Is the United States bound by the ICCPR in relation to occupied territories?

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Abstract

The US has been, since September 8th, 1992, a State party to the International Covenant of Civil and Political Rights (CCPR). While it denies the latter's direct applicability and has not issued any implementing legislation, and while it has severely restricted the scope of the CCPR as applicable to it by extensive reservations, understandings and declarations, there can be no doubt that (at least) within these limits, the US is bound, under international law, by the CCPR. The question is whether this applies also to occupied territories, or other territories under the effective jurisdiction of the US outside its proper territory. There is another, more complicated question connected with the one above i.e. to what degree, if any, a Security Council resolution may dispense the US from respecting its CCPR obligations, if any, in occupied or assimilated territories.

The first question deals with the territorial aspect of jurisdiction: it asks whether the US is responsible, under the CCPR, for its actions in occupied or assimilated territories. The second question may best be formulated in this way: is it a valid defense, under the CCPR, against the reproach of a human rights violation by a State party in occupied or assimilated territories that this violation has been authorized by a Security Council resolution (such an authorization generally taking the form of an unrestricted authorization of „all necessary measures“)? In principle, the answer must be „yes“. But this „yes“ may be qualified. It is conceivable that the States parties to the CCPR have to respect the international law duty inherent in every treaty not to frustrate the objects of that treaty. Within the framework of this question, the first question is whether a State party to the CCPR (the US) is bound by that treaty when participating in Security Council decision-making. The next question is whether a State party's allowing the adoption of a Security Council resolution unrestrictedly authorizing security forces in the territory of their deployment to take „all necessary measures“ infringes, by itself, an obligation in relation to the CCPR.

Both questions will be answered in the affirmative. However, this will not affect, in principle, the authority and the effects of a Security Council resolution voted regardless. But the general international law principle that no State must profit from its own wrongdoing may prevent a State from relying on a Security Council resolution in defense against the reproach of having infringed the CCPR in cases in which it was itself instrumental in bringing about that resolution and was thereby violating the CCPR.

I. Introduction

The US has been, since September 8th, 1992, a State party to the International Covenant of Civil and Political Rights (ICCPR).[1] While it denies the latter's direct applicability[2] and has not issued any implementing legislation, and while it has severely restricted the scope of the ICCPR as applicable to it by extensive reservations, understandings and declarations[3], there can be no doubt that (at least[4]) within these limits, the US is bound, under international law, by the ICCPR[5]. The question is whether this applies also to occupied territories, or other territories under the effective jurisdiction of the US outside its proper territory. This question does not appear to be preëmpted by any reservation or declaration, even if the US Government has expressed the view „that the Covenant lacks extraterritorial reach under all circumstances"[6]. In particular, it is not possible to claim that the US Constitution prohibits such an extra-territorial application of the ICCPR[7], especially since the US Supreme Court has decided that some human rights provisions of the US Constitution have a certain extra-territorial reach[8].

There is another, more complicated question connected with the one above i.e. to what degree, if any, a Security Council resolution may dispense the US from respecting its ICCPR obligations, if any, in occupied or assimilated territories. There are, among others, Security Council resolutions concerning Afghanistan[9] and Iraq[10] which can be read as purporting to provide such a dispensation. According to the Afghanistan resolution, its addressees, i.e. „the Member States participating in the International Security Assistance Force", among them the US, are authorized to take „all necessary measures to fulfil its [the ISAF's]

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[1]of December 16, 1966, 999 U.N.T.S. 171, entered into force on March 23, 1976.

[2]Cf. U.S. reservations, declarations and understandings, International Covenant on Civil and Political Rights, 138 Cong.Rec. S7481-01 (daily ed., April 2, 1992), *sub* III (1): „That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing".

[3]See the U.S. declarations &c., *supra* note 2. The UNCHR „regrets the extent of the [US]'s reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States": UNCHR, Concluding Observations of the Human Rights Committee: United States of America.03/10/95.CCPR/6/79/Add.50; A/50/40, paras. 266-304, at para. 279. Cf. further on this question Rosemary Foot, *Credibility at Stake: Domestic Supremacy in U.S. Human Rights Policy*, in UNILATERALISM AND U.S. FOREIGN POLICY (David Malone and Yuen Foong Khong, eds.) 95 (2003); Catherine Redgwell, *US Reservations to Human Rights Treaties: All for One and None for All?*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW (Michael Byers and Georg Nolte, eds.) 392 (2003).

[4]Cf. UNCHR, General Comment 24, para. 12, and the US government's response, published in 16 HRLJ 422 (1995).

[5]Cf. Theodor Meron, *Agenda: The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties*, 89 AJIL 78 (1995), note 5. — On the question whether the assumed invalidity of some of the US reservations ended, or hindered, the US to become a party to the ICCPR cf. W.A. Schabas, *Invalid Reservations to the International Covenant of Civil and Political Rights: Is the United States Still a Party?*, 21 BROOKLYN J. INT'L L. 277 (1995) who, at 323, answers the question in the affirmative.

[6]Cf. UNCHR, *supra* note 3, para. 284. The UNCHR, *ibid.*, has rejected that view.

[7]In particular, such an application would not require or authorize „legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States"; cf. the Senate's proviso *sub* IV of the U.S. reservations &c., *supra* note 2.

[8]Cf. Supreme Court, Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004).

[9]Resolution 1386 (2001) of 12/20/2001.

[10]Resolution 1511 (2003) of 10/16/2003.

mandate“ i.e. „the maintenance of security in Kabul and its surrounding areas“[11]. Similarly, the Iraq resolution „authorizes a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq“[12]. These unrestricted authorizations („all necessary measures“) of security forces which, in the territory of their deployment, fulfil among other things typical policing duties are extremely questionable under human rights aspects; they may be seen as covering, in more or less appropriate circumstances, everything from arbitrary or unlawful interference with the home (forbidden by Article 17 (1) of the ICCPR) to subjection to torture or to cruel, inhuman or degrading treatment (forbidden by Article 7 of the ICCPR). As municipal law authorizations of police powers they obviously would not be sufficiently specific; they would not allow to determine the limits of police powers, and while such a law would make measures taken under it „lawful“ within the meaning of e.g. Article 17 (1) of the ICCPR, such lawful measures might still be „arbitrary“ and therefore forbidden under the same provision[13]. Therefore, in the individual communications procedure under the Optional Protocol, the United Nations Committee of Human Rights (UNCHR) would have to determine in every single case whether the use made by national authorities of such a provision was in compliance with the ICCPR[14].

The discussion of these questions will rely to a considerable degree on the jurisprudence of the European Court of Human Rights (ECtHR) on the (European) Convention on Human Rights and Fundamental Freedoms (ECHR).[15] The reason for this reliance is the relative scarcity of relevant UNCHR decisions and the rather ecliptic style of their reasoning. The justification of that reliance lies in the evident influence the jurisprudence of the respective treaty bodies exercises on the respective other.[16] Two examples must suffice:[17] In the *Bankovic* case, the ECtHR discusses the UNCHR's pertinent jurisprudence[18]. In the *Judge* case, the UNCHR follows the lead of the ECtHR according to whose established case-law the ECHR must be interpreted as a „living instrument“[19].

II. The Scope of Application of the ICCPR or the Question of the Territorial Jurisdiction of the US

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[11]Resolution 1386 (2001), para. 1-3.

[12]Resolution 1511 (2003), para. 13.

[13]Cf. e.g. UNCHR, case of *Rojas García v. Columbia* (comm. no. 687/1996), views of May 16, 2001, para. 10.3.

[14]Cf. e.g. UNCHR, case of *Faurisson v. France* (comm. no. 550/1993), views of December 19, 1996, para. 9.5.

[15]of November 4, 1950, 213 U.N.T.S. 222, E.T.S. No. 5, entered into force September 3, 1953, as amended.

[16]The ECtHR has been described as a „sort of world court for human rights“ by John B. Attanasio, *Rapporteur's Overview and Conclusions: of Sovereignty, Globalization, and Courts*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 373 (Thomas M. Franck and Gregory H. Fox, eds., 1996) at 383.

[17]On further numerous instances of the UNCHR's adopting reasoning and interpretation methods first developed by the ECtHR cf. J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 18 (2d ed. 1993).

