

The interrelation of the law of occupation and economic, social and cultural rights: the examples of food, health and property

Sylvain Vité*

Dr Sylvain Vité is a Legal Adviser, Legal Division, ICRC

Abstract

The current legal regime relative to occupation is no longer based solely on the contributions made by customary law and treaty-based law as set forth in the law of The Hague and the law of Geneva. It has undergone a thorough change with the progressive recognition of the applicability of human rights law to the situations which it governs, and their complementarity has been highlighted on several occasions. The question of the interrelation of international humanitarian law and human rights is not resolved merely by analysing their respective areas of application. The author examines the issue at the level of their individual rules. He considers whether the rules of international humanitarian law are confirmed, complemented, relativized or even contradicted by those deriving from human rights. The analysis focuses more particularly on the interrelation of the law of occupation and economic, social and

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cultural rights by concentrating on the promotion of adequate standards of living (right to food, right to health) and respect for property.



Even if the issue is still a source of controversy,¹ today there is little question that international human rights law is applicable to situations covered by international humanitarian law – that is, armed conflicts and military occupations.² This position has since been confirmed by a wealth of international practice, particularly that of the International Court of Justice, which has confirmed this trend on three occasions.³ It is therefore appropriate to go beyond that preliminary stage to examine the interrelation of the rules of international humanitarian law and human rights in the areas which are common to them both. In the words of the Court itself, there are three facets to that interrelation: ‘some rights 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’.⁴ However, the Court has not specified which rules are characteristic of one or other category.

The aim of this article is to define those rules by focusing on one of the branches of international humanitarian law, namely that which applies to military occupation.⁵ In international law, ‘territory is considered occupied when it is actually placed under the authority of the hostile army’.⁶ Two conditions are required to satisfy that definition: (i) the occupier is in a position to exert effective control over a territory which does not belong to it; (ii) its intervention has not been approved by the legitimate sovereign. However, power does not need to have been seized as the result of an armed conflict involving hostilities. The relevant rules

- 1 Michael J. Dennis, ‘Application of human rights treaties extraterritorially in times of armed conflict and military occupation’, *American Journal of International Law*, 99 (1) (2005), pp. 119–41.
- 2 See, in particular, W. Kälin, Special Rapporteur, *Report on the situation of human rights in Kuwait under Iraqi occupation*, UN Doc. E/CN.4/1992/26, 16 January 1992; Robert Kolb and Sylvain Vité, *La protection des populations civiles soumises au pouvoir d’une armée étrangère*, Bruylant, Brussels (2009, forthcoming).
- 3 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, General List No. 95, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, General List No. 131, para. 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, General List No. 116, 19 December 2005, para. 216. See also Permanent Court of Arbitration: *Partial Award, Civilians Claim, Ethiopia’s Claim 5*, 17 December 2004, para. 26.
- 4 ICJ, *Legal Consequences*, above note 3, para. 106; ICJ, *Armed Activities*, above note 3, para. 216.
- 5 On the law of military occupation in general see Jean Pictet (ed.), *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War: Commentary*, ICRC, Geneva, 1958; Adam Roberts, ‘What is a military occupation?’, *British Yearbook of International Law*, 55 (1984), pp. 249–305; Eyal Benvenisti, *The International Law of Occupation*, 2nd edn, Princeton University Press, Princeton etc., 2004; Kolb and Vité, above note 2.
- 6 ‘Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907’, in Dietrich Schindler and Jiri Toman (eds.), *The Laws of Armed Conflict*, Nijhoff, Dordrecht, 1988, pp. 69–93 (hereinafter Hague Regulations).

apply even if the occupation meets with no armed resistance.⁷ Those rules are set forth primarily in three treaties: the Hague Regulations of 1907, the Fourth Geneva Convention of 1949 and Additional Protocol I of 1977.⁸ Most of those rules are also customary in nature.

From the perspective of human rights, the focus is on economic, social and cultural rights. These correspond to a specific mode of operation which distinguishes them from civil and political rights.⁹ The main treaty source which is relevant to the subject, at least at the global level, is the International Covenant on Economic, Social and Cultural Rights (the Covenant), which was adopted by the United Nations in 1966.¹⁰

This article will first review broadly the general principles of application of economic, social and cultural rights during a period of occupation (A). It will then go on to examine how the two legal regimes under review actually interact in two specific areas: people's living conditions – particularly as regards food and health – and property (B).

The general principles governing the application of economic, social and cultural rights during a period of occupation

The application of economic, social and cultural rights is a subtle matter. It varies according to the circumstances of each individual case and is required to evolve over time. The nature of those rights is partly programmatic, in the sense that they set objectives that states are obliged to achieve in stages. Their full realization is therefore achieved progressively. However, that flexibility is not such that it deprives the Covenant of all constraining power. The system of economic, social and cultural rights provides for some minimum obligations of immediate effect that states cannot avoid. In addition to the functioning pertaining to the economy of human rights, there are some principles of application which derive from the law of occupation.

7 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (hereinafter Fourth Geneva Convention), ICRC, Geneva, 1949: Article 2(2).

8 Hague Regulations, above note 6; Fourth Geneva Convention, above note 7; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of International Armed Conflicts, 8 June 1977, *Protocols additional to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1977, pp. 3–89.

9 See in particular Philip Alston and Gerald Quinn, 'The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly*, 9 (3) (May 1987), pp. 156–229; Absjorn Eide, 'Economic, social and cultural rights as human rights', in A. Eide (ed.), *Economic, Social and Cultural Rights, A Textbook*, 2nd edn, Kluwer, Dordrecht etc., 2001, pp. 9–28.

10 *International Covenant on Economic, Social and Cultural Rights*, New York, 16 December 1966, *UNTS*, 993, p. 3.

The progressive realization of economic, social and cultural rights

Article 2(1) of the Covenant stipulates that each state party ‘undertakes to take steps ... to the maximum of its available resources, with a view to achieving *progressively* the full realization of the rights recognized in the present Covenant’ (emphasis added). That instrument recognizes that its rules are to be applied over time and that their application may go through different stages by virtue of the very nature of the prescribed obligations.¹¹ Some provisions actually set the objectives while leaving states parties a margin of discretion in terms of the means that they will adopt to fulfil them. Depending on the case, that implies the adoption of new legal texts. The realization of economic, social and cultural rights must therefore be viewed as taking place over time.

That flexibility is particularly important during a period of occupation. When hostilities have just ceased, a large number of infrastructures have been destroyed by war and the country is very often still suffering from considerable instability, the occupying power is not in a position to meet all its obligations. First of all, it has to deal with urgent needs. Then, when it has had the opportunity to strengthen its control over the territory in question, the normative content of its obligations becomes more extensive. Once the emergency period is over, minimum measures are no longer sufficient. The realization of economic, social and cultural rights requires a strategy to be established in order to achieve the set objectives.

That room for manoeuvre is, however, not without restrictions. The progressive realization of economic, social and cultural rights does not mean that states have a right to wait for the most favourable circumstances before meeting their obligations. Such an interpretation would deprive the Covenant of its normative content, as each state would be free to decide the extent of its undertakings. That instrument would consequently lose its constraining powers. The jurisprudence of the UN Committee on Social, Economic and Cultural Rights – the body which supervises the Covenant – shows that states must adhere to a basic normative threshold, whatever the circumstances.

