Military Occupation and Human Rights Protection

Klaudia Hraníková Pyteľová [1]

[1] Faculty of International Relations, University of Economics in Bratislava
Bratislava – Czech Republic

Abstract— **The aim of the paper is to generally outline the relationship between the law of armed conflict and human rights protection, and thus the usability of the human rights standards in the military occupation. The paper provides an analysis of the application of relevant legislation and will aim to explore complementarity, compatibility and possible exceptions to the applicability of those standards. Finally, the paper aims to identify practical and legal loopholes in the implementation of the human rights commitments and options for addressing these international legal problems.**

Index Terms—**military occupation, human rights obligations, law of armed conflicts, international humanitarian law, occupying power.**

I. INTRODUCTION

In international law, the term occupation is used in two meanings. In the case of initial occupation, it is the acquisition of a legal title to a certain territory, which must, however, fulfill the characteristics of terra nullius (territories which have never been subject to the sovereignty of any state). The second concept of occupation forms part of the law of armed conflicts and international humanitarian law. Based on this concept of military occupation, it can be understood as the situation when an alien state exercises effective control over the whole or part of the state territory, without any legal title (sovereignty), without the consent of the domestic sovereign state.

International humanitarian law (IHL) can be defined as "a set of international rules of contractual and custom based origin whose specific task is to address humanitarian problems arising directly from armed conflicts, whether international or domestic, to restrict, for humanitarian reasons, the right of the conflict parties to use means and ways of leading the war, and to protect individuals and objects if they are or could be affected by conflict" (Ondrej at. all, 2010, p. 7). In a broader sense, one can be talking about "a set of international arrangements, written and customary, that ensure respect for and full development of the individual" (Ondrej at. all, 2010, p.7). International humanitarian law and international human rights law are similar branches of international law, which supplement each other. International human rights law (IHRL) is a "set of legal rules of a contractual or customary nature that provides certain rights and freedoms for individuals and their groups" (Ondrej at all, 2010, p.20)

IHL and IHRL began to develop separately and at different times. At present, their fillings are overlapping. The main purpose of both branches is protection of individuals but the protection is not identical. IHL protects people during armed conflicts, on the other hand, IHRL provides rights and freedoms to all individuals because they are human beings (Icrc.org, 2003, p.1).

In recent decades, international human rights law has been developed through universal and regional contractual instruments, whereas there are emerging hard law and ius cogens legal norms and it cannot be forgotten, than the IHRL has the increased impact on the law of armed conflicts in general, and in the context of this paper on the right of military occupation.

II. MILITARY OCCUPATION, OCCUPATION LAW, AND OCCUPATION POWER

The legal provisions on occupation can be found in various international treaties, in the so-called Hague law of 1907 (The Hague Law contains the rules governing war - sets out the rights and obligations of the parties to the conflict during the conduct of military operations. The outcome of the first Hague Conference (1899) was the adoption of three agreements: the Convention for the Pacific Settlement of International Disputes, Convention with respect to the Laws and Customs of War on Land and Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864.

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Corresponding author's e-mail: klaudiapytelova@hotmail.com

At the second Hague Conference (1907), 13 conventions were adopted), the Fourth Geneva Convention of 1949 (Ihl-databases.icrc.org, 2018) or the First Additional Protocol of 1977 (Ihl-databases.icrc.org, 1977), as well as international customary law, soft law instruments and the UN Security Council resolutions (e.g. in the UN Security Council resolutions on the occupation of Kuwait by Iraq). Article 42 of the Hague Convention (IV) respecting the Laws and Customs of War on Land defines occupation as follows: 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" (Ihl-databases.icrc.org, 1907). The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949) refers in Article 2 to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance" (Ihl-databases.icrc.org, 1949). Based on the authoritative interpretation of the International Committee of the Red Cross to the provision, it can be said that it applies to all cases of occupation even without declaration of war and/or hostile military manifestation and/or direct aggression. As a result, it is irrelevant whether the territory is occupied by the illegal use of force in international law or not, but the fact of the occupation as a legal regime is essential." Occupation is therefore a matter of fact based on the assertion of authority and control over the territory" (Chinkin, 2009, p. 198). Thus, the term "control" can be used to define two different interpretative approaches in this case. Based on the first approach - the occupation situation occurs whenever the party to the conflict is carrying out a certain level of authority or authority within a foreign territory. The second approach is more restrictive, it claims that the occupation situation exists if only one party to the conflict is in a position to exercise sufficient authority over the foreign territory, and is able to fulfill all obligations in the context of the occupation law.

