The Right to Work Obligations of an Occupying Power

The Challenge of the Mode of Applicability of Human Rights and Humanitarian Law

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Abstract

Whereas it is no longer a concern whether international human rights law (IHRL) is applicable during an armed conflict, the mode of applicability represents a challenge, particularly in view of the potentially limiting doctrine of lex specialis. The article argues that IHRL provisions on the right to work can contribute positively to the rather scarce provisions on the same right in occupation law. The inherent clash between the applicability of IHRL and international humanitarian law (IHL) lies in the conservative and resistant to change nature of occupation law, on the one hand, and progressive and dynamic economic, social and cultural rights (ESCR), on the other. The author examines the extent to which the domestic law of an occupied territory may be changed during occupation to be in line with the IHL requirements while, at the same time, fulfilling the duties in line with the IHRL obligations. A genuine necessity test is offered as the solution. The author contends that no uniform answer exists and that each case should be analysed separately, taking into account that any change in law should first be absolutely necessary and that, secondly, it should reflect the best interests of the occupied inhabitants. Examples will be drawn from the cases of Occupied Palestinian Territories and Iraq.

Keywords: right to work, right to employment, military occupation, lex specialis, concurrent application, rights during armed conflict.

1 Introduction

The application of certain economic, social and cultural rights[1] as right to food or right to health during an occupation is clearer in the provisions of both international human rights law (IHRL) and international humanitarian law (IHL)

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1 By "economic, social and cultural rights" the author implies the rights as outlined in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

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than the right to work. The right to work is essential as it is one of the conditions for maintaining a dignified life, and it relates to other fundamental rights. In the report of the Special Rapporteur on the Right to Food in Occupied Palestinian Territories, for instance, it has been noted that the right to food is not fulfilled because people have no access to employment, which, in turn, has significantly increased the numbers of malnourished people.[2]

This article examines the scope of the right to work from both IHRL and IHL perspectives and also considers the tension between the two sets of legal regimes. The question of whether the concurrent applicability affects the substance of the right is examined, and it is found that the only appropriate approach is "a case-by-case basis analys[is] of specific rules",[3] which in turn should be governed by the application of the principle of necessity and the best interests of the population concerned. This issue is particularly relevant in view of the possibility that an occupier will carry out structural transformations in the occupied state without the consent of the population concerned, justifying this interference with the fulfilment of international obligations.[4] The risk of abuse is intensified when it comes to economic, social and cultural rights, as this area is "sometimes imprecise and open to irregular interpretations".[5] It is argued that if human rights norms require a change of internal legislation, this has to be done for the benefit of the local population.

To analyse the mode of applicability of the right to work during occupation, the article first provides a background on some of the concepts analysed in the given work, such as what is meant by an "occupied territory" and the relationship between IHL and IHRL. Next, the right to work as provided by IHRL is examined, followed by the right to work under IHL analysis. Finally, a more detailed juxtaposition of the legal regimes, the specific challenges of the mode of applicability, and the specificity of the nature of occupation are discussed.

2 Background

For a territory to be considered occupied, there is a requirement that it is "actually placed under the authority of the hostile army".[6] The preliminary scope of the argument that human rights law is applicable during armed conflicts is no longer a question; rather, the "interrelation of the rules" should be examined.[7] There is a difference between "mode of application" and "applicability" of international human rights law,[8] with the latter not being disputed owing to the

2 Ziegler 2003.
3 Vite 2008, p. 636.
4 Ibid.
5 Ibid.
6 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Annex to the Convention Regulations Respecting the Laws and Custom of War on Land ("Hague Regulations") Art. 42.
7 Vite 2008, p. 630.
8 Lubell 2012, p. 317.

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three decisions on the issue by the International Court of Justice (ICJ)[9] and the UN practice. The "mode of applicability" represents a challenge as no uniform way of applying both bodies of law exists, and it should depend on the practical and legal circumstances of each case.[10]

The ICJ outlined three possibilities of the relationship between IHRL and IHL:

> some right may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.[11]

According to the ICJ, when both IHL and IHRL are applicable, IHL is the *lex specialis*.[12] This essentially implies that IHL, constituting a more specific and precise set of rules, prevails over the general, i.e. IHRL. However, the nature of the relationship is still unclear, specifically in regard to whether *lex specialis* means "only that the special prevails over the general, or whether it means that the former actually displaces the latter".[13] It has been shown that the regimes may both apply at the same time, and it is possible that one may fill in the gaps of another.[14] As noted by Hampson, there is

> a vertical relationship between the general and special. The general is at the bottom and is the default position. The special is a subdivision of the general and above it. One general regime may give rise to several special regimes.[15]

The occupying power is bound by human rights law because international human rights law still applies during an armed conflict. One clear illustration of that would be Article 4 of the International Covenant on Civil and Political Rights (ICCPR), which states that human rights are applicable during times of emergency. General Commentary to Article 4 of the ICCPR states that an armed conflict constitutes a state of emergency, as the life of the nation is under a threat. Although no single accepted definition of armed conflict exists, various sources would point to intensity and protracted violence, which would bring it within the scope of the state of emergency. Occupation, with the various forms it takes, is considered to fall within the category of armed conflict and, therefore, state of emergency when human rights are applicable. Most treaties provide that

9 International Court of Justice ("ICJ"), *Legality or Threat of Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para 25 ("Nuclear Weapons Case"); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para 106 ("Wall"); *Case Concerning Armed Activity on the Territory of the Congo*, Judgment of 19 December 2005, paras 216-220.

