

SAFEGUARDING EDUCATION BEYOND BORDERS

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Abstract: The human right to education has been commonly regarded as a domestic matter of states. In this context, the present thesis proposes to focus on the question whether states have the obligation to realise the right to education beyond their territorial borders. More precisely, it explores whether, and if so, under which conditions, states can be held accountable for violations and denials of the right to education beyond their borders under the current international human rights law. To this aim the international and regional legal framework protecting the right to education are scrutinized with focus on the substance of the right, the corresponding states' obligations and the available remedies to rights – holders. Also, the extraterritorial obligations of states to respect, to protect and to fulfil the right to education are assessed in the light of the clarifications brought by the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights and by academics' interpretations. For a better illustration, a case – study is conducted exploring the obligations of states and the extent of their responsibility in realising the right to education in Transdnistria. The thesis' findings indicate that states' obligations to respect and to protect the right to education extraterritorially are clearer, better defined and can be claimed against the duty – bearers in case of violations. However, it cannot be concluded that the extraterritorial obligation to fulfil the right to education entails a legally binding obligation for states to provide the right to education in foreign territories. Hence, it is the task of the courts and human rights treaty bodies to clearly articulate in individual cases the scope and legal nature of extraterritorial obligations of states in relation to the right to education.

Keywords: right to education, extraterritorial, obligations, violations, accountability, *de facto* states

I. INTRODUCTION

A. Background

The right to education is one of the most important human rights as it operates as a multiplier in the sense that it enhances all other human rights when guaranteed and forecloses the enjoyment of most, if not all, when denied.¹ Through education individuals can escape poverty and are able to participate fully in their communities.² The need of strengthening the guarantees and the protection of the right to education across the world is thus of utmost importance.

Education has been accorded the status of a fundamental right in many national constitutions³ and has also been recognized as a human right at the international level. Even though international law has defined education as a human right ever since this right was first laid down in 1948 in article 26 of the Universal Declaration of Human Rights (UDHR), the educational situations in many states leave much to be desired still in our present days.⁴ Since the right to education is a human right laid down in international conventions, the failure of a state

¹ Katarina Tomasevski, *Education Denied. Costs and Remedies*. (Zed Books Ltd. 2003) 1.

² United Nations, Committee on Economic, Social and Cultural Rights, 'General Comment No. 13. The Right to Education' UN Doc. E/C.12/1999/10 (8 December 1999), [1] <<http://www.unhcr.ch/tbs/doc.nsf/0/ae1a0b126d068e868025683c003c8b3b?Opendocument>> accessed on 18 February 2013.

³ Information regarding the provision of the right to education in national constitutions on Right to Education Project, Country Database <<http://www.right-to-education.org/node/271>> accessed on 10 February 2013.

⁴ Klaus Dieter Beiter, *The Protection of the Right to Education by International Law, Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (Martinus Nijhoff Publishers 2006) 1.

to comply with the right to education amounts to a violation of international law, entailing the international responsibility of that state.⁵ Therefore the analysis of the accountability mechanisms in respect of the right to education is important.

The right to education is the most evident example reflecting the universality, interrelatedness and indivisibility of human rights⁶ as it has been characterized as implying two different aspects: first, the social aspect which is understood as the state's positive obligation in providing education, namely to invest financial and technical resources in setting up and maintaining an education system and second, the freedom aspect of the right which implies the state's negative duty of refraining from discriminating against students on grounds such as race, sex, language, religion or culture and also the liberty of parents to choose for their children schools other than those established by the public authorities in conformity with their own convictions. The categorization of the right to education mostly as an economic and social right is due to the fact that the realization of the right requires positive actions and resources from the State.⁷

The freedom aspect of the right to education has been mostly challenged and courts have dealt more with the civil and political dimensions of the right to education.⁸ For example, the European Court of Human Rights (ECtHR) has analysed the liberty of parents to have their children educated according with their own moral and religious convictions⁹ as well as the non-discriminatory aspect of the right to education in cases involving the exclusion of Roma children from having access to education in some of the European countries.¹⁰

The social dimension of the right to education has been criticized in the context of general ambivalence towards economic, social and cultural rights.¹¹ The right to education requires efforts on the part of the States to make available various forms of education. Therefore, the States must invest financial and technical resources in setting up and maintaining an education system.¹² The State's obligation in this case is of positive nature and requires expenditure of money. Over the last decades, the economic, social and cultural rights (ESCR) have gained increased acceptance in international law and their justiciability has been supported by the Committee on Economic, Social and Cultural Rights (CESCR)¹³ of the United Nations (UN) which is the treaty body responsible to monitor the implementation of the International Covenant of Economic, Social and Cultural Rights¹⁴ (ICESCR) by its States parties. Also the academics¹⁵ and the case – law of the courts had a great role in reinforcing the justiciability of ESCR and in particular of the right to education as it will be showed further.

Even if the right to education is commonly seen as a domestic matter which requires the actions of the national authorities and entails obligations primarily on the domestic governments, it can be further researched if States have the duty to respect, to protect and to fulfil the right to education beyond their national borders and if they can be held accountable in case of violations and abuses. The present thesis will focus on the right to education and the extraterritorial obligations of States in relation to the right to education. The analysis will tackle the obligations of States to respect, to protect and to fulfil the right to education in an extraterritorial dimension, by considering the legal status of such obligations, the extent of the responsibility of duty – bearers and the available remedies in case of violations.

5 Ibid 2.

6 United Nations, 'Vienna Declaration and Programme of Action', UN Doc. A/CONF.157/23 (12 July 1993) <[http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en)> accessed on 10 February 2013.

7 Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio- Economic Demands under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 151.

8 Katarina Tomasevski, *Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable* (Novum Grafiska AB 2001) 9.

9 *Lautsi and Others v. Italy* App no 30814/06 (ECtHR, 18 March 2011).

10 *Orsus and Others v. Croatia* App no 15766/03 (ECtHR, 16 March 2010).

11 Beiter (n 4) 47.

12 Ibid 38.

13 UN CESCR, 'Monitoring the Economic, Social and Cultural Rights' <<http://www2.ohchr.org/english/bodies/cescr/>> accessed on 21 February 2013.

14 International Covenant on Economic, Social and Cultural Rights, UN Doc. A/RES/21/2200 A (16 December 1966) <http://treaties.un.org/Pages/ViewDetails.aspx?mtmsg_no=IV-3&chapter=4&lang=en> accessed on 15 February 2013.

15 eg Martin Scheinin, 'Economic and Social Rights as Legal Rights' in Asbjorn Eide and Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights. A Textbook* (2nd revised edn, Martinus Nijhoff, 2001) 29 – 54; Fons Coomans, 'Justiciability of the Right to Education' (2009) 02 Erasmus Law Review 427.

The conduct of some states may have a big impact on the right to education exercised by individuals or groups in other territories, amounting to violations of their right to education. It is difficult to establish the duty – bearers and their responsibility for violations of the right to education in an extraterritorial dimension, such as in a situation of a *de facto state*¹⁶ controlled by a foreign state, when the legal uncertainty is even more present and the rule of law is almost absent. It seems that the individuals living in these territories have been forgotten by the international community at large and their human rights are continuously denied and violated. Therefore, of empirical importance is the study of states' obligations in relation to the right to education exercised in such a *de facto state*.

The extraterritorial obligations of states, especially in the area of ESCR, are not well defined as the treaty provisions and principles are vague and unarticulated.¹⁷ The number of situations when the extraterritorial conduct of a state has an impact on the right to education of the individuals living in other states has increased due to the economic globalisation and states' interdependence. Since this extraterritorial conduct is not clearly regulated, the state causing the negative effects on the right to education might escape accountability. Therefore, this research is of great legal importance in trying to define and clarify the scope and nature of extraterritorial obligations of states in relation to the right to education in order to avoid an accountability gap.

B. Overall purpose and research questions

The traditional view envisaged human rights obligations of states as being essentially domestic meaning that human rights were recognised only for the people within a state's borders. Over the past decades due to the globalisation and the increased interdependence in the world, the traditional view has been challenged and it has resulted that states have obligations to realise the human rights of individuals outside of their territories.¹⁸ Consequently, there is a need to explore, through the lens of the concept of extraterritorial obligations of states, *if* and in *what conditions* states could be held accountable for violations and denials of the right to education beyond their domestic borders. The key question to be answered is if it can be established, and under what circumstances, a legally binding obligation for States to respect, to protect and to fulfil the right to education extraterritorially.

In order to achieve the above mentioned purpose, the thesis will attempt to answer to the following questions:

First, it is very important to examine the scope of the legally binding obligations of States in relation to the right to education under international human rights law. In order to do this the core content of the right to education as provided by the main universal and regional legal instruments protecting the right to education will be scrutinized.

Secondly, based on the main components and features of the right to education as provided by the international human rights law, the states' corresponding obligations will be identified. Once the state's obligations have been identified, it is important to be able to detect the violations of the right to education, namely when a state fails to comply with its obligations to realise the right to education under the existing legal instruments ratified by that state.

Thirdly, the nature of extraterritorial obligations of states to respect, protect and fulfil the right to education will be analysed in the light of the legal instruments, doctrine and experts' statements such as the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maas-

¹⁶ *De facto states* are defined as breakaway territories which claim to have independence from the parent state and their own authorities, without being recognised as sovereign states by the international community or the parent state, as described in detail in Chapter IV of this thesis.

¹⁷ Olivier De Schutter, 'Foreword' in Fons Coomans and Rolf Kunnemann (eds), *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Intersentia 2012) vi.

¹⁸ Fons Coomans and Rolf Kunnemann (eds), *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Intersentia 2012) 1 – 4.

tricht Principles).¹⁹ For a better illustration, a case – study will be conducted in order to explore the extraterritorial obligations of states in a specific situation involving an extraterritorial dimension that of a *de facto state*.

The right to education involves four key actors: the state as the provider and funder of education and the main duty – bearer, the child as the holder of the right to education and of the duty to comply with compulsory – education requirements, the child’s parents who are the first educators, and professional educators, namely the teachers.²⁰ Here the focus will be on the states’ obligations as the main duty – bearers in realising the right to education.

C. Limitations

The present thesis has some limitations. First, the research will not consist of a comprehensive analysis of all aspects of the right to education under international human rights law, but will rather focus on the legal obligations and accountability of the states as duty – bearers in respecting, protecting and fulfilling the right to education in an extraterritorial dimension, violations and denials of the right and available remedies.

Second, the research will not look at the extraterritorial obligations of states in the area of ESCR in general, but it will try to determine such obligations of States in relation to the right to education. However, an overview of the most relevant findings of the CESCR and of the recent developments in the area of ESCR, such as the Maastricht Principles, is needed for a better understanding of the topic.

Given the limited space of this paper, it is difficult to treat all aspects of extraterritorial obligations in relation to the right to education and to deal with all scenarios involving extraterritorial conduct. Therefore the violation of the right to education in a situation of a *de facto state* will be studied in depth based on a case solved by the ECtHR. Extraterritorial obligations of states to realise the right to education in other circumstances such as in the development or trade context and as members of international organisations are not treated in this paper.

D. Terminology

In a wide sense, education implies '[...] the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge'²¹ while in a narrow sense, education means formal institutional instruction and teaching.²² The right to education as provided by international legal instruments and as dealt with in this thesis, refers primarily to education in its narrower sense.

The term extraterritorial obligations refers to the human rights obligations of states towards individuals living outside their national borders, in foreign territories, and it will be used in this sense in the present thesis in line with the academics’ preference²³ and the Maastricht Principles. Domestic obligations were defined as the obligations incumbent to the state within its territory and toward its citizens.²⁴ Also, foreign state refers to a state other than the domestic state.

Other specific notions such as the obligation of international cooperation and assistance, the obligations to respect, to protect and to fulfil the right to education will be defined and explained within the thesis.

¹⁹ Maastricht University and the International Commission of Jurists, Maastricht Principles on Extraterritorial Obligations of States in the Area of ESCR (28 September 2011) <http://www.fian.org/fileadmin/media/publications/2012.02.29_-_Maastricht_Principles_on_Extraterritorial_Obligations.pdf> accessed on 25 April 2013.

²⁰ Tomasevski, *Education Denied. Costs and Remedies* (n 1) 55.

²¹ UNESCO, 'Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms' (19 November 1974) art 1 (a) <http://www.unesco.org/education/nfsunesco/pdf/Peace_e.pdf> accessed on 20 February 2013.

²² Beiter (n 4) 19.

²³ Mark Gibney, 'On Terminology: Extraterritorial Obligations' in Malcolm Langford and Wouter Vandenhole and Martin Scheinin and Willem Van Genugten (eds), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) 32 – 47.

²⁴ Malcolm Langford and Wouter Vandenhole and Martin Scheinin and Willem Van Genugten (eds), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) 12.

E. Structure and methodology

In order to answer to the research questions, I will proceed as following: the first step is to analyse the substance and normative aspects of the right to education in international human rights law. The second step is to determine the legal obligations of the duty – bearers and to identify violations of the right to education. In a third step, the focus of the research will be on the extraterritorial obligations of states in the area of ESCR and in particular in relation to the right to education, where the scope and legal nature of such obligations will be explored. As a fourth step, the division of responsibility between the actors involved in realising the right to education will be tackled. Then I will attempt to apply the normative provisions and the doctrinal findings to a concrete case of violation of the right to education in a *de facto state* situation. Finally, some conclusions will be drawn in answering the research questions.

This thesis has a legal approach focusing on the legal content of the right to education, the legally binding nature and content of extraterritorial obligations of States in relation to this right, violations, accountability mechanisms and available remedies.

The research questions will be treated on a basis of a descriptive, analytical and normative approach, using both primary sources such as international and regional legal instruments, case law, General Comments, reports of the UN Special Rapporteur on the Right to Education, experts' principles such as the Maastricht Principles, as well as secondary sources such as books and academic articles, NGOs' reports, other internet sources. The doctrinal findings and theoretical analysis are supported, as far as possible, by concrete examples of case – law. A case – study will be conducted for a better exemplification.

In conclusion, the hypothesis of the present research is that the right to education is not only a domestic matter, but states have the duty to respect, protect and fulfil the right to education beyond their domestic borders and they can be held accountable in case of violations and abuses at any time. The questions to be answered are *if* and in *what circumstances* states can be held *legally* responsible for denials and violations of the right to education beyond their domestic borders.

II. EDUCATION AS A HUMAN RIGHT

A. A rights based approach to education

'The right to education straddles the division of human rights into civil and political, on the one hand, and economic, social and cultural, on the other hand. It embodies them all.'²⁵

As already expressed in the first chapter, the right to education belongs to both categories of rights: its civil and political dimension is represented by the state's obligations not to interfere with the freedom of parents to have their children educated according with their own beliefs or with the free establishment of schools, while the state's obligation to provide education and to finance the education system entail the social and economic dimension of the right to education.

This distinction is important as courts and human rights bodies have dealt mostly with the civil and political aspects of the right to education as will be further discussed in this thesis. The reluctance of the courts to deal with the economic and social aspect of the right to education has its roots in the old, traditional view that ESCR are not justiciable and are more of a political nature, while civil and political rights could easily be applied by courts and other judicial bodies.²⁶

The more modern view supports the justiciability of ESCR, including of the right to education,²⁷ as their content and the corresponding obligations of states have been clarified through the General Comments²⁸ of the

²⁵ Katarina Tomasevski, *Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable* (Novum Grafiska AB 2001) 9.

²⁶ Asbjorn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjorn Eide and Catarina Krausse and Allan Rosas (eds), *Economic, Social and Cultural Rights, A Textbook* (2nd edn Martinus Nijhoff 2001) 10.

²⁷ Fons Coomans, 'Justiciability of the Right to Education' (2009) 02 *Erasmus Law Review* 427.

CESCR, and also by scholars, experts and practitioners. The General Comments were characterised as soft-law instruments which do not create any new rules, but are intended to define and clarify the provisions of the human rights treaties.²⁹ Even if they are not legally binding instruments, the General Comments are useful tools in assessing states' obligations to realise ESCR, including the right to education. Also, the work conducted within the UN Special Procedures such as the UN Special Rapporteur on the Right to Education has proved to be very important in strengthening the protection of the right to education.

In her reports, the former UN Special Rapporteur on the Right to Education, Katarina Tomasevski, has stressed for a human rights based approach to education.³⁰ The human rights based approach is useful in the sense that it helps to better identify the human rights obligations of the duty – bearers, as human rights law focuses on the vertical relation between the individuals as rights – holders and the state as duty – bearer. Hence, this approach helps in determining what states, individually and collectively, ought to do (such as providing free and compulsory education for all school – age children) and what they ought not to do (such as subjecting schoolchildren to indoctrination).³¹ In the context of extraterritorial human rights obligations, as it will be further discussed below, the same vertical relationship is being analysed, but in this context as a diagonal line between foreign States and persons living in other states.³²

With the same purpose of clarifying the content of the right to education and the states' obligations in relation to this right, the '4 As Right to Education Framework' has been developed by the former UN Special Rapporteur on the Right to Education, Katarina Tomasevski,³³ and by the CESCR in its General Comment No 13 on the Right to Education.³⁴

The 4 As Framework shows the inter-relatedness of the individual components of the right to education and the counterpart States' human rights obligations.³⁵ According to this framework, the right to education includes the following four inter-related and essential features:

- *Availability*³⁶ requires that functioning educational institutions and programmes are available in sufficient quantity meaning that all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, while other require facilities like library or computer facilities.
- *Accessibility* requires that the system is non- discriminatory and accessible to all, and that positive steps are taken to include the most marginalised. Accessibility has three overlapping dimensions: non-discrimination, physical accessibility and economic accessibility.³⁷ How the accessibility of the right to education is seriously affected will be also subject of analysis in the case – study presented later in Chapter V.
- *Acceptability* requires that the form and substance of education, including curricula and teaching methods have to be acceptable, relevant, culturally appropriate and of good quality, to students and, in appropriate cases, parents.³⁸

²⁸ UN CESCR, 'General Comment No. 3. The Nature of States Parties Obligations' UN Doc. E/1991/23 (14 December 1990) <http://www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664#*%20Contained%20i> accessed on 17 February 2013.

