

Expert opinion on the applicability of human rights law to the Palestinian Territories with a specific focus on the respective responsibilities of Israel, as the extraterritorial state, and Palestine, as the territorial state

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Note on citations: A list of treaties is provided in section 2.1; a list of cases is provided at the end. Footnotes contain abbreviated references to these sources.

Executive Summary

Both Israel and Palestine are bound by most of the main international human rights treaties. These treaties cover civil and political rights, and economic, social and cultural rights. The obligations they contain apply at all times, including during 'wartime' situations; their meaning is context-specific; and they include the right of self-determination. Territorial applicability is assumed, although the substantive requirements of this in the case of Palestine are modified insofar as the state's ability to exercise control in its territory is prevented by Israel. Extraterritorial applicability—so to Israel in the Palestinian territories, and Palestine in Israeli territory—although disputed by some states, is established in authoritative jurisprudence. The test for when this happens is multiple and varied. In some cases, it covers the exercise of effective control, over either territory or individuals, and also addresses situations involving a causal role over decision-making, and the performance of existentially-determinative roles more generally. In other cases, there is a 'free-standing' basis. Each state is also liable for the extraterritorial effects on human rights of acts and omissions originating from within their respective territories. The substantive meaning of Israel's human rights obligations in Palestine is profoundly different compared to the situation in its sovereign territory, all other things being equal. Notably, the legal self-determination entitlement of the Palestinians requires Israel to end the occupation promptly, and whereas other areas of human rights law oblige it to secure rights in areas under its control, this does not affect Israel's obligation to give up this control insofar as it prevents full self-administration by the Palestinians

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Table of Contents

1.	<i>Introduction</i>	4
2.	<i>Preliminary issues</i>	4
2.1.	Human rights treaties	4
2.2.	Features of human rights law	4
2.2.1.	Different types of rights	4
2.2.2.	Instant and progressive realization.....	5
2.2.3.	Nature of obligations: positive and negative; respect, protect, fulfil	6
2.2.4.	Limiting rights.....	6
2.2.5.	Applicability times of war and occupation.....	6
2.2.6.	Significance of broader international law picture.....	7
2.2.7.	What other law is relevant	8
2.2.8.	Human rights obligations being context-specific	8
3.	<i>Applicability provisions in human rights treaties</i>	8
3.1.	'Jurisdiction'	8
3.2.	No general applicability provision	9
3.3.	The ICESCR and the economic, social and cultural rights in the CRC and CRPD	9
3.4.	Overview on applicability	10
4.	<i>Territorial application: general position</i>	11
5.	<i>Extraterritorial application: general position</i>	11
5.1.	'Jurisdiction' defined extraterritorially	11
5.2.	Free-standing obligations	12
5.3.	Effects-based obligations	12
5.4.	Socio-economic rights: international co-operation	12
6.	<i>General considerations for territorial and extraterritorial application</i>	12
6.1.	Introduction	12
6.2.	The territorial and extraterritorial contexts	12
6.3.	What self-determination means in the two contexts	12
6.4.	Occupation law and extraterritoriality	13
6.5.	Human rights law in the two contexts	13
6.5.1.	End the occupation/build up self-government	13
6.5.2.	Reading self-determination into other areas of human rights law.....	14
6.5.3.	An effective territorial system to secure rights.....	14
6.5.4.	Does human rights law impede the transfer of power, and require interference by Israel where power is already partially or fully exercised by the Palestinians?.....	14
6.5.5.	Temporary nature requires short-term efforts.....	16
6.5.6.	Lack of an entitlement to exercise authority requires deference	16
6.5.7.	When authority is not transferred	16
7.	<i>The test for territorial applicability</i>	17
7.1.	Overview	17
7.2.	Summary of territorial applicability	19
8.	<i>The test for extraterritorial applicability</i>	19
8.1.	Extraterritorial 'jurisdiction'	19
8.1.1.	Control over territory	19
8.1.1.1.	General concept	19
8.1.1.2.	Sub-category (1): Direct, exclusive control on the ground.....	20
8.1.1.3.	Sub-category (2): Effective 'overall' control when there is a distinct entity/regime	20
8.1.1.3.1.	The general issue.....	20
8.1.1.3.2.	Applicability in such circumstances	20
8.1.1.3.3.	Liabilities of Israel vis à vis the Palestinian administrative authorities.....	21
8.1.1.3.4.	Responsibility for a subordinate entity only in cases of positive support?	22

8.1.1.3.5.	Territorial control that determines existential survival.....	22
8.1.1.3.6.	Where does the effective 'overall control' have to operate on the ground, in terms of the territorial unit(s) covered by it?	23
8.1.1.4.	Sub-category (3): A sliding scale of applicability depending on the level of control? ...	23
8.1.1.5.	Does it cover aerial bombardment?.....	24
8.1.1.6.	Summary of applicability based on control over territory	24
8.1.2.	Control over individuals	25
8.1.2.1.	Introduction	25
8.1.2.2.	The use of force.....	25
8.1.2.3.	Sliding scale of applicability, and relational substantive meaning	26
8.1.2.4.	Summary of applicability based on control over individuals.....	27
8.1.3.	Causation in decision-making/existential determinism	27
8.1.3.1.	The concepts	27
8.1.3.2.	Summary of applicability based on causation in decision-making/existential determinism.....	29
8.2.	Extraterritorial 'free standing' obligations	30
8.2.1.	Overview.....	30
8.2.2.	Summary.....	30
8.3.	Extraterritorial 'effects-based' obligations	30
8.3.1.	Generally, and <i>non-refoulement</i>	31
8.3.2.	Use of force	31
8.3.3.	Summary of 'effects-based' obligations	32
8.4.	Extraterritorial socio-economic rights: 'taking steps' in the context of 'international co-operation'	32
8.4.1.	Overview.....	32
8.4.2.	Summary.....	33
9.	<i>Comparisons and overlaps of territorial and extraterritorial applicability.....</i>	33
9.1.	Introduction.....	33
9.2.	The different bases for applicability	33
9.3.	Case study 1: Responsibilities relating to the decisions and policies of Palestinian administrative entities in Gaza, Area A, and those areas of Area B under Palestinian control (n.b., responsibility in these territorial areas more generally is addressed separately)	35
9.4.	Case study 2: Israeli and Palestinian responsibility in the areas of Palestine under Palestinian administrative authority: Gaza, Area A, and those parts of Area B under Palestinian authority.....	36
9.5.	Case study 3: Israeli and Palestinian responsibility in the areas of Palestine under the exclusive territorial control of Israel: East Jerusalem, Area C, and those parts of Area B under exclusive Israeli authority	38

1. Introduction

This memo sets out the obligations of Israel and Palestine with respect to the Palestinian territories as a matter of international human rights law treaties. Various assumptions are made herein, which for reasons of space are not substantiated: Israel and Palestine are both states in international law; the territories of the two states correspond to the (pre-)1967 'green line' borders; Palestine's obligations in international human rights law engages the responsibility of all the Palestinian administrative entities exercising authority in all Palestinian territories (i.e. including such entities in Gaza) and the identity, presence and activity of these authorities is referred to descriptively herein as Palestinian administrative entities/authorities, a term which is intended to include, but not be limited to, the formal Palestinian Authority (PA). References to the two states together, 'Israel and Palestine,' are always ordered alphabetically, for this reason.

2. Preliminary issues

2.1. Human rights treaties

Israel and Palestine have acceded to most of the main international human rights treaties. Since these treaties differ in how they apply, it is necessary to refer to them individually in certain parts of this report. Such references are made in abbreviated form. What follows below is a list of the treaties, indicating the dates of accession by the two states, and the abbreviations used. Reference is also made, in italics, to certain other treaties which the two states have not acceded to, but which are included because the jurisprudence related to them is in certain respects transferrable to the applicable treaties.

- *American Declaration on Human Rights [ADHR]*
- *American Convention on Human Rights [ACHR]*
- *European Convention on Human Rights [ECHR] and its Protocols*
- *(Inter-) American Declaration of the Rights and Duties of Man (not a treaty) [ADHR], 1948*
- Convention on the Prevention and Punishment of the Crime of Genocide [Genocide Convention] (9 December 1948) (Israel 1950; Palestine, 2014)
- Convention on the Political Rights of Women [CPRW] (Israel 1953; Palestine 2014)
- International Convention on the Elimination of All Forms of Racial Discrimination [ICERD] (21 December 1965) (Israel, 1979; Palestine, 2014)
- International Covenant on Civil and Political Rights [ICCPR] (16 December 1966) (Israel, 1991; Palestine, 2014)
- International Covenant on Economic, Social and Cultural Rights [ICESCR] (16 December 1966) (Israel, 1991; Palestine, 2014)
- International Convention on the Suppression and Punishment of the Crime of Apartheid [Apartheid Convention] (30 November 1973) (Israel not a party; Palestine, 2014)
- International Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW], (18 December 1979) (Israel, 1991; Palestine, 2014)
- *African Charter on Human and Peoples' Rights [ACHPR], 1981*
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT] (10 December 1984) (Israel, 1991; Palestine, 2014)
- Convention on the Rights of the Child [CRC] (20 November 1989) (Israel, 1991; Palestine, 2014)
- Optional Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict [OP1-CRC] (25 May 2000) (Israel, 2005; Palestine, 2014)
- Optional Protocol to the Convention on the Rights of the Child, on the sale of children, child prostitution, and child pornography [OP2-CRC] (2000) (Israel, 2008; Palestine not a party)
- Convention on the Rights of Persons with Disabilities [CRPD] (13 December 2006) (Israel not a party; Palestine, 2014;)
- *Optional Protocol to Convention on the Rights of Persons with Disabilities [OP-CRPD] (neither state a party)*

2.2. Features of human rights law

2.2.1. Different types of rights

One key classification in international human rights law is the distinction between civil and political rights, on the one hand, and economic, social and cultural rights, on the other. The former addresses such things as freedom of movement, assembly, liberty, a fair trial, freedom of expression, freedom from torture and

inhuman and degrading treatment, privacy and the right to life. The latter covers such rights as the right to adequate food, housing, water, health and sanitation.

Both sets of rights were covered in the UN Universal Declaration of Human Rights of 1948, which is a General Assembly Resolution. However, due largely to the Cold War divisions on ideas of rights, the codification of these rights in a binding treaty was taken forward by splitting them up into the two groups, set out in the two Covenants, the ICESCR and the ICCPR.

Other human rights treaties cover particular rights and prohibitions, such as: the Genocide Convention (prohibition of genocide), Anti-Slavery Convention (freedom from slavery), the Apartheid Convention (prohibition of apartheid), the CAT (freedom from torture, inhuman or degrading treatment), ICERD (freedom from racial discrimination); or the rights of particular groups, such as CEDAW (women), the Refugee Convention (refugees), the CRC and its Protocols (children) and CRPD (people with disabilities). There are also regional instruments, such as the ADHR, ACHR, ACHPR and ECHR. Notably, the CRC, CEDAW, CERD, CRPD and the ACHPR contain both civil and political rights, and economic, social and cultural rights.

2.2.2. Instant and progressive realization

A further general distinction in the meaning of human rights obligations concerns their temporal character: whether they are capable of being implemented in full immediately, or whether it is possible for implementation to happen over time, as capacities dictate. This is a matter of what the obligations require when they apply, rather than the prior question of when they start to apply based on the state being bound by the treaty in question.

In general, economic, social and cultural rights are conceived in terms of progressive implementation. Under the ICESCR, the states are obliged:

...to take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.²

The state is not necessarily obliged to bring about the instant realization of the rights, but must make 'best efforts' to do so within its resources; necessarily, realization of these rights will occur over time absent the full resources available for instant implementation.³ Progressive implementation operates for many of the obligations in the ICESCR, and many of the obligations relating to economic, social and cultural rights in the CRC, CEDAW, CERD, CRPD and the ACHPR.

Civil and political rights, by contrast, are generally conceived in a manner requiring instant implementation by states parties.⁴ No temporal leeway exists, such as the example of an allowance made on the grounds that necessary resources are unavailable to implement the obligation immediately.⁵ Instant implementation operates for the obligations in the ICCPR and its Protocols,⁶ the ECHR and its Protocols, the CAT, the Genocide Convention, and the civil and political rights in the CRC, CEDAW,⁷ ICERD⁸ and the CRPD⁹.

That said, certain aspects of the obligations with respect to economic, social and cultural rights are capable of instant implementation. Most importantly, the 'undertaking to guarantee' that relevant rights 'will be

² ICESCR, Article 2.1. Cf. CRC, Article 4: "With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources..."

³ This is not the same thing as a more generalized notion of progressive implementation, whereby the state could cite factors *other* than resources as a basis for failing to implement its obligations immediately; if the resources are there, the temporal aspect of ICESCR obligations is immediate in the same way as the obligations relating to civil and political rights.

⁴ See ICCPR, Art. 2, and ECHR, Art. 1.

⁵ See ESCR Committee, General Comment 3, esp. para. 9.

⁶ See HRC General Comment 31, para. 5.

⁷ See CEDAW, Art. 2: 'States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.'

⁸ See ICERD, Art. 2 'States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races'.

⁹ See CRPD, Art. 2, 'With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.'

exercised without discrimination...’ and the obligation ‘to take steps’ to achieve progressive realization under ICESCR Article 2 operate instantly.¹⁰

2.2.3. Nature of obligations: positive and negative; respect, protect, fulfil

Traditionally, human rights obligations have been understood through a central division between obligations of action – ‘positive’ obligations – and inaction – ‘negative’ obligations. Relatively, most obligations conceived positively fall within the economic, social and cultural category, and most conceived negatively fall within the civil and political category. For example, the right to work under ICESCR article 6 includes a positive obligation on the part of the state to provide vocational training, whereas the right not to be subjected to torture, inhuman and degrading treatment under ECHR article 3 includes a negative obligation on the part of government officials not to engage in torture.

However, some economic, social and cultural rights involve negative obligations, and some civil and political rights involve positive obligations. For example, ICESCR article 6 encompasses a negative obligation on the part of the state not to prevent individuals from working, and ECHR Article 3 has been understood to include a positive obligation on the part of the state to prevent private actors from committing torture, inhuman and degrading treatment.