The obligations which are of immediate effect

The Committee first recalled that ‘while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various *obligations which are of immediate effect*’.¹² It distinguishes between two normative levels: (i) provisions establishing obligations

11 Committee on Social, Economic and Cultural Rights, The Nature of States Parties’ Obligations (Art. 2, para. 1, of the Covenant), General Comment No. 3, 14 December 1990, para. 9. See also Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, UN Doc. E/C.12/2000/13, 2 October 2000, No. 8.

12 General Comment No. 3, above note 11, para. 1 (emphasis added). See also The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2000/13, 2 October 2000, No. 8.

which are of immediate effect; (ii) provisions establishing obligations which are to be realized progressively. The states bound by that instrument would then not be able to refer to its programmatic nature in order to delay its application as a whole. It is incumbent on them to respect the rules requiring immediate application – that is, the obligations which are ‘inherently self-executing’.¹³ During periods of occupation, these rules form a normative circle which the authorities in place must take into account as soon as they have effective control of the territory. Respect for those rules cannot be postponed or limited in the light of the circumstances of the occupation.

Some of those obligations which are of immediate effect are referred to explicitly in the Covenant. That is the case, for example, for the principle of non-discrimination¹⁴ or for special measures of protection and assistance taken on behalf of children and young persons.¹⁵ Others need to be identified by means of interpretation. By virtue of Article 2(1) states parties are ‘to take steps’ (emphasis added), that is, to adopt specific measures to promote the full application of that instrument, whatever the nature of the obligations concerned. Adopting a passive attitude in that respect would therefore be contrary to their commitments. Although, in some cases, the realization of economic, social and cultural rights may take place over time, states are still obliged to take steps without delay to allow them to achieve the set objectives.¹⁶ In other words, although certain rights may be realized progressively, states remain bound by the duty to adopt immediate measures. ‘Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.’¹⁷

During periods of occupation, the authorities in place may therefore not refer to the temporary nature of their presence on foreign territory in order to evade these obligations. It is revelatory in that respect to recall that the administration of the occupation forces in Iraq justified redrafting the labour code of that country by recalling that, as a state party to International Labour Organization (ILO) Conventions 138 and 182, Iraq was obliged to ‘take affirmative steps towards eliminating child labor’.¹⁸ Order No. 89 adopted by the Coalition Administrator on 5 May 2004 meets that obligation by setting, in particular, a minimum age for employment and by regulating the conditions of work for people under the age of 18.

13 General Comment No. 3, above note 11, para. 5: ‘Any suggestion that the provisions indicated are *inherently non-self-executing* would seem to be difficult to sustain’ (emphasis added).

14 Article 2(1). See General Comment No. 3, above note 11, para. 1; General Comment No. 12, The Right to Adequate Food (Art. 11 of the Convention), UN Doc. E/C.12/1999/5, 12 May 1999, para. 18. See also Limburg Principles, above note 12, Nos. 22 and 35.

15 Article 10(3).

16 Committee on Social, Economic and Cultural Rights, General Comment No. 3, above note 11, paras. 2, 9. See also Alston and Quinn, above note 9, p. 166.

17 General Comment No. 3, above note 11, para. 2.

18 Coalition Provisional Authority, Order No. 89, Amendments to the Labor Code – Law No. 71 of 1987, CPA/ORD/05 May 2004/89 (emphasis added).

The core contents of economic, social and cultural rights

The Committee also recognized that, despite their inherent flexibility, each of the economic, social and cultural rights has an irreducible normative content. Even if the Covenant proves flexible when it recognizes that some provisions may be implemented progressively, it considers that states parties nonetheless have ‘a *minimum core obligation* to ensure the satisfaction of, at the very least, *minimum essential levels of each of the rights*’.¹⁹ For example, the Committee points out that ‘a State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant’.²⁰ Each of the Covenant provisions thus has a basic normative content which must be guaranteed in all circumstances, irrespective of the country’s economic level, its political situation or its institutional structure.²¹ That applies both in periods of military occupation and in times of peace. This core establishes in a sense the starting point from which states parties can plan how to fulfil their obligations progressively. It thus sets a limit to the flexibility allowed by virtue of Article 2(1).

The principle of continuity of the legal system in the law of occupation

The application of economic, social and cultural rights during periods of occupation must also take account of the laws governing that kind of situation. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (2004), the International Court of Justice had occasion to recall that 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’.²² Yet the content and scope of those powers can only be determined with reference to the law of occupation. The occupier is only authorized to make use of the room for manoeuvre allowed with regard to economic, social and cultural rights within the limits set by this legal regime.

In some respects, the application of the Covenant implies a long-term perspective and the ability of the sovereign power to effect far-reaching transformations of societies. The realization of the right to work, for example, obliges states to work out development strategies which commit their national economies for a good number of years.²³ By contrast, the law of occupation offers resistance to changes of that kind. Its aim is to maintain the institutional and legal structures

19 General Comment No. 3, above note 11, para. 10 (emphasis added). See also Maastricht Guidelines, above note 11, No. 9.

20 General Comment No. 3, above note 11, para. 10.

21 See, in particular, Audrey Chapman and Sage Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia, Antwerp etc., 2002.

22 ICJ, *Legal Consequences*, above note 3, para. 112.

23 Article 6(2).

pending a decision on the future status of the territory concerned. Article 43 of the Hague Regulations of 1907 stipulates that the occupier is obliged to ‘restore, and ensure, as far as possible, public order and safety, *while respecting, unless absolutely prevented, the laws in force in the country*’ (emphasis added). This rule prescribing the continuity of the internal legal system thus sets an upper limit to the realization of economic, social and cultural rights. It prohibits structural reforms which would affect the long-term future of the occupied territory.

This principle is, however, not rigid. As stipulated in Article 43 of the Hague Regulations, the occupying powers may depart from it if they are ‘absolutely prevented’ from complying with it. Article 64 of the Fourth Geneva Convention, which takes up and clarifies the rule given in Article 43 of the Hague Regulations, adds that legal amendments can be made when they are ‘essential’ to the realization of 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.²⁴ The obligation to respect human rights must be added to these three objectives.²⁵ The immediate consequences of the Second World War showed that the occupier is entitled to abrogate oppressive or discriminatory national legislation such as the National Socialist Nuremberg laws.²⁶ In some cases the occupier may also be required to adopt new legal texts in order to comply with its commitments. Order No. 7 of 9 June 2003, adopted by the occupation administration in Iraq to reform the Iraqi penal code, suspended capital punishment, for example, and prohibited torture and cruel, degrading or inhuman treatment or punishment as well as discrimination.²⁷

The question which then arises is how to reconcile the occupier’s obligation to apply human rights – which may at times imply legal reforms – with the principle of the continuity of the internal legal system which is at the heart of the law of occupation. To what extent are the reforms carried out compatible with the rule set forth in Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention?²⁸ The reply to that question calls for the greatest caution and gives an indication of the slippage which could result from adopting

24 Despite the heading of Article 64, which refers to ‘penal legislation’, this applies to the entire domestic legal system. Jean Pictet emphasizes in that respect that ‘the reason for the Diplomatic Conference making express reference only to respect for penal law was that it had not been sufficiently observed during past conflicts; there is no reason to infer *a contrario* that the occupation authorities are not also bound to respect the civil law of the country, or even its constitution’. Pictet, above note 6, p. 360. See Benvenisti, above note 5, pp. 100 ff.

25 Marco Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’, *European Journal of International Law*, 16 (2005), p. 676.

26 See, in particular, Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*, University of Minnesota Press, Minneapolis, 1957, pp. 95, 107; Morris Greenspan, *The Modern Law of Land Warfare*, University of California Press, Berkeley etc., 1959, p. 245.

