THE EXTRATERRITORIAL NON-APPLICABILITY OF ECONOMIC AND SOCIAL RIGHTS DURING MILITARY OCCUPATION OF A FOREIGN TERRITORY: A CRITICAL APPRAISAL

Written by ***Chimdessa Fekadu Tsega***

Lecturer, Wollega University, Ethiopia

ABSTRACT

The relationship between International Humanitarian Law and Human Rights Law has been one of the most discussed issues in the current International Law discourse. However, there is no definitive answer for the scope and modalities of the application of Human Rights Law to armed conflict situations. This paper focuses on the role of International Covenant on Economic, Social and Cultural Rights under the law of military occupation. The paper has three parts. The first part is a brief introduction of military occupation under International Humanitarian Law. It highlights the legal and scholarly positions concerning military occupation. The second part introduces the International Covenant on Economic, Social and Cultural Rights. Issues on the nature and scope of obligations under the Covenant are briefly accounted for. Part Three provides for a thorough examination into the role of the Covenant in relation to military occupation. It argues International Covenant on Economic, Social and Cultural Rights, as a separate legal regime under International Law, is not applicable to Military Occupation. In doing so, the paper argues that the law of occupation under International Humanitarian Law is a special regime that exclusively governs military occupation.

Keywords*: Economic and Social rights, Military Occupation, Humanitarian Law, Extra-territoriality*

INTERNATIONAL HUMANITARIAN LAW (IHL) OF OCCUPATION: A BRIEF INTRODUCTION

The concept of Occupation is defined under Art 42 of the Hague Regulation that provides ''*territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised''*.[i] Hence, the exercise of effective control over a foreign territory without the consent of the host state constitutes occupation under IHL. The main issue has been the level of control that the occupying power has to exercise for the territory to be considered occupied. Under Art 42, the need for establishing an authority that enables the occupying power to exercise control is envisaged. Hence, unless the occupying power has effectively established itself and replaced the legitimate government through the authority it established, a territory is not occupied.[ii] However, the concept of effective control as a beginning of the regime of occupation is gradually challenged. The ICTY defined occupation as a *''transitional period following invasion and preceding the agreement on cessation of hostilities''*.[iii] This definition does not clarify the question of when does occupation exactly begin.[iv] An alternative argument forwarded in this regard is the concept of functional occupation. In light of such theory of occupation, there is no intermediate phase between invasion and occupation and that certain provisions of occupation law already apply starting from the phase of invasion.[v] The argument that the law of occupation starts to apply at the invasion phase basis itself on a systematic interpretation of Geneva Convention IV taking into account the object and purpose of the Convention.[vi] If one relies on the functional theory of occupation, the level of obligation of the occupying power varies depending on the level of control that the occupying power is exercising. The more control the occupying power gains, the more provisions of the law of occupation the occupying power shall adhere to.[vii]

The other related issue is the concept of transformative occupation. This is raised in light of prolonged occupations intended to change or transform the institutions and systems of the previous legitimate power. The reason for such fundamental change can be creating conditions for better democracy and the 'need' to transform the constitutional and socio-economic and legal order within the occupied territory.[viii] While trying to challenge the view of Pictet's Commentary to Art 47 of Geneva Convention IV[ix], Adam Roberts argued that a consideration

of an occupying power as a mere *de facto* administrator is not always the case. He further argued that the introduction of a new system by the occupying power can be justified by strong reasons like the prospect that the territory will simply revert to its former rulers.[x] Such arguments inappropriately grant the occupying power the moral legitimacy to decide what is the right system and what is the best fit for the people in occupied territory.[xi] Also, it raises concerns on two main issues. First, the law of occupation is a conservative law focused on maintaining the status quo. This is envisaged under Art 43 of the Hague Regulation that provides for the duty of the occupying power to restore and ensure public order and safety, while respecting unless absolutely prevented, the laws of the host country. This provision indicates that the nature of change envisaged by transformative occupation is not part of the law of occupation as provided under the Hague Regulation.[xii] Secondly, a big question arises as to the legal basis of transformative occupation under IHL. In the Expert Meeting on the Law of Occupation by the ICRC, it was agreed that transformative occupation has no basis under current IHL, in particular because the transitory character of the rights and duties incumbent upon the foreign administrator precludes making a definitive large-scale changes in the institutional structure of the occupied territory.[xiii] However, the experts made a distinction between full-fledged transformative projects entailing disruptions of sovereignty and smoother changes aimed at getting the basic infrastructure of the occupied society to work in accordance with the relevant norms of IHL of occupation.[xiv] It is not clear if the experts are making a distinction between smoother or 'non-smoother' kinds of occupation to determine the relevance of transformative occupation or they are generally calling for a context-specific range of norms of occupation the applicability of which is dependent on the nature of the occupation. In any case, it seems a policy argument rather that a legal point having a foundation under the IHL of occupation. If this assertion is to be uphold, we are going to have a different set of norms entailing a varied range of obligation depending on the nature ('smoothness') of occupation.

In general, the controversies involved in relation to the beginning and end of occupation illustrate the fact that occupation is not an exclusive legal phenomenon the existence of which can be ascertained by exclusively legal element. The factual circumstances underlying the control of a territory by foreign forces and the amount of control necessary on the one hand and the control being exercised by the occupying power on the other hand remain highly relevant.[xv] As a result, the context of the alleged occupation could call for a contextual

treatment of occupation.[xvi] However, the factual elements involved should be part of the assessment of whether or not the control can be considered occupation under IHL rather than being the basis for which obligations should or should not apply. If there is occupation, these rules and norms apply as a system of law governing occupation. Once the existence of occupation is ascertained, the use of different set of norms resulting in different range of obligations 'discriminates' among the occupations and erodes the legal consistency and clarity that constitute the whole essence of legal regulation under IHL.

ICESCR AND STATE OBLIGATION

One of the basic features of the ICESCR is the nature of obligation envisaged under Art 2 of the Covenant. It requires the state parties to take steps to the maximum of available resources with a view to progressively realize the rights recognized in the Covenant.[xvii] Through the General Comments of the treaty monitoring organ of the ICESCR, the Committee on Economic, Social and Cultural Rights (the Committee), the elements of obligation under Art 2 have been elaborated. In particular, General Comment No. 3 is devoted to the nature of State parties' obligation envisaged under Art 2 of the Covenant.[xviii] The General Comment No. 3 provides that despite the progressive realization of the rights in the Covenant there are immediate obligations of the state parties in relation to the minimum essentials of the rights, and the duty to guarantee non-discrimination in the enjoyment of the rights.[xix] However, it has to be noted that as far as the means of discharging the obligation is concerned the states have a discretionary appreciation to adopt any appropriate means including the adoption of legislations.[xx] Hence ICCPR that provides for a concrete and definite means of executing the obligations under the Covenant, the ICESCR leaves the door open for the states to come up with a set of measures considered to be 'appropriate' to progressively realize the rights in the Covenant. However, the Committee remains the ultimate body to ascertain whether or not the alleged measures are 'appropriate'.[xxi] General Comment No. 3 focuses on the need to adopt legislative measures to execute the obligations in the Covenant. In addition, administrative, financial, educational and social measures are indicated as potential 'appropriate measures' that constitute the State parties' obligation towards the progressive realization of these rights.

