

The law of military occupation put to the test of human rights law

Danio Campanelli*

Danio Campanelli is a researcher at the Faculty of Law of Geneva University and a Ph.D. candidate at the Graduate Institute of International and Development Studies, Geneva.

Abstract

This article outlines the debate on the general relationship between the law of armed conflicts and human rights and examines particularly the applicability of human rights during military occupation. Complementarity and compatibility should be evaluated case by case, on the basis of the rules making up each of these regimes and any exceptions that these rules contain. The different interests and values at stake – the interests of the occupying forces and those of the civilian population, the protection of human rights and the derogations necessary to maintain order – reveal many grey areas that still exist in the interaction between human rights law and the law of military occupation.



Traditionally the law of war was considered not only as *lex specialis* in relation to the law applicable in time of peace, but also as being the body of rules *exclusively* applicable during armed conflicts,¹ all other rules being considered as automatically suspended.

As Jean Pictet pointed out in 1975, ‘humanitarian law is valid only in the case of armed conflict while human rights are essentially applicable in peacetime’.² This separation between the law of war and the law of peace – and hence

* The author wishes to thank Ms Cynthia Winkelmann for her valuable advice.

between the law of armed conflicts and human rights law – is based on the *lex specialis–lex generalis* dynamic, according to which the two are mutually exclusive depending on whether or not an armed conflict exists. This separation is also seen at the institutional level, with the United Nations and a number of regional organizations specializing in human rights, whereas the International Committee of the Red Cross specializes in humanitarian law.³

The impressive development of human rights law in recent decades, with its panoply of both universal and regional treaty instruments and the appearance of a ‘hard core’ of rights of a customary or *jus cogens* nature, could not fail to have an influence on the law of armed conflict in general and the law of military occupation in particular. These are legal regimes that are concerned with the protection of the human being.

The question of redefining the relationship between the law of war and human rights has thus been raised at last, albeit somewhat belatedly and rather tentatively. As recently as 2005, Ian Brownlie, Special Rapporteur of the International Law Commission on the effects of armed conflicts on treaties, observed in his first report that ‘The literature makes very few references to the status for present purposes of treaties for the protection of human rights.’⁴ Fortunately, the interest of legal experts in this crucial matter is growing.

The general debate on the relationship between human rights and armed conflicts has given rise to the question of the applicability of human rights during military occupation. This is a particularly interesting question because of the special nature of military occupation, which lies midway between war and peace and is characterized by the resumption of civilian life and the establishment of a particular legal relationship between the occupying army and the civilian population of the occupied country. This article will therefore tentatively outline the debate on the general relationship between the law of armed conflicts and human rights, before examining more closely the applicability of human rights during military occupation.

Compatible and incompatible aspects of the law of armed conflicts and human rights law

The law of armed conflicts and human rights law were not formed *ex nihilo*. They both sprang from the same meta-juridical requirements: the need to promote respect for human beings and their dignity in order to shield them from abuse by

1 See Adam Roberts, ‘Transformative military occupation: applying the laws of war and human rights’, *American Journal of International Law* (2006), p. 589.

2 Jean Pictet, *Humanitarian Law and the Protection of War Victims*, Sijthoff/Henry Dunant Institute, Leyden/Geneva, 1975, p. 15.

3 Ibid.

4 First report on the effects of armed conflicts on treaties (report by Mr Ian Brownlie, Special Rapporteur of the International Law Commission), UN Doc. A/CN.4/552, 21 April 2005, para. 84.

states. In addition, the codification processes applied to these two branches of international law in the late 1940s were motivated by the same desire to overcome the fascist experiments of the first half of the twentieth century that had flouted the rights of several categories of people before and during the Second World War.⁵

The efforts of the international community thus led, on the one hand, to the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948 and now regarded as a text codifying fundamental human rights, and, on the other hand, to the four Geneva Conventions of 1949,⁶ dedicated to protecting certain categories of people during armed conflicts.

While the Universal Declaration is not concerned with building a bridge between human rights and the law of war, the *travaux préparatoires* for the four Geneva Conventions of 1949 show that the negotiators were aware of the problem of the relationship between these two legal regimes. A number of delegates had put forward proposals to clarify the relationship between the Universal Declaration and the Geneva Conventions, but these proposals were not adopted.⁷ The result was that the two bodies of rules continued to grow along parallel tracks that were not destined to meet. For several decades most legal scholars who expressed their views on the applicability of human rights in time of war took the separation between the two regimes for granted, and hence generally the inapplicability of human rights in time of conflict.⁸ It is therefore interesting to note what might almost appear to be a paradox: despite having the same origins, human rights and the law of war could not be harmonized during that period.

