

When weapons speak the law does not fall silent: human rights obligations and foreign forces' de facto control in cases of belligerent occupation: normative complexities and complementarities

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When Weapons Speak the Law does not Fall Silent: Human Rights Obligations and Foreign Forces' *de facto* control in cases of Belligerent Occupation: Normative Complexities and Complementarities

I. Introduction

Contemporary armed hostilities may come in varying degrees of intensity fluctuating from minor boundary incursions to full-scale attacks. Painting the boundaries of where peace ends and where war begins is not possible without establishing the scope of the relevant conflict. In this regard, the type of armed conflict under investigation is belligerent occupation. Peacetime rules are no longer considered to be automatically suspended once hostilities break out. Evidently, the fact that Iraq and the United States were at war did not impact their United Nations (UN) membership, nor did it suspend their obligations under human rights conventions or environmental treaties. Cicero's maxim *inter arma enim silent leges* (in times of war, the law falls silent) is more of a rhetorical flourish rather than an accurate description,¹ for the principles of International Humanitarian Law (IHL) developed around the turn of the twentieth century, intended to constrain the destructiveness of warfare and prevent extreme suffering. Warfare is considered a highly regulated activity and thus the laws, even during a belligerent occupation, are not silent, but they speak with a somewhat different voice.²

The adoption of the Geneva Conventions I-IV (1949) crystalised the regime of belligerent occupation. The emerging prohibition, in contemporary international law, of a unilateral annexation of foreign territory through the use of force presented the need to recognise this regime and develop its legal framework. Occupation does not transfer sovereignty. As Oppenheim emphasised 'there is not an atom of sovereignty in the authority of the occupying power'³ and thus the role that the occupant is called to exercise is far more perplex. Belligerent occupation is regulated by the Geneva Conventions IV (GCIV) and Additional Protocol I as well as the Hague Regulations. Art. 42 Regulations Respecting the Laws and Customs of War on Land of 1907 determine the legal conditions for the commencement of belligerent occupation. Although these conditions are seemingly straightforward, they have been subject of controversy due to diverging interpretations.⁴ The focus of the GCIV and the Additional Protocol I instruments lies in securing the protection of the occupied population delineating a rudimentary bill of rights with internationally endorsed guidelines for the lawful administration of the occupied territory. It is noteworthy that of the 15 articles of the Hague IV Regulation on belligerent occupation, solely Art. 43 encloses a provision stipulating what an occupant can legitimately do to ensure public order and safety in occupied territories.⁵

The assertion that the international norms' *corpus* on the human rights protection applies in occupied territories results from a threefold proposition; first, in the *Coard* case, the Inter-American Commission on Human rights stressed that 'while international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the

¹ Jan Klabbers, *International Law* (Cambridge University Press, 2021) 222

² William H Rehnquist, *All the Laws But One: Civil Liberties in War Time* (New York: Alfred Knopf, Inc, 1998) 224-5

³ Oppenheim, 'The Legal Relations Between an Occupying Power and the Inhabitants' in *Law Quarterly Review* 33 (1917) 364; Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge, 2009) 49

⁴ Eyal Benvenisti, 'The Origins of the Concept of Belligerent Occupation' (26 *Law & HisRev*, 2008) 621-48

⁵ Edmund H Schwenk, 'Legislative Power of the Military Occupant under Article 43', *Hague Regulations* (1945) (54 *Yale Law Journal*, 1945) 393-416

other'⁶ subject to derogation and to any built-in limitations. In the same vein, the International Court of Justice (ICJ) indicated in its *Wall Advisory Opinion* the parallel applicability of both bodies of law. Second, most human rights treaties refer to the territorial scope of State Parties' obligations encapsulating areas which are under their 'effective control', thus occupied territories would fall under this definition (Art. 2(1) of the Civil and Political Rights Covenant (ICCPR)). Third, Art. 43 Hague Regulations requires the occupant power to respect the 'laws in force in the country'.⁷ Therefore, to the extent that human rights treaties form part of the domestic law, the occupying power would also be bound to respect them.

Obviously, the provisions of IHL and IHRL outline obligations of the occupying powers to protect basic human rights during occupation. Namely, Art. 27 of the Fourth Geneva Convention (1949) sketches the obligations to respect the fundamental rights of the occupied population. The interwoven threads of these two bodies of law, which consist of both customary *jus non scriptum* and *jus scriptum*, poses obligations to the State exercising jurisdiction or control. These obligations may as well extend to the occupied territories where a foreign power seeks to exercise *de facto* control over a civilian life by substituting its authority for that of the ousted government. However, the nature of occupation under international law is short-term. The occupying powers control or assume the territory for a limited period and may take provisional measures. The welfare and security of the occupied civilians is incumbent on the occupying powers. The rights of the occupied persons are inviolable and cannot be snatched away (Art. 8 of GCIV), subject to certain derogation clauses that allow for suspension of obligations, such as suspension of political and civil liberties.