a) The Principle of Non-Regression under ICESCR

The non-regression aspect of the obligation under ICESCR is the derivation of the 'progressive realization' under Art 2 of the Covenant.[xxii] This principle prohibits the adoption of regressive measures that result in deprivation of the existing enjoyment of the economic, social and cultural rights. In other words, non-regression is simply the duty not to reduce or deprive the existing state of the rights. A state cannot adopt measures that, as a minimum, diminish the existing level of enjoyment of these rights.[xxiii]

However, this obligation is not absolute. A state can adopt regressive measures as long as it can be duly justified and weighted against the enjoyment of the rights. Also, the prohibition refers to 'deliberate' regressive measures, which is a well-calculated state decision to diminish the existing state of enjoyment of the rights in the Covenant. In this regard General Comment No. 3 provides;

''... any deliberate retrogressive measures would require the most careful consideration and would need to be fully justified by reference to totality of the rights provided for in the Covenant and in the context of the full use of maximum available resources''[xxiv]

In this regard, there is no concrete list of situations that justify the adoption of regressive measures. A situation of economic crisis, war, natural calamities or any other 'reason' could be acceptable as long as it can be fully justified in light of the situation and the availability of resources.[xxv]

b) Does ICESCR Apply Extraterritorially?

The general argument that a human rights treaty is limited to the state parties' territory is based on Art 29 of the Vienna Convention on the Law of Treaties which provides that unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.[xxvi] If taken literally, a treaty including ICESCR, applies to the entire territory of a state party. Any other deviation, it can be limiting the application of the treaty to a certain parts of the territory within a state or expanding the application of the treaty outside the territory of the state party, has to be anticipated by the text

of the treaty itself or the need to do either has to be established.[xxvii] A general look into the text of the ICESCR provides no clear basis in this regard. Apart from the general nature of obligation enshrined under Art 2 (1) of the Covenant, there is no indication as to the extraterritorial application of the ICESCR. As a result, the extraterritorial application of the treaty does not appear from the treaty. But does this mean that ICESCR does not apply extraterritorially?

The first issue that needs to be considered is whether or not this can be inferred from the treaty or can otherwise be established. In this regard, it has been argued that the *raison d'etre* of the treaty necessitates extra-territorial application.[xxviii] That is, both ICCPR and ICESCR are meant to give effect to UDHR which is supposed to be universal and applicable to everyone across every territory. The fact that human rights are universal on the one hand and extra-territorial application on the other are different issues. Universality of human rights concerns with the extension of the protection of human rights to everyone, but it does not negate the fact that state machinery is in charge of doing so and that such obligation, like any other treaty obligation, depends on being a state party to the treaty in question. Let alone being a sufficient reason for extraterritorial application, the argument of universality should not establish the application of ICESCR to non-state parties.

The other point relates to the issue of 'international cooperation and assistance' as indicator of extra-territorial application of ICESCR.[xxix] One of the main features of the Covenant is the obligation of international cooperation and assistance as part of the obligation of the state party to the Covenant. This obligation is two-way since both the state in need and the international community bear the obligation, the former by seeking and the latter by giving.[xxx] Can this be construed as indicatory of the Covenant intended to apply extra-territorially? I believe this can be dismissed too easily as there is no logical connection whatsoever between extra territorial application and the international cooperation and assistance aspects. The latter is meant to assist the state parties progressively realize the rights in the Covenant taking into account the fact that the rights by their nature require strong financial and structural capability. The international cooperation and assistance aspect of the treaty should be preceded by whether the treaty applies to the state seeking assistance and the state required to give assistance. It has no basis to offer concerning extraterritorial application.

Another point worth consideration is the existing international jurisprudence regarding the extraterritorial application of the Covenant. In its Advisory Opinion on the Legality of Construction of Wall Case (Wall Case), the International Court of Justice (ICJ) held that

''....In the case of the ICESCR Israel is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities''[xxxi]

There are two relevant points that need to be addresses in this regard. Firstly, though the court did not explicitly deal on the nature, context and extent of applicability of ICESCR obligations extra-territorially, the conclusion cited above seems a logical extension of the view of the court that ICESCR applies extraterritorially at least with respect to the duty not to raise obstacles towards the realization of the ESC Rights. The other related issue is whether or not the duty not to raise obstacles can be construed as the endorsement of the extraterritorial application of the ICESCR. This is because the obligation not to cause obstacle and the application of ICESCR as a separate legal regime are different and bear different legal consequences. In this regard, it is worth noting Noam Lubbel's argument that a contextual approach is desirable in assessing the extra-territorial application of human rights in situations of 'state agent authority' test and other wider control circumstances.[xxxii] For Lubbel, the extent of application of the human rights in question therefore varies in light of the circumstances of control exercised by state agents.[xxxiii]

c) Extraterritorial Application Versus Military Occupation

The issue of extraterritorial application of human rights has been always raised in connection with military occupation.[xxxiv] However, it should be noted that the nature of exercise of control and the legal regime governing both situations are different. The general literature on extra-territorial application of human rights including ICESCR has been usually dealt in situations of specific situation in which a state exercises control over a certain individuals through its agents.[xxxv] The situation of occupation however is different in the sense that though it is considered a temporary situation, it gives rise to a wider control of territory leading to the exercise of public authority over certain territory. The question of human rights obligation of a state when the state carries out law enforcement operation in a foreign territory has to be treated separately from a situation of military occupation. For instance, the exercise of authority by

Turkey over Ocalan[xxxvi] and the situation of military occupation of Iraq by the Coalition Forces[xxxvii] are different situations resulting in separate legal situations even though both involve extraterritorial exercise of control outside the state's territory. In the Ocalan Case, there is no occupation rather extraterritorial law enforcement over a specific individual. The Iraq occupation is a wide and full-fledged territorial control resulting in the exercise of governmental authority over foreign territory. As a result, the arguments for the former situation do not automatically apply to the latter situation.

The issue of military occupation is governed by a special regime under IHL as provided under The Hague Regulation, Geneva Convention IV and Additional Protocol I. Likewise, any argument to extend the application of human rights issues in specific extraterritorial law enforcement to the situations of military occupation is misguided. As a specific situation governed by clear set of norms, military occupation has to be dealt under these norms.

ICESCR AND THE IHL OF OCCUPATION

Occupation presupposes a control over the territory of another state with no consent from the latter. As provided under The Hague Regulation and Geneva Convention IV, Occupation is essentially temporary and the obligations imposed on the occupying power are consistent with temporality of the control. In order to assess whether or not ICESCR apply during occupation, I will deal with the following relevant points.

