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Unveiling claims of discrimination based on nationality in the context of occupation under international humanitarian and human rights law

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Abstract

This article examines international humanitarian law (IHL) and human rights guarantees of equality and non-discrimination applicable to cases of belligerent occupation. Capitalizing on the responsibilities of the Occupying Power with respect to different categories of persons living in the occupied territory distinguished by their nationality, it looks at the contents of obligations stemming from relevant norms of the two regimes and their interplay. It also addresses questions of the adequacy, utility and limits of IHL and human rights in according protection from discrimination and inequality to the inhabitants of the occupied territory.

Keywords: discrimination, occupation, IHL, Geneva Convention IV, human rights.

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Introduction

International law unequivocally prohibits discrimination and other practices that contradict the principle of equality of persons "in dignity and rights", such as racism, xenophobia or other forms of intolerance. This rule is firmly established in treaty and customary law, and it is a general principle of international law.[1] It is even claimed to be a *jus cogens* norm.[2] With its inclusion in the Charter of the United Nations (UN Charter)[3] and the Universal Declaration of Human Rights (UDHR),[4] and in view of the fact that discrimination is prohibited at the constitutional level in almost all States across the globe,[5] one can confidently speak of wide, if not universal, acceptance of the principle.

In spite of a clear prohibition, discrimination manifests itself in different forms and degrees in virtually all societies and cultures, and in various settings. Naturally, armed conflicts are no exception. As the International Committee of the Red Cross (ICRC) submits, discrimination on various grounds is among the most stressing issues of many contemporary armed conflicts, as often practices that directly contradict the norms of IHL either directly target or have a significantly more detrimental effect on certain segments of the population defined by characteristics such as gender, disability, religion, ethnicity or political opinion.[6] Discrimination based on nationality in the context of occupation – i.e., settings where a State exercises effective control over the territory of another State without the latter State's consent[7] – is the subject of this article.

1 International Court of Justice (ICJ), *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment, 18 July 1966, Dissenting Opinion of Judge Tanaka, paras 293, 299–300. See also ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 of 1970*, Advisory Opinion, 21 June 1971 (South West Africa Advisory Opinion), Separate Opinion of Vice-President Ammoun, p. 76.

2 Inter-American Court of Human Rights (IACtHR), *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion No. OC-18/03, 17 September 2003, paras 100–101, 173; IACtHR, *Yatama v. Nicaragua*, Series C, No. 127, 23 June 2005, para. 184. According to the ICJ, certain forms of discrimination, such as racial discrimination, give rise to obligations *erga omnes*: see ICJ, *Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment, 5 February 1970, para. 34.

3 Charter of the United Nations, United Nations, 1 UNTS XVI, 24 October 1945 (UN Charter), Art. 1(3).

4 Universal Declaration of Human Rights, UNGA Res. 217 A(III), 10 December 1948 (UDHR), Art. 1.

5 Human Rights Committee, General Comment No. 18, "Non-Discrimination", 10 November 1989, para. 9; Daniel Moeckli, *Human Rights and Non-Discrimination in the "War on Terror"*, Oxford University Press, Oxford, 2008, p. 55.

6 See the ICRC Challenges Reports: ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2003, p. 7; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2007, p. 4; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2015, p. 5. In the ICRC's 2019 Challenges Report, an entire chapter is dedicated to the prohibition of adverse distinction based on disability: see ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2019, pp. 41–43. See also ICRC, *Gendered Impacts of Armed Conflicts and Implications for the Application of IHL*, Geneva, 2022, pp. 22–32.

7 Regulations Annexed to the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, Art. 42. Notably, a more functional approach that enables the applicability of certain rules of international law of occupation during the so-called "invasion phase" is also recognized: see Marten Zwanenburg, Michael Bothe and Marco Sassòli, "Is the Law of Occupation Applicable to the Invasion Phase?", *International Review of the Red Cross*, Vol. 94, No. 885, 2012.

Discrimination is prohibited in armed conflicts and occupation. In fact, virtually all international humanitarian law (IHL) instruments that predate the UN Charter and the UDHR expressly prohibited or at least alluded to the prohibition.[8] Today, the four Geneva Conventions of 1949 and their Additional Protocols of 1977 provide a number of rules expressly prohibiting adverse distinction – an IHL counterpart to the term "discrimination", to be understood as synonymous with discrimination in human rights law – against persons affected by armed conflict and occupation, and requiring equality of treatment of certain categories of persons.[9] The ICRC Customary Law Study has also identified relevant practice and *opinio juris* that confirm the existence of a customary rule prohibiting discrimination in armed conflict.[10] Besides, nowadays it is widely accepted that international law, which governs a wide range of humanitarian issues that arise in armed conflict and occupation, is not limited to IHL. Most notably, various international bodies have confirmed that human rights law does not cease to apply in such situations[11] and binds States even when they are operating extraterritorially, especially in (but not limited to) instances where they attain the level of control over a territory that is sufficient to qualify them as an Occupying Power.[12] The prohibition against discrimination

8 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864, Art. 6; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 27 July 1929, Art. 1; Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, Art. 4.

