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# INTERNATIONAL REVIEW of the Red Cross

Humanitarian debate: Law, policy, action

## Occupation



ICRC

### Aim and scope

Established in 1869 the International Review of the Red Cross is a periodical published by the ICRC. Its aim is to promote reflection on humanitarian law, policy and action in armed conflict and other situations of collective armed violence. A specialized journal in humanitarian law, it endeavours to promote knowledge, critical analysis and development of the law and contribute to the prevention of violations of rules protecting fundamental rights and values. The Review offers a forum for discussion about contemporary humanitarian action as well as analysis of the causes and characteristics of conflicts so as to give a clearer insight into the humanitarian problems they generate. Finally, the Review informs its readership on questions pertaining to the International Red Cross and Red Crescent Movement and in particular on the activities and policies of the ICRC.

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The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengthening international humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement.

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## EDITORIAL: OCCUPATION

'*Vae victis!*' ('Woe to the vanquished!'). This exclamation by the Gaulish chieftain Brennus, dictating his terms after defeating ancient Rome,<sup>1</sup> illustrates a historical reality: defeat on the battlefield has, over the centuries, entailed a series of misfortunes for the conquered peoples. Murder, rape, slavery, and plunder: conquest gave the victors absolute rights over people and their property, and it often meant the outright annexation of captured territories. 'To act as if one owns the place' is still a current expression that reflects the arbitrary actions of the conqueror – the principle that 'might makes right'.

Since the nineteenth century, the development of international humanitarian law has put an end to this seemingly inevitable chain of events by gradually expanding the protection of people who fall into enemy hands and by setting greater limits on the conduct of hostilities. The international system has also evolved, banning the use of force in relations between states, forced annexation,<sup>2</sup> and colonization.<sup>3</sup> Humanitarian law has developed in parallel and applies to armed conflict, regardless of its cause and legality.

At first glance, occupation seems to be well covered by treaty and customary law, to the extent that occupation law generally features among the traditional aspects of humanitarian law. During the American Civil War, a series of instructions for an occupying army became part of the rules of conduct of the Union forces, named after the legal scholar Francis Lieber.<sup>4</sup> In international law, Section III of the Regulations concerning the Laws and Customs of War on Land, annexed to the Hague Conventions of 1899 and 1907, is entitled 'Military Authority over the Territory of the Hostile State'. Additional constraints on the occupier's conduct were introduced in the Geneva Conventions of 12 August 1949 and Additional Protocol I of 8 June 1977, so that the powers of occupiers are now governed by these instruments, most of which derive from customary international law.

The notion that the occupier's conduct towards the population of an occupied territory must be regulated underpins the current rules of humanitarian law governing occupation. Another pillar of this body of law is the duty to preserve the institutions of the occupied state. Occupation is not annexation; it is viewed as a temporary situation, and the Occupying Power does not acquire sovereignty over the territory concerned. Not only does the law endeavour to prevent the occupier from wrongfully exploiting the resources of the conquered territory; it also requires the occupier to provide for the basic needs of the population and to 'restore, and ensure, as far as possible, public order and safety, while respecting, *unless absolutely*

*prevented*, the laws in force in the country'.<sup>5</sup> The measures taken by the occupier must therefore preserve the *status quo ante* (this is known as the conservationist principle).

On closer inspection, however, occupation law leaves several questions without clear answers. Furthermore, in recent years, some states have proposed to reinterpret, or have even called into question, the traditional principles of occupation law. The occupation of Iraq in 2003–2004 provoked intense debate about the responsibilities of Occupying Powers and about occupation law in general. Some territories are still occupied today or are disputed by states. Generally, however, Occupying Powers tend to repudiate their status as occupiers under humanitarian law and deny the *de jure* applicability of occupation law to their actions in enemy territory.

Occupation remains a reality, and there is nothing to suggest that new situations of occupation will not arise in the future – for instance, as part of multinational operations. Situations of occupation remain dangerous geopolitical fault lines, which radicalize opinions and sow the seeds of future conflicts. Germany's annexation in 1871 of the French regions of Alsace and Lorraine set a precedent whose consequences for international stability reverberated until 1945. The recurring tensions between Israel, Syria, Lebanon, and Iran are still largely linked to the fate of the Palestinian people and territory and have the potential to destabilize international relations well beyond the region.

Territorial disputes and situations of occupation lead to problems of humanitarian concern affecting occupied or exiled peoples. The inhabitants of occupied or contested territories may therefore be direct victims of hostilities or widespread violence, detained (jailed for breaking the law) or interned (held on security grounds) for long periods, or driven from their homes. In addition to having a direct military advantage resulting from effective control over enemy territory, the occupier may sometimes seek to change the demographic composition of the territory in order to create a new situation on the ground and quash any resistance. This might take place through a policy of forced displacement (sometimes called 'ethnic cleansing') or colonization of the territory. Millions of uprooted people languish in refugee camps in a permanent state of uncertainty, passing on their bitterness and desire for revenge to succeeding generations. Peoples' civil and political rights, as well as their economic and social rights, such as

1 Livy (Titus Livius), *History of Rome from its Foundation (Ab Urbe Condita Libri)*, V.xlviii.9.

2 Charter of the United Nations, Art. 2, para. 4; UN General Assembly resolution 2625 of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc. A/RES/25/2625.

3 See, for instance, the principle of equal rights and self-determination of peoples in Article 1, para. 2, of the UN Charter; Chapters XI, XII, and XIII of the UN Charter; General Assembly resolutions 1514 (XV) of 14 December 1960, Declaration on the Granting of Independence to Colonial Countries and Peoples, and UN General Assembly Resolution 2625, above note 2.

4 'Instructions for the Government of Armies of the United States in the Field', General Orders No. 100, US War Department, Government Printing Office, Washington DC, 24 April 1863 (the Lieber Code).

5 Regulations concerning the Laws and Customs of War on Land, annex to Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, Art. 43 (emphasis added).



the right to education and the right to health care, are generally severely compromised by the imposition of a foreign military government, especially when it lasts for an extended period. Those opposing the occupation often resort to indiscriminate violence in order to gain recognition of their cause or to weaken their adversaries' resolve.

Humanitarian organizations working in occupied territories face numerous challenges and dilemmas.<sup>6</sup> Although occupation is considered a conflict situation requiring the know-how of emergency relief agencies, when the situation persists and needs become chronic, humanitarian workers actually have to roll out post-conflict development programmes. Moreover, for a humanitarian organization, meeting the basic needs of the population amounts to substituting itself for the Occupying Power and relieving it of its primary responsibility – a risky endeavour. The difficulty is how to be seen as neutral and impartial by the occupying army when the humanitarian needs lie mainly with the population of the occupied territory. Conversely, when the occupier controls access to the territory, working in co-ordination with it is unavoidable, but this may be interpreted as complicity with the occupier, or even as legitimizing the occupation.

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As a humanitarian agency working in the field, the International Committee of the Red Cross (ICRC) operates, among other contexts, in situations of occupation and disputed territories to protect and assist victims. Given that it is directly confronted with the legal challenges posed by contemporary situations of occupation, the ICRC felt that it was necessary to check whether the rules of occupation should be strengthened, clarified, or developed. The organization therefore began consulting experts on occupation law and other forms of administration of foreign territory.

To coincide with the publication of the results of this project,<sup>7</sup> the *International Review of the Red Cross* has decided to contribute to the discussion by devoting the present edition to the subject of occupation, and in particular to the grey areas and contentious issues arising from occupation law. The *Review* asked experts on matters related to occupation to offer their perspective, whether historical, military, or legal. The *Review* also wanted to hear from someone living in an occupied territory. Israel's occupation of the Palestinian territory and the Golan Heights is probably the defining occupation context of our time; the *Review* therefore interviewed Raja Shehadeh, lawyer, author, and co-founder of the Palestinian human rights organization Al Haq. Shehadeh offers a unique perspective on humanitarian law and human rights, both through practising law as part of the

6 See, e.g., Xavier Crompté, *Humanitarian Action in Situations of Occupation*, CRASH/Fondation Médecins Sans Frontières, January 2007, available at: <http://www.msf-crash.org/en/publications/2009/06/03/241/humanitarian-action-in-situations-of-occupation> (last visited March 2012).

7 See Tristan Ferraro (ed.), *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory*, ICRC, Geneva, 2012, available at: <http://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf> (last visited March 2012).

dialogue with Israel, and as an essayist committed to peace and peaceful co-existence between peoples.

The contributions brought together in this edition explore six key questions raised by contemporary situations of occupation, frame the issues, and set out to begin answering them.

## **How and along what lines has occupation law developed?**

Occupation law has sometimes been called into question on the ground that it is no longer suited to contemporary situations. To help us understand the principles underpinning this body of law today, the first contributions to this edition trace the history of its development. Dating back to the Lieber Code, occupation law was originally the product of a state-centric view of international relations, concerned above all with protecting the rights of the sovereign whose territory was temporarily occupied by another power, but also with guaranteeing the latter's safety. Although from the same historical period, occupation law was not intended to apply to the colonial project of European states, because they denied the sovereignty of the subjugated peoples. World War I revealed another limitation of this nascent law: the inadequacy of the rules protecting civilians. The horrors endured by combatants in the trenches long obscured the suffering of people in occupied territories behind the front lines. The international community failed to learn the lessons of World War I and to improve the protection for civilians in enemy hands before the outbreak of the World War II. It was not until 1949 that their rights were spelled out in the Fourth Geneva Convention.

## **When does the invasion phase end and the duties of occupiers and the rights of people living under occupation begin?**

'In the first weeks after the fall of Baghdad in April 2003, Iraqis would stop Americans on the street and ask who was in charge of the country. No one seemed to know. The Iraqi leadership had vanished, and the institutions of the state had collapsed'.<sup>8</sup> This quotation illustrates the confusion that exists with regard to determining the end of invasion and the beginning of occupation. The question of exactly when an occupation begins – and ends – is not regulated in detail by law. Yet it has very important practical and legal implications for both the population of the occupied territory and the military in charge of the intervention in enemy territory. For instance, at what point do they begin to be responsible to the population for providing services such as restoring the water and electricity supply and preventing looting? Must they re-establish and ensure public order and safety? Must they

8 George Packer, in R. Gutman, D. Rieff, and A. Dworkin (eds), *Crimes of War 2.0: What the Public Should Know*, W.W. Norton & Co. Ltd, London, 2007, p. 307.

administer the public property of the occupied state from then on?<sup>9</sup> Four specialists share their views on whether or not occupation law is applicable from the invasion phase. This key question of when occupation begins and ends is the subject of an article and of the legal debate section in the *Review*.

## **Is the law always suited to prolonged occupation?**

According to the International Criminal Tribunal for the former Yugoslavia (ICTY): ‘Occupation is defined as a transitional period following invasion and preceding the agreement on the cessation of the hostilities’.<sup>10</sup> Since occupation is considered a temporary, short-term situation, it is difficult to reconcile the principles of this body of law with prolonged occupation. Does the length of the occupation challenge the conservationist principle by making it impossible or even harmful for the occupier to refrain from tampering with the socio-economic conditions of the territory? Doesn’t the prolonged nature of the occupation also require greater emphasis on human rights, in particular on people’s economic and social rights? The question of how important this time factor is for the applicability of occupation law is addressed by several contributors to this edition, particularly in the analysis of the decisions of the Israeli Supreme Court, the only court in the world to have admitted – and regularly handed down – verdicts on appeals from the population of an occupied territory.

## **Is there any justification for changing the institutions and/or the laws of an occupied territory?**

Based on the precedents of the denazification of Germany and the reform of Japanese institutions after 1945, the occupation of Iraq was presented as an opportunity to reform the political system and democratize the country. Expressions such as ‘nation-building’, ‘reconstruction’, and ‘transformative occupation’ were used in this context. Consequently, are there ‘good’ occupations that justify an exception to the conservationist principle cited above? This question may arise when it comes to reforming an oppressive regime or rebuilding a devastated state. The legal validity of the concept of ‘transformative occupation’ is discussed in this edition.

9 For an illustration of this problem, see, e.g., Amnesty International, *Iraq: Looting, Lawlessness and Humanitarian Consequences*, MDE14/085/2003, New York, 10 April 2003 (a report published at the time of the invasion of Iraq, reminding the Occupying Powers of their obligations), and ICRC News Release 03/28 of 11 April 2003, which mentions the duties of Occupying Powers, available at: <http://www.icrc.org/eng/resources/documents/misc/5lhjp6.htm> (last visited March 2012).

10 ICTY, *The Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Case No. IT-98-34-T, Judgment (Trial Chamber), 31 March 2003, para. 214.

## What is the role of the military in the occupation of a territory?

How can an invasion force prepare for the occupation that will follow? What is the role of the military in a ‘transformative occupation’, in other words, a project of political, economic, and social reform? Managing and rebuilding an occupied territory are very different tasks from conquering it by force. In *The Utility of Force*, General Sir Rupert Smith writes:

It is necessary to understand that in many circumstances into which we now deploy, our forces as a military force will not be effective. The coalition forces in Iraq were a classic example of this situation: their effectiveness as a military force ended once the fighting between military forces was completed in May 2003. And though they then went on to score a series of victories in local skirmishes, they had greatly diminished – if any – effect as an occupation and reconstruction force, which had become their main mandate.<sup>11</sup>

The *Review* presents a US military perspective on the lessons to be learnt from the invasion and occupation of Iraq.

## What is the role of human rights in situations of occupation?

Occupation, whether it occurs during or after an armed conflict, or without a declaration of war or even of hostilities, is governed by humanitarian law. What is the role of human rights law when it comes to maintaining order? What are the political, economic, and social rights of people in occupied territories when the situation persists? How can the application of those rights by the occupier be reconciled with the obligation to respect the laws and institutions in place? The decisions of the International Court of Justice<sup>12</sup> recognize clearly that human rights law applies to situations covered by international humanitarian law. However, the exact scope of the occupier’s responsibilities under human rights law needs to be clarified. A better understanding of the way in which these two complementary bodies of law apply means better protection for victims of conflicts.

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Protecting people who fall into enemy hands is central to today’s efforts to develop humanitarian law. Occupation law exemplifies this, as its purpose is to protect an entire population that has been placed in a highly vulnerable position. However,

11 Rupert Smith, *The Utility of Force: The Art of War in the Modern World*, Penguin Books, London, 2006, p. 10.

12 See International Court of Justice (ICJ), *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 102 ff; see also ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, para. 178.

people living under occupation and humanitarian organizations rarely succeed in obtaining compliance with the legal provisions. As the ICRC report points out:

In fact occupying States have repeatedly contested the applicability of occupation law to situations of effective foreign control over territory, which clearly shows their reluctance to be labelled as Occupying Powers and/or to see their actions constrained by this body of law.<sup>13</sup>

In a 1944 essay, Albert Camus wrote: '*Mal nommer un objet, c'est ajouter au malheur de ce monde*' ('To misname things is to add to the misery of the world').<sup>14</sup> All too often, states resort to euphemisms and convoluted legal arguments to absolve themselves of their responsibilities. Through this edition, the *Review* seeks to contribute to a better understanding of occupation today and to the task of defining the rights and duties of the occupier.

*Vincent Bernard*  
*Editor-in-Chief*

13 T. Ferraro, above note 7, p. 4.

14 Albert Camus, 'Sur une philosophie de l'expression', *Poésie* 44, P. Seghers, Paris, 1944.





## Interview with Raja Shehadeh\*

Palestinian lawyer and writer.

*For this thematic edition on occupation, the International Review of the Red Cross considered it crucial to complement the academic and military perspectives reflected in this issue with a viewpoint of someone who has lived and practised law in an occupied territory. The Review chose to interview Raja Shehadeh, a Palestinian lawyer, writer, and human rights activist who lives in Ramallah. In 1979 he co-founded Al-Haq, an independent Palestinian non-governmental human rights organization based in Ramallah, which is an affiliate of the International Commission of Jurists in Geneva. He worked with Al-Haq as co-director until 1991, when he left the organization to pursue a literary career.*

*Raja Shehadeh is the author of several books on international law, humanitarian law, and the Middle East, such as *The West Bank and the Rule of Law* (1980), *Occupier's Law: Israel and the West Bank* (1985 and 1988), and *From Occupation to Interim Accords: Israel and the Palestinian Territories* (1997). He was awarded the Orwell Prize in 2008 for his book *Palestinian Walks: Notes on a Vanishing Landscape*. His most recent book is *Occupation Diaries*.*

*In this interview, Raja Shehadeh gives his views on the relevance of occupation law today, as well as his personal reflections on Israel, the Palestinian Authority, and the work of international organizations such as the International Committee of the Red Cross (ICRC).*



\* This interview was conducted on 13 March 2012 in Ramallah by Vincent Bernard, Editor-in-Chief of the *International Review of the Red Cross*, Michael Stegrist, Editorial Assistant, and Anton Camen, Legal Adviser of the ICRC in Israel and the occupied territories.

***How would you summarize your career as a human rights activist?***

When I came from London in 1976, the occupation had already been in place for nine years. Working in my father's law office enabled me to review changes in the law that the Israeli authorities were making and I realized that there was a very big discrepancy between what was said about the occupation and its benevolent nature, and the actual reality. It became clear to me that these changes were neither haphazard nor arbitrary. At the same time, I realized that the court system was in disarray and that no one was paying attention to these aspects.

My father and I were of the opinion that the solution for the Palestine–Israel conflict was to establish a Palestinian state alongside Israel, and my view was that we, the Palestinians, have to work on establishing that state; nobody's going to do it for us. And I thought that much had to be done to establish the important principle of the rule of law, so that when we achieve our aim of a Palestinian state it would be respectful of that principle. So I have believed since then that what was needed was not just to document the legal changes and the human rights violations, but to try and do something to alleviate those violations and to work on advancing the principle of the rule of law.

The first joint publication of Al-Haq (which was then known as Law in Service of Man) and the International Commission of Jurists, entitled *The West Bank and the Rule of Law*, revealed how the military orders were not being published and the great impact this had on the local law relating to various aspects of life for the Palestinians living in the occupied Palestinian territories (OPT). At that time, the relationship between Al-Haq and the officers in the legal departments of the Israeli military government was what one can describe as 'polite'. Rather than ban the book or arrest its authors and close down Al-Haq, Israel responded by publishing a full-length book that denied the claims of human rights violations and violations of the law of occupation set forth in our publication.

So Al-Haq had a good start. Moreover, it was all voluntary work, we were all volunteers. The idea that human rights work should not be lucrative was very important to us. It was also decided early on that everybody involved in the organization would be included in the decision-making process and would be party to the decisions and responsible for them, therefore accountable. It was a training process for all of us and we wanted everyone to know how the decisions were made. In addition, we had to be very careful because there was no work being done on human rights in our region. There were no other organizations. We were under suspicion from all sides and the possibility of being closed down was considerable. So we had to tread very, very carefully.

Then we started expanding; we were trying to keep anyone interested, anywhere in the world, informed about the changes that were occurring and where they were leading. We legally analysed those changes and kept up with each and every one, however small, indicated how it fitted into the grand scheme, documented the individual human rights and published reports, and so on. And then, of course, our work developed, and with the first *intifada* that began in 1987 it had to go very fast and expand substantially.



I stayed with the organization until 1991. By that time many of the staff had received training in human rights – proper training, with a number of them receiving academic degrees in human rights. So we had a cadre of well-trained, committed people who served the organization and it was becoming something that could stand on its own.

In that year I also became an adviser to the delegation in Washington for the negotiations between the Palestine Liberation Organization (PLO) and Israel. I saw it as a political post because I was for a political stance that not everybody agreed with. So I thought that was the time to leave my position as co-director of the organization. I continued to maintain a relationship with Al-Haq, but not in an official capacity.

After the Oslo Accords came into force I was very disappointed with what was happening, and felt that I had given a lot of my time to making known the legal aspects of the occupation but none of this work was having any impact on the Palestinian leadership. Worse still, I felt that the strong legal case which Palestine had enjoyed had been utterly destroyed. I was actually mystified as to how the PLO could sign such surrender documents as the Oslo Accords of 1993 and the Interim Agreement of 1995. During that period I felt more depressed than I had ever been. Even though I saw the destruction of much that I had worked for, I thought that before moving on to other concerns I should use my expertise in the law to write a legal analysis of the Oslo Accords. So in 1996 I worked on the book *From Occupation to Interim Accords*, which was published by Kluwer International in 1997.

I continue to contribute to the struggle for human rights, as an author and as a member of the Palestinian Independent Commission for Human Rights – which serves as an ombudsman here. But it has always been my belief that human rights activism entails more than being a board member of a human rights organization or writing an occasional article. I have always thought of human rights activism as being fully engaged in and committed to the cause of human rights and living the life of an activist, not just that of an academic remote from the fray.

During my tenure as co-director of Al-Haq I had always continued both my literary writing and my legal practice. I saw writing as a way of serving the cause of justice and human rights. Human rights reports reach a limited sector of the population and so have limited impact, but if you write something that touches more people and is mass-distributed, the impact is that much stronger.

Books don't get through to people solely by being read. If you're affected by what you read, it becomes part of your experience and you take it in or feel it in a much stronger way.

***In one of your books, Occupier's Law of 1988, you described certain stages of occupation. How would you describe the evolution since then?***

My idea from the very beginning, which I've tried to express in my writing and work, was that the occupation is of a colonial nature. Its aim ultimately is to

encourage – certainly not by using force – the Palestinians to leave and to be replaced by Israeli settlers. As a precaution, the Palestinians had to do everything they could, despite all the difficulties, to stay put on the land. In *The Third Way* (published in 1982) I called this *sumud*, which means perseverance, steadfastness, staying put. Over the years the Israeli tactics to implement this policy have changed, and the Palestinian response also has changed. But the main objective of the Israeli occupation has remained the same.

In order to achieve this Israeli objective a number of obstacles had to be overcome. In the beginning, I was interested in the legal methods used to make large-scale settlements of Israelis possible in the occupied Palestinian territories: I could not understand how Israel was going to encourage its population to settle in the occupied territories and transfer some of them there, yet resolve the problem of having these citizens considered, legally speaking, as living within their state although in fact living outside its borders. In other words, how to annex the territories without annexing them? I was very curious as to how they were going to resolve this problem, which is a very technical legal problem.

For the first decade or so they didn't have a solution, but – and here is something very interesting and important – in 1967 Theodor Meron, then Legal Adviser to the Israeli Ministry of Foreign Affairs, was asked by the Foreign Ministry and Prime Minister Levi Eshkol to write a secret memo on whether the settlements were legal, and he wrote that they were not legal, that they were contrary to the Geneva Conventions. He was disregarded and they found someone else who devised a curious interpretation called the 'Missing Reversioner' theory.<sup>1</sup> In short, it says that no other state has sovereignty over this territory because it didn't belong to anybody, and therefore it's not occupied; consequently the Geneva Conventions do not apply since Israel did not occupy it by ousting any sovereign power. This concept of the missing reversioner makes no legal sense and has no basis in international law, but Israel held on to it because it was convenient. And a few months after the occupation took place, the Israeli settlements began.

However, for the first twelve or thirteen years of the occupation the number of Israelis willing to settle in the OPT was small. The government had still not resolved the legal questions of how it would collect Israeli income tax, how it would get Israeli social benefits and services to those citizens living outside the borders of the state, how they would be considered professionals working in Israel when they're not. These were very technical, detailed, important, and fundamental legal questions that had to be resolved.

Until Menahim Begin became Prime Minister the number of settlers was small. The vanguard was the Gush Emunim (Bloc of the Faithful), who were ideological. Begin realized that unless non-religious/non-ideological Israelis were mobilized and encouraged to move to the settlements, the settlement project would

1 See Yehuda Z. Blum, 'The missing reversioner: reflections on the status of Judea and Samaria', in *Israel Law Review*, Vol. 3, 1968, p. 279, available at: [http://heinonline.org/HOL/Page?handle=hein.journals/israel3&div=26&g\\_sent=1&collection=journals](http://heinonline.org/HOL/Page?handle=hein.journals/israel3&div=26&g_sent=1&collection=journals) (last visited February 2012).

not take off. So he began providing financial incentives to encourage lower-income Israelis to move to the OPT, where they would be able to have the kind of house and quality of life which they could never dream of in Israel itself. With these enticements the number of settlers soared.

Another important step was the Camp David agreement with Egypt in '79. In that agreement Israel saw itself as giving up the Sinai in return for keeping the West Bank, and settlements from that point on increased.

The most important legal change that occurred, which was and continues to be fundamental to this day, came in 1981 when Military Order 947 was issued. This order established the civil administration that continues to be in place to this day. It was a way of separating the civilian rule of Israeli Jews from that of non-Jews living in the same territory, making each group subject to different laws and different authorities that implement different laws, which is a form of apartheid. A whole series of military orders and Jordanian laws were transferred from the military government to the Israeli civilian administrator who governed the non-Jews living in the occupied territories. At the same time, using various 'legal' devices, Israeli laws came to be applied to the Israeli Jews living in those same territories. The head of the civil administration was an Israeli official appointed by the army, so it wasn't much of a civilian rule. But it was a structure that Israel devised to resolve the problem of how to apply Israeli laws to one part of the population and not to the other, and how to discriminate in an official, 'legal' manner between the two groups of inhabitants living on the same territory. This was how apartheid was introduced to the OPT.

Al-Haq immediately realized the significance of this change. Just after the order was published we carried out a thorough study with the title *Civil Administration in the Occupied West Bank: Analysis of Israeli Military Government Order No. 947*.<sup>2</sup> Interestingly, Israel responded again by stating its position in the *Israeli Yearbook on Human Rights*. Regardless of the popular resistance taking place against the civil administration, Israel pressed on and continued to search for Palestinians to take over the administration of the civilian aspects which it had identified. Under Begin and later Shamir, Israel created, funded, and controlled the 'Village Leagues', a system of local councils, mainly collaborators, managed by Palestinians who were hand-picked by Israel to run local city and village administrations. The Israeli thinking was that the Village Leagues could ultimately take over the civil administration. Theoretically the plan made sense, because it was based on the correct fact that the majority of the Palestinians live in villages – the countryside – and not in the urban centres considered to be in support of the PLO. But it didn't work and the search continued. Unfortunately this same line of thinking can be seen as extending to the Oslo Accords.

2 Also available on the Al-Haq website: <http://www.alhaq.org/> (last visited February 2012).



***As you took part in the negotiations of the Oslo Agreement between the PLO and Israel as an adviser to the Palestinian delegation in Washington, how would you describe the process and its outcome?***

On 30 October 1991 negotiations began between Israel and the PLO (which was then part of the joint Jordanian–Palestinian delegation). But from the start the negotiations were limited in scope. The terms of reference were that the two sides would negotiate interim self-government arrangements for the Palestinians. And so it was, first of all, ‘interim’ – although it was never to be interim, at least that was the claim – then ‘self-government arrangements’ and ‘for the Palestinians’. I could see exactly, from knowing what had gone before, where the Israelis were heading. As far as I was concerned, the important thing would be how to expand these terms of reference to include land issues and settlements, because obviously, as long as they pertain only to the self-government of the Palestinians, they leave out the land and settlements issue. So that was why I was very interested in joining the negotiations and trying to work out something that would make a difference. I stayed with the negotiations in Washington for one year only and then realized something was happening which I couldn’t understand. I was not aware that secret negotiations were taking place while the Palestinian delegation was negotiating in Washington, and that this was why Arafat was giving the delegation in DC orders and directives that I thought made no sense.

Two years later, in ‘93, I read the Declaration of Principles on Interim Self-Government Arrangements [official name of the Oslo Accords] in the *Guardian* newspaper while I was on vacation in Scotland. When I started reading I was disappointed; yet at the same time I thought that maybe some things could be worked out, that certain favourable interpretations might be possible. But then when I read the ‘Agreed Minutes’ attached to the document, I realized that every possible loophole had been closed. I realized that the policy of Israel’s government that had been pursued in those negotiations and in formulating that document (because it was primarily the work of Israeli legal scholars) made peace between the two sides impossible.

Back in Ramallah I attended a conference on the Oslo Accords in January '94 where I spoke about the legal aspects, quoting from the Agreed Minutes, and people said: 'What Agreed Minutes? We don't know about these!' As it turned out, the local papers had published the Declaration of Principles without the Agreed Minutes and so there was a deliberate attempt to delude people, to get them to support the Accords without knowing all the facts.

It was difficult for me to understand how, after all this struggle and when the settlements were at the heart of the problem, the PLO would agree to something that would not include as a pre-condition the cessation of settlement activity. How was it that the PLO had allowed Israel to pursue a policy that was anathema to peace, namely building Jewish settlements in the Palestinian territories? Worse still, the illegal changes in the law which Israel had thus far made through unilateral military orders were effectively made bilateral when the Palestinians signed the Oslo Accords. It was all a terrible disappointment.

At the time of the Oslo Accords the Jewish settlements were still reasonably small in number. But after the signing of the Interim Agreement in 1995, when some 60% of the West Bank was designated as Area C, the Israeli population was made to believe that settlement in Area C<sup>3</sup> was safe because this was the area which was going to be annexed to Israel, and those who settled in it would not have to worry about being evicted in the event that a final peace settlement is reached with the Palestinians. So in the eyes of most Israelis, if you settle in Area C then you're not really a settler and you're not breaking international law or jeopardizing future peace.

Thus settlement has increased manifold since the Oslo Accords and, while I believe that the settlements are one of the fundamental obstacles to peace, then the problem has become much more complicated since the signing of the Oslo Accords.

***What are the specific problems and challenges of an occupation that lasts for more than four decades, in terms of humanitarian consequences or legal consequences for the people?***

Well, even though in many respects it remains, according to international law, an occupation, and these territories here continue to be occupied territories, yet over time it has moved so far away from the rules and parameters of what is allowed under occupation that it has acquired certain colonial features. So in a sense the question is the same as in a colonial situation, namely how the relationship between the colonial power and the colonized people develops and the effect of a long-term colonial situation on the colonized people. I think this is the heart of the matter here.

3 Editor's note: Under the Oslo Interim Agreements, Area A is under full Palestinian civil and security control, Area B is under full Palestinian civil control and joint Israeli–Palestinian security control, and Area C is under full Israeli control over security, planning, and construction. For a map, see United Nations Office for the Coordination of Humanitarian Affairs (OCHA), occupied Palestinian territory, *Humanitarian Factsheet on Area C of the West Bank*, July 2011, available at: [http://www.ochaopt.org/documents/ocha\\_opt\\_Area\\_C\\_Fact\\_Sheet\\_July\\_2011.pdf](http://www.ochaopt.org/documents/ocha_opt_Area_C_Fact_Sheet_July_2011.pdf) (last visited 2 March 2012).

In the early days of the occupation, when there were not so many settlements and they were not having such a negative impact on the lives of people, the relationship between Israelis and Palestinians was entirely different from what it is today. There were all kinds of possibilities for the sort of future that could develop; there was interaction, there were sometimes benefits, mutual benefits. Things could have gone entirely differently. But now we cannot speak about the occupation without speaking about the settlements and the fact that people do not see Israel only as an occupier that controls certain aspects of their lives, but as a colonizer that is after their land. It feels like a cancerous growth that is eating up their body and making normal life impossible in every way.

I remember, when we at Al-Haq were speaking about settlements in the late '70 s, that people would ask: 'Why are you making a big deal of it?' This was because most people couldn't see the settlements or feel their impact on their lives. Of course, if you were a farmer and your land had been taken, you did. But the immediate effect on most people was not perceptible. Settlements were being established mainly in places that were far away from Palestinian population centres (Hebron being an exception). Now it is a different matter. Settlements have an impact on every aspect of the Palestinians' lives, and so we cannot speak of the effect of the Israeli occupation without keeping in mind the nature of this occupation, in particular its colonial nature.

***How do you see the tension between the obligation for the occupying power to maintain local legislation in force and the need to adapt it to the changing needs of the population, especially in this case of prolonged occupation? What is your assessment of the role of the High Court of Justice in this regard?***

Again, we have to distinguish between pre-Oslo and post-Oslo periods. In the pre-Oslo period, Israel had full control of everything. Post-Oslo, Israel transferred some of the powers to the newly established Palestinian Authority, mostly those relating to the civilian aspects of life; and, within the limits prescribed in the Interim Agreement of 1995, the Palestinians had the right and the amount of control to change the laws, to adapt them to the changing reality of life. So that's one aspect. Whereas in the areas and aspects of life that continue to be under Israeli control, the changes in the law were and continue to be made by the Israeli civil administration, which is now – and has been for quite a while – highly influenced and staffed by settlers.

The civil administration legislates very simply by drafting a new law or an amendment of an existing law. When Al-Haq came to learn of these unilateral and often illegal changes to local law, it would analyse this legislation and bring it to the attention of whoever could protest against it. And sometimes that worked; with the support of others we were able to stop the implementation of certain military orders. At other times it would be decided that a new law, or a decision, should be challenged before the Israeli High Court.

Over the years, many challenges were taken to the High Court by various groups and with the encouragement of Al-Haq and other organizations. This has been a great disappointment because the High Court, which could have played an important role in stopping these illegal Israeli changes in the law, only found justifications for legalizing these dangerous and illegal developments. It would produce very erudite and lengthy decisions, making one fine distinction after another, which would literally make your head spin. But the result was almost always disappointing.

For instance, the High Court introduced the most important change, when it began to consider that the 'local population' whose interests and needs ought to be protected by the Military Commander also encompasses Israeli settlers living in the occupied territories. In this way it turned international law on its head, because this law is, to a large extent, designed for the protection of the occupied people and for their wellbeing, and not that of the citizens of the occupying state.

The whole point of the 1907 Hague Regulations and the Fourth Geneva Convention was that they were formulated and adopted for the benefit of the local population and to safeguard them, they being the weaker party in the equation. Yet the Israeli High Court has made the Israeli settlers part of the local population whose benefit should be sought. So it's entirely an ideological position; it's confusion between the ideology of Israel, which sees the occupied Palestinian territories as part of the biblical land comprising Judea and Samaria, and the legal rules. And so international law is deprived of playing the role that it was intended to play.



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***What are the needs of the Palestinians in terms of human rights protection and what is the role of the Palestinian Authority in this regard?***

I'm a commissioner on the Palestinian Independent Commission for Human Rights and every year the Commission publishes an annual report on the political and civil rights situation. I think that one of the successes of the work of human rights organizations and the NGO [non-governmental organization] and civil society movement has been to instil in the Palestinian population a feeling for the importance of human rights. I think that this has happened. But it is never a static

thing. You can never feel that this has been achieved and then say ‘Okay, I can go home now and take a break’. It’s a constant struggle.

When the PLO first came here, their attitude was: ‘Okay, you people who were working on human rights, you are part of the resistance against the Israeli occupation; now the resistance should be stopped because we have reached an agreement with Israel. Go home.’ Literally, that was their position.

Then we explained that this was not going to happen because now there were new challenges and the Palestinian Authority was part of it. They were rather surprised, because they did not come from places where they would have experienced that kind of work. But I think that now a positive change has taken place. They realize that human rights work is an important safeguard and helps in the healthy development of society. So every year we’ve been going to the Prime Minister and the President of the Palestinian Authority to report on the situation – sometimes we also go in the course of the year – and we are always received very politely and they listen. This at least is positive. I think it has been possible to have some influence in the civil rights sphere.

What worries me is something else. The Palestinian police commit violations, but the present system is more responsive to our appeals against these violations. However, the security forces are another matter because it’s not clear who they are accountable to, and their structure is not clear. It is also not clear which laws they apply. They seem to operate as though they are above the law.

One example is the case of civil servants. The security services, the *Mukhabarat* (‘intelligence agency’), insist that civil servants need clearance from them and that if they decide someone is not politically favourable, so-and-so will be dismissed from their work. There have been at least 100 cases of people who were accepted for employment as teachers in government schools, had started their work, had even in some cases gotten a positive review, and then were dismissed simply because the security services wanted them dismissed. The Human Rights Commission went to the Palestinian High Court to appeal against the decision for their dismissal, and it is a perfectly good case because the law does not allow for dismissal on those grounds. And this has taken – how long is it now? At least two years. And the High Court is unable or perhaps does not dare to decide on the matter. Every time we take the report, go to the people in power, and tell them: ‘You are always speaking about the importance of an independent judiciary and the rule of law, and this is the case in point. You must resolve it.’ Yet nothing happens; it has still not been resolved.<sup>4</sup>

There are some improvements. Certainly some action has been taken against corruption. They’re trying to improve the judiciary. But it’s still very worrisome because once a police state is entrenched, it’s very difficult to dismantle it.

There are also problems of attacks on human rights activists. The trend is neither totally negative nor totally positive; it can swing both ways. So sometimes the police authorities and the security services allow visits to prisons under their control,

4 The High Court eventually decided in favour of the petitioners on 3 September 2012.



but this is not always the case. They have reduced the number of people dying under torture, yet torture still takes place and people still die under torture. They have not removed the death penalty, despite a lot of work done to stop this violation of the right to life.

***And what is the role of civil society in promoting respect for the law?***

I think there is a very important role for civil society. But it's difficult for me to assess completely because I feel I might be prejudiced – one always tends to put oneself first and think of one's own times.

One of the things I feel saddened about is that when civil activities began, much of the work was on a voluntary basis. Many of the big organizations – such as the Palestinian Medical Relief Society, the Palestinian Agricultural Relief Society, and Al-Haq – were totally staffed by volunteers. And certainly in the first *intifada* there was a lot of volunteering. I very firmly believe that a society must feel that it can help itself and that serving your society on a voluntary basis is an important part of belonging to it and seeing it as your own and looking for ways to improve it.

I think that what happened after the Oslo Accords was a serious corruption of this spirit, because massive amounts of international aid money began pouring in. And in a way, one of the disservices that international aid did for us – in addition to financing the occupation, which is another great disservice, and relieving Israel of some of its responsibilities under international law – is to have attracted some of the best people who were otherwise volunteering their services, offering them well-paid jobs and, in a sense, corrupting them.

That's not to say, though, that there isn't a lot of important work still being done on all fronts and above all on the cultural front by NGOs. Civil society work has become so deeply integrated in our society that it has not been possible to destroy it.

So it's a mixed bag, but I think one of the successes of the human rights movement is that it established something lasting, that has gone through all these stages and has produced activists in the field and human rights professionals who are knowledgeable. All of these are important achievements. But human rights is an ongoing battle, and that's what one needs to understand. There's no end to it.

***In one of your books, Palestinian Walks, you describe how you relied on law as a tool. How do you see the value of using and relying on international law, particularly occupation law, and to what extent is it still useful for your work today?***

I'm a believer in international law. I'm passionate about the fact that, if we don't want war, we have to have a way of avoiding conflict, and international law is an important instrument for doing so. That's why we must be extremely careful to guard this instrument, this major human development, because humanity did not always have international law to fall back on. It's something that developed over

time. And in a way it's very sad that now Israel is helping to destroy much of it. This is having a strong and direct impact on us Palestinians, but it also affects humanity as a whole.

Initially, international law was of great value to us because for Al-Haq the criteria we depended on were the principles and the standards of international law. So it provided us with a very important basis for much of our work. I still think that international law is vital for the future. In my view, all these divisions in the Middle East into small non-viable states as a result of the First World War are arbitrary, artificial, and non-workable. They do not take into consideration the scarcity of the resources in the region, especially water. And just as we are stuck with that situation now, we will eventually be rid of it in the future. That is why international law remains important.

However, I still believe that, in order to get to a position where we will have some sort of federation between Jordan, Palestine, Israel, and perhaps Syria and Lebanon as well (which in my view would eventually happen), we have to sort things out step by step. So the people who say the solution is one state including Israel and the occupied Palestinian territories are, I think, dreaming. Yes, there has to be one state eventually, or one political unit, but it cannot bypass the first essential step, which is ending the occupation. So ending the occupation and complying with the principles of international law are an important first step we must take in order to reach other steps. If we abandon international law, we will only have confusion.

I think international law is very important as a means of maintaining order and standards. We just can't abandon it. Naturally, like all other aspects of law, international law needs to be developed and to evolve, but until it does, we have to abide by what it contains now. Otherwise there would be chaos.

***Do you believe that occupation law as it stands today is still appropriate to govern situations of occupation all around the world, or do you see a need for reform?***

It's a very big question, which I am probably not qualified to answer, because all I can say from my understanding of occupation law is that it was intended to stop aggressors from benefiting from their aggression. That to me is a very important principle, and I don't see a way around it. International law tries to preserve relations between nations and keep them on a legal basis, so it has to accept that nations are formed and have a place. And then if one nation captures territory from another, international law should provide for sanctions against that nation.

So that principle is a sound principle. However, for international law to have teeth something has to change. The idea as I understood it was that the Geneva Conventions, which say all the right things, have the ICRC as their neutral guardian, so the organization could play a significant role. That is a very crucial position which, in my assessment, has failed.



### ***What were your expectations of the ICRC?***

You cannot underestimate the importance of the individual help the organization provides. I know that the visits of the ICRC to someone who is isolated mean a lot to that person. The help given on a small scale, on restoring contacts, getting things to that person, is not to be underrated. And this help has always been given by the ICRC.

Israel has always sought to establish a separation between the humanitarian aspects – which it has always said apply to the occupied territories – and the non-humanitarian aspects of the Conventions. It then defined and drew the line it wanted between the two. It also wanted to safeguard some of those humanitarian aspects because, if it didn't, things would blow up. But caring for the humanitarian aspects is not a substitute for working on the others; this is the crucial point. Maybe my expectations were simply too high.

I started out with high hopes: that the ICRC is a neutral organization, that it is interested, willing, and able to play an important role. Maybe that's always a problem when you start out with high hopes – the hopes are dashed. However, I have felt reluctance on the part of the ICRC to take up issues in an effective way, to speak out openly against the settlements or the civil administration, and to use every possible power the organization has to help put a stop to these detrimental violations. Sometimes I detected more fear of speaking out against Israel than I had witnessed in Israel itself. On the many occasions when I met with the ICRC delegates and challenged the organization, I was told that your policy is not to speak out too often. But then in the case of Iraq, I saw many more public statements expressing condemnation and taking a clear stance than in our case.

I understand fully the importance of being economical in the frequency of public statements. From the beginning Al-Haq decided not to issue a press release on every occasion, because if it did they would be less effective. So by the time I left we probably had something like forty press releases. Very, very few, but whenever we did speak out we made sure that it was opportune, that it was strongly worded, that it was right, and so on.

So I share with the ICRC the opinion that condemnation is not always the best way to counter the violations. However, I believe that the ICRC did not speak out when it should have. The ICRC did not take positions that were effective and use every means at its disposal to draw the world's attention to what is really taking place here.

Furthermore, this was a perfect case of an occupation where the Geneva Conventions applied, and in a sense their effectiveness was being tested. I'm not so knowledgeable about history, but I believe that this lengthy occupation was one of the first opportunities of its kind to see how the Geneva Conventions work. So it must also have been an extremely important opportunity for the ICRC to play its role to make sure that they are properly applied, and warn against the danger of the occupier being carried away by its power and turning the occupied territories into a colony that it uses to expand its own territory.

At present I'm not involved enough in the field to know exactly, but my assessment of the work of international organizations in general, whether developmental or on human rights, is that by and large everybody respects the Israeli parameters. One example of this is Israel's *de facto* annexation of some 60% of the West Bank, which under the Interim Agreement has been dubbed Area C and kept under total Israeli jurisdiction. Little is being done by the ICRC and others to challenge this Israeli practice, which is in complete and utter violation of the international law of occupation.

***How do you see the current wave of social and political protest in the region as having an influence on the situation of Palestinians?***

I think it will have a big influence. The previous political set-up had allowed Israel to enjoy a long period of false peace between it and Egypt. This enabled it to proceed with the colonization of the West Bank. With Syria, there was also *de facto* peace. With Jordan, there is another false peace. And instead of helping Israel and Israelis work towards reaching real peace with their neighbours, they were led to believe that, as long as those tyrants ruled in the Arab world, then they would continue to suppress what people really felt about the Israeli policies towards the Palestinians, who are fellow Arabs. Now perhaps this will change and perhaps there will then be a movement towards something more positive. My own position is that I don't believe Israel should be destroyed, because that would be a disaster. I think the Israeli people are here to stay. The question is, on what terms? And I don't see that the Israeli people are thinking about those terms. For instance, what is their relationship to the region? How can workable long-term relationships with their neighbours in the region be established?

You speak to them in Arabic, and they reply: 'We don't speak Arabic'. Why don't you speak Arabic? You are in an Arabic-speaking region! They have no interest in being part of the region. They have no interest in building bridges with the region. They have total reliance on their military power and on their alliance with and full support by the United States. If they want to think of their long-term benefit, they have to see how they can be part of the region.

***In the past, the communities used to live together. Do you believe that such co-existence is possible again, and how?***

You know, I have seen many phases of the relationships between Israelis and Palestinians and I have also learned my lesson from the Oslo process, which is that the mistake most people make is that they think of the future on the basis of their experience of the present. So after the Oslo Accords I was openly sceptical, but I was mainly alone in my scepticism. Almost overnight many of the younger generations started saying: 'We have to be given a chance. We want to live in peace. We want a future. We want to forget about the past. We want to make friends with Israelis!' The people who were then in their early twenties were too young to know anything of what I had experienced. I realized that my experiences during the first *intifada* and the struggle were only mine and those of my generation! So I just can't expect them to know what I know. And that's how it goes and that's why there is hope in the world, because there are always new people and new experiences. And this is not a negative thing.

I've never bought the opinion that there's something in the make-up of Jews and Arabs to make them eternal enemies, because Jews and Arabs have always lived together in this land and co-operated, and it enriched the land to have the three monotheistic religions. So there's nothing in the make-up of the two peoples that prevents this from happening again.

I'll give you an example from just last Friday. Most Fridays we go on walks. In the course of our walk last Friday, we came upon a settlement. It has become almost impossible now to take a walk in these hills and not encounter settlements or settlement roads that cut through the hills and destroy them, or barbed wire, or walls, etc. So we came upon this settlement, which was on one side of the *wadi*, and then there was a huge rock face on the other, and some settlers had come to do rock climbing. In normal times we could have stopped, chatted, and invited them to share some of our food. Out in the countryside people are usually friendlier than anywhere else. Instead, just as we were passing close by – and not that close because we were on one level, they were on another and in between was barbed wire – we noticed that they had called for a security car from the settlement. They were afraid that we would harm them and had called for help.

In the end they went their way and we went our way. But what a sad state of affairs! These are rock climbers; they can't rock climb without having fortifications, needing more bodyguards to come and drive over the wild flowers in their 4×4 cars, and there's no common humanity between the two sides. There's no humanity. That's ugly, it's cruel, and it's unworkable. That's a perfect example, I think.

But that doesn't mean that eventually the two groups will not live together. If the injustice is removed and if the issues are resolved, they will learn to live together, because there is more commonality between them than differences. After all, most Israelis come from Arab countries and we are fellow Semites. Wherever I happen to be in the world, immediately the attraction is to somebody from the Jewish faith and we find that we have a lot in common. Maybe there are now far more common experiences, common sufferings, and common attitudes. So there's more commonality, but the obstacles would first have to be removed. Just as in the

case of the people of India and the British. Now, they're much closer and they appreciate each other's cultures, but when India was a colony, this couldn't happen.

***What little steps could be taken by both sides to move towards this future you just described?***

Amongst the obstacles that stand in the way of co-operation between the two sides, there is not only the exploitation, economic and material, of resources, but also the views of the past. The more I think about it, the more I realize that, unless the Israelis come to terms with what happened in 1948, when the Jewish forces expelled over 75,000 Palestinians from their homes and refused to allow them to return – which the Palestinians call their *Nakba* ('catastrophe'), there can be no possibility of reconciliation between the two sides. So work on understanding the past is important.

Also, for the Palestinians it is important to understand the impact of the Holocaust on the Jewish people. The Israelis might not be aware that, when we grew up, we didn't know about the Holocaust at all. I think the impact of the Holocaust on Israelis has to be understood by the Palestinians.

I've written a short book in two parts that is only in French. The first part is on the right of return, which I think is very crucial, and in it I also speak about what was happening in Europe during and after the Second World War and its impact on Palestine. The second part is a futuristic fantasy that takes place in 2037. The book is called *2037: Le Grand Bouleversement* [*The Great Transformation*]. It's a vision of how things could be in 2037. It's an arbitrary date, but I think it is far enough ahead for something to have happened, for the entire region to be experiencing a different reality.

I believe that the time will come when there will be a different reality. To persist as we are today requires so much force, both military, physical, and intellectual; it requires a forced distortion of history, forced positions, forced narratives, forced economics, forced misuse of natural resources. The benefits that the whole region could have from interaction and co-operation between the different nations that live here is tremendous. Instead, so much is spent on the military. The whole region is just a tiny part of the globe. We're too small in the world and too troublesome . . . for nothing. What is it all for?

## DEBATE

# Is the law of occupation applicable to the invasion phase?

**Marten Zwanenburg, Michael Bothe and Marco Sassòli**

*The 'debate' section of the Review aims at contributing to the reflection on current ethical, legal, or practical controversies around humanitarian issues.*

*The definition of occupation under international humanitarian law (IHL) is rather vague, and IHL instruments provide no clear standard for determining the beginning of occupation. Derived from the wording of Article 42 of the 1907 Hague Regulations, occupation may be defined as the effective control of a foreign territory by hostile armed forces. It is not always easy to determine when an invasion has become an occupation. This raises the question whether or not the law of occupation could already be applied during the invasion phase. In this regard, two main positions are usually put forward in legal literature. Generally it is held that the provisions of occupation law only apply once the elements underpinning the definition set out in Article 42 of the 1907 Hague Regulations are met. However, the so-called 'Pictet theory', as formulated by Jean S. Pictet in the ICRC's Commentary on the Geneva Conventions, proposes that no intermediate phase between invasion and occupation exists and that certain provisions of occupation law already apply during an invasion.*

*The collapse of essential public facilities such as hospitals and water-supply installations, partly due to the large-scale looting and violence that came along with the progress of the coalition forces, in Iraq in 2003 demonstrates that this discussion is not simply a theoretical one. Invading armed forces need clarity as to what rules they need to apply.*

*Three experts in the field of occupation law – Marten Zwanenburg, Michael Bothe, and Marco Sassòli – have agreed to participate in this debate and to defend three approaches. **Marten Zwanenburg** maintains that for determining when an invasion turns into an occupation the only test is the one set out in Article 42 of the*

1907 Hague Regulations, and therefore rejects the ‘Pictet theory’. **Michael Bothe**, while also rejecting the ‘Pictet theory’, argues that a possible intermediate situation between invasion and occupation, if there is any at all, would be very short and that, once an invader has gained control over a part of an invaded territory, the law of occupation applies. Finally, **Marco Sassòli** defends the ‘Pictet theory’ and argues that, in order to avoid legal vacuums, there is no distinction between an invasion phase and an occupation phase for applying the rules of the Fourth Geneva Convention.

The debaters have simplified their complex legal reasoning for the sake of clarity and brevity. Readers of the Review should bear in mind that the debaters’ actual legal positions may be more nuanced than they may appear in this debate.

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## Challenging the Pictet theory

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The law of occupation has enjoyed increasing attention in recent years. Most of this attention has focused on the interpretation of substantive rules of this branch of international humanitarian law (IHL), its interrelationship with human rights law, and the impact of decisions by the United Nations Security Council on its application.

Relatively little attention has been paid to the question of when the law of occupation starts to apply, and in particular when an invasion turns into an occupation. The International Committee of the Red Cross (ICRC), in its report to the 31st International Conference of the Red Cross and Red Crescent on the

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‘Challenges of Contemporary Armed Conflicts’, states that important outstanding legal questions in the field of occupation law remain:

Not only is the definition of occupation vague under IHL, but other factual elements – such as the continuation of hostilities and/or the continued exercise of some degree of authority by local authorities, or by the foreign forces during and after the phase out period – may render the legal classification of a particular situation quite complex. . . . Linked to the issue of the applicability of occupation law is the question of the determination of the legal framework applicable to invasion by and the withdrawal of foreign forces. It is submitted that a broad interpretation of the application of the Fourth Geneva Convention during both the invasion and withdrawal phases – with a view to maximizing the legal protection conferred on the civilian population – should be favoured.<sup>1</sup>

The ICRC is referring to longstanding debate concerning the threshold of application of the law of occupation. Traditionally, occupation was clearly distinguished from invasion. It was generally accepted that only after a minimum level of stability had been reached in an area that had been invaded did the law of occupation start to apply. This was reflected in the wording of Article 42 of the 1907 Hague Regulations.<sup>2</sup>

When the four Geneva Conventions were adopted, the provisions on occupation in the Hague Regulations were complemented by Section III of Part III of the Fourth Geneva Convention. This convention included an important broadening of the scope of application of the law of occupation, by providing in Article 2(2) for its application in case of an occupation without resistance – that is, without a prior invasion. For situations where there was such a prior invasion, the convention is silent on when such an invasion turns into an occupation. This raises the question whether the same test should be applied for this transition as for determining when the provisions on occupation in the Hague Regulations become applicable, or whether a separate, and different, test applies in the case of the Fourth Geneva Convention.

The latter is the point of view adopted by Jean Pictet in his commentary on the Geneva Conventions,<sup>3</sup> which is why it is also referred to as the ‘Pictet theory’.<sup>4</sup> The test employed by Pictet for determining whether there is an occupation for the

1 Report to the 31st International Conference of the Red Cross and Red Crescent, ‘International humanitarian law and the challenges of contemporary armed conflicts’, ICRC, Geneva, October 2011, available at: [http://www.icrc.org/conf/31IC\\_IHL\\_challenges\\_report\\_EN.pdf](http://www.icrc.org/conf/31IC_IHL_challenges_report_EN.pdf) (last visited 21 February 2012).

2 Article 42 of the 1907 Hague Regulations reads: ‘Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised’.

3 See Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1958 (Fourth Geneva Convention, Article 6§1), available online at: <http://www.icrc.org/ihl.nsf/COM/380-600007?OpenDocument> (last visited 21 February 2012).

4 It is to be noted that Jean Pictet’s theory according to which the definition of occupation would be different in the context of the Fourth Geneva Convention from that stemming from Article 42 of the 1907 Hague Regulations does not reflect the ICRC’s present views on the subject matter. For the ICRC, in the

purposes of the Fourth Geneva Convention is based on a particular reading of Article 4 of that convention. This reading is that the provisions on occupation in the Fourth Geneva Convention apply as soon as enemy forces exercise control over a protected person. Thus, the test applied is based on control over persons, rather than control over territory as required under the Hague Regulations. It has been adopted by a number of authors. It also appears to have been embraced by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Naletilić and Martinović* case.<sup>5</sup> Many of the supporters of this test buttress their arguments with the submission that if it were not accepted this would result in gaps in the protection afforded by IHL.<sup>6</sup> As such, it would accord with a teleological interpretation of the Fourth Geneva Convention aimed at maximizing the protection afforded by IHL.

There are serious arguments for questioning the ‘Pictet theory’, however. These arguments will be briefly addressed in this contribution. The first objection concerns the wording of Article 4 of the Fourth Geneva Convention. The relevant part of this article provides that:

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of an armed conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

It is important to note that the article refers to persons who find themselves in the hands of, *inter alia*, an Occupying Power. The article thus appears to require a pre-existing occupation, in the context of which persons find themselves in the hands of the Occupying Power. In other words, the occupation does not come about through the fact that persons find themselves in the hands of a power. It is interesting to note that this is implicitly supported in Pictet’s commentary, suggesting that this commentary is not internally consistent:

The words ‘in case of a conflict or occupation’ must be taken as referring to a conflict or occupation as defined in Article 2. The expression ‘in the hands of’ is used in an extremely general sense. It is not merely a question of being in enemy

absence of any detailed definition of occupation under the Fourth Geneva Convention and by the operation of its Article 154 highlighting the supplementary character of the instrument in relation to the 1907 Hague Regulations, the affirmation according to which the Fourth Geneva Convention would provide a different definition of occupation is not any more relevant in light of *lex lata*. In that regard, the ICRC interprets Pictet’s theory as only lowering the threshold of application of certain norms of the Fourth Geneva Convention so that they could also produce their legal effects during the phase of invasion (i.e. in a situation that does not amount to effective control for the purposes of IHL) with the view to enhancing the legal protection conferred by IHL to protected persons trapped in invaded areas. Therefore, the ICRC still views Article 42 of the 1907 Hague Regulations as the only legal benchmark against which the determination of the existence – or not – of a state of occupation shall be made. For further details, see the article by Tristan Ferraro, ‘Determining the beginning and end of an occupation under international humanitarian law’, in this edition.

5 ICTY, *Prosecutor v. Naletilić and Martinović*, Judgment (Trial Chamber), Case No. IT-98-34-T, 31 March 2001, paras. 219–221.

6 If the test were not accepted, individuals in territories invaded but not yet occupied would only benefit from limited protections set forth in Part I and Part II of GC IV.

hands directly, as a prisoner is. The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or 'hands' of the Occupying Power. It is possible that this power will never actually be exercised over the protected person: very likely an inhabitant of an occupied territory will never have anything to do with the Occupying Power or its organizations. In other words, the expression 'in the hands of' need not necessarily be understood in the physical sense; it simply means that the person is in territory which is under the control of the Power in question.<sup>7</sup>

Accepting the Pictet theory would lead to a situation in which the determination whether a person is a 'protected person' is conflated with the test for determining whether there is an occupation. This is difficult to reconcile with the existence of a section in the Fourth Geneva Convention that is specifically devoted to situations of occupation. It would also raise the question whether a distinction must be made between persons and goods as regards the situations in which they are protected. Part III, Section III of the Fourth Geneva Convention contains provisions protecting persons as well as provisions protecting goods. Under the Pictet theory, the threshold for application of the former would be lower than for the latter. The former would be protected by virtue of Article 4 of the Fourth Geneva Convention as soon as they found themselves in the hands of a Party to the conflict, whereas the latter would presumably only be protected in the case of an occupation in the sense of the Hague Regulations.

There is nothing in the *travaux préparatoires* of the Geneva Conventions to suggest that the drafters intended to depart from the previously accepted notion of occupation. If it had been their intention to include such a radical departure in the Fourth Geneva Convention, one would at the very least expect that such an intention would have been mentioned during the debates.

It is true that, if the Pictet theory is rejected, persons finding themselves in the hands of invading forces enjoy less protection than persons in the hands of an Occupying Power. Such a difference in levels of protection between different groups of persons is, however, no exception in the Geneva Conventions. It is a fact that the drafters of the Geneva Conventions made certain distinctions that have consequences for the level of protection afforded to particular groups of persons. The most obvious example is the distinction between international and non-international armed conflicts. Article 4 of the Fourth Convention provides another example of such a distinction. It provides that nationals of a neutral state, who find themselves in the territory of a belligerent state, and nationals of a co-belligerent state, shall not be regarded as 'protected persons' while the state of which they are nationals has normal diplomatic representation in the state in whose hands they are. Like it or not, such distinctions are part and parcel of IHL as it presently stands. That the object and purpose of the Geneva Conventions are of a humanitarian nature does not change this. This object and purpose have an

7 See J. S. Pictet, above note 3 (GV IV, Art. 4), available online at: <http://www.icrc.org/ihl.nsf/COM/380-600007?OpenDocument> (last visited 21 February 2012).

important role to play in the interpretation of a particular provision of the Conventions, but they cannot introduce a new rule in those Conventions where it did not previously exist.

One could argue that states may, in the application of a treaty provision, come to recognize that a particular provision must be read differently from what the original drafters intended. In accordance with Article 31(3)(b) of the Vienna Convention on the Law of Treaties, 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' shall be taken into account in interpreting a treaty provision.

A well-known example of subsequent state practice changing the previously accepted interpretation of a rule in the context of IHL is Article 118 of the Third Geneva Convention, concerning the release and repatriation of prisoners of war. There is ample state practice demonstrating that states interpret this provision in a different manner from that adopted in 1949.<sup>8</sup> This is not the case for the definition of occupation, however. On the contrary, most of the available state practice, with the notable exception of the judgment of the ICTY Trial Chamber in the *Prosecutor v. Naletilić and Martinović* case mentioned above, points in the opposite direction. For example, in the case of *Rev. Mons. Sebastiao Francisco Xavier dos Remedios Monteiro v. The State of Goa*, the Indian Supreme Court applied the definition of occupation under Article 42 of the 1907 Hague Regulations to define the beginning of an occupation in the sense of the Geneva Conventions.<sup>9</sup> The International Court of Justice (ICJ), in the case concerning armed activities on the territory of the Congo (*DRC v. Uganda*), held that the definition of occupation in Article 42 of the Hague Regulations reflects customary law.<sup>10</sup> It then went on to apply this definition in analysing the claims made by the DRC, including the claims that Uganda had violated provisions of the Geneva Conventions. This suggests that the Court considered that the definition of occupation set out in Article 42 also applies to the Geneva Conventions.

One may wonder whether accepting the Pictet theory accords with the principle of effectiveness. In other words, it could be argued that it would lead to a situation in which an Occupying Power is in a position of material impossibility to fulfil obligations imposed on it. This would imply that the drafters of the Fourth Geneva Convention did not espouse the Pictet theory, as it cannot be supposed that they would accept obligations for their respective states that they knew those states would not be able to fulfil. In general, most of the provisions of Part III, Section III, of the Fourth Convention appear to presuppose the existence of effective control over a certain territory in order to be fully respected. This is particularly true for the

8 See, *inter alia*, the practice referred to in John Quigley, 'Iran and Iraq and the obligations to release and repatriate prisoners of war after the close of hostilities', in *American University International Law Review*, Vol. 5, No. 1, 1989, p. 83; and Marten Zwanenburg, *Accountability of Peace Support Operations*, Martinus Nijhoff, Leiden, 2005, p. 256.

9 Supreme Court of India, *Rev. Mons. Sebastiao Francisco Xavier dos Remedios Monteiro v. The State of Goa*, 26 March 1969, *All India Reporter* 1970 SC 329.

10 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, *ICJ Reports* 2005, p. 168, para. 172.

‘positive’ obligations included in this Section, namely those obligations that require the Occupying Power to do something rather than refrain from doing something. One example is the obligation in Article 50 to facilitate the proper working of all institutions devoted to the care and education of children. Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education – if possible by persons of their own nationality, language, and religion – of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend. It is clear that a single patrol that has penetrated into the territory of the enemy and holds a village there for a brief time will hardly be in a position to ensure education for children it encounters. Such tasks typically involve specialized (‘civil–military co-operation’, ‘civil affairs’) personnel who are not deployed with such a patrol. Another example is Article 56, which obliges the occupant to ensure and maintain, with the co-operation of national and local authorities, the medical and hospital establishments and services, public health, and hygiene in the occupied territory. The Article refers in particular to the prophylactic measures necessary to combat the spread of contagious diseases and epidemics. According to the Pictet commentary, measures to be taken by an Occupying Power to meet its duties under Article 56 include, for example, supervision of public health, education of the general public, the distribution of medicines, the organization of medical examinations and disinfection, the establishment of stocks of medical supplies, the dispatch of medical teams to areas where epidemics are raging, the isolation and accommodation in hospital of people suffering from communicable diseases, and the opening of new hospitals and medical centres. These measures presuppose capabilities and specialized personnel that will not normally be available in many situations in which the Pictet theory would apply. It is true that Article 56 nuances the obligation placed upon the occupant by adding the words ‘to the fullest extent of the means available to it’. This does not detract from the fact that this and other provisions in Part III, Section III, were clearly not written with application during an invasion in mind.

