

Exporting the Rule of Law: Human Rights Abroad During Conflicts and Peace Operations

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1. Introduction

Exporting the rule of law during conflicts or post-conflict operations implies the insertion of the main principles of human rights (hereinafter HR) into the legal system of the administered or assisted country or province. Within this background, a legal system capable of succeeding in the aim to restore peace and stability should respect the necessary conjunction between principles and values affirmed by international authorities on the one hand, and, on the other, their effective strengthening through a day-by-day implementation. Beyond that background, nowadays HR represent a challenge for national states and international organisations facing military operations «overseas». At home, the apparent dilemma between security and liberty has led to extensive derogations from the punctual application of the guarantees normally secured by HR. During peace support operations such derogations from otherwise applicable HR have also frequently been invoked, and they have generally been justified on the basis of the emergency situations faced by the international authorities on the ground. This introduces the issue of the possible (otherwise mandatory) extraterritorial application of human rights law by states or international organisations vested with international legal personality over individuals or areas subjected to their *jurisdiction*.

Therefore it will be necessary to define in the first instance the concepts of *jurisdiction* and *extraterritorial application* through the analysis of the relevant HR supervisory bodies' case-law, and then to concentrate on the possible derogations from the principles ascertained. Given the fact that the only actor in the international environment with a general competence in the matter of threats to international peace and security is the

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United Nations (hereinafter UN), and more specifically the Security Council, we will concentrate on the analysis of the application of HR to UN peace operations. While in principle such operations are undertaken with the prior consent of the parties concerned, there are occasions in which the UN is vested with a degree of authority sufficient to found a *direct and immediate link* with people administered or generally subjected to its complete or overall authority and thus to establish its jurisdiction over them.

The question arises whether those broad powers are balanced with a parallel accountability for the *Organisation* or the states involved. Who is responsible for any HR violations committed? The UN? The member states? This article will try to answer, at least in part, those questions in the light of the relevant jurisprudence of the major HR international supervisory bodies, starting with the parallel development of both HR and international humanitarian law (hereinafter IHL).

2. Human Rights in Armed Conflicts

Our work is based only on the main international human rights law instruments and the analysis will concentrate on some provisions particularly relevant in an armed conflict or a peace operation. As is well known, IHL, defined as the rules relating to the use of weapons and other means and methods of warfare, and the treatment of individuals who have fallen into the enemy hands¹, is applicable in circumstances where human rights are likely to be restricted by an emergency situation. The question mainly raised by this is whether and which HR still apply in those circumstances and to what extent. The question could be easily answered by arguing that HR norms apply in all situations, including armed conflicts, according to the applicable international law². In this broad view, HR treaties and provisions binding upon all states would also seem to bind international organisations in which those states act as members, naturally with the necessary adjustments³. However, the matter is more complex and it needs to be evaluated more in depth.

¹ With regard to the definition and application of IHL see generally F. Kalshoven, *The Law of Warfare*, Leiden, Sijthoff, 1973, pp. 24-27; G. Abi-Saab, *The Implementation of Humanitarian Law*, in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Napoli, Editoriale Scientifica, 1979, pp. 310-346; I. Detter, *The Law of War*, London, Cambridge University Press, 2004 (2nd ed.), pp. 160-163; G. Aldrich, *The Laws of War on Land*, in «Am. J. Int'l L.», vol. 94, no. 1, 2000, p. 62.

² E.g., the UN Human Rights Committee (HRC) in 2001, speaking about the ICCPR, stated 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»: see Human Rights Committee, *States of Emergency (article 4)*, CCPR General Comment no. 29 (General Comments), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 4; K. Bennoune, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, in «U.C. Davis J. Int'l L. & Pol.», vol. 11, no. 1, 2004, p. 206.

³ The International Committee of the Red Cross has always maintained such opinion. See, e.g., the recent address by Jakob Kellenberger, President of the ICRC, at the 27th Annual Round Table on Current Problems of International Humanitarian Law: «Human rights law continues to apply alongside domestic law in armed conflict, except for the limited extent to which certain human rights norms may have been derogated from under the relevant treaty provisions governing states of emergency» (published in «Int'l Rev. Red Cross», vol. 85, no. 851, 2003, p. 651).

⁴ See K. Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, in «Am. J. Int'l L.», vol. 98, no. 1, 2004, p. 13.

⁵ See generally on the matter J. Wouters, F. Naert, *Shockwaves through International Law after 11 September: Finding the Right Responses to the Challenges of International Terrorism*, in C. Fijnaut et al. (eds.), *Legal Instruments in the Fight against International Terrorism: A Transatlantic Dialogue*, Leiden-Boston, Martinus Nijhoff, 2004, in particular pp. 512-525. The authors conclude for the primacy of the HR norms in the legal environment characterising the so-called «global war against terrorism» (GWAT), in as much as it does not amount to an armed conflict.

⁶ Regarding the converging process between IHL and HR see J.A. Roach, *Certain Conventional Weapons Convention: Arms Control or Humanitarian Law?*, in «Mil. L. Rev.», vol. 105, Summer 1984, pp. 7-15.

⁷ *Proclamation of Teheran*, adopted at the International Conference on Human Rights, Teheran, 12 May 1968, reprinted in D. Schindler, J. Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, Dordrecht, Martinus Nijhoff, 1988 (3rd rev. ed.), pp. 261-262.

⁸ *Respect for Human Rights in Armed Conflicts*, 19 December 1968, UNGA Res. 2444, UN GAOR, 23rd Sess., Supp. no. 18, UN Doc. A/7218 (1969), paras. 50-51, reprinted in *ibidem.*, p. 263.

⁹ UN Doc. A/7720, 20 November 1969, para. 16. See D. Schindler, *The International Committee of the Red Cross and Human Rights*, in «Int'l Rev. Red Cross», vol. 19, no. 208, 1979, p. 6.

¹⁰ See H.P. Gasser, *The International Committee of the Red Cross and the United Nations Involvement in the Implementation of International Humanitarian Law*, in L. Condorelli et al. (eds.), *The United Nations and International Humanitarian Law*, Paris, Editions Pedone, 1996, p. 262. See also G.

2.1. Human Rights in Times of Emergency: Relationship between HR and IHL

HR are generally related to the exercise of state powers and concern the relations between the individuals and the state. According to this primary intra-state nature, they find their origin in domestic constitutional law⁴. The shift from this national plane to the international one forces us to analyse the implementation of HR in international armed conflicts. Article 15 of the European Convention on Human Rights and Fundamental Freedom (ECHR) provides that in time of war or public emergency threatening the life of the nation, certain rights included in the Convention may be suspended⁵, except for four inalienable rights which constitute an immutable core: the right to life (Article 2), the prohibition of torture (Article 3), the prohibition of slavery or servitude (Article 4(1)) and the principle of no punishment without pre-existing law (Article 7). In such emergency cases, the member state, intended to avail itself of this right of derogation, must immediately inform the Secretary General of the Council of Europe as regards the entrance into force and the cessation of the derogation measures. Similar provisions are included in several other HR conventions, e.g. Article 4 of the International Covenant on Civil and Political Rights (ICCPR), and Article 27 of the American Convention of Human Rights (ACHR). Those provisions are to some extent an update and modernisation of the principles included in the 1949 Geneva Conventions⁶, and represent the basis for a comprehensive approach to the question of the protection of human beings in time of war and peace. In this regard, the respect for HR during armed conflicts was primarily affirmed during the 1968 Teheran Conference⁷. The *Proclamation of Teheran* was followed by its adoption as a resolution by the UN General Assembly (UNGA) on 19 December 1968⁸ and the subsequent first Secretary General Report on *Respect for Human Rights in Armed Conflicts* in 1969⁹. The UNGA Resolution outlined a series of basic principles applicable in every form of armed conflict, in the meanwhile boosting the process which eventually led to the adoption of the two Additional Protocols to the Geneva Conventions¹⁰. More recently, the World Conference on Human Rights, held in Vienna in 1993, confirmed the necessity to guarantee the HR of people under foreign occupation in accordance with IHL¹¹.

Draper, *The Relationship between the Human Rights Regime and the Law of Armed Conflict*, in M.A. Meyer, H. McCoubrey (eds.), *Reflections on Law and Armed Conflicts*, The Hague, Kluwer Law International, 1998, pp. 125-140 (first published in «I. Y. H. R.», vol. 1, 1971, pp. 191-207).

¹¹ See *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna, 14-25 June 1993, UN Doc. A/CONF. 157/23, 12 July 1993, para. 3.

¹² ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 1996 *ICJ Reports*, p. 240, para. 25.

¹³ *Ibidem*, p. 239, para. 24.

¹⁴ ICTY, *Prosecutor v. Zejnil Delalic, Zdravko Mucic (aka «Pavo»), Hazim Delic and Esad Landžo (aka «Zenga») (Čelebići Case)*, Appeals Judgement, no. IT-96-21-A, 20 February 2001, para. 149.

¹⁵ IACtHR, *Las Palmeras Case*, Judgement on preliminary objections (III), 4 February 2000, para. 31. See F. Martin, *Application du droit international humanitaire par la Cour interaméricaine des droits de l'homme*, in «Int'l Rev. Red Cross», vol. 83, no. 844, 2001, p. 1052.

¹⁶ IACtHR, *Bámaca Velásquez Case*, Judgement, 25 November 2000, para. 207. On the case see *Application of Fifth Amendment to Overseas Torture of Alien*, in «Am. J. Int'l L.», vol. 95, no. 3, 2001, pp. 641-643; generally B.E. Harcourt, *Disappeared in Guatemala: The Case of Efraín Bámaca Velásquez*, in «Human Rights Watch Report/Americas», vol. 7, no. 1, 1995.

¹⁷ ECtHR, *Lawless v. Ireland*, Case no. 3, 332/57, [1961] ECHR 2, 1 July 1961, para. 41. On the case see generally B. Doolan, *Lawless v. Ireland, 1957-1961: The First Case before the European Court of Human Rights, an International Miscarriage of Justice?*, Ashgate, Aldershot, 2001.

¹⁸ ECommHR, *Cyprus v. Turkey*, Report of the Commission, 4 EHRR 482 and 556, para. 528, quoted in A.