The interaction and even complementarity between these two branches of international law leaves many questions open due to the challenges and subtle balances that must be maintained in the context of occupation, especially when foreign forces are likely to regard occupied civilians as a hostile force and thus downgrade the significance of safeguarding their human rights. The article aims to investigate to what extent the complementarity of IHL and IHRL, speaking in a 'different voice', may strengthen protections of the occupied population. The paper builds on three parts: part I examines the degree of interaction between IHL and IHRL and the challenges of belligerent occupation law to maintain a relationship with IHRL. Part II analyses the legal framework and relevant judgments of the international courts and tribunals concerning obligations of the occupying powers and various aspects of human rights protection under international law. To fill the legal vacuum, part III argues that IHRL could be used to complement the, at times constrained, content of IHL norms and interpret the scope of its obligations to better address the needs and streamline the rights of the occupied population.

II. The Symbiotic Terrain of International Human Rights and Humanitarian Law in Safeguarding Human Rights under the Belligerent Occupation Regime

Calamitous events and atrocities have always been the driving forces for advancing international humanitarian law, for it to be granted a more humane face. Both the post-UN Charter international human rights instruments and the formation of international processes of accountability contributed to this development. Even though IHL nucleus centres on the States' interests and their sovereignty, it also encapsulates components of human rights protection. In this context, recurrent cruelties and grievous human rights violations shifted some State-to-

⁶ *Coard et Al. v United States*, Report N 109/99 – Case 10.951, Inter-American Commission on Human Rights (IACHR), 29 September 1999, para 39

⁷ Article 43, Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague 18 October 1907 (The Hague Convention, 1907)

State aspects of the IHL framework to individual criminal responsibility, which allowed to change its State-centric angle to a more homocentric one.⁸ The establishment of the criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) had also had a prodigious impact on further humanising IHL⁹ by virtue of drawing humanitarian law towards the direction of human rights law which illustrates how criminal tribunals in applying IHL are informed by human rights law.¹⁰ In terms of scholarship, IHRL has had a great deal of impact on the formation of customary rules of humanitarian law along with the courts and tribunals jurisprudence and the work of international organisations.¹¹ Hence, there is a robust inter-enrichment piercing these two bodies of law, generated by a substantial measure of parallelism¹² and an ever-growing measure of convergence stemming from the common denominator of these legal systems, the *principle of humanity*.¹³ In this respect and within the context of occupied territories, the IV Geneva Convention wheels out the necessity to amplify the protection regime for individuals and populations, by instituting a new balance between the rights of the occupant and the rights of the occupied population.¹⁴ Nevertheless, challenges in maintaining a balance between belligerent occupation law and IHRL stir up the legal waters and, thus may dilute the protections afforded by the law of occupation as the approaches taken by these two bodies of international law may converge, complement or diverge.

Immediately upon an occupying power issuing the prerequisite proclamation, protected persons fall exclusively under the law of belligerent occupation. Contrariwise to human rights law, *jus in bello* cannot be suspended in wartime and thus, rights established by the ad hoc law are non-derogable.¹⁵ Article 7(1) of GCIV provides that Contracting Parties are not allowed to conclude special agreements that ‘adversely affect the situation of protected persons’,¹⁶ which suggests that these special agreements *per se* may devise more rights but certainly not less.¹⁷ Although extant settings of the law of human rights and of belligerent occupation are both applicable, they, however, at times, point in diverse or even contradictory directions, which do not always facilitate the maintenance of a balanced relationship. Undoubtedly, the IHRL

⁸ Theodor Meron, *The Humanization of International Law* (The Hague Academy of International Law Monographs, 2006) Vol 3, 2

⁹ Theodor Meron, ‘The Normative Impact on International Law of the International Tribunal for former Yugoslavia’ (24 Israel Yearbook on Human Rights, 1994) 163

¹⁰ Theodor Meron, ‘The Continuing Role of Custom in the Formation of International Humanitarian Law’ (90 AJIL, 1996) 262 (Meron, 1996)

¹¹ See ICJ’s *Nicaragua case* and the *Nuclear Weapons Advisory Opinion*; (Meron, 1996) 238

