1428</sup> ICJ, *ibid.*, para. 136.

nonetheless have to be consistent with the principles of proportionality and necessity.<sup>1429</sup> In this sense, testing the proportionality of the restrictions on freedom of movement implies *evaluating the seriousness of the harm made to the impediments to ESC rights* such as work, education and health. Accordingly, a critical question remains as to why the ICJ did not consider such principles, and, instead, it found a violation based on the purpose of the restrictions concerned. Indeed, the ICJ would have probably observed the disproportionality of the harm - as did the Israeli High Court of Justice in reviewing particular sections of the barrier<sup>1430</sup> - and then the ICJ would have still determined the violation of these rights.<sup>1431</sup>

Nonetheless, in expressing doubts as to the specific route chosen for the barrier as “necessary to attain its security objectives”, the ICJ observed that “*the wall, along the route chosen, and its associated regime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel*” and “*the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order*”.<sup>1432</sup>

#### **3.5.1.d. The significance of “the general welfare” under Article 4**

The preceding considerations support a *restrictive interpretation* of this expression, although the *travaux préparatoires* have not elaborated its meaning and the CESCR has not yet commented directly on its understanding of general welfare.

The Limburg Principles’ comment on the phrase “*promoting general welfare*” only underlines *the necessity to construe it “to mean furthering the wellbeing of the people as a whole”*.<sup>1433</sup> As authoritatively underlined, while such a term is broadly defined in general legal usage (*i.e.* indicating the government’s concern for health, peace, morals and safety of its citizens), the drafters of Article 4 were concerned to ensure that *limitations could not be lightly justified*; in this respect, an extensive

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<sup>1429</sup> On this aspect, see also N. Lubell, “The ICJ Advisory Opinion and The Separation Barrier: A Troublesome Route”, 35 *Israel Yearbook on Human Rights*, 2005, 283, pp. 307-8. In particular, the author considers the case of the right to health in light of the view expressed by the CESCR in its General Comment: “*Such restrictions must be in accordance with the law, including international human rights standards, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued, and strictly necessary for the promotion of the general welfare in a democratic society. ... In line with Article 5(1), such limitations must be proportionate, i.e. the least restrictive alternative must be adopted where several types of limitations are available. Even where such limitations on grounds of protecting public health are basically permitted, they should be of limited duration and subject to review*”, see CESCR, *General Comment 14: The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4 (2000), paras. 28-29.

<sup>1430</sup> HCJ 2056/04, *Beit Sourik Village Council v. The Government of Israel*, 30 June 2004.

<sup>1431</sup> See N. Lubell, *op. cit.*, 2005 p. 308.

<sup>1432</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 137.

<sup>1433</sup> See Limburg Principles, No. 52.

interpretation has been deemed inappropriate, and its principal significance has been viewed more as related to the *protective function* of Article 4.<sup>1434</sup>

Further implications derive from the notion that “*general welfare*” is the *exclusive purpose* contained in the general limitations clause of the ICESCR. For instance, concerns such as ‘national security’, or imperatives such as ‘economic development’, which are likely to be referred to by governments affected by times of emergency to justify non-satisfaction of economic and social rights, gain relevance. Firstly, invoking these types of reasons might be legitimate in so far as they are genuinely synonymous with “*the general welfare*”. The treaty body mandated to monitor compliance with the ICESCR might be the appropriate organ for reviewing the eventual reasoning articulated by a government to determine what constitutes the general welfare. Secondly, open-ended concepts like “economic development” might not prove sufficiently adequate to limit the implementation of ESC rights such as education, health, and social security unless the concerned State is able to prove that in a certain situation such a fluid concept coincides with “*the general welfare*”.<sup>1435</sup> Legal scholarship has referred to another significant case regarding internal or international armed conflicts which featured a context of general scarcity of food, by which a State might be able to justify non-discriminatory rationing of food by arguing that this was necessary for maintaining general welfare (even though this would be at the same time a measure to maintain public order through ensuring equitable distribution).<sup>1436</sup>

Notably, these views on “*the general welfare*” of Article 4 have been supported by the CESCR in a number of its General Comments, although *its understanding of this exclusive purpose* explicitly incorporated in that clause *has never been directly articulated*. In particular, a State party is allowed to impose limitations of various aspects of *the right to health* for reasons of national security or public order by “*justifying such serious measures in relation to each of the elements identified in Article 4*”, hence by showing that *those limitations would be imposed for reasons of “promoting general welfare”*<sup>1437</sup>. Similarly, its

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<sup>1434</sup> See P. Alston and G. Quinn, *op. cit.*, pp. 201-202.

<sup>1435</sup> See P. Alston and G. Quinn, *op. cit.*, pp. 201-202, noting the Chilean representative’s statement (Mr. Santa Cruz) during the drafting of article 4, according to which the limitations clause should not justify a State “*delaying implementation of such rights as those to education, health and social security in order to concentrate all its resources on economic development, thus sacrificing the interests of the present generation to those of the next*”, see *Summary Record of the 235<sup>th</sup> meeting of the UN Commission on Human Rights*, UN Doc. E/CN.4/SR.235 (1951), at 13.

<sup>1436</sup> See A. Muller, *op. cit.*, p. 573.

<sup>1437</sup> CESCR, *General Comment No. 14: Right to the highest attainable standards of health (art. 12)*, 11 August 2000, UN Doc. E/C.12/2000/4, para. 28, reading: “*Issues of public health are sometimes used by States as grounds for limiting the exercise of other fundamental rights. The Committee wishes to emphasise that the Covenant’s limitation clause, article 4, is primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by States. Consequently a State party which, for example, restricts the movement of, or incarcerates, persons with transmissible diseases such as HIV/AIDS, refuses to allow doctors to treat persons believed to be opposed to a government, or fails to provide immunization against the community’s major infectious diseases, on grounds such as national security or the preservation of public order, has the burden of justifying such serious measures in relation to each of the elements identified in*

emphasis that Article 4 is mainly meant to protect individuals' ESC rights (instead of permitting States parties to impose restrictions) has led the Committee to stress that “*a State party which closes educational institutions on grounds such as national security or the preservation of public order has the burden of justifying such a serious measure in relation to each of the elements identified in Article 4*”.<sup>1438</sup> Furthermore, in some statements on national and international development policies, such as poverty reduction strategies or structural adjustment programmes, the Committee has shared the opinion that *broad concepts such as “economic development” may not easily justify restrictions on the rights guaranteed under the ICESCR*, since policies introduced in the name of open-ended notion may often impede the implementation of the Covenant's provisions by restricting disproportionately the ESC rights of the most vulnerable groups without “*promoting general welfare*”.<sup>1439</sup>

Interestingly, within war-torn contexts “*the general welfare*” purpose of Article 4 may raise another issue regarding States parties' use of resources for investments in the defence field. It is generally observed that “national security” and “public order” are not mentioned as purposes permitting limitations on ESC rights; moreover, this element entails that *States parties would be required to demonstrate that upholding such concepts is clearly equivalent to upholding “general welfare”*. Nonetheless, States' arguments that in times of armed conflict “general welfare” would be more effectively promoted by spending on defence (including on anti-insurgency operations) rather than on food, health-care, housing or social security programmes has been questioned.<sup>1440</sup> Despite a possible positive answer being suggested where a State faces an attack by a foreign aggressor, it is commonly and appropriately commented that *limitations on the minimum core of each right enshrined in the ICESCR are not justifiable*, given that the minimum core obligations do describe “*the nature of these rights*”. Such limitations would indeed deprive the Covenant of its essential content.

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*article 4. Such restrictions must be in accordance with the law, including international human rights standards, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued and strictly necessary for the promotion of the general welfare in a democratic society”.*

<sup>1438</sup> CESCR, *General Comment No. 13: Right to education (art. 13)*, 8 December 1999, UN Doc. E/C.12/1999/10, para. 42.

<sup>1439</sup> See, e.g., CESCR, *Concluding Observations on Egypt*, 23 May 2000, UN Doc. E/C.12/1/Add.44, para. 10, where the Committee found that “*some aspects of structural adjustment programmes and economic liberalisation policies introduced by the Government of Egypt, in concert with international financial institutions, have impeded the implementation of the Covenant's provisions, particularly with regard to the most vulnerable groups*”. Equally, see CESCR, *Concluding Observations on Kyrgyzstan*, 1 September 2000, UN Doc. E/C.12/1/Add.49, para. 29, stressing the duty of Kyrgyzstan to assess the impact of its economic reforms on the well-being of the population and reminding “*the State party of its obligation, even under severe resource constraints, to protect the vulnerable groups of society, as stated in paragraph 12 of the Committee's General Comment No. 3*”. See CESCR, “Statement on Globalisation and Economic, Social and Cultural Rights”, May 1998, para. 7. See CESCR, “Poverty and the ICESCR”, *Statement by the Committee to the Third United Nations Conference on Least Developed Countries*, 10 May 2001, para. 11.

<sup>1440</sup> See A. Muller, *op. cit.*, at 574-5, noting that the CESCR has indirectly touched upon aspects of this question under Article 2(1) ICESCR in addressing the justification of retrogressive measures occurring due to lack of resources, which has not been regarded as a limitation falling under Article 4; thus, this question seems related to finding a reasonable interplay in the application of Articles 4 and 2 (1).

### 3.5.1.e. Further implications from the qualifications under Article 4

Other qualifications to be satisfied by any restriction on ESC rights under the general clause of Article 4 deserve attention, since they comprehensively define the scope of admissible limitations of the Covenant even in war-torn contexts. In particular, the condition that any limitation must be acceptable “*in a democratic society*” plays a great role, being textually and inherently linked to the understanding of “*general welfare*”. As highlighted during the drafting process, its absence might have led, in fact, to the general limitation clause to “*very well serve the ends of dictatorship*”.<sup>1441</sup> Significantly, this view emphasises that *any States parties’ determinations on what constitutes “general welfare” need to be taken in the context of conditions prevailing in a democratic society*, which may be regarded as a society recognising and respecting the human rights set forth in the UN Charter, the UDHR and the relevant treaties subsequently adopted, although no single model of a democratic society seems to be identifiable. A further implication emerges in the Limburg Principles’ comment on Article 4, stating that *the burden is upon the State to demonstrate that the limitation on ESC rights do not impair the democratic functioning of the society*.<sup>1442</sup>

Another independent standard of legitimacy under Article 4 is that *any limitation on the rights protected under the Covenant is to be “determined by law”*. This condition obliges States parties to define such a limitation in national law in a way that it must be *consistent* with relevant human rights treaties as well as it must be *in force* at the time when the restriction is imposed.<sup>1443</sup> Similar implications are underlined in the Limburg Principles, of which the comment on Article 4 indicates that the laws imposing limitations on the exercise of a certain right should not be “unreasonable” or “discriminatory” or “arbitrary”, nor be understood or applied so as to put at risk its essence<sup>1444</sup>. Moreover, such laws should be understandable, besides providing guarantees and effective remedies against unlawful and abusive application of limitations on ESC rights.<sup>1445</sup>

It is worth referring to the 2011 Maastricht Principles on Extraterritorial Obligations of States in the area of ESC rights, which recognise in Principle No. 42 that States may impose on ESC rights only limitations which are legitimate under international law and which satisfy substantive and

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<sup>1441</sup> See the statement by the Greek representative, *Summary Record of the 235<sup>th</sup> meeting of the UN Commission on Human Rights*, 2 July 1951, E/CN.4/SR.235, at 20.

<sup>1442</sup> Limburg Principle, No. 54.

<sup>1443</sup> This view is confirmed by the CESCR for the right to adequate housing, referring extensively to the Human Rights Committee’ understanding of “law”, see *General Comment No. 7: The right to adequate housing (art. 11(1)): forced evictions*, 20 May 1997, UN Doc. E/1998/22, Annex IV, para. 15, referring, *inter alia*, to *General Comment No. 16: The right to privacy* (8 April 1988, UN Doc. A/43/40, para. 4). See also CESCR, *General Comment No. 15: The right to water (arts. 11 and 12)*, 20 January 2003, UN Doc. E/C.12/2002/11, para. 56, stating that “*any action that interferes with an individual’s right to water ... [must be] performed in a manner warranted by law, compatible with the Covenant*”.

<sup>1444</sup> Limburg Principles, Nos. 48, 49, 56.

<sup>1445</sup> Limburg Principles, Nos. 50-51.



procedural guarantees. The latter have been elaborated in relation to restrictions on the right to water, forced evictions, and retrogressive measures impairing the right to social security.<sup>1446</sup>

### **3.5.1.f. The required compatibility “with the nature of these rights”**

A condition exclusively incorporated in Article 4 requires *any restriction to be “compatible with the nature of these rights”*. This prerequisite for legitimacy gains relevance for the purposes of the present research. While some basic considerations are highlighted here below, further reflections on its several implications are articulated through out the chapters of this work. Firstly, the *travaux préparatoires* of Article 4 reveal how the aim expressed in the Chilean proposal of this phrase consists in assuring that *the impact of any limitations of the ICESCR is studied with regard to each right proclaimed in the Covenant individually* in order to inhibit their nullification.<sup>1447</sup> Secondly, no direct references to this expression are found in the CESCR’s General Comments or Concluding Observations. Nonetheless, the elaboration of a “*minimum core obligations approach*” in its General Comment on the nature of States parties’ obligations (particularly para. 10, see next section 2.c.ii.) reveals at least three aspects of its understanding about “*compatibility with the nature*” of ESC rights. The Committee appears to consider that (1) the minimum core obligations to secure minimum essential levels of each right enshrined in the Covenant represent the ‘nature’ of ESC rights, (2) States parties are required to comply with core obligations, and (3) they are non-derogable. According to this line of interpretation, the condition that *any limitation has to be “compatible with the nature of these rights”* does not to permit restrictions touching upon the minimum core obligations of the rights enshrined in the Covenant.

As detailed in section 2.c.ii., the minimum core obligations approach has been further articulated; the CESCR has identified the core obligations arising from “*minimum essential levels*” of the rights to food, education, health, and water. Moreover, in its view *States are not permitted to remain passive in cases of deprivation of individuals’ basic rights such as health or water, and non-compliance with their minimum core obligations is deemed a violation of the corresponding right under the ICESCR*.<sup>1448</sup> Significantly, it

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<sup>1446</sup> See *General Comment No. 15: The right to water*, para. 56; *General Comment No. 7: The right to adequate housing*, paras. 13-16; *General Comment No. 19: The right to social security*, para. 5.

<sup>1447</sup> *Summary Record of the 235<sup>th</sup> meeting of the UN Commission on Human Rights*, UN Doc. E/CN.4/SR.235 (1951), at 13. This proposal was made by the Chilean representative and was adopted by the Commission without any further discussion, see *Summary Record of the 236<sup>th</sup> meeting of the UN Commission on Human Rights*, 2 July 1951, UN Doc. E/CN.4/SR.236, at 11.

<sup>1448</sup> See *General Comment No. 14: The right to the highest attainable standards of health (art. 12)*, 11 August 2000, UN Doc. E/C.12/2000/4, paras. 47-48. Paragraph 47 reads: “*In determining which actions or omissions amount to a violation of the right to health, it is important to distinguish the inability from the unwillingness of a State party to comply with its obligations under article 12. This follows from article 12.1, which speaks of the highest attainable standard of health, as well as from article 2.1 of the Covenant, which obliges each State party to take the necessary steps to the maximum of its available resources. A State which is unwilling to use the maximum of its available resources for the realisation of the right to health is in violation of its obligations under article 12. If resource constraints render it*

has openly affirmed the non-derogability of the minimum core obligations deriving from the rights to health and water in the two General Comments just mentioned.<sup>1449</sup> This recognition seems to corroborate its understanding of the core obligations as describing the ‘nature’ of the corresponding rights. Then, the notion of “*non-derogability*” has led the same Committee to underline that “*because core obligations are non-derogable, they continue to exist in situations of conflict, emergency and natural disaster*”.<sup>1450</sup>

Overall, this treaty-based body clearly supports the argument that *a limitation established by a State party under Article 4 cannot affect the Covenant’s minimum core obligations because it would be contrary to the “nature” of their corresponding rights.*

Interestingly, the Limburg Principles comment on the compatibility with the nature of ESC rights under Article 4 similarly highlights that such a condition requires a *limitation to “not be interpreted or applied so as to jeopardize the essence of the right concerned”*.<sup>1451</sup> Even in legal scholarship debating this clause the necessity to *respect the compatibility with the nature of ESC rights* has been emphasised along with the need to *reject any restrictions on the minimum core obligations deriving from these rights*. Some scholars have emphasised the importance of not departing from “*a minimum standard of livelihood and health, even in times of armed conflict*” regarding permissible limitations under Article 4.<sup>1452</sup> As to the right to food,

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*impossible for a State to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above. It should be stressed, however, that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable”*.

See *General Comment No. 15: The right to water (arts. 11 and 12)*, 20 January 2003, UN Doc. E/C.12/2002/11, paras. 40, 42, 44 (c). In para. 40 it affirms that: “*To demonstrate compliance with their general and specific obligations, States parties must establish that they have taken the necessary and feasible steps towards the realisation of the right to water. In accordance with international law, a failure to act in good faith to take such steps amounts to a violation of the right. It should be stressed that a State party cannot justify its non-compliance with the core obligations set out in paragraph 37 above, which are non-derogable*”.

See CESCR, *General Comment No. 19: The right to social security*, 4 February 2008, UN Doc. E/C.12/GC/19, para. 65, reading: “*Violations through acts of omission can occur when the State party fails to take sufficient and appropriate action to realise the right to social security. In the context of social security, examples of such violations include the failure to take appropriate steps towards the full realisation of everyone’s right to social security; the failure to enforce relevant laws or put into effect policies designed to implement the right to social security; the failure to ensure the financial sustainability of State pension schemes; the failure to reform or repeal legislation which is manifestly inconsistent with the right to social security; the failure to regulate the activities of individuals or groups so as to prevent them from violating the right to social security; the failure to remove promptly obstacles which the State party is under a duty to remove in order to permit the immediate fulfilment of a right guaranteed by the Covenant; the failure to meet the core obligations (see paragraph 59 above); the failure of a State party to take into account its Covenant obligations when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations”*.

<sup>1449</sup> In other fields this issue has remained unexplored, see *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 (art. 15 (1)(c))*, 12 January 2006, UN Doc. E/C.12/GC/17; *General Comment 18: The right to work (art. 6)*, 6 February 2006, UN Doc. E/C.12/GC/18; *General Comment 19: The right to social security*, 4 February 2008, UN Doc. E/C.12/GC/19.

<sup>1450</sup> CESCR, “*Poverty and the International Covenant on Economic, Social and Cultural Rights*”, *Statement adopted at the 3<sup>rd</sup> UN Conference on Least Developed Countries*, 10 May 2001, E/C.12/2001/10, para. 18.

<sup>1451</sup> Limburg Principles, June 1986, UN Doc. E/CN.4/1987/17 (and UN Doc. E/C.12/2000/13), para. 56.

<sup>1452</sup> A. Rosas and M. Sandvik-Nylund, “*Armed Conflicts*”, in Eide, Krause, Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, Martinus Nijhoff Publisher, 2001, pp. 413-4.

any limitations that “*could result in death by starvation*” have been regarded as unacceptable.<sup>1453</sup> However, the possible extent of the scope of the minimum core obligations corresponding to the right to food as well as the right to health may remain not easily determinable.<sup>1454</sup>

In conflict-related settings the argument that *the required compatibility with the nature of ESC rights under Article 4 does not permit restrictions touching upon the minimum core obligations of States parties* has certain implications. In particular, *subsistence rights* such as the right to basic food, a basic level of health care, clothing and basic shelter gain relevance. The ICESCR’s applicability to contexts of armed conflict or military occupation would imply that *any policy limiting the minimum core obligations corresponding to basic subsistence rights enshrined in the Covenant should be deemed not “compatible with the very nature” of the rights in question*, hence in violation of Article 4. Indeed, restricting the minimum core obligations of basic subsistence rights would undermine the vital interests of the individuals affected by such contexts, thus reflecting a *de facto* extinction of those rights in such times.<sup>1455</sup>

Notably, in undertaking the ICESCR application to armed conflict in General Comment on the right to adequate housing, the Committee has expressively underlined that even when restrictions on this right may be needed “*full compliance with Article 4 of the Covenant is required so that any limitations imposed must be determined by law only insofar as this may be compatible with the nature of these (i.e. economic, social and cultural) rights and solely for the purpose of promoting the general welfare in a democratic society*”.<sup>1456</sup> As is observed by the same Committee, forced evictions occurring “*in connection with forced population transfers, internal displacement, forced relocations in the context of armed conflict, mass exoduses and refugee movements*” may violate the right to adequate housing. In particular, a risk in such contexts concerns the breach of both the right and the prohibition through a variety of acts or omissions of a State party to the Covenant.

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<sup>1453</sup> P. Alston, “International law and the Human Rights to Food”, in Alston and Tomasevski (eds.), *The Right to Food*, Martinus Nijhoff Publisher, 1984, p. 21.

<sup>1454</sup> Kunnemann, “The Right to Adequate Food: Violations Related to its Minimum Core”, in Chapman and Russell, *op. cit.*, pp. 161-83. See Toebes, *The Right to Health as a Human Right in International Law*, Intersentia, 1999, pp. 284-8; Chapman, “Core Obligations Related to the Right to Health”, in Chapman and Russell, *op. cit.*, pp. 185-214.

<sup>1455</sup> This point seems coherent with the general understanding that the “*power to impose restrictions on fundamental rights is essentially a power to ‘regulate’ the exercise of these rights, not to extinguish them*”, see Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press, 2002, p. 187.

<sup>1456</sup> CESCR, *General Comment No. 7: The right to adequate housing (Art. 11.1): forced evictions*, 20 May 1997, E/1998/22, Annex IV, paras. 5-6.

### 3.5.2. *De facto* derogations from ESC rights?

In view of the previous analysis on the general limitations clause contained in the ICESCR, it seems pertinent to reflect on the controversial prerogative of States parties to derogate *in any case* from their obligations under the Covenant notwithstanding it not offering any express legal basis allowing or proscribing to *suspend* ESC rights.

As observed above, *de facto* derogations from the ICESCR have been debated in academic literature, determining it too ambitious to expect that every dimension of ESC rights might be implemented during times of public emergency. The analysis conducted on Article 4 and especially on its drafting history appears to confirm the view that the absence of an explicit derogation clause is not *per se* determinative of whether suspensions of ESC rights are or not admissible. Nonetheless, it seems reasonable to argue that *the general limitation clause of Article 4 alongside the flexibility of the obligations established in Article 2(1) may sufficiently enable a State party to respond to extraordinary circumstances such as armed conflict or military occupation*. In this regard, a State party is allowed to impose no further restrictions on ESC rights than the ones permitted outside such situations, since no limitations on ESC rights may be justified on the grounds of an existing armed conflict.

As revealed in the previous section, the CESCR has not made a general reference to the Covenant's derogability. Instead, it has focused on *the non-derogable nature of minimum core obligations of ESC rights* under a soft approach: it has acknowledged that States parties cannot excuse non-compliance with the core obligations flowing from the right to health and the right to water, while this wording has not featured its General Comments on other rights (like the right to social security or the right to work). Yet, in view of statements such as "*because core obligations are non-derogable, they continue to exist in situations of conflict, emergency and natural disaster*",<sup>1457</sup> apparently the Committee considers *per se* non-derogable also the minimum core obligations under each of the rights of the Covenant.

In this regard, an additional point gains relevance. The Committee's recognition of *non-derogable minimum core obligations in the sphere of basic subsistence rights* may be seen in line with the idea that *in situations of armed conflict basic subsistence human rights (e.g. to adequate food, to health care and prevention measures, to basic shelter) must not be suspended under the ICESCR*, and, instead, States parties are called to respect, protect and fulfil them. Thus, *the extent to which States affected by conflict-related situations are required to implement such obligations* ends up constituting the main issue.

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<sup>1457</sup> CESCR, *Poverty and the International Covenant on Economic, Social and Cultural Rights*, statement adopted at the 3<sup>rd</sup> UN Conference on Least Developed Countries, 10 May 2001, UN Doc. E/C.12/2001/10, para. 18.

The emphasis on the non-derogability of minimum core obligations corresponding to basic subsistence rights acquires further significance in view of *their close connection with the right to life*, which has been pointed out by other monitoring bodies such as the Human Rights Committee<sup>1458</sup> and even explained in the CRC<sup>1459</sup>, in addition to further references in academic debate. In particular, *the social dimension of the right to life* has been meant to entail a basic State obligation to guarantee conditions that are not an immediate threat to life and livelihood. It has been emphasised that “*survival rights, based on a combination of the right to life contained in the ICCPR, and the right to food and health contained in the ICESCR*” should be regarded as non-derogable under these Covenants.<sup>1460</sup> Then, States parties’ ability to justify both limitations on and derogations from ESC rights relating to food, health care, clothing and housing has appeared to be difficult.<sup>1461</sup>

In the same vein, a noteworthy opinion was expressed in the *Street Children Case*, where the right to life was defined to also encompass the life conditions that guarantee a dignified existence.<sup>1462</sup> In the words of the former President of the Inter-American Court of Human Rights: “[...] *The arbitrary deprivation of life is not limited to the illicit act of homicide; it extends itself to the deprivation of the right to live with dignity. This outlook conceptualises the right to life as belonging, at the same time, to the domain of civil and political rights, as well as economic, social and cultural rights, thus illustrating the interrelation and indivisibility of all human rights*”.<sup>1463</sup> Therefore, it may be emphasised that the perspective of focusing on *the direct connection between ESC rights and the non-derogable right to life* gives greater consistency to the view of excluding States parties the possibility of suspending basic subsistence rights in conflict-torn and occupation-related situations.

It is worth mentioning that the practice emerging in the reporting procedure under the Covenant varies. Some States parties have outlined the possibilities to derogate from Articles 6, 7, and 8 ICESCR in their reports to the Committee, so appearing to assume the derogability of the right to strike or other rights related to labour issues.<sup>1464</sup> Conversely, some States have been silent on

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<sup>1458</sup> HRC, *General Comment No. 6: Right to life*, 30 April 1982, para. 5.

<sup>1459</sup> See Article 6 CRC, which connects children’s *right to life* with their *right to survival* that comprises an obligation to guarantee at all times available adequate nutrition and basic health care for children, see *General Comment No. 7: Implementing child rights in early childhood*, UN Doc. CRC/C/GC/7/Rev.1, 20 September 2006, para. 10.

<sup>1460</sup> On the social dimension of the rights to life, see F. Menghistu, “The Satisfaction of Survival Requirements”, in B.G. Ramcharan, *The Right to Life in International Law*, Nijhoff Dordrecht, 1985, pp. 63-83; Rosas and Sandvik-Nylund, “Armed Conflicts”, in Eide, Krause, Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook, op. cit.*, 2001, p. 414.

<sup>1461</sup> See also P. Alston and G. Quinn, *op. cit.*, p. 217 (regarding derogations) and pp. 196-7 (regarding limitations).

<sup>1462</sup> IACtHR, *Villagrán Morales et al. v. Guatemala*, Merits, Judgment of 19 November 1999, Ser C No. 63, para. 144.

<sup>1463</sup> *Ibid.*, Opinion of Judges Cançado Trindade and Abreu-Burelli, para. 4.

<sup>1464</sup> *E.g.*, *Second Periodic Report, Azerbaijan*, 1 December 2003, E/1990/6/Add.37, para. 154; *Combined Second-Fifth Periodic Reports, India*, 1 March 2007, UN Doc. E/C.12/IND/5, para. 173; *Fifth Periodic Report, Ukraine*, 14 August 2006, UN Doc. E/C.12/UKR/5, paras. 195 and 199. For instance, the performance by workers of compulsory labour during emergencies in order to deal with the effects of a natural or other disaster, or in order to ensure actual defence of the

possible derogations from ESC rights in their reports to the Committee, while others States have explicitly argued that the derogation exercised from the ICCPR do not extend to the ICESCR rights as well as it do not affect the enjoyment of ESC rights.<sup>1465</sup>

### **3.6. The relationship with international humanitarian law**

Assumed that ESC rights enshrined in the just examined treaties cannot be generally suspended or freely restricted by States parties in situations of armed conflict and periods of military occupation, *the legal effect of the applicability of international human rights law* deserves specific scrutiny *in relation to the law of armed conflict and the laws of occupation*.

As observed in previous chapters, the laws and customs of war were developed to apply during armed conflicts and provide *a minimum level of humanity*, acknowledging such special circumstances, allocating responsibilities and entitlements to the various actors involved, and addressing duties of Contracting Parties (rather than articulating rights of individuals). For its part, international human rights law emerged later to govern the relationship between the State and individuals within its jurisdiction, providing a framework of State obligations to ensure fundamental and indivisible rights. They both share a concern for the principle of human dignity but under different mechanisms and scopes of application: one only in war-torn scenarios, the other at all times; one applies to all belligerents including non-state armed groups, the other formally obligates only States; one was drafted to protect enemy combatants and non-combatants, the other was drafted to confer rights essentially to nationals.

As they emerged as responses to different sets of issues and originally intended to apply to different situations, they have been generally regarded as mutually exclusive under the principle *lex specialis derogat lex generalis*, with the laws of armed conflict constituting the specialized version. The three occasions in which the International Court of Justice has echoed this view are well known.<sup>1466</sup> However, that separation has gradually eroded, especially as human rights treaties have been increasingly regarded as founding a universally applicable regime in both international and non-

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State under a direct military threat, have been contemplated in a procedure under Slovenian law, see *Initial Report, Slovenia*, 26 May 2006, E/1990/5/Add.62, paras. 53 and 99-105. See also *Initial Report, Kyrgyzstan*, 26 February 1999, E/1990/5/Add.42, para. 14; *Initial Report, Tajikistan*, 31 May 2006, UN Doc. E/C.12/TJK/1, para. 150.

<sup>1465</sup> E.g., *Initial Report, Algeria*, 28 July 2000, E/1990/6/Add.26, para. 46.

<sup>1466</sup> ICJ, *Legality or Threat of Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 106; ICJ, *Case concerning armed activity on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, paras. 216-220.

international armed conflict.<sup>1467</sup> The advanced jurisprudence on human rights law and the consequent relevance acquired by the normative concept of human rights has favoured such an erosion.

It is noteworthy that certain proximity of international human rights law is acknowledged by international humanitarian law. As affirmed in the official commentary, the minimum standard contained in common Article 3 GCs “*merely ensures respect for the few essential rules of humanity which all civilized nations consider as valid everywhere and under all circumstances and as being above and outside war itself*”.<sup>1468</sup> Furthermore, according to the preamble of Protocol II “*international instruments relating to human rights offer a basic protection to the human person*”. Then, in delineating the field of application of Protocol I, Article 72 API establishes that “*(t)he provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict*”.

No agreement on the exact meaning of the *lex specialis* principle has emerged though.<sup>1469</sup> Moreover, under Article 31(3)(c) VCLT State treaty obligations have to be interpreted in accordance with the whole of international law as a system. In echoing such a technique of systematic interpretation, *the special rule may be deemed to represent the application of the general rule in a given setting* (rather than an exemption to it). In this regard, *lex specialis* may be deemed a “*contextual principle*”<sup>1470</sup>. In determining the specialized norm “*the most important indicators are the precision and clarity of a rule and its adaptation to the particular circumstances of the case*”.<sup>1471</sup>

Contemporary contexts of armed conflict as well as periods of occupation have made the option to treat the two regimes as mutually exclusive ever more debatable; the *lex specialis* rule in those situations appears not to dictate *a priori* precedence to any body of law anymore, being that the matter is rather *contexts-dependent* or *interests-dependent*. Of value is a consensus favouring the position

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<sup>1467</sup> Little disagreement on the applicability of human rights law has resulted among practitioners and scholars, see F. Hampson, “The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body”, 90 *IRRC*, 2008, pp. 549-557.

<sup>1468</sup> J. Pictet (ed.), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 1958, at 60.

<sup>1469</sup> In particular note, two main meanings of the principle have been distinguished by the Study Group of the UN International Law Commission on Fragmentation of International Law: “*In the first instance, a special rule could be considered to be an application, elaboration or updating of a general standard. In the second instance, a special rule is taken, instead, as a modification, overruling or setting aside of the general standard (i.e. lex specialis is an exception to the general rule). [...] It was often impossible to say whether a rule should be seen as an “application” or “setting aside” of another rule*”. See ILC, *Report of the Study Group on Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law*, 28 July 2004, UN Doc. A/CN.4/L.663/Rev.1, para. 13.

<sup>1470</sup> See H. Krieger, “A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study”, 11(2) *Journal of Conflict and Security Law*, 2006, pp. 265-291, at 269.

<sup>1471</sup> C. Droegge, “Elective affinities? Human rights and humanitarian law”, 90 *IRRC*, 2008, pp. 501-548, at 524.

that in such times human rights law applies entirely alongside international humanitarian law has actually evolved.<sup>1472</sup> In this respect, *these legal regimes may be applied and clarified in view of one another particularly when they afford norms covering common fields*. According to an approach of “reciprocal-influence” or “cross-interpretation”, human rights law can be read in view of international humanitarian law (as already observed in the ICJ *Nuclear Weapons* advisory opinion<sup>1473</sup>) and the latter can be understood in view of the former too. Otherwise, one branch can substitute, displace or restrain the other.

The consequent meaning of *lex specialis as a tool to interpret norms belonging to distinct branches but interacting in a complementary relation* entails determining the applicable norms on a case-by-case basis. In the sphere of ESC rights, approaching the principle of *lex specialis* as complementarity of norms may have positive implications particularly in situations of non-international armed conflicts and periods of occupations. It seems reasonable to argue that *a constructive coordination in dealing with civilians’ ESC rights may be developed between such regimes*, either when they concur (for existing overlapping norms within each branch) or when they diverge. In imposing concurrent obligations, the extent of their mutual influence may vary. In any case, the question arises as to whether that coordination provides civilians with a greater degree of protection. This may certainly occur when such regimes deal with different issues concerning the same right: as they do not clash, there is no need to favour one over the other or to ascribe to one of the two a special status.

Significantly, a legal basis for such coordination may be found in Article 5(2) ICESCR whereby “*no restriction upon or derogation from any of the fundamental human rights recognised or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent*”. Thus, States parties are required to apply other “*law, conventions, regulations or custom*” that afford better protection than the Covenant. Equally, under Article 75(8) API, “*no provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection under any applicable rules of international law, to persons covered by paragraph 1*”. Furthermore, in Article 158(4) GCIV the applicability of the “*laws of humanity*” is underlined irrespective of the actual obligations under the Geneva Convention.<sup>1474</sup>

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<sup>1472</sup> See J. Cerone, “Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation and Peace Operations”, 39 *Vanderbilt Journal of Transnational Law*, 2006, 1447, at 1453.

<sup>1473</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.*, para. 25.

<sup>1474</sup> Article 58(4) GC IV reads: “*The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience*”. This and the other denunciation clauses of the Geneva Conventions (*i.e.* common Articles 63/62/142/158) codify a version of the Martens clause.



**3.6.(1)** Noteworthy rationales supporting the importance to apply and employ the *concepts and standards pertaining to international human rights law of economic, social and cultural nature* in situations of armed conflict and belligerent occupation may be outlined as follows.

Many IHL provisions protect *vital conditions to the enjoyment by civilians of ESC rights* by dealing mostly with the ways to accomplish efficiency in humanitarian relief supplies, public health services, and food security.<sup>1475</sup> Conversely, IHL provisions ruling on the relationship between a belligerent party and civilian persons/objects under its control have been developed only for situations of military occupation, with some limitations however. Nonetheless, IHL rules afford an exhaustive protection in dealing with the treatment of public or private property.<sup>1476</sup> In any case IHL mechanisms to monitor, implement and enforce the applicable law may as a result be weak.

On the other hand, human rights monitoring bodies at the universal and regional level have progressively given *normative content and force to the ESC rights enshrined in human rights treaties*, drawing basic guidelines to explain how their notions have undergone substantial changes and have widened in scope even in conflict-torn contexts, thus “surpassing” what international humanitarian law provides for.<sup>1477</sup> Indeed, human rights violations of persons found in such situations - and independently of their IHL status - can fall under their judicial or quasi-judicial scrutiny; generally they have jurisdiction to apply human rights law, even in view of IHL, but sometimes the other way around may be provided for, such as in Article 38 CRC.

In this regard, human rights treaties conferring ESC rights to individuals not only may cover

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<sup>1475</sup> On this aspect, see N. Lubell, “Challenges in Applying Human Rights law to Armed Conflict”, 2005, 87 *IRRC*, p. 751; N. Lubell “Human rights obligations in military occupation”, 94 *IRRC*, 2012, pp. 329-334. See also Y. Arai-Takahashi, *The Law of Occupation*, *op. cit.*, 2009, p. 371, who exemplifies this point by referring to the FAO’s *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, in which the special significance of the Fourth Geneva Convention and Protocol I regarding food safety in occupied territories is reaffirmed. See *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, adopted by the 127<sup>th</sup> sess. of the FAO Council, November 2004, and Annex 1 to FAO, *Report of the 30<sup>th</sup> sess. of the Committee on World Food Security*, Rome 20-23 September 2004, Guideline 16.2 and 16.3.

<sup>1476</sup> *E.g.*, Article 53 GCIV prohibits the destruction by the occupying power of any kind of publicly or privately owned real or personal property “*except where such destruction is rendered absolutely necessary by military operations*”; albeit less explicit, see also Articles 46-56 HRs. See Article 33(2) GCIV and Article 47 HRs, which establish limits to its appropriation or requisition by the occupation forces. For a recent contribution, see S. Vité, “The interrelation of the law of occupation and economic, social and cultural rights: the examples of food, health and property”, 80 *IRRC*, 2008, pp. 629-651.

<sup>1477</sup> In addition to the human rights treaty bodies, several reports by UN human rights experts have dealt with the safeguarding of ESC rights in such contexts, clarifying relevant treaty obligations, also referring to the IHRL/IHL relationship, although without delivering fully complete and accurate legal analysis being their main role to inform the former Commission on Human Rights or the Human Rights Council about the human rights situations in the countries concerned. Noteworthy cases regard the rights to food, education, and housing, in times of armed conflict. See *Report to the Special Rapporteur on the right to education, Vernor Muno Villalobos, Right to education in emergency situations*, UN Doc. A/HRC/8/10, 20 May 2008. See *Report to the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari*, UN Doc. E/CN.4//2003/5/Add.1, 12 June 2002.

subjects scarcely if at all mentioned under international humanitarian law, but also afford “overlapping subjects” further normative details not found in the law of armed conflict or merely touched by occupation law. This is evident in relation to the right to health,<sup>1478</sup> the right to food,<sup>1479</sup> and the right to water and sanitation,<sup>1480</sup> the right to education.<sup>1481</sup> In this sense, obligations flowing from human rights treaties are essentially not echoed in IHL rules. For instance, IHL generally encompasses the “respect” and “protect” facets of ESC rights, while the “fulfil” facet is not determined.<sup>1482</sup> The latter provides for broader State obligations (*i.e.* taking legislative, administrative, judicial measures towards a complete realisation of the rights in question); its importance in conflict-torn situations is emblematically shown as to the right to health: while investment and protection in the health sector would be required towards the progressive realisation of this right as well as non-retrogressive measures, in conflict-related situations plans on disease control frequently are critically compromised in relation to patients’ ability to search for care, drug supply, and distraction of economic funds to military ends.<sup>1483</sup> As regards education

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<sup>1478</sup> For interpretation of the nature and scope of the right to health alongside the corresponding obligations under the ICESCR, *e.g.*, CESCR, *General Comment No. 14: Right to the highest attainable standards of health (art. 12)*, 11 August 2000, particularly para. 12 and paras. 43-45. See also Chapman, “Core obligations related to the right to health”, in Chapman and Russell, *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, 2002, pp. 185-215. For a contribution on the argument that, while international humanitarian law offers a critically important set of rules for addressing obligations regarding health in armed conflict, also human rights law acts as “a powerful complement to it”, see K.H.A. Footer and L.S. Rubenstein, “A Human Rights Approach to Health Care in Conflict”, *IRRC*, 2013, pp.1-21.

<sup>1479</sup> For interpretation of the nature and scope of the right to food and the corresponding obligations under the ICESCR, *e.g.*, CESCR, *General Comment No. 12: The right to adequate food (arts. 11)*, 15 May 1999, particularly paras. 6-13, paras. 14-20.

<sup>1480</sup> *E.g.*, the CESCR has derived an implicit human right to water from other rights explicitly guaranteed under the ICESCR: under Article 11(1) the right to water is interpreted as falling “within the category of guarantees essential for securing an adequate standard of living” (*e.g.* adequate housing, adequate food, and adequate clothing) principally because “it is one of the most fundamental conditions for survival”; under Article 12 (1) the right to water is interpreted as “inextricably related to the right to the highest attainable standard of health” and it is indicated that “water should be treated as a social and cultural good, and not primarily as an economic good”. For the normative content of the right to water, see CESCR, *General Comment No. 15: The right to water (arts. 11 and 12)*, 20 January 2003, particularly paras. 3, 6-8, 18. See also R. Kunneman, “The Right to adequate food: violations related to its minimum core content”, in Chapman and Russell (ed.), *op. cit.*, pp. 161-183.

<sup>1481</sup> See Articles 13-14 ICESCR, Articles 28-29 of CRC.

<sup>1482</sup> For example, the right of aliens in the territory of a party to the conflict to claim the same standard of health care as afforded to the State’s own nationals is guaranteed under Article 38 GCIV, but this Convention does not contain a correspondent right for protected persons in occupied territory except Article 56 for health measures; particularly in cases in which the occupation is prolonged, no rules of the scope of health measures are provided for. See N. Lubell, *op. cit.*, pp. 752-753.

<sup>1483</sup> In this regard, some scholars have addressed the endemic status of polio in countries like Afghanistan, Nigeria, and Pakistan that have experienced several conflicts and where vaccination programs have been interrupted. See K.H.A. Footer and L.S. Rubenstein, “A Human Rights Approach to Health Care in Conflict”, *IRRC*, 2013, p. 14. The authors emphasises that, in addition to “avoid interfering directly with polio immunisation programmes” and “to take steps to prevent interference with the right by third parties”, in order to ensure the realisation of the right to health States are required to implement policies that guarantee polio immunisation programmes even in times of conflicts or other disturbances. It is reported that, following the US-led invasion of Afghanistan in 2001, the Afghanistan Ministry of Public Health actively cooperated with the Taliban (through the ICRC’s intermediary) in order to enable the movement of vaccinators and intensify access to children living in Taliban strongholds. The campaign was administered with the support of the WHO and UNICEF and covered some of the most instable areas of Afghanistan. See also L. Rubenstein, “Defying

This comprehensive rationale thus renders more debatable the view that international humanitarian law provides for *sufficient protection of ESC rights* beyond conditions having ‘emergency connotations’ and for *sufficient guidance on substantial needs to ensure healthcare, food and water safety, education and labour conditions* in contemporary settings of armed conflict, especially those having a non-international nature, and present-day periods of military occupation. Remarkably, *a human rights approach* to deal with them encompasses significant elements such as the principles of non-discrimination and equality as well as the entitlements to availability, accessibility, acceptability, and quality in the enjoyment of ESC rights. In this sense, the prohibitions of discrimination in employment, the prohibitions of discrimination in education and racial discrimination represent further issues not addressed under international humanitarian law while being carefully considered under human rights law, being that their relevance is recognised for all human beings regardless of living conditions.<sup>1484</sup>

In focusing on *present-day scenarios of occupation*, it seems reasonable to argue that human rights law is inherently relevant and arguably applicable since the occupying power is expected to facilitate the continuation of civilian life and the founding of a legal relationship between the civilian population and the occupying army. Given its very nature as “*midway between war and peace*”, belligerent occupation brings forth an actual need of redetermining the scope of relevant State obligations.<sup>1485</sup> In the area of ESC rights, this implies referring to States parties’ *minimum core obligations* arising from essential levels of each right in all circumstances, in addition to the *obligations of immediate effect* (*i.e.* taking deliberate and targeted steps to guarantee the most comprehensive possible enjoyment of ESC rights “under the prevailing circumstances”; ensuring their exercise without discrimination of any kind), and *the obligations to be progressively implemented* towards the full realisation of these rights.<sup>1486</sup>

Overall, *several legal effects* of the applicability of modern international human rights law on ESC rights may be articulated: *influencing* the interpretation of relevant IHL norms; *clarifying* elements or *elaborating* aspects referred to in IHL norms when the latter come to (negative or positive) obligations that remain vague in their effects for actual guarantees to civilians; *filling* normative gaps in the

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expectations: Polio vaccination programs amid political and armed conflict”, United States Institute of Peace, 64 *Peace Brief*, November 2010, p. 2.

<sup>1484</sup> In this vein, see A. Roberts, “Prolonged Military Occupation: The Israeli Occupied Territory, 1967-1988”, in E. Playfair, *International Law and the Administration of Occupied Territories: Two decades of Israeli Occupation of the West Bank and Gaza Strip*, Clarendon Press, 1992, pp. 25 and 53. The application of international human rights standards is “*highly desirable*” for such issues according to the author, also referring to the absence in the laws of war rules of those procedures (contained in human rights treaties) enabling individuals to raise a matter directly with an outside institution. See also A. Roberts, “Prolonged Military Occupations: the Israeli-Occupied Territories since 1967”, 84 *AJIL*, 1990, p. 73.

<sup>1485</sup> See D. Campanelli, “The law of military occupation put to the test of human rights law”, 90 *IRRC*, 2008, at 654.

<sup>1486</sup> See previous section 2.c.ii focusing on the obligations stemming from the ICESCR.

scope of protection afforded by IHL; and *corroborating* the legitimacy of international human rights supervisory mechanisms in contexts of armed conflicts and occupation.

**3.6.(2)** Nonetheless, it is worth highlighting that *direct or indirect references to IHL rules and principles* is found in the practice of monitoring bodies to *determine or clarify a certain normative content of ESC rights*; similarly, the *unlawfulness of conducts* not explicitly set out in the human rights treaties concerned has been addressed by taking note of duties stemming from international humanitarian law. Of note, the CESCR has done so in its General Comments and Concluding Observations with regards to the right to health, the right to housing, the right to food, the right to water, the right to take part in cultural and religious life. As shown in chapter one, the CRC has also considered that in armed conflicts the right to education is “*further protected*” by the 1949 Fourth Geneva Convention and the 1977 Protocols, reflecting on the impacts of attacks on schools and related military use in several countries.<sup>1487</sup>

In particular, a “*wider definition of health*” has been proposed by taking into account also “*such socially-related concerns as violence and armed conflict*” and explicitly referring to common Article 3 GCs, Article 75 (2) (a) API and Article 4 APII.<sup>1488</sup> According to the CESCR, “*the right to treatment*” also includes “*the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations*”.<sup>1489</sup> Further, the obligation to respect is understood, *inter alia*, as requiring States to refrain “*from ... limiting access to health services as a punitive measure, e.g. during armed conflicts in violation of international humanitarian law*” as well as “*from unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities, from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health*”.<sup>1490</sup> In considering States duty to cooperate in providing humanitarian assistance, primacy to marginalised or vulnerable groups of the population is emphasised for “*international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and*

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<sup>1487</sup> CRC, “The rights of all children in the context of international migration”, 28 September 2012, para. 3. CRC, Concluding observation: Burundi, UN Doc. CRC/C/15/Add.133, 16 October 2000, paras. 64-65; CRC, Concluding Observations: Ethiopia, UN Doc. CRC/C/ETH/CO/3, 1 November 2006, paras. 27-28; CRC, Concluding Observations: Israel, UN Doc. CRC/C/15/Add.195, 9 October 2002, para. 52; CRC, Concluding Observations: Moldova, UN Doc. CRC/C/MDA/3, 10 July 2008, para. 423, 435; CRC, Concluding Observations: Afghanistan, UN Doc. CRC/C/AFG/CO/1, 8 April 2011, paras. 60-61; CRC, Concluding Observations: Nepal, UN Doc. CRC/C/15/Add.261, 21 September 2005, para. 10.

<sup>1488</sup> CESCR, *General Comment No. 14, The right to the highest attainable standard of health*, 11 May 2000, para. 10.

<sup>1489</sup> CESCR, *General Comment No. 14, The right to the highest attainable standard of health*, 11 May 2000, para. 16.

<sup>1490</sup> CESCR, *General Comment No. 14, The right to the highest attainable standard of health*, 11 May 2000, para. 34.

*financial aid*'.<sup>1491</sup>

As regards the right to housing, the CESCR has underlined the connection of many instances of forced eviction “*with violence, such as evictions resulting from international armed conflicts, internal strife and communal or ethnic violence*”.<sup>1492</sup> The practice of “*forced eviction and house demolition as a punitive measure*” is deemed inconsistent with the ICESCR, but the Committee takes also note of the obligations ensuing from the 1949 Geneva Conventions and 1977 Additional Protocols “*concerning prohibitions on the displacement of the civilian population and the destruction of private property as these relate to the practice of forced eviction*”.<sup>1493</sup> Equally, the exercise of the right to take part in cultural and religious life of Palestinians living in the occupied territories has been understood “*without restrictions other than those that are strictly proportionate to security considerations and are non-discriminatory in their application, in accordance with international humanitarian law*”.<sup>1494</sup> In relation to the right to food, related violations occurring via “*the direct action of States or other entities insufficiently regulated by States*” have also been interpreted to include “*the prevention of access to humanitarian food aid in internal conflicts or other emergency situations*”.<sup>1495</sup> In this vein, in monitoring the armed conflict in Sri Lanka in 2009, the deliberate deprivation of access to food, medical care and humanitarian assistance to civilians were qualified as breaches of Article 11 ICESCR along with “*a grave violation of international humanitarian law*” which prohibits starvation and may consist of a war crime.<sup>1496</sup>

As regards the right to water (which is not expressly set out in the ICESCR) the 1949 Geneva Conventions and the 1977 Protocols have been referred in order to widen or delineate its scope, particularly in view of rules on means and methods of warfare.<sup>1497</sup> In this sense, during armed conflicts and emergency situations this right is interpreted to embrace “*those obligations by which States parties are bound under international humanitarian law*”.<sup>1498</sup> In elaborating the content of the obligation to

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<sup>1491</sup> CESCR, *General Comment No. 14, The right to the highest attainable standard of health*, 11 May 2000, para. 40 (“... *States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons ...*”).

<sup>1492</sup> CESCR, *General Comment No. 7: The right to adequate housing (art. 11.1): Forced Evictions*, 20 May 1997, para. 6. In paragraph 4 the practice of forced evictions is also deemed to result in violations of civil and political rights (e.g. “*the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions*”).

<sup>1493</sup> CESCR, *General Comment No. 7: The right to adequate housing (art. 11.1): Forced evictions*, 20 May 1997, para. 12.

<sup>1494</sup> CESCR, *Concluding Observations: Israel*, 16 December 2011, para. 36.

<sup>1495</sup> CESCR, *General Comment No. 12: The right to adequate food (art. 11)*, 12 May 1999, para. 19.

<sup>1496</sup> CESCR, *Concluding Observations: Sri Lanka*, E/C.12/LKA/CO2-4, 9 December 2010, para. 28.

<sup>1497</sup> CESCR, *General Comment No. 15: The right to water*, 20 January 2003, para. 4.

<sup>1498</sup> CESCR, *General Comment No. 15: The right to water*, 20 January 2003, para. 22, adding that “*this includes protection of objects indispensable for survival of the civilian population, including drinking water installations and supplies and irrigation works, protection of the natural environment against widespread, long-term and severe damage and ensuring that civilians, internees and prisoners have access to adequate water*”. This basically refers to Arts. 35(3), 54, 55 API and Arts. 14, 15 APII.

respect the right to water, States parties are required, *inter alia*, to refrain from “*limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law*”, in line with the aforementioned ICRC Resolution II of 1996; in the same vein, States must refrain from “*unlawfully diminishing or polluting water, for example through waste from State-owned facilities or through use and testing of weapons*”.<sup>1499</sup>

Therefore, in framing the application of ESC rights within the IHL regime, their scope may be construed to prevent a clash of distinct norms or it may be widened to define external bounds of such rights. A *cross-elaboration upon legal validity and content of binding obligations on ESC rights under both regimes* thus remains worthy. In this regard, military conduct unlawful under international humanitarian law may infer ESC rights violations under human rights law, while a military conduct consistent with IHL may preclude such violations. Indeed, although the applicability of human rights norms on ESC rights may provide in depth guidance to the parties to the conflict, legitimate restrictions of such norms may derive either from the aforementioned regime of limitations or from international humanitarian law.

A noteworthy situation in view of all the previous remarks concerns the right to food in Lebanon (as was impacted by the war that took place from 12 July to 14 August 2006 between Israel and the armed forces of the Lebanese political party Hezbollah), which was dealt with by the former Special Rapporteur Jean Ziegler in considering the relevant legal framework as including all the applicable provisions of international human rights and humanitarian law protecting the right to food of the Lebanese population.<sup>1500</sup> Indeed, Israel and Lebanon are parties to two main human rights instruments guaranteeing this right (*i.e.* the ICESCR and the CRC) as well as to the 1949 Geneva Conventions. In the same respect, although only Lebanon is a party to the 1977 Protocol I, most of its relevant provisions reflect customary international law, so binding all States and all parties to a conflict regardless of status and ratification.

(a) Specifically, the definition of “*the right to be able to feed oneself through physical and economic access to food*” was reiterated. The right to food was deemed to entail obligations upon Israel and Lebanon under the ICESCR and CRC towards their people but also towards people living in other countries in view of their undertakings

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<sup>1499</sup> CESCR, *General Comment No. 15: The right to water*, 20 January 2003, para. 21.

<sup>1500</sup> *Report to the Special Rapporteur on the right to food, Jean Ziegler, on his mission to Lebanon*, UN Doc. A/HRC/2/8, 29 September 2006, paras. 1-7. Reportedly during the thirty-four days of war the Israeli forces launched more than 7,000 air attacks and 2,500 attacks by sea as well as heavy artillery shelling. According to the Government of Lebanon, the war resulted in 1,189 killed (mostly civilians), 4,399 injured, 974,189 displaced and between 15,000 and 30,000 homes destroyed.

to cooperate - “without any territorial or jurisdictional limitations” - to realise the right to food.<sup>1501</sup> In this regard, a key State obligation was identified in the *respect of the right to food in time of armed conflict*, namely *refraining from restricting, inhibiting or preventing people’s access to food*. As this right also comprises access to clean, safe drinking water and irrigation water necessary for subsistence production, the relevance of a minimum obligation to *refrain from restricting access to water or destructing water infrastructure* was equally stressed. Another state obligation ensuing from the right to food concern *ensuring access to humanitarian assistance* to any individual or group affected by the war and deprived of access to productive resources.<sup>1502</sup>

(b) In considering IHL rules protecting the right to food and applicable to the war in Lebanon, several provisions of the four Geneva Conventions and two Additional Protocols were mentioned<sup>1503</sup>. Firstly, the core rule prohibiting indiscriminate attacks under article 51(4) API as well as the special protection afforded to objects indispensable to the survival of the civilian population under article 54(2) API were taken into account; the prohibition from attacking civilians as well as the infrastructure for food, water and agricultural production necessary to their survival was addressed, also underlining that “*failing to respect this obligation would constitute a grave breach of international humanitarian law and a war crime*”.<sup>1504</sup> Similar considerations were made for the destruction of drinking water installations and the systematic destruction of roads, bridges, ports and food factories, which could constitute war crimes (although perceived on one side as military objectives) when it produces excessive loss of life or injury to civilians or damage to civilian objects, or it causes “*widespread, long-term and severe damage to the natural environment*”.

Secondly, the IHL rule limiting methods or means of warfare was referred to, including the prohibition to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.<sup>1505</sup> Possible violations resulting from the *use of cluster munitions in populated civilian areas* were addressed given their effects that do not discriminate between military and civilian objectives. Remarkably, in this context serious concerns were expressed for *the dispersal of unexploded bomblets from cluster bombs*: besides immediate affects on civilian life, “*after-effects*” include damage to agricultural fields, life and civilian infrastructure.

Thirdly, the protection of the right to food of civilian populations caught in armed conflict was addressed by referring to IHL rules covering both *the affected civilians’ right to receive aid* and *the right of humanitarian agencies to deliver it*. As observed in chapter 2, under Articles 70 and 71 API the parties to the conflict are required to “*allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel*”; they have to

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<sup>1501</sup> UN Doc. A/HRC/2/8, *ibid.*, para. 8-9, also referring to considerations made in his previous report (E/CN.4/2006/44 of 16 March 2006, paras. 28-38).

<sup>1502</sup> UN Doc. A/HRC/2/8, *ibid.*, para. 9, also referring to considerations made in the following previous reports: *Preliminary report of the Special Rapporteur of the Commission on Human Rights on the right to food*, Jean Ziegler, A/56/210 of 23 July 2001; *Report submitted by the Special Rapporteur on the right to food*, Jean Ziegler, in accordance with Commission on Human Rights resolution 2002/25, UN Doc. E/CN.4/2003/54 of 10 January 2003.

<sup>1503</sup> This aspect was already outlined in the *Report by the Special Rapporteur on the right to food*, Mr. Jean Ziegler, submitted in accordance with Commission on Human Rights resolution 2001/25, E/CN.4/2002/58 of 10 January 2002, paras. 72-106.

<sup>1504</sup> UN Doc. A/HRC/2/8, *ibid.*, para 11. See Article 85(3) API; Article 8(2)(b) Rome Statute of the ICC.

<sup>1505</sup> UN Doc. A/HRC/2/8, *ibid.*, para. 12.

“encourage and facilitate effective international coordination of the relief actions and ensure the safety of medical and humanitarian personnel”; they have to enable and defend these operations, without diverting or obstructing the passage of humanitarian assistance. As aptly underlined, deliberately obstructing humanitarian operations as well as targeting “*personnel, installations, material, units or vehicles involved in humanitarian assistance*” may constitute war crimes.<sup>1506</sup>

(c) In view of the whole framework, certain findings and concerns on *the enjoyment of the right to food and water during and after the war in Lebanon* were highlighted.<sup>1507</sup> In considering the right to food “*not primarily about food aid*”, but instead “*as the right to be able to feed oneself through an adequate livelihood*”, the key concern was *the long-term impacts of the war on livelihoods of a large part of the population*: the core warning to the future well-being of many thousands of families was identified in “*the loss of livelihoods and sources of income*”.

(d) Subsequent recommendations made in light of such findings and in view of the international obligations addressed upon the parties to the conflict are noteworthy as well.<sup>1508</sup> Aimed at improving the realisation of the right to food of the whole Lebanese population, they evidence the Special Rapporteur’s attempt to frame the discourse of the legality of the parties’ conducts by determining the *link* between the *impacts on civilians* and the *violations of international human rights and humanitarian law*.

Significantly, this “violation approach” for monitoring the right to food led to the recommendation that further investigation determine whether those violations “*constitute grave breaches of the Geneva Conventions of 12 August 1949 and Additional Protocol I thereto and possible war crimes under the Rome Statute of the International Criminal Court*”. In the regard it led to advocate the acceptance by the two Governments of Israel and Lebanon of the International Humanitarian Fact-Finding Commission (established in accordance with Additional Protocol I) to investigate IHL violations of the right to food. Then, in view of the ICJ jurisprudence<sup>1509</sup> it led to advocate

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<sup>1506</sup> UN Doc. A/HRC/2/8, *ibid.*, para. 13. See Article 8(2)(b) ICC Statute.

<sup>1507</sup> UN Doc. A/HRC/2/8, *ibid.*, paras. 14-30. Some examples of the findings include: “*a combination of destruction of road and transport infrastructure and repeated denial of safe transit by the Israeli armed forces made it very difficult for humanitarian agencies to transport food and other relief*”; “*the forced displacement of a vast number of people from their homes and agricultural lands disrupted normal access to food and left tens of thousands dependent on food aid*”; since the war occurred at the fishing and fruit harvest season, people earning their livelihood from these sectors were affected both directly in terms of damage and indirectly in terms of lost markets and revenues; bombing and unexploded bombs affected farmland, also making access to many fields impracticable; it was reported that “*more than 1.2 million cluster bombs were dropped by the Israeli forces, noting that about 90 per cent were allegedly dropped in the last 72 hours of the war when the Israeli forces were already aware that a ceasefire was imminent*”; further long-term impacts on livelihoods and access to food and water derived from “*the destruction by the Israeli forces of infrastructure essential to the survival of the population, particularly agricultural, irrigation and water infrastructure*”; “*fishing was heavily affected by the massive oil spill following Israeli bombing of the four Jiyeh fuel tanks on 14 July 2006*”.

<sup>1508</sup> UN Doc. A/HRC/2/8, *ibid.*, para. 31.

<sup>1509</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *op. cit.*, paras. 152, 153 and 163. Significantly, for the first time in its case law, the Court introduced the right to individual reparations for violations of international human rights and international humanitarian law, giving basic importance to the return of individual property in relation to such violations. To be precise, the Court recognised that the construction of the wall resulted in “*the requisition and destruction of homes, businesses and agricultural holdings*”, thus obliging Israel to “*make reparation for the damage caused to all the natural or legal persons concerned*” (para. 152). It remarked that Israel is “*under an obligation to return the land, orchards, olive grove and other immovable property seized from any natural or legal person for purposes of construction of the wall*” in the OPT (para. 153). Should the restitution “*prove to be materially impossible*”, it remarked that Israel “*has an obligation to*



Israel's responsibility under international law for any violation of the right to food of the Lebanese civilian population, openly addressing "*the obligation to ensure that all victims receive adequate reparation and compensation for the losses suffered during the war as well as for ongoing losses due to the disruption of livelihoods*". Another international law obligation addressed upon Israel concerned the reimbursement of the Government of Lebanon "*for the clean-up of the oil spill from the Jiyeh power plant and the fisherfolk for their economic losses caused by the spill*".

Conversely, Lebanon was recommended to accelerate, with bilateral and multilateral donors, the clearing of hundreds of thousands of pieces of unexploded ordnances (UXO) - mainly cluster bombs (anti-personnel weapons spraying bomblets indiscriminately over a wide area) - from agricultural fields. In order to facilitate the clearing of concerned areas, the Government of Israel was recommended to provide details on the use of cluster munitions. Finally, a series of recommendations to the Government of Lebanon - in cooperation with UN agencies and international and national NGOs - focused on the central role to assign to the rights to food and water within reconstruction efforts. They concerned designing programmes in support of farmers, agricultural labourers and fishermen, ensuring transitional measures to guarantee access to food for all vulnerable groups, prioritizing the reconstruction of agricultural infrastructure, water wells and water distributions networks.

**3.6.(3)** The *duration* of contemporary conflict-torn and occupation-related scenarios also deserves attention. Their short or long terms are likely to influence the extent of potential "cross-interpretation" between the legal regimes. In particular, a human rights approach to civilians' ESC rights - which generally widen the range and scope of relevant State obligations under international law - may prove more suitable to handle the challenges featuring situations of persistent armed conflict as well as cases of prolonged occupation, with positive effects for the conduct of other actors involved.

**3.6.(4)** A further relevant issue may be articulated as to whether the *potential co-application* of these two legal regimes *facilitates* or *impedes* the delivery of humanitarian assistance. In other words, possible tensions as well as opportunities may derive from the intersection between human rights law, international humanitarian law and the humanitarian action. In fact, for the organizations with both humanitarian and human rights-related mandates, the commonalities and differences between these two bodies of international law may raise challenges for short-term and long-term humanitarian protection strategies implemented across the dynamic contexts of armed conflicts.

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*compensate, in accordance with the applicable rules of international law, all natural and legal persons having suffered any form of material damage as a result of the wall's construction*" (para. 153).