²⁹ Michael Wabwile, 'Re-examinig States' External Obligations to Implement Economic and Social Rights of Children' (2009) 22 Canadian Journal of Law and Jurisprudence 407, 433, 448.

³⁰ UN, 'Preliminary Report of the Special Rapporteur on the Right to Education Katarina Tomasevski' UN Doc. E/CN.4/1999/49 (13 January 1999) [13], [14] <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/6a76ced2c8c9efc780256738003abbc8?Opendocument>> accessed on 20 February 2013.

³¹ Katarina Tomasevski, *Education Denied. Costs and Remedies* (first edn Zed Books Ltd. 2003) 9.

³² Wabwile (n 29) 415.

³³ UN Special Rapporteur on Education Katarina Tomasevski (n 30) [42] – [74].

³⁴ UN CESCR, 'General Comment No. 13. The Right to Education' UN Doc. E/C.12/1999/10 (8 December 1999) <<http://www.unhchr.ch/tbs/doc.nsf/0/ae1a0b126d068e868025683c003c8b3b?Opendocument>> accessed on 17 February 2013 [6].

³⁵ Tomasevski, *Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable* (n 25) 13.

³⁶ UN CESCR, General Comment No. 13, UN Doc. E/C.12/1999/10 (8 December 1999) [6] (a).

³⁷ Ibid [6] (b).

³⁸ Ibid [6] (c).

- *Adaptability* requires that education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.³⁹

It is important to mention that all the 4 As need to be complied with simultaneously in order for the right to education to be realised. It was argued⁴⁰ that even if the state has succeeded to make education compulsory and free, but indoctrination is used in schools and the parents' and pupils' freedom of choice is not respected, the right to education is partly denied. As already adopted by the CESCR and used by experts on the right to education⁴¹, the 4 As Framework is very important in assessing states' compliance with their obligations, as it matches individual rights to states' obligations, and hence facilitates the process of identifying violations and denials of the right to education. These are the reasons why the 4As Framework has been chosen as a model for analysis of states' obligations in the case study later in this paper.

In conclusion, in accordance with the human rights based approach, it is important, as a first step, to define the substance of the right to education and to identify the existing legal mechanisms and forums available to rights – holders so that they can claim their rights in case of denials and violations. To this aim, the next section consists of an overview of the most relevant universal and regional legal instruments protecting the right to education.

B. The protection of the right to education under human rights law

Due to the limited space, only some significant aspects of various provisions will be analysed, and not the entire international legal framework referring to the right to education. The focus of the analysis will be on the substance of the right, the nature of the states' obligations as duty – bearers in realising the right to education and the available remedies (judicial or non-judicial) under the respective legal instruments.⁴²

1. The protection of the right to education by international legal instruments

a. Universal Declaration of Human Rights

A general right to education was specifically articulated for the first time in an international instrument through the article 26 of the UDHR.⁴³ The UDHR recognised the right of every person to receive an education, the right of parents to choose their children's education and made reference to the aims of education such as the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms. Of major relevance are the provisions of article 22 of UDHR which set the premises for the discussion on the extraterritorial obligations of states in relation to the right to education providing that: 'everyone [...] is entitled to realisation, through national effort and international co-operation [...] of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.'⁴⁴

Even if the UDHR is of a non – binding nature as a resolution of the UN General Assembly, scholars have supported and emphasized the nature of *customary law* of the UDHR⁴⁵ and therefore that the right to educa-

³⁹ Ibid [6] (d).

⁴⁰ Peter Hyll – Larsen and Angela Melchiorre, 'Entitled to Education. Using International Human Rights Law to Advocate for the Right to Education in the Occupied Palestinian Territory' (Right to Education Project, London, 2012) <http://www.right-to-education.org/sites/r2e.gn.apc.org/files/Report_Entitled%20to%20Education_2012.pdf> accessed on 5 March 2013).

⁴¹ Ibid, Hyll – Larsen and Melchiorre use the 4 As Framework in assessing the obligations of Israel and of the Palestinian authorities in relation to the right to education in the occupied Palestinian territory.

⁴² The term *instrument* refers to both human rights treaties of binding nature and soft-law documents.

⁴³ Klaus Dieter Beiter, *The Protection of the Right to Education by International Law, Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (Martinus Nijhoff Publishers 2006) 90.

⁴⁴ Universal Declaration of Human Rights, UNGA Res 217 A (III) (10 December 1948) art. 22<<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement>> accessed on 20 February 2013.

⁴⁵ Jaime Oraa Oraa, 'The Legal Value of the Universal Declaration' in Felipe Gomez Isa and Koen De Feyter (eds), *International Protection of Human Rights. Achievements and Challenges* (University of Deusto 2006) 117-132

tion, namely the right to free and compulsory primary education and the right not to be discriminated against in the enjoyment of the right to education forms part of customary law.⁴⁶ Moreover, it has been argued that a state which has not ratified the ICESCR, that guarantees the right to free and compulsory primary education in article 13 (2) (a) and the right not to be discriminated against in the enjoyment of educational rights in article 13 read with article 2 (2), will nevertheless, be obliged to realize these rights as the state's obligations flow from customary international law.⁴⁷ Notwithstanding the above mentioned academic opinions as regards the customary law nature of the UDHR, in practice the right – holders will be faced with the difficulty of not being able to hold states accountable for violations of the right to education based on the provisions of UDHR only, taking the lack of any remedies into account.

b. International Covenant on Economic, Social and Cultural Rights

In 1966, the right to education as a universal human right was incorporated into the legally binding provisions of article 13 and article 14 of the ICESCR, which are more detailed and thus viewed as constituting a codification of the right to education in international law.⁴⁸

More important, unlike the UDHR which is a UN General Assembly Resolution of non – binding nature, the ICESCR is an international convention which imposes legally binding obligations on state parties. The provisions laid down in article 13 and 14 of the ICESCR refer to the states' obligations of immediate nature to provide primary education free for all and the '[...] immediate obligation to take steps towards the realization of secondary, higher and fundamental education [...]'.⁴⁹

Of importance for the present analysis of the extraterritorial obligations of states in relation to the right to education are the provisions of article 13 (2) of ICESCR, which imposes on States the obligation to provide different levels of education and must be read together with article 2 (1) of ICESCR which provides that states parties to the Covenant must take steps, '[...] individually and through international assistance and co-operation, especially economic and technical to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the [ICESCR] [...]'. Scholars have questioned⁵⁰ if the provisions of article 13 (2) of ICESCR read with article 2 (1) of ICESCR should be understood as entailing instructions to the states to take actions and to devote financial, technical and other resources available nationally or obtained from international sources to realise the right to education, rather than as entailing actionable entitlements of the individual. This thesis will try to answer to the question whether these provisions of the ICESCR constitute a legally binding obligation for States parties and if they, as a result thereof, trigger responsibility in case of non-compliance.

As regards the available remedies, the most welcomed development in the area of ESCR is the entry into force⁵¹ of the Optional Protocol to the ICESCR (OP – ICESCR)⁵² which provides that any individuals or groups of individuals under the jurisdiction of a state party can submit a complaint claiming to be victims of a violation of any of the ESCR provided by the ICESCR.⁵³ Therefore, the CESCR does not examine legislation in abstract and general terms under this procedure, but a concrete violation of which an individual should claim to be a victim.⁵⁴ Even if the CESCR does not issue judicial decisions and the OP – ICESCR creates a *quasi-judicial mechanism*, the mandate of the CESCR in deciding whether in a particular situation a violation of the right to education has occurred is of great importance for strengthening the protection of the right to education.

⁴⁶ Beiter (n 43) 44-46.

⁴⁷ Ibid 46.

⁴⁸ Ibid 86.

⁴⁹ UN CESCR, 'General Comment No. 13' UN Doc. E/C.12/1999/10 (8 December 1999) [51], [52].

⁵⁰ Beiter (n 43) 98.

⁵¹ UN Optional Protocol to the ICESCR has entered into force on 5 May 2013 <<http://www2.ohchr.org/english/bodies/cescr/>> accessed on 20 May 2013.

⁵² UN Optional Protocol to the ICESCR, UN Doc. A/RES/63/117 (10 December 2008) <http://www2.ohchr.org/english/law/docs/A.RES.63.117_en.pdf> accessed on 20 May 2013.

⁵³ Ibid art 2.

⁵⁴ Marco Odello and Francesco Seatzu, *The UN Committee on Economic, Social and Cultural Rights. The Law, Process and Practice* (Routledge 2013) 31.

c. Convention on the Rights of the Child

The Convention on the Right of the Child (CRC)⁵⁵ provides in article 28 and article 29 the states' obligations in relation to the right to education.

Of relevance for the present research are the references to *international cooperation* throughout the CRC. Thus references to extraterritorial obligations are noticed in the final paragraph of the preamble, article 4 of the CRC and, most important in article 28 of the CRC which provides that '[s]tates parties shall promote and encourage international co-operation in matters relating to education [...]. In this regard, particular account shall be taken of the needs of developing countries.' It was observed⁵⁶ that the CRC emphasized the necessity of international cooperation for effective implementation of the rights of the child, bringing more explicit provisions as regards the extraterritorial obligations than the ICESCR, by referring for example to the 'needs of developing countries'. If such provisions can be interpreted as entailing legally binding obligations for states in a position to assist will be further discussed in this thesis.

The interpretations given to the provisions of the CRC by the ComRC through its General Comments are of great value in clarifying and interpreting the content of all rights of the child, including the child's right to education. It is important to mention that, even not yet in force⁵⁷, the Optional Protocol to the CRC on a Communications Procedure gives the possibility to individuals or groups of individuals, within the jurisdiction of states parties, to submit complaints to the ComRC in case their right to education as well as other rights protected by the CRC have been violated.⁵⁸

2. The protection of the right to education by regional legal instruments

a. Instruments of the Council of Europe

Within the European context, relevant provisions on the right to education are provided by the European Convention on Human Rights (ECHR)⁵⁹ and the European Social Charter (ESC)⁶⁰.

Article 2 of the Protocol 1 to the ECHR provides that: 'no person shall be denied the right to education [...] the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'. The negative formulation of the first sentence of article 2 Protocol 1 ECHR seems to imply that the freedom aspect of the right to education rather than its social aspect is provided for⁶¹ and that more attention is given to the rights of the parents to choose for their children's education than to the right of children to receive an education.⁶² In determining the nature of states' obligations deriving from such a provision, the study of the *travaux préparatoires*⁶³ of article 2 Protocol 1 ECHR and the case law of the ECtHR supports a negative construction of the right to education. For example, in the *Case relating to certain aspects of the laws on the use of languages in education in Belgium (Belgian Linguistics Case)*, the Court stated

⁵⁵ UN Convention on the Rights of the Child, UN Doc. A/RES/44/25 (20 November 1989) <http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en> accessed on 5 March 2013.

⁵⁶ Malcolm Langford and Fons Coomans and Felipe Gomez Isa 'Extraterritorial Duties in International Law', in Malcolm Langford and Wouter Vandenhole and Martin Scheinin and Willem Van Genugten (eds), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) 80.

⁵⁷ UN Optional Protocol to the CRC on a Communications Procedure, UN Doc. A/RES/66/138 (27 January 2012) <<http://treaties.un.org/doc/source/signature/2012/a-res-66-138-english.pdf>> accessed on 6 July 2013, art. 19 (1) provides: 'Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.' By 15 January 2014, nine States have ratified this Optional Protocol.

⁵⁸ Ibid art. 5.

⁵⁹ Council of Europe, European Convention of Human Rights (4 November 1950) <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed on 3 April 2013.

⁶⁰ Council of Europe, European Social Charter (18 October 1961) <<http://conventions.coe.int/Treaty/en/Treaties/Html/035.htm>> accessed on 3 April 2013.

⁶¹ Beiter (n 43) 162.

⁶² Manfred Nowak, 'The Right to Education-Its Meaning, Significance and Limitations' (1991) 09 Netherlands Quarterly of Human Rights 420.

⁶³ The initial formulation of article 2 was 'Every person has the right to education.' which was changed by the drafting Committee of Experts on Human Rights, in Beiter (n 43) 162.

that 'the negative formulation indicates, as is confirmed by the "preparatory work"...that the Contracting Parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level'.⁶⁴

As regards the social aspect of the right to education, the key question is if somebody can claim that States Parties to the ECHR are under any positive obligation to actively provide educational facilities. In this sense, the ECtHR adopted a *dynamic interpretation* of article 2 of First Protocol by referring to the 'social and technical developments of the time' which could make it necessary to adapt the interpretation of the Convention to secure an effective protection of human rights.⁶⁵ Therefore, the ECtHR acknowledged⁶⁶ that '[...] it cannot be concluded from [the negative formulation] that the State has no positive obligation to ensure respect for such a right as is protected by Article 2 of the Protocol (P1-2). As a "right" does exist, it is secured, by virtue of Article 1 (art. 1) of the Convention, to everyone within the jurisdiction of a Contracting State'. In interpreting the Court's findings, Beiter has claimed⁶⁷ that since article 2 does guarantee the *right to education* and this right has also a positive aspect, like any other rights, it can be concluded that article 2 entails for States a positive obligation to guarantee the minimum content of the right to education (e.g. free primary school). What this minimum content of the right to education entails will be further explained in this thesis.

b. African Instruments Protecting the Right to Education

Extensive provisions on the right to education may be found in article 11 of the African Charter on the Rights and Welfare of the Child (ACRWC)⁶⁸ which are similar with those contained by the CRC. The African Charter adds, among others, that education shall be directed to the '[...] preservation and strengthening of positive African morals, traditional values and cultures [...]', and to '[...] the promotion and achievements of African unity and solidarity [...]'. Another particularity of states' obligations under this Charter is stipulated by article 11 (6) that States parties shall '[...] take all appropriate measures to ensure that children who become pregnant before completing their education shall have the opportunity to continue their education on the basis of their individual ability'. Therefore it imposes an obligation on States not to ban these children from attending the school while many African schools define pregnancy as a disciplinary offence, which usually leads to the expulsion of the pregnant girls from school.⁶⁹ The supervision of the ACRWC is entrusted to the Committee on the Rights and Welfare of the Child which considers States' reports, but is also competent to deal with complaints from States parties, individuals, groups of individuals and NGOs.⁷⁰

c. The right to education under the American regional system

The right to education is comprehensively dealt by the American human rights system as provisions protecting the right to education can be found in the following instruments:

The American Convention on Human Rights⁷¹ (Pact of San Jose or ACHR) guarantees mainly civil and political rights. In relation to the right to education, article 12 (4) protects the right of parents or guardians '[...] to provide for the religious and moral education of their children or wards that is in accord with their own convictions [...]'.⁷² Of particular relevance for the present research are the provisions of article 26 which obliges States parties '[...] to adopt measures, both internally and through international co-operation, especially those of an

⁶⁴ *Case relating to certain aspects of the laws on the use of languages in education in Belgium (Belgian Linguistics Case)* App nos 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64 (ECtHR 23 July 1968) [3].

⁶⁵ Ibid [5].

⁶⁶ Ibid [3].

⁶⁷ Beiter (n 43) 166.

⁶⁸ African Charter on the Rights and Welfare of the Child (11 July 1990) art 11 <http://www.au.int/en/sites/default/files/Charter_En_African_Charter_on_the_Rights_and_Welfare_of_the_Child_AddisAbaba_July1990.pdf>accessed on 5 April 2013.

⁶⁹ Fons Coomans, 'Education and Work', in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran and David Harris (eds), *International Human Rights Law* (first edn, Oxford University Press 2010) 283.

⁷⁰ African Charter on the Rights and Welfare of the Child (n 68) arts 43 – 44.

⁷¹ American Convention on Human Rights (22 November 1969) <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm>accessed on 6 April 2013.

⁷² Ibid art 12 (4).

economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realisation of the rights implicit in the economic, social, educational scientific, and cultural standards set forth in the OAS Charter.’ This provision reminds of article 2(1) ICESCR referred to above.

The most detailed provisions on the right to education provided by the American system are those to be found in article 13 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador).⁷³ Article 13 of Protocol San Salvador closely resembles with article 13 of ICESCR by granting to everyone the right to education, setting the aims of education, establishing the minimum core obligations for all the levels of education and granting to the parents the right to select the type of education to be given to their children. However, it has been noticed⁷⁴ that article 13 of Protocol of San Salvador has a more permissive language as instead of requiring that states parties *shall* comply with various obligations, article 13 uses the expression *should* comply with the obligations. As regards the supervision, article 19 (6) of the Protocol of San Salvador provides that in relation to certain rights, namely the right to education and the right to organize trade unions, the individuals as right-holders can use the system of individual petition under the American Convention on Human Rights in order to enforce these rights in case they ‘are violated by action directly attributable to a State Party to the Protocol’. This last provision shows the importance attributed to the right to education in the American system.

3. The core content of the right to education

The analysis of the above mentioned human rights instruments protecting the right to education shows that the right to education contains some important elements which can be defined as the *core content* of the right, without which the right would lose its meaning.⁷⁵ Also the General Comments⁷⁶ of the CESCR and the case – law helped to better define the core content of the right to education as including the following key elements:

a. Access to education on a non-discriminatory basis

Over time, children have been excluded from education by means of all forms of discrimination when girls or black or indigenous children were not admitted to school just because they were female, black or indigenous.⁷⁷ Unfortunately, even if the prohibition of discrimination is embedded and expressly provided by most of the legal instruments,⁷⁸ discrimination in education is still present in our contemporary society, for example in the context of Roma children in some of the European countries. The ECtHR dealt with cases regarding the access to education of Roma children,⁷⁹ but the decisions of the ECtHR in most cases lack implementation at the domestic level and therefore they are non-effective in practice.⁸⁰ Also, the girls are continuously discriminated against due to their gender in states like Pakistan where girls were prevented to go to school and therefore they were denied an education.⁸¹

⁷³ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Protocol of San Salvador, (17 November 1988) art 13<<http://www.oas.org/juridico/english/treaties/a-52.html>>accessed on 6 April 2013.