¹² *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v Rwanda)* [2006] ICJ Rep 6, case (*Armed Activities case*): the ICJ, transiting from its so far advisory role to a legally binding judgement, demonstrated its evolutive and synthetic character. The 2005 *DRC v Uganda* case has been marked as the first judgment in the history combined with findings of violations of IHRL and IHL; Similarly, the Trial Chamber in *Furundžija* had turned to human rights law to determine the definition of torture due to the paucity of an express definition under humanitarian law, *Prosecutor v Furundžija*, Case IT-95-17/1-T (Judgment of 10 December 1998) paras 159 and 162

¹³ Ben-Naftali and Shany, ‘Living in Denial: The Application of Human Rights in the Occupied Territories’ (37 Israel Law Review, 2004) 17, 101

¹⁴ Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), Commentary of 1958 <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=C4712FE71392AFE1C12563CD0042C34A>> accessed 5 August 2022

¹⁵ Roberta Arnold, ‘Human Rights in Times of Terrorism’ (ZaöRV 66, 2006) 304

¹⁶ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (4th edn, D Schindler and J Toman eds, 2004) 582

¹⁷ Robert Kolb, *Jus in Bello: Le Droit International des Conflits Armés* (Bale: Helbing & Lichtenhahn, 2003) 180-

temporal application is more comprehensive proffering the opportunity to fill potential vacuums in an occupied territory, particularly, in instances where the norms governing belligerent occupation are silent or quasi complete.¹⁸ The case in point is found in Article 4(1) of GCIV's wording which excludes from its protection nationals of the occupying power, even if they live in the occupied territory, save to one exceptional in character clause; a *sui generis* protection extension to the pre-outbreak of hostilities refugees.¹⁹ Therefore, since IHRL is applicable to everyone in occupied territories, it can thus fill loopholes in protection, point that was expressly made at several instances by the Israel Supreme Court (HCJ) stressing that human rights must be respected not only for protected persons but also for nationals of the Occupying Power –whether or not settlers.²⁰ On that account, the interplay of these two legal systems is not merely centred to fill *a priori* gaps and vacuums but also by 'equalising the playing field'²¹ between the protected and the non-protected ones pursuant to Geneva Convention, the regulatory framework is laid with a two-pronged perspective: the occupying powers to convoy the occupied populations on the road to democracy and economic development and second, to fully implement some of their human rights obligations so that the Occupied population realise their right to self-determination.

III. Determinations of International Courts and Tribunals on Foreign Forces Human Rights Obligations during Occupation

Under the international law framework, the doctrine that IHRL provisions apply extraterritorially has been well established and hence, the occupying powers are under the obligation to *respect, protect* and *fulfil* them. International Courts and tribunals have advanced this prescription through the prism of IHL and IHRL. The occupying power assumes authority over occupied territory and inhabitants as provided in relevant laws.²² However, are the foreign forces exempted from their obligations when occupation occurs? The answer is in negative as determined by international courts and tribunals. The ICJ, for instance, determined that Israel, due to the construction of Wall in an occupied territory,²³ had violated several ICCPR provisions including provisions of the International Covenant on economic, social and cultural rights and those falling under the Convention on the rights of Child. As per the protection of enjoyment of economic, social and cultural rights in an occupied territory, its approach was analogous.²⁴

¹⁸ Eleven judges *per curiam* underlined the absence of protection pursuant to the Convention, HCJ 1661/05, *Gaza Coast Local Council v. The Knesset*, P.D. 59 (2) 481, 517; Yoram Dinstein, 'Human Rights and Belligerent Occupation' in *The International Law of Belligerent Occupation* (Cambridge, 2009) 94

¹⁹ Article 70 (2) stresses that the right to asylum, enjoyed by refugees before the outbreak of hostilities, 'must continue to be respected by their home country, when it takes over control as occupying power in the territory of the asylum country'. Commentary, IV Geneva Convention, Article 70 (2) 351 <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=A18EC1210FDFE245C12563CD0042CD3F>> accessed 8 August 2022

²⁰ See HCJ 256/72, *Jerusalem District Electricity Co, Ltd. v Minister of Defence et al.* 27(1) PD 124, 138; HCJ 1890/03, *Betlehem Municipality et al v State of Israel Ministry of Defence et al.*, 59(4) PD 736; HCJ 72/86, *Tzalum et al. v Military Commander of Judea and Samaria et al.*, 41(1) PD 528, 532