[18]ECtHR, case of *Bankovic, Stojanovic, Stoimenovski, Joksimovic and Sukovic v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom* (appl. no. 52207/99), decision of December 12, 2001, para. 78.

[19]UNCHR, case of *Roger Judge v. Canada* (comm. no. 829/1998), views of October 20, 2003, para. 10.3; and cf. e.g. ECtHR, case of *Tyrer v. United Kingdom*, appl. no. 5856/72, judgment of 4/25/1978, SERIES A, No. 26, para. 31.

The first question deals with the territorial aspect of jurisdiction: it asks whether the US is responsible, under the ICCPR, for its actions in occupied or assimilated territories (1). It also discusses, shortly, the limits of such responsibility (2).

1. The US' Responsibility for Its Actions in Occupied Territory

According to Article 2 (1) of the ICCPR, „[e]ach state party ... undertakes ... to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant". As the International Court of Justice (ICJ) has recently held,

[t]his provision can be interpreted as covering only individuals who are both present within a State's territory and subject to that State's jurisdiction. It can also be construed as covering both individuals present within a State's territory and those outside that territory but subject to that State's jurisdiction.[20]

The former interpretation, which appears to be better suited to the use of the conjunction „and" in the clause quoted, was formerly adopted by the UNCHR, if only *obiter* and in an individual opinion:

Instances of occupation of foreign territory offer another example of situations which the drafters of the Covenant had in mind when they confined the obligations of states parties to their own territory.[21]

In contrast, the UNHCR had held early on, in the Uruguayan passport cases,[22] that

[t]he issue of a passport to an Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and [that] he is „subject to the jurisdiction" of Uruguay for that purpose. Moreover, a passport is a means of enabling him „to leave any country, including his own", as required by Article 12 (2) of the Covenant. Consequently, the Committee found that it followed from the very nature of that right that, in the case of a citizen abroad, Article 12 (2) imposed obligations ... on the state of nationality and that, therefore, Article 2 (1) of the Covenant [which includes the phrase „within its territory"] could not be interpreted as limiting the obligations of Uruguay under Article 12 (2) to citizens within its own territory.[23]

As every State has a certain residual jurisdiction over its nationals abroad, the UNCHR correctly did not consider itself barred from examining the communication by the phrase „within its territory" which is clearly meant to deal with territorial jurisdiction only.

It may be supposed that it was for the same reason that the UNCHR has held that it was „not barred either by virtue of Article 1 of the Optional Protocol ... or by virtue of Article 2 (1) of the Covenant ... from considering" the abduction of a State party's citizen by that State's agents acting on foreign soil.[24] Indeed, based on the „original intent" of the drafters, it has been said that it was never envisaged

to grant states parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad.[25]

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[20]ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of July 9, 2004, para. 108.

[21]UNCHR, case of *Celiberti de Casariego v. Uruguay* (comm. no. 56/1979), views of 29 July 1981, individual opinion of Tomuschat.

[22]Cf. e.g. UNCHR, case of *Lichtensztejn v. Uruguay* (comm. no. 77/1980), views of 31 March 1983.

[23]*ibid*., para. 6.1.

[24]Cf. e.g. UNCHR, *Celiberti de Casariego* case, *supra* note 21, para. 10.1, and cf. the individual opinion of Tomuschat *ibid*. Abductions appear to be a rather common weapon in the „war" against terrorism; cf. e.g. Lawrence Wright, *The Man Behind bin Laden*, THE NEW YORKER, September 16, 2002, 56 at 84.

[25]Tomuschat, *supra* note 21.

In conclusion, the UNCHR used to distinguish between a State party's acts concerning its own citizens abroad, which might be covered by the ICCPR, and other acts in occupied territory, which were not.[26]

The jurisprudence of the UNCHR has evolved[27]. When dealing, in the State reports procedure of Article 40 of the ICCPR, with Israel's claim that the ICCPR was not applicable to the occupied territories in the West Bank and Gaza, the UNCHR expressed the view 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[28].

But it is important to note that the „current circumstances" included

> the long-standing presence of Israel in [the occupied] territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein[29]

and therefore a very special set of circumstances. In the meantime, the UNCHR has gone beyond that still cautious approach and fully has embraced the second interpretation. In its General Comment Nr. 31,[30] it has construed Article 2 (1) of the ICCPR as requiring States parties

> to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means 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. ... This principle also applies to those within the power or effective control of the forces of the 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.[31]

This evolution may be based on another recent jurisprudence of the UNCHR, according to which the ICCPR „should be interpreted as a living instrument and the rights protected

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[26]UNCHR, case of *Gueye* et al. v. *France* (comm. no. 196/1985), views of April 6, 1989, treats the question whether former French soldiers of now Senegalese nationality, living in Senegal, are discriminated against when they are denied the same pension rights that former French soldiers of French nationality have. The UNCHR „recalls that the authors are not generally subject to French jurisdiction" (para. 9.4), without otherwise dealing with Article 2 (1) of the ICCPR. The views are sometimes quoted as evidence for the thesis that the UNCHR „has considered numerous cases of persons ‚under the jurisdiction' of a State party, even if the persons are not ... within the territory of that State party and the jurisdiction is not *in personam* but *in rem*": A. de Zayas, *The Status of Guantánamo Bay and the Status of the Detainees*, 37 UNIVERSITY OF BRITISH COLUMBIA L REV 2004, Nr. 2, note 123.

[27]Earlier steps of this evolution are recorded by Meron, *supra* note 5, at 79-80.

[28]UNCHR, Concluding Observations of the Human Rights Committee: Israel. 21/08/2003. CCPR/CO/78/ISR, para. 11.

[29]UNCHR, Concluding Observations of the Human Rights Committee: Israel. 18/08/1998. CCPR/C/79/Add.93, para. 10.

[30]General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 21/04/2004. CCPR/C/74/CRP.4/Rev.6. (General Comments).

[31]*Ibid*., para. 10. In this, the UNCHR follows the lead of Th. Buergenthal, *To Respect and to ensure: State Obligations and Permissible derogations*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 74 (Louis Henkin ed., 1981).

under it should be applied in context and in the light of present-day conditions".[32] The ICCPR therefore should be construed in consideration of tendencies prevalent in modern international society and it appears that the concept of a territorial restriction of human rights, even those based on treaty, is anathema to large strata of modern society. Indeed, such a concept runs counter to the whole idea of the universality of human rights which is dear to the West.[33]

The second interpretation of Article 2 (1) of the ICCPR has also been chosen by the ICJ. Deciding after the publication of the UNCHR's General Comment No. 31, without however quoting it, it reasoned

> that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.
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> The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *López Burgos* v. *Uruguay*; case No. 56/79, *Lilian Celiberti de Casariego* v. *Uruguay*). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106/81, *Montero* v. *Uruguay*).
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> The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations, *Official Records of the General Assembly, Tenth Session, Annexes*, A/2929, Part II, Chap. V, para. 4 (1955)).[34]

Thus, the ICJ based its opinion exactly on those views of the UNCHR that, in the individual opinion quoted, had distinguished between a State party's action concerning its own citizens abroad and the occupation of foreign territory. Also its understanding of the *travaux préparatoires* differs from the one of that individual opinion. At the very least, these facts do not make that part of the Court's reasoning particularly convincing[35]. But the General Comment quoted appears to warrant the ICJ's sweeping conclusion that „the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory".[36]

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[32]UNCHR, *Judge* case, *supra* note 19, para. 10.3. ECtHR, *Bankovic* case, *supra* note 18, para. 65, has denied that an interpretation of the ECHR as living instrument may lead to an extension of its scope of application beyond the ordinary meaning of Article 1 of the ECHR. But it will be shown that the application of the ECHR to territories occupied by its States parties is compatible with the pertinent jurisprudence of the ECtHR.

[33]The esteem in which this idea is held may be best shown by the US Department of State practice annually to release, for all the countries in the world, *Country Reports on Human Rights Practice*, available at «http: //www.state.gov/g/drl/hr/c1470.htm». This practice itself is justified by the customary law *droit de regard* on which cf. B. Simma, *International Human Rights and General International Law. A Comparative Analysis*, in: IV 2 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 153 (1995) at 221-2, with further references.