Although the distinction between positive and negative obligations remains relevant in explaining what is required, it has become subsumed within a broader, tripartite structure of *respect, protect, fulfil*, applicable to all rights.¹¹

The obligation to *respect* obliges the state to refrain from interfering in the enjoyment of a right. The obligation to *protect* involves the state taking positive steps to ensure that the right is not violated by others. The obligation to *fulfil* requires that the state take further positive steps – administrative, legislative, budgetary, judicial and others – to bring about the full realization of the right, beyond merely preventing its violation by other actors. Each of these three obligations are applicable to every right, although the particular behaviour they require of the state in this regard often varies between rights. In order to implement its duties in relation to any given right, then, the state must fulfil all three obligations.

Thus, for example, in relation to the right to food extraterritorially, the ESCR Committee states that in implementing the obligation:

...to take joint and separate action to achieve the full realization of the right to adequate food...States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.¹²

2.2.4. Limiting rights

Although, then, obligations relating to civil and political rights operate instantly, that is not to say that these obligations do not allow states to limit rights. Certain rights are conceived in absolute terms, such as the right to be free from torture, inhuman and degrading treatment. But most others can be limited, for a legitimate purpose such as the protection of security, provided that the limitation is necessary and proportionate in relation to the purpose. Moreover, when there is a war or public emergency, some of these treaties allow states to ‘derogate’ from their obligations with respect to civil and political rights: to withdraw from being bound by certain substantive rights guarantees—although not the absolute rights—on a temporary basis to the extent that this is necessary to meet the exceptional threat.¹³

2.2.5. Applicability times of war and occupation

Given that the situation between Palestine and Israel involves the conduct of hostilities, and an occupation, a question arises as to whether this has implications for whether human rights law does or does not apply. If the answer is in the negative, then the question of Israel’s human rights obligations being applicable

¹⁰ ESCR Committee, General Comment 3, paras. 2 (on non-discrimination) and 3 (on taking steps).

¹¹ On the tripartite framework generally, see UN Human Rights Council (Sub-Commission), ‘Report of the Special Rapporteur on the Right to Food’ (1987) UN Doc E/CN.4/Sub.2/1987/23; H Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2nd edn, Princeton University Press 1996); CESCR General Comment No. 12, ‘The Right to Adequate Food (Art. 11)’ (Twentieth Session) (1999) UN Doc E/C.12/1999/5.

¹² ESCR Committee General Comment 12, para. 36.

¹³ See e.g. ICCPR, Art. 4; ECHR, Art. 15; ACHR, art. 27

extraterritorially is moot, since even if this is the case, they are rendered inapplicable because of the state of hostilities and existence of the occupation. There are other areas of international law that apply to the conduct of armed conflict and occupation: the law of armed conflict, and occupation law (typically referred to collectively as ‘international humanitarian law’, IHL). The question is whether, and to what extent, these areas of law are supplemented by human rights law rules.

Certain states, including the US and Russia, have taken the position that international human rights law does not apply in times of war.¹⁴ This contention implies that the law of armed conflict and human rights law are mutually exclusive in terms of the situations in which they apply. When one area of law is in play, the other is not. The law of armed conflict applies only in times of ‘war’ and, perhaps it is also suggested, in the case of occupation law, military occupation; human rights law applies only in times of ‘peace.’

Whereas the first contention is correct, the second is difficult to sustain given the affirmation of applicability by several authoritative sources. Notably, the International Court of Justice has affirmed the applicability of human rights law to situations of war and occupation in the *Nuclear Weapons* and *Wall* Advisory Opinions, the *DRC v Uganda* decision and the *Georgia v Russia* Provisional Measures Order.¹⁵

A typical affirmation of the applicability of human rights law in times of ‘war’ comes from the 1999 decision of the Inter-American Commission of Human Rights in the *Coard* case, which concerned the detention of seventeen individuals by U.S. military forces during the 1983 U.S. invasion of Grenada.¹⁶ The Commission stated that:

[W]hile international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a “common nucleus of non-derogable rights and a common purpose of protecting human life and dignity,” and there may be a substantial overlap in the application of these bodies of law. Certain core guarantees apply in all circumstances, including situations of conflict.¹⁷

The applicability of international law on civil and political rights in times of war generally is also assumed by the aforementioned derogation provisions of human rights instruments, given that they are conceived for operation in situations of war or public emergency.¹⁸

It follows, then, that in all circumstances, both wartime and peacetime, and situations of occupation, human rights law will always apply, operating in tandem with the obligations under the law of armed conflict and occupation law when they are applicable. As the International Court stated in the *Nuclear Weapons* advisory opinion in relation to the ICCPR, ‘protection...does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.’¹⁹ Thus the UN Human Rights Committee stated in relation to the ICCPR that:

the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable...both spheres of law are complementary, not mutually exclusive.²⁰

2.2.6. Significance of broader international law picture

The question of the applicability of human rights law to particular subject-matter, and its potential co-application with other areas of law, feeds into the broader question of what other international legal obligations might apply to extraterritorial situations, as far as both the host state—Palestine—and the state acting extraterritorially—Israel—are concerned. The reality of each state’s position in international law is only arrived at by taking account of the totality of their international law obligations, not just those

¹⁴ For Russia, see *Georgia v Russia (Provisional Measures)*, para 110.

¹⁵ *Nuclear Weapons Advisory Opinion*, para. 25; *Wall Advisory Opinion*, para 106; *DRC v Uganda*, para 216; *Georgia v Russia (Provisional Measures)*, para. 112.

¹⁶ *Coard*, paras 1-4.

¹⁷ *Coard*, para 39 (citations omitted).

¹⁸ For derogation provisions, see ACHR, art. 27; ICCPR, art. 4; ECHR, art. 15.

¹⁹ *Nuclear Weapons Advisory Opinion*, para. 25.

²⁰ General Comment 31, para 11. In its earlier General Comment 29, the Human Rights Committee made the following remark: ‘[d]uring armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State’s emergency powers.’ HRC General Comment 29, para. 3.

obligations that might, as in the present opinion, be the main focus of attention. The legal position of each state on any given matter—what, in substance, it can or cannot do—is determined when account has been made of the operative international legal framework in its entirety. International law obligations have to be understood in their totality.

2.2.7. What other law is relevant

The main areas of law that can apply in situations involving extraterritorial action are the aforementioned laws of war, and occupation law, and the law of self-determination.

The law of self-determination is sometimes understood as being in some sense distinct from human rights law, reflecting, perhaps, its origins before the post-1945 era of human rights treaties and its main legal affirmation in the context of decolonization occurring before the two global human rights Covenants (with their common Article 1 on self-determination) were agreed on in the mid-1960s.²¹ With that common Article, however, self-determination is part of human rights law, and so is part of the broad matrix of rights that has to be addressed in substance when considering the question of Palestine and Israel's human rights obligations in Palestine.

It is notable, for present purposes, that the right of self-determination, as well as the prohibition on torture, inhuman and degrading treatment, falls within a special narrow class of human rights obligations that have *jus cogens* status. The main significance of this is that these norms take precedence insofar as there are any inconsistent co-applying legal norms, including other norms of human rights law.

2.2.8. Human rights obligations being context-specific

As a consequence of the foregoing way in which human rights norms are conceived, it follows that, beyond non-derogable rights, these norms are conceived to mean different things in different contexts. Flexibility and contextualization are integral components of the meaning of the obligations themselves, via the operation of the various mechanisms outlined above, which permit restrictions utilizing a relational test tied up with the particular circumstances at issue. To have the same obligations apply in different situations, then, does not necessarily result in identical requirements in terms of particular policies promoted in all cases, even if identical minimum standards operate.

Moreover, the possibility of context-determined differential requirements is accentuated when human rights treaties are placed in their proper international law context. As mentioned, their meaning is mediated by the interplay with other applicable law.

The contextualized nature of the substantive meaning of human rights obligations is often overlooked when extraterritorial applicability is addressed, and yet, as will be indicated, it is actually crucial to appreciating the subject properly.

3. Applicability provisions in human rights treaties

3.1. 'Jurisdiction'

Some of the main treaties addressing civil and political rights—the ICCPR and its Protocols, the ACHR and the ECHR, and their Protocols, the CAT—as well as the CRC, which, as mentioned, also covers economic, social and cultural rights, do not conceive obligations simply in terms of the acts and omissions of states parties. Instead, responsibility is conceived in a particular context: the state's 'jurisdiction'. Under the ECHR and some of its Protocols and the ACHR, the state is obliged to 'secure' the rights contained in the treaty within its 'jurisdiction'.²² Under the CAT, the State is obliged to take measures to prevent acts of torture 'in any territory under its jurisdiction'.²³ Under the CRC, states parties are obliged to 'respect and ensure' the rights in the treaty to 'each child within their jurisdiction'.²⁴ The ICCPR formulation is slightly different from the others in that applicability operates in relation to those 'within [the state's] territory and subject to its jurisdiction'.²⁵

²¹ ICCPR, Art. 1; ICESCR, Art. 1.

²² See ECHR, art. 1; ACHR, art.1.

²³ CAT, art. 2.

²⁴ CRC, art. 2.1.

²⁵ ICCPR, art. 2.

Thus, a nexus to the state—termed ‘jurisdiction’—has to be established before the state’s obligations are in play (the significance of the separate reference to ‘territory’ in the ICCPR will be addressed in due course). As the Grand Chamber of the European Court of Human Rights stated in the *Al-Skeini* decision about the applicability of the ECHR to the activities of UK forces in Iraq,

“Jurisdiction” under Article 1 [the treaty provision on applicability] is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.²⁶

3.2. No general applicability provision

Certain other international human rights instruments do not contain a general provision, whether using the term ‘jurisdiction’ or some other equivalent expression, stipulating the scope of applicability of the obligations they contain: the ADHR, the ACHPR, the ICERD, CEDAW, the CRPD and the OP1-CRC.²⁷

In the case of the ICERD, a sub-set of obligations are conceived in the context of the state’s ‘jurisdiction’. The obligation concerning racial segregation and apartheid applies to parties with respect to ‘territories under their jurisdiction.’²⁸ Similarly, the provision of remedies operates with respect to people in the state’s ‘jurisdiction’, in terms of both the obligation borne by the state to provide such remedies itself, and the jurisdiction of the International Committee on the Elimination of Racial Discrimination, if it has been accepted, to hear complaints against parties.²⁹ The latter arrangement is also used for the competence of the Committee on the Rights of Persons with Disabilities under OP-CRPD.³⁰

The Inter-American Commission on Human Rights treated the ADHR as if it does contain the ‘jurisdiction’ trigger, without an explanation for this assumption.³¹ Similarly, the International Court of Justice appeared to treat the OP1-CRC (binding on Israel and Palestine) and the ACHPR as if they contained the ‘jurisdiction’ trigger, again without explanation.³²

3.3. The ICESCR and the economic, social and cultural rights in the CRC and CRPD

The obligation to secure economic, social and cultural rights in the ICESCR is formulated not in terms of realization within the ‘jurisdiction’, but rather a generalized obligation to ‘take steps’:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.³³

This is akin the earlier ‘free standing’ model of applicability, in that it does not stipulate a particular context (e.g. ‘jurisdiction’) where the steps are supposed to be taken/where the realization they relate to is located. But, at the same time, significantly there is an obligation to do this ‘individually and through international assistance and co-operation’.

Similarly, the provisions on economic, social and cultural rights in the CRC (which utilizes the ‘jurisdiction’ trigger for applicability) and the CRPD (which has a ‘free-standing’ model of applicability) reference international cooperation in the context of realizing these rights in particular (both instruments also cover civil and political rights).

As with the ACHPR and the OP1-CRC, the International Court of Justice has treated the ICESCR as if it did have a ‘jurisdiction’ clause determining the scope of its obligations.³⁴ The Committee on Economic, Social

²⁶ *Al-Skeini* (ECtHR), para 130.

²⁷ ADHR; ACHPR; CEDAW; CERD; CRPD, art. 4; OP1-CRC.

²⁸ ICERD, art. 3.

²⁹ ICERD, arts. 6 (domestic remedies), 14.1 (jurisdiction of the Committee).

³⁰ OP-CRPD, art. 1

³¹ *Coard*, para. 37.

³² *DRC v. Uganda*, paras. 216-17.

³³ ICESCR Art. 2 para. 1.

³⁴ *Wall* Advisory Opinion, para. 112.

and Cultural Rights adopted a definition of 'effective control', which, as will be explained, has been one typical way in which 'jurisdiction' has been defined extraterritorially (including by the ICJ in its aforementioned use of the concept), when determining the applicability of Israel's obligations under the ICESCR to it in the OPT.³⁵ One way of understanding this is on the basis of having adopted a test for applicability through the term 'jurisdiction'.

3.4. Overview on applicability

Treating civil and political rights, on the one hand, and economic, social and cultural rights, on the other hand, in separate categories is in many ways problematic. As mentioned already, not only are Israel and Palestine, like many states, bound by both the Covenants, there has also been a tendency in the later human rights treaties to cover both sets of rights together. However, the significance of the distinction between the two types of rights returns on the issue of applicability, since the different terminology used in this regard maps on to, to a certain extent, the distinction between different types of rights. That said, the operation of the different terminology as it differs between types of rights and particular treaties is complicated. It can be summarized as follows:

1. The obligation to secure in the 'jurisdiction':
 - a. Provision in the ICCPR, ACHR, ECHR and its Protocols, which cover civil and political rights only.
For the ICCPR, the obligation is to secure within the state's territory and subject to its jurisdiction.
 - b. Provision in the CAT, which covers the prohibition on torture, inhuman and degrading treatment.
 - c. Provision in the CRC, which covers the economic, social and cultural rights, and civil and political rights, of children.
For economic, social and cultural rights: requirement to act within the framework of international cooperation.
 - d. Read into the ACHPR, which covers economic and social rights and civil and political rights.
 - e. Read into the ICESCR, which covers economic and social rights only. N.b. the requirement to realize rights within the framework of international cooperation.
 - f. A particular sub-set of obligations in the ICERD and the CRPD which concern non-discrimination on grounds of race and disability respectively.
2. To realize rights by taking steps: in the ICESCR, which covers economic, social and cultural rights only. Requirement to act within the framework of international cooperation. N.b., question of whether this is entirely co-existent with 1.e. or has additional significance outside this.
3. 'Free-standing' obligations:
 - a. ACHR, which covers civil and political rights only.
 - b. ACHPR, ICERD, CEDAW and CRPD, which cover economic, social and cultural rights and civil and political rights.
N.b. in the CRPD in particular, re: economic, social and cultural rights, the requirement of acting within the framework of international cooperation.