Nowadays it is accepted in legal doctrine that because of its *lex generalis* nature, human rights law is applicable at all times, both in peacetime and in time of war. It is a relatively recent body of rules, which aims to be general and universal and has an important specific characteristic, namely the ‘vertical’ nature of the legal relationships, with the state on the one hand and the people under its jurisdiction on the other. This is a unique phenomenon in an international system governed by rules that are quintessentially intergovernmental (and therefore ‘horizontal’). Thus a human rights norm generally cannot take precedence over a special rule aiming at regulating the same situation, as for instance in the case of the treatment of civilians in armed conflicts.

For its part, the law of armed conflicts, because of its nature as ‘specialized’ law, cannot easily be harmonized with human rights law. First, it should be

5 As the International Committee of the Red Cross writes, ‘The year 1945 marked the close of a war waged on an unprecedented scale; the task had to be faced of developing and adapting the humanitarian elements of International Law in the light of the experience gained’. The Geneva Conventions of 12 August 1949, ICRC, Geneva, 1989, preliminary remarks, p. 2. See also Roberts, above note 1, p. 590.

6 Geneva Convention relative to the protection of civilian persons in time of war, 12 August 1949.

7 On this point see Robert Kolb, ‘The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions’, *International Review of the Red Cross*, No. 324 (1998) (special issue), pp. 409–19.

8 See, for example, Yoram Dinstein, ‘Human rights in armed conflict: international humanitarian law’, in Theodor Meron (ed.), *Human Rights in International Law*, Oxford University Press, Oxford, 1985, p. 345 ff.; Pictet, above note 2.

noted that, in parallel with the emergence of international human rights law, the law of armed conflicts equipped itself, through the Geneva Conventions of 1949, with an ample series of rules on the protection of certain categories of persons. The fact that the law of war went through several phases of codification (The Hague in 1907 and Geneva in 1949 and 1977) specially devoted to this subject is further evidence that states have always wanted a separate body of rules to regulate armed conflicts, as regards both relations between states party to conflict and the protection of victims of conflict.⁹ In other words, the law of war traditionally took the form of a legal regime that sought to encompass the whole range of situations conceivable during an armed conflict, including some that could be regulated through human rights standards.

Thus the law of armed conflicts, as *lex specialis*, contains rules which take precedence over some protective human rights norms. Indeed, where the law of war deals with civilians by regulating the situation in a manner incompatible with the regime established for the same situations by human rights law, this conflict of rules is generally resolved in favour of the special rule of the law of armed conflicts. The special nature of the law of armed conflicts therefore allows it to derogate from general rules, such as those of human rights law.

Nevertheless, while it is true that the law of armed conflicts takes priority during conflicts because of its *lex specialis* nature, it is also true that the rules protecting human rights – *leges generales* – can continue to be applied during a conflict, on certain conditions: first, their application must be possible *ratione personae* and, if treaty-based rules are involved, *ratione loci*; second, they must not conflict with a special rule of the law of armed conflicts; and, third, they must not be derogated in case of war, public emergency or a similar scenario that would limit or preclude their applicability during an armed conflict.

What is more, the principle of the universality of human rights, coupled with the principle of humanity – which in international humanitarian law takes the form of the Martens Clause – encourage an interpretation according to which humanitarian law, rather than being an alternative to the law of peace, should henceforth be seen as a mere exception to a full application of that law.¹⁰

The European Convention on Human Rights (ECHR) and the American Convention on Human Rights provide expressly for the possibility of derogations in the event of war.¹¹ The International Covenant on Civil and Political Rights expresses this in the words ‘public emergency which threatens the life of the nation’,¹² which, according to jurisprudence and legal doctrine, also covers the context of war and military occupation.¹³ All these provisions allowing for the

9 Dietrich Schindler, ‘The International Committee of the Red Cross and human rights’, *International Review of the Red Cross*, No. 208 (1979), p. 14.

10 Orna Ben-Naftali and Yuval Shany, ‘Living in denial: the application of human rights in the Occupied Territories’, *Israel Law Review*, (2003–4), p. 42.

11 European Convention, Art. 15(1), and the American Convention, Art. 27.

12 Art. 4(1).

13 Ben-Naftali and Shany, above note 10, p. 50. See, in particular, the Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/CO/78/ISR (2003), 5 August 2003, para. 11.

restriction of some human rights in time of war or public emergency must be seen as mechanisms for adapting each of these texts to emergency situations such as war or military occupation. Such adaptation mechanisms would indeed be pointless if these conventions were assumed to be inapplicable in armed conflicts.¹⁴ On the contrary, the fact that some instruments for the protection of human rights do not contain derogation clauses – such as the Universal Declaration of Human Rights and the 1966 International Covenant on Economic, Social and Cultural Rights – should not necessarily be interpreted as implying the treaties' automatic suspension in the event of armed conflict because the absence of such clauses shows precisely the will to render these instruments applicable during warfare.¹⁵ Generally speaking, by applying the provisions governing conflicts between special and general rules, it should be possible to determine to what extent those instruments are then applicable.