[34]ICJ, Advisory Opinion, *supra* note 20, para. 109.

[35]Cf. also ECtHR, *Bankovic* case, *supra* note 18, para. 78: „[I]t is difficult to suggest that exceptional recognition by the Human Rights Committee of certain instances of extra-territorial jurisdiction ... displaces in any way the territorial jurisdiction expressly conferred by ... Article [2 (1)] of the CCPR".

[36]ICJ, Advisory Opinion, *supra* note 20, para. 111.

The most recent pertinent jurisprudence of the international bodies that have so far decided on the applicability of the ICCPR to occupied territories therefore is in concurrence. In view of the evolution described, it also may be interesting to consider how the ECtHR is dealing with the parallel question under the ECHR. Of course, the ECHR is formulated differently. It is applicable to „everyone within [the High Contracting Parties'] jurisdiction" (Article 1 of the ECHR) and does not contain the clause „within its territory". Even though, for the ECtHR, extra-territorial jurisdiction is the exception rather than the rule; it has held that the term „jurisdiction" is an „essentially territorial notion".[37] According to the Court, that follows from the ordinary meaning (Article 31 (1) of the Vienna Convention on the Law of Treaties[38]) of the term „jurisdiction"[39] which it says covers essentially the territorial i.e. internal exercise of jurisdiction[40]; this is said to be confirmed by the *travaux préparatoires*;[41] the ECHR is said not to be designed for worldwide application[42]. Exceptions include in particular[43] cases in which a

> state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government[44]

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[37]ECtHR, *Bankovic* case, *supra* note 18, para. 59 *et seq*., 67. Before the *Bankovic* case, the ECtHR's jurisprudence had been summed up by learned authors in this way that „the phrase ‚everyone within their jurisdiction' does not contain any territorial limitation"; cf. J.G. MERRILLS & A.H. ROBERTSON, HUMAN RIGHTS IN EUROPE. A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 27 (4th ed. 2001). And cf. JEAN-FRANÇOIS RENUCCI, DROIT EUROPÉEN DES DROITS DE L'HOMME 422 (2nd ed. 2001): „La notion de juridiction ne se limite pas à l'applicabilité territoriale: elle comporte l'idée d'une juridiction exercée sur les personnes par l'entremise des organes ou instances de l'Etat" (Footnote omitted). See also Th. Meron, *The Humanization of Humanitarian Law*, 94 AJIL 239 (2000) at 273.

[38]of May 23, 1969, 1155 U.N.T.S. 331, entered into force January 27, 1980.

[39]*ibid*. para. 59-61.

[40]This jurisprudence appears to mix up the exercise of jurisdiction and its lawful exercise; cf. e.g. B. Schäfer, *Der Fall Bankovic oder Wie eine Lücke geschaffen wird*, MRM 149 (2002) at 155 *et seq*. Critical also M. Breuer, *Völkerrechtliche Implikationen des Falls Öcalan*, EuGRZ 449 (2003) at 450, and the sources quoted there in note 16-17; A. Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EJIL 529 (2003) at 539 *et seq*.

[41]ECtHR, *Bankovic* case, *supra* note 18, para. 63-65. According to Olivier de Schutter, *Chapter 7: The Accountability of Multinationals for Human Rights Violations in European Law*, in: *** COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW ***, text at note 45, „the preparatory works show beyond any doubt that the Convention was drafted to benefit all persons residing, living, traveling through, remaining either legally or illegally, on [the contracting States'] territories — it was not intended, however, to impose obligations on States parties beyond that closed circle of persons" (footnote omitted). But Janet Kentridge, *The Extra-territorial Application of the Human Rights Act*, at <www.matrixlaw.co.uk/seminars/documents/7%20Mar%2002/Application%20of%20the%20Human%20Rights%20Act.pdf>, para. 35, correctly notes that the Court „had not felt the need to [look at the *travaux préparatoires*] in previous cases on the point".

[42]*Bankovic* case, *supra* note 18, para. 80.

[43]Further exceptions include cases in which acts of a State's authorities produce effects outside its own territory (cf. ECtHR, case of *Drozd and Janousek v. France and Spain* (appl. no. 12747/87) judgment of June 26, 1992, SERIES A, No. 240, para. 91, with further references) and cases in which the State's jurisdiction could be based on nationality (cf. ECtHR, case of *Öcalan v. Turkey* (appl. no. 46221/99), judgment of March 12, 2003, para. 93).

[44]*Bankovic* case, *supra* note 18, para. 71. Cf. also ECommHR, case of *X and Y v. Switzerland* (appl. nos. 7289/75 and 7349/76), decision of July 14, 1977, 9 DECISIONS AND REPORTS 57 at 71 *et seq*.

(public powers rationale). The extraterritorial applicability of the ECHR in those cases is the consequence of the exercise of control by the State party[45]. Such an extraterritorial applicability the ECtHR has assumed so far in the case of the occupation of northern Cyprus by Turkey[46]. In addition, in admissibility decisions, the Court has considered it possible that Russia was bound by the ECHR in relation to events in the Moldavian Republic of Transnistria because of its influence on the latter and that Turkey was so bound in the case of a military expedition into northern Iraq[47]. In conclusion, a State party to the ECHR is bound by that treaty, in principle, in the case of operations in foreign territory if that territory is under its effective control.

It remains to discuss, within the framework of the ECtHR's jurisprudence, whether the exercise of public powers by a State party over occupied (or assimilated) territory is constitutive of its extra-territorial jurisdiction over that territory only in cases in which that territory forms part of another State party to the ECHR i.e., in the terms of the Court, in which it is „one that, but for the specific circumstances, would normally be covered by the Convention".[48] A possible argument for such a restriction is the Court's express claim that „[t]he Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States".[49] Further, this additional requirement, if such it is, was fulfilled in the cases which the ECtHR, in the *Bankovic* case, considered under the heading of the public powers rationale.[50] The relevance of this additional requirement also might be deduced from one of the reasons given by the ECtHR in the *Cyprus v. Turkey* case for its decision in that case i.e. to avoid „a regrettable vacuum in the system of human rights protection"[51] in a territory the inhabitants of which might find themselves excluded, by the fact of the occupation, „from the benefits of the Convention safeguards and system which they had previously enjoyed".[52]

However, the Court never held expressly that the extraterritorial applicability of the ECHR was restricted to those cases in which a State party exercised effective extraterritorial jurisdiction within the territorial scope of the ECHR; rather, its relevant pronouncements are in part *obiter*, in part they deal with facts different from those discussed here. In first place, the *Bankovic* case, while concerning territory outside the territorial scope of the ECHR, does not come under this rationale anyway as, according to the Court's decision, the bombardment there complained of could not be assimilated to an occupation and therefore to an exercise of extra-territorial jurisdiction because it did not constitute „effective control" of the territory concerned.[53] In

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[45]ECtHR, case of *Loizidou v. Turkey (merits)*, appl. no. 15318/89, judgment of December 18, 1996, para. 52; ECtHR, *Bankovic* case, *supra* note 18, para. 70; ECtHR, *Ilascu et al. v. Moldavia and Russian Federation*, appl. no. 48787/99, decision of September 4, 2001, The Law, I 2 b.

[46]ECtHR, *Loizidou (merits)* case, *ibid*., para. 52.

[47]ECtHR, *Ilascu* case, *supra* note 45; ECtHR, case of *Issa et al. v. Turkey*, appl. no. 31812/96, decision of May 30, 2000.

[48]ECtHR, *Bankovic* case, *supra* note 18, para. 80.

[49]*ibid*.

[50]*Ibid*., para. 67-71.

[51]ECtHR, case of *Cyprus v. Turkey*, appl. no. 25781/94, judgment of May 10, 2001, para. 78.

[52]ECtHR, *Bankovic* case, *supra* note 18, para. 80.