Put differently, the obligations operate by type of right in the following manner:

1. Economic, social and cultural rights:
 - a. Generally: obligation to take steps to realize rights in the ICESCR.
 - i. As part of this, requirement of acting within the framework of international co-operation.
 - ii. Obligation to secure in the 'jurisdiction'. Unclear whether this is a sub-set of 1.a, or corresponds entirely to it.
 - b. Of children: obligation to secure in the 'jurisdiction', and to act within the framework of international co-operation, under the CRC.
 - c. Non-discrimination on grounds of race, gender and disability: free-standing obligation under the ICERD, CEDAW and CRPD.
For non-discrimination on grounds of disability in particular, requirement to act within the framework of international co-operation under the CRPD.
2. Civil and political rights

³⁵ UN Doc. E/1999/22, E/C.12/1998/26 Supp.2, paras. 232 & 234.

- a. Generally:
 - i. Obligation to secure within the territory and subject to the jurisdiction under the ICCPR.
 - ii. Free-standing obligation in the ACHPR.
- b. Of children: obligation to secure in the jurisdiction under the CRC.
- c. Non-discrimination on grounds of race, gender and disability: free-standing obligation under the ICERD, CEDAW and CRPD.
- d. Prohibition on torture, inhuman and degrading treatment in particular: obligation to secure in the jurisdiction.

There is, therefore, a complicated matrix of provisions that has to be accounted for in appreciating the totality of the international legal framework in this area. The concept of 'jurisdiction', for example, although usually discussed exclusively in the context of civil and political rights (most of the jurisprudence on the topic of extraterritoriality generally has come from the European Court of Human Rights interpreting the ECHR, which is a treaty limited to such rights), is also relevant to economic, social and cultural rights, not only because the concept is used in the CRC, but also because it has been read into the ICESCR and the ACHPR.

4. Territorial application: general position

The territorial application of human rights treaties—to Israel in Israeli territory, and Palestine in Palestinian territory—is a given. The question is whether human rights obligations might apply differently in the case of Palestine because of the deficiencies on the part of that state in exercising control over its territory due to the occupation by Israel (there is, of course, no equivalent issue on the Israeli side). This will be addressed below.

Thus when 'jurisdiction' alone is the trigger for application, whether as a matter of the express treaty provision, e.g. the CRC, or because it has been 'read in' to the treaty, e.g. the ICESCR, this term is understood to cover the state's territory. It is similarly assumed that human rights obligations conceived to be 'free standing', as in the ICERD and CEDAW, and the obligation to 'take steps' to realize the rights in the ICESCR (insofar as it is different from the 'read in' obligation to secure in the jurisdiction) apply to the state in its territory.

5. Extraterritorial application: general position

5.1. 'Jurisdiction' defined extraterritorially

The consistent jurisprudence and authoritative statements of the relevant international human rights review bodies and the International Court of Justice regarding the CAT, ACHR and ECHR has been to interpret the term 'jurisdiction' in these treaties as operating extraterritorially in certain circumstances.³⁶

Although there is less authoritative commentary on the extraterritorial applicability of the CRC, the meaning of 'jurisdiction' in this treaty is arguably similar. The International Court of Justice appeared to assume this in affirming the applicability of this treaty to Israel in Palestine in the *Wall* Advisory Opinion, and to Uganda in the DRC in the *DRC v Uganda* judgment.³⁷

The aforementioned treatment by the International Court of Justice of the applicability of the ICESCR, the ACHPR and OP1-CRC, in terms of whether situation at issue constituted the exercise of 'jurisdiction' (despite that term not being used in these instruments) was a part of the Court's affirmation that these instruments were capable of extraterritorial application on this basis.³⁸ Here, then, it is not a matter of interpreting a treaty provision termed 'jurisdiction' as having an extraterritorial meaning, but, rather,

³⁶ As explained, with citations, in subsequent sections.

³⁷ *Wall* Advisory Opinion, para. 113; *DRC v Uganda*, paras. 216-7. In the *Wall* Advisory Opinion, the International Court of Justice discusses the potential for the term 'jurisdiction' under the ICCPR to subsist extraterritorially, concluding in the affirmative. After considering the position under the ICESCR, it turns to the CRC, and concludes extraterritorial applicability simply on the basis that obligations in that instrument are conceived in relation to the state's 'jurisdiction.' See *id.*, paragraphs 108-111. One can perhaps conclude that this assumption is made in the light of the Court's earlier discussion about the meaning of the same term in the ICCPR, and on the basis that the term has the same meaning in both instruments, since otherwise the Court would have to conduct a similar enquiry into the meaning of 'jurisdiction' in the CRC to that it conducted in relation to the ICCPR.

³⁸ On the ICESCR, see *Wall* Advisory Opinion, para. 111; on the ACHPR and the CRC Optional Protocol, see *DRC v Uganda*, paras. 216-7.

affirming the extraterritorial applicability of the obligations in the instrument by reading into it a concept for applicability called 'jurisdiction' which has an extraterritorial component.

As mentioned earlier, the ICCPR provision on applicability addresses those 'within [the state's] territory and subject to its jurisdiction.'³⁹ By including the word 'territory' in addition to 'jurisdiction', it might be read to suggest that jurisdiction is limited to territory, thereby ruling out extraterritorial applicability. However, this position is difficult to sustain given the affirmation of extraterritorial applicability by the International Court of Justice and the United Nations Human Rights Committee.⁴⁰ An absolutist denial of extraterritorial applicability not only lacks support in, but also is rejected by, the jurisprudence and other authoritative interpretations on this issue. The key question has not been whether human rights law treaty obligations apply extraterritorially, but, rather, in what circumstances this happens.

5.2. Free-standing obligations

In addition to applicability determined through a concept of 'jurisdiction', the obligations that operate on a 'free standing' basis (e.g. in the ICERD and CEDAW) have also been understood to apply extraterritorially.

5.3. Effects-based obligations

As will be explained, a further basis for extraterritorial obligations relates to the causal relationship between the acts and omissions of a state within its territory, and a violation of human rights outside this territory.

5.4. Socio-economic rights: international co-operation

Finally, the aforementioned provisions of certain treaties, e.g. the ICESCR, which reference an obligation to secure rights in the context of international co-operation, have been understood to encompass realizing rights extraterritorially.

6. General considerations for territorial and extraterritorial application

6.1. Introduction

It was explained above how human rights obligations are conceived to be context-specific, and how their meaning is mediated by other areas of international law. What, then, is the relevant 'context' when it comes to extraterritoriality, what do other areas of international law say about it, and what is the effect of all of this on the substantive meaning of human rights law for Palestine and Israel and the interrelationship between their obligations? It is necessary to address substantive meaning at this stage, before turning to the question of when human rights obligations apply territorially and extraterritorially and how the two relate, because part of the answer to these questions lies in the substantive meaning of the obligations which would apply.

6.2. The territorial and extraterritorial contexts

The territorial/extraterritorial distinction is based on a fundamental difference in the political nature of the state's relationship to the people involved, from which flows special legal entitlements and obligations, both domestically and internationally. In its territory—Palestine in the Palestinian territories; Israel in Israel—the state is sovereign, with corresponding entitlements and obligations. Necessarily, the state lacks these sovereign entitlements and obligations extraterritorially—Israel in the Palestinian territories—where they are the exclusive domain of another state—Palestine.

6.3. What self-determination means in the two contexts

Quite apart from issues of state sovereignty is the law of self-determination, which concerns the rights of the people, rather than the state. Under common Article 1 of the two global human rights Covenants, a people have the right to

³⁹ ICCPR, Art. 2.

⁴⁰ In the *Wall* Advisory Opinion and *General Comment No. 31*.

...freely determine their political status and freely pursue their economic, social and cultural development.⁴¹

As with sovereign entitlements, these rights similarly operate profoundly differently in the territorial as opposed to the extraterritorial context.

Territorially—Palestine in the Palestinian territories; Israel in Israel—the state is required to be of and for the people of its sovereign territory as a self-governing polity.

Extraterritorially, the state—Israel in the Palestinian territories—is in an opposite position to this, enjoying no legitimate right to exercise authority over the local population. The effect of the obligation in Common Article 1 of the global human rights Covenants is that Israel's actions in preventing the Palestinians from full self-government and independence are illegal. Israel is subject to an obligation to allow and enable the Palestinian people to run their own affairs, free from outside—notably its own—interference.

This is the legal basis for the obligation Israel has to withdraw from its control over the Palestinian people—to end the occupation. Moreover, the fulfilment of this obligation, or, put differently, the realization of Palestinian independence through full self-administration, is something that should be realized simply by virtue of the right of the Palestinian population to have this situation brought about. The colonial-era idea that independence for certain people should be realized only if and when they are deemed 'ready' for this, in terms of their stage of development, was repudiated and delegitimized by the self-determination entitlement. As holders of this entitlement, independence is now an automatic right of the Palestinian people, not something that is earned depending on the level of development. As articulated in the seminal formulation by the UN General Assembly: 'inadequacy of preparedness should never serve as a pretext for delaying independence.'⁴²

6.4. Occupation law and extraterritoriality

Occupation law is by definition the law that applies to the state when it is acting extraterritorially. To say, legally, that the Palestinian territories and people are 'occupied' by Israel, is to imply that Israel does not have title over these territories.

Occupation law is not the basis for Israel's lack of sovereign title over the Palestinian territories; it is because of this lack of title that the situation is an occupation and, therefore, occupation law applies. That said, one of the substantive obligations of occupation law is that the occupying state cannot use the occupation to acquire title. So not only does Israel lack title; occupation law prevents its acquisition through the occupation.

Beyond this, the main focus of occupation law is to provide a regulatory framework governing the conduct of the occupation. One key requirement of occupation law, as set out in the Hague Regulations of 1899 and 1907, obliges an occupying state to respect, 'unless absolutely prevented, the laws in force' in occupied territory, an obligation generally understood to operate as a bar to an occupying state becoming engaged in significant economic, political and social transformation—so-called 'transformatory occupation'—in occupied territory.⁴³

6.5. Human rights law in the two contexts

What, then, do human rights obligations require extraterritorially that is different from the territorial context, and what do they require territorially for a state affected by the extraterritorial actions of another state?

6.5.1. End the occupation/build up self-government

As mentioned, the self-determination obligation requires that Israel end the occupation, transferring authority to the Palestinian people promptly. Equally, Palestine must take all necessary steps to do all it can to bring about the realization of self-administration by the Palestinian people, including through the end of the occupation and the provision of effective institutions of self-government where this is possible.

⁴¹ ICCPR, Art. 1; ICESCR, Art. 1.

⁴² United Nations General Assembly Resolution 1514 (XV) of 1960, para. 3

⁴³ Hague Regulations 1899 and Hague Regulations 1907, art. 43.

These requirements are based on capacities, leading to very different consequences, in terms of what must, in substance, be done and not done, for each state in any given situation.

Because the right to self-determination is contained in the two global human rights Covenants, this is a 'human rights' obligation on the part of Israel and Palestine, quite apart from it forming part of customary international law.

Beyond this general requirement, the question then arises as to what the other substantive rules of human rights law mean in the territorial and the extraterritorial contexts.

6.5.2. Reading self-determination into other areas of human rights law

Given that, as explained above, the law of self-determination is regarded as having *jus cogens* status, the other norms and doctrines of human rights law which lack such status, which would be most of them (as mentioned, the other main norm with this status is the prohibition on torture, inhuman and degrading treatment), have to be interpreted so as to be consistent with its meaning. Given that, as discussed, this meaning is different as between the territorial and the extraterritorial context, then other areas of human rights law have correspondingly divergent meanings as between the two contexts, because of the mediating effect on them of self-determination.

Thus, understanding Israel's general human rights obligations in Palestine in the light of its obligation concerning Palestinian self-determination in particular requires a different interpretation of these other obligations, as they apply to Israel in its capacity as a foreign presence, compared to their meaning to Israel at 'home', where Israel is the sovereign, and equally to their meaning to Palestine in the Palestinian territories, where it is the sovereign.

How is the meaning of the other human rights obligations different between the two places? In general, everything must be in step with the self-determination entitlement, and how it cuts differently in the two contexts.

6.5.3. An effective territorial system to secure rights

The starting point is the overall means through which human rights law is implemented nationally. Human rights law requires an effective functioning territorial system that can secure all the substantive rights. Given that it is accepted that human rights law can apply extraterritorially, then in principle either the home or the foreign state, or some combination of the two, could deliver on this requirement. However, because of the foregoing effect of the self-determination entitlement, the two possibilities are not equal. Under the law of self-determination, people are entitled to be self-governing. It follows, then, that the structure which guarantees their rights should be that of their own state, not a foreign state.

Overall, this amounts to the same requirement as the earlier, more general self-determination entitlement of the Palestinians to self-administration, and the concomitant obligation on the part of Israel to transfer authority to the Palestinians. This is required, then, as a matter of the right of the Palestinians both to run their own affairs, and to have their human rights secured by their own state.

Insofar as power has been transferred to it, or is otherwise exercised by it, Palestine has an obligation to build up an effective system of human rights protection. This requires considerable, wide-ranging, time-consuming and transformatory changes in institutions and practices, on an ongoing basis.

6.5.4. Does human rights law impede the transfer of power, and require interference by Israel where power is already partially or fully exercised by the Palestinians?

What about the situation before the transfer of power, or in situations where power is only partially exercised, where the extent of the lack of power in this regard is bound up in the exercise of power by Israel? And, furthermore, what of situations where considerable power is exercised by local Palestinian authorities, but Israel nonetheless retains a determinative role over the human rights situation (e.g. in Gaza)? Given that the Palestinians have a right to live under a structure that is effective in securing their rights, the following interrelated questions present themselves:

- i) Is Israel obliged to retain power in order to build up a situation of human rights protection in the area under its control, until things are in full compliance, before handing over full control to Palestine where it does not already exist?
- ii) Does human rights law require that the transfer of power by Israel be contingent on Palestinian capacities to effectively secure rights? Earlier, it was indicated how certain human rights obligations (notably in the sphere of civil and political rights) must be implemented immediately, whereas others (notably in the area of socio-economic rights) are to be implemented progressively, dependent on capacities. At least as a matter of rights that require instant implementation, does human rights law require Israel to retain control insofar as Palestinian capacities are deficient in this regard?
- iii) In areas where there is Palestinian control exercised on the ground (e.g. Gaza, Area A), those activities in Area B under Palestinian authority, but where Israel still, through various, means exercises overall control (a term that is addressed further below) which plays a determinative role over the human rights situation, what should its human rights obligations be, and how should they relate to the behaviour of the local Palestinian administrative authorities? Is Israel responsible for this behaviour? Is Israel obliged to intervene to ensure Palestinian authorities are human rights-compliant?