As for Protocol I of 1977 additional to the four Geneva Conventions, Article 72 thereof specifies that the provisions of Section III of the Protocol (entitled 'Treatment of persons in the power of a party to the conflict') supplement not only the Fourth Geneva Convention but also 'other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict'.¹⁶

Starting from these observations, it is important to stress that as a legal regime, human rights law is not a priori incompatible with the law of armed conflicts. There is no absolute principle whereby all the rules which together constitute human rights law are prohibited, without exception and regardless of their content, from taking legal effect during armed conflicts merely because they belong to that legal regime. Conversely, as it will be shown below, there are cases in which *certain* rules of human rights law are inapplicable during an armed conflict because they conflict with *special* rules of humanitarian law. It follows that, contrary to the positions taken by some authors, the question of compatibility between human rights law and the law of war should not be put in terms of compatibility between legal regimes, but should be evaluated case by case, on the basis of the rules making up each of these regimes and any exceptions that these rules contain.¹⁷

14 Eyal Benvenisti, 'The applicability of human rights conventions to Israel and to the Occupied Territories', *Israel Law Review* (1992), p. 29.

15 Ben-Naftali and Shany, above note 10, p. 49.

16 Roberts, above note 1, p. 591.

17 For further developments on the relationship between human rights and humanitarian law, which cannot be addressed in the present writing, see Marco Sassòli, 'Le droit international humanitaire, une *lex specialis* par rapport aux droits humains?', in Andreas Auer, Alexandre Flückiger and Michel Hottelier (eds.), *Les droits de l'homme et la constitution – Etudes en l'honneur du Professeur Giorgio Malinverni*, Schulthess, Geneva, 2007, pp. 375–95; 'La Cour européenne des droits de l'homme et les conflits armés', in Stephan Breitenmoser et al. (eds.), *Droits de l'homme, démocratie et Etat de droit – Liber amicorum Luzius Wildhaber*, Nomos Publishers, Baden-Baden, 2007, pp. 709–31; Cordula Droeger, 'The interplay between international humanitarian law and international human rights law in situations of armed conflict', *Israel Law Review* (2007), pp. 310–55.

Practice with regard to the applicability of human rights law during armed conflicts

The idea that human rights are generally applicable during conflicts has gained ground mainly because of the standpoints adopted by the United Nations in this regard. The constant practice of the UN has confirmed over and over again the applicability of human rights in time of armed conflicts and military occupation.¹⁸ The UN General Assembly, in particular, placed the question of ‘respect for human rights in armed conflicts’ on its agenda for several years in succession, namely from 1968 to 1977. The close relationship between human rights and humanitarian law was highlighted by the Assembly, which stated, in its Resolution 2853 (XXVI) that ‘effective protection for human rights in situations of armed conflict depends primarily on universal respect for humanitarian rules’.¹⁹

Nevertheless, the General Assembly was concerned chiefly about the inadequacy of humanitarian rules when it came to protecting human rights.²⁰ This prompted it to emphasize the need for ‘a reaffirmation and development of relevant rules, as well as other measures to improve the protection of the civilian population during armed conflicts’,²¹ and to call upon all states to ‘disseminate widely information and to provide instruction concerning human rights in armed conflicts and to take all the necessary measures to ensure full observance by their armed forces of humanitarian rules applicable in armed conflicts’.²²

After 1977 the subject was no longer included in the Assembly’s agenda. At that time, the adoption of Protocols I and II additional to the Geneva Conventions was deemed by the Assembly to be sufficient to resolve the problems relating to the protection of human rights during armed conflicts.

Since 1999 the UN Security Council has adopted a number of resolutions that no longer refer to ‘respect for human rights in armed conflicts’, but rather to the ‘protection of civilians in armed conflict’. The Council’s approach, while differing terminologically from that of the Assembly, seems to follow the same line as the resolutions of the plenary body, except that the Council focused its attention on the suffering of the civilian population. In its resolutions the Council urges

18 See, in this regard, General Assembly Resolutions 2444 (XXIII) of 19 December 1968, 2674 (XXV) of 9 December 1970, 2852 (XXVI) of 20 December 1971, 2853 (XXVI) of 20 December 1971, 3032 (XXVII) of 18 December 1972, 3102 (XXVIII) of 11 December 1973, 3319 (XXIX) of 14 December 1974, 3500 (XXX) of 15 December 1975, 31/19 of 24 November 1976, and 32/44, of 8 December 1977; Security Council Resolutions 1265 (1999) and 1296 (2000); and reports of the Secretary-General, UN Docs. S/1999/957 and S/2005/740.

19 UN General Assembly Resolution 2853 (XXVI) of 29 December 1971, fourth preambular paragraph.

20 ‘Recognizing that existing humanitarian rules relating to armed conflicts do not in all respects meet the need of contemporary situations and that it is therefore necessary to strengthen the procedure for implementing these rules and to develop their substance.’ *Ibid.*, fifth preambular paragraph. See also the third preambular paragraph of General Assembly Resolution 3032 (XXVII) of 18 December 1972, and the first preambular paragraph of General Assembly Resolutions 3319 (XXIX) of 14 December 1974, 3500 (XXX) of 15 December 1975, and 31/19 of 24 November 1976.