## CHAPTER V: THE PROTECTION OF CIVILIANS VIA EXTRATERRITORIAL REACH OF TREATIES ON ESC RIGHTS

### 1. Introduction

The aptitude of States alongside other actors to adversely impact human rights far from home has definitely become a frequent feature of conflict-related scenarios, where it is not unusual that States' conduct (undertaken wholly beyond national borders or resulting from decisions and policies assumed on the sovereign territory) are carried out under certain modalities and produce certain consequences which inhibit the exercise of - or lead to the lack of access to - the ESC rights of civilian individuals or groups living therein, and which would be qualified as violations of relevant human rights treaties had they been undertaken on sovereign territory.

Specifically, instances of conduct which have the potential to put seriously at risk, nullify, or impair civilians' ESC rights include non-territorial State' acts or omissions related to *military operations*, to *belligerent occupations*, to activities undertaken during *the reconstruction of post-conflict societies and the rehabilitation of failed States* (*i.e.* development projects financed by State parties to relevant treaties), to *activities of a business enterprise in a war-torn host State while such a corporation or its parent or controlling company is registered or domiciled under the law of the home State concerned* (so covered by several States' jurisdictions), or, furthermore, to *sanctions and equivalent measures* decided by States as policy instruments for achieving a certain conduct by the target State (in addition to economic - trade and financial - sanctions, military, diplomatic or cultural sanctions have been undertaken to fulfil other international legal obligations).

In looking at the extraterritorial dimensions of the protection of civilians' ESC rights under human rights treaties, the present chapter will be for the most part explored *on the basis of what criteria* and *to what extent* the obligations stemming from States' international commitments in this area can apply to foreign territories as well as to civilians (non-nationals) placed therein as affected by situations of armed conflict and periods of military occupation which involve non territorial States parties to such treaties.

In inquiring this supplementary perspective, the present research will preliminary examine key soft law norm-setting efforts that have recently emerged on the subject of *extraterritorial obligations of States in relation to ESC rights*. The aim is to explore their potential implications as well as actual relevance for the protection of civilians within the evolving practice of conflict-affected situations, including also their weight in shaping the legal discourse on effective and adequate remedies in favour of civilian victims of related violations.

The issue of extraterritorial human rights obligations is framed according to *several key aspects* in the present chapter. It is primarily taken into account that even within conflict-affected scenarios the access to, and enjoyment of, ESC rights is inevitably impacted by the phenomenon of globalisation, the increased interdependency of States and the ever-greater interactions between several actors having considerable imbalanced powers within the international community. This entails bringing into the present narrow inquiry some basic considerations progressively developed around the broad discourse on the challenges posed by globalisation. Specifically, the emerging principal idea that *human rights as global public goods or standards can gradually turn into a guide for the reshaping of the international legal order*,<sup>1510</sup> and the connected basic idea of taking seriously *the twofold content of extraterritorial human rights obligations of States*: obligations as they relate to States' conduct that impact the enjoyment of human rights beyond their sovereign territories, but also obligations as set out in the UN Charter and in other instruments to act separately and in cooperation to realise them.

As to the *theoretical legal foundations* for extraterritorial obligations, these are considered as part of States' duty to comply with internationally recognised human rights standards under several sources of international law, including the UN Charter, the UDHR and treaties guaranteeing ESC rights. In inquiring as to the extraterritorial scope and application of the latter, three aspects will be for the most part examined for the purpose of assessing the potential legal basis for extending relevant obligations beyond the territorial State. They concern the concept of *jurisdiction*, the notion of *international cooperation*, and the application of *economic sanctions or equivalent measures*. The aim is investigated through their distinct and specific, though controversial, relevance for the protection of civilians' ESC rights in contemporary situations of armed conflict and belligerent occupation.

The *content and structure* of extraterritorial State obligations on ESC rights are considered in the light of several typologies conceptualised by scholars and articulated by monitoring bodies, as well as in view of more evaluative legal doctrines used in ESC rights jurisprudence for determining more

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<sup>1510</sup> For an inquiry of the possibilities and disadvantages of applying the idea of public goods in a global context, with an explanation of the history of the concept and its significance for human rights, see E.A. Andersen and B. Lindsnaes (eds.), *Towards New Global Strategies: Public Goods and Human Rights*, Brill, 2007. See also "Symposium: Global Public Goods and the Plurality of Legal Orders", 23 (3) *EJIL*, 2012.

acutely States' compliance (*i.e.* the doctrine of “*justification and due process*” for interferences with these rights or for retrogressions in their realisation;<sup>1511</sup> the “*due diligence*” rule for assessing the degree of protection in the forms of preventing, minimising and remedy human rights violations; the “*reasonableness*” test for assessing the degree of fulfilment). Another significant emerging idea is that of “*shared obligations*” in situations of multiple duty holders. It is also posited that at least three relevant parameters frame the discourse on the nature of human rights obligations (*i.e.* the beneficiaries or duty holders,<sup>1512</sup> the range of rights, the types of obligations).

As to the notion of *violations of ESC rights as result of extraterritorial conducts*, various legal qualifications have been used to address cases of non-fulfilment of relevant obligations flowing from the treaties concerned.<sup>1513</sup> These include expressions such as States' policies or acts that *lead to a violation of ESC rights, result in harm or damage inflicted on individual or groups, have a negative impact on the enjoyment of ESC rights, result in a deprivation of ESC rights*. Clearly, all of them evidence the difficulty to establish a *direct and casual link* between the violations of ESC rights taken place in a certain country and the internationally wrongful act attributable to a non-territorial State under international law and constituting a breach of an international legal obligation in force for that State at that time (so entailing its international responsibility and the obligations incurred as the legal consequences of such act).<sup>1514</sup> Nonetheless, other principles becoming relevant to determine the contributions by non-territorial States include the “*proximity*” to a certain act/omission, the “*foreseeability*” of the effects of a certain conduct, the “*influence*” over a certain decision, and the “*precautionary principle*”. In this

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<sup>1511</sup> See, *e.g.*, CESCR, *General Comment No. 7 on forced evictions*.

<sup>1512</sup> Certain human rights treaties (*e.g.* the ICESCR) and relevant declarations (*e.g.* American Declaration of the Rights and Duties of Man) do not indicate the rights-holders. Besides assuming that the beneficiaries of the obligations concerned are the rights-holders under a legal and factual power of a State party, the obligations to guarantee such rights may be also considered as owed *erga omnes* to the whole international community (as far as safeguarding human rights is in the interest of all States), even without a particular connection between a State and their denial in other States. See ICJ, *Case concerning the Barcelona Traction, Light and Power Co. (Belgium v. Spain)* (second phase - merits), 5 February 1970, ICJ Reports, 3, paras. 33-34; HRC, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, paras. 2 and 10.

<sup>1513</sup> According to paragraph 16 of the 1998 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, *violations are “in principle imputable to the State within whose jurisdiction they occur”*. Examples with an extraterritorial dimension are the following: “*the active support for measures adopted by third parties which are inconsistent with ESC rights*” (para. 14 (c)), “*the failure to regulate activities of individuals or groups so as to prevent them from violating ESC rights*” (para. 15 (d)), and *the State's failure to consider its international obligations regarding ESC rights in the context of “bilateral or multilateral agreements with other States, international organizations or multinational corporations”* (para. 15 (j)).

<sup>1514</sup> It is worth referring to the ILC's Draft Articles of 2001. In particular Articles 4-11 concern the conduct which can be regarded as an act of State and attributed to a State for the purposes of State responsibility: by State organs (Art. 4), by other entities authorised by the State (Art.5), by organs of another State when found at the disposal of the State (Art. 6), by State officials acting *ultra vires* in official capacity (Art.7), by private parties acting under the instruction, control or direction of the State. Conversely, Articles 12-15 deal with further circumstances under which a conduct can be attributed to a State: the issue of *ratione temporis* (Art. 13), the distinction continuing effect/continuing violation (Art.14), the issue about attribution of “*composite acts*” (Art. 15). Then, Articles 16-19 outline a range of forms of complicity by another State: aid or assistance (art. 16), direction or control (Art. 17), coercion to another State (Art.18).

respect, war-torn scenarios may raise the basic question of the attribution of extraterritorial conduct leading to violations of civilians' ESC rights and therefore attract the issue of the international responsibility of non-territorial States.

## **2. Extraterritoriality under international human rights law in legal scholarship: preliminary considerations of research**

The comprehensive issue of *extraterritorial application of international human rights law* has become a serious matter of debate in legal scholarship recently.<sup>1515</sup> The addressed basic idea is that *a conduct in contrast to such application challenges the effective protection of individual rights*, which is the very purpose of this branch of international law.<sup>1516</sup> Subsequent academic studies have investigated the issue of extraterritorial application of universal and regional human rights treaties by focusing on several aspects: the interpretation of applicable treaty law;<sup>1517</sup> the theoretical legal foundations for extraterritorial obligations;<sup>1518</sup> the challenges posed by international economic structures to international human rights law (*i.e.* in the context of processes of economic globalisation as featured by an increased number of transnational corporations, an amplified role for international financial institutions and a large amount of multilateral arrangements).<sup>1519</sup> Moreover, in the field of global

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<sup>1515</sup> For the first contribution on the scope of obligations under the ICCPR, see T. Buergental, "To respect and to ensure: State obligations and permissible derogations", in L. Henkin (ed.), *The International Bill of Rights: the Covenant on Civil and Political Rights*, Columbia University Press, 1981, at 72-91.

<sup>1516</sup> On the applicability of the ICCPR to the US intervention in Haiti, see also T. Meron, "Extraterritoriality in human rights treaties", 89 *AJIL*, 1995, at 78-82, concluding that "*narrow territorial interpretation of human rights treaties is anathema to the basic idea of human rights, which is to ensure that a State should respect human rights of persons over whom it exercises jurisdiction*". See also J. Cerone, "Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo", *EJIL*, 2001, 469-488, at 475.

<sup>1517</sup> For the first collection of essays debating the extraterritorial application of a number of human rights treaties, see F. Coomans and M. Kamminga (eds.) *Extraterritorial Application of Human Rights Treaties*, Intersentia, 2004. See also R. Lawson, "The Concept of Jurisdiction and Extraterritorial Acts of States", in G. Kreijen, *State, Sovereignty and International Governance*, OUP, 2002. For a recent contribution tackling the subject in an integrated way and attempting to develop a flexible approach to be applied generally to extraterritorial application of human rights treaty law, see M. Gondek, *The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties*, Intersentia, 2009.

<sup>1518</sup> See S.I. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation*, Intersentia, 2006; S.I. Skogly, "The obligation of international assistance and cooperation in the International Covenant on Economic, Social and Cultural Rights", in B. Morten (ed.), *Human Rights and Criminal Justice for the Downtrodden, Essays in Honour of Osborn Eide*, Kluwer Law International, 2003, at 403-420. See M. Sepulveda, "Obligations of "International Assistance and Cooperation" in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", 24 *Netherlands Quarterly of Human Rights*, 2006, at 271-303. See W. Vandenhole, "Economic, Social and Cultural Rights in the CRC: is there a legal obligation to cooperate internationally for development?", 17 *The International Journal of Children's Rights*, 2009, pp. 1-41.

<sup>1519</sup> See M.E. Salomon, "International Economic Governance and Human Rights Accountability", *LSE, Law, Society and Economy Working Papers*, Paper No. 9/2007. See V.P. Nanda, "Accountability of International Organizations - Some Observations", *Denver Journal of International Law and Policy*, 2005, p. 379 ff. See B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance*, Cambridge, 2003. See S. Skogly, "The Human Rights Obligations

social justice, “*transnational obligations*” have been posited in relation to economic and social rights through legal, ethical and economic arguments.<sup>1520</sup>

With regard to terminology, a certain diversity of opinions has been a feature of the debate on the subject. Besides the prevailing terms of “*extraterritorial*” applicability of human rights treaties and “*extraterritorial*” human rights obligations,<sup>1521</sup> other terms used with regard to ESC rights include “*transnational obligations*”,<sup>1522</sup> “*international obligations*”,<sup>1523</sup> “*external obligations*”<sup>1524</sup> and “*third States obligations*”.<sup>1525</sup> However, the terms “*extraterritorial application*” and “*extraterritorial obligation*” seem to capture entirely the main feature of the situations in question, namely that *the victims are situated outside the sovereign territory of the State party to the relevant treaty whose conduct has affected their human rights*.

Remarkably, systematic treatments of extraterritoriality concerning ESC rights have been carried out in respect to the ICESCR.<sup>1526</sup> The meaning of extraterritorial obligations has been explored by relying mostly on the CESCR’s readings.<sup>1527</sup> On this basis, certain needs have been

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of the World Bank and the IMF”, in W. Van, P. Hunt and S. Marks (eds.), *World Bank, IMF and Human Rights*, Wolf Legal Publishers, 2003, pp. 45 - 78.

<sup>1520</sup> See International Council for Human Rights Policy 2003, *Duties sans Frontières. Human Rights and Global Social Justice*, at [http://www.ichrp.org/files/reports/43/108\\_report\\_en.pdf](http://www.ichrp.org/files/reports/43/108_report_en.pdf). See S. Skogly and M. Gibney, “Economic Rights and Extraterritorial Obligations”, in S. Hertel and L. Minkler (ed.), *Economic Rights: Conceptual, Measurement, And Policy Issues*, Cambridge University Press, 2007.

<sup>1521</sup> See S. Skogly and M. Gibney, “Economic Rights and Extraterritorial Obligations”, S. Hertel and L. Minkler (eds.), *Economic Rights: Conceptual, Measurement and Policy Issues*, Cambridge University Press, 2007, p. 267.

<sup>1522</sup> See S. Skogly and M. Gibney, “Transnational Human Rights Obligations”, *HRQ*, 2002, p. 781, meaning obligations of States “*relating to the human rights effects of their external activities, such as trade, development cooperation, participation in international organizations, and security activities*”.

<sup>1523</sup> See F. Coomans, “Some remarks on the extraterritorial application of the International Covenant on Economic, Social and Cultural Rights”, in Coomans and Kamminga (eds.) *Extraterritorial Application of Human Rights Treaties*, Intersentia, 2004, p. 185-186, stressing the appropriateness of ‘*international obligations*’ (rather than ‘*extraterritorial*’) since the ICESCR does not use jurisdiction and territory language. See Künnemann, “Extraterritorial application of the international covenant on economic, social and cultural rights”, in Coomans and Kamminga (eds.), *op. cit.*, at 201, distinguishing between *internal* (towards victims in its own territory), *external* (towards victims outside its own territory), and *international* (as members of the governing body or decision-making majority of an international organisation towards victims inside and outside its territory) obligations.

<sup>1524</sup> See M. Craven, *The International Covenant of Economic, Social and Cultural Rights: A Perspective on Its Development*, Clarendon Press, 1995, p. 150.

<sup>1525</sup> On the concept and terminology, see S. Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation*, Intersentia, 2006, at 5; W. Vandenhole, “Third State Obligations under the ICESCR: a Case Study of EU Sugar Policy”, 76 *Nordic Journal of International Law*, 2007, 73-100; Gibney, Tomasevski and Vendsted-Hansen, “Transnational State responsibility for violations of human rights”, 12 *Harvard Human Rights Journal*, 1999, pp. 269-273; M. Gibney, “On Terminology: Extraterritorial Obligations”, in M. Langford, W. Vandenhole, M. Scheinin and W. Van Genugten (eds.), *Global Justice, State Duties: The Extra-Territorial Scope of Economic, Social and Cultural Rights in International Law*, Cambridge, 2012, pp. 32-50.

<sup>1526</sup> See M. Craven, *The International Covenant of Economic, Social and Cultural Rights: A Perspective on Its Development*, Clarendon Press, 1995, at 144-152; M. Gibney, K. Tomasevski and J. Vedsted-Hansen, “Trans-national State Responsibility for Violations of Human Rights”, 12 *Harvard Human Rights Journal*, 1999, at 273; S. Skogly and M. Gibney, “Transnational Human Rights Obligations”, *HRQ*, 2002, pp. 781-798; Künnemann, “Extraterritorial application of the international covenant on economic, social and cultural rights”, in Coomans and Kamminga (eds.), *op. cit.*, pp. 201-231.

<sup>1527</sup> See Langford, Coomans, Gómez, “Extraterritorial Duties in International Law”, in M. Langford, W. Vandenhole, M. Scheinin, W. Van Genugten (eds.), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural*

emphasised: further widening the *notion of the international scope of treaties on ESC rights*,<sup>1528</sup> better explaining the *legal basis for extraterritorial obligations flowing from such treaties*, as well as specifying the *nature of such obligations according to different layers*.<sup>1529</sup> The Committee's use of the notion of the extraterritorial scope of the ICESCR in various documents has been criticised though, having outlined solidly obligations to respect ESC rights while leaving obligations to protect and fulfil as largely undefined and consequently weak in different contexts (*e.g.* trade, development cooperation, actions by international organizations, sanctions).<sup>1530</sup>

Overall, the *legal framework of extraterritorial obligations of States in the area of ESC rights* is still under elaboration in both its normative and accountability dimensions, and it has thus a partly soft law nature.

As for *human rights treaties on ESC rights*, a major controversial aspect for extending the legal obligations stemming from them beyond the territorial State is represented by the frequent absence of provisions specifying their general scope of application, as will be examined in section 4. In actual fact, this textual ambiguity has favoured disagreement on the existence of extraterritorial obligations on ESC rights, with a tendency to differentiate the typologies of duties and examine which ones may be reasonably implemented beyond the national borders of States parties to the treaties in question. This approach has been nonetheless useful to develop the conceptual and interpretative understanding of extraterritorial obligations in scholarship and in comments or statements by UN human rights treaty bodies and other supervisory mechanisms, especially articulating obligations according to the respect-protect-fulfil paradigm.<sup>1531</sup> This line has been recently developed in one the most valuable attempts enunciating the legal parameters for discharging extraterritorial obligations, namely the Maastricht Principles on Extra-territorial Obligations in the Area of Economic, Social

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*Rights in International Law*, Cambridge, 2012; W. Vandenhoe, "EU and Development: Extraterritorial Obligations under the International Covenant on Economic, Social and Cultural Rights", in Salomon, Tostensen, Vandenhoe (eds.), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers*, Intersentia, 2007, pp. 85-106, pp. 92-97.

<sup>1528</sup> See F. Coomans, "The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights", *HRLR*, 2011, at 1-35.

<sup>1529</sup> See S. Skogly, "Extraterritoriality - Universal Human Rights without Universal Obligations?", in S. Joseph and A. McBeth (eds.), *Research Handbook on International Human Rights Law*, Edward Elgar Publishing Ltd., 2010.

<sup>1530</sup> See M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, Intersentia, 2009, p.

<sup>1531</sup> For instance, see Committee on the Rights of the Child, *Day of General Discussion on "Resources for the Rights of the Child – Responsibilities of States, investments for the implementation of economic, social and cultural rights of children and international cooperation*, Forty-sixth session, 21 September 2007, para. 51. See also UNHRC, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, "State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries", A/HRC/4/35/Add.1, 2007, para. 92.



and Cultural Rights,<sup>1532</sup> as highlighted in section 3.2.

It is worth anticipating that the negative obligation to *respect* ESC rights is commonly seen as *territorially unlimited*,<sup>1533</sup> thus requiring States to desist from unlawful direct or indirect interferences with existing access and enjoyment of ESC rights. Conversely, the positive obligation to *protect* ESC rights has been firstly deemed to require the exercise of *territorial jurisdiction* conceived as control over a spatial area, being this functional to their actual realisation;<sup>1534</sup> though under its deeper conceptualisation States have to prevent third parties (“*individuals, groups, corporations and other entities, agents acting under their authority*”),<sup>1535</sup> whose conduct is extraterritorial or has extraterritorial effects) from interfering with ESC rights when States are in a position to do so under certain bases. A further aspect has developed for States acting as members of international organizations. In this respect, the positive obligation to *fulfil* ESC rights has been the most embryonic, largely seen as an issue *de lege ferenda*; but under its deeper conceptualisation States are supposed to assist individuals as well as communities to satisfy ESC rights overseas, through measures of facilitation, promotion and

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<sup>1532</sup> They were developed between 2009 and 2011 and then adopted in September 2011. Signatories comprise Special Rapporteurs of the Human Rights Council, members of UN human rights treaty bodies, academics and legal advisers of leading non-governmental organizations. For a commentary aimed at setting out the legal authority of these Principles, see O. De Schutter, A. Eide, A. Khalfan, M. Orellana, M. Salomon, I. Seiderman, “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights”, *HRQ*, 2012, pp. 1084-1169. For an overview, see Salomon and Seiderman, “Human Rights Norms for a Globalized World: The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights”, 3 *Global Policy Journal*, November 2012, pp. 458-462.

<sup>1533</sup> As Theodor Meron aptly noted, “*in view of the purposes and objects of human rights treaties, there’s no a priori reason to limit a State’s obligation to respect human rights to its national territory. Where agents of the State, whether military or civilian, exercise power and authority (jurisdiction, or de facto jurisdiction) over persons outside national territory, the presumption should be that the State’s obligation to respect the pertinent human rights continues*”, see T. Meron, “Extraterritoriality of Human Rights Treaties”, 8 *AJIL*, pp. 80-81.

<sup>1534</sup> In this regard, see M. Milanovic, *Extraterritorial Application of Human Rights Treaties. Law, Principles, and Policy*, Oxford, 2011, p. 228, taking as example the *Aerial Herbicide Spraying (Ecuador v. Colombia)* case before the ICJ. On 31 March 2008 the Republic of Ecuador applied to the ICJ and alleged that Colombia had been engaged since 2000 in aerial spraying of toxic herbicides “*at locations near, at and across its border with Ecuador*”. In this regard, the author considers Colombia’s obligation towards Ecuadorians living across the border to *respect* their right to health and food, which would be in principle violated by the aerial herbicide spraying over coca leaf plantations in Colombia; however, the author notes that the obligation to actually provide food or health care services to the population of Ecuador would not rise upon Colombia, which does not exercise jurisdiction over the relevant part of Ecuador.

It is worth considering that in its application Ecuador stated that “*the spraying has already caused serious damage to people, to crops, to animals, and to the natural environment on the Ecuadorian side of the frontier, and poses a grave risk of further damage over time*”. Accordingly, it requested the Court “*to adjudge and declare that Colombia has violated its obligations under international law by causing or allowing the deposit on the territory of Ecuador of toxic herbicides that have caused damage to human health, property and the environment*”. In September 2013 this case was consensually discontinued as the parties reached an agreement on 9 September 2013. *Inter alia*, the latter “*establishes, an exclusion zone, in which Colombia will not conduct aerial spraying operations, creates a Joint Commission to ensure that spraying operations outside that zone have not caused herbicides to drift into Ecuador and, so long as they have not, provides a mechanism for the gradual reduction in the width of the said zone; ... sets out operational parameters for Colombia’s spraying programme, records the agreement of the two Governments to ongoing exchanges of information in that regard, and establishes a dispute settlement mechanism*”.

<sup>1535</sup> See CESCR, *General Comment No. 15: The Right to Water*, E/C.12/2002/11 (2003), para. 23.

provision<sup>1536</sup>, within their available resources and capacities.<sup>1537</sup>

### **3. The potential of soft-law norm-setting efforts on extraterritorial obligations**

For the purposes of the present research, noteworthy considerations are found in the current broader academic debate over the relevance of *the notion of extraterritorial obligations as useful tool to address the challenges of globalisation* and the dramatic growth of interactions between States, international organizations and other multilateral institutions, multinational or transnational private actors.<sup>1538</sup>

The decentred position of the State and the increased impact of powerful public and private non-state actors have raised, *inter alia*, questions about the affects of globalisation on ESC rights and the extent to which additional methods need to be explored “*in order to ensure that developments relating to globalisation are conducive to the promotion of those rights*”.<sup>1539</sup> Accordingly, threats of the regressive protection of ESC rights have been addressed along with a progressive weakness of the shield of national sovereignty and a gradual emptiness of the concept of State responsibility.

A clear *leitmotiv* of scholars’ contributions debating extraterritoriality is the acknowledgment that globalisation has challenged fundamental principles governing international law - especially with respect to State sovereignty and international relations - and that it has significantly impacted various areas of law and regulation - such as the practice of trade law, financial regulation, and

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<sup>1536</sup> See CESCR, *General Comment No. 11: Plans of Action for Primary Education*, UN Doc. E/C.12/1999/4 (1999), para. 9. See CESCR, *General Comment 12, Right to Adequate Food*, E/C.12/1999/5 (1999), paras. 36, 38, 39.

<sup>1537</sup> Special emphasis has concerned the realisation of minimum core obligations, which have been placed at the centre of international cooperation, especially regarding the provision of humanitarian assistance for emergency situations or disasters, see CESCR, *General Comment No. 12*, para. 38; CESCR, *General Comment No. 14*, para. 40; CESCR, *General Comment No. 15*, para. 34. On the idea of prioritizing assistance according to human rights concerns, see CESCR, *General Comment No. 2, International Technical Assistance Measures* (Article 22 of the Covenant), UN Doc. E/1990/23, para 7. For an emblematic emphasis of the idea that “*donor countries should prioritize assistance to States most affected by the food crisis*”, see CESCR, *Statement on the World Food Crisis*, UN Doc. E/C.12/2008/1, paras. 9 and 11.

<sup>1538</sup> For a thorough study on the issue, see Kinley, *Civilizing Globalization. Human Rights and the Global Economy*, Cambridge, 2009; M. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law*, Oxford, 2007. For an examination of four different possible intellectual approaches to the development of a theory of international responsibility for breaches of human rights committed by transnational activities of corporations (i.e., the responsibility of the host State, individual responsibility of corporate officials, the direct liability of the corporation, the international responsibility of the home State), see F. Francioni, “Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations”, in Benedek, De Feyter, Marrella (eds.), *Economic Globalization and Human Rights*, Cambridge, 2007, pp. 245-265.

<sup>1539</sup> See CESCR in its first *Statement on Globalization and its Impacts on the Enjoyment of Economic, Social and Cultural Rights*, see E/1999/22-E/C.12/1998/26, paras. 436-461.

environmental law - but with modest effects in human rights law.<sup>1540</sup> Critically, the “inflated” reference to the international legal system still modelled on sovereign States has been seen as impeding crucial developments for the extraterritorial application of international human rights norms, which would be more coherent with other areas of law related to rights holders.<sup>1541</sup> Thus, a number of *challenges* in the interpretation of the law as well as some *obstacles* of a political nature have been addressed in relation to extraterritoriality: re-thinking *the position of sovereignty* with regard to international human rights law generally, and revising some key concepts such as *State jurisdiction*, *State responsibility*, and *accountability*, in order to “operationalize” extraterritorial obligations.<sup>1542</sup>

Within the attempt to “re-conceptualise” the basic tenet of international human rights law that places the obligations mainly on the territorial State, a growing academic debate has searched for widening the circle of human rights duty-bearers beyond the territorial State. This is deemed functional to make this branch of law more responsive to “*what is taking place on the ground*” and capable to operate as a “*corrective to power regardless of the identity of the power holder*”.<sup>1543</sup> Some noteworthy efforts for elaborating principles, policy and regulatory options have led to develop a multi-duty-bearer framework. For *foreign States*, the aforementioned 2011 Maastricht Principles on Extra-territorial Obligations in the Area of Economic, Social and Cultural Rights are of particular note. For *international organizations*, it is worth referring to the 2002 Tilburg Guiding Principles on the World Bank, IMF and Human Rights.<sup>1544</sup> For *corporations*, the 2003 Norms on the Responsibilities of

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<sup>1540</sup> S. Skogly and M. Gibney (eds.), *Universal Human Rights and Extraterritorial Obligations*, University of Pennsylvania Press, 2010, 1-9. Issues covered include the right to life, the right to food, the rights to health, the right to water, the right to housing, refugee law, environmental rights. In exploring the theoretical foundation for States’ human rights obligations that extend beyond national borders, the book raises the question of a need for greater accountability for States’ foreign policies. The general argument consists in that human rights must be seen to apply not merely to States’ domestic actions but also to their conduct abroad as well as to the action of intergovernmental organizations and private international entities that operate globally.

<sup>1541</sup> T. Howland, “Multi-State Responsibility for Extraterritorial Violations of Economic, Social and Cultural Rights”, in M.A. Baderin and M. Ssenyonjo, *International Human Rights Law. Six Decades After the UDHR and Beyond*, Ashgate, 2010, at 386-387.

<sup>1542</sup> See M. Langford, W. Vandenhole, M. Scheinin, W. van Genugten (eds.), *Global justice, State duties: the extra-territorial scope of economic, social and cultural rights in international law*, Cambridge University Press, 2012. See Coomans, “The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights”, *HRLR*, 2011, at 1-35. See S. Skogly and M. Gibney (eds.), *Universal Human Rights and Extraterritorial Obligations*, University of Pennsylvania Press, 2010. See M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, Intersentia, 2009, at 56, 168. See R. Higgings, *Problem and process - International Law and How We Use It*, Clarendon Press, 1994, at 146.

<sup>1543</sup> See W. Vandenhole, “Emerging Normative Frameworks on Transnational Human Rights Obligations”, *EUI Working Paper, RSCAS - Global Governance Programme-15*, 2012/17.

<sup>1544</sup> They were drafted by a group of experts, at Tilburg University, The Netherlands, in October 2001 and April 2002. See Willem van Genugten and Kees Flinterman (eds.), *World Bank, IMF and Human Rights*, Nijmegen: Wolf, 2003, pp. 247-255. They deal with possible human rights obligations upon international financial institutions, examining the possible redress of human rights impacts by their economic and political activities.

Transnational Corporations and Other Business Enterprises with regard to Human Rights<sup>1545</sup> and the 2011 UN Guiding Principles on Business and Human Rights (UN Guiding Principles)<sup>1546</sup> are among the most recent efforts aimed at defining and regulating business-related human rights practices.<sup>1547</sup> Notably, all these efforts have been questioned on a theoretical basis, or on whether the fragmented approach to elaborate principles for each diverse actor risks being unsuccessful in dealing with a global phenomenon with its many players, or indeed whether a holistic method is preferable and how reasonable it would be.<sup>1548</sup>

In the present chapter those efforts are explored narrowly for their relevance to conflict-affected situations, in view of some specific textual reference and generally insofar as they allow further reflection on what implications for the protection of ESC rights in such challenging situations may derive from a progressive development of international law's normative and accountability frameworks, though taking into due account international law *de lege lata*. In particular, a couple gain relevance.

Firstly, the UN Guiding Principles are examined in section 3.1.<sup>1549</sup> Their stated normative

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<sup>1545</sup> Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003. Although adopted in 2003, the UN Commission on Human Rights rejected them in 2004 (because of an unreceptive business community). Under para. 3, “*Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law*”.

<sup>1546</sup> *Report of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework”, UN Doc. A/HRC/17/31, 21 March 2011. This was the outcome of Ruggie’s six year effort, following his appointment by the UN Secretary General Kofi Annan in 2005 “*to identify and clarify standards of corporate responsibility and accountability regarding human rights; elaborate on State roles in regulating and adjudicating corporate activities; clarify concepts such as ‘complicity’ and ‘sphere of influence’; develop methodologies for human rights impact assessments and consider State and corporate best practices*”, see UN Doc. E/CN.4/RES/2005/69. On 6 July 2011, the Human Rights Council endorsed the Guiding Principles, see UN Doc. A/HRC/RES/17/4. For a background explanation to the Guiding Principles, see OHCHR, “The corporate responsibility to respect human rights: an interpretive guide”, 2012.

<sup>1547</sup> For previous soft law instruments that dealt with the responsibility of transnational corporations to respect human rights, see the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, adopted by the ILO Governing Board at its 204<sup>th</sup> session (including representatives of the member States’ employers and workers) (Geneva, November 1977), particularly Article 8; the *OECD Guidelines for Multinational Enterprises*, first drawn up in 1976, revised in 2000, and updated in 2011.

<sup>1548</sup> See W. Vandenhoe, *op. cit.* The author analyses the different sets of principles by questioning their legal nature and legal sources, the scope of the duties concerned, and the responsibility as divided between the domestic State and the other actors. In addition to comparing some features and weaknesses of these principles, the author marks some prospects for research and conceptual evolution.

<sup>1549</sup> For an overview of these principles, see R. Mares, “Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress”, in Mares (ed.), *The UN Guiding Principles on Business and Human Rights - Foundations and Implementation*, Martinus Nijhoff Publishers, 2012, pp. 1-50; N. Jagers, “UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?”, 29/2 *Netherlands Quarterly of Human Rights*, 2011, pp. 159-163; M. Martin, “The Guiding Principles on Human Rights and Business - Implementation in conflict-affected countries”, Paper for the CSDN Meeting on Private Sector and Conflict (on 29 October 2012, Brussels), pp.1-12; R. Davis, “The UN Guiding Principles on Business and Human Rights and

contribution lies in *elaborating the implications of existing standards and practices for States and companies regarding business-related human rights impacts*, in integrating them “*within a coherent and comprehensive template*” while identifying shortfalls and improvements.<sup>1550</sup> Within the international community, however, responses to those Principles have varied from fervent endorsement (at governmental and intergovernmental levels as well as among corporations) to vigorous criticism (especially by several leading human rights non-governmental organizations). In particular, the European Commission’s renewed policy on corporate social responsibility has included in its action agenda 2011-2014 a better implementation of the UN Guiding Principles to improve the coherence of EU policies relevant to business and human rights.<sup>1551</sup> The Organization for Economic Cooperation and Development incorporated a new related chapter in its revised *Guidelines for Multinational Enterprises*.<sup>1552</sup> Key elements of the UN Guiding Principles were integrated also in the IFC Sustainability Framework and Performance Standards, and in the International Organization for Standardization *ISO 26000 Guidance on Corporate Social Responsibility*.<sup>1553</sup> An acknowledgment even came from the UN Global Compact. Nonetheless, the critical stance *vis-à-vis* the Guiding Principles have touched several aspects: *inter alia*, the sliding-scale approach for corporations based on their size and location (see the report, para. 15); the appearance of being informed by a narrow interpretation of human rights as expressed solely in “*the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work*”, so devaluing other core human rights treaties (*e.g.* CRC, CERD, CEDAW, CPMW) which mark the international community’s commitment to elaborate a normative framework beyond that Bill and which detail safeguards for traditionally vulnerable

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conflict-affected areas: State obligations and business responsibilities”, 94 *IRRC*, 2012, pp. 961-979; R.C. Blitt, “Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embracing Approach to Corporate Human Rights Compliance”, 48 *Texas International Law Journal*, 2012, pp. 33-62.

<sup>1550</sup> UN Doc. A/HRC/17/31, 21 March 2011, *ibid.*, para. 14

<sup>1551</sup> See European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘A Renewed EU strategy 2011–14 for Corporate Social Responsibility’*, 25 October 2011, COM(2011) 681 Final, para. 4.8.2, p. 14, in which it calls on all European enterprises to meet the corporate responsibility to respect human rights, as defined in the UN Guiding Principles, and inviting EU Member States to develop national plans for the implementation of the same Principles,

[http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm)

<sup>1552</sup> The OECD is an intergovernmental organization established in 1961 and dedicated to promoting policies to “*improve the economic and social well-being of people around the world*”. See *OECD Guidelines for Multinational Enterprises*, 25 May 2011, particularly the additional new human rights chapter that closely echoes these Principles, <http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm>.

<sup>1553</sup> See International Organization for Standardization, *ISO 26000 Guidance on Social Responsibility*, 2010, which also mirrors the Guiding Principles in its human rights provisions, available at

[http://www.iso.org/iso/iso\\_catalogue/management\\_standards/iso26000](http://www.iso.org/iso/iso_catalogue/management_standards/iso26000). See International Finance Cooperation, *IFC Sustainability Framework and IFC Performance Standards on Environmental and Social Sustainability*, 1 January 2012, available at [http://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/IFC+Sustainability/Sustainability+Framework](http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework) and <http://www.ifc.org/performancestandards>.

groups and have immediate relevance to businesses practices; the inadequate tackling of key corporate accountability issues in view of their failures to mandate a due diligence approach, to prevent and punish extraterritorial human rights abuses, and to recognise the right to a judicial remedy as a human right.<sup>1554</sup> The following section, 3.1, explores the evolving weight and implications of the UN Guiding Principles as a “*set of politically authoritative and socially legitimated norms and policy guidance*” in conflict-affected areas.

Conversely, the Maastricht Principles on Extra-territorial Obligations in the Area of Economic, Social and Cultural Rights will be examined in view of their declared purpose to *clarify the scope of human rights obligations of States beyond their own borders in the area of ESC rights*.<sup>1555</sup> Their (potential) relevance for a broad range of conflict-related situations negatively impacting on such rights is investigated in the following section, 3.2.

### **3.1. The UN Guiding Principles: normative contributions to conflict-affected situations and evolving implications**

In identifying the challenges posed by conflict-affected situations as one of the most major “*governance gaps*” existing at the international level, the SRSR Ruggie has progressively portrayed the relationship between business and human rights as part of both the problem and the solution. In actual fact, this is in line with the entire set of the foundational and operational Guiding Principles, which distinguish the respective roles of governments and businesses and which build on the 2008 “*protect, respect and remedy*” *policy framework*, which was proposed by the same UN Special Representative and addressed the “*what*” question.<sup>1556</sup> Indeed, being the latter deemed part of the

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<sup>1554</sup> See FIDH, *UN Human Rights Council Adopts Guiding Principles on Business Conduct, yet Victims Still Waiting for Effective Remedies*, 17 June 2011; Human Rights Watch, *UN Human Rights Council: Weak Stance on Business Standards*, 16 June 2011; Amnesty International, *Public Statement, United Nations: A Call for Action to Better Protect the Rights of Those Affected by Business-Related Human Rights Abuses*, 4 June 2011; Child Rights Information Network (CRIN), *Business and Human Rights: CRIN Response to Adoption of the Guiding Principles*, 21 June 2011.

<sup>1555</sup> However, in some of the Principles the drafters’ appeal towards other actors emerges (*i.e.* corporations and other business enterprises, or international organizations): *e.g.*, Principle 16 reads: “*Obligations of international organizations. The present Principles apply to States without excluding their applicability to the human rights obligations of international organisations under, inter alia, general international law and international agreements to which they are parties*”.

<sup>1556</sup> That framework affirmed, firstly, *the State duty to protect against human rights abuses* by third parties *via* proper policy, regulation, and adjudication; secondly, *the corporate responsibility to respect human rights* (*i.e.* acting with due diligence to prevent any infringements on the rights of others and to address occurring adverse impacts); thirdly, *improved access for victims to effective remedy* (both judicial and non-judicial). On 18 June 2008 this framework was unanimously approved by the Human Rights Council, which extended Ruggie’s mandate until 2011 to cover its implementation and promotion, see UNHRC, *Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/RES/8/7, 18 June 2008.

Ruggie’s rationale has given priority to the host States’ obligations: international law requires them to protect against corporations’ human rights abuses that affect persons within their territory or jurisdiction. There is a certain disagreement on whether international law calls for home States to help prevent violations by corporations based within their territory, but a great consensus exists around the view that they are not prohibited to do so under a two-fold

global context, the potential of corporate actions and activities is emphasised in contributing positively to worldwide solutions besides originating crises and prolonging their negative impacts.<sup>1557</sup>

Ruggie's second pillar on corporate responsibility to respect human rights is seen as a decisive factor in founding sustainable forms of peace, especially where conflicts are connected to land and the exploitation of scarce natural resources (*e.g.* minerals, water). In the same regard, the extractives industry (*e.g.* oil and gas exploration and development) is emblematically featured by a vast and intrusive social and environmental footprint: extractive companies that operate in challenging socio-political scenarios related to conflict-affected countries do pose several risks to human rights on micro and macro levels; specifically, locally they are likely to impact on human security, nationally they are likely to influence the activities of those in power by creating wealth for governments through taxes and profits.<sup>1558</sup> Therefore, Ruggie's acknowledgement of a "*negative symbiotic relationship*" between companies' involvement in human rights abuses and conflict-affected areas, in view of the fragility of governmental writs therein, is emphasised by requiring *enhanced due diligence*.<sup>1559</sup> Indeed, while externally sourced private investment is deemed crucially important to transition dynamics in countries moving from conflict to peace, the potential of its negative impact on vulnerable societies and the intensified risks of gross human rights abuses are perceived as demanding adequate safeguards and checks in line with international standards.<sup>1560</sup>

In order to control such a "*negative symbiotic relationship*", the UN Guiding Principles set forth specific recommendations on how States and business enterprises should concurrently support "*corporate responsibility to respect*" in conflict-related zones. Additional practical guidance and suggestions about sector-specific benchmarks result from a specific project on "*Business and Human Rights in Conflict-affected Regions: The Role of States*", which was launched by the same Special Representative in October 2009, aimed to identify measures for host, home and neighbouring States for preventing, mitigating and deterring corporate human rights abuses in conflict zones, and included three confidential brainstorming sessions (based on real scenarios) with interested

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condition: the existence of a recognised basis of jurisdiction and a positive overall reasonableness test is met by the actions of the home State (including the principle of non-intervention in internal affairs), see A/HRC/8/5, 7 April 2008, paras. 18-19.

<sup>1557</sup> See Working Group Report 2012, Section II, para 8.

<sup>1558</sup> On the micro level, their influence on human security may be related to the hiring of local security forces for the protection of their operations in the host country and also to the required awareness about community concerns. On the macro level, see Whittemore, "Intervention and Post-Conflict Natural Resource Governance: Lessons from Liberia", *Minnesota Journal of International Law*, 2008, pp. 387-434.

<sup>1559</sup> Under the UN Guiding Principles (particularly 17-21), "*human rights due diligence*" involves a constant management process that a reasonable and prudent enterprise needs to carry out, in the light of several factors (including sector, operating context, size), to meet its responsibility to respect human rights.

<sup>1560</sup> See UN Working Group Report 2012, Section II, para 11. See also "Business and Human Rights: Interview with John Ruggie", 30 October 2011.

governments representatives and experts.<sup>1561</sup>

### **3.1.a. Some remarks on the State's duty to protect**

The basic contours of this standard of expected conduct may be drawn through the position expressed in the commentary to fundamental Principle 1, according to which “*States may breach their international human rights obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors’ abuse*”. Under operational Principle 3, prevention of abuse comprises enforcing laws and periodically measuring the adequacy of such legislation to address any gaps, with awareness of, and response to, “*evolving circumstances*”. Conversely, fundamental Principle 2 embraces the position whereby “*States are not [at present] generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction*”. It is nevertheless recommended that home States “*set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations*”.

In spelling out the policy implications of States’ existing duties under international human rights law for the protection against business-related human rights impacts, operational Principles 3-10 include several aspects. *Inter alia*, States should ensure “*policy coherence*” between States’ human rights obligations and their several actions regarding businesses by improving the enforcement of existing laws, by identifying and addressing key policy or regulatory gaps, and by providing effective guidance to businesses. Then, States are required to foster business respect for human rights both at home and abroad, including where there is a State-business nexus (such as with State-owned or State-controlled enterprises, or when a State engages in commercial transactions such as procurement). States are also called to experience their duty to protect in their roles as participants in multilateral institutions.

As part of the States’ duty to protect against business-related human rights abuses occurred within their territory and/or jurisdiction, foundational Principle 25 contemplates *State-based judicial*

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<sup>1561</sup> See <http://www.reports-and-materials.org/Ruggie-conflict-project-note-Oct-2009.pdf>. For comments on first meeting held with the relevant States, see *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, “Business and Human Rights: Further steps toward the operationalization of the ‘protect, respect and remedy’ framework”, UN Doc. A/HRC/14/27, 9 April 2010, Section III.D on “Conflict affected areas”. For the subsequent outcome, see the companion *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, “Business and human rights in conflict-affected regions: challenges and options towards State responses”, UN Doc. A/HRC/17/32, 27 May 2011. This report concerns the three workshops convened by the SRSG and involving States officials (from Belgium, Brazil, Canada, China, Colombia, Guatemala, Nigeria, Norway, Sierra Leone, Switzerland, the United Kingdom, and the United States). This report is one of the four addenda to the Report on the UN Guiding Principles.



and non-judicial grievance mechanisms for ensuring that effective remedy is available to victims. Unambiguously, having an *effective and fair judicial system* is recognised as the bedrock of the access remedy pillar; this specially requires States to avoid barriers (*i.e.* legal, practical, procedural) to prevent legitimate cases from being brought before courts in situations where judicial recourse is an indispensable part of accessing a remedy, or alternative sources of effective remedy are unavailable.<sup>1562</sup>

For the purposes of the present research it is operational Principle 7 that deserves greater consideration. It identifies additional steps through which States ought ensure that companies operating in conflict-affected areas do not commit, or contribute to, or are not involved in “*gross human rights abuses*”.<sup>1563</sup> It refers to early intervention and mitigation,<sup>1564</sup> provision of assistance,<sup>1565</sup> a “*carrot and stick*” approach of non-judicial penalties,<sup>1566</sup> and effective measures addressing the risk of involvement.<sup>1567</sup>

In situations of transnational corporations’ involvement in gross human rights violations in conflict-related areas, the UN Guiding Principles are inclined to recognise *a human rights responsibility upon the home State*, which appears however feebly defined in the commentary to Principle 7, by also scarcely elucidating the respective roles of host and home States. In this regard, its accompanying commentary specifies that “[i]n conflict-affected areas, the “host” State may be unable to protect human rights adequately due to a lack of effective control. Where transnational corporations are involved, their “home” States therefore have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse [...]”.

Furthermore, in order to attain policy coherence and adequately assist business enterprises in such cases, home States are recommended to “*foster closer cooperation among their development assistance*

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<sup>1562</sup> See UN Guiding Principles 26-30. As to the *legal barriers*, the following are mentioned: attribution of legal responsibility to members of a corporate group under domestic criminal and civil laws in such a way that avoid accountability; denial of justice for the claimant in a host State followed by inaccessibility to the courts of the home State irrespective of the merits of the claim; exclusion for certain groups (*e.g.* indigenous peoples and migrants) from the same level of legal protection of human rights which applies to the rest of the population.

<sup>1563</sup> Violations of ESC rights may amount to gross human rights violations insofar as they are grave and systematic (*e.g.* those occurring on a large scale or targeted at particular groups). Many claims of human rights abuses by transnational corporations have concerned environmental degradation and pollution.

<sup>1564</sup> Under Principle 7 (a), States should engage “*at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships*”. See *Guiding Principles, op. cit.*, UN Doc. A/HRC/17/31, 21 March 2011.

<sup>1565</sup> Under Principle 7 (b), States should provide “*adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence*”. See *Guiding Principles, op. cit.*

<sup>1566</sup> Under Principle 7 (c), States should deny “*access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation*”. See *Guiding Principles, op. cit.*

<sup>1567</sup> Under Principle 7 (d), States should ensure “*that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses*”. See *Guiding Principles, op. cit.*

agencies, foreign and trade ministries, and export finance institutions in their capitals and within their embassies, as well as between these agencies and host Government actors; [...]; and attach appropriate consequences to any failure by enterprises to cooperate in these contexts, including by denying or withdrawing existing public support or services, or where that is not possible, denying their future provision”.<sup>1568</sup>

Importance is also given to States’ own evaluations of their enforcement capabilities to be equipped to proceed for improving their eventual inadequacy. Specifically, States are recommended to review whether their policies, legislation, regulations and enforcement measures effectively address the heightened risk of being involved in gross violations of human rights in conflict-related areas. Significantly, suggested steps to tackle any identified gaps include “*exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses*”. Moreover, multilateral approaches are evoked as functional to prevent and address such abuses, besides supporting effective collective initiatives.<sup>1569</sup>

As briefly indicated in commentary to Principle 7, all these measures are *additional to the States’ obligations under international humanitarian law and international criminal law*.

Nonetheless, the significance of such obligations as regards international crimes allegedly committed by legal persons such as corporations, or in which they are complicit, is not easy to draw. It is worth specifying, firstly, that States are bound to take preventive measures in peacetime such as disseminating international humanitarian law as well as they are obliged “to respect and to ensure respect for” its rules in all circumstances.<sup>1570</sup> Moreover, States are required to enact national

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<sup>1568</sup> See *Guiding Principles*, *op. cit.*, UN Doc. A/HRC/17/31, 21 March 2011, Principle 7, p. 11.

<sup>1569</sup> *Ibid.*

<sup>1570</sup> Common Article 1 GCs and AP I. In the ICRC Commentary, the duty to “*ensure respect*” is deemed as not limited to behaviour by parties to a conflict, rather including the requirement that States do all in their power to ensure that international humanitarian law is respected universally, see J.S. Pictet (ed.), *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War*, ICRC, 1960, p. 18; Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *op. cit.*, para. 45.

Regarding any positive obligations imposed by this duty to ensure compliance with the standards contained in these instruments, it is generally agreed that the resulting obligation is an obligation to use the best efforts and that all States have a right to require respect for international humanitarian law by parties to any conflict. Being *erga omnes* norms, all States have a “*legal interest*” in their observance and consequently a legal entitlement to demand their respect, see ICTY, *Furundžija case*, Judgment (para. 47) and *Kupreškić case*, Judgment (para. 48). See also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, paras. 155-156, 158 and 159.

States’ measures implementing this duty, thereby exercising their influence to stop IHL violations, have included in particular either States’ objections through *diplomatic protest* (in international fora or by means of resolutions of international organizations) or *collective measures* (in the forms of organizing international conferences on specific situations, investigating possible violations, establishing *ad hoc* criminal tribunals and courts, creating the ICC, imposing international sanctions and sending of peacekeeping or peace-enforcement forces). On State practice, see Rule 144 of the ICRC Study on Customary IHL.

Conversely, it remains doubtful whether the duty to ensure compliance with international humanitarian law extends so far to require any positive action on the part of an individual State.

legislation necessary to provide effective penal sanctions for persons committing, or ordering the commission of, grave breaches of international humanitarian law, besides being obliged to investigate and prosecute before domestic courts persons suspected to have ordered to be committed, or to have committed, such particularly serious war crimes, irrespective of where they occurred as well as the nationality of the suspected offenders, or even to hand such persons over for trial to another State, provided it has made out a *prima facie* case:<sup>1571</sup> an aggregate total of nine “grave breaches” are contained in the 1949 Geneva Conventions,<sup>1572</sup> while additional thirteen are contained in 1977 Protocol I<sup>1573</sup> (Protocol II extends the war crimes applicable to non-international armed conflicts without adding the list of grave breaches). Additionally, States’ implementation of subsequent sources on international criminal law such as the Rome Statute has led to the inclusion of further violations of international humanitarian law in national criminal law provisions permitting to investigate and prosecute international crimes (even if they occurred outside their sovereign territory, and regardless of the nationality of the perpetrators or the victims). In this regard, the application of those domestic provisions to legal persons may be possible, either because as a matter of principle national criminal law contemplates the possible commission by legal persons of the offences it defines, or because it

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The legal consequences for third States’ breaches of IHL can arise in two ways: 1) from the obligation not to recognise the resulting unlawful situation (including the entering into treaty relations with such a situation; the invoking or applying existing treaties which involved intergovernmental cooperation in relation to the unlawful situation; the sending diplomatic mission, consular agents or special missions to the non-recognised regime; the entering into economic and commercial dealings concerning the unlawful situation which might set the non-recognised regime’s authority); 2) from the obligation not to render assistance or aid in preserving or maintaining the unlawful situation (to be responsible by way of complicit under the strict rules of Article 16 of the ILC’s Draft Articles, States must do so with actual knowledge of the circumstances and intention to facilitate the occurrence of the wrongful conduct).

<sup>1571</sup> Art. 49 GC I; Art. 50, GC II; Art. 129 GC III; Art. 146 GC IV. While the 1949 Geneva Conventions impose these obligations in principle only on the Contracting Parties to these instruments, they are recognised as part of international customary law, applicable to all State. See ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986 (merits), para. 220 (“*The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to ‘respect’ the Conventions and even ‘to ensure respect’ for them ‘in all circumstances’, since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression*”).

<sup>1572</sup> Article 50 GCI (“*willfully killing*”, “*torture or inhuman treatment, including biological experiments*”, “*willfully causing great suffering or serious injury to body or health*”, and “*extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly*”); Article 51 GCII (same as GCI); Article 130 GCIII (same as GCs I and II, excluding the last clause on destruction and appropriation of property, but adding “*compelling a prisoner of war to serve in the forces of the hostile Power*” and “*willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention*”); Article 147 GCIV (same as GCs I and II, but adding “*unlawful deportation or transfer or unlawful confinement of a protected person*”, “*willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention*”, and “*taking of hostages*”).

<sup>1573</sup> Article 11(4)(2) API deals with medical experimentation. Article 85(3)(3) API deals with: attacking individual civilians (indiscriminately attacking the civilian population or civilian property; attacking “*works or installations containing dangerous forces*” (e.g. dams) knowing that civilians would be harmed; attacking non-defended and demilitarized zones; attacking persons who are *hors de combat*; perfidious use of the symbols of the Red Cross, Red Crescent, or Red Lion and Sun. Article 85(4) API deals with: transferring one’s own population into occupied territory; deportation of the population of an occupied territory; apartheid and other practices based on racial discrimination; attacking works of art, historical monuments, or places of worship that are not in military use by the opposing forces; depriving certain persons of the right to a fair trial.

comprises in the specific acts relating to international crimes legal persons alongside natural persons.

Conversely, the just referred imposition of the principle out *dedere aut judicare* is drawn by the broader principle of international cooperation in combatting international crimes. It is an objective of the international community that such crimes are effectively investigated and the perpetrators put on trial and punished if found guilty. In this regard, although primary responsibility lies on the territorial State, the obligation to cooperate on a bilateral and multilateral basis to halt and prevent such crimes entails both States' domestic measures and international measures for the purpose of mutual assistance in detecting, arresting and bringing to trial suspected offenders, in addition to punishing them if found guilty.<sup>1574</sup>

These considerations have some implications regarding the case of a territorial (host) State suffering from a governance gap, thus exhibiting an ineffective and permissive regulatory or legislative environment to oversee businesses and their representatives, thereby encountering difficulties in engaging in respect of the liability of a foreign company that operates within its borders and has allegedly committed or was complicit in committing international crimes. In such a hypothesis, the *aut dedere aut judicare* principle might become the basis for an “*optional*” exercise of extraterritorial jurisdiction by the forum State; this would mainly be in the interest of the international community and it may be understood as deriving from the obligation of international cooperation in fighting international crimes; possible sanctions would include the confiscation of assets or the imposition of financial penalties.

Of note, operational Principle 7 partly resulted from the work conducted on the challenges posed by the implementation of the State duty to protect in conflict-affected zones. This focus relied on the basic recognition that where grievous business-related human rights abuses are likely to take place in conflict-affected areas and other situations of widespread violence, they may actually induce or intensify conflicts, which may in turn lead to further injury.<sup>1575</sup> In urging States to take action for clarifying innovative policies and tools in this regard, Ruggie's additional attempts to generate practical guidance for States in response to actual and potential abuses in conflict-affected settings, has in turn led to identifying an important series of States' public policy options, as shall be

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<sup>1574</sup> See the *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity* adopted by the UN GA Res. 3074 (XXVIII) of 3 December 1973, UNGAOR, 28<sup>th</sup> Sess., Supp. No. 30, at 78, A/9030 (1973). The Preamble to the ICC Statute contains similar references to the obligation of international cooperation.

<sup>1575</sup> See *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie, “Business and Human Rights in Conflict-Affected Regions: Challenges and Options for State Responses”, UN Doc. A/HRC/17/32, 27 May 2011.

examined heretofore.

### **3.1.b. Some remarks on subsequent States' policy options**

A key aspect of the range of policy approaches identified for preventing, deterring and mitigating corporate abuses in conflict-related contexts is a “*proactive engagement*” of States. This includes home States (where a multinational company is incorporated or has its headquarters), host States (a place other than the home State where the company has operations), and neighbouring States in close proximity to the relevant host State. The assistance or advisory role to be played by home States, even as a preventive role, appears central as far as host States are likely to be unable to meet their duty to protect in such circumstances (*e.g.* for a lack of effective control over their territory).

Specifically, basic policy options include: (1) engaging with business enterprises that are physically present in conflict zones; (2) engaging with business involved in foreign investment and trade activities that encompass conflict zones; (3) fostering corporate accountability through States' individual or collective roles, specially States' responses to corporations that reject constructive engagements.<sup>1576</sup>

While other previous initiatives mostly addressed the role of business enterprises in conflict-affected zones and provided guidance for responsible companies to avoid contributing to human rights harms in such environments,<sup>1577</sup> the focus here is on the *practical policies and tools* States should acquire for *preventing* or *mitigating* corporate-related abuses of human rights therein. Emphasis is put on their ability to *engage* or *advise* business enterprises about “*acceptable conduct*” in, or connected to, conflict-affected regions. This is deemed to require adequate regulatory frameworks, clarified applicability to business entities, and State agencies properly resourced to address businesses' involvement in international or transnational crimes (*e.g.* corruption, war crimes, crimes against humanity).<sup>1578</sup> In doing so, a *constructive interaction* between States and businesses is encouraged according to a “*carrot and stick*” approach and “public sector mechanisms” to be implemented by States. They include, *inter alia*, rules which require companies to implement a human rights and conflict sensitivity policy, the provision of public information about the human rights situation in a particular conflict area and “*white listing*” cooperating enterprises for State procurement markets,

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<sup>1576</sup> UN Doc. A/HRC/17/32, 27 May 2011, *ibid*.

<sup>1577</sup> They include the United Nations' efforts on conflict and natural resources; the work by the Organization for Economic Co-operation and Development (OECD) and the World Bank on weak governance zones and fragile States; the Kimberley Process on conflict diamonds; initiatives such as the Voluntary Principles on Security and Human Rights, the Guidance on Responsible Business in Conflict-Affected and High-Risk Areas of the Global Compact, or the publication on business and international humanitarian law by the ICRC.

<sup>1578</sup> See UN Doc. A/HRC/17/32, 27 May 2011, paras. 12-14.

investment, export credit eligibility and other States' transactions based on their due diligence policies and practices.<sup>1579</sup>

Conversely, available policy options to respond to “*uncooperative enterprises*” vary<sup>1580</sup>. They refer to cases of companies disregarding recognised standards, or not implementing in good faith recommended processes, or refusing to refrain from risky behaviors. Relevant measures include, *inter alia*, investigation requests to embassies or other State agencies, the withdrawal of consular and/or business development support, missions appointed for investigation and reporting to the Parliament, the involvement of partners countries in investigation, conciliation and mediation (*e.g.* via the European Union, the African Union or the Organization of American States).

Further measures are addressed for the most extreme situations in which *enterprises cause or contribute to gross human rights abuses* and disrespect any advice to diminish or remedy their impact. They include: considering civil, administrative or criminal liability; imposing unilateral or multilateral sanctions (targeting a person or a business entity); investigation and indictment for international crimes both senior managers and the business enterprise itself; issuing asset freezes, detention or arrest warrants for key individuals suspected in connection with international crimes; considering “*multilateral approaches*” to prevent and address business-related gross human rights abuses and support effective collective initiatives. As main concluding proposal, a “*standard setting exercise*” is recommended whereby States would work towards “*multilateral agreement on risks and prohibited activities with respect to business in conflict or other high-risk situations*”. This is justified by an explicit acknowledgment of States' major inclination to adopt policies establishing standards that do not put their own businesses at an unfair disadvantage.<sup>1581</sup>

### **3.1.b.i. Reflecting on evolved forms of extraterritorial jurisdiction as tools to influence corporate conduct overseas**

One of the basic needs finally identified in elaborating the studies and consultations conducted under Ruggie's mandate regards *the clarification of international legal standards applying to businesses' involvement in gross human rights abuses*, by advocating in particular further development of international law regarding the complex subject of extraterritorial jurisdiction.<sup>1582</sup>

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<sup>1579</sup> See UN Doc. A/HRC/17/32, 27 May 2011, paras. 15-16.

<sup>1580</sup> See UN Doc. A/HRC/17/32, 27 May 2011, paras. 17-18.

<sup>1581</sup> See UN Doc. A/HRC/17/32, 27 May 2011, paras. 19-21.

<sup>1582</sup> See Ruggie's note submitted to the Human Rights Council, see “Recommendations on follow-up to the mandate”, 11 February 2011. See *Presentation of Report to United Nations Human Rights Council Professor John G. Ruggie Special Representative of the Secretary General for Business and Human Rights Geneva*, 30 May 2011. The same aspects were addressed again in Ruggie's opening remarks as Chair of the first UN Forum on Business and Human Rights held in Geneva on 3-5

As highlighted in Guiding Principle 2, international human rights law does not generally impose a State to *regulate* the extraterritorial activities of businesses entities domiciled within its jurisdiction. As previously noted, an exceptional situation in which States are required under international law to exercise extraterritorial jurisdiction concerns the commission of certain *international crimes* as far as such exercise is functional to repress effectively those crimes perpetrated on the territory of *State loci delicti*. Remarkably, an additional emerging State obligation to exercise extraterritorial jurisdiction is debated in case of *violations of ESC rights* where States are in a position to prevent them by controlling private actors contributing to such violations beyond their sovereign territories. In this regard, the interdependencies between States and transnational actors' activities have been emphasised alongside the need to act jointly for coping with collective problems faced by the international community.<sup>1583</sup> In development theory the concept of *global public goods* has acquired central importance and in international human rights law the obligation of *international cooperation* has been revitalised. This aspect will be properly detailed in section 3.2 in the context of the Maastricht Principles.

Despite the absence of such a general “obligation to regulate”, emphasis has been put on the notion that *States are not precluded from performing so provided there is a jurisdictional basis*. As detailed in section 3.2.d.ii, indeed several judicial and non-judicial human rights bodies (*e.g.* the Committees of ICESCR, the ICCPR, the CERD; the European Court of Human Rights, European Committee of Social Rights of the Council of Europe; the Inter-American Court of Human Rights; the African Commission on Human and Peoples' Rights) have pushed for *States' proactive contribution* in the promotion and protection of internationally recognised human rights standards outside their national borders, in order to expect businesses domiciled in their territory or jurisdiction to act in accordance with human rights.<sup>1584</sup>

In any case, various forms of extraterritorial jurisdiction have started to function as tools to influence the spectrum of corporate conduct overseas. On the one hand, States have approved *domestic legislations/regulations with extraterritorial implications*, which are addressed to decisions and

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December 2012, see <http://www.ohchr.org/Documents/Issues/Business/ForumSession1/SubmissionsStatements/OpeningJRuggie.pdf>.

<sup>1583</sup> As Mr El Hadji Guissé articulated, “(t)he violations committed by the transnational corporations in their mainly transboundary activities do not come within the competence of a single State and, to prevent contradictions and inadequacies in the remedies and sanctions decided upon by States individually or as a group, these violations should form the subject of special attention. The States and the international community should combine their efforts so as to contain such activities by the establishment of legal standards capable of achieving that objective”. See “The Realization of Economic, Social and Cultural Rights”, *Final report on the question of the impunity of perpetrators of human rights violations (economic, social and cultural rights)*, prepared by Mr. El Hadji Guissé, *Special Rapporteur, pursuant to Sub-Commission resolution 1996/24*, UN Doc. E/CN.4/Sub.2/1997/8, 27 June 1997, para. 131.

<sup>1584</sup> For a primary theoretical contribution, see F. Francioni, *Imprese Multinazionali, Protezione Diplomatica e Responsabilità Internazionale*<sup>2</sup>, Giuffrè, 1986.

operations made and carried out ‘at home’ and which support the prevention of corporate-related human rights abuses abroad; thus, such measures rely on *territory* as the jurisdictional basis although they can have extraterritorial effects.<sup>1585</sup> On the other hand, a growing number of *domestic courts have accepted to hear cases against corporations for conduct by overseas affiliates because of the potential negligence (through omission or commission) of the parent company itself*; this judicial exercise of extraterritorial jurisdiction, directly in relation to actors or activities abroad, relies on *clear links* as the jurisdictional basis, so demanding solid legislative or executive support. The rapid evolution at national levels of public policies, prescriptive regulations and enforcement actions in relation to extraterritorial jurisdiction seems directly attached to States’ acknowledgement that what is at stake is “*the social sustainability of globalisation*”.

