

HUMAN RIGHTS EXCEPTIONS

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INTRODUCTION

International human rights law ('IHRL')¹ recognises a core of rights that are absolute. These rights protect human dignity and integrity and are not subject to any qualification, whether in the form of an exception or derogation (within IHRL treaty regimes), or defence (under general international law). The prohibition of torture and slavery are very clear examples.² Most other human rights, however, including the right to life, are subject to some form of qualification. These qualifications might take the form of limitations to the scope of the right or the scope of the rights protection (for the purposes of balancing competing individual rights-based interests against public interests), or in the form of a temporally limited suspension of the obligation to respect the right or the secondary obligations which flow from responsibility for breach of the right (for the purposes of effectively responding to emergencies). In each case, the qualification carves out a space for the exercise of regulatory authority or executive power that is relatively free from the constraints otherwise imposed by a broad conception of human rights, in the interests of achieving some legitimate aim – and have in common an instrumentalist approach to human rights protection.

This chapter explores the different layers of qualification applicable to three IHRL treaty regimes, in particular the ICCPR, ECHR and ACHR – with a view to outlining a typology of qualifications and the interactions between them. One of these qualifications is better qualified as an exemption (at least formally), in that it defines the scope of the rule. Other qualifications will amount to exceptions properly so called, in that they are primary rules which carve out a space that is free from the restrictions otherwise imposed by the rule. The final qualification explored in this chapter is in the form of a defence – it operates to limit the consequences which would normally flow from a breach of the rule. Despite these differences, this paper argues that qualifications in IHRL exist on a spectrum or continuum – even though formally they operate at different levels (for instance some are primary rules internal to the particular IHRL regime, while others are secondary rules which operate at the

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¹ The focus of this chapter will be on the three human rights treaty regimes which expressly allow for derogations – the International Covenant on Civil and Political Rights (1966), 999 UNTS 171, entry into force 23 March 1976 ('ICCPR'); the European Convention on Human Rights (1950), 213 UNTS 221, entry into force 3 September 1953, ('ECHR'), and the American Convention on Human Rights (1969), O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6, entry into force 18 July 1978 ('ACHR') – and are subject to some form of monitoring mechanism (whether a court with compulsory jurisdiction or a treaty monitoring body to which the State party must report).

² Within IHRL treaty regimes, the prohibition of torture and slavery is framed in absolute terms, and expressly excluded from applicable derogation provisions (discussed in Section I.C below). Under general international law, the practice of torture or slavery cannot be the subject of any circumstance precluding wrongfulness in virtue of their characterisation as a *jus cogens* (peremptory) norm, pursuant to Article 26 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, in *Report of the International Law Commission on the work of its fifty-third session*, UN Doc A/56/10 (2001), 31 [hereinafter 'ILC Articles on State Responsibility'].

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level of general international law)³, the different qualifications overlap or bleed into each other and the structure of analysis in respect of each qualification can be relied on to inform the others' application on the basis of principles of systemic interpretation.⁴

TYPOLGY OF 'EXCEPTIONS' APPLICABLE TO IHRL

All types of qualification which operate in the IHRL context are in a broad sense instrumentalist – they enable the exercise of regulatory authority or executive power that is potentially or actually otherwise inconsistent with individual human rights interests, to the extent necessary to either facilitate living in community (balancing the protection of individual rights against the public interest), or to respond to crisis (with a view to restoring non-crisis or 'normal' conditions). Despite this common foundation, however, four types of qualification are ordinarily distinguished:

1. *Limited Rights*: The HR interest does not fall within the scope of a protected right (exemptions, which reflect the public interest, define the scope of the primary rule) [Section I.A(i) below].
2. *Qualified Rights*: The HR interest falls within the scope of the primary rule (a protected right), but in circumstances that are defined within the primary rule, the limitation to the right is permissible in order to achieve legitimate aims (protecting public interests) [Section I.A(ii) below].⁵
3. *Derogations*: The HR interest falls within the scope of the primary rule (a protected right), but in circumstances that are defined by a separate primary rule (which is nevertheless internal to the relevant IHRL treaty regime), the State's obligation to respect that right is temporarily (for so long as the derogation triggering situation persists) waived⁶ [Section I.B below].

³ Primary rules of international law consist of the substantive international obligations of states under customary and treaty law (of particular relevance for present purposes, IHRL treaty obligations), while secondary rules are of general application (of particular relevance for present purposes, the rules of State responsibility which bear on the identification of a breach of the primary rules and the consequences of any such breach). See J Crawford, 'Introduction' in *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002), 16 [hereinafter 'Commentary to ILC Articles on State Responsibility'].

⁴ See e.g. Article 31(3)(c), Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331, entry into force 27 January 1980.

⁵ In his contribution to this edited volume, Jorge Viñuales treats these two first types of qualification together as 'specific carve-outs or exemptions', describing them as responding 'to a specific reason, such as the protection of a specific interest considered as being of overriding importance as compared to the goals pursued by the norm or set of norms.' See J Viñuales, 'Seven ways of escaping a rule: Of exceptions and their avatars in international law' in F Paddeau and L Bartels (eds) *Exceptions and Defences in International Law* (OUP 2017) XX, XXX. They are treated separately in this chapter on IHRL because they are, in principle, subject to different forms of analysis and engage IHRL treaty monitoring mechanisms differently – although, as set out further below, the difference is indeed more theoretical than practical.

⁶ Of course on jurisprudential grounds, some might contest whether it is even possible to have a right without a corresponding obligation to respect that right. For the purposes of avoiding this paper falling into a black hole

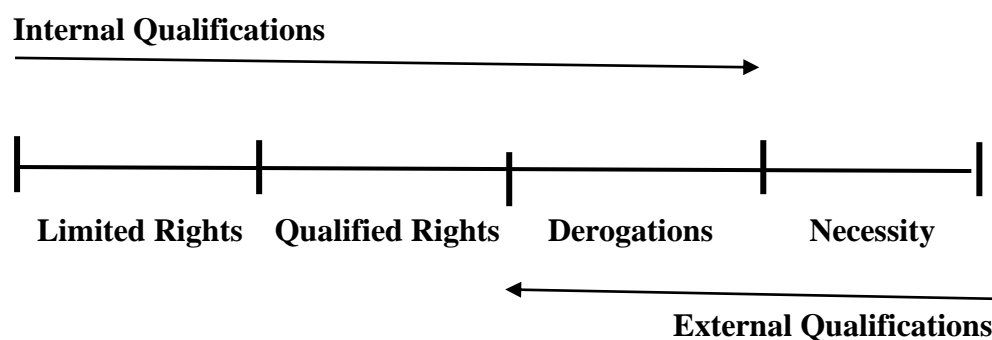
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4. *Excuses*: The HR interest falls within the scope of a primary rule (a protected right), the State's obligation to respect that right has not been waived and the right has been breached, but in circumstances defined by a secondary rule, the obligations which normally attach to a breach⁷ temporarily (for so long as the excuse triggering situation persists) do not follow from the breach [Section II below].

These qualifications exist along a continuum (illustrated below in Figure 1) that creates space for human rights inconsistent exercises of regulatory authority or executive power in the interests of a legitimate aim, each new qualification moving further along the continuum from the core of the right (defined through its scope). These four categories may also be analysed as reflecting two types of qualification which apply to international human rights obligations along this continuum: qualifications that are internal to relevant IHRL treaty regimes and those that are external to them. The first three qualifications outlined above are internal to the IHRL treaty regimes, while the fourth is external. The 'internal/external' nature of the qualifications is co-extensive with the distinction between primary rules of international law (sourced from specialised treaty regimes) and secondary rules which are of general application and are creatures of customary international law. This latter distinction in respect of the source of the qualification results in their being subject to differential monitoring. While internal qualifications (as primary treaty rules) remain subject to scrutiny by the relevant human rights treaty monitoring bodies or courts, external qualifications are ordinarily subject to the general international law mechanisms of State responsibility and courts of general jurisdiction (like the International Court of Justice).⁸

Figure 1



of jurisprudence, it will be assumed that international law and international human rights law now accepts that individuals are rights bearers, even in the presence of derogations and circumstances precluding wrongfulness.

⁷ In particular, cessation and the obligation to make reparations. Arts 30 & 31, ILC Articles on State Responsibility.

⁸ It is possible, on the basis of a doctrine of incidental jurisdiction, that human rights courts and treaty monitoring bodies might exercise jurisdiction over external qualifications, but in practice there are no examples of such exercise.

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I. Internal qualifications

Each of the IHRL treaties explored in this chapter adopt the three ‘internal qualification’ approaches to the relationship between individual rights protection and the legitimate aims pursued by governments, as illustrated in the continuum above.