1. The Source of Human Rights Obligations

In order to deal with the issue of extraterritorial application of human rights in situations of military occupation, it should be necessary to identify which human rights obligation is relevant. This is because especially in situations where the occupier and the occupied states are parties to different human rights treaties, it is difficult to determine which human rights treaties we are talking about in the context of occupation. If we rely on the occupying power, it amounts to subjecting the population of the occupied territory to rights and obligations they never consented to. On the other hand, reliance on the occupied state amounts to subjecting the occupying power to human rights obligations it has never consented to.[xxxviii] In this regard, it

would be necessary to look for a norm of the law of occupation that would help in determining which source of obligation we are dealing with. In this regard, Art 43 of the Hague Regulation could help. According to this provision, the occupying power is under obligation to respect the laws of the occupied state unless absolutely prevented.[xxxix] This principle of continuity of the internal legal system of the occupied state, in other words, prohibits the introduction of new legislations by the occupier. It should be noted that the domestication of human rights treaties is the main implementation mechanism of human rights obligations. The ICESCR requires the states to adopt legislative and other appropriate measures to carry out their obligations under the Covenant.[xl] As a result, unless ICESCR is already part of the domestic legal system of the occupied state, the occupying power shall not extend the application of the Covenant to a territory and population never consented to abide by it. The principle of continuity of internal legal system therefore supports the fact that the source of human rights obligation should be that of the host state, not the occupying power.[xli]

Also, the general rule of International Law lends similar support to the occupied state as a source of human rights obligation. An analogy of the principle of passive personality as a ground of claiming jurisdiction over acts outside the territory of a State is unacceptable under current International Law regime.[xlii] This ground of jurisdiction is rejected under international law because whenever a state claims jurisdiction on the basis of passive personality it indirectly amounts to claiming that a national of that state takes with him his own legal system wherever he travels to. The essence for such prohibition is the need for mutual respect of the legal systems of the countries involved.[xliii] A similar approach can be adopted here. It violates the need for mutual respect towards one another and consequently violates the obligation to respect the legal system of the occupied state mentioned above.

2. Arguments against the Application of ICESCR to Military Occupation

a) The Nature of ICESCR Obligations Vis-à-vis the Nature of Occupation

As mentioned before, the ICESCR imposes the obligation of progressive realization whose fulfilment is dependent on time and available resources. The adoption of legislative and other appropriate measures is considered the major implementation mechanism by state parties. On the other hand, the law of occupation is conservative by its nature. On the basis of temporality of occupation, the law of occupation strives to maintain the status quo in the occupied territory

by prohibiting the occupying power from introducing substantial changes to the system already in place by the occupied state.[xliv] Such prohibition is fundamentally shown by the prohibition of introducing new legislations and keeping the law enforcement and judicial organs intact under The Hague Regulation and the Geneva Convention IV.[xlv] Any deviation from such prohibition needs to be duly justified.

Hence, by claiming that the occupier is under obligation to apply the obligations under ICESCR, we are at the same time empowering the occupier to adopt the legislative and other appropriate measures it deems necessary to progressively realize the rights in the Covenant. This is not only unforeseen but also prohibited under the law of occupation. It also contradicts with the basic essence of the law of occupation, its temporality and conservative nature.

Do the Core Obligations under ICESCR Apply to Military Occupation?

The main advocates for the application of ICESCR to situations of military occupation start by pointing out the core obligations under the Covenant as interpreted by the Committee.[xlvi] Under the famous General Comment No. 3, the Committee held that there are a number of self-executing provisions in the Covenant giving rise to immediate implementation.[xlvii] Among these are equality, non-discrimination and the special protection for women and children. It is true that these obligations need immediate implementation. However, they are already covered by IHL of occupation. Part II of Geneva Convention IV provides for special measures of protection for children and women that applies to every population affected by war irrespective of the existence of occupation. Section III of Part III of the Convention provides for further protections governing the special protections within occupied territory. Hence, the 'immediate obligation' argument does not even possess a strong moral ground since the law of occupation has provided for specific, context-based and even in some cases more rigorous protection in the context of armed conflict.[xlviii] IHL has long foreseen the special protection of children and women, the guarantee of non-discrimination and other protections of immediate nature before ICESCR was adopted. There is no need, and particularly no basis, to rely on the immediate obligations to justify the application of the Covenant to military occupation.

Is the Obligation of Non-regression Applicable During Military Occupation?

Another issue concerning ICESCR and belligerent occupation is the issue of non-regressive measures. As a state is required not to deliberately adopt measures that diminish the level of enjoyment of the rights in the Covenant, can we adopt similar standard in the context of military occupation? The ICJ has endorsed this view when it held that Israel is under an obligation not to raise any obstacle to the exercise of such rights in the fields where competence has been transferred to Palestinian territory.[xlix] From both the General Comment No. 3 and the ICJ's Advisory Opinion the following arguments can be made to challenge such view.

Firstly, the non-regression obligation under the General Comment No. 3 has two exceptions. The first is that the adoption of regressive measures shall not be deliberate. It prohibits a calculated state decision to regress the enjoyment of rights in the Covenant. This can be considered the obligation of the occupying power too. But not because it is laid down by ICESCR rather it already constitutes part and parcel of the IHL of occupation. Under The Hague Regulation, the occupying power is subjected to a series of obligations not to disrupt the existing system within the occupied power. The prohibition to legislate and the obligation to respect the internal legal system of the occupied state signify the same. Moreover, the provisions under the Geneva Convention IV and the Additional Protocol I incorporate similar prohibitions. Art 27 of the Geneva Convention IV encompasses different obligations concerning the protection of persons, family and the need to treat protected persons with same level of consideration without adverse distinction.[l] Even Art 39 of the same Convention goes further by providing for the obligation to grant opportunity to find paid employment for persons who have lost their gainful employment due to the war.[li] Similar obligations are incorporated in different provisions providing for protecting workers, provision of food and medical supplies, hygiene and public health and the protection of property.[lii] It can be argued that these obligations even go further than non-regression since they impose obligation upon the occupying power to restore the socio-economic situation whose protection diminished not due to the measures it has adopted rather as a general consequence of the armed conflict.