Nevertheless, a tricky aspect of a high priority has been identified in the *national jurisdictions’ diverging interpretations of the applicability to business enterprises of international standards prohibiting gross human rights abuses, potentially amounting to international crimes*. As stressed by Ruggie, typically the allegations involve *corporate complicity in acts committed by third parties* and those abuses often arise in the context of armed conflict or similar conditions of intensified risk in a host country whose international human rights regime cannot possibly function since effective institutions may not exist. Despite an intensified number of cases in which claimants resort to the home State’s judicial system, domestic courts of civil and common law systems have not shared consistent understandings of what exactly the international standards require; such a discrepancy increases uncertainty for victims of the abuses, for companies facing operational troubles and finding themselves sued for decades, but also for host States that may lack the capacity of dealing with the consequences and for home States whose reputations remain on the line.

In order to advance greater consistency in legal protection, a “*multilateral approach*” has been suggested. It covers several aspects, including: the standards as to appropriate investigations, punishment and redress where companies cause or contribute to such abuses; what constitutes effective, proportionate and dissuasive sanctions; when the extension of national jurisdiction over corporate activities abroad (counting foreign subsidiaries and commercial partners) may be appropriate, and the acceptable bases for the exercise of such jurisdiction. This could also foster international cooperation, coordination, and consultation, even in resolving jurisdictional disputes

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<sup>1585</sup> A case underlined by Ruggie concerns export credit agencies requiring companies to conduct human rights due diligence as a condition for public support; another example is that of governmental measures requiring the corporate parent to report as to its overall human rights impacts, including those ones of its subsidiaries abroad.



and providing for technical assistance.<sup>1586</sup>

In the following section the advocated clarification of international legal standards applying to businesses' involvement in gross human rights abuses, and the related emphasis on the subject of extraterritorial jurisdiction, is considered in view of the implications resulting from the concept of “*corporate responsibility to respect*” under the UN Guiding Principles.

### **3.1.c. Some remarks on the corporate responsibility to respect**

The UN Guiding Principles do not clarify *per se* the multi-layered regime of responsibility of States and transnational corporations. The concept of “*corporate responsibility to respect human rights*” entails *avoidance* to infringe on the human rights of others, either in the form of *causation* or *contribution*<sup>1587</sup>, plus *addressing* the adverse human rights impacts arising from its own activities (acts or omissions) and *preventing or mitigating* those resulting from its business relationships with partners, entities in its supply chain, and any other non-state or state actors “*directly linked*” to its business operations, products or services (even though it has neither caused nor contributed to those impacts) (Principle 11 and 13).

Further, three recommended mechanisms to evaluate and face such distinct modes of involvement in adverse impacts are included in Principle 15, namely a formal policy commitment to respect human rights to be reflected in the corporate policies and procedures, a due diligence process that entails drawing on external expertise and the results of stakeholder consultation (Principle 18), and a remediation process for any negative impacts the company directly causes or contributes to.

This “*global standard of expected conduct*”, which commentary to Principle 11 conceives as applicable to all business enterprises wherever they run, is understood not only as *independent* from States' ability or willingness to implement their own human rights obligations, but also as *incapable* of weakening them. The autonomy of corporate social norms is emphasised in Principle 12, which refers to the responsibilities directly bestowed upon companies to respect internationally recognised human rights as contained “*at a minimum*” in the International Bill of Human Rights (*i.e.* the UDHR, the ICCPR and the ICESCR) coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.

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<sup>1586</sup> An appropriate precedent and model for such an effort has been considered the UN Convention against Corruption, adopted by GA Res. 58/4 of 31 October 2003 and entered into force in December 2005. Under Article 42(2)(b) a State party may found its jurisdiction over an offence set up under the Convention if it was committed by one of its nationals.

<sup>1587</sup> “*Contribution*” can arise in two different ways: firstly, where a decision or an action by the business enterprise produces an incentive for a third party (supplier or a government) to abuse human rights; secondly, where a business enterprise facilitates or enables the abuse.

Significantly, commentary to Principle 12 specifies that the concept of corporate responsibility is “*distinct*” from issues of legal liability and enforcement that are primarily defined under domestic laws or regulations in relevant jurisdictions.<sup>1588</sup> Nonetheless, the need for business enterprises to consider “additional standards” depending on the circumstances is explicitly referred: not only *respect for individuals’ human rights* as further elaborated for specific groups or populations (e.g. indigenous people, national or ethnic, religious and linguistic minorities), but also *respect for the standards of international humanitarian law* in situations of armed conflict (commentary to Principle 12). Corporations’ need to take into account this additional branch of international law may pose particular challenges, as is highlighted heretofore.

### **3.1.c.i. Elaborating on businesses’ respect for international humanitarian law**

This branch of international law does bind all actors whose activities are *closely linked* to an armed conflict, even though States and other parties to the hostilities may have the ultimate responsibility for ensuring its implementation. As clearly addressed by the ICRC, “*it is not necessary for business enterprises and their managers to intend to support a party to the hostilities for their activities to be considered to be closely linked to the conflict*”.<sup>1589</sup> In this regard, their activities do not have to take place necessarily on the battlefield or throughout fighting. Their actual impact may count regardless of whether or not there was such intent. While international humanitarian law grants protection to both their personnel (provided they do not take part directly in armed hostilities) and their assets and capital investments, it also requires those acting on their behalf not to breach its applicable rules and exposes them (and the enterprises themselves) to the risk of criminal as well as civil liability in the event that they do so.

Specifically, violations of international humanitarian law may give rise to *corporate civil liability before national courts*, whether they stems from the company’s own activities, or whether they stems from the wrongful acts of others (e.g. committed by its employees, another business entity, an armed group, a State) insofar as the latter is substantially connected to the company’s conduct, or whether the company’s acts amount to complicity in the violations concerned. However, the willingness of

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<sup>1588</sup> Although it is often reflected (at least in part) in domestic law or regulations corresponding to international human rights standards, corporate responsibility is deemed as not limited to compliance with these national law provisions: “*It exists over and above legal compliance with national laws and regulations protecting human rights*”. Accordingly, it occurs independently of an enterprise’s own commitment to human rights. It is reflected in other soft law instruments such as the OECD Guidelines for Multinational Enterprises. Emphasis is then put on the fact that where business enterprises pose a risk to human rights and fail to meet their responsibility to respect, they also pose a risk to their own long-term interests, since a range of legal, financial and reputational consequences become possible.

<sup>1589</sup> See *Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law*, ICRC, 2006, at 14.

domestic courts to acknowledge the applicability of international law to claims brought against businesses in order to hold them responsible for violations of international humanitarian law is infrequent. For the purposes of the present research, some recent civil cases filed in French,<sup>1590</sup> Canadian<sup>1591</sup> and US<sup>1592</sup> courts are of particular interest and will be examined in Chapter 5.

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<sup>1590</sup> See the Court of Appeal of Versailles decision of 22 March 2013, in *Association France Palestine Solidarité “AFPS” and Organisation de Libération de la Palestine “OLP” v. Société Alstom Transport SA, Société Alstom SA and SA Veolia Transport*, which ruled against the civil liability under international law of two French corporations for their involvement in the alleged illegal construction of a light rail system that has become active since July 2011 between West Jerusalem (inside Israel’s internationally recognised borders) and East Jerusalem (inside the Palestinian territory of the West Bank) where several Israeli settlements are located. According to the French Court, *the international law provisions relied on do not create direct obligations that may be placed upon private companies*, which are not subjects of international law and do not have international legal personality. For the Court, neither Geneva and Hague Conventions nor the relevant customary international humanitarian law are directly addressed to the companies in question; even if the Court seems to assume that the State of Israel is *prima facie* involved in the internationally unlawful settlements enterprise, this would have no bearing on the validity of the construction and operation contracts signed by the two French companies and on the civil liability of private companies under French law.

<sup>1591</sup> See the Quebec courts judgments of September 2009 and August 2010, in *Bil’in (Village Council) and Ahmed Issa Abdallah Yassin v. Green Park International Inc., Green Mount International Inc. and Annette Laroche*, which declined jurisdiction on the ground of *forum non conveniens* and dismissed a corporate liability suit against the two Canadian-based Green Park Internationals Inc. and Green Mount Internationals Inc. for having participated in the commission of war crimes allegedly committed in the West Bank in view of their involvement in the construction and selling of buildings on the land of Bil’in Palestinian village as part of an Israeli settlement.

<sup>1592</sup> Although a criminal law concept, *complicity* has been applied in civil claims of violations of international humanitarian law and human rights law.

See *Doe v. Unocal Corp.*, U.S. Court of Appeals for the Ninth Circuit, Judgment of 18 September 2002, which ruled that a corporation could be held liable under the federal Alien Tort Claims Act (ATCA) for its complicity in a violation of international criminal law occurring outside the United States. Unocal was sued by citizens of Myanmar who had been subjected to forced labour, physical injuries, torture, rape and murder at the hands of the Myanmar military security unit that was under contract to a consortium of international energy companies, in the context of oil and gas extraction operations and the building of a pipeline. The Government of Myanmar had a mandate, *inter alia*, to provide security and manpower for that joint venture involving Unocal, Total and the Government itself. The two companies were accused of complicity in committing grave breaches of human rights because they had allegedly provided material support to the military unit and had done nothing to limit the abuses. See *Doe v. Unocal Corp.*, F. Supp. 2d, (C.D. California 2000), at 1294-1296, 1303.

The federal district Court of California dismissed the claim against the Myanmar military unit on sovereign immunity grounds (see *Doe I v. Unocal Corp.*, 963 F. Supp. 880, 886 (C.D. Cal. 1997) and it also dismissed the claim against Total for lack of personal jurisdiction (see *Doe I v. Unocal*, 27 F. Supp. 2d 1174, 1181 (C.D. Cal. 1998). Conversely, although the district court recognised that a company could possibly be liable for complicity in the crimes concerned, it granted summary judgment to Unocal on the grounds that the applicable test under international law for complicity had not been met, because there was insufficient evidence in the record to demonstrate Unocal’s “*active participation in the unlawful conduct*”, while it found that Unocal and the government of Myanmar had only the common design of running the project profitably (see District Decision at 1310).

In the second-instance judgment of this case, the US Court of Appeals for the Ninth Circuit found that the district Court of California should have applied the “*complicity theory*” borrowed from international criminal law, instead of applying the “*joint action theory*” (under which the plaintiff had to show that the parties participating in the joint action, *i.e.* Unocal and the government of Myanmar, had the precise common design of violating the victims’ rights). The Appeals Court found that there was sufficient evidence to hold Unocal liable under the Alien Tort Claims Act (ATCA).

See also *Presbyterian Church of Sudan v. Talisman Energy*, 244 f. Supp. 2d 289, US District Court for the Southern District of New York, 19 March 2003. The Canadian oil company Talisman was sued for collaborating with the Sudanese Government in violations of human rights and war crimes committed in the context of the international armed conflict taking place in Sudan. The use of the aiding and abetting standard was challenged by Talisman by arguing that this was not applicable to civil liability actionable under the ATCA. According to the District Court, Talisman’s contention was incorrect and its analysis misapprehended the fundamental nature of the ATCA. The Court underlined that “*the ATCA provides a cause of action in tort for breaches of international law. In order to determine whether a cause of action exists under the ATCA,*

Conversely, as already mentioned, *criminal liability may arise* for those who commit grave breaches of international humanitarian law or other serious violations of international humanitarian law, including where business enterprises and their representatives (*i.e.* officers, directors, employees or agents) commit such violations or are indirectly involved in the commission of such violations performed by others (*e.g.* parent and subsidiary corporations, clients such as States). Even when international humanitarian law is incorporated into domestic legislations, however, States may approach the principle of criminal liability of corporations as well as the nature of the applicable legal sanctions differently. A pertinent criminal complaint brought to the public prosecutor in the Netherlands<sup>1593</sup> will be examined in Chapter 5.

Furthermore, it is worth considering that several international or hybrid criminal tribunals have jurisdiction over natural persons individually responsible and criminally liable for punishment for international crimes either as principal perpetrators or accomplices. In this regard, accomplice liability may be particularly relevant given the complex nature of international crimes and the number of people and entities who may participate in the commission.<sup>1594</sup> The principal modes of participation applied under international criminal law to punish individual offenders where they are not the actual perpetrators include “*conspiracy*”, “*aiding and abetting*”, “*joint criminal enterprise*” (also referred as “*common purpose*”), and “*superior responsibility*” (also referred as “*command responsibility*”). Indeed, none of the international criminal tribunals from the IMT to the ICC have had jurisdiction over legal persons such as corporations.<sup>1595</sup> Despite this, the ICC could adjudicate corporate involvement in international crimes by focusing on the individuals acting on behalf of a certain

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*courts must look to international law. Thus, whether or not aiding and abetting and complicity are recognised with respect to charges of genocide, enslavement, war crimes, and the like is a question that must be answered by consulting international law”, see, ibid., at 320. In looking to international law, the Court found that businesses could be held liable for aiding and abetting where they have provided substantial assistance to the government with the purpose of aiding the government’s unlawful conduct, see Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2<sup>nd</sup> Cir. 2009).*

<sup>1593</sup> The Dutch National Public Prosecutor’s Office dismissal (14 May 2013) of the case against Lima Holdings (the Dutch parent) for Riwal’s role in the construction of the wall in the occupied Palestinian territories.

<sup>1594</sup> Accomplice liability is incorporated into the Statutes of several international or hybrid criminal courts. See Article 7(1) of the ICTY Statute; Article 6(1) of the ICTR Statute; Article 6(1) of the SCSL Statute; Article 29 of the Law on the Establishment of the Extraordinary Chamber for Cambodia with inclusions of amendments as promulgated on 27 October 2004; Article 3 of the Special Tribunal for Lebanon. Under Article 25 (3) (c)-(d) of the Rome Statute *any natural person who “aids, abets or otherwise assists” or “contributes” in the attempted commission or commission of crimes articulated in the Statute is individually responsible for such crimes.* Thus a two-pronged test is established, including (1) practical assistance or encouragement that have a substantial contribution or effect on the commission of the crime and (2) knowledge and purpose in facilitating or assisting the crime.

<sup>1595</sup> See IMT Charter, Article 5 (“*The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility*”); IMTFE Charter, Article 5 (tracking the language of the IMT Charter); ICTY Statute, Article 6 (“*The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute*”); ICTY Statute, Art. 5 (tracking the language of the ICTY Statute); Rome Statute, Art. 25(1) (“*The Court shall have jurisdiction over natural persons pursuant to this Statute*”).

corporation. Historical precedents regard German industrialists who were brought before the US Nuremberg Military Tribunals under Allied Control Council Law No. 10.<sup>1596</sup>

The controversies concerning the enforcement of these types of criminal and civil liability issues will be discussed in Chapter 5, in a narrow sense, in relation to cases of allegations of companies' involvement in serious breaches of international law that inhibit (directly or indirectly) the exercise of, or adequate access to, the ESC rights of civilians.

### **3.2.c.ii. Reflecting on businesses' approach to risks of gross human rights abuses as "a legal compliance issue"**

Refocusing on the position embraced by the UN Guiding Principles on the concept of "*corporate responsibility to respect human rights*", Principle 23 is noteworthy.<sup>1597</sup> In providing three basic guiding rules for companies "*in all contexts*", it ends up referring to scenarios that are likely to concern conflict-affected zones: weak or silent applicable laws, direct conflict between national requirements and internationally recognised human rights, a company's involvement in gross human rights abuses.

Significantly, this elaboration of the basic principle that "*all business enterprises have the same responsibility to respect human rights wherever they operate*" may support its emergence as an international public order principle (similarly to others such as the prohibition on corruption and the good faith obligation). In the commentary to Principle 23 companies that enter or carry on operating in

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<sup>1596</sup> See *Trial of Friedrich Flick and Five Others*, US Military Tribunal, Nuremberg, 20 April-22 December 1947, Law Reports of the Trials of War Criminals before the Nuremberg Military Tribunals, 1950, Vol. IX, pp. 1-68; The I.G. Farben Trial, *Trial of Carl Krauch and Twenty-two Others*, US Military Tribunal, Nuremberg, 14 August 1947-29 July 1948, *op. cit.*, Vol. VIII, pp. 1-68; The Krupp Trial, *Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others*, US Military Tribunal, Nuremberg, 14 August 1947-29 July 1948, *op. cit.*, Vol. X, pp. 69-181.

In the *Krupp case*, twelve top managers of the German industrial entity were indicted of, *inter alia*, war crimes for spoliation and plunder of public and private property in occupied territory as well as of war crimes and crimes against humanity for employing prisoners of war, foreign civilians and concentration camp inmates in arms factories in inhumane conditions.

In the *I.G. Farben case*, twenty-four corporate executives of the German chemical and pharmaceutical company were indicted of "*planning, preparation, initiation and waging of wars of aggression and invasions of other countries*"; plunder and spoliation of public and private property in occupied territory; slavery and mass murder; the indictment issued on 3 May 1947 further alleged that I.G. Farben was responsible for assisting Nazi soldiers at the Auschwitz extermination camp. These corporate executives were convicted as criminal accomplices of the aforementioned egregious violations of international law, see *United States of America v. Carl Krauch et al.*, Judgment, 29, 30 July 1948, particularly at 1132-33 and 1140. I.G. Farben was the largest company assisting the furtherance of Hitler's programmes and racial extermination agenda. The scale of its contribution to the Nazi-Germany's military-economic war preparations led the Allied Control Council to order its dismantling and the seizure of its assets, see Control Council Law No. 9 pmb., *Seizure of Property by I.G. Farbenindustrie and the Control Thereof* (30 November 1945), in *Enactments and Approved Papers of the Control Council and Coordinating Committee*, at 225.

<sup>1597</sup> Principle 23 reads: "*In all contexts, business enterprises should: (a) Comply with all applicable laws and respect internationally recognised human rights, wherever they operate; (b) Seek ways to honour the principles of internationally recognised human rights when faced with conflicting requirements; (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate*".

settings featured by uncertain protection regimes are called for examining carefully the extent of potential contradictions with international human rights standards because, as such, they are likely to face reputational and legal consequences. In fact, conflict-affected zones intensify corporations' potentials of causing or contributing to gross human rights abuses committed by third parties.<sup>1598</sup> Accordingly, they have been recommended to regard such risk as “*a legal compliance issue*” in view of the increasing possibility of corporate liability, which may result not only from *extraterritorial civil claims* but also from *the implementation of the ICC Statute in national jurisdictions that impose corporate criminal responsibility*. Such incorporation may broaden the scope of the Rome Statute beyond individual corporate officers to the company itself. This theoretical possibility supplements the risk of corporate executives and employees to be exposed to individual liability for acts amounting to gross violations. In order not to exacerbate conflict-affected zones, business enterprises have been finally recommended to draw on internal consultation and expertise as well as to consult with reliable experts from governments, civil society, national human rights institutions and relevant stakeholders.<sup>1599</sup>

Insisting on the required prioritizing actions to address actual and potential adverse impacts on human rights, Principle 24 recommends business enterprises, “*in the absence of specific legal guidance*” to begin with the “*most severe*” impacts and to recognise that “*a delayed response may affect remediability*”.

Of note is that the Human Rights Council recently requested the ‘Working Group on the issue of human rights and transnational corporations and other business enterprises’ “*to launch an inclusive and transparent consultative process with States in 2015, open to other relevant stakeholders, to explore and facilitate the sharing of legal and practical measures to improve access to remedy, judicial and non-judicial, for victims of business-related abuses, including the benefits and limitations of a legally binding instrument, and to prepare a report thereon and to submit it to the Human Rights Council at its thirty-second session*”.<sup>1600</sup> The same Working Group was also requested “*to include as an item of the agenda of the Forum on Business and Human Rights the issue of access to remedy, judicial and non-judicial, for victims of business-related human rights abuses, in order to achieve more effective access to judicial remedies*” (para. 10).

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<sup>1598</sup> Commentary to Principle 17, which defines the parameters for human rights due diligence of business enterprises, refers to complicity in its twofold legal (*i.e.* substantially contributing to a harm) and non-legal (*i.e.* benefiting from an abuse committed by others) meanings. As a legal issue, complicity in the commission of a crime is prohibited in the majority of national jurisdictions, which may also allow for criminal liability of business enterprises in such cases. Generally, an enterprise’s alleged contribution to harm may also be the foundation for civil actions, which may not be framed in human rights terms however.

<sup>1599</sup> See *Guiding Principles, op. cit.*, UN Doc. A/HRC/17/31 of 21 March 2011, Principle 23, p. 21.

<sup>1600</sup> UN Doc. A/HRC/26/L.1, Human Rights and Transnational Corporations and Other Business Enterprises, 23 June 2014, para. 8. The resolution was drafted by Ecuador and South Africa and was supported by twenty members States (including India, China, Ethiopia, Pakistan and Russia). Argentina and Brazil abstained from voting, while others voted against it (including Italy, France, the UK, Germany, the US and Japan).

As mentioned above, Chapter 5 examines a number of recent lawsuits regarding companies' involvement in serious breaches of international law norms that directly or indirectly inhibit the exercise of, and adequate access to, ESC rights in conflict-afflicted situations. The evaluation of emerging judicial approaches to the legal determinations of corporate liability for such breaches will consider Guiding Principle 23. In this regard, it will inquire whether and to what extent national and international judicial mechanisms have started to translate the theoretical corporate legal liability (the “*expanding web of potential corporate legal liability*”) into tangible accountability for wrongs as regards ESC rights. Accordingly, it examines the ways courts have handled corporate liability and assesses which realistic prospects exist for legal redress at national or international level, whether action on the part of criminal prosecution and law enforcement bodies is attractive, or whether the possibility of civil liability towards affected persons is effective, and whether the scope of basic liability concepts has acquired a certain legal certainty.

### **3.2. The Maastricht Principles: contributions to the normative framework of human rights obligations of foreign States**

Emanating from a long course of debate on the extraterritorial obligations of States in the area of ESC rights, the Maastricht Principles complement and are built on other notable interpretative documents by human rights experts, as observed in Chapter 3. While the Preamble explains the need for such tenets and vaguely indicates the legal sources they draw on<sup>1601</sup>, seven sections, in a dry and direct style, deal with general principles (Principles 1-7), the scope of extraterritorial obligations of States (Principles 8-18), the extraterritorial obligations to respect (Principles 19-22), protect (Principles 23-27) and fulfil (Principles 28-35), accountability and remedies (Principles 36-41), and final provisions (Principles 42-44).

#### **3.2.a. A twofold conceptual foundation of extraterritorial obligations**

By defining extraterritorial obligations, *two grounds* are identified in Principle 8, which addresses them together since they may overlap or arise simultaneously. One relates to the State acts or omissions (within or beyond its territory) that have (real and foreseeable<sup>1602</sup>) effects on human rights beyond its sovereign territory. The other one refers to “*obligations of a global character*” (such as those

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<sup>1601</sup> Under paragraph 8 of the Preamble, “(d)rawn from international law, these principles aim to clarify the content of extraterritorial State obligations to realise economic, social and cultural rights with a view to advancing and giving full effect to the object of the Charter of the United Nations and international human rights”. See also Principle 6, which stipulates territorial and extraterritorial obligations are included in international human rights law sources.

<sup>1602</sup> See Principles 13 and 14.

set out in the UN Charter and human rights instruments) to take action *via* international cooperation (separately or jointly) so as to realise human rights. The basic view behind that second key foundation is that safeguarding socio-economic rights in the age of economic globalisation cannot be exclusively got through unilateral or bilateral efforts of States. Rather, the global setting may be conducive to their realisation through international arrangements in several regulatory spheres such as development, environment, investment, trade, and finance.

### **3.2.b. A progressive interpretation of the notion of jurisdiction**

An advanced understanding of the notion of *jurisdiction* in the context of obligations to respect, protect, fulfil ESC rights is elucidated in Principle 9. Its broad scope includes not only situations in which States exercise “*authority or effective control*”, but also situations in which “*acts or omissions bring about foreseeable effects*” on the enjoyment of ESC rights, and even situations in which States (acting through their executive, legislative or judicial branches) “*exercise decisive influence*” or “*take measures to realise*” ESC rights extraterritorially in accordance with international law.

While Principle 9 sets forth the bases for exploring the application of human rights obligations to States’ conduct affecting ESC rights extraterritorially, subsequent Principle 10 emphasises that *the duties concerned should not be referred in support of measures that violate the UN Charter or general international law*. This is in line with Article 2(4) of the Charter, which imposes on Member States to “*refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations*”. In the same regard, basic limits may derive from the principles of the sovereign equality of all States and the sovereignty over national territory, as examined heretofore.

### **3.2.c. The general obligation to avoid causing harm**

The overall meaning of States’ extraterritorial obligations is typified by the general and negative “*obligation to avoid causing harm*”. Principle 13 enunciates the State duty to desist from conduct that generate “*a real risk*” of impairing or nullifying the enjoyment of ESC rights beyond its sovereign territory. Without setting up a threshold of intensity or gravity of the risk, the adjective “*real*” underlines the *probability* that it will occur, rather than the nature of the effects once it has materialized.

Notably, international tribunals have dealt with the prohibition of transboundary harm. The principle that *no nation is entitled to use, or allow its nationals to use, its own territory in a way to cause damage to*



a neighbouring country was primarily maintained in the *Trail Smelter* arbitration case.<sup>1603</sup> In this respect, “the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control” was reiterated by the International Court of Justice.<sup>1604</sup> Furthermore, the principle concerned is embodied in basic sources of international environmental law, such as the 1972 Stockholm Declaration on the Human Environment (principle 21) and the 1992 Rio Declaration (principle 2).

The duty articulated in Principle 13 is in accordance with what Article 74 of the UN Charter requires in the context of Non-Self-governing Territories, namely adhering to “the general principle of good neighbourliness, due account being taken of the interests and wellbeing of the rest of the world, in social, economic, and commercial matters”.

### **3.2.c.i. The foreseeability rule**

A relevant condition articulated regarding the “obligation to avoid causing harm” is *foreseeability*, which is actually emphasised even in the aforementioned Principle 9. Under Principle 13, State responsibility is triggered when the prejudice to ESC rights (in breach of the obligation to avoid causing harm) was “a foreseeable result of their conduct”. In other words, State responsibility may be based on whether its authorities are aware of, or should have been aware of, the risks to ESC rights.<sup>1605</sup> Thus the relevance of the notion of foreseeability relies on that it functions as an incentive for States to evaluate in advance the influence of their activities or decisions on the enjoyment of ESC rights beyond their national territories.

This focus on the knowledge of State authorities about the results of their conduct acquires significance also in view of the ILC’s Commentary to Article 23 of its Draft Articles on the Responsibility of States for Internationally Wrongful Acts, where two dimensions of foreseeability are laid down (“To have been ‘unforeseen’, the event must have been neither foreseen nor of an easily foreseeable

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<sup>1603</sup> See *Trail Smelter Case (United States v. Canada)*, 3 Reports of International Arbitral Awards, 16 April 1938 and 11 March 1941, Vol. III, at 1905-1982. See the dissenting opinion of Judge Weeramantry to the ICJ advisory opinion on *the Legality of Threat or Use of Nuclear Weapons*, in which it was affirmed that New Zealand’s claim about prohibiting nuclear tests where they could risk impacting on the State’s population should be determined in light of the “deeply entrenched principle, grounded in common sense, case law, international conventions, and customary international law” that “damage must not be caused to other nations”.

<sup>1604</sup> See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996 (I), 241-242, para. 29. See also ICJ, *Gabčíkovo-Nagymaros Project (Ungheria c. Slovacchia)*, Judgment of 27 September 1997, ICJ Reports 1997, 78, para. 140; ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Request for the indication of Provisional Measures, Order of 13 July 2006, ICJ Reports 2006, 132, para. 72.

<sup>1605</sup> Conversely, in the *Corfu Channel Case*, the ICJ remarked that due diligence obligations “are based ... on certain general and well-recognised principles, namely: ... every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”, see ICJ, *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment of 9 April 1949, ICJ Reports 1949, 4, 22, at 18. Albania was held responsible for failing to warn UK of mines that Albania should have known were in the international channel.

kind”).<sup>1606</sup> Accordingly, State responsibility may be engaged when the resulting impairment of ESC rights was readily predicted by its authorities, or when this should have been predicted and they failed to search for the information that would have permitted to estimate better the risks.

Of further note, Principle 13 also reflects the evolution of the questions of foreseeability and causality (*i.e.* the relation of conduct and result) as addressed in the ILC’s Commentary to Principle 4 of its 2006 Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities.<sup>1607</sup> In this respect, a violation of ESC rights may be attributable to a State provided that it was foreseeable that its conduct could have given rise to it even if other causes were also present.<sup>1608</sup>

### **3.2.c.ii. The precautionary principle**

A final significant reference in Principle 13 is reserved to the precautionary principle, which is articulated by emphasising that “[u]ncertainty about potential impacts does not constitute justification for said conduct” (namely a conduct that entails the risk of infringing ESC rights).

This principle has been acknowledged in relation to international environmental law as well as international humanitarian law;<sup>1609</sup> its programmatic nature result clearly from Article 191(2) of the Treaty on the Functioning of the European Union, where it is laid down among specific principles of the EU environmental policy (precaution and prevention, the rectification of environmental impairment at source and the polluter-pays principle). It also represents a basic principle in the regulation of biotechnology.<sup>1610</sup> As highlighted by the ILC in relation to Article 3 of the 2001 Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, the precautionary principle is commonly viewed as “*taking such measures as are appropriate by way of abundant caution, even if*

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<sup>1606</sup> See Report of the International Law Commission on the work of the fifty-third session, UN Doc. A/56/10, 21 August 2001, Article 23 *Force majeure*, Commentary, at 184, para. 2.

<sup>1607</sup> According to the ILC’s commentary, “(T)he principle of causation is linked to questions of foreseeability and proximity or direct loss. Courts in different jurisdictions have applied the principles and notions of proximate cause, adequate causation, foreseeability and remoteness of the damage. This is a highly discretionary and unpredictable branch of law. Different jurisdictions have applied these concepts with different results. It may be mentioned that the test of proximity seems to have been gradually eased in modern tort law. Developments have moved from strict *condicio sine qua non* theory over the foreseeability (“adequacy”) test to a less stringent causation test requiring only the ‘reasonable imputation’ of damage”. See the text adopted by the ILC in 2006 and submitted to the General Assembly as a part of the ILC’s report on the work of that session, *Report of the International Law Commission*, UN GAOR, 58<sup>th</sup> sess., paras. 44-46; Principle 4 *Prompt and adequate compensation*, Commentary, A/61/10 (2006), at 157, para. 16.

<sup>1608</sup> On this point, see O. De Schutter, A. Eide, A. Khalfan, M. Orellana, M. Salomon, I. Seiderman, “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights”, *HRQ*, 2012, at 1113-1114.

<sup>1609</sup> See Article 57 AP I. See also Principle 15 of the Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development*, I, (New York, 1992), A/CONF.151/26/Rev.1.

<sup>1610</sup> See F. Francioni, “International law for Biotechnology: Basic Principles”, in Francioni and Scovazzi (eds.), *Biotechnology and International Law*, Oxford University Press, 2006, pp. 18-19.

*full scientific certainty does not exist, to avoid or prevent serious or irreversible damage*".<sup>1611</sup>

Therefore, Principle 13 primarily implies that the absence of certainty as to threats or potential threats of serious effects on ESC rights should not be the basis for the approval of planned critical activities or the application of preventive measures combined with effective remedies. A representative example of a situation would concern oil exploitation activities causing water and soil pollution that potentially has negative impacts on the right to health and the right to an adequate standard of living of the people living in the area concerned. Notable support for the precautionary principle has recently come from international jurisprudence.<sup>1612</sup>

### **3.2.c.iii. The prior assessment requirement**

A procedural duty inherently related to the obligation to avoid causing harm is articulated in Principle 14, under which States are required to conduct prior assessment to inform themselves about "*the risks and potential extraterritorial impacts of their laws, policies and practices*" on the enjoyment of ESC rights abroad:<sup>1613</sup> this valuation is needed to *inform* States to *enact* preventive measures, to *guarantee* the cessation of violations, and to *adopt* effective remedies.<sup>1614</sup> Significantly, this assessment is understood as conducted with public participation and through making public the access to related results, thus making operative the right of access to information as acknowledged by human rights bodies.<sup>1615</sup> Existing human rights impact assessments may serve as reference to develop the

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<sup>1611</sup> Under Article 3 "*(t)he State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimise the risk thereof*", see Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, Report of the International Law Commission on the work of the fifty-third session, UN Doc. A/56/10, 21 August 2001, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 155, Article 3, Commentary para. 14.

<sup>1612</sup> In the case concerning *Pulp Mills on the River Uruguay* the ICJ observed that "*a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute*", see *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, ICJ Reports 2010, 14, para. 164. Equally, in the Advisory Opinion on *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea observed that "*the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law*", see Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, 1 February 2011, ITLOS Reports 2011, para. 135.

<sup>1613</sup> Similarly, the duty to acquire information to *ascertain* and *evaluate* the possible effect of States' conduct is mentioned in the ILC's Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities of 2001, commentary of Article 3 (Prevention).

<sup>1614</sup> For a recent methodology of human rights impact assessment, see *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, Report of the Special rapporteur on the Right to Food, Oliver De Schutter*, UN Doc. A/HRC/19/59/Add.5 (2011). Commentators on Principle 14 highlight the experience of other impact assessments, such as the work by the Special Representative of the Secretary General on human rights and transnational corporations and other business enterprises, see O. De Schutter, A. Eide, A. Khalfan, M. Orellana, M. Salomon, I. Seiderman, "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights", *HRQ*, 2012, p. 1117.

<sup>1615</sup> See HRC, *General Comment No. 34: Freedoms of Opinion and Expression (art. 19)*, UN Doc. CCPR/C/GC/34 (2011), paras. 18-19. See IACtHR, *Claude Reyes et al. v. Chile*, Judgment of 19 September 2006 (*Merits, Reparations and Costs*), Ser

content of prior appraisal on ESC rights;<sup>1616</sup> in the environmental field several international agreements already require this.<sup>1617</sup>

### **3.2.d. The normative content of extraterritorial obligations on ESC rights**

In order to specify the normative facets of extraterritorial obligations, the Maastricht Principles rely on the position that States have to respect, protect, and fulfil human rights both within and beyond their territories (Principle 3). The extraterritorial obligations to respect and to protect are conceived as *complementary* and *simultaneous* to those to be complied with in the territorial State; while the extraterritorial obligation to fulfil is regarded as *subsidiary*.

#### **3.2.d.i. Respecting ESC rights**

The *obligation to respect* is clarified under the headings of both direct and indirect interference as well as by reference to sanctions and equivalent measures (Principles 19-22). In enucleating what is already provided for in Article 56 of the UN Charter, such a general obligation comprises duties to take action separately and jointly through international cooperation to found institutional arrangements required to respect ESC rights (Principle 19).

As to direct interferences, the obligation to respect is understood to require States to refrain from conduct that *nullify or impair the enjoyment and exercise of ESC rights in relation to individuals or groups outside the States' national territories*. State conduct having a potential impact on ESC rights entails positive measures to ensure that State authority is discharged without interfering with their fulfilment (Principle 20). Emblematic cases of unlawful interference with existing access and enjoyment of ESC rights would concern a foreign State dumping toxic water in the territory of

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C No. 151, para. 77, founding that, “*by expressly stipulating the right to ‘seek’ and ‘receive’ ‘information’, Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, [...]*”. See ECtHR, *Társaság a Szabadságjogokért v. Hungary*, Appl. No. 37374/05, Judgment, 14 April 2009 - Final 14 July 2009, para. 26, addressing its consistent recognition that “*the public has a right to receive information of general interest*”, also referring to its case law in this field as developed in relation to press freedom which serves to impart information and ideas on such matters (see *the Observer and Guardian v. the United Kingdom*, 26 November 1991, para. 59, Series A No. 216; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, para. 63, Series A No. 239).

<sup>1616</sup> See *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, “Business and Human rights: Further Steps Toward the Operationalization of the ‘Protect, Respect and Remedy’ Framework”, A/HRC/17/31, 21 March 2011, paras. 18-21; *Report of the Special Rapporteur on the Right to Food, Oliver De Schutter*, “Guiding Principles on Human Rights Impact Assessment of Trade and Investment Agreement”, A/HRC/19/59/Add.5, 19 December 2011. See, e.g., also International Business Leaders Forum, *Guide to Human Rights Impact Assessment and Management*, 2010; Danish Institute for Human Rights, *The Human Rights Compliance Assessment*, available at <https://hrca2.humanrightsbusiness.org>.

<sup>1617</sup> See the Convention on Biological Diversity (CBD, adopted on 22 May 1992), the UN Framework Convention on Climate Change (UNFCCC, entered into force on 21 March 1994), and the UN Convention on the Law of the Sea of 10 December 1982.

another country, or a foreign State restricting access to health facilities and services as punitive measure in the course of an armed conflict, or a foreign State depriving objects indispensable for civilians' survival, for example.

Conversely, as to indirect interferences, the same obligation to respect is understood to require States to desist from any conduct (a) that weaken the capacity of a State or an international organization to realise their duties regarding ESC rights, or (b) that “*aids, assists, directs, controls or coerces*” a State or an international organization in breaching such duties (Principle 21). This repeats the content of Articles 16-18 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts.<sup>1618</sup> An emblematic case would concern a foreign State involved in a biofuel project in another country, impacting on ESC rights therein. It is worth stressing that conflicts revolving around large-scale bioenergy projects have been increasingly reported in recent years.<sup>1619</sup>

As to the issue of sanctions, under Principle 22 States must refrain from adopting a wide range of measures that impair or nullify the enjoyment of ESC rights, adding that the *design, implementation and termination* of any regime of sanctions adopted to accomplish other international legal obligations must respect human rights obligations.<sup>1620</sup> In any case, economic sanctions such as embargoes cannot regard the provision and transfer of “*goods and services essential to meet core obligations*”. This point will be considered in section 5.3.

### 3.2.d.ii. Protecting ESC rights

The *obligation to protect the ESC rights of any persons within and beyond sovereign territory* is basically elaborated as a State duty to *regulate* the conduct of non-State actors (natural persons as well as legal persons, including organizations, transnational corporations and other business enterprises), to exercise *influence* on such conduct, and to *take action* separately and jointly through international cooperation (Principle 23).

In Principles 24 and 25, the function of **regulation** is worded robustly (“*must*”), under

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<sup>1618</sup> As addressed by the ILC, specific rules of international law embody this principle, see the first principle of the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the UN Charter, GA Res. 2625 (XXV) of 24 October 1970, UN GAOR, 25<sup>th</sup> Sess., Annex, A/8028/(1970); Article 3 (f) of the *Definition of Aggression*, GA Res. 3314 (XXIX) of 14 December 1974.

<sup>1619</sup> See J. Arevalo, R. Ochieng, B. Mola-Yudego and D. Gritten, “Understanding bioenergy conflicts: Case of a jatropha project in Kenya’s Tana delta”, *Land Use Policy* 14, 2014, pp. 138-148. For a study on biofuel production in Brazil, Argentina, Colombia, Mexico, Central America, and the Caribbean region, and its impacts on “three pillars of sustainability” (*i.e.* social, economic and environmental systems), see D. Berry, Salomon, Bailis, Robert (eds.), *Sustainable Development of Biofuels in Latin America and the Caribbean*, Springer, 2014.

<sup>1620</sup> Relevant criteria based on human rights law have been developed by monitoring bodies, as examined in the section 5.3. *E.g.*, see CESCR, *General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights*, UN Doc. E/C.12/1997/8, *op. cit.*

preventive as well as reactive dimensions, regulation is deemed exercisable *through several means* (administrative, legislative, investigative, adjudicatory measures or even absent legal measures, including diplomatic measures), which a State adopts and enforces *when it is in a position to do so according to certain circumscribed positions* (“*bases for protection*”), in compliance with international law, in order to guarantee that non-state actors’ activities do not impair or nullify ESC rights, while all other States should refrain from overturning or prejudicing the discharge of such a duty.

Specifically, three of the identified “*bases for protection*” - justifying a foreign State’s extraterritorial jurisdiction (prescriptive as well as adjudicative/executive) - echo the active personality principle: (a) the harm or threat comes from or takes place on the *territory* of the State concerned; (b) the same *nationality* between the non-state actor and the State in question; (c) for business enterprises, if the corporation or its parent or controlling company has in the national territory its “*centre of activity, place of registration or domicile, or main place of business or substantial business activities*”.

An additional basis spelled out in Principle 25(d) consists in the existence of a “*reasonable link*” between the State and the conduct it aims to regulate. Reasonableness demands the identification of a *sufficiently close* connection.<sup>1621</sup> Conversely, compliance with international law entails subjecting reasonableness to the respect for the principles of non-intervention in the internal affairs of the territorial State (the host State), non-interference with its sovereign rights, and equality of all sovereign States. Nevertheless, it is worth highlighting that, since compliance with internationally recognised human rights is no longer a matter belonging to the exclusive national domain of the territorial State, the foreign State’s regulation aimed at promoting non-state actors’ compliance with human rights may call for a flexible understanding of the restrictions imposed by international law on prescriptive extraterritorial jurisdiction.

The final basis spelled out in Principle 25(e) aims at justifying the exercise of extraterritorial jurisdiction as a tool to support coexistence between States as well as their cooperation in dealing with situations that are of importance to the whole international community. It refers to any conduct impairing ESC rights and constituting a violation of a peremptory norm of international law or even a crime under international law. Accordingly, the meaning of the obligation to protect

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<sup>1621</sup> Three examples of reasonableness in which the non-territorial State would be required to protect ESC rights under Principle 25 (d) are mentioned in the Commentary to the Maastricht Principles: 1) if a non-state actor suspected of human rights abuses abroad has properties that may be seized to apply the decision of a competent court in view of witnesses or pertinent evidence; 2) if there are relevant officials suspected of criminal liability; 3) if the non-state actor has done a part of the conduct that gave rise to the violation. See O. De Schutter, A. Eide, A. Khalfan, M. Orellana, M. Salomon, I. Seiderman, “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights”, *HRQ*, 2012, at 1141. See also ICJ, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, Judgment of 27 June 1986, ICJ Reports 1986, 64, para. 205.

is explained by requiring States to exercise universal jurisdiction over those bearing responsibility (thus allowing their national courts to prosecute the relevant crime regardless the nationality of the offender or the victim and where it took place) or to lawfully extradite them to an appropriate jurisdiction.<sup>1622</sup>

As far as the conduct of transnational corporations is concerned, apparently the Maastricht Principles go beyond the UN Guiding Principles analysed above. They define more broadly the bases for allowing the State of origin to exercise extraterritorial jurisdiction. In particular, they elucidate in more detail how the forum (home) State and corporations may be connected under the principle of active personality.<sup>1623</sup> Conversely, the existence of “*a reasonable link*” between the conduct concerned and the home State is equally addressed under Ruggie’s Principles.

It is worth mentioning that *international and regional courts as well as non-judicial human rights bodies* have contributed to *affirm and articulate* the notion of *State duty to protect under human rights instruments* (*i.e.* demanding to prevent the violations in the private sphere, to regulate and control private actors, to investigate the violations, to punish the perpetrators and provide effective remedies to victims).<sup>1624</sup> This jurisprudence includes the CESCR,<sup>1625</sup> the HRC,<sup>1626</sup> the Committee on the Elimination of

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<sup>1622</sup> On the principle *aut dedere, aut judicare*, see: crimes against humanity (the *ius cogens* nature of their prohibition is generally understood as implying a duty to contribute to their suppression universally); war crimes (Art. 49 GCII; Art. 50 GCII; Art. 129 GCIII; Art. 146 GCIV); genocide (see *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, ICJ Reports 1951, 15, at 23, noting that “*the principles underlying the Convention are principles which are recognised by civilized nations as binding on States, even without any conventional obligation*” and that “*both ... the condemnation of genocide and ... the co-operation required ‘in order to liberate mankind from such an odious scourge’ (Preamble to the Convention) have a ‘universal character’*”; see also Judgment of 11 July 1996 in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, ICJ Reports 1996, 595, at 615-616, para. 31, stating that “*the obligation each State ... has to prevent and to punish the crime of genocide is not territorially limited by the Convention*”); torture (CAT, Art. 5(2)); and enforced disappearances (ICPAPED, Art. 9(2)).

<sup>1623</sup> Conversely, according to the UN Guiding Principles, the bases for extraterritorial jurisdiction include situations where the actor or victim of a human rights violation is a national of that State, where the acts have substantial adverse effects on the State, or where specific international crimes are involved, see UN Doc. A/HRC/8/5, 7 April 2008, para. 19, and note 12, which also cites the *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum on corporate responsibility under international law and issues in extraterritorial regulation: summary of legal workshops*, UN Doc. A/HRC/4/35/Add.2, 15 February 2007.

<sup>1624</sup> Some of the decisions are referred in the commentary to Principle 24, see O. De Schutter, A. Eide, A. Khalfan, M. Orellana, M. Salomon, I. Seiderman, “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights”, *HRQ*, 2012, at 1134-1135, particularly note 126.

<sup>1625</sup> *E.g.*, CESCR, *General Comment No. 12: The right to adequate food (Art. 11)*, UN Doc. E/C.12/1999/5, para. 15 (“*The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food*”).

<sup>1626</sup> See HRC, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 8 (“*the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities*”). For a recent statement on States parties’ extraterritorial obligations to ensure or protect the

Racial Discrimination,<sup>1627</sup> the European Court of Human Rights,<sup>1628</sup> European Committee of Social Rights of the Council of Europe,<sup>1629</sup> the Inter-American Court of Human Rights,<sup>1630</sup> the African Commission on Human and Peoples' Rights.<sup>1631</sup> In developing a legal basis for State

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Covenant's rights, including the obligation to regulate corporate entities, see HRC, *Concluding Observations: Germany*, UN Doc. CCPR/C/DEU/CO/6, 31 October 2012, para.16 (“*While welcoming measures taken by the State party to provide remedies against German companies acting abroad allegedly in contravention of relevant human rights standards, the Committee is concerned that such remedies may not be sufficient in all cases (art. 2, para. 2). The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.*”).

A controversial case has been that concerning Neumann Kaffee Gruppe, a Hamburg-based German company operating in Uganda through its subsidiary, Kaweri Coffee Plantation Ltd. In August 2002 a group of Ugandans filed a civil lawsuit against the latter and the Ugandan Government, claiming that human rights violations were committed against them in several villages of Mubende district; in particular, they alleged that in August 2001 Ugandan military officials forcibly evicted 392 peasant families (approximately 2,041 persons) from their land, mistreated them and burned down their homes, in order to make way for a large-scale coffee plantation owned by Kaweri. The plaintiffs called for an independent land survey to determine the land's real ownership, the restitution of their land, or adequate compensation. On 28 March 2013 the Court of Uganda decided that they were illegally evicted without being compensated adequately and then ordered compensation of approximately €11 million for the evictees concerned. Although the defendant's behavior was condemned and the Court held that Kaweri officials were informed that the plaintiffs were to be evicted, both defendants were acquitted. The requirement for compensation was imposed on the Ugandan Investment Authority's lawyers for allegedly misadvising the Government to purchase the land. Finally, the Court criticised German investors for neglecting their human rights duty to perform due diligence, stating: “*The German investors had a duty to ensure that our indigenous people were not exploited. They should have respected the human rights and values of people and as honorable businessman and investors they should have not moved into the lands unless they had satisfied themselves that the tenants were properly compensated, relocated and adequate notice was given to them*”. Since the defendants and the lawyers appealed the verdict, the execution of the judgment was provisionally suspended by the Court of Appeal in April 2013.

<sup>1627</sup> States that were explicitly called to “regulate” the extraterritorial conduct of third parties registered in their national territory include the United States and Canada. See *Concluding Observations: United States*, UN Doc. CERD/C/USA/CO/6, 8 May 2008, para. 30 (“*In light of Article 2, paragraph 1 (d), and 5 (e) of the Convention and of its General Recommendation No. 23 (1997) on the rights of indigenous peoples, the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in the State party which negatively impact on the enjoyment of rights of indigenous peoples in territories outside the United States. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in the United States accountable*”). See *Concluding Observations: Canada*, UN Doc. CERD/C/CAN/CO/18, 25 May 2007, para. 17 (calling upon Canada to “*take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada*”, especially recommending that the State party “*explore ways to hold transnational corporations registered in Canada accountable*”).

<sup>1628</sup> See ECtHR, *Young, James and Webster v. the United Kingdom*, Appl. Nos. 7601/76; 7806/77, Judgment of 13 August 1981, Series A, No. 44, para. 49, or ECtHR, *X and Y v. the Netherlands*, Appl. no. 8978/80, Judgment of 26 March 1985, Series A, No. 91, para. 27.

<sup>1629</sup> See European Committee of Social Rights, collective complaint no. 30/2005, *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, decision on admissibility of 30 October 2005, para. 14 (“*the State is responsible for enforcing the rights embodied in the Charter within its jurisdiction. The Committee is therefore competent to consider the complainant's allegations of violations, even if the State has not acted as an operator but has simply failed to put an end to the alleged violations in its capacity as regulator*”).

<sup>1630</sup> See IACtHR, *Velásquez-Rodríguez v. Honduras* (Merits), Judgment of 29 July 1988, Ser C No. 4, para. 172 (“*An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention*”).

<sup>1631</sup> See AfComHPR, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Appl. 74/92 (ACHPR 1995-96), para. 20 (“*The Charter specifies in Article 1 that the States parties shall not only recognise the rights, duties and freedoms adopted by the Charter, but they should also undertake ... measures to give effect to them. In other words, if a State neglects to ensure the rights in the African Charter, this may constitute a violation, even if the State or its agents are not the immediate cause of the violation*”). See also AfComHPR, *SERAC and CESR v. Nigeria*, Appl. 55/96 (ACHPR 2002), para. 46 (“*the State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries*”).



responsibility for human rights violations by non-state actors abroad, this jurisprudence has acknowledged the principle that the conduct attributable to the State *also include its failure to discharge the obligation to protect by adopting regulations or by implementing them effectively insofar as this infringes its human rights undertakings*.<sup>1632</sup> Typically due-diligence failures are qualified as omissions; under Article 2 of the ILC's Draft Articles the conduct attributable to a State may consist of both acts and omissions.<sup>1633</sup>

Remarkably, the general principle of international law at the basis of due diligence obligations was formulated early as 1949 in the *Corfu Channel Case*, in which the International Court of Justice recognised “*every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States*”.<sup>1634</sup> This principle has led to emphasise that States' duty to control private actors' activities within their territory (or jurisdiction/control) also cover *the harm produced to human beings or legal interests* in the territories of other States.<sup>1635</sup>

As previously anticipated, the Maastricht Principles articulate additional dimensions of the State obligation to protect the ESC rights of persons within and beyond its national territory. In particular, the *exercise of influence on the conduct of non-state actors* is worded feebly (“*should*”) but it is deemed *a minimal legal obligation with a protective function*, which persists even when a State does not regulate their conduct. Indeed, Principle 26 refers to the ability to influence such conduct under various forms (such as public procurement system or international diplomacy) in line

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*of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms*”).

<sup>1632</sup> For relevant cases regarding ESC rights, see A. Nolan, “Addressing Economic and Social Rights Violations by Non-State Actors through the Role of the State: A Comparison of Regional Approaches to the ‘Obligation to Protect’”, 8 *HRLR*, 2009, pp. 225-255. For the argument that the doctrine of State responsibility represents an under-utilised device for ensuring that private actors respect ESC rights, see also Chirwa, “The doctrine of State Responsibility as a potential means of holding private actors accountable for human rights”, *Melbourne Journal of International Law*, 2004, pp. 1-36.

<sup>1633</sup> It is worth remembering that situations where the conduct of private actors is directly imputable to the State are exceptional. Under the ILC's Draft Articles of 2001, any organ of the State apparatus may engage the international responsibility of the State (Art. 4), while the conduct of non-state actors will be not attributed to the State *unless* (i) they are authorized by state law to exercise governmental authority and has acted in that capacity in the specific circumstance (Art. 5), or (ii) they has acted under the direction or control of, or the instructions of, the State in implementing the conduct (Art. 8), or (iii) the State has recognised and adopted the conduct concerned as its own (Art. 11). See “Draft Articles on Responsibility of States for Internationally Wrongful Acts”, *op. cit.*. See also ICJ, *Case of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (merits)*, Judgment of 27 June 1986, para. 108.

<sup>1634</sup> See ICJ, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment of 9 April 1949 (Merits), ICJ Reports 1949, 4, 22, at 18.

<sup>1635</sup> See I. Brownlie, *System of the Law of Nations: State Responsibility* (Part. 1), 1983, at 165.

with general principles of international law and the UN Charter.<sup>1636</sup>

As regards the ICESCR, such a position to influence has been emphasised for the right to *health*, the right to *water*, and in relation to *corporations*, maintaining that States parties have “*to prevent third parties from violating the right in other countries if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law*”.<sup>1637</sup> This position is supported by scholars arguing that this Covenant requires States parties - as a minimum - to *refrain from adopting measures that could adversely affect ESC rights beyond national borders* and to *control private actors’ activities to ensure they do not violate ESC rights*.<sup>1638</sup>

A noteworthy attempt to define the **parameters of due diligence** concerning non-state entities placed in foreign territory is found in the *Genocide* judgement of 2007.<sup>1639</sup> Even though the International Court of Justice gave guidance on the due diligence standard in the context of a State’s duty to prevent genocide outside national territory, the principles it sets out are valuable to discuss the application of the due diligence standard in extraterritorial scenarios where human rights violations occur.

Specifically, the Court undertook to determine the scope of the Serbian authorities’ duty to prevent genocide with a view to its influence over the Bosnian-Serb forces in Bosnia. The Court considered the substantive obligations not to commit and to prevent and punish genocide (under Articles I and III of the Genocide Convention) as “*not on their face limited by territory*” and, rather, to apply “*to a State whenever it may be acting or may be able to act in ways appropriate to meeting the obligations in question*”. The precise content of the obligation of due diligence was addressed at length, but the Court emphasised that it did not intend to “*establish a general jurisprudence applicable to all cases where a*

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<sup>1636</sup> Commentary to Principle 26 mentions the reliance of human rights-based conditions in “public procurement schemes” or “export credit agencies”, “fiscal incentives”, “the use of indicators to monitor progress”, or “other forms of social labelling”, see *ibid.*, at 1144.

<sup>1637</sup> See CERSC, *General Comment No. 14: The right to the highest attainable standards of health*, UN Doc. E/C.12/2000/4, para. 39. See CERSC, *General Comment No. 15: The right to water*, 20 January 2003, para. 31. See CESCR, “Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights”, E/C.12/2011/1, 12 July 2011, para. 5 (“*State parties should also take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host States under the Covenant*”). Other human rights treaty bodies have done so as well.

<sup>1638</sup> See S. Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation*, Intersentia, 2006, at 69-70, 191; M. Sepulveda, “Obligations of ‘International Assistance and Cooperation’ in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights”, 24 *Netherlands Quarterly of Human Rights*, 2006, pp. 271-303, at 282, addressing that the preventive and protective function entails States’ duty to discourage practices by non-state actors under their jurisdiction which may violate ESC rights in other countries. See M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective of its Development*, Oxford, 1995, at 147-150.

<sup>1639</sup> ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007.

*treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain act*".<sup>1640</sup>

Then, in articulating that the obligation in question is one of conduct (States parties have to employ all means reasonably available to them, so as to prevent genocide as far as possible), the Court underlined that responsibility is incurred "*if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide*".

In emphasising that the notion of due diligence "*calls for an assessment in concreto*", various parameters were considered as operating in the valuation as to whether a State properly met the relevant obligation. The "*capacity to influence effectively the action of persons likely to commit, or already committing, genocide*" is the first one identified. This ability then depends, *inter alia*, "*on the geographical distance of the State concerned from the scene of the events*" and "*on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events*". Further, since every State may only act within the limits permitted by international law, the ability to influence has to be assessed by "*legal criteria*", thus implying that this capacity will vary depending on the State's particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide.<sup>1641</sup>

Conversely, **cooperation** is addressed in Principle 27 in relation to the measures traditionally identified in human rights jurisprudence as dimensions of the obligation to protect: preventing human rights violations by non-state actors, holding them accountable, and guaranteeing effective remedies.

Regarding all the aforementioned articulations of the obligation to protect ESC rights under the Maastricht Principles, it is worth underlining that a crystallization of the extraterritorial dimension of such obligation in the present evolution of international law is still controversial. The attitude of the CESCR is explicitly in favour of this duty on States parties to the ICESCR.<sup>1642</sup> In the same

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<sup>1640</sup> *Ibid.*, ICJ Reports 2007, at 183 and 429.

<sup>1641</sup> *Ibid.*, ICJ Reports 2007, para. 430.

<sup>1642</sup> See CESCR, "Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights", Report of the forty-sixth and forty-seventh sessions, Suppl. 2, UN Doc. E/C.12/2011/3, Annex VI. In para. 3, it emphasised that "*States parties have the primary obligation to respect, protect and fulfil the Covenant rights of all persons under their jurisdiction in the context of corporate activities undertaken by State-owned or private enterprises. This derives from article 2, paragraph 1, of the Covenant, which defines the nature of the obligations of States parties, referring to legislative and other appropriate steps towards implementation, which include administrative, financial, educational and social measures, domestic and global needs assessments, and the provision of judicial or other effective remedies*". In para. 5, it articulated the meaning of the duty to protect by stating that "*States parties effectively safeguard rights holders from infringements of their economic, social and cultural rights involving corporate actors by establishing appropriate laws and regulations, together with monitoring, investigation and accountability procedures to set and enforce standards for the performance of corporations*". It also underlined that "*non-compliance with this obligation can come about through action or inaction*". It then addressed that "*States parties ensure access to effective remedies for victims of corporate abuse of economic, social and cultural rights through judicial, administrative, legislative or other appropriate means*". Further, it emphasised that "*States parties should*

respect, the Committee on the Elimination of Discrimination against Women has recurrently emphasised that CEDAW requires Contracting Parties to regulate non-state actors under the duty to protect: they are called for exercising due diligence to prevent, investigate, punish and ensure redress for private individuals or entities' acts impairing the rights guaranteed in this Convention.<sup>1643</sup> Notably, the CEDAW has been interpreted to require States parties “*to regulate the activities of domestic non-State actors, within their effective control, who operate extraterritorially*” and to ensure full respect of the Convention by them.<sup>1644</sup> Also the former UN Special Rapporteur of the right to food expressed a positive view in this regard.<sup>1645</sup> Conversely, the former UN Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises deemed the extraterritorial dimension of the duty to protect *still unsettled in international law*, as emerged in the 2011 UN Guiding Principles.<sup>1646</sup> Different opinions have also been expressed in legal scholarship. Regarding trade or investment agreements, the recognition of

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*also take steps to prevent human rights contraventions committed abroad by corporations which have their main offices under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant”.*

<sup>1643</sup> See *General Recommendation No. 19 on violence against women*, 29 January 1992, UN Doc. A/47/38, para. 9; *General Recommendation No. 28 on the core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 19 October 2010, UN Doc. CEDAW/C/2010/47/GC.2, paras. 13 and 19. It outlined due diligence obligations in protecting women from violence and discrimination by any person, organization or enterprise, stressing that, alongside constitutional and legislative measures (*i.e.* the regulation of the activities of private actors in relation to “*education, employment and health policies and practices, working conditions and work standards, and other areas where they provide services or facilities*”), States parties must provide adequate administrative and financial support for the implementation of the CEDAW.

<sup>1644</sup> *General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, 18 October 2013, UN Doc. CEDAW/C/GC/30, para. 10. It gives specific guidance on States parties' obligation of due diligence in respect of crimes against women by non-State actors.

<sup>1645</sup> See *Report of the UN Special Rapporteur on the right to food Jean Ziegler*, E/CN.4/2006/44, 16 March 2006. In reviewing the definition and understanding of the right to food in an era of globalisation, Ziegler affirmed that the primary obligations to respect, protect and fulfil the right to food of their people will always rest with national governments; the need to extend a State's obligations under human rights to include extraterritorial obligations towards the right to food of people living in other countries was also addressed. See particularly para. 36 (“*The extraterritorial obligation to protect the right to food requires States to ensure that third parties subject to their jurisdiction (such as their own citizens or transnational corporations), do not violate the right to food of people living in other countries. This puts a duty on the State to regulate its corporations and non-State actors in order to protect the inhabitants of other countries. With the increasing monopoly control by transnational corporations over all components of the food distribution chain, from production, trade and processing to marketing and retailing of food, and control over the majority of concessions worldwide (see E/CN.4/2004/10, paras. 35-52), it is becoming more difficult for less powerful national Governments to regulate transnational corporations working within their territory to respect human rights, making it essential that the often more powerful “home” States engage in adequate regulation. In privatization, for example, steps should be taken by “home” States to ensure that the policies and activities of transnational corporations respect the right to of all people in the countries where they are working*”).

<sup>1646</sup> According to John Ruggie, “*at present, States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognised jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction*”, and that an overall test of reasonableness is met. See the final report “*Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*”, UN Doc. A/HRC/17/31, 21 March 2011, commentary to para. 2, at 7. See also UN Doc. A/HRC/11/13, 22 April 2009, para. 15. On this subject, see R. McCorquodate and P. Simons, “*Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*”, in A. Bianchi (ed.), *Non-State Actors and International Law*, 2009, p. 505 ff.

extraterritorial obligations to protect upon the home State of private actors has been seen as a logical correspondent to complement the rights afforded to foreign investors under international law.<sup>1647</sup> Some scholars remain in general more cautious.<sup>1648</sup>

### **3.2.d.iii. Fulfilling ESC rights**

The States' obligation to *fulfil* ESC rights *beyond their sovereign territories* has a *subsidiary nature*, being that emphasis is put on the primary responsibility of the territorial State (Principle 28). Accordingly, in Principle 31 it is addressed as an obligation “*to contribute*” to the realisation of ESC rights, in accordance with the States’ “*economic, technical and technological capacities, with their available resources and their influence in international decision-making processes*”.

Significantly, certain priorities are set out in Principle 32: realising “*the rights of disadvantaged, marginalised and vulnerable groups*”, giving effect to “*core obligations to realise minimum essential levels*” of ESC rights, adhering to international human rights principles and standards, moving “*as expeditiously and effectively as possible towards the full realisation*” of these rights and avoiding retrogressive measures.

In Principles 29 a positive duty of all States is clarified as taking “*deliberate, concrete and targeted steps*”, separately and jointly, to generate “*an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection, and development cooperation*” (a non-exhaustive list, and with emphasis added). Notably, this need has been consistently recognised in basic international sources such as the UN Charter, several human rights treaties, and some resolutions of the General Assembly;<sup>1649</sup> the related commitments embody a certain States' practice that may influence the interpretation of relevant treaty provisions. Furthermore, indicative forms and ways to comply with the extraterritorial duty to fulfil include “*the elaboration, interpretation, application, and regular review*” of international standards and binding agreements. As clarified in Principle 29, “*means of compliance*”

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<sup>1647</sup> See F. Francioni, “Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations”, in Benedek, De Feyter, Marrella (eds.), *Economic Globalization and Human Rights*, Cambridge, 2007, pp. 262-263; M. Sornarajah, *The International Law of Foreign Investment*<sup>2</sup>, Cambridge, 2004, Chapter 4, p. 169.

<sup>1648</sup> See O. De Schutter, *International Human Rights Law*, Cambridge, 2010, pp. 162-163, according to which there is not a general obligation imposed on States to exercise *extraterritorial prescriptive and adjudicative jurisdiction* to contribute to the promotion and protection of internationally accepted human rights abroad. This is so even in relation to private actors that have the nationality of the State in question. See also S. Joseph, “Scope of Application”, in D. Moeckli, S. Shah, S. Sivakumaran (eds.), *International Human Rights Law*, Oxford, 2010, at 166, who emphasises that maintaining the existence of an extraterritorial obligation to protect is easier when a State actively facilitates or supports the activities of corporations abroad by providing export credits.