[53]*ibid*., para. 75.

second place, in the *Cyprus v. Turkey* case the clause quoted above did not deal with Turkey's responsibility for its own forces in northern Cyprus — that responsibility the Court had already established in the *Loizidou* case —[54] but with its responsibility for acts of the northern Cyprus satellite government.[55] It follows that the Court, explaining in the *Bankovic* case that it had used the phrase of the inhabitants being „excluded from the benefits of the Convention" only to explain that by the „regrettable vacuum in the system of human rights protection" it had meant only a vacuum within territories „that would normally be covered by the ECHR", and not worldwide,[56] speaks directly only of the States parties' additional responsibility for the conduct of a local satellite government — of course not at all in question in the *Bankovic* case —, and does not need to be understood as positing an additional requirement for the assumption of extra-territorial jurisdiction within the meaning of Article 1 of the ECHR in a case concerning the conduct of a State's own forces. It follows that the ECtHR's jurisprudence is compatible with the assumption of a State party's jurisdiction over occupied (or assimilated) territory even outside the territorial scope of the ECHR.

There are also some positive indications for assuming an extra-territorial jurisdiction of the States parties to the ECHR over occupied (or assimilated) territory outside the territory normally covered by that Convention. First, in the *Issa* case the Court has declared admissible an application based on military actions outside that territory.[57] While the question of jurisdiction was not considered in that decision[58], the Court related that „no other ground for declaring it inadmissible has been established".[59] In addition, there is some State practice[60] comforting the view of the more extended extra-territorial application of the ECHR: the respondent governments in the *Bankovic* case considered the military actions dealt with in the *Issa* case as „a classic exercise of ... legal authority or jurisdiction ... by military forces on foreign soil".[61] Further, in the *Öcalan* case, the ECtHR considered the arrest of a Turkish national in Kenya and therefore outside the territorial scope of the ECHR as an exercise of Turkish jurisdiction within the meaning of Article 1 of the ECHR because the plaintiff was under effective Turkish control.[62] It further considered that the circumstances of the *Öcalan* case are distinguishable from those in the *Bankovic* case „notably in that the applicant was

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[54]ECtHR, *Loizidou (merits)* case, *supra* note 45, para. 52; ECtHR, case of *Loizidou v. Turkey (preliminary objections)*, appl. 15318/89, judgment of March 23, 1995, para. 62.

[55]ECtHR, *Cyprus v. Turkey* case, *supra* note 51, para. 78.

[56]ECtHR, *Bankovic* case, *supra* note 18, para. 80.

[57]ECtHR, *Issa* case, *supra* note 47.

[58]This is emphasized in ECtHR, *Bankovic* case, *supra* note 18, para. 81, where the Court relates that in *Issa*, „the issue of jurisdiction [was not] raised by the respondent Government or addressed in the admissibility decisio[n] and in any event the merits of [that case] remain to be decided".

[59]ECtHR, *Issa* case, *supra* note 47.

[60]On the importance of State practice for the interpretation of the ECHR cf. ECtHR, *Bankovic* case, *supra* note 18, para. 56 and 62.

[61]ECtHR, *Bankovic* case, *supra* note 18, para. 37.

[62]ECtHR, *Öcalan* case, *supra* note 43, para. 93. This reasoning has been criticized by Breuer, *supra* note 40, at 450-1. In the alternative, the Court could have relied on Turkey's jurisdiction based on the nationality of the plaintiff.

physically forced to return to Turkey by Turkish officials".[63] In the same vein, the (now defunct) European Commission on Human Rights (ECommHR) had decided

> that the Contracting Parties' responsibility under the Convention is also engaged insofar as they exercise jurisdiction outside their territory *and thereby bring persons or property within their actual authority or control*;[64]

the outside territory in question — the principality of Liechtenstein — was at the time also outside the territorial scope of the ECHR.[65]

It is therefore submitted that, on the better view, the principle that extra-territorial jurisdiction is understood as a State's exercising public powers abroad having the same nature as, although possibly being more restricted than, its powers at home, applies, under the ECHR, not only to those territories „that would normally be covered by that Convention" but to all foreign territories subjected to such powers of a State party to the ECHR[66]. Indeed, there are at least four additional reasons for this view: (1) the notion posited throughout the Court's jurisprudence, and also in *Bankovic*, that the reason for the extra-territorial application of the ECHR is the States parties' effective ability, based on the effective public powers they exercise in occupied territory — lacking in the case of a mere aerial supremacy — to guarantee to the local population the rights and freedoms of the Convention[67]; (2) the fact that the States parties to the ECHR guarantee the rights mentioned in Article 1 of the ECHR to all persons within their jurisdiction without exception and that there is no difference in meaning between „exercise of jurisdiction" and „exercise of public powers"; indeed, the Court has defined the former concept by the latter[68]; (3) the fact that it is incompatible with the ECHR's object of „maintenance and further realization of human rights and fundamental freedoms"[69] that the States parties to the ECHR guarantee the rights and freedoms there provided for only to their own population and to the population of occupied territories within the territorial scope of the ECHR but exclude from that benefit individuals undoubtedly under their jurisdiction but outside the said territorial scope[70]; (4) the deference that the ECtHR has shown to the ICJ in the *Mamutkulov* case on the

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[63] *Ibid*.

[64] ECommHR, *X and Y v. Switzerland* case, *supra* note 44, at 71; my italics. Cf. also *ibid*. at 73.

[65] Further examples from the case law of ECtHR and ECommHR are quoted by Breuer, *supra* note 40, at 450.

[66] According to Council of Europe, Parliamentary Assembly, *Areas where the European Convention on Human Rights cannot be implemented*, Doc. 9730 of 11 March 2003, Report, Committee on Legal Affairs and Human Rights, Rapporteur: C. Porgourides, II para. 50, „one could well defend the view that States, to the extent that they exercise effective control over a region through their forces and to the extent that they are free to determine, for instance, law enforcement policies, are bound to secure the rights and freedoms of the Convention".

[67] ECtHR, *Bankovic* case, *supra* note 18, para. 75; also ECtHR, *Loizidou (merits)* case, *supra* note 45, para. 52.

[68] ECtHR, *Bankovic* case, *supra* note 18, para. 71. Cf. also ECommHR, *X and Y v. Switzerland*, *supra* note 44, at 57, 71 *et seq*.

[69] Preamble of the ECHR, third recital.

[70] And cf. Porgourides, *supra* note 66, para 58: „The conclusion of [the *Bancovic*] case might be interpreted as implying that, in the field of human rights, States are allowed to do abroad what they have undertaken not to do at home. One would not want that idea to gain strength in the ‚lawless areas' of Europe." And cf. Meron, *supra* note 5, at 82: „Narrow territorial interpretation of human rights treaties is anathema to the basic idea of human rights, which is to ensure that a state should respect human rights of persons over which it exercises jurisdiction."

question whether interim decisions by the respective courts are binding on their addressees[71] and which allows to assume that it will show a similar deference to the ICJ's opinion in the *Palestinian Wall* case.[72]

Interpreted in the way here proposed, the ECtHR's jurisprudence may be seen to coïncide with, and therefore to buttress, the ICJ's and the UNCHR's present reading of Article 2 (1) of the ICCPR. While the latter, contained as they are, respectively, in an advisory opinion and in a General Comment, are not binding, they therefore appear, everything considered, as the best reading of the ICCPR as a living instrument. It follows that the US is bound by the ICCPR also in occupied (or assimilated) foreign territories in which it exercises effective jurisdiction i.e. effective public powers. It may be noted in passing that, in the two examples here chosen, it would make no difference if the ICCPR were to be construed according to the more restrictive interpretation of the ECHR i.e. as applicable only in occupied territory that is „one that, but for the specific circumstances, would normally be covered by the [Covenant]": both Afghanistan and Iraq have ratified the ICCPR long before the US did so.[73]

2. Limits to that Responsibility

A State party to the ICCPR can limit its responsibility for actions detrimental to human rights under Article 4 of the ICCPR according to which „[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed" the State party can avail itself of the right of derogation. That a belligerent occupation may be considered a public emergency, at least in the occupied territory, cannot be in doubt.[74] More doubtful is whether it can be said to threaten the life of the nation. According to the ECtHR, the same phrase in Article 15 of the ECHR refers to „an exceptional situation of crisis ... which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed".[75] But declarations of a state of emergency limited to only a part of the territory of a State party are common and, as such, have not come in for criticism by the UNCHR.[76] Such a restriction may even be required under the proportionality principle.[77] It follows that also a state of emergency in only a part of the State party's territory and, presumably, in occupied territory can be considered as threatening the life of the nation. Therefore, it is submitted, it would be open to the US to declare such a state of emergency in

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[71]Cf. ECtHR, case of *Mamutkulov* et al. v. *Turkey*, appl. nos. 46827/99 *et al*., judgment of 2/6/2003, paras. 51, 106-110.