2.2. Jurisprudence

On their part, international courts and commissions have handed down rulings and advisory opinions on the matter. The International Court of Justice (ICJ) in its Advisory Opinion on the legality of the threat or the use of nuclear weapons affirmed that even in time of war or national emergencies the ICCPR still applies until an explicit invocation of the article that consents derogations in such situations (Article 4)¹². The Court also rejected the principle on the possible application of the *Covenant* only in peacetime¹³. The International Criminal Tribunal for the former Yugoslavia (ICTY) stated that the two regimes «share a common *core* of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted»¹⁴. On its part, the Inter-American Court on Human Rights (IACtHR) has repeatedly ruled on cases concerning the relationship between IHL and HR law. In the *Las Palmeras* case (2000), the Court affirmed that the need to apply the American Convention effectively upholds the competence of the organs of the system to decide on violations of the right to life «in a way which is coextensive with the norm of general international law embodied in Article 3 common to all the Geneva Conventions»¹⁵. In the *Bámaca Velásquez* case (2000), the Court stated that during an internal conflict states parties are obliged to act in accordance to HR obligations included in the Convention, also considering the application of IHL guarantees for civilian and individuals placed *hors de combat*¹⁶. The European Court of Human Rights (ECtHR) has only partially contributed to the issue in question. In the *Lawless* case, the Court confirmed that no derogations under Article 15 of the ECHR may be taken by a state if they conflict with other obligations of that state under international law¹⁷. The latter may include IHL provisions to which the state is bound under the four Geneva Conventions. In *Lawless v. Ireland*, the European Commission on Human Rights (ECommHR) affirmed that the respect for IHL rules by a member state during a military occupation of a foreign territory represents the limit of the right of derogation conferred on it by Article 15 of the Convention¹⁸.

However, one should register that some states have challenged these developments. For instance, recently the authority of the

Reidy, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, in «Int'l Rev. Red Cross», vol. 38, no. 324, 1998, pp. 513ff. (at note 22).

¹⁹ See *Response of the United States to the Request for Detainees in Guantanamo Bay, Cuba*, released on 15 April 2002.

²⁰ IACHR, *Detainees in Guantanamo Bay, Cuba*.

²¹ See E.C. Gillard, *International Humanitarian Law and Extraterritorial State Conduct*, in F. Coomans, M.T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, Antwerp, Intersentia, 2004, p. 37 (at note 21). See M.J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, in «Am. J. Int'l L.», vol. 99, no. 1, 2005, pp. 119-141.

²² See *United States Submission in Guantanamo Case*, 15 December 2005.

²³ See M.J. Dennis, *Application of Human Rights Treaties...*, cit., p. 136.

²⁴ See J.F. Murphy, *The United States and the Rule of Law in International Affairs*, Cambridge, CUP, 2004, pp. 330-331. Turning to the applicability of the ACHR, although the United States is not a party to it, the IACHR exercises jurisdiction over the US on the basis of its mandate under the OAS Charter, to which the US is a party. In those circumstances, the Commission applies the standards provided in the American Declaration of the Rights and Duties of Man (see J. Cerone, *The Application of Regional Human Rights Law Beyond Regional Frontiers: The Inter-American Commission on Human Rights and US Activities in Iraq*, in «ASIL Insights», October 2005).

²⁵ In the *Juan Carlos Abella v. Argentina* case, better known as *Tablada* case, the IACHR considered the relations between the ICCPR and the Additional Protocol II (AP II), stating that where the latter affords higher protection standards than those granted by the ICCPR, it

Inter-American Commission on Human Rights (IACHR) to rule on the application of IHL was challenged by the US government¹⁹ in a case concerning the detainees at Guantanamo Bay²⁰. At first, the US government argued that the Commission had not the power to review the compliance of the US conduct with IHL²¹, thus affirming that the IACHR retained neither the jurisdiction to request for precautionary measures nor the authority to interpret the Geneva Conventions. In a further response to a following request made by the Commission, the US continued to still allege that the IACHR lacked jurisdiction to issue precautionary measures, adding a new and different claim regarding the obligation for the petitioners to previously exhaust domestic remedies before military tribunals and commissions²². The US government took a similar position in regard to the alleged applicability of the ICCPR provisions to the same detainees, affirming that the situations of those captured and detained in Guantanamo base are governed by IHL, while the ICCPR is «intended to secure civil and political rights – that is, the rights and obligations between the Government and the governed»²³.

On this point it seems significant to examine the position of the United States relating to the applicability of the ICCPR. As for its effects under domestic law, in a declaration accompanying the ratification of the Covenant, the US affirmed that the substantive articles of the Covenant were not self-executing, thereby ensuring that the Covenant could not be the basis for lawsuits in US courts. At the international level, the US also contested the HRC's authority to address the legality of the reservations made by the states parties, in the meantime providing for «few references to the implementation of the Covenant's rights» in the reports submitted to the HRC under Article 40 ICCPR. The HRC also declared «incompatible with the object and the scope of the Covenant» the US reservations to Articles 6(5) and 7 of the ICCPR (both of which related to the death penalty). Those reservations included statements recognising the US Constitution as the only source of legal constraints for the US themselves²⁴.

At this point we can confirm that during an armed conflict or in a situation of national emergency, compulsory derogations from the ordinary HR obligations lead us to appreciate the *lex specialis* character of IHL in respect to HR law²⁵. While that

should prevail because of its character of *lex specialis* (see IACHR, *Reports*, 55/97, 1137, paras. 156-160). See L. Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, in «Int'l Rev. Red Cross», vol. 38, no. 324, 1998, pp. 505-511.

²⁶ The need for a separation has always been referred to since HR body of rules came into effect. It was Jean Pictet who noted that «[h]umanitarian [l]aw is valid only in the case of armed conflict while human rights are essentially applicable in peacetime» (quoted in M.J. Dennis, *Application of Human Rights Treaties...*, cit., p. 119). See also D. Schindler, *The International Committee of the Red Cross...*, cit., p. 9. On the relationship between international humanitarian law and human rights law see generally A. Durand, *Human Rights as Perceived by the Founders of the Red Cross*, in «Int'l Rev. Red Cross», vol. 28, no. 266, 1988, p. 435; S. MacBride, *Human Rights in Armed Conflict: The Inter-Relationship between the Humanitarian Laws and the Law of Human Rights*, in «Revue de droit pénal militaire et de droit de la guerre», vol. 9, no. 2, 1970, pp. 373-389; K.D. Suter, *An Inquiry into the Meaning of the Phrase «Human Rights in Armed Conflict»*, in «Revue de droit pénal militaire et de droit de la guerre», vol. 15, no. 3-4, 1976, pp. 393-428.

²⁷ See *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, ICRC Report, 28th International Conference of the Red Cross and Red Crescent, Geneva, 2-6 December 2003, p. 59.

²⁸ See K. Watkin, *Controlling the Use of Force...*, cit., p. 22. In the author's opinion, during a military occupation regime, «[a]n occupying power is going to face situations of common criminal activity that are more suitable for a human rights regime of accountability» (*ibidem*, p. 24). We think that Chapter 3 of the Hague Regulations (1907), the entire 4th Geneva Convention (1949), and Articles 3, 4 of the Additional Protocol I (1977) provide

trend could draw together IHL and HR law up to the point of a final overlapping, it is generally said that the need for a separation of the two branches remains²⁶. It has also been considered that any blurring of the distinction between IHL and HR law and the increased consideration of IHL by regional human rights bodies might even lead to a fragmentation or lack of universality in the application of IHL²⁷. Scholars have also argued that the attempt to employ human rights standards in an armed conflict context might have an adverse impact on the integrity and strength of the same norms applied in peacetime²⁸. We can say that the relationship between the IHL and HR law norms is normally founded on a mutual correlation in order to assure a complete protection for individuals, without leaving them in a legal vacuum because of the occurrence of an emergency situation²⁹. The effective application of a single HR norm would depend on the concrete case, given the fact that IHL and HR law can find a common ground especially during non-international armed conflicts³⁰.

As a specific example of this correlation, we can mention the right to life, as enounced in Article 6(1) of the ICCPR³¹ or in Article 2 of the ECHR (even if such a norm is formulated in a different way) and in Article 4 of the IACHR. The International Court of Justice, in its 1996 Advisory Opinion on the Nuclear Weapons affirmed that during armed conflicts, the prohibition to arbitrarily deprive one's life is not to be deduced from HR law, but from the rules of IHL³².

So, while international HR law regarding the right to life in normal circumstances is stronger (because it reflects a law enforcement context, not an armed conflict, and imposes stronger limits on the lethal use of force), the fact is that both bodies of law provide for the meaning of unlawful killing within their respective scope of application.

It remains to be analysed whether and under what conditions the use of deadly force is considered arbitrary and in breach of IHL or HR law in the gray area in which peace operations usually take place. Given the fact that not all the HR instruments and treaties provide for the same extent of the rights included, we can only refer to a general exam of the relevant norms in a very limited way. Taking apart the rules of *ius cogens*, it is the concrete case that will rule on the concrete

for a wide range of exhaustive derogations suitable to a military occupation context.

²⁹ See J. Kellenberger, *Protection through Complementarity of the Law*, ICRC 6-09-2003 Official Statement, 27th Annual Round Table on Current Problems of International Humanitarian Law, San Remo, 4-6 September 2003.

³⁰ See R. Abi-Saab, *Human Rights and Humanitarian Law in Internal Conflicts*, in D. Warner (ed.), *Human Rights and Humanitarian Law: The Quest for Universality*, The Hague, Martinus Nijhoff Publishers, 1997, pp. 107-123. See generally on the matter D. Momtaz, *The Minimum Humanitarian Rules Applicable in Periods of Internal Tension and Strife*, in «Int'l Rev. Red Cross», vol. 38, no. 324, 1998, pp. 455-462.

³¹ See on the point the comment offered in M. O'Flaherty, *Human Rights and the UN: Practice before the Treaty Bodies*, The Hague, Kluwer Law International, 2002, p. 18.

³² ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, cit., para. 25.

³³ We refer to civil necessity – creating an artificial category – to try to indicate the concept of necessity under internal criminal law instead of the similar concept included in IHL. The latter is generally referred to a principle which justifies measures not forbidden by the law of war and required to secure the overpowering of the enemy. Where explicitly provided for by IHL, «imperative» military necessity may justify measures otherwise forbidden (see F. De Mulinen, *Handbook on the Law of War for Armed Forces*, Geneva, International Committee of the Red Cross, 1987, §§ 352-355, pp. 82-83). Principles of «imperative» military necessity can be found in Article 23 of the Regulation Annex to the IV Hague Convention (1907-H. IV. R), Article 33 Geneva Convention I (1949-G. I), Article 53 Geneva Convention IV (1949-G. IV), Articles 54, 62 Geneva Convention Additional Protocol I (1977-AP I), and Articles 4, 11 Hague Convention for the Protection of Cultural Property (1954-H. CP).

applicability of HR to individuals. If we switch from the use of force during armed conflicts to approach the model only allowing the use of force in a law enforcement way, we see that force can only be regarded as lawful in case of *civil* – not *military* – necessity³³. *Civil* necessity is only present when it is clear that there is no feasible possibility of protecting a person from unlawful violence, lawfully apprehending a suspect or convicted criminal or lawfully quelling a riot. Moreover, in the former case, the use of deliberate lethal force is justified against individuals directly threatening the life of a person where such use of force is necessary to protect that person³⁴. In this context, the ECtHR in *McCann v. UK* confirmed that the use of (lethal) force must be firmly proportionate to the achievement of *aims* specified in Article 2 of the ECHR³⁵. The Court made also clear that, planning the action, other means must be considered by the state authorities to realise the same goal³⁶. Similar concerns have been recently reaffirmed by the Court in *Nachova and Others v. Bulgaria*, where the ECtHR found that the use of lethal force to arrest someone for a minor offence and who does not pose a threat is incompatible with the right to life under the Convention³⁷.