Some might argue that, in view of the above, not all but only certain rights and obligations of the law of occupation would apply in a situation where protected persons find themselves in the hands of a Party to the conflict. This is problematic for two reasons. First, there is nothing in the text of the Fourth Geneva Convention to suggest such a differentiation between different obligations in Part III, Section III. Second, it is entirely unclear precisely which rights and obligations would apply in a situation where the Pictet theory applies, and which would not. This would create a situation in which states parties (as well as protected persons) would be left guessing which obligations they had in a particular situation. This is very undesirable from the perspective of legal certainty.

In conclusion, there are a number of arguments that strongly suggest that there is at present no separate test, apart from that set out in the Hague Regulations, for determining when an invasion turns into an occupation. This is not to say that one cannot argue for the application of the Pictet theory as a matter of *lex ferenda*. Indeed, application of this theory leads to increased protection for protected persons

and would address a 'protection gap' in the law. However, a certain measure of caution is called for.

As the abovementioned ICRC report states, practice has demonstrated that many states put forward claims of inapplicability of occupation law even as they maintain effective control over foreign territory or a part thereof, owing to a reluctance to be perceived as an Occupying Power. If this is already the case when Article 42 of the Hague Regulations is the standard for determining whether there is an occupation, this tendency would be likely to increase sharply if the Pictet theory were to be accepted. In that case, it is questionable whether the application of the theory would indeed provide all the benefits of increased protection claimed by its supporters.



## Effective control during invasion: a practical view on the application threshold of the law of occupation

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The question asked by the editors – ‘Is the law of occupation applicable during the invasion phase?’ – relates two situations to each other, ‘occupation’ and ‘invasion’. While the term ‘occupation’ is defined in IHL, controversial as the fine tuning of the definition may be, the term ‘invasion’ is not. For the purposes of this comment, the term will be taken in its ordinary, common meaning. In a military context, it means the movement of military units into an area belonging to another state. In this sense, it is, for instance, used in the UN General Assembly definition of aggression, which includes: ‘(t)he invasion or attack by the armed forces of a State of the territory of another State’.<sup>11</sup>

The existence of an occupation triggers the application of a specific legal regime that one finds in the Hague Regulations, which constitute customary law, in the Fourth Geneva Convention, and in certain details in the First Additional Protocol to the Geneva Conventions. This regime cannot apply unless there is an occupation. During an invasion phase, it can only be applied if and to the extent that a situation of occupation has arisen at the same time. In legal instruments that deal with both invasion and occupation, however, occupation is generally seen as a situation that arises after an invasion, or that is the result of an invasion. Thus, the paragraph of the definition of aggression quoted above also includes ‘military

11 United Nations General Assembly, Resolution 3314 (XXIX), 14 December 1974, Annex, Art. 3(a).

occupation . . . resulting from such invasion'.<sup>12</sup> This is also true for the so-called Oxford Manual adopted by the Institut de Droit International in 1880: occupation occurs 'as a consequence of invasion by hostile forces'.<sup>13</sup> However, it is submitted that it is not impossible for a situation of invasion to coexist or overlap with a situation of occupation. In particular, if one considers the situation of an invaded state as a whole, control over invaded territory may be established by the invader while the military movement forward – the invasion – is still going on in other parts.

This does not mean simply playing with words. It is an immensely practical question. This can be elucidated by the situation that occurred during the 2003 US/UK invasion of Iraq: while the invading troops advanced, looting by private persons was frequent. If the law of occupation applied, the invasion/occupation forces would have had a duty to prevent it. If not, it is very difficult to find a basis for such preventive duty.

The law of occupation provides for a balanced system of rights and duties of the Occupying Power. It is aptly summarized by the ICJ as follows:<sup>14</sup>

[The Occupying Power is] under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the [occupied country]. This obligation comprise[s] the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.

This regime satisfies a number of protective interests. Do all the interests at stake require protection during an invasion phase? Can their protection be reasonably expected during an invasion phase? In the doctrinal debate about the question of overlap between the two terms, the theory put forward by Pictet provides an easy answer: any successful invasion immediately creates a situation of occupation:

There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets.<sup>15</sup>

This approach, with due respect to the author and to his concern for the protection of victims, is, to say the least, an oversimplification. It is rightly

<sup>12</sup> *Ibid.*

<sup>13</sup> The Laws of War on Land (hereafter Oxford Manual), Oxford, 9 September 1880, Art. 41.

<sup>14</sup> ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, para. 178.

<sup>15</sup> Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1958, Art. 6, p. 60.



rejected by Marten Zwanenburg. If one takes the term 'occupation' in its natural meaning, there must be some kind of control involved. Only some degree of control can trigger the specific regime of rights and duties, including protective duties imposed on the Occupying Power, that is the essence of the law of occupation. The mere presence of forces on foreign territory is unable to trigger the application of that regime. A hit-and-run raid across the border does not establish a situation of control and, thus, an occupation. While an invading army advances, fighting its way into foreign territory, a situation of control is not established immediately. If a tank advances to join a battle that is raging a kilometre ahead and passes a burning house, the driver is not supposed to stop and help the firefighters. He or she must not shoot on the firefighters as they are civilians, and he or she must let them do their job as they are a protected civil defence unit. But in that stage of the conflict, the invading force does not yet have the duty of an Occupying Power to see to the welfare of the population of the occupied territory, which might indeed include help in firefighting. The fighting invading force has essentially negative duties in relation to the population: not to attack the civilian population, individual civilians, or civilian objects. In a contact zone, while fighting is still going on, the invading army has other concerns and responsibilities than fulfilling the public order functions of an Occupying Power.

But when does this situation change to the effect that these responsibilities are indeed imposed on the invading force? This is an essential question that Zwanenburg does not address and did not have to address within the framework of his line of argument. Yet it is one thing to deconstruct the Pictet theory; it is another to give an appropriate answer to that crucially important question. How long does the population of the invaded territory have to wait until the invader takes care of public order that is desperately needed by that population? Until the commander of the invading army makes himself or herself comfortable in the office of the former provincial government and has the secretaries arrive to take up the phone and to type a declaration that he or she has taken over the powers of an occupant? If this question were answered in the affirmative, it would mean, in the final analysis, to make the establishment of a regime of occupation dependent upon the good will of the commander of an invading army, or of his or her government. This would neglect the needs of the affected population, which must be protected by some governmental power. It would make the notion of 'occupation' a subjective one, dependent on the will of the occupant. But occupation is an objective notion. The law of occupation applies once there is, objectively speaking, a situation of occupation.

Objectively, occupation means *de facto* control. To that extent, Zwanenburg is right. But if forces present on a foreign territory are unwilling to exercise such control, this does not change the objective situation. A situation of occupation does not only arise if an occupation force has indeed taken over governmental powers; it has already arisen if that force is in a position to do so. This is a construction of the scope of application of the law of occupation that is contained in older formulations of this law and in quite recent ones.

It was already expressed clearly in the Oxford Manual:

*Art. 41.* Territory is regarded as occupied when, as a consequence of invasion by hostile forces, the State to which it belongs has ceased, in fact, to exercise its ordinary authority therein, and the *invading State is alone in a position to maintain* order there. The limits within which this state of affairs exists determine the extent and duration of the occupation.<sup>16</sup>

The same concept is articulated in the new UK Manual of the Law of Armed Conflict, according to which two conditions must be satisfied: 'First, that the former government has been rendered incapable of publicly exercising its authority in that area; and secondly, that the occupying power *is in a position* to substitute its own authority for that of the former government'.<sup>17</sup> The ICTY adopts essentially the same two pronged test: 'The occupying power *must be in a position* to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly'.<sup>18</sup>

When is an invading army in a position to exercise control? That depends on diverse circumstances. Yet experience, especially in Iraq, shows that it may happen earlier than expected. If no resistance is offered to an invasion and the former government structure just melts away, the invader, whether he likes it or not, is very soon in that position. This is the situation, already alluded to, where the resistance of an invaded state quickly breaks down, so that the invader is indeed in a position to exercise the said *de facto* authority while the movement forward (invasion) is still continuing in other parts of that territory. A responsible (and somewhat optimistic) commander of an invasion force should therefore draft rules of engagement in a way that alerts the soldiers to the responsibility to provide at least some basic protection to the population at a relatively early stage of a successful invasion.

What does this mean for Pictet's postulate that there is no intermediate situation between invasion and occupation? According to the view proposed here, that intermediate situation, if there is any, would indeed be very short. Once an invader has gained control over a part of an invaded territory, the law of occupation applies, even if the movement forward that precedes such control is continuing in other parts of the territory. The essential point that brings the solution proposed in this comment close to that of Pictet is the interpretation that it is not the actual establishment of a mechanism of control that triggers the application of the law of occupation, but that this application is already triggered where the invader is in a position to exercise authority, even if it is not yet willing to do so.

It is the example given by Pictet in the two sentences quoted above<sup>19</sup> that is objectionable. A patrol penetrating into enemy territory without any intention of

16 Oxford Manual, above note 13 (emphasis added).

17 UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford, 2004, Sec. 11.3 (emphasis added).

18 ICTY, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Judgement (Trial Chamber), 31 March 2003, para. 217 (emphasis added).

19 See text accompanying note 15.

staying there does not establish a situation of effective control and therefore does not trigger the application of the law of occupation. But it is exactly at this point that Marco Sassòli joins the Pictet theory. He argues that the Pictet theory is indeed necessary to ensure an appropriate protection of persons falling into the hands of an invading force before a situation of occupation exists in the sense defended by this comment. It is submitted that this protection can be ensured through rules other than those of the law of occupation, in particular Additional Protocol I, customary humanitarian law, and human rights. Part of the problem, as Sassòli rightly points out, is due to the somewhat awkward definition of 'protected persons' in the Fourth Geneva Convention. Article 75 of Additional Protocol I was intentionally drafted to remedy this flaw. It is submitted that the solution proposed in this comment does not compromise the necessary protection of persons falling into the hands of an invading force, but it avoids another serious difficulty that the Pictet theory faces. The duties of the Occupying Power to re-establish and ensure public order and safety and to see to it that the population is provided with food, lodging, health care, and education are positive duties of protection. As Sassòli admits, the Occupying Power cannot reasonably be expected to fulfil such duties while fighting is still going on. In other words: certain duties of the Occupying Power, at least according to Sassòli's interpretation of the Pictet theory, do not apply during the invasion phase. This protects the Pictet theory against the criticism of being practically impossible, but it leads to a need to restrict the protective duties of the Occupying Power as applying not to every situation of occupation but only to one of longer duration.



## A plea in defence of Pictet and the inhabitants of territories under invasion: the case for the applicability of the Fourth Geneva Convention during the invasion phase

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Both Marten Zwanenburg and Michael Bothe, for whom I have the highest possible respect, distinguish between an invasion phase and an occupation phase in the context of a state engaged in an international armed conflict against another state on the territory of the latter. They argue that the rules of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (hereafter Convention IV) pertaining to occupied territories apply only during the latter phase. I disagree. Where they differ – and their interpretations differ only in nuances, on which I rather side with Michael Bothe – is on when IHL of military occupation starts to apply. Both describe the debate about whether an invasion phase and an occupation phase should be distinguished fairly. This makes my task easier to

\* I would like to thank my former student Mr. Michael Siegrist for the ideas he has provided me with from his Masters thesis and my research assistant and doctoral student, Ms Nishat Nishat, for revising this text.

defend the opposite interpretation, one put forward by someone for whom I equally have the highest possible respect, Jean S. Pictet. As an advocate of one position, I have the luxury of being one-dimensional and able to ignore complexity. I will argue, first, that a systematic interpretation of Convention IV, taking its object and purpose into account and avoiding absurd results, leads to the conclusion that enemy control over a person in an invaded territory is sufficient to make this person protected by the rules of Convention IV on occupied territories. Second, even if occupation is defined purely territorially, a civilian falling into the power of the enemy during an invasion perforce finds himself or herself on a piece of land controlled by that enemy. Third, this interpretation does not require of invading forces what they cannot deliver. The very wording of the provisions of Convention IV (and arguably that of the 1907 Hague Regulations concerning the Laws and Customs of War on Land (hereafter the Hague Regulations)) is flexible enough not to require what is impossible in the invasion phase. Alternatively, the concept of control could be interpreted in a functional way, with a different threshold for different rules.

### **Avoiding a gap resulting from the structure of the Fourth Geneva Convention**

Most of the rules of Convention IV – that is, its Articles 27–141, forming Part III of the treaty – benefit only ‘protected civilians’, as defined in its Article 4. This provision reads:

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

As mentioned by Marten Zwanenburg, it would be circular to explain why inhabitants of invaded territories are protected civilians by arguing that they are in the hands of an Occupying Power. However, what Zwanenburg forgets, is the first alternative of Article 4, namely the ‘case of a conflict’. When inhabitants of an invaded territory fall – for example, by arrest and detention – under the control of invading forces, they are without any doubt in the hands of a Party to the conflict of which they are not nationals.

As inhabitants of invaded territories who fall into the hands of the invader are protected persons, they must benefit from some rules of Part III of Convention IV dealing with the ‘status and treatment of protected persons’. The rules of Part III are separated into rules applicable to aliens who find themselves on the ‘own’ (i.e. non-occupied) territory of a state and those applicable to occupied territories. The two categories are mutually exclusive, and I would argue that together they cover all possible situations in which a civilian is in enemy hands. Section II protects foreigners on a Party’s own territory. Section III applies to occupied territory. Section IV contains detailed rules protecting civilians interned for imperative security reasons in both a party’s own and occupied territories. As for Section I, its

title referring to ‘provisions common to the territories of the Parties to the conflict and to occupied territories’ could be read as encompassing not only own and occupied territories, but also any other territory of a Party to the conflict. However, under a systemic interpretation, the term ‘common’ must perforce refer to what appears in the following sections, II and III. Furthermore, the *travaux préparatoires* show that Part III was intended to cover (only) two categories of persons: aliens in the territory of a Party to the conflict and the population of occupied territories.<sup>20</sup> Not a single rule of Part III protects a civilian who is neither in a Party’s own nor in an occupied territory.

Therefore, if invaded territory were not considered as occupied in the sense of the categories of Convention IV, ‘protected civilians’ (and the main purpose and object of Convention IV is to protect ‘protected civilians’) falling into the hands of the enemy on invaded territory would not be protected by any rule of Part III. It would not be a violation of Convention IV to torture such an inhabitant of an invaded territory,<sup>21</sup> to rape her,<sup>22</sup> to take her as a hostage,<sup>23</sup> or to subject her to collective punishment.<sup>24</sup> All aforementioned conduct against protected persons is only prohibited by Convention IV if those persons are aliens in a Party’s own territory or if they find themselves in an occupied territory. Some may object that such conduct is prohibited by international human rights law (if it applies extraterritorially, which some scholars and states would deny, in particular if there is no occupation, as Marten Zwanenburg and Michael Bothe would argue), Article 75 of Additional Protocol I, and Article 3 Common to the Geneva Conventions as a common minimum applicable in all armed conflicts. Others may add that inhabitants of invaded territories remain covered by Chapter I of Section II of the Hague Regulations on ‘Means of injuring the enemy, sieges, and bombardments’, by Part II of Convention IV on ‘General protection of populations against certain consequences of war’, and by the dictates of public conscience of the famous Martens clause. However, while the last does not provide any detail and may therefore deploy its protective effect only when belligerents act in good faith, Chapter I of Section II of the Hague Regulations deals mainly with conduct of hostilities issues, and only its very general Article 22, stating that ‘[t]he right of belligerents to adopt means of injuring the enemy is not unlimited’, could be considered to cover the abovementioned issues. As for Part II of Convention IV, it deals with entirely different issues and applies to all civilians, not only to protected

20 Committee III, ‘Report to the Plenary Assembly’, in *Final Record of the Diplomatic Conference of Geneva of 1949*, Berne, 1950–1951, Vol. IIA, p. 821: ‘Part III constitutes the main portion of our Convention. Two situations presenting fundamental differences had to be dealt with: that of aliens in the territory of a belligerent State and that of the population-national or alien-resident in a country occupied by the enemy’. The ICRC’s ‘preliminary remarks’ to the text of the Geneva Conventions are even more explicit: ‘[Convention IV] distinguishes between foreign nationals on the territory of a party to the conflict, and the population of occupied territories. It is divided into five Sections. Section I contains provisions common to the above two categories of persons . . .’. See also *The Geneva Conventions of 12 August 1949*, ICRC, Geneva, 2010, Preliminary Remarks, p. 32.

21 Article 32 of GC IV only applies in own and occupied territories.

22 Article 27(2) of GC IV only applies in own and occupied territories.

23 Article 34 of GC IV only applies in own and occupied territories.

24 Article 33(1) of GC IV only applies in own and occupied territories.

civilians, while the specificity of inhabitants of a territory under invasion is that they are enemy nationals encountering a belligerent on their own territory, independently of their will. This is precisely the situation for which IHL of military occupation was made.

### **Control over a person is sufficient**

In any case, it is uncontroversial that Convention IV provides better and more specific protection for civilians who find themselves in the hands of the enemy than all other mentioned instruments. In my view, it is not imaginable that its drafters would have left such a gap between own and occupied territory, leaving some persons whom they defined as protected without *any* protection provided by the treaty rules they adopted, even though there is no possible reason why those persons need or deserve less protection than other civilians who are in the power of the enemy. In addition, to take the example aptly mentioned by Pictet,<sup>25</sup> it seems absurd that the deportation of civilians would not be prohibited in the invasion phase by any rule of Convention IV<sup>26</sup> but would be absolutely prohibited once the invasion has turned into an occupation. There seems to be no possible justification for this arbitrary difference. Control over a person in a territory that is not the invader's own must therefore be sufficient to trigger the application to that person of Convention IV's provisions applicable to occupied territories.

### **A functional understanding of the amount of the territory that must be occupied**

Many, including Zwanenburg and Bothe, object that, according to the ordinary meaning of terms (and Article 42 of the Hague Regulations), occupation must involve control over territory. Indeed, a person may be arrested or detained, but not 'occupied'. The reply to this objection could be that a person cannot possibly be in the power of invading forces if the spot of land ('territory') on which he or she happens to be is not under the control of someone belonging to the invading forces. To torture, beat, arrest, detain, or deport a person, I must necessarily control the spot on earth where that person is. Nothing, either in Convention IV or the Hague Regulations clarifies the minimum extension that a territory must have to be occupied. Article 42(2) of the Hague Regulations simply implies that control over parts of the territory of a state is sufficient for the rules on occupied territories of the Hague Regulations to apply. No one would deny that a single border village could be occupied. Why could it not be possible to reduce the requisite amount of territory to the piece of land of an invaded territory where the invading soldier is standing? It is

25 Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1958, p. 60.

26 Article 49(1) of GC IV only applies in occupied territories.

necessarily under his control, and the territorial state is necessarily no longer able to exercise authority over that spot, otherwise our soldier would be a prisoner of war<sup>27</sup> or dead.

## **A flexible interpretation of the obligations of Occupying Powers**

The main objection against the abovementioned interpretation is that many rules of Convention IV, in particular those that provide for positive obligations of an Occupying Power, cannot possibly be respected by invading forces, and that unrealistic interpretations of IHL rules must be avoided (and here I agree with Zwanenburg), not only according to the rules of treaty interpretation but also because unrealistic rules do not protect anyone and weaken the willingness of belligerents to respect even the realistic rules of IHL. However, those making this argument treat the rules of Convention IV on occupied territories as if they were all laying down strict obligations of result. As shown in detail by my former student Michael Siegrist in his Masters thesis, this is not the case.<sup>28</sup> I will discuss here, based on the results of his research, just the examples mentioned by Zwanenburg. Under Article 50 of Convention IV, an Occupying Power has the obligation to facilitate, with the co-operation of the national and local authorities, the proper working of institutions working for the education of children. This obligation means first and foremost a prohibition of interference with the activities of those institutions.<sup>29</sup> I do not see why invading forces should be unable not to requisition the only school in a village they invade. By contrast, I agree with Zwanenburg that supporting those institutions might require a certain degree of control and authority. Yet the kinds of support required may be manifold, and whether the invading forces can actually provide those different kinds of support will depend upon the circumstances and the capabilities of the invading troops. Furthermore, according to the clear wording of Article 50 ('facilitate'), supporting these institutions is an obligation of means, which means that it only requires that the invading troops do whatever is feasible towards the proper working of institutions devoted to the care and education of children.

As for the argument that Article 50(3) of Convention IV ('make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend') presents an undue burden, it must be recalled that it only applies if local institutions are inadequate (which invading forces are not able to

27 If he were on territory controlled by the enemy, he would necessarily be in 'the power of the enemy' according to Article 4 of Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949.

28 For a full discussion, see Michael Siegrist, *The Functional Beginning of Belligerent Occupation*, The Graduate Institute, Geneva, eCahiers, No. 7, April 2011, pp. 35–77, available at: <http://iheid.revues.org/75?lang=en> (last visited 28 March 2012).

29 J. S. Pictet, above note 25, p. 286.



assess). The duty to provide is only a last resort (if there is no adequate institution and relatives or friends could not take care of orphans or children separated from their parents) and only requires that arrangements be made (in other words, that plans or preparations are made).

Similarly, with regard to Article 56 of Convention IV, Pictet stresses that the duty to organize hospitals and health services, and the taking of measures to control epidemics, 'is above all one for the competent services of the occupied territory itself'.<sup>30</sup> As long as the national or local authorities are able to fulfil these tasks, the Occupying Power is merely required not to hamper their work. Only when hospitals and medical services are not properly functioning will the Occupying Power be required to provide services, and, under the wording of Article 56, only '[t]o the fullest extent of the means available to it'. Invading forces have only limited means to adopt 'prophylactic and preventive measures', in particular, as Convention IV correctly requires, 'in cooperation with national and local authorities'. As for the fundamental obligation to care for the wounded, it is, in any event, binding on the invading force (subject to 'military considerations'), as a consequence of Article 16 of Convention IV, which applies even outside occupied territories.

The provisions of Convention IV find the right balance between necessity and humanity. Necessity, limited means, and other priorities have been taken into account with regard to provisions imposing positive obligations upon a Party to the conflict in that they usually leave the Parties with some leeway as to how they can achieve their duties. Often, the positive obligations are obligations of means, which take into account the circumstances and the means available to the invading forces. Humanity, on the other hand, ensures that fundamental rights and safeguards cannot be abrogated. Those provisions are absolute, but they are of a negative nature and hence do not require invading forces to provide anything.

In addition, those who argue that IHL of military occupation is not applicable at all during the invasion phase forget that the rules of Section III of Part III of Convention IV may also be seen as conferring certain rights on invading forces, such as a legal basis for security measures, internment, or the requisition of labour. It could be argued that, otherwise, invading forces would simply have no legal basis to arrest and detain civilians who threaten their security.

### **Alternatively, the concept of occupation could be different for different rules**

I can understand that some readers may be sceptical towards such a flexible interpretation of the rules of IHL of military occupation, because flexibility always opens the door to abuse, including by Occupying Powers after the invasion phase. Those sceptics could come to the same result by adopting a functional concept of (the beginning of) occupation. The idea that only some rules of IHL apply during the invasion phase is not new. Pictet himself distinguishes the Hague Regulations

30 *Ibid.*, p. 313.

from Convention IV, arguing that for the latter ‘the word “occupation” . . . has a wider meaning than it has in Article 42 of the Hague Regulations’,<sup>31</sup> which implies that his theory does not apply to the Hague Regulations. However, the prohibition in Article 44 of the Hague Regulations, ‘to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defence’, may more easily (and must certainly) be respected by an invader than Article 50 of Convention IV, providing for a subsidiary obligation of an Occupying Power to ensure that children benefit from education. Siegrist shows that even Article 43 of the Hague Regulations, requiring an Occupying Power to ‘take all measures in his power to maintain public order’, comprises some obligations that may and must be respected by invading forces.<sup>32</sup>

Others, including the ICTY,<sup>33</sup> want to distinguish between the rules protecting persons and those protecting property, only the former applying during the invasion phase. This finds support in a formulation by Pictet, who writes: ‘So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 [of the Hague Regulations]’.<sup>34</sup> In my view, this wording does not necessarily imply that Pictet draws this distinction between individuals and their property. One could just as well consider that property is protected because of the individuals who own it. In any case, property is equally protected during the invasion phase against pillage and destruction in Section II, Chapter I of the Hague Regulations.<sup>35</sup> As for destruction, in my view the prohibition in Article 23(g) of the Hague Regulations, under which it is forbidden ‘[t]o destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war’, has been refined for two specific situations by modern IHL. For the invader, concerning objects that are under enemy control, the decisive test is laid down in Article 52(2) of Additional Protocol I: whether the object contributes to enemy military action and whether its destruction constitutes a military advantage for the attacker. As soon as an invader has control over an object, by definition it can no longer contribute to military action of the enemy. Its destruction can therefore only be justified by reference to IHL of military occupation, namely Article 53 of Convention IV, when its destruction ‘is rendered absolutely necessary by military operations’, which is a more restrictive standard. Similarly, it makes little sense that the prohibition of requisition of hospitals in Article 57 of Convention IV would not apply during the invasion phase, while the obligations concerning education in Article 50 would apply because they mention persons as beneficiaries.

Although I take very seriously Zwanenburg’s objection that IHL rules must be clear and foreseeable for those who have to apply them in the field, I would suggest an analysis of what rules apply during the invasion phase not according to

31 *Ibid.*, p. 60.

32 M. Siegrist, above note 28, pp. 66–67.

33 Compare ICTY, *The Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-T, Judgment (Trial Chamber), 31 March 2003, paras. 221 and 587.

34 J. S. Pictet, above note 25, p. 60.

35 See Articles 23(g) and 28 of the Hague Regulations.

pre-established broad categories, but for every rule taking into account the degree of control that the invader exercises in that particular case. This would also avoid the difficulty identified by Bothe of determining when the invasion phase turns into the occupation phase. Such an understanding would parallel, for the beginning of occupation, the functional concept of end of occupation that is inherently adopted by all those in scholarly writings,<sup>36</sup> UN documents,<sup>37</sup> and among states who consider Gaza still to be occupied by Israel, but (fortunately) do not require Israel to re-enter the Gaza Strip to maintain law and order,<sup>38</sup> to ensure that detainees in Gaza are treated humanely,<sup>39</sup> or to ensure that they are not used (by Palestinians) to render certain points immune from military operations.<sup>40</sup> Pictet's remark that 'Articles 52, 55, 56 and even some of the provisions of Articles 59 to 62... presuppose presence of the occupation authorities for a fairly long period' points in the same direction.<sup>41</sup> Under such a functional understanding of occupation, an invaded territory could at a certain point in time already be occupied for the purpose of the applicability of Article 49 (prohibiting deportations), but not yet occupied for the purpose of the applicability of Article 50 (on education). On such a sliding scale of obligations according to the degree of control, obligations to abstain would be applicable as soon as the conduct they prohibit becomes materially possible (the person benefiting from the prohibition is in the hands of the invading forces), while obligations to provide and to guarantee would apply only at a later stage. Siegrist distinguishes between those rules where a significant gap of protection would exist if they were not applicable during the invasion phase (Articles 49, 51(2)–(4), 52, 53, 57, and 63 of Convention IV); obligations to provide or respect that are triggered by activities of the Occupying Power and that therefore, in any event, only apply during the invasion phase if the Occupying Power is able and willing to carry out such activities (Articles 64–75, 54, 64(1) and 66, and 78 of Convention IV), for example, to try or intern protected civilians; and the obligations to provide or respect due to the mere fact of occupation (Article 43 of the Hague Regulations and Articles 48, 50, 51(1), 55, 56, 58, 59–61, and 62 of Convention IV).<sup>42</sup> Such a sliding scale would also be much more suited

36 See, for instance, Solon Solomon, 'Occupied or not: the question of Gaza's legal status after the Israeli disengagement', in *Cardozo Journal of International and Comparative Law*, Vol. 19, 2011, pp. 59–90; Shane Darcy and John Reynolds, 'An enduring occupation: the status of the Gaza Strip from the perspective of international humanitarian law', in *Journal of Conflict & Security Law*, Vol. 15, No. 2, 2010, pp. 211–243; and Mustafa Mari, 'The Israeli disengagement from the Gaza Strip: an end of the occupation?', in *Yearbook of International Humanitarian Law*, Vol. 8, 2005, pp. 356–368.

37 See UN Human Rights Council, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48, 25 September 2009, paras. 273–279; UN Human Rights Council, Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance, UN Doc. A/HRC/15/21, 22 September 2010, paras. 63–66.

38 As it should under Article 43 of the Hague Regulations.

39 As it should under Articles 27 and 76 of GC IV.

40 As it should under Article 28 of GC IV. If Gaza is occupied territory, inhabitants of Gaza are necessarily protected persons, because every person (not national of the Occupying Power) who finds himself in that territory is constructively in the hands of the Occupying Power. See J. S. Pictet, above note 25, p. 47.

41 *Ibid.*, p. 60.

42 See M. Siegrist, above note 28, pp. 47–77.

to the fluid realities of modern warfare, weapons, and the absence of frontlines than the traditional 'all or nothing' approach. Both a flexible interpretation of the obligations and a functional understanding of occupation would resolve all the examples given by Marten Zwanenburg and Michael Bothe as arguments against the 'Pictet theory'.

In conclusion, while my theoretical starting point is diametrically opposed to that of both Marten Zwanenburg and Michael Bothe, I must admit that my position would only lead to different results from those that follow from Bothe's position in a few cases. As for Zwanenburg's position, I am unable to evaluate how much its practical consequences differ from those of my position since it is not clear precisely when he would consider the nature of a territory to change from invaded to occupied. Nor does he indicate whether there is a minimum amount of territory required for an occupation and, if so, how much it would be. Anyway, on the theoretical level, my theory has the advantage of avoiding legal vacuums between categories, such as ones (between civilians and combatants or international and non-international armed conflicts) that have had significant practical consequences in recent years.

# Preoccupied with occupation: critical examinations of the historical development of the law of occupation

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## **Abstract**

*This article examines the historical evolution of the law of occupation from two angles. First, it analyses scholarly discourse and practice with respect to the general prohibition on the Occupying Power making changes to the laws and administrative structure of the occupied country, as embodied in Article 43 of the 1907 Hague Regulations. Many Occupying Powers and scholars have endeavoured to rationalize exceptions to this 'general principle' governing the entire corpus of the law of occupation. Their studies support the contingent nature of the law of occupation, with its interpretation being dependent on different historical settings and social context. The second part of the article focuses on how the law of occupation that evolved as a European project has rationalized excluding the system of colonialism from the framework of that law. The historical assessment of this body of jus in bello would be incomplete and biased if it did not address the narratives of such structural exclusivity.*

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**Keywords:** law of occupation, historical development, Article 43 of the Hague Regulations, occupying power, legislative authority, conservationist principle, necessity, colonial occupation, World War I, World War II, Cold War, occupation of Iraq.



This article examines the evolution of doctrines on the law of occupation in the course of its history from the late eighteenth century to the present day. While it highlights salient changes that have impinged upon the normative framework of the law of occupation, it is beyond its scope to undertake a comprehensive historical survey. Instead, the analysis will focus specifically on two main features underlying the historical development of the law of occupation: first, legal discourses on the Occupying Power's limited legislative authority under Article 43 of the 1899/1907 Hague Regulations<sup>1</sup> (and later under Article 64 of the 1949 Fourth Geneva Convention), and the concept of 'necessity' that operates as an exception to this principle under these provisions; and second, the narratives and discourse on justifying the exclusion of 'colonial occupations' from the normative framework of the law of occupation.

As will be discussed below, the first issue relates to the exceptions that are essentially recognized as being built in to the normative framework of international humanitarian law. In contrast to those exceptions, the second issue concerns the institutional paradigm of colonialism that was made exceptional to the entire corpus of the law of occupation. Two reasons can be put forward for justifying the combined historical survey of these two *prima facie* discrete issues. First, the systemic inapplicability of the law of occupation (and the entire body of *jus in bello*) to colonialism (invasions and occupations of non-Western territories) was observable from the nineteenth century until the wave of decolonization after 1945, the period that coincided with the most important epoch for the consolidation of the law of occupation. Second, the systemic exclusion of colonialism from the compass of the laws of war epitomizes the binary opposition of the law as it is and the law as it ought to be (or, in this case, between the law of occupation as it has been and the law of occupation as it ought to have been).<sup>2</sup>

- 1 The authentic French text of Article 43 is identical in both the 1899 and the 1907 Hague Regulations. It reads that: '*L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays*'. However, there is a slight difference in the English texts. While Article 43 of the 1899 Hague Regulations provides that: 'The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country', the same article of the 1907 Hague Regulations stipulates that: 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.
- 2 On the epistemological level, the dualism based on this distinction is considered to derive from the Western philosophical tradition that has been premised upon the binary scheme (mind/body, objective/subjective, empirical/metaphysical, reality/appearance, and us/they). See Marianne Constable, 'Genealogy

The main body of the article is divided into two parts. The first part examines the historical development of the general corpus of the law of occupation from its nascent period in the wake of the Napoleonic Wars until the present day. In so doing, it will focus specifically on the interplay between the general rule predicated on the 'conservationist' principle and the concept of 'necessity', both of which are drawn from Article 43 of the 1899/1907 Hague Regulations (and later Article 64 of the 1949 Fourth Geneva Convention). Under the 'conservationist' principle, Occupying Powers cannot make changes to the local laws and administrative authorities of the occupied state.<sup>3</sup> However, exceptions to this general principle are allowed if an Occupying Power is 'absolutely prevented' from respecting the local laws. This is considered to embody the concept of 'necessity'. Further, the two-tier approach inherent in this provision (the 'conservationist' principle as the general rule, with the 'concept of necessity' providing grounds for exceptions to that rule) is also discernible under Article 64 of the Fourth Geneva Convention, albeit with some changes.

In contrast, the second part critiques the historical discourses that have been presented to justify the system of colonialism as operating *outside* the normative regime on occupation. It will highlight how the mainstream doctrines on occupation overlooked a side current of anti-colonialist ethos on the part of the colonized peoples during the colonial era. It is the present writer's belief that, in our post-colonial world, the historical examinations of the law of occupation would be incomplete without analysing how the occupations that led to colonial control were placed outside the constraints of the law of occupation. It ought to be highlighted again that, while the 'necessity' grounds as exceptions to the general principle under Article 43 of the Hague Regulations (and Article 64 of the Fourth Geneva Convention) are 'endogenous' elements contemplated *within* the framework on the law of occupation, the debarring of the colonial context from the realm of the law of occupation was the structural issue of inequity underlying this body of law. This part is intended to challenge the effect of narrowly compartmentalizing our analytical framework in the existing study of the law of occupation.

## Historical evolution of the law of occupation with special regard to the 'conservationist principle'

### Overview

In this part, we will explore the genesis and the historical evolution of the normative framework of the law of occupation with special regard to the 'conservationist' principle. As outlined above, this is one of the general principles that have governed the entire normative edifice of the law of occupation. It indicates that Occupying

and jurisprudence: Nietzsche, Nihilism, and the Social Scientification of Law', in *Law & Social Inquiry*, Vol. 19, No. 3, 1994, pp. 555–556.

3 Gregory H. Fox, 'The Occupation of Iraq', in *Georgetown Journal of International Law*, Vol. 36, No. 1, 2005, p. 195.

Powers are generally not entitled to modify local laws and administrative structures in the occupied territories. Clearly, this flows from the underlying assumptions of the law of occupation. The Occupying Power does not acquire sovereignty of the ousted occupied state. Instead, its role is to act only as a temporary custodian of the territory until the end of occupation.<sup>4</sup> The interaction between the conservationist principle and the concept of ‘necessity’ as an exception to this principle provides the microcosm for scholarly discourses and propositions on the law of occupation as a whole.<sup>5</sup> As will be discussed below, the parameters of ‘necessity’ grounds can be (over-)stretched with a view to claiming expanded legislative authority to enforce policy objectives in occupied territories, or merely for the purpose of justifying disregarding specific rules of the law of occupation.

## The genesis of the legal regime of occupation

In the Enlightenment period, classic scholars such as Vattel,<sup>6</sup> Jean-Jacques Rousseau,<sup>7</sup> and Georg F. von Martens<sup>8</sup> advocated some elementary principles of

- 4 See, for instance, 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. 27–37; and G. H. Fox, above note 3, p. 199.
- 5 The rule embodied in Article 43 of the Hague Regulations is a general rule in relation to the more detailed ones enumerated in the ensuing provisions of Section III of the Regulations. Even so, judicial practice and scholarly writings have occasionally invoked this general rule to deal with a particular issue that is governed by the specific provision. For instance, in the *Value Added Tax* case judgment, the Supreme Court of Israel ruled that, even if the general ban on introducing new taxes may be inferred from Articles 48 and 49 of the Hague Regulations, exceptions can be made by applying the ‘necessity’ ground of maintaining ‘orderly government’ under Article 43, and this without needing to classify such taxes under the rubric of ‘other money contributions’ under Article 49: HCJ 69+493/81, *Abu Aita [or Abu Itaj] et al. v. Commander of the Judea and Samaria Region et al.*, 37(2) *Piskei Din* 197 (1983); English excerpt in *Israel Yearbook of Human Rights*, Vol. 13, 1983, p. 348 (hereafter *Abu Aita* case); and in *Palestinian Yearbook of International Law*, Vol. 4, 1987–1988, pp. 186–209. See also Yoram Dinstein, ‘Taxation under Belligerent Occupation’, in Jürgen Jekewitz, Karl H. Klein, Jörg D. Kühne, Hans Petersmann, and Rüdiger Wolfrum (eds), *Des Menschen Recht zwischen Freiheit und Verantwortung: Festschrift für Karl Josef Partsch zum 75. Geburtstag*, Duncker & Humblot, Berlin, 1989, pp. 122–123; Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, p. 128.
- 6 Emmerich de Vattel, *Le droit des gens ou principes de la loi naturelle*, J. P. Aillaud, Paris, 1835, pp. 178–179 and 230, paras. 150 (humane treatment of prisoners of war) and 200 (noting that, despite the right of the conqueror to seize the public property, the individuals retain their property). However, the law of occupation, as distinguished from the right of conquest, was yet to evolve. Nowhere in this treatise can we find any reference to the legal terminology of occupation. See also Eyal Benvenisti, ‘The Origins of the Concept of Belligerent Occupation’, in *Law and History Review*, Vol. 26, No. 3, 2008, pp. 622, 624–625 (discussing Vattel’s absence of distinction between an occupier and a conqueror).
- 7 While not providing a distinct legal regime of occupation as such, Rousseau considered war as a phenomenon that could only exist between governments, and stressed the immunity of the lives and property of private persons. He argued that: ‘War is therefore in no way a relation between a man and another man, but a relation between a state and another state, in which the individual persons are enemies only accidentally, not as men, nor even as citizens, but as soldiers. . . . Even in full-blown war, a just prince surely seizes, in an enemy state, all that appertains to public life, but he respects the person and property of the individuals’. Jean-Jacques Rousseau, *Contrat social ou principes du droit politique*, 2nd edition, Bureaux de la Publication, Paris, 1865, Livre 1, IV (‘De l’esclavage’), p. 24 (translation from French by the present author). The original French text reads: ‘La guerre n’est donc point une relation d’homme à homme, mais une relation d’Etat à Etat, dans laquelle les particuliers ne sont ennemis qu’accidentellement, non point comme hommes, ni même comme citoyens, mais comme soldats. . . . Même en pleine guerre, un



the laws of war, including the distinction between combatants and non-combatants, and the sparing of the lives and property of non-combatants from the scourges of war.<sup>9</sup> The so-called Rousseau–Portalis doctrine suggests that war was characterized as a relationship between states, not between individuals.<sup>10</sup> Admittedly, this doctrine was developed at a time when jurists made little distinction between the notion of occupation and that of conquest.

The ensuing French Revolution and the Napoleonic War, and the seeds of revolution and (romanticized) nationalism that were sown by the former across western Europe from the end of the eighteenth century well into the first half of the nineteenth century, challenged the conservative monarchical foundation of the political and constitutional orders in continental Europe.<sup>11</sup> The rudimentary building block of the law of belligerent occupation can be considered as having emerged as a technique of managing such chaotic territorial and constitutional/administrative orders.<sup>12</sup> In other words, it was the fruit of the geopolitical and constitutional changes that swept throughout western Europe at the turn of the nineteenth century.<sup>13</sup> Revolutionaries declared and waged wars on absolute monarchies in other countries while acting to liberate the oppressed local populations. They did so while firmly convinced of the benefits to the populace. Indeed, the French Constitution of 3 September 1791 specifically declared that ‘the French nation renounces the undertaking of any war with a view of making conquests, and it will never use its forces against the liberty of any people’.<sup>14</sup> Many such revolutionaries acted for the purpose of emancipating populations oppressed by their monarchs.<sup>15</sup>

*prince juste s'empare bien, en pays ennemi, de tout ce qui appartient au public, mais il respecte la personne et les biens des particuliers’.*

- 8 Georg F. von Martens, *Precis du droit des gens moderne de l'Europe*, J. C. Dieterich, Göttingen, 1789, Vol. II, Livre VIII, in particular Chapter III, para. 234, pp. 343–344 (prohibition of attacks against women, children, and the aged), and para. 235, pp. 345–346 (protection of rights as prisoners of war for the vanquished soldiers, except by way of retaliation against ‘barbaric peoples’).
- 9 See, however, Karma Nabulsi’s critique of the prevailing understanding that Rousseau was the founder of this key principle of the modern laws of war (distinction between combatants and non-combatants): Karma Nabulsi, *Traditions of War: Occupation, Resistance, and the Law*, Oxford University Press, Oxford, 1999, pp. 184–203 (arguing that Rousseau considered patriotism essential in his advocacy of the civil participation in just wars of self-defence).
- 10 This doctrine is named after J.-J. Rousseau and the French jurist Jean-Etienne-Marie Portalis. It was also advocated by the French diplomat Talleyrand: E. Benvenisti, above note 6, p. 626. For Rousseau’s argument, see J.-J. Rousseau, above note 7, Livre I, IV, p. 24.
- 11 Paul W. Schroeder, *The Transformation of European Politics: 1763–1848*, Clarendon Press, Oxford, 1994, p. 72; Nehal Bhuta, ‘The antinomies of transformative occupation’, in *European Journal of International Law*, Vol. 16, No. 4, 2005, pp. 721, 730.
- 12 See Fyodor F. Martens, *La paix et la guerre: la Conférence de Bruxelles 1874; Droit et devoirs des belligérants (leur application pendant la guerre d'Orient 1874–1878); La Conférence de La Haye 1899*, translated from Russian into French by Le Comte N. de Sancé, Arthur Rousseau, Paris, 1901, pp. 274–275.
- 13 N. Bhuta, above note 11; Martti Koskeniemi, ‘Occupied zone: “a zone of reasonableness”’, in *Israel Law Review*, Vol. 41, 2008, pp. 13, 30.
- 14 The French Constitution of 3 September 1791, Title VI, first paragraph, available in English at: <http://www.duke.edu/web/secmod/primarytexts/FrenchConstitution1791.pdf> (last visited 13 April 2012).
- 15 M. Koskeniemi, above note 13, p. 30. However, this received understanding may be qualified by some unsavoury stories buried in archives. See Timothy C. W. Blanning, *The French Revolution in Germany: Occupation and Resistance in the Rhineland 1792–1802*, Oxford University Press, New York, 1983, p. 148

What emerged in the wake of the conservative European order restored by Metternich's Congress of Vienna were the 'principles' of the maintenance (or restoration) of sovereignty and independence of the states occupied during the Napoleonic Wars, despite many territorial alterations.<sup>16</sup> Admittedly, these principles were ingrained in the well-established 'right to security' and independence of sovereign states.<sup>17</sup> However, they were yet to be recognized as discrete principles of the law of occupation. The principles befitted the reactionary inclination of the Holy Alliance of 1815, premised on the delicate balance of power. With the ideas of liberalism and national self-determination already disseminated across Europe by the French Revolution and the Napoleonic Wars, the two other revolutions originating from France in 1830 and 1848 triggered popular revolts to demand constitutional reforms and political realignments throughout the Continent. This gradually contributed to the emerging European order of ethno-linguistic nation-states based on the idea of national sovereignty, an idea that can arguably be traced back to the post-Westphalian European order.<sup>18</sup> It is in this transformative period in Europe that the legal regime of occupation came to be separated conceptually from that of conquest.<sup>19</sup> Unlike the notion of conquest, which gave valid sovereign title to conquered territories, occupation was understood as leaving the sovereignty of the ousted government intact.

## Tracing the origin of the 'conservationist' premise of the law of occupation at a scholarly level

The historical origin of the 'conservationist' premise of the law of occupation<sup>20</sup> can be traced through examinations of classic treatises. Both Hersch Lauterpacht<sup>21</sup> and

(discussing pillage, vandalism, and rape as booty of war in occupied Rhineland and Spain); Marc Blancpain, *La vie quotidienne dans la France du Nord sous les occupations (1814–1944)*, Hachette, Paris, 1983, p. 21 (describing crimes of rape, pillage, and vandalism that were returned in kind by the Cossacks and the Asian cavalry of the occupying Russian army in northern France), as cited in K. Nabulsi, above note 9, p. 24.

- 16 In the post-Napoleonic period, for some German states that had formed part of the Holy Roman Empire – such as Hanover, Hesse-Kassel, and Oldenburg – the new era provided the much-needed opportunity to restore political sovereignty and territories lost during the *Rheinbund* years. For other states, the era gave occasion to proceed with the integration of German-speaking states through the German Confederation. The Confederation model was favoured by states such as Saxony, particularly because it guaranteed the independence and sovereignty of its members: see Lawrence J. Flockert, 'State-building and nation-building in the "Third Germany": Saxony after the Congress of Vienna', in *Central European History*, Vol. 24, No. 3, 1991, pp. 268, 276.
- 17 See E. de Vattel, above note 6, Livre 2, para. 49.
- 18 E. Benvenisti, above note 6, pp. 623, 628. However, Croxton argues that the concept of sovereignty remained ambiguous for centuries after that point: Derek Croxton, 'The Peace of Westphalia of 1648 and the origins of sovereignty', in *International History Review*, Vol. 21, No. 3, 1999, pp. 569–591.
- 19 It ought to be added that, in view of the element of effective control, the legal regime of occupation was considered analogous to the much older legal regime of blockade: James M. Spaight, *War Rights on Land*, Macmillan, London, 1911, p. 328.
- 20 For the term 'conservationist' principle, see G. H. Fox, above note 3, pp. 199, 234–240.
- 21 Lassa Oppenheim, *International Law: A Treatise, Vol. 2: War, Peace and Neutrality*, ed. Hersch Lauterpacht, 5th edition, Longmans, London, 1935, p. 344.

Benvenisti<sup>22</sup> suggest that the doctrinal refinement on the law of occupation owes much to August Wilhelm Heffter's treatise of 1844. Heffter suggested that, save in the case of *debellatio*, occupation was merely the form of temporary control that suspended the exercise of sovereign rights of the occupied state, without bringing about the transfer of sovereignty as such.<sup>23</sup> Further, a close look at Georg Friedrich von Martens' *Précis du droit des gens modernes de l'Europe* (1789)<sup>24</sup> corroborates the thesis that the basic normative framework on occupation, including the conservationist principle, did not evolve until after the Congress of Vienna (1814–1815). As Bhuta notes,<sup>25</sup> the conservationist premise was conspicuously absent in this classic German author's text. This treatise, published in the same year as the French Revolution, neither mentioned the legal concept of 'belligerent occupation' nor recognized the rights of occupiers, as distinct from those of conquerors, in land warfare.<sup>26</sup> Von Martens even argued that:

The reason why one has occupied an enemy province determines, above all, whether one is allowed to alter, to a greater or lesser extent, the form of the government. The enemy is not obliged to conserve the constitution of the conquered country. Nor is it obliged to leave to that country the rights & privileges that its Sovereign has accorded. . . .<sup>27</sup>

22 E. Benvenisti, above note 6, p. 630.

23 Heffter observed that: 'Only if complete defeat of a state authority (*debellatio*) has been reached and rendered this state authority unable to make any further resistance, can the victorious side also take over the state authority, and begin its own, albeit usurpatory, state relationship with the defeated people. . . . Until that time, there can be only a factual confiscation of the rights and property of the previous state authority, which is suspended in the meantime'. D. August Wilhelm Heffter, *Das Europäische Völkerrecht der Gegenwart*, E. H. Schroeder, Berlin, 1844, pp. 220–221 (translation from German by the present author). The original text reads: 'Erst wenn eine vollständige Besiegung der bekriegten Staatsgewalt (*debellatio*) eingetreten und dieselbe zu fernern Widerstande unfähig gemacht ist, kann sich der siegreiche Theil auch der Staatsgewalt bemächtigen, und nun ein eigenes, wiewohl usurpatorisches, Staatsverhältniß mit dem besiegten Volke beginnen. . . . Bis dahin findet lediglich eine thatsächliche Beschlagnahme der Rechte und des Vermögens der inzwischen suspendirten bisherigen Staatsgewalt Statt' (all spellings as in the original).

24 G. F. von Martens, above note 8.

25 N. Bhuta, above note 11, pp. 726–727, n. 30.

26 See G. F. von Martens, above note 8, Livre VIII, Chapters III ('De la manière de faire la guerre') and IV ('Des conventions qui se font avec l'ennemi dans le cours de la guerre'), pp. 339–369.

27 *Ibid.*, Livre VIII, Chapter III, para. 238, pp. 348–349 (translated into English by the present author). The original French text reads: 'Le motif pour lequel on a occupé une province ennemie décide surtout, si l'on se permet d'altérer plus ou moins le forme du gouvernement. L'ennemi n'est pas obligé de conserver la constitution du pays conquis, ni de lui laisser les droits & les privilèges que son Souverain lui a accordés. . . .'. See also the extensive rights to take the property of the occupied or conquered territories: *ibid.*, para. 239, p. 349, arguing that 'the enemy is equally authorized to seize the property of their enemy . . . either the immovable property (*Conquête, Eroberung*) or the movable property (*Butin, Beute*), not only 1) to obtain what is owed to it or an equivalent, but also 2) to compensate for the cost of the war, and 3) to oblige the enemy to consent to an equitable peace, and finally 4) to deprive the enemy of the desire or the forces to renew the insults that gave rise to the war' (translated into English by the present author); the original reads: 'L'ennemi est également autorisé à s'emparer des biens de l'ennemi . . . soit des biens immeubles (*Conquête, Eroberung*), soit des biens meubles (*Butin, Beute*), tant 1) pour obtenir ce qui lui est dû ou un équivalent, que 2) pour se dédommager des frais de la guerre & 3) pour obliger l'ennemi à donner les mains à une paix équitable, enfin 4) pour ôter à l'ennemi l'envie ou les forces de renouveler les injures qui ont donné lieu à la guerre'.

Contrary to the preservationist tenet of the later Hague Regulations, the conqueror was ‘not obliged to preserve the constitution of a conquered country or province, nor to leave the subjects in possession of the rights and privileges granted them by their former sovereign’.<sup>28</sup> Many scholars agree that the hallmarks of the conservationist principle, such as the limitations on the Occupying Power’s right to amend local legislation in occupied territories and their right to administer public property,<sup>29</sup> were gradually recognized in the period of social transformation in Europe in the early to mid-nineteenth century.

### Drafting the law of occupation and the consolidation of the conservationist principle in the late nineteenth century

In the political climate of post-1848 Europe, the ‘conservationist’ principle became a suitable normative vehicle not only for the conservative status quo for the powerful states but also for emerging nation-states, which favoured the protection of the lives and property of their citizens while being keen to keep their laws intact in the eventuality of occupation by another state.<sup>30</sup> Later, from the mid-nineteenth century onward, the principle of preservation of (or minimum disturbance to) laws and administrative structures of occupied territories matched the interests of the rising bourgeoisie as well. Consistent with *laissez-faire* philosophy,<sup>31</sup> this principle was deployed to minimize any adverse impact of occupation on the rights of private individuals’ (including the right to private property).<sup>32</sup> According to Karma Nabulsi, the conservationist premises of the law of occupation were consolidated by the moderate conservative instinct of the mainstream (bourgeois) international lawyers who played a crucial role in drafting key legal texts on the laws of war in the second half of the nineteenth century.<sup>33</sup> These texts include the 1863 *Instructions for the Government of Armies of the United States in the Field* (the Lieber Code), the 1874 Brussels Declaration (or Brussels Project),<sup>34</sup> the 1880 *Manual on the Laws of War on Land* (the *Oxford Manual*), and the Hague Law as the culmination of the treaty-making efforts at the two Peace Conferences of 1899 and 1907. These lawyers

28 N. Bhuta, above note 11, pp. 726–727, n. 30.

29 Paul Challine, *Le droit international public dans la jurisprudence française de 1789 à 1848*, Domat-Montchrestien, Paris, 1934, pp. 122–124 (referring to the Cour de cassation’s ruling in 1841, according to which occupation could not abrogate the laws in force in the occupied territory), as cited in E. Benvenisti, above note 6, p. 628.

30 E. Benvenisti, above note 6, p. 634.

31 By the mid-nineteenth century, this ideology had become prevalent in most western European countries, with an emphasis on unencumbered rights of private property and free market: see Marion W. Gray, ‘“Modifying the traditional for the good of the whole”: commentary on state-building and bureaucracy in Nassau, Baden, and Saxony in the early nineteenth century’, in *Central European History*, Vol. 24, No. 3, 1991, pp. 293, 301.

32 See, for instance, Article 46 of the 1907 Hague Regulations (respect for private property and the prohibition on confiscating private property).

33 K. Nabulsi, above note 9, pp. 158–174.

34 See *Actes de la Conférence de Bruxelles de 1874 sur le projet d’une convention internationale concernant la guerre, protocoles des séances plénières, protocoles de la Commission déléguée par la conférence, annexes* (1874). As is well known, this humanitarian initiative made by Czar Alexander II of Russia was not ratified in the end.

favoured a law-and-order approach and the preservation of the status quo of the local territory (the approach underlying what Nabulsi dubs the ‘Grotian tradition of war’).<sup>35</sup>

Across the Atlantic, when providing regulations on the Union’s occupation of Confederate territories during the American Civil War, Francis Lieber confined the prescriptive capacity of the occupier to the case of ‘military necessity’ under Article 3 of the 1863 Code. This provision read that:

Martial Law in a hostile country consists in the suspension, by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, *as far as military necessity requires this suspension, substitution, or dictation*. The commander of the forces may proclaim that the administration of all civil and penal law shall continue either wholly or in part, as in times of peace, unless otherwise ordered by the military authority.<sup>36</sup>

Given the close friendship between this German émigré and Johan Caspar Bluntschli, it is very likely that the textual structure of this provision influenced the framing of the corresponding provisions on the occupier’s legislative power in the subsequent Brussels Declaration and *Oxford Manual*, of which Bluntschli was one of the key architects.<sup>37</sup>

## The origin of Article 43 of the 1899/1907 Hague Regulations

To understand how the conservationist principle and the ‘concept of necessity’ exception to this were embodied in Article 43 of both the 1899 and the 1907 Hague Regulations,<sup>38</sup> it is important to look briefly at their precursors: Articles 2 and 3 of the Brussels Declaration of 1874. Article 2 of the Brussels Declaration states that:

The authority of the legitimate Power being suspended and having in fact passed into the hands of the Occupying Power, the latter shall take all the measures in its power to restore and ensure, so far as possible, public order and safety.<sup>39</sup>

35 K. Nabulsi, above note 9, p. 172. When employing the term ‘Grotian tradition of war’, she focuses her analysis on the making of laws of war from 1874 to 1949. Hence, she does not suggest that the seed for the conservationist principle of the law of occupation had already been sown in the aftermath of the Peace of Westphalia (1648).

36 Instructions for the Government Armies in the Field, issued as General Orders No. 100 of 24 April 1863 (Lieber Code), Article 3, (emphasis added).

37 See Betsy Baker Röben, ‘The method behind Bluntschli’s “modern” international law’, in *Journal of the History of International Law*, Vol. 4, No. 2, 2002, pp. 249, 250–256 (exploring Lieber’s influence on Bluntschli in devoting research to laws of war, and even to international law as a whole).

38 This analysis focuses on the negotiations that led to the adoption of the 1899 Hague Regulations, because Article 43 of the 1907 Hague Regulations is identical to Article 43 of the 1899 Regulations in the authentic French text, though there are minor differences in the two English versions. See above note 1.

39 Authentic French text: ‘L’autorité du pouvoir légal étant suspendue et ayant passé de fait entre les mains de l’occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d’assurer, autant qu’il est possible, l’ordre et la vie publique’.

Article 3 of this aborted treaty then provides that: “To this end, it shall maintain the laws which were in force in the country in time of peace, and shall not modify, suspend or replace them unless necessary.”<sup>40</sup> *Prima facie*, these two provisions seem incoherent. While Article 2 appears to accord the occupiers a wide range of legislative authority, Article 3 makes the exercise of this competence conditional on the concept of necessity. Nevertheless, when Articles 2 and 3 of the Brussels Declaration are considered in conjunction, it becomes clear that both the power to modify, suspend, or replace under Article 3 and also the power to enact (*‘prendra toutes les mesures’*) under Article 2 can be exercised in case of necessity.<sup>41</sup> While the Brussels Declaration never entered into force, the normative contents and textual structure (the general rule on the occupant’s legislative authority, qualified by the exception to this rule in case of necessity) were grafted onto Articles 43–44 of the *Oxford Manual*, which was adopted by the Institut de Droit International in 1880.<sup>42</sup>

Subsequently, the two apparently incongruous provisions of the Brussels Declaration were eventually integrated into the single provision in the 1899 Hague Regulations. This was prompted by the need to resolve the main controversy among the delegates of the First Peace Conference at The Hague (1899), where it was severely disputed whether Article 3 of the Brussels Declaration should be retained to prevent sweeping changes in the law of an occupied territory. At the seventh session of the Hague Conference, on 8 June 1899, some representatives highlighted the importance of this provision for small powers in view of the constraints imposed on the belligerent Occupying Power by the words *‘que s’il y a nécessité’*. In contrast, the alternative proposal was to delete this provision and to give Occupying Powers greater scope for legislative capacity in return for certain specific obligations.<sup>43</sup> When the vote was taken, this provision was maintained by a narrow margin (13 votes against 10 and one abstention), at least until further discussion at a later session.<sup>44</sup> At the Eighth Session, Mr. Bihourd, the representative of France,

40 The authentic French reads: *‘A cet effet, il maintiendra les lois qui étaient en vigueur dans le pays en temps de paix, et ne les modifiera, ne les suspendra ou ni les remplacera que s’il y a nécessité’*.

41 As an aside, the textual interpretation of Article 43 of the 1899/1907 Hague Regulations can lead to the view that constraints on the legislative power might apply only to such legislative measures to restore public order and civil life, but not to other measures. However, most writers agree that the limitations on the occupier’s prescriptive powers under Article 43 relate to the entire gamut of legislation. See Edmund H. Schwenk, ‘Legislative power of the military occupant under Article 43, Hague Regulations’, in *Yale Law Journal*, Vol. 54, 1945, p. 395.

42 Article 43 of *The Oxford Manual of Land War* (1880) provides that: *‘L’occupant doit prendre toutes les mesures qui dépendent de lui pour rétablir et assurer l’ordre et la vie publique’* ([t]he occupant should take all due and needful measures to restore and ensure public order and public safety’). Article 44 of the *Manual* stipulates that: *‘L’occupant doit maintenir les lois qui étaient en vigueur dans le pays en temps de paix, et ne les modifier, ne les suspendre ou ne les remplacer que s’il y a nécessité’* ([t]he occupant should maintain the laws which were in force in the country in time of peace, and should not modify, suspend, or replace them, unless necessary’; available at the International Committee of the Red Cross (ICRC)’s database: <http://www.icrc.org/ihl.nsf/FULL/140?OpenDocument> (last visited 13 April 2012).

43 See the statement of the Baron de Bildt (Sweden and Norway), who referred to de Marten’s view that it was important ‘to make sure that the obligations of the conqueror were limited and circumscribed’ (*de trouver les obligations du vainqueur limitées et circonscrites*): *Conférence Internationale de la Paix – La Haye 18 mai–29 juillet 1899* (1899), *Sommaire général, troisième partie* [Deuxième Commission], p. 120.

44 *Ibid.*, pp. 120–121.

suggested a compromise. He proposed that, while Article 3 should be eliminated, its spirit should be integrated into Article 2. The relevant part of his proposal read ‘*en respectant, sauf empêchement absolu, les lois en vigueur dans le pays*’ (‘respecting, unless absolutely prevented, the laws in force in the country’).<sup>45</sup> It was therefore due to Bihourd’s proposal that the key phrase ‘*sauf empêchement absolu*’ (‘unless absolutely prevented’) was introduced in the authentic French text of the 1899/1907 Hague Regulations<sup>46</sup> in lieu of the wording ‘*s’il y a nécessité*’ that had appeared in Article 3 of the Brussels Declaration and Article 44 of the *Oxford Manual*. In any event, the difference in terminology was only semantic. Jurists have come to interpret the term ‘*sauf empêchement absolu*’ as embodying the concept of ‘necessity’,<sup>47</sup> a concept that has become the subject of much debate in scholarly legal study.<sup>48</sup>

### The law of occupation during World War I

Many occupation measures taken during World War I constituted the first challenges to the interpretation of Article 43 of the Hague Regulations. This was discernible mainly in relation to the two diametrically opposed positions: the measures adopted by the German occupying authorities in Belgium during the war; and the post-war Belgian decisions of invalidating the laws promulgated during the period of occupation. Charles Rousseau notes that the general rule on legislative authority was also bent by the British commander-in-chief as the occupying authority of Ottoman Turkey’s Mesopotamia (the area in which the British later created the Kingdom of Iraq).<sup>49</sup> Further, the sketchy provision in the Hague Regulations regarding protection of the civilian population under occupation proved inadequate in dealing with the deportation of civilians in occupied Belgium and northern France during World War I.<sup>50</sup> This was one of the reasons for the International Committee of the Red Cross (ICRC) preparing in the

45 At the 8th session, held on 10 June 1899, unanimity was achieved with respect to the compromise clause proposed by Mr. Bihourd; *ibid.*, pp. 126–127.

46 Article 43 of the Hague Regulations concerning the Laws and Customs of War on Land, annexed to the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899; and Article 43 of the Hague Regulations concerning the Laws and Customs of War on Land, annex to the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.

47 See, *inter alia*, Christian Meurer, *Die Völkerrechtliche Stellung der vom Feind Besetzten Gebiete*, Mohr, Tübingen, 1915; and E. H. Schwenk, above note 41, p. 393.