9 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 12; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 12; Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 16; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Arts 13, 27; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Preamble, Arts 9, 10, 70, 75; Article 3 common to the four Geneva Conventions; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Arts 2, 4, 7.

10 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 88, available at: https://ihl-databases.icrc.org/en/customary-ihl/v1; Jean-Marie Henckaerts and Louise Doswald Beck, *Customary International Humanitarian Law*, Vol. 2: *Practice*, Cambridge University Press, Cambridge, 2005, pp. 2024–2061, available at: https://ihl-databases.icrc.org/en/customary-ihl/v2.

11 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996 (Nuclear Weapons Advisory Opinion), para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004 (Wall Advisory Opinion), paras 105–106; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, 19 December 2005, para. 216; Human Rights Committee, General Comment No. 31, "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", 26 May 2004, para. 11.

12 Among others, see ICJ, Wall Advisory Opinion, above note 11, paras 107–113; ICJ, *Armed Activities*, above note 11, para. 216; Human Rights Committee, above note 11, para. 10. For the case law of the European Court of Human Rights (ECtHR) on the matter, see ECtHR, *Al-Skeini and Others v. the United Kingdom*, Appl. No. 55721/07 (Grand Chamber), 16 September 2014, paras 131–150; ECtHR, *Al-Jedda v. the United Kingdom*, Appl. No. 27021/08 (Grand Chamber), 7 July 2011, para. 86; ECtHR,

and the obligation of equality of treatment of persons contained in virtually all human rights treaties[13] form part of the corpus of such rules.

With the strong stigma attached to it and in view of the universal acceptance of the principle of equality of persons, the notion of discrimination bears with it political and legal significance. Engaging with the Occupying Power to tackle discriminatory practices by insisting on discrimination as a violation in itself, as opposed to treating these as "ordinary violations" of other substantive rules of IHL, can have an added value. On the one hand, it enables tackling the systemic and collective pattern of violations of IHL practised against a given group of persons, and on the other, it "elevates" engagement on the humanitarian issues at stake, thereby increasing the chances of bringing about the end of such practices in humanitarian contexts. This has led to the increasing invocation of discrimination with respect to practices where particular segments of the population in an occupied territory have suffered hardship more than others. Admittedly, over-reliance on discrimination, even with good intentions, in instances where its constitutive elements are not met can risk diluting the notion and ultimately weakening the system of protection against discrimination. In fact,

Chiragov and Others v. Armenia, Appl. No. 13216/05 (Grand Chamber), 16 June 2015, para. 186; ECtHR, *Hassan v. the United Kingdom*, Appl. No. 29750/09 (Grand Chamber), 16 September 2014, para. 75; ECtHR, *Georgia v. Russia (II)*, Appl. No. 38263/08 (Grand Chamber), Merits, 21 January 2021, paras 81–84. For detailed analysis, see Robert Kogod Goldman, "Extraterritorial Application of the Human Rights to Life and Personal Liberty, including Habeas Corpus, during Situations of Armed Conflict", in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar, Cheltenham, 2013; Gloria Gaggioli and Jens David Ohlin, "Remoteness and Human Rights Law", in Jens David Ohlin (ed.), *Research Handbook on Remote Warfare*, Edward Elgar, Cheltenham, 2017; Marko Milanovic, "Al-Skeini and Al-Jedda in Strasbourg", *European Journal of International Law*, Vol. 23, No. 1, 2012; Ralph Wilde, "Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties", *Israel Law Review*, Vol. 40, No. 2, 2007.

13 UDHR, above note 4, Arts 2, 7; International Covenant on Civil and Political Rights, 171 UNTS 999, 16 December 1966 (ICCPR), Arts 2, 26; International Covenant on Economic, Social and Cultural Rights, 3 UNTS 993, 16 December 1966 (ICESCR), Art. 2. Universal human rights treaties devoted to the specific categories of persons also outlaw discrimination: International Convention on the Elimination of All Forms of Racial Discrimination, 195 UNTS 660, 21 December 1965 (CERD), Art. 2; Convention on the Elimination of All Forms of Discrimination against Women, 13 UNTS 1249, 18 December 1979 (CEDAW), Art. 2; Convention on the Rights of the Child, 3 UNTS 1577, 20 November 1989, Arts 2, 28; Convention on the Rights of Persons with Disabilities, 3 UNTS 2515, 24 January 2007 (CRPD), Art. 1; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 3 UNTS 2220, 18 December 1990, Arts 1, 7. All major regional human rights instruments include guarantees of equality and non-discrimination: African Charter on Human and Peoples' Rights, Organization of African Unity, 27 June 1981 (Banjul Charter), Arts 2, 3, 18(3–4), 28; American Convention on Human Rights, Organization of American States, 22 November 1969 (Pact of San Jose), Arts 1, 24; American Declaration on the Rights and Duties of Man, Ninth International Conference of American States, 2 May 1948, Art. II; Arab Charter on Human Rights, League of Arab States, 15 September 1994, Arts 2, 9, 35; Cairo Declaration of Human Rights in Islam, Organization of the Islamic Conference, 5 August 1990, Art. 1; ASEAN Human Rights Declaration, Association of Southeast Asian Nations,18 November 2012, Arts 1, 2, 3, 9; European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, ETS 5, 4 November 1950, Art. 14; Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination, Council of Europe, ETS 177, 4 November 2000, Art. 1; European Social Charter (Revised), Council of Europe, ETS 163, 3 May 1996, Arts 15, 20, 27, E; Charter of Fundamental Rights of the European Union, European Union, 2012/C 326/02, 26 October 2012, Arts 20, 21, 23.

not so infrequently, claims about discrimination do generate a certain amount of pushback by the States concerned, among others.