Turning to the right of liberty, all general HR conventions promote the right to enjoy personal liberty with the sole exceptions of the restrictions imposed by the commission of criminal offences and they also outlaw slavery and forced labour (the latter with some reservations)³⁸. Similar prohibitions are established, *mutatis mutandis*, in IHL conventions applicable in armed conflicts³⁹. For instance, we have the ban over the taking of hostages and discriminatory distinction of treatment⁴⁰ and the provisions regarding the arrest and detention, along with the respect of a regular judicial procedure (relating to the generally recognised principles of regular criminal law procedure) in the course of trials⁴¹. Article 38 of the Convention on the Rights of the Child constitutes another example of the convergence between IHL and HR law, including provisions relating to the minimum age for the participation in hostilities which are specifically inspired by the AP II and by principles of IHL⁴².

Definitely, while the IHL generally applies to armed conflicts, we consider that even in such situations some HR provisions (with various limitations) still remain in force. Moreover,

³⁴ See D. Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, in «Eur. J. Int'l L.», vol. 16, no. 2, 2005, p. 179. On the same topic see C. Downes, *Targeted Killings' in an Age of Terror: The Legality of the Yemen Strike*, in «J. Conf. & Sec. L.», vol. 9, no. 2, 2004, pp. 277-294. Generally on the matter one can affirm that if such killings take place during an armed conflict and within IHL norms their legality cannot be questioned, otherwise we assist in arbitrary deprivations of life contrary to Article 6 of the ICCPR (D. Kretzmer, *Targeted Killing...*, cit., p. 186).

³⁵ ECtHR, *McCann et al. v. UK*, Application no. 18984/91, Judgement, 27 September 1995, ECtHR Series A, no. 324, (1995) ECHR 31, para. 149.

³⁶ *Ibidem*, para. 194. See K. Watkin, *Controlling the Use of Force...*, cit., p. 32.

³⁷ ECtHR, *Nachova and Others v. Bulgaria*, Applications nos. 43577/98 and 43579/98, Judgement, 6 July 2005.

³⁸ See Articles 8, 9 ICCPR; Articles 4, 5 ECHR; Articles 6, 7 ACHR.

³⁹ See D. Schindler, *The International Committee of the Red Cross...*, cit., p. 10.

⁴⁰ See respectively Articles 34 G. IV, 75 AP I; Articles 12 G. I, 12 G. II, 16 G. III, 27 G. IV, 75 G. P. I.

⁴¹ See respectively Articles 43, 78 G. IV, Article 75 AP I, Articles 82-86 G. III, Articles 33, 71-76, 126 G. IV, Article 75 G. P. I.

⁴² *Convention on the Rights of the Child*, UNGA Res. 44/25, adopted on 20 November 1989 and entered into force on 2 September 1990, Article 38.

⁴³ See K. Watkin, *Controlling the Use of Force...*, cit., p. 24. The author empathises the argument that, because of the inclusion in IHL of a body of norms for the governance of «the most» inter-state conflicts, it inevitably comes to be reconciled with «situations where a state continues to exercise forms of internal governance during armed conflict».

because of the degree of interaction and the sharing of principles between HR law and IHL, nowadays it seems hard to say that human rights bodies should not provide applicable principles of IHL⁴³. We can say that HR law and IHL consist of two complementary and distinct bodies relating to the protection of the human being. In fact, generally we find subjective or active rights for individuals in HR law (meaning negative obligations for the state)⁴⁴ and objective or passive rights in IHL (meaning positive obligations for the state)⁴⁵. In the case of a coalition of states acting under the UN aegis, when the contributing nations retain the command of their forces, the existent legal framework remains that of the participants⁴⁶, but even in those circumstances some derogations and caveats are needed⁴⁷.

3. Extraterritorial Application of Human Rights Treaties

According to Coomans and Kamminga, in the jurisprudence of the major HR supervisory bodies there is a broad consensus that, (i) if a state effectively controls a foreign territory, the HR treaties to which it is a party should be applied to its conduct in such territory; and (ii) if a state exercises its authority over individuals by abducting or detaining them on foreign territory the HR treaties to which it is a party should be applied too⁴⁸. Due to the different wording of the articles included in the major HR treaties, it is generally said⁴⁹ that while the ICCPR should be applied to anyone «within the territory» *and* (et) «subject to the jurisdiction» of the state party to the Covenant (Article 2(1) ICCPR), the ECHR applies to individuals within the «jurisdiction» of the state party (Article 1). Nevertheless, this strictly literal interpretation of the former provision has been gradually disputed. One reason could be found in the «evident influence» between the HRC and the ECtHR jurisprudence⁵⁰. In any case, case-law is putting in a broader perspective the notion of *territory*.

3.1. Analysis of the Relevant Jurisprudence

As regards the relevant jurisprudence on the matter, for instance, in the *Tadić* case, ICTY made clear that if the concept of «state sovereignty» allowed state actions abroad in

44 E.g. in the Advisory Opinion on the legality of the Israeli wall in the Palestinian territory, the ICJ concluded that in the areas effectively administered by the Palestinian authorities Israel held «an obligation not to raise any obstacles to the exercise of such rights», referring to the ICESCR (International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 16 December 1966, entered into force on 3 January 1976) (see ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 112).

45 See B. Nascimbene, *L'individuo e la tutela internazionale dei diritti umani*, in M. Carbone et al. (eds.), *Istituzioni di diritto internazionale*, Torino, Giappichelli, 2003 (2nd ed.), p. 344.

46 See J.L. Grenier, *Extraterritorial Applicability of Human Rights Treaty Obligations to United Nations - Mandated Forces*, in A. Faite, J.L. Grenier (eds.), *Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces*, Geneva, International Committee of the Red Cross, October 2004, p. 80.

47 See *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, cit., pp. 33-34.

48 See F. Coomans, M.T. Kamminga, *Comparative Introductory Comments on the Extraterritorial Application of Human Rights Treaties*, in F. Coomans, M.T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, cit., pp. 3-4.

49 See N. Ronzitti, *Diritto internazionale dei conflitti armati*, Torino, Giappichelli, 2001 (2nd ed.), p. 141.

50 See T. Schilling, *Is the United States Bound by the ICCPR in Relation to Occupied Territories?*, in «Emile Noel Fellows Forum», Fall 2004, p. 3.

51 ICTY, *Prosecutor v. Tadić*, Case no. IT-94-1-AR72, Decision on the

violation of HR, this would be «a travesty of law and a betrayal of the universal need for justice»⁵¹. The ICJ, in the Advisory Opinion on the legality of the Israeli wall in the occupied Palestinian territories admitted that Article 2(1) ICCPR «can be interpreted [...] as covering both individuals present within a State's territory and those outside that territory but subject to that State's jurisdiction»⁵². Therefore, in its conclusions, the Court found that the construction of the wall constituted a breach for «Israel of various of its obligations under the applicable international humanitarian law and human rights instruments»⁵³. On the applicability of the ICCPR to the same occupied territories, the UN Committee of Human Rights (hereinafter HCR)⁵⁴ declared the challenges formulated by the Israeli government to be rejected because, given the Israeli long-standing presence in the territories and the uncertainty of the future territories' status, the effective jurisdiction held by Israel allowed the civil population to enjoy the rights enshrined in the Covenant, falling within Israel's responsibility to guarantee their free exercise⁵⁵.

In *Coard v. United States* – a case regarding Grenadian citizens who complained of illegal detention and mistreatment by the US military forces after the invasion of Grenada – the IACHR found that «under certain circumstances», the state jurisdiction can be referred to conducts exercised abroad. Those circumstances would be related to the exercise of the mere state authority and control over a person⁵⁶. The Commission's language was almost the same in *Alejandro v. Cuba* – a case regarding the shooting down of two unarmed civilian light aeroplanes by a Cuban military aircraft resulting in the deaths of the four occupants – where it reaffirmed that jurisdiction «in certain instances» can be referred to extraterritorial actions performed by means of state agents abroad⁵⁷.

More recently, the England and Wales High Court ruled a case concerning six Iraqi citizens who died in provinces of Iraq during the British occupation, between 1 May 2003 and 28 June 2004 (*Al-Skeini case*)⁵⁸. The first five were shot in separate armed incidents involving British troops, while the sixth claimant, Baha Mousa, died in a military prison under British custody. As a preliminary issue, considering the ECtHR jurisprudence, the Court pronounced itself on whether the state party's jurisdiction within Article 1 of the Convention

Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 58.

⁵² ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, cit., para. 108. On the case see generally L. Físlér Damrosch, B.H. Oxman (eds.), *Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory*, in «Am. J. Int'l L.», vol. 99, no. 1, 2005; R. O'Keefe, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Commentary*, in «Belgian Rev. Int'l L.», vol. 37, no. 1, 2004, pp. 92-154; P.H.F. Bekker, *The UN General Assembly Requests a World Court Advisory Opinion on Israel's Separation Barrier*, in «ASIL Insights», December 2003.

⁵³ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, cit., para. 137.

⁵⁴ Generally, HR bodies in charge of reviewing Israel's periodic reports presented pursuant to ICCPR and ICESCR had always concluded on the applicability of the HR treaties signed by Israel to the occupied territories in West Bank and Gaza Strip, since they were under Israeli effective control (see M.J. Dennis, *Application of Human Rights Treaties Extraterritorially...*, cit., p. 121).

⁵⁵ See T. Schilling, *Is the United States Bound by the ICCPR...*, cit., p. 5.

⁵⁶ IACHR, *Coard et al. v. United States*, Case no. 10.951, Report no. 109/99, 29 September 1999, para. 37.

⁵⁷ IACHR, *Alejandro et al. v. Cuba*, Case no. 11.589, Report no. 86/99, 29 September 1999, para. 23.