<sup>1649</sup> See GA Res. 3201 (S-VI), Declaration on the Establishment of a New International Economic Order, 1 May 1974; GA Res 41/128, Declaration of the Right to Development, 4 December 1986, Article 3(1); GA Res 55/2, The Millennium Declaration, 18 September 2000, Article 12.

embrace either policies in the context of foreign relations and within international organizations, or unilateral domestic measures having external effects.

Principles 30 and 33 specify, respectively, the duties to “*coordinate cooperation*” and “*provide international assistance*”, which would depend on a legitimate request from a State incapable to ensure and realise ESC rights within the sovereign territory “*despite its best efforts*”. The latter duty is described as contributing to the fulfilment of ESC rights, and this has been a font of regret.<sup>1650</sup> Such a situation of inability would require the State concerned to seek international assistance and cooperation. Principle 35 clarifies that States (which receive this request and are in a position to assist or to cooperate) “*must consider the request in good faith, and respond in a manner consistent with their obligations to fulfil ESC rights extraterritorially*”; conversely, the requesting State is expected “*to ensure that assistance provided is used towards the realisation of economic, social and cultural rights*”.

### **3.2.e. The accountability dimension of extraterritoriality**

Principles 11 and 12 “replicate” some basic circumstances which may connect the international responsibility of a State to its extraterritorial obligations, reiterating the rules of attribution as reflected in the ILC’s Draft Articles and in line with customary international law.<sup>1651</sup>

Accordingly, under Principle 11 a conduct attributable to a State, “acting separately or jointly with other States or entities”, which constitutes a violation of one of its international human rights obligations (“whether within its territory or beyond it”) engages State responsibility.

Then, under Principle 12 State responsibility covers two well-known circumstances. Under lett. (a), it extends to “*acts and omissions of non-state actors acting on the instructions or under the direction or control of the State*”. In this regard, it is generally highlighted that, despite a strong State’s support to such *de facto* state organs or their close connections, the attribution of their conduct to the State primarily relies on its effective control over them in the particular circumstance.<sup>1652</sup> Conversely, under Principle 12(b) State responsibility extends to “*acts and omissions of persons or entities which are not State*

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<sup>1650</sup> See W. Vandenhoe and W. Benedek, “Extraterritorial Human Rights Obligations and the North-South Divide”, in M. Langford, W. Vandenhoe, M. Scheinin, W. van Genugten (eds.), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Cambridge, 2012, pp. 332-363.

<sup>1651</sup> See Articles 2, 5 and 8 of the ILC’s Draft Articles of 2001, *op. cit.*. Conversely, the Maastricht Principles do not undertake the distinct perspective of holding non-state actors directly accountable for a wrongful act before international or national procedures.

<sup>1652</sup> The notion of effective control was articulated early on the judgment *Nicaragua v. United States of America*, in which the ICJ determined that the conduct of rebel contras could only be attributed to the United States “*had effective control of the military or paramilitary operations in the course of which the alleged violations were committed*”, see ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, para. 115. This notion was re-stated in the *Genocide case*, see paras. 398 and 406. In commentary to Article 8 of the 2001 Draft Articles the ILC upheld this test.

organs, such as corporations and other business enterprises, where they are empowered by the State to exercise elements of governmental authority” as long as they are under such a capacity in the specific situation.<sup>1653</sup> In this regard, delegated functions to private entities, which may be seen as requiring “elements of governmental authority” and so engage State responsibility, may *inter alia* include the provision of basic infrastructures, the supply of certain public services (such as electricity and water), or the delivery of traditionally public functions (such as health and education).

In identifying the profiles of State responsibility, apparently the issue as to the imputability of violations of ESC rights carried out in the implementation of projects on development and cooperation, particularly in relation to broader positive obligations, is left unresolved.

Finally, a weak aspect may be underlined. The Maastricht Principles do not pay proper attention to the increasingly debated issue of allocation of responsibility between States,<sup>1654</sup> whether between the territorial State and third States as well as among third States. As for the responsibility between third States, they tend to reiterate the view that all States “*must take action, separately and jointly through international cooperation*”,<sup>1655</sup> they have to cooperate to protect ESC rights extraterritorially,<sup>1656</sup> and they “*should coordinate with each other in order to cooperate effectively in the universal fulfilment of economic, social and cultural rights*”. However, slight textual references are made on what specific foreign States should do.<sup>1657</sup>

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<sup>1653</sup> See also the 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, particularly Guidelines 16-19 on “Responsibility for violations”. Under Guideline 18, “*The obligation to protect includes the State’s responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors*”.

<sup>1654</sup> For a recent attempt to clarify the distribution of responsibility between States, see W. Vandenhole and W. Benedek, “Extraterritorial Human Rights Obligations and the North-South Divide”, in M. Langford, W. Vandenhole, M. Scheinin, W. van Genugten (eds.), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Cambridge, 2012, pp. 332-363. The authors refer to the classical tripartite typology of obligations. While they do not challenge the primary responsibility of the territorial State, their argument is that the extraterritorial obligations to *respect* and to *protect* are similar in scope and meaning to territorial obligations, and so qualifying them as “*complementary*” and “*simultaneous*”; conversely, the obligation to *fulfil* is qualified as “*subsidiary*” as it is not immediate, but rather it is qualified by time and resources. See also A. Khalfan, “Division of Responsibility between States”, in M. Langford, W. Vandenhole, M. Scheinin, W. van Genugten (eds.), *Global Justice, State Duties, op. cit.*, pp. 299-331.

<sup>1655</sup> See Principles 19, 23, 28, and 29.

<sup>1656</sup> See Principle 27.

<sup>1657</sup> For the obligation to protect extraterritorially, Principle 24 and 26 refer to States in a position to regulate or to influence. For the obligation to fulfil and principally the duty to coordinate, Principle 33 and 35 refer to States that are “*in a position to do so*”, and specify that lack of coordination “*does not exonerate a State from giving effect to its separate extraterritorial obligations*” contributing to fulfil ESC rights extraterritorially.

#### 4. The general scope of application of treaties on ESC rights in view of their textual vacuum or ambiguity

The major treaties on ESC rights contain no provisions specifying their general scope of application *ratione personae* or *ratione loci*. They do not delimit the extent of States parties' obligations to territory or jurisdiction, but they include explicit references and commitments to international cooperation and assistance.

At the *universal level*, the first one was the UNESCO Convention against Discrimination in Education of 1960.<sup>1658</sup> Then, the ICESCR does not indicate that territorial boundaries apply to its provisions, apart from conceiving the obligations concerning the provision for, and immediate fulfilment of, the right to free primary education as limited to “*metropolitan territory or other territories under its jurisdiction*”.<sup>1659</sup> Even the CEDAW is silent on this point. Territorial limitations are also omitted in most provisions of CERD, including Articles 2 and 5 that protect a wide range of substantive rights; exceptions concern the prevention, prohibition and eradication of all practices of apartheid and racial segregation “*in territories under their jurisdiction*” (Article 3) and the provision of effective national remedies against racial discrimination (Article 6). Last but not least, the CRPD contains no express reference to its territorial scope, rather detailing “*appropriate and effective measures*” for international cooperation “*between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society*” (see Article 4 (2) on general obligations and Article 32 on international cooperation).<sup>1660</sup>

At the *regional level*, the AfrCHPR as well as the inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women do *not* contain any jurisdiction clause.

Therefore, apparently the application of treaties on ESC rights is neither confined to the

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<sup>1658</sup> It was adopted in Paris on 14 December 1960 and entered into force on 22 May 1962.

<sup>1659</sup> Article 14 ICESCR reads: “*Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all*”.

<sup>1660</sup> Under Article 32 CRPD, “1. *States Parties recognise the importance of international cooperation and its promotion, in support of national efforts for the realisation of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities. Such measures could include, inter alia: (a) Ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities; (b) Facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices; (c) Facilitating cooperation in research and access to scientific and technical knowledge; (d) Providing, as appropriate, technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies. 2. The provisions of this article are without prejudice to the obligations of each State Party to fulfil its obligations under the present Convention*”.



sovereign territory of a State party nor to the territories or persons over which a State party has jurisdiction. Customary international law as reflected in Article 29 VCLT qualifies the territorial scope of international treaties by establishing that, “*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*”. However, this general presumption does not automatically exclude that a treaty applicable on the sovereign territory of States parties can be applied also beyond national borders and that an explicit provision is required for such purpose. In other words, Article 29 VCLT does not exclude *a priori* the possibility to trigger States parties’ obligations outside the sovereign soil in relation to persons or territories on the basis of a *factual connection* that brings them into an actual relationship; it thus remains as necessary an explicit statement to achieve such a negative effect.<sup>1661</sup> The typical situation is that of a conduct taking place within the territory of the State party, which has an adverse effect on human rights in another State.

A potential counterweight could derive from the *jurisdiction clause* provided for in the individual complaints mechanisms established for the treaties concerned, which determines *who has the right to submit communications to the treaty-monitoring bodies*. Specifically, the Committee on the Elimination of Racial Discrimination may consider individual petitions alleging violations of the CERD by a Contracting Party under Article 14;<sup>1662</sup> the Committee on the Rights of Persons with Disabilities may consider individual communications alleging violations of the CRPD by States parties to the OP-CRPD;<sup>1663</sup> the Committee on Elimination of Discrimination Against Women may consider individual communications alleging violations of the CEDAW by States Parties to the OP-CEDAW,<sup>1664</sup> and the CESCR may consider individual communications alleging violations of the ICESCR by States parties to the OP-ICESCR.<sup>1665</sup> However, it seems reasonable to contend that

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<sup>1661</sup> On the need of an explicit statement excluding such possibility, see Künnemann, “Extraterritorial application of the international covenant on economic, social and cultural rights”, in Coomans and Kamminga (eds.), *op. cit.*, pp. 201-202.

<sup>1662</sup> Article 14(1) CERD reads: “*A State Party may at any time declare that it recognises the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration*”.

<sup>1663</sup> See Article 1(1) of the First Optional Protocol to the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, adopted 13 December 2006, entered into force 3 May 2008, GA Res. 61/106, Annex II, UN GAOR, 61<sup>st</sup> Sess., Supp. No. 49, at 80, UN Doc. A/61/49 (2006). Article 1(1) reads: “*A State Party to the present Protocol (“State Party”) recognises the competence of the Committee on the Rights of Persons with Disabilities (“the Committee”) to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention*”.

<sup>1664</sup> See Article 2 OP-CEDAW, adopted by GA Res. 54/74 on 6 October 1999, Annex, 54 UN GAOR Supp. (No. 49) at 5, A/54/49 (Vol. I) (2000), entered into force 22 December 2000.

<sup>1665</sup> See Article 2 OP-ICESCR, A/RES/63/117 of 10 December 2010. Also see *Rules of Procedure of the Optional Protocol to the ICESCR*, UN Doc. E/C.12/49/3, 3 December 2012, Rule 4. Article 2 reads: “*Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victim of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party*”.

the restriction of complaints to the “*jurisdiction of the State party*”, as existing in several international complaints procedures of human rights treaties, basically serves to put the complainant under a *factual connection with the State* against which the victim claims a violation of a right enshrined in those treaties, wherever they occurred. Although this will be usually the case of a citizen and resident, whether or not another individual can be considered under the jurisdiction of the State concerned will have to be decided once the specific issue arises.

As detailed heretofore, pertinent positions in favour of the extraterritorial application of the aforementioned human rights treaties have been actually articulated by supervisory judicial and quasi-judicial bodies. Certain legal scholarship has also elaborated some noteworthy views in that regard.

#### **4.a. The ICESCR**

The extraterritorial application of the major treaty on ESC rights remains a contentious issue given the absence of any reference to territory or jurisdiction in its main clause on the scope of States parties’ obligations and protected persons, namely Article 2.

Nonetheless, its treaty-based monitoring body has cautiously but progressively developed the idea that *the Covenant may have an effect beyond States parties’ borders* in several of its general comments adopted in the early 1990s, in some of its statements,<sup>1666</sup> and in some of its concluding observations on States’ reports. The perspective of *development cooperation* and *technical or other types of assistance* have been mainly emphasised. However, those non-binding sources of interpretation have not equally developed the discourse on the extraterritorial application of all ESC rights enshrined in the Covenant. Besides, the emergence of case law that could shed light on its extraterritorial reach has not been certainly favoured by the lack of a complaint procedure in this treaty.

Additional contributions extend from the UN Special Rapporteurs of the Human Rights Council and even of the former Commission on Human Rights, particularly concerning the right to food and the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

In legal scholarship, at least two arguments have been developed to read extraterritorial

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<sup>1666</sup> *E.g.*, CESCR, “General Statement on Globalization and its impact on the enjoyment of economic, social and cultural rights”, UN Doc. E/C.12/1998/26, 15 May 1998, para. 515 (3); “Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights”, UN Doc. E/C.12/2001/10, 10 May 2001; “Statement on the World Food Crisis”, E/C.12/008/1, 19 May 2008. States’ practice is limited as they generally remain silent on the subject.

obligations into the ICESCR in view of its textual vacuum.<sup>1667</sup> Firstly, the Covenant applies extraterritorially if a State party' jurisdiction is exercised through *effective control over individuals or territorial areas beyond its national borders*. However, the doctrine of effective control as advanced by the jurisprudence on civil and political rights may prove too restrictive (limited to situations of occupation or control over armed forces). Secondly, the concept of *international assistance and cooperation* in the ICESCR<sup>1668</sup> and in other relevant sources like the UN Charter triggers certain extraterritorial dimensions of treaty obligations, irrespective of any exercise of jurisdiction. Nonetheless, this second argument might prove too expansive and imprecise in providing guidance for States to understand their obligations.<sup>1669</sup> In any case, as aptly highlighted by some scholars, on these two grounds the realisation of ESC rights under the ICESCR would be not conceivable exclusively as “*a function of action or inaction of States parties in isolation, but also of the interaction between States*”.<sup>1670</sup>

#### 4.b. The ICERD and CEDAW

As for the major human rights treaties on the right to be free from discrimination on the basis of race or gender, the extraterritorial scope of both the ICERD and CEDAW may not easily be determined since they primarily set out comprehensive obligations concerning the policies to be followed by States parties in order to remove discrimination.

Nonetheless, a noteworthy consideration of positive extraterritorial obligations deriving from the **CERD** is found in the Order indicating provisional measures of the International Court of Justice in the case on the *Application of the International Convention on the Elimination of all Forms of Racial Discrimination*.<sup>1671</sup> The Court was asked to address the scope of this Convention regarding alleged

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<sup>1667</sup> F. Coomans, “Some remarks on the extraterritorial application of the International Covenant on Economic, Social and Cultural Rights”, in Coomans and Kamminga (eds.), *Extraterritorial Application of Human rights treaties*, Intersentia, 2004, p. 185; Coomans and Kamminga “Comparative introductory comments on the extraterritorial application of human rights treaties”, in Coomans and Kamminga (eds.), *op. cit.*, p. 2; R. Kunnemann, “Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights”, in Coomans and Kamminga (eds.), *op. cit.*, p. 203; S. Skogly, *op. cit.*, 2006, p. 83, 145.

<sup>1668</sup> The ICESCR refers to international assistance and cooperation in Articles 2(1), 11(2), 15(4), 22 and 23.

<sup>1669</sup> But cf. P. Alston, “Ships Passing in the Night the Current State of Human Rights and Development Debate Seen Through the Lens of the Millennium”, 27 *HRQ*, 2005, pp. 755-829, p. 778, arguing that an international duty of cooperation in the fulfilment of the MDGs may eventually crystallise into customary international law. See also *Report of the Special Rapporteur on the right to food, Oliver De Schutter, The Role of Development Cooperation and Food Aid in Realizing the Right to Food: Moving from Charity to Obligation*, 11 February 2009, UN Doc. A/HRC/10/5.

<sup>1670</sup> C. Courtis and M. Sepulveda, “Are Extra-Territorial Obligations Reviewable under the Optional Protocol to the ICESCR”, *Nordisk Tidsskrift for Mennekerettigheter*, 27(1), 2009, p. 56.

<sup>1671</sup> ICJ, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination* (Georgia v. Russian Federation), Order no. 35/2008 - Request for the Indication of Provisional Measures, 15 October 2008, ICJ Reports 2008.

racial discrimination performed and encouraged by Russian authorities in some regions of Georgia, both before and in the aftermath of the Russian-Georgia conflict in 2008. Particularly, the complaint concerned both the activities of Russian State agents operating in South Ossetia and Abkhazia and the potential duties of due diligence upon Russia in relation to separatist forces in those contested regions. In its decision ordering provisional measures, the Court concluded that the Convention governed Russia's conducts, leaving aside the issue of establishing whether any forms of jurisdiction (authority and control over the residents) was exercised by Russia over such regions.<sup>1672</sup> In particular, according to the Court "*there is no restriction of a general nature in CERD relating to its territorial application*" and "*in particular, neither Article 2 nor Article 5 of CERD, alleged violations of which are invoked by Georgia, contain a specific territorial limitation*". Therefore, the Court found that "*these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory*".<sup>1673</sup> Significantly, the Court approached the extraterritorial application issue by referring broadly to human rights treaties in general and by presuming such application unless a treaty provision specifies a territorial limitation. Then, in the indication of provisional measures the Court referred to a number of positive obligations, ordering Russia and Georgia to "*do all in their power to ensure that public authorities and public institutions under their control or influence do not engage in acts of racial discrimination against persons, groups of persons or institutions*".<sup>1674</sup>

In some few cases the extraterritorial application of the CERD has been addressed by its treaty-based body. It occurred for Israel's activities in the occupied Palestinian territories, as examined afterward. Further, the Committee on the Elimination of Racial Discrimination recognised that the CERD applies to the State's conduct in regulating the extraterritorial actions of third parties under their jurisdiction, calling on the United States to "*take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in the State party which negatively impact on the enjoyment of rights of indigenous peoples in territories outside the United States*".<sup>1675</sup>

Similarly, the applicability of the **CEDAW** to States parties' actions beyond sovereign territories has been recognised by its treaty-based body, as underlined in Chapter 3. An explicit position is taken in its General Recommendation no. 28 by addressing that, although under international law States primarily exercise territorial jurisdiction, *States parties' obligations also apply extraterritorially to*

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<sup>1672</sup> The Court did not develop a test for determining the reach of the CERD, though it considered unquestionable that it was not limited to a State party's territorial borders. In this context, the notion of jurisdiction was not deemed an obstacle in the consideration of extraterritorial obligations.

<sup>1673</sup> *Ibid.*, para. 109.

<sup>1674</sup> *Ibid.*, para. 149.

<sup>1675</sup> *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America*, 8 May 2008, UN Doc. CERD/C/USA/CO/6, para. 30.

persons within their “effective control, even if not situated within the territory”; their application without discrimination is referred to both citizens and non-citizens (e.g. “refugees, asylum-seekers, migrant workers and stateless persons”). Emphasis is also put on the position that “States parties are responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territory”.<sup>1676</sup>

Notably, this position is reiterated and elaborated in its General Recommendation no. 30 concerning women in conflict and post-conflict situation.<sup>1677</sup> Paragraph 9 essentially affirms that in such settings States parties are bound to apply the Convention and other sources of international human rights and international humanitarian law “when they exercise territorial or extraterritorial jurisdiction”, whether “individually” (e.g. in unilateral military action) or “as members of international or intergovernmental organizations and coalitions” (e.g. as part of an international peacekeeping force). In this regard, CEDAW is expressly deemed applicable to several situations, including: occupation and other forms of administration of foreign territory; national contingents as part of an international peacekeeping or peace-enforcement operation; persons detained by State agents, such as the military or mercenaries, outside its territory; lawful or unlawful military actions in another State; situations of bilateral or multilateral donor assistance for conflict prevention and humanitarian aid, mitigation or post-conflict reconstruction; cases of involvement as third parties in peace or negotiation processes; and finally in the formation of trade agreements with conflict-affected countries.

In addressing the due diligence obligations of protecting women from violence and discrimination, the Committee makes clear that CEDAW requires States parties “to regulate the activities of domestic non-State actors, within their effective control, who operate extraterritorially” and to ensure full respect of the Convention by them.<sup>1678</sup> The eradication of discrimination by any public or private actor under Article 2(e) is interpreted as covering also the acts of national corporations operating extraterritorially<sup>1679</sup>. Furthermore, this requirement is also seen to cover cases in which they “extend loans to projects in conflict-affected areas that lead to forced evictions” and “which call for the establishment of

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<sup>1676</sup> General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, UN Doc. CEDAW/C/GC/28, para. 12.

<sup>1677</sup> General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-conflict Situations, 18 October 2013, UN Doc. CEDAW/C/GC/30, paras. 8-12.

<sup>1678</sup> See General Recommendation No. 30, *ibid.*, paras. 10 and 17.

<sup>1679</sup> This aspect was also mentioned in General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, *ibid.*, para. 36, in which the Committee concluded that “(t)he obligations of States parties requiring them to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination and to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise, also extend to acts of national corporations operating extraterritorially”. See also General Recommendation No. 19 (1992).

*accountability and oversight mechanisms for private security and other contractors operating in conflict zones*".<sup>1680</sup>

Then, States as occupying powers are also openly recommended to respect, protect and fulfil the rights enshrined in the CEDAW that applies extraterritorially in situations of foreign occupation.<sup>1681</sup>

Significantly, the potential of cases in which States parties to CEDAW have *extraterritorial obligations of international cooperation* is also taken into consideration. The Committee refers to similar obligations set out in international law, including in treaty law on women with disabilities (Article 32 CRPD), girls in armed conflict (Article 24 (4) CRC and the first two Optional Protocols thereto), and the non-discriminatory enjoyment of ESC rights (Articles 2 (1), 11 (1), 22 and 23 ICESCR). In such cases, the extraterritorial application of CEDAW entails States parties' compliance with the Convention in the implementation of those obligations.<sup>1682</sup>

#### **4.c. The CRC**

The rights enshrined in this Convention are subject to a jurisdictional clause under Article 2(1) whereby States parties have to respect and ensure them to "*each child within their jurisdiction*". Conversely, a differentiation is made for the measures of implementation of the vested rights under Article 4, which provides an obligation to undertake legislative, administrative or other measures realising ESC rights to the maximum extent of States parties' available resources "*and, where demanded, within the framework of international cooperation*".

The extraterritorial scope of ensuing obligations has been slightly explored as such within the activities undertaken by its treaty-based body. Nonetheless, as stressed in Chapter 3, the application of the CRC in its entirety during both peacetime and war has been reiterated by its treaty-based monitoring body.

### **5. Looking at treaties on ESC rights through a threefold lens of extraterritorial application in conflict-affected situations**

The textual vacuum and ambiguity of several treaties guaranteeing ESC rights concerning their general scope of application makes difficult an unconditional support for their extraterritorial application within conflict-affected situations. However, when a State party is engaged in the conduct of hostilities as well as when it is an occupying power or when it acts in post-conflict

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<sup>1680</sup> See *General Recommendation No. 30, ibid.* para. 10.

<sup>1681</sup> See *General Recommendation No. 30, ibid.* para. 12 (c).

<sup>1682</sup> See *General Recommendation No. 30, ibid.*, para. 11.

situations, no *a priori* reasons make its human rights obligations limited to its sovereign territory. Instead, it is reasonable to contend that a comprehensive legal assessment of State conduct in such scenarios entails exploring *to what extent the realisation of ESC rights under relevant treaties to which the concerned State is party has extraterritorial dimensions*. As far as the protection of civilians is concerned, this would imply to explore State compliance with corresponding binding obligations and State responsibility for violations of ESC rights albeit when the controversial conduct in question occurred beyond national borders.<sup>1683</sup>

The legal foundations of extraterritoriality under treaties safeguarding ESC rights will be discussed according to a principal question: *on the basis of what criteria and to what extent* may the obligations stemming from such treaties apply to foreign territories as well as to civilians (non-nationals) placed therein as affected by situations of armed conflict and periods of military occupation which involve non territorial States parties to such treaties?

Three aspects have primary importance for the purpose of assessing the potential legal basis for extending such obligations beyond the territorial State. They concern the concept of *jurisdiction*, the notion of *international cooperation*, and the application of *economic sanctions or equivalent measures*. The following inquiry aims at shedding light on their distinct and specific - though controversial - relevance for the protection of civilians' ESC rights in contemporary situations of armed conflict as well as belligerent occupation.

### **5.1. The concept of jurisdiction: which role and content for the extraterritorial application of treaties on ESC rights?**

The relevance of the notion of jurisdiction in defining the scope of State obligations stemming from treaties such as the ICESCR, CEDAW and ICERD may be critical given the lack of a provision specifying their general scope of application. Nonetheless, it is worth taking into account the distinct function of "jurisdiction" under international human rights law. Its ordinary function under international law is concerned with State powers to regulate and enforce rules, and concerns the legitimacy of State acts, it is about the allocation of competencies between States. Conversely, in international human rights law "jurisdiction" generally plays the special function of addressing the

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<sup>1683</sup> It is worth noting that, according to the 2000 Maastricht Guideline No. 16, "*the State responsible must establish mechanisms to correct such violations, including monitoring investigation, prosecution, and remedies for victims*", see *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (Twenty-fourth session, 2000), E/C.12/2000/13. As underlined in related commentary, violations of ESC rights may be committed by individuals, organizations, institutions and other entities in a State without the direct and active participation of the State; however the same commentators explicitly affirm "*the duty of the State to set up procedures, structure and other modes by which victims of violations of ESC rights can get redress and remedies*", see Dankwa V., Flinterman C. and Leckie S., "Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights", 20 *HRQ*, 1998, pp. 705-730.

relationship between an individual as the beneficiary of a human right and a State as the corresponding duty bearer. In this regard, this concept relates to the issue of *whether a State* (which was or not entitled to exercise jurisdiction under international law) *is to be held accountable for a human rights violation resulting from a certain conduct*.<sup>1684</sup>

In dealing with the application of treaties on ESC rights in contexts of armed conflict and belligerent occupation, this concept of jurisdiction may be revised in view of a number of issues, which will be further articulated in the next section.

In particular, invoking the primarily territorial nature of State jurisdiction under public international law seems not in line with the connotation of the term “jurisdiction” under human rights treaties.<sup>1685</sup> Accordingly, other “*special tests*” for jurisdiction warrant consideration for the purpose of triggering the extraterritorial application of treaties on ESC rights in war-torn scenarios. This mainly implies to explore *the adequacy of the “effective control” criterion in relation to ESC rights* (together with the set of standards indicating such control). In this regard, in cases of military occupation the authority exercised by an occupying power constitutes one of the legal bases for the recognition and discharge of obligations on ESC rights of persons within the occupied territory.<sup>1686</sup> Then, “*less demanding*” tests for jurisdiction may be considered, and the more nuanced notion of “*actual control over factual circumstances*” may be explored (when it affects civilians by resulting in violations of their ESC rights).

Moreover, some implications for conflict-affected situations may derive from reflecting on the distinction between the concept of *jurisdiction as State power to act under a human rights treaty* and the notion of *jurisdiction as competence of an international court or a treaty-body to deal with alleged human rights violations*. In particular, a relevant issue arises as how the lack of jurisdiction of a certain monitoring body can lead to (or at least influence) *de facto* impunity for human rights violations allegedly committed by a State party to the relevant treaty.<sup>1687</sup> The fact that a judicial or quasi-judicial body does not have jurisdictional competence to hear a certain case does not automatically mean that the State in question acted outside its jurisdictional power under the treaty concerned; this represents a challenge to the accountability aspect of extraterritoriality, and it also raises the question of

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<sup>1684</sup> See M. Milanovic, “From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties”, 8(3) *HRLR*, 2008, pp. 441-488.

<sup>1685</sup> This aspect will be articulated in next section 5.1.1.

<sup>1686</sup> International humanitarian law does not employ the term “*jurisdiction*” as the relevant criteria to determine whether persons are entitled to protection under its rules; as already highlighted in previous Chapter 1, in view of Article 4 GCIV it is *the link with the actual existence of an armed conflict or a situation of occupation* that places certain obligations on the belligerent State or the occupying power towards individuals situated outside its own sovereign territory.

<sup>1687</sup> On this issue, see L. McGregor, “Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty”, 18 *EJIL*, 2008, pp. 903-919.



international institutions having sufficient jurisdiction to hear relevant cases.

Further implications for conflict-related settings may derive from considering the *relationship* between *State jurisdiction under human rights treaties* and *State responsibility under public international law*. When a State exercises such a jurisdiction it can act lawfully or unlawfully.<sup>1688</sup> The law of State responsibility as codified in the ILC Draft Articles of 2001 echoes an interstate structure of public international law: this responsibility is generally triggered when a State has breached an international obligation by committing an internationally wrongful act and the injured State invokes the principles of State responsibility to address internationally such conduct. These Articles attribute conduct to a State *without resting on the concept of jurisdiction*, but Articles 4-19 deal with the conduct or relationships that trigger its responsibility; thus, they may represent interpretative tools for the application of human rights treaties, providing external guidance for courts and treaty bodies in applying rules on admissibility to ascertain human rights accountability.<sup>1689</sup> In particular, the law of State responsibility may become valuable to address whether an individual was under the jurisdiction of a State party for the purpose of a human rights treaty not containing that term, or whether a certain conduct (which adversely affected the enjoyment of civilians' ESC rights) was within the scope of the obligations flowing from such treaty.

Inasmuch as State responsibility resulting from controversial conduct beyond national borders remains difficult to be triggered, an additional concept of “*diffuse*” and “*shared*” responsibility for individuals or groups' human rights violations has been debated, framing it as “division of responsibility” between the domestic State and other States or among external States, and using the traditional tripartition of obligations as analytical tool.

### **5.1.1. State jurisdiction: a revised traditional basis for extraterritorial obligations on ESC rights**

“Jurisdiction” is generally conceived as a prerequisite for triggering the applicability of States' obligations - and, eventually, responsibility - under human rights treaties. In the context of the

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<sup>1688</sup> For the impact of human rights law on the law of State responsibility, see R. McCordquodale, “Impact on State Responsibility”, in Kamminga and Scheinin (eds.), *The impact of Human Rights Law on General International Law*, Oxford, 2009, pp. 235-254.

<sup>1689</sup> On this aspect, see M. Scheinin, “Characteristic of Human Rights Norms”, in C. Krause and M. Scheinin (eds.), *International Protection of Human Rights: A Textbook*<sup>2</sup>, Åbo Akademi University Institute for Human Rights 2012, pp. 26-27. His illustrative example is the HRC's Concluding Observations on Israel in 2003, in which the Committee applied the principles of State responsibility in addressing the scope of Israel's obligations concerning persons in the occupied Palestinian territories, see HRC, *Concluding Observations: Israel*, 21 August 2003, UN Doc. CCPR/CO/78/ISR. See also Scheinin, “Just Another Word? Jurisdiction in the Roadmaps of State Responsibility”, in Langford, Vandenhoe, Scheinin, van Genugten (eds.), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Cambridge, 2012, pp. 212-229.

present research, the treaties guaranteeing ESC rights without a restrictive reference to both territory and jurisdiction bring forth the following two questions: (i) *what the omission of a jurisdiction clause means and implies in conflict-affected situations*; (ii) *whether the concept of jurisdiction has any role to play in covering States' conduct that have ESC rights implications in such scenarios*, in a way that the protection granted to affected civilians would be not limited to a State party's own national territory, but it would extend whenever the State in question exercises its power.

It is worth highlighting that no definition of “jurisdiction” is given in the human rights treaties that use this concept.<sup>1690</sup> Under general international law jurisdiction may be presumptively territorial,<sup>1691</sup> but the jurisprudence under international human rights law has acknowledged exceptions eroding this presumption. Significant case law and other authoritative statements have interpreted jurisdiction as a *personal or spatial connection between the State and the individual* who is affected by its acts or *the territory* in which its acts took place (as detailed in section 5.1.b.i). It is actually in relation to human rights treaties on civil and political rights that extraterritorial jurisdiction has been identified with *State agents' authority over persons* (both natural and legal) outside its own territory or *State control over foreign territory*.<sup>1692</sup> These “jurisdictional tests” have not followed the ordinary jurisdictional rules of public international law, being more concerned with “*functional*” characteristics of sovereignty rather than with “*formalistic*” notions of sovereignty.<sup>1693</sup> As anticipated above, “*jurisdiction*” has served the purpose of *addressing the relationship between individuals* as the beneficiaries of the rights enshrined in such treaties *and a signatory State* as the corresponding duty-bearer.<sup>1694</sup>

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<sup>1690</sup> However, jurisdictional clauses in human rights treaties ‘support’ the idea that rights and obligations are territorially limited, see T. Meron, “Extraterritoriality of Human Rights Treaties”, 89 *AJIL*, 1995, p. 78.

<sup>1691</sup> Permanent Court of International Justice, The Case of *S.S. “Lotus” (France v. Turkey)*, 7 September 1927, Series A, No. 10 (1927).

<sup>1692</sup> For several references on the personal as well as spatial connections, see R. Wilde, “Triggering State Obligations Extraterritorially: the Spatial test in Certain Human Rights Treaties”, in R. Arnold and N. Quenivet, *International Humanitarian Law and Human Rights Law: Towards a New Merger In International Law*, 2008, at 137-139 (particularly notes 8 and 9).

<sup>1693</sup> This has been properly elucidated in legal scholarship. In public international law *the concept of jurisdiction corresponds to the State's power to regulate or enforce rules*. These powers primarily pertain to acts occurring within State's sovereign territory, but extraterritorial jurisdiction is allowed where a strong connection to the State exists. In this regard, four recognised bases for extraterritorial jurisdiction include *active personality/nationality*, *passive personality*, *the protective principle*, and *universality*, as they are justified by some connection to the State's nationals or they involve vital interests of the State. As Marko Milanović highlights, these bases reflect the *functional purpose of jurisdiction* in public international law, that is the regulation of relations among States by distinguishing between permissible and impermissible exercises of authority when confronted with an instance of direct or indirect intervention by one State into another, see M. Milanović, “From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties”, 8 *HRLR*, 2008, pp. 7-17.

<sup>1694</sup> Human rights treaties apply to States' conduct performed outside their entitlements to exercise jurisdiction under international law: in this regard, the term “*jurisdiction*” in such treaties should not be “confused” with the bounds set up under international law on States' ability to exercise prescriptive/legislative and enforcement jurisdiction. See M. Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*, Oxford, 2011, pp. 30-34, 39-41. See CESCR, *General Comment No. 8, The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights*,

Conversely, States' entitlement to exercise jurisdiction under public international law (over a certain situation via regulatory, adjudicatory and enforcement means) remains relevant in determining whether they are allowed to extend their authority over an individual or a territory through the regulation of conduct outside their sovereign territories so as to contribute to human rights protection.<sup>1695</sup>

In focusing on treaties on ESC rights typically the realisation of these rights occurs on the State's sovereign territory, thus it essentially has a territorial scope. However, this does not make it easier to ignore that the outbreak of an armed conflict or the beginning of a period of belligerent occupation are likely to imply *acts or omissions* - by third States (either undertaken wholly beyond national borders or resulting from decisions or policies taken on national territories) or even by other entities - *which impinge on the territories and civilian individuals or groups affected by such scenarios bycausing the denial or lack of access to ESC rights*, and which would be qualified as a violation of the concerned treaty had it been undertaken on their sovereign territories. In this regard, it is argued that the concept of jurisdiction may *partly* shape the legal discourse as to the obligations flowing from such treaties and arising for States parties other than the territorial one within conflict-related contexts provided that the following points are taken into due account.

As observed above, the protection granted by international human rights law to individuals vis-à-vis States is not entirely in line with the traditional approach of invoking the primarily territorial nature of jurisdiction under public international law. Especially in conflict-affected scenarios, the risks of focusing exclusively on *territorial jurisdiction* under treaties on ESC rights are at least twofold: (1) removing the ground of State responsibility for decisions or acts taken outside a State's own territory but leading to violations of ESC rights; and (2) making international accountability structures unable to operate, so as to lead to a *de facto* impunity of the States involved in human rights violations.<sup>1696</sup>

Conversely, interpreting the concept of jurisdiction as not entirely connected to the State's sovereign territory, it may relate it to *the degree of authority, control, or influence of a State over the factual circumstances* affecting the access and enjoyment of ESC rights. This "less demanding" interpretation consents to *address State jurisdiction on the basis of the actual power a State exercises* (which would result from

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UN Doc. E/C.12/1997/8 (1997), para. 13, holding that: "*When an external party takes upon itself even partial responsibility for the situation within a country (whether under Chapter VII of the chapter or otherwise), it also unavoidably assumes a responsibility to do all within its power to protect the economic, social, and cultural rights of the affected population*".

<sup>1695</sup> See also Maastricht Principle 10.

<sup>1696</sup> Pertinent here is the case of the NATO bombing of the television tower in Belgrade, in which the European Court found that this took place outside the territory (and jurisdiction) of the European members of NATO and affirmed not to having jurisdiction to hear the case on its merit. This will be detailed in section 5.1.b.i.

the decisions or acts taken, alongside their contents and consequences) *over situations that impaired the position of civilians as beneficiaries of ESC rights and that resulted in related violations*. Therefore, this interpretation offers the potential of covering various controversial conduct in contexts of armed conflict and belligerent occupation.

In focusing on distinctive tests denoting the subsistence of State jurisdiction for triggering the extraterritorial application of treaties on ESC rights in conflict-torn situations, a basic issue arises: whether a State party owes obligations exclusively towards individuals or groups who are within its own sovereign territory or, conversely, also towards civilians located outside its national borders but actually subject to “*de facto* jurisdiction” of that State, and if so, under which conditions this may be defined.

Notably, a *progressive understanding of the notion of jurisdiction in the context of the obligations to respect, protect and fulfil ESC rights* has been articulated in Principle 9 of the 2011 Maastricht Principles, as examined in section 3. Precisely, the “jurisdictional scope” of State obligations on ESC rights is enunciated as covering the following situations: (a) State’s exercise of *authority or effective control*, whether or not in line with international law; (b) State’s acts or omissions bringing about “*foreseeable effects on the enjoyment of ESC rights*”, whether outside or within its territory; (c) separate or joint actions of a State (via its executive, legislative or judicial branches) which lead it to “*exercise decisive influence*” or “*take measures*” to realise ESC rights extraterritorially, in line with international law. Such tripartite articulation contributes to outline significant “exceptions” eroding the basic notion of jurisdiction as presumptively territorial, according to certain developments emerged in international law. It clearly broadens the connections under which a State may be deemed to act within its jurisdiction.

In the next sections these three circumstances will be explored in relation to situations of armed conflict and periods of military occupation, taking into due account relevant interpretations articulated by human rights treaty bodies as well as other international judicial or non-judicial bodies in accordance with their several functions.

It is argued that framing under such articulation the “*jurisdictional scope*” of State obligations ensuing from ESC rights within conflict-related settings may favour a better explanation of *several factual connections* basing the relationship between the affected civilians as beneficiaries of such rights and the non-territorial States as corresponding duty-bearers acting in such settings. In fact, the jurisdictional doctrine of effective control (as advanced in the jurisprudence on civil and political rights) may play a role for extending the obligations relating to ESC rights beyond the sovereign territory of the State concerned; for instance, the acknowledgment and execution of the occupying

power's obligations to respect, protect and fulfil such rights within the occupied territory relies on its authority therein. However, such doctrine may be too restrictive, and other “*less demanding*” factual connections may prove equally relevant for disputing serious impairments of civilians' ESC rights as taking place in conflict-affected scenarios.

### **5.1.2. Preliminary remarks on the scope of the ICESCR**

The major treaty guaranteeing ESC rights deserves some preliminary considerations on the potential extensive interpretation of its scope of application despite the different wording of other human rights treaties having explicit jurisdictional clauses.

Article 2 does *not* use the two notions of territory and jurisdiction to emphasise a territorial focus of jurisdiction. Nevertheless, implicit restrictions of the ICESCR scope have been interpreted as flowing from *the territorial nature of the rights concerned*.<sup>1697</sup> Considering its negotiating history, while both draft Covenants approved by the Commission on Human Rights in 1954 included identical provisions specifying their application to all the territories of a State<sup>1698</sup>, during the General Assembly's review in 1966 some amendments by the Soviet-bloc States called for deleting the territorial clauses: these were deemed “*unnecessary and offering nothing to the colonial people*”, being the States' obligation to apply the provisions to both metropolitan and non-metropolitan territories a general principle of international law; thus, taking those clauses “*would be harmful, for it would justify the perpetuation of the colonial system*”.<sup>1699</sup> The final rejection of the territorial clauses followed the UN legal counsel's endorsement that the “*nature of the treaty and the intention of the negotiating States had to be taken into account ... in the absence of a territorial clause, a State on becoming a party to the Covenant would be bound in principle to apply the provisions of the Covenant to all its territories*”.<sup>1700</sup>

Even though the ICESCR does not delimit criteria for its scope of application, *the explicit reference in several provisions to international dimensions of realisation of ESC rights* seems to corroborate that the drafters intended a certain extraterritorial scope of the obligations flowing from this treaty.<sup>1701</sup> This

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<sup>1697</sup> See M. Dennis, “Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation”, 99 *AJIL*, 2005, 119, pp. 127-128.

<sup>1698</sup> See Comm. Human Rights, Report on the Tenth Session, UN ESCOR, 18<sup>th</sup> Sess., Supp. No. 7, para. 243, Annex I, Arts. 28 of the ICESCR and 53 of the ICCPR, providing: “*The provisions of the present Covenant shall extend to or be applicable equally to a signatory metropolitan State and to all the territories, be they Non-Self Governing, Trust, or Colonial Territories, which are being administered or governed by such metropolitan State*”.

<sup>1699</sup> Statement of the representative of Ukrainian Soviet Socialist Republic, A/C.3/SR.1411, (1966), para. 4.

<sup>1700</sup> Statement of UN legal counsel Stavropoulos, A/C.3/SR.1411, (1966), paras. 36 and 38. See generally E. Schwelb, “Some Aspects of the International Covenants on Human Rights of December 1962, in Eide, Asbjorn and Schou, August (eds.), *International Protection of Human Rights*, 1968, pp. 112-113.

<sup>1701</sup> In favour of such an interpretation, see M. Craven, *The International Covenant on Economic, Social and Cultural Rights – A perspective on its Development*, 1995, p. 144, quoting René Cassin, who argued at that time that “*by providing for recourse to*

finds support in Article 2(1) containing the obligation to take steps “*through international cooperation*”, in Article 11(2) on the right to an adequate standard of living, in Article 15(4) on international cooperation in the scientific and cultural fields, in Article 22 on the role of the specialised agencies, in Article 23 on international action to achieve the rights in the Covenant, and also in the Preamble, which refers to the “*obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedom*”.

As to the drafters’ intent, legal scholarship has noticed how there was “*no need to limit explicitly the protection of ESC rights to those people resident in the territory of a State Party only*”.<sup>1702</sup> Indeed, it is the same terminology to indicate that States parties recognise “*the rights of everyone*”, and, in any case, the aforementioned substantive provisions of the ICESCR appear to broaden the range of acts or omissions by States, other than the territorial one, which might be considered in breach of them.

Furthermore, an extensive interpretation of the Covenant’s scope is undertaken in another noteworthy source of guidance on its implementation, namely the 1997 *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, which contain one more explicit reference to jurisdiction as a basis for the Covenant’s application beyond the sovereign territory of State parties.

In addressing the aspect of assigning State responsibility for violations of the treaty, Guideline no. 16 emphasises that these violations are “*in principle imputable to the State within whose jurisdiction they occur*”, specifying that, “*as a consequence, the State responsible must establish mechanisms to correct such violations, including monitoring investigation, prosecution, and remedies for victims*”. The commentary to this guideline does not focus on the notion of jurisdiction and whether it is separated from - and not confined by - territory, but it highlights “*the duty of the State to set up procedures, structure and other modes by which victims of violations of ESC rights can get redress and remedies*”, even if the violations concerned may be committed by individuals, organizations, institutions and other entities in a State without its direct and active participation.<sup>1703</sup>

Conversely, Guideline no. 17 enunciates that under situations of colonialism, further forms of alien domination and military occupation, the denials of ESC rights may be imputable to the

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*international cooperation instead of allowing the enjoyment of rights to be put off, (the reference to international cooperation) filled the gap between what States could in fact do and the steps they would have to take to meet their obligations under the Covenant*”, 21 May 1951, E/CN.4/SR.216, at 6.

<sup>1702</sup> In favour of this reading, see F. Coomans, “The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights”, *HRLR*, 2011, pp. 7-8.

<sup>1703</sup> See T.C. Van Boven, C. Flinterman and I. Westendorp (eds.), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, SIM Special No. 20, Utrecht, The Netherlands, 26 January 1997. These guidelines were published as an official UN Document, (Twenty-fourth session, 2000), E/C.12/2000/13. See V. Dankwa, C. Flinterman, S. Leckie, “Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights”, 20 *HRQ*, 1998, p. 724.

conduct of the State exercising effective control over the territory concerned, specifying as well *the responsibility of the dominating or occupying power for violations of ESC rights*, and indicating that “*there are also circumstances in which States acting in concert violate economic, social and cultural rights*”. According to the related commentary, the duty to establish mechanisms for dealing with such violations “*must be borne by the foreign authority which is in effective control of the State where they occur*”.<sup>1704</sup>

### **5.1.2.a. The “exclusive” use of the term jurisdiction in the OP-ICESCR**

As observed above, contrary to the actual text of the ICESCR, its Optional Protocol uses the term “*jurisdiction*” in two provisions: in Article 2 to determine who has the right to present a communication; in Article 13 to oblige a State party to take measures ensuring that “*individuals under its jurisdiction*” are not ill-treated or intimidated as a result of submitting a communication to the Committee pursuant to the Protocol.<sup>1705</sup> Such a use is in line with the wording of other existing international complaints procedures,<sup>1706</sup> and it is an aspect that received less consideration than other issues thornily negotiated within the text of the Optional Protocol.<sup>1707</sup>

In theory, the textual reference in Article 2 to “*individuals or groups of individuals, under the jurisdiction of a State Party*” makes it difficult to present communications against States parties when they violate ESC rights outside their national borders. No general presumption exists in support of States’ jurisdiction beyond sovereign territories. Thus, under the OP-ICESCR petitioners bear the burden of proof to demonstrate that an extraterritorial violation of the Covenant occurred under the jurisdiction of the State party concerned.

Conversely, in practice, extraterritorial application under this Protocol cannot be precluded. The Committee could choose to accept communications from individuals alleging violations of their ESC rights under the Covenant as occurred outside the territory of the State party whose responsibility is asserted. In this regard, in Article 2 OP-ICESCR the significance of the notion of jurisdiction as *separated* from - and not confined by - State sovereign territory may be linked to the

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<sup>1704</sup> See Maastricht Guidelines, *ibid.* See also V. Dankwa, C. Flinterman, S. Leckie, *ibid.*, p. 724.

<sup>1705</sup> For a comment, see I. Biglino and C. Golay, “The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights”, Geneva Academy of International Humanitarian Law and Human Rights, July 2013; C. Courtis and M. Sepulveda, “Are Extra-Territorial Obligations Reviewable under the Optional Protocol to the ICESCR”, 27 (1) *Nordisk Tidsskrift for Mennekerettigheter*, 2009.

<sup>1706</sup> See Article 1(2) OP-ICCPR; Article 2 OP-CEDAW; Article 14(1) CERD. On the opportunity to incorporate a “jurisdictional limitation clause”, see Inter-American Institute of Human Rights and International Commission of Jurists, *Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Costa Rica/Geneva: Inter-American Institute for Human Rights/Sida, 2010, pp. 51-52.

<sup>1707</sup> For a comment of its negotiations, see M. Langford, “Closing the Gap? - An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights”, 27 *Nordic Journal of Human Rights*, 2009, pp. 1-28.

specific nature of this treaty: *the “exclusive” use of the term jurisdiction* appears to emphasise the requirement that the victim was *under a factual connection* with the State party which she/he claims has violated or is violating her/his rights set forth in the Covenant. In other words, jurisdiction under the Optional Protocol may be addressed on the basis of the actual control/authority exercised by that State over certain factual circumstances, which impinged on the position of the beneficiaries of ESC rights and resulted in their violations. From this perspective, individual communications might call the attention of the Committee to States’ conduct having drastic implications for the ESC rights of civilians affected by conflict-related situations. However, no case law has contributed to clarify this point yet, being as the Protocol has been in force only as of 5 May 2013.

Even though the potential of claiming extraterritorial violations of the ICESCR through the individual communications procedure of the OP-ICESCR remains unpromising, it is worth just mentioning that the aforementioned inter-State communications procedure as well as the inquiry procedure could allow for addressing issues related to extraterritorial violations of ESC rights of individuals affected by a State party’s conduct beyond its national borders. In particular, the inquiry procedure might enable the Committee to address grave or systematic violations of ESC rights of civilians. This option seems plausible even in view that the requirements for submitting information to request an inquiry are less rigorous (*inter alia*, it is not required to indicate identifiable victims, to present a formal communication, to exhaust domestic remedies<sup>1708</sup>) and no reference to territorial or jurisdictional limitations is made among the requirements for initiating this procedure.

Of note is that certain positions undertaken by the treaty-based body of the ICESCR, the International Court of Justice<sup>1709</sup> and other supervisory mechanisms<sup>1710</sup> in the exercise of their functions have contributed to orient the debate in favour of a certain extraterritorial scope of the Covenant by invoking *the factor of State jurisdiction as a basis for its application to a State party’s conduct outside its sovereign territory*.<sup>1711</sup> These positions are detailed in the next three sub-sections.

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<sup>1708</sup> The OP-ICESCR contains all of the admissibility requirements of its ICCPR, and it adds two further stipulations. Firstly, under Article 2(a) cases must be “*submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit*”. Secondly, under Article 4 the CESCR “*may, if necessary, decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance*”.

<sup>1709</sup> See ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, paras. 112 and 134, where the Court found that the Palestinian territories have been subject to Israel’s territorial jurisdiction as an occupying power and on this basis the latter is bound by the ICESCR in the OPT.

<sup>1710</sup> These include UN individual experts monitoring human rights situations in specific countries or dealing with specific issues of concern.

<sup>1711</sup> For a comment on the practice, see M. Gondek, *The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties*, 2009, pp. 304-316.



### 5.1.2.b. The practice of the Committee on economic, social and cultural rights

The CESCR has invoked the standard of jurisdiction in several of its General Comments, indicating the need that State parties “*monitor the actual situation with respect to each of the rights on a regular basis*” and so be “*aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction*”.<sup>1712</sup>

Furthermore, as detailed in the following sections, the jurisprudence in its concluding observations has implicitly developed the position whereby a *State party has jurisdiction outside its own territory*, stating that the Covenant applies to all areas over which a State party maintains *functional, personal, or geographical jurisdiction*, including “*dependent territories*”<sup>1713</sup> and territories where the State has a *de facto* control<sup>1714</sup>. According to the Committee, a State party to the ICESCR may also have a certain jurisdiction over nationals or ordinarily resident of another Contracting Party when the negative implementation of a treaty obligation results in violations within its own territory.<sup>1715</sup>

### 5.1.2.c. The approach of the International Court of Justice

The sole pronouncement so far explicitly referring to the extraterritorial applicability of the ICESCR is represented by its advisory opinion on *the Legal Consequences of Construction of the Wall in the Occupied Palestinian Territories*. As already observed, one of the issues to be determined by the Court was whether the ICCPR, the ICESCR and the CRC were applicable only on States parties’ territories or, instead, also beyond such territories and, if so, in what circumstances. It is worthy just

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<sup>1712</sup> CESCR, *General Comment No. 1: Reporting by States Parties*, UN Doc. E/1989/22, Annex III, para. 3. See also *General Comment No. 4: The right to adequate housing*, E/1992/23, para. 13; CESCR, *General Comment No. 12: The right to adequate food*, UN Doc. E/C.12/1999/11, para. 14 (“*Every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger*”); CESCR, *General Comment No. 13: The right to education*, UN Doc. E/C.12/1999/10, para. 6(a)-(b); CESCR, *General Comment No. 14: The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4, para. 12(b), 51; CESCR, *General Comment No. 15: The right to water*, E/C.12/2002/11, paras. 12(c), 31, 44(b), 53; CESCR, *General Comment No. 18: The right to work* (2005), UN Doc. E/C.12/GC/18, para. 12(b), 35; CESCR, *General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights*, UN Doc. E/C.12/1997/8, para. 10; CESCR, *General Comment No. 9: The domestic application of the Covenant*, UN Doc. E/C.12/1998/24, para. 9.

<sup>1713</sup> CESCR, *Concluding Observations: the Netherlands*, UN Doc. E/1999/22, para. 194, urging “*the State party to ensure that it complies fully with its obligations under the Covenant as they apply to Aruba and the Netherlands Antilles*”. Its concern was expressed in relation to the State party’s statement that “*the Government of the Netherlands is not responsible for the implementation of economic, social and cultural rights in Aruba and the Netherlands Antilles*” since they were deemed “*equal parts of the Kingdom of the Netherlands and the Government of the Netherlands contributes every year 1.5 per cent of GNP*” to them.

<sup>1714</sup> E.g., CESCR, *Concluding Observations on Israel*, UN Doc. E/1999/22, para. 232, reading: “*The Committee takes note of the statement by State party’s representatives that with respect to the Covenant’s applicability in the occupied territories, Israel accepts direct responsibility in some areas covered by the Covenant, indirect responsibility in other areas and overall significant legal responsibility across the board. This conforms to the Committee’s view that the Covenant applies to all areas where Israel maintains geographical, functional or personal jurisdiction*”.

<sup>1715</sup> CESCR, *Concluding Observations on Sri Lanka*, E/1999/22, para. 77, in which it noted with concern “*the plight of hundreds of thousands of Sri Lankan women working abroad as domestic helpers, many of them underpaid and treated as virtual slaves*”, regretting “*that the Government has not made a serious effort to assess the negative impact of this phenomenon on children who are left in vulnerable and difficult circumstances without their mothers and to take appropriate remedial measures*”.

mentioning that the Court found the ICCPR as applicable to a State party's sovereign territories and "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory",<sup>1716</sup> while it concluded that the CRC is applicable within the occupied Palestinian territories.<sup>1717</sup>

As for the ICESCR, the absence of provisions specifying its scope of application was explained in the view that it establishes rights that are by their nature "essentially territorial". Although it did not affirm that the treaty obligations are *exclusively* territorial, the Court cautiously acknowledged "it is not to be excluded" that this Covenant "applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction".<sup>1718</sup> This finding has some implications for those asserting rights' against acts carried out by a State exercising jurisdiction beyond its sovereign territory: apparently the Court delineated carefully the situations in which this Covenant would apply extraterritorially, since it required *territorial jurisdiction* (instead of a simple reference to jurisdiction), so entailing *control over territory* and not just over persons.

Then, the Court referred to Article 14 of the Covenant, which obliges each party "to adopt a plan of action for the progressive implementation of compulsory primary education" in its metropolitan territory or other territories under its jurisdiction.<sup>1719</sup> Here it seems clear the Court's presumption that the implementation of the ICESCR entails the exercise of "quasi-sovereign" powers by the State (e.g. to set up a school system, to build health care centres, or to design social housing programmes). This evidences the complexity of imposing extraterritorial obligations in the area of ESC rights as far as

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<sup>1716</sup> Although *General Comment No. 31* was adopted by the Human Rights Committee before this advisory opinion, the ICJ did not cite it expressly. The Court referred to the Committee's position and acknowledged that the ICCPR is "applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory" (para. 111), but it did not employ the Committee's wider reference to the authorities' conduct "that affect [...] the enjoyment of rights" and it used a narrower and more specific formulation ("acts done by a State in the exercise of its jurisdiction"), without providing indication of such an exercise. This standard was deemed met in the case of occupation, but the Committee's wider interpretation was not rejected by the ICJ, which referred to *Lopez Burgos v. Uruguay* (No. 52/1979, 29 July 1981) and particularly to the arrests as exercises of jurisdiction (para. 109). Significantly Article 2(1) was deemed to cover both individuals within the sovereign territory and individuals subject to State's jurisdiction but outside such territory.

<sup>1717</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 113. Article 2 CRC mentions only the jurisdiction aspect, providing that "States Parties shall respect and ensure the rights set forth in the ... Convention to each child within their jurisdiction ..."; the Court basically noted Article 2 and acknowledged that the "Convention is therefore applicable within the Occupied Palestinian Territory". However, it is not clear what standard was applied by the Court in this finding, since no other analysis was made in relation to the CRC; in light of the similarity between Article 2 CRC and Article 2 ICCPR, it may be deduced that the Court applied the same standard to both; nonetheless, it should be noted that the CRC contains social and economic rights as well as political and civil rights.

<sup>1718</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para.112. The Court cited and approved the finding of the CESCR that the "State party's obligations under the Covenant apply to all territories and populations under its effective control". While this may be interpreted to apply to effective control over either territories or populations, it is difficult to conceive of effective control of a population, as opposed to certain individuals, without territorial control.

<sup>1719</sup> For a critical position on this point, see M. Dennis, *op. cit.*, at 128 (note 71), noting that the negotiating history of Article 14 shows that the phrase "metropolitan territory or other territories under its jurisdiction" was included to guarantee that parties would implement the right to primary education in 'dependent territories' over which they exercised sovereignty, see Report on the 7<sup>th</sup> Session, UN ESCOR, E/CN.4/SR.230, at 4 (1951).

the dominant mind-set conceives them as imposing on the State positive duties (while civil and political rights primarily would impose negative duties). Without examining the negotiating history of the Covenant, the Court concisely interpreted the exercise of territorial jurisdiction and the powers available to the occupying State as the basis for founding the ICESCR applicable within the West Bank and Gaza.

The subsequent reasoning in the same paragraph of the advisory opinion concerned Israel's position and its rejection by the CESC, whose jurisprudence was explicitly endorsed by the Court. Finally, after having considered that "*the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying power*", the Court concluded that Israel was bound by the Covenant's provisions and was also "*under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities*".<sup>1720</sup>

In any case, it appears that the International Court of Justice's view on ESC rights supports what has become more and more acknowledged in the following years, namely the idea that *the long term of occupation impacts the level of protection the occupying power is required to provide for the individuals located beyond its national borders but subject to its territorial jurisdiction*. In this respect, the temporal factor of the duration of belligerent occupation may be taken into account to explain the assessment undertaken by the same Court for the Ugandan occupation of Congolese territories, which did not last for an extremely long period of time, given that it started in August 1998, with troops advancement until July 1999 and their gradual withdrawal from June 2000, which was completed in June 2003.

In the *Case concerning Armed Activities on the Territory of the Congo* the International Court of Justice confined itself to an appraisal of civil and political rights and the issue of child soldiers, notwithstanding the Democratic Republic of the Congo as well as Uganda were States parties to the ICESCR and in spite of the fact that the DRC invoked this Covenant as pertinent in the case before it.<sup>1721</sup> However, in considering which principles and rules of international humanitarian law and human rights were pertinent in the contentious case, the Court openly recalled and emphasised in broader terms that in its advisory opinion on the wall it had "*concluded 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', particularly in occupied territories*".<sup>1722</sup> At least two important suggestions may stem from such wording.

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<sup>1720</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *op. cit.*, para. 112.

<sup>1721</sup> See *Mémoire de la République Démocratique du Congo*, at 147-148, para. 3.58. The Democratic Republic of the Congo acceded to the Covenant on November 1976 and Uganda on 21 January 1987; see *Traité multilatéraux déposés auprès du Secrétaire général*, Etat au 31 décembre 1996, ST/LEG/SER.E/15, New York, Nations Unies, 1997, pp. 117-118.

<sup>1722</sup> ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, para. 216. The Court considered "*whether or not Uganda was an occupying power in the parts of the Congolese territory where its troops were present at the relevant time*", and it subsequently considered whether Uganda was responsible for violations committed

Firstly, it is in favour of a unique standard for finding applicable every human rights treaty, although very little guidance is given in this judgement on what integrate “*acts done by a State in the exercise of its jurisdiction*”. Secondly, it entails the application of such treaties to a State’s conduct even when its control does not make the grade exercised by an occupying power (*i.e.* the application of such treaties during occupation is but one example of possible relevant situations).<sup>1723</sup> Besides, exactly because the Court’s appeal to international human rights law was not inspired by extraordinary circumstances - as those concerning the Israeli prolonged occupation have appeared to be<sup>1724</sup> - the judgment in *Democratic Republic of Congo v. Uganda* represents a noteworthy case corroborating the idea that *the exercise of State jurisdiction abroad triggers the extraterritorial application of core international human rights treaties*, and this notwithstanding the observation made in legal scholarship that “*the general principle that human rights law can apply to military occupation is now widely, but by no means universally, accepted*”.<sup>1725</sup>

#### **5.1.2.d. The position within the UN Special Procedures mechanisms**

The extraterritorial scope of the ICESCR have been considered by some UN independent experts in the exercise of their thematic or country mandates to examine, monitor, advise, and publicly report on human rights issues through activities undertaken by special procedures. For instance, the Covenant’s extraterritorial applicability has been dealt, directly or indirectly, by various Special Rapporteurs on the situation of human rights in the occupied Palestinian territories, as examined in section 5.1.3.a.iii.

#### **5.1.3. A progressive interpretation of the scope of State obligations relating to ESC rights**

As briefly mentioned above, in focusing on the *different de facto circumstances* potentially denoting the

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outside occupied territory. Uganda was found in violation of a number of treaties, including the ICCPR, the CRC and its Optional Protocol on the Involvement of Children in Armed Conflict, and the ACHPR, in addition to a number of IHL instruments, see *ibid.*, para. 217. The Court concluded that “*Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and by its members in the territory of the DRC and for failing to comply with its obligations as an occupying Power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory*” (para. 220).

<sup>1723</sup> On these implications, see J. Cerone, “Out of Bounds: Considering the reach of international human rights”, CHRJ Working Paper No. 5, 2006, pp. 7-8.

<sup>1724</sup> On this view, see M. Dennis, “Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation”, 99 *AJIL*, 2005, 119, p. 122, underling that “*the ICJ’s conclusion...appears to have been based upon the unusual circumstances of Israel’s prolonged occupation. It therefore remains unclear whether the opinion should be read as generally endorsing the view that the obligations assumed by States under international human rights instruments apply extraterritorially during situations of armed conflict and military occupation*”.

<sup>1725</sup> See A. Roberts, “Transformative Military Occupation: Applying the Laws of War and Human Rights”, 100 *AJIL*, 2006, 580, p. 595.

subsistence of State jurisdiction for the purpose of triggering the extraterritorial application of treaties on ESC rights in conflict-afflicted scenarios, the present research takes into account *the progressive understanding of the notion of jurisdiction* as recently articulated within the large debate developed among scholars, human rights experts and organizations in the field of ESC rights. Indeed, this has contributed to outline significant “exceptions” eroding the basic notion of jurisdiction as presumptively territorial while *broadening the connections* under which a State may be deemed to act within its jurisdiction.

More precisely, the “jurisdictional scope” of State obligations relating to ESC rights has been deemed as potentially extending extraterritorially in one the following situations: (1) effective control/authority over individuals or foreign territorial areas, (2) foreseeability as to the effects on the enjoyment of ESC rights, and (3) decisive influence or measures to realise the rights in question.<sup>1726</sup> The following three sections attempt to deal with these circumstances from the perspective of contemporary situations of armed conflict and periods of military occupation.

#### **5.1.3.1. Effective control and authority over people or foreign territories**

The exercise by a State of *effective control and authority over individuals or foreign territorial areas* - whether or not in compliance with international law - may be deemed the most basic factual circumstance for triggering the extraterritorial applicability of treaties on ESC rights in conflict-related scenarios and, consequently, the existence of corresponding human rights obligations upon the State concerned beyond its sovereign territory.

Although the potential of such a basis (borrowed from the civil and political rights jurisprudence) is significant, a primary question is *its adequacy for the ESC rights of civilians affected by conflict-related settings*. This requires we reflect on several aspects such as: what *set of standards* may indicate a situation of “*effective control*” exercised by a State regarding ESC rights affected by such settings; whether the degree of State control weights the *extent* of extraterritorial obligations relating to the ESC rights of civilians; whether recent cases of military occupation require clarifications about the *jurisdictional capacity of the occupying power* from the perspective of safeguarding ESC rights.