A general consideration needs to be borne in mind here, before the scenarios are addressed. It is significant that Palestine has acceded to the main human rights treaties. From the vantage point of human rights protection, then, the obligation to transfer authority involves Israel handing over control to a state that, like it, is bound by human rights law. Similarly, the human rights situation in the areas where Palestinians exercise meaningful authority falls within the territory of a state bound by human rights law.

As for question (i), then, if the area in question needs broader structures of human rights protection building up, implicating an obligation in human rights to do so, then a transfer of authority from Israel to Palestine is simply a shift in the obligation-holder. As long as there is a state in control subject to the obligation, the integrity of the obligation is preserved. Israel's obligation in this regard is not, therefore, violated by its transfer of authority to Palestine.

As for question (ii), in many instances, of course, a transfer of authority may not lead to any worse a situation as far as human rights protection is concerned and, indeed, the situation might be better, or at least no worse. But insofar as it might be worse, then this would be a case where human rights would be violated in either scenario: the retention of control violates self-determination, and the transfer of control would violate human rights norms in other areas.

The *jus cogens* nature of the self-determination entitlement would mean that, in general, the preference for a system operated by Palestine would prevail. On the whole, any relative deficiency in its willingness and ability to secure rights on the part of Palestine when compared to Israel is treated legally as still ultimately secondary, in terms of the normative position, to the imperative of a prompt handover which is compelled by the self-determination entitlement. Of course, once the transfer of control has occurred, attention would then turn to the obligation of Palestine to improve its own human rights system.

Also, it is notable that the experience of states that have existed for much longer than the state of Palestine indicates that the realization of an effective functional state that can fully secure human rights, even those that are supposed to be realized immediately, is best understood to be an ongoing process, not a fixed end point that is, at some stage, reached. In general, human rights law treats a failure on the part of a state to discharge its obligations to fully realize instantly-implementable rights as a violation of this obligation only, not also as a basis for denying that state the right to exercise authority over its territory in favour of the authority of an outside state.

An important potential exception to the foregoing would be circumstances where the human rights deficiencies on the Palestinian side would themselves constitute violations of *jus cogens* norms, which would cover the prohibition on torture, inhuman and degrading treatment. Here an unavoidable normative clash would present itself, with a *jus cogens* violation at risk whether control is retained or transferred. Both states would be under an obligation, individually and collectively, to take steps to resolve the situation, derived from their connection to their corresponding violations. Palestine would have to improve conditions to remove the risk of the violation, with the awareness that at stake was not only its compliance with its own human rights obligations, but also the right of the Palestinian people to have control

transferred to Palestinian hands. Given that a lack of improvement on the Palestinian side would necessarily place Israel in the position of either violating its own *jus cogens* obligation to transfer power (if it retained power), or being complicit in and therefore itself partly responsible for a separate violation of a *jus cogens* obligation by Palestine (if it transferred power), Israel would be under an obligation to make the best good faith efforts to engage with and provide support to those relevant to the issue on the Palestinian side, in order to effect such improvement.

The foregoing analysis covers scenarios concerning the transfer of control from Israel to Palestine. But issue (iii) raises the relatively complicated situation where some control is exercised locally by the Palestinians—so to a certain extent, the obligation to transfer authority has been discharged—but Israel still in various ways plays a continuing, determinative role over the human rights situation, controlling, overall, what happens in the territories at issue. The question, then, is what Israel should be required to do in such a situation, bearing in mind that there is a separate local actor also playing a determinative role over the human rights situation.

Here the self-determination entitlement, and the fact that Palestine is a party to human rights treaties, is crucial. These two contextual features mediate the substance of Israel's obligations flowing from its exercise of overall control, requiring it, as mentioned earlier, to defer to local Palestinian authorities in decision-making. Even though Israel may have the capacity, pursuant to its exercise of overall control, to intervene in such decision-making to ensure human rights compliance, the *jus cogens* self-determination imperative to enable self-administration, requiring restraint, prevails as the operative substantive requirement. The exception to this would be, as addressed earlier, in the very narrow, specific situation when there is a similarly *jus cogens* human rights violation at issue. But even here, as mentioned, the imperative of restraint derived from the self-determination entitlement is still present; the situation is one of two conflicting obligations—to defer to local control, and to prevent a *jus cogens* violation.

The consequence of this is that, although Israel's obligations may be engaged by virtue of it exercising overall control (an issue addressed in subsequent sections), the substance of these obligations, beyond the narrow situation of *jus cogens* norms, does not entail a general liability for all the behaviour of the Palestinian authorities exercising local capacities or, put differently, for the entire human rights situation in the territories where such local capacities are exercised, in the sense that Israel is required to intervene in local administrative activities to ensure human rights compliance. However, for areas where human rights protection would not require such intervention, substantive liabilities would operate. This would include matters where the ability of local authorities to effectively protect human rights is mediated by the acts and omissions of Israel, and matters where such protection is not a matter of the local authorities at all, but, rather, one determined by Israel directly.

6.5.5. Temporary nature requires short-term efforts

Because Israel's exercise of authority in Palestine is illegitimate and must end promptly as a matter of the law of self-determination (i.e. its existence and continued operation are illegal under this area of law), its obligations while this authority is exercised are limited, in that they should never require anything of Israel which necessitates the retention of control or, put differently, that the ending of the occupation to be prolonged. This is, then, a very different set of requirements from those which apply to a state in its own territory, where the continuance of its authority is presumed, and substantive requirements are in step with this, including measures which presuppose and require an ongoing presence. Instead, Israel is under an obligation to make the best short-term efforts it can within a temporary framework.

6.5.6. Lack of an entitlement to exercise authority requires deference

Equally, because as a matter of the law of self-determination Israel has no entitlement to exercise authority in Palestine, its human rights obligations require it to defer as much as possible to the views of the Palestinian people and their representatives insofar as the obligations incorporate within them an appreciation of the local context. In important respects, then, the obligations are of restraint, given that Israel has no entitlement to govern, when compared to the position of the state of Palestine, who because of its link to the local context would be in a different normative position when it comes to rules that incorporate an accommodation with that context.

6.5.7. When authority is not transferred

What if Israel retains control, in violation of its obligation as a matter of the law of self-determination? That other areas of human rights do not require of it anything which prevents a handover of authority is not to say that, if authority is not handed over, Israel's obligations remain limited to the sort of modest requirements that would fit with a situation that is about to end. The context-specific orientation of human rights law means that insofar as control is to continue (unlawfully), then Israel is required to do more than simply hold the line and provide temporary protection. But addressing the consequences of the reality should not mean supporting that reality.

7. The test for territorial applicability

7.1. Overview

As mentioned earlier, it is assumed that human rights obligations apply to a state within its territory. That said, special considerations operate in a situation like that of Palestine, where the state does not control its territory in full, and the nature of its control where it is exercised is less than plenary, and also sometimes varies over time relative to the control exercised by Israel.

The approach to the operation of human rights obligations in this type of situation is indicated by the *Ilascu* decision of the Grand Chamber of the European Court of Human Rights of 2004, which concerned complaints of violations of the ECHR by the authorities of the Moldovan Republic of Transnistria (MRT), an entity in the territory of the state of Moldova which had declared independent statehood in 1992-3, with Russian support, and was not recognized as independent by other states. The applicants argued that Moldova was responsible because what they complained of took place in Moldovan territory, and Russia was responsible because it was supporting the breakaway MRT. What the Court had to say about the responsibility of Moldova, where the state's lack of control in part of its territory was due to a separatist break-away state supported by a foreign state, is transferrable to Palestine, where the state's lack of control is due to the presence and activity of an occupying foreign state. The issue is the nature of obligations when the state has less than full control over its territory, irrespective of the cause of that situation.

As for Moldova's obligations in the area of the MRT, the Grand Chamber of the European Court of Human Rights held that there was a 'presumption' that jurisdiction—the trigger for applicability—is exercised normally throughout state territory, but that

This presumption may be limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory. That may be as a result of military occupation by the armed forces of another State which effectively controls the territory concerned...⁴⁴

The Grand Chamber concluded that

§ ...the Moldovan Government...does not exercise authority over part of its territory, namely that part which is under the effective control of the "MRT".

[...]

§ However, even in the absence of effective control over the Transdnestrian region, Moldova still has a positive obligation under Article 1 of the Convention [the provision determining the trigger for obligations in the treaty] to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.

[...]

§... where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining *de facto* situation...it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State.

Nevertheless, such a factual situation reduces the scope of that jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory. The State in

⁴⁴ *Ilascu*, para 312.

question must endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention.

§ Although it is not for the Court to indicate which measures the authorities should take in order to comply with their obligations most effectively, it must verify that the measures actually taken were appropriate and sufficient in the present case. When faced with a partial or total failure to act, the Court's task is to determine to what extent a minimum effort was nevertheless possible and whether it should have been made. Determining that question is especially necessary in cases concerning an alleged infringement of absolute rights such as those guaranteed by Articles 2 and 3 of the Convention.

§ Consequently, the Court concludes that the applicants are within the jurisdiction of the Republic of Moldova for the purposes of Article 1 of the Convention, but that its responsibility for the acts complained of, committed in the territory of the "MRT", over which it exercises no effective authority, is to be assessed in the light of its positive obligations under the Convention.⁴⁵

The Court was addressing a relatively extreme situation where the state cannot exercise any control on the ground over the territory in question ('does not exercise authority...absence of effective control'). Roughly speaking, this would approximate to the position of Palestine in East Jerusalem and Area C.

In holding that, in such a situation, the state still has 'jurisdiction', the implication is that as far as territorial obligations are concerned, applicability *per se* does not turn on whether or not the state exercises effective control. Even in the complete absence of such control, obligations still subsist. However, the lack of control on the ground leads to the 'scope' of the applicability of these obligations (the scope of jurisdiction) to be 'reduced'. The Court suggests a best efforts test, relative to the level of control and, beyond this, encompassing things that can be done even if there is no control exercised on the ground. It follows, then, that Palestine must 'endeavour...to continue to guarantee the enjoyment of the rights and freedoms defined in' its human rights treaties in a manner that is 'appropriate' and 'sufficient' based on its capacities, including but not limited to the extent of control exercised on the ground.

The applicability of the human obligations of the territorial state, then—the scope of 'jurisdiction' for those treaties that use this concept to determine the matter—has two components. In the first place, there is a relational test, based on the extent of control exercised on the ground. In the second place, in any case there are further core positive obligations that operate irrespective of any practical capacities on the ground.

The absence of control on the ground in the case of Moldova and the area controlled by the MRT (which, as mentioned, would roughly approximate to Palestine as far as East Jerusalem and Area C are concerned) led the Grand Chamber of the European Court of Human Rights to focus exclusively on the obligations in the second category, which it conceives as limited positive obligations in the field of international relations, of both a legal and a diplomatic nature. Although the Court does not itself give examples, relevant activities would include seeking recourse to all available international political and legal mechanisms to vindicate the rights of the Palestinians. Indeed, the decision to ratify the main international human rights treaties and the Rome Statute for the International Criminal Court (ICC) can be seen as a partial fulfilment of such a requirement. Beyond this, the requirement would extend to full cooperation with and support to the various treaty bodies and the ICC, as well as bringing/referring particular issues/situations of violations to them.

Given the relational nature of the test, presumably if the Court had found there to be some degree of control on the ground in the case of Moldova and the area controlled by the MRT, then the scope of what would have been required would have been correspondingly expanded, with the core positive obligations stipulated being supplemented by other obligations. This suggests, then, that in the case of Palestine, the scope of the state's obligations to secure rights increases insofar as there is greater practical control exercised over the territories involved. In other words, a progressively expanding scope as the focus moves from East Jerusalem and Area C, to Area B, and then Area A and Gaza. This amounts to an expanding out from, while still retaining, the core positive obligations that operate even in relation to areas where Palestine exercises no *de facto* control. Thus, the core obligations have to be discharged in relation to all of Palestine, not just Area C and East Jerusalem.

⁴⁵ *Ilascu*, paras. 361-5.

It will be recalled that the ICCPR formulation for applicability is ‘within [the State’s] territory and subject to its jurisdiction’. The first component of territorial jurisdiction, based on the degree of control exercised on the ground, suggests applicability that only covers a state’s territory insofar as control is exercised. This meaning of jurisdiction in the ICCPR formulation thus amounts to a qualified scope of applicability territorially. However, there is also the second component to territorial jurisdiction, which stipulates core obligations operating irrespective of *de facto* control. This meaning of jurisdiction in the ICCPR formulation is necessarily synonymous with the territory in its entirety (and, as will be addressed, also has an extraterritorial meaning) and does not, therefore, qualify applicability territorially in the way the first meaning does.

7.2. Summary of territorial applicability

Two aspects:

1. Obligations in general:
 - Relational test
 - Scope of applicability is relative to the extent of control exercised over territory
2. Core positive obligations which can be fulfilled regardless of territorial control:
 - Operate in all circumstances
 - Includes legal and diplomatic means *vis à vis* states and international organizations

8. The test for extraterritorial applicability

8.1. Extraterritorial ‘jurisdiction’

8.1.1. Control over territory

8.1.1.1. General concept

The trigger for extraterritorial applicability of human rights obligations based on the exercise of ‘jurisdiction’ has three alternative bases: first, control over territory; second, control over individuals; and third, a situation involving a causal role over decision making, or an existentially determinative role more generally.

Extraterritorial jurisdiction understood spatially conceives obligations as flowing from the fact of territorial control—if the state controls territory, the state is responsible for what happens in it.

This echoes a general principle of state responsibility in international law, as articulated in the *Namibia Advisory Opinion* of the International Court of Justice in 1971, where the Court stated that South Africa, who at the time was unlawfully occupying Namibia, was

...accountable for any violations...of the rights of the people of Namibia. The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.⁴⁶

The general contours of the test are set out in a *dictum* from the *Loizidou* decisions about the Turkish military presence in northern Cyprus. The European Court of Human Rights stated that:

...the responsibility of a Contracting Party may...arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control.⁴⁷

The spatial test for triggering applicability, then, is ‘effective control of an area’.⁴⁸

⁴⁶ *Namibia Advisory Opinion*, para. 118.

