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The Future of Extraterritorial Jurisdiction in the International Law of Occupation: The Co-Application of International Humanitarian Law and Human Rights Law

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Abstract: Traditionally, the understanding of the *lex generalis/lex specialis* dynamic of international human rights law (HRL) and international humanitarian law (IHL) has rendered the branches mutually exclusive. This paper argues for the convergence of these branches during military occupation, as it is a special situation within armed conflict in which the occupying force asserts effective control over a territory and is thus temporarily responsible for protecting and respecting the human rights of the civilians within the foreign territory which are now under its jurisdiction. Through examination of evolving jurisprudence, this paper seeks to outline the beginning of what may evolve into the joint application of the branches within *jus cogens.* Our guiding research question is: how do people access human rights while living under occupation?

Despite a generally purported universality of human rights, the application of human rights instruments during armed conflict and occupation is a point of controversy within the international community. Human rights treaty bodies have outlined the possibility of states to derogate from

obligations to protect and respect human rights in exceptional circumstances, including during a state of public emergency which threatens the life of the nation, [1] which has often been extended to mean all situations of armed conflict or war. So it seems that the universality of human rights is limited in a state's ability to derogate from its obligations, and as such the state's right to derogate must also be limited in the name of the universality of human rights. Within situations of armed conflict, military occupation in particular brings to question the scope of a state's human rights obligations because of the very nature of occupation as "midway between war and peace." [2] Human rights law, the law of peace, is inherently relevant and arguably applicable to military occupation because the occupying power is expected to facilitate "the resumption of civilian life and the establishment of a particular legal relationship between the occupying army and the civilian population." [3]

A military occupation occurs when a territory is "placed under the authority of [a] hostile army," and it extends "only to the territory where such authority has been established and exercised."[4] An occupation, by law, is a temporary situation that does not give the occupying power sovereignty over the occupied territory. The law of occupation requires the occupying power to maintain safety and order and provide protection for the population against abuses by the state. In this respect, occupation law resembles the law of peace, "while remaining a branch of the law of war."[5] Although traditionally separate branches, international humanitarian law (IHL) and human rights law (HRL), share in common a concern for the principles of humanity and human dignity. IHL and HRL were not formed *ex nihilo*; "they both sprang from the same meta-juridical requirements: the need to promote respect for human beings and their dignity in order to shield them from abuse by states."[6]

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[1] The International Convention on Civil and Political Rights art. 4, Dec. 16, 1966, 5 I.L.M. 368; 999 U.N.T.S. 171, available at: http://www2.ohchr.org/english/law/ccpr.htm.
[2] Danio Campanelli, *The law of military occupation put to the test of human rights law*, 90 International Review of the Red Cross 871 (2008), 654.
[3] Ibid.
[4] Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 42, Oct. 18, 1907, 1 Bevans 230; 1 AJIL 103, [hereinafter referred to as the Hague Convention IV] available at: http://www.icrc.org/ihl.nsf/b0d5f4c1fb8102041256739003e6366/01d426 b0086089 bec12563cd0 516887.
[5] Id. at 2, 660.
[6] Id. at 2, 655.

The conventional division between the law of war and the law of peace is no longer plausible due to the change in the *de facto* reality of occupation, in which some people may live their entire lives under occupation, and as such may be permanently denied human rights. The law of war "no longer automatically excludes the law of peace."[7] As such, occupation necessitates the dual application of IHL and HRL in order to respect and protect the human rights of civilians within occupied territories. Some human rights may be derogated during exceptional circumstances, proportional to military need. However, as armed violence subsides, derogations must be lifted, and as long as an occupying force asserts effective control over a foreign territory, it must be held to its human rights obligations extraterritorially. Co-application will fill in gaps in IHL, influence the application of IHL, and provide guidelines for returning sovereignty to the people to bring occupation to a close. The controversy currently is not whether human rights is applicable during occupation, but rather to what degree human rights law applies and how to implement such a co-application.[8] It is not a question of substituting human rights law for occupation law, but rather a question of how these legal frameworks applied in convergence can offer increased state accountability during occupation, particularly to civilian non-combatants. People cannot access human rights under occupation unless the occupying force is held legally accountable to human rights, and therefore we propose that the accumulation of evolving jurisprudence which serves to expand the scope of jurisdiction to hold states accountable to extraterritorial application of human rights is laying the foundation for the co-application of IHL and HRL as *jus cogens*.

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[7] Dietrich Schindler qtd. in Dennis. Michel Dennis, *Application of human rights treaties extraterritorially in times of armed conflict and military occupation*, 1 Am. J. Int'l L. 99 (2005), 120.

[8] Orna Ben Naftali and Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories,* 37 Isr. L. Rev. 17 (2003); Danio Campanelli, *The Law of Military Occupation Put to the Test of Human Rights Law,* 90 Int'l Rev. Red Cross (2008); Natan Lerner, *Human Rights, Humanitarian Law and the Occupied Territories,* 10 Palestine-Isr. J. 2 (2003); Adam Roberts. *Transformative Military Occupation: Applying the Laws of War and Human Rights,* 100 Am. J. Int'l L. 580 (2006); The Advisory Opinion of the International Court of Justice on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) *ICJ Rep.*; The Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, (1996) *ICJ Rep.*; YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION (2009); EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (1993); Kenneth Watkin. *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,* 98 A.J.I.L. 1 (2004); *Case Concerning Armed Activities on the Territory of the Congo* (Congo, Uganda), 2005, 45 *ILM* 271 (2006)

This paper will outline the traditional international legal framework of occupation (I), the evolution of the nature of occupation (II), the evolution of the law of occupation (III), effective control,extraterritoriality (IV) and derogations, necessity and proportionality (V).

I. Traditional Legal Framework of the Law of Occupation

The legality of an occupation is regulated by the UN Charter and the law known as *jus ad bellum*, which concerns the justification of the use of force and determines whether a war is just or not. On the other hand, *jus in bellum* concerns the legality of the actions of the foreign power *during* armed conflict. Regardless of the legality of the occupation, the law of occupation triggers when a state has effective control of a territory and continues until one year following the general close of military occupations."[9] The law of occupation, which consists primarily of the Geneva Convention IV of 1949 and the Hague Convention IV of 1907, governs the actions of the occupying power and protects the occupied population. Occupation law falls within the category of armed conflict, and is thus traditionally situated within the branch of international humanitarian law.

IHL and HRL are separate branches of international law "with distinct modes of application."[10] Human rights law is generally understood to be relevant primarily in times of peace, drafted to govern the relationship between a state and its nationals; whereas humanitarian law is relevant in times of war, drafted to protect enemy combatants and noncombatants.[11] IHL is comprised of the Geneva Conventions (I-IV) of 1949 and the Additional Protocols (I-II) of 1977, the Hague Conventions (I-XIV) of 1907, as well as case law and customary international law. IHL is an older legal system, while HRL only dates back to the 1940s, when the Universal Declaration of Human Rights (UDHR) was drafted. The UDHR, although non-binding, provides the basis for human rights law, from which subsequent legally binding instruments have formed regionally and internationally. The International Covenant on Civil and Political

[9] The Hague Convention IV, art. 6.
[10] John Cerone, *Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations*, 39 Vand. J. Transnat'l L. 1447 (2006), 3.
[11] Michel Dennis, *Application of human rights treaties extraterritorially in times of armed conflict and military occupation*, 1 Am. J. Int'l L. 99 (2005), 119.

Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both ratified in 1966, are key international human rights instruments and are viewed in conjunction with the UDHR as the International Bill of Human Rights.[12] HRL is continually developing, with hundreds of treaties and instruments, whereas IHL is slower to develop and adapt to the *de facto* realities of the world.

Traditionally, because of the *lex generalis* character of HRL and that of IHL as *lex specialis*, the two branches of have been generally regarded as mutually exclusive. The traditional view of the *lex generalis* / *lex specialis* dynamic is that the more general human rights law is replaced by the more specific rules of humanitarian law during armed conflict.[13] This separation is reflected on an institutional level, "with the United Nations and a number of regional organizations specializing in human rights, whereas the [ICRC] specializes in humanitarian law."[14] One reason for this separation is that the International Committee of the Red Cross (ICRC) sought to maintain a sense of neutrality as a separate entity from the political organs of the United Nations (UN) and, as such, the ICRC did not approach human rights and the UN did not approach the laws of war.[15] The fact that human rights law was codified much later than humanitarian law is another reason for the traditional separation between the two branches. In the period following WWII, human rights law "was still too immature and technically undeveloped to influence the laws of armed conflict" and "its sphere of application had to be defined."[16] Now, considering the more highly evolved jurisprudence of human rights law that we have today, the changing nature of war, and the starkly different character of occupation itself, "a consensus is evolving in favor of the view that human rights law applies in full alongside humanitarian law during times of armed conflict and occupation."[17]

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[12] Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights* , 100 Am. J. Int'l L. 3, (2006), 590.
[13] See Diagram 1.
[14] Id. at 2, 653.
[15] Heike Krieger, *A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law In the ICRC Customary Law Study*, 11 JC&SL 265 (2006), 2.
[16] Ibid.
[17] Cerone, 3.

II. The Evolution of the Nature of Occupation

Traditionally, occupation involved a 'temporary custodianship' of a foreign territory in times of armed conflict, until it was either re-conquered or until peace negotiations, in which the territory would either be returned to the ousted sovereign or annexed by the occupant (hereinafter, meaning occupying power).[18] During the occupation, the occupant was responsible for maintaining order and carrying out administrative duties, but was not legally permitted to modify the institutions or political structure of the territory. This law is codified in the Hague Convention IV of 1907 and in the Geneva Convention IV of 1949. While the Fourth Geneva Convention updates the law of occupation to provide increased protections for civilian populations, it was still written to suit the traditional model of occupation.

The modern *de facto* reality of occupation is radically different from traditional occupation, in which the "new model"[19] of occupation tends to be both multilateral and transformative. A transformative occupation involves the modification or rebuilding of a territory's political, social, or cultural structure, and often takes the form of nation-building.[20] Transformative occupation is typically a long-term process, sometimes lasting more than ten years. A multilateral occupation is one that involves multiple nation-states assisting in the occupation of a territory. Multilateral occupation has become more popular because it tends to be considered more politically legitimate (than unilateral occupation) and diffuses the financial burden of nation-building. However, multilateral occupations complicate questions of accountability and attribution because multiple state actors share the role of occupant.[21]

The shift in the *de facto* reality has resulted in the law of occupation being routinely violated or blatantly ignored, which is particularly concerning since modern occupations have been seen to last for decades, comprising the entire lifetime of some occupied peoples. The traditional law of occupation does

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[18] Grant Harris, *The Era of Multilateral Occupation,* 24 Berkeley J. Int'l. L. 1 (2006), 3.
[19] Ibid.
[20] Just as occupation has evolved, the reality of nation-building has taken on a new meaning in recent years, specifically implying the institution of democracy: national-building as "the idea of invading and occupying a land afflicted by dictatorship or civil war and turning it into a democracy." James L. Payne, *Deconstructing Nation Building*, The American Conservative (2005).
[21] The occupation of Iraq is a prime of a multilateral occupation, in which access to human rights has been prohibited by the general disclamation of responsibility. See *Al-Skeini v. UK.*

not provide the necessary mechanisms to regulate transformative or multilateral occupations; it no longer fits with the reality of territorial occupations today. This potentially creates a vacuum in the law, and therefore obliges an adaptation in the law of occupation. The law of occupation was drafted to protect an older international system in which it was assumed that the states involved were governmentally functional and that there existed an ousted sovereign with a legitimate and continuing claim to power. However, the modern concept of occupation usually involves the occupation of a 'non-functional' state and the destruction or expulsion of an illegitimate or inadequate sovereign. Although it is still typically produced by armed conflict, the situation of occupation is now viewed as a tool to implement regime-change or to completely transform a country's political institutions. It has also been referred to as a tool for liberating a population by restructuring its institutions.[22]

There is a disturbing lack of evidence that this technique has any positive impact on the occupied state or on its population. Rather, it has been shown that nation-building tends to have negative or neutral effects on the occupied state. Political Scientist, James L. Payne, analyzed 51 cases since 1850 in which the U.S. and Great Britain attempted nation-building through military force. He developed a system of measuring the success of such missions, according to 'establishment of an enduring democracy' as indicated by 'numerous free and fair elections.'[23] He concluded that nation building by occupation is largely unsuccessful, as it only established lasting democracies 27% of the time, in 14 of the 51 cases he examined. However, he called for a distinction between the causal as opposed to the merely temporally conjunctive establishment of democracies after occupation, arguing that "countries are becoming democracies on their own, without any outside help" and these successful democracies may have little or nothing to do with outside military.[24] He concludes that nation-building by military force is "based on no theory, it has no proven technique or methodology."[25] Even when it appears to succeed, Payne argues that "the positive result" is more likely because of "historical evolution and local political culture than

[22] The occupation of Iraq was initially referred to as a 'liberation' of the Iraqi people from a dictator. See the *Iraq Liberation Act of 1998.*
[23] James L. Payne, *Deconstructing Nation Building*, The American Conservative (2005).
[24] Id. at 23.
[25] Ibid.

anything nation-builders might have done."[26] Without any critical concern for the inefficiency of such practices, the new model of occupation continually includes nation-building efforts.