²¹ David Mennie, 'The Role of the International Covenant on Civil and Political Rights in the Israeli-Palestinian Conflict: Should Israel's Obligations under the Covenant Extend to Gaza and the Other Occupied Palestinian Territories?' (21 Transnat'l L & Contemp Probs, 2012) 511, 543

²² See The Hague Convention, 1907 Art 42; The Fourth Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (12 August 1949) Art 27 and 47 and Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol-I 1977) Art 75

²³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004) ICJ Rep 136 (The Wall's case) paras 122-42

²⁴ *Ibid*

The World Court's jurisprudence in determining obligations of the foreign forces has been paramount and has invoked its jurisdiction to address multiple matters pertaining to occupation.²⁵ The *Wall's* case²⁶ has been a preeminent example whereby the Court determined human rights violations committed by Israel's forces and emphasised that the obligation under Geneva Convention IV, article 1, 'to respect and to ensure respect for the present Convention in all circumstances entails the obligation on every state party to that Convention, whether or not a party to a specific conflict, to ensure that the requirements of the instruments in question are complied with'.²⁷ Akin to similar mindset, the Hague Court in the *Armed Activities on the Territory of the Congo*²⁸ case, was convinced that Uganda established and exercised authority in Ituri district as an occupying Power,²⁹ and thus had human rights obligations *per se*. It concluded that the Democratic Republic of Congo had not provided specific evidence 'to show that authority was exercised by Ugandan armed forces in any areas other than Ituri'.³⁰ In the same spirit, the HCJ's standard practice for determining occupying powers' human rights obligations is incrementally based both on Geneva Convention (IV) and the IHRL.³¹ The HCJ's jurisprudence provides that the Military Commander must ensure military or security needs and welfare of local population in an occupied territory are being met; that includes human rights obligations.³²

Under the occupation regime, the occupant is obliged to ensure public order and safety therein to comply with human rights obligations. Two examples are of major import: first, both US and UK as an occupying power in Iraq were obliged to comply with the provisions of Hague Regulations and Geneva Conventions. In this respect, the UNSC Resolution 1483 (2003) explicitly specified these obligations.³³ Second, Israel's control over Gaza and West Bank prolonged character of occupation raised serious questions in terms of its applicability. Even though the law is not silent during war, the continuity of such occupation since 1967 is quite alarming. Walking on the same path, the ICTY in *Prosecutor v Tadic*, held that respect for human rights is fundamental and 'civilian population should not be the object of military objectives'.³⁴ It further stated that 'the occupying power must respect the laws in force in the occupied territory, unless they constitute a threat to its security or an obstacle to the application of the international law of occupation'.³⁵

The European Court of Human rights (ECtHR) has also left its mark while handling matters pertaining to the catalogue of duties and obligations of *de facto* regimes. In *Cyprus v Turkey*, for instance, the ECtHR emphasized on shielding human rights of the people and held Turkey responsible for the Military actions taken over Northern Cyprus due to effective control.³⁶

²⁵ Sandy Ghandhi, 'Human Rights and the International Court of Justice The Ahmadou Sadio Diallo Case' (Human Rights Law Review 11:3, 2011) 528

²⁶ The *Wall's* case para 106

²⁷ Ibid 146

²⁸ *Armed Activities case*, paras 166-80

²⁹ Ibid 176

³⁰ Ibid 177

³¹ See, HCJ 5591/02, *Yassin et al., v Commander of Ketziot Detention Facility et al.*, [2002] 57(1) PD 403-13

³² HCJ 393/82, *Jami'at Ascan et al., v IDF Commander in Judea and Samaria et al.*, 37(4) PD, [1983] 785; HCJ 2056/04, *Beit Sourik Village Council v The Government of Israel et al.*, 48(5) PD, [2004] para 34

³³ Christian Schaller, 'The obligations to protect of the occupying powers in Iraq according to international law' (SWP Comments, No 12/2003) <<http://hdl.handle.net/10419/255888>> accessed 12 August 2022

³⁴ *The Prosecutor v Dusko Tadic*, IT-94-1-AR72, Appeals Chamber Decision ICTY (2 October 1995) para 111

³⁵ Ibid 130-45

³⁶ *Cyprus v Turkey* [2001]-IV 35 ECtHR 731 para 78

Therefore, international Courts and tribunals have determined that human rights obligations maintain the legal bond on foreign forces during occupation, at least due to the *erga omnes* character, and the intertwining of different bodies of law that remain applicable even when the weapons speak.