⁷⁴ Beiter (n 43) 209.

⁷⁵ Hyll – Larsen and Melchiorre (n 40) 46; also CESCR, General Comment No 3, UN Doc. E/1991/23 (14 December 1990).

⁷⁶ CESCR, General Comment No 13, UN Doc. E/C.12/1999/10 (8 December 1999) [57].

⁷⁷ Tomasevski, *Education Denied. Costs and Remedies* (n 31) 57.

⁷⁸ E.g. UNESCO Convention against Discrimination in Education (14 December 1960) arts 2-5<http://portal.unesco.org/en/ev.php-URL_ID=12949&URL_DO=DO_TOPIC&URL_SECTION=201.html>accessed on 18 February 2013.

⁷⁹ *D.H. and Others v Czech Republic* App no 57325/00 (ECtHR, 13 November 2007). The Court found a violation of art 14 ECHR in conjunction with art. 2 of Protocol no. 1 due to the state’s placement of Roma people in specialized schools, originally intended for people with mental and social handicaps.

⁸⁰ Coomans (n 27) 435.

⁸¹ Facts regarding denials of education of girls and the courage of Malala Yousafzai were reported by UNICEF <<http://www.unicefusa.org/campaigns/stand-with-malala/>>accessed on 22.03.2013.

b. The right to enjoy free and compulsory primary education

States are obliged to ensure free and compulsory primary education for all children *immediately*, or elaborate a plan so as to comply with this obligation as fast as possible.⁸² The CESCR has concluded that '[...] article 13 of ICESCR regards States as having the principal responsibility for the direct provision of education in most circumstances⁸³ and that states *have an immediate duty* to provide primary education for all⁸⁴. Also states need to make the introduction of compulsory free primary education a priority in their policies of allocating resources.⁸⁵

c. Free choice of education

The above mentioned legal instruments, namely the UDHR, the ICESCR and the CRC, guarantee the right of the parents to choose to have their children educated in accordance with their religious, moral and philosophical convictions. This right is violated for example when a State does not respect the free choice and wish of the parents with regard to the religious education of their children.⁸⁶ The ECtHR has held in this sense that contracting the states '[...] must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner [...]'⁸⁷ and that states should not '[...] pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions⁸⁸.

Some argued⁸⁹ that another key component of the right to education is the right to be educated in the language of one's choice. In the *Belgian Linguistics Case*, the ECtHR emphasized that 'the right to education would be meaningless if it did not imply, in favour of its beneficiaries, the right to be educated in the national language, or in one of the national languages, as the case may be.'⁹⁰ The right to be educated in the language of one's choice was also one of the claims raised by the applicants in front of the ECtHR in the case of *Catan v Moldova and Russia* which will be further analysed in this thesis.

All the above mentioned components of the right to education have been defined by the CESCR as the *minimum core content* of the right.⁹¹

C. From rights to obligations

In the preceding section the substance and the main elements of the right to education as recognised by the human rights instruments have been analysed. The rights – holders are entitled to enjoy all and any of the various components of the right to education provided by the legal instruments. But in order to be effective, rights require correlative duties⁹² and, as shown in Section F above, the right to education as a human right entails corresponding obligations of states.

Therefore, using the rights – based approach, the following sections will try to identify states' obligations to realise the right to education and, subsequently, a method for detecting violations of the right to education will be proposed.

Based on the particular core elements of the right to education already described in Section G 3 above, the CESCR has identified *minimum core obligations* of states, such as for example the obligations to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis and to ensure

82 ICESCR, UN Doc. A/RES/21/2200 A (16 December 1966) art 14.

83 UN CESCR, General Comment No. 13, UN Doc. E/C.12/1999/10 (8 December 1999) [48].

84 UN CESCR, General Comment No. 11, UN Doc. E/C.12/1999/4 (10 May 1999) [9].

85 UN CESCR, General Comment No. 13 (n 83) [51].

86 *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 18 March 2011).

87 *Folgero v Norway* App no 15472/02 (ECtHR, 29 June 2007) [84].

88 *Campbell and Cosans v United Kingdom* App no 7511/76, 7743/76 (ECtHR, 25 February 1982) [35].

89 Coomans (n 69) 288, 289.

90 *Belgian Linguistics Case* (n 64) [3].

91 UN CESCR, General Comment No. 13 (n 83) [57].

92 Asbjorn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjorn Eide and Catarina Krausse and Allan Rosas (eds), *Economic, Social and Cultural Rights, A Textbook* (2nd edn Martinus Nijhoff, 2001) 9, 22.

the free choice of education without interference from the state or third parties. Thus, complying with the minimum core obligations means that states should fulfil the minimum level of the right to education – described above as the minimum core content. The failure to do so will amount to a violation of the right to education. Complying with a core obligation should not depend upon the availability of resources as the CESCR is very clear in stating that economic restraints cannot be used by states as an excuse or justification for not providing a viable plan for ensuring free primary education for all.⁹³

More important, the right to education, like all other human rights, imposes three types or levels of obligations on States: the obligations (i) *to respect*, (ii) *to protect* and (iii) *to fulfil* ⁹⁴

- The obligation to respect⁹⁵ requires states to avoid measures that hinder or prevent the enjoyment of the right to education. For example, States have an obligation not to discriminate on the basis of sex or ethnic origin with respect to admission to public schools.⁹⁶
- The obligation to protect⁹⁷ requires states to take measures that prevent third parties from interfering with the enjoyment of the right to education. To this aim, states should ensure, for example, that third parties, including parents and employers do not stop girls from going to school.⁹⁸
- The obligation to fulfil⁹⁹ requires States on one hand to take positive measures that enable and assist individuals and communities to enjoy the right to education (obligation to facilitate) and on the other hand States have an obligation to provide the right to education (obligation to provide). It means in practice that states should take appropriate legislative, budgetary, judicial and other measures in order to set up an education system.

The CESCR stresses that article 13 of ICESCR regards States as having principal responsibility for the direct provision of education in most circumstances¹⁰⁰, which illustrates the obligation to fulfil.

States have the obligations to respect, protect and fulfil each of the essential features - *availability, accessibility, acceptability, adaptability* - of the right to education. When matching the 4As Framework which presents the key features that need to be considered with the three – levels of obligations imposed on states the result is a framework which shows *what* states should do or should not do in order to realise the right to education. By way of example, the State must *respect* the *availability* of education by not closing private schools; the State has the obligation to *fulfil* (provide) the availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries.¹⁰¹

As already mentioned, it has been emphasized by the CESCR, that a state cannot escape its obligation to adopt a detailed plan of action for the progressive implementation of compulsory education free of charge for all according to article 14 of ICESCR, on the grounds that the necessary resources are not available. In this context, considering the provisions of article 2.1 and article 23 of ICESCR which refer to *international assistance and cooperation*, where a State lacks the financial resources and/or expertise required “to work out and adopt” a detailed plan, the international community has a clear obligation to assist.¹⁰² The interpretation of the States’ obligation of *international assistance and cooperation* will be further analysed in detail in Chapter III.

Lastly, when the education is provided, the State has an obligation not to take *retrogressive measures*¹⁰³ as States should consider the authoritative instruction of the CESCR given in its General Comment No. 3 that “[...]”

⁹³ CESCR, General Comment No. 11 UN Doc. E/C.12/1999/4 (10 May 1999) [9].

⁹⁴ CESCR, General Comment No. 13 UN Doc. E/C.12/1999/10 (8 December 1999) [46].

⁹⁵ Ibid [47].

⁹⁶ Coomans (n 69) 290.

⁹⁷ CESCR, General Comment No. 13 UN Doc. E/C.12/1999/10 (8 December 1999) [47].

⁹⁸ Ibid [50].

⁹⁹ Ibid [47].

¹⁰⁰ Ibid [48].

¹⁰¹ Ibid [50].

¹⁰² CESCR, General Comment No. 11 UN Doc. E/C.12/1999/4 (10 May 1999) [9].

¹⁰³ Such retrogressive measures can consist for example in the introduction of schools fees where previously education was free.

any deliberately retrogressive measure ...would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the [ICESCR] and in the context of the full use of the maximum available resources [...].¹⁰⁴

D. From obligations to violations – identifying violations of the right to education

As expressed even from the introduction, the right to education, when realised, provides a way to economic and personal development and the enjoyment of many other human rights such as the right to food, the right to work or freedom of expression. On the contrary, violations and denials of the right to education lead to the violation of other human rights and to poverty. Therefore, it is of utmost importance to be able to identify, when a state fails to comply with its obligations to realise the right to education – namely to respect, protect and fulfil the right – under the legal instruments ratified by that state.

There is a direct link between the obligations of states and the nature of violations. Generally, violations of the right to education may occur through the direct action of states (acts of commission) or through their failure to take steps required by the legal instruments (acts of omission).¹⁰⁵

Some illustrative examples of violations of the right to education by the states are given by the CESCR in its General Comment No 13¹⁰⁶ such as: the introduction or failure to repeal legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of education; the failure to introduce as a matter of priority, primary education which is compulsory and available free to all; the closure of educational institutions in times of political tension in non-conformity with the limitations clause of the ICESCR.

Some developments in the area of human rights show the importance of adopting new methods for identifying violations by using (i) human rights indicators in order to determine the level of fulfilment and states' compliance with their human rights obligations¹⁰⁷ and (ii) a *violation approach* in order to assess treaty compliance.¹⁰⁸ These developments help the right – holders to clearly identify what constitutes a violation of the right to education.

By using the 4 As Framework already described above and linking with the obligations of states to respect, protect and fulfil all the four features of the right to education (the 4 As), a framework of violations can be easily built. By way of example, the State's failure to monitor and regulate private education to ensure that it conforms to minimum standards and does not discriminate constitutes a violation through acts of omission of the State. Following the same structure, the failure of state to provide free textbooks or facilitate access to schools for children living in rural areas represents a violation of the state's obligation of fulfilling the accessibility feature of the right to education, namely to provide compulsory education without discrimination, within safe reach and free from direct or indirect costs for children and parents.¹⁰⁹

In conclusion, the human rights based approach and the 4As framework have proved to be useful tools in matching the components and features of the right to education with corresponding State obligations and in identifying the violations of the right to education by the duty bearers. To this purpose, an overview of the substance of the right to education and available remedies as provided by the legal instruments at international and regional level was necessary. Within the analysis of the legal framework, the complex matter of the extra-territorial obligations of states was envisaged by noting the references to *international cooperation and assistance* contained in the universal instruments as well as in some of the regional legal instruments. Further, the tripartite typology of State obligations – respect, protect, fulfil – in relation to the right to education was addressed.

¹⁰⁴ CESCR, 'General Comment No. 3' UN Doc. E/1991/23 (14 December 1990) [9].

¹⁰⁵ CESCR, 'General Comment No. 13' UN Doc. E/C.12/1999/10 (8 December 1999) [58].

¹⁰⁶ Ibid [59].

¹⁰⁷ Sital Kalantry and Jocelyn E. Getgen and Steven Arrigg Koh, 'Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR' (2010) 32 Human Rights Quarterly, 253, 257, 258.

¹⁰⁸ Ibid 259.

¹⁰⁹ CESCR, 'General Comment No. 13' UN Doc. E/C.12/1999/10 (8 December 1999) [50].

What is understood by States' obligations to respect, protect and fulfil the right to education extraterritorially and if states can be held accountable in case of violations of the right to education beyond their territorial borders will be further analysed in the next chapter.

III. EXTRATERRITORIAL OBLIGATIONS OF STATES TO RESPECT, PROTECT AND FULFIL THE RIGHT TO EDUCATION

A. Understanding extraterritorial obligation of states in the area of ESCR

The extraterritorial obligations of states in the area of ESCR (the right to education included) still represent a debated topic which requires further research and more clarity as regards their nature and content. This Chapter tries to address the most ardent questions which are related to the scope and legal status of such extraterritorial obligations of States in realising ESCR.

Human rights law entails a vertical relationship between individuals as rights – holders and the State as the principal duty – bearer which needs to guarantee and protect the human rights of the individuals. The traditional relationship was usually constructed between a State and the individuals living within the territorial boundaries of that particular State. Over time, actions or omissions of States have had serious impacts on individuals or groups of individuals situated beyond their territorial borders, on the territory of other States. For example, the imposition of user fees for education as a condition for development assistance may have negative impacts on the right to education of children in the developing countries.¹¹⁰ Also the influence and control exercised by a foreign State over the individuals living in a *de facto state* can seriously affect their right to education as it will be seen further. From the human rights law perspective, these situations led to the creation of a new relationship between the individuals whose human rights are affected and those foreign States whose actions or omissions created the effects beyond their territorial boundaries. This diagonal relationship has been studied by academics¹¹¹ and it was concluded¹¹² that it has gained some recognition within international law through the interpretation given to legal instruments as well as through the case-law of international courts and treaty bodies which considered extraterritorial claims.

However, extraterritorial application of human rights treaties was tested more in the area of civil and political rights¹¹³ and courts¹¹⁴ have dealt primarily with the notions of *territory* or *jurisdiction* provided by the human rights treaties as it will be shown briefly below within the discussion on jurisdiction.

In the area of ESCR, economic globalisation in particular determined that States and other actors exert considerable influence on the realization of ESCR across the world.¹¹⁵ While in the area of civil and political rights, the question of extraterritorial human rights obligations has often been reduced to questions of jurisdiction.¹¹⁶ It has been argued that there is more space for extraterritorial obligations in the area ESCR¹¹⁷ since there is no reference to jurisdiction or other territorial limitations in ICESCR for example. Nevertheless, the extraterritorial obligations of States in the area of ESC rights are not well defined by legal instruments, a fact which calls for more in-depth analysis of the real life cases and further clarification of existing provisions by judicial and non – judicial bodies.

¹¹⁰ Wouter Vandenhoele, 'Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate Internationally for Development?' (2009) 17 International Journal of Children's Rights 23

¹¹¹ Michael Wabwile, 'Re-examinig States' External Obligations to Implement Economic and Social Rights of Children' (2009) 22 Canadian Journal of Law and Jurisprudence 413 – 417.

¹¹² Malcolm Langford, Wouter Vandenhoele, Martin Scheinin and Willem van Genugten, 'Introduction: an Emerging Field' in Malcolm Langford and Wouter Vandenhoele and Martin Scheinin and Willem Van Genugten (eds.), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) 5.

¹¹³ Ibid 6; also Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 2.

¹¹⁴ eg the ECtHR and the Inter-American Commission and Court, in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 83 – 181.

¹¹⁵ Maastricht Principles (28 September 2011) preamble [1].

¹¹⁶ Wouter Vandenhoele, 'Beyond Territoriality: The Maastricht Principles on Extra-territorial Obligations in the Area of Economic, Social and Cultural Rights' (2011) 29 Netherlands Quarterly of Human Rights 429.

¹¹⁷ Ibid.

One controversial matter is the reference to *international assistance and cooperation*, whose interpretation has been debated among States. Richer countries reject any legally binding obligation in this sense while developing states have argued the opposite,¹¹⁸ as have academics.¹¹⁹ For example, duties of States to cooperate internationally for the realisation of human rights are contained in the UN Charter¹²⁰, UDHR¹²¹, ICESCR¹²², Declaration on the Right to Development¹²³, CRC¹²⁴ and the Convention on the Rights of Persons with Disabilities.¹²⁵

This Chapter will analyse the scope and the legal nature of the extraterritorial obligations of States to respect, protect and fulfil the ESCR in general and the right to education in particular, in the light of the Maastricht Principles. It will also address the interpretations of *jurisdiction* given by courts and experts when dealing with cases involving an extraterritorial dimension.

B. The Maastricht Principles on Extraterritorial Obligations of States in the Area of ESCR

1. Background

The most welcomed development in the area of extraterritorial obligations is represented by a new set of principles, namely the Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights, which were adopted on 28 September 2011 by leading experts in international law and human rights law. Even if the drafters do not clarify the legal status of the Principles, making just a vague reference that they are 'drawn from international law'¹²⁶, the Maastricht Principles claim to bring some light and clearance in the complex question of extraterritorial obligations in the area of ESCR.

The Maastricht Principles came to complement other two important documents, namely the Limburg Principles on the Implementation of the ICESCR¹²⁷ and the Maastricht Guidelines on Violations of ESCR¹²⁸, which were considered successful in drawing the legal contours of ESCR and corresponding obligations.¹²⁹

Therefore, the main task of the Maastricht Principles was to formulate the legal parameters in which the extraterritorial obligations are to be discharged¹³⁰ and to describe the conditions and circumstances under which a state is bound by obligations to people outside its borders.¹³¹ Some are supporting the normative force and

¹¹⁸ Malcolm Langford, Fons Coomans and Felipe Gomez 'Extraterritorial Duties in International Law' in Malcolm Langford and Wouter Vandenhoele and Martin Scheinin and Willem Van Genugten (eds), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) 52.

¹¹⁹ Wabwile (n 111) 435 – 439.

¹²⁰ UN Charter (26 June 1945) arts 55, 56 <<http://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf>> accessed on 25 June 2013.

¹²¹ UDHR, UNGA Res 217 A(III) (10 December 1948) arts 22, 28 <<http://www.un.org/en/documents/udhr/index.shtml>> accessed on 17 February 2013.

¹²² ICESCR UN Doc A/RES/21/2200 A, (16 December 1966) arts 2(1), 11(1), 23 <http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-3&chapter=4&lang=en> accessed on 15 February 2013.