27 Coalition Provisional Authority, Order No. 7, Penal Code, 9 June 2003, Sections 3 and 4.

28 For a more detailed evaluation of the scope of these two provisions see Sylvain Vité, ‘Applicability of the international law of military occupation to the activities of international organizations’, *International Review of the Red Cross*, 86 (853) (2004), pp. 14 ff. (full text in French only).

too lax a position on this matter. Under cover of fulfilling its international obligations, an occupier could carry out structural transformations in the occupied country without conducting a democratic consultation of the people concerned. That risk is even greater with regard to economic, social and cultural rights, as the rules stipulated in that area are sometimes imprecise and open to irregular interpretations.

The interrelation of the law of occupation and economic, social and cultural rights in their common normative areas

That risk may nonetheless be reduced if a varied approach is pursued. The response actually needs to be adapted in accordance with the rules envisaged. In many ways the realization of economic, social and cultural rights does not imply reforms that are so radical that they run counter to the law of occupation. That normative balance cannot therefore be found by studying only the general principles of the application of economic, social and cultural rights during periods of occupation. It needs to be sought on a case-by-case basis by analysing specific rules. That is what will now be attempted by taking two examples, that of the living conditions of the civilian population, with particular regard to food and health, and that of property.

Food and health

The legal regime of occupation is mainly emergency law. Its aim is to respond to the immediate needs of civilians who are in the power of a foreign army. It sets out to protect their living conditions, essentially from the perspective of humanitarian assistance. Without neglecting concerns that are linked to the survival of the population, the system of economic, social and cultural rights is geared to the long term. While it establishes obligations which must be fulfilled in all circumstances and thus overlaps with the law of occupation, it also provides for obligations to be realized progressively as the situation in the territory stabilizes. As far as food and health are concerned, it thus complements the minimum rules of occupation.

The law of occupation

The law of occupation contains several provisions which deal with the living conditions of civilians. Generally, it requires the occupier to take ‘all the measures in his power to restore, and ensure, as far as possible, public order and safety’.²⁹ More particularly, the Fourth Geneva Convention stipulates that ‘the Occupying Power has the duty of ensuring the food and medical supplies of the population’.³⁰ Additional Protocol I extends the range of that provision by adding that that

29 Hague Regulations, Article 43.

30 Fourth Geneva Convention, Article 55(1).

obligation also covers ‘the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship’.³¹ To that end, account is taken of the possible material difficulties encountered by the occupying power as it is bound only ‘[t]o the fullest extent of the means available to it’.³² It nonetheless has the duty to use all the resources available to it to meet those responsibilities.³³ If the occupying power is not able to fulfil that obligation, it must draw on external support. It must agree to and facilitate relief work for people in distress.³⁴ That obligation is unconditional.³⁵

With regard to health, the occupying power is also responsible for ensuring the proper functioning of the medical and hospital establishments and services and for guaranteeing health and public hygiene. In particular, it must take all measures necessary to combat contagious diseases and epidemics.³⁶ Here, too, the binding nature of this obligation must be adapted in line with the available means.³⁷

Lastly, the law of occupation deals with minimum living conditions in connection with evacuations. Those evacuations are allowed only ‘if the security of the population or imperative military reasons so demand’ and solely within the occupied territory, ‘except when for material reasons it is impossible to avoid such displacement’.³⁸ In that case the occupying power must take care to ensure that some essential needs are provided and, in particular, that people are evacuated in ‘satisfactory conditions of hygiene, health, safety and nutrition’ and that they are given ‘proper accommodation’.³⁹

Those rules relative to living conditions during periods of occupation are general and confer discretionary powers on the authorities responsible for enforcing them. While they set certain requirements in terms of food, health, clothing and housing, they do not give precise indications about the objectives which have to be achieved. The very concepts of ‘satisfactory conditions’ or ‘supplies’ can be understood in very different ways. Moreover, conceived as a short-term transitional legal regime, the law of occupation focuses primarily on the duty to assist

31 Additional Protocol I, Article 69(1).

32 Fourth Geneva Convention, Article 55(1); Additional Protocol I, Article 69(1).

33 Pictet, above note 5, p. 310.

34 Fourth Geneva Convention, Article 59(1). For further details, see Fourth Geneva Convention, Articles 30 and 59 ff. See also Robert Kolb, ‘De l’assistance humanitaire – La Résolution sur l’assistance humanitaire adoptée par l’Institut de droit international lors de sa Session de Bruges en 2003’, *International Review of the Red Cross*, 86 (856) (2004), pp. 853 ff.

35 Pictet, above note 5, p. 320.

36 Fourth Geneva Convention, Article 56(1); Additional Protocol I, Article 14(1).

37 Fourth Geneva Convention, Article 56(1), points out that the occupying power is bound ‘to the fullest extent of the means available to it’. Some provisions are also devoted to the living conditions of particularly vulnerable categories of people, especially detainees and internees (Fourth Geneva Convention, Arts. 76, 85, 89–90, 91–92, 108, 125).

38 *Ibid.*, Article 49(1) and (2).

39 *Ibid.*, Article 49(2) and (3). For an application of these rules, see the case law of the Eritrea–Ethiopia Claims Commission, *Civilian Claims, Ethiopia’s Claim 5*, Partial Award of 17 December 2004, paras. 116 ff.; *Civilian Claims, Eritrea’s Claims 15, 16, 23 & 27–32*, Partial Award of 17 December 2004, paras. 66 ff., 79 ff.

people in difficulty. When the situation persists, that obligation may well cease to be in line with the needs of the civilian population. In that case, it then ceases to be solely a matter of guaranteeing their survival but, as stipulated in Article 43 of the Hague Regulations of 1907, of ‘restoring and ensuring public order and safety’. However, the rules of occupation are not of great use when the implications of that provision need to be understood more precisely.

Given those uncertainties, some clarification can be found in the complementary contribution made by the international law of human rights, and in particular the right to adequate food and the right to health.⁴⁰ The economic, social and cultural rights are the subject of a growing number and range of jurisprudential developments. Over time they have thus taken on a new consistency, opening up new perspectives with regard to the protection of civilians during periods of occupation. That contribution is made, on the one hand, by the concretization of minimum rules applicable at all times (core) and, on the other, by the identification of rules which have to be enforced progressively as the occupied territory stabilizes.

The core of the right to adequate food and the right to health

From the perspective of human rights, the right to an adequate standard of living implies that each person has access to the conditions necessary for his or her individual livelihood. According to the terms of the Covenant, that essential minimum includes, in particular, adequate food, clothing and housing as well as the continuous improvement of living conditions.⁴¹ The Covenant also recognizes ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.⁴² The definition of the core of each of those rights establishes their minimum applicable content under all circumstances and consequently clarifies the rules applicable during periods of occupation.

The right to adequate food – with all that it implies – includes as an essential requirement the ‘fundamental right of everyone to be free from hunger’.⁴³ That rule constitutes its core. The Committee on Social, Economic and Cultural Rights thus confirms that states parties have ‘a core obligation to take the necessary action to mitigate and alleviate hunger ..., even in times of natural or other disasters’.⁴⁴ More precisely, it adds that the core content of the right to adequate food is respected when two conditions are met: (i) ‘the availability of food in a

40 Universal Declaration of Human Rights, Article 25(1); International Covenant on Economic, Social and Cultural Rights, Article 11; Convention on the Rights of the Child, Article 27.