In addition to being characterized by the intention to transform and restructure occupied territory, the new model of occupation also reflects a change in the notion of sovereignty, modifying the possible outcomes of an occupation. Within the traditional model, the legitimate ousted government still held *de jure* sovereignty over the country, even when the occupant held *de facto* sovereignty.[27] This was based on the international legal principle that sovereignty cannot be gained by military force, which is the legal basis for the prohibition of annexation. However, human rights law, particularly the right to self-determination, has been highly influential on the evolution of a new understanding of sovereignty. General Assembly Resolution 2625, adopted in 1970, forcefully declares that the international legal principle of self-determination of peoples requires "a speedy end to colonialism."[28] Instead of the government being considered the sovereign entity, sovereignty is now considered to belong to the people, in respect of their right to self-determination. This shift in the concept of sovereignty has created confusion concerning the process of ending an occupation. As Grant Harris explains, "Occupants act in a lacuna of international law because there is no body of law regulating the conditions of the devolution of sovereignty to the occupied population."[29] The principle that sovereignty belongs to the people, as opposed to it continually resting with an ousted figure, is perhaps directly related to the new mandate that occupation be transformative. In the absence of a temporarily ousted but still incorporated government body, traditional occupation law faces the modern occupant with the paradoxical responsibility of ceding sovereignty to the people while avoiding administrative reform.

To conclude, the shift in the *de facto* nature of occupation on the ground has created serious gaps and contradictions in international law. The failure of occupation law to adequately govern the new model of occupation has sensibly resulted in the juridical application of human rights law to situations of

[26] Ibid.
[27] Id. at 18, 19.
[28] GA Res. 2625 (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations), 24 October 1970, UN GAOR.
[29] Id. at 18, 21.

occupation, which should be understood as a natural cessation to the law *lex generalis*. The application of human rights in this sense represents the international community's well-merited accommodation to the change in occupation, addressing the need to protect the human dignity of those living out their lives under occupation. Furthermore, human rights law both demands and provides guidelines for the process of returning sovereignty to the people of the occupied state, supplementing the means with which occupation can be ended.

III. The Evolution of the Law of Occupation

The change in the *de facto* status of occupation has necessitated a change in the law of occupation. The argument for the co-application of humanitarian law and human rights law is largely based on the legal principle of the evolution of the law.[30] Specifically, since the international law of occupation is motivated by humanitarian concerns, its regulations should develop to reflect the status of the people it seeks to protect. "The key factor for formulating an inquiry into the legal criteria for recognizing a status of occupation seems to be the attitude of the occupied population toward the changing circumstances."[31] In other words, occupation law is rightfully evolving to protect those for whom it is most relevant. This conception of the law of occupation in terms of its effect on the inhabitants of occupied territory is itself a function of the evolution of the law. In its initial formation, the international law of occupation served specifically to protect state elites and reciprocally ensure the maintenance of their power.[32] Occupation law is founded upon the principle of the inalienability of sovereignty, originally framed in the interests of those leaders who sought to preserve their rule.[33] However, the transfer of sovereignty away from the ruling elites has resulted in the concurrent conferral

[30] "New occupations present new challenges. Some of these challenges called for more effective enforcement mechanisms… Other challenges call for *adaptation of the law to contemporary perceptions and needs.*" EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (1993) (emphasis added).
[31] Ibid., 183 (emphasis added).
[32] "In a sense, Article 43 [of IV Hague Convention of 1907] was a pact between state elites, promising reciprocal guarantees of political continuity, and thus, at least to a certain extent, rendering the decision to resort to arms less profound." Benvenisti, 29.
[33] Ibid., 6.

of its inalienability on the people. (We call this the right to self-determination). In a dialectical process, the internal regulations of the international law of occupation are evolving under the influence of and with ramifications for the evolution of international law as a whole.

The universality of human rights presents a persuasive premise for their applicability in times of occupation. Only recently has HRL gained enough weight in international law to strongly influence IHL. The entire body of international human rights law rests on the theory that human rights are indivisible and inherent. Human rights advocates would say that human rights themselves are not derived from attachment to a territory or from nationality but exist in natural law. Accordingly, the Charter of the United Nations, "*reaffirm[s]* faith in fundamental human rights, in the dignity and worth of the human person."[34] Not only are human rights understood to be 'fundamental,' but the framers also recognize them in terms of a *re*affirmation, implying that the Charter is merely acknowledging the existence of something that is already there.[35] Human rights can be understood to be prediscursive, as always already given whether or not they are explicitly acknowledged, as *lex generalis.* The derogation of human rights is governed strictly by individual treaties, and can only be merited in exceptional circumstances. The Universal Declaration of Human Rights codifies the origins of these rights in more strident language. The Declaration is predicated on the recognition of 'inherent dignity' and the 'equal' and 'inalienable rights of all members of the human family.'[36] The essential human qualities of dignity and equality provide the basis for the entitlement to human rights. Article 1 states, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[37] Human rights can be understood as a birthright; by virtue of being alive, a person is understood to have human rights and the concomitant duty to respect the rights of others.

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[34] U.N. Charter *Preamble* (emphasis added).
[35] "A State or States are not capable of creating human rights by law or by convention; they can only confirm their existence and give them protection. The role of the State is no more than declaratory." Southwest Africa Cases (Second Phase) (Ethiopia and Liberia v. South Africa), 1966 I.C.J. BASIC DOCUMENTS ON HUMAN RIGHTS (Ian Brownlee ed., Clarendon Press 1971) (Tanaka, J., dissenting). [hereinafter Tanaka].
[36] Universal Declaration of Human Rights, *Preamble*, G.A. Res. 217A (III), U.N. Doc A/810 (Dec. 10, 1948). [hereinafter UDHR].
[37] UDHR, art. 1.

Although people are widely recognized to have the right to human rights, in reality the channels of access and remedy are not absolutely guaranteed. This is particularly of issue in situations like occupation, where purely territorial attribution can leave people without access to effective remedy. However, the universality principle helps to extend the coverage of those rights on the basis of jurisdiction, including extraterritorial jurisdiction. It must be acknowledged that universality exists concurrently as a mandate and an ideal, and that by no means are human rights universally respected today. However as human rights law establishes stronger and stronger jurisprudence, universal application becomes more plausible. For the regulation of occupation, universality may be understood as a *de jure* absolute but a *de facto* ideal. In the following situation described, this principle pushes for the strict regulation of derogations and lends efficacy to the process of restoring those rights. "As hostilities subside, and security interests can permit, the occupant could be expected to restore civil and political rights. Under such circumstances, the human rights documents may well serve as guidance for reestablishing civil and political rights in the occupied territory" (Benvenisti 189). This could be taken as an acknowledgement of ceding from *lex specialis* back to *lex generalis*, implicitly facilitated by the universality principle. However, Benvenisti makes the careful qualification of casting human rights under occupation not as 'rights' per se but as 'documents' that could serve a referential purpose. Rather than affirming the application of human rights law in times of occupation or even in times of transition, Benvenisti invokes human rights as merely guiding principles. This kind of attitude may lead to an increased skepticism on the part of human rights advocates, who see convergence as a possible weakening of the universal nature of the human rights body of law.

The application of human rights extraterritorially, with the reciprocal responsibility for extraterritorial responsibility for human rights violations, has juridical precedent in international case law (although the principle itself and the degree of responsibility remains disputed). In his highly influential dissenting opinion to the South West Africa Cases (Second Phase) in 1966, Judge Tanaka writes,

> The principle of the protection of human rights is derived from the concept of man as a *person* and his relationship with society which cannot be separated from universal human nature. The existence of human

> rights does not depend on the will of a State; neither internally on its law or any other legislative measure, nor internationally on treaty or custom.[38]

The universality of human rights provides a basis for their character as actively *lex generalis*, in that they are intended to hold all the time, everywhere. Indeed, at its basis human rights theory (and therefore enforcement) logically depends on the principle of universality.