Before discussing such potentialities, it seems worth focusing briefly on the doctrine of effective control as has progressively emerged from the jurisprudence advanced in the field of civil and political rights by judicial or quasi-judicial supervisory bodies.

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<sup>1726</sup> See *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, October 2011, Principle 9 (a), (b), (c).

### 5.1.3.1.a. The doctrine of effective control as developed in international jurisprudence

While the jurisdiction clauses contained in some universal and regional human rights treaties (*i.e.* the ICCPR, the CERD, the CAT, the CRC, the ECHR and the ACHR<sup>1727</sup>) was traditionally perceived as a geographical limitation that might be interpreted as granting States' impunity when their conduct takes place outside their national territory, such a narrow interpretation has been challenged by a growing body of international jurisprudence taking *jurisdiction* as related to the *power* a State exercises *over persons (both natural and legal) affected by States' conduct* or *over territory in which States' conduct took place*.<sup>1728</sup>

Notably, the importance of extraterritoriality for human rights treaties has been clearly underlined after *Bankovic and others v. Belgium and 16 other NATO States*, in which the European Court denied the applicability of the ECHR to the victims of a NATO bombing campaign in Yugoslavia in 1999. That decision was based on the *rationale* that jurisdiction within the meaning of the Convention is an essentially territorial concept and its extraterritorial exercise is strictly exceptional.<sup>1729</sup> Conversely, the “*gradual approach to jurisdiction*” has been put forward by the applicants of that case and then by several scholars, arguing that the obligation under Article 1 ECHR to secure the Convention's rights to a given person applies *proportionately to the control in fact exercise* over that person: States would be obliged to secure those rights that were *within their control*,

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<sup>1727</sup> Four human rights treaties (ICCPR, CERD, CAT and CRC) use “*jurisdiction*” to describe their scope of application: “[*e*]ach State party...undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant” (Art. 2 (1) ICCPR); “States Parties... undertake to prevent, prohibit and eradicate all [*racist practices*] in territories under their jurisdiction” (Art. 3 CERD); “Each State Party shall take effective measures to prevent acts of torture in any territory under its jurisdiction” (Art. 2 (1) CAT); “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction” (Art. 2(1) CRC). However, two of these treaties use that term in connection with “*territory*” by determining that States parties’ obligations encompass “*territories under their jurisdiction*” (Art. 3 CERD and Art. 2(1) CAT), thus implying that the exercise of jurisdiction over a territory by a State party (and not the formal existence of sovereignty or lack thereof) represents the crucial test defining the scope of application of such treaties.

<sup>1728</sup> See HRC, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 10, in which the Committee took the view that each 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 that State party*”. See Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States parties*, UN Doc. CAT/C/GC/2, 24 January 2008, para. 16, in which the Committee took the view that “*any territory*” includes every area in which a State party exercises “*de iure* or *de facto*”, “*in whole or in part*”, “*directly or indirectly*”, effective control in line with international law. See ICJ, *Provisional measures in the case of Georgia v. Russian Federation*, 15 October 2008, No. 35/2008, para. 109, in which the Court confirmed that “*(t)here is no restriction of a general nature in CERD relating to its territorial application [...] (t)he Court consequently finds that the provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory*”.

<sup>1729</sup> ECtHR, *Bankovic and others v. Belgium and 16 other NATO States*, Appl. No. 52207/99, Grand Chamber, 12 December 2001, 41 ILM (2002). According to the Court, at the relevant time the victims of the bombing of the Serbian television station RTS in Belgrade, who alleged extraterritorial violations of Article 2 (right to life), Article 10 (freedom of expression) and Article 13 (right to an effective remedy), had not been under the respondent States’ jurisdiction (which were parties to the same Convention). Extraterritorial jurisdiction was understood as applicable when a State - via effective territorial control - “*exercise all or some of the public powers normally to be exercised by*” the government of that territory.

which could be extensive or limited and whose level could be determined in function of establishing the corresponding level of obligations by considering, *inter alia*, the *ability of the State to influence the situation of the person under control* and the *ability of the State to prevent the violation of a certain right*.<sup>1730</sup>

Indeed, notwithstanding the more cautious approach traditionally taken by the European Court of Human Rights, another line of case law of human rights bodies has not limited jurisdiction to territorial boundaries and, instead, has explicitly used the “*effective control*” or “*degree of control*” test, based on power or authority, to determine whether a treaty should be applied extraterritorially.<sup>1731</sup> A lower threshold has been applied by the Inter-American Commission of Human Rights, and its case law indicates that the State’s exercise of “*effective control*” over persons whose rights have been violated<sup>1732</sup> may result from three forms of extraterritorial conduct (*i.e.* military occupation, detention, military control).<sup>1733</sup> Furthermore, in the recent *Al-Skeini*<sup>1734</sup> and *Al-Jedda*<sup>1735</sup> the European

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<sup>1730</sup> See R. Lawson, “Moving from Bankovic: The gradually expanding reach of the European Convention of Human Rights”, in *The Rule of Law in Peace Operations, Recueils de la Société Internationale de Droit Militaire et de Droit de la Guerre*, Vol. 17, pp. 473-487. H. Nannum, “Remarks”, in Cerna *et al.*, “Bombing For Peace: Collateral Damage and Human Rights”, *Proceedings of the 96<sup>th</sup> Annual Meeting of the American Society of International Law*, 13-16 March 2002, Vol. 96, pp. 95-108.

<sup>1731</sup> See ECtHR, *Loizidou v. Turkey*, Appl. No. 15318/94, Judgment of 18 December 1996, para. 52 (“*the concept of jurisdiction ... is not restricted to the national territory of the Contracting States ... (T)he responsibility of a Contracting Party could also arise when ... it exercises effective control of an area outside its national territory*”). See ECtHR, *Cyprus v. Turkey*, Appl. No. 25781/94, Judgment of 10 May 2001, para. 71 (holding Turkey liable for acts of a local administration that endured due to its military support). See ECtHR, *Ocalan v. Turkey*, Appl. No. 46221/99, Judgment of 12 March 2003; ECtHR, *Issa and Others v. Turkey*, Appl. No. 31821/96, Judgment 16 November 2004; ECtHR, *Ilasu v. Moldova and Russia*, Appl. No. 48787/99, Judgment of 8 July 2004.

<sup>1732</sup> See IACommHR, *Coard et al. v. United States*, Report No. 109/99, Case 10.951, 1999, para. 37; IACommHR, *Alejandre v. Cuba*, Report No. 86/99, Case 11.589, 29 September 1999.

<sup>1733</sup> See C.M. Cerna, “Out of Bounds: The Approach of the Inter-American System for the Promotion and Protection of Human Rights to the Extraterritorial Application of Human Rights Law”, *CHRGJ Working Paper No. 6*, 2006, p. 5.

<sup>1734</sup> *Al-Skeini* concerned the killing of six Iraqi civilians by British soldiers in Southern Iraq, including the brutal death of Baha Mousa during his detention at a UK army base. Their relatives asked for an independent investigation, which was denied, so they brought various applications for judicial review. In 2007, the House of Lords held that the Human Rights Act 1998 did not apply to the soldiers’ actions save those on the army base. The UK Court of Appeal recognised the possible application of the European Convention to the occupying powers in Iraq, see UK Court of Appeal, *the Queen (on the application of Mazin Mumaa Galteth Al-Skeini and Others) v. The Secretary of State for Defence*, Case No. C1/2005/0461, C1/20050461B, 21 December 2005, E.W.C.A. Civ. 1609 (2005). Specifically, according to the House of Lords, only Baha Mousa was held to be within the jurisdiction of the UK: since he was killed while in custody in a British detention facility in Iraq, the judges considered him to be within the State’s jurisdiction “*essentially by analogy with the extraterritorial exception made for embassies*” (see Lord Brown at para. 132). Conversely, the other five applicants were killed by British troops on patrol in UK-occupied Basra and the judges dismissed their case by denying jurisdiction and, consequently, the extraterritorial application of the Convention. The five applicants who lost the case took it to Strasbourg. An unanimous Grand Chamber of the ECtHR held, firstly, that the UK had jurisdiction under Article 1 ECHR in respect of civilians killed during British occupation in South East Iraq and, secondly, that the UK had violated the procedural duties under the right to life (*i.e.* it had a duty to conduct an independent and effective investigation into the deaths of all the civilians killed by British soldiers, *whether or not they were within the confines of a UK military base*, in compliance with Article 2 ECHR). Its decision was based on the fact that the UK had assumed responsibility for the maintenance of security in Southern Iraq and was exercising “*control and authority*” over Iraqi civilians. See ECtHR, *Al-Skeini and Others v. The United Kingdom*, Appl. No. 55721/07, Grand Chamber, Judgment, 7 July 2011, 53 E.H.R.R. 18.

Court on Human Rights still retained the basic *Bankovic* position that the recognition of extraterritorial jurisdiction is exceptional and requires justification on the basis of general international law,<sup>1736</sup> but in these two judgments the Grand Chamber significantly held that the ECHR may apply to (certain) military operations performed abroad. It found the UK Government's human rights obligations under the European Convention as exceptionally extended to situations in which British officials exercised, in fact, "control and authority" over foreign nationals abroad. Of note, the Court indicated that *the State authorities' acts performed abroad or producing effects beyond their own territories* may constitute an exercise of jurisdiction under Article 1.<sup>1737</sup> To the Court, however, whether or not all treaty obligations become effective depends on the circumstances: "*the State is under an obligation [...] to secure to that individual the rights and freedoms [...] that are relevant to the situation of that individual. In this sense, therefore, the convention rights can be "divided and tailored"*". Notably, regarding the indicators determining the existence of effective control over an area, the Court referred to "*the strength of the State's military presence in the area*"<sup>1738</sup> concerned, adding the relevance of "*the extent to which (State's) military, economic and political support for the local subordinate administration provides it with influence and control over the region*".<sup>1739</sup>

Therefore, apparently human rights judicial and quasi-judicial bodies as well as the International Court of Justice tend to agree on the basic position that *a State owe human rights obligations in any situation over which it exercises effective control (e.g. over an occupied territory), whether or not such situation is found in its sovereign territory*. In other words, as far as a State exercises through its agents effective control over foreign territory the human rights treaties to which it is a party apply to the conduct it undertakes in such territory.<sup>1740</sup> Nonetheless, even though a State may be required to ensure the whole range of human rights when it exercises effective control over territory or people,

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<sup>1735</sup> *Al-Jedda* concerned the indefinite detention without charge of a dual British/Iraqi citizen in a Basra facility run by British forces. In 2007, the House of Lords held that the detention was lawful because the UK Government had been authorised to act by UN Security Council Res. 1546. However, the Grand Chamber held that the Security Council Resolution did not displace the Government's obligations to protect the right to liberty under Article 5 ECHR. See ECtHR, Grand Chamber, *Al-Jedda v. The United Kingdom*, Appl. No. 27021/08, Judgment, 7 July 2011.

<sup>1736</sup> ECtHR, *Al-Skeini and Others v. The United Kingdom*, Appl. No. 55721/07, Judgment, 7 July 2011, paras. 135-137.

<sup>1737</sup> ECtHR, *Al-Skeini and others v. The United Kingdom*, *ibid.*, paras.131-133.

<sup>1738</sup> ECtHR, *Al-Skeini and others v. The United Kingdom*, *ibid.*, para.139, citing *Loizidou* (merits) at 16 and 56.

<sup>1739</sup> ECtHR, *Al-Skeini and others v. The United Kingdom*, *ibid.*, para.139, citing *Ilascu* at 388-394.

<sup>1740</sup> This interpretation has found certain support by political bodies such as the UN Security Council and the Parliamentary Assembly of the Council of Europe. In particular, see SC Res. 1546 (2004), S/RES/1546, 8 June 2004, which was adopted in anticipation of the transfer of the authority of the Coalition Provisional Authority to the Iraqi interim government, and whose wording does not reveal any departure from the applicable international humanitarian law (whose relevance it explicitly affirmed) nor from human rights law since it does not include any indication to that effect. See also Parliamentary Assembly Council of Europe, Resolution 1386 (June 2004), *The Council of Europe's contribution to the settlement of the situation in Iraq*, para. 17, available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta04/ERES1386.htm>



it is *the extent of such control that may vary* and so will the scope of its obligations under the relevant treaties.

In this regard Maastricht Principle No. 18, which deals specifically with a State carrying out belligerent occupation or otherwise exercising effective control over a territory beyond its national soil, enunciates that this situation involves extraterritorial obligations on the ESC rights of individuals within that territory, whereby the State assumes specific responsibilities for its extraterritorial conduct.

A notable clarification undertaken in legal scholarship has favoured the notion of jurisdiction as related to the exercise of authority and control, supporting a proportionate approach: “*the law of jurisdiction is about entitlements to act, the law of State responsibility is about obligations incurred when a State does act*”.<sup>1741</sup> A State is allowed to act both within and outside its territory as long as its performances are in accordance with international law; when a State commits an internationally wrongful act or omission the notion of State responsibility determines the legal consequences of such conduct, even of an extraterritorial one.

As already observed, a certain confusion as to what the “*jurisdictional*” limitation actually refers in human rights treaties has been extensively addressed by scholars, broadly claiming an incompatibility of the traditional territorial approach to jurisdiction with its function in the context and purpose of human rights treaties. Actually, *a broad interpretation of the notion of jurisdiction* has revealed to be crucial for such treaties: insofar as they bound States acting within a jurisdiction, the risk of considering the latter as related only to a geographic area is that States could have “*extra-jurisdictional activities*” without State responsibility being triggered.<sup>1742</sup>

#### **5.1.3.1.b. The effective control criterion in cases of occupied territories**

Contemporary situations of occupation gain relevance in exploring the use of the effective control standard for triggering the extraterritorial applicability of treaties on ESC rights. As to the ICESCR, the exercise of effective control over foreign territory and over populations residing therein by a State party has constituted a *decisive factor* for its treaty-based monitoring body to acknowledge its extraterritorial application. However, the single case in which the CESCR has extensively discussed

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<sup>1741</sup> See R. Higgins, *Problem and process - International Law and How We Use It*, Oxford: Carendon Press, 1994, at 146.

<sup>1742</sup> On this point, see also M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, Intersentia, 2009, pp. 56 and 168; Coomans, “The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights”, *HRLR*, 2011, pp. 1-35; Skogly, “Extraterritoriality - Universal Human Rights without Universal Obligations?”, in S. Joseph and A. McBeth (eds.), *Research Handbook on International Human Rights Law*, Edward Elgar Publishing Ltd., 2010.

the reach of the ICESCR in such situations concerns Israel and the situation of the occupied Palestinian territories. This will be examined in the following sub-section. Conversely, other cases of present-day occupations involving States parties to the ICESCR have been overlooked by the CESCR. Regrettably this appears a relatively unbalanced and selective approach.

#### **5.1.3.1.b.i. Critical missing cases**

Prominent instances in which supervisory human rights bodies have mainly disregarded the question of the extraterritorial application of treaties guaranteeing ESC rights may total at least four. One may refer here to the belligerent occupation of parts of Iraq and Afghanistan by military forces of the United Kingdom, the effects of which on the enjoyment of ESC rights (*e.g.* the right to have access to basic services like water, electricity, the right to adequate housing, and the right to have access to health care facilities) were not considered during the 2009 examination of the UK State Report.<sup>1743</sup>

Equally, the situation of ESC rights in the Northern part of Cyprus, occupied by Turkish armed forces since 1974, was not included in the list of issues for the consideration of the initial Turkish report on the Covenant's implementation.<sup>1744</sup>

Another relevant situation concerns Western Sahara. Morocco is a party to several UN human rights treaties (*e.g.* the ICCPR, the ICESCR, the CERD, the CAT, the CEDAW, CRC, and the Migrant Workers Convention) and it has made no relevant derogations. Conversely, it is not a party to the AfrCHPR. Contrary to their stance towards other occupying powers, the related treaty-based bodies have not clearly affirmed that these conventions apply in the Western Sahara, and their remarks have been mostly limited to concern about the lack of progress towards self-determination as required by Article 1 of both the ICCPR and ICESCR. While the treaty bodies under CAT, CERD, and CRC, did not explicitly refer to this point, apparently the other two Committees have assumed that the 1977 Covenants do apply.<sup>1745</sup>

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<sup>1743</sup> A different approach has been undertaken by the Human Rights Committee during the discussion on the UK periodic ICCPR report in 2008, as it called upon the State party to “*state clearly that the Covenant applies to all individuals which are subject to its jurisdiction or control*”, see HRC, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, UN Doc. CCPR/C/GBR/CO/6, 18 July 2008, para. 14.

<sup>1744</sup> See *List of issues on Turkey*, UN Doc. E/C.12//TUR/Q/1, 14 June 2010. The CESCR considered the initial report of Turkey on the implementation of the ICESCR (E/C.12/TUR/1) on 3 and 4 May 2011 (E/C.12/2011/SR.3-5). See CESCR, *Concluding Observations: Turkey*, UN Doc. E/C.12/TUR/CO/1, 12 July 2011.

<sup>1745</sup> In the comments to Morocco's 4<sup>th</sup> Periodic Report, the Human Rights Committee remained “*concerned about the very slow pace of the preparations toward a referendum in Western Sahara on the question of self-determination, and at the lack of information on the implementation of human rights in that region*”, CCPR/C/79/Add113, 1 November 1999. In 2004, the Human Rights Committee remained still “*concerned about the lack of progress on the question of the realisation of the right to self-determination for the people of Western Sahara*” and recommended that Morocco made “*every effort to permit the population groups to enjoy fully the rights*

In the context of the CESCR's supervising Morocco as State party to the ICESCR, the general application of this Covenant to the occupied territories of Western Sahara has not been rejected by Morocco.<sup>1746</sup> Several times the CESCR has expressed concern over the self-determination rights of the people living in these occupied territories, particularly about the negative consequences of the of Western Sahara policy of Morocco “*for the enjoyment of the economic, social and cultural rights of the relevant population through population transfer*”.<sup>1747</sup> In regretting the lack of a “*definite solution to the question of self-determination*”, the Committee has encouraged Morocco to resolve problems impeding the realisation of the referendum on this issue,<sup>1748</sup> while the latter's ambiguous response has been that “*Morocco ... continues to collaborate with the United Nations in the search for a settlement to the Sahara conflict that will ensure national sovereignty over the whole of Moroccan territory*”.<sup>1749</sup> In the most recent concluding observations, the Committee indicated among the principal subject of concern “*the fact that no clear solution has yet been found to the question of self-determination for the people of Western Sahara*”, remarking “*reports of the straitened circumstances endured by people displaced by the conflict in Western Sahara, particularly women and children, who apparently suffer multiple violations of their rights under the Covenant*”.<sup>1750</sup>

Notably, the 2006 OHCHR report highlighted that “*the respect of all human rights of the people of Western Sahara must be seen in tandem with this right and a lack of its realisation will inevitably impact on the enjoyment of all other rights guaranteed in the seven core international human rights treaties in force.*”

In 2008 Morocco was subject to the Universal Periodic Review. The comments of the Human Rights Committee and other relevant comments by UN Special Rapporteurs were noted in the compilation of information for the Council that was prepared by the OHCHR. However, the Human Rights Council made little reference to the situation in Western Sahara in the UPR process, and only Amnesty International expressed real concern.

#### **5.1.3.1.b.ii. The Israeli/Palestinian case**

The complex Israeli-Palestinian situation represents a noteworthy case for reflecting on the effective control criterion. The practice of several human rights monitoring bodies offer the chance to

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*recognised by the Covenant*”, see HRC, *Concluding Observations: Morocco*, UN Doc. CCPR/CO/82/MAR, 1 December 2004, para. 8.

<sup>1746</sup> The Morocco-controlled parts of Western Sahara include several provinces treated as integral parts of the kingdom. The Polisario Front is based at the Tindouf refugee camps in Algeria, which it controls; it also controls the part of Western Sahara to the east of the Berm.

<sup>1747</sup> CERSC, *Concluding Observations: Morocco*, UN Doc. E/C.12/1994/5, 30 May 1994, para. 10.

<sup>1748</sup> CERSC, *Concluding Observations: Morocco*, UN Doc. E/C.12/1/Add.55, 1 December 2000.

<sup>1749</sup> *Third Periodic Report of Morocco under Articles 16 and 17 of the Covenant, Addendum*, UN Doc. E/1994/104/Add.29, 17 January 2005, para. 20.

<sup>1750</sup> CERSC, *Concluding Observations: Morocco*, UN Doc. E/C.12/MAR/CO/3, 4 September 2006, para. 13b.

examine its adequacy for clarifying the scope of “*jurisdictional capacity*” and responsibility of an occupying power to safeguard the ESC rights of those who live in occupied territories. Specifically, it raises a twofold question: (i) what set of standards may indicate the exercise of “effective control” by a State over a situation impacting ESC rights;<sup>1751</sup> (ii) how the extent of control exercised by a State determines the scope of its extraterritorial obligations to respect, protect and fulfil the ESC rights of the civilian population.

### ***The CESCR’s use of the criterion of “effective control”***

The relevant position of the CESCR mostly relies on the three rounds of its concluding observations in respect of Israeli reports. The basic question dealt at length by the Committee has concerned whether Israel, as the occupying power, has to comply with its obligations under the Covenant with respect to the occupied Palestinian territories and so whether it has to observe the ESC rights of the Palestinians who live therein.<sup>1752</sup>

Since Israel’s first report, the Committee has expressed the position whereby “*the State party’s obligations under the Covenant apply to all territories and populations under its effective control*”, addressing “*that even in a situation of armed conflict fundamental human rights must be respected, and that basic economic, social and cultural rights, as part of the minimum standards of human rights, are guaranteed under customary international law and are also prescribed by international humanitarian law*”, noting with concern how the statistics included in Israel’s written and oral reports referred only to the enjoyment of Israeli settlers’ rights in the OPT,<sup>1753</sup> but failed to submit information on the living conditions of Palestinian people residing in the same jurisdictional areas.<sup>1754</sup>

Importantly, one of the State measures openly condemned by the Committee regarded the general closures between Israel and the occupied territories and the restrictions on freedom of movement within such territories, which led to the cutting off from land resources. In its words, they resulted in widespread violations of Palestinians’ ESC rights, particularly those afforded in Article 1(2), with a severe impact on the right to health care, access to workplace, livelihood and income. Closures were also criticised for aggravating poverty and the lack of food, and generating a

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<sup>1751</sup> A number of criteria indicating a situation of “effective control” are generally identified in the following: the influence of the State, the position of the State to support or not, the input of a State to policy failures, the issue which States profit from certain policy instruments.

<sup>1752</sup> For an examination of the various theories of applicability of human rights to belligerent occupation, see the report by Al-Haq, “The Applicability of Human Rights Law to Occupied Territories: The Case of the Occupied Palestinian Territories” Ramallah: Al-Haq, 2003. See also M. Dennis, “Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation”, 99 *AJIL*, 2005, p. 119.

<sup>1753</sup> See *Initial Report submitted by Israel under Articles 16 and 17 ICESCR*, 28 November 1997, E/1990/5/Add.39.

<sup>1754</sup> CESCR, *Concluding Observations: Israel*, UN Doc. E/C.12/1/Add.27, 4 December 1998, paras. 6 and 8.

separation of families.<sup>1755</sup> Other concerns included strict permanent residency laws in East Jerusalem, increasing exclusion faced there from the enjoyment of ESC rights, land confiscation, home demolitions, restrictions on family reunification and residency rights, and policies leading to a sub-standard of living.<sup>1756</sup> The policy of expanding and facilitating the expansion of illegal settlements in the West Bank was also critically addressed in light of the obligations flowing from Article 11.<sup>1757</sup>

In the additional information on the realisation of ESC rights, which the Government submitted upon the Committee's request, Israel emphasised to having "*consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction*".<sup>1758</sup> International humanitarian law was considered as the only applicable to the OPT; in its view, powers and responsibilities in all civil spheres were transferred to the Palestinian Council, including those ones relating to the realisation of ESC rights, and in these areas Israel could *not* be "*internationally responsible for ensuring the rights under the ICESCR*".<sup>1759</sup> It was nevertheless admitted that some powers and responsibilities "*continue to be exercised by Israel in the West Bank and Gaza Strip*" under the agreements reached with the Palestinians.<sup>1760</sup> However, its argument that the law of armed conflict supersedes the applicability of human rights treaties was rejected by the Committee, which addressed that the occupying power must respect fundamental rights even during a situation of armed conflict.<sup>1761</sup>

The information on the implementation of the rights concerned in respect of people other than Israeli settlers living in the West Bank and Gaza were not submitted even in the second periodic review report.<sup>1762</sup> Several reasons were restated by the Israeli delegation present in the oral examination to justify this omission. Firstly, the ICESCR was deemed to relate to fields for which powers and responsibilities had been transferred from Israel to the Palestinian Authority in 1994, so considering the latter as "*responsible for nearly all governmental aspects of Palestinian life, including administration, law enforcement, tax collection, education, welfare, health, internal security and public order, as well as the judicial, legislative and executive spheres*". Secondly, in affirming that the law of armed conflict applied in situations where generally recognised human rights norms could not be applied owing to

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<sup>1755</sup> CESCR, *Concluding Observations: Israel*, UN Doc. E/C.12/1/Add.27 (4 December 1998), paras. 17-18-19.

<sup>1756</sup> CESCR, *Concluding Observations: Israel*, UN Doc. E/C.12/1/Add.27, 4 December 1998, paras. 20-22.

<sup>1757</sup> CESCR, *Concluding Observations: Israel*, UN Doc. E/C.12/1/Add.27, 4 December 1998, paras. 24.

<sup>1758</sup> *Israel, Additional information submitted by State Parties to the Covenant following the consideration of their reports by the Committee on Economic and Social and Cultural Rights*, 14 May 2001, E/1989/5/Add.14, para. 2.

<sup>1759</sup> *Ibid.*, para. 3.

<sup>1760</sup> *Ibid.*, para. 5.

<sup>1761</sup> CESCR, *Concluding Observations on the additional information submitted by Israel*, UN Doc. E/C.12/1/Add.69, 31 August 2001, para. 12.

<sup>1762</sup> *Second periodic report submitted by Israel under Articles 16 and 17 ICESCR*, UN Doc. E/1990/6/Add.32, 16 October 2001.

the fact that the normal government-citizen relationship did not prevail, Israel viewed the ICESCR as a specific, territorially-bound treaty that does not apply to areas outside the national territory of a State Party. Thirdly, Israel did not exercise effective control over those territories during the period in which the report had been drawn up (1998 to 2000).<sup>1763</sup>

Conversely, the Committee's position confirmed that "*the State party's obligations under the Covenant apply to all territories under its effective control*", repeating that even in case of armed conflict fundamental rights must be respected and that basic ESC rights, "*as part of a minimum standard of human rights, are guaranteed under customary international law and are also prescribed by international humanitarian law*", but noting that "*the applicability of rules of humanitarian law does not by itself impede the application of the Covenant or the accountability of the State under article 2 (1) for the actions of its authorities*".<sup>1764</sup> Accordingly, Israel was called upon to give full effect to its obligations under the ICESCR in the occupied territories, including, as a matter of priority, to undertake to ensure safe passage at checkpoints for Palestinian medical staff and people seeking medical treatment, unhampered flow of medical food-stuffs and supplies, free movement to places of employment, free access to land and water resources, and safe conduct of students and teachers to and from schools. Furthermore, the Committee insisted on that *any security measure cannot disproportionately limit or impede the enjoyment of the rights enshrined in the Covenant* (particularly, access to land and water resources by Palestinians), emphasising the necessity to provide *adequate restitution and compensation* to those who incurred damage to, and loss of, property and lands as a result of such measures. Therefore, Israel was strongly urged to take "*immediate steps to ensure equitable access to and distribution of water to all populations living in the Occupied Territories*", including the full and equal participation of all parties in the process of water management, extraction and distribution. Then, in addressing the need "*to cease the practices of facilitating the building of Israeli settlements, expropriating land, water and resources, demolishing houses and carrying out arbitrary evictions*", the Committee urged Israel "*to take immediate steps to respect and implement the right to an adequate standard of*

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<sup>1763</sup> *Summary Records of the 18<sup>th</sup> Meeting*, CESCR, Israel, UN Doc. E/C.12/2003/SR.18, 4 June 2003, paras 22-4. On the applicability issue, Israel referred to the fact that "*various States parties had voluntarily made declarations reserving the right to extend the applicability of the Covenant to any territory for whose international relations they were responsible, such as non-self-governing or trusteeship territories, but Israel had made no such declaration in respect of the territories administered by the Palestinian Authority*".

<sup>1764</sup> See CESCR, *Concluding Observations on the second periodic report of Israel*, UN Doc. E/C.12/1/Add.90, 23 May 2003, para. 31. It is remarkable that several human rights treaty bodies have consistently held Israel responsible in respect of the OPT under the respective treaties, and have reaffirmed not only the extraterritorial applicability of the latter but also rejected Israel's argument that the law of armed conflict would supersede their applicability. See HRC, *Concluding Observations: Israel*, UN Doc. E/C.12/1/Add.90 (2003), para.15; CERD, *Concluding Observations: Israel*, UN Doc. CERD/C/ISR/CO/13 (2007), para. 32; CRC, *Concluding Observations: Israel*, UN Doc. CRC/C/15/Add.195 (2002); CEDAW, *Concluding Observations: Israel*, A/60/38 (2005), paras. 243-244; Committee against Torture, *Conclusions and recommendations: Israel*, A/57/44 (2002), paras. 5-7. In the same regard, see also *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mission to Israel, including visit to the Occupied Palestinian Territory*, A/HRC/6/17Add.4 (2007), paras. 8-9.

*living, including housing, of the Palestinian residents of East Jerusalem and the Palestinian Arabs in cities with mixed populations*".<sup>1765</sup>

Before focusing on the monitoring function carried out on the third periodic report, it is worth underscoring a pertinent critique that has emerged in legal scholarship on the Committee's approach. In its concluding observations no explanations were given as to *what the criterion of "exercise of effective control" exactly means*.<sup>1766</sup> Although it reiterated that under military occupation the occupier exercises such a control, *no explanations as to what type of obligations Israel has in the territories over which it exercises effective control were elucidated*. This aspect seems crucially relevant: undertaking a detailed and in-depth legal analysis of the different treaty obligations upon a State party to the ICESCR when it occupies a foreign territory would have been useful so as to corroborate an explicit and coherent position in favour of the existence of extraterritorial binding duties.

Some developments in this regard are noticeable in the most recent concluding observations examining the implementation of the ICESCR. While addressing the serious concerns on security, the Committee reminded the State party of its obligation to report and to fully guarantee and implement the Covenant rights "*for all persons in all territories under its effective control*". Indeed, it regretted the absence of information on the enjoyment of ESC rights in the occupied territories in the third periodic report as well as in the replies to the list of issues, urging Israel to provide such information in the next report.<sup>1767</sup> The principal subjects of concerns and recommendations of the Committee, as based on available information,<sup>1768</sup> included significant references to the situation of such territories and evidence substantial efforts to elaborate the range of obligations on the occupant in relation to the ESC rights of local inhabitants.

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<sup>1765</sup> CESCR, *Concluding Observations on the second periodic report of Israel*, UN Doc. E/C.12/1/Add.90, 23 May 2003, paras. 35, 40, 41, 42.

<sup>1766</sup> See F. Coomans, "The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights", *HRLR*, 2011, p. 15, questioning whether it is only obligations to respect (meaning obligations not to interfere in the free enjoyment of rights and freedoms of the Palestinian people) or whether it includes also more positive obligations (*i.e.* to protect and to fulfil). The Committee considered mainly duties to respect, but positive duties may be included (*i.e.* the obligation to ensure impartial access to, and distribution of, to all those who live in the occupied territories).

<sup>1767</sup> See CESCR, *Concluding Observations on the third periodic report of Israel*, UN Doc. E/C.12/ISR/CO.3, 16 December 2011, paras. 3 and 8. The Israeli report dates from November 2008. The Committee reminded the State party of the advisory opinion of 9 July 2004 and particularly of the ICJ's statement that Israel is bound by the Covenant with regard to the OPT and is also under "*an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities*" (para. 112 of the advisory opinion on the wall). Notwithstanding the adoption of certain Governmental measures to lessen movement restrictions for Palestinians in the West Bank, certain impediments were reported: "*there were indications that settler violence was developing beyond sporadic incidents into organized efforts to destroy Palestinian livelihood and culture (e.g. through the desecration of mosques and the uprooting of olive trees)*", see OHCHR, "OHCHR in the field: Middle East and North Africa (OHCHR-OPT)", Report 2010, pp. 211-212.

<sup>1768</sup> Several international, Palestinian and Israeli human rights organizations provided additional information to CESCR, and related documents are published on the OHCHR website.

Firstly, the Committee focused on serious obstacles to the enjoyment of *the right to work*.<sup>1769</sup> Israel was urged to ensure that Palestinians enjoy “*unimpeded access to their agricultural lands in all their territories*”, to “*demarcate the buffer zone to the extent strictly necessary to address its security concerns*”, and to effectively inform the civilian population in the Gaza Strip of the extent of its applicable regime. Thus, the necessity of conducting investigations of the killings and injuries of workers in the buffer zone alongside providing victims with an adequate remedy was highlighted in the report. Furthermore, Israel was asked “*to recognise and respect the right of the Palestinian people to the marine resources, including the right to fish in the territorial sea and Exclusive Economic Zone of the Gaza Strip*”. Conversely, as to those living in the occupied territories and working in Israel, the Committee expressed concern as they are not permitted to be members of the General Federation of Laborers in Israel, “*which has been assigned by law with the responsibility to protect Palestinian workers’ rights in Israel and retains half of the union fees collected from those workers*” in accordance to Article 8 of the Covenant.<sup>1770</sup>

The *revocation of residency permits* of those living in East Jerusalem were also openly addressed for resulting in the loss, *inter alia*, of their right to social security, including access to social services. An end to this revocation was called by the Committee, urging Israel not to impede the enjoyment of their right to access to social security as well as ensuring this right on a non-discriminatory basis, particularly for marginalised and disadvantaged groups and individuals.<sup>1771</sup>

Additionally, insufficient efforts in the *creation of educational programmes and services on sexual and reproductive health* aimed at the most vulnerable segments, such as women and young people from the occupied territories and the Arab-Israeli population group were addressed. Measures for allowing the Palestinian Authority’s functions and powers under the 1995 Interim Agreement, including the transfer of tax revenues to it, were recommended too. In view of the expanded privatization of social services, affecting the right to an adequate standard of living under Article 11, emphasis was put on the high rate of poverty among the Arab-Israeli population as well as in the occupied territories. Thus, the Committee recommended the establishment of “*a comprehensive policy to address the problem of poverty and social exclusion, accompanied by adequate budget allocations and a scaling down of the*

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<sup>1769</sup> CESCR, *Concluding Observations on the third periodic report of Israel*, UN Doc. E/C.12/ISR/CO.3, 16 December 2011, para. 12. Specifically, the Committee expressed concern about serious obstacles to the enjoyment of the right to work of: (a) Palestinians in the West Bank whose agricultural land has been rendered inaccessible or difficult to reach by the construction of the wall and the limited allocation of permits and opening times of the wall gates; (b) Palestinian farmers in the Gaza Strip whose agricultural land lies in or near the buffer zone; and (c) Palestinian fishermen in Gaza (Article 6).

<sup>1770</sup> CESCR, *Concluding Observations on the third periodic report of Israel*, UN Doc. E/C.12/ISR/CO.3, 16 December 2011, para. 16, recommending Israel to take steps to allow that all those living in the OPT and working in Israel can join the General Federation of Laborers in Israel.

<sup>1771</sup> *Ibid.* para. 17. It referred to its *General Comment No.19 (2007) on the right to social security enshrined in Article 9*.



*privatization of social services*". In this regard, Israel was also recommended "to ensure timely and unfettered access by the humanitarian organizations operating in the Occupied Palestinian Territory to the Palestinian population, including in all areas affected by the wall and its associated regime", also in view of the Committee's Statement on Poverty and the ICESCR.<sup>1772</sup>

Great concern was expressed as regards the practices of *house demolitions and forced evictions* in the West Bank and East Jerusalem by Israeli authorities, military personnel and settlers, in breach of the State obligation to respect the right to an adequate standard of living. Israel was recommended "to stop forthwith home demolitions as reprisals". With respect to the evictions in Area C of the West Bank, it was specifically urged to conform to its "duty (a) to explore all possible alternatives prior to evictions; (b) to consult with the affected persons; and (c) to provide effective remedies to those affected by forced evictions carried out by the State party's military".<sup>1773</sup> It was also recommended to officially regulate the unrecognised villages, stop the demolition of buildings therein, and ensure the enjoyment of the right to adequate housing.<sup>1774</sup>

The growing food insecurity and hunger among marginalised and disadvantaged individuals and groups, including the Ultra-Orthodox Jewish families and the Palestinians living in the occupied territories, was another matter of concern of the Committee, which recommended Israel to intensify its efforts to address it without discrimination.<sup>1775</sup>

The lack of access to *safe and sufficient drinking water* and *adequate sanitation* was specifically addressed by the Committee alongside "the continuing destruction of the water infrastructure in Gaza and the West Bank, including in the Jordan Valley, under military and settler operations since 1967".<sup>1776</sup> This was deemed to violate their right to water under Article 11. Thus, Israel was urged to *take measures* "to ensure the availability of sufficient and safe drinking water and adequate sanitation ... including through the facilitation of the entry of necessary materials to rebuild the water and sanitation systems in Gaza". Additionally, it was urged to *take steps* "to facilitate the restoration of the water infrastructure of the West Bank including in the Jordan Valley, affected by the destruction of the local civilians' wells, roof water tanks, and other water and irrigation

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<sup>1772</sup> *Ibid.*, paras. 19, 23, 24. See also UN Doc. E/C.12/2001/10.

<sup>1773</sup> *Ibid.*, para. 26. The Committee also advised that, to comply with its legal obligations, Israel would have to: ensure that "the development of special outline plans and closed military zones are preceded by consultations with affected Palestinian communities"; review and reform "its housing policy and the issuance of construction permits in East Jerusalem, in order to prevent demolitions and forced evictions and ensure the legality of construction in those areas"; intensify efforts "to prevent attacks by settlers against Palestinians and Palestinian property in the West Bank, including East Jerusalem", investigating and prosecuting criminal acts perpetrated by settlers.

<sup>1774</sup> CESCR, *Concluding Observations on the third periodic report of Israel*, UN Doc. E/C.12/ISR/CO.3, 16 December 2011, para. 27. It referred to the Plan for the Regularization of Bedouin Housing and for the Economic Development of the Bedouin Population in the Negev adopted in September 2011, expressing concern for its land planning scheme to be operated in a short and limited period of time.

<sup>1775</sup> *Ibid.*, para. 28.

<sup>1776</sup> *Ibid.*, para. 29.

*facilities under military and settler operations since 1967*". In this regard, attention was drawn to General Comment No.15 on the right to water.

As to the *right to health*, various obligations were articulated under Article 12.<sup>1777</sup> Recognising a concrete connection between the rights to housing and health, the Committee remarked how the National Health Insurance Law excludes vulnerable persons who do not have a permanent residency permit. Thus, an extended coverage under this law was recommended so as to *guarantee universal access to affordable primary health care* for Palestinians under "temporary" permits, migrant workers and refugees. Conversely, Israel was recommended to take measures allowing the Palestinian Authority's functions and powers under the 1995 Interim Agreement. Nonetheless, it was also urged to guarantee "*unrestricted access to health facilities, goods and services*" particularly for Palestinians living in the areas between the wall and the Green Line (*i.e.* seam zones) as well as in Gaza. Disciplinary action was recommended "*against checkpoint officials who are found responsible for unattended roadside births, miscarriages, and maternal deaths resulting from delays at checkpoints, as well as maltreatment of Palestinian ambulance drivers*"; in this respect, serious measures were advocated "*to ensure Palestinian women's unrestricted access to adequate prenatal, natal and post-natal medical care*". Finally, Israel was urged to take "*measures to ensure the availability and accessibility of psychological trauma care for people living in Gaza, in particular children*".

As to the *right to education* under Article 13 and 14, measures to address the serious shortage of classrooms in schools for Arab Israeli children as well as in the OPT were recommended to the State party, which was additionally urged "*to ensure that children living in East Jerusalem are able to be absorbed in the regular education system through the establishment of adequate infrastructures, and until such time to provide financial coverage for alternative educational frameworks as an interim solution, in line with the decision of the High Court of Justice of 6 February 2011*".<sup>1778</sup> Conversely, measures allowing the Palestinian Authority's functions and powers under the 1995 Interim Agreement were recommended in order to guarantee the right to education for children living in the OPT. Nevertheless, the State party was urged "*to address violations of the right to education, including those stemming from restriction on movement, incidents of harassment and attacks by the Israeli military and settlers on school children and educational facilities, as well as non-attendance caused by a lack of registration*".<sup>1779</sup>

In relation to the measures adopted by Israeli authorities to restrict freedom of movement of both people and goods in the OPT, the Committee specifically urged the State party to ensure to

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<sup>1777</sup> *Ibid.*, paras. 31-32.

<sup>1778</sup> *Ibid.*, para. 33.

<sup>1779</sup> *Ibid.*, para 35, in which it was also addressed the concern that in East Jerusalem there are around 10,000 unregistered children, out of which around 5,500 do not attend school because of their lack of registration.

Palestinians living therein the possibility to “*exercise their right to take part in cultural and religious life, without restrictions other than those that are strictly proportionate to security considerations and are non-discriminatory in their application, in accordance with international humanitarian law*”. The protection of holy sites in the OPT was also recommended against demolition and desecration in accordance with the Protection of Holy Places Law 5727-1967.<sup>1780</sup>

The obligation to respect the right to culture under Article 15 was addressed in relation to the measures relocating Bedouin Arab in new settlements, by recommending the State party to “*fully respect the rights of the Arab-Bedouin people to their traditional and ancestral lands*”.<sup>1781</sup>

Overall, it seems that the Concluding Observations in the third periodic review of Israel as party to the ICESCR offer a more detailed elaboration of its duty to respect alongside positive duties to protect ESC rights as a result of its exercise of effective control over the occupied territories in question. In doing so, the Committee also updated the record of breaches of legal guarantees relating to work, social security, housing, education, healthcare, food, and culture according to a line of reasoning that confirms a constant link between and among the various categories of human rights.

### ***The Committee on Racial Discrimination’s reference to the criterion of effective control***

During its monitoring activities in respect of Israel, the Committee on Racial Discrimination has reiterated the applicability of the Convention to “*all territories under the State party’s effective control*”,<sup>1782</sup> a position that already previously emerged.<sup>1783</sup> Despite the Israeli delegation’s subsequent willingness to discuss issues regarding the West Bank and the Gaza Strip, even its most recent reports did not contain any information concerning the population living in these territories.<sup>1784</sup> In re-expressing its

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<sup>1780</sup> *Ibid.*, para. 36.

<sup>1781</sup> *Ibid.*, para. 37.

<sup>1782</sup> *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel*, UN Doc. CERD/C/ISR/CO/13, 14 June 2007, para. 32.

<sup>1783</sup> In connections with the consideration of the tenth and thirteenth periodic reports of Israel, the Committee’s Rapporteur requested information on “*the number of investigations of complaints of misconduct of the Israeli Defence Force in the Occupied Territories as well as the resulting number of indictments, prosecutions, and convictions*”, see CERD, 69<sup>th</sup> sess., 31 July-18 August 2006, UN Doc. CERD/C/471/Add.2, para. 13. Further, the Rapporteur requested for information on “*how the reported application in the Occupied Palestinian Territories of different set of legislation and rules to Palestinians and Israelis who have committed offences complies with the principle of non-discrimination*”, and on “*violence, intimidation and destruction of property of Palestinians by Israeli settlers in the Occupied Palestinian Territories*” (*ibid.*, para. 14). Then, information was requested on measures adopted by the State Party in relation to the ICJ’s advisory opinion on the wall (*op. cit.*, para. 15), and on non-discrimination and applicability of different rules to Palestinians and Israelis in the OPT concerning freedom of movement, land allocation, access to housing, food, and medical services (*op. cit.*, para. 16).

<sup>1784</sup> Israel submitted these in one document (CERD/C/ISR/14-16), at its 2131<sup>th</sup> and 2132<sup>th</sup> meetings (CERD/C/SR.2131 and CERD/C/SR.2132), held on 15 and 16 February 2012.

serious concern at the State party's position to the effect that the CERD does not apply to all the territories under its effective control, the Committee reiterated that such a position is not consistent with the letter and spirit of the Convention as well as with international law, as affirmed also by the International Court of Justice and by other international bodies. Thus, again, Israel was urged "*to ensure that all civilians under its effective control enjoy full rights under the Convention without discrimination based on ethnicity, citizenship, or national origin*".<sup>1785</sup>

As far as the situation of the occupied Palestinian territories (including East Jerusalem and the occupied Syrian Golan) is specifically concerned, the Committee referred to some violations of the CERD that specifically relate to certain ESC rights.

In addressing that the Israeli planning and zoning policy in the West Bank, including East Jerusalem, seriously breached a range of fundamental rights under the Convention<sup>1786</sup>, the Committee urged Israel to review the whole policy so as to ensure Palestinian and Bedouin rights to property, access to land, access to housing and access to natural resources (especially water resources), recommending the implementation of such policy in consultation with the populations directly affected by these measures (para. 25).

In expressing concern for the "*dramatic and disproportionate impact of the Israel Defense Forces' blockade and military operations on Palestinians' right to housing and basic services in the Gaza Strip*", the Committee urged the State party to rescind its blockade policy and urgently "*allow all construction materials necessary for rebuilding homes and civilian infrastructures into the Gaza Strip so as to ensure respect for Palestinians' right to housing, education, health, water and sanitation in compliance with the Convention*" (para. 26).

In expressing concern for "*the vulnerable situation of Syrian residents of the Occupied Syrian Golan and their unequal access to land, housing and basic services*", the Committee observed that the State party should guarantee "*equal access for all residents of Israeli-controlled territories to fundamental rights such as the right to land, housing, movement, marriage and choice of spouse*", also urging it to satisfactorily solve "*the issue of family separation that particularly affects Syrian residents of the Occupied Syrian Golan*" (para. 29).

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<sup>1785</sup> *Concluding observations of the Committee on the Elimination of Racial Discrimination: Israel*, UN Doc. CERD/C/ISR/CO/14-16, 9 March 2012, para.10; as to the territories under its effective control, it refers to the West Bank, including East Jerusalem, the Gaza Strip and the Occupied Syrian Golan.

<sup>1786</sup> The Committee articulates the State party's discriminatory planning policy by referring to the fact that the granting of construction permits to Palestinian and Bedouin communities is rare and demolitions mostly target property owned by Palestinians and Bedouins. Moreover, concern is expressed on the adverse tendency of preferential treatment for the expansion of Israeli settlements, "*through the use of 'state land' allocated for settlements, the provision of infrastructure such as roads and systems, high approval rates for planning permits and the establishment of Special Planning Committees consisting of settlers for consultative decision-making processes*". Additionally, the "*State party's policy of 'demographic balance'*, which has been a stated aim of official municipal planning documents (particularly in the city of Jerusalem) is negatively referred too by recommending its elimination.

### ***The Committee on the Rights of the Child***

Its Concluding Observations on Israel's periodic reports are noteworthy. The State party's persistent refusal to provide information and data and to respond to the Committee's written questions on children living in the OPT (including East Jerusalem and the occupied Syrian Golan Heights) was considered by the Committee as greatly affecting the adequacy of the reporting process and its accountability for the implementation of the CRC, in respect of which it was urged to abide by its obligations to ensure the full application of this treaty also in those territories.<sup>1787</sup>

The Committee reiterated that the provisions of the Convention and Optional Protocols apply in favour of the children living therein, notably for conduct by the State party's authorities or agents which impact the enjoyment of the rights concerned.<sup>1788</sup>

### ***The UN Special Rapporteurs' approach to the issue of "effective control"***

Another attempt to approach the concept of jurisdiction through the criterion of "*effective control*" in relation to the Israeli-Palestinian situation has emerged in the monitoring activities of some UN Charter-based mechanisms. Several of their reports provide various examples as to what might potentially be regarded as '*violations of ESC rights*' therein, including: the closures causing limited ability to access to both health and education services; the wall and occupation deteriorating the quality of education; the destructions of infrastructures resulting in severe difficulties in the access to safe clean water; house demolitions causing a considerable scarcity of shelters; the loss of property caused by house demolitions, land requisitions and the levelling of land; poverty and growing unemployment resulting from the closures and the wall.<sup>1789</sup>

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<sup>1787</sup> See *Concluding Observations on the second to fourth periodic reports of Israel*, UN Doc. CRC/C/ISR/CO/2-4, 4 July 2013, para. 3; see especially para. 53 on the deterioration of basic health; para. 59 on the increasing poverty among Palestinian children, the serious violations of their right to an adequate standard of living of Palestinian and Bedouin families resulting from the occupation, land confiscation, critical shortage, large-scale demolition of Palestinian houses, chronic malnutrition; paras. 61-68 on education. See also *Concluding Observations on the initial report by Israel*, 2 October 2002, UN Doc. CRC/C/15/Add.195, para. 2; see particularly para. 44 and paras. 52-53, on the deterioration of health and health services of children in the OPT and the prevalence of malnutrition, in addition to the grave deterioration of access to education of children therein because of measures of restrictions on mobility.

<sup>1788</sup> See "Consideration of reports submitted by States parties under article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict", UN Doc. CRC/C/OPAC/ISR/CO/1, 29 January 2010, para. 4.

<sup>1789</sup> On the impacts of closures on the rights to education, see *Report on the situation of human rights in the Palestinian territories occupied since 1967, submitted by Mr. Giorgio Giacomelli, Special Rapporteur, pursuant to Commission on Human Rights resolution 1993/2 A*, UN Doc. E/CN.4/2000/25, 15 March 2000, paras. 47-49. On house demolitions, see *Report of the Special Rapporteur John Dugard on the situation of human rights in the Palestinian Territories occupied since 1967 to the Human Rights Council*, A/61/470, 27 September 2006, paras. 55-56. On the humanitarian crisis in the Palestinian territories resulting from the occupation and the construction of the wall, see *Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied since 1967*, A/60/271, 18 August 2005, paras. 46-49; *Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian*

Remarkably, in a number of reports released by the Special Rapporteur on the situation of human rights in the occupied Palestinian territories, *the concept of jurisdiction* is interpreted by exploring the criterion of *effective control of the territory of Gaza* and focusing on the *factual circumstance of the impact on the lives of the population located therein* (rather than relying on the military presence on the ground of the occupying power's army).

Indeed, in August 2005 Israel withdrew its settlers and armed forces from Gaza, and according to its Government such a withdrawal ended the related occupation. However, on the basis that "*Palestine constitutes a single self-determination unit, comprising the West Bank and Gaza*" under the Oslo Agreements, the withdrawal was viewed as not ending the situation of occupation.<sup>1790</sup> In particular, although the absence of a military occupying power in Gaza removed many of the features of occupation, several reasons were highlighted by the Special Rapporteur. One of his main points is that "*technological advances since 1949 have changed the whole nature of control*" and "*it is no longer necessary for a foreign military power to maintain a permanent physical presence in a territory to exercise control*". In this regard, Israel was deemed to retain "*effective control of Gaza*" even before its forces re-entered therein in 2006; such a control was exercised over its airspace, sea space and territorial waters (fishing has been allowed only within 10 nautical miles of the coastline) and external borders; its effectiveness relied on certain actions of the Israel Defence Forces, such as "*sonic booms caused by (Israeli) over-flying aircraft*", "*regular shelling of homes and fields along the border*" and "*targeted assassinations of militants*".<sup>1791</sup> Additional factual circumstances confirming the maintenance of control were related to the Israeli administration of the Gaza population's civil register, the provision of identity documents to Gazans (a precondition for control and movement in and out of that territory), the unilateral administration of entry visas and work permits for thousands of Palestinian non-ID holders in the occupied

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*Territories occupied since 1967*, UN Doc. E/CN.4/2006/29, 17 January 2006, paras. 47-50; *Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian Territories occupied since 1967*, UN Doc. A/HRC/4/17, 29 January 2007, paras. 14-20. On Israeli actions against Gaza and their consequences concerning ESC rights, see *Report of the Special Rapporteur of the Commission of Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied since 1967*, UN Doc. A/HRC/7/17, 21 January 2008, paras. 15-24.

<sup>1790</sup> *Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied since 1967*, A/60/271, 18 August 2005, para. 8 reading: "*it would be incomprehensible if a statement proclaiming the end of occupation for Gaza were made without addressing the continued occupation of the West Bank*"; *Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian Territories occupied since 1967*, UN Doc. E/CN.4/2006/29, 17 January 2006, para. 8 concluding: "*To suggest that Gaza should enjoy a status different from that of the West Bank would violate the territorial integrity of Palestine and the substantive law of self-determination*".

<sup>1791</sup> *Report of the Special Rapporteur on the situation of human rights in the Palestinian Territories occupied since 1967 to the Human Rights Council*, A/61/470, 27 September 2006, paras. 7-8, adding that "*(t)he actions of IDF in respect of Gaza have clearly demonstrated that modern technology allows an occupying Power to effectively control a territory even without a military presence*" (para. 7) and that "*(t)he question whether Gaza remains an occupied territory is now of academic interest only. In the course of the cynically named "Operation Summer Rains" that commenced on 25 June, the IDF has not only asserted its control in Gaza by means of heavy shelling, but has also done so by means of a military presence*" (para. 8). See also *Report of the Special Rapporteur on the situation of human rights in the Palestinian Territories occupied since 1967 to the Human Rights Council*, UN Doc. A/HRC/4/17, 29 January 2007, para. 6.

territories and for foreign visitors.<sup>1792</sup> Three relevant facts additionally addressed by the same Special Rapporteur included the following: the holding of hundreds of Gaza prisoners in spite of their release “*at the close of occupation*” as provided for in Article 77 GCIV; the military control over a buffer zone ranging between 150 and 300 metres within Gaza along its eastern and northern borders from which Palestinians were excluded; the possibility for Israel to cut off electricity supplies to Gaza. Thus, the Special Rapporteur approached the issue of *control* by focusing on *the actual facts as regards its impact on the lives of the population living in the territories concerned*.

The prior Special Rapporteur, who monitored the situation in the occupied territories when the Israeli military presence was less concentrated, relied on three aspects to affirm the application of human rights treaty obligations therein.<sup>1793</sup> Firstly, Israel’s sharing of the “*personal*”, “*functional*” and “*geographical*” elements of jurisdiction with the Palestinian Authority in a patchwork of areas (“A”, “B”, “C”) as defined by the Oslo Agreement, with the exception of Jerusalem. Secondly, Israel’s constant exercise of control in such areas over the movement of people and goods between and among jurisdictional areas and the external borders. Thirdly, Israel’s claimed right to enter all areas for purposes of security as a matter of agreement with the Palestinian representatives.<sup>1794</sup>

As regards the present Special Rapporteur’s reports, the *issue of control* is implicitly or explicitly referred to. In the last one, the extraterritorial application of human rights is addressed by emphasising the relevant endorsement of other various forums.<sup>1795</sup>

Equally, the independent international fact-finding mission recently established to investigate

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<sup>1792</sup> Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian Territories occupied since 1967, UN Doc. E/CN.4/2006/29, 17 January 2006, para. 8, noting that “(w)hile it is true that the Rafah crossing is now open to Palestinian ID cardholders, Israel reserves the right to complain about who crosses at Gaza and has already done so (the crossing is administered by the Palestinian Authority and Egypt, but supervised by European Union inspectors and followed by Israeli officials on TV monitor screens). Karni crossing was largely dysfunctional at the time of writing and allowed passage of only 35 to 40 trucks compared with the 150 trucks promised by the 15 November agreement. This is a serious problem for greenhouse agricultural products harvested in December/January and exported to Israel and the West Bank. The passage of persons between Gaza and the West Bank by bus convoys, scheduled to start on 15 December, has been stopped by Israel, as a result of a suicide bombing in Netanya and Israel’s dissatisfaction with the Rafah crossing”.

<sup>1793</sup> See *Report on the situation of human rights in the Palestinian territories occupied since 1967, submitted by Mr. Giorgio Giacomelli, Special Rapporteur, pursuant to Commission on Human Rights resolution 1993/2 A*, “Question of the violation of human rights in the occupied Arab territories, including Palestine”, 15 March 2000, UN Doc. E/CN.4/2000/25, para. 6, which emphasises the treaty bodies’ view that “the responsibility and obligation to observe human rights, especially upon a ratifying State, encompasses the State jurisdiction even when such jurisdiction exceeds the State’s entitled territory, whether such territories are occupied, administered or overseen in any other form”.

<sup>1794</sup> *Ibid.*, paras. 7-8.

<sup>1795</sup> See *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, submitted in accordance with Human Rights Council resolution 5/1*, “Situation of human rights in the Palestinian territories occupied since 1967”, UN Doc. A/68/376, 10 September 2013, para. 18, in which he mentioned, as examples: the ICJ Advisory Opinion of 9 July 2004, paras. 109-113; the Human Rights Committee’s *General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, paras. 15, 18; and the Public Commission to Examine the Maritime Incident of 31 May 2010 (the Turkel Commission), “*Israel’s mechanisms for examining and investigating complaints and claims of violations of the laws of armed conflict according to international law*”, February 2013, at 64.

the implications of the settlements on the rights of Palestinian people throughout the occupied territories confirmed that Israel was bound to respect, protect, promote and fulfil the full range of human rights “*of all persons within its jurisdiction*” being a State party to the ICCPR, ICESCR, the CAT, the CEDAW, the CRC (plus its Optional Protocol on the involvement of children in armed conflict) and the CERD, and, furthermore, as a result of relevant human rights rules that are a part of customary international law. Emphasis was then placed on the basic view that “*the rights protected by human rights treaties must be available to all individuals in the territory of or subject to the jurisdiction of Israel, except where the State has lawfully derogated from them*”.<sup>1796</sup>

### **5.1.3.2. Foreseeability as to the effects on the enjoyment of ESC rights**

States’ conduct may affect the access and enjoyment of ESC rights outside their sovereign territories without exercising an effective factual control over a situation or an individual. In this regard an emerging argument for the extraterritoriality issue is that the obligations flowing from relevant treaties may be triggered when *the State’s authorities “know or should have known” that its conduct will produce significant human rights consequences within a foreign territory*.<sup>1797</sup>

In conflict-related settings this perspective would entail inquiring as to the potential of holding a foreign State liable for the *foreseeable consequences which result from its acts or omissions and which nullify or impair the enjoyment of ESC rights of civilians* even in the absence of its effective control or authority. The required protection of civilians would derive from the State’s power/capability to positively influence their human rights situation. In any case, the condition of *foreseeability* as to the impingement of civilians’ ESC rights by the State’s conduct in another territory would entail exclusion of its responsibility insofar as the proximity of its conduct with such human rights impacts is not found or they are only remotely connected. In other words, the *relationship of the State with a particular set of circumstances* would be of such a special nature that would end up being decisive in enlivening its positive obligations.

It is worth briefly considering that some regional judicial human rights bodies have already confirmed this view. According to the Inter-American Commission on Human Rights “*a State party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents*

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<sup>1796</sup> See *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. A/HRC/22/63, 7 February 2013, paras. 11-12.

<sup>1797</sup> Under Maastricht Principle 9 (b), “*a State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following: ... b) situations over which state acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory*”.



which produce effects or are undertaken outside that State's own territory".<sup>1798</sup> Similarly, in delineating the scope of States parties' obligations under Article 1 ECHR, the European Court affirmed that jurisdiction "may extend to acts of its authorities, which produce effects outside its own territory" and some potential situations were identified in this regard, as detailed above.<sup>1799</sup> Furthermore, according to the same Court, "State's responsibility may [...] be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction".<sup>1800</sup>

A further relevant statement comes from the jurisprudence of the Human Rights Committee, which have recognised a State party's responsibility for extraterritorial breaches of the ICCPR "if it is a link in the causal chain that would make possible violations in another jurisdiction", so noting that "the risk of an extraterritorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time".<sup>1801</sup>

### 5.1.3.3. Decisive influence or measures to realise ESC rights

In situations in which a State undertakes policies and measures directly supporting the access, enjoyment and progressive realisation of ESC rights beyond its sovereign territory, the question as *whether or not that State is required to do so in accordance with international law* is controversial. As far as the protection of civilians is specifically concerned, this issue may prove particularly relevant for evaluating multilateral contexts of reconstruction and development assistance in conflict-related contexts. Matters relating to environmental protection, investment, bilateral and multilateral trade may also have certain relevance in such contexts.

Legal scholarship has enunciated the content and implications of a possible obligation in this regard. States would be duty-bound to conform (universally) to ESC rights and to contribute to their fulfilment even outside national territories; such a requirement would take the form of *interstate cooperation* as well as other *concrete, deliberate and targeted measures* supporting their enjoyment by individuals overseas, but respecting the sovereignty of the territorially competent State, and without

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<sup>1798</sup> IACommHR, *Saldano v. Argentina*, Report No. 38/99, OEA/Ser.L/V/II.95 Doc. 7 rev., 11 March 1999, para 17.

<sup>1799</sup> ECtHR, *Al-Skeini and Others v. The United Kingdom*, Appl. No. 55721/07, Judgment, 7 July 2011, para. 133.

<sup>1800</sup> ECtHR, *Ilascu and Others v. Moldova and Russia*, Appl. No. 48787/99, Judgment, 8 July 2004, para. 317.

<sup>1801</sup> See HRC, *Mohammad Munaf v. Romania*, Communication No. 1539/2006, UN Doc. CCPR/C/96/D/1539/2006, 21 August 2009, para. 14.2 ("The main issue to be considered by the Committee is whether, by allowing the author to leave the premises of the Romanian Embassy in Baghdad, it exercised jurisdiction over him in a way that exposed him to a real risk of becoming a victim of violations of his rights under articles 6, 7, 9, 10, paragraph 1 and 14 of the Covenant, which it could reasonably have anticipated. The Committee recalls its jurisprudence that a State party may be responsible for extraterritorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction. Thus, the risk of an extraterritorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time: in this case at the time of the author's departure from the Embassy").

restricting the scope of the obligation upon each State to meet its duties towards the individuals present on its own territory.<sup>1802</sup>

According to this line of reasoning, a duty to advance rules setting up “*an international enabling environment*” is specifically articulated; related tools include either the “*elaboration, interpretation, application and regular review of multilateral and bilateral agreements as well as international standards*”, or State policies and measures regarding its own foreign relations, even within international organizations, and its domestic situation (Maastricht Principle 29). Similarly, a procedural duty for cooperating effectively in the fulfilment of ESC rights globally is identified; *necessary coordination among States* to devise a suitable international division of responsibilities is emphasised - although this would not exempt them from acting separately to meet their own positive duties on ESC rights extraterritorially (Maastricht Principle 30). A procedural component of the duty concerned is enunciated by providing a non-exhaustive list of capacities and resources (Maastricht Principle 31). Guiding principles and priorities during such cooperation are also detailed.<sup>1803</sup>

Within the same scholarly debate, *providing international assistance* as well as *seeking international assistance and cooperation* are understood as two State duties for the satisfaction of ESC rights in the territory of other States: while the first one would be a component of international cooperation, the second one would place on the receiving State the explanatory burden of rejecting assistance, and the requesting State would retain the title to decline them (Maastricht Principles 33 and 34). Furthermore, the notion international cooperation is understood as requiring to desist from “*nullifying or impairing human rights in other States*” and to ensure “*that non-State actors are prohibited from prejudicing the enjoyment of such rights*” when the State is in a position to influence their conduct.

In view of this comprehensive effort to articulate extraterritorial State duties, which would result from the requirements of international cooperation set forth in international law, the next sections aim to explore two relevant aspects: the role of international cooperation in relation to ESC rights within conflict-related settings as well as the role of sanctions in such settings.