41 International Covenant on Economic, Social and Cultural Rights, Article 11. See Eide, above note 9, p. 133. For an example of the application of the law at an adequate standard of living in periods of occupation, see Report of the Special Committee to Investigate Israeli Practices affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, UN Doc. A/58/311, 22 August 2003, paras. 44 ff.

42 International Covenant on Economic, Social and Cultural Rights, Article 12.

43 Ibid., Article 11(2).

44 Committee on Social, Economic and Cultural Rights, General Comment No. 12, above note 14, para. 6.

quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture'; and (ii) 'the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights'.⁴⁵ The right to adequate food thus goes far beyond the simple matter of the quantity of food available. That food must also meet certain quality criteria.⁴⁶

During periods of occupation, that obligation finds its concrete expression in the duty either to ensure that the territory is supplied, or to accept and facilitate the deployment of relief operations. Economic, social and cultural rights are thus at one with the approach of international humanitarian law, in that they impose an obligation to act or, at least, not to create obstacles. The Committee on Social, Economic and Cultural Rights has pointed to that duality in recalling that the right to adequate food incorporates, on the one hand, the obligation to *fulfil* – that is, 'to *facilitate* and ... to *provide*', and, on the other, that of *not preventing* 'access to humanitarian food aid in internal conflicts or other emergency situations'.⁴⁷

The core of the right to adequate food may be violated, for example, when the occupation forces destroy the civilian population's food stocks, when they affect the means of production, especially by placing mines in agricultural areas, by displacing farming or fishing communities, by immobilizing the transport network which allows supplies to be distributed or by blocking access to certain basic services (obligation to respect).⁴⁸ The same applies when the occupying power fails to adopt the measures needed to prevent possible third parties from carrying out similar practices (obligation to protect). Finally, that fundamental obligation may require the occupier to adopt certain positive measures (obligation to fulfil). The occupier is, in particular, to set up an effective relief distribution system and to take account of the needs of the most vulnerable persons, particularly children, the elderly and the handicapped.⁴⁹

With regard to health, the minimum normative content consists of elements from the area of health care and prevention measures. It implies, for example, the obligations to guarantee access without discrimination to medical equipment, products and services, an adequate supply of safe drinking water and

45 Ibid., para. 8. On this particular point, see Rolf Künnean, 'The right to adequate food: violations related to its minimum core content', in Chapman and Russell, above note 21, pp. 161–83.

46 On this point see General Comment No. 12, above note 14, para. 7.

47 Committee on Social, Economic and Cultural Rights, General Comment No. 12, above note 14, paras. 15 and 19. Following the invasion of Kuwait in August 1990, 22,000 people took refuge in the Philippines embassy. The Iraqi troops had prohibited supplying those people, thus violating the right to food, as was subsequently confirmed by the UN Special Rapporteur called to report on these events; see Report on the Situation of Human Rights in Kuwait under Iraqi Occupation, above note 2, para. 222. In its Concluding Observations of 2001 addressed to Israel, the Committee had, for example, criticized the government for having turned back international missions to supply civilians living in the occupied territories, particularly those of the International Committee of the Red Cross: Concluding Observations, Israel, UN Doc. E/C.12/1/Add.69, 31 August 2001, para. 13.

48 See, for example, Committee on Social, Economic and Cultural Rights, Concluding Observations, Israel, E/C.12/1/Add.90, 26 June 2003.

49 For greater detail, see Künnean, above note 45, pp. 177 ff.

the possibility of obtaining essential medicines as defined by the World Health Organization.⁵⁰ Non-compliance with those obligations cannot be justified ‘under any circumstances whatsoever’. These are consequently obligations ‘which are non-derogable’.⁵¹ In the words of the Committee on Social, Economic and Cultural Rights, other rules must also be considered ‘of comparable priority’.⁵² Those rules include, in particular, the obligation to provide immunization against the major infectious diseases, to take measures to prevent, treat and control epidemic and endemic diseases and to provide education and access to information concerning the main health problems.⁵³ Those rules also form part of the core right to health.

In the area of health, as in that of food, any reference to matters that are merely touched on by the law of occupation therefore tends to be made explicit by economic, social and cultural rights.⁵⁴ The UN Special Rapporteur on the human rights situation in Kuwait under Iraqi occupation thus recalled that the assessment of the occupier’s behaviour in the light of Articles 55 and 56 of the Fourth Geneva Convention alone did not expose the full dimension and seriousness of the violations committed. In his view, ‘[t]he true significance of these events was only elucidated by recourse to the concept of the right to health as guaranteed by the Covenant on Economic, Social and Cultural Rights’.⁵⁵

Progressive realization of the right to adequate food and the right to health

The contribution made by human rights is nonetheless not merely to provide normative clarification. Apart from those minimum obligations, other obligations call for progressive realization in terms of food and health. On this point the economic, social and cultural 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 to persist. The right to adequate food is not merely the minimum obligation to combat hunger. As the Committee on Social, Economic and Cultural Rights recalls,

50 Committee on Social, Economic and Cultural Rights, General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4, 11 August 2000, para. 43. See also Report on the International Conference on Primary Health Care, Alma-Ata, 6–12 September 1978, Health for All Series, No. 1, WHO, Geneva, 1978, Ch. 3, para. 50. On this subject, see Audrey R. Chapman, ‘Core obligations related to the right to health’, in Chapman and Russell, above note 21, pp. 185–215.

51 Committee on Social, Economic and Cultural Rights, General Comment No. 14, above note 50, para. 47.

52 *Ibid.*, para. 44.

53 *Ibid.*, para. 44.

54 Noam Lubell suggests that human rights therefore constitute a *lex specialis* with regard to health: Noam Lubell, ‘Challenges in applying human rights law to armed conflict’, *International Review of the Red Cross*, 87 (860) 2005, p. 751. See also Hans-Joachim Heintze, ‘On the relationship between human rights law protection and international humanitarian law’, *International Review of the Red Cross*, 86 (856) 2004, p. 795.

55 Walter Kälin, *Human rights in Times of Occupation: The Case of Kuwait*, LBE, Berne, 1994, p. 28.

that right 'shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients'.⁵⁶ While assuming that certain immediate measures are adopted to cover the essential content of that right, the Committee also calls for a long-term approach to achieve its full realization progressively.⁵⁷ Once the emergency period is over, it is no longer sufficient for the occupier to distribute food to the civilian population. The system of human rights provides for civilians to have access to the resources and means to enable them to ensure their own livelihood.⁵⁸ To that end, the occupier must establish 'measures in regard to *all* aspects of the food system, including the production, processing, distribution, marketing and consumption of safe food, as well as parallel measures in the fields of health, education, employment and social security'.⁵⁹ In particular, that means that it is obliged to ensure the sustainable management of the natural resources used to produce food.⁶⁰

Also with regard to health, human rights require the authorities to look to the future if the occupation persists. For example, these authorities need to devise a 'public health strategy and plan of action'.⁶¹ Those instruments are to be based on statistical data describing the needs of the local people and on a periodic evaluation and readjustment of the work carried out. The view of the Committee on Social, Economic and Cultural Rights is that planning the health policy forms part of the essential obligations of the right to health.⁶²

The reforms intended to ensure adequate living conditions in occupied territories must not, however, go beyond the restraints imposed by the law of occupation. The principle of the continuity of the legal system imposes certain limits in that respect which do not apply to measures adopted by a state on its own territory in peacetime. With regard to food, for example, it is appropriate to carry out a separate examination of the various obligations imposed on states. Some Covenant prescriptions are admissible with regard to the law of occupation, such as that which consists of 'improv[ing] methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition'.⁶³ Their implementation does not imply far-reaching changes to the legal and institutional structure of the country. By contrast, other prescriptions, such as those which imply 'developing or reforming agrarian systems',⁶⁴ risk being problematic in that respect. As far as

56 General Comment No. 12, above note 14, para. 6.

57 *Ibid.*, paras. 6 and 16.