Some instances of unfavourable treatment of persons based on an identifiable ground, such as ethnic cleansing practised by an Occupying Power through deportation of the inhabitants of an occupied territory of a given ethnicity and the destruction of their property, will rather uncontroversially be regarded as discrimination under international law. Cases where the alleged discrimination has to do with differentiations based on nationality, such as nationals of the occupied State and nationals of the Occupying Power, whereby the former are subjected to unfavourable treatment compared to the situation of the latter, are not as straightforward. As shall be discussed below, the IHL treaty regime – and the drafting history of those instruments – leaves room for arguing that such differentiations are not to be regarded as discrimination. A question then arises as to whether and to what extent such results under IHL influence the analysis of the same case under human rights law. The present article delves into this debate with the aim of providing an answer to the question of whether such instances are to be regarded as discrimination under international law. From the outset, the analysis is guided by the approach that the answer has to be practicable in a sense that IHL and human rights should not bring different results, whereby the same practice can be deemed as discrimination under human rights law and not IHL, or vice versa.

At first glance, analyzing the issue of discrimination based on nationality in the context of occupation may seem like a theoretical exercise due to the fact that the Occupying Power is not expected to be confronted with its own nationals in the occupied territory, at least not on a significant scale. Such an assumption presupposes that the Occupying Power has respected its other obligations under IHL and other international law, most notably the prohibition against transferring its own population to the occupied territory[14] and the prohibition against annexation.[15] Admittedly, this is not always the case, particularly in instances where the occupation is of a prolonged nature. Given that claims of discrimination based on nationality are more likely to be made in such contexts, this article will consider the factual and legal nuances relevant to those contexts.

In order to set the scene for the debate, this article starts by presenting the normative framework, first by looking at the notion of discrimination and its constitutive elements and then by analyzing the issue of applicability and contents of relevant IHL and human rights rules on non-discrimination, as well as their interplay. It then turns to the debate and provides several hypothetical scenarios to flesh out the matter at stake – namely whether discrimination exists, and what international law has to say about it, when an Occupying Power treats differently its own population and the enemy population present in the occupied

14 GC IV, Art. 49.

15 UN Charter, above note 3, Art. 2(4); Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV), 24 October 1970.

territory. Finally, it proposes an answer to the question and provides some concluding remarks.

Normative framework

The notion of discrimination and its constitutive elements

Under international law, equality and non-discrimination are considered to be the positive and negative expressions of the same principle – "two sides of the same coin".[16] However, there is a noticeable difference between the terminology used in IHL and human rights when it comes to the negative framing of the principle, and this divergence in terminology is even reflected in the codification of the relevant rules.[17] The term "adverse distinction" is – or rather, used to be – more commonly used in IHL, and "discrimination" in human rights law. With time, this divide is fading, and admittedly, the latter is dominating the political and legal language, even within the IHL domain.[18] For the purposes of this article, it is important to mention that this difference in terminology does not imply a difference in substance: both terms carry the same meaning and can be used interchangeably. This is also confirmed by the drafting history of the main IHL instruments: the term "discrimination" was actively used at the 1949 Diplomatic Conference, and no distinct meaning was attached to the term "adverse distinction" that was ultimately chosen to be used across the four Geneva Conventions.[19]

Importantly, although the term is mentioned in various provisions, the definition of discrimination is not provided either in IHL or in human rights instruments of general scope. Nevertheless, there is a widely accepted definition proposed by the United Nations (UN) Human Rights Committee:

> [T]he term "discrimination" … should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social

16 Daniel Moeckli, "Equality and Non-Discrimination", in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law*, Oxford University Press, Oxford, 2014, p. 156; Anne Bayefsky, "The Principle of Equality and Non-Discrimination in International Law", *Human Rights Law Journal*, Vol. 11, No. 1–2, 2015, pp. 72–73; Dagmar Sheik, Lisa Waddington and Mark Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Hart, Oxford, 2007, p. 26.

17 See the relevant provisions of the main IHL instruments, as listed in above note 9: namely, GC I, Art. 12; GC II, Art. 12; GC III, Art. 16; GC IV, Art. 13, 27; AP I, Preamble, Arts 9, 10, 70, 75; common Article 3; AP II, Arts 2, 4, 7. Compare to some of the main human rights instruments, such as UDHR, above note 4, Arts 2, 7; ICCPR, above note 13, Arts 2, 26; ICESCR, above note 13, Art. 2.

18 Most notably, see ICRC Customary Law Study, above note 10, Rule 88, which frames the customary rule as "non-discrimination".