A. Limited rights vs qualified rights

(i) *Limited Rights*

The first such approach might formally be qualified as an exemption,⁹ in that the recognition of legitimate aims in the exercise of regulatory authority or executive power (which can be pursued unrestricted by human rights interests) is built into the scope of the right – the right is *limited*. The approach involves the identification of a human rights *interest* in general terms (life or liberty for instance), and the exemption of either specific government action, or generally defined government action (all of which is instrumental in protecting a public interest) from the scope of the *right* protecting that *interest*. In principle, the regulatory conduct or exercise of executive power which falls within the scope of an exemption does not engage the protected right – and because it falls outside the ‘rule’, it is in no need of an ‘exception.’¹⁰

The ECHR for instance, recognises a broad interest in liberty, but excludes *specific* deprivations of liberty from the scope of the right (a deprivation of liberty as a result of lawful detention after conviction by a competent court, for instance).¹¹ In the case of the ECHR, the balance between public interest and individual rights is determined *a priori*. The ICCPR and the ACHR, on the other hand, recognise a broad interest in liberty from which a *general* exemption (non-arbitrary deprivations) is carved out.¹² The balance between public interest and individual rights is not determined *a priori* – as the contours of ‘arbitrary’ require definition. The same approach is taken in respect of the right to life, in that deaths which are contemplated in Article 2(2) ECHR, or deaths which are non-arbitrary under Article 6(1)

⁹ See J Pauwelyn, ‘Defenses and the Burden of Proof in International Law’ in F Paddeau and L Bartels (eds) *Exceptions and Defences in International Law* (OUP 2017) XX, XXX, for a discussion of the distinction between exemptions and exceptions and the consequences thereof in respect of the burden of proof.

¹⁰ In their contribution to this edited volume, Jaap Hage, Antonia Waltermann and Gustavo Arosemena articulate this same point regarding ‘limited rights’ as a question of rule applicability (to be distinguished from exceptions, which are engaged in the *application* of the rule). See J Hage, A Waltermann and G Arosemena, ‘Exceptions in International Law’ in F Paddeau and L Bartels (eds) *Exceptions and Defences in International Law* (OUP 2017) XX, §§ 5 & 8.2. The language of human rights ‘interests’ which are exempted from the scope of a protected ‘right’ is used in this chapter to reflect our intuition that certain State conduct limits human freedoms and interests broadly understood, even if those interests are not legally protected.

¹¹ Art 5(1) ECHR.

¹² Art 9(1) ICCPR;

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ICCPR and the Article 4(1) ACHR, do not engage the right to life. These deprivations of life fall outside the scope of the *right* to life as defined by the IHRL treaties, and therefore need not be covered by an exception in order to remain lawful. Having said so, as argued in Section (iii) below, the distinction between exemptions from the rule and exceptions to the rule in the IHRL context can be illusory.

(ii) *Qualified Rights*

The second approach to accommodating legitimate aims within a rights based framework are better qualified as an exception, in the sense that the government action falls within the scope of the right (and would be prohibited as a breach of that right), but the limitation imposed on the right is permitted in the circumstances. All three human rights treaties under consideration provide for these so called ‘qualified rights,’¹³ in addition to providing for rights which do not permit any qualification (like the right to be free from torture discussed above). Qualified rights are defined generally (for e.g. the rights to respect for private life; to freedom of thought, conscience and religion; to freedom of expression, association and movement),¹⁴ but are subject to permissive limitations as are necessary to pursue legitimate aims.¹⁵ Some of these limitations assume that rights are exercised within a community context, that the other members of the community are equivalently rights entitled, and that an absolute approach to certain rights is the enemy of community living. As Sir Hersch Lauterpacht put it, “[i]t is axiomatic that the natural rights of the individual find a necessary limit in the natural rights of other persons.”¹⁶ As such, limitations on relevant human rights might be imposed where the right’s unfettered exercise would be to the detriment of the exercise of the right by other members of the community. Equally, such rights might be limited where the maximal exercise of the right would be to the detriment of important public interests like order, health, or morals.

For instance, Article 9(1) of the ECHR provides broadly for freedom of thought, conscience and religion, while paragraph (2) provides that:

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the

¹³ Rosalyn Higgins refers to these rights as subject to ‘clawbacks’ and treats them as on the same spectrum as derogations – discussed further below. See R Higgins, ‘Derogation under Human Rights Treaties’ (1976) BYIL 281. Cf T Hickman, ‘Between Human Rights and the Rule of Law’, (2005) 68 MLR 655, 658-59.

¹⁴ See for eg arts 17-22 ICCPR; arts 8-11, ECHR; arts 12,13,15,16 21, and 22ACHR.

¹⁵ The ‘legitimate aims’ recognised in the three IHRL treaties which are the subject of this study are very similar and include, in varying combinations: national security, public safety, the prevention of disorder or crime, the protection of public order, health or morals, or for the protection of the rights and freedoms of others. Ibid.

¹⁶ H Lauterpacht, *International Law and Human Rights* (Stevens & Sons 1950), 366.

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exercise of these rights by members of the armed forces, of the police or of the administration of the State.

What is involved in respect of qualified rights is a balancing of interests – between the individual's interest in respect for their rights claim and the community's interest in co-extensive rights assertions or other important public interests.¹⁷ The scope of the permissible restriction of the human right concerned is based on its proportionality to the legitimate aim pursued. The courts and treaty monitoring bodies attached to the IHRL treaties that are the subject of this study measure proportionality in varying ways – including by considering: (i) whether the human rights limiting measure is rationally connected to the legitimate aim; (ii) whether the measure is the least restrictive alternative available to achieve the legitimate aim; and (iii) the proportionality *stricto sensu* of the measure – whether the detriment to the person whose human rights are limited is excessive in relation to the benefits of pursuing the legitimate aim.¹⁸

(iii) *A distinction without a difference?*

On one view, these two techniques for accommodating a sphere of government action undertaken in pursuit of legitimate aims are (at least) formally different, in that one is an exemption defining the very scope of the rule (or right), while the other defines the rule (or right) broadly, and then 'claws back' a sphere of activity free from the restrictions otherwise imposed by the rule (which rule is nevertheless engaged by the relevant activity). An exercise of regulatory authority or executive power which is excluded from the scope of a right is not even potentially in breach of the obligation to respect that right, and is therefore in no need of an exception to carve out a space for the lawful exercise of that authority or power.

On another view, this is a distinction without a difference. First, the 'qualification' in 'qualified rights' is in one important sense also about scope, in that the breadth of the *claimed rights protection* cannot be accommodated in a democratic society. In the case of both limited rights subject to exemptions and qualified rights subject to exceptions, an applicant is making a claim that a particular human rights interest has been engaged (whether it is a liberty interest or a freedom of expression interest), and the relevant Court or treaty

¹⁷ See for eg *Grand Hatton and Others v United Kingdom* App no 36022/97 (ECtHR (GC), Judgment of 7 July 2003) – in which the Court notes qualified rights call for a balance to be struck 'between the competing interests of the individual [...] and the community as a whole'. For a critique of balancing individual rights as against public interests, see B Cali, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions', (2007) 29 HRQ 251, 259-60, arguing in particular that human rights protection need not be conceptualised as a zero-sum game.

¹⁸ See for e.g. Human Rights Committee, General Comment No 27 (1999), UN Doc CCPR/C/21/Rev.1/Add.9, para. 14 (in reference to freedom of movement); *Murillo et al v Costa Rica (In Vitro Fertilization)* (IACtHR, Judgment of November 28, 2012), para 273. For an analysis of the European Court of Human Rights' approach to proportionality, which is a less structured analysis, see Y Arai-Takahashi, 'Structural Principles: Proportionality' in D Shelton (ed), *The Oxford Handbook of Human Rights Law* (OUP 2014) ch 19, 454-56.

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monitoring body is making a determination about the scope of protection afforded that interest. Indeed, the reasoning involved in both cases can be all but identical, as discussed further below.

A possible difference between these two approaches in the sphere of human rights, however, might be in reference to the role courts or human rights treaty monitoring bodies ought to play. In the case of limited rights explored in sub-section (i) above, the primary norm distinguishes between situations to which the rule applies and situations to which it does not – and all that should remain for the court or treaty monitoring body to do is apply the primary norm – the reasoning might be described as ‘algorithmic.’ The ‘legislators’ (or treaty negotiating States) have made the value judgments. In the case of qualified rights explored in sub-section (ii), the individual’s interest in respect for their rights claim is balanced against the interests represented by the clawbacks or exceptions.¹⁹ The ‘legislators’ have left it open for courts or human rights treaty monitoring bodies to determine the scope of protection through a balancing of competing interests on the basis of a proportionality analysis. But again, this difference should not be exaggerated. In cases bearing on limited rights (for instance the right to life or liberty as discussed below), courts or IHRL treaty monitoring bodies engage in the proportionality reasoning which is a principal feature of the human rights calculus in respect of qualified rights and exceptions. In these cases, there is a balancing of human rights interests against legitimate aims as defined by the relevant context or regime, but for the purposes of defining the scope of the rule (right) rather than the scope of the protection.

Regime Interaction

One example of a ‘balancing of interests’ approach in the context of defining the scope of a right emerges as a result of the interaction between IHRL and international humanitarian law (‘IHL’) in respect of the right to life. Courts have repeatedly held either that IHL is a *lex specialis* in respect of the right to life,²⁰ or that IHRL is to be interpreted *in light of* IHL based on Article 31(3)(c) of the Vienna Convention on the Law of Treaties (‘VCLT’).²¹ In either event, IHL does not displace IHRL at the regime level, but does (for the most part) displace IHRL at the normative level in respect of the right to life. The result is that an IHL compliant deprivation of life is also an IHRL compliant deprivation of life (and an IHL non-compliant

¹⁹ See for eg Cali (n17), fn 31.