¹²³ Declaration on the Right to Development, UN Doc. A/RES/41/128 (4 December 1986) arts 3, 4 <<http://www.un.org/documents/ga/res/41/a41r128.htm>> accessed on 30 March 2013.

¹²⁴ Convention on the Rights of the Child (20 November 1989) arts 4, 23(4), 24(4), 28 (3), <http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en> accessed on 5 March 2013.

¹²⁵ Convention on the Rights of Persons with Disabilities UNGA Res A/RES/61/106 (13 December 2006) art 4 (2) <http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-15&chapter=4&lang=en> accessed on 29 June 2013).

¹²⁶ Maastricht Principles (28 September 2011) preamble [8].

¹²⁷ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1987) 9 Human Rights Quarterly 122-135.

¹²⁸ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1998) 20 Human Rights Quarterly 691-704.

¹²⁹ Margot Salomon and Ian Seiderman 'Human Rights Norms for a Globalized World: The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 03 Global Policy 458.

¹³⁰ Ibid 459.

¹³¹ Olivier De Schutter et al 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 Human Rights Quarterly 1084, 1097 Commentary to Maastricht princ 4 contains an important clarification 'A state does not bear extraterritorial obligations to

authority of the Maastricht Principles¹³², even if they lack the legally binding nature, while others are of the opinion that the normative framework of the Principles is not new, but rather a 'restatement and explanation of existing human rights law.'¹³³

2. Definition and typology of extraterritorial obligations of states

The Maastricht Principles define extraterritorial obligations of States as either (i) 'obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory'¹³⁴ or (ii) 'obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally'¹³⁵ or both types of obligations simultaneously.¹³⁶

As shown before, international human rights law imposes three levels of obligations on states: to respect, to protect and to fulfil ESCR of individuals. The same obligations are laid down and explained by the Maastricht Principles:

First, *the obligation to respect* ESCR extraterritorially entails the obligation of states to refrain from both direct and indirect interference with the enjoyment of human rights beyond their borders.¹³⁷ Examples of indirect interference are those situations where a state's conduct impairs the ability of another state or international organization to discharge their obligations or coerces another state or international organisation into violating human rights.¹³⁸ Of importance for the realisation of the right to education, is the states' obligation of refraining from adopting sanctions and other measures, such as embargoes or other economic sanctions, which would result in nullifying or impairing the enjoyment of the right to education¹³⁹, as for example the disruption or severe interference with the functioning of the education systems.¹⁴⁰ Also, states must refrain in all circumstances from embargoes and equivalent measures on goods and services essential to meet core obligations of ESCR.¹⁴¹ By way of example, states must refrain from restricting the provision of goods and services essential to provide free primary education.

Secondly, *the obligation to protect* recalls the duty of the state to take practicable measures to protect ESCR against the risk of interference by third parties¹⁴², such as business enterprises or other non-state actors. States have a general obligation to adopt regulatory measures against non-state actors that can impact negatively on ESCR abroad and whom they are in a position to regulate.¹⁴³ Therefore, the state is exercising extraterritorial jurisdiction by seeking to regulate conduct that takes place outside its territory.¹⁴⁴

The impact on human rights of foreign industries, such as extractive or agricultural, has been discussed by academics¹⁴⁵ and dealt with by courts and human rights bodies. The state has the duty to regulate the conduct of non-state actors by any means, in each of the following circumstances: where the non-state actor is a na-

individually realize the ESC rights of all people everywhere; rather it is bound by obligations to people outside its borders under the conditions, and in the circumstances set out in these principles.'

¹³² Salomon and Seiderman (n 129) 459.

¹³³ Fons Coomans 'Situating the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2013) Maastricht Faculty of Law Working Paper 20 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256836> accessed on 29 May 2013.

¹³⁴ Maastricht Principles (28 September 2011) princ 8 (a).

¹³⁵ Ibid princ 8 (b).

¹³⁶ De Schutter et al (n 131) 1101 Commentary to Maastricht princ 8.

¹³⁷ Maastricht Principles (28 September 2011) princ 20, 21.

¹³⁸ De Schutter et al (n 131) 1129 Commentary to Maastricht princ 21.

¹³⁹ Maastricht Principles (28 September 2011) princ 22; also De Schutter et al (n 131) 1131- 1133.

¹⁴⁰ Salomon and Seiderman (n 129) 459.

¹⁴¹ Maastricht Principles (28 September 2011) princ 22, last phrase; also De Schutter et al (n 131) 1133.

¹⁴² De Schutter et al (n 131) 1134, Commentary to Maastricht princ 23.

¹⁴³ Salomon and Seiderman (n 129) 460; also De Schutter et al (n 131) 1134-1136 Commentary to Maastricht princ 24.

¹⁴⁴ De Schutter et al (n 131) 1138 Commentary to Maastricht princ 25.

¹⁴⁵ Fons Coomans and Rolf Kunnemann (eds) *Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights* (Intersentia 2012): the authors analyse a range of cases in which the actions or omissions of States and non-state actors have impacts on the enjoyment of human rights outside their domestic territory, in the context of trade and investment, climate change, transnational corporations.

tional of the state; where a business enterprise is domiciled or has its main business or substantial activities in the state concerned; where there is a reasonable link between the state and the conduct it seeks to regulate.¹⁴⁶

As regards the right to education, different scenarios can be imagined. For example, a state has the obligation to regulate the conduct of non-state actors which could have a negative impact on the right to education outside its territory for example through the provision by the non-state actors of textbooks and teaching materials with discriminatory content. Also, states have the obligation to regulate the conduct of non-state actors which are transporting goods essential for the realisation of the right to education in other countries.

Thirdly, states have also an obligation to take action, separately, and jointly through international assistance and cooperation, *to fulfil* the ESC rights of persons outside of their respective territories.¹⁴⁷

The CESCR has identified some fulfilment obligations for *States* and found through its General Comments that the *obligation to fulfil* incorporates both an obligation to *facilitate* and to *provide*.¹⁴⁸ The obligation to *fulfil – facilitate* the right to education requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education.¹⁴⁹ For example, a third State obligation to fulfil-facilitate the right to food implies, among others, that food aid should be organized in ways so that it facilitates the return to food self-reliance of the beneficiaries.¹⁵⁰

With regard to the obligation to *fulfil – provide* the right to education, the CESCR was of the opinion that where a State party is clearly lacking in the financial resources and/or expertise required to 'work out and adopt' a detailed plan of action for primary education, the international community has a clear obligation to assist.¹⁵¹ The latter obligation to *fulfil –provide* requires the mobilization of financial resources by States and consequently it is the most difficult to be read and to be accepted by States as a legally binding extraterritorial obligation.

This positive obligation of states to fulfil ESCR beyond their respective territories is based on the provisions of the articles 55 and 56 of UN Charter which call for cooperation among member states in the achievement of human rights by all, higher standards of living and economic and social progress and development as well as on the other instruments which contain the reference to *international assistance and cooperation* as referred before. One commentator¹⁵² claims that the provision of international cooperation in the binding treaties on human rights could constitute a legal basis for extraterritorial obligations of states to realise ESCR of children, including the right to education.

The ICESCR explicitly provides in article 2.1 the obligations of *international assistance and cooperation* of states in realising ESC rights. In its General Comment on the obligations of States parties¹⁵³, the CESCR stated that '[...] in accordance with Articles 55 and 56 of the Charter of the UN, with well- established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States.'

Also the CESCR has stressed that international assistance and cooperation for the realisation of ESCR is '[...] particularly incumbent on those states in a position to assist.'¹⁵⁴ In this regard, scholars have noticed that there is no formal system of international coordination and allocation that would facilitate the discharging of obligations of a global character among states with the capacity to assist.¹⁵⁵ Principle 30 of the Maastricht Principles seeks to address this difficulty, stating that in order that the obligation of international cooperation for realising ESCR to be effective, States should coordinate with each other in the division of responsibilities.¹⁵⁶ Also, the same Principle is enunciating that the lack of such system of coordination does not exonerate a State from

¹⁴⁶ Maastricht Principles (28 September 2011) princ 25.

¹⁴⁷ Ibid princ 28.

¹⁴⁸ CESCR `General Comment No. 13` UN Doc. E/C.12/1999/10 (8 December 1999) [46].

¹⁴⁹ Ibid [47].

¹⁵⁰ CESCR `General Comment No. 12` UN Doc. E/C.12/1999/5 (12 May 1999) [39].

¹⁵¹ CESCR `General Comment No. 11` UN Doc. E/C.12/1999/4 (10 May 1999) [9].

¹⁵² Wabwile (n 111) 419.

¹⁵³ CESCR `General Comment No. 3` UN Doc. E/1991/23 (14 December 1990) [14].

¹⁵⁴ Ibid [14].

¹⁵⁵ Salomon and Seiderman (n 129) 460.

¹⁵⁶ De Schutter et al (n 131) 1149 – 1150.

giving effect to its separate extraterritorial obligations, as the international responsibility of each state is determined individually, on the basis of its own conduct, and by reference to its own international obligations.¹⁵⁷

3. Shortcomings

Even if the Maastricht Principles were characterized as a coherent and consistent document¹⁵⁸ and a reference point for scholarly discussion on extraterritorial obligations in the near future,¹⁵⁹ some lacuna were identified.¹⁶⁰

First, the legal status of the Principles is not clear. The only reference made is that they are 'drawn from international law'.¹⁶¹

Secondly, the Principles are not clarifying the legal basis for extraterritorial obligations, reference being made to the '[...] economic, social and cultural rights and the corresponding territorial and extraterritorial obligations [that] are contained in the sources of international human rights law'.¹⁶²

Third, the Maastricht Principles treat only extraterritorial obligations of States and they do not deal with the obligations of non-State actors.¹⁶³ Nevertheless, during the drafting process, the need for a future clarification of the obligations of non-State actors was stated.¹⁶⁴

Another critique brought to the Maastricht Principles is that they are not addressing the issue of division of responsibility among external actors.¹⁶⁵ For example, in respect of the extraterritorial obligation to fulfil, it is clear *what* should be done, but not *who* should do it.¹⁶⁶

With all their shortcomings, the Maastricht Principles represent the only set of rules which aims to address in detail the issue of extraterritorial obligations of states in the area of ESCR, and therefore I chose to discuss them in the present paper. However, the Maastricht Principles are not of a legally binding nature and they are considered a soft law instrument, but surely they represent a useful tool of interpretation for extraterritorial obligations of states already stated in the treaties. In the long term, through their application, these Principles can have an important influence on the practice of states and extraterritorial human rights obligations in the area of ESCR in general and on the right to education in particular.

The legal status of the obligations to respect, protect and fulfil the ESCR extraterritorially is still questioned, in particular in relation to the obligation *to fulfil*. The next section will explore this aspect.

C. Legal status of the extraterritorial obligations of states

1. Is there a legal obligation to cooperate internationally for the realisation of the right to education?

The obligations of States to respect, protect and fulfil ESCR have been analysed by experts in concrete situations, through case studies.¹⁶⁷ The obligation to respect ESCR does not raise that many questions as the obligations to protect and fulfil ESCR do, since the last two require positive actions from States to realize ESCR. Therefore, States are reluctant to acknowledge that they are bound by any legal obligations which involve expenditure in the form of financial support or any other kind of assistance.

¹⁵⁷ De Schutter et al (n 131) 1150 Commentary to Maastricht princ 30.

¹⁵⁸ Vandenhole (n 116) 432.

¹⁵⁹ Ibid 433.

¹⁶⁰ Ibid 429-433.

¹⁶¹ Maastricht Principles (28 September 2011) preamble [8].

¹⁶² Ibid princ 6.

¹⁶³ Vandenhole (n 116) 431.

¹⁶⁴ Ibid 433.

¹⁶⁵ Ibid 432.

¹⁶⁶ Ibid 432.

¹⁶⁷ eg Fons Coomans and Rolf Kunnemann (n 145).

The legally binding nature of the obligation of *international cooperation* as expressed in article 2 (1) of ICESCR is subject of debates, despite its provision in a binding treaty.¹⁶⁸ Scholars disagree as to, at the moment of drafting, whether extraterritorial obligations were considered by the drafters.¹⁶⁹ The analysis of the *travaux préparatoires* shows that the drafters agreed that *international cooperation and assistance* was necessary to realize ESCR, but they disagreed whether it could be claimed as a right.¹⁷⁰ Some industrialized countries accepted the moral responsibility of international cooperation, but argued that the ICESCR does not impose legally binding obligations in regard to ESC rights internationally.¹⁷¹

Also, the legally binding nature of the obligation *to cooperate internationally* for the realisation of ESCR contained in the preamble and article 4 of the CRC has been also subject of discussions. For example, Vandenhoele argued that no *general legal obligation* exists under the CRC to cooperate internationally for development, or to provide development assistance for the realisation of ESC rights of children in developing countries.¹⁷²

As regards the right to education, article 28 (3) of the CRC provides that 'States Parties shall promote and encourage international cooperation in matters relating to education [...] particular account shall be taken of the needs of developing countries [,]' thus referring to development cooperation which is part of the broad notion of *international cooperation*.

In interpreting article 4 of the CRC which stipulates that States Parties shall undertake all appropriate measures to realize the ESCR of children to the maximum extent of their available resources and within the framework of *international cooperation*, the ComRC has stated that states '[...] take upon themselves obligations not only to implement CRC within their jurisdiction, but also to contribute, through international cooperation, to global implementation.'¹⁷³ Moreover, as regards the right to education, the ComRC identified¹⁷⁴ a general and specific obligation to promote and encourage international cooperation, and therefore urged States parties providing development cooperation '[...] to ensure that their programmes are designed so as to take full account of the principles contained in article 29(1) [...]'¹⁷⁵ which refers to the aims of education. Thus, it seems that the ComRC refrained from imposing an obligation to provide development cooperation, but argued that in case states provide development cooperation, child rights should be ensured.¹⁷⁶

To conclude, it is difficult to argue, under the existing treaty law, that States who are in a position to assist possess binding obligations at a bilateral level to provide assistance to particular rights – holders in other countries and there is little consensus on this.¹⁷⁷ This means in practice that an individual with no access to education is not able to hold foreign States accountable for failing to fulfil his right to education.

D. Human rights beyond borders. Reflections on jurisdiction

When analysing the extraterritorial application of human rights in general, the key issue is still related to *jurisdiction*: if human rights treaties extend their application to situations outside of the State's own territory. However, it can be noticed that international human rights standards are not always territorially limited. For example in some cases there is no spatial limitation, such as in the case of UDHR or the ICESCR where the

¹⁶⁸ De Schutter et al (n 131) 1094 Commentary to Maastricht princ 3 [7].

¹⁶⁹ Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 191: the authors claim that no legally binding obligations were considered by the drafters; in Coomans and Kamminga (n 113) 2, the authors argue that extraterritorial obligations were envisaged by the drafters.

¹⁷⁰ De Schutter et al (n 131) 1094.

¹⁷¹ Langford, Coomans and Gomez (n 118) 62.

¹⁷² Vandenhoele (n 110) 26.

¹⁷³ Committee on the Rights of the Child, 'General Comment No. 5. General Measures of Implementation of the CRC' UN Doc. CRC/GC/2003/5 (27 November 2003) [7] <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/455/14/PDF/G0345514.pdf?OpenElement>> accessed on 7 May 2013.

¹⁷⁴ Committee on the Rights of the Child 'General Comment No. 1. The Aims of Education' UN Doc. CRC/GC/2001/1 (17 April 2001) [28] <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/412/53/PDF/G0141253.pdf?OpenElement>> accessed on 7 May 2013.

¹⁷⁵ Ibid [28].

¹⁷⁶ Vandenhoele (n 110) 46.

¹⁷⁷ Langford, Coomans and Gomez (n 118) 73.

obligations are framed in universal terms as discussed in Section G 1 above. Other treaties are limited by jurisdiction, such as the ECHR¹⁷⁸ and the CRC¹⁷⁹ or the complaint mechanism is limited by jurisdiction.¹⁸⁰ While the ICESCR does not contain a jurisdiction clause, the OP – ICESCR contains the limitation to jurisdiction¹⁸¹ which reflects the reluctance of some State Parties, in particular Western states to recognize and acknowledge *international cooperation and assistance* as a legal concept, giving rise to extraterritorial human rights obligations.¹⁸²

It seems that while under the human rights treaties guaranteeing civil and political rights the obligations of states parties are limited to individuals 'within their jurisdiction', in the case of the human right treaties in the field of ESCR there is no provision limiting the scope of states' obligations to persons within the territory or the jurisdiction of states parties.¹⁸³ However, the latter obligations are more difficult to enforce due to their unclear nature as showed above.

The courts and the human rights treaty bodies developed some criteria for the establishment of 'jurisdiction' over persons living abroad, concluding that there are two types of situations: jurisdiction resulting from (i) control over territory¹⁸⁴ as a result of occupation for example and (ii) control over persons in situations where affected individuals may be brought within the jurisdiction of a State as a consequence of an incidental link between the individuals and the State the acts of which produce effects outside its territory.¹⁸⁵

Of particular relevance in the discussion on jurisdiction is the development of the case-law of the ECtHR. While in an earlier case ECtHR found that the ECHR does not apply to air-strikes by NATO member States which were also parties to the ECHR, on the television and radio facilities in Belgrade¹⁸⁶, as it did not see any 'jurisdictional' link between the victims of the air-strikes and the respondent States¹⁸⁷, in its later judgments the Court appears to have changed the approach as it takes into consideration the factual involvement of the respondent State and the special circumstances when dealing with cases.¹⁸⁸ It was argued that in an extraterritorial dimension, where States act beyond the limits of their jurisdiction, the personal scope of human rights protection is not a question of *legitimacy* but of fact.¹⁸⁹ The interpretation given to jurisdiction by ECtHR in a particular case dealing with the violation of the right to education will be analysed further in Chapter V.