48 E. H. Schwenk, above note 41, p. 393. For state practice, see the German occupation measures in Belgium during World War I, which were justified by interpreting the ‘concept of necessity’ exception very broadly. In a more recent example, this necessity ground was invoked by the Supreme Court of Israel to justify the introduction of VAT as a new tax in the occupied Palestinian territories, overriding the implications of Articles 48 and 49 of the Hague Regulations: *Abu Aita* case, above note 5, pp. 274 ff.

49 The ‘Iraq Occupied Territories Code’ (1915) that the British commander-in-chief promulgated was based on the civil and criminal codes of India. This initiated profound changes in the local laws and judiciary, which Rousseau described as ‘errements’ (‘errors’): Charles Rousseau, *Le droit des conflits armés*, Pédone, Paris, 1983, p. 153, para. 99.

50 *Ibid.*, p. 1258, para. 101C. See also Matthew Stibbe, ‘The internment of civilians by belligerent states during the First World War and the responses of the International Committee of the Red Cross’, in *Journal of Contemporary History*, Vol. 41, No. 1, 2006, pp. 5–19.

interwar period the Tokyo draft text dealing with protection of civilian populations, which would provide the basis for the later Fourth Geneva Convention.<sup>51</sup>

During World War I, the German occupying authorities in Belgium discarded all the constraints imposed by the Hague Regulations in order to undertake a wholesale change in administrative and legal structures.<sup>52</sup> They construed Article 43 of the Hague Regulations as authorizing the transfer of the expanded legislative authority to the German ‘Government General’.<sup>53</sup> The implementation of this policy included such far-reaching administrative changes as the attempted alterations in occupied Belgium’s political framework in favour of the then disadvantaged Flemish.<sup>54</sup> Charles de Visscher considered that the German measures amounted to abuse of the occupant’s power in a manner analogous to the doctrine of French administrative law, *‘l’excès de pouvoir et le détournement de pouvoir’* (‘acting in excess of authority and the abuse of power’).<sup>55</sup>

In contrast, the post-war practice of the Belgian courts was that *any* act passed by the German occupying authorities was illegal.<sup>56</sup> German interpretation designed to justify their extensive prescriptive power during World War I was vehemently contested in a number of Belgian court decisions.<sup>57</sup> In the

51 The ICRC’s Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality Who are on Territory Belonging to or Occupied by a Belligerent, which was submitted to the XVth International Red Cross Conference, Tokyo, in 1934: see Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, pp. 4–5. The Tokyo Draft Convention was adopted unanimously in Resolution XXXIX, entitled *Projet de convention concernant la condition et la protection des civils de nationalité ennemie qui se trouvent sur le territoire d’un belligérant ou sur un territoire occupé par lui*: see *La Quinzième Conférence Internationale de la Croix-Rouge, tenue à Tokio, du 20 au 29 octobre 1934, Compte Rendu*, pp. 262, 203–209 (for the full text of this draft Convention).

52 See Eyal Benvenisti, *The International Law of Occupation*, 2nd edition, Princeton University Press, Princeton, 2004, pp. 32–44; Annette Becker, ‘The dilemmas of protecting civilians in occupied territory: the precursory example of World War I’, forthcoming issue.

53 C. Rousseau, above note 49, p. 140, para. 93; Michael Ottolenghi, ‘The Stars and Stripes in Al-Fardos Square: the implications for the international law of belligerent occupation’, in *Fordham Law Review*, Vol. 72, 2003–2004, pp. 2177 and 2188.

54 According to Charles Rousseau, the German occupying power issued the decree (*arrêté*) on 27 March 1917, which introduced the separation of administration between Flanders and Wallonia and created the Council of Flanders. He also refers to another anomalous practice of the Central Powers in Russia during World War I: the creation of the Council of Regency, which exercised the supreme power and which consisted of the Archbishop of Warsaw and two secular citizens; and the proclamation of independence of Ukraine by the pro-German Rada of Kiev: C. Rousseau, above note 49, p. 140, para. 93.

55 Charles de Visscher, ‘L’occupation de guerre d’après la jurisprudence de la Cour de cassation de Belgique’, in *Law Quarterly Review*, Vol. 34, 1918, pp. 72–81, observing that ‘abuse [committed by the Occupying Power] does not exist only when, enacting the measures that exceeds its competence, the Occupying Power oversteps the objective limits of its provisional attributions: it also arises when the Occupying Power uses its powers for a purpose extraneous to the true objective of its mission in an occupied country’ (translated into English by the present author; the French text reads: ‘L’abus [commis par l’occupant] n’existe pas seulement quand, édictant des mesures qui excèdent sa compétence, l’occupant dépasse les limites objectives de ses attributions provisoires: il se présente également lorsque l’occupant use de ses pouvoirs dans un but et pour des motifs étrangers à l’objet véritable de sa mission en pays occupé’).

56 E. Benvenisti, above note 52, pp. 44–46.

57 See, for instance, Court of Appeal of Brussels, *De Brabant and Gosselin v. T. & A. Florent*, 22 July 1920, (1919–1922) 1 AD 463, No. 328; Court of Appeal of Liège, *Mathot v. Longué*, 19 February 1921, 1 AD 463, No. 329. Compare these with Court of Appeal of Liège, *Bochart v. Committee of Supplies of Corneux*, 28 February 1920, 1 AD 462, No. 327.



case of *Mathot v. Longué*,<sup>58</sup> the Court of Appeal of Liège, contrary to some decisions,<sup>59</sup> rejected any room for legislative manoeuvre on the part of the Occupying Power. It ruled that ‘the orders of the occupying Power . . . are not laws, but simply commands of the military authority of the occupant’,<sup>60</sup> and that the German order had therefore possessed ‘no legal value’.<sup>61</sup> Underlying the Belgian courts’ decisions was the so-called ‘Belgian school’,<sup>62</sup> according to which legislative and administrative acts adopted by the Occupying Power are only *de facto* commands, without any legal effect.<sup>63</sup> Benvenisti criticizes this view as ‘extreme’.<sup>64</sup> As he notes,<sup>65</sup> the Belgian judicial approach underwent an uneven change. During the German occupation in World War II, the Court of Cassation reverted to the judicial tendency, prevalent during World War I, to reject handing down a judgment on legislative measures issued by the Occupying Power.<sup>66</sup>

In the aftermath of World War I, the Allies occupied the Rhineland through the Inter-Allied Rhineland High Commission (1919–1930). However, as its legal basis lay in the Treaty of Versailles, this can be viewed as a case of non-belligerent occupation (*occupatio pacifica*).<sup>67</sup> In the legal discourse of the interwar period, despite the deviations from the general rules on occupiers’ legislative power during World War I, the normative framework on occupation remained intact. Writing during World War II, Feilchenfeld commented that the survival of the law of occupation between 1918 and 1935 owed much to the absence of major

58 *Mathot v. Longué* case, above note 57.

59 See, for instance, the *Bochart* case, above note 57 (upholding the Occupying Power’s legislative measure, the German Order of 8 August 1918, which was, even if taken pursuant to a personal profit of its own nationals, designed to regulate the high price of vegetables); and *City of Malines v. Société Centrale pour l’Exploitation du Gaz*, Belgian Court of Appeal, Brussels, 25 July 1925, reported in Arnold D. McNair and H. Lauterpacht (eds), *Annual Digest of Public International Law Cases: 1925–1926*, No. 362, (1929), p. 475 (recognizing the legal authority of the Occupying Power to issue administrative decrees, which were partly responsible for increase in gas supply, as measures justified by the necessity for providing for the needs of the civilian population).

60 *Mathot v. Longué* case, above note 57, p. 464.

61 *Ibid.* The Court added that: ‘. . . it is unacceptable to say that by virtue of the [Hague] Convention the Occupying Power has been given any portion whatever of the legislative power . . . it appears from the text of the Convention itself and from the preliminary work that all that was intended . . . was to restrict the abuse of force by the Occupying Power and not to give him or recognize him as possessing any authority in the sphere of law . . . The law remains the apportion of the national authority exclusively, the Occupying Power possessing *de facto* power and nothing more’. See also *De Brabant and Gosselin v. T. and A. Florent* case, above note 57.

62 C. de Visscher, above note 55, pp. 72–81; E. Benvenisti, above note 52, pp. 44–47, 194.

63 C. Rousseau, above note 49, pp. 139 and 153, paras. 92 and 99, and the cases cited therein.

64 E. Benvenisti, above note 52, p. 46.

65 *Ibid.*, pp. 194–195.

66 See, for instance, Belgian Court of Cassation, *In re Anthoine*, 24 October 1940, [1919–1922] AD Case No. 151.

67 Article 428 of the Treaty of Versailles (1919). See Y. Dinstein, *International Law of Belligerent Occupation*, above note 5, p. 36 (contending that even the first phase of this occupation, which was predicated on the Armistice agreement, could be categorized as a ‘pacific (non-belligerent) occupation’). See also *ibid.*, p. 270 (discussing the French and Belgian claim that their joint re-occupation of the Ruhr Valley in 1923 was based on Article 430 of the Treaty of Versailles).

occupations during this period, which would have severely tested the normative requirements.<sup>68</sup>

## The law of occupation in relation to World War II

As noted by Benvenisti, during World War II, the three main Axis powers – Germany, Italy, and Japan – as well as the USSR, were engaged in a practice of occupation that completely disregarded and rejected the fundamental tenets of the law of occupation. These countries attempted to effectuate perpetual control by way of the annexation of occupied territories or through the establishment of puppet states.<sup>69</sup> As is widely known, a spate of atrocities committed in the occupied territories during World War II demonstrated a barbaric form of occupation, as exemplified by the Nazi's ideology-based practice designed to implement the Holocaust.<sup>70</sup>

The International Military Tribunal at Nuremberg (IMT) provided the famous dictum that the rules embodied in the Hague Regulations were declaratory of customary international law by 1939.<sup>71</sup> A closer inspection reveals, however that this dictum ought to be carefully analysed to grasp the process of such evolution. The relevant part reads:

The rules of land warfare expressed in the [1907 Hague] Convention undoubtedly represented *an advance over existing international law at the time of their adoption*. But the convention expressly stated that it was an attempt 'to revise the general laws and customs of war', which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6(b) of the [IMT] Charter.<sup>72</sup>

68 Ernst H. Feilchenfeld, *The International Economic Law of Belligerent Occupation*, Carnegie Endowment for International Peace, Washington DC, 1942, p. 23, para. 93. According to Bhuta, 'Feilchenfeld commented that the "old rules" [on occupation in the Hague Law] were essentially defunct by 1914, and that the only reason they were not denounced between 1918 and 1935 was that "they were not tested again through major occupations resulting from major wars": N. Bhuta, above note 11, p. 733. However, the present author argues that this is an inaccurate understanding of Feilchenfeld's work: Feilchenfeld did not go so far as to contend that the Hague Law on occupation was obsolete by the start of World War I. What he emphasized was the absence in practice of the application of this normative framework in the interwar period.

69 E. Benvenisti, above note 52, pp. 60–72.

70 Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff, Leiden, 2009, pp. 328–329. Julius Stone contends that the Hague law of occupation survived the two world wars mainly because of 'two contending imperatives: Allies' concern in both world wars to fix Germany with guilty violations of the rules, and Germany's desire . . . to exploit the great leeway for occupation *machtropolitik* [sic] left by the rules': Julius Stone, *Legal Controls of International Conflict*, Rinehard, New York, 1954, p. 727.

71 IMT, *The Trial against Goering, et al.*, Judgment of 1 October 1946, International Military Tribunal in Nuremberg, *The Trial of the Major War Criminals*, (1947), Vol. 1, at 64–65; reprinted in 'Judicial decisions, International Military Tribunal (Nuremberg), judgment and sentences', in *American Journal of International Law*, Vol. 41, 1947, pp. 172, 248–249.

72 *Ibid.*, (emphasis added).

If we take the view that the bulk of the law of occupation under the 1899/1907 Hague Regulations was not declaratory of customary laws when adopted as treaty-based rules, it must have undergone the process of hardening into customary law somewhere in the period between 1899 and 1939. However, it is not possible to pinpoint the moment at which the rules on occupation prescribed in the 1899 Hague Regulations matured into customary rules.<sup>73</sup> Nevertheless, one can contend that, by the time all the relevant rules under the 1899 Hague Regulations were reiterated in the 1907 Hague Regulations, the *gist* of the doctrines on occupation had ‘crystallized’.<sup>74</sup> This view can be borne out by the wording of the preamble of the Second Hague Convention of 1899, whose identical counterpart in the preamble of the Fourth Hague Convention of 1907 was quoted by the IMT: ‘Thinking it important . . . to revise the laws and general customs of war, either *with the view of defining them more precisely* or of laying down certain limits for the purpose of modifying their severity as far as possible’.<sup>75</sup> It ought to be recalled that both the conservationist principle and the ‘concept of necessity’ exception stipulated in Article 43 of the 1899/1907 Hague Regulations found equivalents in their antecedents (the Lieber Code, the *Oxford Manual*, and the Brussels Declaration). As discussed in the preceding sections, we can at least surmise that the conservationist principle that was already fleshed out in legal discourses of the mid-nineteenth century has been anchored in the bedrock of customary law longer than other detailed rules on occupation.

## The Allied occupations in the immediate aftermath of World War II

Following World War II, the Allied and Soviet occupations of territories of Germany, Italy, Austria, other Axis countries in Europe, and Japan foreshadowed the already nascent Cold War rivalry. They furnished experimental grounds for two competing economic and political ideologies,<sup>76</sup> which provided much of the *political* impetus to throw away the Hague Regulations’ conservationist baggage.<sup>77</sup> In essence, these occupations were the first prototypes of ‘transformative’ occupation geared toward democratization. The joint Allied occupation of southern and central Italian territories, unlike the regimes of belligerent occupation established in Sicily and northern Italy, can be explained on the basis of the armistice agreement.<sup>78</sup> Irrespective of the legal bases, the Allied authorities undertook to rescind fascist laws. The United States’ occupation of post-war Japan, with its wide range of

73 E. Benvenisti, above note 52, p. 8; and G. von Glahn, above note 4, pp. 10–12.

74 E. Benvenisti, above note 6, p. 642.

75 Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899, preamble, third paragraph (emphasis added).

76 Stalin was said to have asserted candidly that ‘whoever occupies a territory also imposes on it his own social system. Everyone imposes his own system as far as his army can reach’: Simon Chesterman, ‘Occupation as liberation: international humanitarian law and regime change’, in *Ethics & International Affairs*, Vol. 18, No. 3, 2004, p. 51.

77 N. Bhuta, above note 11, p. 734.

78 E. Benvenisti, above note 52, pp. 84–91.

prescriptive powers, was predicated on the Instrument of Surrender.<sup>79</sup> This allowed the US to pursue wholesale democratic reforms of Japan's imperial and militarist legacies while unchecked by the conservationist principle and other constraints of the 1907 Hague Regulations.

In contrast, there has been a cacophony of justifications for the Allied policy-oriented objective of carrying out de-Nazification and radical democratic reforms in West Germany. In anticipation of their occupations and policy of implementing sweeping reforms in laws and institutions, the western Allies insisted on unconditional surrender so that they could be exempt from the conservationist principle and other constraints of the Hague Regulations. One might argue that, while sovereignty continued to be vested in the German population, the Allied powers exercised 'sovereign rights' that they conferred upon themselves.<sup>80</sup> Despite the Allies' avowed intention to exclude the law of occupation as the source of their authority, some commentators explain the Allies measures within the framework of the Hague Regulations. Their methodology is to infer justifications from the 'necessity' exceptions under Article 43. The thrust of their argument is that retaining the Nuremberg race laws and other Nazi enactments would have endangered the security of the Occupying Power.<sup>81</sup> On the other hand, other writers regard the Allied occupation of Germany<sup>82</sup> as the typical example of *debellatio* (subjugation), following the total collapse of effective government and the complete control effected by the occupying armed forces.<sup>83</sup> Hans Kelsen expressly contended that Germany as a sovereign state ceased to exist,<sup>84</sup> not least because of the total collapse

79 See Niisuke Ando, *Surrender, Occupation, and Private Property in International Law: An Evaluation of US Practice in Japan*, Oxford University Press, Oxford, 1991, p. 87; E. Benvenisti, above note 52, pp. 92–93; Robert Cryer, 'Of custom, treaties, scholars, and the gavel: the influence of the international criminal tribunals on the ICRC customary law study', in *Journal of Conflict & Security Law*, Vol. 11, No. 2, 2006, p. 241, n. 14.

80 M. Koskeniemi, above note 13, p. 34.

81 Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, Yale University Press, New Haven, CT, 1961, p. 770. See also the previous UK Military Manual: United Kingdom War Office, *The Law of War on Land, Being Part III of the Manual of Military Law*, HMSO, London, 1958, p. 143, n. 1.

82 The juridical state of occupation was considered to have ended in 1952, when the legal character of the foreign (US)-stationed armed forces changed: after the status of forces agreement reached between West Germany and US, the continued stationing of the latter's army can be considered to have been based on the consent of the territorial government: S. Chesterman, above note 76, p. 55.

83 G. von Glahn, above note 4, pp. 276–285. Compare, however, Lassa Oppenheim, *International Law: A Treatise*, 7th edition by H. Lauterpacht, Longmans, London, 1952, p. 553, para. 237a; Paul Guggenheim, *Traité de droit international public*, Vol. II, Librairie de l'Université, Geneva, 1954, pp. 468–469; Y. Dinstein, *International Law of Belligerent Occupation*, above note 5, pp. 32–33.

84 Kelsen argued that: 'By abolishing the last Government of Germany the victorious powers have destroyed the existence of Germany as a sovereign state. Since her unconditional surrender, at least since the abolishment of the Doenitz Government, Germany has ceased to exist as a state in the sense of international law. . . . the status of war has been terminated, because such a status can exist only between belligerent states'. Hans Kelsen, 'The legal status of Germany according to the Declaration of Berlin', in *American Journal of International Law*, Vol. 39, No. 3, 1945, p. 519. In another article, Kelsen reinforced his view: '. . . the four occupant Powers have assumed sovereignty over the former German territory and its population, though the term "sovereignty" was not used in the text of the Declaration [of Berlin, June 5, 1945]. . . . All this is in complete conformity with general international law, which authorizes a victorious state, after so-called *debellatio* of its opponent, to establish its own sovereignty over the territory and population of the subjugated state. *Debellatio* implies automatic termination of the state of war. Hence, a

of the central and local governments in their entirety (*debellatio*).<sup>85</sup> Empirically, it was the crumbling of the Nazi government that was pivotal for the Allies assuming the authority for occupation,<sup>86</sup> and this without awaiting Doenitz's signing of unconditional surrender proclaimed by the Declaration of Berlin of 5 June 1945.<sup>87</sup> In the present writer's opinion, it seems formalistic to attach much normative weight to that Declaration, given that none of the German governmental machinery existed by that time.

However, in developments after World War II, the doctrine of *debellatio* soon became archaic. As Benvenisti notes,<sup>88</sup> it was deemed irreconcilable with the ideas of peoples' sovereignty and self-determination embodied in the UN Charter.<sup>89</sup> Further, Article 2(2) Common to the four Geneva Conventions of 1949 contemplates the broad applicability of the Fourth Geneva Convention without considering the exceptional case of *debellatio*. Accordingly, if the Allied occupation of Germany had taken place after 1949, this would have been fully governed by the Fourth Geneva Convention.<sup>90</sup> Subject to Articles 47 and 6(3) of that Convention,<sup>91</sup> the Allies' transformative policies would have been defended more cogently on the basis of the broader parameters of what constitutes necessity set out in Article 64 of the Convention.

## Article 64 of the fourth Geneva Convention

Since 1949, Article 64 of the Fourth Geneva Convention has served as a complement to Article 43 of the Hague Regulations. It has been widely noted by earlier writers that the structure of the former provision is designed as 'an amplification and clarification' of the latter,<sup>92</sup> and not as a revision of the terms for legislative power of the Occupying Power.<sup>93</sup> Even so, the language of Article 64 clearly suggests that it

peace treaty with Germany is legally not possible. For a peace treaty presupposes the continued existence of the opponent belligerents as subjects of international law and a legal state of war in their mutual relations.' Hans Kelsen, 'Is a peace treaty with Germany legally possible and politically desirable?', in *American Political Science Review*, Vol. 41, No. 6, 1947, p. 1188.

- 85 For a similar argument, see S. Chesterman, above note 76, p. 54; G. von Glahn, above note 4, pp. 275–286.
- 86 The Allies' confidence in the total defeat of Nazi Germany upon crossing the German border was partly accountable for their decision not to treat the law of occupation as the authority for occupation: E. Benvenisti, above note 52, p. 91.
- 87 In contrast, Hersch Lauterpacht attached importance to this unconditional surrender: L. Oppenheim, above note 83, p. 553, para. 237a.
- 88 E. Benvenisti, above note 52, pp. 94–95.
- 89 UN Charter, Articles 1(2) and 55.
- 90 Adam Roberts, 'What is a military occupation?', in *British Yearbook of International Law*, Vol. 55, 1985, pp. 249, 270–271; E. Benvenisti, above note 52, pp. 95–96.
- 91 For a detailed analysis of Article 47 of Fourth Geneva Convention, see Robert Kolb, 'Étude sur l'occupation et sur l'article 47 de la IVème Convention de Genève du 12 août 1949 relative à la protection des personnes civiles en temps de guerre: le degré d'intangibilité des droits en territoire occupé', in *African Yearbook of International Law*, Vol. 10, 2002, p. 267; Robert Kolb and Sylvain Vité, *Le droit de l'occupation militaire: perspectives historiques et enjeux juridiques actuels*, Bruylant, Brussels, 2009.
- 92 Joyce A. C. Gutteridge, 'The Geneva Conventions of 1949', in *British Yearbook of International Law*, Vol. 26, 1949, p. 324.
- 93 Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. 2: *The Law of Armed Conflict*, Stevens & Sons, London, 1968, p. 194.

broadens the prescriptive power of the Occupying Power by articulating specific objectives underlying the notion of necessity.<sup>94</sup> Further, in establishing a more elastic dimension of the occupier's legislative power, Article 64 gives primacy to the necessity of securing the rights and wellbeing of the occupied population. This is supported by a profusion of positive duties incumbent on occupiers under the Fourth Convention. In this respect, it should be remembered that one of the main contributions of this treaty is to furnish a 'bill of rights' for the local population.<sup>95</sup> Presumably, such a shift in emphasis in favour of the rights of the local population mirrors the evolution of international human rights law and the rise of the welfare states in Europe (and the New Deal thinking of the United States administration before and during World War II). In essence, under the Fourth Geneva Convention the primary beneficiaries of the necessity grounds are switched from the political and military elites of the ousted sovereign state, who were anxious to see their laws and institutions preserved upon their return, to the occupied population with whom sovereignty is endowed.<sup>96</sup> This point can be of special pertinence to cases of 'prolonged occupation',<sup>97</sup> where necessity grounds can be invoked to justify novel laws to address the evolving social needs of the civilian population.<sup>98</sup>

### Failure to acknowledge the status of occupation and non-application of the law of occupation during the Cold War

In post-1949 academic discourse, while the 'demise' of Article 43 of the Hague Regulations has never been declared,<sup>99</sup> scholarly discussion of the legislative capacity of the Occupying Power under this provision (and under Article 64 of the Fourth Geneva Convention) has been subdued, save in the case of the Israeli occupation of the Palestinian territories.<sup>100</sup> This can partly be explained by the

94 This can be demonstrated by the enumeration of the grounds of security of the Occupying Power, of giving effect to the obligations of the Geneva Conventions (and to those of other rules of international humanitarian law), and of addressing the humanitarian needs of the civilian population under occupation: Y. Dinstein, *International Law of Belligerent Occupation*, above note 5, pp. 112–116. See also Yoram Dinstein, 'Legislation under Article 43 of the Hague Regulations: belligerent occupation and peacebuilding', Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series, Fall 2004, No. 1; and Marco Sassòli, 'Legislation and maintenance of public order and civil life by Occupying Powers', in *European Journal of International Law*, Vol. 16, No. 4, 2005, p. 661.

95 E. Benvenisti, above note 52, p. 105.

96 *Ibid.*

97 For analysis of 'prolonged occupation' in respect of the Palestinian occupied territories, see Adam Roberts, 'Prolonged military occupation: the Israeli-occupied territories since 1967', in *American Journal of International Law*, Vol. 84, No. 1, 1990, pp. 44–103.

98 Y. Dinstein, *International Law of Belligerent Occupation*, above note 5, pp. 116–120.

99 E. Benvenisti, above note 52, p. 31.

100 See the case law of the Israeli Supreme Court (sitting as a High Court of Justice): HCJ 390/79, *Mustafa Dweikat et al. v. Government of Israel et al.* (Elon Moreh case), 34(1) *Piskei Din* 1, excerpted in *Israel Yearbook on Human Rights*, Vol. 9, 1979, p. 345; HCJ 393/82, *A Cooperative Society Lawfully Registered in the Judea and Samaria Region v. Commander of the IDF Forces in the Judea and Samaria Region et al.* (Teachers' Housing Cooperative Society case), 37(4) *Piskei Din* 785, English excerpt in *Israel Yearbook on Human Rights*, Vol. 14, 1984, pp. 301, 302; and HCJ 61/80, *Haetzni v. Minister of Defence et al.*, 34(3)

fortuitous ground that the law of occupation has rarely been relied upon by the relevant states. Most have failed to recognize the applicability of the law of occupation to *de facto* occupied territories,<sup>101</sup> irrespective of whether or not these resulted from proxy wars of the two superpowers during the Cold War.<sup>102</sup> This left debates both on the prescriptive power of the Occupying Power and indeed on the entire normative framework of the law of occupation nearly dormant for several decades. The law of occupation was excluded because the concept of occupation as such was mistakenly associated with a 'defunct' or even illegal regime.<sup>103</sup> This can be partly accounted for in the light of the special normative importance attached to the right to self-determination of peoples during and after the process of decolonization.<sup>104</sup> Furthermore, reluctance of the potential or *de facto* occupiers to recognize the status of occupation can be explained by a litany of onerous positive duties that the Fourth Geneva Convention would impose on them.<sup>105</sup>

### The occupation of Iraq: the law of occupation 'resuscitated' and the broad legislative authority of the occupiers

The occupation of Iraq,<sup>106</sup> which was led by the Anglo-American forces,<sup>107</sup> has awoken from 'hibernation' the law of occupation and confirmed the continued validity of many rules originating from the Hague Regulations,<sup>108</sup> while witnessing

*Piskei Din* 595, English excerpt in *Israel Yearbook on Human Rights*, Vol. 11, 1981, pp. 358, 359 (*per Landau JP*).

101 N. Bhuta, above note 11, p. 734.

102 A. Roberts, above note 90, pp. 299–301.

103 See Y. Dinstein, *International Law of Belligerent Occupation*, above note 5, pp. 2–3. Compare, however, Orna Ben-Naftali, Aeyal M. Gross, and Keren Michaeli, 'Illegal occupation: framing the occupied Palestinian territories', in *Berkeley Journal of International Law*, Vol. 23, 2005, pp. 551, 609–612; Orna Ben-Naftali, 'Pathological occupation: normalizing the exceptional case of the occupied Palestinian territory and other legal pathologies', in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law – Pas de Deux*, Oxford University Press, Oxford, 2011, pp. 129, 161–162.

104 Assessment of the implication of the principle of self-determination of peoples and its peremptory status on the legality of *prolonged* occupation is beyond the ambit of this article. On this matter, see Yaël Ronen, 'Illegal occupation and its consequences', in *Israel Law Review*, Vol. 41, 2008, p. 201; O. Ben-Naftali, above note 103, pp. 129–200.

105 M. Koskenniemi, above note 13, p. 16.

106 For assessment, see, *inter alia*, S. Chesterman, above note 76, p. 61; Marten Zwanenburg, 'Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation', in *International Review of the Red Cross*, Vol. 86, No. 856, 2004, p. 745; Kaiyan Homi Kaikobad, 'Problems of belligerent occupation: the scope of powers exercised by the Coalition Provisional Authority in Iraq, April/May 2003–June 2004', in *International and Comparative Law Quarterly*, Vol. 54, No. 1, 2005, p. 253; M. Sassòli, above note 94. It is widely recognized that Security Council Resolution 1546 (8 June 2004), adopted under Chapter VII of the UN Charter, formally ended the status of occupation by the coalition forces at the end of June 2004, even though there was hardly any change on the ground: K. H. Kaikobad, this note, p. 273; M. Sassòli, above note 94, p. 684. See, however, Adam Roberts, 'The end of occupation: Iraq 2004', in *International and Comparative Law Quarterly*, Vol. 54, No. 1, 2005, pp. 27, 37–39.

107 For detailed assessment of the legal status of many other troop-contributing states, see Siobhán Wills, 'Occupation law and multi-national operations: problems and perspectives', in *British Yearbook of International Law*, Vol. 77, No. 1, 2006, p. 256.

108 Compare UN Security Council Resolution 674 of 29 October 1990, which condemned acts of the Iraqi occupying forces in Kuwait that violated Fourth Geneva Convention: UNSC Res. 674, 29 October 1990 (adopted under Chapter VII of the UN Charter), operative paras. 1 and 3, and preamble, para. 3.

wide latitudes of legislative power conferred upon the Coalition Provisional Authority (CPA). Security Council Resolution 1483 (22 May 2003), adopted under Chapter VII of the UN Charter, expressly recognized the United States and the United Kingdom as the Occupying Powers that were duty bound to abide by the ‘obligations under applicable international law’.<sup>109</sup> The broad parameters of the legislative authority given to the Occupying Powers can be explained by the peculiar normative framework for occupied Iraq. This framework was provided by the laws of occupation and the Council’s Resolutions 1483 and 1511.<sup>110</sup> Put differently, these mandatory resolutions gave a normative superstructure to the underlying edifice comprised of the law of occupation.<sup>111</sup> Yet, while allowing the possibility of modifying the Occupying Powers’ obligations under existing international humanitarian law, in accordance with Article 103 of the UN Charter,<sup>112</sup> these Chapter VII-based resolutions did not ‘supersede’ the traditional law of occupation comprising the Hague and Geneva laws.<sup>113</sup> As the primary concern of the law of occupation is to secure the rights and wellbeing of inhabitants in occupied territories, it is essential that any modifications to this body of international humanitarian law be made in a clear and explicit manner.<sup>114</sup> While the relevant Council resolutions accorded the CPA wide legislative authority to implement ‘transformative’ objectives in political and economic fields in a manner unchecked by the constraints of the laws of occupation,<sup>115</sup> the CPA’s legislative measures were not free from controversy.<sup>116</sup>

Clearly, the Iraqi experience has contributed to obliterating any political inhibition in recognizing the status of occupation. Since then, the international authorities have been willing to acknowledge such status in a variety of scenarios. Aside from its Advisory Opinion in the *Wall* case,<sup>117</sup> the International Court of Justice, in its contentious case of the *Armed Activities on the Territory of Congo*, recognized Uganda as the Occupying Power in the Ituri region.<sup>118</sup> Similarly, the Eritrea/Ethiopia Claims Commission found cases of belligerent occupation in the

109 UN Security Council Resolution 1483, 22 May 2003, preamble, para. 13.

110 UN Security Council Resolution 1511, 6 October 2003, adopted under Chapter VII of the UN Charter.

111 David Scheffer comments that blending the law of occupation with the Council’s Chapter VII powers was ‘both unique and exceptionally risky’: David J. Scheffer, ‘Beyond occupation law’, in *American Journal of International Law*, Vol. 97, No. 4, 2003, pp. 842, 846.

112 S. Chesterman, above note 76, p. 52.

113 K. H. Kaikobad, above note 106, p. 264.

114 M. Sassòli, above note 94, pp. 681–682; UN Security Council Resolution 1483, 22 May 2003, para. 8(e).

115 This issue is beyond the scope of the present article. See the article by Gregory H. Fox in this issue.

116 The measures that can be considered to go beyond the grounds of necessity included the simplification of the procedure of concluding public contracts, the amendment of Iraqi company law, the liberalization of trade and foreign investment, and allowing foreign investors to own Iraqi companies with no duty to return profits to Iraq. See also M. Zwanenburg, above note 106, pp. 757–759; M. Sassòli, above note 94, p. 679; Jordan J. Paust, ‘The United States as Occupying Power over portions of Iraq and special responsibilities under the laws of war’, in *Suffolk Transnational Law Review*, Vol. 27, 2003, pp. 12–13 (criticizing privatization’ of the Iraqi oil production and distribution industry).

117 International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, p. 136.

118 ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment, 19 December 2005, ICJ Reports 2005, para. 178. See also *ibid.*, paras. 216–217 (application of the International Covenant on Civil and Political Rights to the occupied territory in question).



territories adjacent to the border between the countries.<sup>119</sup> These episodes mark a striking contrast with the tendency in the preceding decades to avoid acknowledging states of occupation openly.<sup>120</sup> However, they have yet to raise any major issues of the legislative competence of the respective Occupying Powers.

### Concluding observations of the historical survey of the law of occupation

In the period between 1815 and 1949, many Occupying Powers flouted their obligations or claimed exceptional broader legislative authority by citing diverse justifications. Nevertheless, the conservationist principle as a general rule governing the entire corpus of the law of occupation has largely resisted historical vicissitudes. The primary reason for the longevity of this principle underlying Article 43 of the Hague Regulations lies in the application of the ‘necessity’ grounds as malleable exceptions. Similarly, the broadened parameters of the necessity grounds under Article 64 of the Fourth Geneva Convention are likely to sustain the general rule on the Occupying Power’s legislative authority under this provision.<sup>121</sup> The provision is sufficiently elastic and well equipped to justify legislative measures to address a variety of political realities and reform agenda in occupied territories.<sup>122</sup> As an ancillary ground, one can add that to call into question the conservationist premise of the law of occupation would result in challenging the transient nature of this normative regime. This would be at variance not only with the sovereignty of the occupied populace but also with their right to self-determination.

In essence, the legal regime of occupation is no exception to the thesis that law is a social construct contingent on divergent social realities. Hence, scholarly

119 See, for instance, Eritrea Ethiopia Claims Commission, *Partial Award: Central Front – Eritrea’s Claims 2, 4, 6, 7, 8 & 22, 28 (between The State of Eritrea and The Federal Democratic Republic of Ethiopia)*, 28 April 2004, para. 57. Further, the Russian skirmishes with Georgia and the former’s intervention in South Ossetia in 2008 may be described as occupation, although disputes remain because of the degree of control exerted by Russian forces: see Independent International Fact-Finding Mission on the Conflict in Georgia, appointed by the Council of the EU on 2 December 2008, *Report*, Vol. II, September 2009, p. 311. The *Report* notes that the law of occupation ‘applies to all the areas where Russian military actions had an impact on protected persons and goods’. However, it quickly adds that ‘the extent of the control and authority exercised by Russian forces may differ from one geographical area to another’, referring to the South Ossetian and Abkhazian territories that are administered by the *de facto* authorities and are much ‘freer’ than other areas. For support of this view, see Kristen E. Boon, ‘The future of the law of occupation’, in *Canadian Yearbook of International Law*, Vol. 46, 2009, pp. 107, 109.

120 M. Koskenniemi, above note 13, p. 16 (referring to the anxiety of international lawyers over the ‘breakdown’ of the law of occupation in view of the paucity of acknowledged occupation since 1945, except in the case of the Israeli occupation and the Anglo-American occupation of Iraq in 2003).

121 See, in particular, Israeli Supreme Court of Israel, HCJ 337/71, *Christian Association for the Holy Places v. Minister of Defence et al.*, 26(1) *Piskei Din* 574, pp. 581–582, excerpted in English in *Israel Yearbook on Human Rights*, Vol. 2, 1972, p. 354 (invoking the necessity ground of securing wellbeing of the local population to justify the legislative measure on a labour dispute). Admittedly, the Court referred only to the necessity ground under Article 43 of the Hague Regulations, as it recognized the applicability of the customary law equivalent rules of Fourth Geneva Convention but not the applicability of the Convention as such: *ibid.*, p. 580, English excerpt in: *Israel Yearbook on Human Rights*, Vol. 2, 1972, pp. 354, 356 (per Sussman J.). However, it can be inferred that as Article 64 of Fourth Geneva Convention embodies the necessity grounds geared more strongly towards the wellbeing of the civilian population, the rationale of this decision would be more cogently applicable with respect to this provision.

122 Y. Dinstein, *International Law of Belligerent Occupation*, above note 5, pp. 110–116.

discourses surrounding this legal regime are amenable to different contemporary ideas and to political realities.<sup>123</sup>

## The exclusion of ‘colonial occupation’ from the normative corpus of the law of occupation

### Overview

Our examinations now turn to the criticism that, until the process of decolonization unfolded, the law of occupation was largely the ‘European project’<sup>124</sup> and was never contemplated as applicable to ‘colonial occupation’.<sup>125</sup> This part critiques the historically iniquitous feature of the law of occupation during the colonial period. As seen in the preceding part, the law of occupation has been marred by many instances in which the ‘concept of necessity’ exception was invoked to justify deviating from the general rule as predicated on the conservationist idea. Yet these exceptions have always operated within the normative parameters of the law of occupation. In contrast, the inapplicability of the law of occupation to colonial control was none other than an exception made to the entire corpus of this body of *ius in bello*.

The proposed analysis of this part goes beyond examining the law of occupation as it has been in the past. As far back as the early nineteenth century, Jeremy Bentham implicitly recognized the framework of tripartite conceptualization (the law as it has been; the law as it is; and the law as it ought to be).<sup>126</sup> This analytical structure has recently been given fresh insight by Anthea Roberts.<sup>127</sup> Working along similar lines, it is proposed in this part that the parameters of our inquiry should be expanded to go beyond *the law of occupation as it has been* and to encompass the normative projection in retrospect of *the law of occupation as it ought to have*

123 E. Benvenisti, above note 6, p. 648.

124 See *ibid.*, p. 647. For the full exploration, see N. Bhuta, above note 11.

125 For the scholarly recognition of this term, see, *inter alia*, M. Koskeniemi, above note 13, p. 34; Sean Watts, ‘Combatant status and computer network attack’, in *Virginia Journal of International Law*, Vol. 50, No. 2, 2010, pp. 436; Joseph P. Fishman, ‘Locating the international interest in international cultural property’, in *Yale Journal of International Law*, Vol. 35, No. 2, 2010, p. 400; and Susan H. Williams, ‘Democracy, gender equality, and customary law: constitutionalizing internal cultural disruption’, in *Indiana Journal of Global Legal Studies*, Vol. 18, No. 1, 2011, p. 80.

126 Bentham argued that the characters of law can be divided into the role of the ‘Expositor’ and that of the ‘Censor’. He explained that: ‘To the province of the *Expositor* it belongs to explain to us what, as he supposes, the Law is: to that of the *Censor*, to observe to us what he thinks it [the Law] *ought to be*. The former, therefore, is principally occupied in stating, or in enquiring after *facts*: the latter, in discussing *reasons*.’ Jeremy Bentham, *A Fragment on Government*, ed. F. C. Montague, Clarendon Press, Oxford, 1891, pp. 98–99, emphasis in original, footnote omitted. With respect to the Expositor, Bentham added that he is assigned two tasks: the ‘business of history’, namely, demonstrating the history of law (‘to represent the Law in the state it *has been*’; and the ‘business of simple demonstration’ (‘to represent the Law in the state it *is in for the time being*’), which is based on ‘*arrangement, narration and conjecture*’: *ibid.*, pp. 116–117, emphasis in original.

127 Roberts furnishes a tripartite analysis of the law as it has been (‘descriptive’); the law as it is (‘normative’); and the law as it ought to be (‘prescriptive’): Anthea Elizabeth Roberts, ‘Traditional and modern approaches to customary international law: a reconciliation’, in *American Journal of International Law*, Vol. 95, No. 4, 2001, p. 761.

been.<sup>128</sup> Such critical analysis will help to elucidate different narratives and rationalizations regarding the ways in which the law of occupation has failed to be applied in the colonial context. This critical and contextual prism can also be of help in assessing how the application of today's law of occupation is vulnerable to the charge of 'political subjectivity'.<sup>129</sup> This part argues that, behind its façade of innocuous value-neutrality, the law of occupation had long hidden a tacit dichotomy: on the one hand, the application of this normative framework (and the entire corpus of *jus in bello*) only among 'civilized' nations capable of exercising sovereignty in international relations; and, on the other, the system of colonialism imposed upon the vast majority of non-Western nations bereft of sovereignty.

The methodology of this part is built on the underlying assumptions of the critical legal studies (CLS) movement. We should remember that, while proposing the (re-)unification of the law as it is and the law as it ought to be in its legal discourse, CLS highlights a *contextual* critique of the existing international legal structure. It advocates pursuing the anti-foundationist objective of unearthing heterogeneous identities and conflict of interests as the reality of international society.<sup>130</sup> Further, CLS's inclusive and culturally sensitive approach,<sup>131</sup> alongside its proposal to lift the 'veil of power',<sup>132</sup> reinforces our retrospective critique of the historically exclusive nature of the law of occupation. Spurred on by this methodology, this part aims to unmask the thinly veiled, binary assumption on which the whole gamut of *jus in bello* was based.

128 It is appropriate to recall that one of Koskenniemi's two principles for construing international law is precisely related to the question of what the law ought to be. He proposes that the principle of the reflection of subjective values, such as what is just, reasonable, and in good faith, should be employed in tandem with the principle of concordance with states' will: Martti Koskenniemi, 'The politics of international law', in *European Journal of International Law*, Vol. 1, No. 1, 1990, pp. 4, 21, 23. See, however, *ibid.*, p. 24, where he argues that the normative content of what is just is far from determinable. See also Ralph Wilde, 'Are human rights norms part of the *jus post bellum*, and should they be?', in Carsten Stahn and Jann K. Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace*, TMC Asser Press, The Hague, 2008, p. 164.

129 This is linked to the argument that law as a social construct can be described as 'a form of congealed politics': Kader Asmal, 'Truth, reconciliation and justice: the South African perspective', in *Modern Law Review*, Vol. 63, No. 1, 2000, p. 15, n. 72. Compare Hersch Lauterpacht's famous statement that 'if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law': Hersch Lauterpacht, 'The problem of the revision of the law of war', in *British Yearbook of International Law*, Vol. 29, 1952, p. 382.

130 Anthony Carty, 'Critical international law: recent trends in the theory of international law', in *European Journal of International Law*, Vol. 2, No. 1, 1991, pp. 1, 66.

131 *Ibid.*, pp. 67–68, 71. This is no doubt influenced by the CLS movement inaugurated earlier in US legal culture, which highlighted a 'diversity of cultural responses': Robert W. Gordon, 'Critical legal histories', in *Stanford Law Review*, Vol. 36, 1984, pp. 57, 70–71, 112. This line of critique resonates further in theories of the Third World Approach to International Law (TWAAIL): see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, Cambridge, 2004; Bhupinder S. Chimni, 'The past, present and future of international law: a critical Third World approach', in *Melbourne Journal of International Law*, Vol. 8, No. 2, 2007, p. 499. See also the methodological affinity of feminism in international law: Hilary Charlesworth, Christine Chinkin, and Shelley Wright, 'Feminist approaches to international law', in *American Journal of International Law*, Vol. 85, No. 4, 1991, p. 613.

132 R. W. Gordon, above note 131, p. 109.

## The era of imperialism and the exclusivity of the law of occupation

The century of ‘relative peace’ in (western) Europe between 1815 and 1914 coincided with the height of imperialism in its later period, with many European powers, small and large, vying for territorial aggrandizement and empire-building outside the continent. ‘Occupying’ and acquiring non-Western (or non-Christian) territories by aggression or coercion was hardly condemned as illegal. Many states firmly believed in their ‘*mission civilisatrice*’, despite ‘uncivilized’ practice against the indigenous populations.<sup>133</sup> Ralph Wilde observes that ‘the idea of the “civilizing mission”’, as one of the underlying rationales of colonialism, was designed ‘to address the perceived incapacity for self-government . . . and also to build up local capacities, sometimes with the goal of making self-administration, meeting the standard [of civilization], eventually possible’.<sup>134</sup> Such was the European *Zeitgeist* that the General Act of the Berlin Conference (1885) in effect legitimized the ‘Scramble for Africa’.<sup>135</sup>

Admittedly, in the nineteenth century not all instances of acquiring sovereign rights and territories outside Western states were realized through aggression. Even so, what appeared to be cases of ‘pacific’ occupation (*occupatio pacifica*) based on agreements between native rulers and European powers, or even agreements between the former and European corporations,<sup>136</sup> were often carried out in coercive circumstances.<sup>137</sup> Furthermore, some instances of colonial rule, far from being a benign model marked by development of economic and social infrastructure, were tainted with what would have constituted very serious violations of human rights if committed in metropolitan territories of ‘civilized’ nations.<sup>138</sup> Note that, even in Victorian Britain, there was a binary assumption upon which the

133 Brett Bowden, ‘The colonial origins of international law, European expansion and the classical standard of civilization’, in *Journal of the History of International Law*, Vol. 7, No. 1, 2005, p. 2, who argues that: ‘On practically every front, European expansion was largely an aggressive act involving what was usually the violent conquest and suppression of indigenous peoples’. That said, he is not blind to the fact that non-Europeans were engaged in similarly violent confrontations among themselves in the same period: *ibid.*

134 Ralph Wilde, ‘From trusteeship to self-determination and back again: the role of the Hague Regulations in the evolution of international trusteeship, and the framework of rights and duties of occupying powers’, in *Loyola Los Angeles International and Comparative Law Review*, Vol. 31, 2009, p. 103.

135 The Conference also endorsed the Free State of the Congo as essentially the private colony of King Leopold II of Belgium. Controversially, the Conference praised Leopold II for his trustee role in ‘civilizing’ natives in Congo.

136 A. Anghie, above note 131, p. 233.

137 B. Bowden, above note 133, p. 1. See also A. Anghie, above note 131, pp. 73–74, discussing the example of the treaty of cession concluded between the Wyanasa Chiefs of Nyasaland (current Malawi) and the British Empire in the 1890s and at the beginning of the twentieth century. For discussions of the issue of ‘unequal treaties’ that were imposed on Ottoman Turkey, Siam, China, and Japan, see *ibid.*, pp. 72–73; and Gerrit W. Gong, *The Standard of ‘Civilization’ in International Society*, Clarendon Press, Oxford, 1984, pp. 64–65.

138 See Jan-Bart Gewald, ‘Imperial Germany and the Herero of southern Africa: genocide and the quest for recompense’, in Adam Jones, *Genocide, War Crimes and the West: History and Complicity*, Zed Books, London, 2004, ch. 3, p. 59; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance*, Cambridge University Press, Cambridge, 2003, p. 55; Adam Hochschild, *King Leopold’s Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa*, Macmillan, New York, 1998 (discussing King Leopold’s Congo); Larry May, *Genocide: A Normative Account*, Cambridge University Press, Cambridge, 2010, pp. 254, 262 (examining the implications of the extermination of indigenous Tasmanians and Torres Strait Islanders in British Australia). See also Robert

British *imperium et libertas* was built: liberal political principles and practices that were defining features of the British domestic infrastructure were by no means wholeheartedly extended to the colonial possessions.<sup>139</sup>

The tacit dichotomy between the legal regime of occupation applied among ‘civilized’ nations and the system of colonialism imposed upon ‘uncivilized’ nations

This section aims to elaborate the thesis that the paradigms of the law of occupation essentially developed as a ‘European project’. It can be assumed that, until the decolonization process was set in motion, with respect to non-consensual control over a foreign territory there operated a tacit dichotomy between the legal regime of occupation that was applicable only among ‘civilized’ European states and the system of colonial rules over ‘uncivilized’ peoples. None of the corpus of *jus in bello* was considered applicable to ‘colonial occupation’ or forced annexation of non-European territories.<sup>140</sup> As a comparison, one can note that it was only in the case of *debellatio*<sup>141</sup> that the normative paradigm of belligerent occupation was ruled out with respect to European powers.

This binary thinking was no doubt grounded on the idea that sovereignty was a ‘gift of civilization’.<sup>142</sup> Sovereignty was almost always a privilege attributed only to members of the ‘European family of states’,<sup>143</sup> to the exclusion of non-European nations.<sup>144</sup> Because non-Western societies were not entitled to sovereignty, the invisible barrier that separated the ‘civilized’ from ‘uncivilized’ nations disabled the application of the entirety of *jus in bello* to armed conflict that led to ‘colonial occupation’ of non-Western societies.<sup>145</sup> Bhuta argues that

Gellately and Ben Kiernan (eds), *The Specter of Genocide: Mass Murder in Historical Perspective*, Cambridge University Press, Cambridge, 2003.

139 Hugh Cunningham, ‘Jingoism in 1877–78’, in *Victorian Studies*, Vol. 14, No. 4, 1971, p. 453, as referred to in K. Nabulsi, above note 9, p. 110.

140 Anthony Anghie and Bhupinder S. Chimni, ‘Third World approaches to international law and individual responsibility in internal conflicts’, in *Chinese Journal of International Law*, Vol. 2, No. 1, 2003, p. 77.

141 For examinations of the legal implications of the *debellatio* doctrine, see D. A. W. Heffter, above note 23, p. 220; J. M. Spaight, above note 19, pp. 330–332 (criticizing the British annexation of the Orange Free State and the Transvaal by way of a proclamation of 1 June 1900, despite the absence of *debellatio* at this time); E. H. Feilchenfeld, above note 68, p. 7, para. 25 (arguing that ‘If one belligerent conquers the whole territory of an enemy . . . the enemy state ceases to exist, rules on state succession concerning complete annexation apply, and there is no longer any room for the rules governing mere occupation’); E. Benvenisti, above note 52, pp. 29, 92–93.

142 N. Bhuta, above note 11, p. 729. See also Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960*, Cambridge University Press, Cambridge, 2001.

143 N. Bhuta, above note 11, p. 729, referring to P. W. Schroeder, above note 11, p. 9; Antony Anghie, ‘Finding the peripheries: sovereignty and colonialism in nineteenth-century international law’, in *Harvard International Law Journal*, Vol. 40, No. 1, 1999, p. 1.

144 For detailed analysis, see A. Anghie, above note 131, pp. 32–114.

145 See Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, Cambridge University Press, Cambridge, 2004, p. 20. Bhuta refers to the example of the Russian Empire expressly declaring non-applicability of the law of occupation to its seizure of Bulgaria from the Ottoman Empire: N. Bhuta, above note 11, p. 729. See also Dorris P. Graber, *The Development of the Law of Belligerent Occupation, 1863–1914*, Columbia University Press, New York, 1949, p. 133.

The anomalous (from the classical international law point-of-view) distinction between effective control and sovereign rights over territory which lies at the heart of the law of occupation, and the law's enjoining of fundamental constitutional change by the military occupant, had no application to colonial wars or 'police actions' against less civilized – and therefore non-sovereign – peoples and territories.<sup>146</sup>

As a result, military occupation of non-European territories was sufficient for the European powers to claim sovereign rights over those territories.<sup>147</sup> Further, together with discovery, conquest, and cession, the occupation of *terra nullius* was one of the modalities that a 'civilized' nation was able to invoke to acquire sovereignty over the 'non-Christian world'.<sup>148</sup> As an ancillary argument, one can add that the temporary nature of the normative regime of occupation was unsuitable for the colonial powers' avowed intention to exert sovereignty over the colonized territories.<sup>149</sup>

It should be borne in mind that, by the time imperialism held sway in the late nineteenth century, many rules relating to occupation were already embodied in the Lieber Code (1863), the aborted Brussels Project (1874), and the *Oxford Manual* (1880). Further, many 'occupations' of territories in the course of imperial adventures took place *after* the First Hague Peace Conference (1899).<sup>150</sup> Bhuta contends that 'As a matter of principle and practice, belligerent occupation in its 19th-century manifestation was applied exclusively to land wars between European sovereigns.'<sup>151</sup> The conceptual chasm between the 'civilized' and 'uncivilized' nations can be readily discerned. During the Franco-Prussian War (1870–1871), the Prussians arguably applied the customary law of occupation, leaving the French laws relatively intact.<sup>152</sup> Similarly, in the Spanish–American War

146 N. Bhuta, above note 11, p. 729; Sharon Korman, *The Right to Conquest: The Acquisition of Territory by Force in International Law and Practice*, Oxford University Press, 1996, pp. 56, 61.

147 Such sovereign rights were understood as encompassing the right to demand allegiance. Note that the Occupying Power, according to Article 45 of the 1907 Hague Regulations, is forbidden to demand the oath of allegiance from a population of foreign nationality under its occupation. See also N. Bhuta, above note 11, p. 729.

148 E. Benvenisti, above note 6, p. 647. See also Malcolm N. Shaw, 'Territory in international law', in *Netherlands Yearbook of International Law*, Vol. 13, 1982, pp. 61, 79 ff.

149 M. N. Shaw, above note 148.

150 Among numerous examples that occurred after 1874, note, for instance, the Russian occupation of Bulgaria (1877–1878) and the 'transformative policy' based on '*un nouvel ordre de choses*' implemented there; the British policy of asserting sovereignty over Egypt and Cyprus by means of occupation in 1914 without being bound by the constraints of Article 43 of the Hague Regulations; and the US occupations and subsequent annexation of Hawaii (1898), The Philippines (1898), and Puerto Rico (1898). See E. Benvenisti, above note 6, pp. 636, 641, 645. Furthermore, even Feilchenfeld, a prominent jurist on the law of occupation, was sceptical of the applicability of the law of occupation to the Japanese occupation of China after 1937 (failing to mention the Japanese occupation and colonization of Manchuria in 1931). With respect to the Italian invasion of Abyssinia, he considered that this was 'a clear occupation', but withheld examination of the applicability of the law of occupation: E. H. Feilchenfeld, above note 68, p. 23, para. 94.

151 N. Bhuta, above note 11, p. 729.

152 J. M. Spaight, above note 19, pp. 323–330. However, there were a few cases of the suspension of the French laws: see F. F. Martens, above note 12, pp. 275–276. Furthermore, many of the Prussian measures, such as the requirement to pay extensive reparations under Article 11 of the General Armistice of 28 January 1871,

of 1898, the US occupying forces retained the Spanish functionaries in Manila.<sup>153</sup> During the Second Anglo-Boer War (1899–1902), it was the British occupying forces' deviation from the body of customary norms on occupation that prompted Spaight to criticize the measures taken against the Dutch-speaking populations.<sup>154</sup> In contrast, the cosmopolitan and once mighty Ottoman Empire was not considered fully 'civilized'. Accordingly, the Russian occupation of Bulgaria in 1877–1878 was excluded from the constraints of the occupation law, and this was pleaded by none other than Fyodor F. Martens.<sup>155</sup>

Turning to the system of colonialism outside Europe, its exclusion from the legal regime of occupation matched a purported aim: the vast swathes of the landmass inhabited by 'uncivilized peoples' were poised for imperial spoils and conquest by European powers that were unshackled by the normative paradigm of *jus in bello* governing conduct of warfare and belligerent occupation, and possible war crimes.<sup>156</sup> Along these lines, Koskenniemi argues that 'the law of colonial occupation that emerged in the late-19<sup>th</sup> century' had an advantage of 'enabl[ing] the colonial powers to rule over non-Europeans without the administrative burdens of formal sovereignty'.<sup>157</sup> Many commentators argue that such an exclusion of the legal regime of belligerent occupation was sustained by the idea of racial hierarchy.<sup>158</sup>

### 'Standard of civilization'

For Fyodor Fyodorovich Martens, the champion of the eponymous clause,<sup>159</sup> universalist conceptions of international law were only integrated among Western civilized peoples.<sup>160</sup> He was adamant that 'it would be impossible to expect Turks or Chinese to observe the laws and customs of war as elaborated by the common efforts of the Christian and civilised nations'.<sup>161</sup> Francis Lieber's 'martialist'

were harsh, as noted by the *Revue de droit international et de législation comparée*, Vol. 3, 1871, pp. 377–379 (this was, however, replaced by a more moderate provision of Article 3 of the treaty concluded on 26 February 1871, purported to prolong the armistice: *ibid.*, p. 379). See J. M. Spaight, above note 19, p. 324.

153 J. M. Spaight, above note 19, p. 364. At Santiago de Cuba, General Shafter initially kept the municipal authorities intact. However, President McKinley later decided to replace the Spanish civilian authorities with a military administration: *ibid.*

154 Apart from the annexation of the territories, he referred to the harsh nature of its martial law regulations issued in May 1901, including punishment of women, the 'policy' of burning houses to intimidate the population, and the setting up of 'concentration camps': *ibid.*, pp. 332, 340–341, 343, 350–353.

155 F. F. Martens, above note 12, p. 279. This view was endorsed by Spaight: J. M. Spaight, above note 19, pp. 329, 357.

156 A. Anghie and B. S. Chimni, above note 140.

157 M. Koskenniemi, above note 13, p. 34; M. Koskenniemi, above note 142, pp. 112–178.

158 K. Nabulsi, above note 9, pp. 120, 141. See also John Vincent, 'Racial equality', in Hedley Bull and Adam Watson (eds), *The Expansion of International Society*, Clarendon Press, Oxford, 1984, pp. 239–254.

159 For a detailed account of how the Russian jurist took credit for the draft of a preamble that had originally been prepared by the Belgian diplomat Baron Lambermont (the Belgian representative of the Brussels Conference in 1874, who sent the draft to the Belgian representative at the Hague Conference, M. de Beernaet), see K. Nabulsi, above note 9, p. 161.

160 *Ibid.*, p. 164. He even justified Russia's 'transformative' occupation ('*un nouvel ordre de choses*') of Bulgaria between 1877 and 1878: F. F. Martens, above note 12, pp. 267–296, esp. pp. 271–272, 278–280, 287, 289, 294.

161 F. F. Martens, above note 12, pp. 46–47 (English translation by the present author).

backbone, not dissimilar to his anti-abolitionist ethos in the United States domestic setting,<sup>162</sup> was faithfully replicated in his understanding that ‘The fundamental idea of all international law is the idea that all civilized nations of our race form a family of nations’.<sup>163</sup> These views are closely intertwined with the idea of the ‘standard of civilization’.<sup>164</sup> This idea denotes the ‘legal mechanism’ by which nations have historically been admitted to or barred from the ‘international society of states’.<sup>165</sup> In Gerrit Gong’s thesis, the international society of European states was equated to ‘international society’ as a whole, because this was the only ‘society’ comprised of ‘civilized states’.<sup>166</sup> The assumption underlying this thesis is that, in encounters between European and non-European peoples and in the case of any ‘civilization clashes’, the European standard of civilization that bore ‘the hallmarks of the evolving Westphalian states’ system’ was deemed superior to standards of civilization espoused by non-Western peoples. As a corollary, the European standard of civilization constituted the benchmark against which different ‘levels of civilization’ attained by non-Western states were measured.<sup>167</sup>

### Concluding observations of the exclusivity of law of occupation

This part has demonstrated that, because the law of occupation was developed chiefly as a social construct among European powers entitled to sovereignty, it trivialized the fate of non-Western peoples divested of sovereignty. Remarkably, one of the few early Western publicists to voice concern about such a dichotomized understanding was Hersch Lauterpacht. While criticizing James Lorimer’s debarring of ‘barbarous, and savage societies’ from the application of both the concept of sovereignty and the general corpus of international law,<sup>168</sup> this erudite publicist asserted in 1947 that ‘Modern international law knows of no distinction, for the purposes of recognition, between civilized and uncivilized States or between States within and outside the international community of civilized States’.<sup>169</sup> The

162 K. Nabulsi, above note 9, pp. 164–165.

163 Francis Lieber, ‘Twenty-seven definitions and elementary positions concerning the laws and usages of war’, in *Miscellaneous Writings*, J. B. Lippincott, Philadelphia, 1881, Vol. II, pp. 223 and 125, as cited in K. Nabulsi, above note 9, pp. 159, 164–165.

164 Georg Schwarzenberger, ‘The Standard of Civilisation in International Law’, in George W. Keeton and Georg Schwarzenberger (eds), *Current Legal Problems*, Stevens & Sons Ltd, London, 1955, p. 220 (arguing that ‘The test whether a State was civilised and, thus, entitled to full recognition as an international personality was, as a rule, merely whether its government was sufficiently stable to undertake binding commitments under international law and whether it was able and willing to protect adequately the life, liberty and property of foreigners’); G. W. Gong, above note 137. See also B. Bowden, above note 133.

165 B. Bowden, above note 133, p. 1.

166 G. W. Gong, above note 137, pp. 3–5.

167 Antony Anghie, ‘Francisco de Vitoria and the colonial origins of international law’, in *Social & Legal Studies*, Vol. 5, No. 3, 1996, pp. 322, 332. See also A. Anghie, above note 143.

168 James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities*, William Blackwood and Sons, Edinburgh and London, 1884, Vol. I, pp. 101–102, where he notes that ‘As a political phenomenon, humanity, in its present condition, divides itself into three concentric zones or spheres – that of civilised humanity, that of barbarous humanity, and that of savage humanity’.

169 Hersch Lauterpacht, *Recognition in International Law*, Cambridge University Press, Cambridge, 1947, p. 31, n. 1.



dichotomized framework that prevailed from the nineteenth century until the mid-twentieth century was normatively incongruent. As Anghie notes,<sup>170</sup> while non-Western nations were divested of sovereignty,<sup>171</sup> many chartered corporations of Western powers designed for colonial enterprises<sup>172</sup> were invested with the ‘sovereign’ rights to enter into treaties with non-Western nations to acquire ‘sovereignty’ over their land. Furthermore, and ironically, non-Western nations were considered ‘sovereigns’ only for the purpose of transferring their sovereignty to the corporation.<sup>173</sup> Indeed, in our post-colonial world the nations of the developing world are united in asserting that, far from having lacked sovereignty, their “‘native sovereignty’ survived the international system of colonialism’.<sup>174</sup> In conclusion, the exemption of ‘colonial occupation’ from the constraints of the law of occupation facilitated colonial control by European powers. While this was a serious cognitive disharmony, it was rationalized on the basis of the ‘standard of civilization’.

## General conclusion

The first main part of this article surveyed the historical evolution of the law of occupation through the lens of the general rules relating to the Occupying Power’s legislative authority. It focused on the conservationist principle under Article 43 of the Hague Regulations and on the elastic ways in which the ‘concept of necessity’ exception has been construed in both practice and legal doctrines. It demonstrated how the concept of ‘necessity’ under Article 43 has served as the ‘fluid vocabulary’ in adjusting to differing needs of Occupying Powers.<sup>175</sup> When supplemented by Article 64 of the Fourth Geneva Convention of 1949, this concept has been adjusted in the direction of promoting the rights and wellbeing of civilian populations under occupation. The analyses undertaken in both parts of the article corroborate the thesis that law is ‘a form of congealed politics’,<sup>176</sup> and that the entirety of legal discourse as a social construct stresses the importance of contextual analysis and understanding.<sup>177</sup> This can be demonstrated by many doctrinal

170 A. Anghie, above note 131, p. 233.

171 If they were not fully colonized, they were subordinated to the half-colonial system of capitulation treaties, as in the case of Persia, Siam (Thailand), China, and Japan. See *ibid.*, pp. 84–86; and G. W. Gong, above note 137, p. 211.