10 Lubell 2012, p. 317.

11 ICJ, *Wall*, para 106.

12 ICJ, *Nuclear Weapons Case*, ICJ, *Wall*.

13 Hampson 2008, p. 558.

14 Ibid.

15 Ibid.

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the territorial scope of human rights obligations expands over the areas of jurisdiction, where the occupying power exercises effective control.[16] The occupying power is responsible for upholding human rights because it has effective control over the territory or the individual. The national authorities of occupied territories cannot be held accountable because they can only have "lesser initiatives" and because they lost effective control over the territory and individual.[17] Although certain inconsistencies exist[18] when choosing an approach of either "control over territory" or control over persons,[19] it is generally accepted that the two approaches apply. The obligations of the occupying power extend extraterritorially to the occupied territory.

The obligations of an occupying power can arise out of treaties and custom, which an occupying power is a party to. At the same time, a different set of obligations may arise out of the law of the occupied territory. This issue was partly resolved by the ICJ in its *Wall* decision stating that Israel is bound by all the treaties it is a party to: the ICCPR,[20] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[21] the UN Convention on the Right of the Child.[22] It can be further stated that the occupying power is bound by the provisions of the occupied state by virtue of the law of occupation, which states that the occupied power shall uphold and respect the existing domestic law.[23] The principle of continuity of obligations, as has been identified by the Human Rights Committee, provides that the rights guaranteed under the ICCPR:

> belong to the people living in the territory of a State party, and 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 changes in administration of that territory.[24]

Having looked at the nature of obligations of the occupying power, and having introduced the concept of *lex specialis*, let us now consider how right to work is outlined in IHRL and IHL.

16 Benvenisti 2012, p. 14.
17 Horowitz 2004, p. 274.
18 In *Al-Skeini and others v. UK*, App.no.55721/07, The European Court of Human Rights used elements of both approaches at the same time as quoted in Lubell 2012, p. 320.
19 Hampson 2008, p. 558.
20 International Covenant on Civil and Political Rights, 999 UNTS 171 (ICCPR).
21 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (ICESCR).
22 ICJ, *Wall*, para 106.
23 Art. 43 Hague Regulations.
24 Human Rights Committee, *Concluding Observations of the Human Rights Committee on Kosovo* (Republic of Serbia), para 4. UN Doc.CCPR/C/UNK/CO/1 (14 August 2006).

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3 Right to Work Under International Human Rights Law

Labour rights are considered to be the most elaborate ESC rights.[25] ESC rights are "still underdeveloped" because of "an absence of coherent conceptualization that would allow for a clarification of their content, corresponding obligations of states and ways of implementation".[26] The lack of conceptualization and delimitation of the scope of the obligation of the right to employment is manifested in the fact that ESCR ought to be realized progressively, which represents some confusion with respect to the nature of the state's obligations.[27] The situation with the difficulty to outline right to work obligations becomes even more complex when it comes to occupation. One of the problems with the implementation of the right to work during occupation is that occupation is essentially an emergency regime, and the right to work is considered by many to be a "right of comparable importance"[28] even in peacetime.

The right to work encompasses a wide variety of rights: "employment-related rights; employment derivative rights; equality of treatment and non-discrimination rights; and instrumental rights."[29] The right to work is mentioned in very many international human rights treaties and regional mechanisms; the ICESCR has three articles, which deal with the right to work: Article 6 is about right to work in general; Article 7 is about an "individual dimension" of the right to work and provides for just and favourable conditions of work; and Article 8 involves a collective dimension of the right to work and provides for the right to form and join trade unions. Although there is no obligation on the state party to guarantee and provide for everyone under its jurisdiction with the employment per se, the right to work is an essential right because it relates to right to life, right to family, right to food, right to health, right to social security. Employment is one of the preconditions of a dignified life: "Every individual has the right to be able to work, allowing him or her to live in dignity."[30]

The problem of implementation of the right to work can be generally explained by the reluctance of states to implement it because of "the alleged deterioration of competitiveness of commodities".[31] Trade protectionist measures that states apply involve not accepting labour from the developing countries and a race to the bottom in order to make their economies more competitive by giving up on human rights commitments. Right to work is one of the rights that is affected the most by globalization and trade policies.[32] Armed

25 Drzewicki 2001, p. 225.
26 Ibid.
27 Horowitz 2004, p. 274.
28 Siegel (1998) Globalization and Economic, Social and Cultural Rights. Statement by the Committee on Economic, Social and Cultural Rights, May 1998, UN Doc E/C.12/1998/SR.49 and E/C.12/1998/SR. 50, p. 25.
29 Ibid.
30 UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment 18: The Right to Work, E/C.12/GC/18, 24 November 2005, para. 1.
31 Drzewicki 2001, p. 225.
32 Siegel 1998, p. 25.