⁵⁸ Royal Courts of Justice, *Jumaa Gatteh Al-Skeini et al. v. The Secretary of State for Defence*, Judgement, Case no. CO/2242/2004, 14 December 2004. On the case see S. Borrelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the «War on Terror»*, in «Int'l Rev. Red Cross», vol. 87, no. 857, 2005, p. 66; A. Nania, *La High Court ed il principio di territorialità della*

remains essentially territorial. It held that such jurisdiction extends to outposts of the state's authority abroad such as embassies and consulates, or even prisons operated by a state party in the territory of another state with the consent of that state⁵⁹. Finally the Court, taking into account the ECtHR *Banković* case (discussed below) recognised the extraterritorial jurisdiction as an exception⁶⁰ in case of an «effective control of the relevant territory» whatever exercised, or in case of activities of diplomatic or consular agents abroad, as well as on board national vessels or planes⁶¹. Therefore, the Court held that the first five victims who died during combat operations⁶² were not within the UK's jurisdiction and that only the sixth, who died in a British prison in Iraq, was within the UK's jurisdiction and thus within the scope of the Convention. The appeal ruling upheld the High Court's finding that the ECHR apply to that prisoner on the basis that he came within the mere authority and control of British forces in Iraq⁶³.

Furthermore, there is plenty of interesting jurisprudence of the Strasbourg Court and Commission to be examined for our aims. In *Cyprus v. Turkey* the ECommHR ruled on a case arisen out of the invasion of Northern Cyprus in 1974. Cyprus complained of various crimes committed by Turkish forces in the area under their control. Both Cyprus and Turkey were state parties to the ECHR. The Commission confirmed that a situation of occupation implies the jurisdiction of the occupying state over persons and properties. This jurisdiction could not be excluded on the ground that a concurrent jurisdiction in the same area is supposed to be exercised by another state entity (specifically, the Turkish Federated State of Cyprus)⁶⁴. In *Loizidou v. Turkey*⁶⁵ the ECtHR repeated that the concept of jurisdiction under Article 1 is not restricted to the national territory of the states. In fact, *responsibility* may also arise «when as a consequence of military action, whether lawful or unlawful, a state exercises effective control of an area outside its national territory». Such rights and freedoms set out in the Convention primarily would derive from the simple fact of such control, either exercised directly through the armed forces, or indirectly through a subordinate local administration⁶⁶.

But it is the *Banković* case⁶⁷ that appears as being one of the most relevant cases. The application to the Court was filed by

Convenzione Europea sui Diritti dell'Uomo e dello UK Human Rights Act del 1988, Associazione Italiana dei Costituzionalisti on-line paper, 17 March 2005.

⁵⁹ Royal Courts of Justice, *Jumaa Gatteh Al-Skeini et al...*, cit., Summary, para. 3. For a more extensive analysis of the case see S. Horvat, *The Extension of Jurisdiction of a State to the Territory of Another State in His Effective Control. The Al-Skeini Judgement of the England and Wales High Court of Justice*, in «Mil. L. & L. War Rev.», vol. 43, no. 3-4, 2004, pp. 195-225; and K. Altiparmak, *Banković: An Obstacle to the Application of the European Convention on Human Rights in Iraq?*, in «J. Conf. & Sec. L.», vol. 9, no. 2, 2004, pp. 213-251.

⁶⁰ See ECtHR, *Drozdz and Janousek v. France and Spain*, Application no. 12747/87, Judgement, 26 June 1992, (1992) ECHR 52, paras. 96-97.

⁶¹ Royal Courts of Justice, *Jumaa Gatteh Al-Skeini et al...*, cit., para. 123, reporting paras. 71, 73 of the *Banković* judgement.

⁶² In situations occurring after the end of combat operations, ICCPR and ECHR's provisions relating to the right to life would have precluded Coalition troops from shooting civilians other than in self-defence, to quell riots and to arrest people, as in the case of suspected looters or generally as regards persons who do not pose a physical danger to either coalition forces or civilians (see B. Clarke, *Military Occupation and the Rule of Law: The Legal Obligations of Occupying Forces in Iraq*, in «Murdoch U. Elec. J. L.», vol 12, no. 1-2, 2005). However, Australian and British rules of engagement issued in the post-conflict period seem to allow the use of deadly force in a broad range of situations departing from the strict rules contained in applicable HR treaties (see M. Tondini, *Regole d'ingaggio e diritto all'autodifesa: riflessioni e suggerimenti*, in «Rassegna dell'Arma dei Carabinieri», vol. 53, no. 1, 2005, p. 28; *a contrario*, see S. Horvat, *The Extension of Jurisdiction of a State...*, cit., p.

the relatives of the persons killed in the 1999 Serbian Radio Television bombing by NATO air forces during the war in Kosovo. The application was brought against all the European NATO member states, which were also parties to the ECHR, while the Federal Republic of Yugoslavia (FRY) was not⁶⁸. In rejecting the applicants' arguments, the ECtHR recognised that the allied control over the FRY's airspace was not as complete as Turkey's control over the territory of Northern Cyprus, as previously reported in *Cyprus* and *Loizidou* cases, thus denying the jurisdiction of the respondents and the applicability of the Convention. The Court further noted that the jurisdictional competence of a state is primarily territorial, meaning that states parties to the Convention shall secure to everyone the rights and freedoms under the Convention, applying an «ordinary and essentially territorial notion of jurisdiction»⁶⁹. According to the Court, the Convention case law demonstrates that the recognition of the exercise of extraterritorial jurisdiction by a state party may be qualified as «exceptional». It would occur where «a respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government»⁷⁰. According to the Court, this principle would derive from the ordinary meaning, given by Article 31(1) of the 1969 Vienna Convention on the Law of Treaties (VCLT)⁷¹ of the term *jurisdiction* which shall essentially cover the territorial exercise of jurisdiction, as results from the analysis of the *travaux préparatoires*⁷². Comparing the applicability of the ECHR and the ICCPR, the Court also noted how «it is difficult to suggest that exceptional recognition by the Human Rights Committee of certain instances of extra-territorial jurisdiction [...] displaces in any way the territorial jurisdiction expressly conferred by [...] Article (2(1)) of the (I)CCPR»⁷³. Definitely, in the Court's opinion, the notion of jurisdiction remains strictly anchored to the *effective control*⁷⁴ over an area or a person. It results in a *de facto* definition, mixing the jurisdiction with its free exercise, whether lawful or not. On the matter, the principle that «facticity determines normativity» was primarily addressed by Professor Christian Tomuschat in his concurring

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⁶³ Royal Courts of Justice, *Mazin Mumaa Galteh Al-Skeini and Others v. The Secretary of State for Defence*, Case no. C1/2005/0461-C1/2005/0461B, Appeal Judgement, 21 December 2005, paras. 48ff.

⁶⁴ ECommHR, *Cyprus v. Turkey*, Application no. 8007/77, (1993) 15 EHRR 509, 4 October 1983, Res. DH (92) 12 of 2 April 1992, para. 63.

⁶⁵ The case of Cypriot citizen (*Mrs. Titina Loizidou*) filing an application against Turkey to the ECommHR, further resulted in three judgements before the ECtHR which held Turkey responsible for human rights violations in the northern part of Cyprus.

⁶⁶ ECtHR, *Loizidou v. Turkey*, Merits, no. 40/1993/435/514, 18 December 1996, para. 52. See also *Loizidou v. Turkey* (preliminary objections), Application no. 15318/89, [1995] ECHR 10, 23 March 1995, para. 62.

⁶⁷ ECtHR, *Banković, Stojanović, Stoimenovski, Joksimović and Suković v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*, Application no. 52207/99, ECHR 2001-XII, 12 December 2001. See generally E. Lauterpacht et al. (eds.), *International Law Reports*, vol. 123, Cambridge, CUP, 2003; A. Rüth, M. Trilsch, *Banković et al. v. Belgium (Admissibility)*, in «Am. J. Int'l L.», vol. 97, no. 1, 2003, pp. 168-173; *Banković and Others v. Belgium and 16 Other Contracting States*, in «Human Rights Case Digest», vol. 12, no. 11-12, 2001, pp. 1121-1124.

⁶⁸ See on the matter M.T. Kamminga, *State Succession in Respect of Human Rights Treaties*, in «Eur. J. Int'l L.», vol. 7, no. 4, 1996, pp. 469ff. See also Y. Blum, *UN Membership of the «New» Yugoslavia: Continuity or Brake?*, in «Am. J. Int'l L.», vol. 86, no. 4, 1992, pp. 830-833.

⁶⁹ *Ibidem*, para. 61.

⁷⁰ *Ibidem*, para. 71.

⁷¹ *Ibidem*, para. 16. Article 31(1) VCLT, General rule of interpretation:

opinion in the *López Burgos* case⁷⁵. The meaning of such a principle is that state responsibility for HR violations can not be addressed if the state is not in the position to prevent them⁷⁶.

3.2. Beyond State Territorial Jurisdiction

As seen above, international HR law usually takes at its starting point for imposing obligations on states their general jurisdictional competence, based on the concept of state sovereignty⁷⁷. For that reason, jurisdiction in international law might be defined as the power of central authorities to exercise public functions over individuals located in a territory⁷⁸. From the examination of the relevant case-law, one can affirm that the *jurisdiction* according to HR supervisory bodies is not related to the place where the violation has occurred, but rather to «the relationship between the individual and the state in relation to a violation of any of the rights set forth [...] wherever they occurred»⁷⁹. In the *Tadić* case the ICTY appeals chamber, to determine the entitlement to affirm its own jurisdiction on the case, found that international tribunals constitute «self contained» systems with «inherent» judicial powers over *Kompetenz-Kompetenz*⁸⁰. In this regard, «jurisdiction» does not remain merely a question of determining whether a case properly falls within the time, matter and scope of the (constituent) statute⁸¹, but might expand thanks to the courts' rulings. In the *Tablada* case, the IACHR confirmed that «jurisdiction does not extend to the conduct of private actors which is not imputable to the State»⁸², thereby revealing its primary character as a public international law category. In the *Al-Skeini* case, Judge Rabinder Singh Q.C., in a personal submission explains the existence of two kinds of jurisdiction: «personal jurisdiction» – in the case of control exercised by a state over persons or property outwith its own territory – and jurisdiction when a state has «effective control of an area» outside its own territory. The points of reference for the two categories could be found both in the *Banković* case, but the second has its archetype in the *Cyprus v. Turkey* case⁸³. Thus, with the aim of a correct implementation of HR law, the concept of jurisdiction acquires a different and larger meaning than the one usually vested under other international law categories⁸⁴. We can offer

«A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose».