²⁰ See eg *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 paras 24–25. In its subsequent *DRC v Uganda* decision, the Court reiterated its approach to the relationship between IHRL and IHL, but dropped the reference to *lex specialis*. See *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of 19 December 2005, [2005] ICJ Rep 168, para 216. The Inter-American Commission on Human Rights has adopted the position of the ICJ. See *Coard v United States* (I/ACommHR, Report no 109/99, 29 September 1999), para 42.

²¹ Adopting the systemic interpretation approach is the ECtHR (*Hassan v UK*, App no 29750/09 (ECtHR (GC), Judgment of 16 September 2014), para 104, and the Human Rights Committee in its General Comment No 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant) (2004), UN Doc CCPR/C/21/Rev.1/Add. 13, para 11.

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deprivation of life is an IHRL non-compliant deprivation of life). An IHL compliant deprivation of life is determined either on the basis of status (combatants or civilians directly participating in hostilities) or through a proportionality assessment – in particular whether incidental loss of civilian life would be excessive in relation to the concrete and direct military advantage anticipated from the attack resulting in the deprivation of life.²² As regards the proportionality analysis, the rule in effect defines a legitimate aim (gaining a military advantage) and requires that any limitations to otherwise applicable protections be proportionate to achieving that legitimate aim. This is precisely the same balancing of interests which is characteristic of qualified rights and their exceptions²³ – but it is applied in the context of determining the scope of a right, because the right to life (once engaged) is not subject to qualification. While IHL obviously takes into account a broader range of legitimate aims than IHRL (for instance the gaining of military advantage which is not an IHRL recognised legitimate aim), the structure of the reasoning is nevertheless the same.

Proportionality analysis in rights of qualified scope

In non-regime interaction cases regarding the scope of a right, the courts will also engage in a balancing of interests. Famously, in *Austin v Commissioner of Police for the Metropolis*,²⁴ the House of Lords held that kettling individuals for over seven hours on public order grounds did not amount to a restriction on liberty which engaged Article 5 ECHR. Clearly, being detained for more than seven hours engages an individual's *interest* in liberty, and the question for the Lords was whether it engaged their *right* to liberty. Kettling on public order grounds does not fall within the list of exemptions provided for in Article 5 (detention after conviction; arrest or detention for noncompliance with a court order; arrest or detention for the purposes of bringing person before a competent court etc.). As a result, if the right to liberty was engaged by kettling, it was also breached. To arrive at their conclusion that the right was not engaged, the Lords reasoned that although article 5 is an absolute right (subject to exemptions, but not exceptions), a pragmatic approach was necessary when deciding on the scope of the right. In particular, the Lords looked to the aim of the confinement – and reasoned that although Article 5 of the Convention does not refer to the interests of public safety or the protection of public order as cases in which a person might be deprived of her liberty, importance had to be attached to such factors in determining whether there had been a breach of article 5 so that competing fundamental rights might be reconciled with each

²² Art. 51(5)(b), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1977), 1125 UNTS 3, entry into force 7 December 1978.

²³ The proportionality *stricto sensu* test applied by international human rights courts and monitoring bodies has been aptly summarised as 'measuring the relative intensity of the interference with the importance of the aim sought'. S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 International Journal of Constitutional Law 468, 474.

²⁴ [2007] EWCA Civ 989, affirmed by the ECtHR in *Austin v UK*, App no 39692/09, (ECtHR (GC), Judgment of 15 March 2012).

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other.²⁵ This balancing of individual rights as against the public interest is precisely what occurs in respect of exceptions to qualified IHRL treaty rights, and yet the House of Lords engaged in this reasoning for the purposes of determining the scope of the right to liberty itself. The Lords concluded that the ambit given to article 5, in respect of crowd control measures resorted to for public order and public safety reasons, has to ‘take account of the rights of the individual as well as the interests of the community [... and that such measures will fall outside the ambit of article 5 provided that they] are proportionate to the situation which has made them necessary.’²⁶ In so doing, the Lords in effect treated a limited right (subject only to expressly determined exemptions) as a qualified right (which permits the balancing of competing interests). The Human Rights Committee similarly characterises the IHRL calculus in respect of the right to liberty in terms of its proportionality, even though the right is one that subject to a limitation in scope (non-arbitrary detentions are exempted from the scope of the right), as distinguished from a qualified right subject to exceptions: ‘The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, *as well as elements of reasonableness, necessity and proportionality.*’²⁷

The structure of this analysis – the identification of legitimate aims which potentially justify limitations to a rights interest, and measuring the proportionality of the limiting measure as against that legitimate aim, is identical to the structure of analysis in reference to qualified rights. It is simply that, in respect of limited rights (rights qualified as to scope and subject to exemptions), the analysis simultaneously determines whether the right has been engaged and whether there has been a breach. There is indeed a formal difference between exemptions and exceptions as a matter of principle, but in the IHRL context the distinction is *significantly* more fluid, with at least exemptions bleeding into exceptions insofar as the structure of analysis is concerned.

B. Derogations

All three IHRL treaty regimes which are the subject of this study allow States to derogate from some of their human rights obligations for the limited purposes of responding to crisis.²⁸

²⁵ *Austin* (n 24), Lord Hope, para 34 (Lords Scott, Walker, Carswell, and Neuberger concurring).

²⁶ *Ibid.* This approach – one in which the pursuit of a legitimate aim (which does not fall within the list of stated exemptions in respect of limited rights) is permitted to proportionately(ish) limit a limited right is also evident in the counter-terrorism context. See H Fenwick & G Phillipson, ‘Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond’, (2011) 56 McGill LJ 863, 870-71 for a very thoughtful critique of this approach.

²⁷ Emphasis added. Human Rights Committee, General Comment No 35, Article 9 (Liberty and security of person) (2014), UN Doc. CCPR/C/GC/35, para 12.

²⁸ Art. 15 ECHR; Art. 4 ICCPR; Art. 27 ACHR. There was much debate during the negotiation of both the ICCPR and the ECHR regarding whether a general derogation clause was necessary, given the availability of exceptions in reference to qualified rights, many of which recognised permissive limitations for the purposes of protecting ‘national security’ or ‘public order. These exceptions were considered to ‘take care of situations which might arise in time of war or national emergency.’ United Nations Secretary-General, ‘Annotation of the Draft Covenant on Human Rights’, UN Doc. A/2929 (1955), Chapter V, Part II (articles 2 to 5), para 36. See

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The ECHR and ICCPR allow for measures which derogate from the obligation to respect (certain) human rights in times of ‘public emergency [threatening/which threatens] the life of the nation’, the ECHR and ACHR allow for derogations in ‘time of war’, and the ACHR allows for derogation in times of ‘public danger, or other emergency that threatens the independence or security of a State Party’. In each case, the State party may ‘take measures derogating from [its] obligations [under the relevant Convention] to the extent strictly required by the exigencies of the situation.’²⁹

While the effect of a derogation is not dissimilar from that of an exception to a qualified right, in that a freedom of action that would not otherwise exist is created, the mechanic for achieving this result is different. In particular, in respect of derogations, the primary rule continues to prohibit the relevant government action, but the obligation to respect that primary rule is suspended (or waived) in virtue of the derogation. In the case of an exception to qualified rights, an exercise of regulatory authority or executive power which falls within the scope of the exception is not prohibited – the entire calculus takes place within the context of the substantive primary rule defining the right. Derogations on the other hand are an ‘internal/external’ qualification – internal to the HR regime (and therefore still a primary rule), but external to the particular primary rule (right) in question.

There is also a temporal distinction between exceptions to qualified rights and derogations. An exception carves out a space for government action from the rights protection which space can exist on a permanent basis provided that the balancing of interests at play does not shift. A derogation, by contrast, is intended to be a temporary measure to respond to a particular crisis which has arisen. In effect, exceptions to qualified rights are a vehicle for government action which *maintains* peace, order and a balance between competing interests, while derogation clauses are a vehicle for government action which *restores* peace and order.³⁰ As a result, qualified rights (and their exceptions), operate as a matter of course – governments balance respect for the fullest possible conception of the right as against competing public interests, and exercise their regulatory authority in keeping with that balance. Derogations are meant to be *exceptional* and *temporary*.³¹ This difference,

also European Commission on Human Rights, [Preparatory work on Article 15 of the European Convention on Human Rights: Information document prepared by the Secretariat of the Commission at the request of the President of the Commission](#), 22 May 1956, 5. On the other hand, it was argued that ‘[t]here might [...] be instances of extraordinary peril or crisis, not in time of war, when derogation from obligations assumed under a convention would become essential for the *safety of the people and the existence of the nation*. These situations would not fall within the scope of the limitations provided for in the various articles of the covenant, nor could they be adequately covered by a general limitations clause.’ UN Doc. A/2929 (1995), para 37. The latter view won the day.

²⁹ Art. 4, ICCPR; Art. 15 ECHR; Art. 27 ACHR. The ACHR makes it clear that ‘strictly required’ is not only a substantive limitation on derogating measures, but also a temporal limitation.