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<sup>1802</sup> Under Maastricht Principle 9 (c), “*a State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following: ... c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realise economic, social and cultural rights extraterritorially, in accordance with international law*”. See also Maastricht Principles 28-35.

<sup>1803</sup> Maastricht Principle 32 reads: “*In fulfilling economic, social and cultural rights extraterritorially, States must: a) prioritize the realisation of the rights of disadvantaged, marginalised and vulnerable groups; b) prioritize core obligations to realise minimum essential levels of economic, social and cultural rights, and move as expeditiously and effectively as possible towards the full realisation of economic, social and cultural rights; c) observe international human rights standards, including the right to self-determination and the right to participate in decision-making, as well as the principles of non-discrimination and equality, including gender equality, transparency, and accountability; and d) avoid any retrogressive measures or else discharge their burden to demonstrate that such measures are duly justified by reference to the full range of human rights obligations, and are only taken after a comprehensive examination of alternatives*”.

## 5.2. The concept of “international cooperation”: which relevance for the extraterritorial application of treaties on ESC rights?

International cooperation may be regarded as a general principle of international law, as detailed heretofore.<sup>1804</sup> The growing significance of this concept deserves attention for the purpose of assessing the potential legal basis for extending the obligations stemming from treaties on ESC rights beyond the territorial State in conflict-related situations. Indeed, “*international assistance and cooperation*” is explicitly referred as *one of the means* to achieve the rights set forth in the ICESCR (e.g. Article 2(1), Article 11(1), Articles 22 and 23) and in the CRC (e.g. Article 4, Article 23(4), Article 24(4), Article 28(3)), which specifically prescribe States’ actions that by their very nature are supposed to produce effects beyond national borders. This concept is also contained in other specialized human rights treaties such as the ICRPD (e.g. Article 32), CAT (e.g. Article 9(1)), ICPED (e.g. Article 15).

Accordingly, in conflict-related situations in which civilians’ ESC rights (as entitled to both individuals and groups) may be substantially impacted by actions or omissions made by States other than their own, a supplementary question may arise: whether and to what extent States are required to enhance the realisation of such rights on the basis of the international cooperation as referred in several international and regional instruments, which would entail *duties to take separate or joint actions through international cooperation in other States*.

In particular, the relevance of this concept may be explored in connection to the emerging normative content of the obligations flowing from treaties on ESC rights as applied in conflict-related settings. Affected civilians may be taken as the beneficiaries of the rights satisfied by means of international cooperation. The legal implications of its relevance as an additional lens to read extraterritorial dimensions of such treaties may be examined in areas such as financial assistance, technical and social assistance, or the multilateral contexts of reconstruction and development cooperation in post-conflict situations. In this regard, a basic question would concern the emerging patterns of State practice in the area of international cooperation and assistance in the process of

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<sup>1804</sup> See Articles 1(3), 55, and 56 UN Charter; Articles 22 and 28 UDHR; paragraph 2 of the *Proclamation of Teheran, Final Act of the International Conference on Human Rights*, Teheran, 22 April to 13 May 1968, A/CONF. 32/41, at 3. For key documents that address international cooperation and elaborate on related issues, see Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 October 1970; Charter of Economic, Rights and Duties of States, GA Res. 3281 (XXIX), 14 December 1974, adopted as one tool for pursuing the New International Economic Order; Declaration on the Right to Development, GA Res. 41/128, 4 December 1986; Vienna Declaration and Programme of Action, A/CONF.157/23, 25 June 1993; UN Millennium Declaration, GA Res. 55/2, 8 September 2000. For a detailed analysis of such documents, see S. Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation*, Intersentia, 2006, pp. 17-18; H.J. Steiner, P. Alston, R. Goodman, *op. cit.*, 2008, pp. 1442-1461; M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, Intersentia, pp. 316-324.

implementing civilians' ESC rights.

### **5.2.1. “International cooperation”: an emerging basis for extraterritorial obligations on ESC rights**

In considering the emergence of international cooperation as a further notion for the purpose of assessing the potential legal basis to extend the obligations flowing from treaties on ESC rights beyond the territorial State, the next sections primarily address its status as a general principle of international law as well as its reference in human rights treaties. Additionally, some remarks are briefly highlighted in relation to customary international law.

#### **5.2.1.1. International cooperation as a general principle of international law**

The UN Charter embodies the notion of international cooperation in various provisions. Under Article 1(3) one of the purposes of this international organization is “*to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion*”. A further two key provisions are contained in chapter IX entitled ‘International Economic and Social Cooperation’; under Article 56, “*all Members pledge themselves to take joint and separate action in cooperation with the Organization...*” to achieve purposes indicated in Article 55, including “*... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion*” and “*higher standards of living*”.<sup>1805</sup>

Conversely, the UDHR - which is understood as an “authoritative interpretation” of the aforementioned provisions<sup>1806</sup> and as declaring “general principles of law as a source of international law”<sup>1807</sup> - lays down some relevant elements. Article 22 entitles everyone to the realisation, “*... through national effort and international co-operation and in accordance with the organization and*

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<sup>1805</sup> UN Charter, signed on 26 June 1945 and entered into force on 24 October 1945. See R. Wolfrum, “Article 55 (a) and (b)”, in B. Simma et al. (eds.), *The Charter of the United Nation. A Commentary*<sup>2</sup>, 2002, at 897-917; E. Riedel, “Article 55 (c)”, in B. Simma, *ibid.*, at 918-941; R. Wolfrum, “Article 56”, in B. Simma, *ibid.*, pp. 941-944.

<sup>1806</sup> See ICJ, *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* (Merits), 24 May 1980, ICJ Reports 1980, 3, 42. See T. Buergenthal, “International Human Rights Law and Institutions: Accomplishments and Prospects”, 63 *Washington Law Review*, 1988, 1, 5-6, 8-9; B. Simma and P. Alston, “The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles”, 12 *Australian Yearbook of International Law*, 1988-9, pp. 100-102; H. Hannum, “The Status of the Universal Declaration of Human Rights in National and International Law”, 25 *Georgia Journal of International and Comparative Law*, 1995-1996, pp. 351-352; O. De Schutter, “The Status of Human Rights in International Law”, in C. Krause and M. Scheinin (eds.), *International Protection of Human Rights: A Textbook, op. cit.*, p. 39, 41.

<sup>1807</sup> See the *Proclamation of Teheran, Final Act of the International Conference on Human Rights*, Teheran, 22 April to 13 May 1968, A/CONF. 32/41, at 3 (1968), para. 2, recognising that the UDHR’s “*common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family*” and its constituting “*an obligation for all members of the international community*”.

resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”. Additionally, Article 28 proclaims the entitlement of everyone “to a social and international order in which the rights and freedoms in this Declaration can be fully realised”, so evoking cooperation in setting up such an order.

Notable reiterations of this view are contained in international declarations, in which States undertake to ensure consistency of their foreign policies with the realisation of human rights and accept certain extraterritorial duties to *respect* them. In this regard, the Declaration on the Right to Development affirms that States have to generate “national and international conditions” beneficial to realising the right in question, they have to cooperate for achieving this right, and they have to take steps “individually and collectively” to frame development policies focused on its fulfillment.<sup>1808</sup> These commitments relate to all fundamental rights since the right to development under Article 1 DRD entitles “... every human person and all peoples to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be realised”. A unanimous recognition by the Heads of States and Governments is also expressed in the Millennium Declaration: “... in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level”.<sup>1809</sup> Furthermore, the 2005 Paris Declaration on Aid Effectiveness, the Accra Agenda for Action and the 2008 Doha Declaration on Financing for Development move towards similar directions.<sup>1810</sup> It is reasonable to contend that all these pronouncements indicate a certain practice of States in the application of human rights treaties and contribute to a foundation as to a certain conformity concerning their interpretation.<sup>1811</sup>

The relevance of the principle of international cooperation is also emphasised in the ILC Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities. According to Article 4 (entitled “Cooperation”), “States concerned shall cooperate in good faith and, as necessary, seek the assistance of

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<sup>1808</sup> See Articles 3 and 4 of the Declaration on the Right to Development of 4 December 1986 (GA Res. 41/128). Subsequent declarations (adopted unanimously) refer to the right to development: e.g., the UN Millennium Declaration of 8 September 2000 (GA Res. 55/2); the Vienna Declaration and Programme of Action of 25 June 1993 (A/CONF.157/23). See also M. E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law*, Oxford, 2007.

<sup>1809</sup> See UN Millennium Declaration, GA Res. 55/2, 8 September 2000, para. 2.

<sup>1810</sup> The Doha Declaration was adopted as outcome-document of the international conference to review the implementation of the Monterrey Consensus (29 November - 2 December 2008), A/CONF.212/L.1/Rev.1. The Accra Agenda for Action was agreed at the OECD’s Ministerial Conference (comprising over 100 countries), at the third high level forum on Aid Effectiveness (2-4 September 2008); its paragraph 13 (d) provides that “developing countries and donors will ensure that their respective development policies and programmes are designed and implemented in ways consistent with their agreed international commitments on gender equality, human rights, disability and environmental sustainability”. See A. Khalfan, “Development Cooperation and Extraterritorial Obligations”, in M. Langford and A. Russell (eds.), *The Right to Water: Theory, Practice and Prospects*, Cambridge, 2012.

<sup>1811</sup> Article 31 (3) (b) VCLT.

one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof”.<sup>1812</sup>

### 5.2.1.2. International cooperation as referred to in human rights treaties

In acknowledging the importance of international cooperation, the CRPD requires States parties to “... undertake appropriate and effective measures in this regard ...”, listing explanatory measures to accomplish this commitment.<sup>1813</sup> The CAT establishes a duty to cooperate for the full realisation of human rights, requiring Contracting Parties to afford each other “... the greatest measure of assistance in connection with criminal proceedings ...” relating to torture, and it requires “... the supply of all evidence at their disposal necessary for the proceedings”.<sup>1814</sup> The ICPPED also contains a comparable commitment.<sup>1815</sup>

As to the CRC, States parties are required to take measures to implement the ESC rights enshrined in this treaty “... to the maximum extent of their available resources and, where needed, within the framework of international cooperation”.<sup>1816</sup> In this respect, the Committee on the Rights of the Child has highlighted that “[w]hen States ratify the Convention, they take upon themselves obligations not only to implement it within their jurisdiction, but also to contribute, through international cooperation, to global implementation”.<sup>1817</sup> Furthermore, under its first two Optional Protocols States parties’ cooperation is required so as to prevent and punish those responsible for the involvement of children in armed conflict, the sale of children, child pornography and child prostitution. They are also required to assist victims and afford technical and financial assistance inasmuch as they are in a position to do so.<sup>1818</sup>

A specific commitment to assist and cooperate in favour of the ESC rights enshrined in the ICESCR is contained in various provisions. Primarily, according to Article 2 (1), States parties undertake to “take steps, individually and through international assistance and co-operation, especially economic and

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<sup>1812</sup> Report of the International Law Commission on the work of the fifty-third session, UN Doc. A/56/10, 21 August 2001, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 155.

<sup>1813</sup> Article 32 CRPD.

<sup>1814</sup> Article 9 (1) CAT.

<sup>1815</sup> According to Article 15 of ICPPED, “States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains”.

<sup>1816</sup> Article 4 CRC. Under Articles 24(4) and 28(3) States are required to “promote and encourage international cooperation” concerning the right to health and the right to education, with particular consideration of “the needs of developing countries”. See W. Vandenhoele, “Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate Internationally for Development”, 17(1) *International Journal of Children's Rights*, 2009, 23-63.

<sup>1817</sup> Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the Child*, Thirty-fourth session, 2003, UN Doc. CRC/GC/2003/5, para. 5.

<sup>1818</sup> See Article 10 of the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography, A/54/49, vol. III (2000). See Article 7 of the Optional Protocol to the CRC on the involvement of children in armed conflict, A/54/49, vol. III (2000).

*technical*”, to the maximum of their available resources, “*with a view to achieving progressively the full realisation of the rights*” recognised in this treaty. In this regard, the existence of a State obligation to engage in international cooperation under the Covenant has been acknowledged by the CESCR since its early attempt to examine the nature of the treaty obligations.<sup>1819</sup> In addition, other notable elements concerning the context in which cooperation and assistance should be placed and how they should be interpreted stem from the Limburg Principles on implementation of the ICESCR.<sup>1820</sup>

The notion of international cooperation is mentioned for the right to an adequate standard of living under article 11(1) ICESCR, which provides that “*States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent*”.

Two relevant provisions relate to the context of the measures of implementation of this treaty. Under Article 22 ICESCR the Economic and Social Council may bring to the attention of other agencies and organs providing “technical assistance” every information arising out of States parties’ reports which “*may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant*”. Further, Article 23 identifies various forms of international action for achieving ESC rights, including “*such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned*”.

All these provisions appear to reinforce the idea that the obligations ensuing from the ICESCR may have international (and consequently extraterritorial) dimensions. In this respect, the treaty’s silence on its scope of application may be understood as confirming its extent beyond both territory and jurisdiction. However, the binding nature of “international cooperation” as articulated in the ICESCR is contentious, since the drafting history of this treaty and subsequent States’ practice do not offer an ultimate solution.

Significantly, some scholarly reviews of the drafting history of Article 2(1) have already highlighted the discussions taken in the 1950s and 1960s in the former Commission on Human Rights and in the General Assembly’s Third Committee in relation to the opportunity to include the

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<sup>1819</sup> *E.g.*, CESCR, *General Comment No. 3: The nature of States Parties’ obligations*, Fifth session, 1993, E/1991/23, para. 14. For a detailed analysis on the manner in which the Committee has approached the issue of extraterritoriality, see Sepulveda M., “Obligations of ‘International Assistance and Cooperation’ in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights”, 24 *Netherlands Quarterly of Human Rights*, 2006, pp. 271-303.

<sup>1820</sup> See Limburg Principles 29-34.

passage “*international assistance and cooperation*” in this provision.<sup>1821</sup> Precisely, although the drafters deemed it necessary to fully realise the ESC rights in question, disagreement emerged on the possibility to claim it as a right, but no vote was taken in this regard; the nature of cooperation was specifically debated, questioning also whether the requirement of being “*especially economic and technical*” would have limited that notion.<sup>1822</sup> Such competing views have reemerged during recent negotiations of the Optional Protocol to the ICESCR: while certain industrialized countries acknowledged a moral responsibility of international cooperation, this treaty was deemed not to impose legally binding obligations for ESC rights internationally.<sup>1823</sup>

Nevertheless, States have not expressed unanimous interpretation. It is a fact that the *travaux préparatoires*<sup>1824</sup> as well as textual elements of other provisions of the ICESCR offer some guidance on the meaning and scope of “international cooperation”: Article 11 (1) and (2) concerning the right to be free from hunger, Article 15 (4) in the field of science and culture, Article 22 on international measures for contributing to the effective implementation of the treaty, and Article 23 on other forms of international action such as technical assistance.

Even though divergences persist about the extent of the engagement in international cooperation and its specific implications, States generally agree that the ICESCR sets out some extraterritorial duties, as certain international declarations adopted without a vote seem to indicate. Of note, in the General Assembly’s resolutions on the right to adequate food, the latter is understood to require “... *the adoption of appropriate environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of human rights for all*”; and it is provided that “... *all States should make all efforts to ensure that their international policies of a political and economic nature, including international trade agreements, do not have a negative impact on the right to food in other countries*”.<sup>1825</sup> Another emblematic endorsement to cooperate internationally for advancing ESC rights is expressed in the Millennium Development Goal no. 8 on “*developing a global partnerships for development*”, which sets forth the targets

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<sup>1821</sup> On documentation and reflections concerning these debates, see S.I. Skogly, “The obligation of international assistance and cooperation in the International Covenant on Economic, Social and Cultural Rights”, in B. Morten (ed.), *Human Rights and Criminal Justice for the Downtrodden*, Kluwer Law International, 2003, pp. 403-420. See also P. Alston and G. Quinn, *op. cit.*, pp. 188-9.

<sup>1822</sup> GA, Seventeenth Session, Third Committee 1204<sup>th</sup> meeting, Official Records, para. 49. On this point, see S.I. Skogly, “The obligation of international assistance and cooperation in the International Covenant on Economic, Social and Cultural Rights”, in B. Morten (ed.), *Human Rights and Criminal Justice for the Downtrodden*, Kluwer Law International, 2003, pp. 407-412.

<sup>1823</sup> See Report of the Open-ended Working Group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its third session, UN Doc. E/CN.4/2006/47, paras. 78 and 82.

<sup>1824</sup> For a comment on the *travaux préparatoires* of the relevant provisions of the ICESCR and of the CRC, see M. Gondek, *The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties*, pp. 299-304.

<sup>1825</sup> GA Res. 64/159 (2009) (adopted without a vote), UN Doc. A/RES/64/159, paras. 32 and 20.



to be met by developed countries and covers basic efforts in areas such as development aid, debt relief, affordable essential drugs, trade and foreign direct investment. All these reiterations on international cooperation seem to strengthen the legal commitment in this field.

Notably, under the aforementioned human rights instruments, the concept of international cooperation clearly embraces, without being limited to, the notion of *international assistance*. A reference to “*international assistance and cooperation*” is contained only in the ICESCR. The CRC and the CRPD refer simply to “*international cooperation*”, being the latter viewed by their drafters as comprising the former. This is the case also for the Declaration on the Right to Development.

### **5.2.1.3. International cooperation on the right to food and the right to health**

The potential of international cooperation and assistance as a specific area for implementing internationally recognised ESC rights has been addressed from the perspective of extraterritorial obligations by the Special Rapporteurs on the right to food and the right to health.

Specifically, the importance of clarifying such obligations in relation to the right to food was primarily placed in the context of an increasingly integrated world economy.<sup>1826</sup> Conversely, a framework for better interpreting a human rights approach to development cooperation and food-aid has been suggested by the subsequent Special Rapporteur. Of remark is that *three levels for the realisation of the right to food* in this area are envisaged: the *normative* level (*i.e.* the obligation to provide cooperation), the level of *implementation* (with tools like national strategies and disciplined and context specific food aid), and the level of *evaluation*.<sup>1827</sup>

Conversely, the Special Rapporteur on the right to the highest attainable standard of health has spelt out “*the contours and content of the human rights responsibility of international assistance and cooperation in health*”, upon which the realisation of this right is viewed as highly dependent.<sup>1828</sup> In particular, *the*

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<sup>1826</sup> See *Report of the Special Rapporteur on the right to food, Mr. Jean Ziegler*, UN Doc. E/CN.4/2005/47, 24 January 2005, paras. 39-40. The extraterritorial obligations flowing from ESC rights were deemed one of the issues challenging the “*traditional territorial boundaries of human rights*” and full compliance with the obligations under the right to food is deemed to impose States to respect, protect and support the fulfilment of the right to food of people living in other territories. The objective of the report is to show that States have responsibilities under international law towards people living in other countries through their own actions and through their decisions taken as members of international organizations (see para. 34). In the same vein, Ziegler addressed that it “*cannot be argued that extraterritorial obligations towards these rights do not exist at all*” and States have at least “*responsibilities towards people living in other countries, both through their own actions and through international institutions*”, see *ibid.*, paras. 43-45.

<sup>1827</sup> See *Report of the Special Rapporteur on the right to food, Olivier De Schutter*, UN Doc. A/HCR/10/5/Add.1, 17 February 2009.

<sup>1828</sup> See *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt*, UN Doc. A/HRC/4/28/Add.2, 5 March 2008, para. 17. See also earlier Reports by the same Special Rapporteur, UN Doc. E/CN.4/2005/51, 11 February 2005, paras. 62-66; UN Doc. E/CN.4/2003/58, 13 February 2003, para. 28 (“*States have an obligation to take steps, individually and through international assistance and cooperation, towards the full realisation of the right to health. For example, States are obliged to respect the enjoyment of the right to health in other jurisdictions, to ensure*

*State duty to dispose of its available resources through offering international assistance and cooperation* is considered to be “supplementary” to the State obligation to realise the right to health within its own available resources. Then, substantive and procedural key features to be supported by such a duty are identified and include freedoms and entitlements, equality and non-discrimination, participation, monitoring, and accountability. Further, policy coherence across national and international policymaking processes is highlighted.<sup>1829</sup>

#### **5.2.1.4. Some remarks under customary international law**

It is worth briefly noting that States are required to bring to an end any breach of peremptory norms. This entails a duty to *cooperate to cease any serious violations*, a duty to *abstain from acknowledging* as legitimate every situation deriving from such violations, and a duty to *abstain from giving assistance or aid* to its maintainance.<sup>1830</sup> As commonly emphasised, peremptory norms may relate to every fundamental right. Indeed, the prohibition against inhuman, cruel or degrading treatment or punishment, war crimes, genocide, crimes against humanity, enforced disappearance, slavery, and racial discrimination represent relevant instances. Moreover, customary international law requires States to collaborate in the investigation of relevant crimes against international law and in the prosecution of related perpetrators.

#### **5.3. Sanctions or equivalent measures as acts giving rise to the extraterritorial application of treaties on ESC rights**

The application of sanctions and analogous measures in the contexts of armed conflict and occupation acquires a specific significance regarding the issue of extraterritoriality, since it may imply certain failures to comply with international human rights law.<sup>1831</sup> When States parties to human rights treaties participate in a regime of multilateral sanctions a basic potential conflict arises between the obligations incumbent on them under those treaties and the other international obligations existing upon the same States. A pertinent case here would concern a State has to impose sanctions to honour its obligation to comply with a certain sanctions regime set up by the Security Council under Chapter VII of the UN Charter; another instance concerns the sanctions

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*that no international agreement or policy adversely impacts upon the right to health, and that their representatives in international organizations take due account of the right to health, as well as the obligation of international assistance and cooperation, in all policy-making matters”*).

<sup>1829</sup> UN Doc. A/HRC/4/28/Add.2, *ibid.*, para. 30.

<sup>1830</sup> See Commentary to Article 41 of the ILC’s Draft Articles of 2001, *op. cit.*

<sup>1831</sup> For an analysis of the notion of sanctions in international law, see G. Abi-Saab, “The concept of sanctions in international law”, in V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law*, The Hague: Kluwer Law International, 2002, pp. 29-41.

needed to comply with a State's obligation to bring to an end breaches of peremptory international norms.

The great potential of a sanctions regime to produce negative effects upon the enjoyment of human rights of the population living within the target State is widely acknowledged, although the related issue of responsibility remains a matter of dispute.<sup>1832</sup> Initially, scholars dealing with the legality of sanctions and their consequential impacts on human rights have extensively focused on the question as to the limits upon the Security Council regarding sanctions.<sup>1833</sup> In this regard, the right to implement them has not been understood as boundless, especially in view of the limitations stemming from the UN Charter, international humanitarian law, international human rights law, and certain resolutions of the General Assembly, though of non-binding character.<sup>1834</sup> Conversely, a distinct issue subsequently addressed by scholars has specifically concerned the human rights obligations applicable to States (both as members of the Security Council and as individual States implementing the sanctions) and the implications of such obligations.<sup>1835</sup>

As evident in the Maastricht Principles (particularly principles 19-22), this issue has been elaborated for the general *obligation to respect ESC rights*. In addition to refraining from adopting a wide range of measures that nullify or impair the enjoyment of ESC rights, States are required to fully respect human rights obligations in the distinct phases ("*design, implementation and termination*") of any sanctions regime undertaken to comply with other international legal obligations. In any case, the provision and transfer of *services and goods indispensable to meet core obligations* are regarded as unconditionally excluded from any permissible content of economic sanctions.

For the purposes of the present research, a primary consideration remains that, despite the

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<sup>1832</sup> *E.g.*, "Report of the Second Panel established pursuant to the note by the President of the Security Council of 30 January 1999 (S/1999/100), concerning the current humanitarian situation in Iraq", Annex II of S/1999/356, 30 March 1999.

<sup>1833</sup> See W.M. Reisman and D.L. Stevick, "The applicability of international law standards to United Nations economic sanctions programmes", 9 *EJIL*, 1998, pp. 86-141; E. de Wet, "Human Rights limitations to economic enforcement measures under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime", 14 *Leiden JIL*, 2001, pp. 277-300.

<sup>1834</sup> See *Working paper prepared by Prof. Marc Bossuyt*, "The adverse consequences of economic sanctions on the enjoyment of human rights", Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2000/33, 21 June 2000, paras. 19-17; a six-prong test was developed by the author in order to assess sanctions: 1. They have been imposed for valid reasons; 2. They have to target proper parties (not the civilian population uninvolved in the threat to international peace and security); 3. They must target proper goods or objects (without interfering with the flow of humanitarian goods necessary to ensure basic subsistence rights of the civilian population); 4. They have to be reasonably time-limited; 5. They have to be effective (capable to attain the chosen result); 6. They have to be free from protest arising from violations of the "*principles of humanity and the dictates of the public conscience*". See also M. Craven, "Humanitarianism and the quest for smarter sanctions", 13 *EJIL*, 2002, 43-61, in particular at 51-53 three possible approaches to the question of legal limits to the activity of the Security Council are provided by the author.

<sup>1835</sup> See, *e.g.*, M. Gondek, *op. cit.*, pp. 343-344.

possibility to qualify sanctions by humanitarian exemptions (whereby certain products are excluded for humanitarian reasons),<sup>1836</sup> a wide range of measures such as embargoes, military blockades, threats or pressures, prohibitions on trade with another State, and removal of trade preferential schemes, may have direct effects on the enjoyment of ESC rights by civilians. Accordingly, within conflict-related situations a basic question arises as to *whether and to what extent the international community has started to regard sanctions as acts giving rise to the extraterritorial application of treaties on ESC rights* in light of their well-documented and inevitable deleterious impacts upon civilians' lives in the target State.

In this regard, the position of States participating in sanctions regimes may be examined in view of the emerging normative elaboration of the issue of *sanctions and equivalent measures concerning the general duty to respect ESC rights*. In particular, Maastricht Principle 22 gains relevance according to the following remarks.

Firstly, this principle enunciates the States' duty to refrain from "*adopting measures, such as embargoes or other economic sanctions, which would result in nullifying or impairing the enjoyment*" of ESC rights. This has to be read in view of Article 50 (1) of the ILC's Draft Articles of 2001 which identifies four categories of substantial obligations that, "*by reason of their character*", cannot be impaired by countermeasures imposed by individual States or groups of States in reaction to an internationally wrongful act by another State: "*the obligation to refrain from the threat or use of force as embodied in the UN Charter*";<sup>1837</sup> "*obligations for the protection of fundamental human rights*"<sup>1838</sup>; "*obligations of a humanitarian character prohibiting reprisals*"<sup>1839</sup>; and "*other obligations under peremptory norms of general international law*". Furthermore, States may agree to exclude other rules of international law from the possibility to be the subject of countermeasures, under the *lex specialis* provision in Article 55 (as underlined in the

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<sup>1836</sup> For an overview of the humanitarian exemptions to the Iraqi sanctions regime, see E. De Wet, "Human Rights limitations to economic enforcement measures under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime", 14 *Leiden JIL*, 2001, pp. 281-284. See SC Res. 661(1990), S/RES/661, para. 4; Security Council Res. 666(1991), S/RES/666, paras. 1, 3-5. Another instance of a broad humanitarian exception is established by SC Res. 986(1995) related to the oil-for-food programme. See the Working paper prepared by Marc Bossuyt, "The adverse consequences of economic sanctions on the enjoyment of human rights", 21 June 2000, para. 53, putting in question the efficacy of the exemptions.

<sup>1837</sup> As highlighted in the Commentary to Article 50, "*it excludes forcible measures from the ambit of permissible countermeasures*"; this prohibition is elucidated in the General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, in which it was stated that "*States have a duty to refrain from acts of reprisal involving the use of force*" (see GA Res. 2625 (XXV), Annex, first principle).

<sup>1838</sup> As highlighted in the Commentary to Article 50, the *Institut de droit international* has declared in its Resolution 1934 that, in adopting countermeasures, a State must "*abstain from any harsh measure which would be contrary to the laws of humanity or the demands of the public conscience*" (see *Annuaire de l'Institut de droit international*, vol. 38 (1934), p. 710).

<sup>1839</sup> As highlighted in the Commentary to Article 50, it is modelled on Article 60 (5) VCLT and it also echoes the essential IHL prohibition of reprisals against individuals.

same commentary to Article 50).

As regards the case in which sanctions are taken to meet other international legal obligations, Principle 22 calls for *States' full respect of human rights obligations in each of the distinct stages of any sanctions regime*. Nonetheless, a position is not taken regarding the legitimacy of the imposition of sanctions impairing ESC rights while having the objective of ensuring compliance by the target State with its own international legal obligations. On this point, some notable considerations are offered by the CESCR, which has examined the consequence of economic sanctions on civilian populations by dealing with both countermeasures by States as well as the effect of measures adopted by international organizations. In particular, besides stressing that “*whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights*”, the emphasis has been put on the crucial distinction “*between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country*”.<sup>1840</sup>

As regards the design stage, Principle 22 is in line with what the CESCR has already emphasised.<sup>1841</sup> In designing a sanctions regime that results proportionate to fulfill other international obligations, two relevant dimensions of the necessary effort to minimise to the greatest extent possible its negative impacts on human rights may be highlighted. One derives from the right to self-determination as enshrined in common Article 1(2) ICESCR and ICCPR (“*In no case may a people be deprived of its own means of subsistence*”). Another one derives from Article 4 ICESCR, which requires the compatibility of any limitation “*with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society*”.

As to the implementation stage, again, the reference in Principle 22 is in line with the view expressed by the CESCR, according to which effective monitoring is to be undertaken during the period in force of the sanctions, and, moreover, the entity enforcing sanctions has “*an obligation 'to take steps, individually and through international assistance and cooperation, especially economic and technical' in order to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country*”.<sup>1842</sup>

Even the termination stage of a sanction regime is deemed to be determined as taking into account human rights obligations, thus avoiding that the impact on ESC rights prevails over the objectives being sought.

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<sup>1840</sup> See CESCR, *General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights*, UN Doc. E/C.12/1997/8 (1997), paras. 1 and 4.

<sup>1841</sup> See CESCR, *General Comment No. 8, ibid.*, para. 12, emphasising that “*must be taken fully into account when designing an appropriate sanctions regime*”.

<sup>1842</sup> See *General Comment No. 8, op. cit.*, paras. 13-14.

Finally, Principle 22 lays down an absolute limit on sanctions by requiring States to desist from imposing embargoes and equivalent measures on *services and goods fundamental to honour core obligations*. The same view has been endorsed by the CESCR for measures that impede the provision of health care, water and food, along with services and goods indispensable for ensuring the corresponding rights; in this regard, the denial of access to such rights is deemed absolutely forbidden as a tool of economic and political pressure.<sup>1843</sup> It is reasonable to contend that other ESC rights, such as the right to education, entail the same duties.

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<sup>1843</sup> See CESCR, *General Comment No. 12: The right to adequate food, op. cit.*, para. 37; *General Comment No. 14: The right to the highest attainable standard of health, op. cit.*, para. 41; *General Comment No. 15: The right to water, op. cit.*, para. 32.

## **CHAPTER VI: TESTING CORPORATE LIABILITY FOR BREACHES OF INTERNATIONAL LAW HAVING DIRECT OR INDIRECT RELEVANCE FOR CIVILIANS' ESC RIGHTS**

### **1. Introduction**

The issue of liability of multinational business corporations engaging in activities carried out in conflict-affected or high-risk areas assumes central importance in relation to breaches of international law that may inhibit the effective exercise of, or adequate access to, ESC rights of civilians (especially in relation to their basic necessities of life). The nature of controversial activities may vary, including, *inter alia*, extractives industry, infrastructural projects, development projects, or simply financial investments. The range of ESC rights enshrined in international human rights and humanitarian law that may be seriously affected through such business activities relate to the following: *adequate standards of living*, including the right to food with particular regard for two of its components (individual and collective access to natural resources as a mean of food procurement and food adequacy), the right to the highest attainable standard of health with special regard to access to healthcare and medicines, the right to water and sanitation with special regard to the need to ensure safety, equality, and non-discrimination in access to it, the right to a clean and healthy environment; *social and economic development*; *human security*; *decent work conditions*; *adequate housing* (with particular regards for the question of evictions).

The modes of participation under which the activities concerned may raise questions of corporate liability for breaches of international law may vary. Besides business misconducts potentially amounting to the direct commission of such a breach, critical ways of indirect involvement include the following: the provision of services, technology, goods, or other resources to State organs or authorities that supposedly use them in the commission of the breach;<sup>1844</sup> the supply of chains, logistical and material support, or even financial assistance, that apparently enables or

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<sup>1844</sup> A test case that will be examined concerns the Dutch National Public Prosecutor's Office dismissal (14 May 2013) of the case against Lima Holdings (the Dutch parent) for Riwal's alleged involvement in the commission of alleged Israeli war crimes due to its supply of equipment used for the construction of the wall in several locations of the occupied Palestinian territories.

facilitates or incentivizes or exacerbates a third-party unlawful conduct<sup>1845</sup>; the corporation's investment in projects or participation in joint ventures having key connections with repressive regimes known as front-line offenders.<sup>1846</sup>

All these ways of involvement primarily relate to developed theories of corporate complicity in the wrongful act perpetrated by others. In this regard, it is worth noting that in national jurisdictions several factors typically play a role in the determination of corporate civil or criminal liability, notwithstanding they are applied differently: what the company and its executive directors *knew* at the relevant time; what they *intended* to occur; what level of *involvement/contribution* was provided by the company when the relevant violation was committed by a third party; the extent to which corporate activities *caused* the violation concerned.

Conversely, international criminal law jurisprudence has recognised and defined the concept of complicity under *the standard of aiding and abetting international crimes*: the *actus reus* is met by any act or omission comprising “*practical assistance, encouragement, or moral support*” to the principal offender of the crime, which has a “substantial effect” on the commission of that crime; the *mens rea* requires the knowledge that one's acts would contribute to the commission of that crime.<sup>1847</sup> Recent jurisprudence on this subject has provided a higher standard (for a defendant to be liable the prosecution had to establish that the defendant's assistance was “specifically directed” towards the specific crime<sup>1848</sup>), which, however, has been confirmed in other judgments.<sup>1849</sup>

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<sup>1845</sup> See *Doe v. Unocal Corp.*, U.S. Court of Appeals for the Ninth Circuit, 395 F.3d 932, Judgment of 18 September 2002. See *Presbyterian Church of Sudan v. Talisman Energy*, 244 f. Supp. 2d 289, US District Court for the Southern District of New York, 19 March 2003. See *Canadian Association Against Impunity (CAAI) v. Anvil Mining Ltd.*, File No. 500-09-021701-115, Court of Appeal, Province of Quebec, Judgment of 24 January 2012. See United States Supreme Court decision, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S., 17 April 2013.

<sup>1846</sup> See *Khulumani et al. v. Barclays National Bank Ltd*, U.S. District Court, Southern District of New York, No. 02-md-1499. In 2002 South African nationals sued twenty banks and corporations in the US courts alleging that their investments and participation in crucial industries was influential in encouraging gross human rights abuses (e.g. extrajudicial killings, torture, rape) against black South Africans and therefore the defendants were complicit in such wrongs.

<sup>1847</sup> See British Military Court, Hamburg, *Trial of Bruno Tesch and Two Others*, 1-8 March 1946, reprinted in *Law Reports of Trials of War Criminals*, Vol. 1, London, 1947, p. 93; Bruno Emil Tesch was the owner of the company that supplied Zyklon B poisonous gas to the SS for use it in the extermination camps and he was convicted of complicity in war crimes and sentenced to death for knowingly supplying Zyklon B: the Court found that he continued to supply ever-larger quantities of such widely-used insecticide even after he realised that it was being used to kill people. See US Military Tribunal, Nuremberg, *The United States of America v. Carl Krauch et al.*, Judgment of 30 July 1948. Officials in the I.G. Farben company were convicted of complicity in war crimes and crimes against humanity for their role in the construction of extermination camps. See US Military Tribunal, Nuremberg, *The United States of America v. Friedrich Flick et al.*, Judgment of 22 December 1947. See ICTY, *Prosecutor v. Furundzija* (IT-95-17/1-T), Trial Chamber, 10 December 1998, paras. 232-235, 243-245.

<sup>1848</sup> See ICTY, *Prosecutor v. Momčilo Perišić* (IT-04-81-A), Appeals Chamber, 28 February 2013, paras. 33-44. See the ICTY, *Prosecutor v. Jovica Stanišić and Franco Simatović*, Trial Chamber (IT-03-69). The specific direction requirement led to the acquittals in these two cases.

<sup>1849</sup> See Special Court for Sierra Leone, *Prosecutor v. Taylor*, SCSL-03-01-A (10766-11114), Appeals Chamber, 26 September 2013, in which it rejected the “specific direction” requirement when convicting Charles Taylor under the same



The present chapter is intended to examine a number of legal cases brought before national as well as international judicial or quasi-judicial bodies, in which business enterprises have been litigated or prosecuted in relation to allegations of *involvement in serious breaches of international law that directly or indirectly inhibit the exercise of, or adequate access to, ESC rights*.

At the national level, such jurisprudence appears to evidence a certain disinclination by domestic courts and prosecutors to proceed with litigation in cases where a corporation is claimed to have contributed to serious breaches of international law by foreign States abroad. In particular, their uncertainty about whether business enterprises are bound by international human rights and humanitarian norms is affirmed when indirect connection exists to the assumed violations. Further, courts and prosecutors' cautiousness to sit in judgment that end up touching the activities and policies of foreign States or to become embroiled in complex disputes that could have far-reaching political and policy consequences is clear. Moreover, a certain hesitation to open domestic courts to litigations related to corporate conducts with tenuous connections to their jurisdiction is palpable; forum shopping or the circumvention of sovereign immunity laws are not encouraged from such jurisprudence over alleging corporate complicity in breaches of international law by foreign States, which rather favours reliance upon non-justiciability doctrines and other non-merits grounds.

However, the relevance of these cases under the present research inquiring the evolving legal framework for the protection of civilians' ESC rights in international law seems basic.

Specifically, the *Jerusalem light rail case* and the *Bil'in Village case*, concerning corporate civil liability before French and Canadian courts, will be emblematic for reflecting about the increasingly debated issue of *liability risks for multinational enterprises playing a major role in funding, facilitating, and abetting serious breaches of international law in the context of the legal ramifications of the settlements policy* in the West Bank (where a vast majority of them are placed).<sup>1850</sup> Indeed, a number of activities undertaken in those settlements have been identified as raising human rights violations concerns<sup>1851</sup>. They include, *inter alia*, the following: “*the supply of equipment and materials facilitating the construction and the expansion of*

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form of responsibility, confirming that knowledge was the *mens rea* standard for aiding and abetting. See ICTY, *Prosecutor v. Nikola Šainovic et al.*, Appeal Judgment, 23 January 2014, in which it concluded that “*specific direction*” is not an element of aiding and abetting liability under customary international law or the Statute.

<sup>1850</sup> See *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, UN Doc. A/HRC/22/63, 7 February 2013, paras. 96-99, which address that “*business enterprises have, directly and indirectly, enabled, facilitated and profited from the construction and growth of the settlements*”.

<sup>1851</sup> Two debated cases of legal action in Israel concern the Israeli corporations' decision to fully or partially withdraw from contracts related to the supply of fuel or financial services whose lack may amount, under specific circumstances, to violations of human rights of the affected population. See D. Weiss and R. Shamir, “Corporate Accountability to Human Rights: The Case of the Gaza Strip”, 24 *Harvard Human Rights Journal*, 2011, pp. 155-183.

*settlements and the wall, and associated infrastructures*”; “*the supply of equipment for the demolition of housing and property, the destruction of agricultural farms, greenhouses, olives groves and crops*”; “*the provision of services and utilities supporting the maintenance and existence of settlements, including transport*”; “*banking and financial operations helping to develop, expand or maintain settlements and their activities, including loans for housing and the development of businesses*”; “*the use of natural resources, in particular water and land, for business purposes*”; “*pollution, and the dumping of waste in or its transfer to Palestinian villages*”; “*captivity of the Palestinian financial and economic markets, as well as practices that disadvantage Palestinian enterprises, including through restrictions on movement, administrative and legal constraints*”; “*the use of benefits and reinvestments of enterprises owned totally or partially by settlers for developing, expanding and maintaining the settlements*”.<sup>1852</sup> In the same vein, other two examples consist of “*banking institutions involved in financial transactions, such as loans to construct or purchase Israeli settlements*” (e.g. the Dexia Group, a European banking group), and “*real estate companies that advertise and sell properties in settlements*” (e.g. Re/Max International, a company based in the United States of America).<sup>1853</sup>

Conversely, among the few advanced domestic instances of investigation and/or prosecution for establishing corporate criminal complicity in international crimes, a recent prosecutorial decision for criminal complaints filed in the Netherlands against the Dutch company Riwal Group/Lima Holding will be examined. It will illustrate the dilemmas that public prosecutors are likely to face in such cases. A basic problem relates to *the margin for exercising prosecutorial discretion to investigate and prosecute allegations of crimes of particular seriousness in the face of external pressure* (mainly economic, political, diplomatic pressure), *weak internal resources to continuing investigations of big proportions*, and *strong public interest in prosecution*. Another dilemma relates to the practical difficulties to carry out effective investigations and prosecutions of serious crimes committed in third countries and with the involvement of transnational entities.

Another relevant criminal complaint is the one issued to the State Prosecutor in Frankfurt against two nationals senior employees of the engineering office of the German corporation Lahmeyer International for conducts undertaken overseas, namely for the alleged reckless management of a large infrastructure project and the related intensification of controversial conduct taken by the Sudanese Government in this regard. Although still at an early stage, this case will offer

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<sup>1852</sup> UN Doc. A/HRC/22/63, *op. cit.*, para. 96. Paragraph 97 elaborates on the issue of business enterprises’ activities in the settlements and the contribution to their maintenance, consolidation and development, stressing that “*industrial parks in settlements, such as Barkan and Mishor Edomim, offer numerous incentives, including tax breaks, low rents and low labour costs*”. It is also underlined that “*a number of banks provide mortgage loans for home buyers and special loans for building projects in settlements. They also provide financial services to businesses in settlements and, in some cases, are physically present there*”.

<sup>1853</sup> See *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, UN Doc. A/68/376, 10 September 2013, paras. 33-57.

the chance to reflect about *the normative content of the extraterritorial dimension of the State duty to protect ESC rights*. As is noticed in Chapter 5, this has been articulated as a duty to *regulate* the conduct of non-State actors, to exercise *influence* on such conduct, and to *take action* separately and jointly through international cooperation. However, as is already underlined, the crystallization of the extraterritorial dimension of such duty in the current stage of international law is still controversial. Emblematically, the Lahmeyer case will evidence the importance of “the function of regulation” exercisable by the State through several means (*e.g.* investigative and adjudicatory measures) when it is in a position to do so according to certain “bases for protection”, in compliance with international law, in order to guarantee that non-state actors’ activities do not impair or nullify ESC rights.

Some of these lawsuits acquire weight particularly for their attempt to attribute legal responsibility to members of a corporate group operating in conflict-affected areas in connection with allegations of damage caused abroad by a foreign subsidiary (mainly as accomplice to unlawful conducts of States), including violations of ESC rights. This appears to be part of a more comprehensive trend of foreign plaintiffs turning to overseas courts for seeking redress against multinational corporations for international law violations committed abroad.

The significance of focusing on such litigations on corporate liability is linked, *inter alia*, to the fact that in conflict-related scenarios judicial recourse may constitute an indispensable part of accessing remedy or alternative sources of effective remedy are unavailable. In such scenarios claimants who suffer a denial of justice in the territorial (host) State and cannot access the courts of the home State (irrespective of the merits of the claim) end up substantiating a serious legal obstacle. In this vein, any legal, practical, or procedural barriers preventing judicial mechanisms to function effectively raises *a question of compatibility with the State duty to protect against business-related human rights abuses which occurred within its sovereign territory and/or under its jurisdiction, or which felt within the ambit of State responsibility under the principles of public international law (i.e. the unlawful act in question is attributable to a State and constitutes a violation of an international legal obligation)*.

As is identified by the International Law Commission, at least in four situations businesses’ actions can be attributed to a State<sup>1854</sup> and so raise the risk of being a co-defendant in those cases where it has renounced to its sovereign immunity.<sup>1855</sup> Primarily, a State may incur international responsibility for the acts of a company that exercised governmental activity and was empowered to do so (Art. 5 of the Draft Articles). Besides, a State would be responsible for the acts of a company

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<sup>1854</sup> See Report of the International Law Commission on the work of the fifty-third session, UN Doc. A/56/10, 21 August 2001, Article 6.

<sup>1855</sup> In cases where the State concerned is the *forum* State, immunity will not apply because that State will be not immune within its own judicial system.

that was under the control or direction of, or acted under the instructions of, the State in having the conduct that allegedly resulted in the relevant breach.<sup>1856</sup> Thirdly, a State would be responsible for the company's activities adopted or acknowledged by that State as its own (Art. 11 of the Draft Articles). Finally, State responsibility may arise as accomplice in the company's actions or as result of its failure to exercise due diligence to prevent the effects of those actions.<sup>1857</sup>

Another relevant dimension of the case law examined in the present chapter is that the corporations concerned operate from within the jurisdiction of the European Union. Indeed, various claims against business enterprises have been brought across several European countries. This leads to question whether and to what extent the European Union and its Member States do ensure that the international legal order is not disregarded in light of controversial activities undertaken by multinational companies which end up undermining, or acting in blatant contradiction of, the EU's legal commitments to its proclaimed foreign policy and to the rule of law.

## 2. Civil litigation in national legal orders

### 2.1 The Jerusalem Light Rail case

In a decision taken on 22 March 2013 the Versailles Court of Appeal dismissed the case against two French multinational companies (Alstom/Alstom Transport and Connex/Veolia Transport),<sup>1858</sup> which was originally filed by the AFPS (*l'Association France Palestine Solidarité*)<sup>1859</sup> and by the OLP

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<sup>1856</sup> See J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries*, Cambridge University Press, 2002, pp. 74, 91-121.

<sup>1857</sup> See Report of the International Law Commission on the work of the fifty-third session, UN Doc. A/56/10, 21 August 2001, 81 ("A receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all the necessary steps to protect the embassy from seizure or to regain control over it"). See ICJ, *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ Reports 1980, 3, paras. 2, 8 (a), 63, 68-71.

<sup>1858</sup> They are involved in vast projects in several countries, mostly focusing on transportation, water and sanitation.

<sup>1859</sup> In parallel to the mentioned proceedings, on 1 March 2007 the AFPS filed a claim against the French Minister for Foreign and European Affairs for the payment of a one euro indemnity to compensate counts of harm resulting from the support provided to the French undertakings' involvement in the operating of said tramway. As this claim was implicitly rejected, the AFPS petitioned the Administrative Court of Paris to order the French State to pay it this indemnity (see *Administrative Court of Paris, Association France-Palestine Solidarité v. Republic of France, No. 1004813/6-1, decision of 28 October 2011*). In this regard, the AFPS objected to France having allowed French undertakings to participate in an international call for tenders for the construction and operation of a tramway to serve the territory of Jerusalem and part of the West Bank and having welcomed the conclusion of this contract. Further, the AFPS objected to the French State having breached its commitment, as affirmed in Article 1 GCIV to "ensure respect for the present Convention in all circumstances". In this vein, the AFPS alleged that the French State triggered its liability in breaching its obligation to take any positive action to prevent the signature of the litigious contracts and in actively encouraging their conclusion. The AFPS petitioned the French *Conseil d'Etat* to annul the decision of Administrative Court of Paris, but it dismissed it (see *Conseil d'Etat, 7ème et 2ème sous-sections réunies, 3 Octobre 2012, No. 354591, Inédit au recueil Lebon*).

(*l'Organisation de Libération de la Palestine*, which voluntarily become co-plaintiff later that year)<sup>1860</sup> at the *Tribunal de Grande Instance* of Nanterre (France) in February 2007.<sup>1861</sup>

These French companies participated, through a series of engineering and construction contracts, in an Israeli law corporation called Citypass (that consisted of the two French law companies<sup>1862</sup> and four Israeli law companies) which had won the thirty-year public service concession contract by the Israeli Government in July 2005 for the financing, design, construction, operation, and maintenance of a light rail project in Jerusalem; since July 2011 this public tramway service has become active between West Jerusalem (inside Israel's internationally recognised borders) and East Jerusalem (inside the Palestinian territory of the West Bank) where several Israeli settlements are located. The AFPS and OLP sought an injunction to annul all these contracts for unlawful cause (as contrary to public policy) pursuant to Articles 6, 1131, and 1133 of the French Civil Code.<sup>1863</sup> As will be detailed hereafter, this ended up in an appeal to determine whether the international responsibility of those French companies occurred as a condition of their corporate liability.

Without entering into the details of overlaid procedures, particularly as to the admissibility of the main action, it is noteworthy to focus on the merits. According to the plaintiffs, the tramway project represented a way for ensuring the long-term persistence of Israeli settlements and the integration of the city of Jerusalem in the State of Israel, involving the destruction of dwellings and infrastructures located on its route, the confiscation of archaeological relics and damage to archaeological sites (Palestinian cultural property), and expropriations of Palestinians' movable and

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<sup>1860</sup> In October 2007, the corporate defendants moved to dismiss the case and questioned the admissibility of AFPS' requests to invalidate the contract, arguing that it was outside the scope of French jurisdiction. In April 2009, without reaching the merits of the case, the Nanterre *Tribunal de Grande Instance* ruled that it had jurisdiction to hear the case, but that the PLO could not be accepted as a co-plaintiff. The Tribunal underlined that the defendants were not in a position to plead immunity, since corporate entities are not included as subjects of sovereign immunity. Alstom and its subsidiary Alstom Transport appealed the decision of the *Tribunal de Grande Instance* in November 2009. Veolia did not contest the ruling; it sold its shares in the City Pass Consortium to Dan Bus Company in September 2009. In December 2009, the Appeals Court upheld the rulings of the *Tribunal de Grande Instance*, emphasising that it had jurisdiction to hear the case. In February 2010 this decision was appealed by Alstom (particularly opposing the jurisdiction of the French courts) before the *Cour de Cassation*, which rejected the appeal in February 2011.

<sup>1861</sup> See Tribunal De Grande Instance De Nanterre, Sème Chambre, *Association France Palestine Solidarité "AFPS" et Organisation de Libération de la Palestine "OLP" c. Société Alstom Transport SA, Société Alstom SA and SA Veolia Transport*, R.G. n. 10/02629, Judgment of 30 May 2011.

<sup>1862</sup> Alstom and CGEA Connex, the latter operating since 2005 under the name Veolia Transport, were respectively owners of 20% and 5% of the shares of CityPass, CityPass had entered into an engineering contract for the supply and construction of the tramway with Alstom Transport and Citadis Israel Ltd. (indirect subsidiary of Alstom) as well as a further contract for the management and operation of the service with Connex Jerusalem Ltd. (indirect subsidiary of Veolia).

<sup>1863</sup> See Cour d'Appel de Versailles, 3ème Chambre, *Association France Palestine Solidarité "AFPS" et Organisation de Libération de la Palestine "OLP" v. Société Alstom Transport SA, Société Alstom SA and SA Veolia Transport*, R.G. n. 11/05331, Judgment of 22 March 2013.

immovable property. In objecting that this project was a major factor in the expansion of the colonization of East Jerusalem and the change of the city's legal status, the plaintiffs claimed it contributed to the policy of annexing territories *de facto*, in breach of international law. In this vein, the defendant companies' involvement into this project was disputed by invoking the *violation of several provisions of international humanitarian law*, as detailed hereafter.

Then, a basic argument was that the illicit object and purpose ("*la cause du contrat*" in French) of the public service concession contract (provided that the protraction of unlawful Israeli occupation in the West Bank allegedly represented the actual reason of this project) affected also the subsequent contracts that the two French companies had as shareholders in Citypass and that should be declared void as against public policy ("*ordre public*" in French).<sup>1864</sup> It was argued that the defendant corporations were liable under French civil law for having participated in contracts whose "*cause*" violated international law as well as for not having complied with their commitments under the Global Compact and their own corporate codes of ethics.

In its decision of 30 May 2011, the Nanterre *Tribunal de Grande Instance* rejected those claims but ruled only on preliminary legal issues. To the Tribunal, the invoked conventional international humanitarian law did not create direct obligations on private companies; further, neither the international public order or *jus cogens*, nor customary international law could overcome the absence of such a direct effect. In any event, for the Tribunal, assuming that the conclusion by Israel of the public service concession contract constituted a violation of its commitments under those international treaties, this violation would have not deprived the contract of its "*cause*", since the latter was subject to Israeli law (and not the French Civil Code). Furthermore, even the companies' responsibility for breaching international codes of conduct and authoritative guidance applicable to multinational corporations was not demonstrated according to the Tribunal (besides ruling that "*ni que la construction du tramway aurait constitué une violation des droits de l'Homme ou du droit humanitaire au sens large*"). Consequently, in the absence of any proved misconduct, the examination of the existence of injury and causation was deemed as unnecessary.

The subsequent judgment of 22 March 2013 by the Versailles Court of Appeal confirmed the Tribunal's reasoning. Despite establishing that the OLP had standing to proceed with the lawsuit, the Court ruled its inadmissibility. It found that the international treaties in question created obligations between States and they could not be used to hold two private companies liable. Furthermore, in its opinion, the purely voluntary character of UN Global Compact as well as

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<sup>1864</sup> Under French law, a contract can be annulled if its "*cause*" is illicit.

the non-binding commitments made by multinational enterprises in their codes of conduct could not create “*d’obligations of engagements ni au bénéfice de tiers pouvant solliciter en le respect*”.<sup>1865</sup> The Court ordered the AFPS and OLP, as losing parties (art. 700 *Code de procédure civile*), to pay € 30,000 to each of the three companies to cover the expenses incurred in their defence.<sup>1866</sup> Thus, the execution by Veolia and Alstom of the contented contracts for the construction and operation of the Jerusalem light rail could not breach international law or any other commitments under their own voluntary codes of ethics. The Court absolved the companies of any responsibility for potential involvement in internationally unlawful acts and maintained the contracts’ validity under French law.

The following sub-sections will examine the basis of actions brought against the two French companies and the validity of the reasoning given by the Versailles Court to reject them, which seems confused, imprecise and approximate, without analysing all the grounds of the appeal judgment.

### **2.1.1 The legal basis for actions against the two French companies**

The AFPS and OLP based their actions primarily on the violations of international humanitarian law applicable to occupation. They firstly claimed that the establishment and operation of the tramway have assisted in the violation of Article 49(6) GCIV, which prohibits the occupier from deporting or transferring part of its own civilian population into the territory it occupies; the appeal judgment does not detail the appellants’ argument on this point, namely that the construction of the tramway - by facilitating the transport of Israelis living in East Jerusalem and adjacent settlements (built in an area on which Israel’s sovereignty is not recognised by the international community) and by connecting the settlements of French Hill, Pisgat Zeev and Neve Yaakov in East Jerusalem with the centre in West Jerusalem - has contributed to the illegal maintenance of the occupier’s population therein, so legitimising the recognition of these settlements.

According to the appellants, the construction of the tramline has also resulted in destructions, almost suppressing road n. 60 which was vital for transporting persons and goods, and the removal of this road and paths that needed expropriations was in violation of several provisions of international humanitarian law: Article 53 GCIV, which prohibits the occupier to destroy “*real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities,*

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<sup>1865</sup> Cour d’Appel de Versailles, *op. cit.*, at 28-29. However, it seems that, in dismissing the relevance of the companies’ obligations under their own voluntary codes, as well as the UN Global Compact, the Court undertook a position that remarkably backtracks on the valuable international developments regarding the concept of responsibility of multinational companies under international law.

<sup>1866</sup> Cour d’Appel de Versailles, *op. cit.*, at 32.

or to social organizations and cooperative organizations ... except where such destruction is rendered absolutely necessary by military operations"; Article 23(g) HRs, which prohibits "to destroy or seize the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war"; Article 46 HRs, which prohibits the confiscation of private property.

Moreover, the appellants invoked the violation of some provisions prohibiting to attack cultural property, as set out in Article 4 of the 1954 Hague Convention,<sup>1867</sup> Article 27 HRs,<sup>1868</sup> Article 5 of the 1907 Hague Convention IX,<sup>1869</sup> and Article 53 API.<sup>1870</sup> Although this is not specified in the judgment, the AFPS and PLO claimed that the tramway affected cultural property and archaeological sites: during the contented construction the ancient ruins of a Judeo-Roman settlement site were discovered in the area of *Shuafat* (an active neighbourhood of some 35,000 Palestinian residents, which links the old Jerusalem-Ramallah road about three miles north of the Old City); they were described as revealing "a sophisticated community impeccably planned by the Roman authorities, with orderly rows of houses and two fine public bathhouses to the north".<sup>1871</sup> It is worth noting that this is not illegal if the archaeological research takes place with the consent of the party occupied and if the occupier provides the protection of the site; but in this case the Palestinian Authority has not allowed this type of research.

In the appeal judgment no reference is made to further relevant aspects invoked by the appellants. There is no mention of the evoked Security Council resolutions<sup>1872</sup> that call for the withdrawal of Israeli armed forces from the occupied Palestinian territory, while the tramline may

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<sup>1867</sup> Under Article 4(1), "The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property". Under Article 4(3), "The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party".

<sup>1868</sup> Under Article 27 HRs, "in sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals ..., provided that they are not being used at the time for military purposes".

<sup>1869</sup> Under Article 5 HC IX, "In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes.

It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large, stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white".

<sup>1870</sup> Under Article 53 AP I, "Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited: (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (b) to use such objects in support of the military effort; (c) to make such objects the object of reprisals".

<sup>1871</sup> See Isabel Kershner, "Under a Divided City, Evidence of a Once United One", *New York Times*, 5 June 2007, [http://www.nytimes.com/2007/06/05/world/middleeast/05jerusalem.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2007/06/05/world/middleeast/05jerusalem.html?pagewanted=all&_r=0)

<sup>1872</sup> See S/RES/242 (1967) of 22 November 1967, para. 1 (i). This resolution has been repeated many times since 1967: e.g., S/RES/258 (1968), S /RES/338 (1973), S/RES/344 (1973), S/RES/1322 (2000), S/RES/1397 (2002), S/RES/1402 (2002), S/RES/1405 (2002), S/RES/1435 (2002), S/RES/1515 (2003), S/RES/1544 (2004), S/RES/1850 (2008), S/RES/1860 (2009).



reinforce the maintenance of the situation against such resolutions. In the same vein, the Versailles judges do not refer to the criminal nature of the establishment of those settlements in view of Article 49(6) GCIV as combined with Article 147 GCIV that criminalises the “*illegal transfer*”. Further, the establishment of a settlement by the occupier in the occupied territory is explicitly recognised as a war crime under Article 85(4)(a) API, Article 8(2)(b)(viii) ICC Statute, and Article 20(c)(i) of the draft Code of Crimes against the Peace and Security of Mankind as prepared by the International Law Commission in 1996. Nonetheless, it is not clear that the invocation of all these texts would have changed the outcome of the appeal judgment, because the Court’s reasoning reveals a critical misunderstanding of international law, as will be detailed hereafter.

Additional international statements and reports were invoked in support of the unlawfulness of the construction of the tramway, such as the reports by the Heads of Mission of the European Union<sup>1873</sup> and a resolution by the Human Rights Council,<sup>1874</sup> but they were simply mentioned in the appeal judgment and considered as not directly related to such construction,<sup>1875</sup> although they explicitly refer to this project.

Conversely, the defendant French companies denied the commission of a fault by arguing their proper execution of the contracts signed with the Citypass and which retained legal autonomy. To them, the invoked IHL norms were not enforceable and the use of custom or *jus cogens* (as determined by an international public order) did not make those norms applicable against them.

## **2.1.2. The reasoning of the Versailles Court of Appeal**

### **2.1.2.a. ..on the locus standi of the appellants**

According to the Court, the AFPS’s object did not allow this Association to sue the two companies

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<sup>1873</sup> See “*EU Heads of Mission Jerusalem Report 2010*”, 16 January 2011, Annex 1 on East Jerusalem, paras. 48-50, in which it is deemed among the infrastructure projects that “*contribute to the Israeli control over occupied East Jerusalem*”. See “*EU Heads of Mission Jerusalem Report 2011*”, January 2012, Annex 1 on East Jerusalem, para. 58, in which it is further specified that “*the first line of this tramway passes through the Palestinian neighborhood of Shu’afat and touches the southern border of Beit Hanina*”, and that the line was about 14 kilometers along with 23 stops but that extensions were planned for both ends of the route. See “*EU Heads of Mission Jerusalem Report 2012*”, January 2013, Annex 1 on East Jerusalem, para. 54, in which it was included among the projects that “*strengthen the Israeli control over East Jerusalem*”, noting that “*on 4 July 2012 the Local Planning Committee approved a plan extending to Jerusalem’s southern neighborhoods (Ein Kerem), a third section between the northern settlements of Piscaal Zeev and Neveh Ya’acov being also contemplated*”, and stressing that “*if it was implemented, this third session would significantly increase this light rail’s contribution to the ‘unification’ of Jerusalem*”.

<sup>1874</sup> See Resolution adopted by the Human Rights Council, “*Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan*”, 14 April 2010, UN Doc. A/HRC/RES/13/7, para. 5(g), in which the Council expressed its grave concern at “*(T)he Israeli decision to establish and operate a tramway between West Jerusalem and the Israeli settlement of Pisgat Zeev, which is in clear violation of international law and relevant United Nations resolutions*”. The resolution was passed 44 to 1, with Ireland and all the EU members of the Council voting in favour.

<sup>1875</sup> See Cour d’Appel de Versailles, 3ème Chamber, *Association France Palestine Solidarité “AFPS” and Organisation de Libération de la Palestine “OLP” v. Société Alstom Transport SA, Société Alstom SA and SA Veolia Transport*, R.G. n. 11/05331, Judgment of 22 March 2013, at 19.

to annul the challenged contracts in view that, under Art. 2-1 of its Statute, its object is “*développer l’amitié et la solidarité entre le peuple français et le peuple palestinien et d’œuvrer pour l’établissement d’une paix juste et durable au Proche-Orient fondée sur la reconnaissance des droits nationaux du peuple palestinien, sur la base du droit international*”. In particular, in seeking to annul contracts to which it is third, the AFPS does not pursue its own members’ collective interest, which is distinct from the public interest of Palestinians for whose defence it has no statutory authority.<sup>1876</sup> However, this may be a very narrow interpretation of the Statute: inasmuch as the AFPS has been established to “*work for the establishment of peace [...] based on the recognition of the national rights of the Palestinian people on the basis of international law*”, its lawsuit may be a “way of working” for such recognition, so it may fill its social object.

Conversely, the Court acknowledged the *locus standi* of the OLP. In noting the difficulty expressed by Alstom to know which of the OLP and the Palestinian Authority are the Palestinians, the Court found no elements in contradiction with the OLP’s *ius standi* (as a subject of law), which had interest in acting since the time it intervened voluntarily, the contracts for the disputed tramway were signed and the construction begun.<sup>1877</sup> In this regard, on the basis of Article 32 of the French Code of Civil Procedure (whereby “*est irrecevable toute prétention émise par ou contre une personne dépourvue du droit d’agir*”), Alstom Transport and Veolia Transport alleged that the plaintiffs were misdirected by suing them, because the “*only serious defendants*” were Israel and Citypass. The Court rejected this argument because the French companies had signed the contracts whose unlawful nature had been claimed by the OLP.<sup>1878</sup>

### **2.1.2.b. ..on the basis of the action brought by the OLP**

While declaring the AFPS’s action as inadmissible, the Court of Appeal considered the request of the OLP, whose action against the defendants required proof of fault and injury directly related to the fault.<sup>1879</sup> The two sources of the companies’ alleged misconduct included (I) the participation to contracts whose object or purpose (“*la cause*”) violate norms of international law and (II) the non-

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<sup>1876</sup> Cour d’Appel de Versailles, *ibid.*, at 17, in which the Court stated that “*en poursuivant l’annulation ou l’interdiction des contrats internationaux auquel elle est tiers, l’association [ne] justifie [pas] de la défense d’un intérêt collectif propre à ses membres, distinct de l’intérêt général des Palestiniens pour la défense desquels elle n’a pas d’autorisation législative*”.