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conflict and trade embargoes adversely affect the local labour market during occupation.

3.1 Core Duties with Respect to Right to Work

The fact that ESC rights are subject to progressive realization does not imply that the obligation is deprived of a meaningful content; on the contrary, the obligations are concrete and continuing "to move as expeditiously and effectively as possible" towards the full realization of the right.[33] During periods of occupation the occupying power cannot "refer to [the] temporary nature of their presence" as an excuse for not fulfilling human rights.[34] The "core obligations", or the obligations that are "inherently self-executing", shall be implemented as soon as the occupying power has effective control over the territory.[35] The core obligations with respect to the right to work do not imply that the state must guarantee employment to every single person but rather that a state must "carry out policies, strategies, and programmes that advance full employment".[36]

Article 2.2 of ICESCR provides for "progressive realization" of rights in the Covenant, giving sufficient flexibility, which is important during times of occupation.[37] After the occupation, much of the infrastructure is destroyed, practical obstacles to the implementation of human rights exist, but it is still the time when the core obligations must be fulfilled.[38] Once the instability is over, the occupying power has more obligations towards the ESC rights, which go beyond the fulfilment of the core aspects of the given rights.[39] Core obligations are cost free and immediate in their nature and are not subject to progressive realization, as they demonstrate the state's commitment to implement ESC rights, even with little or no resources. Core obligations can be formulated both in a negative and in a positive manner. The negative core obligations would be non-interference with one's right to ESC rights, non-discrimination in the provision of rights and so on. The positive obligation would include having a plan of realization of the right, having indexes to measure the implementation and so on. The core obligations are considered to be a "middle ground" in terms of practical implications for the occupying power, as the "all or nothing" obligations on the occupying power will end with "impractical all" or "a legal vacuum nothing".[40] The core obligations with regard to the right to employment may be viewed as too high a threshold owing to the aforementioned perceived obligation of "comparable importance" that right to employment poses.

33 Vite 2008, p. 633.
34 Ibid.
35 Vite 2008, p. 633.
36 Siegel 1998, p. 32.
37 Vite 2008, p. 632.
38 Ibid.
39 Ibid.
40 Lubell 2012.

The IHRL can contribute[41] to occupation law provisions by, for example, "the concretization of minimum rules applicable at all times (core) and the identification of rules which have to be enforced progressively".[42] The core obligations are found not only in the ICESCR and its general comments, but also, as numerous studies suggest,[43] in "a total of eight ILO conventions, those concerning freedom of association, prohibition of forced labour, discrimination in employment, equal remuneration, employment policy, and minimum age for employment".[44] The contribution of human rights law is not "of merely normative character".[45] When it comes to progressive realization, the ESC rights

> complement the law of occupation, which remains general when it comes to defining a long-term normative framework. That contribution is all the more helpful when the occupation tends to stabilize and persist.[46]

Non-discrimination in access to employment, as has already been mentioned, is an example of a core obligation.[47] For example, in the second decade of the occupation, Palestinians from the Occupied Territories were considered a source of "cheap labour for the Israeli economy" and a "market for Israeli products".[48] The wages paid to Palestinian workers are considerably lower than those paid to Israeli workers, amounting to a clear violation of the core aspect of the right to employment, as even the progressive realization of the right implies the absence of discrimination.[49] Not only does an observable difference in wages exists, but, furthermore, Palestinians do not benefit from the deductions made to their salaries. The workers employed by Israel are subjected to the same deductions from their wages, which amount to approximately 20% of the net profit.[50] The deduction fund is used for Israelis to pay for social benefits, which Palestinians do not receive despite their contribution to it.[51] The deduction of funds received from Palestinians is used for the military government budget and the Treasury of Israel.[52] The paradox (which again highlights the importance of (re)considering the mode of applicability of IHL and IHRL) is that this treatment would *not* be

41 It is not always the case that human rights law is more specific with respect to ESC rights, e.g. provisions on property are better regulated in IHL, as it is "a more detailed normative system comprising rules". Vite 2008, p. 643.
42 Vite 2008, p. 638.
43 As suggested, e.g., by the Netherlands National Advisory Council for Development Co-Operation, in Siegel 1998, p. 28.
44 Siegel 1998, p. 29.
45 Vite 2008, p. 640.
46 Ibid.
47 Siegel 1998, para 31(a)(b).
48 Hiltermann 1992, p. 317.
49 Awartani 1992, p. 404.
50 Ibid.
51 Hiltermann 1992, p. 317.
52 Awartani 1992, p. 404.