19 *Final Record of the Diplomatic Conference of Geneva of 1949*, Federal Political Department, Berne, Vol. 2, Section A, 1949, pp. 821, 852. See also George Dvaladze, "Non-Discrimination under International Humanitarian and Human Rights Law", in Robert Kolb, Gloria Gaggioli and Pavle Kilibarda (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar, Cheltenham, 2022.

> origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[20]

The definition covers both direct and indirect discrimination: broadly speaking, the former implies *treatment* that is unfavourable to the person or group of persons concerned, while the latter is concerned with the *effects* of treatment that may not in itself be unfavourable.[21]

Not all differentiation of persons amounts to discrimination, and sometimes the application of a different standard might be not only justified but even required by international law. In order to distinguish prohibited discrimination from other types of differentiation, four cumulative elements outlined in the definition provided above need to be met, namely: (1) the treatment or its effects must be unfavourable to the persons concerned; (2) such disadvantage must be measurable by comparing their situation to those of others in a substantively similar situation (comparator); (3) such treatment must be based on an identifiable characteristic, such as nationality, age, disability, gender, ethnicity, language or any other similar criteria (basis/ground of discrimination); and (4) there must be *no* reasonable and objective justification for such a differentiation, which is to say that (i) it does not serve a purpose that is deemed legitimate under international law, or (ii) it is not necessary and proportionate for attaining such an aim. Whether or not a potential justification was reasonable and objective will be determined on a case-by-case basis, and the standard of scrutiny will vary depending on considerations such as the severity of the treatment applied and the ground of adverse distinction.[22]

International law rules on non-discrimination applicable in the occupied territory

In an armed conflict or context of occupation, the question of whether a given incident or practice meeting the elements set out above and thereby amounting

20 Human Rights Committee, above note 5, para. 7. The pronouncement of the Human Rights Committee builds upon the definition provided in the universal human rights instruments dealing with specific forms of discrimination, such as the CEDAW, above note 13; CERD, above note 13; and CRPD, above note 13. The same definition is adopted in UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 20, "Non-Discrimination in Economic, Social and Cultural Rights", 2 July 2009, para. 7.

21 See Human Rights Committee, above note 5, para. 8; CESCR, above note 20, para. 10; Human Rights Committee, *Althammer v. Austria*, Communication No. 998/2001, 2003, para. 10.2. See also D. Moeckli, above note 16, p. 163; Daniel Moeckli, "Anti-Terrorism Laws, Terrorist Profiling, and the Right to Non-Discrimination", in Ana María Salinas De Frias, Katja L. H. Samuel and Nigel D. White (eds), *Counter Terrorism: International Law and Practice*, Oxford University Press, Oxford, 2012, p. 600.

22 For a more comprehensive analysis of the elements of discrimination see, among others, D. Moeckli, above note 16; A. Bayefsky, above note 16; Tufyal Choudhury, "Interpreting the Right to Equality under Article 26 of the International Covenant on Civil and Political Rights", *European Human Rights Law Review*, Vol. 8, No. 1, 2003; William A. Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary*, 3rd revised ed., N. P. Engel, Kehl am Rhein, 2019; Janneke Gerards, *Judicial Review in Equal Treatment Cases*, Martinus Nijhoff, Leiden, 2005.

to discrimination is to be governed by one or several rules of international law would depend on the scope and content of the rule at stake. In this respect, the temporal, geographical and material scope of the main rules of IHL and human rights law, as well as their interplay, needs to be considered. This article focuses mainly on the rules applicable to occupation.

Rules and principles in IHL instruments

IHL rules governing occupation are included, among other instruments, in the Regulations attached to Hague Convention IV respecting the Laws and Customs of War on Land (1907 Hague Regulations), Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (GC IV), and Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I). All these instruments expressly affirm, or at least allude to, non-discrimination.

The 1907 Hague Regulations do not contain a specific provision on non-discrimination or equality of treatment of persons. Nevertheless, given that the principle of non-discrimination is firmly established as international custom and as a general principle of law,[23] it is safe to suggest that the rule is covered by the Martens Clause contained in the preamble to the Hague Regulations, which provides that

> the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Two GC IV provisions of a general nature are particularly important for non-discrimination – namely, Articles 13 and 27.

Article 27 is contained in Part III ("Status and Treatment of Protected Persons"), Section I ("Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories"), and therefore, the rule applies within the "closed category" of protected persons as defined in Article 4 of GC IV – excluding, among others, persons of the nationality of the Occupying Power. Article 27 provides that

> [w]ithout prejudice to the provisions relating to their state of health, age and sex, all *protected persons* shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion [emphasis added].

The provision includes two important guarantees: treatment with the same consideration, and prohibition of adverse distinction. The two are interconnected

23 ICJ, *South West Africa Cases*, above note 1, Dissenting Opinion of Judge Tanaka, paras 293, 299–300. See also South West Africa Advisory Opinion, above note 1, Separate Opinion of Vice-President Ammoun, p. 76.

but separate obligations; the former is broader, and arguably fully encompasses the latter.