The Inter-American Commission on Human Rights has been one of the most progressive regional bodies in their broad interpretation of the applicability of HRL. In the case of *Coard v. United States*, regarding extraterritoriality, the Commission found, "[g]iven that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction."[39] This lone criteria for jurisdiction, as opposed to territorial control, represents a progression towards the universal application of human rights. And, in light of human rights in occupied territory, it is particularly significant, since jurisdiction can be established on the basis of a relatively low threshold. In the current movement towards more universal application of HRL, which certainly has yet to be realized, the question might be asked: which human rights apply when? In a finding that may be considered somewhat radical but nonetheless precedent-setting, the ICJ Advisory Opinion on the Wall does not specify any particular treaty when it states, "*international human rights instruments* are applicable 'in respect of acts done by a State in the exercise of its jurisdiction.'"[40] This finding represents the possibility that the inhabitants of occupied territory can access not only treaties viewed to be seriously binding like the ICCPR, but also the ICESCR, CEDAW, the CRC etc. The principle of the universality of human rights, which continues to be more and more recognized in international law, is an unignorable justification for the application of human rights in times of occupation.

The Elimination of Extra-Legal Space

As has been stated, the *de facto* evolution of occupation has created gaps in international law, which present the possibility of a *de facto* space that is outside the realm of the law. Occupation law

[38] Id. at 35, 471.
[39] Qtd. in Cerone, 1493.
[40] Ibid, 1477.

intends to govern short-term, non-transformative belligerent occupations, while modern occupations are rarely short-term and often aim to be transformative. The co-application of IHL and HRL serves to fill those gaps and provide further protection for those living under occupation. Eyal Benvenisti, among others, states, "Human rights documents may complement the law of occupation in specific issues that are treated in more detail in the former [HRL]." [41] This co-application operates under the legal principles of *lex specialis / lex generalis*, in which the more specific laws of occupation would take precedence when it is relevant, and proportionality, which requires that human rights be balanced with military necessity.[42]

Although IHL and HRL have traditionally been viewed as mutually exclusive branches, the movement to apply them in cooperation can be concretely traced back as early as the 1968 Teheran International Conference on Human Rights, which demanded the formal application of human rights during armed conflict and was supported by UN General Assembly resolution 2444. However, as Orna Ben-Naftali argues, "while there is no denying the distinct historical roots of these two regimes, it is equally difficult to refute that the seed that would eventually father the law of human rights was already planted in IHL."[43] Human rights as a recently evolved body of international law has only recently (within the last few decades) garnered the strength to be juridically relevant in times of armed conflict. "The law of military occupation arose with a 'human rights' purpose *ante litteram*,"[44] (before its time) and now that human rights exists as a codified set of laws, it is only fitting that the two bodies be applied in convergence. Human rights law and the law of occupation share a common set of motivations[45] but provide coverage for a divergent set of rights,[46] and thus can offer more powerful safeguards for the protection of humanity when one body is allowed to speak where the other must remain silent.

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[41] Id. at 30, 189.
[42] This balance is nothing new, in fact, humanitarian law itself is based off this concept.
[43] Id. at 30, 9.
[44] Id. at 2, 665.
[45] Gillard identifies "the greatest protection to individuals" as "the object and purpose of both international humanitarian law and human rights law" Emanuela-Chiara Gillard. *International Humanitarian Law and Extraterritorial State Conduct, in* EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 25, 36.
[46] Id. at 2, 666.

The Additional Protocol I to Geneva of 1977 represents an evolution of the law of occupation to include the application of human rights law in times of occupation. Article 72 states,

> The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.[47]

This co-application is further supported by the terminology of several of the major human rights treaties, in which the phrase "and under its jurisdiction" is used to describe the scope of application. For example, the ICCPR declares the state party responsible for the human rights of all individuals "within its territory and subject to its jurisdiction." [48] The CRC, CERD, and CAT all contain similar clauses extending their scope of beneficiaries to include individuals under the jurisdiction of the state party. An occupation, by definition, is when a foreign state has effective control over a territory, in which it exercises jurisdiction by maintaining public order and safety with the use of its military. It is only reasonable that a nation-state party to human rights treaties would be obliged to protect the human rights of both its citizens and those under its jurisdiction.

This concept stems from the connection between human rights and the state. It has been shown that the expectations that accompany an international occupation have significantly changed since the law of occupation was first drawn up in 1907, both of the occupying power and nature of occupation itself. In international military interventions, occupation is becoming "an end goal rather than a temporary byproduct," the outcomes of which directly reflect upon the legitimacy of the military action.[49] This new model of *de facto* occupation which may be long-term, multilateral, undeclared by the occupying power,[50] motivated by nation-building, characterized by a state of relative peace and an absence of everyday armed conflict, again opens up a potential legal vacuum. According to Eyal Benvenisti, "The distinction between

[47] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977.
[48] International Covenant on Civil and Political Rights, 1966.
[49] Id. at 18, 12.
[50] "The tendency to avoid the recognition of the applicability of the law of occupation is not likely to disappear." EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (1993), 6.

soldier and citizen, between private activity and wartime effort, was gradually eroded"[51] beginning with the advent of total war in the World War I era. The occupations of today can be understood as an embodiment of that eroded distinction: between the lived experience of absolute war or peace, between external control and self-determination, between occupant and occupied governmental power. In this ambiguous state of affairs (or lack of state to attend to affairs), the question of responsibility becomes paramount. If people living under occupation can be rendered effectively stateless, then they also lose access to human rights.

Human rights and the nation-state as we know them today have a shared history, originating with the French Revolution of 1789 and the Declaration on the Rights of Man and Citizen. The invention of the modern nation-state, as an alternative to monarchy, necessarily coincided with the idea of the citizen, and gave birth to citizen or human rights. The new government system based on constitutionalism (government to serve the people) concretely institutionalized the relationship between nation and citizen: "Officially such a regime would express not simply [his] class interests, but the general will of 'the people' which was in turn (a significant identification) 'the French nation'".[52] Human rights discourse can be traced back to the French revolutionary slogan "*liberté, fraternité, egalité",* which served as a founding maxim for the creation of the French nation. Indeed, it could be argued that it is only through the actualization of the idea of the nation-state that the citizen, concurrently the bearer of rights, has come to exist. The structures of human rights and the nation-state, realized during the same political-historical era, can serve to mutually legitimize each other. Traditionally, human rights have always been articulated as a responsibility of the state to its citizens, particularly when it comes to enforcement. However, the preservation of human rights as a duty of the state presents a notable conflict with another integral aspect of human rights theory, namely that they are universal: inherent to each human being.[53]

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[51] Ibid., 29.
[52] E.J. HOBSBAWM, THE AGE OF REVOLUTION: 1789-1848 59 (1962).
[53] The first sentence of the Preamble to the UDHR recognizes, "the *inherent dignity* and of the *equal and inalienable rights of all members of the human family* is the foundation of freedom, justice and peace in the world." (emphasis added). Universal Declaration of Human Rights, Dec. 10, 1948, *available at* http://www.un.org/en/documents/udhr.