⁷² *Ibidem*, para. 63.

⁷³ *Ibidem*, para. 78.

⁷⁴ *Ibidem*, para. 70.

⁷⁵ HRC, *López Burgos v. Uruguay*, Communication no. 52/1979, 29 July 1981, Appendix, Individual opinion appended to the Committee's views at the request of Mr. Christian Tomuschat.

⁷⁶ See M. Scheinin, *Extraterritorial Effect of the International Covenant on Civil and Political Rights*, in F. Coomans, M.T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, cit., p. 75.

⁷⁷ See D. McGoldrick, *Extraterritorial Application of the International Covenant on Civil and Political Rights*, in F. Coomans, M.T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, cit., p. 45. Sovereignty has been also defined «an umbrella concept» for the possibility to cover most of the state's powers and authority (see A. Cassese, *International Law*, Oxford, Oxford University Press, 2004 (2nd ed.), p. 48).

⁷⁸ See A. Cassese, *International Law*, cit., p. 49. The author points out three different kinds of jurisdiction subjected to state's sovereignty: jurisdiction «to prescribe», jurisdiction «to adjudicate», jurisdiction «to enforce».

⁷⁹ See M. Scheinin, *Extraterritorial Effect of the International Covenant...*, cit., p. 73.

⁸⁰ See generally on the matter G. Beck, *The Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There Is No Praetor*, in «Eur. L. Rev.», vol. 30, no. 1, 2005, pp. 42-67.

⁸¹ ICTY, *Prosecutor v. Tadić*, cit., paras. 10-12, 14, 18. See J.E. Alvarez, *Nuremberg Revisited: The Tadić Case*, in «Eur. J. Int'l L.», vol. 7, no. 2, 1996, pp. 245ff (at notes 16-17).

⁸² See *Tablada Case*, cit., para. 175.

some more remarks on the point.

Concerning the war in Croatia in 1992, the HRC rejected the FRY argument that it was not responsible for the atrocities committed in Croatia and Bosnia on the basis that they were committed outside its territory because of the «links between the nationalists and Serbia which invalidated the Federal Government's claim»⁸⁵. The principle of the «direct and immediate link» has also been the rationale in a case ruled by the ECtHR, the one concerning the sinking of the *Kater I Rades* by an Italian war-ship in the Otranto Channel. The fact that the collision took place in international waters seems not to have impeded the admissibility of the application, which was rejected instead because the process was still pending at that time before an Italian criminal court⁸⁶. For a correct foundation of state jurisdiction, it does not seem important that the presumed violation took place in a portion of foreign territory fully administered by a state party to a convention. In *Matthews v. UK*, Denise Matthews, a citizen of Gibraltar, succeeded in having a complaint admitted to the ECommHR on the grounds that her rights had been violated by the British government because she had not been entitled to vote in EP elections in June 1994 under a 1976 internal law act. The main counter-argument put forward by the British government was that the 1976 act fell within the European Community legal order and was not one for which the UK could be held responsible under the Council of Europe Convention. Thus, the ECommHR/ECtHR was not entitled to examine any consequence of it. In its judgement, the ECtHR found no reason why the UK should not be required to «secure» the rights in respect of European legislation in the same way as those rights are required to be «secured» in respect of purely domestic legislation⁸⁷. Furthermore, in the *Celiberti* case, the HRC noted that the state jurisdiction abroad is anyway established if the presumed violations take place even «with the acquiescence of the Government of that State or in opposition to it»⁸⁸.

Professor Lawson in his contribution to a recent book on the extraterritorial application of HR norms poses a question about the future of the HR supervisory bodies' rulings («life after *Banković*»)⁸⁹. In his opinion, a «gradual approach to the notion of jurisdiction» would be preferable, the extent of which should be proportionate to «the extension of their control over these

⁸³ See Royal Courts of Justice, *Jumaa Gatteh Al-Skeini et al.*, cit., para. 110. See ECommHR, *Cyprus v. Turkey*, Decision on Admissibility, 26 May 1975, (1982) 4 EHRR 586, para. 8.

⁸⁴ See S. Borrelli, *Casting Light on the Legal Black Hole...*, cit., p. 55.

⁸⁵ HRC, *Comments on the Federal Republic of Yugoslavia (Serbia and Montenegro)*, UN Doc. CCPR/C/79/Add.16 (1992), paras. 4-5, 7.

⁸⁶ ECtHR, *Xhavara and Others v. Albania and Italy*, Application no. 39473/98, Decision of inadmissibility, 11 January 2001, Section IV. See generally F. Caffio, *Immigrazione clandestina via mare. L'esperienza italiana nella vigilanza, prevenzione e contrasto*, in «Rivista Marittima» (Annex), no. 8, 2003; F. Caffio, *L'accordo tra l'Italia e l'Albania per il controllo ed il contenimento in mare degli espatri clandestini*, in «Rivista Marittima», no. 6, 1997, pp. 109ff.; T. Scovazzi, *La tutela della vita umana in mare, con particolare riferimento agli immigranti clandestini*, in «Riv. dir. int.», vol. 88, no. 1, 2005, pp. 106ff.

⁸⁷ ECtHR, *Matthews v. UK*, Application no. 24833/94, Judgement, 18 February 1999, (1999) ECHR 12. See E.U. Petersmann, *Time for a United Nations «Global Compact» for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, in «Eur. J. Int'l L.», vol. 13, no. 3, 2002, pp. 621ff. (at note 45).

⁸⁸ HRC, *Lilian Celiberti de Casariego v. Uruguay*, Communication no. 56/1979, 29 July 1981, UN Doc. CCPR/C/OP/1 at 92 (1984), para. 10.3.

⁸⁹ See R. Lawson, *Life after Banković: On the Extraterritorial Application of the European Convention on Human Rights*, in F. Coomans, M.T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, cit., pp. 83-124.

⁹⁰ *Ibidem*, p. 120; see also J. Cerone, *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo*, in «Eur. J. Int'l L.», vol. 12, no. 3, 2001, p. 479; J.L.

individuals»⁹⁰. The most important ECtHR sentences following the *Banković* case seems to suggest a similar approach. In *Öcalan v. Turkey*⁹¹, the Court had to decide on a case relating the forced abduction of Mr. Öcalan – a Turkish national, the leader of the Workers Party of Kurdistan (PKK) – accused by Turkey of inciting terrorist acts in support of a separatist Kurdish state. In 1999 he found himself on the run in Kenya, where he was handed over by Kenyan officials to Turkish officials, who arrested him, on board an aircraft in the international zone of Nairobi airport. He was flown to Turkey, detained over a lengthy period and ultimately tried, convicted and sentenced to death. In affirming its jurisdiction, the Court considered «that the circumstances of the [...] case are distinguishable from those in the [...] *Banković* [...] case, notably in that the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey»⁹². In *Ilafcu v. Moldova and Russia*, the Court, recalling the case-law in *Loizidou and Cyprus* observed that «although in the *Banković* case it emphasized the preponderance of the territorial principle [...], [w]here a Contracting State exercises overall control over an area outside its national territory its responsibility is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration which survives there by virtue of its military and other support»⁹³. The *Issa* case⁹⁴ concerned a large-scale cross-border raid by Turkish military forces into Northern Iraq between 19 March and 16 April 1995 with the purpose of the pursuit and elimination of terrorists who were seeking protection in Northern Iraq. The six applicants were the relatives of seven shepherds who had been detained by members of the Turkish forces in brutal circumstances, mutilated and finally killed. The ECtHR rejected the applications filed because of the lack of «the required standard of proof that the Turkish armed forces conducted operations in the area in question»⁹⁵. If the Court had accepted that this had been proved, the victims would have been within the jurisdiction of Turkey.

The abundant jurisprudence analysed until now confirms the idea that «[t]he notion of “jurisdiction” reflects the term’s meaning in public international law», indicating «that a State’s jurisdictional competence is considered primarily territorial

Grenier, *Extraterritorial Applicability of Human Rights Treaty Obligations...*, cit., p. 83.

⁹¹ ECtHR, *Öcalan v. Turkey*, Application no. 46221/99, Judgement, 12 March 2003, (2003) ECHR 125.

⁹² *Ibidem*, para. 93. See also the appeal judgement before the Grand Chamber: ECtHR (Grand Chamber), *Öcalan v. Turkey*, Application no. 46221/99, Judgement, 12 May 2005, para. 91.

⁹³ ECtHR, *Ilafcu and Others v. Moldova and Russia*, Application no. 48787/99, Judgement, 8 July 2004, paras. 314-316. See on the matter M. Kengerlinsky, *Jurisdiction of the European Court of Human Rights in Conflict Areas: Who Is Responsible for Violations in Nagorno-Karabakh?*, in «The Journal of Turkish Weekly», 2005.

⁹⁴ ECtHR, *Issa and Others v. Turkey*, Application no. 31821/96, Judgement, 16 November 2004.

⁹⁵ *Ibidem*, para. 81.

⁹⁶ ECtHR, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, Application no. 45036/98, Judgement, 30 June 2005, para. 136, quoting *Gentilhomme, Schaff-Benhadi and Zerouki v. France*, Judgement of 14 May 2002, para. 20; *Banković and Others v. Belgium*, cit., paras. 59-61; ECtHR, *Ilafcu and Others v. Moldova and Russia*, cit., para. 312. See also ECtHR, *Assanidzé v. Georgia*, Application no. 71503/01, Judgement, 8 April 2004, para. 137.

⁹⁷ See, e.g., IACHR, *Alejandre et al. v. Cuba*, cit., where the IACHR cited the standard of «authority and control» (para. 23) to correctly find the state's jurisdiction, similarly to what the ECtHR did in *Banković*.

⁹⁸ Some scholars refer to the situation called «Meron gap», where a country is in a state of civil unrest that does not amount to the level of internal armed conflict. In such a circumstance, the state would be able to derogate from most of its obligations under HR law (excluding non-derogable obligations), without applying in the meantime IHL (see J. Cerone, *Minding the Gap...*, cit., p. 471 (note 5), quoting

and a jurisdiction [is] presumed to be exercised throughout the State's territory»⁹⁶. In our opinion, only the *effective control*⁹⁷, resulting in a *direct and immediate link* with the individuals concerned, appears to be the foundation element to successfully establish the jurisdiction of the relevant supervisory bodies. In this regard, the occurrence of an armed conflict remains the most fragile constituent to be verified in ascertaining the responsibility of the states performing activities in breach of HR norms⁹⁸. It should be further observed that, while in *Banković* the Court tried to avoid the adoption of «a sliding scale of scrutiny, in which the degree of responsibility of a state for extraterritorial acts would depend on the degree of effective control or jurisdiction in fact exercised»⁹⁹, anyway it seemed to finally recognise it just in marking the distance with the *Cyprus* and *Loizidou* cases.