21 UN General Assembly Resolution 2852 (XXVI) of 20 December 1971, para. 3(b).

22 *Ibid.*, para. 6.

‘all parties concerned to comply strictly with their obligations under international humanitarian, human rights and refugee law’²³ and reiterates ‘the importance of compliance with relevant provisions of international humanitarian, human rights and refugee law’.²⁴ Moreover, from the beginning of the US–UK occupation of Iraq in 2003–4, the Council has stressed the importance of international humanitarian and human rights law.²⁵

The UN Secretary-General has produced several reports on the protection of civilians in armed conflicts. In the report of 8 September 1999, it is stated that

International humanitarian law sets standards for parties to an armed conflict on the treatment of civilians and other protected persons. ... There are also legal norms in international human rights law from which there can be no derogation or suspension in time of public emergency.²⁶

The Secretary-General considered respect for humanitarian law, human rights law and refugee law to be one of the most effective means of ensuring better protection of civilians during armed conflicts.²⁷

Lastly, the International Court of Justice has recognized the applicability of human rights law in armed conflict, even in an extreme situation involving the use of a nuclear weapon. In particular, according to the Court, ‘the protection of the International Covenant of [sic] Civil and Political Rights does not cease in times of war’.²⁸ The Court also reiterated and specified this assertion in the advisory opinion concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, and confirmed it more recently in the case of the *Armed Activities on the Territory of the Congo*.²⁹

The law of military occupation and human rights law

Turning now to military occupation, a distinction should be made at the outset between it and a situation of armed conflict. Military occupation is a different situation from that of armed conflict in various respects: the occupier controls the occupied territory, there are no major military operations in the occupied zone and a minimum of order and security have been restored, enabling civilian life to resume to some degree. The fact that the occupier has sufficient control over the

23 UN Security Council Resolution 1265 (1999), para. 4.

24 UN Security Council Resolution 1296 (2000), para. 19.

25 See UN Security Council Resolutions 1483 (2003) and 1546 (2004).

26 Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict, UN Doc. S/1999/957, 8 September 1999, para. 6.

27 *Ibid.*, para. 35.

28 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 240, para. 25.

29 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 9 July 2004, para. 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, para. 216.

occupied territory to assert itself – the *condicio sine qua non* for the existence of an occupation and a typical element of the definition found in Article 42 of the Hague Regulations – facilitates its task of stabilizing the occupied territory, a task it can accomplish through the administrative and governmental powers that occupation law confers on it. In other words, occupation law requires the occupier to take into account certain requirements of the population living under occupation, and provides the occupier with the necessary legal tools to do so.³⁰

In this regard occupation law somewhat resembles the law of peace, while remaining a branch of the law of war. After all, the armed conflict between the occupier and the occupied has not truly ended, which means that military occupation is indeed an intermediate situation between war and peace.³¹ The law of military occupation reflects this dual nature of occupation, consisting as it does of rules drawn both from the rules of war and from the rules of peace. Indeed, the rules making up the law of military occupation were dictated by the need to regulate two types of relationship: the relationship between the occupying state and the occupied state – that is, a horizontal inter-state relationship characterized by the existence of a state of war and therefore still governed by typical rules of the law of war – and the relationship between the occupying state and the civilian population of the occupied state – that is, a vertical intra-state relationship less marked by the ongoing armed conflict and therefore characterized by rules drawn from principles valid in time of peace. This second aspect of the law of military occupation constitutes a point of contact between this legal regime and human rights law. The two bodies of law have another point in common: the goal of protecting human dignity. In view of these simple facts they appear, at least on paper, to be compatible in nature and capable of being co-ordinated to ensure that the rights of the population living under occupation are better protected. Let us therefore examine how far this compatibility will go, taking into account the *sui generis* nature and structure of each of the two legal regimes, as well as their incompatibilities.

The applicability of human rights law during military occupation

In general terms, the applicability of human rights law during military occupation has been affirmed repeatedly in case law and in practice.³² As one author observes,

30 On this point see Yoram Dinstein, 'The international law of belligerent occupation and human rights', *Israel Yearbook on Human Rights*, 1978, p. 112.

31 Philippe Burrin, 'Entre guerre et paix: l'occupation militaire', in Michel Porret, Jean-François Fayet and Carine Fluckiger (eds.), *Guerres et paix: Mélanges offerts à Jean-Claude Favez*, Georg, Geneva, 2000, pp. 257–66.