³⁰ See eg International Law Association, The Paris Minimum Standards of Human Rights Norms in a State of Emergency, Report of the 61st Conference (Paris), Section A.3(a); *Brannigan and McBride v. The United Kingdom* App No 14553/89;14554/89 (ECtHR, Judgment of 25 May 1993), para 34.

³¹ Both the derogation triggering situation *and* the measures adopted in response thereto, were originally understood to be temporary and exceptional. See for eg *The Greek Case* App Nos 3321-3323; 3344/67 (European Commission of Human Rights, Report of 1969), para 158, identifying that the ‘the crisis or danger

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however, is perhaps in danger of becoming more theoretical than practical, as the tendency in the post-9/11 world has been to govern as though in a permanent state of emergency.³²

Where a derogation validly operates, the obligation to respect the right is temporarily waived or suspended. As a result, the consequence of a derogation has been described in somewhat similar terms to that of denunciation – which is to say that a derogation ‘take[s] a State outside the human rights regime.’³³ While derogations do indeed create a space for regulatory conduct and executive action within which the relevant human rights obligation does not restrict conduct as it would *sans* derogation, it is too far to claim that derogations take a State outside the human rights regime.³⁴ In particular, the lawfulness of the derogation itself – including whether the conditions of its invocability have been met, and the extent to which a State has in fact restricted its human rights inconsistent conduct to the sphere of freedom provided by the derogation (defined in reference to whether the measure is ‘strictly required by the exigencies of the situation’), is fully subject to review within the relevant human rights regime. It is certainly true that a derogation changes the nature of the human rights regime’s engagement – it is not measuring compliance of government action with substantive human rights, but the validity of the derogation and the compliance of the government action with that valid derogation. But given that the strict necessity of each and every measure which would otherwise be inconsistent with human rights obligations is fully subject to human rights monitoring mechanisms,³⁵ it seems rather a stretch to speak of States acting outside the human rights regime. They act within the regime, even while inconsistently with the normative human rights obligations provided therein.

must be exceptional’ as one of the elements of a public emergency which might justify the invocation of a derogation; Human Rights Committee, General Comment 29 (2001), UN Doc CCPR/C/21/Rev.1/Add.1, para 2, holding that derogating measures must be of an ‘exceptional and temporary nature’ (accepted by the ECtHR in *A and Others v UK* App no 3455/05 (ECtHR (GC) Judgment of 19 February 2009). The ECtHR, however, at least in respect of the temporal nature of the derogation triggering situation, has accepted that emergencies may be entrenched or rather more long term. *A and Others v UK*, Ibid, para 178 (citing to *Ireland v United Kingdom*, App no 5310/71 (ECtHR, Judgment of 18 January 1978).

³² For a very interesting discussion of this phenomenon, see O Gross and F Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (CUP, 2006), ch 4 and 281-83.

³³ Hickman (n 13), 665.

³⁴ Arguing persuasively *against* the existence of ‘legal black holes’ in respect of emergencies, whereby State conduct is taken outside the legal order, see D Dyzenhaus, ‘Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order?’, (2006) *Cardozo L Rev* 2005.

³⁵ Courts and human rights treaty monitoring bodies have been somewhat uneven in distinguishing between the ‘strictly required’ standard of derogations, and the necessity of limitations in respect of qualified rights (framed in terms of proportionality). Compare for instance *Handyside v United Kingdom* App no 5493/72 (ECtHR Judgment of 7 December 1976), para 48, in which the Court suggests that the Article 15 ‘strictly required’ standard is synonymous with ‘indispensable’ (and is, on that basis, to be distinguished from the ‘necessary’ standard *vis à vis* qualified rights which evokes proportionality), with the UN Human Rights Committee’s General Comment 29, in which it considers that proportionality is the standard which applies to both the derogation provision (‘strictly required’) and qualified rights (‘necessary’) in the ICCPR. HRC, General Comment 29 (n 31), para 4.

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That derogations are also subject to the scrutiny of relevant IHRL monitoring bodies (as is the case with exceptions), however, is a similarity that obscures a relatively important distinction. In particular, institutionally, courts are very comfortable with balancing interests against each other, and making determinations on the proportionality of measures as referenced against the objective or aim of that measure or the underlying interest otherwise being protected by that measure. Limitations to qualified rights can therefore be subject to fairly robust judicial scrutiny. Derogations, on the other hand, involve both a judgment as regards a security situation – whether there is a public emergency or other threat to the life of a nation – and a balancing of the measures limiting rights as against the legitimate aim of restoring the pre-emergency situation. The first element of this analysis is precisely the sort of calculus in respect of which courts and treaty monitoring bodies suffer a confidence crisis, underpinned by claims about particular spheres of institutional competence. Courts give governments a rather large margin of appreciation in determining the existence of a derogation triggering situation, even if they are more robust in their analysis of the necessity of the measures adopted in response.³⁶ This judicial discomfort with interference in determinations regarding derogation triggering situations is partially a reflection of the source of that determination. In respect of qualified rights subject to exceptions, it will in large measure be the legislature which determines the balance to be achieved between a legitimate aim (protecting public health for instance) and respect for individual human rights interests. A derogation, however, even if ratified by the legislature, will more commonly be triggered by the executive, in whose power making a determination as to the existence of a ‘public emergency [threatening/which threatens] the life of the nation’ will lie. And courts have long been institutionally disposed, through the operation of various domestic law doctrines, to be very slow to interfere in the exercise of executive or prerogative powers, particularly where such powers touch on questions of national security.³⁷

Having said all this, there is a large measure of overlap between the structure of an exception and the structure of a derogation. Both define legitimate aims for the exercise of regulatory authority or executive power that is otherwise inconsistent with protected human rights

³⁶ On the determination that a derogation triggering situation exists, see for eg *Ireland v UK* (n 31), the Court held that:

It falls in the first place to each contracting state, with its responsibility for ‘the life of [its] nation’, to determine whether that life is threatened by a ‘public emergency’ and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter [Art 15(1)] leaves the authorities a wide margin of appreciation. [para 207.]

While the Courts have maintained an attitude of deference to the executive insofar as determinations regarding the existence of a threat to the life of the nation are concerned (which deference has been the subject of much criticism, see for eg *Gross and Ni’ Aoláin* (n 32), 280 & ff), there is more robust review of whether the measures adopted are ‘strictly required by the exigencies of the situation’. See for eg *A and others v Secretary of State for the Home Department* [2005] UKHL 71; *A and Others v United Kingdom* (n31).

³⁷ See for eg *CCSU v Minister for Civil Service* [1985] AC 374; *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60.

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interests, and indeed there may be some overlap in the aims recognised to be legitimate insofar as some qualified rights recognise national security as one such aim.³⁸ In addition, like qualified rights, derogations are purely instrumental – the human rights limitations must be rationally connected to the legitimate aim, and ‘strictly required’ to meet that aim. The ‘strictly required’ analysis in respect of derogations overlaps with the elements of a proportionality analysis in respect of qualified rights,³⁹ even if the derogation standard is often held to be stricter.⁴⁰ There is therefore not very much space on the spectrum of IHL qualifications between exceptions (to qualified rights) and derogations – at least insofar as the structure of analysis is concerned. There is perhaps more space between limited rights subject to exemptions (explored in Section I.A(i) above) and derogations, where the derogation clause might have a direct impact – in permitting limitations to the exercise of a right that otherwise does not admit such limitations once it is engaged. Again, however, this direct impact is somewhat minimised by the approaches to limited rights explored above. In particular, the fact that a balancing of interests (for the purposes of meeting legitimate aims which are not expressly addressed in the relevant rule) can take place in respect of limited rights⁴¹ means that interests like security might be taken into account at the stage of defining the scope of a right, lessening the need for a derogation. Furthermore, in virtue of the regime interaction principles examined in Section I.A(iii) above (which apply to limited rights), IHL, as an applicable *lex specialis*,⁴² accommodates some of the State interests that are reflected in derogation clauses.⁴³ Consider for instance the difference between the ECHR on the one hand and the ACHR and ICCPR on the other. In respect of the right to life, the ECHR exempts particular government conduct from the scope of the right (and IHL compliant

³⁸ See n 15. The UK’s derogation lodged following the 9/11 terrorist attacks (n **Error! Bookmark not defined.**) identified a ‘threat to [...] national security’ as the derogation triggering situation. While the UK’s approach was confirmed (or at least tolerated) by the ECtHR in its *A and Others* decision (n 31), there is a not unreasonable argument to be made that national security, already a basis for limiting human rights in respect of certain qualified rights, should not be double counted as a derogation triggering situation. See e.g. E Bates, ‘A “Public Emergency Threatening the Life of the Nation”? The United Kingdom’s Derogation from The European Convention on Human Rights of 18 December and the “A” Case,’ (2006) 76 BYIL 245, 251. The UK’s derogation was principally in respect of the right to liberty, however, which is not a qualified right. As a result, a derogation is the only emergency measure available to restrict liberty in response to genuine threats to national security.