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considered a violation of IHL. The GC IV, for instance,[53] differentiates between aliens and inhabitants of the occupied territories, and it can be argued that "complete equality cannot be expected between the residents of the Occupying Power back in its own territory and the population of the occupied territory".[54] An example would be the UK occupation of Iraq and the fact that it would be unrealistic to expect the UK National Health System to be extended to Iraq.[55] Would the discriminatory practice of Israel, with regard to wages, amount to a violation of the core obligation of non-discrimination, if the same treatment were not required with respect to the population of the occupying power and inhabitants of the occupied territories? The provisions on non-discrimination still "remain pertinent to the manner" in which the right is provided within the occupied territory.[56] Here we see a clash between the two regimes: whereas the discrimination in the provision of ESC rights is forbidden by IHRL even when the obligations are realized progressively, IHL allows for such discrimination in certain instances. It is also necessary to draw on the difference between the two occupation regimes: that of Israel and that of the UK in Iraq. Israeli's occupation, long-term presence and resettlement of their population in Palestinian territories has been happening for, arguably, more than half a century, when all of the Israeli administration is present in the Occupied Territories; whereas the UK occupation of Iraq is the case of extraterritorial application of human rights law, when only a part of the UK administration is located on the territory of Iraq. Comparing the obligations with respect to right to employment in these cases would require one to clearly understand the nature of the occupation. It would be logical to argue that Israel has a higher burden when it comes to progressive realization of ESC rights, owing to the long-term occupation, which practically aims to "absorb" and completely take over the occupying territory and population (analysis of the legality of these policies falls outside the scope of this article).

3.2 Respect, Protect, Fulfil

The right to work can be reflected in the tripartite level of obligations: respect, protect, fulfil. The obligation of the occupying power can in most cases be characterized as a cost-free negative obligation to *respect* the right to work, which means "refraining from denying or limiting equal access to decent work for all persons".[57] In the case of Israel, e.g., curfews, closures and the permit system do not allow many Palestinians to access their land for agriculture and to return to their places of employment,[58] and this constitutes a violation of the right to work. The negative obligation or "duty to respect" aspect of the right to work is violated in the Israeli-Palestinian conflict owing to the construction of the Wall,

53 Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949; 75 UNTS 287, ("GC IV").
54 Lubell 2012, p. 334.
55 Ibid.
56 Ibid.
57 Siegel 1998, para 23.
58 Ziegler 2003, p. 20.

which physically obstructs Palestinians from accessing employment.[59] The right to access employment, especially for disadvantaged and marginalized individuals and groups, so they can "live a life of dignity"[60] is a core right, an obligation of an immediate character. The obligation to *protect* means the adoption of appropriate legislation to make sure that third parties do not interfere with the right, or, in other words, that privatization or flexibility of labour markets does not adversely affect the right to work and that the legislation prohibits forced labour by non-state parties.[61]

The obligation to *fulfil* the right to work includes recognizing the right to work in the local legislation and adopting a national policy and employment policy to stimulate "economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment".[62] The measures and resources ought to be allocated to decreasing unemployment rates.[63] The obligation to fulfil involves, in most cases, an obligation of a long-term character, which might be problematic during occupation because of the occupation's inherently temporary character. This long-term obligation is a core obligation of creating and implementing a national employment strategy and plan of action.[64] The obligation to fulfil allows an occupying power "often exceed those normally permitted under occupation law".[65] Here we clearly see a clash between the norms: those of international human rights law and those of international humanitarian law, with, on the one hand, having the former demand greater protection for residents of occupied territories, and with the latter, highlighting normatively the non-permanent nature of the occupation, and thus, implying that the situation under occupation should not last for a prolonged period. The obligation to fulfil also includes an obligation to monitor and combat, through benchmarks and statistics, and disaggregated data among different groups in society. Devising employment strategies and policies to minimize unemployment is an example of the obligation to fulfil.

4 The Right to Work Under International Humanitarian Law

4.1 Article 43 of the Hague Regulations and Article 64 of the GC IV

The obligation imposed on an occupying power with regard to the right to work can be derived from Article 43 of the Hague Regulations and Article 64 of the GC IV. These two articles should be viewed together, and one is a continuation of

59 Ibid.
60 Siegel 1998, para 31(a).
61 Ibid., para 25.
62 ILO No. 122, Art. 1, para 1.
63 Siegel 1998, para 26.
64 Ibid., para 31(c).
65 The ICRC Experts Meeting – Occupation and other Forms of Administration of Foreign Territory, March 2012, https://www.icrc.org/en/publication/4094-occupation-and-other-forms-administration-foreign-territory-expert-meeting, accessed 9 February 2022, p. 87.