The so called occupational law as a sub-section of international humanitarian law and the law of armed conflicts regulates the partial or total occupation of the territory by the hostile army. Roberts describes occupational law as liberal on one hand, because it is accepting that the occupying party has the power to exercise certain authority and, on the other hand, it is restricting by imposing limits on the exercise of those powers (Roberts, 1985). The basic aim of occupational law is to provide minimum humanitarian standards and protection for civilians. Agreements concluded between the occupying power and local authorities cannot deprive the population of the occupied territory of the protection afforded by international humanitarian law, and protected persons cannot waive their rights.

The occupying party does not gain sovereignty over the occupied territory (at any moment of the occupation), and at the same time it is obliged to respect the existing legal system and thus the legal norms and institutions in the occupied territory. At the same time, it is assumed that the occupation will be only temporary, and that the occupying power will maintain the status quo ante in the occupied territory. The role of the occupying power is ultimately an effort to balance between its own security needs and interests, on one hand, and obligations towards the local population on the other. The primary commitments include ensuring the protection and welfare of civilians. These include, in particular, the duty to ensure humane treatment and to satisfy the basic needs of the local population, to respect private property, to ensure the functioning of educational establishments, to ensure the functioning of health services and to enable humanitarian activities, particularly the International Committee of the Red Cross.

As has already been mentioned, the occupation does not lead to the transition of sovereignty and this situation is not characterized by permanency. These are two fundamental features of occupation. These principles stem from a number of international instruments, one of which is the UN Charter or the United Nations General Assembly Declaration on Friendly Relations and Cooperation between States. The aforementioned declaration reads as follows:

- the state territory must not be subject to military occupation as a result of the use of force which is contrary to the provisions of the UN Charter,
- State territory may not be acquired by another State on the grounds of use or threat by force and,
- no acquisition of state territory through use or threat of force may be recognized as legal (Assembly, 2018).

III. MILITARY OCCUPATION IN THE LIGHT OF INTERNATIONAL HUMANITARIAN LAW STANDARDS

Obligations of the occupying party derive from the Hague Conventions and the Fourth Geneva Convention (in particular from Articles 47-78). The Hague Conventions generally refer to the "occupied territories", while the Geneva Convention defines protected persons in Article 4 as those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals (Ihl-databases.icrc.org, 1949). Article 47 of the Geneva Convention provides that Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory (Ihl-databases.icrc.org, 1949). As a result, it must be noted that although the occupying power does not regain sovereignty over the territory, it acquires administrative rights. Under Article 43 of the Hague Convention, the Occupant is required to take all measures to restore and ensure public order and security, within the limits of his powers, and to the fullest extent possible, in compliance with the applicable law in the country. However, the article also contains the phrase "unless absolutely prevented", that is, this codified doctrine provides that the Occupational Interim Administration must

respect the legal order of the Occupied Territory in the extent and manner in which it existed prior to the invasion unless it is absolutely prevented. The Fourth Geneva Convention in Article 64 also uses a similar approach, under which the Occupying Power is not permitted to introduce full-scale changes or to intervene into the legal order or the division of state territory (Ihl-databases.icrc.org, 1949). The reason is to maintain the legal status until the authority of legal, legitimate and sovereign governance over the territory is restored, and this authority will be entitled to make changes. But it can be said that under certain circumstances, the occupying power may suspend or defer the effect of the local legal system. This circumstance is (usually) to ensure the security of its administration over the territory or the protection of its own armed forces. At the same time, however, the occupying power must ensure public order and security for the population of the occupied territory and, to that purpose, ensure effective administrative administration, but distinct from its own legal regime.