32 The European Court of Human Rights did so on two occasions: in *Loizidou v. Turkey* (1996) and *Cyprus v. Turkey* (2001). Likewise, the International Court of Justice, in its advisory opinion of 9 July 2004 (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above note 29, paras. 107–112), affirmed the applicability of the International Covenant on Civil and Political Rights to

‘there is no *a priori* reason why multilateral conventions on matters [other than occupation] should not be applicable to occupied territories’,³³ a consideration that applies as well to conventions for the protection of human rights. Nevertheless, it is not a question of substituting human rights law for occupation law. Given that the law of military occupation is specialized law, it is understandably often better adapted to the particular situation of military occupation.³⁴ This is true, for example, with respect to the protection of private property, a human right from which derogation is normally possible under human rights law and for which the special regime applicable in time of occupation is defined by occupation law.³⁵

It was mentioned above that because some conventions for the protection of human rights, such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights, provide for the possibility of restricting certain human rights in time of war and/or public emergency, they are applicable during an armed conflict or a military occupation.³⁶ It was also pointed out that the extent of applicability of certain instruments not providing for derogation in the event of conflict or any other public emergency – such as the International Covenant on Economic, Social and Cultural Rights – will be determined according to whether there are special rules of the law of war or the law of military occupation that may conflict with their provisions and thus prevail as *lex specialis*.

For its part, the Universal Declaration of Human Rights merits a separate discussion, since in the first place it does not provide for the possibility of derogation in emergencies, and secondly it adds, in its Article 2(2), an element that is relevant to the situation of military occupation:

2. ... no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.³⁷

the occupied Palestinian territory. See also Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/C/79/Add.93, 18 August 1998, para. 10, available at [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.79.Add.93.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.79.Add.93.En?OpenDocument) (last visited 21 October 2008), and Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 11, available at [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.78.ISR.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.ISR.En?OpenDocument) (last visited 21 October 2008). Lastly, it should be noted that a number of recent military manuals – including the United Kingdom military manual of 2004 – contain references concerning respect for human rights during military occupation (see *The Manual of the Law of Armed Conflict*, UK Ministry of Defence, Oxford University Press, Oxford 2004, p. 282, para 11.19).

33 Roberts, above note 1, p. 589.

34 Michael Dennis, ‘Application of human rights treaties extraterritorially in times of armed conflict and military occupation’, *American Journal of International Law* (2005), p. 139; Roberts, above note 1, p. 600.

35 See, in this regard, Arts. 46, 47 and 52 of the Hague Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.

36 See the text accompanying notes 11–13 above.

37 Universal Declaration of Human Rights, 1948; General Assembly Resolution 217 A (III) of 10 December 1948, Art. 2 (emphasis added).

The reference to ‘any other limitation of sovereignty’ could be interpreted as taking into account the situation of military occupation. In that case the Universal Declaration would be applicable to military occupation, a situation specifically characterized by a major limitation of the sovereignty of the occupied state.

Be that as it may, the existence of a hard core of human rights that are considered non-derogable both in peace and war is undeniable. Besides the Universal Declaration there are, for instance, the rules from which Article 4(2) of the International Covenant on Civil and Political Rights stipulates that no derogation may be made under any circumstances.³⁸ It is interesting to note an almost perfect correspondence between the core human rights and the core rights of persons protected by humanitarian law. Pictet identified at least three fundamental principles common to human rights law and humanitarian law, namely, inviolability, non-discrimination and security of person.³⁹ These three fundamental principles are the basis of a number of human rights – the right to life, right to a fair trial, protection from arbitrary arrest or detention, prohibition of torture and any other inhuman or degrading treatment, prohibition of discrimination, protection of the family, prohibition of slavery, freedom of thought, conscience and religion and so on – which exist, with a few very minor variations, in both bodies of law.⁴⁰

While the body of rules that constitute the law of military occupation is henceforth considered to be of a customary nature – and must therefore be observed by all states in the international community – it is not uncommon for some human rights to be included in treaty instruments, often regional ones, that are binding only on the states parties *vis-à-vis* any person within their jurisdiction. There may be important differences between the protection regime established by customary human rights law and the one contained, for example, in regional instruments such as the European Convention on Human Rights or the American Convention on Human Rights. It is therefore necessary for the occupier to ascertain, at the beginning of its military operations, exactly which rules of human rights law it must observe.

Next, from a *ratione loci* standpoint, we must not overlook the reluctance of some states to recognize that a militarily occupied territory comes under the jurisdiction of the occupying power,⁴¹ even though recent legal doctrine and case law recognize, on the contrary, that it does. Thus the Human Rights Committee stated that

[T]he applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including

38 Namely, the right to life (Art. 6), the prohibition of torture and other cruel, inhuman or degrading treatment (Art. 7), the prohibition of slavery and servitude (Art. 8, paras 1 and 2), the prohibition of arrest on the ground of inability to fulfil a contractual obligation (Art. 11), the principle *nulla poena sine lege* (Art. 15), the right to recognition as a person before the law (Art. 16) and the right to freedom of thought, conscience and religion (Art. 18).