IV. *Lex Generalis Completat Legi Speciali*: Streamlining the Protection of the Occupied Population

Two landmark ICJ decisions explicitly established the concurrent applicability of IHRL in occupied territories where the occupying forces actions were dissected via the kaleidoscope of IHL and IHRL.³⁷ Both decisions leaned on the Court's prior Advisory Opinion on the *Legality of the Threat or the Use of Nuclear Weapons*, where the position held was based on the protection afforded by the International Covenant on Civil and Political Rights (ICCPR).³⁸ The expansion in the reach of humanitarian law through its amalgamation with IHRL generates a hybrid regime of 'Humanity's Law' whereby changing conceptions of rule of law values, state responsibilities and human rights transform the international legal system.³⁹ It would be palpable to ask why many of the applicable and viable IHRL obligations do not already exist within the IHL framework. A straightforward answer would be that human rights are not always mirrored in IHL.⁴⁰ Moreover, IHRL, contrary to IHL, proffers the possibility to have recourse to international human rights mechanisms. Another cardinal component is that, even though the occupying power is not acting within its own sovereign territory, human rights norms apply extraterritorially nonetheless, and thus foreign forces must abide by human rights obligations in dealing with individuals under their *de facto* control.⁴¹

Whether the coalescence and parallel applicability of these two bodies of law streamline human rights protection for people living under occupation has been subject to debate. While some argue that no conceptual difference⁴² exists between the two regimes, others suggest that invoking IHRL may limit the rights and entitlements of people under occupation as well as legitimise violations.⁴³ Avoiding rehashing this debate, the paper argues that *lex generalis* does complement *legi speciali* even if IHRL obligations mode of application may differ based on the legal and practical context in which the Occupying Power is operating. The Israeli HCJ, at several instances, has turned to IHRL norms, particularly, when dealing with the belligerent occupation of Palestinian Territories wherefrom the IHRL cardinal import in expanding

³⁷ See n 22 and n 11

³⁸ International Covenant on Civil and Political Rights does not cease in times of war except by operation of Article 4 of the Covenant, whereby certain provisions may be derogated in times of national emergency. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Report 25

³⁹ Ruti G Teitel, 'Humanity's Law: Rule of Law for the New Global Politics' (Cornell International Law Journal, 2002) Vol 35 (2) 359-60

⁴⁰ Noam Lubell, 'Human Rights Obligations in Military Occupation' (International Review of the Red Cross, 2012) Vol 94 (885) 319

⁴¹ As already posited in various international bodies, European Court of Human Rights and ICJ decisions. ICJ, *The Wall's* case, paras 107-12; ICJ, *DRC v Uganda*, paras 21-220, Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel* (18 August 1998), CCPR/C/79/Add 93; Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel* (31 August 2001), E/C12/1/Add 69; ECtHR, *Loizidou v Turkey (Preliminary Objections)*, Application No 15318/89 (Judgment of 23 March 1995), Series A No 310 paras 62-64

⁴² Orna Ben-Naftali and Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (37 Israel Law Review 17, 2003) 41-45

⁴³ Ayel M Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?' (EJIL, 2007) Vol 18 (1) 4-5

protected peoples' rights was apparent.⁴⁴ When civilians' lives, bodies, liberty and property protection is at stake, the Israeli Court, has not solely drawn from human rights law but also has cited the European Court of Human Rights judgments⁴⁵ where IHRL has been employed to restrict the humanitarian norms applicability and thus amplify the occupied population's protection while further humanising humanitarian law.⁴⁶ In this vein, the ICJ has held that where *lex specialis* has a *lacuna*, it can be filled by means of IHRL.⁴⁷ Hence, Cicero's aphorism that laws are silent in times of war does not reflect the normative reality,⁴⁸ for the struggle of a state against an occupying power is not waged 'outside' the law and the ostensible black holes, even if they did exist, they would merely be a provisional epiphenomenon.

⁴⁴ HCJ 3239/02 *Ma'arab v The IDF Commander in Judea and Samaria* 57(2) PD [2003] 349

⁴⁵ European Court of Human Rights cases cited: *Ergi v Turkey*, 32 EHRR [2001] 388; *Banković v Belgium*, 41 ILM [2002] 517; *McCann v United Kingdom*, 21 EHRR [1995] 97

⁴⁶ Marko Milanovic, 'Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killing case' (Int'L Rev Redcross 89 866, 2007) 390

⁴⁷ HCJ 769/02, *Public Committee Against Torture v Government*, Israel Law Reports [2006] (2) (IsrLR 459) 477

⁴⁸ *Ibid* 516