The above mentioned considerations on the extraterritorial reach of human rights treaties of civil and political rights are important in this context as (i) the right to education as described in the previous chapter entails two dimensions – a civil and political one determined by its freedom aspects as well as an economic and social dimension reflected in the duty of state to provide the financial resources for education – and therefore it may be claimed and dealt with by human rights courts and treaty bodies as ECtHR and Human Rights Council as well as by the CESCR; and (ii) the case law on the nature of extraterritorial obligations under civil and political rights can serve as a starting point for the analysis and development of States' obligations under socio-economic human rights treaties in respect of persons in foreign territories.¹⁹⁰ Scheinin has proposed an *integrated ap-*

¹⁷⁸ ECHR art 1 refers to: 'everyone within their jurisdiction'.

¹⁷⁹ CRC art 2(1) refers to: 'each child within their jurisdiction'.

¹⁸⁰ Malcolm Langford and Wouter Vandenhole and Martin Scheinin and Willem Van Genugten (eds), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) 5, 6.

¹⁸¹ Optional Protocol ICESCR art 2 refers to 'individuals under the jurisdiction of a State Party'.

¹⁸² Fons Coomans 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights', (2011) 11 *Human Rights Law Review* 1, 35.

¹⁸³ Coomans and Kamminga (n 113) 2.

¹⁸⁴ *Ilascu and Others v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004).

¹⁸⁵ *Ocalan v Turkey* App no 46221/99 (ECtHR, 12 May 2005) [91].

¹⁸⁶ *Bankovic and Others v Belgium and Others* App no 52207/99 (ECtHR, 12 December 2001).

¹⁸⁷ Maarten Den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in Malcolm Langford and Wouter Vandenhole and Martin Scheinin and Willem Van Genugten (eds), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) 176.

¹⁸⁸ *Al-Skeini and Others v the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011) [143] – [150].

¹⁸⁹ Den Heijer and Lawson (n 187) 164.

¹⁹⁰ *Ibid* 182.

proach which supports the protection of ESCR through treaties on civil and political rights.¹⁹¹ The analysis conducted in Chapter V proves that such an approach is possible as the ECtHR deals with the right to education contained in the article 2 Protocol 1 to the ECHR.

In conclusion, the issue of extraterritorial obligations under treaties providing civil and political rights is reduced to the question of whether States have specific obligations, as a result of their own acts and omissions, towards persons situated in another state.¹⁹² On the contrary, international treaty law pertaining to ESC rights is generally less territorially limited. As showed, the ICESCR does not contain any reference to jurisdiction and the CESCR imposes an obligation upon *all states* to engage in international cooperation to realise ESCR.¹⁹³

Moreover, in respect of ESCR, it has been argued that jurisdiction is used as a 'doctrinal bar' to the recognition and discharge of human rights obligations extraterritorially.¹⁹⁴ That is why the analysis of jurisdiction in the context of extraterritorial obligations of States of respecting, protecting and fulfilling the right to education as an ESCR is also important.

The Maastricht Principles have defined the situations for which *jurisdiction* may extend territorially in broad terms,¹⁹⁵ as including situations of authority or effective control, whether or not such control is exercised in accordance with international law,¹⁹⁶ over the territory or persons on that foreign territory. By way of example, in a situation of belligerent occupation, the occupying power has obligations to respect, to protect and to fulfil the right to work, to health, to education and to an adequate standard of living on the foreign territory.¹⁹⁷

A state will also be considered to be acting within its jurisdiction where, through its conduct it has brought about *foreseeable effects*¹⁹⁸ outside its territory, for example, adopting agricultural subsidies that make basic living impossible for farmers elsewhere.¹⁹⁹ In this case, the responsibility of the state may be effectively triggered when its authorities know or should have known the conduct of the state will bring about substantial human rights effects in another territory.²⁰⁰

Lastly, the Maastricht Principles provide that jurisdiction extends also to situations in which the state is in a position to exercise *decisive influence* or to take measures to realize ESCR extraterritorially.²⁰¹ The Principle is explained by the fact that a state may, through its conduct, influence the enjoyment of human rights outside its national territory, even in the absence of effective control or authority over a situation or a person.²⁰²

What are the effects of an *effective control* on ESCR of individuals living in a *de facto state* and how the responsibility is shared among the parent state and the foreign state (which exercises control *over de facto state*) will be analysed in the next Chapters.

This Chapter has analysed the scope of the extraterritorial obligations of States to realise the right to education. Based on the clarifications brought by the Maastricht Principles, the obligation to respect the right to education extraterritorially can be easily defined as the obligation of States to refrain from both direct and indirect interference with the enjoyment of the right to education beyond their borders. Through the obligation to protect the right to education extraterritorially is understood the obligation of states to take practicable measures to protect the right against the risk of interference by third parties such as the obligation to regulate the conduct of private actors where such conduct may lead to violations of the right to education in another territory.

¹⁹¹ Martin Scheinin, 'Economic and Social Rights as Legal Rights' in Asbjorn Eide and Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights. A Textbook* (2nd edn, Martinus Nijhoff, 2001) 29, 32-42

¹⁹² Den Heijer and Lawson (n 187) 183.

¹⁹³ CESCR, 'General Comment No. 3' UN Doc. E/1991/23 (14 December 1990) [14].

¹⁹⁴ De Schutter et al (n 131) 1105.

¹⁹⁵ Vandenhole (n 116) 432.

¹⁹⁶ Maastricht Principles (28 September 2011) princ 9 (a).

¹⁹⁷ Ibid princ 18; also Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (ICJ, 9 July 2004) <<http://www.icj-cij.org/docket/?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4>> accessed on 21 March 2013.

¹⁹⁸ Maastricht Principles (28 September 2011) princ 9 (b).

¹⁹⁹ Salomon and Seiderman (n 129) 459.

²⁰⁰ De Schutter et al (n 131) 1109 Commentary to Maastricht princ 9 [8].

²⁰¹ Maastricht Principles (28 September 2011) princ 9 (c).

²⁰² De Schutter et al (n 131) 1108, Commentary to princ 9 [6].

On the contrary, the scope of the obligation to fulfil the right to education extraterritorially is not entirely clear and, moreover, it cannot be argued based on the existing legal framework that States have a legal obligation to fulfil the right to education in foreign territories. Another important distinction is that while the treaties pertaining to civil and political rights are limited to jurisdiction, in the case of the human right treaties in the field of ESCR there is no provision limiting the scope of states' obligations to persons within the territory or the jurisdiction of states parties. Also extraterritorial obligations have been mostly articulated in the area of civil and political rights through the courts' interpretation of jurisdiction, while in the area of ESCR they are still at an embryonic stage. The Maastricht Principles have brought some helpful clarifications as regards the scope of jurisdiction in the area of ESCR, which need to be tested through concrete cases.

IV. EXTRATERRITORIAL OBLIGATIONS AND *DE FACTO* STATES

A. The lawless territories

Before entering into the specific analysis of the case – study, it is worth making a few basic, but not exhaustive remarks about the extraterritorial application of human rights in a particular situation that of *de facto* states. For the sake of clarity, *de facto* states were defined as territories which have broken away from a parent (metropolitan) state without the consent of the latter,²⁰³ and which claim to have independence and to have created their own executive, legislative, administrative and judicial structures despite the fact that they are not recognized as sovereign states by the international community.²⁰⁴ The non – recognition of these territories as sovereign states under international law triggers some important consequences. One of them is that these unrecognized states cannot become parties to international treaties and of international organisations such as the United Nations, and cannot ratify human rights treaties and assume human rights obligations. This fact leads to the question if *de facto* authorities cannot be held legally responsible for human rights violations, who then should be responsible for such violations? Should the parent state be held accountable? Or should the state exercising control over the *de facto* state? These questions need to be answered in order to avoid a legal vacuum in the human rights protection.

This Chapter raises interesting theoretical perspectives, but it has an empirical importance as well since a *de facto* state is at the margins of official international life and usually subject to the strong dominance, influence or control of another state, with which the *de facto* state has political, economic, cultural and ideological connections. The extent to which the rule of law exists in these places is questionable and these breakaway states or *de facto* states are often ignored or simply dismissed as lawless 'no man's lands'.²⁰⁵ Unrecognized by the international community, *de facto* states are becoming places where economic misery, organized crime, corruption, smuggling, human and arms traffic, ethnic cleansing are common phenomena.

But the individuals living in these territories or *de facto* states should enjoy their human rights, including the right to education, as any other individuals in the world and, to this extent they should have the possibility to claim their rights against any violation by a foreign state or any other actor in the enjoyment of their rights.

Paradoxically, these territories are claiming recognition and statehood, while in some cases on-going human rights violations and abuses demonstrate the total disregard of democratic values and human rights standards accepted by the international community. Andrysek and Grecu argued²⁰⁶ that the perpetuation of the human rights abuses makes *de facto* states appear as an 'unworthy partner' for discussion and diplomatic negotiations.²⁰⁷

²⁰³ Christopher Waters, 'Law in Places That Don't Exist' (2006) 34 Denver Journal of International Law and Policy 401, 402.

²⁰⁴ Oldrich Andrysek and Mihai Grecu, 'Unworthy Partner: The Schools Issue as an Example of Human Rights Abuses in Transdnistria' (2003) 2 Helsinki Monitor 101, 102.

²⁰⁵ Waters (n 203) 422.

²⁰⁶ Andrysek and Grecu (n 204) 116.

²⁰⁷ Ibid 116.

The extraterritorial application of human rights treaties is questioned today in situations of *de facto states* as well as of armed conflict or military occupation. The question to be answered is if the obligations assumed by states under international human rights instruments apply extraterritorially during such times and in such situations and, most importantly, if there are available remedies for the rights – holders under the current framework of international human rights law. Also, it is important to analyse how the responsibility is shared among the states involved: is the parent state the primary duty bearer? Is it a shared responsibility among the parent state and the state which exercises effective control over the *de facto state*?

The right to education, as well as other ESCR such as the right to food, the right to water, the right to housing, but also the civil and political rights, such as freedom of movement and of thought, freedom of assembly of the individuals living in a *de facto state* are often denied. Courts and human rights treaty bodies have dealt with the question of the extraterritorial application of human rights treaties in *de facto states* and occupied territories, as briefly presented below.

B. The test of effective control

As shown within the discussion on jurisdiction in Chapter III above, a state has obligations under human rights treaties towards the people within its jurisdiction, and according to the case law of the courts, notably of the ECtHR, jurisdiction has been extended to the areas outside a state's own territory when a state has *effective control* over it.²⁰⁸ In the series of cases concerning the situation in Northern Cyprus, the ECtHR found that effective control of territory can arise indirectly, through control of a 'subordinate administration.'²⁰⁹ Although human rights violations were being committed by the local administration for whose actions Turkey rejected any responsibility or control, the Court found that Turkish jurisdiction was engaged: 'The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.'²¹⁰

In an earlier judgment²¹¹, the ECtHR found that 'the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory. Of particular significance to the present case the Court held, in conformity with the relevant principles of international law governing State responsibility that the responsibility of a Contracting Party could also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory.'

In the case of *Ilascu and Others v Moldova and Russia*, the ECtHR considered that the effective control of territory was satisfied since Transdniestria was under the 'effective authority, or at the very least ... decisive influence' of the Russian Federation.²¹² Such decisive influence and control was found as the authorities '[...] survived as a result of military or other support [...] of a state.'²¹³

In such cases, when a foreign State exercises control extraterritorially over a *de facto* administration, the most difficult matter to address from the human rights law perspective is related to the division of responsibility between the actors involved – the extraterritorial state, the parent state and the *de facto* or local authorities.

²⁰⁸ *Al-Skeini and Others v the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011). In this case the Court found that the United Kingdom's human rights obligations apply to its acts in Iraq, and that the United Kingdom had violated the ECHR by failing to investigate the circumstances of the killings [143] – [150].

²⁰⁹ *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001).

²¹⁰ *Loizidou v Turkey* App no 15318/89 (ECtHR, 18 December 1996) [52]; also *Cyprus v Turkey* [76].

²¹¹ *Loizidou v Turkey* (ECtHR, 1996) [52].

²¹² *Ilascu and Others v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004) [392].

²¹³ *Cyprus v Turkey* [77].

C. A shared responsibility?

In the case of *Ilascu and Others v Moldova and Russia* not only was the ECtHR faced with the question of whether detainees in the breakaway region of Transnistria, were within the jurisdiction of Russia due to Russia's support for the rebel forces, but also the Court had to determine whether the detainees could still be considered to be within the jurisdiction of Moldova.²¹⁴ The Court found that Moldova had lost effective control over the separatist regime, but it emphasized that this did not discharge Moldova from its '[...] positive obligation to take all diplomatic, economic, judicial or other measures within its power to secure the release of the applicants [...].'²¹⁵

Hence, the division of responsibility between the potential duty – bearers in relation to the right to education is not always easy to determine. In the above mentioned case, the ECtHR suggested that the parent state is not absolved from its responsibility, even in the absence of an effective control. On the contrary, the ECtHR analysed if Moldova complied with its positive obligations which, in the Court's view, relate both to 'the measures needed to re-establish its control over Transnistrian territory, as an expression of its jurisdiction, and to measures to ensure respect for the applicants' rights, including attempts to secure their release.'²¹⁶ Thus, the Court concluded in this case that despite not holding control over the territory, Moldova had not taken sufficient steps to redress the applicants' situation.²¹⁷ If Moldova fulfilled its positive obligations of securing the right to education of ethnic Moldovans in Transnistria will be analysed in Chapter V below.

The situation of a foreign state exercising control over a *de facto state* is not similar at all to the situation when the foreign state is actually occupying the territory in question. However, some similarities can be drawn as regards the division of responsibilities as in both situations the foreign state exercises an effective control over a territory and the individuals living in that territory. Hence, it is relevant to note how the courts and human rights treaty bodies treated the extraterritorial obligations of states and the division of responsibility in case of an occupation.

D. The right to education and division of responsibility in occupied territories

In case of an occupation, it is of utmost importance to discuss the division of responsibility in relation to human rights as well. Is the occupying state under a legal obligation to observe the human rights of the people living in a foreign occupied territory? Is the local authority absolved from any responsibility as regards human rights? These are the most important questions which need to be addressed. Of significant relevance for the present discussion are the findings of International Court of Justice which in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*²¹⁸ (Advisory Opinion on the Wall) concluded that Israel was in breach of its obligations under ICCPR, the ICESCR and the CRC by constructing the security barrier.²¹⁹ Although the Advisory Opinion of the ICJ is not a binding document, it is considered to be an authoritative statement of international law since it summarizes and interprets existing law and its application to particular facts.²²⁰

²¹⁴ Maarten Den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of "Jurisdiction"' in Malcolm Langford and Wouter Vandenhole and Martin Scheinin and Willem Van Genugten (eds), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press 2013) 166.

²¹⁵ *Ilascu and Others v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004) [331].

²¹⁶ *Ibid* [339].

²¹⁷ *Ibid* [336] – [352].

²¹⁸ Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (ICJ, 9 July 2004) <<http://www.icj-cij.org/docket/?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4>> accessed on 21 March 2013.

²¹⁹ *Ibid* [134] – [137].

²²⁰ Peter Hyll – Larsen and Angela Melchiorre, 'Entitled to Education. Using International Human Rights Law to Advocate for the Right to Education in the Occupied Palestinian Territory' (Right to Education Project, London, 2012) 41 <<http://www.right-to-education.org/>>

Also, when reviewing Israel's reports under ICESCR, the CESCR was of view that 'the State's obligations under the Covenant apply to all territories and populations under its effective control'²²¹ and that the actions of Israel in the Occupied Territories had resulted in widespread violations of the economic, social and cultural rights of the Palestinians.²²² Moreover, the CESCR stressed that even during an armed conflict ESCR must be respected by the occupying power.²²³

As regards the extraterritorial obligations of an occupying state in relation to the right to education in particular, in the case of Israel for example, the ICJ concluded that Israel is in breach of its obligations under IC-CPR, ICESCR and CRC which include the right to education – such as for example the obligation to ensure safe travels of students and teachers to and from schools.²²⁴ In a recent comprehensive report, Hyll – Larsen and Melchiorre argue that the right to education should be guaranteed at all times and states have the obligation to respect, protect and fulfil this right in times of peace as well as in times of war, armed conflict and disasters.²²⁵

Another key issue discussed in relation to the extraterritorial obligations in a situation of occupation, is the fact whether the *occupying* state should secure full compliance with human rights treaty provisions throughout the occupied territory²²⁶ meaning the occupying state's obligations should consist not only of an obligation to respect (not to interfere in the free enjoyment of rights and freedoms of people in the occupied territory), but also of more positive obligations such as obligations to protect and fulfil.²²⁷ The CESCR does not provide a detailed analysis, nor gives examples of types of obligations incumbent on a state party to ICESCR when it occupies a foreign territory.²²⁸ Usually, the occupying power has been criticised for its actions in relation to education consisting in the obstruction of the normal working of educational institutions (therefore an interference resulting in a violation of the obligation to respect the right to education) rather than not doing enough to ensure that they were working properly²²⁹ (consisting in obligations to protect and fulfil the right to education). Therefore, it remains to be articulated clearly what exactly are the positive obligations that an occupying state has with respect to the right to education under human rights law.

As regards potential obligations of the local authorities, the ICJ, in its Advisory Opinion on the Wall, confined Israel's obligations arising from ICCPR and ICESCR to actions of Israeli State organs within the occupied territories and not to activities of the Palestinian authorities.²³⁰ However, the ICJ does not clarify the division of responsibility between Israel and Palestinian authorities, noting only that Israel was under the obligation 'not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities'.²³¹ Therefore, it can be concluded that the Palestinian authorities do have positive obligations in relation to the right to education, even if these obligations are not clearly stated by the ICJ. Although the capacity of Palestinian authorities to sign and ratify international human rights instruments is debatable,²³² they

education.org/sites/r2e.gn.apc.org/files/Report_Entitled%20to%20Education_2012.pdf> accessed on 5 March 2013.