If a state is only responsible for the human rights of its own citizens, situations such as occupation, in which the existence of a sovereign state is unclear, represent the very real possibility of a total loss of access to human rights. The problem is one of *attribution* and *responsibility*; if neither party is identified with having established effective control, the responsibility for upholding human rights will likely become lost in a quagmire of denial and finger-pointing. For this reason, in the case of *Cyprus v. Turkey*, the European Court goes to great lengths to attribute responsibility for the protection of human rights, even to a non-legal entity, like the TRNC.

> The obligation to disregard acts of *de facto* entities is far from absolute. Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the *de facto* authorities, including their courts; and, in the very interest of the inhabitants, the acts of these authorities related thereto cannot be simply ignored by third States or by international institutions, especially courts, including this one. To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled.[54]

This opinion directly cites the landmark precedent established by the ICJ Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, which states:

> In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages the effects of which can be ignored only to the detriment of the inhabitants of the Territory.[55]

In both of these cases, even a belligerent occupier broadly condemned by the international community (South Africa in Namibia, Turkey by proxy in northern Cyprus) is found to be responsible for the maintenance of human rights. By no means does either court imply that their decision renders the occupation at all legitimate.[56] Rather, they acknowledge that regardless of who is in power, the rights and

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[54] *Cyprus v. Turkey*. App. No. 25781/94 (Eur. Ct. H.R. May 10, 2001) *Available at* http://www.echr.coe.int/Eng/Judgments.htm. Para. 96.

[55] The Advisory Opinion of the International Court of Justice on *Legal Consequences for States of the Continued Presence of South African in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, (June 21, 1971) ICJ REP. [hereinafter ICJ Advisory Opinion on Namibia], para. 125, page 56.

[56] It should be noted that the danger of legitimizing the TRNC by stipulating the exhaustion of domestic remedy, even on a case by case basis, was quite a contentious decision on the part of the Court (ten votes to seven). In his partly dissenting opinion, Judge Marcus-Helmons councils that the requirement to exhaust domestic remedy provided by an illegal entity goes against the sensible use judicial restraint and is also contradictory the findings of the Court in *Loizidou v. Turkey*. Furthermore, he states that paragraph 125 of the ICJ Advisory Opinion on Namibia

well being of a territory's inhabitants must be prioritized. This emphasis on the quality of life of the people, as opposed to that of military personnel or government authority, is consistent with the evolution of sovereignty, which as previously, is now understood to be vested in the hands of the people and not a governing body.[57]

In addition to scholarly writing and treaty law, court jurisprudence has set precedent on the co-application of IHL and HRL. The 1996 ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons states

> The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.[58]

This confirms the premise that human rights law is always and universally applicable, and that the law of armed conflict is a short-term derogation from the default law of human rights. It further implies that the derogation from human rights must be both necessary and proportional. In regards to this court's decision, Orna Ben-Nafali states, "The practical effects of this position would thus seem to suggest that gaps in the protection of one regime, due to either derogation or inapplicability, may be bridged by the application of the other."[59]

This same view was further solidified by the 2005 ICJ case, the Democratic Congo v. Uganda, also known as the Case Concerning Armed Activities on the Territory of Uganda. In this case, the court concluded that, Uganda, as the occupying power,

> 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

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was only meant to be applied in exceptional circumstances, inasmuch as it could benefit the inhabitants (and never to their detriment). In his opinion, "requiring the inhabitants of Cyprus to exhaust domestic remedies before the "TRNC"… when… those remedies are known to be ineffective obviously constitutes an additional obstacle for the inhabitants to surmount in their legitimate desire to secure an end to the violation of a fundamental right." Although the impulse to attribute responsibility is admirable, the validation of illegal or belligerent entities must be stringently guarded against. *Cyprus v. Turkey*, Marcus-Helmons, J., dissenting, 82-86.

[57] Id. at 50, 183.

[58] The Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, (1996) *ICJ Rep.*

[59] Orna Ben Naftali and Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 Isr. L. Rev. 17 (2003), 12.

> 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.[60]

This case supports the building jurisprudence in which the occupant can be held accountable under international human rights law. According to Yoram Dinstein, this ICJ case is evidence of the growing customary law of human rights, which are "conferred on human beings wherever they are."[61] All of this suggests that there is a building consensus generated by scholars, legal thinkers, and judges who agree that the co-application of IHL and HRL is the natural legal evolution of the law of occupation, as it is necessary to eliminate the extra-legal space in IHL so that no person falls beyond the protections of international law. [62] The process of rearticulating co-application, though seemingly repetitive, represents the instant, albeit potential, generation of a customary norm in international law. The repeated invocation of co-application of the two branches in times of occupation within all of these spheres of influence can be interpreted as the progression and regression, push and pull, and eventual consolidation that involves the creation of a custom.

IV. Effective Control and Authority and Extraterritorial Jurisdiction

Questions regarding the specifics of convergence have been explored in various court systems, and the legal conversation regarding co-application is still on-going through case law. Some questions that have arisen through case law include territoriality, extraterritoriality, and effective control and authority. The cases within this section include the *Al-Skieni* case, *Cyprus v. Turkey*, and *Loizidou v. Turkey.*

Effective Control, Authority, and Decisive Influence

The oft-invoked determination of the status of an occupied territory is the principle of effective control. However, precisely how and when effective control becomes established is a controversial matter. Since the framers of the Hague Regulations did not define how effective control is to be

[60] *Case Concerning Armed Activities on the Territory of the Congo* (Congo, Uganda), 2005, 45 *ILM* 271 (2006).
[61] YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION (2009), 71.
[62] One example of such a gap is "unlawful combatants" or any individual who is declared to not be protected under Geneva.

measured, it has been left up to the adjudicatory bodies and case law to flesh out precisely when it is established.[63] One of the major precedents for a test of effective control comes from the *Loizidou v. Turkey* case in the European Court. *Loizidou* pertains to the divided island of Cyprus, the northern region of which has been a contested territory since the Civil War of 1974. With the assistance of an estimated twenty to thirty-six thousand Turkish troops, the Turkish Republic of Northern Cyprus (TRNC) was established in 1983. This administration has been roundly condemned by the international community,[64] and is only recognized by one country: Turkey. The *Loizidou* case concerned the attribution of responsibility and the Court found that

> The responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory… that the responsibility could also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control… whether it [such control] be exercised directly, through its armed forces, or through a subordinate local administration.[65]

The 'or' in the last sentence is the operative word for defining effective control. Effective control, by the measure of *Loizidou*, does not require that direct administrative control and the presence of troops exist in tandem. The existence of any one of the three possibilities (direct control, military control, administrative control) becomes grounds for the establishment of effective control. This definition has come to carry weight, since it has been retrieved in subsequent cases.[66] Moreover, even though Turkey denied responsibility for the situation in Northern Cyprus, claiming that the TRNC was the legitimate governing body, the Court found

> It is obvious from the large number of troops engaged in active duties in northern Cyprus… that her army exercises effective overall control over that part of the island. Such control… entails her responsibility for the policies and actions of the "TRNC"… Those affected by such policies or actions therefore come within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention. Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.[67]

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[63] Id. at 10, 665.
[64] See UN Security Council Resolutions 541 and 550. S.C. Res 441, U.N. Doc. S/RES/541 (Nov. 18, 1983); S.C. Res. 550, U.N. Doc. S/RES/550 (May 11, 1984).
[65] *Loizidou v. Turkey* 1996-VI Eur. Ct. H.R. 2216. Para. 52 (1996). [hereinafter *Loizidou*].
[66] For instance, *Cyprus v. Turkey* directly lifts almost all of the instant paragraph (52) and imports it into paragraph 76.
[67] *Loizidou*, para. 56.

