

Human rights obligations in military occupation

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Abstract

This article examines the applicability of international human rights law in situations of military occupation. Proceeding from the position that human rights obligations can exist in these circumstances, the article provides an analysis of the precise modalities of application. It examines the tests for the determination of human rights applicability, and how these are linked to the concept of occupation. Finally, it recognizes the practical and legal challenges to the implementation of human rights obligations, and argues for a contextual approach that provides for human rights protection while recognizing the realities of military occupation.

Keywords: military occupation, human rights obligations, applicability, occupying power, territorial control, contextual approach, economic, social and cultural rights.

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This article examines the applicability of international human rights law in situations of military occupation. That human rights obligations exist in some form in these circumstances should, by now, be firmly established and have wide support. Nonetheless, there remains room for further analysis of the precise modalities of application, questioning how far the human rights obligations stretch, and how this notion might be affected by practical and legal challenges to implementation. The article begins with an examination of the tests for determination of applicability of human rights law, and the link between the established authority of an Occupying Power and the notion of territorial control required for human rights law obligations. Recognizing the possible impediments to total fulfilment of all rights, an analysis is provided, suggesting the need for a contextual

approach to obligations. Finally, the source of the obligations – those of the occupying power or the occupied state – is also addressed.

The determination of applicability

Before engaging in an examination of the substance of human rights obligations, it is first necessary to establish that this branch of international law does in fact apply to situations of occupation. Two objections have been raised to its applicability: whether international human rights law applies to extraterritorial conduct – in this case, in an occupied territory; and whether the human rights obligations, as a whole, are set aside in favour of international humanitarian law (IHL).¹ Both these objections have been covered extensively in the literature, and are therefore only mentioned here briefly at the start.² The latter objection can be dismissed with comparative ease. While IHL applies only in the context of armed conflict, international human rights law is not a mirror-opposite that only applies in times of peace. In fact, international human rights law applies at all times, regardless of peace or war. This is supported by numerous arguments, state practice, and jurisprudence of the International Court of Justice (ICJ) as well as of the regional and UN human rights bodies.³ Accordingly, if the situation is one to which IHL applies – and military occupation is such a case – then the bodies of law are

- 1 See, for example, the questions and debates in G. I. A. D. Draper, 'The relationship between the human rights regime and the law of armed conflicts', in *Israel Yearbook on Human Rights*, Vol. 1, 1971, pp. 191–207; Keith Suter, 'An inquiry into the meaning of the phrase "human rights in armed conflicts"', in *Revue de droit pénal militaire et de droit de la guerre*, Vol. 15, 1976, pp. 393–439; Michael J. Dennis, 'ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: application of human rights treaties extraterritorially in times of armed conflict and military occupation', in *American Journal of International Law*, Vol. 99, No. 1, 2005, pp. 119–141.
- 2 These issues have been examined on numerous occasions, including in the following: Louise Doswald-Beck and Sylvain Vité, 'International humanitarian law and human rights law', in *International Review of the Red Cross*, Vol. 33, No. 293, 1993, pp. 94–119; Raúl Emilio Vinuesa, 'Interface, correspondence and convergence of human rights and international humanitarian law', in *Yearbook of International Humanitarian Law*, Vol. 1, 1998, pp. 69–110; Cordula Droega, 'The interplay between international humanitarian law and international human rights law in situations of armed conflict', in *Israel Law Review*, Vol. 40, No. 2, 2007, pp. 310–355; UN Sub-Commission on the Promotion and Protection of Human Rights, *Administration of Justice, Rule of Law and Democracy: Working Paper on the Relationship Between Human Rights Law and International Humanitarian Law by Françoise Hampson and Ibrahim Salama*, 21 June 2005, E/CN.4/Sub.2/2005/14; Noam Lubell, 'Challenges in applying human rights law to armed conflict', in *International Review of the Red Cross*, Vol. 87, No. 860, 2005, pp. 737–754; Nancie Prud'homme, 'Lex specialis: oversimplifying a more complex and multifaceted relationship?', in *Israel Law Review*, Vol. 40, No. 2, 2007, pp. 356–395; Orna Ben-Naftali and Yuval Shany, 'Living in denial: the application of human rights in the Occupied Territories', in *Israel Law Review*, Vol. 37, No. 1, 2003–2004, pp. 17–118.
- 3 International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory opinion, 8 July 1996, *ICJ Reports* 1996, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, *ICJ Reports* 2004, para. 106 (hereafter *Wall case*); ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, *ICJ Reports* 2005, para. 216; Inter-American Court of Human Rights, *Juan Carlos Abella v. Argentina*, Case 11.137, Report No. 55/97, OEA/Ser.L/V/II.95 Doc. 7 rev. at 271, 1997; Human Rights Committee, 'General Comment 29: states of emergency (Article 4)', UN Doc. CCPR/C/21/Rev.1/Add.11, 2001, para. 3; Committee on Economic, Social and Cultural Rights, 'Concluding

applicable concurrently. This then raises other questions concerning concurrent applicability and whether it affects the substance of obligations under either of these two frameworks – a matter that will become relevant later in this analysis.⁴

The question might be raised at this early stage as to whether many – if not most – of the human rights obligations that will be found applicable and viable do not in fact already exist in IHL rules such as prohibitions on harming civilians and those relating to treatment of detainees. The simple answer is that it is not always the case that human rights obligations are mirrored in IHL.⁵ Furthermore, the applicability of human rights law brings additional elements that IHL does not provide, chief among them being the possibility to seek recourse from international human rights mechanisms.

The other objection regarding the applicability of international human rights law centres upon the fact that the Occupying Power is not acting within its own sovereign territory. Consequently, the question is raised as to whether human rights obligations extend to actions taken extraterritorially. While there is strong reason to support extraterritorial human rights obligations in a wide range of situations,⁶ it must be acknowledged that there are certain circumstances in which extraterritorial applicability is unclear and subject to debate.⁷ Nonetheless, military occupation is perhaps one of the least controversial circumstances, and there is a solid foundation for the assertion that the Occupying Power must abide by international human rights law. This has been confirmed by numerous international bodies, including the ICJ.⁸ The basis for this can be argued to rest on the premise that the Occupying Power is acting as the administrator of the territory and, as such, must abide by human rights obligations in its dealing with individuals in the territory under its control. In light of the above, this article proceeds from a starting point accepting the potential applicability of international human rights law in situations of military occupation, and places the focus not on the question of whether it can apply but rather on the tests behind such a determination, the ways in which this applicability might be manifested, and the extent of obligations created.

observation: Israel', UN Doc. E/C.12/1/Add.69, 31 August 2001; see also discussion in the articles listed in note 2 above.