39 Pictet, above note 2, pp. 34 ff.

40 Ben-Naftali and Shany, above note 10, pp. 52–3.

41 See, in particular, the position of Israel and the United States, *ibid.*, p. 17 ff.

article 4 which covers situations of public emergency which threaten the life of the nation. Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territories.⁴²

This position is shared by a number of international organizations active in the protection of human rights.⁴³ In terms of case law, the International Court of Justice, in its advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, stated clearly that the International Covenant on Civil and Political Rights must be applied to the occupied territories:

In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.⁴⁴

With regard to the extraterritorial applicability of conventions for the protection of human rights, the *Al-Skeini* case seems particularly interesting. It was brought before the UK Court of Appeal in 2005 by Iraqi civilians who had been subjected to human rights violations in Iraq by British soldiers during their country's occupation in 2003–4. The Court discussed the concept of the United Kingdom's extraterritorial jurisdiction in Iraq for purposes of implementation of the European Convention on Human Rights and the 1998 Human Rights Act, while recognizing that at least one of those civilians (namely Mr Mousa) had been under the effective control of the UK armed forces. This meant that the European Convention on Human Rights and the Human Rights Act were applicable in the UK occupation zone in Iraq and that the British judge had jurisdiction to hear the case.⁴⁵ However, the extraterritoriality of the European Convention and of the

42 Concluding Observations: Israel, above note 32, para. 11.

43 As an example, see Concluding Observations of the Committee on the Rights of the Child: Israel, UN Doc. CRC/C/15/Add.195, 9 October 2002, in which the Committee affirms that the Convention on the Rights of the Child is applicable to the occupied Palestinian territories (para. 2); see also Concluding Observations of the Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/30/4/Add.45, 30 March 1998, in which the Committee invites Israel to report on the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination 'in all areas over which it exercises effective control' (para. 12); lastly see Concluding Observations of the Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/1/Add.69, 31 August 2001, in which the Committee, after affirming the applicability of the International Covenant on Economic, Social and Cultural Rights in times of military occupation (para. 11), points out that 'even during armed conflict, fundamental human rights must be respected and ... basic economic, social and cultural rights as part of the minimum standards of human rights are guaranteed under customary international law and are also prescribed by international humanitarian law' (para. 12).

44 Above note 32, para. 111.

45 *The Queen ex parte Al-Skeini and Others v. Secretary of State for Defence*, England and Wales Court of Appeal [2005] EWCA Civ 1609, 21 December 2005, available at www.bailii.org/ew/cases/EWCA/Civ/2005/1609.html (last visited 21 October 2008).

Human Rights Act was limited by the Court of Appeal to cases in which the occupying power exercised effective control over the person concerned:

It is quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time ... The UK possessed no executive, legislative or judicial authority in Basrah City other than the limited authority given to its military forces, and as an occupying power it was bound to respect the laws in force in Iraq unless absolutely prevented ... It could not be equated with a civil power: it was simply there to maintain security, and to support the civil administration in Iraq in a number of different ways.⁴⁶

The Court of Appeal limited its reasoning to the applicability of the human rights legislation binding upon the United Kingdom. In effect, the Court of Appeal lacked the necessary competence to extend its reasoning to humanitarian law issues. However, it could not avoid some references to the law of military occupation, because the facts of the case at stake took place during the British military occupation of the city of Basrah. The Court explicitly admitted the existence of a military occupation and drew a distinction between the applicability of humanitarian law and of human rights law in Iraq, concluding that the United Kingdom did not have jurisdiction within the meaning of Article 1 of the ECHR in relation to five of the six victims – that is, those killed as a result of incidents that took place during the activities of the British Army. As to the sixth victim, Mr Mousa, the Court concluded that he was under the control of the British army for the purposes of the ECHR and that the Human Rights Act applied to him because at the time of his death he was in the custody of the British forces.⁴⁷

As a result, the English Court of Appeal seems to introduce two distinct definitions of occupation: one characterized by the occupying power's effective control over the places and people under occupation, allowing the application of the ECHR and all related municipal human rights norms; and another kind of occupation characterized by the lack of such control and thus not allowing the application of the ECHR and all related municipal human rights norms. This result does not seem consistent with the definition of occupation stemming from Articles 42 and 43 of the 1907 Hague Regulations. According to these articles, the key element of the definition of a military occupation is precisely the *effectiveness* of the occupation army's control, which corresponds to the factual exercise of governmental authority by the occupant.⁴⁸

46 Ibid., para. 124.

47 Roberts, above note 1, p. 598–9.

48 Art. 42(2) of the Hague Regulations, in the authentic French version, states, 'L'occupation ne s'étend qu'aux territoires où cette autorité est établie et en mesure de s'exercer', while Art. 43 states, 'L'autorité de pouvoir légal ayant passé de fait entre les mains de l'occupant'. For a study of the effectiveness criterion in the law of occupation, see Roberto Ago, *Il requisito dell'effettività dell'occupazione in diritto internazionale*, ARE, Roma, 1934, p. 125.

