

**Left behind? The Parallel Application of International
Humanitarian Law and International Human Rights Law to
Civilians living in Undefined Territorial Entities in
Situations of Armed Conflict**

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Executive summary:

Humanitarian law and human rights law began as distinct fields of law that have been applied to different situations, the two disciplines of law developed to respond to circumstances and realities that were not imagined by the original drafters. This was possible because both regimes of law have the same common goal of protecting the human beings from state coercive practices (whether their own or another), and was reached through United Nations resolutions, the formulations of new treaties that took in consideration co application of both regimes. The holdings of regional and international judicial and quasi-judicial mechanisms also contribute to the evolution of both regimes of law to a level where they interact to better serve the core value of embracing the dignity of the human being and ensure their protection from state powers.

The problem arises when the human beings are living in an unidentified entity that lacks legal capacity to enter into treaties, faces a situation of armed conflict or a conduct of hostilities, does that mean that they are not afforded rights and protections from authorities coercion? Are they left behind because of the status of the entity they live in? As an example of such unidentified entities I will provide the cases of Palestine, Taiwan, and Kosovo, entities considered to be the closest “state to be”, with a permanent populations, a defined territory, a government; and each is a member of some international organizations and conduction relations with other states, in accordance with the Montevideo criteria for states, but due to special characteristics of each entity and its relation with the other intervening state entity, they cannot ratify and be members of international human rights treaties.

Generally, international law considers states to be the concrete manifestation of its subjects, but this consideration is not limited to states. It considers other entities as its

subjects, and it finds in these other subjects the legal personality to be obligated and to have rights in accordance with its status, therefore, unidentified entities can be subjects of international law, because the laws are living instruments and they develop by case law as in the reparations case recognising the UN as to hold legal personality.

For unidentified entities they can be subjects to international human rights laws and international human rights laws to a degree that is more apparent than in the case of recognized states. Humanitarian law provides the minimum protections afforded to people living in such entities by the application of Common Article 3, regardless of the nature of relation between the unidentified territorial entity and the intervening state as recognized by several courts from different disciplines.

As for human rights protections, the jurisprudence of the regional and international bodies, is becoming more and more in conformity with each other, and considers human rights law to be applicable in situation of armed conflict. And even If we believe that some violations can be attributed as a burden to non-state actors in unidentified entities based on a new trend as shown in the observations of the Committee against Torture and the International Court of Justice, but this is considered to be a new phenomena and we still need some more cases to study how to make the unidentified entity as a principle duty barrier. Considerations must be taken to allow a reading of the membership clause in each treaty to enable these entities to be full members to better protect the human beings. However, what is more certain that in a situation of armed conflict, the practice of regional and international judicial mechanisms, holds the occupying state responsible for violations accruing on the territories of the unidentified entities, because human rights laws are not supposed to leave the civilians of such entities in a legal vacuum, preventing them from the rights that are supposed to be universal. Therefore, the state interfering in the unidentified

entity has the obligation to guaranty and respect the rights as we saw in the decision of the International Court of Justice in the Congo case.

The finding that human rights laws can be extended in their application from the occupying entity (and the mother entity to the case of our study) to the occupied or in our case the unidentified entity to avoid the legal vacuum is very important.

And while the threshold test differs from one human rights regime to another, from as slight as being “under the state`s authority” as in the threshold applied by the American Commission, to “the effective over all control”, or “under power or authority” implemented by the European Court, or the Human Rights Committee`s test of being under state power or effective control, and finally the test adopted by the International Court of justice, with the necessity for the “acts done by a State in the exercise of its jurisdiction outside its own territory”. But establishing a common threshold test to know to what extent the jurisdiction of the state actor reaches is of crucial importance.

My final conclusion will reveal a need to address the protection gap between defining the right test of application, the threshold of the intervening state responsibilities in situations of armed conflict, and the restriction imposed by the membership clause for unidentified entity to ensure that human rights are truly universal.

Introduction

Humanitarian law and human rights law began as distinct fields of law. They developed through treaties, and international judicial and quasi-judicial practices to share the same goal of protecting the human being from the state. However, the usual scope of application for both disciplines is the state, which raises the question what about the individuals living in unidentified entities? Can they enjoy their rights in a situation of armed conflict or are they left behind? And if yes, to what degree? Who are the duty barriers? Those are the issues that will be addressed in this thesis.

This **issue** is of significant importance, since if the outcome was that human rights and humanitarian law cease to apply to unidentified territorial entities, that would create a legal vacuum and thus, disadvantage the people living in such entities from having the protections of human rights and humanitarian law during the time of armed conflict.

As for **the methodology**, this thesis will focus on secondary sources, where articles and books focusing on the issue of parallel application of human rights and humanitarian law, and statehood will be reviewed. Primary data including international conventions and covenants will be analyzed in relation to the thesis problem. Research of preparatory works of international legal instruments as the International Court of Justice will be conducted to look at how justices have dealt with a case when the issue of jurisdiction, parallel application of the both human rights law and humanitarian law, the test applied, and who are the duty barriers are

raised, Case law from in addition to the jurisprudence of the regional and international judicial and quasi judicial bodies as the Inter American Court of Human rights, the European Court of Human rights, the Human Rights Committee, and the Committee against Torture, with very few cases from the U.S jurisprudence that will be analyzed for comparison.

The thesis structure will constitute of three chapters, the first with the title “The relationship between International Humanitarian Law and International Human Rights Law”. Where I will demonstrate that relationship between International humanitarian law and human rights law exists, this will be elaborated in five sections; the first is a general introductory section that will provide a brief account of the origin of each discipline of law, and how they first start to interact; the second will speak about the manifestation of this relationship in international resolutions; the third will briefly mention some new treaties applying both regimes of law; and the fourth will speak about how the parallel application was reached through regional and international mechanisms jurisprudence. And finally, the fifth, which will be the final section, will conclude that both regimes apply to situations of armed conflict.

The second chapter with “Unidentified State Entities as Subjects of International Law” as its title, in which I will provide in the primary section a definition of what is an unidentified territorial entity; and then provide examples for unidentified entities in the second section, those will be Palestine, Taiwan, and Kosovo; the third section will provide a narrative introductory about each of those entities to highlight some of their characteristics; then in the fourth section I will explore if such entities can be regarded as subjects of international law; and finish with a conclusion that yes they are but we need to find to what extent, which will bring us to third chapter.

In the third chapter, I will be continuing the conclusions of the previous chapter in a brief general section, establishing that if an unidentified entity have some obligations in the context armed conflict, it will be sharing such an obligation with the other duty barriers, the state, therefore, in the second section I will speak about the Common article 3 to the Geneva Conventions as the minimum grantees afforded to the individuals living in such entities, especially with the situation of military occupation; then will move to the third section, trying to establish how can an unidentified entity carry an obligation, and show that there is a trend in this direction; and explore the duties of the occupying state intervening in the occupying entity; and at last provide a conclusion to this chapter, that while the obligations of the unidentified entity is a necessity, it share a small percentage of the duties of the occupying power, and thus, we need to explore more how to trigger the responsibility of each to better protect the human beings in such entities.

At the end there will be a conclusion chapter, where I reaffirm the findings of each chapter, and emphasize the necessity to establish a clearer test to verify the percentage of obligation accorded to each of the duty barriers in our case of study, the unidentified territorial entity, and the state intervening by occupation to the territory of the former.

Chapter 1: the relationship between International Humanitarian Law and International Human Rights Law

In this chapter, I will demonstrate the relationship between International humanitarian law and human rights law exists, this will be elaborated in five sections; the first is a general introductory section that will provide a brief account of the origin of each discipline of law, and how they first start to interact; the second will speak about the manifestation of this relationship in international resolutions; the third will briefly mention some new treaties applying both regimes of law; and the fourth will speak about how the parallel application was reached through regional and international mechanisms jurisprudence. And finally, the fifth, which will be the final section that concludes that both regimes apply to situations of armed conflict.