²²¹ CESCR, 'Concluding Observations regarding Israel's Initial Report' UN Doc. E/C.12/1/Add.27 (4 December 1998) [8]

<[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/df35bf5b5ee94d01802566d5003dd6cd?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/df35bf5b5ee94d01802566d5003dd6cd?OpenDocument)>accessed on 15 May 2013.

²²² Ibid [17] – [22].

²²³ CESCR, 'Concluding Observations on the additional information submitted by Israel' UN Doc. E/C.12/1/Add.69 (31 August 2001) [12]

<[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/19b934142bfa843ac1256abc003095cb?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/19b934142bfa843ac1256abc003095cb?OpenDocument)>accessed on 15 May 2013.

²²⁴ Fons Coomans 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights', (2011) 11 Human Rights Law Review 1, 14, 15.

²²⁵ Hyll-Larsen and Melchiorre (n 220) 13.

²²⁶ Den Heijer and Lawson (n 214) 169.

²²⁷ Coomans (n 224) 15.

²²⁸ Ibid 15.

²²⁹ Jonathan Thompson Horowitz, 'The Right to Education in Occupied Territories: Making More Room for Human Rights in Occupation Law' (2004) 7 Yearbook of International Humanitarian Law 233, 246

²³⁰ Den Heijer and Lawson (n 214) 169.

²³¹ Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (ICJ, 2004) [111], [112].

²³² Hyll – Larsen & Melchiorre (n 220) 44.

cannot be absolved from responsibility as regards the right to education. By using the 4 As Framework and the three – levels typology of obligations - respect, protect and fulfil - Hyll – Larsen and Melchiorre have identified among the duty – bearers for realising the right to education in the occupied Palestinian territories some of the Palestinian authorities²³³ along with Israel, as occupying power.

The situation of belligerent occupation is also covered by the Maastricht Principles. In this sense, principle 18 provides that a state in ‘belligerent occupation or that otherwise exercises effective control over territory outside its national territory must respect, protect and fulfil the economic, social and cultural rights of persons within that territory.’²³⁴ It was concluded that where the state exercises belligerent occupation, its obligations are substantially similar to those it assumes with regard to situations or persons in its national territory.²³⁵

This Chapter has illustrated that in a context of a *de facto state* controlled by another state and in a case of an occupation, difficulties appear as regards the division of responsibility between the actors involved. From the human rights law perspective, holding accountable the occupying state or the state exercising control, does not imply that the *de facto* authorities and the territorial state are totally absolved from responsibility. On the contrary, an effective protection of the right to education in such situations demands that all duty – bearers be identified and further investigate how the responsibility is shared among them and what are their concrete obligations – negative as well as positive – for realising the right to education.

If the previous chapters have analysed the most relevant legal provisions of international human rights law in relation to the right to education and what the obligations of states to respect, protect and fulfil the right to education in an extraterritorial dimension might entail, including in a situation of a *de facto state* and an occupation, the following chapter is questioning how these theoretical legal perspectives and findings are applied into practice through the analysis of one case. The analysis will look at the extraterritorial obligations, violations, responsibilities of duty bearers and the division of responsibility in relation to the right to education of the ethnic Moldovans in Transdniestria, one of the four²³⁶ unrecognized breakaway states of the former Soviet Union.

V. CASE STUDY – THE RIGHT TO EDUCATION IN TRANSDNIESTRIA

A. Introduction

The question if states have legally binding obligations in relation to the right to education beyond their territorial borders has been confronted by the ECtHR in the case of *Catan and Others v Moldova and Russia*²³⁷ (*Catan and Others*), which is a very important case as regards the protection of the right to education and the extraterritorial application of ECHR, which demands an in-depth analysis.

This case concerns alleged violations of the rights to education, private life and freedom from discrimination of a group of ethnic Moldovan schoolchildren, parents and teachers in the Transdniestrian region, part of the sovereign territory of the Republic of Moldova, currently under the de facto control of Russian Federation-backed separatists - the Moldovan Republic of Transdniestria (MRT) administration. The forced closure of schools and acts of harassment and intimidation of ethnic Moldovans were conducted by the MRT authorities following the introduction of a law banning and criminalising the use of Latin script in schools. This law imposed a requirement that the ‘Moldavian’ language spoken by the large ethnic Moldovan population be written with the Cyrillic alphabet, instead of Latin alphabet. Therefore, it prescribed that Moldavian-speaking children should be educated in this language anomaly, a combination of spoken and written languages that is neither used nor

²³³ Ibid 64 – 70, eg Palestinian Ministry of Education and Higher Education, Ministry of Transport, Palestinian Authority, Palestinian Legislative Council.

²³⁴ Maastricht Principles (28 September 2011) princ 18.

²³⁵ Olivier De Schutter et al, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’ (2012) 34 Human Rights Quarterly 1084, 1124 Commentary to Maastricht princ 18.

²³⁶ The other three are: Abkhazia, South Ossetia and Nagorno Karabakh.

²³⁷ *Catan and Others v Moldova and Russia* App nos 43370/04, 8252/05, 18454/06 (ECtHR, 19 October 2012).

recognised anywhere in the world and which provides children with full functional literacy in no recognised language at all.

The harassment and closure of Moldovan schools is part of a policy of eradication of the Moldovan language and culture and increasing Russian influence in the region, which has been referred to as 'linguistic cleansing' in Transdniestria.²³⁸

Before proceeding with the assessment of the ECtHR's findings and analysis of the States' obligations in respect to the right to education, a brief description of the historical background and circumstances of the case is needed.

B. Background

The region of Transdniestria is a strip of land situated on the eastern bank of the river Dniester on the sovereign territory of the Republic of Moldova. From 1989 onwards, a movement of resistance to Moldovan independence had been formed in Transdniestria which had the effect that on 2 September 1990, Transdniestrian separatists announced the creation of the 'Moldavian Republic of Transdniestria'.²³⁹ This breakaway region, which is *de jure* on the territory of Moldova, has its administrative centre at Tiraspol with its own local authorities. To date, the MRT has not been recognised by the international community as a sovereign state under international law.

Violent clashes took place between the Transdniestrian separatist forces and the Moldovan security forces in late 1991 and the beginning of 1992, which resulted in the death of several hundred people and more than 100,000 refugees.²⁴⁰ The ECtHR analysed in detail the armed conflict of 1991-1992 and the situation in the region in the case of *Ilascu and Others v Moldova and Russia*²⁴¹ (*Ilascu and Others*) where the Court found beyond reasonable doubt that Transdniestrian separatists were able, with the assistance of the 14th Army personnel of Russian Federation, to arm themselves with weapons taken from the stores of the 14th Army stationed in Transdniestria²⁴², that prevented Moldovan army to regain control of Transdniestria. It was therefore concluded²⁴³ that the MRT administration was established and continues to exist by virtue of the military, political and economic support of the Russian Federation.

Following the armed conflict in 1991-1992, despite various attempts of friendly settlement of the Transdniestrian conflict such as the 'ceasefire agreement' of 1992, the '1997 Memorandum', the 'Istanbul Commitments' and the 'Kozak Memorandum'²⁴⁴ and despite Russia's commitments to withdraw its forces from Transdniestria, the conflict has not been solved until the present day. The reports submitted to the case by the Organisation for Security and Co-operation in Europe (OSCE) show that in the period 2004 – 2008 there were no withdrawals of Russian ammunition or equipment from the Transdniestrian region, and more than 21,000 tons of ammunition remained stored in the region.²⁴⁵

C. The circumstances of the case

As the ECtHR noted²⁴⁶, the applicants are children and parents from the Moldovan community in the Transdniestrian region who complained about the effects on them and their children's education and family lives created by the language policy of the separatist authorities. The facts of the case relate to the actions of MRT authorities of storming the schools, harassment and intimidation of the applicants between 2002 and 2004 in

²³⁸ OSCE, Press Release 'Linguistic cleansing underway in Transdniestria' (14 July 2004) <<http://www.osce.org/hcnm/56534>> accessed on 3 June 2013.

²³⁹ Ibid (n 237) [13].

²⁴⁰ OSCE Mission to Moldova website <<http://www.osce.org/moldova/43356>> accessed on 13 June 2013.

²⁴¹ *Ilascu and Others v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004) [28] – [183].

²⁴² Ibid [379] – [382].

²⁴³ Ibid [382].

²⁴⁴ *Catan and Others v Moldova and Russia* App nos 43370/04, 8252/05, 18454/06 (ECtHR, 19 October 2012), all referred agreements are detailed in [20] – [27].

²⁴⁵ Ibid [66] – [70].

²⁴⁶ Ibid [108].

order to prevent the applicants to use the Latin alphabet in schools, following a law issued by the MRT authorities requiring the use of a MRT – approved curriculum and Cyrillic script instead of Latin script. A brief presentation of the circumstances of the case is useful for the purposes of further analysis.

On 8 September 1992, the MRT administration, through the adoption of the ‘MRT Law on Languages’ banned and criminalised the use of Latin alphabet, requiring that for all purposes *Moldavian* must be written with the Cyrillic alphabet and that use of the Latin alphabet may amount to an offence.²⁴⁷ On the contrary, on 29 July 1994 Moldova adopted a new Constitution according to which the national language was *Moldovan*, to be written using the Latin alphabet.²⁴⁸ According to the ECtHR’s records, on 18 August 1994 the MRT authorities explicitly forbade the use of Latin script in all Transdniestrian schools, and by a decision of 21 May 1999, they stated that all schools belonging to ‘foreign States’ and functioning in Transdniestria had to register with the MRT authorities.²⁴⁹ Moreover, in the summer of 2004 the MRT authorities besieged and stormed the schools; acts of pressures and harassment of the pupils, the teachers and the parents with the aim of closing down all the schools using the Latin script were undertaken; teachers were arrested and detained and Latin script materials were seized and destroyed; some parents lost their jobs as they continued to send their children to Moldovan language schools.²⁵⁰ The applicants in this case were subject to such measures of pressures and intimidation as presented below.

The applicants are represented by children who studied at three schools in the Transdniestrian region, namely Evrica School in Ribnita, Alexandru cel Bun School in Tighina, and Stefan cel Mare School in Grigoriopol, as well as their parents. Evrica School and Alexandru cel Bun School were both registered with the Moldovan Ministry of Education and were using the Latin script and a curriculum approved by the Ministry of Education. Following the above mentioned MRT decision of 21 May 1999 and due to the fact that both schools refused to register with the MRT authorities and therefore to use the Cyrillic alphabet instead of the Latin one, a campaign of pressures and intimidation by the Transdniestrian authorities took place in 2004. However, teachers, pupils and parents occupied the buildings of both schools and guarded them day and night, refusing to leave.²⁵¹

At Evrica School, in July 2004 the Transdniestrian police stormed the school and evicted the women and children who were inside.²⁵² Also pressures were made on the parents by the Transdniestrian authorities asking them to withdraw their children from this school, otherwise they would be fired from their jobs and would be deprived of their parental rights.²⁵³ Even if the school was able to finally register as a foreign institution of private education in September 2004, it could not function properly due to the lack of premises.²⁵⁴ In October 2004, the school was moved by the MRT regime from the building situated on Gagarin Street to another building which had previously housed a kindergarten. The latter lacked laboratories, sport facilities and the lighting; corridors and classrooms were not fully adapted as it was shown by the applicants.²⁵⁵ Also, the OSCE reported that the premises were not appropriate for the school’s activity.²⁵⁶ The applicants filed petitions and complaints with the authorities of the Russian Federation as well as the Moldovan authorities; they also complained that the children were intimidated by the local Russian – speaking population and they feared to speak Moldovan outside the school.²⁵⁷

²⁴⁷ Ibid [43].

²⁴⁸ Ibid [22]; also the Constitution of Republic of Moldova art 13 (1): ‘The national language of Republic of Moldova is the Moldovan language, using the Latin script’ <http://lex.justice.md/document_rom.php?id=44B9F30E:7AC17731> accessed on 10 June 2013.

²⁴⁹ *Catan and Others v Moldova and Russia* [44].

²⁵⁰ Ibid [126].

²⁵¹ *Catan and Others v. Moldova and Russia* App nos 43370/04, 8252/05, 18454/06 (ECtHR, 19 October 2012) [47] – [58].

²⁵² Ibid [48].

²⁵³ Ibid

²⁵⁴ Ibid [49].

²⁵⁵ Ibid

²⁵⁶ OSCE Mission to Moldova and OSCE High Commissioner on National Minorities, ‘The Moldovan – Administered Latin – Script Schools in Transdniestria. Background, Current Situation, Analysis and Recommendations’ (November 2012) 30 <<http://www.osce.org/moldova/99058>> accessed on 15 June 2013.

²⁵⁷ *Catan and Others v. Moldova and Russia* [50] – [51].

As regards Alexandru cel Bun School in Tighina, it is relevant to mention that in July 2004 the school was disconnected from electricity and water supplies by the MRT administration and only after interventions of international observers, as the representatives of the CoE, the school was reconnected to water and electricity in September 2004.²⁵⁸ Also, the MRT regime did not allow the school to use the initial premises, but other three different buildings, rented from the MRT authorities, which were located in separate districts of the town,²⁵⁹ at a significant distance from one another.²⁶⁰ The applicants showed that the main building has no cafeteria, science or sports facilities and cannot be reached by public transport.²⁶¹

Stefan cel Mare School in Grigoriopol was initially using a Cyrillic alphabet curriculum and following the request of the parents and their children in 1996 to be allowed to use the Latin script, a campaign of intimidation was undertaken by the MRT authorities during the period 1996 – 2002.²⁶² On 22 August 2002, the Transdnestrian police stormed the school and evicted the teachers, the pupils and their parents; few days later the President of the Pupils Committee was arrested and sentenced to fifteen days' administrative imprisonment.²⁶³ Moreover, due to the occupation of the building by the MRT administration, the school was transferred to a building in Dorotcaia, a village about 20 km from Grigoriopol.²⁶⁴ Therefore, each day the pupils and teachers had to travel to Dorotcaia and they were subjected to bag searches and identity checks by the MRT officials as well as acts of harassment such as spitting and verbal abuse according to the claimants.²⁶⁵ Representatives of the school complained to the OSCE, the UN, as well as to the Russian and Moldovan authorities; both Russian and Moldovan authorities denied their responsibility by stressing that the conflict be solved through negotiations, respectively that nothing further can be done to help the claimants by Moldovan authorities.²⁶⁶

D. Legal analysis

1. Considerations on jurisdiction

The ECtHR had to analyse first if the two respondent States, Moldova and Russia, exercised *jurisdiction*, which is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the ECHR.²⁶⁷ Thus, the Court clearly distinguished between *jurisdiction* and *responsibility* in this case, as it has been noticed by one commentator.²⁶⁸

The Court concluded that the present case comes within Moldovan jurisdiction as the state on whose sovereign territory the violations took place, and within the jurisdiction of the Russian Federation because the Russian Federation exercises effective control extra-territorially. It is interesting to analyse how the ECtHR reached its conclusions as regards the jurisdiction in this case.

As already shown in Chapter III above, the Court's approach as regards jurisdiction has evolved in its case-law from considering that a state's jurisdictional competence under article 1 is primarily *territorial*,²⁶⁹ to recognizing a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries.²⁷⁰ The Court has concluded that 'the question whether excep-

²⁵⁸ Ibid [55].

²⁵⁹ Ibid [55] – [58].

²⁶⁰ OSCE Mission to Moldova and OSCE High Commissioner on National Minorities (n 256) 26.

²⁶¹ *Catan and Others v. Moldova and Russia* [56].

²⁶² Ibid [60].

²⁶³ Ibid

²⁶⁴ Ibid [61].

²⁶⁵ Ibid

²⁶⁶ Ibid [62].

²⁶⁷ *Catan and Others v Moldova and Russia* [103].

²⁶⁸ Marko Milanovic, 'Grand Chamber Judgment in *Catan and Others*' (21 October 2012) Blog of the European Journal of International Law <<http://www.ejiltalk.org/grand-chamber-judgment-in-catan-and-others/>> accessed on 12 June 2013.

²⁶⁹ *Bankovic and Others v Belgium and Others* App no 52207/99 (ECtHR, 12 December 2001) [61], [67].

²⁷⁰ *Catan and Others v Moldova and Russia* [105].

tional circumstances exist which require and justify a finding by the Court that a State was exercising jurisdiction extraterritorially must be determined with reference to the particular facts of each case.²⁷¹

When determining whether the case falls within the jurisdiction of the Republic of Moldova, the Court noted first that all three schools were at all times situated within Moldovan territory and therefore Moldova was the territorial State, even if it did not have effective control over Transdniestria.²⁷² Relying on its previous case-law²⁷³, the Court concluded that although Moldova had no effective control over the acts of the MRT in the Transdniestrian region, the fact that this region is recognised under public international law as part of Moldova's territory gives rise to a positive obligation to use all legal and diplomatic means available to it in order to guarantee the enjoyment of the rights and freedom prescribed by the ECHR to those living there.²⁷⁴ The assessment of the Court on whether Moldova has satisfied the above mentioned positive obligation will be dealt with in the next sections.

