Part III

Convergence and Interaction between International Humanitarian Law and International Human Rights Law

Part II has analysed IHL-treaty-based rules (and corresponding customary rules) which deal with fundamental guarantees of individual persons in occupied territories. The examinations now turn to the implications of the symbiotic relationship between international human rights law (IHRL) and international humanitarian law (IHL) in occupied territories. The appraisal will deal with a number of diverging areas, starting with the applicability or not of IHRL in occupied territories and the relationship between IHRL and IHL in occupied territories. Special inquiries will be made into the extent to which the standards and criteria for assessing the right to life, as developed in the jurisprudence of IHRL, can provide guidance for appraising recourse to lethal force in occupied territories, which are riddled with outbreak of hostilities. Analysis then turns to the expanding categories of non-derogable rights as affirmed by the monitoring bodies of human rights treaties and to the question to what extent the converging relationship between IHL and IHRL helps identify procedural safeguards for individual persons in occupied territories.
Chapter 17

The Relationship between International Human Rights Law and International Humanitarian Law in Occupied Territories

1. The Applicability of Human Rights during Armed Conflict

Writing toward the end of the Second World War, Fraenkel argued that:

Today there is a good deal of discussion on the question whether the basic rights of the individual and the idea of supremacy of law can be protected by an international bill of rights. The proponents of this idea should consider whether they are prepared to apply the principle to an occupation regime, at least after the purely military phase of the occupation has ended. Universal recognition of an international bill of rights implies that the values expressed in such a document are recognized by those who rule in the name of international law. Indeed, the application of these principles to the subjects of an occupation regime can be regarded as a test case for the general validity of such proposals.¹

Fraenkel’s remarkably far-sighted proposal to apply international human rights law in an occupation context was not, however, fully taken up by commentators until the late 1970s. Before appraising requirements of international human rights law (IHRL) that must be met in occupied territory, special inquiries ought to be made into the applicability of IHRL during armed conflict in general. The traditional theory, based on a distinction between the laws of peace and the laws of war, presupposed that the application of human rights which belonged to the former category of international law was mostly to be superseded by the laws of war in situations of armed conflict.² A similar line of argument was advanced by