172 See, for instance, the British East India Company, which ran India after the Battle of Plassey (1757) until 1857 (the Indian Revolt or the Sepoy Mutiny), and the Belgian King Leopold’s holding company for his private colony in Congo, which formed the basis of the later Congo Free State.

173 A. Anghie, above note 131, p. 233.

174 *Ibid.*, p. 212.

175 M. Koskenniemi, above note 13, p. 35.

176 K. Asmal, above note 129, p. 15, n. 72.

177 Descriptive sociologists hold that descriptions of social knowledge, including law, are ‘contingent’ and ‘the problematic outcome of intersubjective dialogue, translation, and projection’: see Christine B. Harrington and Barbara Yngvesson, ‘Interpretive sociological research’, in *Law & Social Inquiry*, Vol. 15, No. 1, 1990, pp. 135, 144.

endeavours, whether cogent or not, to rationalize what appear to be deviations from the general rule predicated on the conservationist ethos.

On the other hand, the second main part of the article, which critiqued issues of the exclusion of ‘colonial occupation’ from the law of occupation, lends succour to one of the main theses of the critical legal studies movement – that the law as the system of regulatory control is contingent upon, and parasitic on, ‘institutionalized social power’.<sup>178</sup> Until the period of decolonization, the entire conceptual edifice of the law of occupation remained embedded in the then exclusive ‘international society’, which, in the nineteenth and early twentieth centuries, comprised only the European and North American family of ‘civilized nations’. The law of occupation was the product of limited ‘interpretive communities’,<sup>179</sup> equipped with the enduring legacy of the concept of the ‘standard of civilization’. ‘Unearthing’ the hidden parallel process (the barring of ‘colonial occupation’ from the regulatory realm of the law of occupation) reveals how our social knowledge of this distinct branch of international humanitarian law has been contingent on particular historicity, inter-subjective dialogues, compromise, and normative projection of the privileged and exclusive circle of ‘civilized’ states.<sup>180</sup>

178 Compare Gary Peller, ‘The metaphysics of American law’, in *California Law Review*, Vol. 73, 1985, pp. 1151, 1168, 1170.

179 The normative framework comprised of legal concepts, principles, doctrines, and practices of interpretation is ineluctably developed whenever ‘interpretive communities’ arise: Michael S. Moore, ‘Interpreting interpretation’, in Andrei Marmor (ed.), *Law and Interpretation: Essays in Legal Philosophy*, Clarendon Press, Oxford, 1995, pp. 1, 21.

180 See also the line of reasoning followed in US domestic laws: C. B. Harrington and B. Yngvesson, above note 177, pp. 147, 144; Austin Sarat ‘Leading law into the abyss: what (if anything) has sociology done to law?’, in *Law & Social Inquiry*, Vol. 19, No. 3, 1994, pp. 609, 620.

# A different sense of humanity: occupation in Francis Lieber's Code

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## **Abstract**

*Accounts narrating the history of the modern law of occupation display ambivalence to the 1863 Lieber Code. At times, they mark the humanity of its provisions on occupied territories; at others, they find its concept of humanity in occupation limited compared to subsequent developments. A broader reading of the Code against Lieber's published works, teaching, and correspondence reveals a unique – and disconcerting – sense of humanity pervading through its provisions. Lieber's different sense of humanity, not directed at individuals, throws light on the history of the law governing occupied territories today and paves the way for critical reflections on its conceptual bases.*

**Keywords:** occupation, Lieber Code, Lieber's sense of humanity, occupied territories, early modern occupation law, humanitarian imperative, international order, military necessity, public order.

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The development of the modern law of war is often seen as a process of 'humanization'.<sup>1</sup> In this view, the law's evolution tells a story of measured progress, from rules once dictated by state interests towards norms increasingly aimed at affecting the humane treatment of individuals, on and off the battlefield. According to this view, today's international humanitarian law represents a pinnacle of achievement of the laws of war project.

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Parallel to progressive accounts, one finds a predisposition to emphasize humanitarian sentiment in earlier legal prescriptions, war practices, and writing on war, treating these as precedents lending the moral authority of history to the 'humanity in warfare' project.<sup>2</sup> Such accounts tend to accentuate the humanity in restraints legislated, practised or theorized by and for past belligerents and occupants. If progressive accounts hail the 1949 Geneva Conventions as the height of humanitarian achievement, other accounts commend the humanity expressed by the 1874 Brussels Declaration, the 1880 *Oxford Manual*, or the 1899/1907 Hague Regulations.<sup>3</sup>

Nowhere is this ambivalence more patent than with the Lieber Code.<sup>4</sup> Frequently referred to as 'the first modern codification of the laws of war',<sup>5</sup> it was commissioned by the Union government and promulgated by President Lincoln in the midst of the American Civil War. Though authored by a private person, its impact on subsequent codification of the laws of war and its development was considerable.<sup>6</sup> Thus, the Lieber Code is acknowledged as the basis for the Brussels, Oxford, and Hague texts, but also commonly credited for the humanity pervading its provisions.<sup>7</sup>

Consider the case of the law of occupation, one of the first areas of the laws of war to be codified in modern times – starting with the Lieber Code. While the Code's contribution to the development of humanitarian norms governing occupied territories is commonly acknowledged,<sup>8</sup> progressive historiography ascribes early modern occupation law – again, starting with the Code – with a limited humanitarian motivation or impact. It identifies the law's transformation into a truly humanitarian instrument with the 1949 Fourth Geneva Convention. Thus, Article 47 of that Convention is perceived as a provision 'of an essentially

- 1 Theodor Meron, 'The humanization of humanitarian law', in *American Journal of International Law*, Vol. 94, No. 2, April 2000, p. 246 ('the humanization of [the law of war], a process driven to a large extent by human rights and the principles of humanity [through which] . . . the law of war has been changing and acquiring a more humane face').
- 2 Rotem Giladi, *Rites of Affirmation: Progress and Immanence in International Humanitarian Law Historiography* (unpublished manuscript, 2012), analyses this ambivalence.
- 3 'Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874', in Dietrich Schindler and Jiri Toman (eds), *The Laws of Armed Conflicts*, 4th edition, M. Nijhoff, Leiden, 2004, p. 27; International Law Institute, 'Manual on the Laws of War on Land, Oxford, 9 September 1880', in *ibid.*, p. 29. For accounts commending e.g. the humanity of the Hague Regulations, see, for example, Arthur Eyffinger, *The 1907 Hague Peace Conference: 'the conscience of the civilized world'*, JudiCap, The Hague 2007.
- 4 *Instructions for the Government of Armies of the United States in the Field, General Orders No. 100*, War Dept., Washington DC, 24 April 1863 (hereafter Lieber Code).
- 5 Richard R. Baxter, 'The first modern codification of the laws of war: Francis Lieber and General Orders No. 100', in *International Review of the Red Cross*, Vol. 3, No. 25, April–May 1963, p. 171; D. Schindler and J. Toman, above note 3, p. 3 ('The "Lieber Instructions" represent the first attempt to codify the laws of war').
- 6 I deal with the Code's impact below; the next part deals with the Code's context and its making.
- 7 Johann Caspar Bluntschli, 'Lieber's service to political science and international law', in Daniel C. Gilman (ed.), *The Miscellaneous Writings of Francis Lieber*, Vol. II, Lippincott, Philadelphia, 1881, p. 12; Doris A. Graber, *The Development of the Law of Belligerent Occupation 1863–1914*, Columbia University Press, New York, 1949, p. 5 (the Lieber Code 'marks the beginning of the modern law of belligerent occupation').
- 8 D. A. Graber, above note 7; Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, 1993; Karma Nabulsi, *Traditions of War: Occupation Resistance, and the Law*, Oxford University Press, Oxford, 1999.

humanitarian character; its object is to safeguard human beings and not to protect the political institutions and government machinery of the State as such'.<sup>9</sup> The law of occupation in the Fourth Convention is accordingly perceived as 'primarily motivated by humanitarian considerations'.<sup>10</sup> Humanity in occupation today expresses a concern for the human dignity of individuals and civilian populations who find themselves under an occupation.<sup>11</sup>

By contrast, the 1899/1907 Hague Regulations are perceived to have furnished individuals with only rudimentary protection against the occupant.<sup>12</sup> And, unlike Article 47 of the Fourth Geneva Convention, their Article 43 also protected 'the separate existence of the State, its institutions and its laws'.<sup>13</sup> Thus, the law contained in the Hague Regulations is depicted less as the product of an effort to humanize civilized warfare and more as a legacy of a personal sovereignty era, a means of preserving the power bases of the European *ancien régime* as well as the European public order itself against the threats of revolution and nationalism,<sup>14</sup> or as a diplomatic compromise between weak and powerful states.<sup>15</sup> Such accounts imply that whatever concept of humanity existed in early modern occupation law was nebulous, primitive, and unavoidably limited.

Reconciling this ambivalence is possible; the Lieber Code may therefore truly represent a humanitarian achievement for its time, while at the same time foretelling subsequent progress. In other words, the Code may embody an essential link between past and present in the story of the emergence of the modern humanitarian law of occupation and, equally, in the shaping of the contemporary meaning of humanity in war. This assumes that the sense of humanity underpinning the Code's provisions on occupation is comparable and related to that informing today's law of occupation. This article challenges that assumption,

9 Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross (ICRC), Geneva, 1958, pp. 273–274.

10 ICRC, 'Occupation and international humanitarian law: questions and answers', 4 August 2004, available at: <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/634KFC> (last visited 2 March 2012); E. Benvenisti, above note 8, pp. 105–106 (the Fourth Geneva Convention represents a 'shift of attention from governments to the population', signifying 'growing awareness ... of the idea that peoples are not merely the resources of states, but rather that they are worthy of being the subjects of international norms').

11 ICRC, 'General problems in implementing the Fourth Geneva Convention', Report to Meeting of Experts, Geneva, 27–29 October 1998, available at: <http://www.icrc.org/eng/resources/documents/misc/57jpf6.htm> (last visited 2 March 2012): 'the entire philosophy behind the Convention ... [stipulates] the respect due to the individual and the inalienable character of the individual's fundamental rights'.

12 T. Meron, above note 1, p. 46 (of the fifteen articles on occupation, 'only three relate to the physical integrity of civilian persons. The other provisions deal essentially with the protection of property'). By contrast, the Fourth Geneva Convention protects 'personal, rather than proprietary, rights of the population of occupied territory': Georg Schwarzenberger, 'The law of belligerent occupation: basic issues', in *Nordisk Tidsskrift International Ret*, Vol. 30, 1960, pp. 10, 12.

13 J. S. Pictet, above note 9, p. 273.

14 Nehal Bhuta, 'The antinomies of transformative occupation', in *European Journal of International Law*, Vol. 16, No. 4, September 2005, pp. 721, 723, rejects 'the common historical account which narrates the emergence of belligerent occupation as part of the progressive "humanization of warfare" by European civilization'. See also E. Benvenisti, above note 8, p. 28; Eyal Benvenisti, 'The origins of the concept of belligerent occupation', in *Law & History Review*, Vol. 26, No. 3, September 2008, p. 621.

15 E. Benvenisti, above note 14, p. 621.

however. It argues that, while the Code is undoubtedly crucial to understanding how the modern law of occupation evolved, a different sense of humanity pervades its provisions. Lieber's sense of humanity in war and occupation is not comparable to the individual-oriented sense of humanity associated with contemporary norms such as Article 27 of the Fourth Geneva Convention. Identifying his sense of humanity therefore paves the way for critical reflections on the forces, ideas, and visions that shaped the contemporary law of occupation; it also raises questions on how that law is historicized.

In order to trace Lieber's different sense of humanity, I first place his contribution to the development of the law in historical context, suggest a number of methodological imperatives for approaching the Lieber Code, and provide some background on its making. Next, I discuss the sense of humanity underpinning Lieber's political theory. Here I present his views on the relations between individuals, society, and the state; nationalism and inter-nationalism; and war and peace. These are essential for deciphering the sense of humanity underpinning the Code's provisions. I move on to demonstrate how these views inform Lieber's concept of occupation – and his sense of humanity in occupation. In evaluation of Lieber's different sense of humanity in occupation, I then argue that his humanitarian imperative was not the protection of individuals but, rather, the preservation of a modern vision of international order. In the conclusion, I discuss some implications of these findings.

## Approaching Lieber

A number of preliminary matters need to be addressed before delving into Lieber's sense of humanity. First, we need to consider its historical intellectual context. We need, in other words, to assess his ideas against some baseline in the development of the modern concept of humanity in war and occupation. Next, identifying Lieber's sense of humanity requires a broad inquiry into his other works and the context of the Code's making. These help expose, and avoid, some prevalent misconceptions about the Code, its authority, and its relevance to the law of occupation.

### Occupation before Lieber

The very advent of the modern occupation category commonly represents law's humanization and progress. Existing accounts trace its rise to late nineteenth-century codification of ideas and practices seeking to limit the right of conquest in the preceding two centuries: "The idea of occupation of enemy territory was formed when the right of conquest was rejected as too brutal".<sup>16</sup> The occupation category

16 Ernest Nys, 'Francis Lieber: his life and his work', in *American Journal of International Law*, Vol. 5, No. 1, 1911, pp. 84, 355, 379; D. A. Graber, above note 7, p. 14; E. Benvenisti, above note 14; Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice*, Oxford University Press, Oxford, 1996; Erich Kussbach, 'Conquest', in *Encyclopedia of Public International Law*, Vol. I, North-Holland, Amsterdam, 1992, p. 756.

formed a modern departure from and a limitation on conquest. Previously, conquerors were at liberty to acquire good title over territory and to ‘dispose’, as Vattel put it, of the inhabitants with equal licence.<sup>17</sup> The emerging new category of ‘mere’ occupation was driven, it is commonly perceived, by a desire to impose humanitarian restraints on the conqueror.<sup>18</sup>

There was, however, another potent motive for imposing procedural restraints on conquest. In Vattel’s 1758 *The Law of Nations* and Heffter’s 1844 *Das Europäische Völkerrecht der Gegenwart*,<sup>19</sup> occupation was conceptualized as a transient, indeterminate phase preceding final decision in the field. To limit the liberties of the conqueror vis-à-vis the peaceful civilian populace and private property during and after the campaign, Vattel proposed extending civilian immunity to their property in addition to their person:<sup>20</sup>

In the conquests of ancient times, even individuals lost their lands . . . the quarrel was in reality the common cause of all the citizens. But at present war is less dreadful in its consequences to the subject: matters are conducted with more humanity: one sovereign makes war against another sovereign, and not against the unarmed citizens. The conqueror seizes on the possessions of the state, the public property, while private individuals are permitted to retain theirs. They suffer but indirectly by the war; and the conquest only subjects them to a new master.<sup>21</sup>

Vattel’s allusion to humanity is visible and appealing, but he was equally concerned with ‘stability in the affairs of mankind’ and certainty in lawful acquisition by conquest.<sup>22</sup> Conquest, by itself, was insufficient to secure a stable transfer of title, but was a necessary preliminary to acquisition pending the outcome of the war. Rather than devising a novel category, Vattel sought to ensure order.<sup>23</sup>

Vattel dealt with territory; post-Revolutionary Heffter was attentive to public authority. In cases not involving complete subjugation, he wrote:

By the mere occupation of the other side’s territory or part thereof, the invading enemy does not immediately replace the former state authority, for as long as the invader continues the war, when it is still possible that the fortunes of the war will change. . . . From a legal perspective, the defeat of the enemy does not

17 Emmerich de Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, trans. and ed. Joseph Chitty, T. & J. W. Johnson, Philadelphia, 1853, Bk. III, Ch. 13, S. 201.

18 D. A. Graber, above note 7, pp. 13–14, 37. For Grotian justification of and limitations on conquest, see Rotem Giladi, *Occupation, Humanity, Order: A Critique of International Humanitarian Law*, unpublished SJD dissertation, University of Michigan Law School, 2011, p. 159. See N. Bhuta, above note 14.

19 August Wilhelm Heffter, *Das Europäische Völkerrecht der Gegenwart*, E. H. Schroeder, Berlin, 1844.

20 E. Benvenisti, above note 14; E. de Vattel, above note 17, Bk. III, Ch. 13, S. 201.

21 E. de Vattel, above note 17, Bk. III, Ch. 13, S.200, reflecting a growing distinction between public and private spheres and an emerging view of war as a contest between rulers, elaborated four years later by Jean-Jacques Rousseau in ‘The social contract, or principles of political right (1762)’, in George D. H. Cole (ed.), *Rousseau’s Social Contract and Discourses*, Dent & Sons, London, 1923.

22 E. de Vattel, above note 17, Bk. III, Ch. 13, S. 196 (stability); S. 194–195 (conquest acquires lawful title).

23 *Ibid.*, S. 197–198.

immediately bring about the complete subjugation of the enemy's state authority.<sup>24</sup>

Heffter therefore elaborated an explicitly novel distinction between conquest and occupation. Its rationale developed Vattel's emphasis on stability and certainty: fortunes of war may still change.<sup>25</sup> However, he then underscored the notion that the occupation category was to serve interests of order. For Vattel, by contrast, humanity and order both drove the identification of a provisional state of affairs preceding decision on the battlefield and the notion that possession by itself, unconsolidated and therefore reversible, could not be a sufficient requirement for a stable, legally certain change.<sup>26</sup> This nexus between considerations of order and humanity is crucial, as we shall see, for understanding the Lieber Code's treatment of occupation.

### The Code's context and its making

In the Code, Lieber entwined notions of humanity and order to forge a bold vision, now largely forgotten, of the future. He constructed a comprehensive, purposive system for the legal regulation of war, in which humanity was both a foundation and a progressive end product, yet, at the same time, was consciously designed as an instrument of order. Approaching Lieber and exposing his sense of humanity in occupation therefore requires some observations on methodology.

Allusions to humanity in the Code that Lieber prepared in the midst of the American Civil War cannot be lightly assumed to correspond to any sense in which the term is used today. The Code has had an enduring impact on the development of the law of occupation, but Lieber's sense of humanity and his sense of occupation significantly differ from all that was to follow his work. These are hard to discern without a broader inquiry. One must approach the Code as one item in a broad modernist theoretical – and ideological – manifesto consisting of Lieber's other published works, teaching, and correspondence.

Lieber never wrote a general treatise on international law or a topical tome on the laws of war. What we may read in the Code's provisions on occupation must come from the study of the Code's overall scheme and from other works that he authored. His letters contain useful telltales on his motives and reasoning.<sup>27</sup> His Columbia Law School lectures on the 'Law and usages of war' and pamphlets published during and after the Civil War often read as precursors to or a putative

24 A. W. Heffter, above note 19, pp. 220–221; translation by E. Benvenisti, above note 14, p. 630.

25 E. Benvenisti, above note 14, p. 631, observing that Heffter, who voiced a new principle of war limited by the need to re-establish peace, considered the occupant to have 'a legitimate expectation of acquiring sovereignty after a successful military campaign' forming the basis for the occupant's exercise of 'provisional authority over the territory also during the interim period between the end of hostilities and commencement of peace'.

26 Elsewhere, I trace this notion to Grotius: R. Giladi, above note 18, p. 169.

27 Lieber never published any commentary on the Code: James F. Childress, 'Francis Lieber's interpretation of the laws of war: General Orders No. 100 in the context of his life and thought', in *American Journal of Jurisprudence*, Vol. 21, 1976, pp. 34, 39–40.



commentary on the Code.<sup>28</sup> Finally, the Code draws heavily on Lieber's earlier works, most notably his *Manual of Political Ethics* (1838–1839).<sup>29</sup> These reveal the Code to be a product of a general and pre-existing ethical system, intellectual method, and political theory. They supply the insights necessary to decode Lieber.<sup>30</sup>

What likewise compels a broad inquiry is the aforementioned historiographical ambivalence to the Lieber Code. On the one hand, his contribution to the modern law of war is universally acknowledged, and 'founding father' designations are common. Lieber is credited for having authored the first modern codification of the laws of war, and is no less praised, by contemporaries and present commentators, for the 'spirit of humanity' that 'everywhere reigns' in the Code.<sup>31</sup> They note the Code's immense impact on the subsequent codification of the law of war, including occupation;<sup>32</sup> it inspired and gave impetus for private development of the law.<sup>33</sup> Others trace its visible imprint in the 1949 Geneva Conventions and the 1977 Additional Protocols.<sup>34</sup> Some point out that the question of occupation is the first addressed in the Code, others that a third of its 157 provisions concerns occupation.<sup>35</sup>

Other, progressive, accounts downplay the Code's humanizing effect. Many observe (erroneously, as I show below) that the Code was designed to deal with civil war and assume that it has limited relevance to the regulation of occupation, which is essentially an international armed conflict phenomenon.<sup>36</sup>

28 Francis Lieber, 'Law and usages of war' (1861–1862), Box 2, Folders 16–18, Milton S. Eisenhower Library, Johns Hopkins University, Baltimore, MD; I wish to thank the Library staff for their help.

29 Francis Lieber, *Manual of Political Ethics, Designed Chiefly for the Use of Colleges and Students at Law*, 1st edition, Little & Brown, Boston, 1838–1839.

30 Lieber's biography reveals too many irreconcilables to serve as a simple explanation for Code rules: Frank Freidel, *Francis Lieber: Nineteenth-century Liberal*, Baton Rouge, LA, Louisiana State University Press, 1947, pp. 320, 325; J. F. Childress, above note 27, p. 43.

31 J. C. Bluntschli, above note 7, p. 12; Theodor Meron, 'Francis Lieber's Code and principles of humanity', in *Columbia Journal of Transnational Law*, Vol. 36, 1998, pp. 269, 274; Elihu Root, 'Francis Lieber', in *American Journal of International Law*, Vol. 7, July 1913, p. 453; E. Nys, above note 16, pp. 379–380; R. R. Baxter, above note 5, p. 183; D. A. Graber, above note 7, p. 17; Silja Vöneky, 'Der Lieber's Code und die Wurzeln des modernen Kriegsvölkerrechts (Lieber and the evolution of the laws of war)', in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 62, 2002, p. 423.

32 The Code also had enduring impact on official practice: it was reissued in 1898, and served as the baseline for similar manuals: Thomas E. Holland, *The Laws of War on Land*, Oxford University Press, Oxford, 1908, pp. 72–73; D. A. Graber, above note 7, pp. 20 ff.

33 Bluntschli's 1866 *Das moderne Kriegsrecht der civilisirten Staaten als Rechtsbuch dargestellt* was 'little more than a paraphrase of General Orders No. 100': R. R. Baxter, above note 5, p. 249; E. Nys, above note 16, p. 358; Betsy Röben, *Johann Caspar Bluntschli, Francis Lieber und das Moderne Völkerrecht 1861–1881*, Nomos, Baden-Baden, 2003.

34 George B. Davis, 'Memorandum showing the relation between General Orders No. 100 and the Hague Convention with respect to the laws and customs of war on land', in E. Root, above note 31, p. 466; R. R. Baxter, above note 5, p. 171; and table in Richard Sallet, 'On Francis Lieber and his contribution to the law of nations of today', in Hans Werner Bracht et al., *Recht im Dienste der Menschenwürde: Festschrift für Herbert Kraus*, Holzner-Verlag, Würzburg, 1964, pp. 279, 286.

35 D. A. Graber, above note 7, p. 15.

36 T. E. Holland, above note 32, pp. 71–72; R. R. Baxter, above note 5, p. 235; E. Nys, above note 16, pp. 378, 381 (the Code 'contemplated a civil war'; 'Lieber attributed to the occupant the rights which American practice gave to him: it was more than the occupation of war, such as it had been constituted in Europe'); E. Benvenisti, above note 14, p. 640 (the 'Code did not address the question of sovereignty: in this

Lieber's terminology – such as 'martial law' – facilitates such views.<sup>37</sup> Some critique the Code's expansive treatment of military necessity and the 'extreme views of the rights of the military occupant over the inhabitants of occupied territory' that it embodied.<sup>38</sup> Others highlight the 'cardinal position assigned to the notion of order... [which] was so absolute that it appeared to be reified', implying the inferiority of humanitarian values.<sup>39</sup> Various accounts note the low authority of a private individual. The ensuing tension commends reading the Code's provisions against a broader context and free, if possible, from ideological filters other than Lieber's own.

Finally, approaching Lieber requires some familiarity with the Code's making. For present purposes, it may be recalled that his interest in the laws of war long preceded the Civil War; but the war was what provided Lieber, who started teaching international law at Columbia College in 1857,<sup>40</sup> with an opportunity to put his views on war and law into the service of the Union cause.<sup>41</sup> After several attempts to convince Washington of the necessity of codifying the laws of war, Lieber was appointed, with four generals, to a board tasked 'to propose amendments or changes in the Rules and Articles of War, and a Code of Regulations for the government of armies in the field, as authorized by the laws and usages of war'.<sup>42</sup> The Board left the laws of war to Lieber. He first proposed a 97-clause draft, requesting 'suggestions and amendments'.<sup>43</sup> This he revised, based on his own thoughts and some suggestions coming mainly from General Henry Halleck.<sup>44</sup> The new version was discussed in Washington; some changes were made,<sup>45</sup> but he

Civil War, it was not at issue'); George B. Davis, 'Dr. Francis Lieber's instructions for the government of armies in the field', in *American Journal of International Law*, Vol. 1, January–April 1907, pp. 13, 24.

- 37 R. R. Baxter, above note 5, p. 235. Lieber considered the term, used in earlier US practice, confusing: 'Much error and not a little mischief has arisen from the name. What is called Martial Law ought to be called Martial Rule: 'Martial law', handwritten note attached to 'Law and usages of war', above note 28, Box 2, Folder 18.
- 38 Percy Bordwell, *The Law of War between Belligerents: A History and Commentary*, Callaghan, Chicago, 1908, p. 74; Seddon to Robert Ould, 24 June 1863, in Richard S. Hartigan, *Lieber's Code and the Law of War*, Precedent, Chicago, 1983, p. 120 (Confederate critique).
- 39 Bernard Brown, *American Conservatives: The Political Thought of Francis Lieber and John W. Burgess*, Columbia University Press, New York, 1951, pp. 20–21.
- 40 F. Freidel, above note 30, p. 294. Lieber tried to teach a course on the laws of war at West Point in 1859; Frank Freidel, 'General Orders 100 and military government', in *Mississippi Valley Historical Review*, Vol. 32, March 1946, pp. 541–542.
- 41 F. Freidel, above note 30, pp. 342 ff. In 1863, Lieber co-founded a propaganda society: Frank Freidel, 'The Loyal Publication Society: a pro-Union propaganda agency', in *Mississippi Valley Historical Review*, Vol. 26, No. 3, December 1939, p. 359.
- 42 Lieber to Halleck, 7 December 1862, in R. S. Hartigan, above note 38, p. 84; War Dept. Adjutant General Office, Special Orders No. 399, 17 December 1862, in G. B. Davis, above note 36, p. 19.
- 43 Francis Lieber, *A Code for the Government of Armies in the Field as Authorized by the Laws and Usages of War on Land etc.*, February 1863; Lieber to Halleck, 20 February 1863, in Thomas S. Perry, *The Life and Letters of Francis Lieber*, Osgood, Boston, 1882, p. 330.
- 44 F. Freidel, above note 30, pp. 333–334; R. R. Baxter, above note 5, pp. 183–184.
- 45 'Transpositions were made, as well as curtailments, improvements, and a very few additions; but some things were left out which I regret, and two weak passages slipped [*sic.*] in. They are not mine': F. Lieber, cited in R. R. Baxter, above note 5, p. 185. On receipt of the final version, he wrote: 'the generals of the board have added some valuable parts; but there have also been a few things omitted, which I regret. This is natural': Lieber to Halleck, 20 May 1863, in R. S. Hartigan, above note 38, p. 108.

endorsed the final product without reserve.<sup>46</sup> Lincoln promulgated the Code in May 1863. It was largely the product of one man.

The Code's making clarifies that, though tasked with addressing the Civil War, Lieber authored a broader document. Many of its provisions bear the mark of the Civil War – both Lieber and Halleck were preoccupied, for different reasons, with the authority of military governors<sup>47</sup> – but there can be no doubt that Lieber sought to codify regular, inter-state wars. The evidence is conclusive: of the Code's ten sections, nine deal with 'regular war'; the last, 'Insurrection – Civil war – Rebellion', was not part of the February draft. It was added as 'something of an afterthought' and only at Halleck's insistence, based on instructions that he had previously issued.<sup>48</sup> Lieber 'derelished' the addition;<sup>49</sup> his '*projet*' was to have universal relevance, and so had to cover 'regular' war.<sup>50</sup>

Moreover, Lieber took care to clarify that the regular war institution of occupation could be imported to civil wars. The Code's rules were meant for regular war; but it explicitly foresees the 'partial or entire' discretionary 'adoption of the rules of regular war to war rebels' (Article 152). Among the rules that could be so adopted for rebels was that concerning 'proclaiming Martial Law in their territory' (Article 153). 'Martial Law' was Lieber's codeword for the occupant's military authority. He took equal care to emphasize that doing so or any 'act sanctioned or demanded by the law and usages of public war between sovereign belligerents' did not imply recognition of the rebels (Article 153).

46 Thus, 'my little code' or, affectionately, 'the old hundred': Lieber to Halleck, 20 May 1863, and Lieber to Thayer, 12 January 1871, in T. S. Perry, above note 43, pp. 333–334, 406.

47 As the Union was shifting from leniency towards propertied secessionists – abandoning prior assumptions about support for Southern leadership – to destruction of Confederate economic bases: Mark Grimsley, *The Hard Hand of War: Union Military Policy Toward Southern Civilians, 1861–1865*, Cambridge University Press, Cambridge, 1995, pp. 149 ff. See F. Freidel, above note 40, p. 548 (the Code provided Union Generals with a shield from both the lashing of Republican Radicals and critique of unwarranted harshness). The question of the authority of military governors was tied to the treatment of slaves, the source of divergent Union practices: Francis Lieber, 'The duty of provisional governors', in *New York Evening Post*, 16 June 1862, p. 1.

48 F. Freidel, above note 30, p. 334; F. Freidel, above note 40, p. 552. Lieber thought that civil war exceeded the Board's mandate: Lieber to Halleck, 20 February 1863, in R. R. Baxter, above note 5, p. 184: 'I have said nothing of rebellion and invasion of our country with reference to the treatment of our own citizens'; the response was: 'The civil war articles should by all means be inserted': J. F. Childress, above note 27, pp. 38–39.

49 '[P]robably because he did not wish the "Code" to be capable of the construction that it was applicable only to civil war and not to wars between states': R. R. Baxter, above note 5, pp. 184, and 249. F. Freidel, above note 40, p. 550 ('applicable to all international wars in which the United States might be involved, with the exception of the final section [on] . . . rebellions. The basic premise of these earlier sections was that the army acquired its authority over occupied territory from international rather than municipal law. Limitations upon it could come only from that source'). Lieber hoped that the Code would 'be adopted as a basis for similar works by the English, French and the Germans. It is a contribution of the United States to the stock of common civilization': Lieber to Halleck, 20 May 1863, in T. S. Perry, above note 43, pp. 333–334; D. A. Graber, above note 7, pp. 19–20; J. F. Childress, above note 27, p. 35 (not 'merely a product of or excessively oriented toward the Civil War'); Rosemary Abi-Saab, 'Humanitarian law and internal conflicts: the evolution of legal concern', in Astrid J. M. Delissen and Gerard J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honour of Frits Kalshoven*, M. Nijhoff, Dordrecht, 1991, pp. 209–211.

50 See above, note 36.

The Code, as indicated above, was largely the product of a single author.<sup>51</sup> What is more, Lieber's earlier writings are manifest in many of its provisions and give crucial hints as to the Code's interpretation.<sup>52</sup> It was original in many respects, not least in its integrative method.<sup>53</sup> Bluntschli – who transposed the Code to German – hailed Lieber's personal triumph in the scholarly synthesis of 'these opposing tendencies', positive and natural law, the 'union of the philosophical and historical methods'.<sup>54</sup> Outside the Code, Lieber indiscriminately quoted historical precedent, both classical and modern, but regularly shared with his reader an explicitly modern reasoning for the rules that he discussed.

The Code's enduring impact owes much to Lieber's synthetic methodology. For all its flaws in style and organization, it presents 'a mature and logically consistent system, developed and systematized over many years of thinking and teaching'.<sup>55</sup> He did not devise rules *ad hoc*, but rather based them on his own systematic interpretation of war and international law'.<sup>56</sup> As such, the Code cast many of the forms of today's law of war, its methods, philosophy, and ideology.

- 51 One may question the Code's validity. Did it constitute a 'codification' of pre-existing laws and usages and was thus authoritative only to the extent that it reflected positive law? Or was it 'progressive development' of the law of war, and so of diminished authority? The authority of the enterprise of a private individual can equally be challenged: see e.g. J. F. Childress, above note 27, p. 39. Yet the role that Lieber and his contemporaries assumed as the heralds of the modern law of nations, an 'alliance of leading international jurists from all civilized nations, for the purpose of working harmoniously together, and thus serving as an organ for the legal consciousness of the civilized world', challenges distinctions between codification and development, positive and natural law: J. C. Bluntschli, above note 7, p. 14. The formula describes the object of the Institut de Droit International, whose founding was credited to Lieber: Martii Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, Cambridge University Press, Cambridge, 2002, pp. 38 ff. See also Betsy Baker Røben, 'The method behind Bluntschli's "modern" international law', in *Journal of the History of International Law*, Vol. 4, 2002, p. 249; B. Røben, above note 33, p. 241 ('both sought to show that international law was binding because based on shared humanity, and that this foundation necessarily led to legal protections for individual or human rights, in war and in peace'). See David W. Glazier, 'Ignorance is not bliss: the law of belligerent occupation and the U.S. invasion of Iraq', in *Rutgers Law Review*, Vol. 58, No. 1, 2005–2006, pp. 121, 129. Later generations did treat the Code as authoritative. Ironically, Lieber's work inspired and triggered diplomatic codification; for prudential and practical reasons, he himself preferred private codifications by scholars. See E. Root, above note 31, pp. 463–464; J. F. Childress, above note 27, p. 39; F. Lieber, above note 29, p. 651; E. Nys, above note 16, p. 110; Lewis R. Harley, *Francis Lieber: His Life and Political Philosophy*, Columbia University Press, New York, 1899, p. 142.
- 52 J. F. Childress, above note 27, *passim*; B. Røben, above note 33, *passim*; R. R. Baxter, above note 5, *passim*; F. Freidel, above note 30, p. 333.
- 53 See P. Bordwell, above note 38, p. 74: Lieber 'followed too closely the hard precedent of earlier wars'. Lieber wrote: I 'was obliged to spin the whole out of my own head following the Law of Nations and its principles[:] History Reason and Love of Justice and Humanity and conscience'. Lieber to Bates, 25 February 1863, in B. Røben, above note 33, p. 128. He claimed: 'nothing of the kind exists in any language. I had no guide, no groundwork, no text-book... [I was] laying down for the first time such a code... Usage, history, reason, and conscientiousness, a sincere love of truth, Justice, and civilization, have been my guides...': Lieber to Halleck, 20 February 1863, in T. S. Perry, above note 43, p. 330.
- 54 J. C. Bluntschli, above note 7, pp. 8–9; Charles B. Robson, 'Francis Lieber's theories of society, government, and liberty', in *Journal of Politics*, May 1942, Vol. 4, No. 2, pp. 227 ff; see B. Røben, above note 33, p. 250. E. Nys, above note 16, p. 107, was less benign ('an eclectic... willing to sacrifice either of... methods... to derive profit from both').
- 55 R. R. Baxter, above note 5, p. 250.
- 56 J. F. Childress, above note 27, p. 69.

Above all, it rationalized the modern law of war, embedding in its provisions the author's distinct sense of humanity.

## Lieber's sense of humanity

Lieber's occasional allusions to 'humanity' in the Code and elsewhere often give rise to his appraisal as an early architect of the 'humanity in war' project. Yet, reading the Code as a whole, in light of his other works, reveals a unique sense of humanity that forms an integral part of an aggregate theory encompassing the individual, the nation-state, and international society. This sense of humanity compels a revision of how the Code (and the law of war) is historicized.

### Humanity as condition and as vocation: the individual, society, and the state

Lieber's essays reveal a dual sense of humanity: on the one hand, an observation on conditions of human nature from which emanates a theory of the individual, society, the state, and international society; on the other, a civilizational vocation to which individuals and their organizations are subordinate. Lieber started with the individual, but framed this discussion in societal and institutional contexts. His man<sup>57</sup> was a rational – hence an ethical and 'jural' – being, who 'consciously work[s] out his own perfection; that is, the development of his own humanity'.<sup>58</sup> Rationality, for Lieber, was a moral faculty to distinguish between good and evil; as such, it attested to man's humanity. Humanity expressed itself in the existence of human society. Society, embedded in the human nature (that is, in rationality), was therefore a necessary attribute of humanity; it was also a necessary instrument for achieving the 'great ends of humanity' at individual and collective levels alike.<sup>59</sup> Humanity, then, was also a vocation.

Liberty was one of the highest ends of society; it stemmed from the condition of humanity and fulfilled the vocation of humanity.<sup>60</sup> Lieber recognized some natural rights but these were neither predicated nor did they express a humanist perception of the inherent dignity of the individual or a theological interpretation of creation in god's image.<sup>61</sup> Rather, Lieber was concerned with civil liberty, a necessary, natural attribute of man as a member of a jural polity.<sup>62</sup> Civil liberty consisted of protection against interference with the rights of individuals in society.<sup>63</sup> The greatest danger to liberty was absolutism of any kind, 'whether

57 'Man' and 'mankind' in this section reflect Lieber's own usage.

58 F. Lieber, above note 29, p. 63 (development).

59 *Ibid.*, pp. 3 (rationality) and 176–179 (society).

60 Liberty is a condition of 'free agency as a member of society [and] an ingredient of ... humanity': *ibid.*, p. 205.

61 F. Freidel, above note 30, pp. 152 ff; C. B. Robson, above note 54, *passim*.

62 B. Röben, above note 33, p. 247.

63 Francis Lieber, *On Civil Liberty and Self-government*, 1st edition, Lippincott & Grambo, Philadelphia, 1853, Vol. 1, p. 34 (meaning of civil liberty).

Monarchical or Democratic, intelligent and brilliant or coarse'.<sup>64</sup> Rampant individualism of rights, unencumbered by corresponding obligations, or unchecked majority rule were as dangerous as tyranny.<sup>65</sup> Man's societal nature was a source for individual and collective rights and obligations; not as a logical corollary, but as a moral-normative prescription.<sup>66</sup>

Lieber's theory of liberty rejected the French model of protection of individual rights as devoid of a 'system of institutions'. Hailing the organic growth of institutions in England, his notion of liberty was wedded to, and preconditioned on, institutional frameworks and regulation.<sup>67</sup> Thus, 'no liberty is possible without institutional polity'; he identified self-government, a notion embodied in the modern nation-state, as the institutional polity of modern times.<sup>68</sup> The modern nation-state was the principal institution necessary to safeguard civil liberty and meet the demands of modern conditions. The state was inherent in man's humanity and 'necessary to his nature'; Lieber therefore rejected the social contract and the notion of the state as a necessary evil.<sup>69</sup> Rather, the state was indispensable, through protecting liberty, to advance the vocation of humanity, individual and collective. That was the role of the state; it was instrumental to humanity:<sup>70</sup>

The state is aboriginal with man; it is no voluntary association, no contrivance of art, or invention of suffering, no company of shareholders; no machine, no

64 Francis Lieber, *Fragments of Political Science on Nationalism and Inter-Nationalism*, Scribner, New York, 1868, p. 5 (absolutism). Absolutism was 'the lowest phase in politics, and democratic absolutism the worst of all, and . . . no liberty is possible without institutional polity': Lieber to Mittermaier, 28 November 1857, in T. S. Perry, above note 43, p. 296.

65 Individualism 'would reduce society to loathsome despotism': F. Freidel, above note 30, pp. 152–154. Lieber rejected Rousseau's 'divine right of the majority' – 'inarticulated, unorganized, uninstitutional majority' – as 'almost invariably false in all vast and high spheres': F. Lieber, above note 63, p. 75.

66 F. Lieber, above note 29, p. 181 ('The state existing of necessity, and it being each man's natural society, it follows that each member singly owes some duties to each member collectively, and, of course, all members collectively have certain rights (and, consequently, duties) toward each man singly'); F. Lieber, above note 63, p. vi ('no right without a parallel duty, no liberty without the supremacy of the law, and no high destiny without earnest perseverance . . . no greatness without self-denial').

67 'By an "institution" Lieber meant any system of relationships among a number of individuals which had sufficient vitality to generate its own rules and organs': C. B. Robson, above note 54, p. 247, who notes that Lieber nonetheless focused mainly on the common law (or the courts), local self-government, and national representation (*ibid.*, p. 244). Institutional liberty therefore meant regulated liberty. See also F. Lieber, above note 63, p. 256.

68 F. Lieber, above note 63, pp. 302–303 (system of institutions); Lieber to Mittermaier, 28 November 1857, in T. S. Perry, above note 43, p. 296 (polity); F. Lieber, above note 63, p. 5 (state); C. B. Robson, above note 54, p. 242.

69 F. Lieber, above note 63, pp. 5 and 8 ('Civil Liberty resting on Institutional Self-Government is the high political calling of this period'; the nation is the only form 'adequate' to meet 'the high demands of modern civilization'). F. Lieber, above note 29, p. 179; F. Lieber, above note 63, Vol. 2, p. 17 (government consequence of 'jural nature of society and of man'). Lieber also rejected the 'state of nature': Jeremiah Hackett, 'Lieber's moral philosophy: freedom and institution', in Charles R. Mack and Henry H. Lesesne (eds), *Francis Lieber and the Culture of the Mind*, South Carolina University Press, Columbia, SC, 2005, p. 107.

70 F. Lieber, above note 29, p. 176 (i.e. supply 'protection of each member as that being who cannot otherwise but obtain conjointly with others, or through and in society his great ends of humanity – those ends which are necessary, and yet cannot be obtained singly').

work of contract by individuals who lived previously, out of it; no necessary evil, no ill of humanity which will be cured in time and by civilisation; no accidental thing, no institution above and separate from society, no instrument for one or a few – the state is a form and faculty of mankind to lead the species toward perfection – it is the glory of man.<sup>71</sup>

The role assigned to the state underpins Lieber's views on authority, law, obedience, and revolution. It equally controls his approach to suffering in war, for Lieber left little room for the individual in the 'Leviathan he had conjured up [which] might absorb all . . . social relationships (and thus . . . all the media for the realization of individuality) under its "protecting" wings'.<sup>72</sup> In essence, he reconciled liberty and nationalism by instrumentalizing both the individual and the state to the pursuit of modern progressive civilization, of humanity-as-vocation. Neither the state nor the individual was supreme; both were subordinate to that humanity's vocation. The state

always remains a means, yet it is the most indispensable means to obtain the highest end, that man be truly man. . . . On the one hand, the individual stands incalculably higher than the state; for that he may be able to be all that he ought to be, the state exists. . . . On the other hand, the state stands incalculably above the individual, is worthy of every sacrifice, of life, and goods, of wife and children, for it is the society of societies, the sacred union by which the creator leads man to civilization, the bond, the pacifier, the humanizer, of men, the protector of all undertakings in which and through which the individual has received its character, and which is the staff and shield of society.<sup>73</sup>

## Nationalism and inter-nationalism

If reconciling liberty and nationalism imparts the vocational, progressive, and un-individual nature of Lieber's sense of humanity, the way that he squared off nationalism and inter-nationalism (the dash is crucial) and the role that he assigned to inter-national law underscore the primacy of order in his sense of humanity. He saw no tension between nationalism and inter-nationalism; on the contrary, he considered the existence of national states a necessary condition for inter-national order in which civilization can advance. Thus, one of the 'main characteristics of the political development' marking modern times was:

the decree that has gone forth that many leading nations flourish at one and the same time, plainly distinguished from one another, yet striving together, with

71 *Ibid.*, pp. 183–184 ('The state does not absorb individuality, but exists for the better obtaining of the true ends of each individual, and of society collectively').

72 C. B. Robson, above note 54, p. 237.

73 F. Lieber, above note 29, pp. 180–181; see also F. Lieber, above note 63, p. 60.

one public opinion, under the protection of one law of nations, and in the bonds of one common moving civilization.<sup>74</sup>

The very inter-national order – the ‘multiplicity of civilized nations [with] their distinct independence’ – was one of ‘the great safeguards of our civilization’. Its virtue was its ability to create – and preserve – the conditions necessary to meet the demands of the age, the quest for ‘the Spreading Progress of our Kind’. The modern inter-national order – the existence of many nation-states – was a guarantee against a total war that would encompass and consume European civilization entirely, or the threat of hegemony, an ‘enslaving Universal Monarchy’.<sup>75</sup> ‘Modern nations of our family’, members of ‘one common moving civilization’, were bonded by ‘their increasing resemblance and agreement’, which produce legal, cultural, scientific, and political unities.<sup>76</sup> Inter-nationalization was not a fixed condition but an ongoing, self-preserving process, whose end result was not the ‘obliteration of nationalities’ (these were requisite for a ‘moving civilization’), for, if that happened, ‘civilization would be seriously injured. Hegemonies of “ancient times” were short lived. Once declining, they never recovered . . . Modern nations by contrast are long-lived, and possess recuperative energy’.<sup>77</sup>

### Inter-national law and the vocation of humanity

For Lieber, the modern inter-national order was as expressive of man's humanity and his faculty of reason as were the nation-state and modern society. Humanity, as an observed condition, gave rise to humanity as a calling. The existence of the nation-state and of a modern inter-national society was innate in and expressive of human nature. National and inter-national societies were, on different scales, two manifestations of the same attribute, two applications of the same principle of self-government; both were geared towards the same vocation.<sup>78</sup> And if, within a state, it was the role of government to preserve order by supplying protection against undue interference with liberty, protection against interference in the inter-national society was the role of inter-national law.<sup>79</sup> Inter-national law was essentially equivalent to

74 F. Lieber, above note 64, pp. 19–20 (other forms of order ‘obsolete’: ‘universal monarchy . . . ; a ‘single leading nation; an agglomeration of States without a fundamental law, with the mere leadership or hegemony of one State or another, which always leads to Peloponnesian wars; regular confederacies of petty sovereigns; . . . all these are obsolete ideas, wholly insufficient for the demands of advanced civilization, and attempts at their renewal have led and must lead to ruinous results’).

75 *Ibid.*, p. 21 (multiplicity), p. 20 (safeguard, monarchy, a clear reference to Napoleonic empire), p. 5 (progress).

76 *Ibid.*, pp. 19–21; Francis Lieber, ‘Twenty-seven definitions and elementary positions concerning the law and usages of war’ (1861), manuscript, Box 2, Folder 15, § 8 (in the Eisenhower Library, above note 28).

77 F. Lieber, above note 64, p. 21.

78 A fundamental, ‘all-pervading law of inter-dependence, without which men would never have felt compelled to form society . . . inter-dependence which like all original characteristics of humanity, increases in intensity and spreads in action as men advance, this divine law of inter-dependence applies to nations quite as much as to individuals’: *ibid.*, p. 22.

79 *Ibid.* (‘Without the law of nations . . . which . . . is at once the manly idea of self-government applied to a number of independent nations in close relation with one another, and the application of the fundamental



government: protecting and restraining nation-states, it was an empire overseeing their relations.<sup>80</sup> Rather than a product of sovereign states, law was the source of their sovereignty, their protection and restraints on their conduct. Rules of modern inter-national law, innate in human nature, drew directly from the fact of modern inter-national order and aimed at preserving it.<sup>81</sup> Expressing the condition of humanity, their role was to promote its vocation.<sup>82</sup>

This progressive ideology is explicit in the Code. Lieber's humanity-as-vocation required 'the existence, at one and the same time, of many nations and great governments related to one another in close intercourse' (Article 29). This was a fundamental feature of a stable, regenerative order, which was necessary to preclude the emergence of short-lived hegemonies and total war. Such order guaranteed a healthy, constant competition, catalyzing human progress to counter the challenges of modern conditions. This ideology formed the basis for Lieber's approach to peace and war.

## War and peace

Humanity, as both an observed condition and a vocation, pervades Lieber's theory of war and the law that he devised to regulate it. Though he preferred peace to war, Lieber rejected pacifism and did not consider war as necessarily evil; he recognized the suffering that it brings, but often expressed admiration for war's virtues.<sup>83</sup> In his theory, war was a force that could serve virtue. Though it caused suffering, war might have a moralizing, civilizing effect on individuals and nations.<sup>84</sup> War could bring nations 'to their senses and makes them recover themselves'; if just, it often

law of Good Neighborhood, and the comprehensive law of Nuisance, flowing from it, to vast national societies, wholly independent, sovereign, yet bound together by a thousand ties').

- 80 '[C]ivilized nations have come to constitute a community of nations, and are daily forming more and more, a commonwealth of nations, under the restraint and protection of the law of nations, which rules, *vigore divino*. They draw the chariot of civilization abreast . . .': L. R. Harley, above note 51, p. 142; Lieber Code, Art. 30; the notion of law as empire, entwining protection and restraint, appears in the Martens clause: Preamble, 1899 Hague Regulations.
- 81 F. Lieber, above note 76, § 20 ('the civilized nations of our race form a family of nations. If members of this family go to war with one another, they do not thereby divest themselves of the membership – neither toward the other members, nor wholly toward the enemy'); B. Röben, above note 33, pp. 246–247.
- 82 Lieber to Sumner, 27 December 1861, in T. S. Perry, above note 43, p. 324 ('International law is the greatest blessing of modern civilization, and every settlement of a principle in the law of nations is a distinct, plain step in the progress of humanity').
- 83 He dismissed peace societies and their 'principle of benevolence' seeking 'to prohibit all violent contest, even wars of defence and resistance, even . . . to acquire liberty': F. Lieber, 'Law and usages of war', above note 28, no. I; F. Lieber, above note 29, pp. 632–635. He admitted being 'no vilifier of war under all circumstances': Lieber to Hillard, 18 April 1854, in T. S. Perry, above note 43, pp. 270–271; J. F. Childress, above note 27, p. 44; F. Friedel, above note 30, p. 223. His approach to war is manifest in his war advocacy: F. Friedel, above note 30, p. 319; Francis Lieber, 'The disposal of prisoners', in *New York Times*, 19 August 1861, p. 5.
- 84 F. Lieber, above note 29, pp. 634 ff and 649 (wars historically disseminate civilization and cause 'exchange of thought and produce and enlargement of knowledge'); F. Lieber, above note 63, p. 26 ('Blood has always flowed before great ideas could settle into actual institutions, or before the yearnings of humanity could become realities. Every marked struggle in the progress of civilization has its period of convulsion'). J. F. Childress, above note 27, pp. 43–44.

catalyzed progress.<sup>85</sup> By the same token, long peace could have corruptive, stifling effects.<sup>86</sup>

Both war and peace had an inter-national function, and both were to be assessed in reference to that function. Lieber's imperative for modern times was not perpetual peace but the dynamic process of mankind's progress and the advance of civilization.<sup>87</sup> The value of peace and war depended on their effect on the stability of the modern inter-national order as a requisite for constant competition, their contribution to a dynamic interaction producing progress and fulfilling humanity's vocation. Peace was crucial to this order and its stability; yet, at times, peace might cause the inter-national society to wane, degenerate, or disintegrate; some wars might therefore preserve or regenerate the inter-national order. War – a 'human contest'<sup>88</sup> – was a necessary component of a dynamic process of human advance.<sup>89</sup>

As part of inter-national law, Lieber's law of war was aimed at neither states nor individuals, but at enabling and preserving the dynamic inter-national order as a prescription of human progress. For Lieber, war was neither cause nor symptom of an anarchical international society, but an instrument of order. It reinforced stability and produced 'a new set of obligations between the belligerents'. War was not in itself immoral; its morality drew largely on its service to order.<sup>90</sup>

War's service to order and the vocation of humanity explains both Lieber's recognition of a *droit de guerre* of states and the restraints that he imposed on that right.<sup>91</sup> He identified three types of restraints on war: the first was rooted in just war theory; the second, in the relation of war to peace; and the third, in the public character of modern war. All three flow from the instrumental nature of modern war, not its innate immorality, which he rejected. In Lieber's theory and law of war, it was the instrumental nature of war that generated restraints on its conduct. Such restraints were humanitarian, but they referenced progressive, vocational humanity and the order that it required.

### *Just war*

For Lieber, war was neither the realist's fact of force nor the humanist's vestige of barbarity requiring charitable moderation through law, but rather a moral and legal

85 F. Freidel, above note 30, pp. 299, 305.

86 'Prolonged peace and worldly security and well-being had thrown us into a trifling pursuit of life, a state of un-earnestness, had produced a lack of character, and loosened many a moral bond': F. Lieber, cited in R. R. Baxter, above note 5, p. 178; F. Lieber, above note 29, pp. 645–646.

87 *On Perpetual Peace* was thus one of Kant's 'weaker productions': F. Lieber, above note 29, p. 653.

88 F. Lieber, above note 47; Lieber Code, Art. 15; J. F. Childress, above note 27, pp. 47–48.

89 Captured by an 1872 eulogy: 'he applauded the success of Germany, his first homeland but he did not desire for it an unlimited empire, and he was deeply impressed with the advantages which would result to civilization from the friendly rivalry [*rivalité pacifique*] of several great nations': Gustav Rolin-Jaequemyns, 'Nécrologie Francois Lieber', in *Revue de droit international et de législation comparée*, Vol. 4, 1872, pp. 700, 704.

90 F. Lieber, above note 29, pp. 640 ff.; R. R. Baxter, above note 5, pp. 175–176 (obligations).

91 'The law of nations allows every sovereign government to make war upon another ...': Lieber Code, Art. 67.

procedure ‘waged with justice not less than by force’.<sup>92</sup> His version of just war tradition had the basic premise that, to be just, war must have a just cause and that it was necessary to pursue that cause:

A just war implies that we have a just cause, and that it is necessary: for war implies sufferance in some parties, and it is a principle of all human actions that, in order to be justified in inflicting sufferance of any kind, we must not only be justified, but the evil must be necessary.<sup>93</sup>

A just cause was insufficient; circumstance must render it necessary to pursue it.<sup>94</sup> As is often the case with just war doctrines, neither Lieber’s criteria nor his examples of just causes produce a sufficiently close, objectively workable category.<sup>95</sup> Yet he did not fall into the tradition’s most obvious snare, elegantly avoiding the issue of objective/subjective assessment of justness: ‘there are wars where the right is on both sides’; in other words, ‘both sides in a war may be objectively right’.<sup>96</sup>

Restraints in war had little to do with the justice or injustice of the cause *per se*. Justice or injustice of cause was not the source of obligations towards the enemy, nor did it mandate inhumane treatment. Article 67 of the Lieber Code states that:

The law of nations allows every sovereign government to make war upon another sovereign state, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant.

This statement on the equality of belligerents cannot, however, be construed as insulating the manner of fighting from war’s causes. On the contrary, Lieber saw a direct nexus between the right to wage modern war and obligations concerning means and methods employed in its pursuit. For him, modern war was instrumental, *ad bellum* and *in bello* alike; its instrumental character was the basis for restraints on both recourse to war and the manner of fighting. As Article 30 provides,

[e]ver since the formation and coexistence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defense against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor.<sup>97</sup>

92 F. Lieber, cited in R. R. Baxter, above note 5, p. 178.

93 F. Lieber, above note 29, p. 635.

94 See J. F. Childress, above note 27, p. 45.

95 F. Lieber, above note 29, pp. 653–656, enumerating just causes.

96 Lieber to Von Holtzendorff, 20 May 1872, in T. S. Perry, above note 43, p. 424; J. F. Childress, above note 27, p. 45.

97 F. Lieber, above note 76, § 14 (‘War being a physical contest, yet man remaining forever a moral and a rational being, and peace being the ultimate object of war, the following four conditions result: . . . b. All means to injure the enemy so far as [they?] deprive him of power to injure us or to force him to submit to the conditions desired by us are allowed to be resorted to, but c. Only so far as necessary for this object . . .’).

While the rules apply to all belligerents, for Lieber the causes and aims of the war were highly relevant to the determination of legality of conduct *in bello*. His law of war imposed limits on the manner of waging war by a belligerent as was necessary to the accomplishment of its war aims: 'I must injure him as enemy, that is, so far as he is there to oppose me in obtaining the ends which I consider as the next object of the war'.<sup>98</sup> The justice or injustice of the cause was irrelevant, but the nature of the cause dictated the scope of what was permissible.

Modern war was instrumental: not 'its own end, but the means to obtain great ends of state, or to consist in defense against wrong'.<sup>99</sup> For Lieber, those 'great ends' were a major source of restraint on the waging of war: ends limited permissible violence to what was necessary for victory. If war was instrumental, so was the right to wage war; in consequence, the Code permitted belligerents only such means, methods, and practices as were necessary for meeting their war aims, but proscribed those that were not (Article 68).<sup>100</sup> Much like today's distinction between *jus ad bellum* and *jus in bello*, the rules were the same for all belligerents; unlike current doctrine, the content and detailed application of the rules, *per* Lieber, varied between belligerents, depending on their respective war aims.

Lieber's notion of just war implies that human suffering may be necessary and justified by a just and necessary cause.<sup>101</sup> It also implies that constraints on the manner of fighting were not necessarily or directly concerned with the mitigation of human suffering. Moreover, the justness of a cause itself was not the source of obligations in war, even if the cause of war – war's instrumentality – was relevant to determining the legality of the manner of pursuing war and, presumably, to what was humane in war. This raises the question of the purpose of and basis for restraint in war. In both cases, the answer has to do with war's instrumental nature.

### *War and peace as instruments of order*

The right to wage war, and the right to choose the means in war, were also constrained by war's instrumentality to the modern inter-national order. Since war could preserve and invigorate the dynamic inter-national society in its march of progress, it was neither antithetical to civilization nor a moral abnormality, but only an exception to the 'normal state of civilized society' – that is, peace.<sup>102</sup> Departures from peace, however, are temporary. To be moral and justifiable, to serve its international public function, war had to be geared towards return to the normal order of things: 'the ultimate object of the war . . . among civilised nations is always peace',<sup>103</sup> so that 'Peace of some sort must be the end of all war – a return to the normal state.

98 F. Lieber, above note 29, p. 658.

99 F. Lieber, above note 76, § 5.

100 Lieber Code, Art. 68: 'The destruction of the enemy in modern war, and, indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war. Unnecessary or revengeful destruction of life is not lawful'.

101 See quote above at note 92.

102 F. Lieber, above note 76, § 1 ('Peace is the normal state of civilized society. War is the exception').

103 F. Lieber, above note 29, p. 658.

They who would carry on war for its own sake are enemies to civilization and to mankind'.<sup>104</sup>

Modern war, as the destruction it wrought and the suffering it caused, drew its very legitimacy from its service to that overarching goal: peace, not as its own end, but as an instrument of order, progress, and civilization. When Lieber stated that 'peace is the end of war', he did not merely describe the formal practice of terminating wars in a treaty of peace, but rather commented on war's legitimacy.<sup>105</sup> War's exceptional legitimacy drew on its instrumentality to order. Lieber therefore used 'return to peace' as a restrictive yardstick of war's legitimacy *in bello*. As an instrument of order, the conduct of war was constrained by the degree to which it facilitated (or jeopardized) the achievement of peace: thus, military necessity 'in general . . . does not include any act of hostility which makes the return to peace unnecessarily difficult' (Article 16).<sup>106</sup> Today, we draw law's legitimacy from its role in facilitating the resumption of peace;<sup>107</sup> for Lieber, return to peace was a yardstick of legality but at the same time legitimized war – and its more vigorous pursuit.

For, at the same time, the instrumentality of war to inter-national order legitimized and required the energetic pursuit of war. This notion, prevalent in Lieber's writing throughout his life, underscores in Article 29 (succinctly containing Lieber's theory on the nexus between the inter-national order), the instrumentality of war and peace, and *in bello* rules:

Modern times are distinguished from earlier ages by the existence, at one and the same time, of many nations and great governments related to one another in close intercourse. Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace. The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.

The nexus to order is distinct and unequivocal; short, intense wars are a surety against protracted suffering once war breaks out:

being an exceptional state of things, the shorter . . . [war] is the better; and the intenser it is carried on, the shorter it will be. The gigantic wars of modern times are less destructive than were the protracted former ones, or the unceasing feudal turbulence . . .<sup>108</sup>

Moreover, they guarantee the scarcity of war. Lieber advised, on a point of morality: 'First, settle whether the war be just; if so carry it out vigorously; nothing diminishes the number of wars so effectually.'<sup>109</sup>

104 F. Lieber, above note 76, §§ 4, 14. See also Lieber Code, Art. 29, considered below.

105 F. Lieber, above note 29, pp. 661–662.

106 *Ibid.* (armistice violations censured); Lieber Code, Arts. 11, 15, 30 (faith in warfare crucial to resumption of peace).

107 Marco Sassòli, Antoine A. Bouvier, and Anne Quintin, *How Does Law Protect in War*, 3rd edition, ICRC, Geneva, 2011, Vol. 1, p. 442.

108 F. Lieber, above note 29, p. 660; F. Lieber, above note 76, § 19. This and similar statements on the nature of modern war have without doubt proven fallacious.

109 F. Lieber, above note 29, p. 661.

This prescription encapsulates Lieber's sense of humanity. If justified and required at all, greater violence is not only just but also meritorious as a humanitarian imperative: vigorously pursued wars are, in Article 29, 'better . . . for humanity'.<sup>110</sup> Albeit exceptional, war is required for preserving the modern international order; because it is exceptional, it must be limited to that which is necessary to its conclusion. When Lieber references humanity, he addresses a collective condition, or vocation, of humankind, not a standard measuring the position of individuals.<sup>111</sup> The humanitarian imperative that emerges from the instrumentality of war to order is war's finality.

### *The public character of modern war*

Third, Lieber drew restraints on the instrumental conduct of modern war from its public character. This, too, drew heavily on the relationship between nationalism and inter-nationalism. The entirety of Lieber's work on war demonstrates a deliberate effort to limit the legal institution of war, *ad bellum* – and, consequently, war rights, *in bello* – to a class of participants. He explicitly rejected as illegitimate uncontrolled war over fief, creed, or throne; violence for private ends; and war controlled by religious or medieval class ethics.<sup>112</sup> Rather, through a pervading distinction between public and private war, he reconstructed war to fit modern conditions and the needs of the nation-state.<sup>113</sup>

Thus, the Code addresses 'the law and usages of public war between sovereign belligerents' (Article 153); war is defined only as 'public war' – 'a state of armed hostility between sovereign nations or governments'.<sup>114</sup> The public aspect of modern war served Lieber to impose further restraints on the waging and the manner of war, for it narrowed the class of just causes and legitimate war aims, and so, too, the scope of legitimate destruction. Permissible injury to the enemy flows from 'that which serves the public good, and what is not allowed is that which serves private ends'.<sup>115</sup> The collective, public character of war restrains its conduct but also justifies suffering and destruction:

I have not the right to injure my enemy privately, that is, without reference to the general object of the war, or the general object of the battle. We do not

110 'I am not only allowed . . . but it is my duty to injure my enemy, as enemy, the most seriously I can, in order to obtain my end. . . . The more actively this rule is followed out the better for humanity, because intense wars are of short duration. If destruction of my enemy is my object, it is not only right, but my duty, to resort to the most destructive means' (*ibid.*, p. 660).