In short, we can try to divide the possible situations into two upper categories, one relating to the exercise of the state's authority and control abroad, the other regarding the operations conducted by state's agents abroad without any effective control of the foreign soil¹⁰⁰. The first group might include situations of military occupation, trusteeship administrations, peacekeeping missions (with the consent of the host state), assistance missions with an «overall control»¹⁰¹ of individuals or areas, and the administration of small portions of foreign soil (embassies, prisons, military bases). The second might consist of the state agents' activity performed abroad (covered or with the consent of the host state) while exercising an *effective control* over individuals (nationals or foreigners). In any case, a state could be held responsible for the lack of due diligence in order to prevent a conduct contrary to international law and to prosecute and punish the perpetrators if it occurs¹⁰². A similar classification has been issued by HRC in its recent General Comment no. 31, also as regards PKOs¹⁰³.

4. Human Rights Application in UN Peace Operations

Once we have established the various cases in which HR law must be fully or partially applied we can move towards the second topic to be examined. Up to this point we have only

T. Meron, *Towards a Humanitarian Declaration on Internal Strife*, in «Am. J. Int'l L.», vol. 78, 1984, pp. 859-868; by the same author see T. Meron, *Extraterritoriality of Human Rights Treaties*, in «Am. J. Int'l L.», vol. 89, no. 1, 1995, pp. 78-82).

⁹⁹ Thus rejecting the applicants' argument that the FRY's airspace control by NATO's air forces could be analogically assimilated to the occupation of the FRY's soil (see K.K. Bennoune, *Toward a Human Rights Approach to Armed Conflict...*, cit., p. 223).

¹⁰⁰ See S. Borrelli, *Casting Light on the Legal Black Hole...*, cit., pp. 56-62.

¹⁰¹ See *Loizidou case* (above-cited), para. 56. See generally R. Wilde, *Opinion: The «Legal Space» or «Espace Juridique» of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action?*, in «Eur. H. R. L. Rev.», vol. 10, no. 2, 2005, pp. 115-124.

¹⁰² It's an unquestionable principle of international public law that the extraterritorial conduct of state organs is attributable to the sending state. See International Law Commission, *Yearbook of the ILC*, 1975, vol. II, pp. 69, 83, 87. See more recently D. Bodansky, J.R. Crook (eds.), *Symposium: The ILC's State Responsibility Articles*, in «Am. J. Int'l L.», vol. 96, no. 4, 2002, pp. 773-890.

¹⁰³ HRC, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, General Comment no. 31, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10.

¹⁰⁴ On the legal personality of the international organisations and, in particular, the «contractualist» and «constitutionalist» theories see generally G. Arangio Ruiz, *Diritto internazionale e personalità giuridica*, Bologna, CLUEB, 1971; G. Arangio Ruiz, *Diritto internazionale e personalità giuridica*, in *Novissimo digesto italiano*, Torino, UTET, 1971. On the topic see generally J.E. Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, Cambridge,

faced cases referring to a single state in hypothesis of extra-territorial application of HR. Now we will focus on the possibility that the same application could regard a coalition of states in the course of a military operation. We assume that a coalition of states does not have any personality in international law different from the sum of the personalities of the contributing states. In contrast, we might appreciate a difference in the case of a military operation conducted under the flag of an international organisation with a recognised international legal personality¹⁰⁴. Then, we will analyse the extent to which international organisations are bound by HR in operations under UN command and control, as well as the possibility of Security Council derogations from applicable law and the duty to protect. Finally we will examine state practice. However, the starting point of the reasoning in question seems to be the possibility to compare the UN with any other subject under international law, and, from those grounds, deriving obligations, duties and responsibility for the *Organisation* itself as well as for the contributing states.

4.1. The International Legal Personality of the UN

The international legal personality of the UN was primarily recognised in the ICJ *Reparation for Injuries* case¹⁰⁵, which recognised a functional legal capacity tailored to the aims of the Charter and limited by the functions entrusted to the UN by the participating countries¹⁰⁶. According to that interpretation, where the UN retains the command and control of a force deployed in a PSO, the troops enjoy the legal status of a United Nations' subsidiary body¹⁰⁷. Thus, any violation of the HR committed by its members in their official capacity is attributable to the UN itself. In the case of a mission in which the UN holds only the operational control, the responsibility will be determined in each and every case according to the degree of actual control exercised¹⁰⁸, taking into account any relevant applicable agreements such as Status of Forces Agreements (SOFAs) or participation agreements¹⁰⁹. In this respect, the UN model SOFA adopted in 1990 and the following 1991 Report of the Secretary General include a clause which states how the UN forces are expected to observe and respect «the principles and spirit of the general conventions applicable to the conduct of military personnel»¹¹⁰

CUP, 2004; Y.M. Kamil, *Création et personnalité juridique des organisations internationales*, in R.J. Dupuy (ed.), *Manuel sur les organisations internationales*, Dordrecht, Martinus Nijhoff, 1988, pp. 33-55.

¹⁰⁵ ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports 1949, p. 174. The case occurred as a consequence of the assassination in Jerusalem, September 1948, of the United Nations Mediator in Palestine, Count Folke Bernadotte, and other members of the United Nations Mission to Palestine.

¹⁰⁶ *Ibidem*, p. 182. See also ICJ, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 13 July 1954, ICJ Reports 1954, p. 57.

¹⁰⁷ See P. Tavernier, *Les Casques bleus*, Paris, Presses Universitaires de France, 1996, pp. 98-99; D. Shraga, *The United Nations as an Actor Bound by International Humanitarian Law*, in L. Condorelli et al. (eds.), *The United Nations and International Humanitarian Law*, cit., p. 327. By the same author see *UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations - Related Damage*, in «Am. J. Int'l L.», vol. 94, no. 2, 2000, pp. 406ff.

¹⁰⁸ D. Shraga, *The United Nations as an Actor Bound by International Humanitarian Law*, cit., p. 332. The author refers to the accountability for IHL violations, but the rationale can be easily turned into the case for HR breaches.

¹⁰⁹ See generally on the matter R.J. Erickson, *Status of the Forces Agreements: A Sharing of Sovereign Prerogative*, in «Air Force L. Rev.», vol. 37, 1994, pp. 137ff.

¹¹⁰ *Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations*, Report of the Secretary General, 23 May 1991, UN Doc. A/46/185, Annex, para. 28.

and «all local laws and regulations»¹¹¹. However, the same SOFA provides for functional immunity the personnel of the mission before the local Courts but such personnel remain accountable to the jurisdiction of their own countries¹¹².

4.2. International Organisations and Human Rights

The UN and other international organisations in general are not parties under the relevant HR treaties and conventions, so they are generally considered not bound by HR obligations as a matter of treaty law¹¹³. However, as a subject of international law the UN remains certainly subject to *jus cogens*, and, among the scholars, many believe it should be bound by customary norms of human rights as well¹¹⁴. The different ways in which one can assume that the UN (and its peace forces deployed in the Area of Responsibility (AoR)) must respect HR norms may derive from (1) the constitutional character of the UN Charter; (2) the fact that the *Organisation* should respect in its duties the same purposes and principles it promotes worldwide; (3) the illogic divergence created by national contingents bound by HR law where operating under national command and free from any accountability while acting as a UN subsidiary body. Some remarks may be offered on the point. Sub. (1) we assume that the UN is «an international organization, established by a treaty which serves as a constitutional framework for that organization»¹¹⁵. In this regard it has been observed that «the assumption that the UN member states could have succeeded in collectively opting out of customary law and general principles of law by creating an international organisation that would cease to be bound by those very obligations appear rather unconvincing»¹¹⁶. However, even if this approach also offers the possibility of an equal application to the whole UN system, it does not (at least formally) apply to the activities performed by bodies and agencies outside the *Organisation's* galaxy, that, instead, would be bound only by HR customary norms. Under this theory, HR instruments approved under the auspices of the UN (i.e. the Universal Declaration of Human Rights or the Covenants in 1966) would consist in a sort of «UN Law» that applies not only to the states, but also constitutionally to the *Organisation* itself¹¹⁷. In this context one should consider that an international organisation with a distinct legal personality, in exercising powers under its

¹¹¹ *Model Status of the Force Agreement for Peacekeeping Operations*, 9 October 1990, UN Doc. A/45/594, para. 6.

¹¹² *Ibidem*, paras. 3, 4; *Model Agreement between the United Nations and Member States...*, cit., paras. 5, 24-25.

¹¹³ See A. Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, in «Am. J. Int'l L.», vol. 95, no. 4, 2001, p. 854. See the official legal opinion of the UN Secretariat with regard to the possible accession of international organisations to the Geneva Conventions reported at note 19. Such a position is also quoted in D. Shraga, R. Zacklin, *The Applicability of International Humanitarian Law to United Nations Peace-Keeping Operations: Conceptual, Legal and Practical Issues*, in U. Palwankar (ed.), *Symposium on Humanitarian Action and Peace-Keeping Operations*, Geneva, International Committee of the Red Cross, 22-24 June 1994, p. 43. See also D. Shraga, *The United Nations as an Actor...*, cit., p. 323. See generally on the matter S. Wills, *Military Interventions on Behalf of Vulnerable Populations: The Legal Responsibilities of States and International Organizations Engaged in Peace Support Operations*, in «J. Conf. & Sec. L.», vol. 9, no. 3, 2004, pp. 387-418; A. Reinisch, *International Organizations before National Courts*, Cambridge, Cambridge University Press, 2000, reviewed by C. Schreuer in «Eur. J. Int'l L.», vol. 12, no. 3, 2001, pp. 623ff.

¹¹⁴ See P. Sands, P. Klein, *Bowett's Law of International Institutions*, London, Sweet & Maxwell, 2001 (5th ed.), pp. 458-459. See also International Law Association, *Accountability of International Organizations: Final Report of the Berlin Conference (2004)*, in «Int'l Org. L. Rev.», vol. 1, no. 1, 2004, p. 250.

¹¹⁵ ICTY, *Prosecutor v. Tadić*, Case no. IT-94-1-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October

constituent treaty, performs activities on its *own* behalf and not on behalf of its member states: that is the reason why states are not generally considered as having consented to the establishment of an agency rapport simply by their participation in the organisation¹¹⁸. Indeed that argument does not impede affirming the existence of an obligation for the UN to respect HR during its activities: as derivative subject of international law, it does not retain any original power or sovereign authority, but only those powers and authority conferred on it by its member states. If those powers are compelled *ab origine* in their exercise by the limits imposed by HR law, the *Organisation* might not go beyond those borders¹¹⁹. This theory could easily explain the respect for customary law but it does not seem sufficient to address such an obligation in respect of treaty law. In fact, given that the 191 states forming the UN are parties to different treaties, which level of HR protection should be afforded by the UN?