³⁹ See n 18 and accompanying text for a discussion of the elements of the proportionality analysis in reference to qualified rights. In respect of ‘strictly required’ under derogation clauses, see for eg *Aksoy v Turkey* App No 21987/93 (ECtHR, Judgment of 18 December 1996), para 23 (in which the Court examines whether lesser measures might have been sufficient to respond to the emergency situation); *Jorge Landinelli Silva v Uruguay*, Communication No R.8/34, UN Doc Supp No 40 (A/36/40) 130 (1981), para 8.2 (in which the Human Rights Committee considered the breath of the measures adopted and held them to be beyond what was ‘strictly required’).

⁴⁰ See n 35.

⁴¹ See notes 24-26 and accompanying discussion.

⁴² Alternatively, IHL might be characterised as a regime which informs the interpretation of a limited right qualified as to scope. See notes 20-21.

⁴³ Indeed, IHL accommodates State interests on a broader basis than derogation provisions in that the security interests of a small subset of a nation – like the armed forces – form the basis of the limitation on a right in the IHL regime interaction context, while this is not necessarily so in the derogation context. See Section I.B(ii) below for further discussion.

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incidental civilian deaths in the context of an armed conflict is *not* one of the exemptions), while the ACHR and ICCPR exempt non-arbitrary deprivations of life (with ‘non-arbitrary’ tracking IHL compliance in respect of deprivations of life resulting from armed conflict). To accommodate this difference, there is also a difference in the derogation provisions of the ECHR as compared to the ACHR and ICCPR: The ECHR permits no derogations to the right to life ‘except in respect of deaths resulting from lawful acts of war’⁴⁴, while the ACHR and ICCPR permit no derogations to the right to life, full stop. The scope of the right to life under the ACHR and ICCPR are defined in reference to a standard which accommodates some forms of government action in emergency situations (in particular those resulting from armed conflict), and as a result, the derogation clause need not *also* accommodate such emergency situations. The scope of the ECHR right to life on the other hand, does not accommodate armed conflict type emergencies, leaving this work to be done by the derogation clause. Both the ICCPR and the ECHR address the right to life and wartime deaths to the same effect, but relying on different ‘qualification’ mechanisms. There is nothing inherent or necessary in these concerns being addressed through defining the scope of a right or permitting derogations – it is a formal difference of course, but not necessarily a substantive one.⁴⁵

What remains to be determined, insofar as IHRL qualifications are concerned, is whether necessity, as a circumstance precluding wrongfulness (‘CPW’) in the ILC’s Articles on State Responsibility,⁴⁶ is the final qualification to human rights along the continuum. Part of the answer to that question involves an exploration of the applicability of derogations to situations of extra-territorial armed conflict, as set out below.

i) *The Approach to Derogations in Extra-Territorial Armed Conflicts*

Article 15 ECHR and Article 27 ACHR expressly recognise that derogations can apply to ‘time of war.’ Article 4 ICCPR, on the other hand, does not expressly reference war. It is clear from the drafting history of the provision, however, that war was envisaged as a derogation triggering situation, but that States objected to the optics of expressly contemplating war in a UN treaty.⁴⁷ This chapter will proceed on the basis that the

⁴⁴ Art 15(2) ECHR.

⁴⁵ Some of the chapters in this edited volume suggest that there may be normative consequences to (or litigation strategies attempting to derive normative consequences from) the distinction between a rule which incorporates its exception and a rule whose exceptions are addressed separately, in particular as regards the burden of proof. See F Schauer, ‘Rules, Defeasibility, and the Psychology of Exceptions’ in F Paddeau and L Bartels (eds) *Exceptions and Defences in International Law* (OUP 2017) XX, §5; Viñuales (n 5), §§ 2.2 & 2.3. In the IHRL context, given the inequality of arms between the applicant human right victim and the respondent State, strict rules on burdens of proof are not appropriate. For instance, the European Court of Human Rights has held that certain human rights cases do not ‘lend themselves to a rigorous application of the principle whereby a person who alleges something must prove that allegation.’ ECtHR, *Bazorkina v. Russia*, no. 69481/01, 27 July 2006, § 170.

⁴⁶ Chapter V, ILC Articles on State Responsibility (n 2).

⁴⁷ In his Guide to the *travaux préparatoires* of the ICCPR, Bossuyt explains that ‘it was felt that the covenant should not envisage, even by implication, the possibility of war, as the United Nations was established with the

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applicability of derogations to ‘war’ – a formalistic concept which is no longer a relevant feature of the legal landscape – extends to the modern (post World War II) concept of ‘armed conflict’, most clearly in cases where the conflict takes place in the territory of the State invoking a derogation.⁴⁸ Indeed, the only State practice to date of invoking derogation clauses as a result of armed conflict have been in reference to armed conflicts within the invoking State’s territory.⁴⁹

It remains an open question, however, whether derogation clauses cover extra-territorial armed conflicts – in particular armed conflicts in which a State is acting in protection of its domestic security interests through an armed conflict which it pursues *abroad*.⁵⁰ There are suggestions in some of the IHRL case law that derogation clauses ought not apply in such circumstances, in particular, two decisions by the UK’s highest court. In *Al-Jedda*, Lord Bingham noted that:

It is hard to think that these conditions could ever be met when a state had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw. The Secretary of State does not contend that the UK could exercise its power to derogate in Iraq (although he does not accept that it could not). It has not been the practice of states to derogate in such situations, and since subsequent practice in the application of a treaty may (under article 31(3)(b) of the Vienna Convention) be taken into account in interpreting the treaty it seems proper to regard article 15 as inapplicable.⁵¹

To similar effect, Lord Hope had this to say in the House of Lords *Smith* opinion:

[T]he phrase “threatening the life of the nation” suggests that the power to derogate under this article is available only in an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed [...]. I do not think therefore that it

object of preventing war.’ M Bossuyt, *Guide to the ‘Travaux Préparatoires’ of the International Covenant on Civil and Political Rights* (Martinus Nijhoff 1987), 86.

⁴⁸ The Human Rights Committee, in setting out the availability of derogations, makes it clear that situations of armed conflict might amount to a derogation triggering situation: ‘The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.’ Human Rights Committee, General Comment 29 (States of Emergency) (2001), U.N. Doc. CCPR/C/21/Rev.1/Add.11, para 3.

⁴⁹ See M. Milanovic, ‘Extraterritorial Derogations from Human Rights Treaties in Armed Conflict’ in N Bhuta (ed), *Collected Courses of the Academy of European Law* (OUP, 2015). The UK may be the first State to invoke a derogation in respect of an extra-territorial armed conflicts. At the time of writing, Theresa May – the un-elected Conservative Prime Minister of the UK – announced that the UK would derogate from the ECHR in future overseas armed conflicts. ‘Government to protect Armed Forces from persistent legal claims in future overseas operations’, 4 October 2016, <https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations>.

⁵⁰ This section assumes that IHRL treaties apply extra-territorially to armed conflicts (in respect of at least some State conduct), as determined by all three IHRL courts and treaty monitoring bodies explored in this Chapter: I/ACommHR *Coard v United States* (Report no 109/99) 29 September 1999, paras 38; Human Rights Committee *General Comment 31* (2004) just para 11; ECtHR (GC), *Hassan v. UK*, n 21, para

⁵¹ *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, para 38.

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would be right to assume that concern about the practical consequences in situations such as those with which we are dealing in this case can be answered by exercising the power to derogate. The circumstances in which that power can properly be exercised are far removed from those where operations are undertaken overseas with a view to eliminating or controlling threats to the nation's security. The jurisprudence of the Strasbourg court shows that there are other ways in which such concerns may be met.⁵²

The International Court of Justice, on the other hand, seems to allow for the possibility that derogations are permissible in extra-territorial armed conflicts, in its general statement that 'the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights'.⁵³ The Court makes no reference to whether it is contemplating armed conflicts within the invoking State's own territory or beyond, but the facts under contemplation in each case (Israel's limitations on human rights in occupied territory and the use of nuclear weapons – presumably abroad) suggest it may have had the applicability of derogations beyond the invoking State's territory in mind.

The matter obviously remains contested, but there may be very good reason for the Lords' intuition that derogations ought not apply to (at least some features of) extra-territorial armed conflicts – particularly those in which the State is protecting domestic security interests in its armed conflict abroad. While not articulated in these terms by the Lords – the problem is with identifying the relevant derogation 'situation' in complex factual contexts (like those of an extra-territorial armed conflict).

The 'One Situation / Two Situation' Problem

Extra-territorial armed conflicts potentially result in a disconnect between the derogation triggering situation and the situation to which the human rights limiting measure responds. It is clear from the language of the derogation clauses, however, that they contemplate *one* situation which *both* triggers the derogation and to which the relevant human rights limiting measures respond. In relevant part, derogation clauses read:

In time of [war, public danger, or public emergency threatening the life of the nation / independence or security of a State Party], [the State parties to the present Convention] may take measures derogating from [their] obligations under [the present Convention] to the extent [strictly] required by the exigencies of **the** situation [...].⁵⁴

⁵² *R (Smith and others) v The Ministry of Defence*, [2013] UKSC 41, paras 59-60.

⁵³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), [2004] ICJ Reports 136, para 106; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), [1996] ICJ Reports 226, para 25.