111 See, for example, the discussion following note 81, above.

112 Lieber Code, Art. 30, rejects past 'conventional restriction of the modes adopted to injure the enemy'; F. Lieber, above note 29, pp. 660–661 (derision for chivalry-based limitations); F. Lieber, above note 76, § 12 ('Wars and battles are not duels, nor appeals to the deity to decide by the award of victory who is right').

113 Consider, in this respect, the language of Lieber Code, Arts. 20, 29–30, 67–68. Lieber was not the first to make the distinction between public and private war; but he asserted its consequences to the fullest, harnessing law to the requirements of the national age.

114 Lieber Code, Arts. 11, 15, 46.

115 James T. Johnson, 'Lieber and the Theory of War', in C.R. Mack and H.H. Lesesne, above note 69, pp. 61–63.

injure in war, in order to injure, but to obtain the object of war. All cruelty, that is, unnecessary infliction of suffering, therefore, remains cruelty as among private individuals. All suffering inflicted upon persons who do not impede my way, for instance surgeons, or inoffensive persons, if it can possibly be avoided, is criminal; all turning the war to private ends... as, for instance, the satisfaction of lust; the unnecessary destruction of private property is criminal... for I do not do it as public enemy, because it is not serviceable to the general object of war, it is not use, but abuse of arms, which, nevertheless, I only carry in consequence of that public war.<sup>116</sup>

Just causes are reasons of state; wars are 'but the means to obtain great ends of state' (Article 30); therefore, only public ends can justify war and give rise to war rights. This public instrumentality of war is crucial to deciphering the 'public enemy' status and treatment of non-combatants (or 'noncombatants', as Lieber wrote the term) in the Code; we shall return to it shortly.

Deriving restraints from the public character of modern wars underlines the revolutionary currents in the work of an ostensible conservative.<sup>117</sup> Rather than an inadvertent servant of the old European regime, Lieber here appears as a disciple of Edmund Burke and a voluntary draftsman of international order dedicated to consolidating, in the nation-state, a monopoly of external force and its attendant entitlements.<sup>118</sup> He wields restraint not as a shield of the individual but as a sword against past wars by private sovereigns, nobility, and men of the cloth;<sup>119</sup> it is his answer to these, but also to the totality of modern war, with its marshalling of all national resources and harnessing of science and industry. Lieber sought to restrain war; he did so by imposing on war a cast of instrumentality that was tailor-made to fit the modern nation-state. Instrumentality reined modern war into legal reason but, at the very same time, it espoused and justified the expanded aims of modern national wars.

### *Military necessity*

The three types of restraints emanating from war's instrumentality combine to form Lieber's doctrine of military necessity. If the Code's main achievement has been to systematize the modern law of war, nowhere is this more patent than in that doctrine. It was Lieber's central method to constrain – that is, humanize – war.<sup>120</sup> This perception of military necessity as a limiting principle is, however, at odds with current literature that posits military necessity and humanity as opposing

116 F. Lieber, above note 29, p. 659; J. F. Childress, above note 27, p. 57.

117 K. Nabulsi, above note 8, pp. 137 ff.

118 C. B. Robson, above note 54, p. 230.

119 F. Lieber, above note 76, § 19 (contrasting modern war's brevity to long destructiveness of 'religious wars').

120 Burrus M. Carnahan, 'Lincoln, Lieber and the laws of war: the origins and limits of the principle of military necessity', in *American Journal of International Law*, Vol. 92, No. 2, April 1998, p. 213: 'the Lieber Code's greatest theoretical contribution to the modern law of war was its identification of military necessity as a general legal principle to limit violence, in the absence of any other rule', but Carnahan fails to account for war's instrumentality in Lieber's theory.

values, the balance of which yields norms that are, on the one hand, pragmatic and expedient and, on the other, humane. The sense of humanity emerging from Lieber's works serves as a reminder that military necessity is also permissive.

The Code's first section – the same that contains its concept of occupation – lays the general principle of military necessity (Articles 14–17). Here the language is both permissive ('military necessity admits, allows') and prohibitive ('does not admit'). This choice of words is more than a structural device; it reflects an understanding of the essentially dual character of military necessity. It is permissive, as it 'consists in the necessity of those measures which are indispensable for securing the ends of the war' (Article 14). For Lieber, modern war itself is instrumental, not 'its own end, but the means to obtain great ends of state' (Article 30). Yet the 'ultimate object of all modern war is a renewed state of peace' (Article 29). Military necessity permits only that which is necessary for attaining war aims in order to secure the speedier return to peace. Hence the sanctification of the finality of war and the advocacy of sharp, brief, vigorous wars as a humanitarian imperative. Starvation, for example, is permitted 'so that it leads to the speedier subjection of the enemy' (Article 17); likewise, 'it is lawful, though an extreme measure' to force back non-combatants expelled from a 'besieged place' in order to increase demand for limited provisions and 'hasten' surrender (Article 18).

The same instrumental rationale makes military necessity also prohibitive, limiting the choice of means and methods in war. Lieber's premise is that in modern wars 'the killing of the enemy is [not] the object', but that the 'destruction of the enemy [is a] means to obtain that object of the belligerent which lies beyond the war'. The conclusion that follows is that 'Unnecessary or revengeful destruction of life is not lawful' (Article 68). Hence the prohibition on cruelty, 'the infliction of suffering for the sake of suffering or for revenge' rather than for military advantage, or the prohibition on 'wanton' destruction or devastation:<sup>121</sup> recourse to such practices is not required to secure the aims of war, and does not qualify as militarily necessary.

The dual nature of necessity is essential to Lieber's sense of humanity. Lieber drew restraints on war from war's instrumentality – to just cause, and hence war aims; to war's finality and the restoration of inter-national order; and to the public character of war. The scope of actual restraint, however, was as wide or as narrow as the war aims. Lieber's just war theory, under which just causes are abundant, and both belligerents may be objectively just, leaves room for the widest war aims. All that was necessary to accomplish a belligerent's war aims and victory was permitted, in fact mandated: it was expedient, just, and lawful. Military necessity comprised all 'measures which are indispensable for securing the ends of the war' (Article 14, with an important proviso that I discuss below). If 'the injury done in war beyond the necessity of war is at once illegitimate, barbarous, or cruel',<sup>122</sup> then that which is necessary is, necessarily, humane.

121 Lieber Code, Arts. 16 (wanton devastation), 36, 44, 68.

122 F. Lieber, above note 29, p. 663.



The counter-argument is, of course, that military necessity is relevant only in the absence of specific prohibition.<sup>123</sup> This finds some support in the proviso in Article 14: ‘Military necessity . . . consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war’. Yet the language, though apparently clear, does not really resolve the matter: are measures ‘which are indispensable for securing the ends of the war’ required to be also ‘lawful according to the modern law and usages of war’ or are they, *ipso facto*, ‘lawful, etc.’?<sup>124</sup> In fact, absolute prohibitions are scarce in the Code; even provisions whose text appears unqualified are subject to Lieber’s circular hierarchy of values.<sup>125</sup> The counter-argument ignores the bases of Lieber’s military necessity, namely the various aspects of war’s instrumentality, and the sources of restraint in the Code and in Lieber’s theory. Even if absolute prohibitions can be identified in the Code, and if lawfulness is cumulative to necessity, nothing in the Code suggests that this is grounded in humanity or human dignity in the sense used today.

When it came to war, and to the law of war, Lieber’s sense of humanity was flexible and relative to various facets of war’s instrumentality. It had no fixed boundaries and little autonomous meaning. It therefore had little existence independently of that which is necessary to the ends of war. Its content was not immutable; Lieber’s sense of humanity in war was not a value opposed to military necessity, but rather a derivative of the belligerents’ war aims – and subordinate to them. In that, Lieber’s ‘humanity’ is quite dissimilar to the contemporary associations of the term. In the Code, humanity in the sense of the ‘dignity and worth of the human person’<sup>126</sup> is neither a direct nor a significant source of restraint on the conduct of belligerents. Lieber’s sense of humanity was rational in method, not sentimental in proclivity.<sup>127</sup> Fundamentally, his sense of humanity in war was instrumental to humankind’s progressive vocation and the order – societal, national, and inter-national – necessary to attain it.

From humanity as a commentary on attributes of human nature, Lieber constructed a theory in which humanity was ultimately to serve as mankind’s progressive, civilizational vocation. Though individuals stood at the foundation of this theoretical edifice, they also carried its full weight: Lieber’s humanity-as-vocation left little room for any variety, however rudimentary, of individual humanity or entitlement under any doctrine of human dignity.<sup>128</sup> Lieber instrumentalized and subordinated the individual to humanity’s vocation: order

123 B. M. Carnahan, above note 120, p. 218.

124 J. T. Johnson, above note 115, pp. 64–65. The February draft, above note 43, supports this.

125 Lieber Code, Art. 5: ‘To save the country is paramount to all other considerations’.

126 Universal Declaration of Human Rights, UN General Assembly Res. A/RES/217, 10 December 1948, preamble.

127 J. C. Bluntschli, above note 7, pp. 12–13, lauded Lieber for remaining ‘fully aware’ that ‘to those engaged in [war], the harshest measures and most reckless exactions cannot be denied; and that tender-hearted sentimentality is here all the more out of place, because the greater the energy employed in carrying on the war, the sooner will it be brought to an end, and the normal condition of peace restored’.

128 See discussion on non-combatants, below.

and the progress of civilization. What remains to be seen is how Lieber's sense of humanity informs his sense of occupation.

## Humanity in occupation

Lieber was familiar with his predecessors' attempts to restrain the liberties of conquest. His successors, acknowledging their debt to his Code, would use his formulae – in the Hague Regulations and beyond – to give the modern law of occupation a more humane face.<sup>129</sup> But his sense of humanity in war, instrumental to the order of modern nation-states, translated to a concept of occupation that was itself subordinate to requirements of vocational order. Though different – in fact, diametrically opposed – notions of humanity now explain the law and concept of occupation, the Lieber Code had crucial impact on their formation, fundamental assumptions, and expression.

### The Code's concept of occupation

Despite its curious terminology,<sup>130</sup> the Code's occupation provisions raise a strong sense of familiarity. Thus, martial law in the Code – 'simply military authority exercised in accordance with the laws and usages of war' (Article 4) – is 'the immediate and direct effect and consequence' of the presence of 'a hostile army' in territory (Article 1). The Code, much like today's law, recognizes that, since occupation stems from a hostile presence, it exists independently of proclamations or other formalities,<sup>131</sup> and corresponds to the temporal and spatial limitations of that presence.<sup>132</sup> Likewise, the Code's discussion of the legal effects of occupation appears akin to subsequent treatment. Under Articles 3 and 6 of the Code, the functions of the existing government cease, and the 'military rule and force' of the 'occupying military authority' substitutes 'the domestic administration and government in the occupied place or territory'; 'criminal and civil law' is suspended, replaced by the occupant's legislative authority 'as far as military necessity requires' (Article 3).<sup>133</sup> Local law continues to 'take its usual course' (Article 6) at the discretion of the occupant. As with later instruments on the law of occupation, the Code recognizes the material needs of the occupying army, 'its safety, and the safety of its operations' (Article 10).<sup>134</sup> The dissimilarities between the Code and its progeny, however, are more instructive.

129 In 1899, Martens acknowledged the Code as 'the basis of all subsequent efforts in . . . the humanization of war': Fredrick William Holls, *The Peace Conference at The Hague and its Bearings on International Law and Policy*, Macmillan, New York, 1900, p. 150.

130 See also above note 37.

131 Compare Arts. 42–43 of the 1907 Hague Regulations to the Code's Art. 1.

132 Compare Arts. 42–43 of the 1907 Hague Regulations, as well as Art. 2 of the Fourth Geneva Convention, to Arts. 1 and 3 of the Lieber Code; see also F. Lieber, above note 47, *passim*.

133 Compare to Art. 43, 1907 Hague Regulations; Art. 68, Fourth Geneva Convention.

134 See also Arts. 15 and 134 of the Code.

## The occupant's duty to restore and maintain public order and public life

Striking in its absence from the Code is the fundamental duty of the occupant to restore and maintain public order and public life in occupied territory. Having rendered existing state institutions 'incapable of publicly exercising its authority' in the occupied area, the Occupying Power is today required to assume the role of government as provider of order and security.<sup>135</sup> The occupant's duty to administer the territory positively is now perceived as a humanitarian justification of its authority:<sup>136</sup> it is central to the contemporary sense of humanity in occupation.

The Code contains all elements used to construct this duty in the 1874 Brussels Declaration, itself the basis of the Hague Regulations: the authority of the occupant stemming from the fact of its presence and control; the curtailing of public power; and the substitution of existing law and authority by military law and authority.<sup>137</sup> Yet the Brussels text imports a sense of purpose connecting the occupant's entitlement to its obligation: it is '[w]ith this object' – namely, to restore and ensure public order, and so forth – that the occupant has authority. The Hague Regulations described 'replacement' and 'substitution' of public power as a transition; the Brussels text an intermediary, semi-continuous transition;<sup>138</sup> in the Code, no such transition is envisaged. Under Article 3, the occupant's authority does not derive from that of the 'legitimate power'. Its existence requires no justification:<sup>139</sup> it is original, unrestrained by limits on the authority of the ousted government.<sup>140</sup>

The occupant's authority, *per* Lieber, was not encumbered by any sense of purpose directed at the inhabitants' entitlement to public order. Indeed, the notion of a general public duty owed by the occupant to the inhabitants is entirely missing from the Code.<sup>141</sup> When Lieber observed that 'Martial Law affects chiefly the police and collection of public revenue and taxes' (Article 10), he referenced only the occupant's right, not its public duty, to police (that is, maintain public order in) occupied territory: it 'refers mainly to the support and efficiency of the army, its

135 1907 Hague Regulations, Art. 43; UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004, p. 275.

136 Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, Yale University Press, New Haven, CT, 1961, p. 740 (duty to administer territory primary 'manifestation of the humanitarian principle').

137 See 1874 Brussels Declaration, Arts. 2–3: '2. The authority of the legitimate Power being suspended and having in fact passed into the hands of the occupants, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety. 3. With this object he shall maintain the laws which were in force in the country in time of peace, and shall not modify, suspend or replace them unless necessary'.

138 '[H]aving actually passed into the hands of the occupant' (Hague Regulations, 1899); 'having in fact passed into the hands of the occupant' (Hague Regulations, 1907); 'being suspended and having in fact passed' (Brussels Declaration, 1874).

139 Military necessity is absent from Art. 1 of the Code (existence of authority) but appears in Art. 3 (its exercise and effects).

140 Following Heffter, Lieber did not require the occupant 'to respect the bases of power of the ousted government': E. Benvenisti, above note 14, p. 631.

141 It could be argued that such a duty is implied in Art. 3 of the Code; but neither text nor systemic interpretation of the Code's provisions on occupation support this position.

safety, and the safety of its operations' (Article 10) – not to the role of the occupant as surrogate, temporary sovereign charged with safeguarding the civil liberty of the inhabitants by reason of having replaced the sovereign.<sup>142</sup>

Whereas, in the Code, the existence of the occupant's original authority required no justification, its exercise did require grounding in military necessity: martial law 'consists in the suspension' of law and domestic administration, and its substitution by military rule, and the dictation of 'general laws' 'as far as military necessity requires' (Article 3). Given Lieber's concept of military necessity, its invocation in relation to the exercise of the occupant's authority implies that while not constrained by the authority of the former government the exercise of that authority is limited – and legitimized – by the occupant's war aims, to which occupation itself is instrumental.<sup>143</sup> The reference to military necessity also explains the express mention of 'humanity' as guiding the occupant's exercise of authority. Humanity in Article 4 does not import an independent entitlement to human dignity on the part of individuals. Rather, humanity entirely depends on that which is necessary to accomplish war aims. Given the sources of Lieber's concept of military necessity and his sense of humanity in war, it is hard to see how can Article 4 be interpreted any differently.<sup>144</sup> Humanity in occupation, as in war, was contingent on the necessary.

The absence of the duty to administer the territory signifies that Lieber did not prioritize order within the occupied territory as service to the human dignity of the occupied. His sense of humanity in occupation was rooted in the instrumentality of occupation to the occupant's war aims. War aims serve, for the occupant, as a source of both authority and restraint. Order is a humanitarian value in occupation, but under a different sense of humanity, illustrated by the Code's treatment of the occupied.

## Non-combatants: status, restraints on treatment, and protection

An equally instructive dissimilarity to subsequent law is the absence from the Code of a standard of protection akin to that of 'humane treatment' of civilians in occupied territories in Article 46 of the 1907 Hague Regulations and, more elaborately, Article 27 of the Fourth Geneva Convention.<sup>145</sup> Notwithstanding the allusion to 'humanity' in Article 4, it is hard to find in the Code a civilian status

142 He was concerned with 'subsistence' of the occupation army, not the population: 'Self-support of the army as by Napoleon. First much cried against & cannot be helped that the individual suffers': F. Lieber, 'Law of war', handwritten notes attached to 'Law and usages of war', above note 28.

143 'Martial Law in the enemy's country consists in the assumption of authority over persons and things, by the commander-in-chief, and the consequent suspension of all laws, and the substitution of military force for them, so far as the necessity of the war requires it, and for the time being, according to the usages of war, which includes what is called the necessity of war or *raison de guerre*': in R. R. Baxter, above note 5, p. 265.

144 Art. 4 Lieber Code (administering martial law ought 'be strictly guided by the principles of justice, honor, and humanity').

145 J. S. Pictet, above note 9, pp. 200–201 (Art. 27 of the Fourth Geneva Convention proclaims 'respect for the human person and the inviolable character of the basic rights of [the] individual').

predicated on a human dignity ideology. Rather, the treatment of non-combatants is instrumental, not a goal on its own. Restraints on the occupant are not predicated on the status of non-combatants, nor do they present a standard of protection ideologically comparable to what the law offers today.

### *Status: the non-combatant as enemy*

The Code contained 'little that dealt explicitly with a belligerent's obligations towards civilians'.<sup>146</sup> It spoke of 'non-combatants', 'persons', 'citizens', and 'inhabitants'; more significantly, it lacked non-combatant status, at least as a source of treatment.<sup>147</sup> This flows directly from Lieber's theories of war and politics and the role to which they reduced individuals in the quest for vocational humanity. Since modern war draws its legitimacy from its public character, it is an affair of the collective. As such, the civilian of a belligerent is never an uninvolved bystander. Rather, he is the enemy. 'Public war' is a contest between states or nations 'whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war' (Article 20). Article 21 spells out the consequences: 'The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.'

The individual non-combatant was an enemy not so much by virtue of formal nationality or allegiance as by being a member ('constituent') of the whole. For Lieber, the treatment of non-combatants was predicated on a sense of collective responsibility. As parts of the whole, non-combatants contributed to, and must also suffer with, the whole. War was not hardship visited upon hapless civilians who 'find themselves . . . in the hands' of the occupant (Fourth Geneva Convention, Article 4). As members of collective society, innate in and expressive of their humanity, and so possessed of concomitant rights and obligations, they enjoyed the 'fruit' of war and paid its price.<sup>148</sup> 'Individual citizens' of the enemy, therefore, 'cannot be made to suffer in person and property, as individuals. As such they are not the enemies in truth';<sup>149</sup> but as members of the collective, they are made to suffer so, for they are the enemy.<sup>150</sup>

146 M. Grimsley, above note 47, p. 150; J. T. Johnson, above note 115, p. 65 (the Code did not provide an 'extensive discussion of how to treat enemy noncombatants . . .'); J. F. Childress, above note 27, p. 52 (Lieber 'in principle emphasize[d]' rules on 'military operations and methods of warfare', not rules on 'war casualties and noncombatants'; 'did not elaborate the category of the noncombatant'). The term 'civilian' would only appear in the twentieth century.

147 Though a form of non-combatant category was appended to the Code (Art. 155), it is of little substance: see discussion below. This classification is not central to Lieber's treatment of non-combatants and does not ground their protection in status: e.g. Lieber to Halleck, 13 June 1864, in T. S. Perry, above note 43, pp. 347–348.

148 'Man . . . owes what he is in a great measure to his social state – the society in which he actually lives, and to the continuity of that society. Man does not merely enjoy benefits owing to his social character, but he must also bear many evils in consequence, in peace as much as in war': F. Lieber, above note 76, § 7.

149 *Ibid.*, § 12.

150 F. Lieber, above note 29, p. 659 ('So soon as an enemy is rendered harmless by wounds or captivity, he is no longer my enemy, for he is no enemy of mine individually'); similarly, the treatment of prisoners of war as 'public enemy', in Lieber Code, Arts. 49, 74, 56, 76, is contingent on public function, not individual humanity.

The collective responsibility of non-combatants in public war provides the theoretical basis, moral justification, and a legal measure for their suffering. Lieber's base legal standard for assessing the treatment of non-combatants justifies that the 'hardships of the war' should fall on them by reason of the political organization inherent in their humanity.<sup>151</sup> That standard was permissive, but also a source of restraint.<sup>152</sup> The harshness of this base standard may be mitigated: elsewhere, Lieber articulated the collective responsibility of non-combatants in functional terms, assessing whether they, notionally or actually, contributed to their nation's war effort or impeded the enemy's war aims. The functionality test opens, as we shall see shortly, the possibility of finer distinction and some leniency in treatment.<sup>153</sup> Nonetheless, constraints on war practices affording protection to non-combatants are couched in instrumental terms.

As far as status is concerned, Lieber assesses non-combatants not as individuals, but by their instrumentality. Non-combatants are not the objects of his humanity; subordinated to war aims, they are its subjects.<sup>154</sup> Their suffering – the 'moral and physical calamities of conquest'<sup>155</sup> – if only 'serviceable to the general object of war', is necessary and justified; as such, it is humane.<sup>156</sup> Humanity is not individual entitlement inherent in a non-combatant's status; rather, it is a source of collective liability.

### *Treatment: protection of non-combatants*

Nor does the Code's concept of protection correspond to contemporary views of entitlement rooted in human dignity. Its treatment of non-combatants was predicated mainly on their classification as enemy. True, the Code acknowledges the emergence of a practice by which unarmed individuals are spared. Immediately after classifying even non-combatants as enemies, it states:

22. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the

151 F. Lieber, above note 29, p. 644, conceded that 'In war those suffer generally most who were least the cause of wrong', but argued: 'the evil, though great, as has been admitted, is not so great as is often supposed. For it is the plan of the creator that government and people should be closely united in weal and woe; no state of political civilisation, no high standard of national liberty and general morality is possible' otherwise.

152 'Enemies . . . [t]he contending parties are the political societies. The hostile States are the real belligerents. In regular wars each citizen of a warfaring state is reputed to be an enemy of each citizen of the hostile state, but this is only because member of the hostile society, and not on account of individual hostility. . .': F. Lieber, above note 76, § 11.

153 'Properly speaking, the enemy is the hostile state . . . represented . . . also in all its citizens, from whom the means of carrying on the war are drawn, or who furnished them . . . [The enemy, therefore, includes] the unarmed enemy . . . supplying the means for the war, directly or indirectly': F. Lieber, above note 29, pp. 650, 658–659.

154 J. T. Johnson, above note 115, p. 63 ('avoidance of harm to noncombatants followed not from the rights of noncombatants themselves . . . but in . . . uses of armed force for public as opposed to private ends. . .').

155 F. Lieber, above note 29, p. 661.

156 *Ibid.*, p. 659; J. F. Childress, above note 27, pp. 52–53, underplaying collective responsibility ('Lieber's distinction between combatant and noncombatant has nothing to do with a person's subjective guilt or innocence, but with his objective position, impeding or obstructing the opposing belligerent in his war aims').

private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

23. Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.<sup>157</sup>

These and other provisions may offer non-combatants in occupied territory a measure of protection. Yet whether historical observation or statement of law (with Lieber's method, it is hard to tell), they do not entail status-based protection of non-combatants as an imperative transcending their enemy character. Nor do they posit protection of individual dignity autonomous from what is necessary to meet the ends of war.<sup>158</sup> The emergent practice of protection that Lieber records is subordinate to military necessity and, through it, to war aims. Thus, the 'unarmed citizen is to be spared in person, property, and honor', yet only 'as much as the exigencies of war will admit' (Article 22).<sup>159</sup> In these provisions, unlike their equivalent in subsequent codifications, protection does not represent a specific compromise between the rights of the occupant and those of the occupied population; rather, it is entirely contingent on what is necessary to accomplish the aims of the war.<sup>160</sup>

Protection of non-combatants' person or property is not only subordinate; it also appears quite illusory.<sup>161</sup> We saw how subjection of the enemy allows subjecting its population, in Articles 17 and 18, to starvation and siege tactics. Similarly, commanders may give notification prior to bombardment to allow the evacuation of non-combatants 'especially the women and children', but it is perfectly legal and justifiable not to do so: 'Surprise may be a necessity' (Article 19); if private citizens are 'no longer . . . carried off to distant parts (Article 23), public officers declining to take an 'oath of temporary allegiance or an oath of fidelity' may still be expelled (Article 26); for 'civilized nations', retaliation – presumably, including against non-combatants – is the 'sternest feature of war'; yet it is permitted in order to preclude 'repetition of barbarous outrage' (Article 27). In the final analysis, the inoffensive individual is hostage to 'the overruling demands of a vigorous war' (Article 23).

157 Note the civilizational limits in Lieber Code, Arts. 24–25.

158 News of wanton property destruction by Union troops caused Lieber to warn against 'incalculable injury. It demoralizes our troops; it annihilates wealth irrevocably and makes a return to a state of peace . . . more and more difficult'; Lieber to Halleck, 20 May 1863, in R. S. Hartigan, above note 38, p. 109. What caused alarm was force efficiency, wastefulness, and the war's conclusion, not the plight of civilians.

159 Similarly, Lieber Code, Arts. 23 ('overruling demands of a vigorous war'), 25 ('privation and disturbance of private relations'), and 37.

160 Compare Arts. 7, 15, 16 22, 32, 37, and 38 of the Lieber Code to Arts. 4 and 6 of the 1899 Hague Regulations; Art. 46 of the 1907 Hague Regulations; and Art. 38 of the Brussels Declaration. With small variations, these use the Code's language to posit autonomous values.

161 As has been argued in the scholarly – and Confederate – critique of the Code: see P. Bordwell, above note 38; R. S. Hartigan, above note 38.

Such severities demonstrate the subordination of non-combatant protection to the vast requirements of military necessity; they do not permit reading into the Code any system of mitigation of harm to non-combatants based on human dignity. Lieber's concept of non-combatant protection is not predicated on their status, but rather on their instrumentality.<sup>162</sup> This instrumentality is manifest in the adjectives and modifiers that the Code uses to describe non-combatants and in the consequences that it prescribes. Being 'unarmed' (Article 22) or 'inoffensive' (Article 25) is not a guarantee of protection. Thus, notwithstanding the Article 25 suggestion that 'protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions', the Code systematically upholds and expands these exceptions.

Yet the instrumentality of non-combatants and their treatment to war aims does not sufficiently explain the Code's limited scope of protection. If their protection depended only on the extent of their contribution to the war effort, or the degree to which they impeded the occupant's war aims, a simple actual contribution test would be apt; protection of non-combatants based on this test, though subordinate to necessity and narrow in scope, could tangibly mitigate the suffering of non-combatants in occupied territory. Such a test would also, to some extent, mitigate the harshness of collective responsibility of non-combatants embedded in their enemy character: under an actual contribution test, non-combatants could elect to remain unarmed and inoffensive and so gain the protection of the occupant. Lieber, however, did not give non-combatants this choice; he implicated them as enemies by using a broader test that included potential contribution. The citizenry furnishes the 'means of carrying on the war'; and so, they are the 'unarmed enemy . . . supplying the means for the war, directly or indirectly'.<sup>163</sup> The conduct of non-combatants, however harmless, is insufficient to assure them protection; hence the relations that the Code foresees between the Occupying Power and the population under its control.

### *Submission and the instrumentality of occupation*

In a handwritten note discussing the Women Order, Lieber observed that it was 'obvious that the conquered must conduct themselves decently . . . toward the victor'.<sup>164</sup> This vignette illustrates the role that the Code assigns to non-combatants in occupied territories. In order to gain its protection, they must manifest submission to the occupant.<sup>165</sup> The submission requirement is mentioned in

162 Status-based humanitarian protection (prisoners of war) may appear in Lieber Code, Art. 76, but see above note 147.

163 Quoted in full above, note 152.

164 F. Lieber, 'Law of war', note attached to 'Law and usages of war', above note 28. See James M. McPherson, *Battle Cry of Freedom: The Civil War Era*, Oxford University Press, New York, 1988, pp. 551–552.

165 F. Lieber, above note 29, p. 643.



Section X on ‘a war of rebellion’; yet it borrows explicitly from conditions in a ‘regular war’. Under Article 155 of the Code:

All enemies in regular war are divided into two general classes – that is to say, into combatants and noncombatants, or unarmed citizens of the hostile government. The military commander of the legitimate government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen. The disloyal citizens may further be classified into those citizens known to sympathize with the rebellion without positively aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy without being bodily forced thereto.

Article 156 lists the considerable consequences of lack of submission: ‘common justice’ and ‘plain expediency’ require the protection of the ‘manifestly loyal citizens . . . against the hardships of the war as much as the common misfortune of all war admits’. But ‘stricter police’ applies ‘on the disloyal citizens’ on whom ‘the burden of the war’ is thrown; commanders may ‘expel, transfer, imprison, or fine the revolted citizens who refuse to pledge themselves anew as citizens obedient to the law and loyal’ to the government.

Protection of person and property is not an entitlement based on non-combatant status or individual humanity. Still, submission is required of the populace. The same requirement applies in occupied territories: ‘protection’ pertains only to the ‘inoffensive individual’, the ‘inoffensive citizen’; by contrast, the property of the offensive citizen may be forfeited (Article 38).<sup>166</sup> Lieber emphasized the significance of submission immediately after the provisions setting the enemy character of non-combatants and their protection; in Article 26:

Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance or an oath of fidelity to their own victorious government or rulers, and they may expel everyone who declines to do so. But whether they do so or not, the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives.<sup>167</sup>

Submission of the population, then, may result in protection. Lack of submission may result in loss of life and property, or deportation. Yet submission, whether rendered voluntarily or upon demand, is insufficient to guarantee protection. The occupant is not bound even then to accord ‘the protection which, by the modern law of war, the victor extends to the persons and property of the conquered’.<sup>168</sup> Protection is, essentially, a matter of utility or discretion. There is no balance between the occupant’s interests and those of the populace. There is no reciprocal

<sup>166</sup> The condition of submission is most apparent in the treatment of resistance to the occupant, spies, war-rebels and war-traitors in occupied territories: Francis Lieber, ‘Guerrilla parties considered with reference to the laws and usages of war’ (1862), in D. C. Gilman, above note 7, p. 275; J. F. Childress, above note 27, pp. 53–58; Lieber Code, Arts. 10, 15, 38.

<sup>167</sup> Also Lieber Code, Art. 134.

<sup>168</sup> F. Lieber, above note 166, pp. 283–284.

relationship: the occupant's position, and authority, is unilateral. Lieber assigns non-combatants individually, and the occupied population collectively, no independent value, and recognizes in them no interest.

## Occupation according to Lieber: instrumentality to imperatives of order

The Occupying Power's duty to administer the territory, and a status-based concept of protection predicated on human dignity, represent the two conceptual bases for humanitarian restraints in subsequent developments of the law of occupation. In the Hague Regulations, the duty temporarily to administer the territory expresses the role of the occupant as a provider of surrogate order, and serves as a humanitarian justification of its authority. The Fourth Geneva Convention retains this conceptual base, but emphasizes protection based on human dignity and elaborates restraints on treatment of civilians. Their absence from the Lieber Code is not coincidental. The Code's concept of occupation does not represent a stage antecedent to these conceptual bases of humanity in occupation. Rather, in the Code, Lieber reacted to the emergence of these conceptual bases – human dignity and transient, surrogate order – for restraining the liberties of conquest.

In identifying the whole citizenry of the belligerents as enemies, Lieber directly rejected Rousseau's doctrine, which became a theoretical keystone of the sense of humanity in occupation under present-day law. In *The Social Contract*, Rousseau argued:

War is then a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders. Finally, each State can have for enemies only other States, and not men; for between things disparate in nature there can be no real relation.<sup>169</sup>

Rousseau and Lieber alike harnessed reason to find in the public nature of modern war a vehicle of moderation. Both used the necessity device to restrain war among civilized nations. Yet, while Rousseau discerned in 'the practice of civilized people' the principle that once enemies 'lay [their arms] down and surrender, they cease to be enemies or instruments of the enemy and become once more merely men, whose life no one has right to take',<sup>170</sup> Lieber's non-combatant, even if unarmed, even if inoffensive, forever retains his or her enemy character and is 'made to suffer' on account of the place that he or she occupies in the political organization of the international order, itself an expression of his or her humanity. For Lieber, there could be no autonomous, individual 'civilian' status as a basis of protection.

169 J.-J. Rousseau, above note 21, p. 11. See E. Benvenisti, above note 14, pp. 625–626. The Code rejects this in Arts. 20 and 21. For Lieber's ridicule of Rousseau, see L. R. Harley, above note 51, p. 126; F. Freidel, above note 30, pp. 154–155.

170 J.-J. Rousseau, above note 21, p. 12.

At the same time, the Code was a reaction to the emergence of a category of occupation as a transient phase restricting other liberties of the conqueror. Lieber was familiar with Rousseau's repudiation of the legality of acquisition by conquest, Vattel's attempt to contain the liberties of the conqueror to the public sphere, and Heffter's distinction between conquest and 'mere' occupation, during which the occupant did not acquire sovereignty.<sup>171</sup> He was equally acquainted with French Revolutionary practices leaving the decision on the disposition of the territory to liberated populations.<sup>172</sup> His successors combined some or all of these trends to restrain the liberty of the conqueror by imposing a duty to provide temporary and surrogate order, however harsh, as a humanitarian commodity. In so doing, they underlined the incidence of occupation to the war aims of the occupant.<sup>173</sup> Lieber, however, was predominantly concerned with order of another sort altogether, external to conditions in the occupied territory and predicated on an altogether different sense of humanity. For him, occupation was not an incident of war any more than conquest, or the fate of individuals, were. Rather, it was instrumental to the belligerent's war aims.

The Code uses occupation and conquest almost interchangeably.<sup>174</sup> While it may appear to accept a distinction between these categories, careful reading reveals that its provisions do not sustain such a distinction in substance.<sup>175</sup> Lieber described a temporary concept of occupation, but its provisional nature was not preparatory to the possible reversion of the territory to the original sovereign. Rather, it was preparatory to making conquest complete if the victor but chose to follow that path: Lieber recognized a right of conquest, unlimited.<sup>176</sup> Thus, even if commanders should leave to the treaty of peace the final settlement of some matters,<sup>177</sup> all the 'victorious government' has to do to in pre-emption is to proclaim 'that it is resolved to keep the country . . . permanently as its own' (Article 33). Lieber therefore sought to reinstate, not limit, the right of conquest.<sup>178</sup>

Having learned of the Anglo-French declaration of war on Russia in April 1854, Lieber was riled by the evident general good feeling

for Louis Napoleon in England. It is disgraceful to England . . . It is so unEnglish to repeat and re trumpet a word of that crowned scamp, and call his Speech 'The

171 B. Röben, above note 33, p. 69. Lieber was dismissive of Vattel: J. F. Childress, above note 27, p. 59.

172 Francis Lieber, 'The value of plebiscitum in international law' (1871), in D. C. Gilman, above note 7, p. 301.

173 See discussion above notes 137–140; Henry Wager Halleck, *International Law, or, Rules Regulating the Intercourse of States in Peace and War*, Bancroft, San Francisco, 1861, p. 776 ('The rights of one belligerent to occupy and govern the territory of the enemy while in its military possession, is one of the incidents of war, and flows directly from the right to conquer').

174 Lieber Code, Arts. 1, 5, 9, 85, and 92.

175 The Code often mentions 'conquest' or the victorious army while addressing matters preceding final settlement: consider, e.g., Arts. 31, 33, and 36.

176 Francis Lieber, *The Arguments of Secessionists*, Loyal Publication Society, New York, 1863 ('if the South had a right to secede, . . . they constitute a sovereign nation, and we . . . have, according to all law of nations, the right of conquering another sovereign nation'); F. Lieber, above note 172, p. 301.

177 Lieber Code, Arts. 31 and 36.

178 D. A. Graber, above note 7, p. 5, on Art. 33 (in the Code, 'annexation is possible prior to the conclusion of peace').

age of conquest is past,' a noble *dictum*, and all that. Fudge! The age of conquest is not past, as we shall presently see; and whether he says so or not is not worth the snap of a finger.<sup>179</sup>

Just how reactionary were his views on conquest is evident in his 1871 campaign to refute the fashionable claim that Prussian annexation of Alsace-Lorraine required popular consent. Lieber dismissed plebiscites as a 'recent Bonaparte innovation', non-binding in law, invariably rigged by those in control, involving no true democratic process, and unsuitable to people wanting democratic culture.<sup>180</sup> Rather, he argued, Prussian annexation would serve European peace and stability(!).<sup>181</sup> He urged his collaborator Bluntschli – Swiss by birth, Prussian by choice – to 'be firm, keep Alsace and Lorraine'.<sup>182</sup> Lieber found no more use for protection of collective rights – self-determination in this case, cultural property in Article 36 – than he did for individual entitlement to human dignity.

For Lieber, the transience of occupation did not imply any limitation on the occupant's authority, either in favour of the ousted government (as under the Hague Regulations) or in favour of the inhabitants (as in the Fourth Geneva Convention). Such notions were irreconcilable with the occupant's original authority. Rather, the transience of occupation confirmed its original character. Lieber's concept of occupation embodied a rejection of emerging theories that identified a quasi-contractual relationship between the occupant and the inhabitants, exchanging temporary obedience for protection.<sup>183</sup> Even if lack of submission justified the harshest measures, submission of the populace did not in any way bind the occupant's hands: protection was discretionary. After all, commanders could make public servants in the occupied territory take either 'the oath of temporary allegiance' or 'an oath of fidelity to their own victorious government or rulers' (Article 26). Lieber would have wholeheartedly endorsed Oppenheim's 1917 *dictum*: 'a just and humane, albeit stern and not indulgent, rule is apt to reconcile the population to their inevitable fate and make them submit to it, although they may chafe under its yoke'.<sup>184</sup> 'Fate', here, meant a new master. In the Code, there could be no duty towards the populace limiting the occupant's authority in any way: that authority was not incidental to temporary possession of the territory, but rather

179 Lieber to Hillard, 18 April 1854, in T. S. Perry, above note 43, p. 27.

180 F. Lieber, above note 172, p. 306 ('a change of the political status [does not require] ... in all cases the so-called consent of the people': European practices changing the population's allegiance and mastery, 'given and taken like chattel' 'by scheming diplomatists', was distasteful, but could happen 'by simple conquest': Lieber to Hammond, 14 February 1859, in Chester Squire Phinney, *Francis Lieber's Influence on American Thought and Some of His Unpublished Letters*, International Print, Philadelphia, 1918, p. 74.

181 F. Lieber, above note 172, p. 301 ('necessary for the safety of Germany, as well as for the peace of Europe').

182 Lieber to Bluntschli, 5 November 1870, in E. Nys, above note 16, p. 88; F. Freidel, above note 30, p. 409. On the Lieber–Bluntschli collaboration, see B. Röben, above note 33.

183 H. W. Halleck, above note 173, pp. 793–794 ('implied', 'tacit agreement ... mutual and equally binding upon both parties', whereby the populace forego further resistance and the conqueror is obliged not to slaughter males and allow the populace 'freely and peacefully to pursue their ordinary avocations'); Lassa Oppenheim, 'The legal relations between an Occupying Power and the inhabitants', in *Law Quarterly Review*, Vol. 33, October 1917, p. 368.

184 Oppenheim, above note 183, p. 370.

instrumental to its conquest. A ‘conquering or occupying power’ was ‘the victorious government’ (Articles 9 and 26).

For Lieber, restraints on the occupant and its authority drew on, and were designed to serve, the same purpose as any other restraint on belligerents. His sense of occupation and conquest was embedded in his sense of humanity, in its service to vocational order. The Code therefore prioritized the finality of war in occupied territory. Within the territory, the occupant’s temporary authority was preparatory to the new order that the conqueror would impose once it had ‘resolved to keep the country . . . as its own’ (Article 33). It was not a means of instating a surrogate, provisional order. Despite his sympathy to national liberation, Lieber was suspicious of resistance ‘after having been conquered’.<sup>185</sup> The harsh treatment that the Code prescribes for the spy or war rebel in occupied territory is rooted in the ‘peculiarly dangerous character’ of the activities of ‘this renewer of war within an occupied territory’.<sup>186</sup> The authority of the occupant, unconstrained, serves the reinstatement of peace, stability, and a permanent order within the territory: conquest brings the war to its conclusion.<sup>187</sup> The conqueror’s authority serves humanitarian imperatives – in Lieber’s sense of humanity.<sup>188</sup>

Outside the territory, Lieber’s concepts of occupation and conquest were *sine qua non* to inter-national order and the constant ‘human contest’ that it generates to catalyze human progress under modern conditions (Article 29). If war catalyzes a healthy competition between modern nations, conquest – through which the victor’s will, territorial or otherwise, is imposed on the vanquished<sup>189</sup> – is the instrument that harnesses war to order and progress. Without the right of conquest, the occupant cannot accomplish its war aims, and war cannot regenerate the international order. Recognition of the right of conquest, and consequently, the broad authority of the occupant, are essential to the progress of human civilization and the vocation of humanity. Here lies the justification for both the unfettered liberty of the conqueror and civilian suffering. Neither is incidental; both are instrumental to victory through occupation. Once victory has been decided, and the conqueror allowed to accomplish its aims, peace can be reinstated and order restored.<sup>190</sup> For the vocation of humanity, conquest was an imperative of progressive humanity, both logically and as a matter of historical necessity.<sup>191</sup>

185 F. Lieber, above note 166, pp. 283–285.

186 *Ibid.*; Lieber Code, Art. 52.

187 Lieber Code, Art. 153 (‘victory in the field . . . ends the strife and settles the future relations between the . . . parties’).

188 Lieber to Thayer, 3 February 1864, in T. S. Perry, above note 43, p. 340 (‘nothing can decide but victory in the field. The more efficient, therefore, the army is made, and the more unequivocally [*sic*] the conquest of the South, the better for all, North and South’).

189 Francis Lieber, *No Party Now But All for Our Country*, Westcott, New York, 1863 (‘Either the North conquers the South and re-establishes law, freedom, and the integrity of our country, or the South conquers the North. . . and covers our portion of the country with disgrace and slavery’).

190 F. Lieber, above note 29, p. 658 (‘the ultimate object of the war . . . among civilised nations is always peace, on whatever conditions that may be’).

191 Francis Lieber, *Essays on Property and Labour*, Harper, New York, 1842, p. 132 (‘present political societies arose out of conquest’); his South Carolina inaugural lecture appreciated ‘the conquests which our own age may have made in the cause of civilization’: D. C. Gilman, above note 7, p. 185.

## Conclusion

Lieber's sense of humanity, embedded in his political theory, did not concern individuals; rather, it was instrumental to a progressive, civilizational vision of international order that could meet humanity's vocation. Neither accounts that mark the Code's humanity nor those identifying therein a rudimentary version of humanity in war can capture Lieber's unique sense of humanity or, indeed, the role that it played in his law of occupation. His sense of humanity in occupation was not a precursor of contemporary notions of human dignity restricting the authority of the occupant; rather, it was a reaction inimical to ideological trends that would later generate them. Nonetheless, it remains embedded, hidden but potent, in the contemporary law of occupation, providing an enduring but questionable humanitarian justification for the occupant's authority.

The relevance of Lieber's different sense of humanity is not limited to historical anecdote. Historicizing the Code as an antecedent to or affirmation of today's human dignity conceals its essential difference; with no understanding of this difference, our ability to appraise today's law critically is impoverished. International humanitarian law, the law of occupation included, has certainly changed significantly over the last century and a half. But it is disconcerting to realize that a highly similar language depicting an essentially identical concept of occupation, then and now, is capable of supporting such ideologically divergent approaches. The transience of occupation lends itself with equal facility to both authoritarian, conquest-based order and the human dignity creed. Both offer ample justification for the occupant's authority.

This compels critical reflection: one wonders, for example, whether the current law of occupation, notwithstanding its association with the human dignity creed, likewise serves political or ideological imperatives of order. So does the instrumentality of occupation: doctrine today asserts, as in the Preamble to the 1977 First Additional Protocol, that the law applies without regard to 'the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict'.<sup>192</sup> Lieber underscored the instrumentality of occupation to the occupant's war aims; his law of occupation meant to render them service. Does occupation remain instrumental today, or is it an incident of war? What goals, other than humanitarian, does it render service to? Whatever the answers to these questions, reducing the complex history of international humanitarian law to celebration or derision of the humanity of the past is not likely to reveal them.

192 Rotem Giladi, 'The *jus ad bellum/jus in bello* distinction and the law of occupation', in *Israel Law Review*, Vol. 41, October 2008, p. 246.

# The dilemmas of protecting civilians in occupied territory: the precursory example of World War I

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## **Abstract**

*Advances in the law of Geneva and the law of The Hague did not remain a dead letter during the World War I, but this was essentially with regard to the wounded and prisoners of war. Those categories of persons were better protected than civilians by*

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*treaty-based humanitarian law, which was still in its infancy. Although the ideal of humanity was realized on a large scale thanks to the efforts of the International Committee of the Red Cross (ICRC) and myriad other charitable, denominational, or non-denominational organizations, none of the belligerents hesitated to infringe and violate the law whenever they could. The various occupied populations, on the Western and Eastern fronts and in the Balkans, served as their guinea pigs and were their perfect victims.*

**Keywords:** occupation, occupied territories, World War I, total war, ICRC, civilians, reprisals, hostages, civilian internment.



During the Great War, fiercer fighting between armed forces than had previously been witnessed was accompanied by acts of violence and atrocities against civilians, who were also deported and massacred. Civilians suffered first from the devastation wrought by armed manoeuvre warfare; when they were taken captive by the advancing troops, the invasions became occupations. This is what happened in 1914 to most of Belgium, ten departments of northern and eastern France (Aisne, Ardennes, Marne, Meurthe-et-Moselle, Meuse, Nord, Oise, Pas-de-Calais, Somme, Vosges), a sliver of eastern Prussia, the northern Balkans, and Serbia. In 1916, the same lot befell Romania, Montenegro, the Venetian Alps, and Trentino. Throughout those years, the Germans, Austro-Hungarians, and/or Russians occupied territory in Poland, Galicia, and Bukovina, as well as parts of Lithuania, Latvia, Ukraine, and Belorussia, not to mention the colonial occupations of Western Africa and Asia.

It would be difficult, however, to find a war map indicating the occupied zones. At the time, the world's attention was consumed by the combatants, hence the production of numerous maps of frontlines and enemy territories. The territories considered to have been stolen or usurped had no means of representation at all. They were simply perceived as 'the front', with no attempt being made to think of or designate them as occupied. This 'non-thought' has been passed down in memory: the violence inflicted on civilian populations on a domestic front, with homes – *domūs* – besieged by the occupying powers, has been erased from both physical and mental maps. And yet, the periods of invasion and military occupation served as life-size tests of population displacements and repression – even policies of extermination, when it comes to the Armenians in the Ottoman Empire.

Paradoxically, these huge testing grounds for a form of new warfare did not attract scrutiny from the experts at the time – they were too busy on the military front – and have been given scant attention by historians since. This field, this place of interacting experiences – occupier and occupied – has simply not been covered, or rather has been left under cover. Yet World War I was, whether deliberately or unconsciously, a *laboratory* for the twentieth century: a terrain for experimenting with violence, a testing ground on which to put into practice and optimize its effects on man and materiel. Are we not right to say that the occupied areas of the World War I were laboratories, an atypical front



whose cannons and gases were called deportation, forced labour, concentration camp?<sup>1</sup> For men, women, and children they were the scene of a common experience – the suffering of war – and, at the same time, a starkly different trial. In etymological terms, the word *exterminare* means to expel, to place outside the borders of. For occupied civilians, to be ‘exterminated’ can be said to imply this way of being literally *hors de combat* with respect to the military fronts – which nevertheless surrounded them – without uniforms and without arms, unlike the enemies they faced. The occupied undergo a siege from within, an invasion of their private sphere in which military and administrative terror take it in turn to keep them subjugated; this is the paradigm for an imposed brutality, for a form of terrorism (in the original sense of the word) aimed at distressing the population and maintaining it in a state of shock. The laboratory was military: the occupied areas abutted the battlefields, and became their rear lines.

Pierre Hassner has grasped the paradox of war as it applies to occupied territories:

There is really no more paradoxical relationship than that between force – war in particular – and morality. There is not a single society that does not threaten to use force, sometimes putting that threat into action, against internal and external enemies, and that does not pay homage to the heroism and sacrifice of those who have defended it with their lives. And yet there is no society in which killing a human being does not pose a moral problem.<sup>2</sup>

For, whereas no-one between 1914 and 1918 escaped a war that had become particularly amoral, and immoral, the populations in the occupied territories found themselves trapped first and foremost between loyalty to their country and the lawful or unlawful demands of the occupiers. The scholars who for centuries have written about the moral tradition of just war speak of a moral presumption against the use of force, and go on to specify how, in what conditions, the presumptions can be trumped: from *jus ad bellum* (which defines the conditions in which force can be employed) to *jus in bello* (which defines the manner in which force may be legitimately employed). Neither was practised during the conflict in the regions ravaged by total war – the occupied territories, the fronts held against civilians.

Advances in the law of Geneva (1864 Geneva Convention, revised in 1906) and the law of The Hague (negotiations of 1899 and 1907) did not remain a dead letter during the fighting – far from it – but this was true above all of the wounded and prisoners of war. They were better protected than civilians by treaty-based humanitarian law, which was still in its infancy.

1 The first ‘modern’ concentration camps were set up by the Spanish in Cuba in 1896, followed by the British during the Boer War. They were first used worldwide – for foreign civilians deemed by the belligerents to pose a threat on their home territory and for occupied civilians – between 1914 and 1918. Annette Becker, ‘La genèse des camps de concentration: Cuba, Guerre des Boers, Grande Guerre’, in *Revue d’Histoire de la Shoah*, No. 189, July–December 2008, pp. 101–129.

2 Pierre Hassner, ‘De guerre et paix à violence et intervention: les contextes politiques et techniques passent, les dilemmes moraux demeurent’, in Jonathan Moore (ed.), *Des choix difficiles: les dilemmes moraux de l’humanitaire*, Gallimard, Paris, 1999, p. 23 (ICRC translation).

Henri Dunant wanted to ‘civilize’ war, to set a ‘human’ limit to brutality so as to prevent war from becoming an ‘animal’ massacre. That ideal was implemented on a large scale during World War I, thanks to the efforts of the International Committee of the Red Cross (ICRC) and myriad other denominational and non-denominational charitable organizations. However, all the belligerents flouted and violated the law whenever they could, and the exercise of such terrorist violence attests to the remarkable tension of the period. Various occupied populations, on both the Western and Eastern fronts and in the Balkans, served as their guinea pigs and were their perfect victims.

## The law of the Hague and military occupation

The humanitarian organizations did not fail to be moved by the new conditions afflicting civilians as of 1914, as demonstrated by a delegate’s report and a letter from the ICRC President Gustave Ador to the German Red Cross in 1915:

The lamentable plight of the populations of northern France and Belgium, cut off from the world and separated from their loved ones for over 14 months, weighs on many minds . . . The military necessities invoked do not completely explain the iron wall erected between this population and the world. That wall is so impenetrable that the President of the International Committee of the Red Cross has even been refused, again for military reasons, the authorization he had requested from Berlin to travel there. . . . These populations are in a pitiful material and moral state. No more work, closed factories . . . Many families are going hungry and view the approach of winter with trepidation. From the point of view of morale, the absence of news is a cruel infliction. . . . The heart bleeds at the thought of so much undeserved suffering.<sup>3</sup>

What could the ICRC do in such extraordinary conditions, in the face of ‘so much undeserved suffering’? First, it set up a civilian section in 1914. But this service, which had no standing in international law, could not be grouped with the two sections for military prisoners, one for the Central Powers, the other for the Entente Powers. Practically no information got through, no list of occupied persons or deportees, for example, in contrast to the prisoners of war, lists of whom were regularly updated thanks to the bilateral conventions. On the other hand, thousands of requests for information were received from families distraught at the disappearance of family members.

To define the exceptional situation of people first invaded then occupied, the relatively vague notion of ‘law of nations’ was used as a marker – one whose position varied depending on the point of observation: that of the victims, that of the legal scholars concerned about their fate, or that of the humanitarian

3 ‘L’Agence internationale des prisonniers de guerre’, 15 August, and letter from the president of the ICRC, Gustave Ador, to the German Red Cross, December 1915, in *Bulletin International des Sociétés de la Croix-Rouge*, October 1915, pp. 497–498 (ICRC translation).

or charitable organizations trying to assist them. The ICRC, the Vatican and the Protestant organizations, and the neutral countries (The Netherlands and Spain on the Western and Balkan fronts, Denmark on the Eastern front, the Americans until 1917) made up the bulk of that humanitarian front, in addition to various local entities, 'charities' that numbered in the thousands.

During the Hague Conferences of 1899 and 1907, an attempt had been made to regulate war and invent peace, in the name of the 'principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience'.<sup>4</sup> The Russian lawyer Friedrich von Martens, chairman of the Third Commission, on the laws and customs of war, advocated the 'laws of humanity' in a declaration that came to be known as the Martens Clause and was repeated in the preamble to the 1899 Hague Convention (II):

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.<sup>5</sup>

The clause was repeated, with slight differences, in 1907, in the preamble to the convention that was to become, on ratification in 1909, the cornerstone of the international law of war in 1914 (*jus in bello*). Those drawing up this still uncertain law discussed in particular the obligation for citizens to resist invasion of their country, even if they had civilian status. Martens had introduced the declaration precisely because the delegates had failed to agree on this issue. Certain large military powers argued that such civilians should be treated as *francs-tireurs* (guerrilla fighters) and would therefore be liable to execution, while most smaller states contended that they should be treated as lawful combatants.<sup>6</sup> These small countries had modest military means, and saw in their populations a last line of defence in the case of invasion. For the large countries with big armies, this did not appear to be an issue. It quickly became one, however, when they *were* invaded: terror of the *francs-tireurs* permitted immediate infringements of all agreements, Martens Clause or not. In 1914, the invaded territories were the first to be affected by the reservation made by the three great multinational empires in respect of Article 44 of the 1907 Hague Convention (IV), which led rapidly to non-compliance, in one form or another, with most articles of the Convention.

The Hague Conferences followed on from the humanitarian inventions of the nineteenth century and therefore recalled the duty to protect non-combatants

4 The Hague Convention (II) with Respect to the Laws and Customs of War on Land, 1899, Preamble.

5 *Ibid.*

6 Rupert Ticehurst, 'The Martens Clause and the laws of armed conflict', in *International Review of the Red Cross*, No. 317, March–April 1997, p. 133, citing Frits Kalshoven, *Constraints on the Waging of War*, Martinus Nijhoff, Dordrecht, 1987, p. 14. See also Vladimir Pustogarov, 'Fyodor Fyodorovich Martens (1845–1909): a humanist of modern times', in *International Review of the Red Cross*, No. 312, 1996, p. 334.

and to distinguish between civilians and armed forces members. In a way, Martens himself personified the organic ties between the ‘law of Geneva’ and the ‘law of the Hague’. He contributed to important provisions on non-combatants who were – or were not – already protected by conventions: prisoners of war, the wounded, those shipwrecked in naval battles, civilians in occupied territories.

In the absence of other international rules, it was the Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex, the Regulations concerning the Laws and Customs of War on Land, adopted on 18 October 1907, that served as a reference to which the belligerents in 1914 had to or could refer in the event of an invasion or occupation. The Convention had entered into force on 26 January 1910 and had been ratified by most of the belligerents, with or without reservations. The preamble, which concludes with the Martens Clause, and Section III of the Annex in its entirety, dealing directly with occupied territories, are remarkable evidence of both the optimism and the vagueness that reigned in the humanitarian field at the start of the century, just before the horrors – intense and brief – of the Balkan Wars and – over a long period – World War I brought down part of the treaty edifice being built.<sup>7</sup>

The law of war codified in the Hague demonstrates that states wanted a separate body of rules to regulate armed conflicts, in particular so as to protect conflict victims. Most of the rules of this first law of war were in keeping with the logic of the relationship of the state to individuals, understood as the beneficiaries of a system of protection because of their situation of vulnerability vis-à-vis the state. This applied in particular to the law of occupation, which, with the 1907 Hague Regulations, sketched out a framework for the legal protection of civilians subjected to occupation from abuse on the part of the occupying power. To quote one of the legal specialists on the subject: ‘In other words, the law of military occupation arose with a “human rights” purpose *ante litteram*’.<sup>8</sup>

The ‘law of occupied nations’ was indeed, at least on paper, a branch of international law in 1914. But what about on the ground? In the area under its control, the occupier had administrative and governmental authority, as though the situation were one of peace, but the jurisdiction was no longer the same: there had been a change of state. Was this tantamount to a law of peace? The country remained at war. Was military occupation therefore, from the point of view of the law, a hybrid situation, halfway between war and peace? Neither war nor peace? Simultaneously war and peace? The articles of the Hague Regulations reflect that dual nature and those contradictions, for they are based on rules of both the law of war and the law of peace.

In fact, in a situation of occupation there exist horizontal relations between states – as of 1914, a situation of war between the Central Powers and the Entente

7 Human rights had yet to take shape, but were emerging in parallel. See Marco Sassòli, ‘Le droit international humanitaire, une *lex specialis* par rapport aux droits humains?’, in Andreas Auer, Alexandre Flückiger, and Michel Hottelier (eds), *Les droits de l’homme et la Constitution: Études en l’honneur du Professeur Giorgio Malinverni*, Schulthess, Geneva, 2007, pp. 375–395.

8 Danio Campanelli, ‘The law of military occupation put to the test of human rights law’, in *International Review of the Red Cross*, Vol. 90, No. 871, September 2008, p. 665.

Powers – governed by the rules of the law of war on the one hand, and, on the other, an imposed intra-state relationship between the occupying state and the civilian population of the occupied state. The latter sees the emergence of a vertical relationship between ‘administrators’ and ‘administrated’, which should be characterized by the rules and principles that are valid in time of peace. But these entirely theoretical principles take no account of the reality of total war, in which the civilian population is powerless, a pawn in the horizontal relationships of a state of war.

This contradiction explains why the exceptions were much more common than the rule, and the articles of the Hague Regulations forgotten, although oft-repeated, like a mantra, by the occupied, even though they afforded barely any protection. This also proves that international law was perceived from then on as being in favour of the possible victims of conflicts, in which regard the victims were mistaken. As Article 43 of the Regulations stipulates:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.<sup>9</sup>

The occupant could always ward off any accusation that the Regulations had been violated by claiming that it had had to ‘restore order’. Indeed, the law of military occupation gives pride of place to the interests of the occupying power. Until such time as the war ends, the army ensures respect for the population under its occupation but first and foremost its own security. In The Hague, an attempt had been made to strike a balance between the interests of the local population and those of the occupying power. On the ground, however, it was the rights of the occupant that prevailed. The conventions provided a minimum frame that was often invoked but rarely respected. So much for the law of The Hague.

## **The law of Geneva, or humanitarian disappointment in total war**

There remained the law of Geneva: the ICRC clung with desperate fervour to the 1906 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, of which it was the guardian, for fear that even it would end up being violated and abolished. Civilians, the new victims of war in 1914, could not be placed under its treaty-based jurisdiction, unlike military prisoners. All the belligerents waged a ‘battle of law’ – the better to win the war, namely to eradicate the enemy. Alone, or almost alone, the ICRC endeavoured to ensure respect for a law of the victims, no matter what camp they belonged to. But the scales were weighted too heavily in favour of one side, as witness the horrific example of the exactions and reprisals committed against prisoners on the

9 1907 Hague Regulations, Art. 43.

battlefield even though they benefitted from protection under the treaties. For occupied civilians, there was not even a convention. And the savage war being waged could always be justified by the crimes of the enemy: enemy action and the growing number of dead were proof that the fighting was just; the inevitable result was increasingly brutal measures of retaliation. The extreme difficulty for the mission of the humanitarian organizations stemmed from the gap between those seeking the truth and those who knew the truth, or thought they did: the enemy was by definition barbaric and only a fight to the finish would rid the world of its presence, for the benefit of all.

Since world war in essence prohibited neutrality, the ICRC,<sup>10</sup> neutral by nature, could draw but one conclusion: there had to be peace. It therefore differed from the belligerents on two points, advocating neutrality and peace in the torment of war, where both were impossible. It nevertheless remained relatively lucid, albeit not without bitterness. ICRC delegates wrote:

Concern for the damages one hopes to inflict on the enemy all too often outweighs the good one could do oneself; that's the mentality of war, one goes back on it later, sometimes when it's too late. . . . In ordinary times it is no easy task to tell the truth . . . how much more difficult that task becomes in these critical times, when passions are stirred by war and people blinded by hatred. A Frenchman said of my mission: 'the neutral person, watching a war like this one, cannot see things from the same point of view as the belligerent in the thick of the fighting', and *fortunately* he was probably right, and what he said was true. A neutral person who judged matters of war from the point of view of a belligerent would no longer be neutral . . . but let those who are neutral be permitted this humble prayer, that they be trusted, for without trust their work would be in vain and useless.<sup>11</sup>

An approach based almost exclusively on protest and the law at a time when so many lives were at stake may appear not only limited but also ethically inadmissible, but we have to consider the logic underpinning the ICRC's reasoning between 1914 and 1918, and situate it in the historical and intellectual context. The ICRC drew its legitimacy for action solely from the 1906 Geneva Convention, which had already been ratified, and hence from the reciprocity between the signatories that had become enemy belligerents. It had no mandate, no humanitarian intervention. No-one, unfortunately, had had the foresight to include civilians in the 1906 Convention. That was to be regretted, but the texts could not be changed as new needs arose. The numerous propaganda images used by both camps of Red Cross nurses ill-treated or drowned (when their hospital ships were torpedoed, one of the conflict's new features) are symptomatic: the nurses belonged to the Red Cross, they worked for the benefit of wounded soldiers, and were therefore protected by the Geneva Convention. If the decision was to show them as women (raped) and

10 And, in similar fashion, the Vatican. In 1917, Benedict XV made a stirring appeal for peace that was incomprehensible to any of the belligerents, including fervent Catholics.