A: General:

International human rights law and international humanitarian law began as separate origins of international law despite the fact that they share a humanist ideal,¹ while the latter regulates the conduct of parties to an armed conflict, the former deals with the protection of inherent rights of all people at all times.² However, the essence of human rights law could be disclosed from humanitarian law, which is associated with

¹ Martin, et al, "International Human Rights & Humanitarian Law: treaties, cases and analysis". Cambridge, Cambridge University press 2006, p2; see also Droege, Cordula, "The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict". Israel Law Review, 2007,p 310; Campanelli, Danio, "The law of military occupation put to the test of human rights law", International Review of the Red Cross 2008, p 653

² Droege, Cordula, "The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict". Israel Law Review, 2007,p 310

the legal concepts of just war (*jus as bellum*) and the conduct of war (*jus in bello*).³

Humanitarian law was mainly based on the mutual expectations of parties to an armed conflict and the notions of civilized behavior.⁴ It was not rights- obligations oriented, but from a principle of humanity and its doctrine progress was possible based on the notion of mutual exchange of privileges among states, and how they treat the troops of the others. Military considerations have historically been essential to its evolution. To sum, humanitarian law originated from the interstate relations in international law.⁵

As for the historical development of humanitarian law, it was still a concept of chivalrous and civilized behavior until the 19th century was the first evidence of the manifestation of these theoretical bases into norms of international law. A good example from that era, was the adoption of a practice outlawing slave trafficking, another one was the St. Petersburg declaration condemning the use of “Dum Dum” bullets⁶ in war, these norms in which contemporary international human rights law would be based.⁷ Other humanitarian treaties were adopted before the Second World War; the Geneva Convention of 1929 regulating the conduct of war, the Kellogg-Briand pact outlawing aggression wars, the formation of the International Committee of the Red Cross, the creation of the League of Nation, but still no International

³ Martin et al, “International Human Rights & Humanitarian law: treaties, cases and analysis”, Cambridge, Cambridge University press 2006, p 2

⁴ Droege, Cordula, “The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict”. Israel Law Review, 2007, p313

⁵ Ibid

⁶ The “dum-dum” was a British soft-nosed bullet made for use in India, and was named after the factory it was developed at in the Dum-Dum Arsenal. The use of such bullets was prohibited by The Hague Convention of 1899 during times of armed conflict. For more details see <http://www.firstworldwar.com/atoz/dumdum.htm> last viewed 12/03/2010

⁷ Martin et al, “International Human Rights & Humanitarian law: treaties, cases and analysis”, Cambridge, Cambridge University press 2006, p 3

regulation would accept the interference with the sovereignty of states⁸, with the sole exception of bilateral treaties recognizing some minority rights in Europe.⁹

As for human rights, stressed by Henkin, the theoretical bases can be traced back to natural law theory:

“Individual rights as a political idea draw on natural laws and its offspring, natural rights. In its modern manifestation that idea is traced to John Locke, to famous articulations in the American declaration of independence and in the French declaration of rights of man and citizen, and to realization of the idea in the United States constitution and its bill of rights and in the constitutions and laws of modern states”¹⁰.

As Henkin noted above, one can trace human rights to the Enlightenment of the United States and French revolutions, which demanded a more just relationship between the individual citizens and the sovereign state.¹¹ Therefore, human rights primarily began as a subject of constitutional rule, an internal relation amid the sovereign and its people.¹²

The Second World War had a huge impact on both disciplinarians of law; starting with the creation of intergovernmental organizations as the United Nations (1945), which had –and still has- a very effective role in the promulgation of human rights and international humanitarian legal principles, through drafting declarations, as the Universal Declaration of Human Rights (1948), other treaties as the International Covenant on Civil and Political Rights (1966); the International Covenant on Economics, Social and Cultural rights (1966), and other treaties with their own

⁸ Droege, Cordula, “The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict”. *Israel Law Review*, 2007, p313

⁹ Davidson, Scott. “Human Rights”, Open University press. Phil. 1993, pp7-11

¹⁰ Henkin, Louis, “The Age of Rights”, (1990) ,p 1

¹¹ Droege, Cordula, “The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict”. *Israel Law Review*, 2007, p 312

¹² Ibid, p 313; see also Campanelli, Danio, “The law of military occupation put to the test of human rights law”, *International Review of the Red Cross* 2008, p 665

monitoring instruments, protecting more explicit rights.¹³ The creation of other organizations with their own human rights protecting mechanisms also contributed to the development of human rights as the Organization of American States (1948) and its Inter American Commission for Human rights, and the Council of Europe (1949) and its Convention of human rights with the European Court of Human Rights as its judicial mechanism.¹⁴ International law had a new discipline; the discipline of human rights.

As for humanitarian law, the Fourth Geneva Convention emerged with aim of protecting civilians, although mainly focusing on protecting those considered third parties to the conflict, moved the humanitarian ideal with strides to the character of human rights,¹⁵ Another indication that Humanitarian law was becoming in conformity with the human rights ideal was the adoption by the four Geneva Conventions of a common code, the Common Article 3 for situations of non-international armed conflict, regulating the state conduct internally as opposed to usual interstate nature of humanitarian law.¹⁶

A first implementation of the two regimes interacting with each other under an accountability mechanism was in front of the two World War II tribunals in Nuremberg and Tokyo. The two tribunals that used the different standards of international law, creating a more consistent combination of international human

¹³ Martin et al, "International Human Rights & Humanitarian law: treaties, cases and analysis", Cambridge, Cambridge University press 2006, pp 5-6, see also Davidson, Scott. "Human rights" Open University Press. Phil. 1993 p11-16

¹⁴ Ibid. p 5

¹⁵ Droege, Cordula, "The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict". Israel Law Review, 2007, p313

¹⁶ ibid

rights law and humanitarian law to prosecute the atrocities against mankind committed by the axis powers, and that were not covered by the laws of war¹⁷

However, the drafting histories of the Universal Declaration and the Geneva Conventions show that it was not the objective of the drafters, for the two regimes of law to overlap in practice; as peace was the basis of creating the United Nations, times of peace were considered the ground of application for the Universal Declaration.¹⁸

B: The relation in resolutions:

Nonetheless, States practice at the United Nations started slowly to accept that human rights are applicable to many situations of armed conflict¹⁹. One of the most significant situations that were especially prompted for a more constructive discussion about the applicability of human rights in situations of armed conflict was the situation in the Middle-East. After the six Days War in 1967 between Israel and Arab countries, and the occupation of new territories by Israel, the United Nations Security Council established that the “essential and inalienable human rights should be respected even during the vicissitudes of war”.²⁰ A step further was taken by the United Nations towards the application of human rights in situations of armed conflict, in the Tehran international Conference on Human Rights one year later in

¹⁷ Martin et al, “International Human Rights & Humanitarian law: treaties, cases and analysis”, Cambridge, Cambridge University press 2006, p 3-4

¹⁸ Droege argues that although the development proceedings of the Universal Declaration of Human Rights shows that while at the time of drafting it, it was not probably assumed that human rights would be applicable in armed conflict situations, she notes that the delegates still had in mind the near experiences of war, where most human rights abuses occurred in occupied territories. For more on this view see Droege, Cordula, “The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict”. Israel Law Review, 2007,p 314

¹⁹ Dennis contradicts the view that state practice accepts the notion of applying human rights in situations of armed conflict extraterritorially, citing the stand of a handful of states like the United States and the United Kingdom in front of the concerned human rights treaty bodies, for more of his view see Dennis, Michael J., “Non-Application of Civil and Political Rights Extraterritorially During Times of International Armed Conflict”. Israel Law Review, 2007 p 457-458

²⁰ GA Res. 237, UN Doc. A237/1967, (June 14, 1967)..

1968²¹ with two important resolutions, the first “Respect and Enforcement of Human Rights in the Occupied Territories” demanded that the State of Israel adhere to the Universal Declaration and the Geneva Conventions in the occupied Palestinian territories.²² The second “Respect for Human Rights in Armed Conflict” established that “even during the periods of armed conflicts, humanitarian principles must prevail.”²³ the General Assembly affirmed this stand in a number of resolutions, as resolution 2444 of 19 December 1968 with the same title, and resolution 2675 in 1970 titled “basic principles for the protection of civilian populations in armed conflict” that “fundamental human rights... continue to apply fully in situations of armed conflict.”²⁴

Influenced by the process of the United Nations, the International Committee of the Red Cross initiated a process of developing international humanitarian law that resulted in the two additional protocols of 1977 that better served the cause of protecting civilians in situations of non-international - as well as international- conflicts. Both Protocols recognized the application of human rights in situations of armed conflict, and even provided a larger curtain of protection for civilians, by making some of the derogable rights under human rights law, part of international humanitarian law, and thus, non-derogable.²⁵

Other resolutions made by the UN bodies, reaffirmed the notion that human rights applies in situations of armed conflicts, in the form of Security Council resolutions,

²¹ Resolution I (Respect and Enforcement of Human Rights in the Occupied Territories), Final Act of the International Conference on Human Rights, 13 May 1968, UN. Doc. A/Conf.32/41

²² Resolution XXIII (Human Rights in Armed Conflicts), Final Act of the International Conference on Human Rights, 13 May 1968, UN. Doc. A/Conf.32/41

²³ Ibid

²⁴ GA Res. 2675 (XXV), Principles for the Protection of Civilian Populations in Armed Conflict UN Doc. A/8028Basic (Dec. 9, 1970).

²⁵ Droege, Cordula, “The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict”. Israel Law Review, 2007,p 315

General Assembly resolutions, and resolutions made by the Commission on Human Rights.²⁶

C: The relation in treaties and their instruments:

While the former human rights treaties did not establish this link between the two disciplines if law to begin with, the treaty instruments came to realize such link in practice as in the case of the Human Rights Committee General Comment 31²⁷, which will be discussed further below. However, the inter-applicability notion is now apparent in the formation of some new international treaties and instruments that draw provisions from both disciplines of law. Few examples would be the Convention on the Rights of the Child of 1989²⁸, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000²⁹, and the Rome Statute of the International Criminal Court³⁰ among other instruments and treaties.