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another.[66] Article 43 of the Hague Regulations is recognized as reflecting international customary law[67] and is a "mini-constitution for the occupation administration", which serves as an umbrella for other more detailed provisions.[68] It reflects the "inherent conflict of interests that exists between occupant and occupied".[69] Article 43 imposes dual obligations on the state: (*i*) a positive obligation of "restoring and ensuring" "public order and safety" and (*ii*) an obligation of omission of "respecting the laws in force" in the occupied territories.[70] The drafting history of this article shows that these were originally two separate articles, joined together later.[71] Therefore, "the beginning must not be superimposed on the ending, or vice a versa: the limitation on the legislative power is independent of the duty to restore and ensure public order and safety".[72] Both the obligations are not absolute. The obligations should be performed "as far as possible" and "unless absolutely prevented".[73] The word "absolutely" is not "as absolute as [it] sounds" and should be interpreted in terms of its necessity, derived either from "the legitimate interests of the occupant or from the concern for the civilian population".[74]

It is claimed that Article 43 of the Hague Regulations is "ill-fitted for the complex issues of modern occupation" but in reality the article is misinterpreted.[75] The misinterpretation can be explained by the discrepancies between the English and French versions of translation. In French, being the original text, the phrase has a broader meaning "l'ordre et la vie public", which is left out in the English translation of "order and safety", which the occupying power should guarantee.[76] The word "safety" not only has not been mentioned in the French version but also does not show the significance of the meaning of "la vie public", which includes "the entire social and commercial life of the community".[77] The French version is even more significant as it provides greater protection, and humanity, the guiding principle of IHL, always leans towards the greater protection for people.[78]

Article 64 of the GC IV is more "precise, albeit less restrictive" than Article 43 of the Hague Regulations[79] and introduces not only an innovative element into occupation law but also enables "the occupant to achieve the aims of the GC IV,

66 Ibid.
67 The International Military Tribunal in Nuremberg, *The Trial of the Major War Criminals*, pp. 253-254 (1947).
68 Benvenisti 2012, p. 69.
69 Ibid.
70 Dinstein 2009, pp. 90-91.
71 Dinstein 1978, p. 111.
72 Ibid.
73 Dinstein 2009, p .91.
74 Dinstein 1978, p. 112.
75 Dinstein 2009, pp. 89-90.
76 Ibid.
77 Ibid.
78 ICRC Experts Meeting 2012, p. 56.
79 Sassòli 2005, p. 670.

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and thus represents a departure from Article 43".[80] The question of whether or not an occupying power can make changes to non-penal legislation was answered by the Pictet Commentary, specifying that the occupying power

> may promulgate provisions required for the application of the Convention in accordance with the obligations imposed on it by the latter in a number of spheres: child welfare, labour, food, hygiene and public health and etc.[81]

Article 64 of the GC IV takes the obligation further and clarifies Article 43, stating that the modifications to internal law can be made under three objectives: "(*i*) to implement international humanitarian law; (*ii*) to maintain the orderly government of the territory and (*iii*) to ensure the security of the occupying power and the local administration."[82]

Article 43 should be "interpreted broadly" so that the occupying power can "fulfil its duties under occupation law, in particular the administration of the occupied territory for the benefit of the local population, while ensuring the security of its own armed forces".[83] The contemporary application of the IHL principles suggests that occupying powers take an "interventionist approach and are involved in almost all aspects of life in the occupied territories",[84] and "the role of an occupying power could no longer be regarded as that of a disinterested invader but rather as that of a full-fledged administrator".[85]

4.2 Specific Articles on the Right to Work in GC IV

Articles 51 and 52 are the only specific articles dealing with labour rights in the Fourth Geneva Convention that are applicable during occupation. They talk largely about IHL-specific provisions as enlistment and requisitioning of services of the population of an occupied territory. The Pictet Commentary differentiates between the two types of requisitioning of service: military service and civilian work. More can be drawn in terms of greater protection of working conditions from Article 51(3) of GC IV, which provides for

> protected persons whose work may be requisitioned are entitled to the continued application of local laws concerning working conditions and safeguards (wages, hours of work, equipment, preliminary training and compensation for occupational accidents and diseases).[86]

80 Benvenisti 2012, p. 102.
81 The ICRC Commentary on Geneva Convention IV (1958) http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=3981B00761618CEEC12563CD0051BDEC. Accessed 10 June 2013, p. 335.
82 Vite 2008, p. 635.
83 ICRC Experts Meeting 2012, p. 80.
84 Siegel 1998, p. 56.
85 Ibid., p. 57.
86 Yutaka 2009, p. 356.