Even though neither Turkey nor the TRNC acknowledged the situation to be an occupation, the Court attributed effective control over northern Cyprus to Turkey, and thus found Turkey to be implicated in the violation of the human rights of the applicant.

Although the *Loizidou* case is widely referenced in jurisprudence regarding effective control, various regional and international bodies maintain different tests for the conditions of its definitive establishment. Whereas the Human Rights Committee of the UN confirmed the standard of effective control in *General Comment 31: Nature of the General Legal Obligations Imposed on States Parties to the Convention* in 2004, the ICJ Advisory Opinion on the wall later utilizes a narrower standard based on the exercise of jurisdiction.[68] On the other hand, in the case of *Coard v. United States*, the IACHR established jurisdiction on the basis of 'authority and control.'[69] And, in the *Alejandre v. Cuba* case, the exercise of 'power and authority' (without any mention of control) was enough to establish extraterritorial human rights obligations.[70] In the European system, a movement of progression and regression can be observed in the creation of a standard for extraterritorial human rights obligations. *W.M. v. Denmark* (1992) employs the broader 'authority and control,' followed by the stricter standard of 'effective control' in the Cyprus cases and *Bankovic* (2001), a reversion to 'authority and control' in *Issa v. Turkey* (2004), and the creation of a new and much lower standard with the advent of 'decisive influence' or 'dependence' in *Ilascu v. Moldova* (2004).[71] The very principle of effective control (if that is what it can be called) can thus be considered an evolving continuum, rather than a fixed rule of the law. Although attribution of responsibility in times of occupation is paramount in assuring access to human rights, the principle that provides the very basis for that attribution is very much in flux.

This is perhaps a place where humanitarian law provides a more concrete understanding of the meaning of effective control.

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[68] Id. at 10, 1473.
[69] Ibid., 1479.
[70] "Following this line of reasoning any intentional infringement by a state of the rights and duties of individuals anywhere would be sufficient to bring those individuals within the jurisdiction of that state for the purpose of applying its human rights obligations." Cerone, 1480.
[71] Id. at 10, 1484-1491.

> "A situation of military occupation without effective control of the occupied territory is inconceivable, since military occupation is by definition a de facto situation characterized by effective control of the occupying power over the occupied territory… As a result, admitting the existence of a military occupation is tantamount to admitting a degree of territorial control by the occupant, which, by virtue of the definition of military occupation, satisfies the conditions of Article 1 of the ECHR." (Campanelli 665).

Although this statement might seem somewhat circular, Benvenisti's point may well render the distinction between effective control, authority, and decisive influence irrelevant. The test for what he calls 'territorial control' is quite simply any military occupation. The ICRC's *Commentary to the Fourth Geneva Convention* attests that foreign troops advancing in occupied territory are bound by the law of occupation.[72] According to this line of reasoning, the mere presence of military troops of foreign territory calls forth the law of occupation. Moreover, the ICRC does not distinguish between a legal or illegal, acknowledged or denied, invited or belligerent occupation as preconditions for application of the law of occupation.[73] The determining factor is purely the *de facto* situation on the ground, as governed by the previously described broad margin of effective or 'territorial' control. By this conception, every occupying power has effective control and is thus responsible for upholding all relevant international law. Therefore, an international occupation in which the occupant can rightfully deny responsibility for the law cannot exist. If responsibility is attributed as such, the occupying power should refer to human rights law for governance of liberties that are not expressed in humanitarian law; in other words, the application of humanitarian law and human rights law in convergence.

The Principle of Extraterritoriality

The establishment of effective control is definitively important for the application of human rights in occupied territories, since it operates as the precondition for the responsibility of extraterritorial jurisdiction. The territorial principle within human rights law asserts that states hold obligations to protect

[72]The conception of effective control in most military manuals is more restrictive. International Committee of the Red Cross. "Occupation and International Humanitarian Law" (2004), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/html/634KFC (last visited May 11, 2010).

[73] "For the applicability of the law of occupation, it makes no difference whether an occupation has received Security Council approval, what its aim is, or indeed whether it is called an "invasion", "liberation", "administration" or "occupation." As the law of occupation is primarily motivated by humanitarian considerations, it is solely the facts on the ground that determine its application." International Committee of the Red Cross. Occupation and International Humanitarian Law (2004), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/html/634KFC (last visited May 11, 2010).

and respect the rights of those within its national territory. However, case law points to "well-established exception[s]" such as "cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of that State."[74] Occupation may also be included as an exception because an occupied territory is under the authority and effective control of the occupying state.[75] The case law of international and regional courts and treaty bodies "largely supports the view that a state's obligation to respect and ensure international human rights laws outside its territorial boundaries," particularly when "a state is in control of territory outside its borders," or "the actions of a state agent bring persons or property under their direct control, for example by kidnap or detention" and in other "recognized exceptions to the territorial principle of jurisdiction generally characterized by localized state control or authority, for example embassies and vessels flying the state's flag."[76]

Human rights obligations extending beyond the territory of the state are supported not only in case law, but in international customary law as well. The US Operational Law Handbook of 2004 "clearly accepts that US forces in extraterritorial operations can be bound by customary human rights law."[77] The ICRC states that it is a principle of customary law "that human rights law 'applies in all times.'"[78]

The *Al-Skeini* case brought to the UK Court of Appeal in 2005 challenged the scope of the UK's territorial obligations to the European Convention on Human Rights (ECHR). The case concerned the deaths of six Iraqi civilians in Basra city, Iraq, in 2003-2004. Five of the civilians were shot by members of the UK armed forces in the course of patrol operations and one of the civilians was arrested and died at a UK military base. Article 1 of the ECHR calls state parties to "secure to everyone within their jurisdiction the rights and freedoms" of the convention.[79] Jurisdiction, as previously expressed, is gauged through effective control and authority of a state in a given territory. The Court determined that the UK