Treatment with the same consideration, commonly understood as the obligation of equality of treatment (of protected persons), is comparable to the obligation of "alike" treatment of prisoners of war under Article 16 of Geneva Convention III relative to the Treatment of Prisoners of War (GC III). The drafting history of the Geneva Conventions confirms that both Article 16 of GC III and Article 27 of GC IV set substantively similar standards, and the difference in wording does not bear any significance.[24] As Pejic points out, these articles refer to "mandatory equality of treatment under IHL", and they seek to ensure consistency of treatment of protected persons.[25] Therefore, any deviation from the standard of treatment required, whether preferential (that is, more favourable) or unfavourable (prejudicial), will contradict this rule, unless there is a justification that can be deemed reasonable and objective, including differentiations that are not based on an identifiable status and characteristic (and therefore do not qualify as discrimination due to the absence of such a ground, as discussed above).

The *prohibition against adverse distinction* covers various practices that may take different forms, such as direct and indirect discrimination, as explained above, as well as the remedial role of the Occupying Power to prevent and protect from discrimination.[26] The prohibition is autonomous in nature – i.e., it prohibits adverse distinction in any area, irrespective of whether the unfavourable treatment in question is expressly prohibited by other substantive rules of GC IV – as opposed to an accessory rule, which has no independent existence and simply requires that a rule expressly provided in a given treaty should be implemented without discrimination.[27]

Article 13 of GC IV is contained in Part II ("General Protection of Populations against Certain Consequences of War") and is applicable to all members of the civilian population (and therefore not limited to protected persons as defined in Article 4). It provides that

> [t]he provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.

Due to the broader personal scope of Article 13, Rona and McGuire suggest that the rule contained in this provision is a "general prohibition of discrimination without

24 Given the similarity of those provisions, recently updated Commentary to Article 16 of GC III provides important clarifications: see ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2021.

25 Jelena Pejic, "Non-Discrimination and Armed Conflict", *International Review of the Red Cross*, Vol. 83, No. 841, 2001, p. 186.

26 ICJ, *Armed Activities*, above note 11, para. 209.

27 For the difference between accessory and autonomous rules on non-discrimination, see D. Moeckli, above note 16. See also G. Dvaladze, above note 19.

limitation" and that "all obligations regarding civilians function 'without adverse distinction'".[28] Nevertheless, it has to be pointed out that the prohibition is accessory in nature and only prohibits discrimination in areas covered by the provisions contained in Part II of GC IV. However, as far as distinctions in areas covered in Part II of GC IV are concerned, Article 13 prohibits unfavourable treatment of protected persons vis-à-vis any other person, including nationals of the Occupying Power and third-country nationals who are not protected persons.

Last but not least, Article 75 of AP I contains an accessory rule that also applies to all persons and prohibits discrimination in their enjoyment of fundamental guarantees while in the hands of a party to the conflict or the Occupying Power, by providing that

> persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the [Geneva] Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

Rules on equality and non-discrimination in human rights instruments

Virtually all human rights treaties – whether universal or regional, general or specific in scope – set out at least one provision on non-discrimination.[29] The International Covenant on Civil and Political Rights (ICCPR) contains five interrelated rules on equality and non-discrimination.[30]

It is widely accepted that human rights instruments, including the ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR), continue to apply in cases of occupation, since the Occupying Power exercises a degree of control over the territory concerned that is sufficient to bring individuals present there within its jurisdiction.[31] While the provisions on non-discrimination are not listed among the non-derogable rights in Article 4 of the ICCPR, they are considered to be of such a nature. Article 4 requires that measures of derogation must not involve discrimination and must comply with other international obligations of the State concerned[32] – in a context of occupation, this includes IHL rules on equality of treatment and the prohibition

28 Gabor Rona and Robert J. McGuire, "The Principle of Non-Discrimination", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 199.
29 See above note 13.
30 Bertrand Ramcharan, "Equality and Non-Discrimination", in Louis Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, p. 250.
31 See above notes 11 and 12.
32 ICCPR, above note 13, Art. 4(1).

of adverse distinction. The UN Human Rights Committee has also confirmed the non-derogability of guarantees of non-discrimination under the ICCPR in its General Comment 29, in which it observed that

> there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant.[33]

The most important guarantees of non-discrimination are found in Articles 2 (accessory prohibition of discrimination) and 26 (equality before the law, equal protection of the law and general prohibition of discrimination by an autonomous rule) of the ICCPR.

General pronouncements on the interplay between IHL and human rights, and their relevance for the rules on non-discrimination

There are different theories on the relationship between IHL and human rights, such as separation, convergence, confluence, complementarity and cross-fertilization.[34] According to the International Court of Justice (ICJ),

> as regards the relationship between international humanitarian law and human rights law, there are three possible situations: 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.[35]

With its approach in the Nuclear Weapons Advisory Opinion interpreting "arbitrary deprivation of life" under Article 6 of the ICCPR in light of applicable IHL rules on the conduct of hostilities,[36] the ICJ seems to support the complementarity of the two regimes, at least as far as inherently qualified rights are concerned – that is, non-absolute rights that require a degree of performance which is situation- and context-specific, and that can accommodate the exigencies of the situation and other pertinent factors. A similar stance has been taken by the Human Rights Committee with respect to the right to life and the right to liberty and security, by proposing that IHL rules and principles can provide guidance in determining whether deprivation of life or liberty is to

33 Human Rights Committee, General Comment No. 29, "Article 4: Derogations during a State of Emergency", 31 August 2001, para. 8. See also D. Moeckli, "Anti-Terrorism Laws, Terrorist Profiling, and the Right to Non-Discrimination", above note 21, p. 603.