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Article 51(3) allows an occupied power to compel adult civilians to work "either for the needs of the army of occupation, or for the public utility services, or for feeding, sheltering, clothing, transportation or health of the population of the occupied country". This provision is very much at odds with human rights obligations, as in human rights there is a prohibition of compulsory labour. It can be claimed that Articles 51 and 52 of the GC IV are considered *lex specialis* to human rights law. The prohibition on forced or compulsory labour in human rights law is not absolute. Article 8(3) is not listed as a non-derogable right under Article 4 of the Covenant on Civil and Political Rights. Furthermore, Article 8 (3) (iii) of the ICCPR states that "any service exacted in cases of emergency or calamity threatening the life or well-being of the community" is not considered, for the purposes of the article, forced or compulsory labour.[87] Even though ICCPR allows for derogation and limitations on the prohibition of forced labour during an emergency, the ICESCR does not contain any provisions on derogation. It is claimed that states can derogate from the ICESCR during an armed conflict as the treaty "does not have provisions to the contrary".[88] The absence of any provisions on derogation does not mean that derogations are allowed; the best guidance in this case would be Article 2 of the ICESCR on the nature of state obligations. It is also claimed that despite the absence of provisions on derogation, non-core obligations are derogable during an emergency.[89] Occupation is a state of emergency, which can last for a rather long time, and the suspension of non-core obligations for a long time would undermine important obligations placed on the occupying power by both IHL and IHRL. Therefore, the proposition that the core obligations are valid during the early stage of occupation but that they extend once the situation stabilizes is compatible with the international obligations.

Article 6 (1) of the ICESCR "recognizes the right to work, which includes the right of everyone to the opportunity to gain his living by work which *he freely chooses or accepts*".[90] Free choice or acceptance of work contradicts Article 51 of the GC IV provisions, which allows an occupied power to compel civilians to work, and thus Articles 6 and 2 (which does not have a provision on derogation) of the ICESCR conflict with Article 51 of the GC IV and Article 8(3) of the ICCPR. This conflict of certain human rights norms, not only with occupation law, but also with other provisions of human rights law itself, is an interesting phenomenon, because there is usually a tension purely between the application of human rights law and the law of occupation.

It cannot be claimed that the right to freely choose place of work is absolute in the ESC rights either; although the state is required to take steps to immediately achieve goals set in the ICESCR, the steps should be taken "to the maximum available resources", and compulsory labour is allowed under GC IV because of public necessity caused by emergency and lack of resources. There is

87 There are similar provisions in regional treaties: European Convention of Human Rights, Art. 4(3)(c); Inter American Convention of Human Rights, Art. 6(3)(c).

88 Dennis 2005, p. 140.

89 Ibid.

90 Emphasis added.

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another hypothesis that prohibition of forced labour is considered to be a core right, because it is contained in major human rights treaties and "ha[s] strongest claim to the status of customary international law".[91] Prohibition of forced labour was also claimed to be a core right by the Organisation for Economic Co-operation and Development (OECD) in a study in 1996, which supports its view by the important role of this right as claimed by the Declaration of World Summit, international human rights covenants and as it is proclaimed in 1998 Declaration on Fundamental Principles and Rights at Work, which shall be respected by all members of the International Labour Organisation (ILO).[92]

A provision concerning employment is that "it is forbidden to take any measures calculated to cause unemployment or restricting employment opportunities so as to induce workers in an occupied territory to work for the occupying power", as provided in GC IV 52(2).[93] The modern armies are mostly "self-contained and therefore [are] much less dependent than they were on the services of the population of occupied territory".[94] As for "the work necessary for the public utility services", it largely means "water, gas and electricity services, transport, health and similar services" and "telegraphic and telephone services" as well.[95] The Commentary claims that the requisitioning of services is necessary for the maintenance of public order and is therefore in line with Article 43 of Hague Regulations.

Compulsory labour in times of emergency is permitted under both IHL and IHRL subject to certain limitations. Article 6 of the GC IV considers Article 51 to be applicable even one year after "the general close of military operations", given that the occupying power exercises functions of government over the territory, which raises concerns as to the temporary character of compulsory labour in Article 51. There is an inconsistency with the fact that Article 6 considers Article 51 to be the one applicable in the long term after the seizure of military operations, given the fact that the compulsory labour is a temporary measure and can put the inhabitants of occupied land in a vulnerable position in cases when the occupation lasts significantly long. On the other hand, Articles 51 and 52, which deal specifically with employment, do not expire in cases of prolonged occupation by virtue of provisions of Article 6 of the GC IV, unlike, for example, the provisions of duties of the occupying power to maintain and create educational institutions.

These articles focus on questions of "forced labour, requisitioning of services, and more generally the issue of protected persons working at the behest of the occupying power", thus providing "little attention with regard to the right to work outside these circumstances".[96] The Commentary explicitly mentions that the provisions of Article 51 do "not mean that working conditions must remain

91 Siegel 1998, p. 29.
92 Ibid., p. 31.
93 Yutaka 2009, p. 356.
94 ICRC GC IV Commentary 1958, p. 291.
95 Ibid.
96 Lubell 2012, p. 331.

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unchanged throughout the period of occupation".[97] The Commentary further clarifies, as suggested by the International Labour Organization, its guarantee to protected people of "valuable humanitarian and social safeguards":[98]

> The Diplomatic Conference recognized, on the contrary, that labour laws would probably be modified from time to time during the occupation and that wages, in particular, would be liable to vary if prices increased to any appreciable extent; the Conference considered that provision had been made for this contingency by the reference to the "legislation in force" in the occupied territory.[99] This interpretation of Article 51 conflicts with Article 43 of the Hague Regulations, which provides for the continuity of the legal regime of the occupied territory. Given the non-static nature of the labour law, which, as pointed out by the Commentary, changes as, e.g., the amount of minimum wage changes in most countries every year, it would be appropriate to make changes to local labour legislation in compliance with IHRL standards and to reflect the economic realities of the occupied territory.