[72]*supra* note 20.

[73]Afghanistan on Apr 4, 1983, Iraq on Mar 23, 1976; cf. Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, «www.unhchr.ch/pdf/report.pdf».

[74]It has also been argued that „where there is Chapter VII authorization, a *de facto* ‚state of emergency' exists, which justifies derogations from international human rights standards": reported by Frederick Rawsky, *To Waive or Not To Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 CONN. J. INT'L L 103 (2002) 126 with references.

[75]ECtHR, case of *Lawless v. Ireland (No. 3)* (appl. no. 332/57), judgment of 7/1/1961, SERIES A, No. 3, The Law, para. 28.

[76]Cf. e.g. UNCHR, Comments on Senegal, CCPR/C/79/Add.10 (1992), para. 4-6.

[77]UNCHR, General Comment No. 29, *supra* note 79, para. 4.

territory belligerently occupied and to derogate from some of the rights recognized under the ICCPR.

In such a case, under Article 4 (3) of the ICCPR, the US should „immediately inform the other States Parties ... of the provisions from which it had derogated and of the reasons by which it was actuated". But of course, such a derogation would amount to the admission that the ICCPR has extraterritorial reach, contrary to the US Governement view[78], and therefore is not likely to happen. For this reason, the limits of admissible derogations set out in Art. 4 (2) of the ICCPR, and in the UNCHR's General Comment no. 29,[79] need not be discussed here in detail. Suffice it to say that, among others, the right to life, the prohibition of torture and fundamental requirements of fair trial must be respected also during a state of emergency.[80]

Another limit to the responsibility of a State party to the ICCPR for actions detrimental to human rights in occupied territory lies in the fact that the Fourth Geneva Convention[81] contains, in its Part III — Status and Treatment of Protected Persons — Section III — Occupied Territories — (Articles 47-78), a full regime for the protection of persons „who ... find themselves ... in the hands of a ... Occupying Power of which they are not nationals" (Article 4). This convention applies also if the „occupation meets with no armed resistance" (Article 2 (2)). As we have seen that the ICCPR applies also to occupied territory, there are two regimes concomitantly applicable which are not necessarily completely in harmony. The ICJ put it thus: „The protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant".[82] However, as the Fourth Convention contains the more specific regime, a possible conflict between the two regimes can be solved in this way „that the obligations under the human rights convention do apply. However, the specific rules of the Fourth Geneva Convention take precedence regarding specific measures which are justified on the basis of these provisions".[83] In particular, „whether a particular loss of life ... is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself".[84] In addition to the Fourth Geneva Convention, it appears that insofar as an armed conflict continues within occupied territory,

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[78]See *supra* note 3.

[79]UNCHR, General Comment No. 29. State of Emergency (Article 4), CCPR/C/21/Rev.1/add.11 of 8/31/2001.

[80]Cf. Article 4 (2) of the ICCPR and UNCHR, General Comment No. 29, *ibid.*, para. 14, respectively.

[81]Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, UNTS No. 973, vol. 75, p. 287.

[82]ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ REP. 226, para. 25 (July 8).

[83]J.A. Frowein, *The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation*, ISR. Y.B. HUM. RTS. 1 (1998) at 11. And cf. Meron, *supra* note 37, at 266.

[84]ICJ, *Nuclear Weapons*, *supra* note 82, para. 25.

operations against combatants are covered by other provisions of international humanitarian law.[85]

III. The Possible Effect of Security Council Resolutions on the Application of the ICCPR

The second question may be formulated in this way: is it a valid defense, under the ICCPR, against the reproach of a human rights violation by a State party in occupied or assimilated territories that this violation has been authorized by a Security Council resolution (such an authorization generally taking the form of an unrestricted authorization of „all necessary measures")? In principle, the answer must be „yes", as the implementation of a Security Council resolution is lawful, by virtue of that very resolution, on the basis of Article 103 of the Charter providing for the primacy of Security Council resolutions over all other treaty obligations[86], even if that implementation would violate, otherwise, human rights provisions by which the implementing State normally is bound: in such a case, the human rights treaty provisions are temporarily[87] set aside by the UN Charter and the Security Council resolution taken under Chapter VII, the latter being binding on the UN member States according to Article 25 of the Charter[88].

But this „yes" may be qualified. It is conceivable that the ICCPR, or general international law, controls the way its States parties vote in the Security Council on certain issues. In particular, it is conceivable that those States parties have to respect the international law duty inherent in every treaty not to frustrate the objects of that treaty (1). If so, while a violation of that duty presumably would not affect, in principle, the authority and the effects of a Security Council resolution voted regardless, the general international law principle that no State must benefit from its own wrongdoing may prevent a State from relying on a Security Council resolution in defense against the reproach of having infringed the ICCPR in cases in which it was itself instrumental in bringing about that resolution and was thereby violating the ICCPR or general international law (2).

1. The international law control over the way States parties to the ICCPR vote in the Security Council on certain issues

The question is whether a State party (the US) must be considered to violate the ICCPR, or general international law, when being instrumental in the adoption of a Security Council resolution which makes future violations of the ICCPR lawful. Concerning the violation of the ICCPR, this is the question whether, and in how far, the participation in Security Council

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[85]Cf. K. Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AJIL 1 (2004) at 27. He continues at 28: „The challenge lies in separating incidents that are simply criminal in nature from those that form part of the armed conflict."

[86]Cf. ICJ, *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom), Order of April 14, 1992, ICJ REP. 15 (1992), para. 39-41.

[87]R. Bernhardt, in THE CHARTER OF THE UNITED NATIONS. A COMMENTARY (B. Simma, ed., 2d ed. 2002), Article 103 para. 16.

[88]Cf. e.g. *ibid*., para. 9, with further references, and the statement of the United Kingdom agent, Mr. Steel, in the 1963rd Meeting of the UNCHR on October 18, 2001, CCPR/C/SR.1963, para. 25.

decision-making by the US as a State party to the ICCPR is controlled by that treaty. Is it a breach of treaty obligations for the US to be instrumental in the adoption of a Security Council resolution that authorizes States, notably itself, to act in a way incompatible with that treaty? Concerning the violation of general international law, it is the question whether the US, by being so instrumental, would breach the „obligation of good faith to refrain from acts calculated to frustrate the object of the treaty attached to a State which has signed a treaty“,[89] recognized under general international law.[90]

Under political and practical aspects, a control of the ICCPR, or of general international law, over the voting of its States parties within the Security Council appears desirable to rein in, in questions relating to human rights, the dominating influence the US have within the Security Council[91] and more generally the marked power inequality of Security Council members. It could be a means to limit US exceptionalism in human rights law, closing one of its preferred avenues out of treaty and other international law obligations.[92] A good example of the dominating influence of the US in the Security Council, and the way it enhances and uses it, is the story of the adoption of Security Council Resolution 1441 (2002)[93] which was ultimately used, by the US and its (few) allies, as legal justification of the second Iraq war. Here, it has been said that „for the first time, Washington approached the U.N. as a publicly demanding hegemon, demanding a certain result from the Council and threatening illegal unilateral military action against Iraq and U.N. ‚irrelevance' if its bidding was refused“.[94] Even more illuminating may be press reports on the adoption of that resolution. According to them, „[u]sing aid as both incentive and arm-twister isn't a new approach. ... But the economic aspect to negotiations over this resolution is more overt than ever. ‚There's so much at stake for the adminstration on this that they will use every lever possible,' a U.S. State Department official said“.[95] Even if this resolution did not authorize, on the face of it, a unilateral decision by the US to wage war against Iraq, and therefore did not contain one of the clauses considered in the present contribution, it still shows the use the US is prepared to make of its hegemonial and economic power. An objective international law duty to respect, when voting in the Security Council,

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[89]Thus the formulation of the International Law Commission (ILC), *Draft Articles on the law of treaties with commentaries*, YBILC 1966, II, 187, 202, Article 15 comm. (1).