11 Dr Frédéric Ferrières, *Bulletin International des Sociétés de la Croix-Rouge*, No. 192, October 1917, p. 413.

civilians (murdered), it is because the only front that still counted was the military front to which they belonged; there was no awareness of the novel concept of civilians caught up in war.<sup>12</sup>

Everything happened in a kind of chain reaction, as part of an irreversible process. Although neutrality, humanity, compassion appeared to oppose, term for term, engagement, brutality, reprisals, there were many contradictions. The new war did not burden itself with any scruples, whether for the combatants, who should have been rendered neutral when they were placed *hors de combat* by their wounds or capture, or even less for civilians, who were covered by no convention.

Actual verbal denunciations soon reached their limits, and had no effect. The humanitarian and charitable organizations found themselves, when it came to civilians, faced with a minimal choice between action on the ground – often impossible – and testimony, in the form of denunciations. They could act and bear witness, act without bearing witness, or bear witness and not act: there are countless traces of the last in the archives of the ICRC, the Vatican, and other religious organizations. The ICRC civilian section, for example (like its military sections, which were able to do more because of the international conventions), liked to toss out figures, to brandish its index cards, as here with regard to the German files in the civilian section:

The card service grows by about 100 or 200 cards per day, and already has about 150,000 cards. . . . The return of evacuees from Nord department has given rise to numerous requests, the men from those departments having almost all been interned in Germany, without the possibility of letting their families know. We have the satisfaction of finding an answering card in our files for almost all of those requests.<sup>13</sup>

The most important – and, incidentally, exaggerated – bit of information, ‘the men from those departments having almost all been interned’, is drowned out in a kind of bureaucratic purr of satisfaction: yes, they have index cards, but are they reliable, and what is the point of collecting them if there is no possibility for action in the occupied territories?

The example of the dissolution of the Belgian Red Cross Central Committee by Baron von Bissing, the country’s governor-general and hence ‘occupier in chief’, is remarkable in that it shows how powerless the ICRC was in the face of the occupying powers on the ground, including when it came to helping a National Red Cross Society. The Belgian Central Committee had refused to co-operate with a charity that the German government had decided to set up in Belgium. The Belgian Red Cross considered that this ‘aid and protection for women through work’, which ostensibly helped women find work, was in fact political and therefore not a charity within the meaning of its statutes. Moreover, the occupants thought they would be able to establish the charity by treating Belgium as a country

12 Numerous illustrations on postcards in the collection of the International Museum of the Red Cross and Red Crescent.

13 *Bulletin International des Sociétés de la Croix-Rouge*, April 1915, p. 170 (ICRC translation).

at peace. The reality was more prosaic. The Germans wanted to get hold of the cash held by the Belgian Red Cross, whose refusal was a good pretext. The reaction of the occupying power was brutal: the National Society was dissolved. The ICRC could do nothing but protest: ‘The Red Cross cannot bow to an administrative measure that, by considering it a simple mechanism of the State, would rob it of its independence and even eliminate its governing bodies’. It also published, in its *Bulletin International*, the arguments of the Prince of Ligne, the president of the Belgian Red Cross relieved of his post, on the specificities of the occupation, which he saw as a state of war:

It is ridiculous to say that most of Belgium can be considered as being at peace when our regular authorities have been replaced by German civil servants, our laws are often modified, suspended or abrogated by decree of the Government-General . . . when at any time citizens are placed under administrative arrest and deported without trial, as undesirables from the point of view of the occupants’ security. . . . What is more, our children, our army, are armed and fighting every day.<sup>14</sup>

Protests, publication, refusal expressed. But the occupants achieved what they wanted; the Belgian Red Cross had ceased to exist.

And yet, the ICRC often went beyond mere protests and narrow legalism. It circumvented the absence of conventions relating to civilians by furnishing all manner of individual aid – in Belgium, in the other occupied territories, and in situations of blockade, which, for civilians, were comparable to the disasters of the occupation.

## **The ICRC in the face of reprisals, concentration camps, and the blockade**

If the new burden placed on the ICRC was so dramatic, it was because the occupied regions were not separate from the world war – quite the contrary – and throughout the conflict the reprisals affected the civilian populations held hostage as a result. None of the belligerents showed any scruples in using all possible weapons to achieve their goals. The battlefields were but one aspect – key, yes, but not the only one – of the violence of war. The war spread worldwide as it grew spatially, and as violence and cruelty expanded into the various areas affected. Violence presented itself as the only coherent aspect in the world at war, even though every party used and abused the concept of ‘law of nations’ to foster belief in the justice of its cause. The semantic difficulties were enormous, however. The ICRC was not alone, during this entirely new form of conflict, in struggling to find the words to express the reality of the concepts at work. What term applied when civilians disappeared from their homes, from their habitual lives: abduction,

<sup>14</sup> *Ibid.*, p. 275.



displacement, deportation?<sup>15</sup> ‘It was very hard to specify whom the belligerents considered as “civilian internees” among those taken away as “hostages” or those considered as “political prisoners” . . .’: the lists of prisoners sometimes designated as political prisoners or hostages included those who figured on other lists under the term ‘deported’.<sup>16</sup> The texts spoke about ‘*civils capturés*’, in the masculine, but had no means of understanding the specific nature of individual tragedies or even of grouping them in reliable categories of victims – men, women, or children.

In Geneva in September 1917, the president of the ICRC convened a conference in Geneva of National Societies from neutral countries to discuss the issue of civilian prisoners:

**Civilian internment** is a novel feature of this war; international treaties did not foresee this phenomenon. At the start of the war it seemed logical that enemy civilians might be **retained** as suspects; a few months should have been enough to separate the chaff from the wheat. [But now] we have to add to the number of civilian internees those deported into enemy territory as well as the inhabitants of territories occupied by the enemy. These civilians have been deprived of their liberty and their treatment hardly differs from that of **prisoners**. After three years and more of war, we demand that these different categories of civilian detainees should become the object of special consideration and that their situation, which in some respects is even more cruel than that of military prisoners, should be properly discussed before the fourth winter of the war.<sup>17</sup>

Indeed, enemy – and, later, occupied – civilians had been an insoluble problem since the war broke out in August 1914. No-one knew what to call them or what to do with them. The various belligerents ended up holding them in concentration camps. These deported civilians were the image of the war itself, global and total, with conditions ranging from ‘mere’ deprivation of freedom to forced labour behind the lines. Admittedly, the widespread use of reprisals against occupied civilians hugely complicated the situation: it was as though several eras of war co-existed in the same place in space and time – between archaic and modern warfare.

### The question of reprisals against occupied civilians

‘Reprisals! The word is on everyone’s lips! This is the golden calf, the only one worshipped by all peoples in arms’, an anonymous ICRC author wrote in 1915.

15 The word ‘deportation’, borrowed from the classical Latin *deportatio*, ‘a carrying’ or ‘conveying away’, ‘a transportation’ (Charlton T. Lewis and Charles Short, *A Latin Dictionary*, Clarendon Press, Oxford, 1879, consulted on [www.perseus.tufts.edu](http://www.perseus.tufts.edu)), took on the meaning of deportation or exile in Low Latin. The modern meaning combines the two, since it refers to ‘the removal from a country of an alien whose presence is unlawful or prejudicial’ (*Merriam-Webster’s Collegiate Dictionary*, 11th edition, Merriam-Webster Inc., 2008).

16 ICRC Archives, 1917.

17 ICRC Archives, ‘Introduction sommaire à la question concernant les civils’, September 1917, p. 1, cited in Matthew Stibbe, ‘The internment of civilians by belligerent states during the First World War and the response of the International Committee of the Red Cross ICRC’, in *Journal of Contemporary History*, Vol. 14, No. 1, 2006, p. 5 (emphasis added).

But who can fail to see the sophistry, the childishness of the term? Does the harm done by others excuse in any way the harm one does oneself? . . . Laws without sanctions, bits of paper, we Swiss have the right to protest all the violations . . . And so we shall, until the world's conscience rises up and, by the fertile indignation that those protests spark, kindles a new strength in the service of the law.<sup>18</sup>

Thus, a dignitary from the Hirson region in France was arrested in February 1915 and found himself, before being deported to Germany, with other hostages, such as the mayor of Noyon, Mr. Noël, and the prefect of Nord Département, Mr. Trépont. All three were arrested on the same date for the same reason: 'You are suspected of having committed acts akin to those for which German citizens have, in defiance of the law, been executed in Morocco'.<sup>19</sup> Indeed, after the Ottoman Empire had entered the war on the side of Germany, Sultan Mehmed V had proclaimed a holy war (*jihad*) and called on Muslims to rise up against the European Powers. Germany, the Ottoman Empire's ally, promoted strong pan-Islamic propaganda, sending agents to militate against French and British interests. In response to their activities in Morocco, the French arrested 300 members of the German colony there and sent them to an internment camp – known then as a concentration camp – in Algeria. Some were civilians. Others, convicted of spying and arms smuggling against France, were shot.<sup>20</sup> The German reprisals against the hostages from France's Nord Département testify yet again to the globalization of the war, in this case through the prism of occupation.

By the same token, in the midst of the Dardanelles campaign (and the extermination of the Armenians – everything can always get worse), it was decided in Lille:

In contravention of the law of nations, French warships destroyed, on 13 and 31 May 1915, the German consulates in the Turkish free ports of Alexandretta and Haifa. In reprisal, and to cover the damages to German and Turkish property, the towns of Roubaix and Valenciennes are each ordered to pay, by the master headquarters, a fine of 150,000 francs.<sup>21</sup>

The logic underlying the total mobilization of states and societies implied retaliatory measures against civilians located thousands of kilometres from each other. In all cases, the 'law of nations' was invoked, and the victims were sometimes military prisoners, sometimes occupied civilians.

Retaliatory measures were certainly not taken against the captive civilian population in enemy countries in the belief that the adversary would be forced to change his tune. Everyone knew that the logic of the war for all concerned

18 Article signed 'X', diary entry pasted into the *Bulletin International des Sociétés de la Croix Rouge*, 18 March 1915 (Collections of the ICRC Library, Geneva) (ICRC translation).

19 G. Desson, *Souvenirs d'un otage: de Hirson à Rastatt*, Bloud et Gay, Paris, 1916, p. 60 (ICRC translation).

20 Pascal Le Pautremat, *La politique musulmane de la France au XX<sup>e</sup> siècle: de l'Hexagone aux terres d'Islam: espoirs, réussites, échecs*, Maisonneuve et Larose, Paris, 2003, p. 81.

21 Letter from Major Hoffman, 20 June 1915, Nord Departmental Archives, 9R515 (ICRC translation).

was first and foremost that of battlefields, soldiers, increasingly heavy weaponry, and campaigns. Everyone also knew that the population could not, no matter how hard one tried, be brought to disassociate itself from its country at war.<sup>22</sup>

## Negotiating aid and the release of hostages

Occupied civilians used as hostages or targeted by reprisals would remain one of the total war's open sores. Negotiations were nevertheless started in 1915, under the aegis of the Vatican, for the release of women and girls, boys under the age of 17, men over the age of 55, doctors and priests. The humanitarian organizations focused their struggle throughout the entire war on the following three categories: women and children, the elderly, and medical and religious personnel. A 'bureau for the repatriation of civilian internees' was established in Bern under the direct supervision of the Federal Political Department in February 1916; it provided diplomatic backing for the ICRC civilian section. But in letter after letter, circular after circular, the Pope and the Red Cross asked their captors for news of these three categories of 'innocent victims' – meaning that they were never released. What is more, doctors and priests continued to be the target of reprisals throughout the conflict, as observed by the diarist Clémence Leroy in December 1917 from his village in Pas-de-Calais:

Bombshell: around 9 a.m. the timekeeper notified Mr. Daussu and Mr. Lefrancq, Mrs Duflos and Mrs Moriaux that they had to prepare to leave as hostages, the men tomorrow morning at 9, the women at a date to be set later. They have to take enough food for five days and can take 50 kilos of luggage. The reason: retaliation. The French are apparently holding some Alsatians and don't want to let them return to their country. Retaliation and more retaliation, that's what we're told every time an unjust act is committed. But I haven't done anything wrong, I have committed no crime to justify my being taken away, Mrs Duflos cried out. No, you've done nothing wrong, but you're being taken away because you're a well-known person. What luck, to be considered well known in these circumstances! The entire country feels especially sorry for this woman, who is almost sixty and leaves behind an infirm husband in poor health. The other woman is young and strong, people feel less sorry for her. Of the two men, one is here without his family, the other leaves behind an upset wife and two daughters. . . .

The two hostages left this morning, quite bravely. They were accompanied by the *curé* and the doctor from Rumaucourt, who learned that he was slated to leave yesterday when he came back from his rounds. We can imagine his surprise, and how well he must have slept! He appeared to have aged ten years

22 The civilians should not, however, be seen solely as the hapless victims of states and occupation armies. They, too, were broadly self-mobilized by the demonization of the enemy, which, by pushing them to resist, added another loop to the cycle of repression.

overnight, we've been told. . . . The *curé* from Rumaucourt was crying his heart out, poor man. He is old, poor, and ill, apparently he suffers from what they think are epileptic fits. And it seems that he and the others have left for Eastern Prussia, at this time of year, and for a climate much harsher than ours. Their unexpected and precipitate departure is on everyone's lips and the thoughts of every one of us are with these unfortunate souls, torn from their homes. The longer we stay on this painful road, the louder we cry out, over and over: Accursed war!<sup>23</sup>

Pas-de-Calais to Saxony: the route was indeed 'cursed' for civilians arbitrarily used as abject bargaining chips in late 1917, even though negotiations to prevent this had theoretically been ongoing for over two years. The doctors, priests, women, and even children taken hostage continued to be sent to concentration camps until 1918; they continued to be discovered, in the countries of Central and Eastern Europe, until the 1920s. Indeed, while some were exchanged or released, others were taken prisoner and deported. Worse yet, during the negotiations for their release, certain powers realized that they could use the hostages to exert pressure on the enemy. Thus, on several occasions civilian hostages were taken to Germany to influence the negotiations on military and even civilian prisoners with France. Once again, the interned were victims, this time of what must be termed the perverse effect of the humanitarian negotiations: as these often amounted to no more than exchanges, the civilians of one region ended up being used to 'pay' for those of another.

The German reprisals against the people in the occupied territories have to be seen in the light of the Allied blockade against the Central Powers to understand the phenomenon as a whole. The violence left the victims full up in some respects (with the shock of destruction, death, hunger, the camps), hollow in others (the lack of food and basic necessities). The German and Austrian populations experienced the blockade as a war crime, and the propaganda machines used it to condemn the intrinsic inhumanity of the French and English. The excess mortality in Germany caused by the blockade is today estimated at one million people during the conflict.<sup>24</sup> An insightful remark by a witness from Nord in occupied France illustrates the interaction between the processes of occupation, resistance, and blockade. David Hirsch wanted to believe that, from his town cut off from France, from his shop in Roubaix, he was also waging war: 'We close on Sunday afternoons. It's mainly the Germans who buy on Sundays. This is our small way of contributing to the effects of the blockade.'<sup>25</sup>

23 Clémence Leroy, 'Historial de la Grande Guerre', handwritten diary, 28–29 December 1917 (ICRC translation).

24 See, generally, Jay Winter and Jean-Louis Robert (eds), *Capital Cities at War: Paris, London, Berlin, 1914–1918*, Vol. 1, Cambridge University Press, Cambridge, 1997.

25 'Journal de David Hirsch', in Annette Becker (ed.), *Journaux de combattants et civils de la France du Nord dans la Grande Guerre*, Septentrion, Paris, 1998 (ICRC translation).

## Conclusion: a humanitarian moral?

Above and beyond the individual relief they provided, the ICRC and the Vatican were limited by their neutrality (the ICRC) and their *impartialità* (the Vatican). By placing themselves above the two sides, they remained outside the reality of the worldwide, global, total war. And yet the relief provided was real. Even a simple card – a ‘*Croix-Rouge*’, as the inhabitants of Nord called the pre-printed cards that were at least a sign of life – was a tangible source of hope. Perhaps too early, in 1916, the ICRC paid tribute to its new civilian agency, and to Dr. Ferrières, a member of the Committee and the agency’s driving force, in particular:

Without being able to invoke either rules or conventions – because no provision had been made for the war’s extension to civilian populations – but on the strength of the powerful considerations of humanity that had led to its birth, this agency within the agency, this small world within a larger one, has almost as many chapters in its history as the big sister alongside whom it walks, hand in hand. . . . It played a magnificent role in showing interest in a category of victims entirely bereft of support and relief, and thanks to its steadfast perseverance and devotion, was blessed by families brought back together or reassured as to the existence of their dispersed members.<sup>26</sup>

The plight of the occupied population may have been terrible, but it paled in comparison to what was being done at the same time to the Armenians in the Ottoman Empire. A French caricaturist got this right. His drawings denouncing the deportation of the women of Lille at Easter 1916 depict Teutonic brutes carrying away or taking aim at women and children. In one, a soldier with a pointed helmet says: ‘Listen to them complain. What would they say if they were in Armenia?’<sup>27</sup>

America’s Theodore Roosevelt did not mince his words when news of the massacre of the Armenians reached the United States:

Even to nerves dulled and jaded by the heaped-up horrors of the past year and a half, the news of the terrible fate that has befallen the Armenians must give a fresh shock of sympathy and indignation. Let me emphatically point out that the sympathy is useless until it is accompanied by indignation, and that the indignation is useless if it exhausts itself in words instead of taking shape in deeds.

For Roosevelt, only war could put an end to the tragedy:

If this people through its government had not . . . shirked its duty in connection with the world war for the last sixteen months, we would now be able to take effective action on behalf of Armenia. Mass meetings on behalf of the Armenians amount to nothing whatever if they are mere methods of giving a

<sup>26</sup> *Bulletin International des Sociétés de la Croix Rouge*, No. 192, October 1917, p. 413.

<sup>27</sup> *La Baionnette*, 1916, drawings by Henriot.

sentimental but ineffective and safe outlet to the emotions of those engaged in them. . . . Until we put honor and duty first, and are willing to risk something in order to achieve righteousness both for ourselves and for others, we shall accomplish nothing; and we shall earn and deserve the contempt of the strong nations of mankind.<sup>28</sup>

Thus was Roosevelt brought by his compassionate and indignant morals to join the total war that was responsible for these crimes, just as the French caricaturist used irony to give vent to his anti-German hatred more than his indignation at the deportations and the massacre of Armenians.

Didier Fassin starts the introduction to his book, *Humanitarian Reason: A Moral History of the Present*, by citing Emmanuel Levinas: ‘Everyone will readily agree that it is of the highest importance to know whether we are not duped by morality’.<sup>29</sup> Fassin continues his book on the long-term contradictions between compassion – which is all sentiment – and reason – which prompts action for distressed human beings – and points to a paradox in his study of the most modern humanitarian policies:

On the one hand, moral sentiments are focused mainly on the poorest, most unfortunate, most vulnerable individuals: the politics of compassion is a politics of inequality. On the other hand, the condition of possibility of moral sentiments is generally the recognition of others as fellows: the politics of compassion is a politics of solidarity.<sup>30</sup>

That paradox is no doubt most striking in time of total war. The upheaval of war first led to this fatal inflammation for civilians on a large scale during World War I. Could the victims and their saviours speak of the contradictions while struggling with the realities of what had become unspeakable, unthinkable?

28 Letter from Theodore Roosevelt to Samuel Dutton, 24 November 1915, available at: <http://query.nytimes.com/mem/archive-free/pdf?res=F50C17F6385B17738DDDA80894DA415B858DF1D3> (last visited 2 May 2012).

29 Emmanuel Levinas, *Totality and Infinity: An Essay on Exteriority*, Martinus Nijhoff, The Hague, 1969, cited in Didier Fassin, *Humanitarian Reason: A Moral History of the Present*, transl. Rachel Gomme, University of California Press, Berkeley and Los Angeles, CA, and London, 2012, p. 1.

30 D. Fassin, above note 29, p. 3.

# Determining the beginning and end of an occupation under international humanitarian law

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## **Abstract**

*International humanitarian law (IHL) does not provide a precise definition of the notion of occupation, nor does it propose clear-cut standards for determining when an occupation starts and when it ends. This article analyses in detail the notion of occupation under IHL and its constitutive elements, and sets out a legal test for identifying when a situation qualifies as an occupation for the purposes of IHL. It concludes by suggesting an adjustment of the legal test to the specific characteristics of occupation by proxy and occupation by multinational forces.*

**Keywords:** occupation, effective control, authority, consent, legal test, occupation by proxy, occupation by multinational forces.

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Recent occupations have raised a new set of legal questions. Much attention, however, has been given to the substantive rules of occupation, to the detriment of the difficult issues concerning standards to determine when an occupation begins or when it ends. This is surprising, given that one has to determine whether an occupation has been established and endures before one can address any substantive question of occupation law.

\* This article was written in a personal capacity and does not necessarily reflect the views of the ICRC.

The determination as to whether a situation amounts to an occupation is not easy to make. This is mainly because the definition of occupation contained in Article 42 of the 1907 Hague Regulations is somewhat vague. Indeed, this provision defines the concept of occupation as follows: ‘Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised’.

Besides the imprecision of the legal definition of occupation, there are a number of other complicating factors as well, such as the continuation of hostilities, the continued exercise of a degree of authority by the local government, or the invading party’s refusal to assume the obligations stemming from the exercise of authority over a foreign territory. It may also be very difficult to assess the end of an occupation from a legal perspective. Progressive phasing out, partial withdrawal, retention of certain competences over areas previously occupied, maintenance of military presence on the basis of consent that is open to question, or the evolution since the Hague Regulations of the means of exercising control: all these issues can complicate the legal classification of a given situation and raise numerous questions about when an occupation may be said to have ended.

The objective of this article is to elaborate on the notion of occupation – in particular the legal criteria for determining when the presence of foreign troops in a territory amounts to an occupation under international humanitarian law (IHL). After a reminder that determining the existence of an occupation is based on the prevailing facts, it attempts to clarify the notion of occupation by identifying its constitutive elements derived from Article 42 of the Hague Regulations. It then discusses these elements, before proposing a legal test for determining the existence of an occupation under IHL. Finally, the article addresses the issue of the beginning and end of occupation in two specific situations: occupation by proxy and occupation conducted by a coalition of states or by multinational forces.

## Occupation: a question of facts

The starting point of this analysis is that the existence of an occupation – as a species of international armed conflict – must be determined solely on the basis of the prevailing facts. This view, besides being widely held, is reflected notably in international instruments and jurisprudence, as well as in some military manuals.

In 1880, the Institute of International Law, in Article 41 of its *Manual on the Laws of War on Land* (the *Oxford Manual*), had already declared that a

territory is regarded as occupied when, as the consequence of invasion by hostile forces, the State to which it belongs has ceased, *in fact*, to exercise its ordinary authority therein, and the invading State is alone in a position to maintain order there.<sup>1</sup>

1 Emphasis added.



The use of the words ‘in fact’ clearly affirms that it is the facts that establish the existence of a state of military occupation.

This position has since been endorsed by the US Military Tribunal of Nuremberg in the *Hostages* trial, which stated that ‘whether an invasion has developed into an occupation is a question of fact’.<sup>2</sup> It has also been reaffirmed in recent, emblematic decisions handed down by the International Court of Justice (ICJ)<sup>3</sup> and the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>4</sup> In addition, a number of military manuals have adopted the position expressed in the *Oxford Manual* and in international jurisprudence. For example, the US *Field Manual 27-10* specifies in its Section 355 that ‘military occupation is a question of fact’.<sup>5</sup>

Therefore, the definition of occupation, as set forth in Article 42 of the Hague Regulations, does not rely on a subjective perception of the prevailing situation by the parties to the armed conflict, but on an objective determination based on a territory’s *de facto* submission to the authority of hostile foreign armed forces.

A determination of this kind, based on the prevailing facts, conforms to the strict separation of *jus in bello* from *jus ad bellum*. The separation retains all its relevance and validity for situations of occupation. This was expressly stated by the US Military Tribunal at Nuremberg: ‘International law makes no distinction between a lawful and unlawful occupant in dealing with the respective duties of occupant and population in occupied territory’.<sup>6</sup> Therefore, the law of occupation, as a branch of IHL, applies without any adverse distinction based on the nature or origin of a particular armed conflict, the objectives pursued by the occupying power, the lawfulness under *jus ad bellum* of the extra-territorial military intervention, or the causes espoused by or attributed to the parties to the conflict.

Nonetheless, establishing, on a factual basis, that foreign forces exert a significant degree of authority over a territory is a complex exercise, mainly because of the ‘fogs of war’. In this regard, the transition between the invasion and occupation phases is particularly difficult to identify with exactness.<sup>7</sup> Given this difficulty, determining the existence of an occupation would undoubtedly be made

2 See US Tribunal at Nuremberg, *Hostages* trial, *Law Reports of Trial of War Criminals*, Vol. III, UN War Crimes Commission, 1949, London, p. 55.

3 In a recent case – *DRC v. Uganda* – the ICJ was emphatic that it had to examine the prevailing facts before stating that Uganda had in fact established its authority over parts of the territory of the Democratic Republic of the Congo; ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment, 19 December 2005, para. 173.

4 To interpret the notion of occupation, the ICTY made literal use of the Nuremberg Tribunal’s formula and decided that ‘the determination of the existence of a state of occupation is a question of fact’; ICTY, *Prosecutor v. M. Naletilić and V. Martinović*, Judgment, Case No. IT-98-34-T, Trial Chamber, 31 March 2003, para. 211 (hereafter *Naletilić* case).

5 FM 27-10, *Department of the Army Field Manual: The Law of Land Warfare*, Washington, DC, July 1956. See also, for instance, Canada, *Joint Doctrine Manual: Law of Armed Conflict at Operational and Tactical Levels*, JAG Office, 2001, Section 1203(1); New Zealand Defence Force, DM 112, *Interim Law of Armed Conflict Manual*, 1992, Section 2(1302)(1).

6 US Tribunal of Nuremberg, *Von List* case, *Law Reports of Trial of War Criminals*, Vol. VIII, 1949, p. 59.

7 For instance, it has been extremely difficult to identify the precise date marking the beginning of the occupation of Iraq in 2003. This is mainly because of the continuation of hostilities, the advance of the

easier by setting out criteria for guiding the factual assessment. What follows is an attempt to define those criteria and to develop a legal test for determining the beginning and end of an occupation on the basis of the relevant norms of occupation law, in particular Article 42 of the Hague Regulations.

## The definition of occupation under IHL

The notion of occupation has been sketched out by Article 42 of the Hague Regulations. However, in light of the vagueness of that provision's plain language, a careful examination of its interpretation over time is necessary for clarifying the exact meaning of the notion of occupation. This will enable us to establish the components of a legal test for determining the existence of an occupation for the purposes of IHL.

### The central role played by Article 42 of the Hague Regulations

After some fluctuations,<sup>8</sup> the definition of occupation was conclusively established in Article 42 of the Hague Regulations: 'Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.' Subsequent IHL treaties have not altered this definition. The notion of occupation has been expanded by Article 2 common to the 1949 Geneva Conventions specifically in order to include occupation that encountered no armed resistance. However, nothing in the *travaux préparatoires* indicates that the drafters of these instruments intended to change the widely accepted definition of occupation contained in Article 42 of the Hague Regulations.<sup>9</sup> Since Common Article 2 explicitly recognizes the application of these instruments to all cases of occupation but fails to define the notion of occupation, one can logically conclude that the applicability of the Conventions' relevant norms – in particular those of Part III, Section III of the Fourth Geneva Convention – is predicated on the definition of occupation laid down in Article 42 of the Hague Regulations. This is also suggested by Article 154 of the Fourth Geneva Convention governing the relationships between this instrument and the Hague Conventions of 1907.<sup>10</sup>

coalition troops, and the initial uncertainty about their ability to exert authority over parts of Iraqi territory.

- 8 See, for instance, Article 1 of the International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874; Article 41 of the *Oxford Manual* adopted in 1880 by the Institute of International Law; and Article 42 of the Regulations concerning the Laws and Customs of War on Land (Hague Convention II), The Hague, 29 July 1899.
- 9 Federal Political Department of Switzerland, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II, Section A (Bern), pp. 650, 672, 675–676, 728, and 811.
- 10 Article 154 of the Fourth Geneva Convention (GC IV) states: 'In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of July 29, 1899, or that of October 18, 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague'.

This interpretation of the concept of occupation is confirmed by those made by international tribunals such as the ICJ and the ICTY, who have described Article 42 of the Hague Regulations as the *exclusive* standard for determining the existence of an occupation under IHL.<sup>11</sup> In fact, the ICTY has used the definition of occupation contained in the Hague Regulations in various decisions in order to determine whether an occupation existed within the meaning of the Fourth Geneva Convention. Relying on Article 154 of the Convention, it decided that,

while Geneva Convention IV constitutes a further codification of the rights and duties of the occupying power, it has not abrogated the Hague Regulations on the matter. Thus, in the absence of a definition of ‘occupation’ in the Geneva Conventions, the Chamber refers to the Hague Regulations and the definition provided therein, bearing in mind the customary nature of the Regulations.<sup>12</sup>

The Trial Chamber then quoted Article 42 of the Hague Regulations and specified that it endorsed this definition.

The ICJ has had two opportunities recently to consider the notion of occupation. In its Advisory Opinion of 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and in its 2005 decision on *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, the Court relied exclusively on Article 42 of the Hague Regulations to determine whether an occupation existed in the territories in question and whether the law of occupation applied in those situations.<sup>13</sup> In particular, the ICJ’s reliance on Article 42 of the Hague Regulations to assess the applicability of Part III, Section III of the Fourth Geneva Convention – titled ‘Occupied territories’ – leads to the conclusion that Article 42 of the Hague Regulations is the basis for determining the existence of a state of occupation. The law of occupation is thus a normative construction essentially made up of the Hague Regulations and the Fourth Geneva Convention; its scope of application is predicated entirely on the fulfilment of the conditions inferred from Article 42 of the Hague Regulations.

It has been argued that two distinct definitions of occupation exist, one drawing on the Hague Regulations and the other on the Fourth Geneva Convention.<sup>14</sup>

- 11 It should also be noted that, at the domestic level, the Supreme Court of India indicated in 1969 that Article 42 of the Hague Regulations was the only legal basis on which the determination of a state of occupation should be made. See Supreme Court of India, *Rev. Mons. Sebastiao Francisco Xavier dos Remedios Monteiro v. The State of Goa*, 26 March 1969, *All India Reporter*, 1970, SC 329, *Supreme Court Reports*, 1970, pp. 87–102.
- 12 ICTY, *Naletilić* case, above note 4, paras. 215–216.
- 13 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 78; ICJ, *DRC v. Uganda*, above note 3, paras. 172–177.
- 14 The authors of the ICRC’s *Commentaries* on the Geneva Conventions argued in 1958 that the concept of occupation under GC IV would be broader than that used under the Hague Regulations as far as the protection of individuals was concerned. See *Commentary on the Geneva Conventions of 12 August 1949*, Vol. IV, ICRC, Geneva, 1958, p. 60. This view may be found in recent international jurisprudence as well as in scholarly writings. See Vaïos Koutroulis, ‘L’affaire des activités armées sur le territoire du Congo: une lecture restrictive du droit de l’occupation?’, in *Revue belge de droit international*, No. 2, 2006, pp. 719 ff. However, in the absence of any express definition of occupation under GC IV and given the operation of

However, various scholars have also stressed the importance and prevalence of Article 42 of the Hague Regulations for defining an occupation.<sup>15</sup>

Finally, various military manuals have confirmed the importance of Article 42 of the Hague Regulations as a trigger for the application of occupation law. In fact, when dealing with the law governing territory under the authority of hostile foreign armed forces, these manuals usually follow the same logic: the section on occupation starts with a restatement of the definition of occupation set out in Article 42 of the Hague Regulations. The manuals then describe and comment on numerous provisions borrowed from the Hague Regulations and Part III, Section III of the Fourth Geneva Convention, indicating clearly that their drafters considered Article 42 of the Hague Regulations as the trigger for all norms of occupation law.<sup>16</sup>

its Article 154, which emphasizes the supplementary character of the instrument in relation to the Hague Regulations, the assertion that GC IV would provide a distinct definition of occupation has no legal basis under IHL. Article 154 of GC IV governs the relationship between GC IV and the Hague Regulations and makes it clear that the former has not changed the definition contained in Article 42 of the latter. Moreover, one should not misinterpret the position expressed in the ICRC's *Commentaries* as well as in the ICTY's decision in the *Naletilić* case (see above note 4, para. 221). They suggest only that certain provisions of the law of occupation, as set out in GC IV, should also apply during the invasion phase. The interpretations given in the ICRC's *Commentaries* and in the ICTY decision do not persuasively demonstrate that the definition of occupation found in Article 42 of the Hague Regulations has been relaxed to the extent that effective control over foreign territory is no longer required for applying occupation law norms. On the contrary, they simply mean that the threshold of application for certain norms of GC IV has been lowered so that they can also take legal effect during the invasion phase. In the *Naletilić* decision, the ICTY said only this: 'the application of the law of occupation as it effects [sic] "individuals" as civilians protected under Geneva Convention IV does not require that the occupying power have actual authority'. The very last part of this sentence clearly indicates that effective control is not necessary to give effect to the protections set out in Part III, Section III, of GC IV. The definition of occupation contained in Article 42 of the Hague Regulations is therefore not affected. The threshold of application of Part III, Section III, of GC IV is diminished only for the purposes of according more protection to individuals during the invasion phase. Such an interpretation can also be inferred from the jurisprudence of the Eritrea–Ethiopia Claims Commission (*Partial Awards: Western Front, Aerial Bombardment and Related Claims – Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25, and 26*, Decision, 19 December 2005, para. 27). See also Dapo Akande, 'Classification of armed conflicts: relevant legal concepts', in E. Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, pp. 44 ff.

- 15 Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, 1993, p. 4; 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. 28–29; Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, pp. 42 ff.; Yuval Shany, 'Faraway, so close: the legal status of Gaza after Israel's disengagement', in *Yearbook of International Humanitarian Law*, 2005, Vol. 8, pp. 374 ff.; Marten Zwanenburg, 'The law of occupation revisited: the beginning of an occupation', in *Yearbook of International Humanitarian Law*, 2007, Vol. 10, pp. 109 and 128–129; Hans-Peter Gasser, 'Belligerent occupation', in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edition, Oxford University Press, Oxford, 2008, pp. 273–274; Michael Bothe, 'Beginning and end of occupation', in *Collegium*, No. 34, Autumn 2006, pp. 26 ff.
- 16 See, for instance, Australian Defence Force, *Law of Armed Conflict: Commander's Guide*, 1994, para. 1202; Canada, *Joint Doctrine Manual*, above note 5, para. 1203; Germany, *The Handbook of Humanitarian Law in Armed Conflict*, 1995, para. 526; United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict*, 2004, paras. 11.2–11.3; US Army, *Field Manual 27-10*, above note 5, paras. 351 ff.; New Zealand, *Interim Law of Armed Conflict Manual*, above note 5, 1302; Sweden, *International Humanitarian Law in Armed Conflict, with Reference to the Swedish Total Defence System*, Swedish Ministry of Defence, 1991, section 6.1.2; Argentina, *Leyes de Guerra*, Ejército Argentino, RC-46-1, 1969, section 5.001; Germany, *Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch*, 1992, para. 526; France, *Manuel de droit des conflits armés*, Ministère de la Défense, SGA, 2003, p. 121.

In view of the above, Article 42 of the Hague Regulations can be regarded as the only legal basis on which the determination of the existence of a state of occupation can be made.

### Identifying the components of a legal test for determining a state of occupation under IHL

The definition contained in Article 42 of the Hague Regulations is pivotal, but it needs further clarification. To this end, the following section aims to set out the various components of a legal test, derived from Article 42, that will make it possible to determine when a situation amounts to an occupation for the purposes of IHL.

#### *The importance of the notion of 'effective control'*

To identify the elements of the occupation test,<sup>17</sup> one must first examine the concept of effective control, which is at the heart of the notion of occupation and has long been associated with it. The phrase 'effective control' is not found in treaty law; it reflects a notion developed over time in the legal discourse pertaining to occupation to describe the circumstances and conditions for determining the existence of a state of occupation.

In this regard, it is self-evident that occupation implies some degree of control by hostile troops over a foreign territory or parts thereof in lieu of the territorial sovereign. However, the application of occupation law will not be triggered only when foreign forces exert full control over foreign territory but also when they exercise a lesser level of authority.<sup>18</sup> It has often been argued that occupation is a question of degree. As Yoram Dinstein points out,

effective control is a *conditio sine qua non* of belligerent occupation. But defining the exact amount of control deemed objectively 'effective' is an imponderable problem. In particular, the optimal size of the army of occupation and the manner of its deployment cannot be determined *a priori*. Circumstances vary from one occupied territory to another, and the degree of effective control required may depend on the terrain, the density of the population and a slew of other considerations.<sup>19</sup>

In any case, it is the effectiveness of the control exercised by the foreign forces that sets off the application of occupation law.<sup>20</sup> Indeed, effective control will

17 For the purposes of this article, 'occupation test' means the criteria inferred from Article 42 of the Hague Regulations, whose fulfilment on a cumulative basis will make it possible to designate a situation as an occupation within the meaning of IHL.

18 Daniel Thürer and Malcolm MacLaren assert that occupation exists 'when a party to a conflict is exercising *some* level of authority over enemy territory'. See "'*Ius post bellum*" in Iraq: a challenge to the applicability and relevance of international humanitarian law?', in Klaus Dicke *et al.* (eds), *Weltinnenrecht: Liber Amicorum Jost Delbrück*, Duncker & Humblot, Berlin, 2005, p. 757.

19 Y. Dinstein, above note 15, pp. 43–44.

20 The choice of the word 'effective', which is commonly associated with the notion of control in order to define the nature of the foreign forces' ascendancy over the territory in question, reflects the analogy made

permit the foreign troops to enforce the rights and duties granted to them by occupation law.

This assertion is corroborated by the legal literature, which has established the notion of effective control as a central element in the issue of occupation.<sup>21</sup> A careful examination of the international jurisprudence,<sup>22</sup> and of the content of some military manuals, also supports the assertion that the notion of effective control is at the heart of the concept of occupation<sup>23</sup> and should be the starting point for devising a test for determining the existence of an occupation. In this regard, ‘effective control’ is an essential concept as it substantiates and specifies the notion of ‘authority’ lying at the heart of the definition of occupation contained in Article 42 of the Hague Regulations. As such, effective control is the main characteristic of occupation as, under IHL, there cannot be occupation of a territory without effective control exercised therein by hostile foreign forces.

Therefore, the notion of effective control has to be examined more closely. This will enable us to identify the criteria for defining occupation for the purposes of IHL.

between occupation and blockade during the negotiations related to the Brussels Declaration of 1874. At the discussions that took place during the drafting process of this Declaration, the delegates, almost without exception, pointed out the similarities between occupation and blockade: both had to be effective to be said to exist for the purposes of the law of armed conflict. See M. Zwaneburg, above note 15, p. 102; Shane Darcy and John Reynolds, “‘Otherwise occupied’: the status of the Gaza Strip from the perspective of international humanitarian law”, in *Journal of Conflict and Security Law*, Vol. 15, No. 2, 2010, pp. 218–220; T. J. Lawrence, *The Principles of International Law*, 6th edition, Macmillan & Co, London, 1917, pp. 435–436; James Molony Spaight, *War Rights on Land*, Macmillan & Co, London, 1911, pp. 328–329. It was argued that, just as blockades are not recognized unless they are effective, the existence of occupations, too, must be decided on the basis of effective control. In this regard, a consensus emerged among the delegates indicating that, in fact, an occupation would come into existence only to the extent to which the foreign army could exercise a certain degree of control over the territory in question. See Doris A. Graber, *The Development of the Law of Belligerent Occupation, 1863–1914: A Historical Survey*, Columbia University Press, New York, 1949.

- 21 Georg Schwarzenberg, *International Law as Applied by International Courts and Tribunals*, Vol. 2: *The Law of Armed Conflict*, Stevens, London, 1968, pp. 274–276. The same position had previously been expressed by G. Von Glahn, above note 15, pp. 27–29. See also E. Benvenisti, above note 15, p. 4, who defined occupation as ‘the effective control of a power (be it one or more states or an international organization such as the UN) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory’. More recently, Yoram Dinstein described the notion of effective control as indispensable for the purposes of determining the existence of an occupation (Y. Dinstein, above note 15, pp. 42–43). Finally, Robert Kolb and Sylvain Vit  say that, for determining the existence of an occupation, ‘tout revient   se demander   partir de quel moment le contr le de l’arm e ennemie est suffisamment effectif au sens de l’article 42 du R glement de 1907’, in *Le droit de l’occupation militaire: perspectives historiques et enjeux juridiques actuels*, Bruylant, Bruxelles, 2009, p. 142.
- 22 ICTY, *Prosecutor v. Duško Tadić*, Trial Chamber, Judgment, 7 May 1997, Case No. IT-94-1-T, para. 580: ‘Whether or not the victims were “protected persons” depends on when it was that they fell into the hands of the occupying forces. The exact moment when a person or area falls into the hands of a party to a conflict depends on whether that party has effective control over an area’. See also, ICJ, *DRC v. Uganda*, above note 3 para. 175.
- 23 For example, US Army, *Field Manual 27-10*, above note 5, section 352 (addressing the distinction between invasion and occupation), indicates that ‘an invader may attack with naval or air forces or its troops may push rapidly through a large portion of enemy territory without establishing that effective control which is essential to the status of occupation’. See also UK, *Manual*, above note 16, section 11.7; Italy, *Manuale di diritto umanitario*, Stata maggiore della Difesa, SMD-G-014, 1991, p. 12 at 32; New Zealand, *Interim Law of Armed Conflict Manual*, above note 5, 1302; Germany, *Humanit res V lkerrecht*, above note 16, para. 526; Canada, *Joint Doctrine Manual*, above note 5, para. 1203.7.

### *The constitutive elements of the notion of effective control*

International jurisprudence, some army manuals, and legal scholarship tend to propose a consistent approach to the notion of effective control based on the ability of the foreign forces to exert authority, in lieu of the territorial sovereign, through their unconsented-to and continued presence in the territory in question. With regard to international jurisprudence, the US Military Tribunal in Nuremberg stated the following, in connection with the *Von List* case:

The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of an established government. This presupposes the destruction of the organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied.<sup>24</sup>

The Tribunal also emphasized the importance of the potential ability of the Occupying Power to effectively enforce its authority in the area in question: 'While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country'.<sup>25</sup>

More recently, in its decision in the case of *DRC v. Uganda* (2005), the ICJ stated:

In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as the result of an intervention, is an 'occupying Power' in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government.<sup>26</sup>

Other elements that could form part of the notion of effective control have also emerged in the jurisprudence of the ICTY. In the *Naletilić* case, it elaborated a few guidelines for determining whether a situation amounted to occupation:

To determine whether the authority of the occupying power has been actually established, the following guidelines provide some assistance:

- the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly;

24 See US Tribunal of Nuremberg, *Von List* case, above note 6, pp. 55–56.

25 *Ibid.*

26 ICJ, *DRC v. Uganda*, above note 3, para. 173.

- the enemy’s forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation;
- the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt;
- a temporary administration has been established over the territory;
- the occupying power has issued and enforced directions to the civilian population.<sup>27</sup>

Military manuals have also elaborated the notion of effective control. For instance, the United Kingdom’s *Manual of the Law of Armed Conflict* states:

To determine whether occupation exists, it is necessary to look at the area concerned and determine whether two conditions are satisfied:

- First, that the former government has been rendered incapable of publicly exercising its authority in that area;
- Second, that the occupying power is in a position to substitute its own authority for that of the former government.<sup>28</sup>

Finally, legal scholarship has also endorsed the elements put forward, by the international jurisprudence and army manuals mentioned above, to determine whether a situation amounts to occupation for the purposes of IHL.<sup>29</sup>

IHL treaties and their *travaux préparatoires*, scholarly literature, military manuals, and judicial decisions all give proof of the pre-eminence accorded to three elements in the occupation equation, namely, the unconsented-to presence of foreign forces, the foreign forces’ ability to exercise authority over the territory concerned in lieu of the local sovereign, and the related inability of the latter to exert its authority over the territory. All together, these elements constitute the so-called ‘effective-control test’ used to determine whether a situation qualifies as an occupation for the purposes of IHL. These three elements are also the only ones

27 ICTY, *Naletilić* case, above note 4, para. 217. It is important to note that some of the elements identified by the ICTY constitute criteria (for instance, that the Occupying Power must be in a position to substitute its own authority), while others are only useful indicators for identifying whether the constitutive criteria of occupation have been effectively met (for instance, the establishment by the Occupying Power of a temporary administration).

28 UK, *Manual*, above note 16, point 11.3, p. 275. Other military manuals have employed the same interpretation of the notion of effective control, reflecting a common reading, as it were, of the constitutive elements of the concept of occupation for the purposes of IHL. See, for instance, Canada, *Joint Doctrine Manual*, above note 5, para. 1203; US Army, *Field Manual 27-10*, above note 5, para. 355; New Zealand, *Interim Law of Armed Conflict Manual*, above note 5, 1302(4).

29 See G. Von Glahn, above note 15, pp. 28–29; M. Bothe, above note 15, pp. 26–32; Y. Shany, above note 15, pp. 374–378; M. Zwanenburg, above note 15, pp. 128–130; Y. Dinstein, above note 15, pp. 35–36 and 38–45; Eyal Benvenisti, ‘The law on the unilateral termination of occupation’, in T. Giegerich and U. Heinz (eds), *A Wiser Century? Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years after the Second Hague Peace Conference*, Berlin: Duncker & Humblot, 2009, pp. 371–375; H.-P. Gasser, above note 15, pp. 273–274.



that – cumulatively – reflect the tension of interests between the local government, the Occupying Power, and the local population, which is an unchanging characteristic of a situation of belligerent occupation.<sup>30</sup> In light of their importance, these elements should be established as prerequisites for the effective-control test. As such, they form the constitutive and cumulative conditions of the notion of occupation for the purposes of IHL.

## The main elements of the effective-control test

The previous section showed that three cumulative criteria – the unconsented-to foreign military presence, the foreign forces' ability to exercise authority over the areas in lieu of the territorial sovereign, and the related inability of the latter to exert their authority over the territory – have emerged as the constitutive elements of the notion of effective control. However, their exact meaning requires further clarification and interpretation. This section will examine how these criteria might be interpreted.

### The importance of foreign military presence in the occupied territory

Recent occupations have raised the question of whether the physical presence of hostile foreign troops is required for establishing and maintaining a state of occupation. It has been argued that the concept of occupation and the definition thereof, as set out in Article 42 of the Hague Regulations, could be re-interpreted in light of changes in technology and/or in the use of force.<sup>31</sup> It has been notably contended that the development of modern technologies has made it possible for contemporary Occupying Powers to assert effective control over foreign territory and significant aspects of the civilian life of its inhabitants without having a continuous military presence therein. Seen in this way, the maintenance of effective control for the purposes of occupation law could be detached from its modalities of enforcement:<sup>32</sup> this definition of effective control implies that an occupation could exist solely on the basis of the foreign power's ability to project military power from a position beyond the boundaries of the 'occupied territory'.<sup>33</sup> At first sight, this

30 M. Bothe, "Effective control": a situation triggering the application of the law of belligerent occupation', background document for the ICRC project on occupation and other forms of administration of foreign territory, First meeting of experts in *Occupation and Other Forms of Administration of Foreign Territory*, Report prepared and edited by T. Ferraro, ICRC, Geneva, April 2012, pp. 36 ff [hereinafter 'ICRC Report on Occupation']. See also M. Zwanenburg, above note 15, pp. 109–110.

31 Gisha – Legal Center for Freedom of Movement, 'Disengaged occupiers: the legal status of Gaza', Position Paper, 2007, pp. 69 ff. See also, M. Zwanenburg, above note 15, pp. 125 ff. However, Zwanenburg stresses that technological and military developments do not lead to the conclusion that it is no longer necessary to have hostile foreign troops on the ground for the purposes of the effective-control test.

32 It must be noted that the requirement of the foreign military presence cannot be questioned for the *establishment* of an occupation. If one might argue that an occupation can be maintained – once established – by a kind of remote control under specific circumstances, it is submitted here that the establishment of an occupation still requires the physical presence of the foreign armed forces in the invaded areas.

33 Gisha, above note 31.

position seems to be in line with Article 42 of the Hague Regulations, which, when interpreted literally, tends to confirm that the physical presence of the foreign forces enforcing effective control is not necessarily required.

However, it is very much open to question whether, without the physical presence of enemy forces, the authority of the territorial sovereign can be said to have been suppressed and replaced by that of the enemy. Article 42 of the Hague Regulations specifies expressly that authority – and the inherent control over an occupied territory that it requires – must be *established* before it can be *exerted*: ‘occupation extends only to the territory where . . . authority has been established and can be exercised’.

Article 42 thus creates an inseparable connection between the establishment of authority, which presupposes the deployment of foreign enemy forces within the area concerned, and the ability to exercise the related military control.<sup>34</sup> Effective control over foreign territory requires the Occupying Power to be able, because it has already established its authority as the result of the military invasion, to impose its authority in that territory within a reasonable time. Thus, in principle, the ability to exert authority over occupied territory cannot be separated from the physical military presence of the Occupying Power.<sup>35</sup>

The actual physical presence of the hostile army in occupied territory – the working assumption on which IHL drafters relied<sup>36</sup> – is also presumed throughout the provisions of the Hague Regulations and the Fourth Geneva Convention.<sup>37</sup> In general, the obligations and rights conferred upon the Occupying Power by IHL require, to be given effect, its physical presence in the occupied territory.<sup>38</sup> For example, how could an occupant discharge its obligation to maintain law and order without being present in occupied territory? How could it ‘administer’ the occupied

34 R. Kolb and S. Vité, above note 21, pp. 179–180.

35 In other words, occupation and its related element of effective control cannot – in principle – be established and maintained solely by exercising power from beyond the boundaries of the occupied territory. The test of effective control cannot include the potential ability of one of the parties to the armed conflict to project power through its forces positioned outside the ‘occupied territory’ without stretching the concept of occupation so much that it makes any assignment of responsibilities under occupation law meaningless. Otherwise, any state capable of invading the territory of its weaker neighbours by virtue of its military superiority, and of imposing its will there, would be said to be in ‘effective control’ of that territory and considered an occupant for the purposes of IHL. Such an interpretation would be unreasonable. See, in particular, Eyal Benvenisti, ‘Responsibility for the protection of human rights under the interim Israeli–Palestinian agreements’, in *Israeli Law Review*, 1994, pp. 308–309. However, one should wonder whether this position could be nuanced in very specific and exceptional circumstances, notably when the occupying forces leave the area under their control while still maintaining key elements of authority therein. See below, ‘A legal test for determining whether a situation qualifies as an occupation for the purposes of IHL’.

36 The drafters of IHL instruments that contain provisions related to occupation have always assumed that the armed forces of the invader must be present in the territory for it to be regarded as occupied under IHL. For instance, during the negotiations for the Brussels Declaration of 1874, most of the delegates rejected a proposal made by the German delegate according to which an occupation could be said to exist even in the absence of occupying forces on the ground. Their rejection of the German delegate’s proposal was linked to the view that an occupation, like a blockade, had to be effective; and such effectiveness could not be achieved without the deployment of foreign troops in occupied territory.

37 M. Zwanenburg above note 15, p. 105; S. Darcy and J. Reynolds, above note 20, pp. 218–219.

38 See, for instance, Articles 43, 46, 52, 53, 55, and 56 of the Hague Regulations, and Articles 55, 56, 59, and 66 of GC IV.

territory, within the meaning of IHL, from outside? How could it requisition or seize properties if it is not deployed in the occupied territory? How could it ensure and maintain medical establishments and services, public health, and hygiene?

Should the occupier not be in a position to effectively assume those duties under occupation law (in particular when it has removed its troops from the foreign territory), it would then become quite meaningless to invoke occupation law as the legal frame of reference. For this reason, control over air space alone, for instance, has been rejected as constituting effective control for the purposes of IHL.<sup>39</sup>

Effective control also implies the enemy foreign forces' potential ability to substantiate their activities of occupation. In other words, effective control means that the occupant will put its authority into effect by, for instance, enforcing – or by being able to enforce – directives issued to the local population, and by making them respected.<sup>40</sup> In this regard, the setting up of an administration run by the occupant in the occupied territory, albeit not compulsory, has been identified, repeatedly, as a necessity for the foreign forces: only then will the occupant be able to discharge its obligations and enforce its rights effectively under occupation law. The Hague Regulations assumed that, on gaining control, the occupant would establish its authority, introducing a system of direct administration.<sup>41</sup> This bolsters the view that the occupant's presence is a precondition for establishing the existence of a state of occupation. G. Von Glahn emphasized the point when discussing the difference between invading forces and occupying forces: 'In the former case, the invading forces have not yet solidified their control to the point that a thoroughly ordered administration can be said to have been established'.<sup>42</sup> Consequently, effective control is – in principle – achieved when the Occupying Power, through its presence on the ground, is in a position not only to exert authority but also to assume responsibilities attached to it under IHL.

However, requiring the presence of foreign troops on the ground does not mean that effective control obliges them to inhabit every square metre of occupied territory. For instance, the US Army's *Field Manual* specifies that the size of the foreign forces cannot be pre-determined and will vary according to the circumstances, in particular the topographical characteristics of the territory, the density of the population, and the degree of resistance encountered. Effective control could be exerted by positioning foreign troops in strategic positions on the occupied territory: this would make it possible for the Occupying Power to dispatch troops, within a reasonable period of time, to make its authority felt throughout the area

39 See H.-P. Gasser, above note 15, para. 527: 'Supremacy in the air alone does not fulfil the requirement of actual occupation'. See also, Y. Dinstein, above note 15, p. 48: 'As such, belligerent occupation of the airspace is inconceivable independently of effective control over the subjacent land. This is a corollary of the proposition that air supremacy alone does not qualify as effective control'.

40 See H.-P. Gasser, above note 15, para. 527.

41 See E. Benvenisti, above note 15, p. 4.

42 G. Von Glahn, above note 15, p. 28. This assumption is also reflected in US Army, *Field Manual 27-10*, above note 5, para. 356: 'Military government is the form of administration by which an occupying power exercises governmental authority over occupied territory'.

in question. Thus, effective control may, to a certain extent, take the form of remote control.<sup>43</sup>

The importance of the physical presence of hostile armed forces is also widely reflected in legal scholarship<sup>44</sup> and can be deduced from the ICJ's decision in *DRC v. Congo*, which states in paragraph 173:

In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as the result of an intervention, is an occupying power in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were *not only* stationed in particular locations *but also* that they had substituted their own authority for that of the Congolese Government.<sup>45</sup>

In this paragraph, the ICJ follows the classic sequence of occupation: intervention by armed forces in foreign territory that permits them to establish their authority over that area, this authority reinforced by the continuous stationing of enemy troops, and, finally, the substitution of this authority for that of the legitimate government. The presence of the hostile army as a precondition is acknowledged by the use of the words 'not only' and 'also', which link presence and exercise of authority and put the two notions on equal footing in terms of preconditions. Both must be fulfilled for

43 One might wonder whether, in some specific instances (in particular when the belligerents' territories are contiguous), the same result could be attained by positioning troops in strategic places located just outside the occupied territory.

44 IHL experts, such as M. Bothe, while referring to the definition of belligerent occupation laid down in Article 42 of the Hague Regulations, have identified two essential characteristics: military presence and lack of consent from the occupied state. Bothe asserts that the cumulative existence of these two elements will determine the beginning and the end of occupation. He also states that a certain threshold of military presence must be passed for the occupant to be said to exert effective control. See M. Bothe, above note 15, p. 27. H.-P. Gasser, who has also stressed the requirement regarding the occupant's presence for the purposes of effective control, writes: 'The question [of occupation] is whether in fact the armed forces that have invaded the adversary's territory have brought the area under their control *through their physical presence*, to the extent that they can assume the responsibilities which attach to an occupying power'. See H.-P. Gasser, above note 15, p. 274 (emphasis added). A. Roberts has written that 'At the heart of treaty provisions, court decisions and legal writings about occupations is the image of the armed forces of a State exercising some kind of domination or authority over inhabited territory *outside the accepted international frontiers*'. See Adam Roberts, 'What is military occupation?', in *British Yearbook of International Law*, Vol. 55, 1984, p. 300 (emphasis added). Military presence as a precondition for the occupation test can be also inferred from writings that analyse the conditions for the termination of occupation: many scholars who emphasize that the test for the end of occupation mirrors that for its beginning say that an occupation ends when the troops leave the foreign territory. As Oppenheim points out, 'occupation comes to an end when an occupant withdraws from a territory, or is driven out of it'. See L. F. L. Oppenheim, *International Law*, Vol. 2, Longmans, London, 1952, p. 436. For Gerhard Von Glahn, 'normally, military occupation ends through permanent and voluntary withdrawal of the occupying power'. See G. Von Glahn, above note 15, p. 30. More recently, Yuval Shany has stressed that 'none of the arguments raised against the negation of the first condition (physical presence in the territory) is ultimately convincing. First, *lex lata* still seems to insist upon physical presence of hostile forces on the ground. This is not mere formalism, as it is hard to conceive of the manner in which an occupier with no ground presence could realistically be expected to execute its obligations under *jus in bello*'. See Y. Shany, above note 15, p. 380.

45 ICJ, *DRC v. Uganda*, above note 3, para. 173 (emphasis added).

a situation to qualify as an occupation. Had the Court relied exclusively on the exercise of authority, it would not have used the ‘not only . . . but also’ formula, but would have referred directly to the concept of substitution of authority without mentioning the presence of hostile troops on the ground.

In light of the above, it can be asserted that the presence of hostile military forces on foreign territory is – in most cases – a necessary condition for describing that territory as ‘occupied’.<sup>46</sup> While the presence of foreign troops may not be sufficient to cause an area to be classified as occupied territory, it is nonetheless a prerequisite because it generally provides the necessary conditions for the exercise of effective control. Finally, requiring the presence of foreign forces in the occupied territory conforms to the principle of effectiveness underlying occupation law, according to which the Occupying Power must be capable of enforcing rights and duties under occupation law.

Lowering the threshold of effective control by ignoring the requirement that the occupant must have a presence in the occupied territory will ineluctably affect the application of occupation law. The rights and duties assigned to an Occupying Power by IHL have been calibrated in relation to a certain threshold of control that normally presupposes the physical presence in occupied territory of the occupying forces. Any attempt to lower the threshold of effective control – particularly by not requiring the physical presence of hostile troops in the occupied territory – will necessarily diminish the importance and extent of the occupant’s obligations since, in such instances, it will generally not be in a position to assume them. To accept a type of effective control that will not permit the occupant to execute the obligations listed under occupation law could harm the relevance of that body of law and could potentially prevent it from producing legal effects and responding adequately to the social needs arising from a state of occupation.

Therefore, the test of effective control cannot be defined in terms of the general capabilities – detached from their means of enforcement – of the foreign forces in comparison with those of their opponent. The test should generally refer instead to the effect of the foreign forces’ presence on the exercise of authority in the contested area, in particular the ability of these forces to exert authority over the territory concerned in lieu of the local government. In other words, the test for an occupation, as set out in Article 42 of the Hague Regulations, should not be: who has the military capability to impose its will? Instead, it should be: which of the belligerents has the military capability, *by virtue of its presence in a given area*, to impose its authority therein and prevent its opponent from doing so, and, as a result of this, be in effective control of that area?

### The notion of authority

The notion of authority under Article 42 of the Hague Regulations is not easy to understand and interpret. This is mainly due to the ambiguous nature

46 Y. Shany, above note 15.

of this provision, which combines the actual exercise of authority<sup>47</sup> with the potential exercise of such authority<sup>48</sup> while not specifying the nature of such authority.

Concerning the nature of the authority, it is submitted here that ‘authority’ under Article 42 of the Hague Regulations should refer to the notion of governmental functions exercised by the hostile foreign armed forces, since occupation has to do with political direction of the territory concerned and cannot be enforced by anything short of governmental functions.<sup>49</sup>

The way in which this authority is exercised by the Occupying Power has also been the subject of controversy. The first relates to the question whether *only* the Occupying Power must exercise authority in the occupied territory. The second concerns this question: must the foreign forces, in addition to their presence in the concerned area and the related disablement of the territorial sovereign, *actually substitute* their authority for that of the ousted government or is it enough that they exert a degree of control sufficient to place them *in a position to substitute* their authority for that of the former local government (i.e. ability to exercise authority)?<sup>50</sup>

### *Does the Occupying Power’s authority need to be exclusive?*

As already noted, one of the underlying principles of occupation law is that the Occupying Power, through its firm control of the occupied territory, must prevent the territorial sovereign from exercising its governmental authority. This position has been inferred in particular from Article 41 of the 1880 *Oxford Manual*, which states:

Territory is regarded as occupied when, as the consequence of invasion by hostile forces, the State to which it belongs *has ceased, in fact, to exercise its ordinary authority therein*, and the invading State is alone in a position to maintain order there.<sup>51</sup>

Some authors have deduced from this that occupation requires the exercise, in the occupied territory, of authority that is exclusive and unique: that of the foreign forces. In this regard, Daphna Shrager has pointed out that ‘it is the fact of exercising exclusive governmental or administrative authority in the territory independently of the displaced sovereign which qualifies the foreign presence as an occupant and the

47 ‘Territory is considered occupied when it is actually placed under the authority of the hostile army’.

48 ‘The occupation extends only to the territory where such authority . . . can be exercised’.

49 ICRC Report on Occupation, above note 30, p. 19.

50 This conception of the notion of authority reflects the views of various delegates during the negotiations that led to the 1874 Brussels Declaration. For instance, on that occasion Baron Jomini, the Russian delegate, observed that ‘if the occupier is in position to exercise his authority, the occupation is a reality; from the moment that this power no longer exists, the occupation ceases’. See UK, House of Commons, *Parliamentary Papers*, ‘Correspondence Respecting the Proposed Conference at Brussels on the Rules of Military Warfare (Miscellaneous, No. 1)’, 1875, p. 259.

51 Emphasis added.

“source of authority” in the occupied territory’.<sup>52</sup> Those who support this view deny the possibility of any sharing of authority in occupied territory and assert that the previous government must necessarily have been ousted or must have collapsed because the military operation resulted in an occupation.

This position was endorsed by the US Military Tribunal in Nuremberg in the *Von List* case,<sup>53</sup> but it does not necessarily reflect current IHL, which does not exclude the possibility of authority being shared by the occupant and the government of the occupied territory and even suggests it in various provisions.