- 4 See below, in the section on the content of obligations and legal restrictions imposed by IHL.
- 5 See the discussion below of economic, social, and cultural rights.
- 6 See analysis in Noam Lubell, *Extraterritorial Use of Force Against Non-state Actors*, Oxford University Press, Oxford, 2010, ch. 8.
- 7 *Ibid.*; see also further analysis of this issue in Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, Oxford, 2011.
- 8 ICJ, *Wall case*, above note 3, paras. 107–112; ICJ, *DRC v. Uganda*, above note 3, paras. 216–220; 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/C.12/1/Add.69; *Report on the Situation of Human Rights in Kuwait under Iraqi Occupation, prepared by Mr. Walter Kälin, Special Rapporteur of the Commission on Human Rights, in Accordance with Commission Resolution 1991/67*, E/CN.4/1992/26, 15 January 1992, paras. 55–59; European Court of Human Rights (ECtHR), *Loizidou v. Turkey (Preliminary Objections)*, Application No. 15318/89, Judgment of 23 March 1995, Series A No. 310, paras. 62–64; ECtHR, *Cyprus v. Turkey*, Application No. 25781/94, Judgment of 10 May 2001, para. 77.

As will be seen, the specific reasoning behind the conclusion of applicability in an individual case may affect the assessment of the content of the obligations. The European jurisprudence, in particular, has provided more than one route to the finding of extraterritorial applicability of human rights law, as seen in the differing tests advanced most explicitly in the case law of *Al-Skeini v. UK*.⁹ The first test has been described as that of ‘state agent authority’, and the European Court of Human Rights, using the term ‘state agent authority and control’,¹⁰ summarizes it thus:

It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual.¹¹

The other test is that of ‘effective control over an area’, referring to situations ‘when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory’.¹² The Court has created a significant difference between the two tests, in that the ‘state agent authority’ test creates obligations only with regard to the rights ‘that are relevant to the situation of that individual’,¹³ whereas under the ‘effective control over an area’ test

The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights.¹⁴

At first sight, situations of military occupation appear to be a prime example in which the ‘effective control over an area’ test is satisfied; indeed, it was a previous case dealing with occupation that at least in part formed the basis for the approach in the above case.¹⁵ After all, the essence of occupation revolves around the Occupying Power’s control of the area, as is clear from Article 42 of the Hague Regulations: ‘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’. Accordingly, one could be forgiven for assuming that a military occupation might automatically be considered

9 *The Queen ex parte Al-Skeini and Others v. Secretary of State for Defence*, England and Wales Court of Appeal [2005] EWCA Civ 1609, 21 December 2005; Opinions of The Lords of Appeal for Judgment in the Case *Al-Skeini and Others (Respondents) v. Secretary of State for Defence (Appellant) Al-Skeini and Others (Appellants) v. Secretary of State for Defence (Respondent) (Consolidated Appeals)*, 13 June 2007, [2007] UKHL 26; ECtHR, *Al-Skeini and Others v. the United Kingdom*, Application No. 55721/07, Judgment of 7 July 2011.

10 ECtHR, above note 9, *Al-Skeini*, paras. 133–137.

11 *Ibid.*, para. 137.

12 *Ibid.*, para. 138.

13 *Ibid.*, para. 137.

14 *Ibid.*, para. 138; ECtHR, *Cyprus v. Turkey*, above note 8, para. 77.

15 *Ibid.* For further discussion of the notion of control, see M. Milanovic, above note 7, pp. 135–151.

a situation in which human rights obligations are applicable as a result of effective control over the area. Not everyone agrees, however. Notably, in the *Al-Skeini* case the UK argument differentiated between being an Occupying Power and having control as required to trigger human rights obligations. According to Brooke LJ in the UK Court of Appeal:

it is quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time.¹⁶

The European Court, while taking a different route, did not settle the debate over the 'effective control over an area' test. On the one hand, the Court disagreed with the UK submission and ruled that the circumstances in this case did entail a jurisdictional link that created human rights obligations. On the other hand, despite this being a situation of occupation – which by definition is linked to notions of territorial control – the European Court did not fully rely on the 'effective control over an area' test, and appears to have included elements of the 'State agent authority' test:

It can be seen, therefore, that following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, *the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq*. In these exceptional circumstances, the Court considers that the United Kingdom, *through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals* killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.¹⁷

This conclusion appears to be a badly mixed cocktail, unsuccessfully attempting to fuse concepts of control over the territory with the question of state agent authority. While noting the UK's territorial authority, the Court proceeds to make its determination based on the authority exercised by state agents over individuals. After appearing to acknowledge the validity of the two tests, it would have been preferable for the Court to apply either one (or both) of the tests from start to finish. The first possibility would have been to reject the UK position and to clarify that the authority and control that had been recognized in order to establish the existence of a military occupation must itself serve as proof of the requisite control over the area necessary to find the applicability of human rights law. Alternatively, each of the individual cases could have been examined as to whether they satisfy the 'state agent authority' test – it is submitted here that this test extends beyond the strict confines

16 *Al-Skeini*, Court of Appeal, above note 9, Brooke LJ, para. 124. See also para. 127.

17 ECtHR, *Al-Skeini*, above note 9, para. 149 (emphasis added).

of formal detention, and can include many situations such as those which arose in this case.¹⁸

The purported obstacle to the equation of military occupation with the human rights ‘effective control over an area’ test stems from the suggestion that, in situations of control over territory, the state is bound to uphold the entire range of its human rights treaty obligations. This is said to be an ‘utterly unreal’ proposition.¹⁹ This ‘all or nothing’ approach is raised as an objection to equating military occupation with the human rights notion of control over an area. It is argued, for example, that, despite a situation being recognized as occupation, the Occupying Power may not have the requisite forces on the ground to exercise the control required under the human rights test for applicability.²⁰ Moreover, it is claimed that, as a matter of law, the ability of the Occupying Power to abide by human rights obligations is curtailed by the limitations imposed on its authority through occupation law.²¹ There is merit in the criticism from both directions. It would be disconnected from the realities of occupation to assume that full applicability of human rights law under an ‘effective control over an area’ test could equate occupied territory with the state’s own territory. Practical impossibilities of life on the ground and legal obstacles may all play a part in limitations on the Occupying Power’s ability to implement the obligations in the same manner as it does domestically. At the same time, the existence of certain impediments cannot overshadow the fact that, by definition, the Occupying Power has the control and responsibility for the territory, and with it the human rights obligations that are attached to its authority. Ultimately, the ‘all or nothing’ standpoint is likely to lead either to an unrealistic ‘all’ or to an obligationless vacuum of ‘nothing’. Neither one is completely satisfactory, and, as noted by Sedley LJ in the UK Court of Appeal:

[I]t is not an answer to say that the UK, because it is unable to guarantee everything, is required to guarantee nothing. The question is whether our armed forces’ effectiveness on the streets in 2003–4 was so exiguous that despite their assumption of power as an occupying force they lacked any real control of what happened from hour to hour in the Basra region. My own answer would be that the one thing British troops did have control over, even in the labile situation described in the evidence, was their own use of lethal force. Whether they were justified in using it in the situations they encountered, of which at least four of the cases before us are examples, is precisely the subject of the inquiry which the appellants seek. It is in such an inquiry that the low ratio of troops to civilians, the widespread availability of weapons and the prevalence of insurgency would fall to be evaluated.²²

The solution may be found by suggesting that, while the starting assumption may presuppose the full range of obligations, there is need for a contextual examination

18 N. Lubell, above note 6, ch. 8.

19 *Al-Skeini*, Court of Appeal, above note 9, Brooke LJ, para. 124.

20 *Al-Skeini*, Court of Appeal, above note 9, paras. 119–124, 194.

21 ECtHR, *Al-Skeini*, above note 9, para. 114.

22 *Al-Skeini*, Court of Appeal, above note 9, Sedley LJ, para. 197.

of the circumstances in each case. Turning for a moment to the ‘state agent authority’ test, it is clear that a contextual approach is not only possible, but also desirable. The ‘state agent authority’ test, according to the European Court, is already one that recognizes the need to consider the circumstances when determining the extent of the state’s obligations.²³ These obligations arise only with regard to those rights that the state agents have the power to control in the circumstances. The logic behind this is based on the fact that, absent wider control of the circumstances and the necessary ability to perform certain acts, the state cannot be expected to uphold every one of the individual’s rights. However, if some of the individual’s rights are *de facto* directly in the control of state agents – lawfully or unlawfully – then the state is obligated to uphold those rights that are in its power to control. For example, freedom from arbitrary detention would be applicable when detaining an individual, and the right to life would be applicable when using force against an individual.²⁴

Accordingly, under the ‘state agent authority’ approach, the context can affect the actual *applicability* of obligations. However, our current concern focuses not on control over individuals outside territorial control but on occupied territory where – by definition – the Occupying Power has an element of authority and control over territory. Returning therefore to the ‘effective control over an area’ test, while there is a presumption of wide-ranging applicability of human rights obligations, it is submitted here that the context can nevertheless affect the *substantive content* of the obligations. An example of this can be found in the ICJ Advisory Opinion on the *Wall*, where the following is stated:

[T]he territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it 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.²⁵

The ICJ thus recognizes that, while the International Covenant on Economic, Social and Cultural Rights (ICESCR) applies as a whole by virtue of Israel being an Occupying Power, the substantive obligations must be determined in a context that takes into account the existence of the Palestinian Authority and the role that it plays in the territory. Notably, while the context may modify the substance of the obligation, it does not remove it altogether; Israel is required not to actively raise

23 ‘... relevant to the situation ...’, in ECtHR, *Al-Skeini*, above note 9, para. 137.

24 N. Lubell, above note 6, ch. 8; O. Ben-Naftali and Y. Shany above note 2, p. 64. In situations of armed conflict there is also, of course, the question of how the concurrent applicability of international human rights law and IHL might affect the nature of the obligations. This is a separate question, which has been examined often elsewhere, and with no conclusive or agreed answer. The focus of this article is not on how to manage concurrent applicability, but on the earlier stage of determining the scope of applicable human rights obligations.

25 ICJ, *Wall case*, above note 3, para. 112.

obstacles with regard to the rights that the Palestinian Authority is administering. Other cases have also recognized context in relation to territorial control.²⁶

According to such an approach, territorial control – including occupation – does trigger the applicability of the full range of human rights obligations that the state is committed to uphold. Nonetheless, the substantive elements of the obligations and the assessment of whether a violation has occurred, must be determined in the light of the context, including both the situation on the ground and legal restraints. These could include questions of logistical ability to act in a certain way; or, for example, obligations might be affected by the legislative restrictions placed on the Occupying Power under occupation law.²⁷ Nonetheless, neither of these types of concern provide a ready-made justification for wholesale discarding of obligations. While aspects of the obligations may be modified in light of the context, the overall applicability of international human rights law is established and an element of obligation will always exist.

The content of human rights obligations

Based on the above examination, international human rights law obligations are applicable to situations of military occupation, but the precise behaviour considered sufficient to satisfy the obligation must be determined in the light of the legal and practical context in which the Occupying Power is operating. Context may be difficult to define in advance, but it is impossible to create precise laws for every possible scenario without ultimately allowing Occupying Powers to evade responsibilities that they should have fulfilled or, alternatively, to place unrealistic obligations that do not stand the chance of being implemented owing to impossible circumstances. The likeliest route to achieving protection of human rights wherever possible is to have a general principle determining the applicability of international human rights law, while allowing for a case-by-case approach that takes the context into account when determining the precise content of the obligation. This section uses examples of certain key areas of concern to demonstrate how such an approach can work in practice. At its foundation is the understanding that, while human rights obligations may remain applicable at all times, their *mode of application* – as opposed to their *applicability* – may differ in accordance with the ruling circumstances. This is neither new nor unique to situations of military occupation; the precise actions that a state takes in relation to a specific right can be affected by various circumstances. For example, the right to privacy would prevent a state from having the entire population's private post being read and censored on a regular basis, but it may be implemented differently in the context of mail delivered to inmates at a high-security prison facility.²⁸

26 ECtHR, *Ilașcu and Others v. Moldova and Russia*, Application No. 48787/99, Judgment of 8 July 2004.

27 Whether or not this is the case will be discussed further below.

28 The Committee accepts that it is normal for prison authorities to exercise measures of control and censorship over prisoners' correspondence. Nevertheless, article 17 of the Covenant provides that "no one shall be subjected to arbitrary or unlawful interference with his correspondence". This requires that any

In many cases, the language of the human rights conventions explicitly allows for certain restrictions that take context into account, by having the description of the right itself accompanied by statements such as those making room for 'limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.²⁹ Derogations are an additional route to possible limitations:³⁰ for example, permitting a state experiencing a calamitous natural disaster to restrict movement on the streets so as to allow emergency services to function effectively. Financial circumstances may also be taken into account in certain cases, as is evident from the phrase in the ICESCR referring 'to the maximum of its available resources'. There are occasions when the context may not even be one that was necessarily originally envisaged, but must nevertheless be taken into account. For example, when the detention of an individual occurs on the high seas, 5,500 kilometres from the state's territory, the obligation to bring him or her 'promptly' before a judge can allow for sixteen days to elapse, despite such a period being remarkably longer than that usually permitted.³¹ The above examples demonstrate that context indeed can be – and is – taken into account when determining the content of human rights obligations in specific circumstances.