The other exception to non-regression is the need for justification. The General Comment No. 3 does not even prohibit deliberate regressive measures if it is duly justified.[liii] In the context of military occupation, the occupying power is in the state of armed conflict and at the same time in charge of administration of the occupied territory. It can be legitimately expected to adopt necessary measures if situation demands. Also the law of occupation has imposed the

obligation to restore peace and public safety on the occupying power. As part of this obligation, the adoption of regressive measures can be justified or even necessary to carry out the obligation of maintaining and restoring peace and public safety.[liv]

In relation to the view of the ICJ indicated above, the obligation not to raise any obstacle is already part of the law of occupation. Even though ICJ relied on ICESCR to justify this obligation, it can easily be discerned for IHL of occupation which provides for the obligation of the occupying power to respect the laws of the occupied state. This obligation essentially requires the occupying power not to interfere in the enjoyment of such rights as incorporated under the domestic legal system. Also if a need to interfere arises due to the inherent obligation of the occupying power, obstacles to the enjoyment of rights are authorized under the law of occupation. It could have been better to assess whether or not the alleged obstacles are necessary to carry out the obligation to maintain and restore peace and public safety under the IHL of occupation, instead of relying on the Covenant. By doing so, it is not a question of primacy of the set of norms rather an application of a governing law of the situation.

b) The Principle of Continuity of Internal Legal System

Another but related issue is the obligation of the occupier to respect the legal system of the occupied state unless absolutely prevented. The objective of occupation is not transforming the occupied state. Whether or not transformation is necessary and how it should be done is a political question that has to be inherently addressed by the free choice of the population of the occupied territory.[lv] Taking into account the fact that legislative measures are at core of the obligation imposed by the ICESCR, the prohibition to introduce new legislations indicates there is no room for introducing new legislations to enforce the rights in the Covenant under military occupation.

The counter argument for introducing new legislation to enforce ICESCR has been made by relying on the French version of Art 43, which is the authentic version of The Hague Regulation. According to this argument, the obligation to ensure 'public order and safety' is provided as *'l'ordre et la vie publique'* in the French version of the provision and the term '*la vie publique'* is broader than public safety since it includes 'social functions, ordinary transactions which constitute daily life'.[lvi] Consequently it is suggested to translate the term as civil life, not public safety.

I still conquer that the use of the term 'civil life' instead of 'public safety' does not create a meaningful difference when it comes to legislating for human rights obligations under ICESCR. The term 'civil life' could be much broader and can be interpreted as the restoration of normal daily life of the population in the occupied territory. Whether or not this normality empowers the occupier to come up with laws and appropriate measures in relation to the rights under ICESCR is another issue. Moreover, legislating on the basis of such interpretation needs to show that the rights and responsibilities of the occupying power under the law of occupation are either insufficient or non-existent to restore life to normal daily routine. The law of occupation has already enshrined the responsibility to maintain order and public safety on the occupier. Moreover, while doing so the occupier is required to respect the internal legal system of the occupied state and the manner and legal procedures of the administration of justice are to be held in light of the laws of the occupied state. Whether it is a civil life or public safety, there is no basis to justify the adoption of new legislations under the ICESCR scheme.[lvii]

In addition, the French version providing for 'civil life' does not necessarily call for measures transforming the territory to fulfil the rights under the Covenant. It is the firm belief of the writer that by civil life, the provision intends to restore the normal daily life that used to exist before the occupation, not a set of new measures aimed at transforming the way of life of the population in the occupied territory. In this regard, it should be noted that the provision talks about 'restoring and ensuring', not transforming public safety (or civil life). Restoration implies maintaining or re-establishing the normal condition of life, not imposition of measures intended to bring about a new condition of life in the guise of carrying out the obligation under ICESCR.

c) Does the Realization of ESC Rights Constitute the Absolute Necessity Exception under Art 43 of The Hague Regulation?

As mentioned before the principle of continuity of the internal legal system has an exception. That is, in the course of maintaining order and public safety the duty to respect the laws of the occupied state can be disregarded if there is absolute necessity justifying it.[lviii] What constitutes 'absolute necessity' is subject to interpretation and context-specific. However, the provision requires the occupier to show that the respect for the laws of the country is impossible for the occupier to comply with its responsibility of restoring and ensuring order and public safety. Most of the obligations of the occupier under The Hague Regulation and Geneva Convention

IV are related with maintaining peace and order.[lix] Most of the provisions deal with internment, administration of justice and ensuring the basic necessities of the population in the occupied territory. To this effect, it can logically be argued that the situations that justify the disregard of the obligation to respect the laws of the occupied state are usually related to the military/security measures that the occupier needs to undertake to protect the life of civilians in occupied territory.[lx] For instance, instabilities in the occupied territory might require law enforcement operations resulting in limitations of the normal rights enshrined under the laws of the occupied state. Also force majeure due to natural or man-made calamities can disrupt order and safety and consequently might warrant the disregard of the domestic laws of the occupied state in order to restore order and safety within the occupied territory.

Also the absolute necessity exception is an exception to a legal regulation intended to govern a temporal situation of military occupation by maintaining the status quo. As an exception to a conservative law of occupation, such exception needs to be construed very strictly. Taking into account the fact that the occupier is not a formal replacement of the sovereignty of the occupied state and that occupation is meant to be essentially temporary, considering the progressive realization of ESC rights as exception under Art 43 is farfetched. Moreover, if the exception under Art 43 includes the adoption of legislative and other appropriate measures to progressively realize the rights under ICESCR, it runs the inevitable risk of over empowering the occupier and legitimizing the military occupation as an instrument of transformation, which is neither intended nor warranted under IHL.[lxi]

d) Isn't the IHL of Occupation Adequate to Ensure the Socio-economic Needs of the Population in Occupied Territory?

In dealing with whether or not ICESCR obligations apply during military occupation, it is necessary to identify in what role we are arguing for the application of the Covenant. Occupation is a matter primarily governed by IHL. In other words, there is an independent legal regime exclusively dealing with the norms of military occupation under IHL. Hence, as far as occupation is concerned the law of occupation under IHL is *lex specialis*.[lxii] Any other argument extending the application of other branch of international law, specifically international human rights law, has to be secondary to the IHL law of occupation. To this effect, a resort to ICESCR as a separate legal regime will only be necessary if there is no similar (or

equivalent) protection accorded under the law of occupation. This of course is dependent on the validity of the premise that ICESCR applies to military occupation.

As held before there is no legal basis to claim that ICESCR applies to military occupation. Such application is neither foreseen by the Covenant nor warranted under the law of occupation. This is especially true when we look at the socio-economic protection that The Hague Regulation and the Geneva Convention IV have provided during occupation.[lxiii] In this regard, the right of workers is protected under Art 52 of Geneva Convention IV. The protection of property is provided under Arts 53 (2) and 53 of The Hague Regulation and Geneva Convention IV respectively. The protection of medical and food supplies is also provided under Arts 55 and 56 of Geneva Convention IV. These provisions imposing socio-economic obligations on the occupier are special norms exclusively governing the state of military occupation. As a special set of norms designed to govern occupation, they determine the specific obligations of the occupier in relation to the population of the occupied territory.[lxiv] However, the extent of protection provided by these provisions and ICESCR are different. Taking into account the fact that these provisions are meant to deal with a situation of armed conflict giving rise to military occupation, the provisions are not normally required to accord the same level of protection like that of ICESCR. As a result, a further incorporation of additional set of obligations based on ICESCR is not necessary and not envisaged.