Additionally, the obligations of the occupying power are providing legal protection for the civil and political rights of the population in the occupied territory, including procedural safeguards in relation to judicial proceedings. Article 46 of the Hague Convention requires the occupier to respect family honor and rights, the lives of persons, private property, religious conviction and practice. A further clause can be added, namely Article 27 of the Fourth Geneva Convention, according to which Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. Positive commitments include provision of education (Ihl-databases.icrc.org, 1949, art. 50), food and medical supplies (Ihl-databases.icrc.org, 1949, Art. 55) to the civilian population of the occupied territories, maintenance of medical and hospital facilities (Ihl-databases.icrc.org, 1949, Art. 56), distribution of books and articles for religious needs (Ihl-databases.icrc.org, 1949, Art. 58). The prohibition includes the prohibition of collective punishment (Ihl-databases.icrc.org, 1949, Art. 33), the ban on the use of the economy or natural resources in favor of the occupying power, and the prohibition to deport or to transfer groups of the occupant's domestic population to the occupied territory (Ihl-databases.icrc.org, 1949, Art. 49). The Hague Convention forbids the occupying power to make permanent changes to the occupied territory, except as a result of military needs in the strict sense of the word or if it is done for the benefit of the local population. Population changes due to the arrival of "settlers" are also prohibited under the Hague law.

As the occupation does not come to pass the sovereignty, the occupier cannot demand the promise of temporary loyalty from the population of the occupied territory (Ihl-databases.icrc.org, 1907, Art. 45), and the people cannot be convicted for the "war treason" if they commit acts of hostility against the occupying power. The occupier cannot compel the population of the occupied territories to perform certain types of acts, such as providing information about the armed forces of the other belligerent, or about its means and ways of defense (Ihl-databases.icrc.org, 1907, Art. 44), or forcing "protected persons to serve in their armed or auxiliary forces" or to exert pressure to ensure or "to undertake any work which would involve them in the obligation of taking part in military operations" (Ihl-databases.icrc.org, 1949). In an event that the occupant orders some of the aforementioned actions, the individuals may refuse. On the other hand, the occupying power may amend legal norms and laws to maintain order and ensure its own security, and therefore may also take action against a person who denies it. In the context of Article 68 of the Fourth Geneva Convention, the occupant may, in certain circumstances, also act against protected persons. It is to be noted that "the inhabitants of the occupied territories have no obligation of obedience to the occupant, but the occupying power is allowed to enforce obedience on the basis of orders and changes made in accordance with the provisions of the Hague Convention and the Fourth Geneva Convention" (Bothe, 2012).

IV. Military Occupation and International Human Rights Law (IHRL)

In 1975, Jean Pictet emphasized that humanitarian law is only valid in the case of armed conflict, while human rights are in principle applicable at a time of peace (Pictet, 1975, p.15). The distinction between war and peace law is thus based on the lex specialis/lex generalis relationship and therefore depends on the existence of an armed conflict. It can be said that the common feature of both is the need to promote respect for human beings and human dignity and to protect against abuse by states.

At present, given the nature of lex generalis of international human rights law, the IHRL is applicable in all circumstances, both in time of peace and in time of war. IHRL can therefore be defined as a set of general and universal legal norms governing vertical legal relations with the state (s), on one hand, and individuals under its (their) jurisdiction, on the other. It is a generally recognized fact that international human rights law is applicable in parallel with international humanitarian law on the situation of armed conflict and occupation. What remains less clear is the relationship between IHRL and IHL in the occupied territory.

The law of armed conflicts, such as the lex specialis, thus contains (or should contain) legal norms which take precedence over certain protective human rights provisions. Thus, if the law of armed conflicts regulates a particular situation regarding the status of civilians otherwise, there is a legal arrangement incompatible with the legal regime contained in the IHRL, then this conflict of legal rules should generally be resolved in favor of the special arrangement established by the law of armed conflicts (or IHL).

Another (traditional) difference between IHL and IHRL is the human application scope. The main purpose of the IHL is to protect persons who are not, or are no longer, directly involved in combat actions (non-combatants and excluded from combat operations). IHL primarily protects the civilian population, and at the same time combats hors de combat – for example the injured, sick, dead-runners or prisoners of war. IHRL applies to all persons within the jurisdiction of the State. Unlike the IHL, IHRL does not distinguish individuals from combatants and

civilians and does not provide protection for only a certain category of "protected persons".

On the other hand, it should be noted that the situation of military occupation is different from the situation of armed conflict. The distinction is that the occupier controls the occupied territory, there are no major military operations in the occupied zone, a certain minimum extent of order and security is reconstituted, and civil life is also restored to some extent. Occupational law, by its very nature, "resembles" the law of peace, even though it forms part of the law of armed conflicts. As a result, military occupation is often a "between time" between war and peace between the occupier and the occupied. It can be said that the military occupation is governed by a dual legal regime based on the double nature of the legal norms that govern it (both war and peace standards). This stems from the fact that the right of occupation regulates two types of relations. In the first place (because it is a public international law), it is a state-state relationship, that is, an occupying power and an occupied state, a horizontal interstate relationship governed by the rules of the law of armed conflicts. The second relationship is the relationship between the occupying power and the civilian population of the occupied state, which is a vertical (essentially) national relationship, characterized by the legal rules of the peace law.