The notion of positive and negative obligations is another useful tool for discussing the substantive elements of a human rights obligation. This identification of positive and negative obligations is not a means to differentiate between groups of different rights. Rather, it is that within most rights there are both positive and negative elements. These distinctions can be understood through referring to the three-tiered approach of 'respect, protect, and fulfil'. This structuring of rights has received much attention in the sphere of economic, social, and cultural rights, but it is also pertinent to civil and political rights.³² The respect/negative element of a right

such measures of control or censorship shall be subject to satisfactory legal safeguards against arbitrary application (see para. 21 of the Committee's views of 29 October 1981 on communication No. R.14/63 [63/1979]). Furthermore, the degree of restriction must be consistent with the standard of humane treatment of detained persons required by article 10 (1) of the Covenant. In particular, prisoners should be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, by correspondence as well as by receiving visits'. Human Rights Committee, *Miguel Angel Estrella v. Uruguay*, Communication No. 74/1980, UN Doc. CCPR/C/OP/2 at 93 (1990), para. 9.2.

29 International Covenant on Civil and Political Rights (ICCPR), UN General Assembly res. 2200A (XXI), UN Doc. A/6316 (1966), entered into force 23 March 1976, Art. 18, para. 3 (on the manifestation of freedom of religion).

30 ICCPR, Art. 4; Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, entered into force 3 September 1953, as amended by Protocols Nos. 3, 5, 8, and 11, which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively, Art. 15; American Convention on Human Rights (ACHR), O.A.S. Treaty Series No. 36, 1144 UNTS 123, entered into force 18 July 1978, Art. 27.

31 ECtHR, *Rigopoulos v. Spain*, Application No. 37388/97, Decision of 12 January 1999; see also ECtHR, *Medvedev and Others v. France*, Application No. 3394/03, Grand Chamber, Judgment of 29 March 2010, paras. 127–134.

32 'Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights'. Theo van Boven, Cees Flinterman, and Ingrid Westendorp (eds), *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, SIM, Utrecht, 1996, para. 6; Committee on Economic, Social and Cultural Rights, 'General comment no. 12: right to adequate food (Art. 11)', Twentieth session, 12 May 1999, UN Doc. E/C.12/1999/5, para. 15; Committee on

obliges the state to refrain from taking action that would directly contravene the right. In most cases, this primarily requires the state to refrain from certain actions, ‘not to deprive people of what they have rights to’, and as such does not normally create a significant burden.³³ It should be noted, however, that the contextual approach advanced in this article does not rely on a differentiation between negative and positive obligations as such. Rather, this distinction is only relevant insofar as in most contexts negative obligations are unlikely to present a challenge for implementation. Ultimately, the test for all types of obligation is one of assessing each one in the light of the context, rather than categorizing an obligation as negative or positive.

Notwithstanding the above observation, positive duties of protecting and fulfilling a right are, however, likely to raise further concerns that must be examined, especially in situations such as military occupation. With regard to civil and political rights, the positive obligation to protect can manifest itself in a number of ways, for example by ensuring the protection of life in certain circumstances in the form of ‘a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual’.³⁴ This entails the existence of a law enforcement system capable of protecting the rights in the required manner. The *Al-Skeini* case provides a useful example as to whether such protection can be demanded from an Occupying Power. The UK Government asserted that it was unable to maintain law and order in south-east Iraq owing to a combination of too few troops and the breakdown of local law enforcement systems, which gave rise to widespread crime.³⁵ The UK argument was presented as a basis for denying the applicability of the European Convention on Human Rights (ECHR) since the described situation was said to contradict the existence of effective control. In contrast to the UK argument, and based on the earlier analysis in this article, the UK position can be described as being back to front: the correct approach begins with an agreed determination that the UK was an Occupying Power; as such the requisite control for the applicability of human rights obligations is inherently established. Arguing that an Occupying Power’s inability to enforce law and order proves the inapplicability of human rights obligations goes against not only the correct approach to human rights applicability but also the obligations under the laws of occupation. Article 43 of the Hague Regulations states the following:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and

Economic, Social and Cultural Rights, ‘General comment no. 13: the right to education (Article 13 of the Covenant)’, Twenty-first session, 8 December 1999, UN Doc. E/C.12/1999/10, paras. 46–47.

- 33 ‘Negative duties – duties not to deprive people of what they have rights to – are, and must be, universal. A right could not be guaranteed unless the negative duties corresponding to it were universal, because anyone who lacked even the negative duty not to deprive someone of what she has rights to would, accordingly, be free to deprive the supposed right-bearer. Universal negative duties, however, are no problem (if “opportunity costs” are ignored). I can easily leave alone at least five billion people, and as many more as you like’. Henry Shue, ‘Mediating duties’, in *Ethics*, Vol. 98, No. 4, 1988, p. 690.
- 34 ECtHR, *Osman v. The United Kingdom*, Application No. 23452/94, 87/1997/871/1083, Judgment of 28 October 1998, para. 115.
- 35 ECtHR, *Al-Skeini*, above note 9, para. 112.

ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.³⁶

The duties of an Occupying Power under this provision, and the entailment of human rights obligations in this regard, were addressed by the ICJ in its examination of Uganda's actions:

The Court thus concludes that Uganda was the occupying Power in Ituri at the relevant time. As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.

The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.³⁷

Accordingly, by virtue of being an Occupying Power a state can be expected to attempt to ensure that law and order prevails in the occupied territory,³⁸ if it is already required to do so under the law of occupation, it cannot proclaim a failure to abide by its IHL obligation as a justification for denying the applicability of human rights obligations. IHL requires the Occupying Power to take positive action. As for the substance of the human rights obligations, clearly the negative tier of respecting the rights can be demanded, while the positive elements will, at the very least, be the same ones as required by the already existing IHL obligations. An inability to fulfil positive duties in particular situations does not negate the applicability of human rights obligations; however, it may lead to a determination that in the circumstances the state did what it could so as not to contravene its obligations. In such situations, although the applicability of human rights obligations can be asserted, there is still room to debate whether the circumstances affect the ability to fulfil the obligations.³⁹

36 Regulations Annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907, Art. 43.

37 ICJ, *DRC v. Uganda*, above note 3, paras. 178–179.

38 On the Article 43 obligation to restore and ensure public order and life, see Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, pp. 91–94.