Another point is, to hold that ICESCR does not apply to military occupation; do we need to show there is equivalent protection under the IHL of occupation for each and every right under ICESCR? I am afraid not. The ICESCR and the law of occupation are two different set of obligations intended to govern different situations. The IHL of occupation has already provided for socio-economic protections tailored with the context of military occupation. It has dealt with the protection of workers, the provision of food and medical supplies, the protection of property including housing, the administration of justice and the administration of financial sources.[lxv] These provisions are exclusively meant to govern the situation of military occupation. As a set of independent norms that govern a special situation of military occupation, these provisions apply irrespective of the nature and extent of protection that ICESCR envisages. If a right recognized in ICESCR has no respective protection under the IHL of occupation, it means there is no obligation in relation to this right unless there is a domestic law of the occupied state that provides for similar protection. For instance, the right

to social security is provided under Art 9 of the ICESCR. There is no provision that deals with social security under the law of occupation. Does this mean the occupying power has to come up with a scheme for ensuring this protection? The only legitimate obligation on the occupying power is only if there is a domestic legal scheme ensuring the social security of the population of the occupied territory; the occupier is duty bound to respect and ensure such protection under Art 43 of The Hague Regulation. This is not because social security is provided under ICESCR rather it is part of the domestic legal system of the occupied state that the occupying power is required to respect under the IHL of occupation.

3. What Relevance does ICESCR Serve in Military Occupation?

I have argued that ICESCR as a separate legal regime should not be applicable in situations of military occupation. Neither the Covenant envisages the possibility of such application nor is it necessary to extend its application to military occupation. However, does this mean ICESCR is completely irrelevant for an occupying power? I will address this issue by dealing with the following two points

a) ICESCR applies if the occupied state has domesticated the Covenant in the domestic legal system

One of the obligations of the occupier is to respect the laws of the occupied state unless it is absolutely prevented to do so while ensuring order and public safety. ICESCR, like most of international human rights treaties, requires domestication acts to be part of the domestic legal system.[lxvi] In this regard, General Comment No. 9 provides;

''…the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be in place''[lxvii]

The procedure of domestication might vary based on the monist or dualist nature of the legal system of the occupied state.[lxviii] However, once the necessary domestication process has been made, ICESCR is considered part and parcel of the domestic legal system of the occupied state. Therefore, the duty to respect the laws of the occupied state encompasses the duty to respect the ICESCR and to comply with the obligations it imposes like any other domestic law of the

occupied state. Here, it should be noted that the application of ICESCR is not as a separate legal regime intended to apply to situations of military occupation. Rather, it applies because it constitutes part of the domestic law of the occupied state and the occupying power has a clear obligation to comply with it.

b) ICESCR could supplement the clarification of the socio-economic obligations under the IHL of Occupation

Despite the fact that ICESCR does not apply as an independent legal regime, it plays a vital role in the interpretation of the socio-economic obligations of the occupier under the law of occupation. In determining the nature and extent of legal obligation of the occupier concerning the socio-economic protections envisaged under the law of occupation. In this regard, the ICESCR plays a vital role of 'informing' the provisions of the law of occupation.

For instance, Art 52 of the Geneva Convention IV reads

No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power's intervention. All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited.[lxix]

This obligation of the occupier needs further clarification in relation to the legitimacy of measures it has taken in relation to the potential impact of such measures on unemployment. It is clear that this provision is not a substitute (or even an equivalent) for Arts 6 and 7 of ICESCR, and as mentioned before it is not supposed to be. The ICESCR provides for measures taken to enhance the right to work and ensure the conditions of work while Art 52 of Geneva Convention IV provides for the obligation to respect the right of the worker to have access to the Protecting Power and ensure that the measures it has taken does not create unemployment. In this regard, it should be noted that the measures envisaged under Art 52 of Geneva Convention IV are not necessarily related with enhancing or progressively realizing the right to work. Rather the measures can be any measures within the meaning of Art 43 of the Hague Regulation and the protection of the right to work is incidental to the adoption of such measures. However, while assessing the obligation of the occupying power within the context

of Art 52 of Geneva Convention IV, Arts 6 and 7 of ICESCR and General Comment No. 18[lxx] of the Committee will provide clarity to the meaning of the obligation. In this regard, the ICESCR and General Comment No. 18 informs the measures taken by the occupying power not to interfere with the freedom to choose occupation, the obligation not to make the conditions of work difficult, to respect the trade unions and similar elements of the right to work deemed relevant in light of the specific measures adopted by the occupying Power.

c) What is the difference between application as a separate legal regime and supplementing the IHL of occupation?

I believe the argument that ICESCR does not apply to military occupation on the one hand and the position that ICESCR plays a role in informing the obligation of the occupier under IHL need further clarification. The application of ICESCR as an independent legal regime requires the occupier to enforce the necessary elements of legal obligation envisaged in the Covenant as illustrated through the General Comments of the Committee. If ICESCR apply as a separate legal regime, the occupier will have to take the necessary legislative and other appropriate measures intended to progressively realize the rights in the Covenant. Also, the application of ICESCR as an independent legal regime will entitle a person to exclusively rely on the Covenant to claim and enforce his/her rights. Hence, like The Hague Regulation and Geneva Convention IV, ICESCR will be a governing legal instrument determining what is valid and invalid concerning the actions (or inactions) of the occupying power.

On the other hand, the argument that ICESCR does not apply as an independent legal regime but still plays a vital role in informing the actions of the occupying power whenever relevant has a different legal consequence. Here, ICESCR as an international human rights treaty does not establish a set of obligations that the occupying power needs to uphold throughout the military occupation.[lxxi] The provisions of ICESCR do not give rise to an independent set of norms governing the military occupation. Rather, whenever there is a relevant action by the occupying power in relation to the socio-economic obligations envisaged under the law of occupation, ICESCR could inform such actions by serving as an interpretive tool (or guidance) to specific measures of the occupying power. This entails a totally different nature of obligation. Firstly, ICESCR as a whole does not apply. Hence, there is no obligation to take appropriate measures to ensure that the rights in the Covenant would be realized progressively.

The occupying power is not required to come up with laws, policies and strategies necessary to realize every ESC right within the Covenant. Secondly, reference to ICESCR will only be made whenever it is necessary to carry out the obligations under the law of occupation. Here, the role of ICESCR is to provide relevant considerations that the occupying power could make while carrying out the obligations under the law of occupation. In other words, ICESCR can be referenced like any other soft law providing clarification to the set of obligations under the law of occupation. However, as an international instrument considered more authoritative concerning the ESC Rights protection, ICESCR might possess a primary moral position in this scheme.