58 *Ibid.*, para. 15.

59 *Ibid.*, para. 25.

60 *Ibid.* On this point, human rights overlap with the law of occupation. See the Hague Regulations of 1907, Article 55. That provision stipulates that the occupier may only manage property (including the natural resources) and agricultural estates belonging to the occupied state as 'administrator and usufructuary'. It must therefore 'safeguard the capital of these properties'.

61 Committee on Social, Economic and Cultural Rights, General Comment No. 14, above note 50, para. 43.

62 *Ibid.* For a more detailed analysis of the obligations to respect, protect and implement the hard core of the right to health, see Chapman, above note 50, pp. 205 ff.

63 Article 11(2)(a).

64 *Ibid.*

health is concerned, the obligations provided for by the Covenant do not seem to contravene the principle of the continuity of the legal system. Without making far-reaching changes to the structures of a society, it is possible to guarantee, for example, ‘the prevention, treatment and control of epidemic, endemic, occupational and other diseases’ or ‘the creation of conditions which would assure to all medical service and medical attention in the event of sickness’.⁶⁵

The examples of food and of health thus show that the occupier’s obligations are not limited to the minimum defined by international humanitarian law. They must be viewed from a perspective which encompasses the complementary contribution made by human rights.

Property

With regard to property, economic, social and cultural rights and the law of occupation are interrelated in a different manner. With a few exceptions, human rights are not sufficiently developed in that area to make it possible to derive from them a normative content that is both universal and precise. Contrary to what occurs in the areas of food and health, the law of occupation provides the most specific ruling in this case. The core guarantee of property thus merges with the prescriptions of humanitarian law. Respect for those prescriptions must be immediate. In that case there is no room for progressive fulfilment of the occupier’s obligations.

Human rights

Article 17(2) of the Universal Declaration of Human Rights stipulates that ‘no one shall be arbitrarily deprived of his property’. However, that principle was not reiterated in either of the covenants of 1966 which set out to give treaty-based form to the provisions of the Declaration. The preparatory work for those two instruments shows that the participating delegations failed to agree on the scope of the principle in Article 17(2), as well as on the restrictions to be applied to it.⁶⁶ At the universal level there is therefore no basis in treaty law which allows the various dimensions of a property guarantee to be considered from the human rights perspective.⁶⁷ As we shall see, however, some jurisprudential developments enable that deficiency to be partly offset.

At the regional level, each of the European, American and African human rights protection systems proposes a treaty-based provision which recognizes the existence and defines the outline of the right to property. Under

65 Convention, Article 12(2).

66 Catarina Krause, ‘The right to property’, in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights, A Textbook*, 2nd edn, Nijhoff, Dordrecht (etc.), 2001, p. 194.

67 On the legal bases of the right to property, see *ibid.*, pp. 194 ff.

certain conditions those rules authorize restrictions to the enjoyment of property.⁶⁸ Article 1 of Protocol I additional to the European Convention on Human Rights stipulates, for example, that '[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions'. It adds that any restriction to that rule is acceptable only if it is in the public interest, is in line with national and international law and upholds the principle of proportionality.⁶⁹ However, states have particularly broad discretionary powers in evaluating those conditions. Article 1 of the Additional Protocol makes it clear that the guarantee to property does not impair the right of a state to 'enforce such laws as *it deems necessary* to control the use of property in accordance with the general interest ...' (emphasis added). Placing so much emphasis on the freedom of the contracting parties to use their discretion has the effect of considerably weakening the binding force of this provision. One observer has even referred to the 'soft' nature of Article 1.⁷⁰ The American and African texts do not provide further clarification in the matter. It is therefore on a case-by-case basis and in the light of the jurisprudence of the bodies responsible for applying regional treaties that an attempt may be made to understand what the actual implications of the right to property are. However, with regard to the particular case of the protection of property during periods of occupation, international practice in this field is limited or even non-existent.

Human rights thus seem to provide little support on this issue.⁷¹ One therefore needs to refer to international humanitarian law. In this case, the latter provides a more detailed normative system comprising rules on the treatment of public or private property. Those rules, on the one hand, prohibit, subject to certain exceptions, the destruction of that property and, on the other hand, establish limits to its appropriation or requisition by the occupation forces.

The destruction of property in the law of occupation

Article 53 of the Fourth Geneva Convention prohibits the destruction by the occupying power of any kind of publicly or privately owned real or personal property, 'except where such destruction is rendered absolutely necessary by military

68 Protocol Additional to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, as amended by Protocol No. 11 of 11 May 1994, entered into force 1 November 1998, Article 1; American Convention on Human Rights, entered into force 18 July 1978, OAS Treaty Series No. 36, 1144, Article 21; African Charter on Human and Peoples' Rights, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, Article 14.

69 For an analysis of this provision see Luigi Condorelli, 'Premier Protocole additionnel, article 1', in L. E. Pettiti, E. Decaux and P. H. Imbert (eds.), *La Convention européenne des human rights, Commentaire article par article*, Economica, Paris, 1995, pp. 972–97.

70 *Ibid.*, p. 972.

71 However, the UN General Assembly has referred to the Universal Declaration of Human Rights to recall the rights of the Palestinian refugees to reclaim the goods taken from them during the Israeli occupation. See, in particular, Palestinian Refugees' Properties and Their Revenues, UN Doc. A/Res/61/115, 14 December 2006.

operations'.⁷² The expected military advantages therefore need to be weighed against the damage done on a case-by-case basis.⁷³ The occupying power is required to carry out that review from the perspective of strict necessity.⁷⁴ To that end, it also has to take account of other rules of international humanitarian law relative to respect for certain items of property. Under no circumstances, for instance, may it destroy cultural property or private property by way of reprisals.⁷⁵ If acts of resistance to the occupation take the form of genuine military combat, the rules relative to the protection of civilian property during hostilities apply.⁷⁶

Furthermore, some property enjoys absolute protection. It may not be destroyed deliberately on the basis of the exception given in Article 53. This property includes, in particular, the buildings, materials and stores of fixed medical establishments of the armed forces,⁷⁷ military or civilian medical units,⁷⁸ the property of municipalities, that of 'institutions dedicated to religion, charity and education, the arts and sciences' and 'historic monuments, works of art and science'.⁷⁹ Cultural property is also the subject of greater protection. The Hague Regulations of 1907 prohibit its deliberate seizure, destruction or wilful damage without exception, and even require states to prosecute anyone who fails to comply with that obligation.⁸⁰ The Hague Convention of 1954, which deals specifically with that problem, adds that its contracting parties are also duty-bound to contribute to safeguarding and preserving that property in the territories under their authority by virtue of occupation, in particular by taking control measures or by transferring the items in danger.⁸¹

72 In this regard, albeit less explicit, see also Articles 46–56 of the Hague Regulations of 1907. On the prohibition of destruction see Eric David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2002, p. 518.