39 See above discussion in previous section on applicability. 'When faced with a partial or total failure to act, the Court's task is to determine to what extent a minimum effort was nevertheless possible and whether it should have been made'. ECtHR, *Ilaşcu and Others*, above note 26, para. 334. See also the reference to 'due diligence' in *M. Milanovic*, above note 7, p. 141.

Accordingly, one could argue that the negative tier of the human rights obligations must be adhered to, and therefore the state is prohibited from acting in a way that does not respect the rights of the population. The positive elements of protect and fulfil would, however, be dependent on context. For example, while perhaps not being able to carry out the equivalent of total police protection against criminal activity throughout the whole territory, troops must not themselves engage in arbitrary acts of killing or detention. Moreover, in circumstances where troops have the requisite ability, they must also be responsible for the positive elements – for instance, they cannot stand aside and witness a violent crime when they have the ability to step in and prevent it. How far beyond this they will be expected to go, may be affected by issues such as sufficient capabilities in the light of the prevailing level of violence on the streets. Likewise, in a detention facility the occupying forces would be required not only to refrain from directly causing harm to the detainee but also to comply with all positive duties arising from the right (such as feeding the detainee or protecting him/her from other detainees). Any assessment must therefore consider the circumstances at hand. An example of recognizing the need to utilize a realistic understanding of the situation can be found in the European Court's treatment of the *Al-Skeini* case:

The Court takes as its starting point the practical problems caused to the investigatory authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war. These practical problems included the breakdown in the civil infrastructure, leading *inter alia* to shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time. As stated above, the Court considers that in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators.⁴⁰

A separate issue is the denial of human rights obligations in situations of occupation, based on perceived legal obstacles. The law of occupation places certain restrictions on the Occupying Power, and these have been raised as an impediment to fulfilling human rights obligations.⁴¹ Article 43 of the Hague Regulations appears to present a problem in this regard, requiring the Occupying Power to respect, 'unless absolutely prevented, the laws in force in the country'. Similarly, Article 64 of the Fourth Geneva Convention states that:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.⁴²

40 ECtHR, *Al-Skeini*, above note 9, para. 168.

41 *Ibid.*, para. 114.

42 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, entered into force 21 October 1950 (hereafter GC IV), Art. 64.

The expectation that occupation should be a temporary affair, and that sovereignty – as opposed to authority – is not transferred to the Occupying Power, requires rules designed to minimize the possibility of the occupier creating changes that would endanger these assumptions. Nonetheless, the limitations are not absolute, and certain changes might not only be allowed but – if required for complying with the obligation to ensure or restore public life – they might even be mandatory. Article 43 must not become ‘an extremely convenient tool’ allowing the Occupying Power to intervene when it suits, and to hide behind claims of limitations when it does not.⁴³ Combined interpretations of the above provisions can allow for changes that are in line with the objectives of the law of occupation. These include the responsibility for public order, which, recalling the original French text, has the wider notion of public life, rather than just matters of law and order.⁴⁴ While there are risks and potential for abuse in the form of changes motivated by self-interest,⁴⁵ there is reason to prefer the arguments for allowing – and even requiring – changes that are based on adherence to international human rights law and are designed to benefit the rights of the inhabitants in the occupied territory.⁴⁶ In particular, prolonged occupation may require active intervention in numerous areas, if only to prevent economic, social, and legal stagnation. The duration of the occupation is therefore also part of the context in which human rights obligations must be assessed.⁴⁷

Economic, social, and cultural rights

The applicability and level of human rights obligations is equally a matter for concern in relation to economic, social, and cultural (ESC) rights. There is no well-grounded basis for disregarding this set of rights in situations of occupation, and all the arguments for applicability arise with similar force with respect to these rights as they do for civil and political rights. Indeed, the UN human rights bodies and the ICJ have confirmed that the ICESCR applies to the actions of an Occupying Power.⁴⁸ Moreover, for the populations of an occupied territory, it is often precisely

43 Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, NJ, 2004, p. 11.

44 *Ibid.*, pp. 9–11; Y. Dinstein, above note 38, p. 89.

45 See discussion in Y. Dinstein, above note 38, pp. 120–123.

46 See discussion in *ibid.*, pp. 46, 112–123. On development of interpretations in this regard, see E. Benvenisti, above note 43, pp. xi–xiv. See also the analysis of legislation by occupying powers in Marco Sassòli, ‘Legislation and maintenance of public order and civil life by occupying powers’, in *European Journal of International Law*, Vol. 16, No. 4, 2005, pp. 661–694. While there is room for changes based on human rights obligations, Sassòli notes that the interpretation and implementation must endeavour to respect local society and customs (*ibid.*, pp. 676–677).

47 For discussion of the particular challenges in cases of prolonged occupation, see Adam Roberts, ‘Prolonged military occupation: the Israeli-occupied territories 1967–1988’, in *American Journal of International Law*, Vol. 84, No. 1, 1990, pp. 44–103.

48 ICJ, *Wall case*, above note 3, paras. 107–112; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel*, above note 8; see also Sylvain Vité, ‘The interrelation of the law of occupation and economic, social and cultural rights: the examples of food, health and property’, in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 629–651.

these rights that are of the greatest concern. While there can be no true expectation that a military occupation will guarantee the same civil and political freedoms as a self-governing democracy, the inhabitants of the territory require their health, education, and employment situation to continue in as uninterrupted a manner as possible. Indeed, a significant amount of the work on the ground in situations of occupation revolves around these concerns.⁴⁹ Notwithstanding, here too there is a need for a contextual approach when determining the level of obligations and the precise duties that must be implemented by the Occupying Power. Objections might be raised to the notion of obligations in this area, since ESC rights are said to involve significant financial and logistical commitment, which one cannot expect from a temporary Occupying Power. This type of argument is often at the heart of the more general discussions differentiating between civil and political rights and ESC rights. The claim is not entirely accurate, however, either in the context of occupation or outside it. Most rights can ultimately entail financial commitments, and civil and political rights can also be a costly affair. Consider, for example, rights related to detention and trial: a functioning police force, a judicial system, trained judges and lawyers, courthouses, and prisons – all these are far from being cost-free. It is perhaps more useful to return to the earlier mentioned three-tiered approach of respect/protect/fulfil, and to note that all rights entail some obligations that are relatively cost-free (for example, not to torture a detainee, not to prevent an individual from accessing a hospital) and other obligations that require investment (e.g. a judicial system that is capable of preserving justice, a health system that provides basic health care). However, and notwithstanding this observation that all rights include the different tiers of obligation, there is some credence to the view that the individual claims associated with civil and political rights tend to centre upon the negative/respect obligations (such as the individual's desire to remain free from arbitrary intrusions), while ESC rights are more likely to revolve around the positive/fulfil elements of the right (e.g. demanding health care). The possibility that the context of military occupation requires a differentiation between the different elements of obligations therefore takes extra significance when dealing with ESC rights. In other words, can the Occupying Power be expected to carry out the 'fulfil' aspects of ESC rights?