However, it should be emphasized that there is a fundamental exception to this point. That is when ICESCR is domesticated and has been made part of the internal legal system of the occupied state. In this situation, ICESCR constitutes part of the laws of the country that the occupying power should respect unless absolutely necessary under Art 43 of The Hague Regulation. Even in this situation, the duty of the occupying power is to 'respect', which is not to interfere concerning the enjoyment of laws and policies that protect the rights under ICESCR. There is no obligation to take positive steps to progressively fulfil the rights within the Covenant.

CONCLUSION

The gradual developments concerning the application of human rights law to armed conflict have created a complex legal phenomenon concerning the interplay between IHL and Human Rights Law. Military occupation is part of such phenomenon. However, a legal regulation needs clarity and consistency as much as it needs wider application in terms of the subjects it regulates. An unwarranted extension of the application of a legal instrument to a situation already regulated by separate and independent legal regime is misguided.

The IHL of occupation provides for a set of norms that regulate the behaviours of the parties involved. These norms are designed taking into account the special feature of military occupation which involves the control and administration of a territory by a foreign power without the consent of the legitimate government of the territory. The occupying power is not

a *de jure* formal replacement of the legitimate government. The occupying power is granted the powers and responsibilities under IHL because they are necessary to restore and ensure normal daily life in the occupied territory. A normal daily life shall not require transformation of the whole system. If that is required, it is not the business of the IHL of occupation to regulate that. Neither does the introduction of a separate legal regime necessary to take charge of transformation in parallel with IHL of occupation. To ensure normality in the territory in light of the needs of the population in the occupied state and the responsibilities of the occupying power, IHL has provided sufficient and specific norms. The fact that the responsibilities of the occupying power are consistent with the temporality of occupation and significant safeguards for protecting the population of the occupied territory are provided show that the IHL of occupation governs the military occupation to the exclusion of ICESCR.

BIBLIOGRAPHY

Books and Articles

Abdullah An-Na'im, *To Affirm the Full Human Rights Standing of Economic, Social and Cultural Rights* in Yash Ghai and Jill Cottrell (eds), *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights,* INTERIGHTS, 2004

Absjorn Eide, *Economic, Social and Cultural Rights as Human Rights as Human Rights,* in Absjorn Eide (ed.), *Economic, Social and Cultural Rights*, A Textbook, 2nd ed., 2001

Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, American Journal of International Law, Vol. 100, No. 3, 2006

Andrew Arato, *Constitution Making under Occupation: The Politics of Imposed Revolution in Iraq*, Colombia University Press, 2009

Anne-Laurence Graf-Brugere, *A Lex favorabilis? Resolving Norm Conflicts between Human Rights Law and Humanitarian Law*, in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar Publishing Limited, 2013

Audrey Chapman and Sage Russell (eds), *Core Obligations, Building a Framework for Economic, Social and Cultural Rights*, Intersentia, 2002,

Clarence Dias, *Towards Effective Monitoring of Compliance with Obligations and Progressive Realization of ESCR*, UNDP, Human Development Report Office, 2000

David Lovell and Igor Primoratz (eds), *Protecting Civilians During Violent Conflict: Theoretical and Practical Issues for the 21st Century*, Military and Defense Ethics Series, 2012

David Sloss, *Domestic Application of Treaties*, Oxford University Press, 2011

Eyal Benvensti, *The International Law of Occupation*, Princeton University Press, 1993

Francoise Hampson, *The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, International Review of the Red Cross, Vol. 90 No. 871, 2008

Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, Minnesota Archive Editions, 1957

Gregory Fox, *Transformative Occupation and the Unilateralist Impulse*, International Review of the Red Cross, Vol. 94 No. 885, 2012

Jean Pictet, *Commentary on the Geneva Convention (IV) Relating to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, 1958

Jordan Toone, *Occupation Law during and after Iraq: The Expedience of Conservationism Evidenced in the Minutes and Resolutions of the Iraqi Government Council*, Florida Journal of International Law, Vol. 24, 2012

Marco Sassoli, *Debate: Is the Law of Occupation Applicable at the Invasion Phase?*, International Review of the Red Cross, Vol. 94, No. 885, 2012

Marco Sassoli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, The European Journal of International Law, Vol. 16, No. 4, 2005

Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Oxford University Press, 1998

Michael Dennis, *Application of Human Rights Treaties Extraterritorially in times of Armed Conflict and Military Occupation*, American Journal of International Law, Vol. 99 No. 1, 2005

Michael Hechter, *Alien Rule*, Cambridge University Press, 2013

Michael Siegrist, *The Functional Beginning of Belligerent Occupation*, a research paper submitted to the Geneva Academy of International Humanitarian Law and Human Rights, 2010

Nancie Prud'homme, *Lex Specialis: Oversimplifying a more Complex and Multifaceted Relationship?* Israel Law Review, Vol. 40, No. 2, 2007

Nehal Bhuta, *The Antinomies of Transformative Occupation, European Journal of International Law*, Vol. 16, No. 4, 2005

Noam Lubell, *Human Rights Obligations in Military Occupation*, International Review of the Red Cross, Volume 94 Number 885, 2012

Philip Alston and Gerald Quinn, *The Nature and Scope of State Parties' Obligations under the International Covenant of Economic, Social and Cultural Rights*, Human Rights Quarterly, Vol. 9, No.2

Rene Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, 2002

Roberta Arnold and Noelle Quenivet, *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, Martinus Nijhoff Publishers, 2008

Rolf Kunneman, *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights*, Legal Principles of New World Governance, 2001

Stefan Talmon, *The Occupation of Iraq*, Oxford University Press, 2013

Sylvain Vite, *The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights: The Examples of Food, Health and Property*, International Review of the Red Cross, Vol. 90, No. 871, 2008

Tristan Ferraro, *Determining the Beginning and End of an Occupation under International Humanitarian Law*, International Review of the Red Cross, Vol. 94 No. 885, 2012

Tristan Ferraro, *The Law of Occupation and Human Rights Law: Some Selected Issues*, in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar Publishing Limited, 2013

Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, 2009

Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff Publishers, 2009

Legal Instruments

Committee on Economic, Social and Cultural Rights, *The Domestic Application of the Covenant: General Comment No. 9*, UN. Doc. E/C.12/1998/24, 3 December 1998

Committee on Economic, Social and Cultural Rights, *The Nature of State Parties' Obligations: General Comment No. 3*, U.N. Doc. E/C/1991/23, 14 December 1990.