73 See Pictet, above note 5, p. 302. See also Greenspan, above note 26, pp. 278 ff. When the destruction is 'extensive ... and carried out unlawfully and wantonly', it also constitutes a grave breach of the Fourth Geneva Convention and, as such, must be subject to criminal proceedings. Fourth Geneva Convention, Articles 146 and 147; see, in particular, in ICTY case law, the *Naletilic Case*, Judgment of 31 March 2003, paras. 574 ff.; *Kordić case*, Judgment of 26 February 2001, para. 341.

74 On the idea of necessity in Article 53, see von Glahn, above note 26, pp. 224 ff.

75 *Fourth Geneva Convention*, Article 33(3). C. Rousseau cites the case of a German soldier sentenced in 1949 by the Netherlands Special Court of Cassation for having set fire to several civilian houses in reprisal for acts of sabotage committed by unknown persons (judgement *Wintgen*, No. 178, 6 July 1949, in Charles Rousseau, *Le droit des conflits armés*, Pedone, Paris, 1983, p. 165).

76 Additional Protocol I, Articles 52 et seq.

77 First Geneva Convention, Article 33(2) and (3).

78 Additional Protocol I, Article 12(1).

79 Hague Regulations of 1907, Article 56. See von Glahn, above note 26, p. 191.

80 Article 56(2).

81 See Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 5, and the Regulations for the Execution of the Convention, in particular Articles 2(a), and 19. See also the Protocol for the Protection of Cultural Property in the Event of Armed Conflict (1954), which prohibits exporting cultural property from the occupied territories. The Eritrea–Ethiopia Claims Commission, for example, considered that the Stela of Matara (which was approximately 2,500 years old) had been deliberately destroyed by the Ethiopian forces in violation of customary law (since the two states were not party to the 1954 Convention), in particular the law which is reflected in Article 56 of the Hague Regulations of 1907, Article 53 of the Fourth Geneva Convention and Article 52 of Additional Protocol I. However, according to the Commission, it is not clear whether Article 53 of Additional Protocol I applies, given the type of historic monuments covered by that provision. See *Central Front, Eritrea's Claims* 2, 4, 6, 7, 8, 22

While the prohibition of destroying property in occupied territory is worded fairly precisely in international humanitarian law, it is not entirely foreign to the system of human rights. It has been studied primarily in relation to the right to housing. In its Concluding Observations of 2003 relative to Israel, the UN Human Rights Committee expressed its disapproval of what, for example, it considered to be ‘the partly punitive nature of the demolition of property and homes in the Occupied Territories’.⁸² In the Committee’s opinion, those practices were in contravention of several provisions of the International Covenant on Civil and Political Rights of 1966 – that is, the right not to be subjected to arbitrary interference with one’s home, freedom to choose one’s residence, equality of all persons before the law and equal protection of the law, and the right not to be subjected to torture or to cruel or inhuman treatment.⁸³ International humanitarian law and human rights concur on that point, although the former is more complete and more detailed than the latter.

The appropriation of property in the law of occupation

The law of occupation also establishes precise rules regarding the appropriation of property. While it prohibits without exception all forms of pillage, it allows for some property to be requisitioned by the occupation forces. A distinction needs to be made between public property and private property.

Pillage – that is, the unjustified, violent appropriation of valuable enemy property⁸⁴ – is prohibited by both the Hague Regulations of 1907 (Art. 47) and the Fourth Geneva Convention (Art. 33).⁸⁵ That rule is also customary in nature.⁸⁶ The scope of that protection is extensive. It includes ‘both widespread and systematized

(2004), paras. 107 ff. See also *ibid.*, paras. 58 ff and 85 ff. *Central Front, Ethiopia’s Claims 2* (2004), paras. 43 and 75; *Civilian Claims, Ethiopia’s Claims 5* (2004), paras. 133 and 135.

82 Human Rights Committee, Concluding Observations, Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 16.

83 Articles 17, 12, 26 and 7 respectively. Similarly, the United Nations Committee against Torture considered that ‘Israeli policies on house demolitions may, in certain instances, amount to cruel, inhuman or degrading treatment or punishment’; Conclusions and recommendations: Israel, UN Doc. A/57/44(SUPP), 25 September 2002, para. 6(j). For other examples see David, above note 72, p. 519; Krause, above note 66, pp. 207–8.

84 For a review of the concept of pillage and its implications in international humanitarian law, see ICTY, Trial Chamber, *Prosecutor v. Zejnir Delalic et al.*, IT-96-21-T, paras. 584–92. The chamber also recalls that, according to the texts, the same behaviour has variously been termed ‘pillage’, ‘plunder’ and ‘spoliation’, para. 591. See also von Glahn, above note 26, pp. 228 ff.; Alwyn V. Freeman, ‘Responsibility of States for Unlawful Acts of their Armed Forces’, *Collected Courses of the Hague Academy of International Law*, (2) (1955), pp. 325–43. There are countless examples. See, *inter alia*, Commission on Human Rights, Report on the Situation of Human Rights in Kuwait under Iraqi Occupation, above note 2, paras. 224 ff.; Eritrea–Ethiopia Claims Commission, *Partial Award, Central Front, Ethiopia’s Claim 2*, April 28, 2004, paras. 71 ff.

85 Hague Regulations of 1907, Article 47; Fourth Geneva Convention, Article 33(2). See Pictet, above note 5, p. 226.

86 Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, Vol. 1: *Rules*, ICRC/Cambridge University Press, Geneva and Cambridge 2005: Rule 52 (and appended practice). See, in particular, *Kordić Case*, above note 73, para. 351.

acts of dispossession and acquisition of property in violation of the rights of the owners and isolated acts of theft or plunder by individuals for their private gain'.⁸⁷ It also extends to all categories of public or private property. It is sufficient for the deeds committed to target property with 'sufficient monetary value ... as to involve grave consequences for the victims'.⁸⁸

In the *Case Concerning Armed Activities on the Territory of the Congo* (2005), the International Court of Justice established, for example, that Uganda had not taken the necessary measures to prevent the exploitation of certain natural resources, in particular the gold and diamond mines, in the Democratic Republic of the Congo. As the occupying power, Uganda should have taken action to stop the illegal trade carried out not only by members of its armed forces, but also by private persons in the region.⁸⁹ The Court found that the behaviour constituted a violation of Article 47 of the Hague Regulations of 1907 and Article 33 of the Fourth Geneva Convention of 1949.⁹⁰ The Court also pointed out in the same judgment that international humanitarian law and human rights partly overlap on the issue of pillage. The African Charter on Human and Peoples' Rights, which is applicable in this case, prohibits 'spoliation' and stipulates that the dispossessed people shall have the right to adequate compensation.⁹¹ However, the protection given by the African Charter is less extensive than that provided by humanitarian law. That instrument considers the prohibition of spoliation only as a collective right belonging to the 'people' and not as an individual right.⁹²

While entirely prohibiting pillage, the law of occupation authorizes the appropriation or use of property in the occupied territory in a number of limited cases.⁹³ The occupier is first entitled to seize public movable property 'which may be used for military operations'.⁹⁴ It may be seized if three conditions are met: (i) the

87 *Kordić Case*, above note 73, para. 352.

88 *Ibid.*

89 ICJ, *Armed Activities*, above note 3, para. 248. In the 1958 Commentary on the Fourth Geneva Convention, the ICRC had already acknowledged this duality. On the subject of Article 33, it considered that '[t]he High Contracting Parties prohibit the ordering as well as the authorization of pillage' and that they 'pledge themselves furthermore to prevent or, if it has commenced, to stop individual pillage' (Pictet, above note 5, p. 226).