[90]Cf. e.g. ICJ, *Case concerning the Gabcíkovo-Nagymaros Project*, ILM 1998, 195 *et seq.*, diss. op. Fleischhauer; BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, Reprint ed. 1987, at 117: „it follows that it is not permissible, whilst observing the letter of the agreement, to evade treaty obligations by ... ‚indirect means'“. Cf. also Legal Service of the European Commission, *ICC undermined by bilateral immunity agreements as proposed by the U.S.*, 23 HRLJ 158 (2002). In the Vienna Convention on the Law of Treaties, this obligation is even recognized for the time predating the ratification of a treaty; cf. Article 18 of the Convention.

[91]On the instrumentalization of the Security Council by the US cf. Nico Krisch, *Imperial International Law*, GLOBAL LAW WORKING PAPER 01/04, at 26-27.

[92]Cf. ICJ, *Lockerbie* case, *supra* note 86, para. 28-34; and e.g. Marc Weller, *Undoing the Global Constitution: UN Security Council Action on the International Criminal Court*, 78 INTERNATIONAL AFFAIRS 693 (2002).

[93]of November 8, 2002.

[94]H.J. Richardson, III, *U.S. Hegemony, Race and Oil in Deciding United Nations Security Council Resolution 1441 on Iraq*, 17 TEMP. INT'L & COMP. L. J. 27 (2003) at 80.

[95]M. Farley, *Mauritius' Envoy to U.N. Gets the Boot for Not Toeing the Line*, LOS ANGELES TIMES, November 6, 2002, p. A.5.

human rights treaty obligations entered into *erga omnes contractantes* may countervail such a use to a certain degree and could at least delegitimize it.

The legal discussion will start with the question whether a State party to the ICCPR (the US) is bound by that treaty when participating in Security Council decision-making (a). Considered under the angle of the ICCPR, the question is whether such participation constitutes an exercise of jurisdiction bringing it, under Article 2 (1) of the ICCPR, within the purview of that treaty (aa). Considered under the angle of the UN Charter, it is the question whether it would be made overly difficult to „maintain and restore international peace and security" (Article 39 of the UN Charter) if (some of) the members of the Security Council were so bound (bb). The next question is whether a State party's being instrumental in the adoption of a Security Council resolution unrestrictedly authorizing security forces in the territory of their deployment to take „all necessary measures" infringes, by itself, an obligation under the ICCPR or general international law (b).

(a) According to Article 2 (1) of the ICCPR,

> [e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals ... subject to its jurisdiction the rights recognized in the present Covenant.

(aa) The question therefore is whether participating in Security Council decision-making is part of the (functional) „jurisdiction" of a State. One possible reason to deny this is the fact that the Security Council is an autonomous international body. While there are, as far as I can see, no relevant views of the UNCHR on that question and no discussion of it under the ICCPR, there exists pertinent jurisprudence under the ECHR. For example, the ECommHR has declared inadmissible the application on behalf of *Rudolf Hess* directed against the United Kingdom because of *Hess'* continued imprisonment in an Allied Prison under the supreme authority of the Allied Kommandatura Berlin.[96] It concluded

> that responsibility for the prison ... is exercised on a Four Power basis and that the United Kingdom acts only as a partner in the joint responsibility which it shares with the three other Powers ... and that ... [this] participation ... is not a matter „within the jurisdiction" of the United Kingdom, within the meaning of Article 1 [ECHR].[97]

But this view of the ECommHR which is only *obiter*[98] does not take into account that it was the State party's own decision on how to cast its vote within the autonomous body (the Kommandatura) which had to be scrutinized under the ECHR, and not the decision of the latter body as such.

In accordance with this criticism, the ECtHR held in the *Matthews* case, without further defining and thereby restricting the concept of jurisdiction, that

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[96]ECommHR, Case of *Ilse Hess v. United Kingdom* (appl. no. 6231/73), decision of May 28, 1975, 2 DECISIONS AND REPORTS 72.

[97]*ibid*. at 74.

[98]Cf. J.A. Frowein, in: *idem*/W. Peukert, EUROPÄISCHE MENSCHENRECHTSKONVENTION. EMRK-KOMMENTAR (2nd ed. 1996), Article 1, para. 14.

Article 1 [of the ECHR] makes no distinction as to the type of rule or measure concerned, and does not exclude any part of the member states' „jurisdiction" from scrutiny under the Convention.[99]

The ECtHR applied this concept to the decisions taken by the United Kingdom in a two-step EC procedure which led to a measure of the EC — without doubt an autonomous organization — depriving the inhabitants of Gibraltar of their right to vote in the elections to the European Parliament,[100] and considered them as an exercise of jurisdiction. In the framework of that procedure, the United Kingdom first assented to a decision of the Council of the EC, which had to make a proposal by unanimous vote, and then adopted that proposal — together with the other Member States — in accordance with its constitutional requirements. The Court held the United Kingdom, together with all the other Member States of the EC, responsible for that measure. It expressly rejected the United Kingdom's contention that, „[i]n the case of the provisions relating to the election of the European Parliament, the United Kingdom had no [effective] control [over the act complained of]".[101] The ECtHR's reasoning, it is submitted, is based only on two aspects: that the United Kingdom could have prevented the measure (even if it had no positive control over it), and that the measure failed to secure human rights protected under the ECHR.[102]

The ECtHR's reasoning may be transferred to Security Council resolutions in this sense that, if a State party, member of the Security Council, is instrumental in the adoption of such a resolution, that action or inaction must be considered an exercise of jurisdiction within the meaning of Article 1 of the ECHR. Therefore, if the resolution affects human rights protected under the ECHR, such State party is responsible for it. As every permanent member of the Security Council can prevent any resolution by using its so-called veto power (Article 27 (3) of the Charter), such a member, being at the same time a State party to the ECHR, must be held responsible, under that treaty, for the adoption of such a resolution.

The same applies, it is submitted, in the case of Article 2 (1) of the ICCPR. This submission is based on the similarities of object, structure and provisions of both treaties and in particular on the influence the ECtHR's jurisprudence has on the UNHCR.[103] It is comforted by the fact that also another UN treaty body i.e. the UN Committee on Economic, Social and Cultural Rights (CESCR)

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[99]ECtHR, case of *Matthews v. United Kingdom* (appl. no. 24833/94), judgment of February 18, 1999, REP. 1999-I, 251, para. 29, confirmed in ECtHR, case of *Prince Hans Adam II of Liechtenstein v. Germany* (appl. no. 42527/98), judgment of July 12, 2001, para. 46.

[100]ECtHR, *Matthews* case, *ibid*., para. 33-34.

[101]*Ibid*., para. 26, 34.

[102]The further reference by the Court to the fact that EC and Gibraltar legislation had the same effects on the population of Gibraltar (*ibid*., para. 34) is meant to show that the right to vote to the European Parliament is, for that population, part of the guarantee of a practical and effective right to vote in general.

[103]Cf. text at *supra* notes 16 through 19.

considers that the provisions of the Covenant [on Economic, Social and Cultural Rights] ... cannot be considered to be inoperative ... solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions".[104]

And the CESCR continues: „it should also be recalled that every Permanent Member of the Security Council has signed the Covenant".[105] This clearly implies that, in the CECSR's view, those members have to respect that Covenant even when voting in the Security Council. All things considered, therefore, under the angle of the ICCPR, it appears that its States parties' voting on a Security Council resolution is controlled by the ICCPR.

(bb) The next question is whether the Security Council's main task under Chapter VII of the UN Charter i.e. to „maintain and restore international peace and security" (Article 39 of the Charter) would be made overly difficult if the voting of its members were so controlled. This question is relevant because a positive answer might determine the interpretation of the ICCPR. This is so because the Charter primes the ICCPR for those States that are parties to both; this follows from Article 103 of the Charter.[106] But this primacy of the Charter is relevant only if there is a contradiction between a State's obligations under the one and the other treaty.

