5. Human Rights on the Battlefield

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1 Introduction

One of the most controversial and politically charged issues in current human rights discourse is whether and to what extent states are bound by their human rights obligations with respect to the conduct of their armed forces abroad in the context of armed conflict, occupation, and peace operations.

In the decades following the adoption and entry into force of the major human rights treaties, the capacity of states to project their power beyond their borders has dramatically increased. In the modern world, states are capable of mobilizing massive destructive power across the globe with increasing speed and efficiency. A crucial consequence of this enhanced military power is the increasing breadth of the state’s impact on the enjoyment of human rights in territories far beyond its physical frontiers.

In addition to traditional situations of armed conflict, individuals today may find themselves in the power of states in fairly complex configurations. States are increasingly operating through multilateral frameworks, e.g. through coalitions or under the auspices of UN or regional peacekeeping operations with increasingly expansive mandates.

Further, states are now purporting to create zones beyond the reach of their human rights obligations. Detention facilities at Guantanamo Bay, on the high seas, and in secret locations raise controversial questions as to the nature and purpose of human rights norms. Indeed, efforts by powerful states to withdraw their military conduct from the purview of international law threaten to undermine the hard-won victories achieved by the international human rights movement during the past sixty years.

Whether such conduct is beyond the reach of the relevant states’ obligations under international human rights law1 is a question very much alive before interna-

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1 This refers to international human rights law in the strict sense (i.e. not including humanitarian law and international criminal law). The present analysis will focus on the International Covenant on Civil and Political Rights (ICCPR), the International Cov-
tional courts and human rights mechanisms. Increasing numbers of cases involving alleged human rights violations committed in conflict situations outside the physical territory of the state are being adjudicated in various international fora. These institutions have already developed a varied jurisprudence, accepting extraterritorial application of human rights norms to the different scenarios to differing degrees.

Underlying the controversy are a number of complex legal questions, several of which have eluded definitive resolution. Chief among these questions is whether individuals affected by the conflict are among those whose rights states are obliged to secure. A common feature of human rights treaties is that the scope of beneficiaries (i.e. those whose rights the state is obliged to respect and ensure) is typically limited to those within a state’s territory or subject to its jurisdiction. Based purely on an ‘ordinary meaning’ interpretation of the text, it is unclear how this would apply with respect to individuals outside of a state’s territory. Even if a juridical basis for extraterritorial application is established, the question of positive obligations must still be resolved.

The complexity of answering these questions is further compounded in situations of collective action, giving rise to such questions as whether national contingents of multilateral operations retain their status as organs of their respective sending states.

The purpose of this chapter is to outline the issues underlying these questions, and to provide a framework for answering them. As a preliminary matter, section II examines the relationship between human rights law and international humanitarian law. Section III explores the nature of human rights obligations and the various modes of state responsibility in relation to human rights violative conduct. Section IV delineates a framework for understanding the application of human rights law in relation to individuals outside of a state’s territory. Section V concludes the analysis by discussing implications of the present legal framework and suggesting principles to guide future jurisprudential development.

2 The Relationship between Human Rights Law and Humanitarian Law in Times of Armed Conflict and Occupation

Human rights law and humanitarian law (i.e. the law of armed conflict) are separate bodies of international law with distinct modes of application. While human rights law is primarily concerned with the way a state treats those within its domain,