<sup>1877</sup> Cour d’Appel de Versailles, *op. cit.*, at 14.

<sup>1878</sup> Cour d’Appel de Versailles, *op. cit.*, at 18.

<sup>1879</sup> The Court summarised as follows the basis of action of the PLO: “*Elle soutient que la construction du métro léger ou tramway qui traverse la ville de Jérusalem est illicite en ce qu’elle correspond à la violation de normes internationales notamment par son tracé qui en donne accès aux colons israéliens et les conséquences de sa construction en résultant pour le peuple palestinien. Elle considère que les contrats signés à cette occasion qui violent ainsi l’ordre public sont en conséquence également illicites et que les sociétés ont commis une faute d’une part, pour avoir participé à des contrats dont la cause viole des normes de droit international et d’autre part, pour ne pas avoir en même temps respecté les engagements pris par leur adhésion au Pacte Mondial et dans leurs codes d’éthiques. Elle sollicite que leur responsabilité soit reconnue et fonde son action sur les articles 6, 1131et 1133 du code civil*”, Cour d’Appel de Versailles, *op. cit.*, at 18.

compliance with their ethical commitments under the Global Compact and their own ethical codes.

The Court's reasoning deserves attention in relation to its rejection of the appellant's arguments based on international law. It seems that the comprehensive evaluation of the "*motif déterminant ayant poussé le débiteur à s'engager*" (as the Court defined the contractual claim under French law<sup>1880</sup>) was circumvented in its judgment, with a focus on the peculiar "nature" of the parties involved in order to rule in favour of the non-applicability of international law to multinational corporations. In this vein, despite its explicit admission to refrain from evaluating the conduct of Israel (which was not a party of this suit), the Court seems to validate the light rail project with a not entirely appropriate reasoning in view of relevant documents invoked by the appellant and, more generally, in view of international law.

**I.** *The companies' participation to contracts whose "cause" violates international law.* The Versailles judges examined the participation of Alstom, Alstom and Veolia Transport to the contracts at issue by evaluating the alleged unlawfulness of their "*cause*" (A) because of Israel's violation of its obligations under the international law of occupation as well as (B) because of the companies' violation of international humanitarian law.

**I.A.** *The unlawfulness of the "cause" due to State violation of the law of occupation.* The Court of Appeal primarily referred to the OLP's argument that the unlawfulness of the construction was connected to the illegal occupation, which would have altered all acts taken and signed by Israel during the implementation of the light rail project: such construction would have been implicitly directed to consolidate a "*colonization juive illégale*".<sup>1881</sup> In particular, the appellant argued that the French companies, which not signed the public service concession contract, were directly affected by its implementation due to the technical and financial guarantees provided in their capacity as shareholders in Citypass as well as due to the direct aid resulting from the construction and operation contracts. In connecting the illegality of all these contracts to Israel's violation of its obligations under the international law of occupation, the appellant invoked several international humanitarian law instruments.

In respect to this specific claim, the Court ruled that on the basis of Article 43 HRs "*la puissance occupante pouvait et même devait rétablir une activité publique normale du pays occupé*" though administrative measures concerning "*toutes les activités généralement exercées par les autorités étatiques (vie sociale, économique et*

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<sup>1880</sup> Cour d'Appel de Versailles, *op. cit.*, at 21.

<sup>1881</sup> Cour d'Appel de Versailles, *op. cit.*, at 19.

*commerciale*”); and that, as such, the occupier could build a lighthouse or a hospital. In referring to a subway construction in occupied Italy to underline that the building of a public transportation infrastructure was recognised as part of the occupier’s administration, the Court concluded that “*la construction d’un tramway par l’Etat d’Israël n’était pas prohibée*”.<sup>1882</sup>

Nonetheless, the Court’s interpretation of Article 43 HRs seems to overlook that the occupier’s exercise of governmental activities in the occupied territory is legitimate as long as it is consistent with international law, particularly the Fourth Geneva Convention of 1949. In the same vein, while the Court considered the tramway among the measures authorized by Article 43 HRs, the disputed project had been deemed as one of the activities likely contributing to the consolidation of settlements in violation of international law at different times and by several organs of the United Nations and the European Union. Indeed, the Court disregarded several positions expressed within these international organizations about the settlements and the other practices undertaken or arranged therein in breach of international law.<sup>1883</sup>

At any rate, in underlining that the invoked IHL treaties were signed between States, the

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<sup>1882</sup> Cour d’Appel de Versailles, *op. cit.*, at 20-21.

<sup>1883</sup> *Inter alia*, at the UN level, see SC Res. 452 (1979) of 20 July 1979 and SC Res. 465 (1980) of 1 March 1980; ICJ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 120 (Article 49(6) “*prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organise or encourage transfers of parts of its own population into the occupied territory*”); Human Rights Council, UN Doc. HRC/RES/13/7, 14 April 2010; *Report of the Independent Fact-Finding Mission to Investigate the Implications of the Israeli Settlements on the Civil, Political, Economic, Social and Cultural Rights of the Palestinian People Throughout the Occupied Palestinian Territory, Including East Jerusalem*, UN Doc. A/HRC/22/63, 7 February 2013, para. 16 (in para. 4 “*Israeli settlements*” were deemed to encompass *all physical and non-physical structures and processes that constitute, enable and support the establishment, expansion and maintenance of Israeli residential communities beyond the 1949 Green Line in the OPT*”, and in para. 20 measures such as “*supporting settlements through public services delivery and development projects*” were included). At EU level, see the “*EU Heads of Mission Jerusalem Report for 2012*”, para. 3, <http://www.haaretz.com/news/diplomacy-defense/eu-consuls-recommend-imposing-sanctions-on-israeli-settlements.premium-1.506043>: two of its ten recommendations directly relate to the economic activities of European companies that profit from settlements; in addition to the standard practice of excluding settlement products from the free trade agreement between the EU and Israel, the report recommends “*guarantee[ing] the consumers’ right to an informed choice*”, asking the European Commission to provide guidelines on labeling of settlement products, moreover, the report recommends that EU governments “[p]revent, discourage and raise awareness about problematic implications of financial transactions, including foreign direct investment, from within the EU in support of settlement activities, infrastructure and services”; this is followed by another recommendation that the EU informs businesses of the “*financial and legal risks involved in purchasing property or providing services in settlements*”. See also European Parliament resolution on the EU policy on the West Bank, including East Jerusalem, 2012/2694(RSP), 5 July 2012, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0298&language=EN>; Council of the European Union, 3209<sup>th</sup> Foreign Affairs Council Meeting Conclusions, 10 December 2012, at 7, para. 3, available at [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/134152.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/134152.pdf); “*Guidelines on the Eligibility of Israeli Entities and their Activities in the Territories Occupied by Israel since June 1967 for Grants, Prizes and Financial Instruments Funded by the EU from 2014 onwards*”, 2013/C 205/05, adopted on 17 July 2013 by the Council of the European Union, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:205:0009:0011:EN:PDF>. Even France supported the same view repeatedly, opposing the creation of settlements, see “*Declaration by the Permanent Representative of France to the United Nations on the situation in the Middle East*”, at the Security Council, 23 January 2013, and the press on Israeli settlements to the Security Council by the Member States of the European Union, 20 December 2011, both available at <http://www.franceonu.org/france-at-the-united-nations/press-room/statements-at-open-meetings/security-council/>.

Versailles Court held that the ensuing obligations or prohibitions are addressed to States, consequently they apply to Israel in its capacity as occupying power and could have a bearing on the public service concession contract signed with Citypass. For the Court, however, Alstom and Veolia were parties only to the construction and operation contracts with Citypass, which retained legal autonomy from the concession contract (although all of them had in common to allow the creation of the tramway) and were not “contaminated” by any alleged illicit “cause” of that contract. On this point the Court detailed that under French law the legality of the “cause” of a contract could not be founded on “*seule appréciation par un tiers d’une politique ou social situation*”: in an objective sense, each party’s “cause” would be the execution of the other party’s contractual obligations; conversely, under a subjective approach, which allows to better assess the conformity of the “cause” to public order, the latter would be the decisive reason that pushed the debtor to commit. In this vein, for the Versailles Court, the “*motif politique*” (presented by the OLP as the “cause” of Israel’s engagement with Citypass) could not be transferred, as effect of a “contamination”, to distinct contracts between business companies.<sup>1884</sup> Being Alstom, Alstom and Veolia Transport third parties to the general concession contract, on the one side, they could not respond for violations of international standards establishing obligations only on the occupier, and their responsibility could be sought only in respect of contracts they signed with Citypass; on the other side, they could not respond for any alleged illegality of the concession contract.

Prudently, the Versailles judges underlined that the State of Israel was not named as a party to the proceedings and that the illegality of the “cause” of the separate contracts signed by Alstom and

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<sup>1884</sup> See Cour d’Appel de Versailles, *ibid.*, at 21. However, the inappropriateness of that characterisation may rely on that this is not simply a political interpretation of the facts; it is worth considering that the impact on the Palestinians’ rights of the activities of multinational enterprises operating in the occupied territories have been subject to a specific monitoring over the last years by the United Nations (especially following the 2011 Guiding Principles) as well as by various non-governmental organizations. Indeed, it is also in light of this widespread criticism that some States have adopted measures to discourage the participation of multinational enterprises in economic activities in those settlements. In this regard, some instances are noteworthy: the decision taken in January 2014 by the Dutch pension fund *PGGM* to no longer invest in five Israeli banks (*i.e.* Bank Hapoalim, Bank Leumi, First International Bank of Israel, Israel Discount Bank and Mizrahi Tefahot Bank) because of their involvement in financing Israeli settlements in the occupied Palestinian territories, <http://st.ilmfattoquotidiano.it/wp-content/uploads/2014/01/Statement-PGGM-exclusion-Israeli-banks.pdf?adf349>; the decision taken in December 2013 by the Dutch drinking water company *Vitens*, following consultations with the Dutch Foreign Ministry, to suspend its trade relations with Mekorot (the Israeli public water company) given the latter’s provision of infrastructure for water supplies in West Bank settlements and other related operations, <http://www.haaretz.com/news/diplomacy-defense/.premium-1.562769>; the decision of the Dutch company *Royal Haskoning Dhw*, following the directions of the Government of the Netherlands, to withdraw its participation in a co-construction project of a sewage treatment facility in East Jerusalem; the decision taken in August 2010 by the Ministry of Finance Norway, revoked only in August 2013, to exclude the Israeli company Africa Israel Investments Ltd. and its subsidiary Danya Cebus Ltd. from its Government Pension Fund Global because it was involved in the construction of settlements in the West Bank, <http://www.regjeringen.no/en/archive/Stoltenbergs-2nd-Government/Ministry-of-Finance/Nyheter-og-pressemeldinger/nyheter/2013/repeal-of-exclusions-from-the-government.html?id=733936>

Veolia could not be decided, without expressing any comment on the claimed “*illicit*” purpose behind Israel’s decision to build the light rail line. Thus, the Court of Appeal rejected the argument that the contracts between Alstom/Veolia and Citypass were void as against public policy.

The Court’s reasoning to apply the autonomy criterion to the disputed contracts seems, however, a bit confusing. It dealt just with the relativity of the public service concession contract, without considering to discuss the fact that the “*cause*” allegedly was linking illegal settlements of East and West Jerusalem (a service that did not benefit the civilian population); and, in any case, the application of the legal autonomy criterion would have required a more comprehensive analysis. Indeed, even if the “*causes*” of the various contracts remain distinct, it is reasonable to contend that, in view of their nature (the public service concession contract between Israel and CityPass was materially realised through a “*contractor*” - Alstom - and an “*operator*” - Veolia), a special connection makes all of them as mutually conditioning. In this vein, if the cause of the public service concession contract was finally assessed as illegal, it is reasonable to assume that the invalidity of the agreement between Israel and Citypass could also affect the existence of the subsequent contracts with Alstom and Veolia.

**I.B.** *The unlawfulness of the “cause” owing to companies’ violation of IHL.* As anticipated, the OLP claimed the unlawful “*cause*” of the contracts at issue even as a result of the French companies’ violation of IHL norms. The Court of Appeal considered the various ways this unlawfulness was invoked, namely (a) as non-compliance with certain provisions of IHL treaties and (b) by virtue of the customary nature acquired by the relevant norms or their imperative character.<sup>1885</sup>

**I.B. (a)** While the OLP contended that the invoked IHL standards entitled it to exercise special rights (vertical effect) and were applicable to the defendant companies (horizontal effect), the latter argued that the provisions concerned do not create rights for individuals and do not apply to private companies as they are not recognised subjects of international law. The following lines will examine the Court’s reasoning on these points.

**I.B. (a)(1)** As to *the vertical effect of IHL conventional norms*, the Versailles judges ruled that the invoked IHL norms could not create private cause of action in French courts. By expressing a traditional position in international law, the Court of Appeal confirmed the application of the conventions concerned only to State parties and rejected their direct applicability to private companies according to the following reasoning. After mentioning the higher legal authority of

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<sup>1885</sup> Cour d’Appel de Versailles, *op. cit.*, at 21-27.

international treaties by virtue of Article 55 of the 1958 French Constitution (to the extent that they have been approved and do not need to be implemented), it stressed that the Geneva Conventions and the Hague Regulations came into force and are applicable under French law. For the Court, in the absence of a specific reference, in order to confer rights on individuals in the internal legal order, the relevant international norm must contain elements sufficiently precise to infer the drafters' intention to produce such an effect and be expressive enough in appointing individuals as recipients. In this regard, the existence of a presumption of direct applicability of the invoked treaties could not be upheld because, although supported in some reports submitted to *le Conseil d'Etat*, “*elle n’a pas été consacrée par les décisions subséquentes et ne peut pas davantage être retenue à l’occasion de la présente procédure*”.<sup>1886</sup>

As far as the vertical effect of the Fourth Geneva Convention is specifically concerned, the Court of Appeal referred (in an imprecise manner) to an opinion by the International Court of Justice according to which the *travaux préparatoires* of this treaty would only address obligations upon States without mentioning the right of individuals to rely on it. For the Versailles judges, the first articles of this Convention would also lead to such an interpretation (under Article 1 “*the High Contracting Parties undertake to respect and to ensure respect for the present at all times*” and under Article 2 “*the Powers who are parties thereto shall remain bound by it ...*”). In particular, the analysis of all the IHL provisions invoked by the OLP would not support the existence of a right granted to individuals: Articles 49 and 53 GCIV are addressed to the “*occupying power*” and impose obligations on States; Articles 23 and 46 HRs refers to “*contracting powers*”; Article 4 of the 1954 Hague Convention and Article 53 API cite the commitments of the Contracting Parties; thus they would create obligations upon States parties, excluding individuals as the recipients. As to Article 5 of the 1907 Hague Convention IX and Article 27 HRs, the Court confirmed the non-applicability for the same reasons expressed by the Nanterre Tribunal, namely that Jerusalem was not bombed.<sup>1887</sup>

In considering the cases cited by the OLP in which the *Cour de cassation* recognised direct effect to international law norms,<sup>1888</sup> the Versailles judges still stated that the individual is not addressed in the Fourth Geneva Convention, which, instead, would focus on groups such as “*protected persons*” or

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<sup>1886</sup> Cour d’Appel de Versailles, *op. cit.*, at 22, in which the Court refers to the *amicus curiae* brief filed by *le Centre de recherches et d’études sur les droits fondamentaux de l’Université de Paris Ouest-Nanterre la Défense* (CREDOF) in the case *CE, Ass., 11 avril 2012, Gisti et FAPIL*.

<sup>1887</sup> Cour d’Appel de Versailles, *op. cit.*, at 22.

<sup>1888</sup> The emblematic cases referred to international law texts providing the recipient (*i.e.* the child in Article 10 CRC of 26 January 1990, and the employee in Articles 2 and 4 of the ILO Convention of 22 June 1982) or conferring rights against the State to individuals or groups in specific situations (“*the litigant*” or “*the defendant*” is entitled to a fair trial under Article 6(1) ECHR).

“the population”. The existence of individual subjective rights in the present case was not acknowledged even by rejecting the appellant’s full assimilation of the protection granted under international humanitarian law and the protection under human rights law: for the Court of Appeal, only some of the invoked IHL provisions embody the protection afforded by the latter and, as such, involve individuals (*e.g.* in relation to genocide, torture, slavery); besides, the rights claimed under the invoked IHL are not of the same nature (*e.g.* in relation to the transfer of population, the destruction of property).<sup>1889</sup>

Moreover, according to the Versailles Court, the invoked conventional norms could not confer upon individuals (or the Palestinian people who the PLO indicated to represent) the right to rely directly on them before a court.

However, the aforementioned passages of the appeal judgment on the vertical effect of IHL conventional norms call several remarks.

Firstly, it is worth noting that only two of the ICJ’s advisory opinions refer to the Fourth Geneva Convention (*i.e.* the 1996 Opinion on the legality of use of nuclear weapons and the 2004 Opinion on the construction of a Wall in the Occupied Palestinian Territory) and no one reveals that its *travaux préparatoires* “ne contenaient que des obligations à la charge des États et que la faculté pour les individus de s’en prévaloir n’était pas évoquée”.<sup>1890</sup> At the most, in the advisory opinion on the wall the ICJ held that: “... the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories, as is shown by Article 47 of the Convention. That interpretation is confirmed by the Convention’s *travaux préparatoires*. The Conference of Government Experts convened by the International Committee of the Red Cross [...] in the aftermath of the Second World War for the purpose of preparing the new Geneva Conventions recommended that these conventions be applicable to any armed conflict ‘whether [it] is or is not recognised as a state of war by the parties’ and ‘in cases of occupation of territories in the absence of any state of war’”.<sup>1891</sup> It seems that this passage has nothing to do with what the Court of Appeal of Versailles stated. It is true that it relates to the States Parties’ obligations to the Fourth Geneva Convention and that “the ability for individuals to rely on is not mentioned” (as affirmed by the Court of Appeal), but this was not the purpose of the reproduced passage concerning the subject of this convention (*i.e.* the protection of civilians) and its scope (armed conflict) without questioning whether it confers upon individuals some rights and obligations.

Secondly, the Court of Appeal’s assertion that the Fourth Geneva Convention entails only

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<sup>1889</sup> Cour d’Appel de Versailles, *op. cit.*, at 23.

<sup>1890</sup> Cour d’Appel de Versailles, *op. cit.*, at 22.

<sup>1891</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, p. 175, para. 95.



obligations upon States is incorrect. Certain prohibitions (such as murder, mutilation, cruel treatment and torture of persons not or no longer participating in hostilities, under common Article 3 GCs) are addressed to individuals, and common Articles 50, 51, 130, 147 GCs criminalise such conducts as taken by individuals (not by States), without distinguishing whether they are or not State organs.<sup>1892</sup> Further, the Court's incorrect assertion would also mean that common Article 3 GCs (which is applicable even to conflicts not of an international character) would not bind organised opposition groups acting as non-state belligerents; it would also mean that international criminal tribunals would be wrong in attributing serious violations of the four Geneva Conventions to the accused persons. In any case, prohibitions imposed upon a State create correlative rights for individuals.

Thirdly, as to the Court's statement that in the Fourth Geneva Convention "*seules quelques dispositions*" embody the protection afforded by human rights law and, as such, involve individuals, it is worth noting that this assertion contradicts the one examined just above: while its *travaux préparatoires* contain only obligations on States and the right of individuals to rely on is not mentioned, certain of its provisions have a direct effect like human rights instruments.

As regards the Court's contention that the Fourth Geneva Convention does not address the individual because it focuses on groups such as "*protected persons*" or "*the population*", this point seems inconsistent with the aforementioned recognition of the direct effect of certain provisions; the reference to "*protected persons*" and "*the people*" in a collective form does not exclude the legal existence of individual components of these groups.

Overall, the Court's reasoning contains some contradictory and confused aspects, besides suffering from a serious lack of accuracy.

**I.B. (a)(2)** As to the horizontal effect of IHL conventional norms (meaning that private companies are bound by the invoked norms, so implying a status as subjects of international law), the Versailles judges primarily ruled that the international legal personality of transnational corporations is recognised "*de façon très limitée*": their international capacity is partly allowed under specific conventional instruments, basically of economic nature, in order to protect their business activities

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<sup>1892</sup> The grave breaches specified in the four 1949 Geneva Conventions (Art. 50, 51, 130, 147 respectively) include: "*willful killing of a protected person*"; "*torture or inhuman treatment, including biological experiments; willfully causing great suffering or serious injury to body or health of a protected person*"; "*extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly*" (this provision is not included in Art. 130 GCIII). Other grave breaches specified in Art. 147 GCIV include: "*compelling a protected person to serve in the forces of the hostile Power*"; "*willfully depriving a protected person of the rights of fair and regular trial prescribed in the Convention; unlawful deportation or transfer or unlawful confinement of a protected person*"; "*taking of hostages*".

in foreign countries *vis-à-vis* States which may be in dispute with them (*e.g.* the 1965 Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States), or concerning the responsibility for the environment (*e.g.* the 1969 Brussels International Convention on Civil Liability for Oil Pollution Damage and the 1993 Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment).<sup>1893</sup> Conversely, the Versailles Court emphasised that the obligations under the IHL conventions (whose breach was claimed by the OLP) should be specifically formulated against corporations, while they are addressed only to States.<sup>1894</sup> Its conclusion was that the defendants companies, which were not signatories to those conventions or direct recipient of their ensuing obligations, are not subjects of international law; as far as they lack international legal personality, those norms cannot be opposed to them.<sup>1895</sup>

It is worth noting a certain inconsistency of this articulation of the Court's reasoning, also in view of the ICJ's statement in the *Reparation case*, namely that "*the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community*".<sup>1896</sup> In particular, the Versailles Court seems to overlook positive law. The view that Alstom of Veolia may not be recipients of obligations under the invoked treaties seems as incorrect as affirming that individuals are not recipients of conventions because they are not Contracting Parties. Even though natural or legal persons cannot create rules of public international law, the latter may confer upon them rights and obligations. As far as legal persons are specifically concerned, the possibility to be addressees of obligations under international law, and, as such, be subjects of international law, is emblematically confirmed in European Union competition law (*e.g.* Arts. 101-102 TFEU<sup>1897</sup>) or in other international legal instruments that require States to

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<sup>1893</sup> Cour d'Appel de Versailles, *op. cit.*, at 23.

<sup>1894</sup> The Court referred again to Articles 49(6) and 53 GCIV, and Article 4 of the Hague Convention of 1954.

<sup>1895</sup> Cour d'Appel de Versailles, *op. cit.*, at 23, holding that "*Les sociétés intimées morales de droit privé qui ne sont pas signataires des conventions invoquées, ni destinataires des obligations qui les contiennent, ne sont pas, en conséquence, des sujets de droit international. Dépourvues de la personnalité internationale, elles ne peuvent se voir opposer les différentes normes dont se prévaut l'appelante*".

<sup>1896</sup> ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Report 1949, p. 174, at 179. On this point, see L. Van den Herik and J.L. Cernic, "Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again", 8 *Journal of International Criminal Justice*, 2010, at 725 ff.; M. Fasciglione, "Corporate Liability, Extraterritorial Jurisdiction and the Future of the Alien Tort Claims Act: Some Remarks after Kiobel", *Diritti Umani e Diritto Internazionale*, 2013, at 401 ff.; P. Acconci, "La rilevanza per le imprese multinazionali degli obblighi convenzionali in materia di diritti della persona umana", *Diritti Umani e Diritto Internazionale*, 2011, at 299 ff.

<sup>1897</sup> See Arts. 101-102 TFEU (former Arts. 85-86 of the 1957 Rome Treaty establishing the EEC, which turned into Arts. 81-82 after the 1997 Amsterdam Treaty), which typifies as crimes the abuse of a dominant position and agreements designed to distort competition.

incorporate the criminal or civil liability of corporations in their legislation in certain areas.<sup>1898</sup>

Although the practice is not unanimous, as evidenced by this case or in others such as *Kiobel*,<sup>1899</sup> some additional remarks are noteworthy. Primarily, some excerpts from the judgments by the United States Military Tribunal in Nuremberg, in two trials following the Second World War, did refer to IHL breaches perpetrated by the corporations themselves, although the latter had not been charged as those trials were conducted against the natural persons running them and the Tribunal did not have jurisdiction over legal persons. Specifically, in the *I.G. Farben Trial* acts of plunder and pillage were addressed as acts of the company<sup>1900</sup> by the Tribunal, which admitted the possibility that a juristic person breaches the laws and customs of war.<sup>1901</sup> Furthermore, in the *Krupp Trial* the Krupp firm was found capable to take part in a crime,<sup>1902</sup> to commit acts of plunder<sup>1903</sup> and the war

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<sup>1898</sup> *E.g.*, see the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, whose Article 1(2) provides that “*The States Parties declare criminal organization, institutions and individuals committing the crime of apartheid*”; the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, which requires States parties to prohibit “all persons” (natural or legal) from transporting or disposing of hazardous waste unless authorized or allowed to do so; the 1999 UN International Convention for the Suppression of the Financing of Terrorism (Art. 5), the 2000 UN Convention against Transnational Organized Crime (A/RES/55/25), which criminalises the participation in an organized criminal group, the laundering of proceeds of crime, corruption, and obstruction of justice (Arts. 5, 6, 8, 23), and the 2001 European Convention on Cybercrime (Art. 12).

<sup>1899</sup> See Supreme Court of the United States, *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, No.10-1491, 17 April 2013. A *general presumption against the extraterritorial application of U.S. law* was found for claims under the Alien Tort Statute (US federal common law), also recognising that the law on which a claimant relies has to “*overcome*” such presumption, possibly via a considerable connection to the U.S. territory or interests. According to the Court, the ATS did not provide a possibility for justice for twelve Nigerian citizens against Dutch and British oil companies (Royal Dutch Petroleum and its subsidiaries), alleging that (via the Nigerian subsidiary) the companies had *aided and abetted international law norms violations of human rights* as committed by Nigerian military in the 1990s on foreign soil (Nigeria). In particular, the Nigerian subsidiary allegedly supplied transportation to Nigerian forces; allegedly permitted the utilisation of their property as “*a staging ground for attacks*”; allegedly supplied food for the soldiers concerned; and provided compensation to them. In dismissing the case, the judges of the U.S. Court of Appeal for the Second Circuit unanimously agreed that the simple presence of a multinational corporation was not an evident connection to U.S.

<sup>1900</sup> See U.S. Military Tribunal, Nuremberg, *The United States of America v. Carl Krauch et al.*, Judgment of 30 July 1948, in *Trials of War Criminals Before the Nuremberg Military Tribunals*, Vol. VIII, United States Government Printing Office, Washington, 1950, [http://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_war-criminals\\_Vol-VIII.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-VIII.pdf). In the judgment convicting twenty-three senior executives of the I.G. Farben Company, the Tribunal held: “*With reference to the charges in the present indictment concerning Farben’s activities in Poland, Norway, Alsace-Lorraine, and France we find that the proof establishes beyond a reasonable doubt that offences against property as defined in Control Council Law No. 10 were committed by Farben, and that these offences were connected with, and an inextricable part of the German policy for occupied countries [...]. In some instances, following confiscation by Reich authorities, Farben proceeded permanently to acquire substantial or controlling interests in property contrary to the wishes of the owners. [...] The action of Farben and its representatives, under these circumstances, cannot be differentiated from acts of plunder and pillage committed by officers, soldiers, or public officials of the German Reich. [...] Such action on the part of Farben constituted a violation of the Hague Regulations*”, *ibid.*, p. 1140.

<sup>1901</sup> *Ibid.*, p. 1132-33, holding: “*Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law. [...] Similarly, where a private individual or a juristic person becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations*”.

<sup>1902</sup> See U.S. Military Tribunal, Nuremberg, *The United States of America v. Alfried Felix Alwyn von Bohlen und Halbach and Eleven Others*, Judgment of 31 July 1948, in *Trials of War Criminals Before the Nuremberg Military Tribunals*, Vol. IX, United States Government Printing Office, Washington, 1950, [http://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_war-](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-)

crime of pillage, besides using forced labour of prisoners of war, foreign workers and civilian concentration camp inmates to work in its armament factories in breach of Article 6 HRs.

Conversely, other cases in which corporations' rights have been recognised under international law do not reject the view that they may be subject to direct legal obligations. In the advisory opinion on the wall the International Court of Justice found that, "*given that the construction of the wall in the Occupied Palestinian Territory has, inter alia, entailed the requisition and destruction of homes, businesses and agricultural holdings, ... Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned*".<sup>1904</sup> Furthermore, the jurisprudence of the European Court of Human Rights has not excluded "*the possibility that a commercial company may be awarded pecuniary compensation for non-pecuniary damage*" resulting from a violation of the ECHR,<sup>1905</sup> and it has also admitted the possibility to invoke the rights secured "*to everyone*" within the jurisdiction of a State party.<sup>1906</sup>

In view of the general acknowledgment of States' power to create (through relationships with other actors of the international system) "*derivatives*" international actors, remarkably some authors have highlighted that States may be intended to confer a limited and functional international legal personality to multinational enterprises (often as investors, in view of treaties conferring investment rights on corporations which then become capable of asserting and enforcing them), without

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[criminals\\_Vol-IX.pdf](#), pp. 1351-1352. In the judgment convicting twelve executives of the German Krupp company, the Tribunal held: "*the confiscation of the Austin plant based upon German inspired anti-Jewish laws and its subsequent detention by the Krupp firm constitute a violation of Article 43 of the Hague Regulations*", *ibid.*, p. 1353; "[...] it is conclusively shown that throughout German industry in general, and the firm of Krupp and its subsidiaries in particular, prisoners of war of several nations including French, Belgian, Dutch, Polish, Yugoslav, Russian, and Italian military internees were employed in armament production in violation of the laws and customs of war", *ibid.*, p. 1376.

<sup>1903</sup> *Ibid.*, p. 1370, holding: "*We conclude that it has been clearly established by credible evidence that from 1942 onward illegal acts of spoliation and plunder were committed by, and on behalf of, the Krupp firm in the Netherlands on a large scale, and that particularly, between about September 1944 and the spring of 1945 certain industries of the Netherlands were exploited and plundered for the German war effort, in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy*".

<sup>1904</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, p. 198, para. 152.

<sup>1905</sup> ECHR, Grand Chamber, *Comingersoll S.A. v. Portugal*, 6 April 2000, para. 35, in which the Court held: "*In the light of its own case-law and that practice, the Court cannot therefore exclude the possibility that a commercial company may be awarded pecuniary compensation for non-pecuniary damage. The Court reiterates that the Convention must be interpreted and applied in such a way as to guarantee rights that are practical and effective. Accordingly, since the principal form of redress which the Court may order is pecuniary compensation, it must necessarily be empowered, if the right guaranteed by Article 6 of the Convention is to be effective, to award pecuniary compensation for non-pecuniary damage to commercial companies, too*".

<sup>1906</sup> ECHR, Grand Chamber, *Sté. Colas Est et al. v. France*, 16 April 2002, para. 41, in which the Court held: "*The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions (see, mutatis mutandis, Cossey v. the United Kingdom, judgment of 27 September 1990, Series A no. 184, p. 14, § 35 in fine). As regards the rights secured to companies by the Convention, it should be pointed out that the Court has already recognised a company's right under Article 41 to compensation for non-pecuniary damage sustained as a result of a violation of Article 6 § 1 of the Convention (see Comingersoll v. Portugal [GC], no. 35382/97, §§ 33-35, ECHR 2000-IV). Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises [...]*".

denying States' typical role as subject of law.<sup>1907</sup> Moreover, such international legal personality may be more developed in respect to other non-state actors in view of corporations' influence of over global political and social realities.

**1.B. (b)** As anticipated, the alleged unlawfulness of the “*cause*” of the contracts because of the companies' violation of IHL norms was also invoked by virtue of (1) the customary nature acquired by these norms and even (2) their imperative character.

**1.B. (b)(1)** According to the OLP the existence of a *customary rule of international law on corporate liability for human rights violations* would allow applying the IHL norms in question, and thus the obligations imposed on States, to private companies.<sup>1908</sup> Conversely, the defendant companies' denial of such a customary rule was argued in view of the necessary indication of States' practice and *opinio juris* and the apparent exclusion of an implicit recognition of international legal personality to transnational corporations by such practice.

The Versailles Court concluded for the absence of evidence of such a customary rule on account of three main considerations. First, the view that the interpretation of “*organs of society*” or “*group*” in the 1948 UDHR includes companies remains questionable. Second, as regards the role of courts in the application of corporate responsibility, the US cases cited by the OLP (*i.e.* Filarga/Pena Irala-Sosa/Alvares Machain) were deemed as not relevant since they discussed the enactment of a domestic legislation (*i.e.* the Alien Tort Claims Act), or because some of them had “*criminal*” aspects (Saro WIWA/RoyalDutch) being the company prosecuted for complicity in the murder and torture of several opponents to the Nigerian military junta. Even the invoked decisions of French courts

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<sup>1907</sup> See, *e.g.*, J. Zerk, *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge, 2006, at 75 ff. On the gradual transformation of the role of multinational corporations in the international order, see Sacerdoti, “Le società e le imprese nel diritto internazionale: dalla dipendenza dallo Stato nazionale a diretti destinatari di obblighi e responsabilità internazionali”, *Diritto del commercio internazionale*, 2013, at 109 ff. On the will of States to determine what (and who) has legal significance at the international level, see C. Focarelli, *International Law as a Social Construct*, Oxford, 2012, at 223 ff.

<sup>1908</sup> The OLP relied on the position formulated by Prof. Chemillier Gendreau: under such customary rule of international law, “*les règles fondamentales du droit international s'appliquent aux entreprises privées notamment aux multinationales qui doivent répondre devant les juridictions nationales et internationales de leur responsabilité pour violation de ces règles*”. In this regard, several circumstances were addressed in support of this rule: the reference in the 1948 UDHR of “*every organ of society*” (preamble) and “*group*” (Article 30); the acknowledgment by the PCIJ (in the *Advisory Opinion No. 15 on the Jurisdiction of the Courts of Danzig*, 3 March 1928), that a treaty may confer subjective rights and obligations of individuals; the assimilation to *jus cogens* of many IHL norms by the ICTY; the increasingly frequent referral to national courts of individuals' petitions against corporate responsibility for violations of international law (concerning human rights, labour law, environmental law, humanitarian law); the recognition in French courts of violations of the ECHR, the ICESCR and the ILO Convention; the work of international organizations (the ILO Declaration and the OECD Guiding Principles, the UN General Assembly's Declaration on the Right and Responsibility of Individuals, groups, and Organs of Society adopted on 9 December 1998); policy statements; NGOs measures; the acceptance by States of the principle of corporate responsibility for violation of international law; the doctrine's opinion. See Court d'Appel de Versailles, *op. cit.*, at 24-25.

were considered as no longer relevant, because they occurred in a criminal context or they were related to the application of the ECHR, without connection with the present circumstances and the invoked IHL conventions. Third, the signs in favour of corporate responsibility were deemed additional to a key element for the formation of a customary norm, namely a general practice of States consenting to recognise the legal value of such a norm as a principle to be applied. According to the Court, the various elements of soft law cited by the OLP did not allow to consider that the conditions for the existence of a customary rule establishing *la “responsabilité générale des entreprises transnationales pour violation des Droits de l’Homme”* were met; during the search for such a norm, the notions of humanitarian law and human rights (affect to the human person and her/his dignity) were assimilated.

Thus, the international standards whose violation was invoked by the OLP were deemed as not enforceable against the French companies.

**1.B. (b)(2)** Regarding *the imperative character of the IHL norms* invoked by the appellant (*i.e.* those related to the prohibition to transfer the occupying power’s population into the occupied territories, the prohibition to destroy and expropriate property therein, the obligation to respect cultural property of the occupied population, and the prohibition to confiscate), the OLP argued that they represent irreducible principles of *jus cogens* that “*devait s’entendre comme un ordre public international qui s’impose à tous les sujets de droit international*”, and such order is hierarchically superior to the French public law.<sup>1909</sup>

Conversely, according to the defendant companies the notion of *ius cogens* is not recognised under France law, it could not be applied since it has not acquired customary value. They denied the effect attributed by the OLP to *jus cogens* as well as the reference to international public order that would include the invoked IHL norms. They refuted the existence of an international public order as a normative standard. For the defendants, even if those norms had customary value this would not be sufficient to enforce them in relation to private legal persons.

In this regard, the Court of Appeal highlighted that the customary nature of several IHL norms has been confirmed in the advisory opinion on the legality of the threat or use of nuclear weapons.<sup>1910</sup> Nonetheless, for the Versailles judges, the extent of such acknowledgement must be

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<sup>1909</sup> Cour d’Appel de Versailles, *op. cit.*, at 25 and 27.

<sup>1910</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, at 257, para. 79, holding that: “*C’est sans doute parce qu’un grand nombre de règles du droit humanitaire applicables dans les conflits armés sont si fondamentales pour le respect de la personne humaine et pour des considérations élémentaires d’humanité selon l’expression utilisée par la cour dans son arrêt du 9 avril 1949 rendue dans l’affaire du détroit de Corfou ...que la Convention IV de la Haye et les Conventions de Genève ont*

qualified as the ICJ's wording does not allow to consider as custom all IHL norms: "*il est déclaré que se trouvent concernées 'un grand nombre de règles', en outre il est pris en considération la protection assurée par la règle à savoir 'le caractère fondamental pour la personne humaine', 'des considérations élémentaires d'humanité' en lien avec la protection de la personne humaine et de sa dignité. En outre, la CIJ ne cite au titre des destinataires de l'obligation, que les Etats auxquels il est interdit d'écarter la norme par les clauses d'un traité de sorte que se pose le problème de leur applicabilité, aux sociétés françaises intimées*".<sup>1911</sup>

Furthermore, the Court of Appeal considered that the invoked notion of *ius cogens* remains variously interpreted. For some, it has effect exclusively under the Vienna Convention on the Law of Treaties that adopted it,<sup>1912</sup> and so it prohibits States to adopt a conventional norm contrary to it. In noting that domestic law does not recognise the notion of *jus cogens*, even in this limited aspect, the Court of Appeal highlighted that France is not a party to the Vienna Convention and repeated a quote by the French Minister of Foreign Affairs which reflects an opposition to that notion.<sup>1913</sup> It was then noted that under French law *ius cogens* has the same value of customary law, it does not meet the requirements of international law and it only serves to solve conflicts of international norms. Conversely, for others such as the appellant, *jus cogens* is a broader concept enforceable against the subjects of international law, and IHL norms having this nature could not be derogated.<sup>1914</sup>

However, for the Versailles judges, even if it could be proven that the relevant IHL norms constitute *ius cogens*, they would only apply to States, without a direct binding effect to private companies, stressing that the concept of non-derogation or "*non dérogeabilité*" of a norm does not imply formal hierarchy of the norms in question. The appellant's argument was then rejected by repeating that "*les entreprises ne sont sujets de droit international qu'exceptionnellement*" (*i.e.* in relation to the conventions they signed or to specific areas that apply to them, such as labor law or environmental law) "*et en l'espèce, cette condition n'existe pas, les normes en cause appartenant au droit humanitaire*".<sup>1915</sup>

For the Court of Appeal, the existence of a higher international public order qualified as "*jus*

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*bénéficié d'une large adhésion des Etats. Ces règles fondamentales s'imposent d'ailleurs à tous les Etats qu'ils aient ou non ratifié les instruments conventionnels qui les expriment parce qu'elles constituent des principes intransgressibles du droit international coutumier*".

<sup>1911</sup> Cour d'Appel de Versailles, *op. cit.*, at 26.

<sup>1912</sup> Article 53 VCLT.

<sup>1913</sup> Cour d'Appel de Versailles, *op. cit.*, at 26. That quote emphasises several aspects: the composition of *ius cogens* is uncertain; the inaccuracies featuring *jus cogens* have not been reduced since 1969; the vagueness about the content of this concept remains despite the contributions of international jurisprudence; the mode of formation of a peremptory norm is unclear; imprecision characterises the effects of *jus cogens* because, despite the entry into force of the Convention, the risk has not gone that the *pacta sunt servanda* rule is ignored by an abusive invocation of *jus cogens*. See Chronique Charpentier, *AFDI*, 1993, at 1055.

<sup>1914</sup> The OLP quoted the recognition of such a notion by Professor Kolb, according to which "*truffée de dispositions protectrices de la personne dans une situation de vulnérabilité prononcée, elle établit un standard minimum d'ordre public*".

<sup>1915</sup> Cour d'Appel de Versailles, *op. cit.*, at 27.

*cogens*” (including the humanitarian rules that were invoked and that should be applied) was not demonstrated. Therefore, the application of the Hague and Geneva Law in question against the French companies under the jurisdiction of national law in the name of an international public order resulting from *jus cogens* was rejected. The Court emphasised that those IHL provisions could not be imposed on domestic courts as rules relating to fundamental subjective human rights as contended by the appellant, because they correspond to rights of another nature, whose respect and protection relate to States, but which cannot be applied to private legal persons.

Accordingly, the Court concluded that the OLP could not claim against Alstom and Veolia the violations of Articles 49 and 53 GCIV, Articles 23 and 46 HRs, and Article 4 of the 1954 Hague Convention nor the 1977 Protocol I, for the contracts signed with Citypass during the construction of the tramline or for having participated in the public service concession contract to which they were not parties: its request concerning the unlawfulness of these contracts could only be rejected.

It is worth considering that, the unlawfulness of the contracts awarded by Alstom and Veolia could have been explained without relying on that notion of *ius cogens* contested by France, but, instead, by reiterating, firstly, the criminal nature of the establishment of the aforementioned settlements under international norms legally binding to France (*i.e.* Art. 49(6) GCIV combined with Art. 147 GCIV criminalise the “*illegal transfer*”; Art. 85(4)(a) API and Art. 8(2)(b)(viii) ICC Statute explicitly recognise it as a war crime), and, secondly, the absolute obligation upon Israel to put an end to the settlements policy under the Geneva Convention and Security Council’s resolutions demanding the withdrawal from the occupied territories (Arts. 25 and 103 UN Charter).

Overall, the significance of the Veolia case is reflected in the multiplicity of means (*i.e.* campaigning, advocacy and litigation) employed to promote and bring about respect for international law by corporations.<sup>1916</sup> Apparently the pressure originated from such measures induced Veolia to withdraw from the railway project in 2011.<sup>1917</sup> Further loss of large contracts and reputational costs were then suffered by this company because of its involvement in activities undertaken in the Palestinian occupied territory.<sup>1918</sup>

Of note, another exclusion for Veolia from public contracts with UK local councils, under UK and EU procurement law, was debated in 2012 due to its involvement in activities of “grave

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<sup>1916</sup> See O. Barghouti, “Derailing Injustice: Palestinian Civil Resistance to the “Jerusalem Light Rail”, [http://www.jerusalemquarterly.org/images/ArticlesPdf/38\\_Derailing\\_Injustice.pdf](http://www.jerusalemquarterly.org/images/ArticlesPdf/38_Derailing_Injustice.pdf)

<sup>1917</sup> See Ma’an New Agency, “France’s Veolia pulls out of Jerusalem tram project”, 30 November 2010.

<sup>1918</sup> See A. Nieuwhof, “Veolia suffering ‘expensive’ damage due to Palestine campaigners’ publicity, says financial expert”, 19 February 2013. See also <http://www.globalexchange.org/economicactivism/veolia/victories>



*misconduct' in the conduct of business under any reasonable interpretation".*<sup>1919</sup> A legal briefing clarified that Veolia “operates as a single entity worldwide, providing transport, sewage treatment, landfill and waste collection services that benefit illegal Israeli settlements in East Jerusalem and the occupied West Bank”, and this conduct was criticised for directly assisting serious violations of international humanitarian law.<sup>1920</sup> Conversely, Veolia has still served a landfill in the Jordan Valley area of the occupied West Bank (near the Israeli settlement of Masua) and run transportation services from settlements of the occupied territories to Israel.

As regards the French Government’s position vis-à-vis its and the EU institutions, it is worth considering its proclaimed foreign policy and legal commitments to ensure respect for “*human rights and fundamental freedoms*” and the “*rule of law*” (international and internal), even set out in the 2009 “EU Guidelines on the promotion of compliance with international humanitarian law” in third countries.<sup>1921</sup> On the one hand, the Versailles Court’s conclusions may create legal and political dissonance for their apparent incompatibility with the condemnations by both French and EU institutions of the settlements issue and their institutional practice *vis-à-vis* such settlements in terms of EU-Israel relations.<sup>1922</sup> On the other hand, in the *Veolia case* the theoretical basis for ascertaining corporate responsibility raises the open issue of international economic competitiveness in respect to other businesses in different national jurisdictions which do not prevent them contributing to similar violations of international law and do not held them accountable for such breaches, including under civil and criminal liabilities as well as exclusion from public tendering.

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<sup>1919</sup> Under Article 23(4)(e) of the Public Contracts Regulations 2006, which was enacted to comply with the requirements of EU Directive 2004/18/EC (31 March 2004), a public body may exclude a bidder or reject a bid where it is found that the individual or organization concerned “has committed an act of grave misconduct” in his business or profession. See <http://www.legislation.gov.uk/ssi/2006/1/regulation/23/made>; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Official Journal L 134, 30/04/2004 P. 0114 – 0240, available at

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0018:EN:HTML>

<sup>1920</sup> For a detailed reasoning on this view, see “Excluding Veolia from public contracts” - *A legal briefing note prepared by Hickman and Rose, Solicitors*, at [http://jffp.com/?page\\_id=30850](http://jffp.com/?page_id=30850). See “Canterbury Council meeting interrupted by Middle East Protest”, 13 February 2012, <http://www.thisiskent.co.uk/Canterbury-council-meeting-interrupted-Middle/story-15214437-detail/story.html#axzz2ehAThMVC>

<sup>1921</sup> Updated European Union Guidelines on promoting compliance with international humanitarian law (IHL), OJ C 303, 15 Decemebr 2009, p. 12-17, available at:

[http://europa.eu/legislation\\_summaries/human\\_rights/human\\_rights\\_in\\_third\\_countries/ah0004\\_en.htm](http://europa.eu/legislation_summaries/human_rights/human_rights_in_third_countries/ah0004_en.htm)

<sup>1922</sup> See the EU-Israel Association Agreement, signed on 20 November 1995 and entered into force on 1 June 2000, Article 2 (“*Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement*”). See also the Report by Euro-Mediterranean Human Rights Network, “Eu-Israel Relations: Promoting and Ensuring Respect For International Law”, February 2012; it examines Israel’s integration into the EU Internal Market as well as the EU corrective measures in relation to the State practice of expanding the implementation of its cooperation instruments with the EU to the illegal settlements of occupied territories.

## 2.2. *Bil'in* Village case

*Bil'in* is a Palestinian village located north of Jerusalem and west of Ramallah in the central West Bank, and its municipal lands touch the 1967 border with the State of Israel (*i.e.* the Green Line).

### 2.2.1. The suits before Canadian courts and the controversial viability of civil claims for war crimes allegedly committed abroad

In July 2008 the Village Council of *Bil'in* and the Head of the Village Council sued two Quebec-registered corporations and their sole Director and Officer before the Superior Court in the District of Montreal, Québec.<sup>1923</sup> The plaintiffs claimed that Green Park International Inc. and Green Mount International Inc., “*on their own behalf and as de facto agents of the State of Israel*”, had illegally constructed residential and other buildings on *Bil'in*'s territory (more precisely on land owned by the late Ahmed Issa Abdallah Yassin) as well as marketing and selling condominium units and/or other built up areas to the Israeli civilian population, creating a new dense settlement neighbourhood therein (*i.e.* since 2003 the *East Mattityahu* neighbourhood of the *Modi'in Illit* settlement, which sits in part on confiscated *Bil'in*'s lands.<sup>1924</sup> In doing so, the defendants were claimed to be accountable to international law and Canadian domestic law for aiding, abetting, assisting and conspiring with the State of Israel in carrying out the illegal purpose of transferring (directly or indirectly) portions of its civilian population to the occupied territories, and so assisting in the alleged commission of war crimes in the West Bank.

In this regard, the pleaded sources of legal obligations included: Article 49(6) GCIV which prohibits the occupying power from *transferring “parts of its own population onto the territory it occupies”*; Article 1(1) and Article 85(4)(a) API which classifies a violation of Article 49 as a grave breach (thus as war crime); Article 8(2)(b)(viii) which sets out that prohibition as a war crime, and Article 25(c) ICC Statute. The plaintiffs contended that Israel was in breach of these provisions and the defendants were assisting (therefore civilly liable for) in such a violation.<sup>1925</sup> They framed this alleged participation as a civil wrong by invoking the standards of conduct articulated in the *Geneva*

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<sup>1923</sup> Superior Court of Quebec, *Bil'in (Village Council) and Ahmed Issa Abdallah Yassin v. Green Park International Inc., Green Mount International Inc. and Annette Laroche*, R.G. No. 500-17-044030-081, 2009 QCCS 4151, Judgment of 18 September 2009.

<sup>1924</sup> In 1991 large lots of agricultural lands under *Bil'in*'s municipal jurisdiction were declared “*state land*” as part of a big expropriation project undertaken by the Israeli Civil Administration, which allocated for the construction of the *Modi'in Illit* settlement since 2001.

<sup>1925</sup> Israel is party to the Fourth Geneva Convention, but not to the Additional Protocol I or the ICC Statute.

*Conventions Act* and the *Crimes Against Humanity and War Crimes Act*<sup>1926</sup> to claim that the defendants were liable in tort under Article 1457 of the *Civil Code of Quebec*, which sets out the basic principle of extra-contractual civil liability under Quebec civil law.<sup>1927</sup> Apparently this was the first time in Canada for plaintiffs instituting a civil claim for war crimes. It is worth noting that that serious allegation was highly politically charged, since the personal consent of the Attorney General (*i.e.* the Minister of Justice) or Deputy Attorney General is required for such a prosecution.<sup>1928</sup>

The plaintiffs sought only punitive damage and injunctions (against the two corporations and their sole director, officers, agents or any other persons under their direction or control) to cease immediately all constructions and sales activities in *Bil'in*, to demolish the buildings in dispute, and to restore the lands concerned to their condition prior construction. They also mentioned violations concerning freedom of movement and the denial of access to, use of, and control over land historically used “for livelihood purposes”.

A series of motions to dismiss were filed by the defendants, pleading no cause of action, State immunity, lack of standing, *forum non conveniens*, and *res judicata*. The Québec Superior Court rejected most of these motions either in whole or in part; for instance, it refused to grant them immunity under the *State Immunity Act*, ruling that the corporations were alleged to be acting in their own capacity and not as agents of Israel.<sup>1929</sup>

Remarkably, Justice Louis-Paul Cullen ruled (for the first time in Canada) that the commission of a war crime could be the subject of a civil lawsuit in Québec: “*A war crime is an indictable offence. As such, it is an imperative rule of conduct that implicitly circumscribes an elementary norm of prudence, the violation of which constitutes a civil fault pursuant to art. 1457 C.C.Q.*”<sup>1930</sup> Furthermore, the Court found that knowingly participating in a war crime could potentially lead to civil liability in a Quebec court: “*In theory, a person would therefore commit a civil fault pursuant to art. 1457 C.C.Q. by knowingly participating in a foreign country in the unlawful transfer by an occupying power of a portion of its own civilian population into the territory it occupies, in violation of an international instrument which the occupying power has ratified. Such a person would thus be knowingly assisting the occupying power in the violation of the latter’s obligations and would also*

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<sup>1926</sup> The *Geneva Conventions Act* (R.S.C. 1985, c. G-3) and the *Crimes Against Humanity and War Crimes Act* (S.C. 2000, c. 24) have enacted the Geneva Conventions and the ICC Statute into Canadian criminal law, and they confer on Canadian courts criminal jurisdiction over war crimes committed anywhere in the world.

<sup>1927</sup> Under Article 1457 of the *Civil Code of Quebec*, “*Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another*”.

<sup>1928</sup> See *Geneva Conventions Act* (R.S.C. 1985, c. G-3), 3 (4); *Crimes Against Humanity and War Crimes Act* (S.C. 2000, c. 24) 9 (3).

<sup>1929</sup> See Superior Court of Quebec, *Bil'in (Village Council) and Ahmed Issa Abdallah Yassin v. Green Park International Inc., Green Mount International Inc. and Annette Laroche*, *ibid.*, paras. 119-144.

<sup>1930</sup> *Ibid.*, para. 175.

*become a party to a war crime, thereby violating an elementary norm of prudence*".<sup>1931</sup>

Nonetheless, the Superior Court declined jurisdiction on the ground of *forum non conveniens*, ruling that the case had a much closer connection to Israel than Canada.<sup>1932</sup> In this regard it is worth considering that the appropriateness of the Canadian forum could rely on the defendants' incorporation in the Province of Québec and on the plaintiffs' arguments that they pursued the suit in Canada because doing it in Israel would result in contravening "*public order*".<sup>1933</sup> In particular, the law as applied by Israeli courts would fail to take account of the Fourth Geneva Convention and they would declare as non-justiciable the facts of a suit on the legality of settlements in the West Bank; to the extent that this would condone the commission of war crimes recognised under both domestic and international law, this would be "*manifestly inconsistent with public order as understood in international relations*". Another compelling argument was that filing a civil suit for war crimes to the forum whose State is allegedly responsible for such crimes would be basically unjust, above all where the legality of State action with respect to war crimes is not a justiciable issue.<sup>1934</sup>

The trial judge, however, rejected these arguments. Looking at the jurisprudence of the High Court of Justice,<sup>1935</sup> Justice Cullen concluded that the cases concerned did not completely close the Israeli judicial authorities to *Bil'in*: according to his own interpretation of this case law, the HCJ refrained from applying Article 49(6) GCIV "*not because of its unwillingness to adjudicate on its alleged violation by reason of the political significance of the matter, but either because it was unnecessary to do so or because the HCJ considered that it was not customary international law (contrary to what professor Ben-Naftali states in her footnote) and that it had not been incorporated into the domestic law of Israel through appropriate legislation*",<sup>1936</sup> concluding that this is not "*manifestly inconsistent with public order as understood in international relations*" under the meaning of Article 3081 C.C.Q.<sup>1937</sup> According to the Superior Court of Québec, the

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<sup>1931</sup> *Ibid.*, para. 176.

<sup>1932</sup> Under Article 3135 C.C.Q., "[e]ven though a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide".

<sup>1933</sup> In Canada, in a tort action the *lex loci delicti* is the applicable law, but under Article 3081 C.C.Q., "[t]he provisions of the law of a foreign country do not apply if their application would be manifestly inconsistent with public order as understood in international relations".

<sup>1934</sup> In order to support their position, the plaintiffs filed the affidavit of Professor Orna Ben-Naftali, who described the judicial policy of Israeli courts to refuse to review the legality of settlements with respect to international humanitarian law. Conversely, the defendants filed the affidavit of Israeli attorney Renato Jarach, who substantially agreed on that Israeli courts would not review the legality of settlements with respect to war crimes, but highlighting that this was because a judicial determination with such broad political aspects should defer to the political process (rather than because of a lack of legal tools to give judgment).

<sup>1935</sup> The parties submitted to the Superior Court of Québec three cases in which the HCJ refrain from applying Article 49 GCIV: HCJ, *Ayub v. Minister of Defense*, (1978) 606/78, 33 (2) PD 113; HCJ, *Dweikat v. Government of Israel*, (1979) 390/79, 34 (1) PD 1; HCJ, *Bargil v. Government of Israel*, (1991) 4481/91, 47 (4) PD 210.

<sup>1936</sup> Superior Court of Québec, *Bil'in (Village Council) and Ahmed Issa Abdallah Yassin v. Green Park International Inc., Green Mount International Inc. and Annette Laroche*, *ibid.*, para. 288.

<sup>1937</sup> *Ibid.*, para. 289.

juridical advantage sought by the plaintiffs was procedural: not having to argue before an Israeli court that the Fourth Geneva Convention has become part of customary international law (and thus part of Israeli law) since the 1970s. The trial judge found that this minor advantage over the defendants was not enough to justify an assertion of jurisdiction, in view of other connecting factors that “clearly point to the HCJ as the logical forum and the authority in a better position to decide”,<sup>1938</sup> and he dismissed it.

In a decision taken on 11 August 2010, the Québec Court of Appeal upheld the dismissal of the incidental appeal filed in October 2009 on the account of *forum non conveniens*, noting that the dispute essentially concerned citizens of the West Bank against corporations operating therein “in compliance with the law applicable in the West Bank” and so it would require “a great deal of imagination to claim that the action has a serious connection with Quebec”.<sup>1939</sup> As regards the competence or jurisdiction of the HCJ, it was stressed that under art. 3135 C.Q.Q., the judge who declines jurisdiction is not required to designate a specific foreign court, being sufficient to refer to the “authorities of another country”, and that “the conclusion of the trial judgment do not rule out the possibility that the dispute be heard if necessary by another Israeli court”.<sup>1940</sup> As regards the justiciability issue, the appellants had not shown that the trial judge committed an error that would justify interference by a higher court.<sup>1941</sup> On 3 March 2011, the Supreme Court of Canada refused to review the *Bil’in* lawsuit and dismissed the application for Leave to Appeal filed in October 2010.<sup>1942</sup>

It is worth noting the consistency of this dismissal with another decision of the Supreme Court of Canada which refused to review a case brought forth by the Canadian Association Against Impunity against Anvil Mining Ltd. Previously the Québec Court of Appeal held that Canadian courts lack jurisdiction over actions by Canadian corporations that are committed abroad when no

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<sup>1938</sup> *Ibid.*, para. 335. See paras. 305-335; in paragraph 317 the Court emphasised that “as it is presently framed, [plaintiffs’ case] can hardly lead to a just result”: by pursuing the demolition of many houses they had failed to include the “numerous owners or occupants ... thereby depriving those persons of the right to be heard, a fundamental tenet on natural justice”; by omitting Israel as a party they had bypassed sovereign immunity laws although they were indirectly seeking an “essential finding that [Israel] is committing a war crime”; they had not implead the Canadian attorney general or get his authorization, as required by Canadian law.

<sup>1939</sup> See Québec Court of Appeal, *Bil’in (Village Council) v. Green Park International Inc., Green Mount International Inc. and Annette Laroche*, R.G. No. 500-09-02-0084-091, 11 August 2010, para. 86. In paragraph 51 it was reaffirmed that the plaintiffs’ assertions of an ownership interest in the lands were inconsistent and that the plaintiffs were just seeking a judicial “declaration on the policy of the ‘occupying State’”.

<sup>1940</sup> See Québec Court of Appeal, *ibid.*, paras. 62 and 70.

<sup>1941</sup> See Québec Court of Appeal, *ibid.*, para. 79.

<sup>1942</sup> See Supreme Court of Canada, *Bil’in (Village Council), Late Ahmed Issa Abdallah Yassin, Basem Ahmed Issa Yassin, Maysaa Ahmed Issa Yassin v. Green Park International Inc., Green Mount International Inc. and Annette Laroche*, 2011 CanLII 10843 (SCC), Case No. 33898, 3 March 2011, <http://scc-csc.lexum.com/scc-csc/scc-l-csc-a/en/item/10463/index.do>

“*real and substantial connection*” to activities that occurred within Canadian territory is found.<sup>1943</sup>

In that case, the plaintiffs wanted to hold Anvil Mining Ltd. (a Quebec-registered corporation, but headquartered in Perth, Australia) accountable for complicity in crimes (including summary executions, rape, torture, illegal detention, destruction of homes, and looting) for its “*logistical support*” to the Congolese Army (FARDC) during a massacre of civilians occurred in 2004 near the town of Kilwa, which was situated fifty kilometres from the Dikulushi copper mine operated by Anvil Mining in 2002-2011.<sup>1944</sup>

However, the Court of Appeal found that “*Anvil’s activity in Quebec has no connection, directly or indirectly, to the ‘complicity’ in committing ‘war crimes’ or ‘crimes against humanity’ during the operation of a mine*”.<sup>1945</sup> According to the Court, the necessary requirements for jurisdiction were not satisfied: Anvil Mining did not have an office in Quebec at the time that such abuses occurred; since its Montreal office had no involvement in the decisions leading to the business’s alleged participation in the Kilwa massacre, the case could not be brought in Quebec.<sup>1946</sup> Moreover, the Court of Appeal rejected the CAAI’s claim that it could not seek justice and pursue remedy for the victims of this massacre in either the Congolese judicial system<sup>1947</sup> or the Australian criminal system: the difficulties faced in Australia<sup>1948</sup> were deemed not sufficiently compelling to bring its lawsuit in Canada under the principle of *forum necessitatis*, which requires exceptional circumstances such as “absolute impossibility at law or practical impossibility” in filing its lawsuit in the other forum.<sup>1949</sup> Even though Justice André Forget of the Court of Appeal found “*regrettable to note that citizens have so*

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<sup>1943</sup> See Court of Appeal, Province of Quebec, *Association Canadienne Contre L’Impunité (CAAI) c. Anvil Mining Ltd.*, File No. 500-09-021701-115, Judgment, 24 January 2012, paras. 57-58, 67-68,

<sup>1944</sup> *Ibid.*, paras. 21-26. In particular, Anvil allegedly provided rides to the military to the place of the massacre, supplying drivers, trucks and airplanes, fuel, and food. It was claimed that in failing to withdraw the vehicles, Anvil staff members “*knowingly facilitated (the actions of) the accused ... when they committed the war crimes*”. Anvil maintained that the military requisitioned the vehicles and that it had no choice but to hand them over.

<sup>1945</sup> *Ibid.*, para. 85.

<sup>1946</sup> *Ibid.*, paras. 893 and 104.

<sup>1947</sup> In the DRC the plaintiffs’ difficulty in bringing their claims was mainly due to irregularities within the national judicial system, major barriers in lawyers’ access to victims, and threats along with intimidation, see OHCHR, “Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed Within the Territory of the Democratic Republic of the Congo Between March 1993 and June 2003”, August 2010, paras. 63, 869, 904, 1068.

<sup>1948</sup> In view of a 2005 documentary by the Australian Broadcasting Corporation, the Australian Federal Police opened an investigation into Anvil Mining’s complicity in crimes against humanity and war crimes in the DRC, but in August 2007 decided to drop it in light of the acquittal of the suspects in the DRC. In order to launch a civil action against the company, an Australian law firm representing sixty-one Congolese victims filed a preliminary application to the Western Australian Supreme Court to seek the “*disclosure of documents*”, but the validity of the agreements concerning the the lawyers’ representation of the plaintiffs was questioned by the defendant. In the subsequent attempt to return to the DRC to reconfirm these agreements, the DRC Government prevented the group of Congolese lawyers from flying to Kilwa and gaining access to the victims. This failed efforts along with security concerns for Congolese lawyers led the Australian law firm to withdraw from the case. See *Requête Pour Autorisation D’Exercer Un Recours Collectif et Pour Être Désignée Représentante*, para. 2.206, *Association Canadienne Contre L’Impunité c. Anvil Mining Limited*, case No. 500-06-000530-101, (2010).

<sup>1949</sup> *Ibid.*, paras. 96-103.