First, it is important to note that, as with the earlier discussion of law and order, here too IHL already imposes certain obligations upon the Occupying Power with regard to matters such as food,⁵⁰ health,⁵¹ and education.⁵² The question before us now is whether the applicability of human rights obligations adds any substantive duties to those in the law of occupation.⁵³ Although the Fourth Geneva Convention imposes certain positive obligations such as provision of medical

49 For example, see the work of Physicians for Human Rights – Israel, available at: <http://www.phr.org.il/default.asp?PageID=21> (last visited 24 April 2012).

50 GC IV, Art. 55.

51 *Ibid.*, Arts. 55–56.

52 *Ibid.*, Art. 50.

53 As noted earlier, even with regard to existing IHL obligations, the fact that these are also part of human rights law can trigger the possibility for monitoring by human rights treaty bodies.

supplies, this is not the case with all ESC rights. For example, on matters of work and employment, the Convention focuses on questions of forced labour, requisitioning services, and more generally the issue of protected persons working at the behest of the Occupying Power.⁵⁴ The law of occupation thus provides little protection with regard to the right to work outside these circumstances. Looking at the example of the Israeli–Palestinian conflict, it is clear that concerns over work can be a major problem for the population in an occupied territory, and that actions of the Occupying Power can have a serious detrimental effect on the occupied population in this regard. The ICJ Advisory Opinion on the *Wall* highlighted some of these issues, and it has been well documented that the physical barriers created by this construction, as well as numerous other restrictions on movement, have had a negative impact on the ability of the Palestinian population to go about earning their livelihood.⁵⁵ In the Advisory Opinion, after noting the applicability of the ICESCR, the ICJ proceeded to determine the violation of the right to work as one of the transgressions of international law.⁵⁶ International human rights law can therefore add protection with regard to certain rights that may not be fully protected in the law of occupation. Notably, in the above example, the focus is not upon the positive duties of this right (such as vocational training programmes to raise employment opportunities)⁵⁷ but on the respect/negative duties of not acting in such a way as to harm the employment and ability to work of the individuals in the occupied territory. Human rights obligations of this type must be respected by occupying powers.

The greater challenge arises from the fulfil/positive aspect of rights, including those that do receive mention in the law of occupation. Taking the example of the right to health, it is clear from the Fourth Geneva Convention that the Occupying Power has duties with regard to ensuring medical supplies and the maintenance of hospitals and certain public health services.⁵⁸ Moreover, while there is reference in the Convention to co-operation with local authorities, the ultimate responsibility is on the Occupying Power to ensure the ‘adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics’.⁵⁹ It is therefore clear that in the area of ESC

54 GC IV, Art. 51–52.

55 ICJ, *Wall case*, above note 3, paras. 133–134. See also the description given by the non-governmental organization B’Tselem: ‘Within the West Bank, the restrictions make it very hard for Palestinians to get to their jobs and to transport goods from area to area. This has led to an increase in transportation costs and consequently to lower profits. Trade from one section to another in the West Bank has become expensive, uncertain, and inefficient. The economy in the West Bank has been split into smaller, local markets. Restrictions on access of West Bank farmers to their lands in the “seam zone” and in the Jordan Valley have severely harmed the farming sector in these areas’. B’Tselem, ‘Effect of restrictions on the economy’, 1 January 2011, available at: http://www.btselem.org/freedom_of_movement/economy (last visited 24 April 2012).

56 ICJ, *Wall case*, above note 3, paras. 130, 133, and 134.

57 As required by the International Covenant on Economic, Social and Cultural Rights (ICESCR), UN General Assembly res. 2200A (XXI) of 16 December 1966, entered into force 3 January 1976, Art. 6, para. 2.

58 GC IV, Arts. 55 and 56.

59 *Ibid.*, Art. 56. See also Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949, Commentary, Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva,

rights also, the duties of the Occupying Power go beyond non-interference and negative/respect obligations to include positive obligations. But how far do the positive obligations stretch? Those that can be drawn from the Fourth Geneva Convention are not many, since beyond the above example the Convention does not elaborate on the meaning of ensuring the work of medical services. This might be the point at which human rights law can assist because it does contain greater detail on ESC rights and the obligations that they entail. While there is some description of specific obligations in the ICESCR itself, there is abundant and detailed further explanation of the related duties in the General Comments produced by the Committee on Economic, Social and Cultural Rights, such as can be found in their General Comment on the right to health.⁶⁰ Many of the core obligations found by the Committee are not too dissimilar from the requirements for basic health services and medical supplies that exist in the law of occupation. However, there are also demands placed upon the state to invest in long-term strategies for advancing health care in the country.⁶¹

The ICESCR itself allows for the possibility that states may not be able to put all arising duties into effect immediately, and includes the notion of progressive realization, taking into account the state's 'maximum of its available resources'.⁶² This, together with the fact that the healthcare duties in the Fourth Geneva Convention are prefaced by the phrase '[t]o the fullest extent of the means available to it',⁶³ might lead one to the conclusion that the obligations are to be determined on the basis of available resources, the Occupying Power being required to do whatever its resources allow. At first sight, this might provide a solution for situations of occupation where it might not be feasible to expect the Occupying Power to engage in all the positive and long-term duties required in order to fulfil the right. However, under human rights law, it is not simply a question of budgetary capabilities. Even without huge resources, progressive realization does not remove an obligation to action: while it recognizes that immediate change might not be possible, it nonetheless requires steps in the direction of

1958, pp. 313–314 : 'It is possible that in certain cases the national authorities will be perfectly well able to look after the health of the population; in such cases the Occupying Power will not have to intervene; it will merely avoid hampering the work of the organizations responsible for the task. In most cases, however, the invading forces will be occupying a country suffering severely from the effects of war; hospitals and medical services will be disorganized, without the necessary supplies and quite unable to meet the needs of the population. The Occupying Power must then, with the co-operation of the authorities and to the fullest extent of the means available to it, ensure that hospital and medical services can work properly and continue to do so. The Article refers in particular to the prophylactic measures necessary to combat the spread of contagious diseases and epidemics. Such measures include, for example, supervision of public health, education of the general public, the distribution of medicines, the organization of medical examinations and disinfection, the establishment of stocks of medical supplies, the despatch of medical teams to areas where epidemics are raging, the isolation and accommodation in hospital of people suffering from communicable diseases, and the opening of new hospitals and medical centres.'