²⁶ While there are extensive resolutions that reflect the notion of application of human rights in times of armed conflict, as S.C. Res. 1019, UN Doc. S/RES/1019 (Nov. 9, 1995) and S.C. Res. 1034, UN Doc. S/RES/1034 (Dec. 21, 1995); and G.A. Res. 50/193, UN Doc. A/RES/50/193 (Dec. 22, 1995) (regarding former Yugoslavia); G.A. Res. 3525 (XXX), UN Doc. A/3525 (Dec. 15, 1975) (territories occupied by Israel); G.A. Res. 52/145, UN Doc. A/RES/52/145 (Dec. 12, 1997) (Afghanistan); Commission on Human Rights Resolutions and comments as an example: E/CN.4/2003/77 (April 25, 2003) (Afghanistan); E/CN.4/RES/2003/15 (Apr. 17, 2003) (Congo); OHCHR/STM/CHR/03/3 (2003) Timor-Leste; also see the Report of the Special Rapporteur of the UN Commission on Human Rights on the Situation of Human Rights in Kuwait under Iraqi Occupation, UN Doc. E/CN.4/1992/26 (Jan. 16, 1992); It is important to note that the UN Security Council starting from 1999, adopted a number of resolutions using the term “protection of civilians in armed conflict” instead of “respect for human rights in armed conflicts” that urges the concerned parties to “comply ... with their obligations under international humanitarian law, human rights and refugee law” see UN S.C. Res. 1265 (1999), para. 4; S.C. Res. 1296 (2000), para. 19, for more details see Campanelli, Danio, “The law of military occupation put to the test of human rights law”, *International Review of the Red Cross* 2008, pp. 658-659.

²⁷ Human Rights Committee, General Comment No. 31, Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CPR/C/74/CRP.4/Rev.6 (2004)

²⁸ Convention on the Rights of the Child, article 38

²⁹ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

³⁰ Rome Statute of the International Criminal Court.

D: The relation in regional and international mechanisms jurisprudence:

The position that human rights apply in situations of armed conflict, is also shared by the Inter-American Commission on Human Rights (IACHR)³¹, European Court of Human Rights,³² and the Human Rights Committee in its important General Comment 31 that states:

“The enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals . . . who may find themselves *in the territory or subject to the jurisdiction of the State Party*. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation”.³³

While most scholars agree with the observation of the Human Rights Committee³⁴, some writers as Michael Dennis disagrees with the view that human rights treaties - and more specifically ICCPR- apply extratorrerially in situations of armed conflict, and they base their argument on the *travaux préparatoires* of the Covenant indicates that it was not intended to be apply extraterritorially³⁵, this position is also adopted by a few states including the United States.³⁶

The International Court of Justice also asserted the human rights laws are applicable even when using nuclear weapons in a situation of armed conflict. It holds that:

³¹ See *Coard v. the United States*, Case 10.951, IACHR Report No. 109/99, para. 39

³² *Loizidou v. Turkey*, Application no. 15318/89, 18 December 1996; *Cyprus v. Turkey*, Application no. 25781/94, 10 May 2001

³³ Human Rights Committee, General Comment No. 31, Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6 (2004). Para. 11

³⁴ See for example the views of Droege, Cordula, “The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict”. *Israel Law Review*, 2007, p.335; Orna Ben-Naftali and Yuval Shany, “Living in Denial: The Application of Human Rights in the Occupied Territories”, *Israel Law Review*, 2003, p.54

³⁵ Dennis, Michael J., “Non-Application of Civil and Political Rights Extraterritorially During Times of International Armed Conflict”, *Israel Law Review*, 2007, Pp 457-458

³⁶ *Ibid.*

“the protection of the International Covenant [of] Civil and Political rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency”³⁷.

While the Court acknowledged the fact that human rights do not cease to apply generally, it restricted their applicability to the *lex specialis* of international humanitarian law.

The Court reasserted and slightly developed its finding in its advisory opinion concerning the Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory when it stated that:

“[T]here are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law”³⁸.

Thus, the Court reached a conclusion that both disciplines of law complement each other in some situations.

It confirmed and developed its stand even further in the case of the Armed Activities on the Territory of Congo³⁹, where it extended the scope of human rights obligations of the occupying power by using one test approach for all rights concerned,⁴⁰ and made a new formulation that infringed human rights by the tool international humanitarian law in the occupied territories and beyond as we will see in the coming pages.

E: Conclusion:

³⁷ International Court of Justice, Legality of the threat or use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p.240, para. 25.

³⁸ International Court of Justice, Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, 9 July 2004, para 106.

³⁹ International Court of Justice, Armed Activities on the Territory of Congo (Democratic Republic of Congo v. Uganda), Judgment, ICJ reports 2005, para. 216

⁴⁰ Cerone, John, “Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context”. Israel Law Review, 2007, p. 102

While humanitarian law and human rights law began as distinct fields of law that have been applied to different situations, the two disciplines of law developed as to respond to circumstances and realities that were not imagined by the authors of human rights and humanitarian law. This was possible because both regimes of law have the same goal of protecting the human beings from state coercive practices (whither their own or another), and was reached through United Nations resolutions, the formulations of new treaties that considered co applying both regimes, and the findings and decisions reached by regional and international judicial and quasi- judicial mechanisms to a level where they interacted to better serve the core value of embracing the dignity of the human being and ensure their protection of state powers.

Chapter 2: Unidentified State Entities as Subjects of International Law

As we explored in the first chapter, international human rights treaties and international humanitarian law can apply alongside each other to better serve the people and protect them from power abuses in situations of armed conflict. The question arises what if the individual need of protection is not a civilian living in one state party? What if the individual is a resident of an unidentified state like entity?

In answering those questions, I will first provide in the primary section a definition of what is an unidentified territorial entity; and then provide examples for unidentified entities, those will be Palestine, Taiwan, and Kosovo; the third section will provide a narrative introductory about each of those entities to highlight some characteristics of each entity; then in the fourth section I will explore of such entities can be regarded as subjects of international law; and finish with a conclusion that yes they are but we need to find to what extent, which will bring us to third chapter.

A: An Unidentified Entity:

An unidentified entity would be an entity falling to possess the statehood elements, those are best pointed in Montevideo Convention on the Rights and Duties of States 1933 are “(a) a permanent population; (b) a defined territory; (c) government; and (d) the capacity to enter into relations with other states.”⁴¹, other crucial elements include self-

⁴¹ Convention on Rights and Duties of States, Dec. 26, 1933

determination, recognition and territorial effectiveness⁴². While scholars have different views about the importance of each of these elements, they acknowledge the fact that some states seem to exist in a particular manner even if lacking some of these elements, as long as they receive recognition. For an example on how these requirements may not be very demanding, show explains on the defined territory element, that a state may be recognized and have the capacity regardless of its involvement in border dispute with its neighbor states as long as it had an irrefutable control over some territory by its government.⁴³

The most curial element and the most relevant to our discussion is the element of recognition. The nature of recognition and its impact on the creation of states is reasoned through two major theories; the first is the constitutive theory which considers the act of recognition by other states, the act creating a new state and provides it with legal personality. Therefore, new states are founded in the international discipline as subjects of international law enjoying the full legal capacity by the will and consent of already existing states. The second theory is the declaratory theory, which sustain that recognition is only an act of by state accepting an already non-disputed factual situation where the entity aspiring to be, has met the above mentioned criteria.⁴⁴

In the today`s world, where an entity such as Taiwan, with a population of almost 23 million living in Taiwan and its outlying islands, and defined territory, with an existing independent government with the legal capacity to conduct foreign relations,

⁴² Ibid; other scholars include other elements like non-use of force, territorial integrity and democracy, but acknowledge also that the last two are less crucial in the formation of states, for more on this see Peter, Anne, "Stathood after 1989: *Effectivites*" between legality and virtuality", For publication in James Crawford (ed), *Proceedings of the European Society of International Law* vol. 3 (2010)

⁴³ Malcolm Shaw, "International law", (6th ed. 2008).p 199

⁴⁴ Ibid. pp 444-454

cannot obtain state status⁴⁵, while failed state entities such as Somalia⁴⁶ do enjoy the statehood capacity, I believe the constitutive theory to have more merit. Therefore, we can conclude that the practical standard to assess whether an entity has reached the status of statehood is success or failure to do so.⁴⁷

Consequently, an unidentified state entity would be an entity that might lack one or more of the elements of a full state, and short of sufficient recognition from state entities enjoying full legal capacity when they cannot identify the entity concerned to have a status other than a state.

In this world, a lot of entities may be recognized as unidentified entities, according to the former definition, the reason why they are not identified varies practice, and while some might lack one or another of the Montevideo state criteria, most of them are lacking the legal status of a full state due to the factor of recognition

Another shared aspect of these entities is the fact that they are in a conflict situation with the “mother state entity”, this will be illustrated further more in the following section.