While occupation law does assume that the Occupying Power will bear all responsibility in occupied territory as the result of its enforcement of its military domination, it also allows for a ‘vertical sharing of authority’. It is submitted here that this ‘vertical sharing of authority’ reflects the hierarchical relationship between the Occupying Power and the local authorities, the former maintaining a form of control over the latter through a top-down approach to the allocation of responsibilities. ‘Horizontal sharing of authority’ would, in contrast, imply competition of a sort between the foreign troops and the local authorities, which would ultimately bring into question the ability of the former to impose their will on the latter, thus casting doubt on the existence of effective control for the purposes of IHL.

This ‘vertical sharing of authority’ is implied by some provisions of the Fourth Geneva Convention – notably Articles 6(3), 47, 50, and 56 – that require co-operation between the Occupying Power and national and local authorities. Such sharing of power must not, however, affect the ultimate or overall authority of the occupier over the occupied territory and must not impinge upon its security and military operations in the areas in question; and it must issue from the Occupying Power’s genuine desire to share the authority it has gained as the result of the military invasion and not from an inability to overcome the local government and/or its surrogates. The continued operation of the local government must therefore depend on the occupier’s willingness to let it function and exert responsibilities to a certain extent. In other words, the ‘vertical sharing of authority’ must contain within it the notion of subordination, which always characterizes the relationship between the Occupying Power and the occupied territorial sovereign and which reflects the view that no authority can be exercised other than that imposed or permitted by the foreign forces. The allocation of competences that this sharing of authority implies has been emphasized notably by the Supreme Court of Israel, which decided that

the [occupying] military force may determine to what degree it exercises its powers of civil administration through its direct delegates and which areas it leaves in the hand [*sic*] of the former government, whether local or central government officials. Permitting the activities of such governmental authorities does not, per se, detract from the factual existence of effective military

52 Daphna Shraga, ‘Military occupation and UN transitional administrations: the analogy and its limitations’, in M. G. Cohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law: Liber Amicorum L. Caflisch*, M. Nijhoff, Leiden, 2007, p. 481.

53 See above note 6, pp. 55–56.

control over the area and the consequences that ensue therefrom under the laws of war.<sup>54</sup>

### *Ability to exert authority versus actual authority: which criterion prevails?*

As to the nature of the authority exerted by the Occupying Power over the occupied territory, the ICJ's recent decision in the case of *DRC v. Uganda* has complicated the interpretation of the notion of authority. The Court declared that occupation required the exercise of *actual* authority by the foreign forces.<sup>55</sup> In other words, the ICJ decided that foreign troops had to substantiate their authority in order to qualify as an Occupying Power. The ICJ judgment, in emphasizing actual over potential control, represents a significant change in the interpretation and application of the test laid down in Article 42 of the Hague Regulations. It is submitted here that the ICJ's interpretation is too narrow and does not reflect *lex lata*, which continues to emphasize the ability to exert authority, not the actual exercise of authority. As we have already seen while examining the elements constituting the notion of effective control, an expansive reading of the notion of effective control that sanctions the occupant's potential exercise of governmental authority in occupied territory is supported, notably, by post-World War II jurisprudence,<sup>56</sup> some military manuals,<sup>57</sup> and the prevailing legal scholarship,<sup>58</sup> all of which have opted for a test based on the Occupying Power's ability to exert authority over the occupied territory.

Therefore, it is argued here that – once the local government has been subdued by the invading army – the occupation test must be based solely on the *ability* of foreign forces to exert authority over a specific area. One has only to turn to the situation of Denmark during World War II: there, German armed forces chose not to exert authority and allowed the Danish government to function despite their military supremacy. Had the test proposed by the ICJ been applied in this instance, one would have had to conclude that Germany was not occupying Denmark. It is also submitted here that the necessity of opting for a test based on the ability to exert authority is supported by other considerations.<sup>59</sup>

In fact, the interpretation of Article 42 of the Hague Regulations that disconnects the existence of occupation from the actual and concrete exercise of governmental authority by the military power vis-à-vis the local population would eventually dissuade the Occupying Power from evading its obligation to govern the occupied territory. Indeed, it is argued here that requiring the foreign forces to exercise concrete authority (for instance, by establishing a provisional civil administration) would open the door to a bad-faith interpretation of this criterion.

54 High Court of Justice, Israel, 102/82, *Tsemel v. Minister of Defence*, 37(3), P.D. pp. 373–374.

55 ICJ, *DRC v. Uganda*, above note 3, para. 173, emphasis added.

56 *Von List* case, above note 56, p. 59 See also ICTY, *Naletilić* case, above note 4, para. 217.

57 See, for instance, UK, *Manual*, above note 16, point 11.3, p. 275.

58 See above note 29.

59 See Y. Shany, above note 15, p. 376.



It would be enough for the occupier to refuse to assume its duties under the law in order to be regarded as not actually exerting authority over the territory it had just invaded. Ultimately, such an approach could encourage foreign forces to refrain from maintaining law and order or from meeting the basic needs of the local population – simply to avoid being regarded as the Occupying Power. This would leave the local population without any protection, because its own government would be incapable of governing the area and the foreign troops would be unwilling to do so. In addition, a test based on the ability to exert authority would prevent any attempt by the Occupying Power to evade its duties under occupation law by installing a government by proxy that would exercise governmental functions on its behalf.

Therefore, the notion of authority under Article 42 of the Hague Regulations should be interpreted as referring to the local government's submission to the foreign forces' military superiority resulting from the successful invasion combined with the ability of these foreign forces to exercise governmental functions in lieu of the local government.

Finally, in relation to interpreting the notion of authority for the purposes of the occupation test, one should also examine the impact of local armed resistance on the Occupying Power's ability to exert authority in the occupied territory. It is an established principle of IHL that military occupation can be said to exist despite the presence of resistance to it, and can be said to exist even when some part of the territory in question is temporarily controlled by resistance forces.<sup>60</sup> Paragraph 509 of the 2004 UK *Manual of the Law of Armed Conflict* stipulates clearly that

occupation does not become invalid because some of the inhabitants are in state of rebellion, or through occasional successes of the guerrilla bands or 'resistance' fighters. Even a temporarily successful rebellion is not sufficient to interrupt or terminate occupation, provided that the authority of the legitimate government is not effectively re-established and that the occupant suppresses the rebellion at once.

However, if foreign armed forces are required to engage in significant combat operations to recapture the area in question from forces of the local armed resistance, that part of the territory cannot be considered to be occupied until the foreign forces have managed to re-establish effective control over it.

The US Army's *Field Manual 27-10*, in its Section 356, stipulates that 'the mere existence of a fort or defended area within the occupied district, provided the fort or defended area is under attack, does not render the occupation of the remainder of the district ineffective'. Thus, the existence of an unoccupied space within a larger area under the effective control of the foreign troops does not negate

60 See US Tribunal at Nuremberg, *Hostages* trial, above note 2, p. 56. The Court stated that 'while it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary only and not such as would deprive the German Armed Forces of its status of an occupant'.

the existence of a state of occupation over the rest of the territory. Yoram Dinstein explains:

Should the occupying power be expelled from – or lose its grip over – an occupied territory, in whole or in part, the occupation in the area concerned is terminated. Over time, the territory subject to the effective control of an occupying power is likely to grow or shrink in size, and the fluctuations may be egregious... The ebb and flow in the extent of the territory subject to belligerent occupation may be the direct outcome of battlefield victories or defeats.<sup>61</sup>

Therefore, local armed resistance may be of great significance and, in certain circumstances, might even challenge the authority of the foreign forces to such an extent that the latter would no longer qualify as an Occupying Power within the meaning of IHL.

There is another issue to be considered: what role does interpreting the notion of authority play in determining the end of occupation? It has been argued that some form of transfer of authority, from the former occupant to the local government, should occur to make it unambiguously clear that the occupation has ended: for instance, the local government's authority should replace that previously exerted by the occupant. For the supporters of such position, any transfer of competences short of such a complete handover would prolong the state of occupation and the application of occupation law (with regard to the responsibilities of the foreign forces).<sup>62</sup>

It is submitted here that it is difficult to find a basis under *lex lata* for this position. Empowering the local government is not a precondition for ending an occupation, since IHL is silent on the issue. In fact, a situation in which foreign troops completely withdraw from territory they had occupied, leaving behind them a vacuum of authority, has already been tackled, by the Eritrea–Ethiopia Claims Commission.<sup>63</sup> It can be inferred from the Commission's jurisprudence that one cannot justify on the basis of IHL the continued application of occupation law to foreign forces that have withdrawn completely from a territory formerly under their effective control and that no longer exert key elements of authority therein.

### Absence of consent from the local governmental authority: a necessity

Military occupation is by definition an asymmetric relationship: the existence of an occupation implies that foreign forces are imposing their authority over the government of the occupied territory by coercive, military, means. Therefore, the distinguishing features of a military occupation within the meaning of IHL will always be a) its coercive character and b) the related absence of consent. These are

61 Y. Dinstein, above note 15, p. 45.

62 M. Bothe, above note 15, p. 29; Gisha, above note 31, pp. 82 ff.

63 Eritrea–Ethiopia Claims Commission, Partial Awards: Central Front - Eritrea's Claims 2, 4, 6, 7, 8 & 22, paras. 67, 71, 83–84.

also the elements that distinguish 'belligerent occupation' from 'pacific occupation', to which the sovereign government consents.<sup>64</sup>

The absence of consent seems to be an essential element of the occupation test, but determining its existence remains something of an undertaking. First of all, it is worth specifying that absence of consent is not merely one element to factor into the occupation test: it must be established as a prerequisite for the test. Indeed, it is doubtful whether one could find a single example of belligerent occupation – and the related application of occupation law – that has occurred with the consent of the host state. The existence of consent is simply incompatible with the institution of belligerent occupation. The use of the word 'hostile' in Article 42 of the Hague Regulations notably precludes from occupation law's field of application situations in which foreign troops are stationed on and exercise authority over a territory with the consent of the local government.

Consent, in this context, has to be genuine, valid, and explicit in order to entail the inapplicability of occupation law.<sup>65</sup> Determining whether this is so, in any given situation, is not an easy task, notably because of the existence of 'engineered consent', which can be defined as a process by which a state intervening in a foreign territory ensures, by any means or legal constructions available to it, that the host state gives the appearance of consenting to the presence of its armed forces. The complexity of interpreting the notion of consent should not, however, detract from its overall importance in determining the applicability of occupation law.

Another issue in determining the existence of consent for fixing the applicability of occupation law relates to the identity of the consenting party. It can be argued that consent to the foreign forces' presence should be given by the *de jure* government. However, it can also be argued that the consent that counts is that of the *de facto* government effectively exercising authority over the territory concerned just before the foreign forces' invasion, not that of the *de jure* government.

The latter position would be in line with the theory according to which the classification of a situation for the purposes of occupation law can be made only on the basis of the prevailing facts; ultimately, this requires determining who has *de facto* effective authority, in order to identify who would be entitled to permit the presence of the foreign military. This focus on the prevailing facts also implies not having to enter into sensitive, controversial, and often endless discussions about the legitimacy of the authority concerned. It is submitted here that this position should be preferred when tackling the notion of consent for the purposes of determining the applicability of occupation law. Finally, determining the identity of the consenting party on the basis of the effectiveness of authority would conform to that principle of public international law according to which an entity must be

64 'Pacific occupation' does not trigger the application of occupation law.

65 M. Bothe, above note 15, p. 30: 'where it is considered that there is no genuine, freely expressed consent given by the legitimate and effective government, the foreign military presence must be regarded as belligerent occupation'.

considered the legal government of a state if it is independent and is in fact the *effective* government.<sup>66</sup>

It is also submitted here that the consent given should be explicit in order to avoid the ambiguities attached to the assessment of consent that is implicit. In this regard, it is necessary to distinguish between the absence of military opposition to the foreign troops' presence and formal consent given by the local governmental authority. As suggested in Article 2(2) common to the 1949 Geneva Conventions,<sup>67</sup> the fact that the invaded state does not carry out military operations to contest the deployment of foreign forces does not mean that it has consented to their presence on its soil and that occupation law would therefore not be applicable to the situation.

An intervention by the United Nations Security Council might also be of consequence for assessing the notion of consent: it would be very difficult to classify a situation as an occupation when consent – even if initially the product of coercion – is validated *a posteriori* by the Security Council through a resolution. However, even though the Security Council can override IHL by virtue of Articles 25 and 103 of the United Nations Charter, it could be argued that the Security Council should not change legal definitions and concepts and declare that there is no occupation if the prevailing facts say otherwise. In other words, the Security Council should not unilaterally change the facts on the ground and state that an occupation has ended if the effective government of the territory concerned has not genuinely consented to the foreign forces' presence.

Another case in point is when consent is given by local authorities after the situation has stabilized and effective control by foreign forces has been clearly established. It has been argued that, in this instance, free and genuine consent cannot be said to have been given, the local government being under the authority of the Occupying Power. It can therefore be said that free consent can be given only when both parties possess some measure of independence. An agreement concluded during an occupation for the purposes of securing consent to the foreign forces' presence – leading ultimately to the end of the occupation – would reflect a relationship that entailed the subordination of the local government to the Occupying Power and would imply a coerced consent.<sup>68</sup> It has also been argued that Article 47 of the Fourth Geneva Convention would freeze the situation and would imply the presumption that occupation law should continue to apply until the Occupying Power transferred its provisional authority to the local government.<sup>69</sup> For the

66 Hans Kelsen, *Principles of International Law*, The Lawbook Exchange, Clark, NJ, 2003, p. 279. Whether an entity is an 'effective government' can be determined by reference to its capacity to control the territory and population, as well as its willingness to carry out the international obligations incumbent on the state. See Quoc Dinh Nguyen, Patrick Dailler, and Alain Pellet, *Droit international public*, 7th edition, L.G.D.J., Paris, 2002, pp. 416–417.

67 *Commentary on the Geneva Conventions of 12 August 1949*, above note 14, pp. 21–22.

68 ICRC Report on Occupation, above note 30, p. 29.

69 Article 47 of GC IV: 'Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory'.

supporters of such a position, the end of the occupation could be triggered only by the complete withdrawal of the foreign forces together with the full empowerment of the local government. However, this position can be challenged on the basis that genuine consent can be given during an occupation and can result in its termination. A local government with a good deal of authority and credibility, and recognition as a representative body, could conceivably emerge from an occupation, as was the case in Iraq in 2004.

In conclusion, consent – as it has been shown – can be very difficult to evaluate. Consent may be far from genuine when the difference in power is great, but that does not mean that occupation law would apply automatically. In this regard, it is submitted here that when the existence of genuine, valid, and explicit consent is in doubt, the presumption of absence of consent should prevail – resulting in the application of occupation law as the default regime if the other criteria are fulfilled.<sup>70</sup> This would be the case particularly when foreign forces are deployed in a failed state: in this instance, absence of consent should be deduced from the absence of effective governmental authorities.

### **A legal test for determining whether a situation qualifies as an occupation for the purposes of IHL**

In light of what has been discussed above, one may infer the following test for the purposes of determining the existence of a state of occupation within the meaning of IHL. The effective-control test consists of three *cumulative* conditions:

- the armed forces of a state are physically present in a foreign territory without the consent of the effective local government in place at the time of the invasion;
- the effective local government in place at the time of the invasion has been or can be rendered substantially or completely incapable of exerting its powers by virtue of the foreign forces' unconsented-to presence;
- the foreign forces are in a position to exercise authority over the territory concerned (or parts thereof) in lieu of the local government.<sup>71</sup>

70 This presumption is particularly important and relevant, especially when a new local government established during the occupation consents to the foreign forces' presence on its territory and – potentially – their exercise of authority therein. In such cases, it is submitted here that the situation on the ground will always be the decisive factor in order to determine whether such consent has terminated the occupation and therefore ended the application of occupation law. If the situation in terms of exercise of authority has not changed on the ground and foreign forces still exert effective control over the territory in which they are deployed, the existence of genuine consent will be more difficult to assess. In such situations, occupation law should continue to apply, since it is difficult to imagine a local government delegating entirely effective control – and related authority – over its own territory (or parts thereof) to foreign forces that were previously the Occupying Power. When a local government consents to the presence of foreign forces that were previously occupying the territory, this consent – to be considered genuine – should be accompanied by an effective transfer of authority from the foreign forces to the local government and thus be characterized by a significant degree of empowerment of the local government, demonstrating the independence of the latter vis-à-vis the foreign forces.

71 This test equally applies to the forces of international or regional organizations. Nothing under occupation law permits the argument that this test would be different if the effective control over a foreign territory

The concept of effective control must be analysed as a whole and its components regarded as an integral part of that concept. Any attempt to ignore or set aside an element of the effective-control test will affect the entire structure and *raison d'être* of occupation law, the implementation of which revolves around the fulfilment of the criteria set out in Article 42 of the Hague Regulations.

In principle, this test applies equally for the beginning and the end of occupation. In fact, the criteria to be met in order to establish the end of occupation should generally mirror the ones used to determine its beginning.<sup>72</sup> In other words, the criteria should be the same as for the beginning of occupation, but in reverse. Therefore, the physical presence of foreign forces, their ability to enforce authority over the territory concerned in lieu of the existing local governmental authority, and the continued absence of the local governmental authority's consent to the foreign forces' presence, cumulatively, should be scrutinized when assessing the termination of occupation. If any of these conditions ceases to exist, the occupation should be considered to have ended.

The criteria to be used for establishing the end of an occupation should reflect the *rationale* of the concept and definition of occupation, which is the ability of foreign forces to replace the local governmental authority by invading its territory and establishing a presence there without securing consent for it. Effective control over the foreign territory or parts thereof generally ceases to exist when one of these criteria is absent; when that happens, occupation law no longer applies in the area concerned.

The identical nature of the tests for determining the beginning and the end of an occupation can be deduced from the legal literature and military manuals, as these do not distinguish between the criteria to be used for assessing the beginning or the end of an occupation, implying that the test is the same for both. As S. Vité and R. Kolb assert, '*de manière générale, la fin de l'occupation renvoie, en négative, à ce qui en constitue le commencement. Elle se détermine par référence aux critères définissant son champ d'application*'.<sup>73</sup> In addition, this view, which holds that the criteria for determining the beginning and the end of an occupation are the same, seems to have been endorsed by the ICJ in the case of *DRC v. Uganda*. The Court based its analysis of whether Uganda was an occupying power within the meaning

were exerted by armed forces of an international or regional organization. See Tristan Ferraro, 'The applicability of the law of occupation to peace forces', in Gian Luca Beruto (ed.), *International Humanitarian Law, Human Rights and Peace Operations*, 31st San Remo Round Table on current problems of international humanitarian law, 4–6 September 2008, International Institute of Humanitarian Law, 2009, pp. 133–156.

72 It has been argued by some that Article 6(3) of GC IV sanctioned a new definition for the end of occupation, one that changed the criterion from effective control to the exercise of functions of government. See ICRC Report on Occupation, above note 30, p. 30. However, it is submitted here that this position is premised on a misinterpretation of Article 6(3). This provision has never been intended to provide a criterion for assessing the beginning and end of occupation, but only to regulate the end or the extent of GC IV's applicability on the basis that occupation would still continue. Article 42 of the Hague Regulations and Article 6(3) of GC IV are two distinct provisions pertaining to different specific *material*. Therefore, Article 6(3) can in no way be used as a provision of reference for determining the end of occupation.

73 R. Kolb and S. Vité, above note 21, p. 150. See also, Y. Shany, above note 15, p. 378.

of IHL on a test inferred from Article 42 of the Hague Regulations without distinguishing between the beginning and end of occupation.<sup>74</sup> Thus, it is submitted here that *lex lata* generally imposes a ruling not to differentiate the tests for the beginning and the end of occupation.

However, in some specific and exceptional cases – in particular when foreign forces withdraw from occupied territory (or parts thereof) while retaining key elements of authority or other important governmental functions therein which are typical of those usually taken on by an Occupying Power – it is proposed here that occupation law might continue to apply within the territorial and functional limits of those competences.

Indeed, it is submitted here that, despite the absence of the foreign forces' physical presence in the territory concerned, the authority they retained can – in some cases – amount to effective control for the purposes of the law of occupation and entail the continued application of that body of law's relevant provisions.

This functional approach to occupation would thus be used as the relevant test for determining the extent to which obligations under occupation law remain incumbent upon hostile foreign forces progressively phasing out or suddenly withdrawing from the occupied territory. This test applies to the extent that the foreign forces still exercise within all or part of the territory governmental functions acquired when the occupation was undoubtedly established and ongoing.

This functional approach permits a more precise delineation of the legal framework applicable to situations where it is difficult to determine with certainty if the occupation has ended or not. This is all the more important insofar as the law of occupation does not expressly address the question of the legal obligations applicable during the unilateral withdrawal from an occupied territory. The silence of IHL on this very issue is notably due to the fact that occupation usually ends either by force, by agreement, or by a unilateral withdrawal often followed by a related empowerment of the local government. In most of the cases, the foreign forces leaving the occupied territory do not continue – at least without the consent of the local government – to exercise important functions therein.

However, today, the continued exercise of effective control from outside the territory subject to it cannot be discarded outright. Indeed, it may be argued that technological and military developments have made it possible to assert effective control over a foreign territory (or parts thereof) without a continuous foreign military presence in the concerned area. In such situations, it is important to take into account the extent of authority retained by the foreign forces rather than focussing exclusively on the means by which it is actually exercised. One should also recognize that, in these circumstances, any geographical contiguity existing between the belligerent states might play an important role in facilitating the remote exercise of effective control, for instance by permitting an Occupying Power that has relocated its troops outside the territory to make its authority felt within reasonable time.

74 ICJ, *DRC v. Uganda*, above note 23, paras. 172–173.

Therefore, it is submitted here that any unilateral withdrawal from an occupied territory in which foreign forces, without the consent of the occupied territory's government, retain key elements of authority (previously exerted as a result of their legal status as Occupying Power and amounting to effective control under IHL)<sup>75</sup> calls for the application of those provisions of the law of occupation that remain relevant to the functions that the power continues to exercise.

The continued application of the relevant provisions of the law of occupation is indeed particularly important in that it is specifically equipped to deal with and regulate the sharing of authority – and the related assignment of responsibilities – between belligerent states.<sup>76</sup>

This dynamic and teleological interpretation of the law of occupation would thus require an application *rationae temporis* of this *corpus juris* that, in those circumstances, would not be dependent upon the continued presence of hostile foreign forces in the concerned territory but rather upon the subsistence of a form of authority which still qualifies as an effective control for the purposes of IHL.

A contrary position, which would not allow for the application of certain relevant provisions of occupation law in such specific situations, would encourage Occupying Powers to withdraw their troops from the occupied territory (or parts thereof) while still retaining some important functions remotely exerted in order to evade the significant duties imposed by IHL. This artificial legal construct would ultimately leave the local population bereft of any major legal protection and would run contrary to a teleological interpretation of the law of occupation.

## **Special cases of occupation: occupation by proxy and occupation conducted by a coalition of states or by multinational forces**

### Occupation by proxy and the notion of indirect effective control

It is submitted here that effective control may be exercised through surrogate armed forces as long as they are subject to the overall control of the foreign state. Thus, a state would be an occupying power for the purposes of IHL when it exercises overall control over *de facto* local authorities or other local organized groups that are themselves in effective control of a territory or part thereof.<sup>77</sup>

75 This retention of competences can also – but not necessarily – be accompanied by the prohibition of the local authorities exerting certain governmental functions.

76 The rationale of the law of occupation is the necessity to organize the allocation of responsibilities between the belligerents with the view to avoiding, as far as possible, vacuum of authority and protection in occupied territory.

77 It is important to note that the first part of this test refers to the notion of 'overall control' *over a group of individuals*, which is used with the view to assessing whether the actions of such a group can be attributed to a foreign state. Should this be the case, the second part of the test addresses the question as to whether this group has 'effective control' *over the concerned territory* for the purposes of classifying the situation as an occupation for the purposes of IHL. Therefore, the first part of the test (i.e. 'overall control over *de facto* local authorities') relates to the concept of imputability under public international law, whereas the second



The existence and relevance of this theory is corroborated by various decisions of international tribunals. A notable example is the decision in the well-known *Tadić* case: the ICTY decided that ‘the relationship of *de facto* organs or agents to the foreign Power includes those circumstances in which the foreign Power “occupies” or operates in certain territory solely through the acts of local *de facto* organs or agents’.<sup>78</sup> In the case of *DRC v. Uganda* (2005), the ICJ examined whether Uganda exerted overall control over Congolese insurgent groups.<sup>79</sup> This clearly demonstrates that the Court had endorsed the position developed by the ICTY and thus accepted the possibility of an occupation being conducted through indirect effective control.

The notion of indirect effective control has scarcely been addressed in the legal literature<sup>80</sup> or in military manuals. It is argued here that the criterion requiring the military presence of hostile foreign troops is fulfilled when the theory of indirect effective control is applied, because the overall control exerted over local entities themselves having effective control over the areas in question turns the individuals

part of the test (‘effective control of a foreign territory’) corresponds to the notion of effective control under IHL, which is at the core of the notion of occupation. Therefore, the two distinct parts of the test must be cumulatively satisfied in order to determine the existence of an indirect effective control exerted by one state over the territory of another.

- 78 ICTY, *Tadić* case, 7 May 1997, above note 22, para. 584. In March 2000, the ICTY confirmed this interpretation in the *Blaškić* case. On that occasion it stated: ‘In these enclaves, Croatia played the role of occupying Power through the overall control it exercised over the HVO [a local militia, the “Croatian Defence Council”], the support it lent it and the close ties it maintained with it. Thus, by using the same reasoning which applies to establish the international nature of the conflict, the overall control exercised by Croatia over the HVO means that at the time of its destruction, the property of the Bosnian Muslims was under the control of Croatia and was in occupied territory’ (ICTY, *Prosecutor v. Tihomir Blaškić*, Trial Chamber, 3 March 2000, Case No. IT 95-14-T, para. 149). However, in the *Naletilić* case (2000), the Trial Chamber challenged the position adopted by the ICTY in the *Blaškić* case: ‘The Chamber notes that the jurisprudence of the Tribunal relating to the legal test applicable is inconsistent. In this context, the Chamber respectfully disagrees with the finding in the *Blaškić* Trial Judgement argued by the Prosecution. The overall control test, submitted in the *Blaškić* Trial Judgement, is not applicable to the determination of the existence of an occupation. The Chamber is of the view that there is an essential distinction between the determination of a state of occupation and that of the existence of an international armed conflict. The application of the overall control test is applicable to the latter. A further degree of control is required to establish occupation’ (ICTY, *Naletilić* case, above note 4, para. 214). However, this latter piece of jurisprudence can be challenged, since the Trial Chamber confuses overall control over a territory with overall control over an entity that itself has effective control over the territory concerned.
- 79 ICJ, *DRC v. Uganda*, above note 3, para. 177: ‘The Court observes that the DRC makes reference to “indirect administration” through various Congolese rebel factions and to the supervision by Ugandan officers over local elections in the territories under UPDF control. However, the DRC does not provide any specific evidence to show that authority was exercised by Ugandan armed forces in any areas other than in Ituri district. The Court further notes that, although Uganda recognized that as of 1 September 1998 it exercised “administrative control” at Kisangani Airport, there is no evidence in the case file which could allow the Court to characterize the presence of Ugandan troops stationed at Kisangani Airport as occupation in the sense of Article 42 of the Hague Regulations of 1907. Neither can the Court uphold the DRC’s contention that Uganda was an occupying Power in areas outside Ituri controlled and administered by Congolese rebel movements. As the Court has already indicated, the evidence does not support the view that these groups were “under the control” of Uganda’.
- 80 In their recent book, Robert Kolb and Sylvain Vité do not seem to adhere fully to the theory of indirect effective control, as they emphasize the necessity of the presence of foreign boots on the ground. They only concede that ‘dans le cas d’un exercice d’autorité indirect, par contrôle global ou effectif d’une faction interposée, il n’est pas exclu que certains devoirs issus du droit de l’occupation puissent ponctuellement s’appliquer, du moins indirectement’ (R. Kolb and S. Vité, above note 21, pp. 180–181).

belonging to those entities into ‘agents’ or ‘auxiliaries’ of the foreign state.<sup>81</sup> Such control exerted over these local entities reflects a real and effective link between the group of persons exercising the effective control and the foreign state operating through those surrogates.

Finally, the question of indirect effective control has been tackled in Section 11.3.1 of the UK *Manual of the Law of Armed Conflict*:

In some cases, occupying troops have operated indirectly through an existing or newly appointed indigenous government... In such cases, despite certain differences from the classic form of military occupation, the law relating to military occupation is likely to be applicable. Legal obligations, policy considerations, and external diplomatic pressures may all point to this conclusion.

In any case, the theory of indirect effective control is important insofar as it prevents a legal vacuum arising as a result of a state making use of local surrogates to evade its responsibilities under occupation law. Taking into account the validity of the concept of indirect effective control, the test for determining a state of occupation within the meaning of IHL should be adapted to read as follows:

- the armed forces of a state *or agents controlled by the latter* are physically present in a foreign territory without the consent of the effective local government in place at the time of the invasion;
- the effective local government in place at the time of the invasion has been or can be rendered substantially or completely incapable of exerting its powers by virtue of the foreign forces’ unconsented-to presence or by virtue of *agents controlled by the latter*;
- the foreign forces or *agents acting on their behalf* are in a position to exercise authority over the territory concerned (or parts thereof) in lieu of the local government.

## Occupation conducted by a coalition of states or by multinational forces

Usually, occupation involves one state exerting effective control over another state’s territory. Contemporary multinational operations may also create a situation in which the territory of a belligerent is occupied by more than one state operating within the framework of a coalition.<sup>82</sup> This occurred in Iraq in 2003–2004 and raised a critical question: how should one determine which of the states forming the

81 See International Law Commission, Articles on Responsibilities of States for Internationally Wrongful Acts, with Commentaries (2001), Article 8, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two. The word ‘agent’ should be interpreted broadly, as any person through whom the foreign state acts. See ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, *ICJ Reports*, 1949, p. 1977.

82 The notion of multinational occupation should not be confused with occupation conducted by an international organization such as the UN. It is submitted here that such an international organization can also qualify as an occupying power for the purposes of IHL. On this issue, see T. Ferraro, above note 71, pp. 133–156.

international coalition is/are the Occupying Power(s)? The question has very important practical consequences albeit it did not generate much legal debate at the time.<sup>83</sup>

There are two options for determining which states involved in a multinational operation exercising effective control over a territory can be classified as Occupying Powers for the purposes of IHL.<sup>84</sup> The first option consists of applying to each state in a coalition, separately, the legal criteria developed earlier in this article. In order to qualify as an Occupying Power for the purposes of IHL, each member of the coalition would need to have troops deployed on the ground without the consent of the local governmental authority and be in a position to exert authority, in lieu of the displaced local government, over those parts of the occupied territory it was assigned to.

The ICRC chose a different option to deal with the occupation of Iraq in 2003. This involves taking a so-called functional approach to occupation by a coalition.<sup>85</sup> In addition to the states that individually fulfil the criteria of the effective-control test, other coalition members who perform functions and tasks that would typically be carried out by an Occupying Power, and for which respecting occupation law would be relevant, should be classified as Occupying Powers and be bound by the rules contained in the relevant instruments of occupation law. In other words, it would be the actions of the foreign forces, and the functions assigned to them, that turned them into Occupying Powers.

Despite the relevance of the functional approach proposed above, in practice it remains difficult to differentiate the legal status under IHL of the various members of a coalition occupying a country, when one takes into account the existence of a sliding scale of activities ranging from humanitarian assistance to exercise of administrative authority on behalf of the Occupying Powers. In fact, carrying out tasks under the command or instruction of the 'recognized' Occupying Powers would tend to confer the status of Occupying Power on those co-operating with these Occupying Powers, particularly when such tasks are essential to the fulfilment of the administrative responsibilities stemming from the law of occupation.<sup>86</sup>

83 D. Thürer and M. MacLaren, above note 18, pp. 759–762.

84 A complementary approach based on the law of state responsibility may also be used. The International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts could be a useful tool in this regard, for distinguishing members of a coalition involved in an occupation from those who should not be classified as Occupying Powers. According to this view, if the actions of a member state's armed forces could be attributed exclusively to the organization running the coalition *per se* or to other states participating in the coalition, that state should not be classified as an Occupying Power, since it has relinquished the effective or overall control over the troops it has put at the coalition's disposal.

85 Knut Dörmann and Laurent Colassis, 'IHL in the Iraq conflict', in *German Yearbook of International Law*, Vol. 47, 2004, pp. 302 ff.

86 Adam Roberts, 'The end of occupation in Iraq', in *International and Comparative Law Quarterly*, Vol. 54, June 2005, p. 33. See also Liesbeth Lijnzaad, 'How not to be an Occupying Power: some reflections on UN Security Council Resolution 1483 and the contemporary law of occupation', in Liesbeth Lijnzaad, Johanna van Sambeek, and Bahia Tahzib-Lie (eds), *Making the Voice of Humanity Heard*, Martinus Nijhoff, Leiden, 2004, p. 298: 'carrying out tasks under command or instruction of an Occupying Power tends to confer Occupying Power status on those cooperating with them, particularly when such tasks are

It must also be stressed that, whatever the task performed by a coalition member, even if not a core task in terms of the occupier's duties under IHL, it would contribute to the occupation, since it would – at the very least – permit the 'uncontested' Occupying Powers to forego secondary tasks in order to focus on the main ones, such as enforcing law and order. Consequently, the actions of 'co-operating' member states would appear to be in support of the Occupying Power and would make it particularly difficult to fix their legal status, at least from the perspective of the enemy. In addition, one should also recognize that the evolution in the Occupying Power's rights and duties vis-à-vis the occupied territory, and the acknowledged role of full-fledged administrator – stemming from the prevailing interpretation of Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention – make it virtually impossible to observe the distinction, mentioned above, between primary and secondary tasks, since all these tasks would fall into the occupant's competences under *lex lata*. Thus, a presumption – rebuttable as it is – of status of occupier for those states participating in a coalition enforcing effective control over a foreign territory should be proposed.<sup>87</sup> This presumption may be rejected when, for instance, a state putting its troops at the disposal of a coalition also relinquishes operational command/control over them to another state or to the international organization occupying the territory as a result of the international military operation.

## Conclusion

It is hoped that this article will contribute to clarifying an essential aspect of occupation law; and, especially, that it will help to determine more precisely when the protective norms of occupation law will come into play after a foreign military invasion and the establishment of effective control over a particular territory.

The article proposes a legal reading and interpretation of Article 42 of the Hague Regulations. It argues that this central provision of occupation law is still relevant and provides the sole legal basis for inferring the conditions or criteria for

core to the position of an Occupying Power. This is clearly the case when tasks carried out are crucial to the way in which the Authority executes its role as an Occupying Power and carries out its administrative responsibilities. Participation may create responsibilities which may not be politically desirable. Thus, this late participation could confer the status of Occupying Power on such cooperating states, depending on the nature of their cooperation'.

87 This proposed presumption seems to be corroborated by UK, *Manual*, above note 16, section 11.3.3, which implies that all coalition members are Occupying Powers for the purposes of IHL: 'in cases where two or more states jointly occupy territory (following a coalition military campaign, for example), it is desirable that there be an agreement between them setting out the relationship between the occupying powers'. This view is shared by Y. Dinstein, who states: 'A number of Occupying Powers may act together as a coalition governing a single occupied territory. If they maintain unified command, as happened in Iraq in 2003–4, the Occupying Powers will bear the brunt of joint responsibility for what is happening within the area subject to their combined effective control. The coalition partners may also opt to divide the occupied territory into discrete zones of occupation with little or no overlap of authority. Should each Occupying Power administer its own zone, it will assume sole responsibility commensurate with the span of its respective effective control'. See Y. Dinstein, above note 15, pp. 48–49.

identifying the existence of an occupation. As a result of the analysis conducted here, one may conclude that the notion of effective control, which is at the core of the definition of occupation under IHL, has the following characteristics: the unconsented-to military presence of foreign forces in the territory concerned, the foreign forces' ability to exercise authority over that territory in lieu of the local government, and the related potential inability of the local government to exert its authority in the territory in question. Based on these prerequisites, which cumulatively make up Article 42's requirement of being 'actually placed under the authority of the hostile army', this article submits a legal test for determining more precisely when and how a specific situation amounts to an occupation for the purposes of IHL. The article also emphasizes the fact that, in principle, the same legal test can be used to establish the beginning and end of an occupation. It also argues that, in a situation of unilateral withdrawal of the foreign troops from the occupied territory, remnants of occupation law might continue to apply when those troops retain the competences acquired previously, provided that the authority retained still amounts to effective control over the concerned area. Finally, the article shows how this test can be used, with a few adjustments, to cover situations in which foreign forces can be classified as an Occupying Power because they have overall control of local surrogates exerting effective control over the territory in question. The article also addresses the issue of multinational occupation, submitting that the proposed legal test does apply to multinational forces when it is supplemented by a functional approach according to which the Occupying Power's status can also be derived from the nature of the functions effectively carried out by coalition members.



# The application of international humanitarian law and international human rights law in situation of prolonged occupation: only a matter of time?

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## **Abstract**

*The article deals with the effect of the time factor in the application of international humanitarian law (IHL) and international human rights law (IHRL) in 'prolonged belligerent occupations'. It demonstrates that IHL applies in its entirety to such situations and that the adjustments necessary can be made through the interpretation of existing IHL norms. As for IHRL, the protracted character of an occupation reinforces the importance of respecting and applying human rights. It cannot, however, be invoked in order to influence the interpretation of the notion of a state of emergency leading to the adoption of derogations from IHRL rules.*

\* All the internet references were accessed on 28 June 2012, unless otherwise stated. Documents by UN organs can be accessed through: <http://www.un.org/en/documents/index.shtml>. Similarly, unless otherwise stated, references to written and oral proceedings before the ICJ can be accessed at: <http://www.icj-cij.org>.

**Keywords:** prolonged occupation, international humanitarian law, human rights law, law of occupation, duration of occupation, conservationist principle, *de facto* annexation, state of emergency.

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Article 42 of the 1907 Regulations concerning the Laws and Customs of War on Land (the Hague Regulations) defines occupation as follows: ‘Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised’.<sup>1</sup> For its part, the International Criminal Tribunal for the former Yugoslavia (ICTY) has held that: ‘Occupation is defined as a transitional period following invasion and preceding the agreement on the cessation of hostilities’.<sup>2</sup> The determination of the situations that come under this definition lies beyond the scope of this article.<sup>3</sup> We will focus instead on the time element of an occupation and, more precisely, on what legal scholarship has called ‘prolonged’ occupations.<sup>4</sup>

None of the definitions listed above indicate any time-frame for belligerent occupation. However, occupation is considered as being a temporary state of affairs,<sup>5</sup> or, in the words of the Supreme Court of Israel, as ‘inherently temporary’.<sup>6</sup>

- 1 Regulations concerning the Laws and Customs of War on Land, annex to the Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, available at: <http://www.icrc.org/ihl.nsf/WebART/195-200053?OpenDocument>. The authentic text of the Convention and the Regulations is the French one.
- 2 ICTY, *The Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Case No. IT-98-34-T, Judgment (Trial Chamber), 31 March 2003, para. 214. Eyal Benvenisti defines occupation as ‘a situation where the forces of one or more States exercise effective control over a territory of another State without the latter State’s volition’: Eyal Benvenisti, ‘Occupation, belligerent’, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2012, p. 920, para. 1.
- 3 For more information on this topic, see the contribution to this volume by Tristan Ferraro, as well as Adam Roberts, ‘What is a military occupation?’, in *British Year Book of International Law*, Vol. 55, 1985, pp. 249–305; Robert Kolb and Sylvain Vité, *Le droit de l’occupation militaire: perspectives historiques et enjeux juridiques actuels*, Bruylant, Brussels, 2009, pp. 61–114; Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff, Leiden and Boston, 2009, pp. 3–54; Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, pp. 31–49; Vaïos Koutroulis, *Le début et la fin de l’application du droit de l’occupation*, Pedone, Paris, 2010, pp. 19–94.
- 4 See, mainly, Adam Roberts, ‘Prolonged military occupation: the Israeli-occupied territories since 1967’, in *American Journal of International Law*, Vol. 84, No. 1, 1990, pp. 44–103; Y. Dinstein, above note 3, pp. 116–120; Richard Falk, ‘Some legal reflections on prolonged Israeli occupation of Gaza and the West Bank’, in *Journal of Refugee Studies*, Vol. 2, No. 1, 1989, pp. 40–51.
- 5 Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1958, p. 275 (hereafter *Commentary GC IV*); Adam Roberts, ‘Transformative military occupation: applying the laws of war and human rights’, in *American Journal of International Law*, Vol. 100, No. 3, 2006, p. 582; Michael J. Kelly, ‘Critical analysis of the International Court of Justice ruling on Israel’s security barrier’, in *Fordham International Law Journal*, Vol. 29, 2005–2006, p. 223; Eyal Benvenisti, ‘Origins of the concept of belligerent occupation’, in *Law and History Review*, Vol. 26, No. 3, 2008, pp. 621 and 623.
- 6 Supreme Court of Israel, *Beit Sourik Village Council v. The Government of Israel et al.*, Case No. HCJ 2056/04, Judgment, 30 June 2004, para. 27; Supreme Court of Israel, *Zaharan Yunis Myhammad Mara’abe et al. v. The Prime Minister of Israel et al.*, Case No. HCJ 7957/04, Judgment, 15 September 2005, para. 22 (with further references to Israeli case law); the judgments are available at: [http://elyon1.court.gov.il/Files\\_ENG/](http://elyon1.court.gov.il/Files_ENG/)



Prolonged occupations appear to be fundamentally at odds with precisely this temporary character. It should be noted that the word ‘temporary’ can be somewhat misleading in this context. It can mean both ‘not permanent; provisional’ and ‘lasting only a short time; transitory’. In situations of belligerent occupation, ‘temporary’ means first of all ‘not permanent; provisional’. It reflects the idea that a belligerent occupation does not change the status of the occupied territory but merely suspends the exercise of the ousted sovereign’s rights over the said territory.<sup>7</sup> One major consequence of this provisional character is the rule according to which the Occupying Power should, as far as possible, preserve the status quo in the territory that it occupies, and refrain from introducing permanent changes – a rule referred to by some scholars as the ‘conservationist’ principle.<sup>8</sup> The notion of prolonged occupation, on the other hand, relates to the duration of a belligerent occupation and therefore refers to the second meaning of the word ‘temporary’. The Supreme Court of Israel has recognized that an occupation’s ‘temporariness can be long-lived’.<sup>9</sup> The issue concerning situations of prolonged occupation is whether their duration affects the rules applicable in belligerent occupations.

What *are* these rules? Aside from international humanitarian law (IHL) and international human rights law (IHRL), occupation can also be examined from the perspective of the right to self-determination or from the perspective of the rules regulating the use of force in international relations (*jus ad bellum* or *jus contra bellum*). In this respect, the duration of a belligerent occupation may affect the exercise of these rights. It has been suggested, for example, that a protracted occupation is illegal *per se*, as amounting to *de facto* annexation.<sup>10</sup> Along the same

[04/560/020/A28/04020560.A28.pdf](#) and [http://elyon1.court.gov.il/Files\\_ENG/04/570/079/A14/04079570.A14.pdf](http://elyon1.court.gov.il/Files_ENG/04/570/079/A14/04079570.A14.pdf) (last visited 30 August 2012).

- 7 See Article 47 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, *U.N.T.S.*, No. 973, 1950, p. 318 (hereafter GC IV), as well as Article 43 of the Hague Regulations, stating that, in situations of occupation, ‘[t]he authority of the legitimate power ha[s] in fact passed into the hands of the occupant . . .’. See also, UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004, p. 278, para. 11.9 (hereafter UK, *Military Manual*); Federal Republic of Germany, Federal Ministry of Defence, *Humanitarian Law in Armed Conflicts – Manual*, VR II 3, August 1992, paras. 529–530 (hereafter Germany, *Military Manual*); Canada, *Law of Armed Conflict at the Operational and Tactical Levels*, National Defence, Chief of Defence Staff, Office of the Judge Advocate General, 13 August 2001, B-GJ-005-104/FP-021, p. 12–2, paras. 1205–1206 (hereafter Canada, *Military Manual*); United States, *The Law of Land Warfare*, Department of the Army Field Manual, FM 27-10, 1956, pp. 138, 140, paras. 353 and 358 (hereafter US, *Law of Land Warfare*); *Commentary GC IV*, above note 5, p. 275; Hans-Peter Gasser, ‘Protection of the civilian population’, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edition, Oxford University Press, Oxford, 2008, pp. 277–278; Eric David, *Principes de droit des conflits armés*, 4th edition, Bruylant, Brussels, 2008, pp. 562–565; E. Benvenisti, above note 5, p. 623.
- 8 See, e.g., Gregory H. Fox, *Humanitarian Occupation*, Cambridge University Press, Cambridge, 2008, pp. 233–237; A. Roberts, above note 5, p. 580; Kristen E. Boon, ‘Obligations of the new occupier: the contours of a *jus post bellum*’, in *Loyola of Los Angeles International and Comparative Law Review*, Vol. 31, No. 1, 2009, p. 60.
- 9 Supreme Court of Israel, *Jamayat Askan Alma’Almun Althaunia Almahduda Almasaulia, Lawfully registered Cooperative in regional Command of Judea and Samaria v. Commander of IDF Forces in the Judea and Samaria region – the Superior Planning Council for the Judea and Samaria region*, Case No. HCJ 393/82, Judgment, 12 December 1983, p. 13, para. 12 (on file with the author) (hereafter *Askan case*).
- 10 Palestine: International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory proceedings (hereafter *Wall advisory proceedings*),

lines, if an occupation is established in exercise of a state's right to self-defence, the duration of the occupation will be taken into account in the evaluation of the necessary and proportionate character of the self-defence in question. It is evident that the longer the duration of the occupation, the harder it will be for a state to prove that the conditions of self-defence relating to necessity and proportionality are satisfied.<sup>11</sup> As interesting as these issues may be, they are beyond the scope of this contribution, which will be limited to the influence exercised by the duration of the occupation over IHL and IHRL. However, before making our analysis, it is important to identify what kinds of situations qualify as 'prolonged occupations'.

### Prolonged occupation: in search of a definition

In exploring what is meant by 'prolonged occupation', it should be underlined from the outset that neither conventional nor customary IHL distinguishes between 'short-term' occupations and 'prolonged' ones. In the absence of a formal definition of prolonged occupation in conventional or customary humanitarian law, any attempt to define these terms will essentially be arbitrary or, as Adam Roberts has admitted in his seminal article on the subject of prolonged occupation, 'a pointless quest'.<sup>12</sup> This arbitrariness is applicable both to the temporal element and to other particular characteristics that may be attributed to a prolonged occupation. For example, the UN Security Council used the term 'prolonged occupation' with reference to the Israeli occupation of Palestinian territories in 1980, that is, thirteen years after the beginning of the occupation in question.<sup>13</sup> According to Roberts, a prolonged occupation 'is taken to be an occupation that lasts more than 5 years and extends into a period when hostilities are sharply reduced – i.e., a period at least approximating peacetime'.<sup>14</sup> Thus, for Roberts, prolonged occupation has two characteristics: a temporal one (five years) and a substantial one relating to the *quasi*-absence of hostilities. Yoram Dinstein seems to define prolonged occupations only with reference to their

Oral Statement by counsel Georges Abi-Saab, 23 February 2004, CR 2004/1, p. 46; also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion, 9 July 2004, ICJ Reports 2004 (hereafter ICJ, *Wall* advisory opinion), Separate Opinion of Judge Al-Khasawneh, p. 237, para. 9.

- 11 South Africa: ICJ, *Wall* advisory proceedings, Written Statement Submitted by the Government of the Republic of South Africa, 30 January 2004, p. 15, para. 37; Democratic Republic of the Congo (DRC): ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Merits, Written Proceedings, Reply of the Democratic Republic of the Congo, 29 May 2002, pp. 240–242, paras. 3.173–3.176. Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal*, Cambridge University Press, Cambridge, 1995, p. 99; Christine Gray, *International Law and the Use of Force*, 3rd edition, Oxford University Press, Oxford, 2008, pp. 154–155.
- 12 A. Roberts, above note 4, p. 47. Cf. International Committee of the Red Cross (ICRC), First meeting of experts in *Occupation and Other Forms of Administration of Foreign Territory*, Report prepared and edited by T. Ferraro, ICRC, Geneva, April 2012, pp. 72–78 (a chapter referring to prolonged occupations, which has no discussion of the definition of this notion).
- 13 UNSC Res. 471, 5 June 1980, p. 2, para. 6; UNSC Res. 476, 30 June 1980, p. 1, para. 1.
- 14 A. Roberts, above note 4, p. 47.

duration.<sup>15</sup> He introduces a further distinction, however, pleading for the existence of ‘semi-prolonged’ occupations, whose duration extends to ‘a number of years (rather than decades)’.<sup>16</sup> In this regard, he points, among others, to occupations that lasted for a little more than three years.<sup>17</sup>

The reference to ‘semi-prolonged’ occupations and the fact that the ‘prolonged occupation’ argument has been raised in some cases as early as three or four years after the beginning of an occupation call for some comments.<sup>18</sup> It is submitted that, despite the inherent difficulty in determining a precise time-frame in the issue under consideration, three or four years are in any case too few to allow the broadening of the occupier’s powers on the basis of the duration of the occupation. This is confirmed by the International Court of Justice (ICJ) in the *Armed Activities on the Territory of the Congo* case (*Democratic Republic of the Congo v. Uganda*), where, among other issues, the Court dealt with the application of IHL to the occupation of part of the DRC’s territory by Uganda. Although the temporal limits of the occupation in question are not explicitly determined by the ICJ, a reading of the judgment indicates that the occupation had lasted almost five – or, at the very least, four – years.<sup>19</sup> Yet at no point does the ICJ suggest that the occupation might be one of a prolonged or semi-prolonged character or that its duration might influence the applicable rules.<sup>20</sup> Uganda itself did not rely on a broader application of occupation law rules on the basis of the time element.<sup>21</sup> The same goes for the judges who issued declarations or separate or dissenting opinions: no one invokes time as a factor influencing the application of relevant occupation law rules.<sup>22</sup> In view of the above, we conclude against the existence of a ‘semi-prolonged’ occupation category.

15 Y. Dinstein, above note 3, p. 116.

16 *Ibid.*

17 *Ibid.*, pp. 116–117.

18 Supreme Court of Israel, *The Christian Society for the Sacred Places v. Minister of Defence*, cited by Eyal Benvenisti, *The International Law of Occupation*, Cambridge University Press, Cambridge, 2004, p. 146. In the same vein, Dinstein cites Singapore, *Original Civil Jurisdiction, Public Trustee v. Chartered Bank of India, Australia and China*, 1956, in *International Law Reports*, Vol. 23, pp. 693–694 (Y. Dinstein, above note 3, p. 117).

19 The duration of the occupation was five years starting from the date of the withdrawal of the DRC’s consent concerning the presence of Ugandan forces inside Congolese territory (August 1998) and ending with the withdrawal of the Ugandan forces (June 2003); see ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, *ICJ Reports 2005*, pp. 254–255, para. 254 (hereafter *DRC v. Uganda*, Judgment). In any case, the relevant territory was considered occupied at least since the creation of a new province in Congolese territory and its administration by Uganda in June 1999; see *ibid.*, p. 230, para. 175.

20 The ICJ found that Uganda violated, among others, Articles 43, 46, and 47 of the Hague Regulations and Article 53 of GC IV; *ibid.*, p. 244, para. 219.

21 Uganda rejected the DRC claim that its forces occupied DRC territory, and did not elaborate on the application of occupation law; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Written Proceedings, Counter-Memorial submitted by the Republic of Uganda, Vol. 1, 21 April 2001, mainly pp. 180 ff., paras. 329 ff.; *ibid.*, Rejoinder Submitted by the Republic of Uganda, Vol. 1, 6 December 2002, pp. 75–78, 86–91, 181–182, paras. 170–174, 198–210, 407.

22 ICJ, *DRC v. Uganda*, Judgment, above note 19, pp. 284 ff. Judge Parra-Aranguren was the only judge to refer to an adjustment of the interpretation of Article 43 of the Hague Regulations. However, his critique against the majority was that it did not take into consideration geographical – not temporal – characteristics in the appreciation of the conformity of Ugandan actions with Article 43 of the Hague Regulations; see *ibid.*, separate Opinion of Judge Parra-Aranguren, p. 305, para. 48.

Leaving this issue aside, the real question is whether there is a need to define ‘prolonged occupations’ at all. In this author’s view, no distinct legal category of prolonged occupation exists in IHL. This means that, as will be further demonstrated below,<sup>23</sup> there is no distinct legal regime regulating prolonged occupations. In other words, the starting point of this analysis is that the same IHL rules apply to all occupations, independently of their duration. The adjective ‘prolonged’ is descriptive. It is therefore submitted that embarking on a protracted quest for the definition of prolonged occupation is misleading, in that it suggests that they constitute a separate category of occupations, which in turn implies precisely that a distinct legal regime governing prolonged occupations exists. Roberts correctly (although somewhat indecisively) warned against the danger of suggesting that prolonged occupations constitute a special category.<sup>24</sup>

Of course, the fact that prolonged occupations do not constitute a distinct category of belligerent occupations in the sense that they are not regulated by different rules does not necessarily mean that the duration of an occupation leaves the applicable IHL and IHRL completely unaffected. Thus, the thread that will guide our analysis is whether and to what extent the duration of an occupation affects the interpretation and application of these rules. It is in this sense that we will be talking of ‘prolonged’ occupations.

The absence of a precise definition of prolonged occupations entails an uncertainty in choosing relevant precedents to examine.<sup>25</sup> However, the prime example of prolonged occupation is the occupation of Palestinian territories (including Gaza) (hereafter OPT)<sup>26</sup> by Israel. Indeed, it is with reference to OPT that the notion of prolonged occupation has principally been used in the United Nations

23 See the analysis under the heading ‘International humanitarian law applies in its entirety to prolonged occupations’ (below pp. 172–176).

24 A. Roberts, above note 4, p. 51. Despite this warning, Dinstein reads Roberts as ‘com[ing] up with the notion that prolonged occupation should be regarded as a distinct and special category within the law of belligerent occupation’: see Y. Dinstein, above note 3, p. 120.

25 See the precedents cited by A. Roberts, above note 4, pp. 48–51; Y. Dinstein, above note 324, p. 117.

26 The present author believes that Gaza continues to be under belligerent occupation, despite the 2005 Israeli disengagement. Without entering into a detailed presentation of relevant arguments, it is submitted, first, that the presence of enemy troops inside the occupied territory is not a *conditio sine qua non* for the existence of a belligerent occupation; second, that Article 42 of the Hague Regulations does not require the Occupying Power to be the sole authority in the occupied territory or to fully administrate it; and, third, that Israel exercises the necessary control over the Gaza Strip for it to be considered occupied. For more details, see V. Koutroulis, above note 3, pp. 181–189; Vaios Koutroulis, ‘Of occupation, *ius ad bellum* and *ius in bello*: a reply to Solon Solomon’s “The great oxymoron: *ius in bello* violations as legitimate non-forcible measures of self-defense: the post-disengagement Israeli measures towards Gaza as a case study”’, in *Chinese Journal of International Law*, Vol. 10, No. 4, 2011, pp. 900–906 and the references cited therein. The qualification of Gaza as occupied territory has been accepted by the vast majority of states: see UN GA Res. 64/94, 10 December 2009, paras. 4 and 10 (adopted by 162 votes in favour, 9 against and 5 abstentions); UN GA Res. 65/105, 10 December 2010, paras. 5 and 10 (165 votes in favour, 9 against, 2 abstentions); UN GA Res. 66/79, 9 December 2011, paras. 5 and 10 (159 votes in favour, 9 against, 4 abstentions). All these resolutions explicitly recognize Israel as the occupying power of the Gaza Strip. For the view that Gaza is not occupied, see R. Kolb and S. Vité, above note 3, pp. 177–182; Yuval Shany, ‘Faraway, so close: the legal status of Gaza after Israel’s disengagement’, in *Yearbook of International Humanitarian Law*, Vol. 8, 2005, pp. 369–383.

(UN) context,<sup>27</sup> in case law,<sup>28</sup> and in legal scholarship.<sup>29</sup> Thus an inextricable link has been established between the notion of prolonged occupation and Israeli occupation of Palestinian territories.

In this regard, one last remark should be made. Unlike other situations that can be considered as prolonged occupations (such as Turkey's occupation of the northern part of Cyprus<sup>30</sup> or Morocco's occupation of Western Sahara<sup>31</sup>), that of the OPT has been the only instance of a long-time Occupying Power openly recognizing that status.<sup>32</sup> This recognition has resulted in a significant number of decisions by the Supreme Court of Israel on the interpretation and application of various IHL and IHRL rules relating to belligerent occupation, some of which also deal with the influence exercised by the prolonged nature of the Israeli occupation on these rules. In the absence of any other significant case law, the decisions handed down by the Supreme Court of Israel constitute the primary material for evaluating the application of the aforementioned sets of legal rules to prolonged occupations. Thus, the already close ties linking the precedent of the OPT and prolonged occupation become almost incestuous. Valuable as this material may be, the fact that

- 27 See the UN Security Council resolutions cited above note 13. See also statements by: Azerbaijan, UN Security Council, 6706th meeting, 24 January 2012, UN Doc. S/PV.6706, p. 25; Cuba, UN GA, Special Political and Decolonization Committee (Fourth Committee), Summary Record of 8 November 2011, UN Doc. A/C.4/66/SR.22, p. 2; Iran, UN GA, Third Committee, Summary Record of the 37th meeting, 2 November 2009, UN Doc. A/C.3/64/SR.37, p. 5; Bahrain, UN GA, Special Political and Decolonization Committee (Fourth Committee), Summary Record of the 23rd meeting, 14 November 2007, UN Doc. A/C.4/62/SR.23, p. 3; Indonesia, UN GA, 2nd Committee, Summary Record of the 12th meeting, 22 October 2007, UN Doc. A/C.2/62/SR.12, p. 5 and Summary Record of 20 October 2006, UN Doc. A/C.2/61/SR.17, p. 6; Saudi Arabia, UN GA, 66th plenary meeting, 2 December 2003, UN Doc. A/58/PV.66, p. 1; Cyprus, UN GA, 66th plenary meeting, 3 December 2002, UN Doc. A/57/PV.66, p. 8; Jamaica, UN GA, 65th plenary meeting, 2 December 2002, UN Doc. A/57/PV.65, p. 13; Sri Lanka, UN GA, Fourth Committee, Summary Record of the 17th meeting, 6 November 2000, UN Doc. A/C.4/55/SR.17, p. 3; Bangladesh, UN GA, Fourth Committee, Summary Record of the 18th meeting, 7 November 2000, UN Doc. A/C.4/55/SR.18, p. 7 and 13 October 1999, UN Doc. A/C.4/54/SR.9, p. 4. Finally, see Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, annex to Situation of human rights in the Palestinian territories occupied since 1967, Note by the Secretary-General, 13 September 2011, UN Doc. A/66/358.
- 28 Separate Opinions of Judge Al-Khasawneh and Judge Elaraby, ICJ, *Wall* advisory opinion, above note 10, p. 237, para. 9, and pp. 255 ff. respectively, as well as the judgments by the Supreme Court of Israel cited or referred to below in notes 73–75 and 95.
- 29 See, among many, the authors cited above notes 3 and 4.
- 30 For the qualification of the presence of Turkish forces in Cyprus as an occupation, see UN GA Res. 33/15, 9 November 1978, preambular para. 6 (110 in favour, 4 against, 22 abstentions); UN GA Res. 34/30, 20 November 1979, preambular para. 9 (99 in favour, 5 against, 35 abstentions); UN GA Res. 37/253, 13 May 1983, preambular para. 8 and para. 8 (103 in favour, 5 against, 20 abstentions). See also European Court of Human Rights (ECHR), *Loizidou v. Turkey (Preliminary Objections)*, Judgment, 23 March 1995, Appl. no. 15318/89, paras. 62–64; ECHR, *Loizidou v. Turkey*, Judgment, Merits, 18 December 1996, Appl. no. 15318/89, paras. 42–44, 56–57; ECHR, *Cyprus v. Turkey*, Judgment, 10 May 2001, Appl. no. 25781/94, paras. 75–76; all available at <http://www.echr.coe.int> (last visited 5 July 2012).
- 31 See UN GA Res. 34/37, 21 November 1979, preambular para. 9 and paras. 5 and 6 (85 in favour, 6 against, 41 abstentions); UN GA Res. 35/19, 11 November 1980, preambular para. 7 and para. 3 (88 in favour, 8 against, 43 abstentions).
- 32 E. Benvenisti, above note 18, pp. 189–190, and the state practice cited therein. This is in line with the general 'disinclination of states to consider occupation law relevant even when the conditions for its applicability are met': Tristan Ferraro, 'Enforcement of occupation law in domestic courts: issues and opportunities', in *Israel Law Review*, Vol. 41, Nos 1–2, 2008, p. 338.

it is linked to a single precedent and that it comes from the domestic courts of one state imposes prudence in its analysis.<sup>33</sup>

With these considerations in mind, we will now turn to the impact exercised by time on the application of IHL rules to situations of belligerent occupation.

## Prolonged occupations and international humanitarian law

It will first be shown that the protracted duration of an occupation cannot be invoked as a legal basis for excluding altogether the application of any IHL rule. It can, however, influence the way in which some IHL rules apply to such occupations.

### International humanitarian law applies in its entirety to prolonged occupations

As was indicated in the previous part, our position is that all IHL rules pertaining to situations of belligerent occupation remain applicable until the end of the occupation.<sup>34</sup> The rules pertaining to occupation laid down in the Hague Regulations do not contain any article determining their end of application.<sup>35</sup> The *travaux préparatoires* of the Hague Regulations confirm that the scope of application *ratione temporis* of these rules is aligned to their scope of application *ratione materiae*. In other words, the rules continue to apply as long as a belligerent occupation in the sense of Article 42 of the Hague Regulations exists.<sup>36</sup> This has been confirmed by the ICJ in its *DRC v. Uganda* judgment.<sup>37</sup> Things are more complex with the application of the Fourth Geneva Convention, whose Article 6, paragraph 3 reads as follows:

In case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory,

33 See, e.g., Eyal Benvenisti, 'Judicial misgivings regarding the application of international law: an analysis of attitudes of national courts', in *European Journal of International Law*, Vol. 4, No. 1, 1993, pp. 160 ff. Along the same lines, Tristan Ferraro argues that: 'enforcement of occupation law by domestic courts . . . does not seem to actually provide for an adequate system of implementing control and review of occupants' measures': T. Ferraro, above note 32, p. 337. Finally, according to Guy Harpaz and Yuval Shany, 'The jurisprudence of the Supreme Court during all these years may be seen as an exercise in judicial acrobatics, simultaneously regulating and legitimizing the occupation': Guy Harpaz and Yuval Shany, 'The Israeli Supreme Court and the incremental expansion of the scope of discretion under belligerent occupation law', in *Israel Law Review*, Vol. 43, 2010, p. 515.