34 For a detailed analysis of those theories, see e.g. Kubo Mačák, "The Role of International Human Rights Law in the Interpretation of the Fourth Geneva Convention", *Israel Yearbook on Human Rights*, Vol. 52, 2002; Nancie Prud'homme, "Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?", *Israel Law Review*, Vol. 40, No. 2, 2007.

35 Wall Advisory Opinion, above note 11, para. 106; ICJ, *Armed Activities*, above note 11, para. 216.

36 Nuclear Weapons Advisory Opinion, above note 11, para. 25.

be deemed "arbitrary".[37] Some of the regional courts have followed the same path.[38]

International courts and tribunals have not clarified the exact interplay between IHL and human rights rules on non-discrimination, even if in some contexts they have insisted on the complementary nature of those provisions and have found violations in instances where the Occupying Power failed to fulfil its remedial role of tackling discrimination in the occupied territory.[39] Nevertheless, a few important observations can be made by drawing from the pronouncements made in respect of the right to life and right to liberty and security. Firstly, the notion of discrimination and the corresponding IHL and human rights rules are inherently qualified, and therefore, in domains where the two sets of rules overlap, there is room for harmonious interpretation whereby one set of rules can help interpret the other. Secondly, given that some of the most important rules on non-discrimination are accessory in nature, it would be difficult, if not impossible, to determine a single scheme through which IHL and human rights rules on non-discrimination interact. In other words, since such non-discrimination rules attach to other substantive rules that are significantly different (in that some are exclusively regulated by IHL, others are exclusively regulated under human rights law, and the rest are regulated by both), they reflect the nature of those rules with respect to the relationship. Consequently, the task of determining a single and general mode of interplay between IHL and human rights guarantees is difficult, and determination has to be made on a case-by-case basis, taking into consideration the practice area, ground of discrimination, and relevant rules of IHL and human rights on non-discrimination. In the following section, this article will focus on the interplay between relevant IHL and human rights rules that are pertinent to the question at stake.

Debate: Can the Occupying Power discriminate against persons living in the occupied territory on the basis of nationality?

The subject of this article is the question of whether the Occupying Power discriminates based on nationality if it accords different standards of treatment to its own and enemy nationals who reside in the occupied territory, whereby the treatment accorded to the latter is unfavourable or less favourable in comparison to the situation of the former category of persons. A few examples of unfavourable treatment involving such a differentiation are deportation, destruction or confiscation of property or other impediment to the enjoyment of related property rights, failure to protect certain segments of the population from

37 Human Rights Committee, General Comment No. 35, "Article 9 (Liberty and Security of Person)", 16 December 2014, para. 66; Human Rights Committee, General Comment No. 36, "Article 6 on the Right to Life", 3 September 2019, para. 64.

38 See, e.g., ECtHR, *Hassan*, above note 12, para. 107.

39 ICJ, *Armed Activities*, above note 11, para. 209.

private persons and other threats, failure to provide proper administration of the occupied territory and ensure civil life for all, and, as one of the most stressing issues in light of the recent COVID-19 pandemic, failure to manage the spread of disease and to distribute vaccines to the population.

The debate has to do with the non-discrimination rule contained in Article 27 of GC IV, which does not mention nationality among the other listed grounds of discrimination and thereby leaves room to argue that that law applicable to occupation is not concerned with discrimination on the ground of nationality. Importantly, even when discrimination is not established under the black letter of the law, the treatment that underlies alleged discrimination could still be detrimental to the persons affected and, if it falls within the scope of relevant rules, could amount to a violation of IHL. On the other hand, in such instances the treatment will not bring about the legal (and political) consequences attached to the notion of discrimination.

Article 27 of Geneva Convention IV and its perceived limits in addressing discrimination based on nationality

Article 27 of GC IV is different from all the other provisions of the four Geneva Conventions dealing with non-discrimination – with the only other exception of common Article 3 – in not mentioning "nationality" among the listed grounds of discrimination. Importantly, Article 13 of GC IV *does* include it.

The absence of reference to "nationality" is not due to the drafters simply forgetting to include it. In fact, the ground was initially listed but was deliberately deleted during the negotiations at the 1949 Diplomatic Conference. The reason for the deletion was that the delegations found certain measures envisaged for "enemy aliens" by IHL to be precisely based on nationality.[40] For the same reason, the ICRC Commentary on GC IV suggests that nationality cannot be read under "any other similar criteria" under Article 27.[41]

The clarifications derived from the drafting history of the provision confirm that the *sole* intention of the rule on non-discrimination not mentioning "nationality" is to accommodate the prohibition with the status-based protection provided by the vast majority of rules contained in GC IV. The fear seems to

40 *Final Record*, above note 19, p. 641. See also ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (2016 Commentary on GC I), p. 200 fn. 333.