B: The Example of Unidentified Entities:

As mentioned above, many entities can fall under the purposed definition, like Palestine, Taiwan, and Kosovo for example. Each of these entities has some or all the

⁴⁵ HSIEH, Li Tian, Pasha, “An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan”, Michigan Journal of International Law, 2007, pp771-772

⁴⁶ Somila is considered to be the number 1 state according to the Failed States Index, published by Foreign Policy under http://www.foreignpolicy.com/articles/2011/06/17/2011_failed_states_index_interactive_map_and_rankings

⁴⁷ Marcel Kohen, “The State as “Primary Fact”: Some Thoughts on the Principle of Effectiveness” in Secession – International Law Perspectives (Cambridge, Cambridge University Press, 2006, pp 138-170, pp 147-48. there is a huge debate between legal scholars about the nature of recognition and its rule in the formation of new states, states practice is also very controversial on the issue of recognition, which makes it beyond the scope of this paper to mention. For more details about the declaratory and constitutive theories see Malcolm Shaw, “International law (6th ed. 2008)., pp 444-454

state criteria requirements. Thus, they have permanent populations, a defined territory, a government; and, each is a member of some international organizations and conduction relations with other states, in accordance with the Montevideo criteria.⁴⁸

At the same time, none of these entities can obtain the state status because of the lack of consent of the “attached to” or the “the other” state entity, which they had – or still are- engaged with in a hostile conduct that reached the level of non-international conflict. And while they have this in common, each of these entities differs and has its own unique character and circumstances. I will first introduce a narrative brief about each of the unidentified entities concerned, so we can recognize the entity and its characteristics, and also to recognize the other; the state that is preventing it from enjoying full international capacity, so we can later on ask the question of whether human rights and humanitarian law can be applied to such entities, lacking the status of a state states, or that the people of such entities are living in a legal lacuna, beyond the reach of protection of both disciplines of law. Thus, the next section will provide a brief introduction to the example of entity, and then explore the limits of protection to the people of unidentified entities.

C: Narrative View

1- Palestine:

After the defeat of the Ottoman Empire in the First World War 1918, Palestine became under the control of British government, as a trusty under the mandate of the League of Nations.⁴⁹ By 1948 the state of Israel declared its independence⁵⁰, which

⁴⁸ Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19

⁴⁹ Mandate for Palestine, league of nations Doc. C.529.M.314.VI (1922); after the Sykes-Picot agreement, May 16, 1916, Britain and France agreed to divide the territories that will come later under

initiated the first Arab –Israeli war.⁵¹ As a result, historical Palestine was divided into three parts between Jordan which annexed the West Bank area, Egypt had control over the Gaza Strip area, and Israel with the rest.⁵²

In June 1967, Israel occupied the territories of the West Bank and the Gaza strip, resulting a UN Security Council Resolution 242 reaffirming “the inadmissibility of the acquisition of territory by war” and demanding an Israeli withdraw from the new territories it had occupied.

The United Nations acknowledged the Palestinian tragedy, and granted the PLO an observer status at the UN General Assembly, and other sub international bodies⁵³In the 15th of November 1988 the Palestinian Liberation Organization [hereinafter the P.L.O] declared the establishment of the state of Palestine, and a month later, endorsed the "two state" solution, denounces terrorism and accepts UN resolution 242 and 338, and again re-declared the state of Palestine.⁵⁴

On 13 September 1993, the two sides to the conflict, signed a Declaration of Principles on Interim Self-Government arrangements for Palestinians [hereinafter the DOP] in which the parties to the conflict undertook to conclude a number of interim agreements leading to a settlement of the long conflict based on the “land for peace”

their control, and Palestine became under the British control according to the Sykes-Picot agreement, based on that, the League of Nations gave Britain mandate to control the territories of Palestine.

⁵⁰ For more details see <http://www.stateofisrael.com/declaration/>

⁵¹ For more details see [http://www.israel-palestina.info/arab-israeli-conflict.html#Ancient history of Israel and Palestine](http://www.israel-palestina.info/arab-israeli-conflict.html#Ancient%20history%20of%20Israel%20and%20Palestine)

⁵² Cavanaugh, K, “Selective Justice: The case of Israel and the Occupied territories”, Fordham International Law Journal, 2003, pp 937-938.

⁵³ As a result, In 1975 the UN General Assembly conferred on the PLO the status of observer in the Assembly and in other international conferences held under UN auspices. UN GA Res 3237 (XXIX) 1975. Faresekh, L."Commemorating the Naksa, Evoking the Nakba", the MIT electronic journal of Middle East studies, spring 2008, p 15.

⁵⁴ Ibid. Also U.N GAOR, 43rd Sess., 78th mtg. at 37, U.N Doc. A/43/PV.78 (1989)

principle. The failure to reach an end to the conflict by the end of the interim period in 1999, resulted in a break out of violence, and each party engaged back in hostilities.⁵⁵

By June 2002, Israel started building a separation wall between itself and then West Bank, but this wall was not built along the 1949 armistice line and caused lots of violations to the population affected by it⁵⁶, this situation led to the International Court of Justice advisory opinion on the Legal Consequences of Construction of a wall in the Occupied Palestinian Territories [hereinafter the Wall case] in July 2004, finding Israel in violation of its human rights treaty obligations⁵⁷. Other important events include the Israeli unilateral disengagement from the territories of the Gaza strip in the 15th of August 2005, and after two years of the disengagement plan and the redeployment of the Israeli army ground troops (although with some presence during military incursions to the border line), the paramilitary movement “ Hamas ” took over the powers in Gaza strip. Thus, becoming the de facto authority that exercises the powers before invested with the PNA in the Gaza strip, while the PNA remained in power of governing the West bank. The Israeli Government decided to declare on 19th of September 2007 that Gaza had become a "hostile territory" under Hamas control.⁵⁸ Which became the bases for applying a siege on the Gaza strip⁵⁹. An

⁵⁵ Goluitz, H. “International Legal Consequences of the Construction of a Barrier by Israel in the West Bank”, LL.M Minor dissertation, University of Cape town, school for advanced legal studies, faculty of law, February 2005, p 15., see also Cavanaugh, K, “Selective Justice: The case of Israel and the Occupied territories”, Fordham International Law Journal, 2003, p 939. See also DOP, art. VI. Under article VI, "preparatory Transfer of powers and responsibilities":

“Upon the entry into force of the declaration of principles and the withdrawal from Gaza strip and the Jericho area, a transfer of authority from the Israel military government and its civil administration to the authorized Palestinians for this task, as detailed herein, will commence. This transfer of authority will be of preparatory nature until the inauguration of the council”.

⁵⁶ Faresekh, L. "The political Economy of Israeli occupation: what is colonial about it?", the MIT electronic journal of Middle East studies, spring 2008, p 54

⁵⁷ Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 I.C.J. 163, (July 9)

⁵⁸ Darcy, S., Reynolds, J, “An enduring occupation: the status of the Gaza strip from the perspective of international law”, Oxford Journals, Journal of Conflict and Security Law (2010), p. 225

escalation to the situation of hostilities lead to the Israeli military operation “Cast lead” in the Gaza strip in the 2008 resulting many casualties and violations of human rights and international law from and to both sides.⁶⁰

In September 2011, the president of the Palestinian national authority, submitted an application to the United Nations secretary, requesting to join the membership of the international organization as a full state member on the borders of the armistice line of 1967,⁶¹ and while the application process is still pending, Palestine was accepted on the 31st of October this year as a full member state in the United Nations Educational, Scientific and Cultural Organization (UNESCO).⁶² Last but not least, it is important to note that Palestine has a permanent population of 4.17.⁶³

2- Taiwan:

After the Chinese communist party won the civil war against the government formed by the nationalist party over mainland China in 1949, the former declared the Popular Republic of China [hereinafter PRC]. The defeated regime of the Republic of China [hereinafter ROC], led by the Nationalist Party, retreated to the territory of Taiwan

⁵⁹ Ibid; See also - Elizabeth Samson. “Is Gaza occupied? Redefining the statues of Gaza under international law”, American University International Law Review (2010),p 39

⁶⁰ Report of the United Nations Fact-Finding Mission on the Gaza Conflict can be accessed on line at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>

⁶¹ See the official site of the UN news services at:

<http://www.un.org/apps/news/story.asp?NewsID=39863&Cr=Palestin&Cr1=>

⁶² UNESCO general conference admitted Palestine as full member to the organization by a vote of 107 members in favour, and 14 against, with 52 abstentions. For more details and to see the statment of UNESCO director general Irina Bokova welcoming the new state member, see the UNESCO official media service site at http://www.unesco.org/new/en/media-services/single-view/news/general_conference_admits_palestine_as_unesco_member_state/; other important events took place, but they are omitted due to space restrictions.

⁶³ Palestinian Central Bureau of Statistics, 2011, A Special Bulletin on the Palestinians on the Occasion of World Population Reaching 7 Billion, Ramallah , Palestine can be accessed on line at <http://www.pcbs.gov.ps/Portals/PCBS/Downloads/book1794.pdf>

and established its own regime with the aim of recovering the mainland, both parties claimed to represent the legitimate government of the whole of China.⁶⁴

Until the 1970`s, the international community recognized the ROC on Taiwan to have the capacity as a state to represent the “whole China”; It had diplomatic recognition by most States and not only the ROC had membership to the United Nations, but also was considered a founding State.