⁴⁷ *Loizidou (Preliminary Objections)*, para. 62, cited in *Loizidou (Merits)*, para. 52.

⁴⁸ See also *Cyprus v. Turkey*, para. 77.

As indicated by the phrase ‘whether lawful or unlawful’, this is a factual test, operating regardless of whether the arrangement is or is not officially acknowledged and/or legally sanctioned and/or more broadly pursuant to a legal entitlement, whether as a matter of the Oslo agreements, the rules of Israeli law, the general international law frameworks on self-determination, intervention, the use of force etc. The definition of ‘outside its national territory’—extraterritorial—is an objective, international law one, operating regardless of the position taken on this matter by the states involved. Thus, as far as Israel is concerned this covers not only Gaza but also the entire West Bank beyond the 1967 border, including East Jerusalem.

As for the requirements that flow from this regime of applicability, the *Loizidou* dictum above indicates a generalized ‘obligation to secure, in such an area, the rights and freedoms set out in the Convention’. In the *Cyprus v Turkey* decision about the same situation, the Court articulated this regime in the following terms:

...Turkey’s “jurisdiction” must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.⁴⁹

The substantive effect of this generalized obligation is then determined by the context, bearing in mind the foregoing observations about the relational, contextualized nature of most human rights obligations, and the significance of the self-determination entitlement. This is elaborated on further below.

8.1.1.2. Sub-category (1): Direct, exclusive control on the ground

It is beyond dispute that the effective territorial control test covers such control exercised directly and exclusively on the ground, through the state presence there, for example by military forces, in the specific areas where there is a military presence. Thus, in areas where Israel exercises such control, its human rights obligations are applicable.

Because this is, as mentioned above, a factual test, it covers not only those extraterritorial areas where Israel asserts a general entitlement to exercise control, whether on the basis of its unlawful purported annexation of East Jerusalem, or on the basis of the ostensibly provisional arrangements in Oslo concerning Area C and certain parts of Area B. Also, it may additionally cover Area A, and those activities in Area B under Palestinian authority, and Gaza, in particular circumstances where direct, exclusive control on the ground is in fact exercised (e.g. during military incursions).

Because of the absence of Palestinian administrative authorities in East Jerusalem, Area C and those parts of Area B under Israeli authority, and in circumstances where Israeli incursions into other parts of Palestine similarly displace entirely the local administrative regime, the substantive nature of Israel’s generalized obligation to secure rights is very broad in scope and depth, covering both positive and negative obligations, as it is the only authority present and able to secure rights. As indicated in the earlier section, this does not, however, alter Israel’s obligation to bring its exercise of control to a speedy end. It merely determines the substantive nature and extent of what it must do, and not do, while it is there.

8.1.1.3. Sub-category (2): Effective ‘overall’ control when there is a distinct entity/regime

8.1.1.3.1. The general issue

What about a situation where power on the ground is exercised by a separate actor from the extraterritorial state, but is subject to some form of more generalized control by that extraterritorial state? This implicates the question of Israel’s responsibility for the overall situation in Gaza, Area A, and those parts of area B where authority is exercised by Palestinian administrative authorities, separately from the circumstances addressed above where particular Israeli interventions occur (e.g. during military incursions in Gaza), because of the overall control it exercises with respect to the Palestinian territories.

8.1.1.3.2. Applicability in such circumstances

⁴⁹*Cyprus v. Turkey*, para. 77.

The *Loizidou* dictum above is from a case concerning a similar situation, concerning northern Cyprus, where the authorities of the Turkish Republic of Northern Cyprus (TRNC), an entity regarded by all involved to be legally distinct from Turkey (it claims to be an independent state, not part of Turkey), administers the area under the overall umbrella of a Turkish military presence. In *Loizidou*, the European Court of Human Rights stated that

[i]t is not necessary to determine whether...Turkey actually exercises detailed control over the policies and actions of the authorities of the “TRNC”. It is obvious from the large number of troops engaged in active duties in northern Cyprus...that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the “TRNC” ...Those affected by such policies or actions therefore come within the “jurisdiction” of Turkey for the purposes of Article 1 of the Convention...Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.⁵⁰

Similarly, in the *Cyprus v Turkey* judgment, also about the northern Cyprus situation, the Court stated that

[h]aving effective overall control over northern Cyprus...[Turkey’s] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish support.⁵¹ It follows that...Turkey’s “jurisdiction” must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.⁵²

So, if the state is in ‘overall control’ of an extraterritorial unit, everything within that unit falls within its extraterritorial ‘jurisdiction’, even if at lesser levels powers are exercised by other actors. The behaviour of these other actors—their ‘policies and actions’—falls within the responsibility of the state exercising overall control, by virtue of that overall control, regardless of whether or not there is more ‘detailed’ control exercised over such behaviour.

Would this encompass the control exercised by Israel with respect to Gaza, Area A and those activities in Area B under Palestinian authority, and if it did, does this mean Israel is responsible for the behaviour of local Palestinian authorities in these areas?

In the first place, the TRNC, unlike Palestine, is not a state and is not subject to human rights obligations in its own right. Thus, making Turkey responsible for the human rights situation in the north serves an important objective of ensuring that an actor bound by human rights law, playing determinative role over the situation, is responsible for that situation. As the European Court of Human Rights observed, in the absence of Turkish responsibility, there would be a vacuum in protection. This is not the case as far as Gaza, Area A, and those activities in Area B under Palestinian authority are concerned, now that Palestine is a party to human rights treaties. The acts and omissions of Palestinian authorities in these areas engage the responsibility of the state of Palestine as far as Palestine’s human rights obligations are concerned. However, a requirement that such a vacuum in protection is needed before human rights law should be applicable in such circumstances is not part of the legal regime.

8.1.1.3.3. Liabilities of Israel vis à vis the Palestinian administrative authorities

That said, the fact that separate local authorities exist who, furthermore, act pursuant to a self-determination entitlement and engage the responsibility of a state that is bound by human rights law, mediates the substantive nature of Israel’s obligations with respect to their acts and omissions. This was explained in the section above, on the ‘general considerations for territorial and extraterritorial application’. These two features of the Israeli-Palestinian context are completely different from the Turkey-TRNC context, and lead to a correspondingly different consequence for what, in substance, Israel is required to do compared to the position of Turkey, in the similar situation of effective overall control of a subordinate entity.

⁵⁰ *Loizidou (Merits)*, para. 56. See also *Loizidou (Preliminary Objections)*, paras. 63-64.

⁵¹ *Cyprus v. Turkey*, para. 77.

⁵² *Cyprus v. Turkey*, para. 77.

In the case of northern Cyprus, the TRNC is not administering the area pursuant to an external self-determination entitlement providing a basis for the existential legitimacy of this administration, and so a concomitant obligation on the part of Turkey to enable it to operate, free from Turkish interference. Thus, a regime of Turkish liability rendering that state directly responsible for everything done by the TRNC, necessarily requiring intervention in decision-making and policies to ensure human rights compliance, does not come up against any countervailing obligation of restraint. Given that, also, the TRNC is not bound by human rights obligations in its own right, an effective regime for the full implementation of human rights law by an actor subject to this legal regime can only be arrived at, absent a Turkish withdrawal and the resumption of control by the state of Cyprus, by making the substantive requirements of Turkey's obligations encompass all the 'policies and actions' of the TRNC regime.

In the case of Palestine, by contrast, Israel is obliged by the self-determination entitlement to exercise restraint. Moreover, for those areas where direct Palestinian administration is exercised, an actor bound by human rights law—the state of Palestine—is in play. This does not mean that Israel does not bear 'responsibility for the policies and actions' of Palestinian authorities in these areas. What it means, rather, is that this responsibility has a profoundly different substantive meaning, in terms of its requirements, than in the Northern Cyprus situation. As indicated earlier, this substantive meaning is limited to Israel's role, via its exercise of overall control, in mediating the capacities of Palestinian actors to realize rights.

Also, as indicated earlier, quite separately from liabilities that relate to the behaviour of the local Palestinian authorities in particular, Israel's liabilities extend more generally in the areas where Palestinian administrative authority operates, insofar as this authority does not function because of the effect of Israel's acts and omissions on it, and in any case with respect to determinative behaviour by Israel which has nothing directly to do with the operation of Palestinian structures.

8.1.1.3.4. Responsibility for a subordinate entity only in cases of positive support?

In the northern Cyprus situation, the nature of the causal nexus was a positive, supportive one: the very purpose of the Turkish occupation was to enable the TRNC to operate. But the underlying logic is transferrable to the situation of Palestine, where in various ways Israel also plays a determinative role with respect to the conduct of the Palestinian administrative regimes in areas A, B and Gaza, but not on the basis of the same political rationale. The key thing is that capacity of these regimes to operate is affected to a considerable extent by the acts and omissions of Israel.

8.1.1.3.5. Territorial control that determines existential survival

The supportive nature of the relationship between Turkey and the TRNC leads to a further important feature of that situation, with potential relevance for applicability: that the very existence of the TRNC is enabled by this support. The aforementioned quotation from the *Cyprus v Turkey* judgment ends by highlighting, as emphasised below, this feature of the situation:

[h]aving effective overall control over northern Cyprus ...[Turkey's] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration *which survives by virtue of Turkish military and other support* [emphasis added].⁵³

This feature is not mentioned in the original formulation of effective territorial control articulated in the earlier *Loizidou* decision. It can be viewed, then, as a particular type of effective territorial control—such control that has an existential significance for the entity subject to it—rather than as an essential component of the test itself. It would be at the relatively extreme end of the spectrum of situations involving territorial control that trigger extraterritorial applicability.

As, then, a particular instantiation of the 'effective control' trigger, it can be taken to extend to all situations where there is an existential causal nexus between the capacity of the separate administration to function and the exercise of control by the foreign state over the territory where that administration functions. This causal nexus can operate in a positive fashion, as in Turkey and the TRNC, or a negative one, or a more complicated arrangement with positive and negative elements. Such a general situation fits with the nature

⁵³ *Cyprus v. Turkey*, para. 77.

of the overall control exercised by Israel with respect to those areas of Palestine where there are local Palestinian administrative structures in operation.

8.1.1.3.6. Where does the effective 'overall control' have to operate on the ground, in terms of the territorial unit(s) covered by it?

In northern Cyprus, the Turkish military presence operates throughout the territory, spatially intermingled with the TRNC administration. The regime of applicability based on 'overall control' in that context corresponds to the general area where there is presence on the ground. Clearly the situation is different, when it comes to the question of a direct Israeli presence, in Gaza, Area A, and those parts of Area B under Palestinian authority.

However, the crucial issue in the northern Cyprus cases was the qualitative effect, in terms of the projection of power, that the presence in particular parts of the territory had on the territory as a whole: this constituted 'effective overall control.' The key requirement, then, is the projection of power of this significance.

In Gaza, Area A and those activities in Area B under the authority of Palestine, a projection of power by Israel meeting this test of 'overall control' is affected by the way these areas are territorially encircled by other areas under the exclusive control of Israel (and Egypt in the case of Gaza), providing Israel with an exceptionally acute level of control over these territorial units irrespective of any direct presence within them.

Indeed, the nature of this control would fall within the aforementioned existential sub-category of control over territory, since it enables Israel to play a determinative role over the situation in the Palestinian-administered areas that effectively renders them dependent on Israel in many important respects.

8.1.1.4. Sub-category (3): A sliding scale of applicability depending on the level of control?

A separate but connected issue is whether human rights obligations can be applicable to the extent that Israel exercises control over Palestine. In the *Banković* case, the applicants claimed that 'jurisdiction' under Article 1 of the ECHR could be said to exist on the basis of territorial control to the extent that such control was in fact exercised, and that, accordingly, in the words of the European Court of Human Rights, 'the extent of the positive obligation under Article 1 of the Convention to secure Convention rights would be proportionate to the level of control in fact exercised'.⁵⁴ This suggests a 'sliding scale' or 'cause and effect' concept of jurisdiction based on territorial control: obligations apply insofar as control is exercised; applicability is set in proportional relation to the level of control.⁵⁵

The European Court of Human Rights rejected this argument; it held that the concept of jurisdiction could not be 'divided and tailored in accordance with the particular circumstances of the extra-territorial act in question.'⁵⁶ According to this view, then, as a matter of the trigger for applicability based on effective territorial control, there is an 'all or nothing' approach when it comes to the extent of control required in any given territorial situation.

This concept was picked up in the English Court of Appeal stage of the *Al-Skeini* case about the UK in Iraq by Lord Justice Sedley, who considered the idea that applicability might depend not on 'enforceability as a whole' but 'whether it lay within the power of the occupying force to avoid or remedy the particular breach in issue.'⁵⁷ Although he acknowledged that this was blocked by the *Banković dictum*, he rejected the underlying logic of the *dictum* and suggested that the European Court of Human Rights might sooner or later revisit it.⁵⁸

Indeed, in the *Issa* decision issued a year before the *Al-Skeini* Court of Appeal decision, the European Court of Human Rights, having concluded that Turkey did not exercise 'overall control' in the area of Northern

⁵⁴ *Banković* para. 46.

⁵⁵ *Banković*, para. 75.

⁵⁶ *Banković*, paras 75-76.

⁵⁷ *Al-Skeini (CA)*, para. 198 (Lord Justice Sedley).

⁵⁸ *Id.* paras 201-202. The idea of dividing and tailoring was criticized at the House of Lords stage. See in particular *Al-Skeini (HL)* paras. 79 – 80 (Lord Rodger) and 128 – 30 (Lord Brown).

Iraq in question, did not end its consideration of whether the Turkish presence constituted the exercise of 'jurisdiction.' Rather, it went on to consider

...whether at the relevant time Turkish troops conducted operations in the area where the killings took place.⁵⁹

The assumption was that if the troops had been doing this, which the Court found on the facts they had not, jurisdiction would have subsisted. Unfortunately, the Court failed to indicate whether at that stage it was considering extraterritorial jurisdiction defined as territorial control (as opposed to the alternative definition based on control over individuals, addressed in the next section). If it was, one might discern a more receptive attitude towards the broader cause-and-effect concept than in the earlier dictum in *Banković*.