[74] Siobhan Wills, *The Responsibility to Protect by Peace Support Forces under International Human Rights Law,* 13 International Peacekeeping 4, (2006), 478.
[75] Noam Lubell, *Challenges in applying human rights law to armed conflict,* 87 International Review of the Red Cross 860, (2005), 740.
[76] Id. at 74, 477.
[77] Id. at 75, 741.
[78] Id. at 74, 482.
[79] The European Convention for the Protection of Human Rights and Fundamental Freedoms, *Council of Europe,* Nov. 4, 1950, ETS 5; 213 UNTS 221, [hereinafter referred to as the European Convention of Human Rights (ECHR)] available at: http://www.hri.org/docs/ECHR50.html.

did not have effective control of Basra city because the "UK possessed no executive, legislative or judicial authority in Basra other than the limited authority given to its military forces."[80] This ruling is inconsistent with the Hague Conventions, considering the definition of a military occupation is "the effectiveness of the occupation army's control, which corresponds to the factual exercise of governmental authority by the occupant."[81] Additionally, "to rule out the United Kingdom's responsibility for human rights violations" on the grounds that the UK did not have effective control, "while admitting at the same time that Britain was the occupying power of this city, is thus contradictory from the point of view of the law of military occupation."[82] However, the Court also determined that the civilian who died at a military base, which is considered analogous to an embassy or consulate, had been under the effective control of the UK during the time that the crime was committed, which allowed the UK jurisdiction to hear the case.

The ECHR has two tests for judging extraterritorial liability, the *Bankovic* and the *Issa* tests. *The Bankovic* test comes from *Bankovic v. Belgium*, a case concerning the bombing by the North Atlantic Treaty Organization (NATO) of the building Radio Televizije Srbije in Kosovo in 1999, in which 16 people were killed and 16 others seriously injured. The applicants, injured civilians and relatives of the deceased, brought the case to the ECHR, claiming that ECHR state parties had violated their human rights. The Court declared the application inadmissible because the act was outside the jurisdiction of the respondent States.[83] This case established the precedent that "a state is only subject to extraterritorial liability under the [ECHR] where it exercises 'effective authority and control' over another State's territory, which will occur only in exceptional cases."[84] The *Issa* test comes from *Issa v. Turkey*, which was a case concerning the deaths of Iraqi civilians killed in northern Iraq by Turkish Army soldiers during military operations in 1995. The Court tried to determine "beyond reasonable doubt" that the killings had taken place in a territory that was under the effective control of Turkey at the time. The Court could not

[80] *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, available at: www.bailii.org/ew/cases/EWCA/Civ/2005 /1609.html.
[81] Id. at 2, 664.
[82] Id. at 2, 665.
[83] Dirk Voorhoof, *European Court of Human Rights Case Bankovic and Others v. Belgium and Others*, 1 IRIS 3 (2002), 5, available at: http://merlin.obs.coe.int/iris/2002/1/article2.en.html.
[84] Ibid, 6.

meet the standard of proof necessary to determine that Turkey had conducted combat operations in the given area where the victims had been and as such could not determine that the victims were within the jurisdiction of Turkey, based on Article 1 of the ECHR.[85] However, this case set the precedent that "a state engaged in a short military incursion in a second State can incur extra-territorial liability if its agent commits an act on the territory of the second State, if the act in question would have amounted to a Convention violation if committed on the first State's own territory."[86]

The UK High Court used the *Bankovic* test in the case of *Al-Skeini.* The Court justified the use of the *Bankovic* test because *Bankovic* was decided by Grand Chamber of the ECHR, and the Court "took into consideration the regional nature of the Convention, the inappropriateness of applying the Convention in countries where securing the Convention rights would be impossible, and the consequent risk of 'being accused of human rights imperialism.'"[87] The UK was weary of setting a new precedent that would call for state responsibility of ECHR rights extraterritorially. The Court justified not using the *Issa* test because, "*Issa* was not…a judgment of the Grand Chamber…nor in the event did the application succeed."[88] All of these cases bring into question the glaring contradiction of the situation of occupation, as by definition the effective control and authority of one state over another, which puts the peoples of the occupied territory under the temporary jurisdiction of the occupying power, yet does not consider these peoples under the jurisdiction of the occupying power in terms of human rights obligations.

Al-Skeini is an example of the backlash against the growing jurisprudence of co-application. Although it went back and against the two cases involving Cyprus, it will not permanently prevent co-application judicially. This is an example of dialectic progress, in which for every two steps forward there is a counter step back.

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[85] Press Release issued by the Registrar, Chamber Judgment Issa and Others v. Turkey, European Commision of Human Rights, (2004), available at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm &action =html&highlight=issa&sessionid=52874623&skin=hudoc-pr-en.
[86] Id. at 83, 6.
[87] Ibid., 6.
[88] *The Queen ex parte Al-Skeini and Others v. Secretary of State for Defence*, para 124.

V. Derogations, Necessity, and Proportionality

Evolving jurisprudence shows the widespread consensus that HRL is, in fact, applicable during occupation, despite occasional setbacks like *Al-Skeini.* The next question becomes how to implement this co-application and what principles govern the co-application. The legal principles of derogation, necessity, and proportionality are examples of important governing principles of the co-application of IHL and HRL. As illustrated thus far, human rights law is always applicable, including during armed conflict, but may be derogated from in times of public emergency. Article 4(1) of the ICCPR states,

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[89]

Yoram Dinstein argues that there is a "general recognition" that war is the most extreme example of a public emergency, and suggests that the *travaux prépartoires* "unambiguously divulge that war was upper-most in the minds of the framers of the derogation clause."[90] The article explicitly states, however, that the derogation can only be justified to the "extent required by the exigencies of the situation." Although states have a wide margin of appreciation in determining what is militarily necessary, no state has unlimited power.[91] In the ICJ Advisory Opinion on the Wall, the court stated that any derogation to human rights law must meet the legal principle of necessity, which it defines as "the only way for the State to safeguard an essential interest against a grave and imminent peril."[92] The principle of necessity is further regulated by the legal principle of proportionality. The needs of the military must be balanced with the needs of the people, and the security advantage of any action must be proportional to the negative impact upon the population.[93]

The ICJ Advisory on the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory was requested by the General Assembly at the end of 2003. The request was made in

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[89] International Covenant on Civil and Political Rights.
[90] Id. at 61, 72.
[91] *Ireland v. United Kingdom* (European Court of Human Rights, 1978), 25 ECHRJD 5, 79.
[92] The Advisory Opinion of the International Court of Justice on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) 43 *ILM* 1009. [Hereinafter ICJ Advisory Opinion on the Wall].
[93] HCJ 2056/04, Beit Sourik Village Council v. Israel (June 30, 2004), 43 ILM 1099.

response to the construction of a security barrier separating Israel from occupied Palestine, which began in 2002. The security barrier, or wall, frequently crossed the "Green Line," and created incredible hardships for local Palestinian residents who resided on both sides of the wall. At the same time, the Israeli Supreme Court, sitting as the High Court of Justice, entertained a case on the same topic – the legality of the construction and the routing of the barrier. Both courts considered the legality of the wall in terms of whether, firstly, the wall was constructed out of military necessity, and furthermore, whether the negative impact on the Palestinian residents was proportional to the security achieved by the barrier. These two legal principles, necessity and proportionality, were central in the findings of both courts.