Further, the Court had to analyse if the applicants also fall within the jurisdiction of the Russian Federation. First the Court noted that the key events in this case, namely the actions of MRT authorities of storming and evicting the schools as well as intimidating and harassing the teachers, pupils and parents as briefly presented above, took place between August 2002 and July 2004.²⁷⁵ Then the ECtHR emphasised that the same relevant period was already considered by the ECtHR in the *Ilascu and Others* judgment where the Court found that the MRT survived by virtue of the military, economic, financial and political support given to it by the Russian Federation and that it remained under the effective authority, or at the very least under the decisive influence, of Russian Federation.²⁷⁶

It seems that the Court missed the opportunity to analyse the mere circumstances of this case, choosing to rely on the previous case of *Ilascu and Others* since in the view of the Court the events took place in the same period and circumstances as in the *Ilascu* case. Therefore, since the Court had already concluded that the Russian Federation had jurisdiction over certain events in the Transdniestrian region during the relevant period, it showed that only the Russian Government could prove that Russia did not exercise jurisdiction in relation to the events complained of by the applicants in the *Catan and Others*.²⁷⁷

The Court similarly makes it clear that it is applying a spatial, rather than a personal conception of article 1 ECHR as regards jurisdiction,²⁷⁸ as unlike in *Al-Skeini and Others* case there is no evidence of a direct involvement of Russian agents in the acts against the applicants' schools. One commentator²⁷⁹ argued that the Court did not take into consideration the differences between *Ilascu and Others* case and *Catan and Others* case, and that in effect, the Court would appear to have treated this case in exactly the same way as if Russian authorities were directly involved in the closing of the schools.²⁸⁰

The Russian Government distinguished the case from *Ilascu and Others* and *Al-Skeini and Others* by denying that Russia exercised jurisdiction in Transdniestria during the relevant period and sustaining that its military presence in Transdniestria during that period was insignificant.²⁸¹ Since Russia failed to provide evidence to demonstrate that the findings made in the *Ilascu* judgment were unreliable, the Court maintained its findings in the *Ilascu* judgment that MRT was able to continue its existence only because of Russian military, economic and

²⁷¹ *Al-Skeini and Others v the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011) [132].

²⁷² *Catan and Others v Moldova and Russia* [109].

²⁷³ *Ilascu and Others v Moldova and Russia* App 48787/99 (ECtHR, 8 July 2004) [331]; and *Ivantoc and Others v Moldova and Russia* App no 23687/05 (ECtHR, 15 November 2011) [105] – [111].

²⁷⁴ *Catan and Others v Moldova and Russia* [110].

²⁷⁵ *Ibid* [111].

²⁷⁶ *Ilascu and Others v Moldova and Russia* [392].

²⁷⁷ *Catan and Others v Moldova and Russia* [112].

²⁷⁸ *Ibid* [114].

²⁷⁹ Milanovic (n 268).

²⁸⁰ *Ibid*

²⁸¹ *Catan and Others v Moldova and Russia* [117].

political support, and therefore it concluded that Russia exercised *effective control* and *decisive influence* over the MRT administration during the period of the schools' crisis.²⁸²

What is even more interesting to analyse is the approach of the ECtHR to the Russian military presence and Russian political and economic support in the Transdnestrian region. Neither in *Ilascu and Others*, nor in *Catan and Others* did the Court reflect upon the legitimacy of the Russian presence and support in the Transdnestrian region. The Court acknowledged that only with the support of the Russian Federation, the MRT administration could survive and consolidate its position on the sovereign territory of Republic of Moldova. In reality, the cumulative effect of Russian influence and support in this area made possible the continued existence of an illegal regime, contributed to the MRT administration's secessionist goal of securing autonomy from the rest of Moldova, and rendered ineffective the sovereign state's duty to impose the rule of law and protect human rights, including those of the applicants in the case *Catan and Others*. The Court noted that Russia supported the separatists through its military and armaments presence in the region as well as through free or highly subsidised gas supplies, pensions and other financial aid.²⁸³

In conclusion, the ECtHR chose to consider the specific circumstances of the case and concluded that the Russian Federation had effective authority over the MRT administration, but was reluctant in assessing if the influence exerted by Russian Federation through its military, economic and political support is legal or illegal, which would obviously be a politically sensitive decision. In assessing the jurisdiction of the Russian Federation, the Court applied the test of *effective control* of an area outside the Russian territory, which has already been analysed in Chapters III and IV above. In line with the Court's jurisprudence in *Cyprus v Turkey* and *Ilascu and Others v Moldova and Russia* already discussed in Chapter IV, in this case the Court concluded that the Russian Federation exercised jurisdiction extraterritorially as a result of its effective control and decisive influence over the Transdnestrian administration.

2. Violations of the right to education

The applicants complained of an alleged violation of the article 2 of Protocol 1 to the ECHR which provides that:

'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.'

Recalling the events which took place between 2002 and 2004, when the schools were forced to close down and reopen in different premises, the applicants complained that the quality of their education was affected by lack of adequate premises, long journeys to and from school and border checks, shortage of materials, no access to extracurricular activities and on-going harassment, vandalism of school premises, intimidation and verbal abuse.²⁸⁴ As shown above within the description of the facts, most of the premises were too small and inappropriate for the adequate functioning of a school, without electricity and water, with no laboratories, sport facilities or canteens. The alternative offered by the MRT authorities to Moldovan speakers was education in *Moldavian*, written with the Cyrillic script, a language which was not recognised anywhere outside Transdnestria, and was not even used by the MRT administration. Relying on the international provisions and standards on the right to education presented in Chapter II above, in particular on articles 13 (1) of ICESCR and 29 (1) (a) of CRC which provide that education should be directed to the 'full development of the human personality', the applicants complained that they were prevented by the restrictions of MRT administration to have access to higher education and further employment opportunities and therefore to escape poverty. Also, the pupils' parents complained of an interference with their right to respect for their philosophical convictions that the best

²⁸² Ibid [122].

²⁸³ Ibid [121].

²⁸⁴ Ibid [127].

interests of their children lay in an education in the Moldovan language using the Latin script, relying on the second paragraph of article 2 of Protocol 1 to the ECHR. As regards the responsibility of the Respondent States, the applicants claimed on one hand that the Moldovan Government had made insufficient efforts to ensure that the children were restored to adequate educational facilities and to protect them from harassment, and on the other hand that Russia did not take any measures to prevent the violations or to express opposition to them.²⁸⁵

The Court's assessment as regards the violation of the right to education as well as the States' obligations in relation to this right will be analysed further in this thesis.

In assessing if there has been a violation of the applicants' right to education in the present case, first, the Court reminded the general principles drawn from its case-law when interpreting and applying the provisions of article 2 of Protocol 1 to the ECHR. As regards the first sentence of article 2 of Protocol 1 to the ECHR, which has a negative formulation, the Court has ruled in its case law that the Contracting States guarantee to anyone within their jurisdiction a right of access to educational institutions existing at a given time.²⁸⁶ As shown in section G 2 d above, the Court has held that, from the negative formulation of the first sentence of article 2 of Protocol 1 'it cannot be concluded that the State has no positive obligation to ensure respect for such right.'²⁸⁷ Moreover, for the right to education to be effective, it is further necessary that, the individual who is the beneficiary should have the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each State, and in one form or another, official recognition of the studies which he has completed.²⁸⁸ Even if the text of the article 2 of Protocol 1 ECHR does not mention the language in which education must be conducted, however, according to the Court's case-law, 'the right to education would be meaningless if it did not imply in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages.'²⁸⁹ As already emphasized in Section G 3 i above, the right to be educated in one's own language is one of the main components of the right to education and therefore States have the obligations to ensure the realisation of this right.

The second sentence of article 2 of Protocol 1 to the ECHR guarantees the right of parents to have their children educated according to their own religious and philosophical convictions and imposes an obligation on States to refrain from interfering with such right. This constitutes another key component of the right to education indicated in Section G 3 i above, which forms the core content of the right. This provision aims at safeguarding the pluralism in education and consequently the Court has stressed that the State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions.²⁹⁰

Secondly, applying all the above mentioned principles, already established in the Court's case-law to the situation of the applicants and based on the facts of the case, the Court concluded that the forced closure of the schools by the MRT authorities, and the subsequent measures of harassment constitute interferences with the applicant pupils' rights of access to educational institutions existing at a given time and to be educated in their national language.²⁹¹ In addition, the Court considers that these measures amounted to an interference with the applicant parents' rights to ensure their children's education and teaching in accordance with their philosophical convictions.²⁹² The Court found that the sole purpose of the interference with the applicants' right to education by the MRT authorities was 'entrenching the separatist ideology' in order to enforce the 'Russification of the language and culture of the Moldovan community living in Transnistria'²⁹³ which could not be considered as a legitimate aim by the ECtHR.

²⁸⁵ Ibid [129], [130].

²⁸⁶ *Belgian Linguistics Case* [3], [4].

²⁸⁷ Ibid [3].

²⁸⁸ Ibid [4].

²⁸⁹ Ibid [3].

²⁹⁰ *Lautsi and Others v Italy* App no 30814/06 (ECtHR, 18 March 2011) [62].

²⁹¹ *Catan and Others v Moldova and Russia* [143].

²⁹² Ibid [143].

²⁹³ Ibid [144].

The measures adopted by the MRT authorities amounted to violations of the right to education as the main features of the right to education were affected as follows:

The *availability* of the right to education was affected following the closure of the schools and acts of intimidation and harassment of MRT authorities, which led to the drastic reduction of the number of teachers and pupils in the Moldovan speaking schools using the Latin script. Also, the lack of appropriate infrastructure and facilities as well as the lack of teaching materials in Latin script seriously affected the *availability* of the right to education.

The *accessibility* of the applicants' right to education was also badly affected through the measures taken by the MRT authorities. As accessibility of the education requires that the education must be accessible to everyone, without any discrimination based on ethnicity for example, and has to be within safe physical reach and has to be affordable to all.²⁹⁴ As showed in the description of the facts and as resulted from the applicants' submissions, the children were discriminated based on their Moldovan ethnicity and desire to learn in their national language using the Latin script, against their colleagues/peers who opted for education in Cyrillic script and Russian language. Also the physical accessibility was restricted since, as showed above, the main building of the three premises used by Alexandru cel Bun School could not be reached by public transport and in the case of Stefan cel Mare School, pupils and teachers had to travel 40 km every day to the premises in Dorotcaia.

The lack of teaching materials in Latin script and the fact that the existing ones were outdated, from Soviet times, affected the *acceptability* of the right to education and therefore the applicants – pupils and their parents – complained of the quality of their education.

3. Accountability

In response to the applicants' claims, the Moldovan Government denied its responsibility submitting that they had taken all reasonable steps to improve the situation, in general as regards the Transdnestrian conflict, and showing that they fulfilled their positive obligation as regards the situation of the schools in particular, by paying for the rent and the refurbishment of the buildings, the teachers' salaries, educational materials, buses and computers.²⁹⁵ By invoking the fact that it did not exercise actual authority or control over the territory in question, Moldova is trying to escape accountability, claiming that 'the Moldovan Government could not be expected to do more to fulfil its positive obligation in respect of the applicants.'²⁹⁶ Also, the Russian Government denied any responsibility for the acts of MRT authorities and underlined that Russia could not be held accountable for the acts of the MRT police of storming the school buildings or of the MRT local authorities for shutting off water and electricity supplies.²⁹⁷

Therefore, it is clear that neither Moldova, which is the sovereign state, nor Russia which exercises *de facto* control over the illegal administration accept that they have human rights obligations towards the individuals living in the Transdnestrian region in this case.

However, the Court considered that Moldova had discharged its positive obligation by 'having made considerable efforts to support the applicants'²⁹⁸ while Russia incurs responsibility under the ECHR for the violation of the applicants' right to education as it exercised effective control over the MRT during the period in question.²⁹⁹

The findings of the ECtHR in this case are of great importance for the protection of the right to education of the ethnic Moldovans living in the region of Transdnestria. Nevertheless, the analysis of the Court seems to lack clarity and can be subject to critics. In particular the Court's approach to States' responsibility requires further analysis.

²⁹⁴ CESCR, 'General Comment No. 13', UN Doc. E/C.12/1999/10 (8 December 1999) [6].

²⁹⁵ *Catan and Others v Moldova and Russia* [131] – [133].

²⁹⁶ *Ibid* [133].

²⁹⁷ *Ibid* [135].

²⁹⁸ *Ibid* [145] – [148].

²⁹⁹ *Ibid* [149], [150].

In its reasoning, the ECtHR stated that the provisions relating to the right to education as set out in the international instruments such as the UDHR, the ICESCR and the CRC are of relevance and the ECHR should so far as possible be interpreted in harmony with other rules and principles of international law.³⁰⁰ Nevertheless, the Court does not rely on the international standards described before in Chapter II and it does not make any reference for example to the States' obligations to *respect, protect and fulfil* the right to education identified by the CESCR in interpreting the Article 13 of ICESCR. As showed in Sections H and I of this thesis, states have the obligation to respect, protect and fulfil the right to education, failure of which will amount to the violation of such right. Therefore the usage of the threefold typology of obligations would have provided the Court the opportunity to conduct a more in depth analysis. Instead, the Court makes a broad analysis of both respondent States' responsibility as reflected in the decision.

d. Obligations of Moldova to secure the right to education

As regards Moldova's responsibility, the Court distinguishes this case from *Ilascu and Others* case where the ECtHR found that Moldova failed to take all the measures available to it in the course of negotiations with the MRT and Russian authorities to bring about to the end of the violation of the applicants' rights.³⁰¹ In this case the ECtHR has concluded that 'Moldovan Government have made considerable efforts to support the applicants'³⁰² by paying for the rent, equipment, staff salaries and by providing buses for the pupils and teachers. Is that enough to discharge Moldova of its positive obligations with regards to the right to education? Does this mean that the Court established here a *minimum threshold* for complying with positive obligations as regards the right to education under the ECHR?

It seems that the ECtHR tended to absolve Moldova from any responsibility as it did not have effective control over the territory in question.

Perhaps these opened questions would have been answered if the Court had conducted an in-depth analysis of the human rights obligations of Moldova in relation to the right to education, relying on the obligations to respect, protect and fulfil the essential features of the right to education as established by the international human rights law.³⁰³ Even if according to article 32 of ECHR, the ECtHR's jurisdiction is applicable only to matters concerning the interpretation and application of the ECHR, the Court needs to assure the *effective* protection of human rights. In its case law on the right to education,³⁰⁴ the ECtHR has emphasized:

'The Court does not lose sight of the fact that the development of the right to education, whose content varies from one time or place to another according to economic and social circumstances, mainly depends on the needs and resources of the community. However, it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. Moreover, the Convention is a living instrument which must be interpreted in the light of present-day conditions.'

Therefore the ECtHR can consider and use as guidance the international human rights standards and indicators in relation to the right to education as analysed in Chapter II of this thesis. As mentioned before, the 4 As Framework might be a very useful tool for any court and human rights bodies in assessing the states' obligations to respect, protect and fulfil the right to education and identify the alleged violations. The same model was used by experts in order to identify and better analyse states' obligations and violations in relation to the right to education.³⁰⁵

³⁰⁰ Ibid [136].

³⁰¹ *Ilascu and Others v Moldova and Russia* [348] – [352].

³⁰² *Catan and Others v Moldova and Russia* [147].

³⁰³ CESCR, 'General Comment 13' UN Doc. E/C.12/1999/10 (8 December 1999) [6].

³⁰⁴ *Leyla Sahin v Turkey* App no 44774/98 (ECtHR, 11 November 2005) [136].

³⁰⁵ Peter Hyll – Larsen and Angela Melchiorre, 'Entitled to Education. Using International Human Rights Law to Advocate for the Right to Education in the Occupied Palestinian Territory' (Right to Education Project, London, 2012) 50 - 70 <http://www.right-to-education.org/sites/r2e.gn.apc.org/files/Report_Entitled%20to%20Education_2012.pdf> accessed on 5 March 2013.

With reference to the factual circumstances of the case and using the Framework of 4As, an in-depth analysis of both states' obligations is possible.

As previously shown, according to the CESCR, *availability* of the right to education means that functioning institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party, requiring in practice a sufficient number of schools with adequate infrastructure – sanitation facilities, electric lightning, safe drinking water, canteens, libraries – but also an adequate number of trained teachers whose own human rights are realized, and teaching materials.³⁰⁶ In this case, the applicants complained about the inadequate premises where the lightning, corridors and classrooms were not fully adapted for a secondary school, about the lack of electricity and water supply at Alexandru cel Bun in Tighina, and in general about the lack of teaching materials in Moldovan language using the Latin script. Also there were only few schools using a Moldovan curriculum and Latin script and that many teachers due to the intimidation and pressures made on them by the MRT authorities. Consequently the *availability* of the applicants' right to education was seriously affected.

The Court held that the Moldovan Government paid for the rent, refurbishment of the premises, but also for the equipment, staff salaries and transport costs providing buses for the pupils and teachers to travel in the case of Alexandru cel Bun School and Stefan cel Mare School (where the pupils had to travel 40 km every day),³⁰⁷ thus discharging itself from its positive obligations under the ECHR. Indeed, Moldova had a great contribution in supporting the applicants to continue learning in their language. But these measures were enough in the circumstances? The Court considered that the actions of Moldova led to the fulfilment of its positive obligations.

In fact all the above mentioned measures taken by Moldova of providing financial resources in order for the schools to continue to function are part of its domestic positive obligation to fulfil the right to education.

e. Obligations of Russian Federation

As regards the responsibility of the Russian Federation, the ECtHR is not conducting a comprehensive analysis, but in broad terms is relying on its findings in its previous case of *Ilascu and Others* where it was established that Russia exercised effective control over the MRT during the same period. The Court concluded that 'by virtue of its continued military, economic and political support for the MRT, which could not otherwise survive, Russia incurs responsibility under the Convention for the violation of the applicants' right to education.'³⁰⁸ Having reached this conclusion, the Court considers that 'it is not necessary to determine whether or not Russia exercised detailed control over the policies and actions of the subordinate local administration.'³⁰⁹ These findings might be subject to interpretations as the Court lacked clarity and strong legal argumentation.

Is the Court here saying that Russia was responsible for everything that the MRT did, namely that all of MRT's acts were attributable to Russia? As in the *Ilascu and Others case*, the Court does not clarify the concrete human rights obligations of Russia in relation to the controlled territory of Transdniestria.