⁵⁴ Emphasis added. *Supra* note 29. Indeed, human rights courts or treaty monitoring bodies have often used language suggesting that the single situation (that which triggers the derogation and to which the relevant measures respond) must be within the *very* territory of the State invoking the derogation. See for eg the decision in *Lawless v Ireland* (n **Error! Bookmark not defined.**), para 28: 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of

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In respect of Security Council authorised humanitarian interventions,⁵⁵ initial phases of operations may well fall outside the scope of IHRL treaties entirely, even if the human rights ‘interests’ of those on the ground would be considered to be engaged. And there is no need to search for a derogation triggering situation in cases where the IHRL treaty regime doesn’t apply, as derogation clauses obviously do not contemplate situations which are beyond the jurisdiction of the derogation invoking State. A State’s conduct, which is otherwise inconsistent with the human rights interests of individuals beyond its jurisdiction, is in no need of an exception or derogation from a legal perspective – and humanitarian interventions carried out through aerial campaigns (for instance in Kosovo and Libya) have to date been judged by at least the European Court of Human Rights to be excluded from the scope of IHRL treaties.⁵⁶

But in respect of humanitarian intervention operations which do fall within the scope of application of IHRL treaties, because individuals in the territory subject to the intervention fall within the intervening State’s jurisdiction, there will in fact be *two* emergency situations, one of which threatens two separate constituencies: First there is the humanitarian catastrophe which occasioned the armed intervention (which does not require a derogation until troops are on the ground exercising some form of effective control over territory or control over individuals such that the derogation invoking State has jurisdiction) – situation 1.

which the State is composed.’ As the point has never been decided in quite such definitive terms, and the scope of application of human rights treaties (through the concept of ‘jurisdiction’) is constantly being expanded extra-territorially, this section will proceed on the basis that an extra-territorial situation could amount to a derogation triggering situation.

⁵⁵ A humanitarian intervention involves State A engaging in an armed conflict in State B’s territory, not in defence of its own (or another State’s) security interests, but in the interests of State B’s civilian population (because the Government of State B is either unwilling or unable to protect its own civilian population, or because that Government is the source of the threat to the civilian population). For present purposes, and to side-step entirely the debate regarding the lawfulness of such interventions on a unilateral (or coalition) basis (see eg WM Reisman, ‘Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention’ (2000) 11 EJIL 3; M Hakimi, ‘Toward a Legal Theory on the Responsibility to Protect’, (2014) 39 Yale Journal of International Law 247; H Koh, ‘Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)’, EJIL:Talk! October 4 2013, <http://www.ejiltalk.org/syria-and-the-law-of-humanitarian-intervention-part-ii-international-law-and-the-way-forward/>; Sir D Bethlehem, ‘Stepping Back a Moment – The Legal Basis in Favour of a Principle of Humanitarian Intervention’, EJIL:Talk! September 12 2013, <http://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/>), this chapter will assume that the intervention in State B has been authorised by the Security Council acting in exercise of its primary responsibility for international peace and security under Chapter VII of the UN Charter. Arts 39 & 42, UN Charter.

⁵⁶ See in particular *Banković and others v Belgium and others* App no 52207/99 (ECtHR (GC), Judgment of 12 December 2001), paras 59–82. This decision has rightly been the subject of sustained criticism, but subsequent ECtHR decisions have left untouched the basic principle that aerial attacks do not amount to an exercise of jurisdiction for the purposes of IHRL treaty obligations. See *Al-Skeini and others v United Kingdom* App no 55721/07 (ECtHR (GC), Judgment of 7 July 2011), paras 109–150. In a recent UK Court of Appeal decision, Lord Justice Lloyd Jones left it open for the ECtHR to step back from its position in *Banković*, such that a use of lethal force (even via aerial campaign) would in and of itself amount to the exercise of jurisdiction triggering human rights obligations. See *Al-Saadoon & Ors v Secretary of State for Defence* [2016] EWCA Civ 811. At the time of writing, the decision had not yet been appealed to the UK Supreme Court (from which it will inevitably be appealed to Strasbourg), but it is widely expected that it will be.

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Second, there is the emergency situation created by the armed conflict / intervention itself (as distinguished from the situation which occasioned the armed conflict / intervention, which might also have been a situation of armed conflict) – situation 2. In respect of situation 2, there are two separate constituencies threatened by the armed conflict: First, residents of the territory in which there is an armed conflict (2A); Second, the intervening armed forces (2B). While 1 and 2A may well give rise to a valid derogation to which human rights limitations could be tailored (both of which will be a ‘public emergency [threatening/which threatens] the life of the nation,’ in particular the nation that is victim of the humanitarian catastrophe and in whose interests the armed intervention is being fought), 2B could not, for the reasons set out below. And yet some of the human rights limitations adopted in humanitarian interventions will respond to situation 2B – and to the extent that they do, there is a disconnect between a valid derogation triggering situation and the situation to which particular human rights limiting measures respond.

The second type of conflict to consider is that in which a State is exercising its Article 51 UN Charter right of self-defence.⁵⁷ We will assume that State A is the victim of an armed attack (actual or imminent), and State B is both the source of the armed attack (actual or imminent) and the State in whose territory armed conflict is waged in defensive response. There might be several stages of such an armed conflict, including active combat operations (during which time State A’s armed forces are fighting first and foremost in defence of State A’s interests, and second with a view to their own ‘force protection’); and potentially occupation of State B. During occupation of State B, State A has an IHL obligation to ‘take all the measures in [its] 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,’⁵⁸ in the interests of the local population. State A might also be taking measures necessary for its own security at home (to the extent that the threat of further armed attack remains from individuals within State B’s territory) and its security as an Occupying Power (including detaining individuals who threaten the security of State A as an Occupying Power, as is permitted under Geneva Convention IV).⁵⁹

In such cases, the situation which threatens the life of the nation is the armed attack (actual or imminent) suffered in State A’s territory, but the exigency creating situation (which calls for limitations on human rights) will in part be that of the armed conflict abroad (in particular the threat to the armed forces of State A during combat operations and to State A’s security

⁵⁷ This chapter will not examine armed conflicts in which State A is engaging in armed conflict in collective self-defence of State C, in State B’s territory and pursuant to Article 51 of the UN Charter. This type of extra-territorial armed conflict raises similar issues to those explored in reference to individual self-defence, but with the complicating factor of a third State’s interests in the mix.

⁵⁸ Art 43, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907), Annex: Regulations respecting the laws and customs of war on land - Section III: Military authority over the territory of the hostile state.

⁵⁹ Art 78, Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12 1949, 7 UNTS 287 [hereinafter ‘GCIV’].

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interests as an Occupying Power, as permissibly protected pursuant to GCIV, during any subsequent occupation). But based on the pronouncements of IHRL treaty bodies and regional IHRL courts, the armed conflict abroad (as distinguished from the armed attack in the derogating State's territory) cannot subsequently be characterised as the derogation triggering situation. This is because IHRL treaty bodies and courts have held that derogation triggering situations must threaten the life of the 'whole' nation, or the 'whole' population of the area to which the declaration applies – not a small subset thereof (like the armed forces fighting in a foreign armed conflict).⁶⁰

The difficulty is best perceived when we remind ourselves that derogations permit the imposition of human rights limitations for the purposes of responding to an emergency situation and to *restore* conditions of normalcy. In the case of foreign armed conflicts, there will always be one situation which does not admit restoration to normalcy – and that is the situation of the armed forces participating in the armed conflict (whose interests may well need protecting during active combat operations and any subsequent occupation through limitations to human rights protection). The State engaging in an armed conflict abroad, in limiting human rights, is in part always responding to threats to its own security interests (which security interests are those created by the armed conflict, not those which might have triggered derogation by threatening the life of the nation domestically). And those security interests are the interests of a small subset of the nation (in particular, the armed forces) which do not have a 'normal' because if those particular interests are engaged, it is always in a situation of conflict and emergency. Even where the derogation invoking State is principally acting to restore normalcy to the community whose rights are being limited and in whose territory the armed conflict is being waged (in situations of humanitarian intervention and any subsequent occupation), the derogating State will *also* in part be responding to a threat to its own security interests (in the sense of armed forces protection during active combat operations or its security interests as an Occupying Power). But the threat to its armed forces, being a subset of the 'nation as a whole,' is not an 'emergency threatening the life of the nation' which might validly trigger a derogation. Again, there is a disconnect between the valid derogation triggering situation and the situation to which particular human rights limiting measures respond.

The 'one situation / two situation' problem, as articulated above, suggests that derogation provisions ought not be available in respect of at least some features of extra-territorial armed conflicts. In particular, derogations should be unavailable where the triggering situation is a

⁶⁰ See ECOSOC, 'Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights', UN Doc E/CN.4/1985/4, Annex (1985), para 39. See also The Paris Minimum Standards, n 30, Section A.1(b); *Lawless v. Ireland (No. 3)* App. No. 332/57 (ECtHR, Judgment of 1 July 1961). But see Commentary to ILC Articles on State Responsibility (n3), Art 21, para 3 – in which the ILC concludes that '[h]uman rights treaties contain derogation provisions for times of public emergency, including actions taken in self-defence.' The Commentaries do not elaborate on this statement, and indeed say nothing about whether the 'actions taken in self-defence' are those a State might take in its own territory (for instance preventative detention of residents who are suspected of assisting invading forces, as would be permitted under GCIV), or those it might take extra-territorially.