Committee on Economic, Social and Cultural Rights, *The Right to Work*: *General Comment No. 18*, 2006, UN. Doc. E/C. 12/GC/18, 6 February 2006

Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (Hague Regulation), 18 October 1907

European Court of Human Rights (judgement), Grand Chamber, *Case of Ocalan Vs Turkey*, 12 May 2005

Geneva Convention (IV), Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949

International Committee of the Red Cross, *Commentary on the Geneva Convention (IV) Relating to the Protection of Civilian Persons in Time of War* (Jean Pictet eds), 1958

International Committee of the Red Cross, *Occupation and Other Forms of Administration of Foreign Territory*, Expert Meeting Report, 2012

International Court of Justice, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004

Institute of International Law, *Manual on the Laws of War on Land*, Oxford, 9 August 1913

International Covenant on Economic, Social and Cultural Rights (ICESCR), U.N. Doc. A/6316(1966), 16 December 1966

International Criminal Tribunal for the former Yugoslavia (ICTY), Trial Chamber (TC), *Prosecutor vs Mladen Natelelic and Vinko Martinovic* (judgement), IT-98-34-T, 31 March 2003

Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2000/13, 2 October 2000

Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights, a document adopted by a group of experts on international law and human rights on 28 September 2011

Permanent Court of International Justice (PCIJ) (Judgement), *The Case of S.S Lotus (France Vs Turkey)*, 1927

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

Vienna Convention on the Law of Treaties, 23 May 1969, UNTS. No.

REFERENCES

[i] Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (Hague Regulation), 18 October 1907, Art 42.
[ii] Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, Minnesota Archive Editions, 1957, pp 29.
[iii] International Criminal Tribunal for the former Yugoslavia (ICTY), Trial Chamber (TC), *Prosecutor vs Mladen Natelelic and Vinko Martinovic* (judgement), IT-98-34-T, 31 March 2003, para. 241.
[iv] For more on the beginning and end of occupation see Tristan Ferraro, *Determining the Beginning and End of an Occupation under International Humanitarian Law*, International Review of the Red Cross, Vol. 94 No. 885, 2012, pp 133-163.

[v] However, it should be noted that Geneva Convention IV does not provide a definition of occupation, and therefore the definition under Art 43 of The Hague Regulation remains intact. See also Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, 2009, pp 42-45, emphasizing the indispensability of effective control for occupation.

[vi] Marco Sassoli, *Debate: Is the Law of Occupation Applicable at the Invasion Phase?* International Review of the Red Cross, Vol. 94, No. 885, 2012, pp 42-50.

[vii] See Michael Siegrist, *The Functional Beginning of Belligerent Occupation*, a research paper submitted to the Geneva Academy of International Humanitarian Law and Human Rights, 2010 pages 35-46.

[viii] Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, American Journal of International Law, Vol. 100, No. 3, 2006, pp 580. See also Nehal Bhuta, *The Antinomies of Transformative Occupation*, European Journal of International Law, Vol. 16, No. 4, 2005, pp 721-740

[ix] Jean Pictet, *Commentary on the Geneva Convention (IV) Relating to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, 1958, pp 273

[x] Adam Roberts, above note 8, pp 586

[xi] See Michael Hechter, *Alien Rule*, Cambridge University Press, 2013, pp 14-24. By relying on instrumental conception of legitimacy Hechter argues only the citizens of the state are the arbiters of the regime's legitimacy whether or not the regime conforms to global norms about democracy. Similarly, the decision on 'what system' or 'which system' has to be at the behest of the people in the occupied territory, not the occupying power.

[xii] For more on Transformative Occupation, see Gregory Fox, *Transformative Occupation and the Unilateralist Impulse*, International Review of the Red Cross, Vol. 94 No. 885, 2012, pp 237

[xiii] International Committee of the Red Cross, *Occupation and Other Forms of Administration of Foreign Territory*, Expert Meeting Report, 2012, pp 12.

[xiv] ICRC Expert Meeting Report, above note 13, pp 12.

[xv] See also *Manual on the Laws of War on Land of the Institute of International Law*, Oxford, 9 August 1913. Art 41 of the Manual reads *''territory is regarded as occupied when, as a consequence of invasion by hostile forces, the state to which it belongs has ceased, **in fact**, to exercise its ordinary authority therein, and the invading state is alone in a position to maintain order there''* (Emphasis Added).

[xvi] See Yoram Dinstein, above note 5, pp 43-44. He holds that though effective control is necessary, circumstances vary from one occupation to another and the degree of control may depend on different considerations. See also Sylvain Vite, *The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights: The Examples of Food, Health and Property*, International Review of the Red Cross, Vol. 90, No. 871, 2008, pp 629.

[xvii] *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, U.N. Doc. A/6316(1966), 16 December 1966, Art 2 (1). See also Philip Alston and Gerald Quinn,, *The Nature and Scope of State Parties' Obligations under the International Covenant of Economic, Social and Cultural Rights*, Human Rights Quarterly, Vol. 9, No.2, 1987, pp 156-229.

[xviii] Committee on Economic, Social and Cultural Rights, *The Nature of State Parties' Obligations: General Comment No. 3*, U.N. Doc. E/C/1991/23, 14 December 1990.

[xix] *General Comment No. 3*, above note 18, para. 10. See also Audrey Chapman and Sage Russell (eds), *Core Obligations, Building a Framework for Economic, Social and Cultural Rights*, Intersentia, 2002, pp 156-229

[xx] *General Comment No. 3*, above note 18, para. 4.

[xxi] Philip Alston and Gerald Quinn, above note 17, pp 166.

[xxii] *General Comment No. 3*, above note 18. See also *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N Doc. E/C.12/2000/13, 2 October 2000, No. 8.

[xxiii] *General Comment No. 3*, above note 18, para. 9. See also Absjorn Eide, *Economic, Social and Cultural Rights as Human Rights*, in Absjorn Eide (ed.), *Economic, Social and Cultural Rights*, A Textbook, 2nd ed., 2001, pp 9-28.

[xxiv] *General Comment No. 3*, above note 18, para. 9.

[xxv] Clarence Dias, *Towards Effective Monitoring of Compliance with Obligations and Progressive Realization of ESCR*, UNDP, Human Development Report Office, 2000. pp 14-26.

[xxvi] *Vienna Convention on the Law of Treaties*, UN. Doc. A/Conf.39/27., 23 May 1969, Art 29.

[xxvii] Rolf Kunneman, *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights*, Legal Principles of New World Governance, 2001, pp 11.

[xxviii] Rolf Kunneman, above note 27, pp 6.

[xxix] *ICESCR*, Art 11.