This being said, there is no denying the utility of the criterion of territorial effective control to determine the extraterritorial applicability of the ECHR, since there may be situations in which a state exercises effective control outside its territory without doing so in the form of a military occupation. The European Court of Human Rights has already dealt with such situations.⁴⁹ However, the reverse is not true: a situation of military occupation without effective control of the occupied territory is inconceivable, since military occupation is by definition a *de facto* situation characterized by effective control of the occupying power over the occupied territory. In other words, the Hague Regulations did not envisage the possibility of evaluating the degree of effectiveness of the territorial control in order to establish what duties are to be imposed upon the occupier – an evaluation which, on the contrary, has to be made when determining the applicability of the ECHR. As a result, admitting the existence of a military occupation is tantamount to admitting a degree of territorial control by the occupant, which, by virtue of the definition of military occupation, satisfies the conditions of Article 1 of the ECHR. To rule out the United Kingdom's responsibility for human rights violations suffered by certain of the said Iraqi civilians on the grounds that the British army did not have effective control of Basrah City, while admitting at the same time that Britain was the occupying power of this city, is thus contradictory from the point of view of the law of military occupation.

The 'human rightist' nature of the law of military occupation

While it is true that the great texts codifying human rights law rarely contain guiding principles concerning their applicability in armed conflicts, and while neither the 'the Hague law' nor the 'law of Geneva' is expressed in terms of 'human rights', it is also undeniable that in both cases international law endeavours to guarantee the individual at least a minimum of protection against the activities of states. As noted earlier, the law of armed conflicts and the rules of human rights law stem from the same underlying consideration, namely the state's relationship to the individual and the need to protect the latter owing to his or her vulnerability *vis-à-vis* the state. Occupation law likewise outlined, as early as the 1907 Hague Regulations, legal safeguards for civilians under occupation against abuses by the occupying power in the areas of national law, security, the right to life and private property, family law, allegiance, respect for religious practices, and collective punishment.⁵⁰ In other words, the law of military occupation arose with a 'human rights' purpose *ante litteram*, so to speak, one that was supplemented and strengthened during the two main phases of adaptation and development of Geneva law in 1949 and 1977.

49 See, e.g., the cases *Gentilhomme v. France*, European Court of Human Rights (ECtHR) No. 48205/99, 14 May 2002; *Banković and Others v. Belgium and 16 Other Contracting States*, (dec.) [GC], No. 52207/99, ECtHR 2001-XII; *Assanidze v. Georgia* [GC], No. 71503/01, ECtHR 2004-II; *Ilaşcu and Others v. Moldova and Russia* [GC], No. 48787/99, ECtHR 2004-VII; *Issa and Others v. Turkey*, ECtHR No. 31821/96, 16 November 2004.

50 See Arts. 43–51 of the 1907 Hague Regulations.

Despite this, the law of military occupation remains incomplete as regards protection of civilians. The fact that human rights law is generally applicable to military occupation, as demonstrated in the preceding paragraph, provides an important tool for filling these gaps, particularly where civil and political rights are concerned. These rights are virtually absent from the Hague Regulations, the Geneva Conventions and Additional Protocol I, but are dealt with fully in the human rights texts, both in content and in terms of remedies for violations.⁵¹ They are of paramount importance in the event of occupation, primarily because such rights are often the first to be subject to derogation measures by the occupier if they conflict with its interests.⁵² In particular, the requirement that the occupier must ‘restore, and ensure ... public order and safety’, laid down in Article 43 of the Hague Regulations, may allow the adoption of measures in the occupied territory that comply with the guarantees set out in international humanitarian law (especially in Geneva Convention IV), but that derogate, at the same time, from human rights law.⁵³ Second, if the conditions of occupation so permit, the occupier may decide to restore some civil and political rights and, in so doing, will be compelled by the silence of occupation law on that subject to be guided by the rules protecting human rights.⁵⁴ These rules set the standards for civil and political rights, standards whose outlines will be adapted by the occupier to the specific needs of the situation. Occupation law is also silent on such questions as discrimination in workplaces or schools, or in relation to ‘third-generation’ rights – such as the right to a safe environment – areas in which the occupier must once again refer to human rights law, the only body of law able to provide the individual with clear rules and the necessary redress mechanisms.⁵⁵ Lastly, by invoking the fact that the domestic law of the occupied state does not respect basic human rights, the occupier could trigger the ‘absolute prevention’ clause contained in Article 43 of the Hague Regulations in order to justify its non-observance of the domestic laws concerned and introduce the legislative measures needed to bring the law of the occupied state in line with international human rights standards.⁵⁶

Reconciling the interests of the occupying army with the rights of the civilian population

The law of military occupation takes into consideration not only the interests of the civilian population in the occupied territory, but also the interests of the occupying power. Its ‘human rights’ purpose must therefore be juxtaposed with the military

51 Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, 1992, p. 189.

52 Benvenisti, above note 14, p. 30.

53 Marco Sassòli, ‘Legislation and maintenance of public order and civil life by occupying powers,’ *European Journal of International Law* (2005), pp. 664–5. In particular, Sassòli focuses on criminal prosecution.