5 Problems with Concurrent Application

5.1 Operationalizing the Concurrent Application

The right to work places an obligation on the occupying power "to devise development strategies that would bind the occupation territory's economy for a long time".[100] Occupation law, in contrast, is resistant to change because of its inherently conservative nature.[101] The aim of Article 43 of the Hague Regulations is "to maintain the institutional and legal structures pending a decision on the future status [of] the territory concerned", setting "a limit to the realization of economic, social and cultural rights".[102]

The question is what kind of changes need to be done in order to meet an occupying power's obligations with regard to employment and at the same time by "avoiding the suspension or modification of existing laws?"[103] Vite argues that whenever it is possible to change local legislation to bring them in line with international human rights law requirements, the occupying power can, or is even required to, do so: "from human rights perspective this would not be interference but assistance".[104] The ICJ, in its *Wall* decision, ruled that "the Israel, as the occupying power, is obliged to uphold the provisions of the Covenant in the exercise of the powers available to it on this basis".[105] It has been done in practice as well; e.g., the Coalition Provisional Authority has made changes to the labour

97 ICRC GC IV Commentary 1958.
98 Ibid.
99 Ibid.
100 ICRC Experts Meeting 2012, p. 66.
101 Ibid.
102 Ibid., p. 67.
103 Dinstein 2009, p. 91.
104 Horowitz 2004, p. 273.
105 Ibid., p. 275.

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code in Iraq to fulfil its obligations under ILO Conventions 138 and 182 to "take affirmative steps towards eliminating child labour".[106] The "litmus test" for "a genuine necessity for each new piece of legislation" by an occupying power would be seeing whether the proposed change in the law is existent in a parallel provision of legislation of the occupying power as well.[107] Parallel, in this case, "does not mean identical".[108] Importantly, this could be only a *prima facie* test, as the social and economic conditions of an occupying country and occupied territory may differ.[109] An example of the incompatibility of this test would be introducing labour laws to benefit the occupied state's inhabitants, but this may be driven by a motive to deprive the local economy of its competitive advantage, such as cheap labour.[110] This example raises concerns within IHRL as well, as it represents a tension between such principles as the right to development (including economic well-being of the country in general) and the individual rights of workers to an adequate standard of living. The example provided cannot immediately reject the test suggested by Dinstein, as the imposition of more favourable working conditions, including a higher and adequate minimum wage, despite depriving the market of its competitive advantage, should still be upheld in certain circumstances to guarantee an appropriate level of living for the population. The changes in the law should reflect the needs of the occupied inhabitants and avoid a "wholesale duplication of legislation", which could potentially amount to "a *de facto* annexation" of the occupied state.[111]

The concept *lex specialis* is "potentially limiting the content of the human rights obligations an Occupying Power has".[112] Since according to the ruling of the ICJ the IHL is *lex specialis* in situations of armed conflict, it shall be given prior attention.[113] In making this decision, the Court still reaffirmed the applicability of the human rights law during armed conflict, which can be deduced from the provision in Article 4 of the ICCPR for derogation of certain rights during war.

The rules of IHL are often less specific and even limited and do not cover the right to work to the same extent as IHRL does: "occupation law remained too general for defining long-term normative framework", and, therefore, "the complementarity contribution made by human rights" is necessary.[114] The situation is even more so with regard to employment, where occupation law provides little guidance, but there still is, although not entirely complete, a comprehensive normative framework with regard to employment in IHRL. For example, the right to form and join trade unions is not at all reflected in IHL. It is argued that the occupying power is under an obligation to protect freedom of

106 ICRC Experts Meeting 2012, p. 65.
107 Dinstein 2009, p. 121.
108 Ibid.
109 Benvenisti 2012, p. 93.
110 Ibid.
111 Ibid.
112 Horowitz 2004, p. 238.
113 *Nuclear Weapons Case*, para 25.
114 Horowitz 2004, p. 273.

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association and freedom to form trade unions because this right is claimed to represent customary international law.[115] Again, the right is not absolute but subject to restrictions in case there are demands of military necessity and public order. Moreover, most safeguards with regard to human rights protection in IHL focus on civil and political rights but do not adequately address ESC rights, although both are important because of the long-term implications that ESC rights have.[116]

The solution to the problems relating to concurrent applicability of IHRL and IHL is to reflect the provisions of IHRL in IHL commentary or restatement of law as "the occupier's obligations are not limited to the minimum defined by international humanitarian law".[117] The occupation of Iraq, in 2003, "revived occupation law from its slumber", highlighting tensions and challenges and, at the same time, the importance of applicability of IHRL during occupation.[118] For IHRL to "breathe new life"[119] into occupation law, "further detail is needed to instruct how exactly they are permitted to make the two operate simultaneously".[120]

5.2 Lex specialis and Typology of Occupation

Lex specialis fails to take into account different types of occupation. Although there is no typological division of different occupation types in the law of armed conflict, the context of occupation does matter. One could see that the implications of applying the *lex specialis* doctrine to the cases of belligerent occupation (for which the occupation law was originally drafted), as opposed to, e.g., "humanitarian" occupation, are different. It can be argued that *lex specialis* does not consider the fact that occupation is a typological phenomenon and that different types of occupation might require different legal regimes.