60 Committee on Economic, Social and Cultural Rights, 'General Comment no. 14: the right to the highest attainable standard of health (Art. 12)', Twenty-second session, 11 August 2000, UN Doc. E/C.12/2000/4.

61 *Ibid.*, para. 36.

62 ICESCR, Art. 2.

63 GC IV, Arts. 55 and 56.

change.⁶⁴ Conversely, would this mean that a relatively wealthy Occupying Power, who cannot easily plead a lack of resources, would suddenly have to pour huge sums into building new national healthcare systems in the occupied territory? At this juncture, it is necessary to return to the earlier discussion of context.

The theatre of operations of occupied territory is far removed from the circumstances of a state operating domestically, in a myriad of ways. Above all, a military occupation is meant to be a temporary affair, and the Occupying Power is not encouraged to envisage itself administering the state into the distant future. An argument could therefore be made that the human rights obligations of the Occupying Power, in addition to the negative/respect duties, are limited to those positive actions required to fulfil the core obligations such as ensuring basic sanitation, safe water, and essential drugs,⁶⁵ while not including engagement in long-term matters such as investing in the creation of new medical schools. Context, however, works in both directions. While it may limit the positive obligations of an Occupying Power in the light of the nature of military occupation, if the circumstances are that of an occupation that does not adhere to the expectation of temporariness – for example, Israel remaining an Occupying Power for more than four decades – the context may then require a more expansive approach to positive duties. Although there are limitations, the Occupying Power is allowed to engage in certain activities that change the status quo for the benefit of the local population.⁶⁶ In a prolonged occupation, it may be incumbent upon the Occupying Power not only to engage in the core minimum of obligations but also to ensure the long-term strategic aspects of fulfilling the population's rights.

Attention must also be given to the principle of non-discrimination. This is a paramount principle cutting across all areas of human rights law. Continuing with the example of the right to health, the issue of discrimination raises an interesting question in the context of military occupation. States are required to implement the right to health in a non-discriminatory fashion;⁶⁷ how does this translate to

64 '[T]he fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal'. Committee on Economic, Social and Cultural Rights, 'General Comment no. 3: the nature of States Parties obligations, Art. 2, para. 1 of the Covenant', Fifth session, 14 December 1990, para. 9.

65 GC IV, Art. 56; Committee on Economic, Social and Cultural Rights, General Comment no. 14, above note 60.

66 See earlier discussion; note, however, that a common assumption is that the 'local population' refers to the protected persons and original inhabitants of the occupied territory. Widening this to include others such as nationals of the Occupying Power (e.g. the Israeli settlers) creates significant challenges and potential for distorting the crucial balance between the needs of the occupier and those of the protected persons. For discussion of related issues, see Aeyal M. Gross, 'Human proportions: are human rights the emperor's new clothes of the international law of occupation?', in *European Journal of International Law*, Vol. 18, No. 1, 2007, pp. 1–35.

67 ICESCR, Art. 2, para. 2; Committee on Economic, Social and Cultural Rights, 'General Comment no. 20: non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant

occupation? There may be a vast difference between the health services that a state provides in its own territory and those of the occupied territory, and it is probably not feasible to expect the health situation in the two areas to be the same – the UK was clearly not going to extend its famous National Health Service to southern Iraq. Indeed, while requiring equal medical treatment for aliens in the territory of a party to the conflict,⁶⁸ the Fourth Geneva Convention does not do the same for protected persons in an occupied territory, and complete equality cannot be expected between the residents of the Occupying Power back in its own territory and the population of the occupied territory. The human rights principle of non-discrimination will, however, remain pertinent to the manner in which health services are provided within the occupied territory. The principle may therefore be relevant to situations such as those in which a civilian population from the Occupying Power is living in the occupied territory (e.g. the Israeli settlers) and has access to a higher level of health care than their local neighbours.⁶⁹

The source of human rights obligations

While there is considerable support for asserting the duty of occupying powers to abide by international human rights law, a question may still be asked as to the source of the precise obligations. Namely, which human rights obligations are we speaking of: those which the occupier is bound to uphold based on its own treaty ratifications, or those of the state that it is occupying? Applying those accepted by the occupier might be seen as enforcing a set of international principles upon the population of a state that did not agree to them. Conversely, basing the obligations on those of the occupied state might place the occupier in a position of being bound by obligations to which it had not itself agreed. In fact, there are arguments to the effect that the suggested solution is not a straightforward reliance on either of these alone, but a combination of both.

First, however, it should be noted that, although the source of the treaty obligations must be further identified, there is not the same obstacle for customary international law. Fundamental rights such as the right to life, freedom from arbitrary detention, and the prohibition of torture will bind all states under customary international law.⁷⁰ Accordingly, regardless of the treaties to which the

on Economic, Social and Cultural Rights), Forty-second session, 2 July 2009, E/C.12/GC/20; Committee on Economic, Social and Cultural Rights, 'General Comment no. 14', above note 60, paras. 12(b), 18–19.

68 GC IV, Art. 38.

69 See Israel High Court of Justice, 168/91 *Morcu v. Minister of Defence*, and the requirement of non-discrimination with regard to distribution of gas masks to both settlers and the Palestinian population.

70 Bertrand Ramcharan 'The concepts and dimensions of the right to life', in Bertrand Ramcharan (ed.), *The Right to Life in International Law*, Martinus Nijhoff, Dordrecht, 1985, pp. 1–32; W. Paul Gormley, 'The right to life and the rule of non-derogability: peremptory norms of *jus cogens*', in *ibid.*, pp. 120–159; International Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Anto Furundzija*, IT-95-17/1, Trial Chamber, Judgment of 10 December 1998, paras. 153–157; ECtHR, *Al-Adsani v. The United Kingdom*, Application No. 35763/97, Judgment of 21 November 2001, paras. 60–61; Richard B. Lillich, 'The growing importance of customary international human rights law', in *Georgia Journal of International and Comparative Law*, Vol. 25, No. 1, pp. 5–6; Restatement (Third) of the Foreign Relations Law of the United

Occupying Power and occupied state are party, the occupier will be bound by all human rights obligations that are part of customary international law.