There could be such a contradiction if the obligation of States parties to the ICCPR to take into account human rights when voting within the Security Council would make the decision-finding within the latter overly difficult.[107] It is evident that such an obligation of its members does not make it easier for the Security Council to come to a decision. But this difficulty does not go beyond the one following from the fact that, according to all available evidence, the members' positions in Security Council deliberations are primarily guided by national interests. The Charter is not opposed to that; rather, the institution of the permanent members' so-called veto demonstrates that the Charter considers the Security Council members' national interests as important[108]. This is wholly legitimate as the Security Council is a political organ[109]. Therefore, the pursuit of national interests cannot be considered an inadmissible handicap for the decision-making within the Security Council. This being so, there is no reason to exclude ICCPR obligations from those interests the Security Council members may pursue when voting in the

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[104]CESCR, The relationship between economic sanctions and respect for economic, social and cultural rights:.12/12/1997.E/C/12/1997/8, CESCR. General Comment 8, para. 7.

[105]*Ibid*., para. 8.

[106]Cf. text at *supra* note 86. Also, the ICCPR is younger than the Charter so that the ratification of the Charter by the States parties of the (younger) ICCPR cannot be an infringement of the latter. The inverted temporal order of the ECHR and the EC Treaty was of some importance to ECtHR, *Matthews* case, *supra* note 99, para. 32. And cf. ECommHR, *Hess* case, *supra* note 96, at 74.

[107]Thus, in the context of the EC, U. Everling, *Überlegungen zur Struktur der Europäischen Union und zum neuen Europaartikel des Grundgesetzes*, 108 DEUTSCHES VERWALTUNGSBLATT (DVBL.) 936 (1993) at 946-7; contra: Th. Schilling, *Zur Bindung der Bundesregierung an das Grundgesetz bei der Mitwirkung an der Rechtsetzung im Rate der EG. Die Mitwirkung als Gesetzgebung im Sinne des Grundgesetzes*, 112 DVBL. 458 (1997) at 462-3.

[108]Accordingly, B. Simma/ St. Brunner/ H.-P. Kaul, in Simma, *supra* note 87, Article 27 para. 123, call the notion of a possible misuse of the veto power „from a legal point of view ... flawed and untenable".

[109]Cf. e.g. *ibid*., para. 152, and I. Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 EJIL 437 (2003), *passim*, who speaks *ibid*. at 480 of „perceptions of national interest ... which are essential to the effective functioning of the Council".

Council; as treaty obligations, those obligations (must) decisively influence the States parties' national interests. Indeed, there is even less such reason here than in the case of other national interests as promoting and encouraging the respect for human rights is, under Article 1 (3) of the UN Charter, one of the Purposes of the United Nations which are guidelines for the Security Council's decision-making even under Chapter VII.

There could also be a contradiction between the obligations stemming from the two treaties if, even without a corresponding Security Council decision, „to maintain and restore international peace and security [were] an international law duty incumbent on member states even if it means breaching other rules of international law",[110] especially of human rights law. However, such a duty i.e. a purely substantive obligation of the Security Council members to maintain and restore the peace without a corresponding Security Council resolution must not be assumed if only for this reason that such a duty does not exist for the Security Council itself. Although the determination under Article 39 of the Charter that there is a threat to or a breach of the peace is a decision bound by law[111], it is so only in this sense that the Security Council is prevented from determining a threat to the peace if objectively there is none but not in this sense that it is bound to determine such a threat if objectively there is one[112].

The conclusion therefore is that Article 103 of the Charter does not invalidate the result found under the angle of the ICCPR i.e. that the latter controls voting on a Security Council resolution as such voting is an exercise of jurisdiction within the meaning of Article 2 (1) of the ICCPR. The States parties to the ICCPR therefore are obligated to prevent, if they can, as the US always can thanks to its veto power, the adoption of a resolution if their being instrumental in that adoption would violate their obligation to secure the rights recognized by the ICCPR.

Being instrumental in the adoption of a Security Council resolution unrestrictedly authorizing security forces in the territory of their deployment to take „all necessary measures" may be considered as a violation of that obligation. Although such a resolution contains a basically abstract rule, it can be seen as abolishing temporarily the guarantees granted under the ICCPR and thereby creating, under human rights aspects, a precarious situation for the population concerned by the resolution. Such a situation may be construed, as such, as a concrete interference with the rights recognized under the ICCPR. The UNCHR occasionally has considered a precarious situation created by an abstract rule as an interference with a protected right.[113] Generally, however, it considers only an act that implements the abstract rule and

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[110]Such a duty is discussed by G.H. Oosthuizen, *Playing the Devil's Advocate: the United Nations Security Council is Unbound by Law*, 12 LEIDEN JOURNAL OF INTERNATIONAL LAW 549 (1999) at note 54.

[111]Cf. e.g. Th. Schilling, *Die „neue Weltordnung" und die Souveränität der Mitglieder der Vereinten Nationen*, 33 ARCHIV DES VÖLKERRECHTS 67 (1995) at 78 *et seq*. with further references; J.A. Frowein/ N. Krisch, in: Simma, *supra* note 87, Article 39 para. 5.

[112]Cf. also V. Gowland-Debbas, *The Functions of the United Nations Security Council in the International Legal System*, in: THE ROLE OF LAW IN INTERNATIONAL POLITICS, M. Byers (ed.), 277 (2001) at 288.

[113]Cf. e.g. UNCHR, case of *Aumeeruddy-Cziffra* et al. v. *Mauritius*, comm. no. 35/1978, views of Apr 9, 1981, para. 9.2(b)2(i)2; UNCHR, case of *Toonen v. Australia*, comm. no. 488/1992, views of Apr 4, 1994, para. 8.2. And cf. ECtHR, case of *Marckx v. Belgium*, appl. no. 6833/74, judgment of Jun 13, 1979, SERIES A, no. 31, para. 50.

infringes a protected right by itself as a forbidden interference.[114] Its jurisprudence therefore does not permit to conclude with any degree of certainty that a Security Council resolution, as such, may constitute a prohibited interference with protected rights.

(b) But there is another aspect to the question. A State party to the ICCPR's being instrumental in the adoption of a Security Council resolution authorizing security forces in the territory of their deployment to take „all necessary measures" — including those which, otherwise, would be contrary to the ICCPR — could infringe its obligation to guarantee human rights practically and effectively.[115] The ECtHR's held in the *Matthews* case that all States parties to the ECHR participating in international body decision-making are responsible *ratione materiae* for the consequences of that body's decision i.e. they have to take care that the rights recognized in the ECHR are effectively „secured".[116] The important point in the present context is that this applies not only to the State party directly concerned i.e. the one in whose territory a human rights violation is caused by the international body decision but to all States parties being at the same time members of that body.[117] This obligation therefore goes beyond the normal territorial obligation of a State party to secure the rights guaranteed. It must be taken also to cover other state party conduct that is apt indirectly to cause human rights violations e.g. the participation in the adoption of an international body decision justifying such violations.

Under this aspect, the very general obligation to guarantee human rights practically and effectively can be equated with the general international law „obligation of good faith to refrain from acts calculated to frustrate the object of the treaty attached to a State which has signed a treaty".[118] Strictly speaking, however, the equation of the ICCPR obligation to guarantee human rights practically and effectively with the good faith obligation under general international law not to frustrate the objective of a treaty whose party one is is not necessary for present purposes;[119] for those purposes, the uncontested existence of the latter obligation is sufficient. It is therefore this obligation that I shall discuss.

The object of a human rights treaty clearly is „the maintenance and further realisation of Human Rights and Fundamental Freedoms"[120] which is recognized by the ICCPR when it considers „the obligations of states under the Charter of the United Nations to promote universal respect for,

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[114]Cf. prominently UNCHR, *Faurisson* case, *supra* note 14, para. 9.3. And cf. ECtHR, case of *Buckley v. United Kingdom*, appl. no. 20348/92, judgment of Jun 25, 1996, REP. 1996-IV, para. 59.

[115]This obligation is a matter of course. Although it is not expressly addressed by the UNCHR, it is settled case law under the ECHR; cf. e.g. ECtHR, case of *Klass v. Germany*, appl. no. 5029/71, judgment of September 6, 1978, SERIES A, No., 28, para. 34; ECtHR, *Matthews* case, *supra* note 99, para. 34.

[116]ECtHR, *Matthews* case, *supra* note 99, para. 34.