90 ICJ, *Armed Activities*, above note 3, paras. 327 ff.

91 African Charter on Human and Peoples' Rights, above note 68, Article 21(2); ICJ, *Armed Activities*, above note 3, para. 245.

92 The Eritrea–Ethiopia Claims Commission also draws attention to the vast amount of pillage carried out in the case submitted to it. It underlines the fact that the occupying power is responsible for maintaining public order in the occupied territory and that it is obliged to prevent pillage (Articles 43, 46–47 of the Hague Regulations of 1907). In the case in question, Ethiopia is responsible for having allowed this pillaging without trying to stop it as required by law. However, the Commission also admits that any violation in this area could not reasonably have been prevented by the authorities of the occupying force. It therefore decided to hold Ethiopia responsible for 75 per cent of the acts of pillage committed in the area (*Central Front, Eritrea's Claims* 2, 4, 6, 7, 8, 22 (2004), paras. 67 ff).

93 On this point see von Glahn, above note 26, pp. 176 ff.; Myres S. McDougal and Florentino P. Feliciano, *The International Law of War, Transnational Coercion and World Public Order*, Nijhoff, Dordrecht etc., 1994, pp. 809 ff.

94 Hague Regulations of 1907, Article 53(1). On this provision see von Glahn, above note 26, pp. 180–81. On public property in occupied territories see Greenspan, above note 26, pp. 287 ff.; Rousseau, above note 75, pp. 159 ff.; David, above note 72, pp. 521 ff.

property in question belongs to the state; (ii) it is movable; and (iii) it is able to contribute to the needs of the army. In a non-exhaustive list, the Hague Regulations authorize the occupier to appropriate 'cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies'.⁹⁵ Conversely, that category does not include public property that is used for civilian purpose only, such as 'that of institutions dedicated to religion, charity and education, the arts and sciences' or historic monuments.⁹⁶ Finally, the property of municipalities is to be treated as private property and is consequently not covered by the right of seizure.⁹⁷

As for publicly owned immovable property, it is subject to the system of usufruct.⁹⁸ The occupier is entitled to benefit from what it produces but must safeguard its capital. It may, for example, consume or sell the produce of land belonging to the state or appropriate the revenue from road or river tolls. By contrast, it does not have the right to dispose of that property in any way whatsoever. Similarly, the use that it makes of the property must remain 'normal', that is, it must be in line with what was done with it before the occupation.⁹⁹ Over-exploitation of public immovable property is contrary to the law of occupation. The rule of usufruct applies, for example, to all buildings, forests and agricultural estates belonging to the occupied state.¹⁰⁰ As recalled by the International Court of Justice in its judgment on the *Armed Activities on the Territory of the Congo* (2005), any other type of appropriation of natural resources by the occupying power must be placed on a par with pillage.¹⁰¹

During the occupation of Timor-Leste by Indonesia, it was evident that the forests in that country were largely exploited beyond the limit set by the rule of usufruct. In 1999, that is, at the end of that occupation, the state of most of those forests was such that they were no longer able to supply the basic needs of the local people. Those people were thus deprived of an environment that was essential for gathering food, medicinal plants, firewood and fodder. Similarly, the erosion of the soil threatened to have a serious effect on agricultural production and water resources.¹⁰² Lack of respect for Article 55 of the Hague Regulations of 1907 thus leads, in extreme cases, to simultaneous violations of certain economic,

95 Article 53(1). G. von Glahn considers that the number of items which could be included in this category is extremely large. He states that 'in view of the increasing technological character of modern war, ... few articles and commodities owned by the enemy state escape seizure by an occupant by reason of their lack of adaptability to war use', von Glahn, above note 26, p. 181.

96 Hague Regulations of 1907, Article 56.

97 Ibid.

98 Ibid., Article 55. On this matter see in particular Julius Stone, *Legal Controls of International Conflicts*, 2nd edn, Rinehart, New York, 1959, pp. 714–15.

99 Von Glahn, above note 26, p. 177.

100 Hague Regulations of 1907, Article 55.

101 ICJ, *Armed activities*, above note 3, para. 245.

102 Commission for Reception, Truth and Reconciliation in East-Timor, Final Report, January 2006, paras. 48–49. The production of sandalwood was, moreover, virtually eradicated during the occupation because of over-exploitation; *ibid.*, paras. 46–47.

social and cultural rights, in particular the right to adequate food and the right to health.

Finally, even if treaty-based law does not state it explicitly, practice shows that the revenues thus acquired have to be used solely to finance the expenses connected with the occupation. It would indeed be paradoxical for the use of the income from immovable property not to be subject to restrictions while monetary contributions or requisitions may only be exacted for certain specific objectives – that is, the needs of the army of occupation or the territorial administration.¹⁰³ The Nuremberg International Military Tribunal considered that the provisions of the Hague Regulations relative to public property ‘make it clear that under the rules of war, the economy of an occupied country can only be required to bear the expenses of the occupation’.¹⁰⁴

In practice, the application of the rule of usufruct to public property does, however, give rise to a number of questions. What about property such as oil or gas reserves, for instance, which, strictly speaking, do not produce a yield, but rather non-renewable products? Can the rule of usufruct be applied in that case, given that any form of exploitation automatically affects the basis of production and threatens, in the long run, the very capacity to derive revenue from it? If it can, what is the limit of ‘normality’ beyond which exploitation must be considered excessive and hence in contravention of Article 55 of the Hague Regulations? Does the occupier have the right to improve the means and techniques of production with a view to increasing the quality and/or the quantity of the resources harvested? Can it create new extraction units on deposits that are considered insufficiently productive?¹⁰⁵

103 Hague Regulations of 1907, Articles 48, 49, 52. See Antonio Cassese, ‘Powers and duties of an occupant in relation to land and natural resources’, in E. Playfair (ed.), *International Law and the Administration of Occupied Territories, Two Decades of Israeli Occupation of the West Bank and the Gaza Strip*, Clarendon Press, Oxford, 1992, pp. 428–9. The question is certainly debated in the doctrine. Some authors consider that, since no mention is made in Article 55, the occupier would be entitled to exploit immovable property belonging to the occupied state in order to achieve the objectives that it has freely set, including that of developing its own national economy (see in particular von Glahn, above note 26, p. 177; McDougal and Feliciano, above note 93, pp. 812–13). However, that position is not in keeping with the spirit of the law of occupation, whose aim, we recall, is to organize the temporary management of a territory until a global permanent solution is found.

104 *Trial of the Major War Criminals before the International Military Tribunal*, I, Nuremberg, International Military Tribunal, 1947, p. 239. See also *Flick and others*, US Military Tribunal at Nuremberg, Law Reports of Trials of War Criminals, IX, 1949, pp. 21–4; *The Law of Land Warfare – Field Manual*, Department of the Army, FM 27-10, 1956, para. 363. See also Stone, above note 98, p. 697. For other examples see R. Dobie Langenkamp and Rex J. Zedalis, ‘What happens to the Iraqi oil? Thoughts on some significant unexamined international legal questions regarding occupation of oil fields’, *European Journal of International Law*, 14 (3) (2003), pp. 430 ff.

105 An analysis of these questions is beyond the scope of this article. The reader seeking further information will find parts of the answer in Cassese, above note 103, pp. 419–42; Iain Scobbie, ‘Natural resources and belligerent occupation: mutation through permanent sovereignty’, in S. Bowen (ed.), *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories*, Nijhoff, The Hague etc., 1997, pp. 221–90; Kolb and Vité, above note 2.