[xxx] Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Oxford University Press, 1998, pp 147.
[xxxi] International Court of Justice, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (the Wall Case)*, 9 July 2004, para. 112.
[xxxii] Noam Lubell, *Human Rights Obligations in Military Occupation*, International Review of the Red Cross, Volume 94 Number 885, 2012, pp 323.
[xxxiii] Noam Lubell, above note 32, pp 323.
[xxxiv] For a combined approach to both extraterritoriality and military occupation, see Michael Dennis, *Application of Human Rights Treaties Extraterritorially in times of Armed Conflict and Military Occupation*, American Journal of International Law, Vol. 99 No. 1, 2005, pp 119-141.
[xxxv] See also the *Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights*, a document adopted by a group of experts on international law and human rights on 28 September 2011.
[xxxvi] European Court of Human Rights (judgement), Grand Chamber, *Case of Ocalan Vs Turkey*, 12 May 2005.
[xxxvii] For a Comprehensive account of Iraqi's occupation, see Jordan Toone, *Occupation Law During and After Iraq: The Expedience of Conservationism Evidenced in the Minutes and Resolutions of the Iraqi Government Council*, Florida Journal of International Law, Vol. 24, 2012, pp 470-511.
[xxxviii] Lubell, above note 32, pp 334.
[xxxix] *The Hague Regulation*, Art 43.
[xl] *ICESCR*, Art 2. See also Committee on Economic, Social and Cultural Rights, *The Domestic Application of the Covenant: General Comment No. 9*, UN. Doc. E/C.12/1998/24, 3 December 1998, para. 8. It reads *''while the Covenant does not formally oblige states to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides basis for direct invocation of the Covenant Rights by individuals in national courts. For these reasons, the Committee strongly encourages formal adoption or incorporation of the Covenant in national law.''*
[xli] For a contrary view, see Noam Lubell, above note 32, pp 335-336.
[xlii]The principle of Passive personality refers the claim by a state to exercise criminal jurisdiction over a conduct outside its territory on the basis of the nationality of the victim. By relying on passive personality a person indirectly carries the protection she or he has under domestic national law to a foreign territory. See John McCarthy, *The Passive Personality Principle and Its Use in Combating International Terrorism*, Fordham International Law Journal, Vol. 13, No. 3, 1989, pp 298-327.
[xliii] Permanent Court of International Justice (PCIJ) (Judgement), *The Case of S.S Lotus (France Vs Turkey)*, 1927, para 50-53.
[xliv] For a flexible understanding of the prohibition of new legislation by the occupying power, see Marco Sassoli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, The European Journal of International Law, Vol. 16, No. 4, 2005, pp 661-694. Sassoli argues that the obligation to restore and ensure public order and civil life applies not only to security but also welfare conferring the legislative power of the occupying power a broader reading on the basis of the authentic French translation of Art 43, pp 663-664.
[xlv] *The Hague Regulation*, Art 43 cumulative *Geneva Convention IV*, Section III.
[xlvi] Rolf Kunneman, above note 27, pp 11.
[xlvii] Audrey Chapman and Sage Russell, above note 19, pp 8-18.
[xlviii] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV*), International Committee of the Red Cross, 12 August 1949, Arts 13-26, 47-58. For a comprehensive account of the protections under the IHL of occupation, see Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff Publishers, 2009, pp 167-296.
[xlix] ICJ, *Wall Case*, above note 31, para. 112 See also Noam Lubell above note 32, pp 326, who argues on the universality of the obligation not to interfere (negative duties). I do not disagree that the obligations are universal but universality does not mean absoluteness. In the context of belligerent occupation, these obligations do not apply as human rights obligations under ICESCR. However, they apply as part of the obligations under the IHL law of occupation and consequently they can be disregarded if necessary under Art 43 of The Hague Regulation. For an interesting discussion on universality of human rights see Abdullah An-Na'im, *To Affirm the Full Human Rights Standing of Economic, Social and Cultural Rights* in Yash Ghai and Jill Cottrell (eds), *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights*, INTERIGHTS, 2004, pp 7-16.

[l] *Geneva Convention IV*, Art 27 para. 1-3.
[li] *Geneva Convention IV*, Art 39.
[lii] *Geneva Convention IV*, Section III.
[liii] *General Comment No.3* above note 18, para. 9.
[liv] For a different view, see Marco Sassoli, above note 44, pp 676-677. Sassoli argues that the occupying power could be allowed to adopt new, additional laws that are genuinely necessary to protect international human rights law while at the same time conceding that in some cases the will of the people is necessary. However, it is wide open on how and on with reference to what 'genuineness' is assessed. This begs the question 'aren't there already sufficient provisions under IHL of occupation to provide for genuine protection?'.
[lv] See also Michael Hechter, above note 11, pp 96-116.
[lvi] Marco Sassoli, above note 44, pp 664.
[lvii] See also Eyal Benvensti, *The International Law of Occupation*, Princeton University Press, 1993, pp 13. Benvensti holds that the requirement to respect the existing laws under Art 43 of The Hague Regulation needs a proper balance between stability and change in general, and the balance between the conflicting considerations that the occupant faces in a particular matter.
[lviii] *The Hague Regulation*, Art 43.
[lix] Eyal Benvenisti, above note 57, pp 14, provides *''it seems that the drafters of this phrase viewed military necessity as the sole relevant consideration that could absolutely prevent an occupant from maintaining the old order.''*
[lx] Eyal Benvenisti, above note 59, pp 16. Benvenisti argues that there should be no general formula that could substitute for the process of analyzing each and every act, taking note of all the relevant interests at stake and available alternatives. I agree that this is a valid argument. However, these 'relevant considerations' should be 'relevant' within the context of the specific obligation enshrined, which is the obligation to restore and ensure public order and safety, no more.
[lxi] Gerhard von Glahn, above note 2, pp 95-96.
[lxii] *Lex Specialis* in this sense does not mean the prevalence of special law over general law. Rather it denotes a special law exclusively governing a special situation. Concerning the various use of the term *Lex Specialis*, see Nancie Prud'homme, *Lex Specialis: Oversimplifying a more Complex and Multifaceted Relationship?*, Israel Law Review, Vol. 40, No. 2, 2007, pp 355-395.
[lxiii] See also Yutaka Arai-Takahashi, above note 48, pp 355-374.
[lxiv] See Conor McCarthy, *Legal Conclusion or Interpretive Process? Lex Specialis and the Applicability of International Human Rights Standards*, in Roberta Arnold and Noelle Quenivet (eds), *International Humanitarian Law and Human Rights Law: Toward a New Merger in International Law*, Martinus Nijhoff Publishers, 2008, pp 101-118.
[lxv] See generally *Geneva Convention IV*, Section III, in particular Arts 52, 53, 55, 64 and *The Hague Regulation*, Arts 45-56.
[lxvi] *ICESCR*, Art 2 (1).
[lxvii] General Comment No. 9, above note 40, para. 2.
[lxviii] Monist refers to a legal system in which an international treaty will automatically become part of the legal system of the country upon ratification by the concerned organ. Whereas dualist legal system requires ratification plus a separate act of Parliament making the international treaty part of the domestic legal system. See David Sloss, *Domestic Application of Treaties*, Oxford University Press, 2011, pp 14-19.
[lxix] *Geneva Convention IV*, Art 52.
[lxx] Committee on Economic, Social and Cultural Rights, *The Right to Work: General Comment No. 18*, UN. Doc. E/C. 12/GC/18, 6 February 2006, see particularly para. 6-12 on the normative content of the Right to Work.
[lxxi] See also Francoise Hampson, *The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*, International Review of the Red Cross, Vol. 90 No. 871, 2008, pp 549-572.