[117]*Ibid*., para. 33: „The United Kingdom, together with all other parties of the Maastricht Treaty, is responsible *ratione materiae* under Article 1 of the Convention ... for the consequences of that Treaty" (my underlining; the Court's italics).

[118]Cf. text at *supra* note 89.

[119]It is necessary for the discussion of possible remedies against a violation of that obligation; cf. Th. Schilling, *Der Schutz der Menschenrechte gegen Beschlüsse des Sicherheitsrats. Möglichkeiten und Grenzen*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (HEIDELBERG J INT'L LAW) 343 (2004) *sub* IV 3.

[120]Thus the third recital of the Preamble of the ECHR.

and observance of, human rights and freedoms".[121] A Security Council resolution unrestrictedly authorizing „all necessary measures" in occupied territory is apt to dispense forces there deployed from the obligation to respect human rights: all measures taken by those forces within the framework of the Security Council resolution are, in principle, lawful[122]. Such a dispensation from the duty to respect human rights may constitute, again in principle, a frustration of the objects of the ICCPR.

It remains to be seen in which cases a Security Council resolution unrestrictedly authorizing security forces in their area of deployment to take „all necessary measures" effectively may frustrate the objects of the latter and thereby violate the good faith obligation discussed. These are those cases in which the security forces of a State authorized to implement the resolution are dispensed, by that resolution, from the respect of human rights which otherwise they would have to secure in the occupied territory. As we have seen that the ICCPR applies extraterritorially[123], a Security Council resolution dispensing the security forces of a State party to the ICCPR from respecting the rights guaranteed by that treaty may very well frustrate the objects of that treaty. Indeed, such a frustration is obvious in the only case here considered in which the State party to the ICCPR having allowed the adoption of the Security Council resolution is itself authorized under it to implement it; by being instrumental in the adoption of the resolution such a State effectively dispenses itself from the obligation to secure the rights guaranteed by the ICCPR and thereby clearly frustrates the latter's object to secure human rights.[124] Therefore, it is the fact of being instrumental in the adoption of such a resolution itself, irrespective of the latter's eventual consequences, which violates the good faith obligation discussed and, it is submitted, the ICCPR obligation to guarantee the ICCPR rights practically and effectively.

2. The effects of a violation of such international law control

(a) If one or more States parties to the ICCPR act in violation of the international law obligation of good faith, and thereby in violation of the ICCPR, in being instrumental in the adoption of a Security Council resolution, the validity of that resolution presumably is not affected thereby[125]; the validity of the resolution is independent of the Security Council members' motives in adopting it and the eventual violation of international or municipal obligations they thereby commit.[126] The same is true, in principle, of the effects of such a resolution. Therefore, and

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[121]Thus the fourth recital of the Preamble of the ICCPR.

[122]Cf. text at *supra* note 86 *et seq.*

[123]Cf. *supra sub* II.

[124]Whether the same applies in cases in which the two States involved are different States either both parties to the ICCPR, or States parties to different human rights treaties, or bound only by internal human rights, is a question that does not need discussion in the present context; I tend to answer it in the positive for the first group of cases and in the negative for the two remaining groups. Cf. Schilling, *supra* note 119, at note 65.

[125]What has been said of a possible misuse of the veto power (cf. *supra* note 108) presumably must apply also to a „mis-non-use" of that power.

[126]Cf. also Gowlland-Debbas, *supra* note 112, at 305: „UN member States are not necessarily barred from doing collectively, on the basis of a Security Council decision, what they are prohibited from doing as parties to a treaty."

again in principle, also if such a violation happened, measures taken by security forces in occupied or assimilated territories covered by that resolution are lawful as long as they fall within the framework of that resolution even if they would infringe the ICCPR in absence of that resolution. However, it must be asked whether the same applies if the forces in question are the proper forces of a State party (the US) that was instrumental in the adoption of the Security Council resolution and that thereby infringed international law.

This question must be answered in the negative. There is a customary international law principle that no State should benefit from its own wrongdoing,[127] and it clearly applies in the present context. Should US forces in Afghanistan or Iraq treat people under US jurisdiction in a degrading way or should they detain people in a way not compatible with the ICCPR or international humanitarian law, and could the US claim, based on Article 103 of the UN Charter, that Article 7 or 9 of the ICCPR, as the case may be, is not applicable because of the primacy of the Security Council resolution making such conduct lawful, it would benefit from its own wrong i.e. being instrumental in the adoption of that resolution in violation of the good faith obligation not to frustrate the objects of the ICCPR, the benefit being the dispensation from a legal obligation under the ICCPR i.e. the obligation to respect the human rights recognized therein. It is precisely this consequence which the said principle does not permit. It is therefore missing the point when a permanent member of the Security Council maintains that, if the measures it has taken against terrorism, mandated by Security Council resolution 1373 (2001), should infringe human rights guaranteed under the ICCPR, „the provision of Article 103 of the Charter of the United Nations to the effect that obligations under the Charter prevailed over those under any other international agreement would apply"[128]. The decisive point is rather that, by reason of the principle discussed, that permanent member could not dispense itself effectively, by allowing the adoption of the resolution in question, from the respect of its treaty obligations.

(b) One might be excused for asking whether this result may lead to any practical consequences, in particular as the US has not signed the Optional Protocol to the ICCPR[129] and therefore the individual communications procedure under this protocol is not available. It is true that the US has accepted the competence of the UNCHR under Article 41 of the ICCPR and that, therefore, a State communication procedure would be possible. However, this procedure has never been tested and therefore this possibility is somewhat impractical. On the other hand, the State reports procedure is very practical. In such a procedure, in view of certain measures the United Kingdom had introduced to implement Security Council Resolution 1373 (2001), the UNCHR has indicated that the State party had to respect the rights recognized by the ICCPR even when implementing that resolution.[130] The United Kingdom answered by referring to Article 103 of

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[127]ICJ, *Case concerning Interpretation of Peace Treaties with Albania, Hungary and Rumania (2nd phase)*, Advisory Opinion, ICJ REP. 1950 (July 18), 221, 244, per Judge Read, diss., using the term „estoppel". Cf. also ICJ, *Case concerning the Gabcíkovo-Nagymaros Project*, *supra* note 90, para. 110, with reference to PICJ, *Case concerning the factory at Chorzów*, SERIES A 7, and CHENG, *supra* note 90, at 149 *et seq*.

[128]Thus the statement of the representative of the United Kingdom, Mr. Steel, *supra* note 88.

[129]of December 16, 1966, 999 U.N.T.S. 302, entered into force on March 23, 1976.

[130]Cf. UNCHR, Concluding Observations: United Kingdom of Great Britain and Northern Ireland. 06/12/2001.CCPR/CO/73/UK; CCPR/CO/73/UKOT, para. 6.

the UN Charter. But, in the case of a permanent member of the Security Council, this answer is incompatible with the principle prohibiting a State to benefit from its own wrong. Although the UNCHR has not discussed the role the United Kingdom played in the adoption of that resolution, the latter's consent to that resolution must be considered as a measure adopted (not) to give effect to the rights recognized in the ICCPR within the meaning of Article 40 of the ICCPR, provided, of course, that that resolution effectively permits violations of the ICCPR. As such, it can and should be discussed in the State reports procedure. The practical consequence of the above result therefore is a modicum of control by the UNCHR of Security Council resolutions detrimental to the respect of human rights, and of their implementation.

IV. Conclusion

An interpretation of the ICCPR as a living instrument has led us to the conclusion that the ICCPR is applicable also in territories occupied by its States parties in this sense that those States parties are obligated under international law to respect the rights recognized under the ICCPR also in those territories. For the permanent members of the Security Council, and therefore for the US, this applies also in cases in which a Security Council resolution dispenses them, in principle, from the respect of the ICCPR in an occupied territory: under such circumstances, for a State party to be instrumental in the adoption of the resolution is a violation of the international law prohibition to frustrate the objects of the ICCPR, and as a consequence, a reliance on that resolution (which is valid notwithstanding) by that State party is not permitted by the international law principle that no State may benefit from its own wrong. This conclusion allows the discussion, in the UNCHR's State report procedure, as well of the consent to ot the toleration of the Security Council resolution authorizing „all necessary measures“ as of the measures effectively adopted in implementing the resolution.