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threat to the civilian population of foreign States (as is the case of the armed conflict phase of humanitarian interventions), but the interests protected by human rights limiting measures are those of the intervening and derogation invoking State's armed forces; or where the human rights limiting measures respond to the security interests of the armed forces which are *created* by the armed conflict. For principally pragmatic reasons, and perhaps counterintuitively, this is not necessarily a *positive* human rights outcome. There is arguably a greater human rights benefit in permitting States to invoke derogations during extra-territorial armed conflicts, implicitly accepting that the human rights regime applies (in a way that is reviewable by human rights courts and treaty monitoring bodies), than there is in derogations being inapplicable, resulting in the continued (and rather stubborn) refusal of States engaging in these extra-territorial armed conflicts to accept the applicability of human rights law.⁶¹ Necessity, as a defence or excuse under general international law, may be available in respect of extra-territorial armed conflicts to partially respond to this concern, as explored in Section C below.

C. External Exceptions: Circumstances Precluding Wrongfulness

Necessity is a 'circumstance precluding wrongfulness' in the ILC's Articles on State Responsibility. Article 25 of the ILC's Articles provide that:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
 - a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
 - b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
 - a) the international obligation in question excludes the possibility of invoking necessity; or
 - b) the State has contributed to the situation of necessity.

As far as the ILC is concerned, 'necessity' does not render the relevant conduct lawful (or at least not unlawful) as a matter of the applicable primary rules, as do exceptions and derogations. Rather, it temporarily suspends the consequences of wrongfulness – in particular the obligations (derived from the secondary rules of State responsibility) to cease the wrongful conduct and to make full reparation.⁶² Unlike derogations, which waive the

⁶¹ See Milanovic (n 49).

⁶² See n 7.

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obligation to comply with the primary rule (the right) in advance, necessity excuses a breach after the fact⁶³ – but the relevant conduct nevertheless remains a breach. Like derogations, however, necessity is autonomous from the primary rule which defines the right in question, although unlike derogations – it is also outside the scope of the primary regime entirely, falling squarely within the secondary rules of State responsibility. On these bases, necessity as a CPW is best characterised as a defence, not an exception. While this is certainly a formal difference, it is perhaps *only* that.

There are more points of overlap in respect of derogations and necessity as a CPW applied to a human rights context than points of divergence⁶⁴:

1. Like derogations, necessity as a CPW is temporally limited – it excludes the consequences of responsibility only for so long as the CPW triggering situation persists.
2. Both derogations and necessity as a CPW create the space for IHRL non-compliant conduct on the basis of situations that are not generally applicable, but exceptional and particular to the circumstances of the invoking State. This is to be distinguished from exceptions, at least in the context of IHRL, which principally address interests of a general (and ongoing) nature.
3. As is the case in respect of derogations, measures which are excused by necessity as a CPW have to be strictly tailored to the situation giving rise to its invocation. Human rights limiting measures adopted pursuant to a derogation need to be ‘strictly required’ to respond to the derogation triggering situation, which analysis involves a ‘least restrictive means’ approach.⁶⁵ Similarly, measures adopted in reliance on necessity as a CPW need to be ‘the only way’ to respond to the necessity triggering situation, which also involves an inquiry as to whether there are other means available.⁶⁶

⁶³ The Commentary to the ILC Articles on State Responsibility (n3) (Art 25, para 2) qualifies ‘necessity’ as a circumstance which ‘excuse[s] the non-performance of an obligation.’ There is however some debate in the literature as to whether this is an accurate characterisation of ‘necessity.’ Federica Paddeu argues that ‘necessity,’ in its guise as a CPW under the ILC Articles on State Responsibility, is in fact a justification (and not an excuse), in that it ‘involve[s] a permission of the legal order to engage in conduct which would normally be prohibited [and as] permissible conduct, justified conduct is therefore lawful’. F Paddeu, ‘Clarifying the Concept of Circumstances Precluding Wrongfulness (Justifications) in International Law’ in F Paddeu and L Bartels (eds) *Exceptions and Defences in International Law* (OUP 2017) XX, XXX. While this is an important debate, particularly insofar as it affects the right of State to terminate a treaty for material breach under article 60 VCLT, termination for material breach is not generally accepted to be applicable in respect of IHRL treaties. This chapter will therefore proceed on the basis of the framework set out in the ILC Articles on State Responsibility, mindful that the ILC failed to treat the distinction between excuses and justifications with any care. See also *Vinuales* (n 5), X, qualifying the CPW of ‘necessity’ as an excuse.

⁶⁴ See JF Hartman, ‘Derogation from Human Rights Treaties in Public Emergencies - A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations’, (1981) 22 HJIL 1, 12-13, discussing the ‘striking resemblances between the derogation clauses and the customary law doctrine of necessity.’

⁶⁵ See note 39.

⁶⁶ Commentary to ILC Articles on State Responsibility (n3), Art. 25, para 15.

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4. Derogation and necessity as a CPW (like exceptions to qualified rights) engage in a form of balancing of interests: The benefit that is sought through the relevant measure cannot be outweighed by the cost to those who suffer at the hands of the measure. Put another way, the situation which the measure seeks to avoid must be worse than the situation created by the measure itself.

The question remains whether necessity is an applicable CPW in respect of IHRL treaty obligations, and particularly in respect of human rights limiting measures that may not fall within the scope of derogations (on the basis of the ‘one situation / two situation’ problem discussed above). The answer to this question involves consideration of two separate questions: First, whether breaches of human rights norms might be excused by their necessity under the terms of Article 25 of the ILC Articles on State Responsibility (and related customary international law); and second, whether – assuming its applicability – the application of Article 25 to human rights breaches is nevertheless excluded by the human rights regime and the *lex specialis* rule.⁶⁷

(i) *Availability of necessity as a CPW as a matter of principle*

The ILC Draft Articles on State Responsibility adopted on First Reading left little doubt that necessity could indeed preclude the wrongfulness of human rights breaching conduct (provided the human rights norm was not *jus cogens*⁶⁸) – in that it adopted a principally state centric approach to State responsibility.⁶⁹ The interests against which the availability of wrongfulness preclusion had to be measured were those of other States.

Draft Article 33, adopted on First Reading, did not allow for the invocation of necessity as a CPW *unless*:

the act did not seriously impair an essential interest of the State towards which the obligation existed.⁷⁰

While it might be argued that respect for the human rights of its nationals is an essential interest of a State, the result would nevertheless be that necessity might only be excluded as a CPW in reference to State A’s breach of the human rights of State B’s nationals. Necessity would be available as a CPW in respect of State’s A’s breach of the human rights of its own nationals.

This state-centricity of the article on necessity as a CPW, however, was not reflected in the final articles adopted by the ILC. Like the previous draft, Article 25 excludes necessity as a CPW in respect of *jus cogens* breaches, but it further excludes necessity as a CPW to the

⁶⁷ Arts 25(2)(a) & 55 ILC Articles on State Responsibility.

⁶⁸ Art. 33(2)(a), Draft Articles on State Responsibility adopted on First Reading, Report of the ILC on the work of its Thirty-second session, UN Doc A/35/10 (1980), reproduced in II(2) YBILC [1980], 30 [Draft ILC Articles on State Responsibility adopted on First Reading].

⁶⁹ See C Ryngaert, ‘State Responsibility, Necessity and Human Rights’ (2010) 41 Netherlands yearbook of International Law 79, 80.

⁷⁰ Art. 33(1)(b) Draft ILC Articles on State Responsibility adopted on First Reading, n 68.

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extent that the breaching act ‘seriously impair[s] an essential interest of the State or States towards which the obligation exists, *or of the international community as a whole*.’⁷¹

Given the human rights obligations have long been characterised as *erga omnes*⁷² and the increasingly central role human rights play in international law generally⁷³ respect for such rights undoubtedly amounts to an essential interest of the international community as a whole. Necessity as a CPW, however, is only inapplicable where the measure adopted by the necessity invoking-State *seriously impairs* an essential interest (of another State or the international community as a whole). The Commentaries to the ILC Articles do not define ‘serious impairment’ of an interest, but there is perhaps a clue elsewhere in the Articles as to what serious impairment might entail. In the context of serious breaches of peremptory norms, the ILC Articles define serious breach as one which ‘involves a gross or systematic failure’.⁷⁴ This undoubtedly precludes the kind of human rights breaches that are in fact contemplated as State practice of necessity as a CPW in the Commentaries (albeit practice which occurred at a time when international law did not yet protect human rights) – which make reference to some rather serious breaches of the non-derogable right to life (in the *Caroline Incident*) and the right to property (in the Anglo-Portuguese dispute of 1832).⁷⁵ But in respect of targeted and limited breaches of human rights (like the right to liberty for instance), engaged in for the strict purposes of responding to a grave and imminent peril, necessity is on its face available as a CPW. For present purposes, this means that human rights feature on both sides of the CPW calculus: they are the obligation in respect of which wrongfulness preclusion is sought through the invocation of necessity; and they are also the interest which must be outweighed by the CPW invoking State’s necessity driven interests.⁷⁶

In respect of the types of grave and imminent peril which might legitimately trigger the invocation of necessity as a CPW, the Commentaries highlight ‘safeguarding the

⁷¹ Emphasis added. Article 25(1)(b) ILC Articles on State Responsibility.