41 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 206. In this respect the Commentary on Article 27 of GC IV takes a different stance than with respect to the same issue under common Article 3. According to the ICRC's initial Commentary on GC I, despite the decision of the Diplomatic Conference to omit this criterion in certain provisions of the Geneva Conventions on the prohibition of adverse distinction, nationality should be still read as a subsumed protected ground under the category "any similar criteria", at least as far as common Article 3 is concerned: see Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 56. This position was reaffirmed in the ICRC's 2016 Commentary on GC I, above note 40, p. 200, para. 572.

have been that the inclusion of the term would give rise to claims of discrimination or otherwise create confusion that would dilute the protections of the Convention – and this is a relevant consideration. The non-discrimination clause under Article 27 of GC IV operates mainly within a closed category of persons, namely protected persons as defined in Article 4. As such, it does not seek to put an Occupying Power's own nationals and protected persons on an equal footing. References to nationality in the provision would not in themselves "open up" the closed category of persons.

While the idea of maintaining the structure of GC IV and its status-based protection is sound, the execution is somewhat problematic in terms of legal drafting. Article 4 of GC IV is sufficient to tackle the issue, and the extra effort of the drafters seems to have created a legal problem. If Article 27 of GC IV were not concerned with *any* discrimination on the basis of "nationality", it would mean that the Occupying Power is not prohibited under IHL from drawing unjustified distinctions between different categories of protected persons, namely between third-country nationals who are entitled to protected person status, stateless persons, and nationals of the occupied State. Such a reading of the law clearly contradicts the object and purpose of the provision. Instead, it is suggested that Article 27 must be understood – as a matter of principle – to prohibit discrimination based on nationality and should not automatically be dismissed on the premise explained above. This would allow a substantive analysis to be made on a case-by-case basis as to whether a differentiation between the inhabitants of the occupied territory who are protected persons based on nationality amounts to discrimination. The inherently qualified nature of the notion of discrimination would, in any event, accommodate the legitimate considerations mentioned above – namely, in the process of determining if for the differentiation at stake the enemy and third-State nationals or stateless residents of the occupied territory were in a substantively similar situation, and whether such differentiation had a reasonable and objective justification.

The impact of Article 27 of Geneva Convention IV on other international law rules that are concerned with instances of unjust differentiations between own and enemy nationals

In light of its object and purpose of prohibiting discrimination and ensuring treatment with the same consideration of *protected persons*, Article 27 is a specific rule. Differentiations between own nationals and protected persons are not covered by the material scope of this rule, and therefore, it has no direct relevance in assessing claims about practices amounting to discrimination. Nevertheless, the Occupying Power might be inclined to invoke Article 27 of GC IV in order to automatically dismiss claims concerning discrimination based on nationality when it comes to differentiations between own and enemy nationals in the occupied territory. This section seeks to clarify the relationship between the rules affirmed in this provision and other relevant provisions of IHL and human rights instruments.

As far as IHL instruments are concerned, non-discrimination rules contained in Article 13 of GC IV and Article 75 of AP I – both of which mention nationality as a protected ground[42] – are broader in their respective personal and material scopes, and are not limited to distinctions within the "closed category" of protected persons. Admittedly, these are accessory rules, as explained above. Nevertheless, as far as discrimination based on nationality and involving difference in treatment of own and other nationals – including protected persons – is concerned, rules contained in these provisions will apply. And they do cover a wide range of areas, including fundamental guarantees of all persons. For example, Article 13, read in conjunction with Article 17 of GC IV, would prohibit drawing arbitrary differentiations between own and enemy nationals in the evacuation of persons from besieged or encircled areas. Similarly, Article 75 of AP I would require humane treatment and fundamental guarantees to be accorded to all persons irrespective of "national … origin", and would prohibit as discrimination all unfavourable treatment – including collective punishment – of persons compared to the treatment of persons with different nationality (including own, enemy or third-country nationals) that has no reasonable and objective justification.

As for the interplay between Article 27 of GC IV and human rights instruments, in particular the virtually all-encompassing autonomous prohibition against discrimination contained in Article 26 of the ICCPR, the relationship is not singular.

Discrimination among the closed category of protected persons in the occupied territory belongs to the category issues that fall within the personal and material scopes of *both* Article 27 of GC IV and Article 26 of the ICCPR, the former being the more specific rule and the latter being the more general one. In this respect, and following the approach of international courts and tribunals, the more special rule can help interpret and give content to the latter, and the inherently qualified nature of the notion of discrimination will allow this. However, as explained above, this issue is not at the heart of the question addressed by this article.

With regard to differentiations between own nationals and protected persons residing in the occupied territory, if Article 27 of GC IV is not applicable, it is not capable of influencing the analysis under the relevant provisions of the ICCPR, including its Article 26. While technically such matters are not *exclusively* governed by human rights law, at least as far as differentiations covered by the accessory rules contained in Article 13 of GC IV and Article 75 of AP I are concerned,[43] Article 27 of GC IV will not suffice to dismiss claims about the applicability and relevance of human rights provisions

42 Article 75 of AP I mentions "national origin", which is not identical but a related notion: see 2016 Commentary on GC I, above note 40, p. 199 fn. 330; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 259.