In the case of the Israeli Supreme Court, the court did acknowledge the human rights of the Palestinians but considered those rights to be protected sufficiently under IHL. The Israeli Supreme Court found that the barrier was militarily necessary, but "the Court noted that even when done out of military necessity, the wall must take into account the needs of the local population."[94] The Court, by application of the principle of proportionality, found that the portions of the barrier that crossed the "Green Line" caused disproportional harm to the Palestinians, and were thus in violation of Israeli and International law. The court stated, "The route undermines the delicate balance between the obligation of the military commander to preserve security and his obligation to provide for the needs of the local inhabitants."[95] Although the Court did not formally apply HRL, and only held Israel accountable for IHL, the judgment reflects that the Court did consider the human rights of the Palestinians in making their decision.

The ICJ made a similar conclusion, but found that the entire length of the barrier was in violation of international law. Specifically, the court found that the wall violated International Humanitarian Law, in particular, articles 46 and 52 of the Hague Regulations, and 53 of the Fourth Geneva Convention. The court also found that the wall violated Human Rights Law, in particular 17(1) and 12(1) of the ICCPR, articles 6, 7, 10, 11, 12, 13, 14 of ICESCR, and similar articles 16, 24, 27, and 28 of the CRC. Furthermore, the court found that the wall violated the Palestinians' right to access of Holy Places

[94] Id. 93.
[95] Ibid.

guaranteed in the General Armistice Agreement. The ICJ went on to acknowledge the agricultural impacts of the wall, quoting the Special Rapporteur on human rights in Palestinian territories, who said, "Much of the Palestinian land on the Israeli side of the Wall consists of fertile agricultural land and some of the most important water wells in the region…[And] many fruit and olive trees had been destroyed in the course of building the barrier."[96] The ICJ advisory opinion, in its application of HRL in Palestine, strongly supports the growing jurisprudence of co-application. Furthermore, both the Israeli Supreme Court case and the ICJ case illustrate the importance of proportionality in balancing the needs of the military and the impacts on the occupied population under belligerent occupation.

If human rights are applicable during military occupation, in conjunction with IHL, states must protect and respect not only civil and political rights, but also economic, social and cultural rights, which include the rights to "education, health, social security, food and employment" among other things.[97] While such issues may be covered under IHL, the framework offered in human rights treaties may offer greater detail of state obligation.

States that ratify regional and international human rights treaties should be responsible for respecting and protecting the rights of all those under its jurisdiction, which extends to occupied peoples during military occupation. States cannot presently be held accountable to human rights instruments of which they are not party to during military occupation. As established in the *Issa* test within the ECHR, obligations extend extraterritorially when a state has jurisdiction of a group of people outside of its national boundary and is responsible for the same human rights obligations in the occupied territory as it is in the domestic territory.

VI. Conclusions and Futuring

The application of human rights to occupation is widely recognized, although the specifics of when and how to implement co-application continues to be debated in the courts. It cannot be denied that

[96] ICJ Advisory Opinion on the Wall., 58.
[97] Id. at 75, 751.

significant resistance to co-application still exists, which reflects the reluctance of states to extend treaty obligations to occupied territories (this attitude is represented in the *Al-Skeini* case). However, as evidenced in *Cyprus v. Turkey*, *Loizidou v. Turkey*, and numerous other conclusions of international bodies, extraterritorial obligations of human rights treaties hold growing weight in regional human rights courts. The foreseeable evolution of co-application into *jus cogens* is a dialectical process of progression and regression. *Al-Skeini* is representative of the backlash against the growing legal precedent of co-application. On the other hand, the ICJ advisory Opinion on the Wall is a strong indication of this growing precedent, and the controversial nature of the case, and of this topic, is due to the far-reaching implications of the ruling.

Such implications include an overhaul of the relationship between the occupant and the occupied territory. This in turn would require a complete re-training of any troops who are stationed in occupied territory, such as Iraq. Siobhan Wills notes, "It is inexcusable to deploy troops into situations where they may find themselves responsible for extensive administrative and security tasks…without sufficient recognition (and appropriate mandate, resources and training) of their potential responsibilities under human rights law, in particular recognition that the obligations of the force are not limited to ensuring that their own conduct is of a high standard also that they may be required to secure, in so far as it is in their power to do so, the human rights of the local population."[98] To train troops in human rights law could completely undermine the current understanding of military training and combat preparation. Furthermore, co-application establishes a necessity for additional methods of legal redress for abuses committed during war. Under IHL, the occupied population does not have rights in the way that they would under HRL. Only grave breaches of humanitarian law can be legally addressed, and usually only after an armed conflict is over. With occupation, which may last decades, the application of HRL would allow individuals living in occupied territory some method of taking legal action against their occupants. Lastly, and perhaps most radically, there is the concern that the application of human rights during occupation could lead to the illegalization of occupation, in respect of the inherent human right to self-

[98] Id. at 74, 486.

determination. By defending the inherent human rights of the occupied population, it is not a far stretch to argue that occupation is inherently a violation of human rights and specifically the right of peoples to self-determination. This could allow for the prohibition of occupation for the very same reason as the prohibition of colonization. For example, in the ICJ advisory opinion on the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, the court declared that the wall violated the Palestinian people's right to self-determination; "The wall severs the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination and constitutes a violation of the legal principle prohibiting the acquisition of territory by the use of force."[99] The court also referenced the ICJ opinion on the status of South West Africa in declaring its belief in the fundamental right to development, which of course, is strongly intertwined with the right of self-determination.

Of course, co-application is not a clear-cut or simple task; it requires cross-dialogue and understanding between bodies within IHL and HRL. Some may argue that holding the occupant responsible for the protection of human rights would legitimate the occupant and normalize occupation. However, as has been discussed, holding states accountable for HRL obligations for those within their *de facto* control neither legitimizes the occupant nor pacifies the population. The desire and demand for self-determination is only stronger when the population has access to basic human rights, as no country living in terror has the power to assert its own will.

Although some scholars argue that HRL should be applied during all armed conflict, we propose the application be limited to occupation, at least for now. The conditions of occupation specifically allow for the protection of human rights in a way that is not yet as clear within all situations of armed conflict. It is possible even that formal application of human rights within armed conflict at this time would cause a weakening or dismissal of human rights. However, the continuing influence of human rights upon the laws of war, and upon international law, may lead to a possible future in which war itself is considered an inherent violation of human rights. Perhaps more practically, human rights today provide the *lex generalis*, overarching guidelines for the treatment of all people. We propose that this law, except under

[99] ICJ Advisory Opinion on the Wall, 58.

exceptional and far-between circumstances of derogation, is and should be applicable in occupied territories. The object and purpose of both IHL and HRL is to preserve the well-being of all human beings, regardless of territorial situation. The evolving principles, scholarship, case law, and general jurisprudence have been analyzed to be moving towards the co-application of the two branches becoming customary law. It is only when human rights and humanitarian law operate in conjunction, for the benefit of those whose rights are perhaps most vulnerable, that territorial occupation can be brought under the auspices of international law.