In any case, as is explained below, there are other approaches regarding the alternative triggers for extraterritorial jurisdiction defined as control over individuals, control over decision-making, and existential determinism, which offer alternative bases for triggering obligations on a flexible 'cause and effect' basis.

Moreover, as indicated earlier, because most human rights obligations are conceived to be context-specific, what is effect 'dividing and tailoring' is brought into the analysis when considering what obligations mean when they apply (as opposed to considering the circumstances in which they apply, which is the present analysis).

8.1.1.5. Does it cover aerial bombardment?

In the *Banković* decision, the European Court of Human Rights rejected applicability of the ECHR in the context of the NATO bombing of a radio and TV station in Belgrade, holding that aerial bombardment did not constitute the exercise of territorial control so as meet the test for the territorial/spatial concept of extraterritorial jurisdiction.⁶⁰ Although it is not entirely clear, this is seemingly partly based on the aforementioned rejection of a 'cause-and-effect'/'sliding scale' doctrine of extraterritorial territorial jurisdiction as far as the 'control over territory' test is concerned. It is, therefore, potentially questionable after the later *Issa* decision. Moreover, as will be explained, the doctrine is also relevant to other triggers for extraterritorial applicability, which have been interpreted to encompass shooting and so potentially, by analogy, bombing. Furthermore, there is also the potential for bombing originating from within the state's jurisdiction (whether territorial or territorial) to be covered under the separate 'effects' basis for human rights obligations.

8.1.1.6. Summary of applicability based on control over territory

1. The test and its substantive requirements:
 - Test: Effective territorial control
 - Substantive requirements: Generalized requirement to secure all rights
2. Sub-category (1): Effective control exercised directly and exclusively on the ground throughout:
 - Relevant generally to East Jerusalem, and Area C and those activities in Area B under Israeli authority pursuant to Oslo, and, in particular incidents (e.g. during incursions), Gaza, Area A, and those activities in Area B under Palestinian authority pursuant to Oslo.
 - Substantive requirement: Very broad in scope and depth, covering both positive and negative obligations, as it is the only authority present and able to secure rights. But obliged to give up control speedily.
3. Sub-category (2): Effective 'overall control' of territory where there is a distinct local administrative structure – applicability:
 - Test: the projection of power that operates 'overall' with a determinative effect on the local administrative structures.
 - Based on the existence of overall control, regardless of whether there is detailed control over the behaviour of the local administrative structure.
 - Not limited to situations where the relationship with the local administrative structure is supportive: the test is whether it is determinative.

⁵⁹ *Issa* (2004), para. 76.

⁶⁰ *Banković*, paras 75-76.

- Can be exercised through presence on the ground around the areas in question, not necessarily in them.
 - Includes, but not limited to, situations of overall control that have an existential significance on the survival of the local administrative structure.
 - Test met for Gaza, Area A, and those activities in Area B under Palestinian authority.
 - Substantive requirement: liable for everything within the area of overall control, including the behaviour—policies and actions—of the local administrative structure. But:
 - The nature and extent of this liability is mediated by the self-determination obligation to enable Palestinian self-administration.
 - In consequence, substantive requirements are specific to areas of policy and practice where:
 - First, the ability of local Palestinian authorities to secure rights, and the manner in which this is done, is mediated by Israel’s acts and omissions—this determines the nature and extent to which the ‘policies and actions’ of such authorities are covered.
 - Second, other aspects of the human rights situation where:
 - Palestinian administrative structures do not function because of the effect of Israel’s acts and omissions on them; or
 - Israel’s behaviour has a determinative effect on this situation, in a manner that has nothing directly to do with the operation of Palestinian structures.
4. Possible sub-category (3): Lesser degrees of control, including bombing (by itself) – might not be a sliding scale of applicability depending on the level of control (but this is unclear, cf. *Issa* approach). However:
- Note that the sliding scale approach is relevant to alternative triggers for applicability based on control over individuals and decisive influence/authority (see coverage of those triggers).
 - Note the possibility of bombing being covered if originating from territory where obligations are otherwise applicable, under the ‘effects’ trigger (see coverage of that trigger).

8.1.2. Control over individuals

8.1.2.1. Introduction

The second main trigger for extraterritorial jurisdiction concerns control over individuals, referred to herein and in some of the relevant judicial decisions as a *personal, individual* or, because of the type of state action involved, *state-agent-authority* connection (the state agent being the actor, e.g. a foreign soldier, exercising control, not the actor, e.g. a local soldier, over whom the control is exercised). This connection has been understood variously as *control* (like the spatial relationship discussed already), *power*, or *authority*. This test has been held to be met, triggering the applicability of human rights obligations, in the context of extraterritorial abductions, detention, presence in an embassy, the issuance of a passport and the use of force, including being shot.

8.1.2.2. The use of force

The particular case of the use of force as a trigger for obligations warrants further elaboration, because of its special significance in introducing the applicability of human rights law in circumstances where this would not be otherwise applicable under the alternative ‘control over territory’ basis. It is based on two decisions from the European Court of Human Rights, *Isaak* and *Solomou*.

The *Isaak* case concerned Turkish responsibility for the beating to death of Anastassios Isaak, a Greek Cypriot, in the buffer zone between the Turkish-controlled TRNC, and the rest of Cyprus, i.e. outside the area under the effective control of Turkey.

The question of whether Isaak came under Turkish extraterritorial jurisdiction was determined according to the state agent basis of control being exercised over him personally. The European Court of Human Rights determined that the test was met, on the basis of: a) clear evidence that ‘Turkish-Cypriot policemen had actively taken part in the beating of Anastassios Isaak;’ and that b) ‘Turkish armed forces and other

“TRNC” police officers’ were present in the area, but ‘nothing was done to prevent or stop the attack or to help the victim.’⁶¹ The Court held that:

In view of the above, even if the acts complained of took place in the neutral UN buffer zone, the Court considers that the deceased was under the authority and/or effective control of the respondent State through its agents.⁶²

This suggests that Turkey’s relationship of overall control in relation to the TRNC moved with it into the area outside of TRNC territory, in the form of a continuing responsibility for the actions of TRNC officers (the policemen who did the beating, and the other police officers who failed to intervene) as well as its own armed forces. The collective behaviour of all these agents—the beating, and failure to intervene—constituted the exercise of control over the victim so as to trigger Turkey’s human rights obligations.

The compound nature of the determinative behaviour on the facts—the beating and the failure to intervene—raises the question as to whether either element might be sufficient by itself to constitute control over an individual for the purpose of triggering the obligations. Certainly, the use of physical violence by Israeli agents (whether its own soldiers and other security personnel, or others e.g. private contractors whose relationship to the Israeli state meets the legal test for a link of agency) itself constitutes the exercise of jurisdiction over the individuals affected. It might also mean that when such violence is perpetrated by non-Israeli-state-agents (e.g. settlers) in circumstances where Israeli agents are present and in a position to intervene and stop the violence, the situation will also constitute the exercise of jurisdiction by Israel over the situation so as to trigger its human rights obligations.

In addition to violence perpetrated through the use of direct physical force by individuals, a possibility also exists, following the *Solomou* decision of the European Court of Human Rights, to understand shooting and bombing as the exercise of extraterritorial jurisdiction as a matter of the ‘control over individuals’ trigger. During a demonstration about the killing of Anastassios Isaak in and around the UN buffer zone in between the TRNC and the rest of Cyprus, another Greek Cypriot, Solomos Solomou, got through the UN cordon from the Greek side into the UN buffer zone, crossed in to the TRNC side, and climbed a flagpole, to protest at the Turkish occupation of the north.⁶³ He was hit by shots fired from the TRNC side of the buffer zone.⁶⁴

This might have been treated as taking place within Turkish jurisdiction on the basis of effective overall control of TRNC territory. However, the European Court of Human Rights focused on not the opening of fire, but the experience of being shot, treating this as an exercise of state agent control.⁶⁵ The emphasis is thus on control exercised over the individual, rather than the territory within which the individual and/or the soldiers are located. In the context of the case, the only direct nexus of control was being in receipt of a bullet. Indeed, it is logical to conclude that a concept of effective control over individuals that has been found to encompass abduction would also cover being shot (and a contrary conclusion would be perverse).

The decision on bombing addressed earlier – *Bankovic* – turned on whether the bombing constituted the exercise of territorial control. The shift away from territory to the individual in *Solomou* suggests an additional approach to the applicability of human rights law to such action, with potentially broad consequences. The use of force through shooting, and so by analogy also bombing, can be regarded as the exercise of effective control over individuals so as to trigger human rights obligations extraterritorially.

This and the earlier finding in *Isaak* mean that any incident where individuals are subject to the use of force perpetrated through either direct physical human action by state agents, or the use of bullets or bombs fired/launched by Israel or Palestine, is by that fact covered by the relevant state’s human rights obligations, without the need for any consideration of whether or not broader control is exercised by the state concerned in the area in question (or, as will be addressed below in the section on ‘effects-based’ obligations, in the case of bullets and bombs, whether or not the firing/launching originated from the state’s jurisdiction).

8.1.2.3. Sliding scale of applicability, and relational substantive meaning

⁶¹ Page 21 of admissibility.

⁶² Page 21 of admissibility.

⁶³ *Solomou, passim*, esp. para. 48.

⁶⁴ *Solomou, passim*, para 12.

⁶⁵ *Solomou*, para 49-51.

It will be recalled that, as explained above, the conventional view of the ‘control over territory’ extraterritorial jurisdiction test is that it requires a generalized level of effective overall control. According to this view (which, as mentioned, is placed into question by the *Issa* decision), lesser forms of control over territory cannot also trigger obligations in a ‘cause-and-effect’ or ‘sliding scale’ fashion, whereby the applicability of the obligations is ‘divided and tailored’ to the degree of control exercised.

However, the alternative ‘control over individuals’ trigger is by its nature more specific to certain forms of control. Regardless of the operation of a generalized regime of applicability based on territorial control, then, the operation of this other trigger has the effect of introducing obligations on a cause-and-effect basis. What may not be possible under one trigger for applicability is possible under the other. In the *Al-Skeini* decision, the European Court of Human Rights stated that:

It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be “divided and tailored”.⁶⁶

If such relatively specific circumstances are covered by human rights obligations, it follows that, applying the relational test to determine substantive requirements, only a narrow sub-set of the range of potentially operable rights will be in operation—those that are ‘relevant to the situation of that individual.’ Thus, the dividing-and-tailoring of substantive requirements occurs through the dividing-and-tailoring of applicability. This is in contrast to the ‘control over territory’ test, where the conventional view, set out earlier, is that only circumstances of effective overall control are covered, leading to a generalized operation of obligations, with dividing-and-tailoring only happening at the substantive stage of determining the substantive requirements which are generally operable.

8.1.2.4. Summary of applicability based on control over individuals

- Obligations are triggered extraterritorially if the state, including through its agents (e.g. soldiers), exercises control over individuals.
- Applicability in terms of what subject-matter is covered is determined in relation to the extent of control exercised—the ‘sliding scale’/‘cause-and-effect’/‘dividing-and-tailoring’ approach to applicability.
- Particular (non-exhaustive) accepted instances of this are:
 - abductions;
 - detention;
 - presence in an embassy;
 - the issuance of a passport,
 - the use of force, including:
 - violence perpetrated by the state agent physically (e.g. beating),
 - shooting, and
 - bombing;
 - Relevant to individual instances of control exercised by Israel over Palestinians, and Palestine over Israelis, including of the type indicated on the above list.
- Applicability in terms of the particular areas of human rights law brought to bear is similarly ‘tailored’ to the specifics of, what is ‘relevant’ to, the situation.

8.1.3. Causation in decision-making/existential determinism

8.1.3.1. The concepts

A relatively recent approach to defining jurisdiction extraterritorially moves beyond the exercise of control over territory or individuals to broader concepts of ‘effective authority’, ‘decisive influence’ and ‘support’ that affects ‘survival’. These concepts overlap with certain aspects of the ‘control over territory’ test, but also go beyond the limits of that test.

The concepts are suggested in the aforementioned *Ilascu* decision of the Grand Chamber of the European Court of Human Rights in 2004, concerning Russian and Moldovan responsibility for the area in Moldovan

⁶⁶ *Al-Skeini* (ECTHR), para. 137.

territory controlled by the Russian-backed Moldovan Republic of Transnistria (MRT). As far as Russian responsibility was concerned, the Court held that

§ ...[the MRT] set up in 1991-92 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.

§ That being so, the Court considers that there is a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate, as the Russian Federation's policy of support for the regime and collaboration with it continued beyond 5 May 1998 [when Russia ratified the ECHR], and after that date the Russian Federation made no attempt to put an end to the applicants' situation brought about by its agents, and did not act to prevent the violations allegedly committed after 5 May 1998.

Regard being had to the foregoing, it is of little consequence that since 5 May 1998 the agents of the Russian Federation have not participated directly in the events complained of in the present application.

§ In conclusion, the applicants therefore come within the "jurisdiction" of the Russian Federation for the purposes of Article 1 of the Convention and its responsibility is engaged with regard to the acts complained of.⁶⁷

In consequence, the acts complained of fell within the extraterritorial exercise of jurisdiction by Russia.

The test is articulated as 'effective authority', or 'at the very least...decisive influence'. The Court also posits a consideration, 'in any event,' that 'survival' is 'by virtue of...the military, economic, financial and political support' of Russia.

'Effective authority' and 'decisive influence' are posited as different points (higher to lower) on the spectrum of the same idea, which concerns a causal relationship between the foreign state and the decision-making process of the territorial entity. This might be termed holistically a trigger concerned with 'causation in decision-making'. Invoking both points in the spectrum, the lower being held to be met 'at the very least', suggests that this would be sufficient by itself. 'Effective authority' suggests situations of direction and control of decision-making. 'Decisive influence' suggests situations involving interventions in decision-making that play a partially but not exclusively determinative role in substantive outcomes.

Separate from considerations of causation in decision-making is a further trigger, whereby the very continued existence of the host territorial entity is bound up in the acts and omissions of the foreign state. This relationship of what might be termed 'existential determinism' between the two is posited as an alternative to the causation-in-decision-making consideration. Either of these two considerations would be sufficient by themselves to trigger obligations. They can, thus, be regarded as two additional jurisdictional triggers for human rights obligations, in addition to the 'control over territory' and 'control over individuals' triggers. As such, they widen the scope of extraterritorial jurisdiction from a position arrived at from focusing only on the 'territorial' and 'individual' triggers.