As for the treaty obligations, where both the occupier and the occupied are party to the same treaties, there is less of a difficulty. In examining alleged human rights violations by Uganda in the Democratic Republic of the Congo (DRC), the ICJ determined the applicability of a number of instruments, including the International Covenant on Civil and Political Rights (ICCPR), and noted that both states were party.⁷¹ However, not all instances of occupation involve two states equally bound by the same human rights treaties. In such a situation, a number of cases support the principle of holding the occupier to the standards to which it is bound by its own treaty obligations. The *Al-Skeini* case centres upon the obligations of the UK under the ECHR – clearly not a convention to which Iraq was party. The UK, recognized as being in occupation of parts of Iraqi territory, was held to standards appearing in its own human rights treaty obligations.⁷² Likewise, in numerous cases before international bodies dealing with the Israeli occupation of Palestinian territory, Israel was required to abide by the human rights obligations created by the treaties to which it was party. The ICJ held that Israel's obligations under the ICCPR, the ICESCR, and the Convention on the Rights of the Child were all applicable to its actions as an Occupying Power in the West Bank.⁷³ UN human rights treaty bodies – such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights – have likewise determined Israel's treaty obligations to be applicable within the Occupied Palestinian Territories.⁷⁴ This approach demonstrates the notion underlying extraterritorial applicability: that the basic premise of human rights as a safeguard for human dignity and a tool for protecting all individuals from abuse of power remains applicable to the actions of a state, whether acting on its sovereign territory or elsewhere.

Nonetheless, the human rights obligations of the occupied state also remain of relevance to situations of occupation. In fact, the law of occupation may necessitate the observance, by the Occupying Power, of certain human rights obligations to which the occupied state is party. The first reason for this stems from the requirement to uphold domestic law: if the law of the land includes the incorporation of international human rights standards taken upon itself by the occupied state, the Occupying Power must not act in contravention to them.⁷⁵ That being said, as seen in the earlier discussion there may be reason to distinguish between not taking direct action that impedes rights and finding an obligation actively to fulfil certain rights. Principles of continuity of obligations and

States, section 702, 1987 (referring to 'prolonged arbitrary detention'); Human Rights Committee, 'General Comment no. 24: issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant', Fifty-second session, 4 November 1994, UN Doc. CCPR/C/21/Rev.1/Add.6, para. 8.

71 ICJ, *DRC v. Uganda*, above note 3, paras. 217, 219.

72 ECtHR, *Al-Skeini*, above note 9.

73 ICJ, *Wall case*, above note 3, paras. 102–113.

74 Committee on Economic, Social and Cultural Rights, 'Concluding observation: Israel'; above note 3; *Concluding observations of the Human Rights Committee: Israel*, CCPR/C/ISR/CO/3, 3 September 2010.

75 Hague Regulations, Art. 43.

non-regression could provide a further argument for preserving those rights guaranteed to the population through the original obligations of the occupied state. The UN Human Rights Committee, in General Comment 26, held the following:

The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.⁷⁶

One may question whether an Occupying Power is an exception to this notion, since it is a temporary authority rather than a change of government. But, so long as it provides the *de facto* government of the territory, the idea that the rights are vested with the people in the territory may place the obligation to protect these rights on the shoulders of the Occupying Power. Additional support for this approach, this time in the context of economic, social, and cultural rights, can be found in the presumption against deliberate retrogressive measures.⁷⁷

This notion will clearly be a debatable proposition, as it appears to imply the imposition of international obligations on a third party without its consent.⁷⁸ It is not argued here, however, that the Occupying Power becomes bound directly by the international treaties ratified by the state whose territory it is occupying. Rather, it is a question of whether these obligations arise by osmosis through the domestic legislation in force in the occupied territory, and via the IHL obligations in relation to this domestic law. Moreover, as noted above, while this might require the Occupying Power to refrain from acting in contravention of domestic law and the international human rights elements contained therein, it would not necessarily entail an obligation to take extensive measures of actively fulfilling these laws.

Ultimately, this question of the treaty source of human rights obligations will, for a number of reasons, often remain a question of theory with relatively little impact in practice: many of the fundamental rights will apply through customary international law; the widespread ratification of treaties makes it likely that the Occupying Power and the occupied state will be party to the same instruments; when they are not the same, certain recent cases before international bodies have relied upon the international human rights law treaty obligations of the Occupying Power, in circumstances when these in fact placed obligations from instruments to which the occupied state/territory was not party.⁷⁹ In other words, determining the

76 Human Rights Committee, 'General Comment no. 26: continuity of obligations', 8 December 1997, CCPR/C/21/Rev.1/Add.8/Rev.1, para. 4.

77 Committee on Economic, Social and Cultural Rights, 'General Comment no. 3', above note 64, para. 9.

78 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 8 ILM 679, entered into force 27 January 1980, Art. 34.

79 See the above discussion of the UK in Iraq under the ECHR, and the cases covering the Israeli occupation of the Palestinian Territories.

source of obligation would not present a serious obstacle if the less controversial source of treaty obligations resulted in an ostensibly higher level of human rights protection. Finally, the earlier discussion of context must be recalled here. Whether applying the human rights obligations of the Occupying Power itself or those that were in place in the occupied state, the legal and practical context of occupation may affect the substantive content of these rights and their implementation.

Conclusion

That international human rights law may be applicable during military occupation should not, by now, be a surprising conclusion. Although controversies remain over the full extent of circumstances in which human rights obligations apply extraterritorially, and the modalities of concurrent applicability of IHL and human rights law continue to be debated, there is now a weight of opinion and cases to support applicability of human rights law in military occupation. Moreover, the prevailing approach points to the full spectrum of human rights obligations being applicable when a state exercises territorial control, a criterion argued here to be inherent in the definition of occupation. However, such a conclusion risks placing impractical – perhaps even impossible – demands upon the Occupying Power. Clearly, situations of occupation may involve volatile circumstances far removed from the possible tranquillity within a state's own territory. While the Occupying Power will always be required to act to the best of its ability, the circumstances – legal and factual – of each case will affect its capabilities in dispatching its duties. This article has argued that, although the full applicability of international human rights law can be presumed in military occupation, the precise requirements necessary to fulfil the obligations, and any assessment of whether they have been adhered to, must proceed based on a contextual approach.