Similar issues arise for the case of the occupation of Iraq: the occupying power (or, in this case, powers) were faced with the dilemma of either adhering to the law of occupation, which was restricted in its nature, or to following the requirements of the UN mandate, i.e., nation-building and restoration of rule of law on the territory, which requires human rights law to be "aggressively" applied, as well as taking a proactive stance on the mobilization of "economic initiatives".[121] The *jus ad bellum* aspect of the dubious law-wise Operation Iraqi Freedom is not considered here.[122] This situation represents a dilemma between the interests of occupying power in welfare of the Iraqi population (which often do not reflect the needs of the population), on the one hand, and occupation law,

115 As reflected in ILO 1998 Declaration on Fundamental Principles and Rights at Work, and Art. 23(4) of the Universal Declaration of Human Rights (GA Res. 217A(III)).
116 Lubell 2005, p. 751.
117 Benvenisti 2012, p. 29.
118 Ibid.
119 Ibid.
120 Horowitz 2004, p. 276.
121 Scheffer 2003, p. 844.
122 Ibid., p. 843.

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on the other.[123] The lesson that can be drawn is that every case is unique, as the specificity of the Iraqi's case is the support of the Security Council and a clear agenda for restoring the damage inflicted by the military operation (as can be read implicitly) and the previous authoritarian regime.

Another agenda, which is not so hidden but morally dubious, of the given operation was the oil-for-food programme, and it can be portrayed that the welfare basket was provided in return for the expropriated resources (the fairness and moral implications of the given "exchange" represent yet another topic for consideration).[124] Some parties would even like to label the given operation as peacekeeping, or *jus post bellum*, rather than occupation. "Humanitarian" occupation typologically represents a rather interesting phenomenon as there is neither legal definition nor acceptance of humanitarian intervention in international law. "Humanitarian" occupation might enter the dangerous ground of mixing *jus in bello* and *jus ad bellum*, the two branches of law, which should be kept separate. One should not bring the arguments from *jus ad bellum* to the occupation law, as occupation law is blind to the rationales and motivations behind the occupation, considering any occupation regime illegal and temporary.

6 Conclusion

As is evident from the foregoing analysis, the teleological nature of the approach, which advocates adherence to the legal regime, providing for better protection of civilians,[125] might clash with the pragmatic nature of the law of armed conflict. The given approach might raise a myriad of questions in the spirit of the Hart-Fuller debate and whether the law, which is (more) morally right, should be applicable at the expense of the positivist adherence to the legal principles (and the need to adhere to the ICJ's reading of the mode of applicability principle). The mode of applicability of IHRL and IHL, can also reiterate the debate of humanity over prudence and practicality, as both the given dimensions constitute a foundation of IHL, whereas it can be argued that IHRL consists only of the humanity aspect. Analogously, "'the complementarity' between analytic, historical, and moral enterprises in legal theory is more complex, and of greater intellectual interest' than the strict positivism approach contents".[126] Furthermore, "the conceptual analysis shall be contextualized", i.e. the issue of complementarity or exclusivity of the different legal regimes should be resolved depending on the context.[127] The given approach to the *lex specialis* doctrine can be considered in line with what Jeremy Wardon labelled as "normative positivism" – i.e., strict adherence to the legal norms in light of the contextual underpinnings.[128]

123 Scheffer 2003, p. 845.
124 Scheffer 2003, p. 846.
125 Prud'homme 2007, p. 358.
126 Lacey 2008, p. 1062.
127 Lacey 2008, p. 1062.
128 Lacey 2008, p. 1062.

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The scope of obligations differs with different stages of occupation, and occupier's obligations increase during prolonged occupation: "The interrelation of the two bodies of laws during periods of occupation cannot therefore be construed by resorting to a sole principle which could be applied systematically."[129] The challenges relating to the concurrent application of IHL and IHRL with respect to the right to work during occupation should be evaluated on a case-by-case basis, taking into account the needs of the inhabitants and the legitimate interests of the occupying power. One should also consider the broader interpretation of Article 43 of the Hague Regulations, the original text of which presupposes extensive protection of public life during occupation. Core obligations with regard to right to work should be upheld at all times. Due attention needs to be given to ESC rights, and not only to the ones that are easily identifiable but also to the contested ones, as right to employment.

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129 Vite 2008, p. 651.

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