Analysing the case sub. (2), one might generally affirm that the UN is in charge of promoting and encouraging respect for HR¹²⁰. This principle follows from the *Organisation's* general obligation to exercise its responsibility «in conformity with the principles of justice and international law»¹²¹. That means that the *Organisation* itself should not disrespect or derogate from international law unless the Charter allows such derogation¹²². In addition, the UN is supposed to «establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained» and promote «universal respect for, and observance of, human rights and fundamental freedoms»¹²³. According to those provisions, any UN violation of HR in its activities would infringe the promotion of those rights themselves¹²⁴, and so the *Organisation* would be acting in breach of its statute. A solid ground on which to build this legal opinion may be found in the ICJ *Effects of Awards of Compensation* case, where the Court noted that the promotion of freedom and justice by the UN could hardly be consistent with the impossibility for its own personnel to suit the *Organisation* before a judicial or arbitrary body in respect of any disputes arisen in the course of duty¹²⁵.

This track leads us to the third issue listed above: the difference as regards the respect and accountability for HR norms

1995, para. 28.

¹¹⁶ See A. Reinisch, *Developing Human Rights...*, cit., p. 858.

¹¹⁷ See N. White, D. Klaasen, *The UN and the Protection of Human Rights in Post-Conflict Situations*, Framework document for the conference *The United Nations and the Protection of Human Rights in Post-Conflict Situations*, Human Rights Law Centre, University of Nottingham, 12-13 September 2002, p. 5. This possibility is also suggested in D. Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?*, in *Int'l & Comp. L. Quart.*, vol. 46, no. 2, 1997, p. 324.

¹¹⁸ See D. Sarooshi, *Some Preliminary Remarks on the Conferral by States of Powers on International Organizations*, Jean Monnet Working Paper no. 4/03, New York, New York University School of Law, 2003, p. 52.

¹¹⁹ See ECtHR, *Bosphorus Hava Yollari Turizm...*, cit., para. 154.

¹²⁰ UN Charter, Article 1(3).

¹²¹ *Ibidem*, Article 1(1).

¹²² See D. Akande, *The International Court of Justice...*, cit., p. 317; M. Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts*, Basingstoke-New York, St. Martin's Press, 1994, p. 7.

¹²³ *Ibidem*, Preamble, Article 55(c).

¹²⁴ See A. Reinisch, *Developing Human Rights...*, cit., p. 857.

¹²⁵ ICJ, *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 13 July 1954, 1954 ICJ Report 47, p. 57.

¹²⁶ ECtHR, *Bosphorus Hava Yollari Turizm...*, cit., paras. 152-154.

¹²⁷ *Ibidem*, quoting the rulings issued by ECommHR in *M. & Co.* and ECtHR in *Matthews*, at para. 32.

¹²⁸ *Ibidem*, quoting the ECtHR ruling in *United Communist Party of Turkey and Others v. Turkey*, Judgement, 30 January 1998, Reports, 1998-I, para. 29.

between national and UN military contingents. Against the case sub. (3) one could argue it looks like a logical but not a legal thesis. Nevertheless the ECtHR's jurisprudence recently seemed to defend this theory in the *Bosphorus Hava Yollari* case¹²⁶. The Court noted that:

The Convention does not [...] prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue co-operation in certain fields of activity¹²⁷ (but) [...] it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's «jurisdiction» from scrutiny under the Convention¹²⁸. In reconciling both these positions and thereby establishing the extent to which State action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its preemptory character and undermining the practical and effective nature of its safeguards¹²⁹.

That is exactly the point: the impossibility for a state to deprive the HR norms of their compulsory character in creating new subjects in international law not bound by the same provisions that limit the state powers. Under this framework one might also argue that this obligation comes directly from the duty of the state to «refrain from acts calculated to frustrate the object of the treaty»¹³⁰ (principle of good faith). Obviously states are free to establish international bodies with international legal personality, as for the case of the international or regional organisations, but

State action taken in compliance with (HR) [...] obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a

¹²⁹ *Ibidem*, quoting the rulings issued by ECommHR in *M. & Co.* and ECtHR in *Waite and Kennedy*, at para. 67.

¹³⁰ See International Law Commission (ILC), *Draft Articles on the Law of Treaties with Commentaries*, YBILC 1966, II, 187, 202, Article 15(1); VCLT, Article 18; ICJ, *Case Concerning the Gabčíkovo-Nagymaros Project*, ILM 1998, 195ff. (quoted in T. Schilling, *On the Constitutionalization of General International Law*, Jean Monnet Working Paper no. 06/05, New York, New York University School of Law, 2005, p. 71, at note 245).

¹³¹ ECtHR, *Bosphorus Hava Yollari Turizm...*, cit., paras. 155-156, quoting the ECommHR decision in *M. & Co.* case. See also F. Schorkopf, *The European Court of Human Rights' Judgement in the Case of Bosphorus Hava Yollari Turizm v. Ireland*, in «German L. J.», vol. 06, no. 09, 2005, p. 1263.

¹³² *Ibidem*, para. 152. See also A. Reinisch, *Developing Human Rights...*, cit., pp. 854, 868; D. Shraga, *The United Nations as an Actor...*, cit., p. 323.

¹³³ See T. Schilling, *Is the United States Bound by the ICCPR...*, cit., p. 19.

¹³⁴ See A. Rùth, M. Trilsch, *Banković et al. v. Belgium (Admissibility)*, in «Am. J. Int'l L.», vol. 97, no. 1, 2003, p. 172.

¹³⁵ Some scholars also refer to the tendency which has arisen among the HR supervisory bodies to find an «indirect» way to exercise an «incidental» form of jurisdiction over international organisations by means of the publication of general comments. See A. Reinisch, *Developing Human Rights...*, cit., pp. 868-869. Another decision often cited for the same purpose is ECommHR, *Confédération française démocratique du travail (CFDT) v. Council of the European Communities*, Application no. 8030/77, Decision of 10 July 1978, 13 ECommHR Decisions & Reports 1978, p. 231.

¹³⁶ HRC, *H.v.d.P. v. the Netherlands*, Communication no. 217/1986, 8

manner which can be considered at least equivalent to that for which the Convention provides. By «equivalent» the Court means «comparable»: any requirement that the organisation's protection be «identical» could run counter to the interest of international co-operation pursued. [...] If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient¹³¹.

This ECtHR ruling contains the turning point of our analysis. Normally international organisations are not themselves held responsible under the HR treaties for proceedings before, or decisions of, their organs as long as they are not contracting parties¹³², but their member states might be subjected to an individual responsibility for the activities performed through international organisations¹³³. In the *Banković* case, the application filed to the Court has been rejected because of the lack of jurisdiction in its *territorial (latu sensu)* dimension, not because the aircrafts involved in the TV station's bombing were acting directly as NATO's subsidiary bodies¹³⁴.

Nevertheless, an argument asserting the HR supervisory bodies' lack of jurisdiction with regard to international organisations¹³⁵ can be found in the often reported case of *H.v.d.P. v. Netherlands*¹³⁶, in which the HRC decided to reject the claim on the basis that the concerned international organisation did not fall within the jurisdiction of the Netherlands or of any other state party to the ICCPR¹³⁷. In this case, however, one should consider that the international agency (the European Patent Office - EPO) in which the claimant was doing his service was based in West Germany, that at the time of the application was not a party of the first Optional Protocol, and so outside the jurisdiction of the Committee¹³⁸, and, moreover, the author was claiming a supposed agency-rapport between the Netherlands and the EPO, affirming that the latter would «constitute(s) a body exercising Dutch public authority»¹³⁹, which, in effect, was to be considered groundless.

What seems to be clear is that, notwithstanding the

April 1987, UN Doc. Supp. no. 40 (A/42/40) at 185 (1987).

¹³⁷ *Ibidem*, para. 3.2.

¹³⁸ D. McGoldrick, *Extraterritorial Application of the International Covenant...*, cit., p. 54.

¹³⁹ HRC, *H.v.d.P. v. the Netherlands*, cit., para. 2.3.

¹⁴⁰ See Judge Ress' concurring opinion in *Bosphorus Hava Yollari* case, in which he noted the concept of a presumption of compliance with HR provisions should not be interpreted as excluding a case-by-case review by ECtHR of whether there has been really a breach of the Convention (see F. Schorkopf, *The European Court of Human Rights' Judgement in the Case of Bosphorus Hava Yollari...*, cit., p. 1263).

¹⁴¹ See International Law Association, *Accountability of International Organisations...*, cit., pp. 250-253.

¹⁴² *Convention on the Safety of United Nations and Associated Personnel*.

¹⁴³ See J.E. Alvarez, *Judging the Security Council*, in «Am. J. Int'l L.», vol. 90, no. 1, 1996, p. 6. See generally on the matter M. Hirsch, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles*, Dordrecht, Martinus Nijhoff Publishers, 1995, also reviewed by J. Klabbers in «Eur. J. Int'l L.», vol. 8, no. 2, 1997, p. 385; M.F. Pérez Solla, *The Notion of International Responsibility: A «Classic» in Times of Change?*, Florence Agora Papers (2005), presented at the 2005 Florence Founding Conference of the European Society of International Law.

¹⁴⁴ See ILC, *Report on the Work of Its Fifty-Seventh Session*, UN GAOR, 60th Sess., Supp. no. 10, UN Doc. A/60/10, 2 May-3 June and 11 July-5 August 2005.

¹⁴⁵ *Ibidem*, p. 81, Draft Article 5.

impossibility to bring before a HR international supervisory body an international organisation, it remains possible to file a petition against a single state, in the eventuality it has failed to comply with its obligation to secure¹⁴⁰, while acting through an international or regional organisation, a level of HR protection *equivalent* to the one it has to afford to individuals coming within its jurisdiction because of the obligations arisen from the HR instruments signed. The lack of jurisdiction over international or regional organisations naturally does not prevent those organisations from protecting fundamental rights, providing for substantive guarantees and audit mechanisms¹⁴¹. As long as the protection afforded to the individuals within the jurisdiction of the organisation is guaranteed in that way, a rebuttable «presumption» of compliance with HR does not cease. In the case of states parties to the ECHR, the ECtHR affirms indirectly his power to review the compliance of the actions undertaken by the organisation with the HR provisions included in the Convention. This theory is not without any failures in the context of UN PSOs. In fact it would be applicable only to the personnel *associated* to the UN, or generally to UN personnel coming from governmental or intergovernmental agencies or bodies (military, police or state officials, etc.)¹⁴², where such personnel, even acting in its functional capacity as UN subsidiary body, maintains its primary obligation to conduct its service as a national civil servant, thus limited by means of the restrictions imposed by HR law at home. In this regard, there arises an obligation for UN member states to watch over the conduct of detached personnel. In other cases, as for the personnel directly engaged by the *Organisation*, the obligation to ensure and respect HR still remains a *lex imperfecta*, a norm without any sanction in case of violation.