⁷² The ICJ first characterised ‘the principles and rules concerning the basic rights of the human Person’ as *erga omnes* in its *Barcelona Traction* decision (*Barcelona Traction, Light and Power Company, Limited*, Judgment, [1970] ICJ Reports 3, para 34).

⁷³ See for eg R Teitel, *Humanity’s Law* (OUP 2011); A Peters, ‘Humanity as the A and Ω of Sovereignty’ (2003) 20 *European Journal of International Law* 513; JD Van der Vyver, ‘Sovereignty and Human Rights in Constitutional and International Law’ (1991) 5 *Emory International Law Review* 5 321; and M Reisman, ‘Sovereignty and Human Rights in Contemporary International Law’ (1990) *American Journal of International Law* 866

⁷⁴ Art. 40(2) ILC Articles on State Responsibility.

⁷⁵ Commentary to ILC Articles on State Responsibility (n3), Art. 25, paras 4-5. While the precise measures adopted may well be beyond the reach of necessity as a CPW under the ILC Articles on State Responsibility as finally adopted, the triggering situations remain relevant. See further notes 80-81 below.

⁷⁶ While the language of Article 25 suggests that there is no weighing of interests involved, and instead that serious impairment of an interest is an objectively determined and *absolute* bar to successful reliance on necessity as a CPW, the ILC Commentaries stipulate that:

In other words, the interest relied on [in invoking necessity] must *outweigh* all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the *competing interests*, whether these are individual or collective [Emphasis added, Commentary to ILC Articles on State Responsibility (n3), Art 25, para 17].

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environment,⁷⁷ preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population.’⁷⁸ The ‘existence of the State’ and ‘public emergency’ is evocative of the situations which might trigger a derogation.

The point for present purposes is that necessity can respond to emergency situations beyond those which might underpin the valid invocation of a derogation, in that there is nothing in Article 25 or the Commentary thereto which suggests that the responded to peril must be one that affects the ‘nation as a whole’. As a result, extra-territorial human rights limitations occasioned by (for instance) a State’s interests in armed forces protection or security interests in occupation (which interests a State could protect as a matter of IHL), but which fall outside the scope of limitations which are permissible on the basis of regime interaction⁷⁹ and would be excluded from the scope of derogations on the basis of the ‘one situation / two situation’ problem articulated above, may fall within the scope of necessity as a CPW. For instance, the Commentaries to the ILC Articles on State Responsibility consider State practice in which a necessity triggering peril included ‘the pressing necessity of providing for the subsistence of certain contingents of troops engaged in quelling internal disturbances’⁸⁰ and ‘the necessity of self-defence and self-preservation.’⁸¹

Furthermore, the ILC Articles define necessity triggering crises as those which affect the interests of the international community as a whole.⁸² Necessity as a CPW therefore recognises that a triggering situation might be one that affects the interests of third party States, those *not* immediately subject to the jurisdiction of the invoking State, and that so long as the measures are strictly necessary to protect those third party interests, the wrongfulness of the measures might be precluded. This has the effect of making necessity an available CPW for human rights limitations occasioned by (for instance) humanitarian intervention, particularly relevant should aerial campaigns ever be decided to engage the jurisdiction of the intervening State.⁸³

(ii) *The exclusion of necessity as a CPW on the basis of lex specialis?*

Article 25(2)(a) stipulates that necessity may not be invoked as a CPW if ‘the international obligation in question excludes the possibility of invoking necessity’.⁸⁴ The question

⁷⁷ This particular essential interest was recognised

⁷⁸ Commentary to ILC Articles on State Responsibility (n3), Art. 25, para 14.

⁷⁹ See discussion in note **Error! Bookmark not defined.**

⁸⁰ Commentary to ILC Articles on State Responsibility (n3), Art. 25, para 4.

⁸¹ Commentary to ILC Articles on State Responsibility (n3), Art. 25, para. 5.

⁸² Commentary to ILC Articles on State Responsibility (n3), Art. 25, para 15.

⁸³ See n 56.

⁸⁴ To somewhat similar effect, Article 55 of the ILC Articles on State Responsibility provides that: These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law. The Commentaries contemplate either inconsistency between the special and general rules, or a discernible intention (in the special rules) to exclude the general rules. Commentary to ILC Articles on State

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remains, therefore, whether the internal qualifications to IHRL treaties discussed in Section I above (in particular, exemptions to limited rights, exceptions to qualified rights and derogations) are meant to exclude the operation of necessity as a CPW.

The International Court of Justice had the opportunity to address the applicability of necessity as a CPW to human rights breaches in its *Palestinian Wall* Advisory Opinion. The Court held that construction of the wall was in breach of the ICCPR – an IHRL treaty which contains a derogation provision, and queried whether necessity, as a customary CPW, had been displaced thereby.⁸⁵ Presumably on the basis of judicial economy (in respect of its decision that the route of the wall was not the *only* way to safeguard against a grave and imminent peril and therefore did not meet the strict requirements of necessity as a CPW in any event), however, the Court declined to answer the question. In considering whether the conditions for invocation of necessity had been met, however, the Court implicitly accepts – at the very least – that the case *against* the continued applicability of necessity as a CPW in respect of IHRL treaties is not open and shut.

The principal argument regarding the inapplicability of necessity as a CPW to human rights breaches, on the basis of both Article 25(2)(a) and the *lex specialis* principle, is that the exceptions to human rights treaties and derogation clauses ‘occupy the field’ – accounting fully for emergency situations which might legitimately give rise to limitations on human rights,⁸⁶ and that they have done so on the basis of an internal IHRL calculus which is to be respected. And indeed, to the extent that exceptions (insofar as they address national security and therefore at least potentially the type of essential interest which might be in grave and imminent peril) and derogations under IHRL treaties cover the field that would otherwise be occupied by necessity as a CPW, there can be no doubt that necessity has been displaced. It has been argued above, however, that certain features of extra-territorial armed conflicts will be excluded from the scope of derogation clauses in virtue of the ‘one situation / two situation’ problem, and self-defence and force protection (for instance) are precisely the sort of circumstance envisioned by the ILC Commentaries as a necessity triggering situation.⁸⁷ As a result, in certain circumstances that are not covered by derogation clauses, but nevertheless potentially call for targeted human rights breaches to respond to a grave and imminent peril to an essential interest, the invocation of necessity as a CPW is not precluded by either Article 25(2)(a) or Article 55 of the ILC Articles on State Responsibility.

Responsibility (n3), Art 55, para 4. There is certainly no inconsistency between the derogation provision and necessity – and the argument in reference to a discernible intention is as set out below.

⁸⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), [2004] ICJ Rep 136, para 140.

⁸⁶ See C. Ryngaert, ‘State Responsibility, Necessity and Human Rights’, (2010) 41 *Netherlands Yearbook of International Law* 79, 88; S. Heathcote, ‘Est-ce que l’état de nécessité est un principe de droit international coutumier?’, (2007) 40 *Revue belge de droit international* 53, 60.

⁸⁷ See n 80.

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CONCLUSION

There is a broad spectrum of permissible qualifications to human rights interests, all of which carve out a space for the exercise of regulatory authority or executive power that is free from the constraints otherwise imposed by a broad conception of human rights in the interests of achieving some legitimate aim. There is nothing inherent in the form relevant qualifications take – they may take the form of exemptions from the scope of the right, exceptions to the rights protection, or a temporally limited suspension of the obligation to respect the right or the secondary obligations which flow from responsibility for breach of the right. The same legitimate aim can be recognised in the human rights calculus at the stage of defining the scope of the right itself, at the stage of waiving the obligation to respect the right, or at the stage of suspending the consequences of wrongfulness. The distinction with serious consequence lies not in the form of the human rights qualification, or indeed in the nature of the analysis applied to determining its lawfulness, but in the competence of various courts and human rights bodies to determine that lawfulness. In respect of qualifications which are internal to human rights treaty systems, human rights limiting measures remain subject to scrutiny by human rights treaty monitoring bodies and courts. And at least in the European system, such scrutiny has insured that human rights interests are not obscured or even obliterated by the 21st century's all-consuming sense of crisis and emergency.

External qualifications, like necessity as a circumstance precluding wrongfulness, on the other hand, are ordinarily subject to the general international law mechanisms of State responsibility and courts of general jurisdiction (like the International Court of Justice). There is nothing which precludes human rights monitoring bodies and courts (like the ECtHR, which is determining a State's responsibility for breach of its treaty obligations) from looking to necessity as a circumstance precluding wrongfulness in cases where the permissible internal qualifications to human rights are inapplicable, but there is nevertheless a widely recognised legitimate aim behind the human rights limitation. It is certainly hoped, on the basis of a doctrine of incidental jurisdiction, that human rights courts and treaty monitoring bodies might exercise jurisdiction over external qualifications in such cases – for the sake of ensuring both that emergency measures remain subject to independent scrutiny and that the human rights paradigm remains at the centre of State action which affects the human condition.