Finally, property belonging to private persons is covered by relatively strict protection.¹⁰⁶ The Hague Regulations of 1907 stipulate that ‘private property ... must be respected’ and that it ‘cannot be confiscated’.¹⁰⁷ That principle – which states did not incorporate into the universal system designed to protect human rights – is an integral part of the law of occupation. It is nonetheless subject to restrictions.

Some categories of property associated with communications, transport and military operations, especially any kind of munitions, may be ‘seized’ temporarily, even if they belong to private individuals and not to the state. They are to be restored and compensation paid once peace has been made.¹⁰⁸ Apart from property which is used in the war effort, private property must be respected, regardless of whether it is immovable. The occupier is prohibited from confiscating food stocks, from appropriating securities or from selling buildings belonging to individuals. This applies even if the property in question is operated by virtue of a concession granted by the occupied state to a private person or a commercial company. In the *Lighthouses* case (1956), recourse had been made to an arbitral tribunal to pronounce judgment on the seizure of the revenue of the French lighthouse company in Salonica (Thessaloniki) by the Greek armed forces in 1912. The tribunal found that those revenues were to be considered private property and, as such, could not be seized by the occupying state. It would have been different if that service had been operated directly by the occupied state.¹⁰⁹

Moreover, the occupier is entitled to collect taxes, dues and tolls imposed for the benefit of the state. In that case it must respect the rules of assessment and incidence in force. If appropriate, it may levy other financial contributions but only to the extent justified by the needs of the army or the territorial administration.¹¹⁰

Finally, by virtue of Article 52 of the Hague Regulations of 1907, requisitions in kind and the compulsory provision of services are authorized in some conditions.¹¹¹ That category covers all ‘acts of constraint imposed on the civilian population by the occupying authority in order to meet the needs arising from the warfare’.¹¹² Such acts must have the sole aim of meeting the needs of the army of

106 Hague Regulations of 1907, Article 46. On private property in occupied territories, see von Glahn, above note 26, pp. 185 ff; Greenspan, above note 26, pp. 293 ff; Stone, above note 98, pp. 708 ff; Rousseau, above note 75, p. 162; David, above note 72, pp. 527 ff.

107 Hague Regulations of 1907, Article 46.

108 *Ibid.*, Article 53(2).

109 Franco-Greek Arbitral Tribunal, *Lighthouses Case*, Sentence of 24 July 1956, *Reports of International Arbitral Awards*, XII, pp. 200 ff. On this matter see Rousseau, above note 75, pp. 160–161.

110 Hague Regulations of 1907, Articles 48 and 49. See also Article 51. For a review of these contributions see Greenspan, above note 26, pp. 227 ff.; von Glahn, above note 26, pp. 161 ff.; Stone, above note 98, pp. 712–13.

111 See Gerhard von Glahn, above note 26, pp. 165 ff.; Greenspan, above note 26, pp. 300 ff.; Rousseau, above note 75, p. 166.

112 Rousseau, above note 75, p. 166 (translation ICRC).

occupation.¹¹³ Their ultimate aim may not be to support military operations outside the occupied territory or the occupier's economic growth.¹¹⁴ Similarly, ornamental property may not be requisitioned.¹¹⁵

Requisitions must be 'in proportion to the resources of the country'.¹¹⁶ The Hague Regulations thus apply the principle of proportionality to the occupied territory. Total requisitions may not constitute an excessive burden on the latter's resources. As pointed out in the Fourth Geneva Convention, the occupier has, in particular, the duty not to undermine the fundamental needs of the civilian population. The powers conferred by Article 52 could not overrule its obligation to ensure that civilians are supplied with food and medicines.¹¹⁷ Similarly, the stores of civilian hospitals may not be requisitioned so long as they are necessary for the needs of the civilian population.¹¹⁸ Finally, the people concerned must receive adequate compensation.¹¹⁹ The amount paid must be in line with the 'fair value'¹²⁰ of the property taken. Contributions in kind are in principle to be paid in cash. If not, the dispossessed owner will be given a receipt and will be paid as soon as possible.¹²¹

Conclusion

The legal regime of occupation has experienced far-reaching changes since its foundations were established by treaty in 1907 and in 1949. The interaction of international humanitarian law and human rights has resulted in that normative system being broadened and enriched. It has been broadened as human rights sometimes institute new types of protection compared with those under humanitarian law. It has been deepened when their content is sufficiently detailed to concretize certain provisions of the Hague Regulations or the Fourth Geneva Convention.

113 Hague Regulations of 1907, Article 52(1).

114 For case law on the admissibility of the objectives of the requisitions, see McDougal and Feliciano, above note 93, pp. 817 ff.; Rousseau, above note 75, p. 167.

115 G. von Glahn has drawn up a fairly long list of goods which may be requisitioned. It includes, in particular, animals, vehicles, homes, factories, machines and food. In the author's view, even luxury consumer goods, such as cigars and alcoholic beverages, may be requisitioned, 'if they are in sufficient supply'. Money is the only item which does not clearly feature on that list, since it can only be obtained by means of taxes, tolls or other forms of taxation; von Glahn, above note 26, p. 167. See also Greenspan, above note 26, p. 305.

116 Hague Regulations of 1907, Article 52.

117 Fourth Geneva Convention, Article 55(2).

118 *Ibid.*, Article 57.

119 Several judgments have obliged former occupiers to pay compensation to owners dispossessed of their property by means of requisitioning. For a review of that case law see, in particular, Rousseau, above note 75, p. 168.

120 Fourth Geneva Convention, Article 55(2).

121 Hague Regulations of 1907, Article 52(3). See also Fourth Geneva Convention, Article 55(2); McDougal and Feliciano, above note 93, pp. 821–2.

These developments have nonetheless not been uniform. They need to be analysed on a case-by-case basis – that is, by studying each of the areas governed by those laws during periods of occupation. That analysis first implies a differentiated approach depending on whether the economic, social and cultural rights or civilian and political rights are under scrutiny. Each of those two areas involves distinct implementation principles.¹²² Moreover, even if the focus is solely on economic, social and cultural rights, differences remain.

As far as food or health is concerned, international humanitarian law and human rights largely overlap when the issue in question is meeting the immediate needs of the civilian population. Conversely, when the occupation persists and the situation stabilizes, economic, social and cultural rights prove to be vital to a better understanding of the scope of the obligations of the foreign power. They give concrete form to the general obligation to ensure public life as in Article 43 of the Hague Regulations of 1907. Their relation to the law of occupation is one of complementarity.

With regard to property, the relation between the two legal regimes is very different. International humanitarian law proves to be more complete and more detailed than the law of human rights. There is no complementarity, as the latter is superseded by the former by virtue of the principle of speciality. Irrespective of whether it applies to the short term or to the long term, the prevailing legal regime is the law of occupation.

The interrelation of the two bodies of laws during periods of occupation cannot therefore be constructed by resorting to a sole principle which could be applied systematically. It is the outcome of a process of adaptation dictated by the different legal contents of the rules studied. Two specific categories have been chosen here to illustrate that delicate search for balance. The work could be appropriately continued in the future by applying the analysis to other areas such as housing, work or education.¹²³

122 For a comparative analysis of the two areas during periods of occupation, see Kolb and Vité, above note 2.

123 See Jonathan Thompson Horowitz, 'The right to education in occupied territories: making more room for human rights in occupation law', *Yearbook of International Humanitarian Law*, 7 (2004), pp. 233–77.