The relevance of these triggers to the relationship between Israel and Palestine implicates the same issues addressed earlier, in the section on the jurisdiction trigger defined extraterritorially as 'effective overall control,' concerning responsibility where there is a distinct entity locally. It will be recalled that although the approach for that trigger originates in a case where the relationship between the extraterritorial state (Turkey) and the host entity (the TRNC) was supportive, and the distinct local entity was not a state party to human rights treaties, nonetheless the underlying logic of the approach, concerning a determinative causal relationship, fits with the Israel-Palestine situation. The same considerations apply to these 'causation in decision-making' and 'existential determinism' triggers.

On causation in decision-making in particular, it will be recalled that the 'overall control' definition of the 'control over territory' test involves responsibility of a state for all the behaviour of a subordinate authority, because of the existence of this overall territorial control in the area where the authority operates. The focus is not, then, on the relationship between the foreign state and the decision-making of that entity

⁶⁷ *Ilascu*, paras. 392-4.

directly (in the *Loizidou* decision, the European Court of Human Rights, in applying this test, rejected the need to examine whether there was detailed control by Turkey over the ‘polices and actions’ of the TRNC), even if that relationship might be relevant to an assessment of the state’s relationship over the territory. In a complementary way, the causation-in-decision-making trigger shifts the focus away from territory towards decision-making. Within this, it is also relatively broader, covering not only situations of control (like the control over territory test), but also decisive influence.

On the facts, the *Ilascu* case concerned a relationship of control/influence in a generalized, unqualified sense, but there is nothing in the way the Court articulated the test that would prevent it from operating also to specific situations of particular interventions in decision-making. Whether or not the causal role is a general or specific one, would then determine the scope of obligations that are applicable. A generalized role like the one played by Russia over the MRT would lead to a generalized applicability of all the state’s human rights obligations, like the ‘control over territory’ test. A specific role, by contrast, would mean applicability being ‘divided and tailored’ to fit the particular decisions at issue, as in the ‘control over individuals’ test. So, then, the law applies to the particular decisions at issue, and the law applicable is that which is relevant to those decisions. In either case—generalized or specific—the extent of liability would then be determined by the level of significance of the causal role (greater liability in circumstances of direction and control, lesser liability in circumstances of decisive influence).

The relevance of this concept to the relationship between Israel and Palestine is in the area of specific decision-making outcomes on the Palestinian side which are wholly or partially determined by interventions in the decision-making process by Israel.

On existential determinism in particular—the concept of ‘survival’ by virtue of ‘support’—given the context of the Russia-MRT relationship, the terminology used in *Ilascu* to denote an existentially-determinative relationship between the two is cast in positive terms. But the crucial feature is the existentially-determinative nature of the relationship itself: that the very ‘survival’ of one is bound up in the behaviour of the other, because of an acute level of dependency. It is for this reason that the latter state is responsible for the human rights situation in the territory of the former entity. The logic of this is transferrable to the Israel-Palestine situation, where Israeli actions and omissions in various ways play a determinative role on the very existence of a functioning state in the Palestinian territories. This role may be negative as well as positive, as in Russia’s role vis a vis the MRT were, but what matters is that it shares the common characteristic of being existentially deterministic.

In *Ilascu* the Court identified how the existential relationship was brought about through ‘military, economic, financial and political support.’ The means indicated here are equally relevant to an existential relationship of a negative kind. Thus, the use of ‘military, economic, financial and political’ means by Israel which have an existentially negative impact on the continued existence of the Palestinian state would be the basis for establishing a jurisdictional link, triggering human rights obligations, between Israel and Palestine. This would encompass, for example, the blockade of Gaza, and multiple aspects of how the Israeli presence in the West Bank functions, from the purported annexation of East Jerusalem to the settlements and their associated infrastructure and natural resource use, the Bantustan-style isolation of Palestinian-administered zones in Areas A and B into mutually disconnected units and more broadly the mutually disconnected and isolated nature of Palestinian-habited areas, enabled through the Israeli military presence, operation of infrastructure, transportation, checkpoints, settlements, etc.

An existential role played over a situation is by its nature a general one, suggesting, in turn, a generalized regime when it comes to the scope of applicable obligations. However, as with generalized nature of applicable obligations on the basis of the ‘territorial control’ trigger, the substantive meaning is then determined by the context. In the case of the MRT, Russian responsibility for the entire situation under the control of that entity, on the basis of its relationship of existential support (and general role in decision-making) was the only route to enabling a link between the de facto authority and a state party to human rights treaties. In Palestine, as discussed earlier, the fact that the state is a party to human rights treaties, and the Palestinian people have a right to self-government as a matter of the law of self-determination, changes the material context. Israel’s generalized liabilities are consequentially relational in substance: tied to features of the human rights situation in Palestine that are bound up in those aspects of Palestine’s existential limitations caused by Israel.

8.1.3.2. Summary of applicability based on causation in decision-making/existential determinism

- Causation in decision-making:
 - Test for applicability: a relationship that amounts to the exercise of
 - Effective authority (relatively higher test): direction and/or control by Israel by over decision-making on the Palestinian side; or
 - Decisive influence (relatively lower test): lesser forms of intervention by Israel over Palestinian decision-making that has a partially determinative effect on decision-making outcomes.
 - Can be a generalized relationship, or one specific to particular decisions.
 - The scope of applicability flows from scope of the relationship at issue:
 - If generalized, applicability is similarly generalized.
 - If specific to particular decisions, applicability is tailored to the specifics of the decision-making, in terms of the subject-matter covered and the areas of human rights law involved.
 - Extent of liability is determined by the level of significance of the causal role (greater liability in circumstances of direction and control, lesser liability in circumstances of decisive influence).
- Existentially determinative relationship to the host authorities and population.
 - The test:
 - The existence of the host entity is determined by and dependent on the acts and omissions of the extraterritorial state.
 - This can be positive and/or negative.
 - A relationship of this kind can be manifest through military, political, financial and economic means.
 - Relevant in multiple respects to the relationship between Israel and Palestine.
 - Substantive consequence:
 - Generalized applicability of human rights law.
 - Liabilities are relational, being tied to features of the human rights situation in Palestine that are bound up in those aspects of Palestine's existential limitations caused by Israel.

8.2. Extraterritorial 'free standing' obligations

8.2.1. Overview

It will be recalled that some human rights instruments, notably the ICERD, CEDAW, and the CRPD, have a conception of scope of application or responsibility that is 'free standing', in that it is not linked to a particular type of state activity, as in the treaties that use the 'jurisdiction' formulation. Nonetheless, as previously mentioned, some of these instruments have been treated for the purposes of extraterritorial applicability as if they contained the 'jurisdiction' provision. According to such approaches, the foregoing analysis on the meaning and scope of 'jurisdiction' extraterritorially would apply to these instruments.

However, because the instruments do not actually utilize the 'jurisdiction' trigger for obligations, it is possible also to understand their applicability extraterritorially in a broader, simpler manner. In decisions of the UK House of Lords (as it was then) and the International Court of Justice, the ICERD was applied extraterritorially without recourse any requirement that a particular type of state activity more broadly (e.g. effective territorial control) has to be established prior to this application.⁶⁸ This suggests a regime of applicability that operates to all acts and omissions of a state taking place extraterritorially, regardless of whether or not the 'jurisdiction' test is met. It presupposes, then, a 'sliding scale/cause-and-effect/dividing-and-tailoring' approach, whereby the extent of the applicability of the obligations is bound up in the extent of the state presence extraterritorially.

8.2.2. Summary

'Free-standing' obligations apply extraterritorially, to all acts and omissions. They operate on the basis of a 'sliding scale/cause-and-effect/dividing-and-tailoring' approach, whereby the extent of the applicability of the obligations is bound up in the extent of the state presence extraterritorially.

8.3. Extraterritorial 'effects-based' obligations

⁶⁸ *Roma Rights* case, Opinion of Lady Hale, paras. 97 – 102; Opinion of Lord Steyn, paras. 44 & 46; *Georgia v Russia* (Provisional Measures), paras. 109 and 149.

8.3.1. Generally, and *non-refoulement*

In the *Drozdz and Janousek* case, the European Court of Human Rights observed that states' responsibility under the ECHR

...can be involved because of acts of their authorities producing effects outside their own territory.⁶⁹

Set out in these terms, the idea is of broad scope, potentially suggesting a generalized conception of human rights obligations covering acts and omissions taking place within a state's jurisdiction (as will be explained, whether territorial or extraterritorial) which have a negative effect on the enjoyment of human rights outside the state's jurisdiction.

This provides an alternative basis for liability, operating irrespective of whether, as in the aforementioned regime of obligations, a test based on some sort of extraterritorial control is met in the location where the harm is felt.

The main way it has been applied in most of the relevant decisions in this area has been in a specific situation: where the state transfers an individual to a foreign location. If there is a risk that the individual will face certain forms of human rights abuse in the foreign location, the transfer is prohibited—the *non-refoulement* obligation. The forms of human rights abuse covered here amount to an exceptional sub-set of human rights obligations generally, including those concerning non-derogable rights.

The articulation of this area of liability in the *Drozdz* decision is in the context of the extraterritorial effects of an act or omission originating in a state's territory. Similarly, the main specific area where it has been applied and enforced, *non-refoulement*, began with an exclusive focus on transfers of individuals from state territory. Because of this, it has sometimes been understood as a special type of territorial obligation. However, the logic of this approach is equally applicable to such effects from acts and omissions originating outside the state's territory, in circumstances where that state's human rights obligations are applicable (e.g. because the effective-territorial-control 'jurisdiction' test is met). Indeed, the jurisprudence on the *non-refoulement* obligation in particular has gone on to encompass extraterritorial as well as territorial situations, and a further application of the more general approach, addressed below, has similarly been in an extraterritorial context.

What is distinctive about this area of liability is that it is not based on the applicability of the state's human rights obligations in the location where the harm is suffered, unlike other areas of extraterritorial human rights obligations. Rather, it is the link back between that harm and its origin, a different location, where the state's obligations are applicable.

8.3.2. Use of force

Beyond *non-refoulement*, this area of obligations potentially also covers the use of force originating from within the state's jurisdiction (whether territorial or extraterritorial) which has a negative effect on the enjoyment of human rights outside this jurisdiction. Such coverage is suggested by the decision in the *Andreou v Turkey* case by the European Court of Human Rights. The decision concerned the firing of shots by soldiers of the Turkish Republic of Northern Cyprus located on the TRNC side of the neutral UN buffer zone between the TRNC and the rest of Cyprus, which hit the applicant, Mrs. Andreou, located on the Greek side of the buffer zone. The European Court of Human Rights held that Mrs Andreou came within Turkey's extraterritorial jurisdiction because

...even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as 'within [the] jurisdiction' of Turkey'.⁷⁰

As established in the aforementioned earlier decisions about Northern Cyprus, the TRNC side of the buffer zone from which the shots were fired constituted Turkish extraterritorial jurisdiction for the purposes of

⁶⁹ *Drozdz and Janousek* case, para. 91.

⁷⁰ *Andreou* (Merits) para 25.

the ECHR on the basis of effective overall control. The Court focused on the act performed in this space – ‘the opening of fire’ – as being determinative, rather than its effect, which took place outside Turkish extraterritorial jurisdiction, on the Greek side. The Court did not, then, consider whether shooting *per se* constituted an exercise of jurisdiction, since the territory from which the shot was fired already constituted extraterritorial Turkish jurisdiction for a different reason.

Thus, the finding concerns effective control based on the general Turkish presence in the north, rather than control based on shooting. It raises the possibility that a continuous act that starts in the state’s jurisdiction, whether territorial or extraterritorial, will be covered by human rights law in its entirety, including if the end point is, as here, more generally extra-jurisdictional. Revisiting the aforementioned *Banković* decision (that bombing does not itself constitute the exercise of extraterritorial jurisdiction based on territorial control) it creates the possibility that bombing initiated from within the state’s jurisdiction, e.g. missiles launched from state territory which land extraterritorially, or aircraft located outside the jurisdiction when the bombing mechanism is operated from within the jurisdiction (including in the case of remotely-operated aircraft, so-called ‘drones’) will be covered by human rights obligations.

This would be clearly relevant to certain features of both Israeli and Palestinian military action, including shooting, the firing of missiles, and the dropping of bombs. These features would be covered by each of the two states’ human rights obligations in areas where the obligations are not otherwise applicable (e.g. on the basis of effective territorial control as defined above), if the action originates from territory where the obligations are otherwise applicable.

8.3.3. Summary of ‘effects-based’ obligations

1. Applicable to acts and omissions taking place within Israel and Palestine’s jurisdiction, whether territorial or (in the case of Israel) extraterritorial, which have an effect outside this jurisdiction.
2. Covers the following in particular (non-exhaustive list):
 - a. Transfers of individuals from the jurisdiction, if the extra-jurisdictional effect is certain forms of human rights abuse
 - b. Shooting from the jurisdiction
 - c. Bombing—projectile sent from the jurisdiction
 - d. Bombing—dropped from aircraft outside the jurisdiction, where the bombing is activated from within the jurisdiction

8.4. Extraterritorial socio-economic rights: ‘taking steps’ in the context of ‘international co-operation’

8.4.1. Overview

Above it was explained how the obligations to ‘take steps’ in the ICESCR, and the obligations concerning socio-economic rights in the CRC and the CRPD, reference ‘international co-operation’ as a context for their implementation. These provisions have been interpreted to encompass a generalized obligation to realize socio-economic rights extraterritorially.

Such an obligation operates separately from the application of socio-economic rights to states acting extraterritorially in particular (where, as mentioned, the above doctrines serve as the trigger for obligations); it covers the extraterritorial context generally. Thus, the aforementioned reading-in of the concept of ‘jurisdiction’ to the ICESCR as the basis for determining extraterritorial applicability when a state exercises effective extraterritorial control is not the only basis for an extraterritorial obligation in this instrument. In addition, there is a broader, generalized obligation to realize socio-economic rights extraterritorially, irrespective of any particular situation of control exercised by a state beyond its borders. This obligation covers the area of state practice within which resource and technology transfers from the rich to the poor, for example through international assistance/aid programmes, are situated as a matter of legal obligations.