This, however, changed by the 1970s, when most states of the world, and due to international political manipulation derecognized Taiwan as a State. In 1971, with the help of the countries of the unallied movement taking the side of the PRC, the UN General Assembly passed Resolution 2758, forcing the ROC out from the agency, and giving China’s seat to the PRC.⁶⁵ 17 within one year, Taiwan lost its membership status of most UN sub organizations, and by the 1979, Taiwan`s strongest ally recognized the PRC as representing the whole of China, and terminated its diplomatic relations with the government of Taiwan.⁶⁶

Taiwan has attempted for 15 times since the 1990 to obtain membership to the United Nations, after it dropped the view of representing the whole of China, but failed each and every time, due to the fact that the China -the “mother entity”- rejects the sovereignty claim of Taiwan, and uses its political influence on the international arena and its veto power in the Security Council as a tool to maintain the status quo.⁶⁷

⁶⁴ HSIEH, Li Tian, Pasha, "An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan", *Michigan Journal of International Law*, 2007, pp 767-769; also Malcolm Shaw, “International law (6th ed. 2008).pp 234-235

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Roth, Brad R., “The Entity That Dare not speaks its name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order. Wayne State University Law School Research Paper No. 07-27, 2009, p93 , footnote 2

Today, which Taiwan has a permanent population of about 23 million individuals, is recognized by 24 states, and is a full member in at least twenty-two international organizations, including the World Trade Organization and the Asian Development Bank⁶⁸

3- Kosovo:

With the creation of the Socialist Federal Republic of Yugoslavia [hereinafter SFRY] in 1963, Kosovo was granted the status of an autonomous region within the Republic of Serbia. In 1974, a new constitution granted Kosovo greater autonomy within the SFRY and rights almost equal to those of the republics forming the federation. This status ended by 1989 when the new Yugoslav President, Slobodan Milo evi, put an end to Kosovo's autonomy.

In 1998, and as a result of brutal military Serbian campaign in Kosovo, a 78-day NATO bombing campaign forced the Serbian forces withdrawal from Kosovo on 10 June 1999. On the same day, the UN Security Council passed Resolution 1244 to deploy a security force [hereinafter KFOR], and a UN Mission in Kosovo, [hereinafter UNMIK] for the purpose of interim administration. The resolution also had the mandate to find a final status.⁶⁹

After years of marinating the status quo, and based on a joint declaration made by western countries including the United states⁷⁰ in 2005, that led to many failed processes, the independence of The Republic of Kosovo was declared on the 17

⁶⁸ Ibid, p773

⁶⁹ SC Res. 1244, UN SCOR, UN Doc. S/RES/1244 (1999)

⁷⁰ See the Guiding principles of the Contact Group for a settlement of the status of Kosovo at: <http://www.unosek.org/docref/Contact%20Group%20-%20Ten%20Guiding%20principles%20for%20Ahtisaari.pdf>

February 2008.⁷¹

This declaration was not accepted by the mother state of Serbia, and many other countries in the world, which feared that it would encourage secessionist groups to follow the movement and consider it a precedent on one hand. On the other hand, more than sixty states have so formally, including the U.S and most of the E.U countries.⁷²

The issue was therefore, subject to the scrutiny of the International Court of Justice, which issued its advisory opinion on the 22nd July 2010, stating that "the declaration of independence of the 17th February 2008 did not violate general international law because international law contains no "prohibition on declarations of independence".⁷³

Today, Kosovo which has a permanent population of about 2 million individuals⁷⁴, is recognized by over 60 states and the number is rising.

4- Summary:

The three above mentioned entities, are not considered to be states, but yet they are considered the closest "state to be", with a permanent populations, a defined territory, and a government; and each is a member of some international organizations and conduction relations with other states, in accordance with the Montevideo criteria.⁷⁵ At the same time, none of these entities can obtain the state status because of the refusal of the other

⁷¹ Kosovo Declaration of Independence, 17 February 2008, online: Republic of Kosovo Assembly in Albanian, can be accessed on line at: http://www.assembly-kosova.org/common/docs/proc/trans_s_2008_02_17_al.pdf

⁷² Zohar Nevo, Tamar Megiddo, "Lessons from Kosovo the Law of Statehood and Palestinian Unilateral Independence", Journal of International Law & International Relations. 2009. P 7

⁷³ Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010

⁷⁴ According to a report submitted to the Committee on Budgetary Control Delegation to Kosovo and FYROM, accessed on line at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/cont/dv/2_kosovo_note_2_kosovo_note_en.pdf

⁷⁵ Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19

entity; Israel for Palestine, China for Taiwan, and Serbia for Kosovo. The nature of the relation between the entity and the “the other” state however, is different from one entity to the other. Regarding the case of Palestine, it is considered by international law to be under Israeli occupation. While the case of Taiwan, it is China, and as there is no active conduct of ongoing hostilities, but that does not mean the hostilities are over⁷⁶, since China still considers Taiwan as a “renegade province”⁷⁷. As for Kosovo, and while the hostilities which were with Serbia are over, it is under military presence of UN and EU peace forces.

D: Unidentified Entities as Subjects of International Law:

International humanitarian law and international human rights law are basically international laws. Therefore, the same subjects of international law are the subjects of international human rights and international human rights laws. According to Shaw, the subject of international law includes a variety of entities; the most evident are states⁷⁸, but states are not the sole subjects of international law, other entities such as international organizations, international corporations, individuals, and sui generis territorial entities, may also enjoy international legal personality.⁷⁹

A "legal personality" subject of international law is: “an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims.” according to Brownlie⁸⁰. From this definition, we can conclude that, as in any legal system, certain entities will be

⁷⁶ See for an example of China’s measures to regain control over Taiwan <http://ca.reuters.com/article/topNews/idCATRE66113F20100719>

⁷⁷ Roth, Brad R., “The Entity That Dare not speaks its name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order. Wayne State University Law School Research Paper No. 07-27, 2009, p111

⁷⁸ Malcolm Shaw, “International law” (6th ed. 2008). p 197

⁷⁹ Ibid. pp 224-259

⁸⁰ Ian Brownlie, , Principles of Public International (6th ed. 2003), p. 57.

regarded as enjoying rights and duties enforceable at law. These entities are able to do so, because the law recognizes them as enjoying the legal capacity to have and maintain certain rights, and being subject to perform specific duties⁸¹. According to Shaw, "One of the characteristics of modern international law is the range of its participants. These include states, international organizations, international companies, and individuals..."⁸².

As a general example of this, is the International Court of Justice in its advisory opinion in the "Reparation for injuries suffered in the service of the United Nations" case, the Court found that "the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights."⁸³The Court then concluded by according to the International Organization the capacity to international personality subject of the law, and can enjoy rights and have duties⁸⁴, As for our example entities, other than their participation in international organizations, we can find such practices that reflect the fact that they can be considered obtaining some legal capacity, and have some rights and obligations, for instance Palestine was treated as an entity equivalent to a state in the wall case proceedings, allowing it to make oral and written submissions⁸⁵, and of course the above mentioned fact that Palestine was accepted as a full member to the UNESCO. Kosovo also had participated actively in presenting its written and oral submissions in the Unilateral Declaration of Kosovo Case, but under the name "Authors of the unilateral declaration of independence"⁸⁶.The same could be

⁸¹ Malcolm Shaw, "International law" (6th ed. 2008). p 195-197

⁸² Ibid. pp196

⁸³ Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Reports, 1949

⁸⁴ Malcolm Shaw, "International law (6th ed. 2008)., p 260

⁸⁵ Mendes, Errol, "Statehood and Palestine for the purpose of article 12(3) of the ICC Statute :A contrary Perspective", UCLAFOURM Memo. P46, can be accessed online at http://uclalawforum.com/media/background/gaza/2010-03-30_Mendes-Memo.pdf

⁸⁶ Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, para. 3

concluded in Taiwan, due to its commercial powers, it is considered to be a “fishing entity” that is considered to be equal to the states before the International Tribunal for the Law of the Sea, and has a similar status as a “separate customs territory” for World Trade Organization dispute settlement instrument of the World Trade Organization⁸⁷. Therefore, even though such entities do not enjoy the same characteristics to the extent states do, they seem to enjoy these rights to a certain point which allows them the ability to enjoy rights and be duty barriers to a certain point.

E: Conclusion:

While states are the usual subjects of international law, other entities exist that do not enjoy status. These entities are quite often and there are many examples of such unidentified entities. People living in such entities might be disadvantaged due to the fact that they live in an entity that cannot perform duties and possess rights in the international level. A good example of such entities is Palestine, an entity that is claimed to have all the requirement criteria for a state, but still cannot enjoy a state status because of the lack of recognition. Which leads to the question of do such entities such as Palestine have the capacity to inter into treaties and there benefit from, and be obligated by the international law, the answer to this question in theory is yes, unidentified entities can be subjects of international law, because the laws are living instruments and they develop by case law as in the reparations case, but to what extent? And how international human rights laws and international humanitarian law apply is what we are going to explore in the next chapter.

⁸⁷ HSIEH, Li Tian, Pasha, "An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan", Michigan Journal of International Law, 2007, pp 799-810

Chapter 3: The Parallel Application of International Human Rights Laws and International Humanitarian Law to Unidentified Entities

In this chapter, I will be continuing the conclusions of the previous chapter in a brief general section, establishing that if an unidentified entity have some obligations in the context armed conflict, it will be sharing such an obligation with the other duty barriers, the state, therefore, in the second section I will speak about the Common article 3 to the Geneva Conventions as the minimum grantees afforded to the individuals living in such entities, especially with the situation of military occupation; then will move to the third section, trying to establish how can an unidentified entity carry an obligation, and show that there is a trend in this direction; and explore the duties of the occupying state intervening in the occupying entity; and at last provide a conclusion to this chapter, that while the obligations of the unidentified entity is a necessity, it share a small percentage of the duties of the occupying power, and thus, we need to explore more how to trigger the responsibility of each to better protect the human beings in such entities.