Regarding the ECtHR case – law, it is relevant to notice that the Grand Chamber in the *Al-Skeini and Others* case reiterated³¹⁰, in line with previous case law, that where a member state exercises effective control over an area outside its territory it must secure the full range of ECHR rights and any additional Protocols it has ratified:

'The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights.'

It is submitted thus that the Russian Federation bears responsibility for the MRT administration's human rights violations as that administration exists and functions by virtue of Russian Federation's support. The Court

³⁰⁶ CESCR 'General Comment 13' UN Doc. E/C.12/1999/10 (8 December 1999) [6].

³⁰⁷ *Catan and Others v Moldova and Russia* [52], [56], [61].

³⁰⁸ *Ibid* [150].

³⁰⁹ *Ibid* [150].

³¹⁰ *Al-Skeini and Others v the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011) [138].

found a resemblance with the case of *Cyprus v Turkey*, where the Court found that Turkey's 'jurisdiction under article 1 of the ECHR based on effective control of territory must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.'³¹¹ In that case, the Court has found violations of *positive obligations* incumbent to the state with effective control of territory, in relation to a broad range of Convention rights, including the right to education.³¹²

In this case, the Court does not mention any positive obligations of the Russian Federation. In fact, the Court simply concluded that Russia is responsible for the closure of schools and all the other acts of harassment and intimidation undertaken by the MRT authorities due to its effective control over the region. Or is the Court here saying that Russia is responsible for failing to prevent the acts of the MRT that violated the applicants' rights?³¹³ This question needs to be answered. Did Russia comply with its obligation to *protect* the right to education which is of positive nature?

It is beyond doubt in the circumstances of the case that the Russian Federation was aware of the violations of the applicants' right to education. Yet Russia has failed to take any measures to protect the applicants' right to access to effective education and a safe school environment and failed to prevent the various interferences, including acts of harassment, verbal intimidation and vandalism, by MRT agents. There is no indication of any measures having been taken by the Russian Federation to prevent the violations, express opposition to them or to respond to violations of the MRT officials.

Further, an analysis of the human rights obligations of Russian Federation in respect to the right to education by building on the three - level types of obligations – respect, protect and fulfil is conducted.

First, as regards *the obligation to respect the right to education*, the Russian Federation had an obligation to abstain from any measures or interferences that hinder or prevent the enjoyment of the right to education of Moldovan pupils in Transdnistria. The Court noticed that there was no evidence of any direct involvement of the Russian agents in the action taken against the applicants' schools.³¹⁴ But the Court failed to analyse if Russia could be held accountable for any indirect interference in relation to the applicants' right to education. As shown in Chapter III above, States must refrain in all circumstances from embargoes and equivalent measures on goods and services essential to meet *core obligations* of ESCR according to Maastricht Principles. The Court did not consider if the economic measures and bans on certain products imposed by the Russian authorities had a negative impact whatsoever on the enjoyment of the applicants' right to education.

As regards *the obligation to protect the right to education* of the applicants, the Russian Federation should have taken measures that prevented MRT authorities from interfering with the enjoyment of the right to education by the applicants. Did Russia fulfilled with this positive obligation? The Russian Government claimed that it was through efforts made by Russian mediators, acting together with mediators from Ukraine and OSCE, that the MRT authorities permitted the schools to reopen as foreign institutions of private education.³¹⁵ These measures were clearly not enough to discharge Russia of its positive obligation to protect the right to education of the applicants. On the contrary, as already showed Russia failed to take any measures to prevent the violations in this case. However, the Court missed the opportunity to analyse the positive obligation of Russian Federation to protect the right to education in the region.

Lastly, one question arises in relation to Russia's obligations in this case: is Russia under any positive *obligation to fulfil the right to education* of the applicants? This is a debated matter.

The ECtHR proved reluctant in considering it at all, given the complex political, economic and diplomatic context of this case. As the obligation to *fulfil* the right to education includes positive measures that enable and assist individuals and communities to enjoy the right to education and an obligation to *provide* the right to

³¹¹ *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001) [76], [77].

³¹² *Ibid* [273] – [280].

³¹³ *Milanovic* (n 268).

³¹⁴ *Catan and Others v Moldova and Russia* [114].

³¹⁵ *Ibid* [149].

education as well, could the Court consider that the Russian Federation was responsible for providing the right to education in Transdnistria? This would have been a dangerous path for the Court to follow as in reality it would have meant that it needs to analyse if the Russian Federation is responsible to take all appropriate legislative and financial measures in order to provide education in Transdnistria, and therefore recognizing in a way the legitimacy of the presence of Russian Federation on the sovereign territory of Republic of Moldova.

E. Concluding remarks

Catan and Others is an important case as regards the ECtHR's approach on one hand in relation to the extraterritorial application of the human rights obligations that Member States of the CoE have according to the ECHR and, on the other hand, as regards the international protection of the right to education.

However, the Court could have gone further in its judgment as some conclusions and points need more clarity, as it has been showed in this Chapter. Even if the Court deals mainly with civil and political rights, it is able through its case law to develop clear interpretations and principles applicable to ESCR, in particular to the right to education as an ESC right. It has been argued that the ECtHR has no rigid perception of the ECHR and its Protocols as belonging to a particular category of human rights, but rather it takes into consideration that human rights are indivisible, interrelated and interdependent when assessing the cases.³¹⁶

The case of *Catan and Others* is clearly a step in the right direction as the ECtHR seems willing to analyse positive obligations which require budgetary implications³¹⁷, but there is still a lot of work to be done by the ECtHR in the area of ESCR. The Court needs to take into consideration the indivisibility of the right to education – namely to consider its civil and political dimension reflected in the liberty of parents to choose education for their children according with their own convictions, but also its economic and social aspect which require the analysis of positive obligations to provide education such as having in place adequate premises and equipment, teaching materials, sufficient number of trained teachers, transport facilities to reach the school.

The decision of ECtHR is also important not just because it recognises violations of the right to education that took place in the past, some years ago, but also because these violations continue to the present day.³¹⁸ The same decision was welcomed as a strong signal that the Court will not tolerate legal 'black holes' on the territory of the CoE, proving that ethnic Moldovans in Transdnistria are entitled to legal protection on the same basis as individuals throughout the rest of the territory of the CoE.³¹⁹ Despite the Court's reluctance in addressing in a trenchant way the politically sensitive issue of Russian military presence and strong influence and control in the Transdnistrian region and its failure to clarify the nature of both respondent States' obligations in relation to the right to education, the decision represents a welcomed outcome and a historic one, long awaited by Moldovan people living in the Transdnistrian region.

As regards the extraterritorial obligations of the Russian Federation, the Court could have gone more in depth in analysing the content of its positive extraterritorial obligations in relation to the right to education. Given the politically sensitive nature of this case, the Court abstained from assessing on the legitimacy or the legality of the Russian influence and control in Transdnistria, and it was satisfied to conclude that Russia is responsible for the violation of the right to education in Transdnistria as it exercised *effective control* over the region. It seems that the Court uses the analysis of the right to education as an entry point to talk about human rights in general and wished to address Russia's effective control or other violations through the right to education.

³¹⁶ Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 317.

³¹⁷ Reference is made here to the positive obligations of Moldova which were analyzed in section 10 j.

³¹⁸ Alexandru Postica, Promo Lex Moldova, Press Release (London, 19 October 2012) <<http://www.interights.org/document/245/index.html>> accessed on 9 June 2013.

³¹⁹ Pdraig Hughes, Interights, Press Release (London, 19 October 2012) <<http://www.interights.org/document/245/index.html>> accessed on 9 June 2013.

Despite hopes that the ECtHR's decision will have a positive impact on the situation of Latin –script schools³²⁰, the situation of the right to education of ethnic Moldovans in Transdniestria has not improved as showed by the OSCE latest report on the situation of Latin – script schools.³²¹ As resulted from this report, students are still studying in inadequate premises for a school's activity (some of them designed for a kindergarten)³²² and they are forced to travel long journeys to and from school and sometimes to wait few hours to return home as all buses leave one time after classes in order to minimize problems at the checkpoint.³²³

The violation of the right to education of Moldovan children in Transdniestria is an actual and continuing matter which needs the full attention of the international community. 'Child's right to education should not be politicized'³²⁴ has emphasized the OSCE High Commissioner on National Minorities during a visit to Moldova when trying to facilitate the dialogue between the Moldovan authorities and the Tiraspol administration in order to find solutions for the future of the Latin – script schools in Transdniestria.

VI. CONCLUSION

The present thesis has analysed states' obligations in relation to the right to education as prescribed by the international and regional human rights instruments. It has been emphasized that the right to education represents the key to unlock other human rights as it is interconnected and interrelated with the exercise of those rights. The right to education, when fulfilled, gives the opportunity to the development of the human personality and economic development. That is why it is very important to ensure its realisation in any circumstances.

The thesis' main purpose was to explore whether, and, if so, in what circumstances states have legally binding obligations to respect, to protect and to fulfil the right to education beyond their domestic borders, i.e. in an extraterritorial dimension.

In order to achieve this purpose, first, the core content and substance of the right to education as a human right and the corresponding states' obligations as provided by the most relevant international and regional instruments were scrutinized. In this sense, emphasis was put on the provisions of ICESCR, CRC, ECHR and on the interpretations given by the CESCR through its General Comments. The most important components of the right to education as recognised and defined in the above mentioned human rights instruments refer to: the access to education on a non – discriminatory basis, the provision of free and compulsory primary education, the free choice of education (reflected in the freedom of parents to choose an education for their children in accordance with their own convictions and the right to be educated in the national language or in one of the national languages). Also it was shown that the 4 As Framework represents a very useful tool in matching the obligations of states to respect, protect and fulfil all the four features of the right to education: *availability*, *accessibility*, *acceptability*, *adaptability*, and therefore makes it easier to identify alleged violations of the right to education in any context. As regards the available remedies, the recent entry into force of the Optional Protocol to the ICESCR which provides victims with an international accountability mechanism for their ESCR was welcomed

Second, the thesis addressed the concept and the legal status of extraterritorial obligations of states in the area of ESCR considering that the right to education has been mostly characterized as an ESC right, since it requires positive actions and resources from states for its realisation. In order to do this, the latest developments in the area of extraterritorial obligations, as the Maastricht Principles, the doctrinal findings and the interpretations of the CESCR and ComRC were discussed. The obligations of states to respect, protect and fulfil

³²⁰ Ion Manole and Alexandru Postica, PromoLex <<http://www.civilrightsdefenders.org/news/achievements/important-victory-for-the-right-to-education-in-transnistria/>>accessed on 13 June 2013.

³²¹ OSCE Mission to Moldova and OSCE High Commissioner on National Minorities, 'The Moldovan – Administered Latin – Script Schools in Transdniestria. Background, Current Situation, Analysis and Recommendations' (November 2012)<<http://www.osce.org/moldova/99058>>accessed on 15 June 2013.

³²² Ibid [26], [30].

³²³ Ibid [36].

³²⁴ The words of Knut Vollebaek, the OSCE High Commissioner on National Minorities, during a visit to Moldova from 26 to 28 June 2013<<http://www.osce.org/hcnm/103189>>accessed on 30 June 2013.

ESCR extraterritorially were analysed, with illustrative examples of such obligations in relation to the right to education. The focus was on the legal nature of such obligations. Even if references to *international assistance and cooperation* of states for the realisation of the right to education are provided by legally binding instruments such as the ICESCR and the CRC, the interpretations of the scope and nature of such obligations are offered mainly through the General Comments and experts' statements, which have an important authoritative value, but they lack the legally binding nature.

Third, when dealing with extraterritorial claims, the concept of jurisdiction and its interpretation by the courts are of importance. It was commented that while most of the human rights treaties guaranteeing civil and political rights are limited by jurisdiction, the human rights treaties in the field of ESCR are not territorially limited and obligations are usually framed in universal terms. For example, while the ICESCR contains no reference to jurisdiction, the ECHR is limited by jurisdiction. However, it was proposed that the already existing case – law of the courts in relation to extraterritorial claims in the area of civil and political rights should be used as a foundation for building different interpretations and principles applicable to such claims in the area of ESCR in order to address the increasing number of cases of violations of ESCR by a state beyond its territorial borders.

Further, given the limited space of this paper, the situation of human rights violations occurred in a *de facto state* was chosen for reflection as it involves a discussion on extraterritorial obligations of states. In this context, it was interesting to analyse the division of responsibility between all the actors involved. To this purpose and to make the analysis even more interesting, states' obligations to secure the right to education in a situation of occupation have been analysed based on the interpretation of the ICJ and of human rights treaty bodies. Even if the two situations are not identical, one resemblance is that both the occupying state and the foreign state exercising influence over the *de facto state* have a certain degree of control over a territory and in respect to the individuals living on that territory. It has been concluded that the division of responsibility as regards the protection of the right to education among the states involved is not clear in either of these situations.

Finally, for a better exemplification and interpretation of states' obligations in relation to the right to education, the analysis of a case solved by the ECtHR was performed.

The decision of ECtHR in the case of *Catan and Others v Moldova and Russia* concerning the right to education of ethnic Moldovans in the breakaway region of Transnistria is a welcomed outcome for the protection of the right to education in general. More important, the Court seems willing to deal with both dimensions of the right to education – its civil and political dimension reflected in the liberty of parents to choose the education of their children according with their beliefs and the right to enjoy an education in their own language – as well as its social and economic dimension as reflected in the analysis of the Court of the positive actions undertaken by the duty – bearers to provide premises and equipment, teaching materials and transportation. However, the decision of the ECtHR has its shortcomings as some matters would have deserved more clarity and in – depth reflection as it was shown in the analysis of Chapter V. It seems that the Court missed the opportunity to assess in detail Moldova's positive obligations and the extraterritorial obligations (of negative and positive nature) of the Russian Federation in this case. For an in-depth analysis, I've chosen to conduct an useful exercise – that of analysing the four features (*availability, accessibility, acceptability, adaptability*) of the right to education, in the concrete circumstances of this particular case. The purpose of such exercise was to better identify states' obligations and alleged violations of the right to education. Also, the exercise proves that the Framework of 4 As developed by experts on the right to education can be used by any court when dealing with the right to education understood both as an ESC right and as a civil and political right.

Following the theoretical perspectives and as resulted from the study case presented in the present thesis, some conclusions can be drawn.

First, it can be concluded that the obligations *to respect and to protect* the right to education extraterritorially are easier to be defined, complied with and enforced in case of violations by foreign states and hence trigger their responsibility in case of non-compliance.

It was mentioned that *the obligation to respect the right to education extraterritorially* entails an obligation of states to refrain from any actions which might affect the enjoyment and exercise of the right to education of

persons outside their territories. Also, States should refrain from any indirect interference such as embargoes or other economic sanctions which are essential to meet core obligations in relation to the right to education. In the analysed case, Russia adopted some economic sanctions against Moldova such as bans on certain food products as showed in Chapter V. The Court did not consider analysing if the right to education was affected by the economic sanctions imposed by Russia.

As regards *the obligation to protect the right to education extraterritorially*, states are obliged to take measures that prevent third parties from interfering with the enjoyment of the right to education outside their borders. As resulted from the case study analysis, the Russian Federation failed to take any measures in order to prevent the Transdniestrian authorities from interfering with the enjoyment of the right to education by the applicants and therefore it failed to comply with its obligation to protect the right to education extraterritorially.

On the contrary, it cannot be concluded that there is a legally binding obligation *to fulfil the right to education extraterritorially* in the sense that individuals can hold foreign states accountable for realising their right to education. Since there is no consensus among the international community of states as to the states' legal obligation to fulfil the right to education beyond their borders, the obligation to fulfil is the most sensitive one. Despite the CESCR's recommendations as regards the 'international cooperation and assistance as an obligation for all states to realize ESCR'³²⁵ the richer states are refusing to accept to assume any type of legally binding obligation in this sense.

Also, more clarifications are needed as regards the content and the scope of the obligation *to fulfil the right to education extraterritorially*. It was shown in the present thesis that while international assistance and cooperation for the realization of economic, social and cultural rights is 'particularly incumbent on those states in a position to assist',³²⁶ there is no clear guidance as regards the allocation of resources and division of responsibility among the donor states in order to comply with their obligations. The Maastricht Principles attempted to bring some clarity in relation to the obligation to fulfil ESCR, but they missed to identify some clear criteria for determining *who* the duty – bearers are and how the responsibility is shared among them. As resulted from the case presented in Chapter V, even in a situation where there is a clear evidence of an effective control and influence by a foreign State over the *de facto state* it was difficult for the Court to conclude as regards the positive obligations of both states involved, especially with regard to Russia's extraterritorial obligation to fulfil the right to education of individuals living in Transdnistria. The same difficulties of articulating the positive obligation to fulfil the right to education and to address the division of responsibility were encountered by the ICJ and the CESCR in the case of the occupied Palestinian territories.

Notwithstanding the progress brought by the Maastricht Principles in interpreting and clarifying the extraterritorial obligations of states in the area of ESCR, it appears that there is place for more clarification as regards the scope and the legal nature of the obligation to fulfil ESCR extraterritorially. Another obstacle in enforcing such obligation is the attitude of most states who acknowledge that they have a *moral obligation to provide education* in other countries, but they refuse to take any kind of binding obligations in this sense.

In conclusion, clear criteria and interpretations with regard to the scope and legal nature of extraterritorial obligations of states in relation to the right to education are expected to be developed by courts and human rights treaty bodies, such as CESCR and ComRC, when dealing with concrete cases and considering the circumstances of each case. The case of *Catan and Others* is a welcomed starting point on which we can build upon, but courts and non – judicial bodies should consider the core content and the essential features of the right to education (*availability, accessibility, acceptability, adaptability*) as well as the legal developments in the field of ESCR when dealing with an extraterritorial claim in relation to the right to education.

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³²⁵ CESCR, General Comment No. 3, UN Doc. E/1991/23 (14 December 1990) [14].

³²⁶ Ibid [14].

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