Quite apart from Israel’s obligations to Palestine based on the particular causal nexus between its actions and the human rights situation, including the socio-economic rights situation, in Palestine, then (covered in the regimes of applicability reviewed above), Israel also bears a separate obligation, as a relatively economically advantaged country, towards the Palestinians alongside those other people globally who are relatively economically disadvantaged.

8.4.2. Summary

Obligation on the part of Israel to realize extraterritorially the socio-economic rights of economically disadvantaged people generally, including the Palestinians.

9. Comparisons and overlaps of territorial and extraterritorial applicability

9.1. Introduction

This section brings together and applies the foregoing analysis. It begins by reproducing the summaries of the different triggers for applicability of human rights obligations taken from the previous sections. It then applies these triggers comparatively to various aspects of the Israel-Palestine situation, through three case studies, addressing overlapping obligations between the two states in each case.

9.2. The different bases for applicability

Below are reproduced the summaries of the previous sections, setting out the different tests for territorial and extraterritorial applicability:

A: Territorial applicability

Two classes of obligations

Obligations in general:

- Relational test
- Scope of applicability is relative to the extent of control exercised over territory

Core positive obligations which can be fulfilled regardless of territorial control:

- Operate in all circumstances
- Includes legal and diplomatic means *vis à vis* states and international organizations

B: Extraterritorial applicability

B(1) Extraterritorial jurisdiction trigger 1—control over territory.

The test and its substantive requirements:

- Test: Effective territorial control.
- Substantive requirements: Generalized requirement to secure all rights.

Sub-category (1): Effective control exercised directly and exclusively on the ground throughout:

- Relevant generally to East Jerusalem, and Area C and those activities in Area B under Israeli authority pursuant to Oslo, and, in particular incidents (e.g. during incursions), Gaza, Area A, and those activities in Area B under Palestinian authority pursuant to Oslo.
- Substantive requirement: Very broad in scope and depth, covering both positive and negative obligations, as it is the only authority present and able to secure rights, but obliged to give up control speedily.

Sub-category (2): Effective 'overall control' of territory where there is a distinct local administrative structure – applicability:

- Test: the projection of power that operates 'overall' with a determinative effect on the local administrative structures.
 - Based on the existence of overall control, regardless of whether there is detailed control over the behaviour of the local administrative structure.
 - Not limited to situations where the relationship with the local administrative structure is supportive: the test is whether it is determinative.
 - Can be exercised through presence on the ground around the areas in question, not necessarily in them.
 - Includes, but not limited to, situations of overall control that have an existential significance on the survival of the local administrative structure.
 - Test met for Gaza, Area A, and the parts of area B under Palestinian control.
- Substantive requirement: liable for everything within the area of overall control, including the behaviour—policies and actions—of the local administrative structure, but:
 - The nature and extent of this liability is mediated by the self-determination obligation to enable Palestinian self-administration.
 - In consequence, substantive requirements are specific to areas of policy and practice where:

- First, the ability of local Palestinian authorities to secure rights, and the manner in which this is done, is mediated by Israel's acts and omissions—this determines the nature and extent to which the 'policies and actions' of such authorities are covered.
- Second, other aspects of the human rights situation where:
 - Palestinian administrative structures do not function because of the effect of Israel's acts and omissions on them;
 - or-Israel's behaviour has a determinative effect on this situation, in a manner that has nothing directly to do with the operation of Palestinian structures.

Possible sub-category (3): Lesser degrees of control, including bombing (by itself) – might not be a sliding scale of applicability depending on the level of control (but this is unclear, cf. *Issa* approach). However:

- Note that the sliding scale approach is relevant to alternative triggers for applicability based on control over individuals and decisive influence/authority (see coverage of those triggers).
- Note the possibility of bombing being covered if originating from territory where obligations are otherwise applicable, under the 'effects' trigger (see coverage of that trigger).

B(2) Extraterritorial jurisdiction trigger 2: Control over individuals

- Obligations are triggered extraterritorially if the state, including through its agents (e.g. soldiers), exercises control over individuals.
- Applicability in terms of what subject-matter is covered is determined in relation to the extent of control exercised—the 'sliding scale'/'cause-and-effect'/'dividing-and-tailoring' approach to applicability.
- Particular (non-exhaustive) accepted instances of this are:
 - abductions;
 - detention;
 - presence in an embassy;
 - the issuance of a passport;
 - the use of force, including:
 - violence perpetrated by the state agent physically (e.g. beating),
 - shooting,
 - bombing.
 - Relevant to individual instances of control exercised by Israel over Palestinians, and Palestine over Israelis, including of the type indicated on the above list.
- Applicability in terms of the particular areas of human rights law brought to bear is similarly 'tailored' to the specifics of, what is 'relevant' to, the situation.

B(3) Extraterritorial jurisdiction trigger 3: Causation in decision-making:

- Causation in decision-making
 - Test: for applicability: a relationship that amounts to the exercise of:
 - Effective authority (relatively higher test): direction and/or control by Israel by over decision-making on the Palestinian side; or
 - Decisive influence (relatively lower test): lesser forms of intervention by Israel over Palestinian decision-making that has a partially determinative effect on decision-making outcomes.
 - Can be a generalized relationship, or one specific to particular decisions.
 - The scope of applicability flows from scope of the relationship at issue:
 - If generalized, applicability is similarly generalized.
 - If specific to particular decisions, applicability is tailored to the specifics of the decision-making, in terms of the subject-matter covered and the areas of human rights law involved.
 - Extent of liability is determined by the level of significance of the causal role (greater liability in circumstances of direction and control, lesser liability in circumstances of decisive influence).

B(4) Extraterritorial jurisdiction trigger 4: Existential determinism

- Existentially determinative relationship to the host authorities and population
 - The test:

- The existence of the host entity is determined by and dependent on the acts and omissions of the extraterritorial state.
- This can be positive and/or negative.
- A relationship of this kind can be manifest through military, political, financial and economic means.
- Relevant in multiple respects to the relationship between Israel and Palestine.
- Substantive consequence:
 - Generalized applicability of human rights law.
 - Liabilities are relational, being tied to features of the human rights situation in Palestine that are bound up in those aspects of Palestine's existential limitations caused by Israel.

B(5) 'Free-standing' obligations

Apply extraterritorially, to all acts and omissions. 'Sliding scale/cause-and-effect/dividing-and-tailoring' approach, whereby the extent of the applicability of the obligations is bound up in the extent of the state presence extraterritorially.

B(6) Extraterritorial socio-economic rights: 'taking steps' in the context of 'international co-operation'.

Obligation on the part of Israel to realize extraterritorially the socio-economic rights of economically disadvantaged people generally, including the Palestinians.

A&B 'Effects-based' obligations: can be territorial or extraterritorial their origin, with an extraterritorial effect.

- Applicable to the acts and omissions of each state, taking place within its jurisdiction, whether territorial or (in the case of Israel) extraterritorial, which has an effect outside this jurisdiction.
- Covers the following in particular (non-exhaustive list):
 - Transfers of individuals from the jurisdiction, if the extra-jurisdictional effect is certain forms of human rights abuse.
 - Shooting from the jurisdiction.
 - Bombing—projectile sent from the jurisdiction.
 - Bombing—dropped from aircraft outside the jurisdiction, where the bombing is activated from within the jurisdiction.

9.3. Case study 1: Responsibilities relating to the decisions and policies of Palestinian administrative entities in Gaza, Area A, and those areas of Area B under Palestinian control (n.b., responsibility in these territorial areas more generally is addressed separately)

Israeli responsibility

- Based on two distinct triggers for applicability:
 - Territorial control trigger for extraterritorial jurisdiction:
 - Sub-category of effective overall territorial control can cover this; operates irrespective of whether there is specific control over the policies and actions of the subordinate authorities.
 - Consequence is responsibility for the behaviour—policies and actions—of the local administrative structure.
 - The nature and extent of Israel's substantive liability here is mediated by the self-determination obligation to enable Palestinian self-administration.
 - In consequence, as far as liability concerning the acts and omissions of Palestinian administrative authorities are concerned, substantive requirements are specific to areas of policy and practice where the ability of local Palestinian authorities to secure rights, and the manner in which this is done, is mediated by Israel's acts and omissions—this determines the nature and extent to which the 'policies and actions' of such authorities are covered.
 - Causation in decision-making trigger:
 - If there is a specific causal link between the particular policies and actions of the Palestinian authorities, then there is Israeli responsibility.
 - The causal link can be on the basis of:

- Effective authority (relatively higher test): direction and/or control by Israel by over decision-making on the Palestinian side; or
 - Decisive influence (relatively lower test): lesser forms of intervention by Israel over Palestinian decision-making that has a partially determinative effect on decision-making outcomes.
 - Can be a generalized relationship, or one specific to particular decisions—likely to be the latter in the case of Israel and the Palestinians.
 - The scope of applicability flows from scope of the relationship at issue:
 - If generalized, applicability is similarly generalized.
 - If specific to particular decisions, applicability is tailored to the specifics of the decision-making, in terms of the subject-matter covered and the areas of human rights law involved.
 - Extent of liability is determined by the level of significance of the causal role (greater liability in circumstances of direction and control, lesser liability in circumstances of decisive influence).
- Comparison
 - Taken together, the two triggers address a spectrum of causal links between the acts and omissions of Israel, and the decisions and policies of Palestinian authorities, of differing levels:
 - Causal effect brought about without direct intervention in decision-making—covered by territorial control trigger, sub-category of effective overall control.
 - Causal effect brought about through direct intervention in decision-making, covered by causation in decision-making trigger, within this covering interventions of differing causal significance: direction and control, and decisive influence.
 - The causation in decision-making trigger does not, therefore, cover all instances of responsibility relating to the name given to it; only such causation involving some form of direct intervention in it. More generalized causation without direct intervention can be brought about through effective overall control of the territory within which the decision-making occurs, and is covered under the territorial control trigger.
 - Note that under either trigger the relationship does not need to be a supportive one.

Palestinian responsibility

- Obligations in general:
 - Relational test: scope of applicability is relative to the extent of control exercised over territory—the extent to which Palestinian administrative authorities function.
- Core positive obligations which can be fulfilled regardless of abilities to make and implement decisions on the ground:
 - Operate in all circumstances.
 - Includes taking all available legal and diplomatic means *vis à vis* states and international organizations.

9.4. Case study 2: Israeli and Palestinian responsibility in the areas of Palestine under Palestinian administrative authority: Gaza, Area A, and those parts of Area B under Palestinian authority

(covering the same areas as case study 1, but with a broader focus on the entire situation, not just Palestinian decision-making)

Israeli responsibility

- Based on the following triggers of responsibility:
 - Territorial control trigger for extraterritorial jurisdiction. Sub-category (1): Effective control exercised directly and exclusively on the ground throughout
 - Relevant in particular incidents (e.g. during incursions) to Gaza, Area A, and those activities in Area B under Palestinian authority pursuant to Oslo.
 - Substantive requirement: Very broad in scope and depth, covering both positive and negative obligations, as it is the only authority present and able to secure rights, but obliged to give up control speedily.

- Territorial control trigger for extraterritorial jurisdiction, Sub-category (2): Effective 'overall control' of territory where there is a distinct local administrative structure – applicability
 - Test: the projection of power that operates 'overall' with a determinative effect on the local administrative structures
 - Based on the existence of overall control, regardless of whether there is detailed control over the behaviour of the local administrative structure.
 - Substantive requirement: liable for everything within the area of overall control, including the behaviour—policies and actions—of the local administrative structure, but:
 - The nature and extent of this liability is mediated by the self-determination obligation to enable Palestinian self-administration.
 - In consequence, substantive requirements are specific to areas of policy and practice where:
 - First, the ability of local Palestinian authorities to secure rights, and the manner in which this is done, is mediated by Israel's acts and omissions—this determines the nature and extent to which the 'policies and actions' of such authorities are covered.
 - Second, other aspects of the human rights situation where:
 - Palestinian administrative structures do not function because of the effect of Israel's acts and omissions on them; or
 - Israel's behaviour has a determinative effect on this situation, in a manner that has nothing directly to do with the operation of Palestinian structures.
- Extraterritorial jurisdiction trigger 2: Control over individuals
 - Whenever Israel, including through its agents (e.g. soldiers), exercises control over individuals.
 - Applicability in terms of what subject-matter is covered is determined in relation to the extent of control exercised—the 'sliding scale'/'cause-and-effect'/'dividing-and-tailoring' approach to applicability.
 - Particular (non-exhaustive) accepted instances of this are:
 - abductions;
 - detention;
 - presence in an embassy;
 - the issuance of a passport;
 - the use of force, including:
 - violence perpetrated by the state agent physically (e.g. beating),
 - shooting,
 - bombing.
 - Applicability in terms of the particular areas of human rights law brought to bear is similarly 'tailored' to the specifics of, what is 'relevant' to, the situation.
- Extraterritorial jurisdiction trigger 3: Causation in decision-making – as in case study 1
- Extraterritorial jurisdiction trigger 4: Existential determinism
 - The test:
 - The existence and viability of Palestinian governance structures is determined by and dependent on the acts and omissions of Israel.
 - This can be positive and/or negative.
 - A relationship of this kind can be manifest through military, political, financial and economic means. Includes but goes beyond the use of such means which have the effect of exercising effective overall control, meeting the earlier test for applicability on this basis.
 - Relevant in multiple respects to the relationship between Israel and Palestine.
 - Substantive consequence:
 - Generalized applicability of human rights law.
 - Liabilities are relational, being tied to features of the human rights situation in Palestine that are bound up in those aspects of Palestine's existential limitations caused by Israel.

Palestinian responsibility

As in case study 1.

9.5. Case study 3: Israeli and Palestinian responsibility in the areas of Palestine under the exclusive territorial control of Israel: East Jerusalem, Area C, and those parts of Area B under exclusive Israeli authority

Israeli responsibility

Extraterritorial jurisdiction trigger 1—control over territory, sub-category (1): Effective control exercised directly and exclusively on the ground throughout.

- Substantive requirement: Very broad in scope and depth, covering both positive and negative obligations, as it is the only authority present and able to secure rights. But obliged to give up control speedily.

Palestinian responsibility

Core positive obligations which can be fulfilled regardless of territorial control.

- Operate in all circumstances.
- Includes legal and diplomatic means *vis à vis* states and international organizations.



Dr. Ralph Wilde
12 February 2018

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