As the sovereignty over the occupied territory does not go beyond the occupying power, the application of the human-law obligations by the occupier requires acceptance of the claim that the human-law treaties have an extraterritorial effect (Chinkin, 2009). However, this effect is not explicitly defined in any UN-registered human rights treaty. On one hand, in certain situations, it is possible to confirm the extra-territoriality of human-law obligations, on the other hand, in some circumstances, extra-territorial application is unclear and raises (at least) various expert and scientific debates. But it should be noted that the occupying power in the occupied territory must respect international human rights law. This statement was confirmed by the decisions of the relevant authorities, including the International Court of Justice. The International Court of Justice (ICJ), in its advisory opinion on the case of the Law of Nuclear Weapons, stated as follows: the protection of the International Covenant on Civil and Political Rights does not end in times of war, with the exception of interventions in the context of Article 4 of the Covenant, which makes it possible to derogate from certain provisions in a state of emergency in the State. Respect for the right to life, however, does not fall within the scope of derogating provisions. In principle, the right is not arbitrarily deprived of life also applies to warfare.

This wording was also used in the further advisory opinion of the Legality of the Security Wall, in which the ICJ defined three different positions (groups of affairs). According to this version, some issues fall exclusively within the framework of international humanitarian law, others in international human rights law, and there are also situations that can be managed by both legal branches. The ICJ did not, however, define how it should be made to determine the group to which the situation is to be classified.

European case law has, in several judgments, addressed the question of the extra-territorial applicability of fundamental human rights. For example the European Court of Human Rights (ECHR) uses the term "state agency authority and control" and, in the case of Al-Skeini vs. The UK (Case Of Al-Skeini And Others V. The United Kingdom, [2011]) explains this as follows: It is clear that at any time the State, through its agents, exercises control and authority over individuals and therefore the jurisdiction, then the State is required, in accordance with Article 1 (The European Convention of Human Rights), to ensure the applicability of individual rights and freedoms in the context of Title I (Case Of Al-Skeini And Others V. The United Kingdom, [2011], p.137) that are relevant to the situation of a specific individual.

The European Court of Human Rights has also introduced a second concept, namely "effective control over an area", in which it refers to the situation where "due to a legal or illegal military action - the State Party performs effective control of areas outside its national territory" (Case Of Al-Skeini And Others V. The United Kingdom, [2011], p.138). The ECHR also defined a distinction between the two concepts in that the "State Agent Authority" combined with the commitments only in relation to rights that are relevant to the situation of a specific individual while the second term: the controlling State has responsibility under Article 1 for securing, within the areas under its control, the absolute scope of the material rights provided for in the Convention and the Protocols it has ratified - the controlling State will be responsible for any violation of these rights (Case Of Al-Skeini And Others V. The United Kingdom, [2011] and Case of Cyprus v. Turkey, [2001]).

V. Conclusion

International humanitarian law and international human rights law are mutually complementary sub-sections of international law that have (in principle) the same objective. IHL and IHRL protect the lives, health and dignity of individuals, albeit from different perspectives. Both components, e.g. include a ban on torture or cruel treatment, a ban on discrimination, or provisions for the protection of women and children. At the same time, however, it must be noted that there are also significant differences between them (origin, scope, institutions implementing them, etc.). In the context of military occupation, an essential distinctive feature is their extra-territorial reach. The fact that IHL is applied extraterritorially is not a controversial issue, unlike IHRL's extraterritorial application, considering that - its purpose is to regulate the behavior of one or more states involved in an armed conflict in the territory of another state. The understanding that IHRL is applied extraterritorial is based, in particular, on the decisions of regional and international courts. Anyway, the fact that IHRL can be applicable during military occupation is not a controversial conclusion. The controversy remains within IHRL's applicability in an extraterritorial way and in terms of the competing applicability of IHL and IHRL. In the context of the relationship between occupying law and IHRL, more questions remain than responses, as it is the penetration of two

different legal regimes, both of which are needed to regulate various aspects of military occupation.

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