4.3. Accountability of International Organisations

International law has barely developed the matter of international organisations' responsibility for illegal actions¹⁴³. Under the last edition of the draft articles on the responsibility of international organisations, issued by the International Law Commission (ILC)¹⁴⁴, the conduct of an organ of a state is attributable to an international organisation if the organisation exercises effective control over that conduct¹⁴⁵. Moreover, in

some specific circumstances, the *Organisation* is retained responsible in the commission of internationally wrongful acts just because of the general direction or control of the state's body committing the violation¹⁴⁶. As regards the UN accountability for its Security Council Resolutions, the ILC draft articles recognise to some extents the responsibility of international organisations for decisions binding a member state to commit unlawful acts¹⁴⁷. Moreover, as it has been authoritatively observed, the characterisation of an act of an international organisation as internationally wrongful is not affected by the characterisation of the same act as lawful by the international organisation's internal legal order¹⁴⁸.

Concerning the possible judicial review of the UN decisions, as previously seen in the *Effects of Awards of Compensation* case, at the beginning the ICJ tried to identify its competence to serve as judicial review organ of the UN, but later, with the beginning of Security Council Resolutions adopted under Chapter VII of the UN Charter, it backed down¹⁴⁹. While in theory the ICJ could review Security Council Resolutions under Chapter XIV of the UN Charter, the eventuality of such a ruling is extremely unlikely¹⁵⁰. According with that trend, the use of a rebuttable *presumption* may have been a good compromise between a general power to revise and the complete impossibility to pronounce on the matter.

4.4. Possible Derogations from Human Rights Law Via Security Council Resolutions

Once one has identified the obligations that must be fulfilled by UN member states in respect of HR, one should consider the possibility of derogation from some of those prescriptions by means of decisions adopted under the UN Charter. We know that Article 103 of the Charter contains the principle of prevalence as regards the obligations assumed by states as members of the UN over those obligations contracted under any other international agreement¹⁵¹. Also, Article 25 of the same constituent treaty provides for the mandatory nature of the Security Council decisions¹⁵². It does not seem entirely clear which decisions of the Security Council are to be considered binding under Article 25, but resolutions adopted under Chapter VII of the Charter are indisputably binding¹⁵³. Moreover, Article 103 is considered by authoritative scholars

¹⁴⁶ *Ibidem*, p. 84, Draft Article 13.

¹⁴⁷ *Ibidem*, p. 85, Draft Article 15.

¹⁴⁸ See International Law Association, *Accountability of International Organisations...*, cit., p. 256.

¹⁴⁹ 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, 21 June 1971, 1971 ICJ Reports 16, p. 89: «Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned». See also E. Benvenisti, *Public Choice and Global Administrative Law: Who's Afraid of Executive Discretion?*, ILLJ Working Paper 2004/3 (Global Administrative Law Series), New York, New York University School of Law, 2004, p. 19.

¹⁵⁰ See J. Gordon, *When Intent Makes All the Difference in the World: Economic Sanctions on Iraq and the Accusation of Genocide*, in «Yale H. R. & Dev. L. J.», vol. 5, no. 1, 2002, pp. 77-78.

¹⁵¹ UN Charter, Article 103.

¹⁵² *Ibidem*, Article 25.

¹⁵³ See Y. Dinstein, *The Right to Humanitarian Assistance*, in «Naval War College Rev.», vol. 53, no. 4, 2000, p. 86. Professor Dinstein quotes the 1970 ICJ Advisory Opinion on the *Namibia* case, at pp. 52-53.

not just a treaty norm, but a part of *jus cogens*¹⁵⁴. Thus, we can affirm that the international customary norm derived from Article 103 may derogate from treaty or customary norms, and so from HR customary or treaty rules. According to this view, Security Council Resolutions consenting to the authorisation to the use of force (including the expression «with all necessary means»)¹⁵⁵ might in theory derogate from HR, temporarily setting aside their mandatory efficacy, e.g. to impose economic sanctions or an air/maritime blockade. In such a case HR obligations would be ineffective, while the international treaties from which they derive would remain still valid¹⁵⁶. However, one must consider that the same UN Charter imposes on the member states an obligation to promote and encourage respect for HR, and as regards that provision the UN enjoys the rebuttable presumption of compliance as seen above.

In a very recent case, the Court of First Instance of the European Communities (CFI) ruled a case concerning the challenges for violations of a number of articles contained in the ECHR moved by a national of Saudi Arabia to a Council Regulation. The latter implemented the Security Council Resolutions on the freezing of funds and other economic resources belonging to terrorist groups or organisations¹⁵⁷. In its decision, the Court observed the prevalence of the sanctions adopted under Chapter VII of the Charter, because of their mandatory nature, established under Article 25 and Article 103, to the obligations deriving from international treaty law and domestic law included in the ECHR¹⁵⁸. The CFI also noted that, notwithstanding the fact that the Community itself is not a member of the UN, an examination of the Council Regulation would indirectly mean an examination of the legality of the resolutions. To this reason the case escaped its jurisdiction. Nevertheless, the Court reaffirmed its power «to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*»¹⁵⁹. Therefore, according to this view, the international customary rule derived from Article 103 represents a *quasi-ius cogens* norm.

Finally, we see a double legal path: on one side we have the possibility, generally recognised, for the UN to derogate from HR by adopting resolutions under Chapter VII of the Charter;

¹⁵⁴ See B. Conforti, *Diritto Internazionale*, Napoli, Editoriale Scientifica, 2002 (6th ed.), pp. 185-190.

¹⁵⁵ See T. Schilling, *Is the United States Bound by the ICCPR...*, cit., p. 13.

¹⁵⁶ See B. Conforti, *Diritto Internazionale*, cit., p. 186.

¹⁵⁷ Court of First Instance of the European Communities, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Case no. T-315/01, Judgement, 21 September 2005.

¹⁵⁸ *Ibidem*, paras. 183ff.

¹⁵⁹ *Ibidem*, para. 226.

on the other, the *Organisation*, in the concrete action on the ground by means of the forces provided by contributing countries, should balance the aim «to restore peace and security» with the applicable HR norms¹⁶⁰. The latter acquire a sort of legal barrier status beyond which the actions performed by UN forces become illicit under domestic law of both host state and sending state and/or unlawful under international HR law. The possible solution of this dilemma seems simple and immediate: in time of armed conflict, or whether UN forces are under attack, HR will be restricted by the full applicability of IHL; in other circumstances, while at international level the UN may adopt resolutions under Chapter VII, capable of producing effects on the HR enjoyed by individuals living in the territory hit by the sanctions or the measures undertaken, once it establishes a «direct and immediate link» (a situation «comparable» with state *jurisdiction*) with the population of such a territory (in the form, i.e. of a transitional administration), the *Organisation* seems obliged to fully respect HR norms, by means of the concrete actions performed by the contributing states. Those forces, in their ordinary duty should entirely respect HR provisions contained in the HR treaties and instruments ratified by their respective countries, until they are not engaged in an armed conflict¹⁶¹. Within that legal framework, the economic sanctions seem allowed until their effects amount to a threat to one of the fundamental rights enshrined in the HR instruments (e.g., the right to life).

¹⁶⁰ In our view the principle of balance between values is enshrined in the ECtHR, *Bosphorus Hava Yollari Turizm...* case (cit., para. 156), where the ECtHR considers the existence of a presumption of compliance with HR norms until the case when it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a «constitutional instrument of European public order» in the field of human rights (*Loizidou v. Turkey (preliminary objections)*, Judgement of 23 March 1995, Series A no. 310, para. 75).

¹⁶¹ See International Law Association, *Accountability of International Organisations...*, cit., p. 251; A. Faite, J.L. Grenier (eds.), *Expert Meeting on Multinational Peace Operations...*, cit., Foreword, p. I.

¹⁶² The «living instrument» nature of ICCPR is empathised, i.e. in HRC, *Roger Judge v. Canada*, Communication no. 829/1998, 20 October 2003, UN Doc. CCPR/C/78/D/829/1998, para. 10.3; ECtHR, *Tyrer v. United Kingdom*, Application no. 5856/72, Judgement, 25 April 1978, (1978) ECHR 2, para. 31; ECtHR, *Marckx v. Belgium*, Application no. 6833/74, Judgement, 13 June 1979, (1979) ECHR 2, para. 41.

5. Conclusion

Human rights law instruments and provisions are becoming a sort of critical mass overtaking the boundaries of national states and applying more and more in a wider perspective. Their nature of *living instruments*¹⁶² may be negated or slowed down, but in the end, what we have assisted to is a long and complex path towards the recognition of the major HR treaties and agreements being interpreted in the light of present-day conditions. With the aim to maintain and preserve the existence and the validity of those norms, international humanitarian law provides for a set of mandatory rules to be

implemented in time of armed conflict. Even though IHL rules limit indeed the strict applicability of HR, both bodies of norms share common ground and values in a mutual reinforcing and realistic approach that secures the respect for the individuals involved while also guaranteeing the interests of the belligerent parties.

The relevant jurisprudence of the main HR supervisory bodies is inclined to recognise the existence of an obligation for the states to preserve HR while dealing with individuals in situations *other than war*, as during PSOs. In that event, normally Security Council Resolutions might generally derogate from some HR provisions, e.g. by imposing economic sanctions or indirect coercive measures. Where those measures put in danger one of the inalienable rights listed in the specific provisions of the relevant HR treaties, they should be suspended or at least limited.

International organisations vested with international legal personality must not represent a way for the states to escape from respecting their obligations contained in the HR treaties they have ratified. Apart from the use of soft-law enforcement mechanisms, the possible state accountability for HR violations while acting as subsidiary bodies of such international organisations (included the UN) is nowadays a reality susceptible to further development. The experience derived from the past and current UN PSOs suggests the importance of ensuring the full application of HR and to limit the eventual derogations in cases of absolute emergency. Besides, a dichotomist policy between a formal continuative affirmation of human rights by international authorities on one side and a fragmentation in the concrete application on the other, will only lead to a situation where confusion reigns concerning the concrete enjoyment of individual rights.