43 In any event, save for their accessory nature as explained above, Article 13 of GC IV and Article 75 of AP I do not deal with discrimination in a substantively different manner to human rights instruments, including Article 26 of the ICCPR.

that have no corresponding limitation regarding the personal and material scope of the rule.

Why insist on discrimination based on nationality, and how to draw the line between these and other differentiations that are permitted?

Without pronouncing on the legality of the situation under *jus ad bellum*, IHL regulates the behaviour of the Occupying Power in the occupied territory under the premise that the factual and legal situation of the occupation is temporary. It further provides additional legal safeguards that seek to maintain the *status quo* which existed prior to the commencement of the occupation. Among other things, it recognizes as void, for the purposes of the protections that IHL provides for the inhabitants of the occupied territory, any *de facto* or *de jure* annexation of the territory, and it prohibits demographic changes in the occupied territory.[44] While it is expected that the Occupying Power will be confronted with its own nationals in the occupied territory, IHL does not presuppose that the concentration of nationals of the Occupying Power will be so significant as to give rise to humanitarian concerns in respect of differentiations between own and enemy nationals. Such differentiations will become challenging from the humanitarian and legal standpoint precisely where the Occupying Power has failed to comply with the above-mentioned obligations.

The interrelatedness of discrimination and the Occupying Power's lack of respect for the prohibition against annexation and demographic changes in the occupied territory is significant in that it can have a spiralling effect, ultimately undermining the protection of the inhabitants of the occupied territory. Firstly, the scarcity of resources in the occupied territory – be it in housing, property, employment, health care, or other services or goods – would mean that whatever is given to own nationals would be taken away or diverted from protected persons. Secondly, the discontent tied to such distribution of resources or changing of the demographic of the occupied territory in disregard of international law by the Occupying Power is likely to aggravate the security situation on the ground, giving the factual and legal prerogative to the Occupying Power to use more restrictive measures. It would be difficult to ignore the fact that the use of such prerogatives to the detriment of protected persons ultimately serves the purpose of maintaining the continued breach of the IHL violation of allowing own nationals to reside in the occupied territory.

Lack of resources and the security and safety of others are commonly deemed to be legitimate aims that can render differentiations non-adverse, provided that they are proportionate. In such situations, however, a systematic

44 GC IV, Arts 47 and 49 respectively.

reading of international law would require that the Occupying Power not be allowed to rely on factors that emanate from or are closely connected to its continued breach of international obligations – namely, to alter the *status quo* or to make permanent demographic changes in the occupied territory. It is suggested that in such instances, not only must nationality *not* be dismissed as a ground of discrimination under IHL and human rights, but it must instead be seen as a suspect classification that necessitates an even higher, if not the highest, standard of scrutiny for determining whether the differentiation between persons has reasonable and objective justification. This would mean that justifications proposed by the Occupying Power to rebut claims about discrimination must be particularly strong and convincing.

Conclusion

This article has addressed claims about discrimination based on nationality in the Occupying Power's treatment of persons in the occupied territory. It has provided an overview of the applicable international law framework by focusing on IHL and human rights guarantees of non-discrimination and their interplay. Having analyzed the specificity of relevant provisions of key instruments and their interplay, the article has concluded that the merit of such claims cannot be dismissed on the premise that certain rules of IHL do not govern distinctions drawn between own and enemy nationals in the occupied territory. Instead, the determination has to be made on a case-by-case basis, and the reasonable and objective nature of justifications, or lack thereof, must be assessed in light of legal and factual realities pertaining on the ground. At the same time, the determination of whether the differentiation at stake serves a legitimate purpose must take into account, among other aspects, the compatibility of such an aim with general international law. Differentiations between own and enemy nationals, where protected persons are treated unfavourably in connection with the Occupying Power's effort to maintain or facilitate a continued breach of an IHL obligation involving demographic changes in the occupied territory, cannot be deemed legitimate; if coupled with other elements, such practices will amount to discrimination.

Arguments based on a narrow reading of Article 27 of GC IV, which seek to transpose the logic of the provision to more general rules on non-discrimination applicable to occupation, are not grounded in law – and besides, such arguments are not sustainable. Even if the claims regarding discrimination based on nationality were to be readily dismissed, since in such contexts other characteristics, such as ethnicity, religion, culture or political opinion, often appear as the dividing factor between the populations at stake, comparable claims can easily be formulated on those grounds in order to engage the responsibility of the Occupying Power for the same practices, and the analysis would, in any event, need to be made on a case-by-case basis.

Lastly, this article has mainly dealt with the interplay between IHL and human rights guarantees under the relevant instruments, since the discussion on the interplay primarily arises in respect of treaty regimes. Nevertheless, it is suggested that the conclusions drawn from this analysis should be deemed to be fully aligned with the relevant customary rule and general principle of non-discrimination, since these do not establish two distinct (IHL and human rights) standards of performance for the same act occurring in a given context or situation,[45] *in casu* in the treatment of persons in the context of occupation.

45 Marco Sassòli, "The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts", in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law: Pas de Deux*, Oxford University Press, Oxford, 2011, p. 72.