A: General:

As established in the previous chapter, unidentified territorial entities can be subjects of international law, and thus have a capacity less than full to carry treaty obligations and enjoy to an extent some of treaty established rights. And when applying international human rights and humanitarian law, these entities must be able to carry some responsibilities to guaranty and respect rights of their individuals along with the other entity which will be the intervening state. Thus, they will both share the duty

and become “duty barriers” to ensure the implementation and protection of the human beings.

B: The Minimum Humanitarian Law Applied:

As mentioned above, the early bases of humanitarian law were structured for inter-state relation of the international legal system, and since a conflict of non-international nature is usually a conflict that is not between states, and that a non-international conflict could not be imagined to be more than an internal conflict as a civil war within state boundary, such a conflict was not the focus of international law.⁸⁸

Additionally, the principle of non-intervention prohibited international regulation of such conflicts in general,⁸⁹ and also necessitated that the conflicting parties to be parties to the convention, limiting the subjects of the convention to be state’s only.⁹⁰

A significant advance took place with the drafting of the 1949 Geneva Conventions, where it revealed for the first time a treaty provision that regulates non-international armed conflict. Common Article 3 of the Conventions applies to “armed conflict[s] not of an international character”⁹¹

Common article 3 reads as follows:

“...the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to” persons “taking no active part in the hostilities,” including those placed hors de combat:

- (a) Violence to life and person in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;

⁸⁸ Cerone, John, “Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context”. Israel Law Review, 2007, p.81

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, can be accessed on line at <http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument> , , last viewed 01/12/2011.

- (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples...⁹²

This is considered as advancement to the traditional application of humanitarian law. While states were the sole subjects of international law, Common article 3 made a room for the first time to non-state actors engaged in non-international conflicts to be subjects of international law.⁹³

How common Article 3 applied in a transnational setting, John Cerone argues that it could be that the use of the term “non-international,” was to ensure that all armed conflicts were included. Hence, a “non-international” armed conflict would be read to take account of any armed conflict other than one that was international.⁹⁴

The International Court of Justice seems to be agreeing to this reading of Common Article 3. In the case of *Nicaragua v. U.S.*⁹⁵, after clarifying that Common Article 3 applies to conflicts of non-international nature, the ICJ stated that there was: “no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which in the Court’s opinion, reflect what the Court in 1949 called “elementary considerations of humanity”⁹⁶.

⁹² Ibid. Para.1

⁹³ This section will not include the protections afforded by the two additional protocols of 1977, for they fall to provide a better protection than provided by common article 3 for any unidentified entity, the reason why is that the first Protocol applied to international entities, which will subsequently will mean it lack of applicability to entities short of statehood status; as for the second Protocol, and while it specifically have the aim of providing better protections in the context of conflicts of non-international nature, the threshold required to provide such protections are higher than those of common article 3

⁹⁴ Cerone, John, “Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context”. *Israel Law Review*, 2007, p.83-84

⁹⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, 1984. ICJ Reports. 392 June 27, 1986

⁹⁶ Ibid. Para. 218

The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia also shared this view in its 1995 Tadic Appeal Decision⁹⁷. It took consideration that the ICJ holding “confirmed that these rules reflect “elementary considerations of humanity” applicable under customary international law to any armed conflict ...at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant”.⁹⁸ We can conclude from all of the above that the principles of Common Article 3 have developed into being the minimum legal protection applicable in situations of armed conflicts, whether international or non-international.⁹⁹

C: The Unidentified Territorial Entity as a Duty Barrier:

1- The Clause: Membership:

In each of the human rights treaties, there is a membership criteria or what we can call the membership clause that identify who can be subjects of the concerned treaty, while most human rights treaties ratification clause emphasizes the memberships of states only, as in the case for the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT] reads as the following “[T]his Convention is open for signature by all States”¹⁰⁰, Convention on the Elimination of All Forms of Discrimination against Women [CEDAW], and the

⁹⁷ Prosecutor v. Tadic, Case No. IT-94-1-I, Decision On The Defense Motion For Interlocutory Appeal On Jurisdiction

⁹⁸ Ibid. para. 102

⁹⁹ See also from the United States jurisprudence the case of Hamdan V. Rumsfeld, 126 S.Ct. 2749 (2006).were the court adopted the position that Common article 3 of the Geneva Conventions provides the minimum applicable protection irrespective of the nature of the conflict. For more on the case see <http://www.supremecourt.gov/opinions/05pdf/05-184.pdf> , last viewed 01/12/2011. for more in this view on Common Article 3 to the Geneva Conventions, see Cerone, John, “Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context”. Israel Law Review, 2007, p.83-88

¹⁰⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 25. Para. 1

Convention on the Rights of the Child share another formulation that stresses the same criteria; “[T]he present Convention shall be open for signature by all States”.¹⁰¹ However, some of the other core human rights treaties have a different membership clause that might have a different reading, as for who can be a subject of the considered treaties that might entail that the membership of such treaties is not disclosed to states only. This is the situation for International Covenant on Civil and Political Rights[CCPR], International Covenant on Economic, Social and Cultural Rights[CESC], and the International Convention on the Elimination of All Forms of Racial Discrimination[CERD]; each of those treaties –covenant or convention– consider that the treaty is;

“...open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to this Convention.”¹⁰²

While at first sight, a reading of the article suggests that it could be limited to states only, a second reading, specially for the second phrase “member of any of its specialized agencies” might consider the possibility that any other entity that acquired the membership of one or more of the agencies of the United Nations, can in fact also join the designated treaty.

Though I found no literature supporting this argument, but this could be justified with the fact that no such entity before acquired a full membership of one of the specialized agencies of the United Nations before¹⁰³. However, this has changed in light of the United Nations Educational, Scientific, and Cultural Organization

¹⁰¹ Convention on the Elimination of All Forms of Discrimination against Women, article 25. Para. 1; Convention on the Rights of the Child, article 46

¹⁰²International Covenant on Civil and Political Rights, article 48, para.1; International Covenant on Economic, Social and Cultural Rights, article 26, Para. 1; International Convention on the Elimination of All Forms of Racial Discrimination, article 17, Para.1

¹⁰³ See for the UN treaty collection, viewing states only, as participant of the designated treaties, as an example participants of CCPR at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#4

[hereinafter UNESCO] decision to accept Palestine as a full member of the organization,¹⁰⁴ establishing a new precedent that would allow scholars to consider such a claim.

A *travaux préparatoires* approach of reading this article would not allow us to establish that there is but one criteria of membership. Limiting the opportunity of participating to these treaties to states only.

Nevertheless, considering the fact that the *travaux préparatoires* approach is only one approach of many to interpret a treaty¹⁰⁵, but if we adapt the approach of article 31 (1) of the Vienna Convention on the Law of Treaties, and interpret as an example article 48 of CCPR "... in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."¹⁰⁶ One can read this article to open the membership criteria to include states and any entity member of any of the UN specialized agencies. Thus, it would allow an unidentified entity with a full membership status with any of the UN sub agencies to become members of human rights treaties with such a membership clause as in the example of Palestine.

2- Jurisprudence: International:

This approach of allowing the unidentified entity to hold obligations can find its support in the views of several doctrines and decisions of regional and international conventions and treaty bodies, for example, the Universal Declaration of human rights emphasis that:

¹⁰⁴ See the UN news center at <http://www.un.org/apps/news/story.asp?NewsID=40253&Cr=Palestin&Cr1=member>

¹⁰⁵ Vienna Convention on the Law of Treaties

¹⁰⁶ Ibid, article 31(1).

“...no distinctions shall be made on the basis of political, jurisdictional or international status of the country or territory to which a belongs, whether it be independent, trust, non-self –governing or under any other limitation on sovereignty”.¹⁰⁷

The approach of the Committee against Torture also indicates such a trend to accept the view that the unidentified entity also should be able to carry some duties.

Therefore, in its concluding observations to Israel, and while most of the report stressed the duty of Israel as an occupying power, and based on the Human Committee General Comment 31, it also pointed its observations to both the Palestinian authority and Hamas for violations of the Convention, each in their jurisdiction.¹⁰⁸

Last but not least, in the wall case, the International Court of Justice had a similar view, addressed the necessity to explore what are the rights and obligations of Palestine and Israel recognizing that each of them enjoys different legal capacities of international law¹⁰⁹, when it stated: “both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life.”¹¹⁰

D: The Occupying State as a Duty Barrier:

The ICCPR has set the obligation to respect and ensure human rights treaties are read to be implemented directly upon state parties.¹¹¹ As a consequence, only state members can be liable for the violations on the international sphere when it fails its

¹⁰⁷ Universal Declaration of human rights, article 2

¹⁰⁸ Concluding Observation of the Committee against Torture, Israel, Para. 34, CAT/C/ISR/CO/4 (Jun. 23, 2009)

¹⁰⁹ See Mendes, Errol, “Statehood and Palestine for the purpose of article 12(3) of the ICC Statute :A contrary Perspective”, UCLAFOURM Memo. P44, can be accessed online at http://uclalawforum.com/media/background/gaza/2010-03-30_Mendes-Memo.pdf

¹¹⁰ Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 I.C.J. 163, (July 9), para. 162

¹¹¹ International Covenant on Civil and Political Rights, article 2

obligation; whether the nature of its obligation is a positive one that demands the state to take action, or is a negative one that requires the state not to act in a certain way.