54 Benvenisti, above note 51, p. 189.

55 See Roberts, above note 1, p. 594.

56 See Sassòli, above note 53, pp. 665 ff.

purpose of enabling the occupier to continue, to the best of its ability, its military effort against the enemy state in order to defeat it. The occupying power is in actual fact engaged in an armed conflict that has not yet ended, and must ensure not only respect for the civilian population under occupation, but also the safety of the occupying army and the pursuit of its military objectives. The law of military occupation is therefore designed to ensure a certain necessary balance between the interests of the local population and those of the occupying army. It is characteristic of occupation law to take these two opposing facets into account. The occupying power's consideration of its own requirements consequently means that the human rights it recognizes as belonging to the civilians of the occupied state may differ from the corresponding rights in peacetime. For example, the right to life and the prohibition of arbitrary arrest may be interpreted by it in the light of Articles 5, 68 and 78 of the Fourth Geneva Convention, which confer on the occupier the power to execute certain criminals and to arrest suspect individuals.⁵⁷ Likewise, Article 4(1) of the International Covenant on Civil and Political Rights, which provides for the possibility of derogation from some human rights in time of public emergency, may be interpreted by the occupier according to the seriousness of the situation. Whereas Article 4(1) provides that the state concerned shall take decisions 'to the extent strictly required by the exigencies of the situation', during an occupation these exigencies may vary in time and in space, depending on a number of parameters relating to the different situations that the occupier may have to face.

The general balance – or, rather, the relationship of forces – between the occupier's military requirements and the requirements of the population under occupation is not fixed; it has evolved significantly over the decades, hand in hand with the development of international law. We have in mind, in particular, the updating of the Hague law that took place in Geneva in 1949, in which the 'human rights' aspect of military occupation was markedly developed in reaction to the abuses of that law by the Axis Powers during the Second World War. Since 1949 the balance struck between military and civilian requirements has continued to evolve under the inevitable influence exerted on occupation law by the rise and consolidation of human rights. Yet although the law of military occupation has evolved in a 'human rights' direction in recent decades, it does not seem able to go beyond certain limits inherent in that legal regime. It must therefore not be forgotten that, generally speaking, as one author states,

The government of an occupied territory by the occupant is not the same as a State's ordinary government of its own territory: a military occupation is not tantamount to a democratic regime and its objective is not the welfare of the local population.⁵⁸

57 Ben-Naftali and Shany, above note 10, p. 104.

58 Dinstein, above note 30, p. 116.

There are nonetheless specific situations that refute this statement, as was the case recently during the US–UK occupation of Iraq in 2003–4: UN Security Council Resolution 1483 (2003) mandated the Coalition Authority to co-operate with the United Nations in ‘promoting the protection of human rights’, while working to establish institutions for representative governance and promoting a vast and thoroughgoing judicial reform.⁵⁹ While the protection of human rights, as we have seen, is generally possible in the framework of the law of military occupation, the *promotion* of human rights, coupled with initiatives to transform the organizational and institutional fabric of the occupied country, is undoubtedly a task on the occupier’s part that was specially envisaged by the Security Council for the specific case of the occupation of Iraq, and not as an obligation normally arising under the general law of military occupation.⁶⁰ This approach taken by the Council did not fail to create a certain tension between the law of military occupation, which tends to be conservative, especially where respect for the domestic law and institutions of the occupied state is concerned, and the requirements of the transformation that the Security Council wished to support via the occupying powers.⁶¹

Conclusion

In closing, we are aware that the framework briefly outlined in this article raises more questions than it answers. The wealth of rules and the complexity of the law of military occupation and human rights law, as well as the need to highlight the *lex specialis–lex generalis* relationship between them, taking into account the evolution of these two bodies of law in recent decades, are all elements that often render any effort to identify the exact content of the civilian population’s rights during military occupation very difficult. This complexity is the inevitable result of the intersection of two distinct legal regimes, both of which are needed to regulate different aspects of military occupation. At the same time, it unquestionably makes the application of the law less comprehensible, especially for military operators, who do not necessarily have the time and specialized tools required to consider all the subtle variations that may crop up from one case to the next. Military manuals are without doubt an essential practical source of clarification, but the balance between the different interests and values at stake – the interests of the occupying forces and those of the civilian population, the protection of human rights and the derogations necessary to maintain order – calls for further efforts by legal scholars to shed light on the many grey areas that still exist in the interaction between human rights law and the law of military occupation.

59 UN Security Council Resolution 1483 (2003), para. 8(c), (g) and (i). At the declared end of the occupation, in June 2004, the Security Council entrusted this task to the Special Representative of the Secretary-General and to the United Nations Assistance Mission for Iraq (Security Council Resolution 1546 (2004), para. 7(b)(iii)).

60 Roberts, above note 1, p. 613.

61 In this regard see *ibid.*, pp. 580–622.