*much difficulty obtaining justice” and expressed “all of the sympathy that must be felt for the victims and the admiration that the NGOs’ involvement within the [ACCI] inspires”, his opinion was that “the legislation does not make it possible to recognise that Quebec has jurisdiction to hear this class action”.*<sup>1950</sup>

### **2.2.2. The petitions before the Israeli Supreme Court**

Before the unsuccessful attempt to hold the two Quebec-registered corporations accountable for their conduct on the *Bil’in*’s land and seek remedies before the Canadian judicial order, the complainant (the late Ahmed Issa Abdallah Yassin) submitted four petitions to the Israeli High Court of Justice against the Government and the IDF Commander in the West Bank (among other respondents).<sup>1951</sup>

In particular, the first petition (filed on 5 September 2005) contested that the route of the separation wall cut off the village from over half of its municipal lands, based on relevant Israeli jurisprudence. The Court decided to order the respondents “*to reconsider an alternative to the route of the separation fence on Bil’in land which will harm the residents of Bil’in to a lesser extent, and leave the cultivated land on the east side of the fence to the extent possible*”; it upheld the complainant’s argument that the existing one was chosen in support of the construction of the neighbourhood (and not for security concerns). Accordingly, an arrangement of the barrier to a route closer to the settlement *Modi’in Illit* was made in July of 2011 (around 25 per cent of *Bil’in*’s land was returned to it, while other 25 per cent of its land has remained behind the wall). Conversely, the second petition (HCJ 143/06 of 4 January 4 2006) disputed the validity of the activity carried out to construct the settlement neighbourhood *East Mattityahu* and of related building permits under the military orders applied to the occupied territories. The Court was asked “*to annul the approval for coming into force which the settlement subcommittee had granted to planning scheme 210/8/1 in September 2005, and to order action necessary so as to enforce planning and construction law in ‘East Mattityahu’*”. Green Park International, Inc. and Green Mount International, Inc. requested to be joined as respondents and they were approved. The Court deliberated that the building permits were unlawful and ordered an interim injunction which established the “*immediate halt of any building without a building permit*”, the “*immediate cession of any activity to inhabit the buildings*” in the zones concerned, and the halt of “*all construction work in the zone pursuant to building permits*”. On 27 August 2007 the second petition was dismissed, since a new version of

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<sup>1950</sup> *Ibid.*, para. 104.

<sup>1951</sup> See HCJ 8414/05, *Ahmed Issa Abdallah Yassin, Bil’in Village Council Chairman v. The Government of Israel, The Military Commander in the West Bank, Green Park Inc., The Land Redemption Planning and Development Fund, Ein Amin Enterprise and Development Company Ltd., The Moidin’in Illit Local Council, Heftsiba Construction and Development Ltd.*, Judgment, 4 September 2007.

planning scheme 210/8/1 was approved for deposit on 15 February 2006 (by the Israeli Civil Administration) and came into force on 31 January 2007, and new permits were issued in accordance with it. As regards the third petition against the same planning scheme, it was dismissed on 5 September 2007 in a decision based on laches, unreasonable delay; to the Court, the complainant's objection should have been raised to the original plan. Finally, a fourth petition unsuccessfully sought to repeal retroactively a declaration concerning part of *Bil'in*'s lands as State land. Even though the complainants' claims were deemed justified (because this declaration of 1991 was discovered to rely "on false purchase claims" in the course of the litigation regarding the first petition), the Court held that the matter could not be decided so many years later.

### **2.2.3. The individual complaint before the United Nations Human Rights Committee**

While there was no chance for the plaintiffs to be completely heard by the Canadian judicial system insofar as the case was never decided on the merits, accountability and remedial mechanisms in the Israeli judicial system did not reveal to be effective. This led the *Bil'in* Village Council, along with eleven village residents, to file an individual complaint to the Human Rights Committee under the Optional Protocol to the ICCPR on 28 February 2013, alleging that Canada has violated "*its extraterritorial obligation to ensure respect for Articles 2, 7, 12, 17 and 27*" of the Covenant.<sup>1952</sup> Specifically, Canada has allegedly failed to regulate the corporations' activities adequately so as to prevent violations in the occupied Palestinian territory and it has allegedly failed to provide effective remedies to hold them accountable for the human rights violations in which they have been complicit.

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<sup>1952</sup> HRC, *Mr. Mohammed Ibrahim Ahmed Abu Rahma et al. v. Canada*, Communication No. 2285/2013, 28 February 2013. According to the complaints, the general foundations of extraterritorial obligations under the ICCPR include Article 55 and 56 of the UN Charter (as under Art. 103 they "*take precedence over any over international instruments, including bilateral agreements*"). In considering the interpretation of Article 2(1) ICCPR ("*within its territory and subject to its jurisdiction*") the complainants refer not only to its General Comment No. 31 (in which the meaning was "*within its territory or subject to its jurisdiction*", see UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 10) but also to its Concluding Observations on Israel of 2003, in which the Committee moved away from the effective control test, and, instead, applied the standard adopted in the ILC's Draft Articles of 2001 (*i.e.* whether or not the act is attributable to a State and is a violation of an international legal obligation), stating that "*the conduct by [Israeli] authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law*" constitute violations of the ICCPR. See also HRC, *Concluding Observations: Yugoslavia*, UN Doc. CCPR/C/79/Add.16, 28 December 1992, paras. 5, rejecting the Federal Republic of Yugoslavia (Serbia and Montenegro)'s denial of responsibility for acts outside its territory on the basis of the links between the government of Serbia and Serbian nationalists in Bosnia and Croatia, and, instead, it "*firmly urged the Federal Government to put an end to this intolerable situation for the observance of human rights, and to refrain from any support for those committing such acts, including in territory outside the Federal Republic of Yugoslavia*". See also HRC, *Concluding Observations: Iran*, UN Doc. CCPR/C/79/Add.25, 3 August 1993, para. 9, condemning "*the fact that a death sentence has been pronounced, without trial, in respect of a foreign writer, Mr. Salman Rushdie, for having produced a literary work and that general appeals have been made or condoned for his execution, even outside the territory of Iran*". See also HRC, *Lopez Burgos v. Uruguay*, Communication No. R 12/52, 6 June 1979, para. 10.3 ("*it would be unconscionable to permit a State to perpetrate violations on foreign territory, which it could not perpetrate on its own territory*").



The articulation of the violations of the aforementioned provisions deserves attention. As to the right to freedom of movement under Article 12 ICCPR, the complainants claim the impossibility to access their lands used for generations for agriculture, grazing and other livelihood aims, due to the settlements built by the two corporations.

As regards the right to be protected against illegal or arbitrary interference with her/his family, privacy, home or correspondence under Article 17 ICCPR, the complainants emphasise a number of issues. Firstly, the contested interference (“*the building, marketing and selling of housing units to Israel settlers by the two corporations*”), which are prohibited activities under international law) is argued to be unlawful under the meaning of this provision.<sup>1953</sup> Secondly, the latter covers interferences stemming from State authorities and legal or natural persons.<sup>1954</sup> Thirdly, the contested *forced eviction from agricultural land* (as resulted from the construction of *Modi’in Illit*) is understood as strictly coupled to housing as well as essential to the functioning of each family unit, so as falling within the scope of “*home*” as applied in Article 17 (*i.e.* where an individual resides or carries out her/his work<sup>1955</sup>) and then under the protection contained in this clause. In support of this argument, the interpretation given by the European Court of Human Rights (in two cases concerning access to, use of, and control over land used for traditional livelihood purposes) is emphasised in the complaint: such land was deemed part of a certain cultural way of life within the scope of “*home*” and “*private life*” as enshrined in Article 8 ECHR; in the same vein, “*a minority’s way of life*” was considered “*entitled to the protection guaranteed for an individual’s private life, family life and home*”.<sup>1956</sup>

Finally, in view that State authorities are under “*the duty to provide the legislative framework banning such acts by natural or legal person*”,<sup>1957</sup> according to the complainants, Israeli authorities issued the declarations that resulted in the loss of the title over the lands in question, but it was the two corporations that carried out actual possession and use of those lands during the constructions of the settlements, thus being engaged in activities that violate Article 17 and Article 7 due to unlawful and arbitrary interference with their homes.

As regards the rights of ethnic minorities to enjoy their own culture “*in community with the other members of their group*” under Article 27 ICCPR, the complainants (as “*members of the indigenous*”

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<sup>1953</sup> HRC, *General Comment No. 16: Right to Privacy (art. 17)*, 9 April 1988, HRI/GEN/1/Rev.9 (Vol. I), para. 3 (“*the term “unlawful” means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant*”).

<sup>1954</sup> HRC, *General Comment No. 16, ibid.*, para. 1.

<sup>1955</sup> HRC, *General Comment No. 16, op. cit.*, para. 5.

<sup>1956</sup> EurCommHR, *G. and E. v. Norway*, Appl. Nos. 9278/81 and 9415/81, Decision on Admissibility, 3 October 1983, D.R. 35, p. 30; ECtHR (4<sup>th</sup> Section), *Noack and others v. Germany*, Appl. No. 46346/99, 25 May 2000, Rep. 2000-VI.

<sup>1957</sup> HRC, *General Comment No. 16, op. cit.*, para. 9.

*Palestinian population*”) contest the destruction of “*their culture, including agricultural production and related close connection with the land*” on account of the constructions of the settlements whose access is barred to them. In the same vein, such construction was argued to negate their capacity to enjoy their land for economic and cultural aims, putting emphasis on the Human Rights Committee’s view that “*the rights protected by Article 27 include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong*”<sup>1958</sup> and that “*culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in [but not limited to given this language] the case of indigenous peoples*”.<sup>1959</sup> Focusing on past applications of Article 27 to similar situations,<sup>1960</sup> another basic issue concerns the *dynamic dimension of culture* and so the protection of *livelihood activities that are “central to enjoyment of one’s culture”*, whether or not they traditionally extend back for generations by nature.<sup>1961</sup> Therefore, the complainants claim that the interference with the indigenous population’s livelihood based on agriculture (due to the planning and construction of settlements in the West Bank) gives rise to violations of Article 27, especially as both occupation and settlements violate international law.

The Human Rights Committee could provide for a pioneering decision on the subject of corporate accountability and as regards States’ human rights extraterritorial obligations under the ICCPR, especially concerning the duty to regulate the conducts of nationals and home corporations acting abroad (as part of the obligation to protect).

### **3. Criminal litigation in national legal orders**

#### **3.1. The Riwal Group/Lima Holding B.V. case for corporate complicity in international crimes**

On 14 May 2013 the Netherlands Public Prosecutor’s Office decided to discontinue criminal proceedings against Lima Holdings B.V. (part of the Riwal Group, a Dutch private rental company

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<sup>1958</sup> HRC, *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, Communication No. 167/1984, UN Doc. CCPR/C/38/D/167/1984, 26 March 1990, para. 32.2.

<sup>1959</sup> HRC, *General Comment No. 23: The Rights of Minorities (art. 27)*, UN Doc. CCPR/C/21/Rev.1/Add.5 (1994), para. 7.

<sup>1960</sup> HRC, *Concluding Observations: Israel*, UN Doc. CCPR/C/ISR/CO/3, 2 September 2010, para. 24, in which grave concern was expressed on the “inadequate consideration of the Bedouin population in Israel” and the State party was required to respect, in the planning efforts in the Negev area, the right to their traditional livelihood based on agriculture and ancestral land.

<sup>1961</sup> HRC, *Ilmari Lämsmäen et al. v. Finland*, Communication No. 511/1992, UN Doc. CCPR/C/52/D/511/1992, 26 October 1994, para. 9.8 (“*With regard to the authors’ concerns about future activities, the Committee notes that economic activities must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry. Furthermore, if mining activities in the Angeli area were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the authors’ rights under article 27, in particular of their right to enjoy their own culture. The State party is under a duty to bear this in mind when either extending existing contracts or granting new ones*”).

specialising in the field of vertical transportation) and its managing directors for alleged involvement in the commission of war crimes and crimes against humanity, within the meaning of the International Criminal Act (*Wet Internationale Misdriften or WIM*),<sup>1962</sup> on account of its contribution - through the provision of mobile cranes and aerial working platforms - to the construction of the separation wall around various Palestinian villages and an industrial area nearby the Ariel West settlement on the West Bank.<sup>1963</sup>

The contested acts were qualified as follows: “*large-scale deliberate and unlawful destruction and appropriation of property without military necessity*” committed against protected persons within the meaning of Article 5(1)(d) WIM, which is based on Article 147 GCIV; “*transfer, directly or indirectly, by the occupying power of part of its own civilian population into the territory it occupies*” within the meaning of Article 5(5)(d) WIM, which is based on Article 49 GCIV; the crime against humanity of persecution pursuant Article 4(1)(h) WIM in conjunction with apartheid under the meaning of Article 4(1)(j) WIM. The *locus delicti* of the punishable acts was considered (partly) the Netherlands since the natural and legal persons under suspicion lived or resided or had their official seat therein and “*the contested acts were committed in the Netherlands or in the Dutch scope of these legal persons*”.

The related investigation was opened following the criminal complaint filed in 2010 by the Dutch Advocate Liesbeth Zegveld on behalf of a Palestinian human rights organization (Al-Haq) and included searches in the company premises and executives’ private homes. After a three-years investigation, which reportedly found the company’s contribution to the construction works in the occupied territory,<sup>1964</sup> the Prosecutor decided not to pursue criminal charges. According to the Public Prosecutor’s Office, “*Dutch companies are required to refrain from any involvement in violations of the International Crimes Act or the Geneva Conventions*”,<sup>1965</sup> and several times in 2006 and 2007 the Ministries

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<sup>1962</sup> Article 2(2) of the 2003 WIM prohibits the commission of crimes against humanity and war crimes by Dutch nationals, including companies; it also criminalises acts that amount to complicity in crimes, such as the facilitation or the aiding or abetting of crimes.

<sup>1963</sup> It was alleged that Riwal participated in the construction of the wall in the Palestinian village of Al-Khader in 2005-2008, in the Palestinian village of Hizma in 2004-2006, in the Palestinian village of Bruqin in 2008-2010. For the complaint, see <http://www.alhaq.org/images/stories/PDF/accoutability-files/Complaint%20-%20English.pdf>

<sup>1964</sup> The investigation evidenced the following activities: “*renting out a crane that was used from 10 through 12 June 2005 in the construction of the barrier in occupied territory near Aida; renting out a crane that was used on 27 March 2006 in the construction of the barrier in occupied territory near Qalandia; renting out a crane that was used on 3 and 4 April 2006 in the construction of the barrier in occupied territory near Rachel’s Tomb; renting out a crane that was used on a day in the last week of June 2006 in the construction of the barrier in occupied territory near Hizma; renting out two aerial working platforms that were used on 13 June, 2007 in the construction of the barrier in occupied territory near Al Khader; renting out one or two aerial working platforms that were used on 27 July 2009 and on 9 September 2009 in the construction of an industrial site near the settlement Ariel in occupied territory*”. See “No further investigation into crane rental company”, available at [http://www.om.nl/algemene\\_onderdelen/uitgebreid\\_zoeken/@160908/no-further/](http://www.om.nl/algemene_onderdelen/uitgebreid_zoeken/@160908/no-further/).

<sup>1965</sup> Under Article 5 of the International Crimes Act, natural persons as well as legal entities within the Dutch jurisdiction are required not in any way to be involved in, or contribute to, possible violations of the Geneva Conventions or other IHL rules; such an involvement is a crime according to Dutch law. Under Article 51 of the Dutch

of Foreign Affairs and Economic Affairs called Lima to account regarding this matter.

In affirming that the complex question on whether the contested activities constitute such a violation could not be solved with certainty without further investigations, the Public Prosecutor's Office decided not to carry out them and not to prosecute the company and its managing directors, in view of various factors. Firstly, "*Lima only contributed on a small scale to the building of the barrier and settlements*" and its effective involvement was "*relatively minor*", in the sense that the material concerned was used only occasionally and for a few days, at times after its rental to third parties. Secondly, Lima has taken far-reaching steps so as to terminate its activities in Israel and/or the occupied territories permanently; thus there was a minor danger of repetition (within the Dutch jurisdiction) according to the Prosecutor. Thirdly, Lima and its managing directors have been affected by the consequences of the proceedings (including the searches of homes and company premises and the media attention).<sup>1966</sup> Moreover, the Prosecutor's decision was explained by admitting that additional investigations would consume a significant amount of State resources of police and judiciary, also noting that "*further investigations in Israel would most probably not be possible due to lack of cooperation from the Israeli authorities*".

However, disappointment for the dismissal of this case was expressed. In contesting the impact of the claimed construction to the fragmentation of Palestinian communities and the loss of privately-owned agricultural lands and olive groves upon which local Palestinians depend for income, it was highlighted how such dismissal did not provide restitution for those who remain isolated from their land and livelihood; in this vein, the reorganization of the company to terminate activities in Israel did not provide an effective legal remedy for victims.<sup>1967</sup>

### **3.2. The Lahmeyer case**

The Merowe dam, located on the Nile River about two hundred miles north of Khartoum (Sudan), represents one of the large-scale hydroelectric power projects on the African continent. Began in 2003 and terminated in 2009, its construction has resulted in affecting approximately between 50,000 and 78,000 people, mainly the Manasir, Hamadab and Amri communities.<sup>1968</sup>

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Penal Code, both natural persons and legal entities can commit a crime under Dutch law. Accordingly, corporations can incur criminal responsibility for participation in violations of international humanitarian law.

<sup>1966</sup> See "Q&A concerning investigation into involvement in construction of Israeli barrier and settlement", available at <http://www.om.nl/onderwerpen/internationale/map/concerning/>

<sup>1967</sup> See "Prosecutor Dismisses War Crimes Case against Riwal", 14 May 2013, available at [http://www.alhaq.org/advocacy/targets/accountability/71-riwal/704-prosecutor-dismisses-war-crimes-case-against-riwal?utm\\_source=smartmail&utm\\_medium=email&utm\\_campaign=](http://www.alhaq.org/advocacy/targets/accountability/71-riwal/704-prosecutor-dismisses-war-crimes-case-against-riwal?utm_source=smartmail&utm_medium=email&utm_campaign=)

<sup>1968</sup> For a detailed account of the social, environmental and human rights impacts of the project, see N. Hildyard, "Neutral? Against What? Bystanders and Human Rights Abuses: The case of Merowe Dam", 37 *Sudan Studies*, April

Lahmeyer International GmbH, based in Bad Vilbel (Germany), was the engineering firm in charge of the project planning, construction supervision and commissioning of the whole plant.<sup>1969</sup> While the first of the plant's water turbines became operational in April 2008, the company received the first order for this project in 2001; however, unsuccessful negotiations on relocation measures followed the 2002 presidential decree by the Sudanese government that expropriated an area of 6364 km<sup>2</sup> for the reservoir lake. The inexistence of a resettlement plan even six months prior to the arranged start of the construction was acknowledged in the Environmental Impact Assessment Report (EIAR) produced by the company in April 2002 and subsequently critically reviewed for not having disregarded the World Bank's international standards concerning resettlement and the World Commission on Dams' Guidelines on writing EIAR for dam construction projects.<sup>1970</sup> The actual resettlement of the affected groups of population had not taken place until two settlement areas behind the Merowe dam were hugely flooded in August 2006 and between July 2008 and January 2009 respectively. The forced relocation of thousands of displaced people still living there interested zones unsuitable for agriculture and livestock farming by reason of poor soil conditions.<sup>1971</sup>

On May 3 2010, a representative of the affected inhabitants of the region, together with the Berlin-based European Center for Constitutional and Human Rights, lodged a criminal complaint against two German high-level employees of Lahmeyer with the department of public prosecution in Frankfurt.<sup>1972</sup> The Prosecutor accepted the case and apparently the investigation is still open.

Due to the company's position as construction manager in the whole project as well as the defendants' own position within the company, it was claimed that they ultimately influenced and

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2008; E. Failer, M. Mutaz, A. El Tayeb, "Merowe: the largest water resources project under construction in Africa", 6 *Hydropower and Dams*, 2006, 68-73.

<sup>1969</sup> The Sudanese Ministry of Irrigation and Water Resources' Merowe Dam Implementation Unit - renamed the Dam Implementation Unit (DIU) - is the project owner. Several institutions provided finance: the Government of Sudan, the Peoples' Republic of China (mainly through the China Export Import Bank), the Kuwait Development Fund; the Saudi Development Fund; the Arab Fund for Economic and Social Development; the Abu Dhabi Development Fund, the Sultanate of Oman, and the Government of Qatar. The project involved a consortium of several companies and Sudanese subcontractors, including China International Water and Electric Corp and Harbin Power Engineering Co, the French Alstom, and the Swiss ABB. Information available at:

<http://www.merowedam.gov.sd/en/establishment.html>

<sup>1970</sup> See C. Teodoru, A. Wüest, B. Wehrli, "Independent review of Environmental Impact Assessment Report for the Merowe Dam Project", 23 March 2006, EAWAG (the Swiss Federal Institute of Aquatic Science and Technology), available at :

<http://www.eawag.ch/medien/bulletin/archiv/2006/20060323/Independent-Review-20060323-Short.pdf> .

<sup>1971</sup> See the statement, dated 28 August 2007, by the UN Special Rapporteur on Adequate Housing, Miloon Kothari, who urged the suspension of two hydroelectric dams until an independent evaluation could be conducted on their impacts, after receiving several reports by local communities facing large-scale forced evictions from the area to make way for the projects, available at <http://www.un.org/apps/news/story.asp?NewsID=23617#.UzqOsBbd7wx> .

<sup>1972</sup> For the English translation of the original criminal complaint and other related documents, see the website of the European Center for Constitutional and Human Rights at <http://www.ecchr.de/index.php/lahmeyer-case.html>.

decided on every single construction phases and that they were aware of the threats resulting from that project for the local inhabitants' lives and properties. As “*indirect perpetrators*” of the “*Dam Implementation Unit*” that commissioned the project, the two employees were accused of being liable to prosecution for several criminal offences, particularly by ordering or authorizing the closure of the left arm of the river in December 2005 and redirecting the waters through the narrower right arm, or, respectively, by refraining from ordering to open the flood spillway in August 2006 at the latest.<sup>1973</sup>

In particular, they were accused of *joint causing* the flooding of the Amri settlement areas in August 2006 as well as the Manasir areas in 2008 and 2009 (under sections 313(1), 25(2) of the German Criminal Code). They were also accused of “*joint induction of a flooding, intentionally or negligently causing a concrete danger for health and life and of damage to possessions*” and to property of considerable value (under section 313(2) in connection with sections 308(5), 25(2) of the German Criminal Code). Furthermore, they were allegedly criminally liable for abandonment (under section 221(1)(1) of the German Criminal Code) and for the destruction of buildings (under section 305(1) of the German Criminal Code). An additional offence was coercion (under section 240(1) of the German Criminal Code) because, when the flooding occurred, they forced the 2,740 Amri families to flee their lands and leave behind all their belongings. As for the further offence of criminal damage of the property of the Amri (under section 303(1) of the German Criminal Code), according to the complainants, “*a complexity of actions*” damaged the local population massively after they had not deferred to the DIU resettlement plans and they were carried out forcibly without prior notification or advance warning; the claimed damage included even the animals and moveable belongings destroyed or washed away, which did not fall within the lawful expropriation of land. Another accuse concerned the killing of approximately 12,000 vertebrate livestock without sensible reason (under § 17(1) Animal Protection Act).

Therefore, defendants' criminal liability for the acts has been claimed under sections 3 and 9 of the German Criminal Code. However, it is still to be established whether the criminal actions (*i.e.* the above-mentioned orders or authorizations) occurred in Germany or in Sudan, or whether the

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<sup>1973</sup> Specifically, according to the criminal complaint, “*Failer had the guarantor’s obligation to prevent the flooding given “his responsibility for the creation of a high risk situation and his de facto capacities to influence the course of the construction as project manager”*”. Conversely, the executive director Nothdurft had the “*surveillance guarantor*”’s duty to ensure that the population, which had not been resettled and was therefore in danger, would not suffer any harm from the high-risk situation he had caused. In fact, since 2005 he had been engaged in the immediate communication of several non-governmental organizations about the resettlement and other problems of the Merowe Dam Project, and so he was “*sufficiently informed and consequently jointly responsible for the coordination of the construction and resettlement measures*”. As additionally claimed, “*the fact that the resettlement took place in spite of missing resettlement measures having been carried out indicates that Nothdurft had approved of them or is guilty of remaining passive instead of interfering to prevent the flooding*”.

aforementioned omission should have occurred in Germany or Sudan.<sup>1974</sup> In case the criminal acts would be deemed committed on foreign territory (*i.e.* in Sudan), the applicability of German criminal law has been nevertheless asserted under section 7(2)(1) of the German Criminal Code, which provides for the prosecution of offenses committed abroad as far as the accused is a German citizens and the condition of “double criminal liability” is satisfied, so being the prosecution in the German public interest.

Although still at an embryonic stage, the criminal complaint issued to the State Prosecutor in Frankfurt has twofold relevance. It clearly illustrates the significance of States’ exercise of extraterritorial jurisdiction to make companies operating on a transnational scale liable in their home countries, especially when a conflict of sovereignty does not arise insofar as the State decides to prosecute criminal actions of its citizens.

At the same time, it reveals the importance of the due diligence requirement upon business enterprises for activities undertaken in dealing with authoritarian regimes which are likely to fail to take into account the social and environmental impacts of the planning and implementation of infrastructure projects in conflict-affected areas, and which are unwilling or not able to offer preventive human rights protection to the affected local communities as well as quick redress to the victims of related massive violations. Indeed, Lahmeyer’s inaccurate management of the Merowe dam project seem to exacerbate the Sudanese government’s debatable approach to applicable international and regional human rights standards: the right to adequate housing (including the prohibition of eviction or displacement), the right to food (particularly the availability and access to nourishment), the right to health (including the accessibility of the healthcare system and the prohibition of the destruction of healthcare infrastructure), the right to property, the right to work, the right to security of a person. In this regard, the criminal complaint has shown the lack of any comprehensive study independently carried out by Lahmeyer for ascertaining the completion of the resettlements, besides considering that the company was not prepared to suspend its activities until such completion.

It is worth noting that an additional attempt to bring justice and provide redress to the communities affected by the construction of the Merowe dam (along with a second one in Kajbar) is represented by a complaint filed at the African Commission on Human and People’s Rights by two

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<sup>1974</sup> Under § 9, par 1.2. Alt. German Criminal Code, all those locations where the omitted action should have taken place constitute the relevant location of the criminal offence; this is generally where the defendant was at the time of the offence or where the defendant could have acted to avoid criminal omission.

activists from the affected groups, represented by the Egyptian Initiative for Personal Rights (EIPR). In the decision to hear the case, taken at its 14<sup>th</sup> extra-ordinary session (20-24 July 2013), the African Commission found worthy of its consideration the alleged violations of several provisions of the AfrCHPR, to which Sudan is signatory. Of note, the intricate relationship between ESC rights and civil and political rights has been highlighted in the complaint. The concerned communication was specifically considered on 10 March 2014, during its 15<sup>th</sup> extra-ordinary session.<sup>1975</sup> The various forms of reparation sought on behalf of the affected communities include compensation to forcibly evicted individuals, investigation and prosecution of several incidents in which excessive force was allegedly used against protesters, restitution of land where available, putting a halt to the Kajbar dam and structural reforms of relevant Sudanese laws and policies with respect to development projects.<sup>1976</sup>

Strategically, this case offers the main African human rights protection mechanism a chance for ruling on the States parties' duty to involve affected local communities in the decision making process relating to infrastructure development projects and to ensure proper compensation for those affected when undertaking large-scale projects such as hydropower dams.

#### **4. Concluding remarks**

Access to justice and accountability remain very critical areas in respect to the open question on the action to provide States and other actors with the necessary avenues to ensure effective remedy and redress for victims of serious abuses committed by, or with the complicity of, corporations in home and host countries affected by war-torn situations.

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<sup>1975</sup> See AfComHPR, *Ali Askouri and Abdel-Hakeem Nasr (on behalf of persons affected by the construction of the Merowe and Kajbar Dams) v. The Republic of Sudan (Request for the Addition of two more Complainants)*, Comm. 452/13.

<sup>1976</sup> See "The Other Side of the Sudan Dams Complaint before the African Commission seeks justice for victims of Sudanese dams" and "EIPR launches legal action against Sudan for violations arising from the construction of the Merowe and Kajbar dams", *Egyptian Initiative for Personal Rights Blog*, 7 October 2013, <http://www.eipr.org/en>.





## CONCLUSIONS

### 1. The object of this study

This dissertation has examined the role, function and adequacy of international law to deal with civilians' access to, enjoyment and progressive realisation of, ESC rights as controversially affected during and in the aftermath of contemporary scenarios of armed conflict, other situations of massive violence, and contexts of occupied territories. The subject has been chosen in the view of significant developments occurred in the last decades at the national, regional and international level in relation to ESC rights and in the light of basic attention paid to possible implications of a more integrated and holistic approach of international law to such complex and changing contexts.

The question arises as to whether and how the evolution of the international legal framework has allowed for ESC rights to be addressed in relation to civilians' vulnerability, either handling the humanitarian consequences or tackling the direct/indirect and short/long-term detrimental effects of present-day warfare and administration of occupied territories. This means in particular whether and how the applicable international law takes into account such implications and contributes to their mitigation.

The framing of civilians' ESC rights from an international law perspective raises a number of legal issues that have been addressed throughout the research project: which international norms have progressively *supported* developments in the normative content of ESC rights and favour a more precise understanding of the nature and scope of ensuing obligations to be addressed for the imperative of civilian protection; which international norms have *tackled* questions of accountability for their violations as committed during the conduct of hostilities and its aftermath or the administration of occupied territories; which international norms have also *advanced* the availability of remedies to ensure the basic right to effective remedy and reparation for the violations concerned.

In order to answer these questions, this study has investigated the normative responses advanced under international humanitarian law in tandem with the functional development of other

applicable international legal regimes, such as international criminal law and international human rights law. This examination has shed light on the role played by a plurality of international norms that may interact with one another and reshape the interpretation of the rules representing the traditional point of reference to assess the emerging practice. Accordingly, it has confirmed that each of these branches represent valuable legal tools enabling to delineate the core substance and clarify the uncertain boundaries of outstanding connections between civilians' ESC rights and conflict-affected or occupation-related situations. Indeed, their divergence in nature does not necessarily imply their mutual exclusiveness. The main findings of this study are summarised in the following sections.

## **2. The main findings of this study**

### **2.1.**

The analysis carried out on the extensive IHL regime has shown that its normative developments have marked, owing to gradual codification or evolutionary interpretation, *certain steps forward in the sphere of ESC rights* against the effects of military operations as well as against civilians' mistreatment when in the hands of the enemy, which may include a party to a conflict or an occupying power. IHL sets down several obligations on the latter, which ultimately protect individual or collective interests of civilians. In doing so, IHL rules address certain components of ESC rights relating to health, food, work and employment, family, education, culture, resources, relief assistance, and environment. They have a primary importance for ensuring that civilians are not denied, or have access to, their basic needs. They have also a certain potential to generate positive conditions for peace and restoration of the affected situation, so supporting more generally the progressive realisation of ESC rights. However, *relevant gaps and weaknesses* in the existing IHL regime of protection of civilians, the civilian population as such, and civilian objects have emerged in the practice of present-day warfare and administration of occupied territories, as detailed hereafter.

The study on the scope of civilian immunity for the safeguarding of ESC rights against the effects of military operations and individual acts of violence in warfare has revealed that *the law on the conduct of hostilities* constitutes *a basic restraint on armed violence which has economic, social and cultural implications for civilians*. However, controversial cases (as reported in several fact-finding missions and

commissions of inquiry or dealt with in judgments) clearly evidence how *violations of cardinal principles and rules* of IHL have resulted in severe civilian losses of access to, and enjoyment of, ESC rights or other related consequences (Chapter I). Numerous breaches derive from a lack of inclination to respect them, scarce ways and means of enforcement, or ambiguous application in certain circumstances. Conversely, the same breaches prove a need to (re)consider the IHL protection of civilians in the area of ESC rights regarding either the *implementation* of such principles and rules or their *adequacy and effectiveness* in contemporary conflicts. In elucidating how they apply in practical circumstances, the study suggests a number of basic remarks in this regard.

(1) First, the emerging acceptance of systematic involvement of the civilian population in hostilities is *a conduct in radical contrast to the rationale underlying the IHL system*, thus not simply compatible or not with the principle of military necessity, which in any case gives way to the need to respect binding IHL principles. A disturbing trend of adopting conduct contrary to IHL on a reciprocal basis is often justified by the parties according to the peculiarities of the theatre of the conflict (*e.g.* overpopulation, promiscuity between military sites and civilian settlements). However this is far from the objective character of relevant IHL obligations.

In particular, *military operations carried out in the context of urban warfare must be specifically inquired from the perspective of the serious implications they could have for the ESC rights of the civilian population*. This remains a pressing need. Although such conduct in urban environments cannot classify *per se* as a violation of IHL principles, the latter are easily breached in cases of attacks in the vicinity of civilians or protected buildings, especially if carried out in densely populated residential areas, through artillery that cannot be aimed accurately and whose power derives from the quantity of fired shells and their massive belligerent parties involved. In this regard, the outlining of the applicable IHL rules and principles shall base further confidential discourse on compliance with the laws of war. Nevertheless, a true appraisal of the gravity of the implications for civilians' ESC rights during military operations appears to require a complementary recourse to concepts and standards pertaining to the evolved international human rights law; this may offer promising preventive or remedial approaches to the same breaches of operational obligations of IHL.

(2) Second, *certain limits of the definition of military objective* clearly weaken the protection of ESC rights. For instance, dual-use facilities are not identified as a separate category of military objectives and, as such, they are subject to Article 52(2) API regardless of any potential challenges of establishing the effective contribution made to military action. However, when such facilities serve the military but

also are *vital* for civilians, what remains highly problematic is the application of proportionality in attack by taking into due account its reverberating indirect effects. Although extensive consequences do not automatically mean “*excessive*” collateral damage, substantial “*subsequent-tier*” effects on civilians also concern the access to, and enjoyment of, the basic rights to health, food, safe and drinking water. This issue matters either in related humanitarian crises or beyond the battlefield, since *de facto* certain types of damage only materialise over time or are experienced far from the combat zone. In this sense, *greater humanitarian considerations* in the implementation of the proportionality principle may have positive implications in the targeting process on certain core dual-use facilities, which is highly likely to cause incidental long-term impacts on ESC rights and their progressive realisation. In particular, proportionality may be applied in favour of *limiting “derivative damage”, also calculated on a cumulative basis, which influences the access to, and enjoyment of, ESC rights*. Accordingly, an application of proportionality as a real guarantee of civilian protection from armed attacks may require taking into account *the resonant effects of attacking an object that serves the military while it simultaneously plays a vital role for civilians*, according to a twofold meaning. Firstly, ‘vital’ may refer to what is *necessary to the survival of the civilian population*, in doing so indicating the urgency of protecting the realisation of minimum level of ESC rights. Secondly, ‘vital’ may refer to what is *functional to the ‘sustainable human development’ of the civilian population*, in doing so indicating the value of protecting civilians’ opportunity to engage in economic, social and cultural activities. The relevance of taking into account this second concept relies on its evolution under international law as the primary development paradigm where the human dimension has come to constitute the main vector and core element, and on its inevitable implications even in the way of looking at the special vulnerabilities affecting civilians during and in the aftermath of hostilities.

(3) Third, *certain variables* affecting the ability to respect the obligations on feasible precautions (in attack and defence) to avoid or minimise the risk of collateral damage done to civilian persons and objects *may particularly influence an insufficient protection of adequate housing and shelter, healthcare, and education*. Two recurrent instances in recent military operations concern the location of military objectives in urban populated areas as well as the range and accuracy of the weapons used. In particular, the toxicities, volatilities and hazards inherent in the chemical white phosphorus shall be called into question to ban its use as an obscurant and be supplied with other screening and illuminating means. Similarly, the use of weapons such as flechette missiles, DIME munitions, and depleted uranium pose serious health concerns.

(4) Fourth, *the special protection regime provided for certain objects is of basic importance to safeguard specific dimensions of civilians' ESC rights against the effects of warfare.* With regard to the prohibition on targeting medical unit or medical transports, however, blatant disrespect has still characterised very recent armed conflicts.

As regards objects indispensable to the survival of the civilian population, significantly the prohibition on attacking, destroying, removing or rendering them useless is intended to cover all eventualities, including pollution of water supplies by chemical or other agents and the destruction of harvests by defoliants. Indeed, this is a corollary of the prohibition of starvation of civilians as a method of warfare aimed at weakening or destroying the population, which is established for both international and non-international armed conflicts and deemed to be customary in nature in both situations. However, a certain complexity of this system *calls into question its effectiveness in providing protection.* Such prohibitions are set out in a way that may obstruct concrete application: they cover cases of deliberate denial of sustenance, while other acts hampering the survival of the population through incidental damage (even when foreseeable) are left up to the rules prohibiting indiscriminate attacks and requiring precautions in attack to prevent devastating collateral damage. From an international criminal law perspective, nonetheless, the choice of counting measures of severe deprivation of food, water, healthcare and housing in criminal accusations (*e.g.* the contamination of wells and water pumps in the Darfur region) has led to *integrate socio-economic dimensions in the prosecution of existing crimes* (rather than a direct criminalisation of related esc-rights).

In discussing the aforementioned special regime in relation to two ancient methods of warfare, the possibility of severe cumulative effects on the enjoyment of a wide range of ESC rights by the civilian population has been emphasised, also in view of relevant practice such as the recent sieges employed in the non-international armed conflict in Syria and the prolonged blockade of Germany during and immediately after the First World War. Conversely, the atypical case of the Gaza Strip has shown how the illegality of a naval blockade may be acknowledged to the extent that its effect alongside the closure policy is deemed disproportionate under international humanitarian law or in the persistence of unlawful methods of warfare. Furthermore, the damaging dimensions of a persistent blockade may lead to (re)affirm the application of the Fourth Geneva Convention and the obligation to ensure (to the full extent of the available means) the supply of foodstuff, medical and hospital items and others to meet the humanitarian needs of the civilian population, thus providing for and permitting free passage of supplies basic for its survival. The combined impact of a blockade plus military operations on a civilian population living under occupation may be articulated

according to different applicable branches of international law, thus examining several inconsistencies with its protected status in respect to deteriorated and regressed levels of realisation of ESC rights.

(5) Fifth, as regards civilian objects falling within the category of cultural property, a special regime does prohibit its targeting and its use for military purposes but allows immunity to be waived on account of imperative military necessity. The determination of what precisely constitutes cultural property, however, may be challenging. As the scrutiny of the scope of application of the relevant *ius in bello* framework has shown, two aspects significantly influence this determination: *the cultural and spiritual value of certain objects are often established according to subjective criteria*, and, additionally, within a given community *the relative importance of an object may change over time as well as under certain circumstances*. Conversely, the unfortunate consequence of a generous definition of cultural property would be that of minimising the protective regime for objects that have a more widely recognised cultural value, although existing rules have not been taken seriously in the heat of recent armed conflicts. Nonetheless, further perspectives have emerged in examining the IHL ability to address and mitigate adverse affects of modern warfare. On the one hand, the targeting, destroying, plundering, or any other form of damage to cultural heritage and cultural property have also been deemed to *impair or nullify civilians' enjoyment of cultural rights* during the conduct of hostilities. In this regard, the normative content of the right of everyone to take part in cultural life has been interpreted as requiring States to respect and protect cultural heritage in times of war; the same right has been understood as closely related to other cultural rights, as inherently linked to the right to education, and as interdependent on the right to an adequate standard of living and also the right of all peoples to self-determination. On the other hand, IHL provisions describing offences against cultural heritage and cultural property in armed conflicts have been *integrated into the statutes of several international criminal tribunals*. In this regard, relevant jurisprudence of the ICTY includes cases related to the looting and destruction of cultural and religious institutions, treasures and monuments in the conflict-torn context of the Balkans. Significantly, a possible interpretation of the Rome Statute in relation to crimes against cultural property may derive, for the first time, after the opened investigation into alleged crimes committed on the territory of Mali, as the ICC Prosecutor has included “*intentionally directing attacks against protected objects under Article 8(2)(e)(iv)*” among the war crimes for which there are reasonable grounds to believe they have been committed by insurgents groups during this internal conflict; in particular, the acts in questions against religious and

historical Malian sites have been deemed to violate the special protection of cultural objects reflected in Article 53 API, as some of them are inscribed under the UNESCO World Heritage List.

Nevertheless, the 1999 Second Protocol to the 1954 Hague Convention remains the most valuable and suitable existing international instrument for pursuing war crimes against cultural property; particularly in view of Article 15, which defines five “serious violations” as acts intentionally committed in breach of these two treaties and requires States parties’ to adopt legislation making such acts criminal offences punishable under domestic sanctions, as well as in view of Article 21, which requires States parties to adopt measures to suppress “other violations” of the same two treaties inasmuch as they are committed intentionally.

(6) Sixth, the recognition of *an autonomous privileged status to schools buildings* on the basis of their intrinsic educational, and therefore humanitarian, value to society is arguably pertinent, particularly for being first public structures built in new settlements and for determining their essential importance to a community’s future growth and development in post-conflict scenarios. Supporting such an “integral” protection would imply expanding the focus of existing IHL rules on the conduct of hostilities, which should not only limit military forces’ choice of targets but also prohibit both attackers and defenders from converting educational buildings for military purposes. In this sense, the practice of placing military objectives in school facilities or using them to advance military goals would become unlawful, regardless their ordinary functioning and use by civilian students and educational staff.

In view of the alarming escalation of military attacks, the “derivative” and indirect level of IHL protection of most educational facilities should be considered quite anachronistic. Indeed, their military use, disruption and destruction may result in an absolute denial of students’ right to education, creating a serious divergence between international human rights and humanitarian law. In this regard, *indirect protection* may derive from certain human rights provisions since attacks on any related structures or materials on which the provision of education depends is likely to violate not only the right to education but also the right to freedom from discrimination, the right to private property and the right to health as enshrined in human rights treaties. Nonetheless, *strengthening the IHL protection of education facilities* would be in line with the special regime afforded to other categories of objects having inherent humanitarian value (*i.e.* medical establishments) or representing the spiritual conscience of a people or community (*i.e.* religious buildings); this would be also in accordance to existing IHL principles and rules affording special protection to children in armed



conflicts.

Turning to the widespread impunity for perpetrators of such attacks, international humanitarian and human right law are comprehensive enough to empower States' investigations on situations relating to this specific field. Moreover, there is a certain scope to coordinate these legal regimes with international criminal law so as to ensure a broader response to education-related violations, which also attracts individual criminal responsibility. In particular, certain war crimes, the crime against humanity of persecution, the crime of genocide under the ICC Statute may provide measures to criminalise military attacks on educational facilities and to protect education itself. A number of cases in which the Office of the ICC Prosecutor has conducted investigations and prosecutions contain references to crimes that deal with attacks on education.

## **2.2.**

The study on the protective scope of occupation law for the pursuit of the livelihood and wellbeing of the local inhabitants of occupied territories has revealed how *ESC rights represent a significant dimension of the traditional concept of welfare of the civilian population* (Chapter III). However, this regime may not satisfactorily meet the socio-economic and cultural entitlements concerned in contemporary situations of occupations. On the one hand, relevant obligations upon the occupant remain contingent to *contextual factors* (such as the intensity of control exercised in the occupied territory, the resources available therein, and the temporal dimension of occupation), which may require restrictive or expansive approaches to interpret their normative content. In any case, in covering a range of the ESC rights of the protected local population, IHL imposes fundamental duties that do not have a purely negative nature. Rather, they consist of due diligence obligations on the occupier according to its actual capacities and means, though their meaning is not elaborated much. On the other hand, the scope of such obligations is influenced by the changed international expectations as have arisen by several developments of international law.

It is reasonable to contend that the conventional division between the law of war and the law of peace may no longer be plausible in light of the changes surfaced in modern *de facto* realities of occupation, in which civilian populations may even live an entire lifetime under it or, in any case, may end up facing serious damage to the occupied economy as well as to human development, environmental consequences and permanent damage on the landscape, and so challenging the possibility for their own future generations to benefit from it. Moreover, the traditional international law of occupation has been often blatantly ignored and regularly violated. In this sense, an

adaptation in occupation law to evolve its protective scope concerning the civilian population finds in the *dual application* of international humanitarian law and modern international human rights law a valuable perspective to safeguard fundamental rights of civilians living in occupied territories. In fact, it may give new substance to the shift in focus regarding the beneficiaries of the “trust” created by occupation, *expanding and deepening the normative content of the needs, interests and rights of those civilians*, thus supporting a further departure from the Hague Law as already determined by Geneva Law in relation to the protection concerned. As already emphasised, co-application lies on the legal principle of the evolution of the law.

From a *de lege ferenda* perspective, in view of the now dated codification of this regime, the adoption of conventional law, such as a new additional protocol, may be considered so as to make the concepts and standards pertaining to the evolved international human rights law of economic, social and cultural nature directly applicable.

### **2.3.**

The analysis carried out on the evolution of international human rights law has shown *a certain potential of this developing regime for the imperative of civilian protection in the socio-economic and cultural spheres* (Chapter IV). This primarily matters in respect to the open issues of developing a contemporary understanding of civilians’ needs in such dynamic scenarios and elaborating upon legal validity and content of the obligations possibly incumbent on several actors performing crucial roles therein. Further, it matters in respect to the issue of facing the challenges of compliance with international norms enshrining ESC rights and of international enforcement mechanisms able to supplement and support domestic implementations of those norms when national systems do not or cannot pursue accountability because they are lacking or fail to function.

In particular, the application of human rights law may entails a *better understanding of distinct dimensions of realisation of ESC rights* that warrant - or should deserve - more consideration. Indeed, this legal regime has a special aptitude to *tackle the normative content of the rights to be protected against the conduct of military operations or in periods of occupation*, clarifying the nature and scope of a range of ensuing State obligations (particularly through basic tools such as the concept of progressive realisation or the principles of equality and non-discrimination).

Secondly, this regime may help framing *the legality of a variety of controversial actions or measures affecting civilians*: detrimental impacts may be addressed as stemming from the violations of obligations established by international law norms on ESC rights; in other words, the *link* between

such impacts and relevant obligations may be revealed.

A third benefit regards *the beneficial provision for enforcement mechanisms to redress breaches concerning ESC rights*. In the fight against impunity for gross violations of human rights law and international humanitarian law, the principle of criminal or civil accountability before quasi-judicial bodies or courts has been acknowledged at the universal and regional levels. As to the various possible sanctions for violations of ESC rights, a main concern is the aptitude to be adequately efficacious. As to the victims, a key issue regards the access to effective remedies empowered to grant reparation and to order cessation of such violations. The study has shown that meaningful jurisprudence on ESC rights in conflict-affected situations or transitional justice contexts has started to emerge from judicial or quasi-judicial proceedings. Conversely, certain possibilities through an institutionalised practice of legal interpretation of treaty obligations derive from the new OPICESCR instituting an individual complaints procedure, an inquiry mechanism for grave or systematic violations, and an interstate complaints mechanism. The third Optional Protocol to the CRC also offers similar and complementary procedures that may become mutually supporting for children's rights violations under the CRC and its two Protocols.

The examination of the various procedural issues on the applicability of human rights treaties on ESC rights during public emergencies prompted by situations of armed conflict, military occupation and post-conflict collapse has confirmed such an applicability, highlighting a number of basic remarks.

(1) On the one hand, States parties are not generally permitted to suspend the exercise of the rights enshrined in such treaties. However, when a situation is suitably severe as to warrant a *de facto* derogation, such a possibility may not be foreclosed provided that the satisfaction of the principles and criteria regulating explicitly derogations to human rights treaties is required to the State party concerned. In particular, the principle that a hard core of fundamental aspects of ESC rights cannot be suspended any time has crucial importance. Moreover, the modalities of derogation have to be shaped by the principles of *proportionality* (measures strictly required by the exigencies of the situation), *non-discrimination*, and *consistency* with the other State obligations under international law, which supposedly prevent abusive situations of emergency. Judicial and quasi-judicial monitoring bodies have expressed positive views (in addition to less clear opinions) about the non-permissibility of derogations from those treaties in such extraordinary circumstances.

(2) On the other hand, the analysis conducted on Article 4 ICESCR and especially on its drafting history confirms the view that the absence of an explicit derogation clause is not *per se* determinative of whether suspensions of ESC rights are or not admissible. Nonetheless, *the general limitation clause of Article 4 alongside the flexibility of the obligations established in Article 2(1) may sufficiently enable a State party to respond to extraordinary circumstances such as armed conflict or military occupation.* In this regard, a State party is allowed to impose no further restrictions on ESC rights than the ones permitted outside such situations, since no limitations on ESC rights may be justified on the grounds of an existing armed conflict. Accordingly, different conditions (*determination by law, compatibility with the nature of the rights, and promotion of general welfare as the sole purpose*) are necessary to substantiate legitimate limitations on the ICESCR, which must also conform to criteria preventing States' arbitrariness (i.e. *the principles of proportionality and necessity*). As regards the argument that *the required compatibility with the nature of ESC rights under Article 4 does not permit restrictions touching upon the minimum core obligations of States parties,* certain implications derive for *subsistence rights* such as the right to basic food, a basic level of health care, clothing and basic shelter as affected by conflict-related settings. More precisely, *any policy limiting the minimum core obligations corresponding to basic subsistence rights enshrined in the Covenant should be deemed not compatible with the very nature of the rights in question,* hence it should be considered in violation of Article 4. Indeed, restricting the minimum core obligations of basic subsistence rights undermines the vital interests of the individuals affected by such contexts, thus reflecting a *de facto* extinction of those rights. Conversely, relevant obligations ensuing from international humanitarian law cannot be derogated from, since the latter does not refer to any concept of derogation.

(3) The analysis carried out on the conditions under which the treaties on ESC rights may apply within or beyond States parties' national borders has revealed that the textual vacuum and ambiguity in relation to their general scope of application makes it problematic to maintain an unconditional support for their extraterritorial application within conflict-affected situations. However, when a State party is engaged in the conduct of hostilities as well as when it is an occupying power or when it acts in post-conflict situations, no *a priori* reasons make its human rights obligations limited to the sovereign territory. The concept of *jurisdiction*, the notion of *international cooperation*, and the application of *economic sanctions or equivalent measures* have been shown as three distinct aspects which have primary importance for assessing potential legal basis to extend such obligations beyond the territorial State (Chapter V).

In particular, taking into account the *progressive understanding of the notion of jurisdiction in the context of the State duties on ESC rights* (specially in view of the Maastricht Principles) may favour a better explanation of significant "exceptions" eroding the basic notion of jurisdiction as presumptively

territorial while broadening the *several de facto connections* basing the relationship between the affected civilians (as beneficiaries of these rights) and the non-territorial States (as corresponding duty-bearers) acting in such situations. Indeed, the jurisdictional doctrine of effective control over individuals or foreign territorial areas may play a crucial role<sup>1977</sup> but also be too restrictive, and other “*less demanding*” factual circumstances may prove equally relevant for disputing serious impairments of civilians’ basic rights as taking place in conflict-affected scenarios. In this regard, the potential of holding a foreign State liable for “necessary” and “foreseeable” consequences resulting from its conduct and impinging on the ESC rights of civilians may be argued insofar the proximity of its conduct with such impact is found or they are not only remotely connected; as highlighted, some regional human rights bodies have confirmed this view. Conversely, extending the scope of State obligations on ESC rights to situations in which its joint or separate actions lead it to exercise decisive influence or to take measures directly supporting access, enjoyment and progressive realisation of ESC rights as entitled to civilians overseas has further potential. This may prove particularly relevant for evaluating the international cooperation and assistance provided by the foreign State concerned in conformity to international law in multilateral contexts of reconstruction and development assistance.

## 2.4.

Among the theoretical and practical grounds funding reliance on modern international human rights law as further normative regime contributing to safeguard civilians in the area of ESC rights under international law, the greatest potential has been identified in the articulation of *its manifold relationship with international humanitarian law*.

The option to treat the two regimes as mutually exclusive has become ever more debatable; the *lex specialis* rule appears not to dictate *a priori* precedence to any body of law anymore, being that the matter is rather *contexts-dependent* or *interests-dependent*. In this respect these legal regimes may be applied and clarified in view of one another (particularly when they afford norms covering common fields) according to an approach of “reciprocal-influence” or “cross-interpretation”. The consequent

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<sup>1977</sup> For instance, the practice of several human rights monitoring bodies have offered the chance to examine the adequacy of the effective control criterion for clarifying the scope of “jurisdictional capacity” and responsibility of an occupying power to safeguard ESC rights of those living in the occupied territories. In particular, the concept of jurisdiction has been interpreted via the *effective control criterion* by focusing on *the factual circumstance of its impact on the lives of the civilian population living in the territory concerned* (e.g. the administration of the population’s civil register, the provision of identity documents to civilians, the unilateral administration of entry visa and work permits for non-ID holders in the occupied territories and for foreign visitors).

meaning of *lex specialis* as a tool to interpret norms belonging to distinct branches but interacting in a complementary relation entails determining the applicable norms on a case-by-case basis. In the sphere of ESC rights, approaching the principle of *lex specialis* as complementarity of norms may have positive implications particularly in situations of non-international armed conflicts and periods of occupation. It is reasonable to argue that *a constructive coordination in dealing with civilians' ESC rights may be developed between such regimes*, either when they concur (for existing overlapping norms within each branch) or when they diverge. In imposing concurrent obligations, the extent of their mutual influence may vary. Certainly, coordination may provide civilians with a greater degree of protection when these regimes deal with different issues concerning the same right: as they do not clash, there is no need to favour one over the other or to ascribe to one of the two a special status.

(1) The importance to apply and employ the concepts and standards pertaining to the evolved international human rights law of economic, social and cultural nature in situations of armed conflict and belligerent occupation has been confirmed in view of significant rationales.

On the one hand, many IHL provisions protect *vital conditions to the enjoyment by civilians of ESC rights* by dealing mostly with the ways to accomplish efficiency in humanitarian relief supplies, public health services, and food security. Conversely, IHL provisions ruling on the relationship between a belligerent party and civilian persons/objects under its control have been developed only for situations of military occupation, with some limitations however. Nonetheless, a more exhaustive IHL protection is afforded to the treatment of public or private property. In any case, IHL mechanisms to monitor, implement and enforce the applicable law may as a result be weak. On the other hand, human rights monitoring bodies at the universal and regional level have progressively given normative content and force to the ESC rights enshrined in human rights treaties, drawing basic guidelines to explain how their notions have undergone substantial changes and have widened in scope even in conflict-torn contexts, thus “surpassing” international humanitarian law. Indeed, human rights violations of persons found in such situations - and independently of their IHL status - can fall under their judicial or quasi-judicial scrutiny; generally they have jurisdiction to apply human rights law, even in view of IHL, but sometimes the other way around may be provided for.

In this regard, human rights treaties conferring ESC rights to individuals not only may cover *subjects scarcely if at all mentioned under international humanitarian law*, but also afford “*overlapping subjects*” *further normative details not found in the law of armed conflict or merely touched by occupation law*. This has been evidenced in relation to the right to health, the right to food, and the right to water and sanitation,

the right to education. In this sense, certain obligations flowing from human rights treaties are essentially not echoed in IHL rules, which generally encompass the “respect” and “protect” facets of ESC rights without determining the “fulfil” facet.

Furthermore, focusing on *scenarios of occupation*, modern human rights law is inherently relevant and arguably applicable since the occupying power is expected to facilitate the continuation of civilian life and the founding of a legal relationship between the civilian population and the occupying army. Given its very nature as “*midway between war and peace*”, belligerent occupation brings forth an actual need of re-determining the scope of relevant State obligations. In the area of ESC rights, this implies referring to States parties’ *minimum core obligations* arising from essential levels of each right in all circumstances, in addition to the *obligations of immediate effect* (*i.e.* taking deliberate and targeted steps to guarantee the broadest possible enjoyment of ESC rights under the existing circumstances; ensuring their exercise without discrimination of any kind), and *the obligations to be progressively implemented* towards the full realisation of these rights.

Therefore the analysis carried out has made more debatable the view that international humanitarian law provides for *sufficient protection of ESC rights* beyond conditions having ‘emergency connotations’ and for *sufficient guidance on substantial needs to ensure healthcare, food and water safety, education and labour conditions* in contemporary settings of armed conflict, especially those having a non-international nature, and present-day periods of military occupation. Remarkably, *a human rights approach* to deal with them encompasses significant elements such as the principles of non-discrimination and equality as well as the entitlements to availability, accessibility, acceptability, and quality in the enjoyment of ESC rights. In this sense, the prohibitions of discrimination in employment, the prohibitions of discrimination in education and racial discrimination represent further issues not addressed under international humanitarian law while being carefully considered under human rights law, being that their relevance is recognised for all human beings regardless of living conditions.

Overall, the applicability of modern international human rights law on ESC rights has revealed several encouraging implications: *influencing* the interpretation of relevant IHL norms; *clarifying* elements or *elaborating* aspects referred to in IHL norms when the latter come to (negative or positive) obligations that remain vague in their effects for actual guarantees to civilians; *filling* normative gaps in the scope of protection afforded by IHL; and *corroborating* the legitimacy of international human rights supervisory mechanisms in contexts of armed conflicts and occupation.

(2) Nonetheless, the function of IHL in understanding the ESC rights and ensuing human rights obligations is also important to define the relationship concerned. Indeed, *direct or indirect references to IHL principles and rules* have been found in certain practice of human rights monitoring bodies in order to *refine part of the normative content of ESC rights*, such as the right to health, the right to housing, the right to food, the right to water, the right to take part in cultural life. Similarly, the *unlawfulness of conducts* not explicitly set out in the human rights treaties concerned has been addressed by taking note of further duties stemming from international humanitarian law. In other words, IHL has been considered to elucidate, in a complementary way, *how the scope of ESC rights may be identified in conflict-affected contexts*.

Accordingly, in framing the application of ESC rights within the IHL regime their scope may be construed to prevent clashes of distinct norms or may be widened to define external bounds of these rights. A *cross-elaboration upon legal validity and content of binding obligations on ESC rights under both regimes* thus remains worthy. In this regard, military conduct unlawful under international humanitarian law may infer ESC rights violations under human rights law, while military conduct consistent with IHL may preclude such violations. Indeed, legitimate restrictions of human rights norms may derive either from the aforementioned regime of limitations or from the application of international humanitarian law and related military considerations.

In any case, the ultimate evaluation of whether violations of ESC rights took place would depend on the precise situation. In fact, the question as to whether *any* unlawful conduct under IHL necessarily infers a violation of a certain ESC right under human rights law is left open. The determination of short-term consequences as well as long-term effects on these rights is needed in this regard. Furthermore, military conduct leading to disproportionate or excessive damage or destruction of civilian objects necessary to the enjoyment of ESC rights can amount to serious violations of IHL and war crimes (*e.g.* an attack intentionally directed at an educational facility can be investigated and prosecuted as war crime under the ICC Statute) but they do not inevitably qualify as violations of ESC rights under human rights law, since the latter would require a “causal link” with the civilian victims insofar as it protects individuals’ rights (while it is only presumed that such damage or destruction affect civilians). Thus, the integration of IHL into the examination of the protection of civilians’ ESC rights appears valuable (more than a simple recognition of relevant concurrent obligations). It favours a progressive acknowledgment of a *de facto* impossibility of sorting out legal regimes which may afford actual and enhanced protection to civilians insofar as they influence each other. It also favours consistency within international law.



Of note, the mandate of relevant monitoring bodies does not always comprise the authority to pronounce on States' breaches of international humanitarian law. As to the CESCR, the possibilities of receiving of individual communications or conducting an inquiry under the OPICESCR may become a chance to advance technical examination of the application of the ICESCR in armed conflicts and to investigate the relationship between the human rights in question and international humanitarian law. As regards fact-finding missions and commissions of inquiry, their mandate generally extends to both regimes and may facilitate "reciprocal-influence" or "cross-interpretation".

(3) An element that deserves specific attention is the *duration* of contemporary conflict-affected and occupation-related scenarios. Their short or long terms are likely to influence the extent of potential "cross-interpretation" between relevant legal regimes. In particular, a human rights approach to civilians' ESC rights - which generally widen the range and scope of relevant State obligations under international law - may prove more suitable to handle the challenges featuring situations of persistent armed conflict as well as cases of prolonged occupation, with possible positive effects for the conduct of other actors involved.

## **2.5.**

There is no doubt that the legal discourse on the protection of civilians may be shaped, to a certain extent, by the two soft law norm-setting efforts which have been elaborated within the broader attempt of widening the circle of human rights duty-bearers beyond the territorial State and which have been explored narrowly for their relevance to conflict-affected situations (Chapter V).

The Maastricht Principles propose a more conceptual approach to foreign States' human rights obligations in the area of ESC rights, with some potential to impact the work of UN treaty bodies as well as judicial bodies in dealing with extraterritoriality and in advancing its elaboration. In the same vein, these principles are likely to nurture public understanding and awareness as to the scope and nature of such extraterritorial obligations among governments and intergovernmental organizations. They may also serve as an instrument for civil society organizations to hold States accountable for extraterritorial conduct related to different relevant dimensions of international relations (*e.g.* modalities and consequences of military conduct, international assistance and development policies, free trade agreements and bilateral investments treaties, conduct of transnational corporations).

The evolving weight of the UN Guiding Principles as a “*set of politically authoritative and socially legitimated norms and policy guidance*” has had certain implications for State responses to actual and potential business-related human rights abuses. As regards the advocated clarification of international legal standards applying to businesses’ involvement in gross violations, emphasis is appropriately put on the various forms of State extraterritorial jurisdiction which have started to function as tools to influence the spectrum of corporate conduct overseas. Nonetheless, a tricky aspect is identified in the national jurisdictions’ different interpretations of the applicability to business enterprises of international standards prohibiting gross human rights abuses, potentially amounting to international crimes. Conversely, as regards the concept of “*corporate responsibility to respect*”, business enterprises are aptly recommended to treat as “*a legal compliance issue*” the risks of causing or contributing to gross human rights abuses committed by third parties in view of an expanding theoretical possibility of civil and/or criminal liability. The need for business enterprises to consider “additional standards” of international humanitarian law is also explicitly referred.

## **2.6.**

However, the final analysis carried out on legal cases in which business enterprises have been litigated or prosecuted in relation to allegations of involvement in breaches of international law (which directly or indirectly inhibit the exercise of, or adequate access to, ESC rights in conflict-related contexts) has evidenced certain existing limits of international law (Chapter VI). In fact, the evaluation of the emerging judicial approaches to the legal determinations of corporate liability for such breaches has shown that national and international judicial mechanisms have not properly started to translate the theoretical corporate legal liability into tangible accountability for wrongs regarding ESC rights.

In particular, domestic courts and prosecutors have shown certain disinclination to proceed with litigation in cases where a corporation is claimed to have contributed to serious breaches of international law by foreign States abroad. Their uncertainty about whether business enterprises are bound by international human rights and humanitarian norms has been affirmed when indirect connection exists to the assumed violations. Furthermore, courts and prosecutors’ cautiousness to sit in judgment that end up touching the activities and policies of foreign States or to become embroiled in complex disputes that could have far-reaching political and policy consequences is clear. Moreover, a certain hesitation to open domestic courts to litigations related to corporate conducts with tenuous connections to their jurisdiction is real; forum shopping or the circumvention

of sovereign immunity laws have been not encouraged from such jurisprudence over alleging corporate complicity in breaches of international law by foreign States, which rather favours reliance upon non-justiciability doctrines and other non-merits grounds.

On the one hand, this case law has implicitly evidenced the need for States to continue to implement several measures to make sure that private actors under their jurisdiction do not cause or contribute to breaches of international law. Similarly, this examination has confirmed the enduring need for business enterprises to keep on incorporating self-regulating mechanisms to ensure not only compliance with ethical standards and international law but also available effective procedures through which affected parties or their legitimate representatives can raise concerns when they believe relevant commitments have not been met.

On the other hand, it is worth highlighting that in conflict-related scenarios judicial recourse may constitute an indispensable part of accessing remedy or alternative sources of effective remedy are unavailable. In such scenarios claimants who suffer a denial of justice in the territorial (host) State and cannot access the courts of the home State (irrespective of the merits of the claim) end up substantiating a serious legal obstacle. In this vein, any legal, practical, or procedural barriers preventing judicial mechanisms to function effectively raises a question of compatibility with the States' duty to protect against business-related human rights abuses which occurred within their sovereign territory and/or under their jurisdiction, or which felt within the sphere of State responsibility under the principles of public international law.

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