1- The Clause: Jurisdiction:

As demonstrated in article 2(1) of the ICCPR “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...” In its General Comments, the Human Rights Committee has interpreted this provision to necessitate that states protect the Covenant rights even against non-state interference.¹¹² Thus, the Human Rights Committee stated in General Comment 31:

“the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties” permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities”¹¹³

Therefore, we can see that the position of the Human Rights Committee that human rights violations committed by “private persons or entities”, that may or may not be affiliated with the state, might trigger state responsibility. Under the main human rights treaties states can fulfill its obligation to “ensure” only by taking reasonable and effective measures to first stop and further to take action to human rights violations caused by “private persons or entities”.¹¹⁴

¹¹² Human Rights Committee, General Comment No. 31 [80]: Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6 (2004) ; Concluding Observation of the Human Rights Committee, Israel, Para. 11, CCPR/CO/78/ISR (Aug. 21, 2003)

¹¹³ Ibid. para. 8

¹¹⁴ Cerone, John, “Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context”. Israel Law Review, 2007, p.94

As discussed earlier in the first chapter, all human rights treaties are limited in their application to a territory of a state and a territory subject to its jurisdiction extraterritorially¹¹⁵, as adopted by several regional and international bodies. This next section will explore the stand of these bodies in applying human rights in situations of armed conflict extraterritorially, where the occupying state is practicing its jurisdiction in the territory of the unidentified territorial entity entailing its share as a duty barrier. This will be conducted through analyzing the practices of the regional and international bodies. I will first start with the regional bodies starting with The Inter-American Commission on Human Rights, then will follow with the stand of the European Court of Human Rights, then move on to the Human Rights Committee of the ICCPR, and finally end with the stand of the International Court of justice and reflect how it even developed the scope of obligation of the occupying force.

2- Jurisprudence: regional and international:

a. The Inter-American Commission on Human Rights:

Between all of the human rights judicial and the quasi-judicial bodies, the Inter-American Commission is considered to have the lowest threshold for extraterritorial application of Inter-American human rights law requiring the concerned state to only exercise power, authority, or control over the individuals whose rights have been

¹¹⁵ Ibid. 96, see also Ben-Naftali, Orna and Shany, Yuval, "Living in Denial: The application of Human Rights in the Occupied Territories". Israel Law Review, 2003-2004, pp. 17-118; Droege, Cordula, "The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict". Israel Law Review, 2007, pp. 310-355; Stigall, Dan E., Blakesley, Christopher L. and Jenks, Chris, "Human Rights and Military Decisions: Counterinsurgency and Trends in the Law of International Armed Conflict". University of Pennsylvania Journal of International Law, 2008-09; Campanelli, Danio, "The law of military occupation put to the test of human rights law", International Review of the Red Cross, 2008, pp 653-668. However, other authors like Michael Dennis reflecting the stand of a handful of states like Israel and the United States, rejects the view that international human rights treaties apply extraterritorially in situations of armed conflict, and base their view on the *travaux préparatoires* of the Covenant indicates that it was not meant to be applied extraterritorially, for more on his view in general see Michael Dennis, "Non-application of civil and political rights treaties extraterritorially during times of International armed conflict", Israel Law Review (2007).

violated to trigger the state jurisdiction.¹¹⁶ Thus, the Commission found Cuba to be in violation of its human rights obligations after it shot down civilian planes in international airspace, killed all 4 passengers in *Alejandro v. Cuba*.¹¹⁷ The standard of control in this case applied by the Commission to find Cuba responsible was the fact that the Cuban military “first and only response was the intentional destruction of the civilian airplanes and their four occupants.”¹¹⁸ Based on this the Commission established “conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots . . . under their authority”¹¹⁹ and held consequently that the victims were under Cuba’s jurisdiction in this particular case.¹²⁰

b. The European Commission and Court of Human Rights:

At the other end to the stand of the Inter-American Commission, the threshold developed in the jurisprudence of the European Court of Human Rights has been more demanding even than those of the international jurisprudence.

Over the years, the European Court has developed different standards for triggering state jurisdiction for the purpose of applying the European Convention on Human Rights. In the early case in front of the court, like in the cases of *Loizidou v.*

*Turkey*¹²¹, *Cyprus v. Turkey*¹²² or *Ilaşcu and Others v. Moldova and Russia*¹²³, it has found the Convention to apply, where state parties to the convention exercises

¹¹⁶ This could be due to the fact that article 1 of ACHPR does not limit the scope of application of the Charter to the territory or jurisdiction of states parties as in the other human rights treaties. Article 1 of the ACHPR reads as “parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.” See American Convention on Human Rights, art. 1

¹¹⁷ *Alejandro v. Cuba*, Case 11.589, IACHR., Report No. 86/99, 1999

¹¹⁸ *Ibid.* Para. 8.

¹¹⁹ *Ibid.* para. 25.

¹²⁰ *Ibid.*; for more on rule of IACHR see Cerone, John, “Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context”. *Israel Law Review*, 200, pp 103-104

¹²¹ *Loizidou v. Turkey*, Application no. 15318/89, 18 December 1996, para. 52

¹²² *Cyprus v. Turkey*, Application no. 25781/94, 10 May 2001

¹²³ *Ilaşcu and Others v. Moldova and Russia*, Application no. 48787/99, 8 July 2004

effective overall control over a territory. Later on, in *Banković v. Belgium*¹²⁴, it applied a more restricted scope of a threshold requiring permanent effective overall control of the state concerned to apply the convention, in addition to referring to a geographical requirement to apply the Convention.¹²⁵ Thus, it found that the applicants and family members of victims killed in the NATO bombing of a radio station in Serbia short of being subject to the jurisdiction of the European Convention. However, it seems that the Court redirected itself towards its primary position within the later cases, as in the case of *Öcalan v. Turkey*¹²⁶, where it found the applicant, a Turkish citizen from the Kurdish minority accused of leading a terrorist group with international arrest warrants, to be within the jurisdiction of Turkey because he was held under custody by Turkish agents, regardless of the fact that he was arrested in Kenya and not within the geographical sphere of the Convention emphasized in the *Banković dicta*, this position of a relaxed standard of extraterritorial application was again confirmed and developed even further in the case of *Issa v. Turkey*¹²⁷. In this case concerning the conduct of Turkish forces in northern Iraq, the Court took the approach of triggering the Convention jurisdiction extraterritorially if the state party had “effective overall control” over the territory concerned, or a “power and authority” standard.¹²⁸

¹²⁴ *Banković v. Belgium*, Application no. 52207/99, 12 December 2001

¹²⁵ *Ibid*, para. 80

¹²⁶ *Öcalan v. Turkey*, Application no. 46221/99, 12 May 2005

¹²⁷ *Issa v. Turkey*, Application no. 31821/96, 16 November 2004

¹²⁸ The standard of power and authority was initially applied in the *W.M. v. Denmark*, admissibility decision, application no. 17392/90 14 October 1992, Cerone argues that what happened in the *Issa* case, was more of adopting the stand of the Inter-American Commission and Human Rights Committee, which the Court had refused to do so in *Bankovic*, for more on Cerone view, see Cerone, John, “Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context”. *Israel Law Review*, 2007, p.96

Those same standards were applied again in the very recent case of *Al- Skeini v. The United Kingdom*¹²⁹, which indicates that the stand of the European court on jurisdiction in an extraterritorial context is becoming more coherent with those of other regimes of human rights jurisprudence.

c. The Human Rights Committee:

As for the Human Rights Committee, its position was time after time affirming that ICCPR applies extraterritorially,¹³⁰ and that a state's jurisdiction under the ICCPR can be triggered beyond its territorial borders concluding that the scope of Article 2(1) "does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it."¹³¹

The Committee asserted this position in its General Comment 31, where it noted that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."¹³² likewise, after establishing that the "enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness... and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party"¹³³ the Committee asserted:

"[t]his principle also applies to those within the power or effective control of the

¹²⁹ *Al- Skeini v. The United Kingdom*, application no. 55721/07, 7 July 2011

¹³⁰ See for example Concluding Observations of the Human Rights Committee: Israel. CCPR/CO/78/ISR, para.11 (Aug.21, 2003); and the more recent Concluding Observation of the Human Rights Committee: Israel. CCPR/C/ISR/CO/3, para.5(Sep. 3, 2010)

¹³¹ *Burgos/Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979 (29 July 1981), U.N. Doc. CCPR/C/OP/1, at 88 (1984).

¹³² Human Rights Committee, General Comment No. 31, para. 10

¹³³ *ibid*

forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.”¹³⁴

The Committee confirmed had the same stand in the context of military occupation.

In response to the Israeli government’s claim that the ICCPR does not apply extraterritorially in a situation of armed conflict or occupation, the Committee responded:

“Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party’s authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.”¹³⁵

And again, the Human Rights Committee reasserted its position recently in its

Concluding observations on Consideration of reports submitted by the state of Israel under article 40 of the Covenant, where it stated:

“The State party should ensure the full application of the Covenant in Israel as well as in the occupied territories, including the West Bank, East Jerusalem, the Gaza Strip and the occupied Syrian Golan Heights. In accordance with the Committee’s general comment No. 31, the State party should ensure that all persons under its jurisdiction and effective control are afforded the full enjoyment of the rights enshrined in the Covenant”¹³⁶

Thus, we can conclude that the standards applied by the Human Rights Committee to trigger state responsibility are those of power or effective control.

d. The International Court of Justice:

The International Court of Justice seems to have developed its dicta to take the same stands as of those of the Human Rights Committee. While in the stage of its 2004

¹³⁴ Ibid

¹³⁵ Concluding Observations of the Human Rights Committee: Israel. CCPR/CO/78/ISR, para. 11 (Aug.21, 2003)

¹³⁶ Human Rights Committee, Concluding Observation of the Human Rights Committee: Israel. CCPR/C/ISR/CO/3, para.5(Sep. 3, 2010)

Advisory Opinion on Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory¹³⁷, the Court adopted the view that the ICCPR, the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CROC) applied to Israel's conduct in the Palestinian Occupied Territories, and "that the [ICCPR] is applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory."¹³⁸ This could be read as lowering the threshold of state obligation and not requiring the standard of territorial control.¹³⁹

On the other hand, the former was not the Court position when scrutinizing the application of ICESCR. The Court required territorial control to trigger application of ICESCR rights because they are "essentially territorial."¹⁴⁰

In the case of the Democratic Republic of Congo (DRC) v. Uganda¹⁴¹, the ICJ asserted and even developed its former position about the extraterritorial application of human rights law. In this case, the Court found the Ugandan forces conduct on Congo to be in violation of Uganda's obligations under several human rights treaties including the ICCPR, the African Charter on Human and Peoples' Rights (ACHPR), and the CROC.

The court examined the nature of Uganda's existence on Congo's soil. After finding that Uganda was occupying the district of Ituri¹⁴², the Court found that Article 43 of

¹³⁷ Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 I.C.J. 163, (July 9), para. 106

¹³⁸ *ibid*

¹³⁹ On this view, see Cerone, John, "Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context". *Israel Law Review*, 2007, p. 97

¹⁴⁰ Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 I.C.J. 163, (July 9), para. 112

¹⁴¹ Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), I.C.J Reports 2005 I.C.J. 116, para. 119 (Dec. 19)

¹⁴² *Ibid*, para. 166

the 1907 Hague Regulations¹⁴³ necessitates that Uganda “take all the measures in its power to restore and ensure, as far as possible, public order and safety in the occupied area, while respecting unless absolutely prevented, the laws in force in the DRC.”¹⁴⁴

On those bases, the Court considered that this obligation “comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law to protect the inhabitants of the occupied territory against acts of violence and not to tolerate such violence by any third party.”¹⁴⁵

Thus, the Court seemed to establish a new practice incorporating international human rights law into the law of occupation.

The Court proceeded and found that Uganda was in violation of its obligations as an occupying power even in areas outside the occupied territories. Bringing to mind its findings in Wall case, “that international human rights instruments are applicable... in respect of acts done by a state in the exercise of its jurisdiction outside its own territory... particularly in occupied territories.”¹⁴⁶ And then ended with the conclusion that all the relevant human rights treaties, in addition to a number of humanitarian law treaties were “applicable as relevant in the present case.”¹⁴⁷ And that Uganda had acted in violation of all of these treaties.

This assessment of the case reveals a significant advancement to the Court’s jurisprudence and to the application of human rights in the extraterritorial field, this is reflected in the court decision to establish two basis for applying human rights law, one through extending the jurisdiction of the applied human rights norms of the occupying country and the other by pausing a responsibility on the occupying country

¹⁴³ Reads as follows : “[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”

¹⁴⁴ Ibid. para. 178

¹⁴⁵ ibid

¹⁴⁶ Ibid. para. 216

¹⁴⁷ Ibid. para. 217

to incorporate human rights laws through the tool of applying humanitarian occupation law; another significant progress is that the Court had the view that human rights law applies even in situation less than full territorial occupation. Last but not least, the Court seems to developed its view in applying different standards of application of human rights treaties according to scope of obligation of the right concerned in the wall case to adapt one more for all approach standards that finds the occupier responsible for implementing and protecting all the human rights treaties, regardless of its scope of obligation to state of each right as noted by Cerone¹⁴⁸. Thus, it looks like the Court adapted the view of the Human Rights Committee.¹⁴⁹

D: Conclusion:

Accordingly, we can conclude that the jurisprudence of the regional and international bodies is becoming more and more in conformity with each other, and considers human rights law to be applicable in situation of armed conflict. And even If we believe that some violations can be attributed as a burden to non-state actors in unidentified entities based on a new trend based on the comments of treaty bodies and international courts, but we must emphasis that this practice was a small freckle in these comments and decisions when addressing and holding the occupying state responsible for violations accruing on the territories of the unidentified entities. Hence, these violations of human rights laws cannot lead to a vacuum for the stateless and preventing them from the rights that are supposed to be universal. Therefore, the state interfering in the unidentified entity has the obligation to guaranty and respect

¹⁴⁸ Cerone, John, "Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context". Israel Law Review, 2007, pp. 99-102

¹⁴⁹ Ibid

the rights as we saw in the decision of the International Court of Justice in the Congo case.

The finding that human rights laws can be extended in their application from the occupying entity (and the mother entity to the case of our study) to the occupied or, in our case, the unidentified entity to avoid the legal vacuum is very important.

And while the threshold test differs from one human rights regime to another, from as slight as being under the state`s authority as in the threshold applied by the American Commission to the effective overall control, or under power or authority implemented by the European Court, or the Human Rights Committee`s test of being under state power or effective control, and finally the test adopted by the International Court of justice with the necessity for the “acts done by a State in the exercise of its jurisdiction outside its own territory”. But establishing a common threshold test to know to what extent the jurisdiction of the state actor reaches is of crucial importance.

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CONCLUSIONS:

While humanitarian law and human rights law began as distinct fields of law that have been applied to different situations, the two disciplines of law developed to respond to circumstances and realities that were not imagined by the original drafters. This was possible because both regimes of law have the same common goal of protecting the human beings from state coercive practices (whether their own or another), and was reached through United Nations resolutions, the formulations of new treaties that took in consideration co application of both regimes. The holdings of regional and international judicial and quasi-judicial mechanisms also contribute to the evolution of both regimes of law to a level where they interact to better serve the core value of embracing the dignity of the human being and ensure their protection from state powers.

The problem arises when the human beings are living or citizens of unidentified entity that lacks legal capacity to enter into treaties, faces a situation of armed conflict or a conduct of hostilities, does that mean that they are not afforded rights and protections from authorities coercion? Are they left behind because of the status of the entity they live in? As an example of such unidentified entities we provided the case of Palestine, Taiwan, and Kosovo, entities considered to be the closest “state to be”, with a permanent populations, a defined territory, a government; and each is a member of some international organizations and conduction relations with other states, in accordance with the Montevideo criteria for states, but due to special characteristics of each entity and its relation with the other intervening state entity, they cannot ratify and be members of international human rights treaties.

Generally, international law considers states to be the concrete manifestation of its subjects, but this consideration is not limited to states. It considers other entities as its

subjects, and it finds in these other subjects the legal personality to be obligated and to have rights in accordance with its status, therefore, unidentified entities can be subjects of international law, because the laws are living instruments and they develop by case law as in the reparations case recognising the UN as to hold legal personality.

For unidentified entities they can be subjects to international human rights laws and international human rights laws to a degree that is more apparent than in the case of recognized states. Humanitarian law provides the minimum protections afforded to people living in such entities by the application of Common Article 3, regardless of the nature of relation between the unidentified territorial entity and the intervening state as recognized by several courts from different disciplines.

As for human rights protections, the jurisprudence of the regional and international bodies, is becoming more and more in conformity with each other, and considers human rights law to be applicable in situation of armed conflict. And even If we believe that some violations can be attributed as a burden to non-state actors in unidentified entities based on a new trend as shown in the observations of the Committee against Torture and the International Court of Justice, but this is considered to be a new phenomena and we still need some more cases to study how to make the unidentified entity as a principle duty barrier. Considerations must be taken to allow a reading of the membership clause in each treaty to enable these entities to be full members to better protect the human beings. However, what is more certain that in a situation of armed conflict, the practice of regional and international judicial mechanisms, holds the occupying state responsible for violations accruing on the territories of the unidentified entities, because human rights laws are not supposed to leave the civilians of such entities in a legal vacuum, preventing them from the rights that are supposed to be universal. Therefore, the state interfering in the unidentified

entity has the obligation to guaranty and respect the rights as we saw in the decision of the International Court of Justice in the Congo case.

The finding that human rights laws can be extended in their application from the occupying entity (and the mother entity to the case of our study) to the occupied or in our case the unidentified entity to avoid the legal vacuum is very important.

And while the threshold test differs from one human rights regime to another, from as slight as being “under the state`s authority” as in the threshold applied by the American Commission, to “the effective over all control”, or “under power or authority” implemented by the European Court, or the Human Rights Committee`s test of being under state power or effective control, and finally the test adopted by the International Court of justice, with the necessity for the “acts done by a State in the exercise of its jurisdiction outside its own territory”. But establishing a common threshold test to know to what extent the jurisdiction of the state actor reaches is of crucial importance.

Between defining the right test of application, the threshold of the intervening state responsibilities in situations of armed conflict, and the restriction imposed by the membership clause unidentified entity, there lies a gap of application therefore of protection and that need to be addressed probably to ensure that human rights are truly universal.

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