34 See also ICJ, *Wall* advisory opinion, above note 10, Separate Opinion Judge Elaraby, p. 255; V. Koutroulis, above note 3, pp. 274–276; Christopher Greenwood, 'The administration of occupied territory in international law', in Emma Playfair (ed.), *International Law and the Administration of Occupied Territories*, Clarendon Press, Oxford, 1992, p. 263.

35 Hague Regulations, articles 42–56.

36 V. Koutroulis, above note 3, pp. 156–157.

37 ICJ, *DRC v. Uganda*, Judgment, above note 19, pp. 228, 231, and 254–255, paras. 167, 178–179, and 254. The Court considered that Uganda was responsible for violations of IHL (including the Hague Regulations) until 2 June 2003, the date of the final withdrawal of the Ugandan forces from DRC territory.

by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.<sup>38</sup>

The ‘one year’ time limit laid down by this provision has been widely viewed by legal scholars as having fallen into desuetude.<sup>39</sup> It has, however, been given the ‘kiss of life’ by the ICJ advisory opinion relating to the *Wall* advisory opinion.<sup>40</sup> We have extensively addressed this provision elsewhere.<sup>41</sup> For the purposes of this article, it will briefly be shown, first, that Article 6, paragraph 3 of the Fourth Geneva Convention has been replaced by Article 3(b) of the First Additional Protocol of 1977, which abolishes the ‘one-year’ time limit and calls for the application of all IHL rules until the end of occupation; and, second, that, even if one clings to Article 6, paragraph 3 of the Convention, this provision does not impose a purely temporal criterion for the end of application of IHL rules relating to occupation.

### *Article 3(b) of the First Additional Protocol as the only relevant provision for the end of application of IHL rules regulating belligerent occupations*

Article 3(b) of the First Additional Protocol reads as follows:

‘The application of the Conventions and of this Protocol shall cease . . . , in case of occupied territories, on the termination of occupation, except . . . for those persons whose final release, repatriation or re-establishment takes place thereafter’.<sup>42</sup>

For the 172 states<sup>43</sup> that have ratified the Protocol, the temporal limit of ‘one year after the general close of military operations’ stipulated by Article 6, paragraph 3 of the Fourth Geneva Convention has been abolished, and IHL rules pertaining to occupation remain applicable until the ‘termination of occupation’. Twenty-four states have not ratified the Protocol and therefore are not conventionally bound by

38 GC IV, p. 292.

39 E. David, above note 7, p. 263; Michael Bothe, Karl J. Partsch, and Waldemar A. Solf, ‘Article 3’, in *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff Publishers, The Hague/Boston/London, 1982, p. 59; Robert Kolb, ‘Deux questions ponctuelles relatives au droit de l’occupation de guerre’, in *Revue Hellénique de Droit International*, Vol. 61, 2008, pp. 358–360; Orna Ben-Naftali, ‘“A la recherche du temps perdu”: rethinking Article 6 of the Fourth Geneva Convention in the light of the legal consequences of the *Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion’, in *Israel Law Review*, Vol. 38, 2005, p. 217; David Alonzo-Maizlish, ‘When does it end? Problems in the law of occupation’, in Roberta Arnold and Pierre-Antoine Hildbrand (eds), *International Humanitarian Law and the 21st Century’s Conflicts, Changes and Challenges*, Editions interuniversitaires suisses – Edis, Lausanne, 2005, p. 106 (with some doubts).

40 ICJ, *Wall* advisory opinion, above note 10, p. 185, para. 125.

41 V. Koutroulis, above note 3, pp. 163–179. For a critical assessment of the application of GC IV, Art. 6, para. 3 by the ICJ, see Ardi Imseis, ‘Critical reflections on the international humanitarian law aspects of the ICJ *Wall* advisory opinion’, in *American Journal of International Law*, Vol. 99, No. 1, 2005, pp. 105–109; O. Ben-Naftali, above note 39, pp. 214–220.

42 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (AP I), *UNTS*, Vol. 1125, No. I–17512, 1979, p. 8, Art. 3(b).

43 According to the ICRC’s list of States Parties to the main IHL treaties, last updated 4 June 2012, available at: [http://www.icrc.org/IHL.nsf/\(SPF\)/party\\_main\\_treaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) (last visited 5 July 2012).

Article 3(b).<sup>44</sup> However, there is more than sufficient proof of these states' support for the rule of Article 3(b).

First of all, this support is confirmed by the *travaux préparatoires* of Article 3(b), which reveal the will of the negotiators to abolish Article 6, paragraph 3 of the Fourth Geneva Convention.<sup>45</sup> It is also significant that Article 3 was adopted by consensus successively before the relevant Working Group and the First Committee as well as at the Plenary session.<sup>46</sup> This consensus includes States non-parties to Additional Protocol I that participated in the 1974–1977 Diplomatic Conference, namely India, Indonesia, Iran, Israel, Pakistan, Somalia, Sri Lanka, Thailand, Turkey, and the US.<sup>47</sup> The fact that these states have not ratified the Protocol because they disagreed with other contentious provisions within the document does not mean that their adherence to the rule laid down in Article 3(b) can be put to question. All the more so since this adherence has been confirmed by later practice.<sup>48</sup> Finally, a series

44 These states are: Andorra, Azerbaijan, Bhutan, Eritrea, India, Indonesia, Iran, Israel, Kiribati, Malaysia, Marshall Islands, Myanmar, Nepal, Niue, Pakistan, Papua New Guinea, Singapore, Somalia, South Sudan, Sri Lanka, Thailand, Turkey, Tuvalu, and the United States.

45 Draft API, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974–1977) (hereafter *Official Records of the 1974–1977 Diplomatic Conference*), Bern, Federal Political Department, 1978, Vol. I, Part Three, p. 4. See also *ibid.*, Vol. VIII, CDDH/I/SR.8, 8th meeting, 18 March 1974, p. 60, para. 9; *ibid.*, Vol. III, pp. 16 and 17. Pakistan and the US were among the states that proposed relevant amendments. For the opinions expressed by delegations see, e.g., *ibid.*, Vol. VIII, CDDH/I/SR.10, 10th meeting, 19 March 1974, p. 73, paras. 21 and 25, and p. 74, para. 35; *ibid.*, Vol. VIII, CDDH/I/SR.21, 21st meeting, 13 February 1975, p. 196, para. 33. An overview of the amendments concerning Article 3 shows that the abolition of the time limit imposed by Article 6, para. 3 of GC IV was not called into question: see *ibid.*, Vol. III, pp. 15–18.

46 *ibid.*, vol. VIII, CDDH/I/SR.26, 26th meeting, 13 March 1975, pp. 247–248, para. 4; *ibid.*, Vol. VI, CDDH/I/SR.36, 36th plenary meeting, 23 May 1977, p. 57.

47 For a list of participants see *ibid.*, Vol. II, pp. 29 ff.

48 The 2005 US *Law of War Handbook* cites AP I, Art. 3, among the rules regulating the end of the application of the Geneva Conventions; Maj. K. E. Puls (ed.), *Law of War Handbook (2005)*, JA 423, International and Operational Law Department, The Judge Advocate General's Legal Center and School, Charlottesville, VA, 2005, p. 149, available at: [http://www.loc.gov/rr/frd/Military\\_Law/pdf/law-war-handbook-2005.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/law-war-handbook-2005.pdf) (last visited 5 July 2012). The Supreme Court of Israel has not invoked Article 6, para. 3 of GC IV, and has referred to articles whose application does not extend beyond the 'one-year' time limit: Supreme Court of Israel, *Ajuri v. IDF Commander*, 3 September 2002, HCJ 7015, 7019/02 (citing Article 78); *Marab v. IDF Commander*, 5 February 2003, HCJ 3239/02, pp. 11–12, 16, 24–25, paras. 21–22, 28, 42 (citing Articles 78 and 113); *Yassin v. Commander of Kziot Military Camp*, 18 December 2002, HCJ 5591/02, pp. 17–18, para. 17 (citing Article 85); all available at: <http://elyon1.court.gov.il/eng/home/index.html> (last visited 5 July 2012). See also David Kretzmer, 'The Advisory Opinion: the light treatment of international humanitarian law', in *American Journal of International Law*, Vol. 99, No. 1, 2005, p. 91, note 23; G. Harpaz and Y. Shany, above note 33, p. 539 (noting that Israel has never openly objected to Article 3 of AP I). The High Contracting Parties to GC IV called upon Israel to 'fully and effectively respect' that convention: the declaration 'reflects the common understanding reached by the participating High Contracting Parties' to the conference. The text of the declaration is reproduced in Pierre-Yves Fux and Mirko Zambelli, 'Mise en oeuvre de la Quatrième Convention de Genève dans les territoires palestiniens occupés: historique d'un processus multilatéral (1997–2001)', Annex 1: Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, in *International Review of the Red Cross*, Vol. 84, No. 847, 2002, pp. 683–686. Aside from Israel, the US, and Australia, all the other States Parties to GC IV subscribed to the declaration (see Communiqué de presse, Swiss Federal Department of Foreign Affairs, 5 December 2001). Moreover, in the context of the *Wall* advisory procedure before the ICJ, no state invoked Article 6, para. 3 of GC IV as limiting the application of occupation law. Malaysia and the League of Arab States invoked GC IV articles not listed among those applicable beyond the 'one-year' time limit: Malaysia, ICJ, *Wall* advisory proceedings, Written Statement



of UN General Assembly Resolutions adopted after the ICJ *Wall* Advisory Opinion, while recalling the advisory opinion in its preamble, demand, in the relevant operative paragraph, that Israel ‘comply *fully* with the provisions of the Fourth Geneva Convention’.<sup>49</sup> Nineteen out of the twenty-four states that have not yet ratified Additional Protocol I voted in favour of these resolutions.<sup>50</sup> The aforementioned elements illustrate that, with the exception of states such as Niue or Kiribati, the overwhelming majority of the States non-parties to the Protocol have expressed their intention of seeing all IHL rules applied until the end of an occupation. In this respect, the limitation laid down by Article 6, paragraph 3 of the Fourth Geneva Convention has been rejected.

### *The exercise of governmental functions as a fundamental criterion for the application of article 6 para. 3 of the Fourth Geneva Convention*

Aside from the relationship between Article 6, paragraph 3 of the Fourth Geneva Convention and Article 3(b) of Additional Protocol I, it is also submitted that Article 6, paragraph 3 does not impose a purely temporal criterion for the termination of the application of the law of occupation. Indeed, the *travaux préparatoires* of this provision indicate that Article 6, paragraph 3 refers in substance to occupations in which there has been a transfer of governmental functions by the Occupying Power to authorities of the occupied territory.<sup>51</sup> The ‘one-year’ period was suggested as a time limit because it was optimistically considered, that, after this time, the Occupying Power would have already transferred some responsibilities to local authorities of the occupied territory. Even during negotiations, this time limit was viewed as arbitrary by some delegations.<sup>52</sup> The inclusion of the second line of Article 6, paragraph 3 formalizes this link between the transfer of responsibilities and the application of the Convention.<sup>53</sup> Italy expressed this point clearly:

of Malaysia, 30 January 2004, pp. 48 and 49, paras. 134 and 137; League of Arab States, *ibid.*, Written Statement of the League of Arab States, 28 January 2004, paras. 9.7 and 9.10.

- 49 Emphasis added. The relevant resolutions are: UN GA Res. 60/107, 8 December 2005, pp. 1, 3; UN GA Res. 61/119, 14 December 2006, pp. 1, 3; UN GA Res. 62/109, 17 December 2007, pp. 1, 3; UN GA Res. 63/98, 5 December 2008, pp. 2, 4; UN GA Res. 64/94, 10 December 2009, pp. 2, 4; UN GA Res. 65/105, 10 December 2010, pp. 2, 4; UN GA Res. 66/79, 9 December 2011, pp. 2, 4.
- 50 The states that did not vote in favour of either of the aforementioned resolutions were the US, Israel, and the Marshall Islands; Niue and Kiribati did not take part in the vote. See UN GA, A/60/PV.62, 8 December 2005, p. 16; UN GA, A/61/PV.79, 14 December 2006, p. 10; UN GA, A/62/PV.75, 17 December 2007, pp. 10–11; UN GA, A/63/PV.64, 5 December 2008, pp. 10–11; UN GA, A/64/PV.62, 10 December 2009, p. 12; UN GA, A/65/PV.62, 10 December 2010, p. 11; UN GA, A/66/PV.81, 9 December 2011.
- 51 The first draft of GC IV stipulated that the Convention would remain applicable until the end of an occupation: Draft Convention for the Protection of Civilian Persons in Time of War, in *Final Record of the Diplomatic Conference of Geneva of 1949*, Federal Political Department, Berne (n.d.), Vol. I, p. 114 (Art. 4). It was the United States that proposed an amendment introducing the ‘one-year’ time limit to the application of the Convention, justified by the fact that occupation leads to a progressive return of governmental responsibilities to local authorities and that, following such a return, the Occupying Power should not be subject to the relevant obligations of the Convention: *ibid.*, Vol. II-A, p. 623.
- 52 For example, the delegates of Bulgaria (*ibid.*, Vol. II-A, p. 624) and Norway (*ibid.*).
- 53 See the comments on Article 6 by Committee III to the Plenary Assembly of the 1949 Diplomatic Conference: *ibid.*, p. 815.

‘An occupation which lasted beyond the date of cessation of hostilities only entailed obligations which were to be lifted progressively, as and when the local authority took over administrative powers’.<sup>54</sup> Therefore, what seems at a first glance to be a simple temporal criterion for the non-application of some of the articles of the Fourth Geneva Convention is in fact a condition of substance, relating to the transfer of governmental authority.<sup>55</sup> This is nothing more than an expression of the fundamental link between the application of IHL and the facts on the ground.<sup>56</sup> Thus Article 6, paragraph 3 was clearly not designed for protracted occupations where no transfer of powers has taken place. In other words, if one defines ‘prolonged occupations’ solely by a temporal criterion, Article 6, paragraph 3 of the Fourth Geneva Convention is of little use as a legal basis for rejecting the full application of IHL. This is all the more so since the provision of that paragraph would certainly not prevent all relevant IHL customary rules from applying beyond the ‘one-year’ limit.<sup>57</sup>

Having established that all IHL rules remain applicable to situations of prolonged occupation, we will now turn to the possibility of adapting the application of these rules to the specific circumstances of such occupations.<sup>58</sup>

## Adapting international humanitarian law to prolonged occupations

The influence exercised by the duration of the occupation on the application of IHL is not entirely clear. The central question seems to be whether the Occupying Power should be accorded more leeway or not. In this regard, the ‘inherent dilemma’<sup>59</sup> in long-term occupations is that their prolonged character can be invoked in support of both options.<sup>60</sup> Scholars have expressed opinions both in favour of according more leeway<sup>61</sup> and against it.<sup>62</sup>

54 *Ibid.*, p. 625.

55 The relevance of the distinction between the articles listed in Art., 6 para. 3 of GC IV and the ones excluded from the provision has also been challenged. Roberts notes that the great majority of the GC IV articles pertaining to occupation remain applicable even after the ‘one-year’ time limit: see A. Roberts, above note 4, pp. 55–56. Comparing Articles 49 and 53, which remain applicable even after the ‘one-year’ limit, with Article 50, whose application is excluded, Kolb correctly notes that the reasons for the distinction between the two categories of rules are not always clear: see R. Kolb, above note 39, pp. 355–356.

56 V. Koutroulis, above note 3, pp. 168–169.

57 R. Kolb, above note 39, p. 359.

58 This contribution will not deal with the possibility of adapting IHL occupation law through the adoption of binding Security Council resolutions.

59 The expression is used in Christine Chinkin, ‘Laws of occupation’, in Neville Botha, Michele Olivier, and Delarey Van Tonder (eds), *Multilateralism and International Law with Western Sahara as a Case Study*, Unisa Press, Pretoria, 2010, p. 178.

60 A. Roberts, above note 4, pp. 52–53. See also C. Chinkin, above note 59, p. 178: ‘In a prolonged occupation there may be strong reasons for recognizing the powers of an occupant in certain specific respects – for example, because there is a need to make drastic and permanent changes in the economy or the system of government. At the same time, there may be strong reasons for limiting the occupant’s powers in other respects’.

61 Y. Dinstein, above note 3, p. 120.

62 O. Ben-Naftali, above note 39, pp. 218–219.

However, the realities in long-lasting occupations are too complex to be limited to a binary approach, according to which either the occupant's powers are more extensive in prolonged occupations or they are curtailed. For example, recognizing that the Occupying Power enjoys greater liberty in its law-making power in situations of prolonged occupation does not automatically imply that the same liberty should be accorded in relation to the application of all IHL rules relating to occupation. Starting from this premise, we will first focus on IHL rules whose application appears prone to become more liberal due to the long duration of an occupation. We will then identify IHL rules whose application seems to be influenced in the opposite direction: the more an occupation lasts, the stricter their application becomes. The existence of these two categories of rules indicates that IHL application in prolonged occupations admits no straitjacket solutions and that whether a specific IHL rule will be applied in a more or less strict manner owing to the particularities of a prolonged occupation will depend mainly on the nature of the rule itself.

### *Time as an element allowing for a permissive application of the law of occupation*

A prolonged occupation is considered as granting the Occupying Power the possibility to introduce changes of a more permanent nature to the occupied territory. For example, Yoram Dinstein 'takes it as almost axiomatic that the military government must be given more leeway in the application of its lawmaking power if the occupation endures for many years'.<sup>63</sup> The main IHL rules whose application is affected in such a way are those related to the 'conservationist principle': Article 43 of the Hague Regulations<sup>64</sup> and Article 64 of the Fourth Geneva Convention.<sup>65</sup>

The obligation to respect the status quo of the occupied territory stipulated by these articles is not overly cumbersome. On the contrary, it has been interpreted rather flexibly.<sup>66</sup> The main obligation imposed by Article 43 of the Hague

63 Y. Dinstein, above note 3, p. 120.

64 Hague Regulations, Art. 43: 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.

65 GC IV, Art. 64, p. 328: 'The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws. The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.' See, in this respect, the discussion in T. Ferraro, above note 12, pp. 72–74.

66 See also, Marco Sassòli, 'Legislation and maintenance of public order and civil life by Occupying Powers', in *European Journal of International Law*, Vol. 16, no. 4, 2005, pp. 663–680; Yoram Dinstein, 'Legislation under Article 43 of the Hague Regulations: belligerent occupation and peacebuilding', Program on Humanitarian Policy and Conflict Research (HPCR), Harvard University, Occasional Paper Series, Fall 2004, p. 8, available at: <http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper1.pdf> (last visited 5 July 2012); Edmund H. Schwenk, 'Legislative power of the military occupant under Article 43, Hague Regulations', in *Yale Law Journal*, Vol. 54, 1944–1945, pp. 395 ff.

Regulations is the one to restore and ensure ‘public order and safety’ or – more accurately in light of the formulation of the authentic French version (*l’ordre et la vie publics*) – ‘public order and (civil) life’.<sup>67</sup> ‘Public order and civil life’ have been interpreted as referring to ‘the whole social, commercial and economic life of the community’.<sup>68</sup> In doing so, the Occupying Power must respect the laws of the occupied territory ‘unless absolutely prevented’. These terms have been further specified by Article 64, paragraph 2 of the Fourth Geneva Convention.<sup>69</sup> The Occupying Power is not absolutely prevented from introducing legislative changes in order to, first, fulfil its obligations under the Fourth Geneva Convention; second, maintain the orderly government of the occupied territory; and third, ensure the security of the Occupying Power and of the members and property of the occupying forces or the administration.<sup>70</sup> In reality the limitations imposed by the ‘unless absolutely prevented’ exception are far less rigid than its negative formulation suggests.<sup>71</sup> This is confirmed by the interplay between Article 43 of the Hague Regulations and Article 64, paragraph 2 of the Fourth Geneva Convention. As we just explained, according to the first of these two articles, the Occupying Power should preserve public order and civil life while respecting the legislation of the occupied territory. Only in exceptional cases can this respect be circumvented. Among these exceptional cases, Article 64, paragraph 2 of the Convention includes the need to maintain the orderly government of the occupied territory. However, the preservation of public order and civil life itself forms an essential part of the occupier’s obligation to maintain the orderly government of the occupied territory. Thus, the two parts of the rule laid down in Article 43 of the Hague Regulations become tautological to a large extent: the occupier should preserve public order and civil life without interfering with local legislation unless such interference is necessary for the orderly government of the territory, orderly government that certainly includes the preservation of public order and civil life. In view of the above,

67 M. Sassòli, above note 66, pp. 663–664; David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, State University of New York Press, Albany, NY, 2002, pp. 58–59; E. H. Schwenk, above note 66, p. 393.

68 Court of Criminal Appeal established at the British Zone of Control in Germany, *Grahame v. The Director of Prosecutions*, British Zone of Control, Control Commission, 26 July 1947, *Annual Digest and Reports of Public International Law Cases*, Vol. 14, 1947, p. 232. The Supreme Court of Israel, *Askani* case, above note 9, p. 19, para. 18, states that Article 43 ‘extends to the public order and life in all their aspects . . . such as economic, social, educational, hygienic [*sic*], medical, traffic and similar matters that are connected with life in a modern society’.

69 *Commentary GC IV*, above note 5, p. 335; M. Sassòli, above note 66, pp. 669–671; Y. Dinstein, above note 66, pp. 4–6. Schwenk’s analysis confirms that the exceptions introduced by Article 64 of GC IV were in conformity with the interpretation of the phrase ‘unless absolutely prevented’ before the adoption of GC IV, Art. 64: see E. H. Schwenk, above note 66, pp. 399–402.

70 See GC IV, Art. 64, para. 2, above note 65. For an analysis of the scope of this provision see M. Sassòli, above note 66, pp. 674–675 and 678–679. Penal legislation is specifically regulated by GC IV, Art. 64, para. 1.

71 It has, for example, been considered that an Occupying Power would be absolutely prevented from applying local legislation contrary to international law in general, with particular reference to human rights norms. See UK, *Military Manual*, above note 7, pp. 278–279, para. 11.11; M. Sassòli, above note 66, pp. 676–678; Robert Y. Jennings, ‘Government in commission’, in *British Year Book of International Law*, Vol. 23, 1946, p. 132, n. 1; F. A. Mann, ‘The present legal status of Germany’, in *International Law Quarterly*, Vol. 1, No. 3, 1947, p. 321.

there is no reason not to allow for the long duration of an occupation to influence the meaning and scope of what is needed to ‘maintain the orderly government’ of the occupied territory.

The obligation to ensure ‘public order and civil life’ set out in Article 43 of the Hague Regulations has been applied by national courts permissively, several changes in the status quo of the occupied territory having been considered as valid by case law.<sup>72</sup> This notwithstanding, the duration of the occupation has been invoked as an element allowing for an even more permissive application of Article 43, as well as other IHL rules linked to the preservation of the status quo of the occupied territory. Thus, the Supreme Court of Israel has invoked the long-lasting character of the Israeli occupation over Palestinian territories in order to justify the adoption of new tax legislation,<sup>73</sup> or the implementation of infrastructure projects with permanent effect on the occupied territories, such as the construction of high-speed motorways<sup>74</sup> or high-voltage lines.<sup>75</sup> The essence of the argument here is to avoid freezing life and to allow for the normal development of the occupied territory.<sup>76</sup> The judgment handed down in the *Askan* case on the construction of high-speed motorways provides a résumé of the Court’s case law until 1983 and deserves a more detailed presentation here.

The central issue before the Court was whether the Occupying Power can go through with a project ‘that has permanent implications’, reaching ‘beyond the time limits of the military government itself’.<sup>77</sup> The Supreme Court of Israel turned first to Article 43 of the Hague Regulations and asserted that the distinction between a short-term and a long-term occupation affects the content given to ‘the public order and life’.<sup>78</sup> And the Court went on to explain that

military and security needs predominate in a short-term military occupation. Conversely, the needs of the local population gain weight in a long-term

72 See E. David, above note 7, pp. 567–568 and 571–572; D. Kretzmer, above note 67, pp. 62 ff.; Yoram Dinstein, ‘The Israel Supreme Court and the law of belligerent occupation: Article 43 of the Hague Regulations’, in *Israel Yearbook on Human Rights*, Vol. 25, 1995, pp. 12–16. For an extensive analysis of the scope of Article 43, including reference to the *travaux préparatoires* of the provision, see E. H. Schwenk, above note 66, pp. 395 ff.

73 Supreme Court of Israel, *Bassil Abu Aita et al. v. The Regional Commander of Judea and Samaria and Staff Officer in Charge of Matters of Custom and Excise – Omar Abdu Kadar Kanzil et al. v. Officer in Charge of Customs, Gaza Strip Region and the Regional Commander of the Gaza Strip*, HC 69/81 – HC 493/81, 5 April 1983, pp. 133–134, para. 50, available at: [http://elyon1.court.gov.il/files\\_eng/81/690/000/z01/81000690.z01.pdf](http://elyon1.court.gov.il/files_eng/81/690/000/z01/81000690.z01.pdf) (last visited 5 July 2012). We are not commenting here on the subordination of Articles 48 and 49 of the Hague Regulations to Article 43, since the duration of the occupation has not been invoked as an argument in favour of this subordination. For a comment, see Y. Dinstein, above note 72, pp. 16–20.

74 Supreme Court of Israel, *Askan* case, above note 9, p. 39, para. 36.

75 See the case law cited in Y. Dinstein, above note 3, pp. 118–119.

76 See ‘Statement by the International Committee of the Red Cross, Geneva, 5 December 2001’, Conference of High Contracting Parties to the Fourth Geneva Convention, para. 3, available at <http://www.icrc.org/eng/resources/documents/misc/57jrgw.htm> (last visited 5 July 2012): ‘the Occupying Power... must ensure the protection, security and welfare of the population living under occupation. This also implies allowing the normal development of the territory, if the occupation lasts for a prolonged period of time’. See also Cuba, *Wall* advisory proceedings, Written Statement of the Republic of Cuba, 30 January 2004, p. 12.

77 Supreme Court of Israel, *Askan* case, above note 9, p. 17, para. 16.

78 *Ibid.*, pp. 23–24, para. 22.

military occupation. . . . Therefore legislative measures (such as new taxation or a new rate of taxation for an existing tax) that might be improper for a short-term military government could be proper for a long-term military government.<sup>79</sup>

Despite insisting on the fact that the Hague Regulations had not foreseen such distinction, the Supreme Court of Israel did not reject the Regulations as irrelevant. It accepted that it was bound to apply them but asserted that ‘the time dimension can be taken into account when considering proper policy in cases in which there is room for policymaking within the Regulations themselves’.<sup>80</sup> Article 43 is considered as sufficiently flexible to accommodate such interpretations by incorporating the time element in the analysis of both the term ‘public order and life’ and the term ‘unless absolutely prevented’.<sup>81</sup> The Court stated unequivocally:

The life of a population, like the life of an individual, is not static but is in a perpetual movement that contains development, growth and change. A military government cannot ignore this. It may not freeze life. . . .

The Military Government’s authority therefore extends to taking measures necessary for growth, change and progress. The conclusion is that a military government may develop industry, trade, agriculture, education, health and welfare services and similar matters of proper administration that are necessary for securing the changing needs of a population in an area subject to belligerent occupation.<sup>82</sup>

These actions are subject to the limits imposed by the temporary character of the military government, by the fact that the occupier is not the sovereign ruler of the occupied territory.<sup>83</sup> The Court affirmed that investments favouring growth and development of the occupied territory but leading at the same time to permanent changes in the occupied territory ‘are permitted if they are reasonably required for the needs of the local population’.<sup>84</sup> As for prohibited measures for the Occupying Power, the Court cited ‘institutional changes’ or measures that ‘bring about a substantial change in the fundamental institutions’ of the occupied territory.<sup>85</sup> The military government was under no obligation to adopt far-reaching measures for the development of the occupied territory. According to the Court, this margin of appreciation was reflected in the wording of Article 43 (the occupier must take ‘*all measures in its power*’ in order to ensure ‘*as far as possible*’ public order and life).<sup>86</sup> There exists for the Occupying Power

a minimal standard with regard to securing the public order and life of the local population below which the military government functioning as a proper

79 *Ibid.*, p. 24, para. 22.

80 *Ibid.*, p. 25, para. 22.

81 *Ibid.*

82 *Ibid.*, pp. 28–29, para. 26.

83 *Ibid.*, p. 27, para. 23.

84 *Ibid.*, pp. 30–31, para. 27.

85 *Ibid.*, p. 31, para. 27.

86 *Ibid.*, p. 33, para. 29 (emphasis added).

government may not descend, and that there certainly exists a maximal standard with regard to securing the public order and life of the population above which the military government functioning as a temporary government may not ascend, and that between these two there exists a field of authority within which there is permission and not duty to choose between various options...<sup>87</sup>

Thus, the occupier may or may not choose to act in order to make fundamental investments and this choice will depend on factors such as the occupier's 'physical capacity, the manpower (military and civilian) at its disposal and its monetary resources'.<sup>88</sup> In the end, the Supreme Court of Israel established a link between Article 46 of the Hague Regulations, concerning expropriation of private property, and Article 43, and found that both the high-speed motorway construction plan and the expropriations necessary for its realization were in conformity with the Hague Regulations.<sup>89</sup>

This judgment raises several interesting issues. First, the Court affirmed that the Hague Regulations rules remain applicable to situations of prolonged occupation. Second, it admitted that the duration of the occupation would be taken into account 'in cases in which there is room for policymaking within the Regulations themselves',<sup>90</sup> not with respect to every rule of the Hague Regulations. This is also confirmed by the fact that the Court did not invoke the duration of the occupation in order to modify the scope of Article 46 of the Hague Regulations directly. Indeed, Article 46 is a straightforward provision with no caveats.<sup>91</sup> The Court could have viewed the duration as an element 'external' to the Hague Regulations, capable of directly modifying the application of the rules of those Regulations, independently of their wording. It chose not to do so. Instead, it linked Article 46 to Article 43, whose wording offers room for integrating considerations relating to the time element of the occupation. Third, turning to Article 43 itself, the Supreme Court of Israel asserted that the duration of the occupation affects the scope of the terms 'public order and life' and 'unless absolutely prevented'. In a prolonged occupation, the needs of the local population gain in importance. This allows the occupier to take measures that would be excluded in a short-term occupation, in view of securing these needs. The Court did not offer detailed explanation concerning the influence of time on the 'unless absolutely prevented' part of Article 43. It seemed to consider self-evident that, in prolonged occupations, an Occupying Power would be absolutely prevented from respecting local laws. As we have already explained, this view finds a sounder legal basis in the interplay between Article 43 of the Hague Regulations and Article 64, paragraph 2 of the Fourth Geneva Convention. Fourth, the Court identified the limits to the extension

87 *Ibid.*, p. 33–34, para. 29.

88 *Ibid.*

89 *Ibid.*, pp. 34–37, para. 31 and pp. 39–41, paras. 35–37.

90 *Ibid.*, p. 25, para. 22.

91 Hague Regulations, Art. 46: 'Private property cannot be confiscated'.

of the authority of the Occupying Power. These limits rest upon the temporary (read: ‘non-sovereign’) character of the occupier’s administration. The Court affirmed in rather general terms that measures adopted by the Occupying Power should not ‘blur the distinction between a military and ordinary government’, and referred mainly to the occupier’s obligation to act as usufructuary of immovable public property and not to introduce substantial institutional changes in the occupied territory.<sup>92</sup> Unfortunately, the Court did not envisage the influence of the prolonged character of an occupation over these limits. However, the longer an occupation lasts and the wider the authority exercised by the Occupying Power over the local population, the more the distinction between a military and an ordinary government becomes strained and difficult to perceive. According too much authority to the Occupying Power may result in what some refer to as ‘creeping annexation’.<sup>93</sup> Consequently, the duration of an occupation can be seen as imposing on the Occupying Power the need to offer further assurances about the non-permanent or the reversible character of the measures it adopts. Fifth, and finally, the Supreme Court of Israel insisted that the Occupying Power is under no obligation to adopt measures in order to promote growth or development of the occupied territory. Here again, the Court stopped short of analysing the impact of the prolonged character of the occupation on the ‘minimal standard with regard to securing the public order and life of the local population below which the military government functioning as a proper government may not descend’.<sup>94</sup> Since the time element broadens the scope of ‘public order and life’, this broadened scope also influences the obligations imposed on the Occupying Power by Article 43 of the Hague Regulations. Thus, since the occupier has to ‘take all the measures in his power to restore, and ensure, as far as possible, public order and [life]’, it is submitted that the interpretation of the terms ‘as far as possible’ and ‘all the

92 See above note 85. The Court allowed for one exception to this rule, in cases where the local institutions are opposed ‘in their substance to fundamental notions of justice and morality’ (*Askani* case, above note 9, p. 27, para. 23). Although this exception is formulated in broad and vague terms, it is submitted that it should be read as referring to the cases covered by Hague Regulations, Art. 43, read together with GC IV, Art. 64, para. 2 (i.e. legislation contrary to fundamental IHRL rules).

93 Palestine, *Wall* advisory proceedings, Written Statement Submitted by Palestine, 30 January 2004, p. 274, para. 596; UN Economic and Social Council, Commission on Human Rights, ‘Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine: Report of the Human Rights Inquiry Commission established pursuant to Commission resolution S-5/1 of 19 October 2000’, UN Doc. E/CN.4/2001/121, 16 March 2001, p. 20, para. 68; R. Falk, above note 4, p. 46; Gamal Abouali, ‘Natural resources under occupation: the status of Palestinian water under international law’, in *Pace International Law Review*, Vol. 10, No. 2, 1998, p. 508; Editor’s Note accompanying the *Basic Abu Ita* judgment of the Supreme Court of Israel, in *Palestinian Yearbook of International Law*, Vol. 4, 1987–1988, p. 186; Theodor Meron, ‘Applicability of multilateral conventions to occupied territories’, in *American Journal of International Law*, Vol. 72, No. 3, 1978, p. 550; G. H. Fox, above note 8, p. 235. At the time of Israel’s occupation of parts of southern Lebanon, Lebanon had also denounced the link by Israel of ‘the economic and administrative infrastructure of southern Lebanon to its own’ as ‘creeping annexation’: see letter dated 16 July 1990 from the Permanent Representative of Lebanon to the United Nations addressed to the Secretary-General, UN Doc. S/21396, 16 July 1990, p. 1. See also Jordan, *Wall* advisory proceedings, Written Statement Submitted by the Hashemite Kingdom of Jordan, 30 January 2004, pp. 79–80, para. 5.106 (referring to *de facto* annexation).

94 See above note 87 and accompanying text.



measures in his power' are equally influenced by the long duration of the occupation. The longer the occupation, the more difficult it will be for the Occupying Power to suggest that it has absolutely no measure in its power to ensure the development and growth of the occupied territory or that it has been impossible to do so. Therefore, in situations of prolonged occupation, the minimal standard identified by the Court should be interpreted as imposing on the Occupying Power at least some positive obligations to take action in favour of growth and development in the occupied territory. This may prove particularly useful in situations where the Occupying Power rejects the application of human rights instruments in the occupied territory.

The question of the prolonged character of the occupation has been raised before the Supreme Court of Israel in a recent judgment concerning activities in relation to the exploitation of quarries in the occupied Palestinian territory (the *Yesh Din* case).<sup>95</sup> On the basis of Articles 43 and 55 of the Hague Regulations the petitioner, a voluntary human rights association, requested an order to cease quarrying activities inside the occupied territories of Judea and Samaria and to stop the establishment of new quarries or the expansion of already existing quarries in these territories.<sup>96</sup> Usufruct is defined by the Court as the 'right to use and enjoy the fruits of another's property for a period without damaging or diminishing it, although the property might naturally deteriorate over time'.<sup>97</sup> The Court explained that this meant that the Occupying State 'shall not be entitled to sell the asset or to use it in a way that shall result in its depletion or exhaustion'.<sup>98</sup> Without invoking the prolonged character of the occupation, the Court affirmed that the mere mining of minerals was not considered as damaging to the capital and therefore is not excluded by Article 55.<sup>99</sup> The Court then turned to the question whether the mining was allowed only with regard to mines and quarries that already existed before the occupation, as the petitioners suggested, or whether the Occupying Power could establish new ones, as the respondents proposed, invoking 'the unique circumstances of a prolonged belligerent occupation'.<sup>100</sup> The Court acceded to this line of reasoning. It admitted that

the duration of the occupation period . . . requires the adjustment of the law to the reality on the ground, which imposes a duty upon Israel to ensure normal

95 Supreme Court of Israel, '*Yesh Din*' – *Volunteers for Human Rights v. The Commander of IDF Forces in the West Bank and others*, HCJ 2164/09, 26 December 2011, available at: <http://www.yesh-din.org/userfiles/file/תורערכה%20דין/psak.pdf> (last visited 5 July 2012).

96 *Ibid.*, pp. 4–5, paras. 2–3. Article 55 of the Hague Regulations reads as follows: 'The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct'.

97 Supreme Court of Israel, *Yesh Din* Judgment, above note 95, p. 11, para. 7.

98 *Ibid.*

99 *Ibid.*, pp. 12–14, para. 8. For a persuasive critical analysis of this issue, see Guy Harpaz, Yuval Shany, Eyal Benvenisti, Amichai Cohen, Yael Ronen, Barak Medina, and Orna Ben-Naftali, Expert Legal Opinion, opinion with regard to the issues arising from the *Yesh Din* judgment in support of the petitioners' motion for a review of the judgment (En Banc review), January 2012, pp. 38 ff.

100 Supreme Court of Israel, *Yesh Din* Judgment, above note 95, pp. 14–16 paras. 7 and 9.

life for a period, which even if deemed temporary from a legal perspective, is certainly long-term. Therefore, the traditional occupation laws require adjustment to the prolonged duration of the occupation, to the continuity of normal life in the Area and to the sustainability of economic relations between the two authorities – the occupier and the occupied.<sup>101</sup>

On the basis of this finding, the Court held that the current, limited and reasonable, usage of minerals of the occupied territory did not contradict Article 55, as adjusted to the particularities of prolonged occupation. The Court appeared to exclude the establishment of new quarries.<sup>102</sup> As for mining activities in quarries established during the occupation, referring to ‘the unique aspects’ of the occupation in question, the Court stated that

adopting the Petitioner’s strict view might result in the failure of the military commander to perform his duties pursuant to international law. For instance, adopting the stance, according to which under the current circumstances the military commander must cease the operations of the Quarries, might cause harm to existing infrastructures and a shut-down of the industry, which might consequently harm, of all things, the wellbeing of the local population.<sup>103</sup>

The Court went on to cite aspects of the quarrying activities that are beneficial to the local population (such as employment in the quarries and training of Palestinian residents, marketing of quarrying products to Palestinians and Israeli settlers in the occupied territories, payment of royalties by the quarries’ operators) and concluded that

it is therefore difficult to accept the Petitioner’s decisive assertion, according to which the quarrying operations are in no way promoting the best interests of the Area, especially in light of the common economic interests of both the Israeli and Palestinian parties and the prolonged period of occupation.<sup>104</sup>

The following remarks deal solely with the use of the occupation’s prolonged character in the Court’s legal reasoning.<sup>105</sup> First, contrary to the approach adopted in the *Askaniya* case, it seems that, in this case, the Court considered the duration of the occupation as imposing the adjustment of all the rules of occupation law, regardless of whether the wording of a particular rule allows for such an adjustment or not. The Court’s stance on this matter was not unambiguous: it is not clear whether the Court did indeed consider that the time element directly alters the scope of application of Article 55 or whether this adjustment is due to the link established between this Article and Article 43. In any case, to the extent that the judgment could be interpreted in favour of a direct influence of the time element on the application of Article 55, such an interpretation is flawed. The wording of

101 *Ibid.*, p. 16, para. 10.

102 *Ibid.*, p. 17, paras. 10–12.

103 *Ibid.*, p. 18, para. 13.

104 *Ibid.*, p. 19, para. 13.

105 For a general critical analysis of the judgment, see G. Harpaz *et al.*, above note 99.

Article 55 itself does not allow for a change in its scope depending on the duration of the occupation<sup>106</sup> and the Court offered no alternative legal basis for such a change.<sup>107</sup> It should be noted that Israel advanced a similar position in 1978, in respect of the exploitation of new oil fields in Sinai and the Gulf of Suez. In that case, Israel invoked, among other arguments, the duration of its occupation of these two territories, arguing that preventing exploitation of oil fields would amount to a delay in the development of these territories and economic paralysis.<sup>108</sup> However, Israel's memorandum contradicted one issued by the United States on the same theme, which rejected Israel's right to exploit new oil fields under occupation law, without mentioning any relaxation of this prohibition owing to the duration of the occupation.<sup>109</sup> The US memorandum pointed out that allowing for such a right might be an incentive against withdrawal and in favour of prolonging the occupation.<sup>110</sup>

Second, turning back to the *Yesh Din* judgment, it is important to underline that the Israeli governmental authorities admit that the duration of the occupation creates positive obligations for the occupier.<sup>111</sup> The Court agreed with this view.<sup>112</sup> This would imply that the operation of the quarries is not a decision that the Occupying Power is free to take or not, but rather an obligation stemming from the general duty of the occupier to ensure public order and life. This confirms the view expressed above that the duration of the occupation enhances the obligations imposed on the Occupying Power by Article 43 of the Hague Regulations.

Third, as seven Israeli legal experts have outlined in a legal opinion on the *Yesh Din* judgment,

the protraction of the occupation does indeed broadly impact the appropriate interpretation of Article 43 and consequently the powers of the Military Commander... but this broad impact is subject to two strict and basic

106 For example, the meaning of 'usufruct' is unlikely to vary according to the duration of the occupation.

107 See, along the same lines, G. Harpaz *et al.*, above note 99, pp. 45–48, who insist that the character of the prohibition to use the capital of the natural resources is an absolute one that admits no exceptions or adjustments of degree.

108 Ministry of Foreign Affairs of Israel, 'Israel: Ministry of Foreign Affairs memorandum of law on the right to develop new oil fields in Sinai and the Gulf of Suez', 1 August 1977, in *International Legal Materials*, Vol. 17, No. 2, 1978, pp. 434–435, paras. 5 and 10.

109 US Department of State, 'United States: Department of State memorandum of law on Israel's right to develop new oil fields in Sinai and the Gulf of Suez', 1 October 1976, in *International Legal Materials*, Vol. 16, No. 3, 1977, pp. 733–753. The occupation in question dated from 1967.

110 *Ibid.*, p. 746: 'A rule holding out the prospect of acquiring unrestricted access to and use of resources and raw materials, would constitute an incentive to territorial occupation by a country needing raw materials, and a disincentive to withdrawal'. For a defence of this policy consideration, see Brice M. Clagett and O. Thomas Johnson Jr., 'May Israel as a belligerent occupant lawfully exploit previously unexploited oil resources of the Gulf of Suez?', in *American Journal of International Law*, Vol. 72, No. 3, 1978, pp. 577–578.

111 Israel, Ministry of Justice, HCJ 2164/09 *Yesh Din*, Response on Behalf of Respondents 1–2, 20 May 2010, para. 52, available at: <http://yesh-din.org/userfiles/file/Petitions/Quarries/Quarries%20State%20Response%20May%202010%20ENG.pdf> (last visited 5 July 2012): 'in a state of prolonged belligerent occupation, the prevailing belief is that the military administration acquires additional positive duties in relation to the area it is administering'.

112 Supreme Court of Israel, *Yesh Din* Judgment, above note 95, p. 18, para. 12.

limitations: the first is that such expansion does not allow the Military Commander to factor in considerations that are prohibited under Article 43 or to act outside of the other provisions that apply to his powers, and the second is that the expansion must be exercised for the benefit of the local population and not against it.<sup>113</sup>

The present writer agrees with the experts that the *Yesh Din* judgment uses the time element to promote an expanding interpretation of Articles 43 and 55 that circumvents these two limitations articulated by its own case law.<sup>114</sup> Taking this last remark one step further, and along the same lines as our comments on the *Askan* judgment, the long duration of the occupation can be interpreted as establishing new limits to the freedom of the action of the Occupying Power. These limits will be explored below.

### *Time as an element allowing for a restrictive application of the law of occupation*

Aside from being a tool for the expansion of the powers of the occupier, the prolonged character of the occupation may also constitute an argument in favour of limiting the freedom of these powers. We have already referred to one example in this regard in relation to the application of Article 43 of the Hague Regulations. The starting point in defining the limits of the occupier's freedom is the recognition that the prolonged character of an occupation implies certain positive obligations for the Occupying Power. As it has just been shown, both the Israeli authorities and the Supreme Court of Israel have recognized the existence of such obligations in the *Yesh Din* case.<sup>115</sup> In this respect, two things should be kept in mind. The first is the fact that the expansion of the occupier's powers should be exercised for the benefit of the local population.<sup>116</sup> The second is that this expansion should not blur the distinction between a military government and a national one.<sup>117</sup> As we have already stated, prolonged occupations put this last consideration to the test. In short-term occupations, in order to maintain the aforementioned distinction, it may suffice to abstain from introducing fundamental institutional changes in the occupied territory.<sup>118</sup> However, in long-term occupations, where the degree of dependence of the occupied territory upon the Occupying Power is enhanced over the years, this simple abstention may not be enough, and supplementary action may be needed in

113 G. Harpaz *et al.*, above note 99, p. 30, para. 84. The experts cite several judgments of the Supreme Court of Israel confirming this position.

114 *Ibid.*, p. 33, para. 92. As the experts correctly underline: 'the decision adjusts the provisions [i.e. Articles 43 and 55] to accommodate the reality on the ground instead of subjecting that reality to the rule of law and limiting the authorities of the military Commander so as to accord with the provisions of the laws of occupation'.

115 See above notes 111–112.

116 Supreme Court of Israel, *Askan* case, above note 9, p. 24, para. 22 and pp. 28–29, para. 26; G. Harpaz *et al.*, above note 99, p. 30, para. 84.

117 Supreme Court of Israel, *Askan* case, above note 9, p. 29, para. 26.

118 As the Supreme Court of Israel suggests: see Supreme Court of Israel, *Askan* Judgment, above note 9, p. 27, para. 23 and p. 31, para. 27.

order to ensure the potential (depending on the final decision of the sovereign) reversibility of the occupier's measures. In such a context, the simple affirmation that the measures are temporary may not be deemed sufficient. This is demonstrated by the ICJ *Wall* advisory opinion. Despite Israel's repeated statements that the wall was a temporary measure and that Israel was 'ready and able . . . to adjust or dismantle',<sup>119</sup> the ICJ remained reluctant and considered that

the construction of the wall and its associated régime create a 'fait accompli' on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.<sup>120</sup>

Although the ICJ did not explicitly mention the long duration of the occupation, the finding in itself suggests that the spectre of annexation on the occupied territory by the Occupying Power may not be chased away merely by reaffirming the temporary character of the measures adopted or the occupier's will to reverse them. The difficulty in reversing the 'temporary' measures adopted by the Occupying Power is shown by the situation in the Gaza strip following the 2005 disengagement of the Israeli forces. The Supreme Court of Israel has determined that, following the 2005 disengagement, Gaza is no longer a territory under belligerent occupation.<sup>121</sup> It has, however, conceded that the State of Israel continues to have obligations towards the residents of the Gaza strip that derive, among others,

from the relationship that was created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the territory, as a result of which the Gaza Strip is currently almost completely dependent upon the supply of electricity from Israel.<sup>122</sup>

This finding reveals the extent of interdependence between the occupier and the occupied territory that develops during long-term occupations.<sup>123</sup> First, it should be noted that the Supreme Court did not explain the legal basis of this statement. If one follows the Court's underlying reasoning, the finding cited above could be read to

119 ICJ, *Wall* advisory opinion, above note 10, p. 182, para. 116.

120 *Ibid.*, p. 184, para. 121 (emphasis in the original).

121 Supreme Court of Israel, *Jaber Al-Bassiouni Ahmed et al. v. Prime Minister and Minister of Defence*, HCJ 9132/07, Judgment, 30 January 2008, para. 12; Supreme Court of Israel, *A and B v. State of Israel*, CrimA 6659/06 and others, Judgment, 11 June 2008, para. 11. Both judgments are available at: <http://elyon1.court.gov.il/eng/home/index.html> (last visited 5 July 2012). See also Public Commission to Examine the Maritime Incident of 31 May 2010 (the Turkel Commission), *Report*, Part One, January 2011, pp. 50–53, paras. 45–47, available at: <http://www.turkel-committee.gov.il/files/worddocs/870720021english.pdf> (last visited 5 July 2012).

122 Supreme Court of Israel, *Al-Bassiouni* Judgment, above note 121, para. 12. See also Supreme Court of Israel, *Physicians for Human Rights et al. v. Prime Minister of Israel et al.* and *Gisha Legal Centre for Freedom of Movement et al. v. Minister of Defence*, HCJ 201/09 and 248/09, Judgment, 19 January 2009, p. 13, para. 14. Both judgments are available at: <http://elyon1.court.gov.il/eng/home/index.html> (last visited 5 July 2012).

123 The supply of electricity was one of the first issues that the Supreme Court of Israel decided taking into account the 'prolonged occupation' argument. See Supreme Court of Israel, *The Jerusalem District Electric Company Ltd. v. The Minister of Energy and Infrastructure*, HCJ 351/80, Judgment, cited in Supreme Court of Israel, *Askan* Judgment, above note 9, p. 31, para. 27.

mean that the prolonged character of a belligerent occupation leads to the extension of obligations of the Occupying Power even after the end of the occupation as such. However, this does not seem to be the position of the Supreme Court of Israel, since no IHL rule pertaining specifically to occupation law is mentioned in its judgment.<sup>124</sup> More simply, one could view this statement as confirming that Israel still exercises over Gaza the degree of control necessary for the occupation to continue.<sup>125</sup> In this respect, Dapo Akande suggests that

the criteria for the establishment of occupation may not be the same as the criteria for the maintenance of occupation. . . . [E]ven in cases where a former occupying power no longer exercises the level of control that would justify the establishment of occupation, if it exercises such control as to prevent another power from exercising full control, the occupying power remains in occupation.<sup>126</sup>

There is no indication that states qualify Gaza as occupied territory based on such a differentiated conception between the control necessary for the establishment of the occupation and the one required for its maintenance. The fact that a very large majority of states consider that Gaza is still occupied<sup>127</sup> indicates that, in reality, the degree of control necessary for a state to be an Occupying Power does not require *full and exclusive* control over the occupying territory. However, Akande's argument may become relevant if one adheres to a restrictive conception of the criterion of control for the purpose of establishing a belligerent occupation.<sup>128</sup> In this case, the positions adopted by states in relation to the status of Gaza as occupied territory suggest that, in situations of prolonged occupation, the interdependence between the occupier and the occupied territory may lower the degree of control necessary for the continuation of the occupation.

Furthermore, a long-term Occupying Power has the obligation to take positive measures for the welfare and development of the local population. We subscribe to the position that the benefit to the local population should be significant. Thus, 'any beneficial outcome at all, as small, indirect and speculative as it may be' will not absolve the Occupying Power of its obligations under IHL.<sup>129</sup> The importance of the 'welfare of the local population' element was also expressed during the expert meetings on occupation and other forms of administration of foreign territory organized by the ICRC.<sup>130</sup> The experts participating in these

124 Supreme Court of Israel, *Al-Bassiouni* Judgment, above note 121, paras. 13 ff.

125 Dinstein affirms that the real source of such obligation is that Gaza still remains under belligerent occupation: Y. Dinstein, above note 3, pp. 276–279. As has already been noted, this is also the point of view of the present author: see above note 26.

126 Dapo Akande, 'Classification of armed conflicts: relevant legal concepts', in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, p. 48.

127 See the references cited above at note 26.

128 Along the lines of the view held by the ICJ in its *DRC v. Uganda* Judgment, above note 19, pp. 229–231, paras. 172–178. See also Turkel Commission, above note 121, pp. 51–53, paras. 46–47. For a critical appraisal of this interpretation, see V. Koutroulis, above note 3, pp. 47–58.

129 G. Harpaz *et al.*, above note 99, p. 18, paras. 45–46.

130 The experts 'were unanimously of the view that the welfare of the local population played a key role' in situations of prolonged occupation: see T. Ferraro, above note 12, p. 72.

meetings discussed ways to ensure that the measures adopted by the Occupying Power do indeed preserve the welfare of the local population and, *inter alia*, 'took the view that long-term occupation required the occupying power to take into consideration the will of the local population by including it in its decision making process', although they were unable to agree on the most suitable means for such an involvement.<sup>131</sup>

The long duration of a belligerent occupation may also influence the application of military necessity, which is, along with humanitarian considerations, one of the two pillars on which the entire edifice of IHL is built. IHL rules are the fruit of the balance struck between these two elements.<sup>132</sup> Military necessity is not defined in IHL conventions. However, several military manuals propose definitions of the concept.<sup>133</sup> According to the UK military manual,

Military necessity permits a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.<sup>134</sup>

The fundamental rule concerning military necessity is that, since it has already been taken into consideration during the elaboration of all IHL rules, it can be invoked only where the specific IHL rules provide for a relevant exception; it cannot be invoked to justify actions contrary to IHL.<sup>135</sup> Exceptions founded on

131 *Ibid.*, pp. 75–76.

132 Michael N. Schmitt, 'Military necessity and humanity in international humanitarian law: preserving the delicate balance', in *Virginia Journal of International Law*, Vol. 50, No. 4, 2010, p. 798. The preamble of the 1907 Hague Convention IV respecting the Laws and Customs of War on Land (above note 1) notes that the wording of the Convention's provisions 'has been inspired by the desire to diminish the evils of war, as far as military requirements permit'. See also the preamble of the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November/11 December 1868, available at: <http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument> (last visited 5 July 2012).

133 UK *Military Manual*, above note 7, pp. 21–22, para. 2.2. See, along the same lines, Canada, *Military Manual*, above note 7, p. 2–1, para. 202; US, *Law of Land Warfare*, above note 7, p. 4; France, Ministère de la Défense, *Manuel de droit des conflits armés*, Secrétariat général pour l'administration, Direction des Affaires juridiques, Sous-direction du droit international et du droit européen, Bureau du droit des conflits armés, (undated), p. 48. These definitions can be traced back to the 1863 Lieber Code. Military necessity was defined there as 'the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war' (Article 14), with the additional precision that 'in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult' (Article 16): Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, available at: <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> (last visited 5 July 2012).

134 UK *Military Manual*, above note 7, pp. 21–22, para. 2.2.

135 See the military manuals cited above, as well as Australia, Royal Australian Air Force, *Operations Law for RAAF Commanders*, AAP 1003, Royal Australian Air Force, 2nd edition, 2004, p. 50, para. 6.7 (hereafter Royal Australian Air Force, *Military Manual*), available at: <http://airpower.airforce.gov.au/Publications/Details/156/AAP1003-Operations-Law-for-RAAF-Commanders-2nd-Edition.aspx> (last visited 5 July 2012); Germany, *Military Manual*, above note 7, paras. 131–132. See also, ICJ, *Wall* advisory proceedings, Egypt, Legal Memorandum Submitted by the Arab Republic of Egypt, 28 January 2004, p. 39; League of Arab States, Written Statement of the League of Arab States, 28 January 2004, p. 52, para. 9.5. This has been confirmed by legal doctrine: see International Law Commission, *Report of the International Law*

military necessity can be found in various IHL rules and can have different scopes.<sup>136</sup>

It is particularly interesting for the issue under discussion that the definition cited above establishes a link between the appreciation of military necessity and time. Indeed, the 'legitimate purpose of the conflict' is defined as the submission of the enemy 'at the earliest possible moment'.<sup>137</sup> This could be interpreted to mean that the longer a conflict (including a belligerent occupation) lasts, the more pressing the necessity to submit the enemy at the earliest possible moment becomes. Such an interpretation would lead to a broader application of the principle of military necessity in long-lasting conflict situations. However, to our knowledge, no such broad application of military necessity has been invoked by states, international jurisprudence, or legal doctrine.<sup>138</sup> Indeed, time appears to be left out from the scope of the 'legitimate purpose of the conflict' – the 'ends of war', in the 1863 Lieber Code terminology.<sup>139</sup> This is confirmed by the fact that the Lieber Code itself, as well as some military manuals, does not include a reference to time in its definition of military necessity.<sup>140</sup> In any case, the duration of a conflict or occupation may not overturn the fundamental rule according to which military necessity may not be invoked as a general justification of actions contrary to IHL.<sup>141</sup> In the same vein, the prolonged character of an occupation may not be invoked in order to integrate political, demographic, or economic considerations of the Occupying Power into the notion of military necessity.<sup>142</sup>

*Commission*, Fifty-third session (23 April–1 June and 2 July–10 August 2001), UN Doc. A/56/10, 2001, p. 219, para. 19 and pp. 220–221, para. 21; Nobuo Hayashi, 'Requirements of military necessity in international humanitarian law and international criminal law', in *Boston University International Law Journal*, Vol. 28, 2010, p. 52; M. N. Schmitt, above note 132, pp. 796 ff.; William Gerald Downey Jr., 'The law of war and military necessity', in *American Journal of International Law*, Vol. 47, 1953, pp. 253–254; Burrus M. Carnahan, 'Lincoln, Lieber and the laws of war: the origins and limits of the principle of military necessity', in *American Journal of International Law*, Vol. 92, No. 2, 1998, p. 218; Gerald I. A. D. Draper, 'Military necessity and humanitarian imperatives', in *Revue du droit pénal militaire et du droit de la guerre*, Vol. 12, 1973, No. 2, pp. 133–134; Hilary McCoubrey, 'The nature of the modern doctrine of military necessity', in *Revue du droit pénal militaire et du droit de la guerre*, Vol. 30, 1991, p. 221.

136 For a detailed list of the relevant provisions, see Robert Kolb, 'La nécessité militaire dans le droit des conflits armés: essai de clarification conceptuelle', in *Colloque de Grenoble de la Société française pour le droit international, La nécessité en droit international*, Pedone, Paris, 2007, pp. 176–178.

137 Some scholars distinguish between the 'restrictive' and the 'permissive' function of military necessity: see Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, pp. 286–291. Along the same lines but with different terminology, see also R. Kolb, above note 136, pp. 164–173.

138 We found no trace of such an interpretation in states' military manuals. Equally revealing is the fact that none of the states intervening during the written and oral phase of the *Wall* proceedings before the ICJ referred to the possibility of applying military necessity in a broader manner owing to the long-lasting character of the occupation in question. States interventions are available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=mwp&case=131&k=5a&p3=0> (last visited 5 July 2012). Moreover, no such interpretation has been advanced by either Israel or the ICJ in the *Wall* advisory opinion.

139 See the text of Article 14 of the Lieber Code, cited above at note 128.

140 *Ibid.* See also, Royal Australian Air Force, *Military Manual*, above note 135, p. 49, para. 6.6; Norway, *Norwegian Armed Forces Joint Operational Doctrine*, Organisation and Instruction Authority, Defence Staff, p. 34, para. 0247; Germany, *Military Manual*, above note 7, para. 130.

141 See above note 135 and the accompanying text.

142 Such considerations are excluded from the scope of military necessity. See N. Hayashi, above note 135, pp. 64 ff. with analysis of the *Elon Moreh* decision of the Supreme Court of Israel. The case concerned an



Having established that the long duration of an occupation does not lead to a broader application of military necessity, we will now consider whether it leads to a stricter one. As was underlined above, the scope of the exceptions relating to military necessity differs from one rule to the other. For example, Article 52 of the Hague Regulations allows for requisitions in kind and services from municipalities or inhabitants of the occupied territory ‘for the needs of the army of occupation’.<sup>143</sup> Article 53 of the Fourth Geneva Convention prohibits the destruction of public or private property inside the occupied territory by the Occupying Power, ‘except where such destruction is rendered absolutely necessary by military operations’.<sup>144</sup> Finally, Article 48 of the Convention provides for the possibility of protected persons who are not nationals of the power whose territory is occupied to leave the occupied territory, unless their departure is contrary to the national interests of the Occupying Power.<sup>145</sup> It is obvious that the exception provided for by Article 52 of the Hague Regulations is more limited in scope than military necessity, since it relates only to the needs of the occupying army.<sup>146</sup> At the other end of the spectrum, the exception relating to national interests of the Occupying Power is sufficiently broad to include interests going beyond the concept of military necessity as such.<sup>147</sup>

There are few indications in state practice, military manuals, and international or national case law that the duration of the occupation alone may influence the interpretation of these exceptions. For example, with the exception of Switzerland noted below, none of the states that intervened before the ICJ in the *Wall* advisory proceedings suggested that exceptions relating to military necessity were either excluded or should be interpreted narrowly because of the duration of the occupation. Interpretations as to the scope of the military necessity exceptions cited by the states may differ. However, none of them used the prolonged character of the occupation as a factor influencing the interpretation advanced.<sup>148</sup> The *Jamayat Askan* judgment of the Supreme Court of Israel points towards conceiving

order to requisition privately owned Palestinian land in order to establish a settlement. The Court held that the order was null and void because it was founded on a predominantly political decision and thus was outside the scope of the military necessity exception provided for by Article 52 of the Hague Regulations (‘Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation’): Supreme Court of Israel, *Duweikat et al. v. Government of Israel et al.*, HCJ 390/79, 22 October 1979, reproduced in *International Legal Materials*, Vol. 19, 1980, pp. 171–175. The Supreme Court of Israel has stated generally that ‘[t]he Military Commander may not consider the national, economic and social interests of his own state, so long as they do not affect his security interest in the Region or the interest of the local population’: Supreme Court of Israel, *Askan* Judgment, above note 9, p. 13, para. 13. This was reaffirmed, in relation to Article 43 of the Hague Regulations, in the *Yesh Din* judgment: Supreme Court of Israel, *Yesh Din* Judgment, above note 95, p. 15, para. 8. See also H. McCoubrey, above note 135, p. 227; B. M. Carnahan, above note 135, pp. 219 ff.

143 Hague Regulations, Article 52.

144 GC IV, Art. 53 (emphasis added): ‘Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, *except where such destruction is rendered absolutely necessary by military operations*’.

145 GC IV, Arts. 48 and 35.

146 For an interpretation of the scope of this exception, see Y. Arai-Takahashi, above note 3, pp. 223–225.

147 For example, economic interests: see *Commentary GC IV*, above note 5, p. 236.

148 See ICJ, *Wall* advisory proceedings, Written Statement of the League of Arab States, pp. 86–87, para. 9.13; Egypt, Legal Memorandum, p. 39; Palestine, Written Statement, 30 January 2004, pp. 199–202,

the military necessity requirement of Article 43 of the Hague Regulations narrowly, in cases of prolonged occupation: ‘military and security needs predominate in a short-term military occupation. Conversely, the needs of the local population gain weight in a long-term military occupation ...’.<sup>149</sup> If Article 43 is conceived as establishing a balance of interests and, in prolonged occupations, the needs of the local population do indeed gain weight in this balance, then more compelling military and security considerations will be needed in order to outweigh them. In that sense, time does affect the influence of the military element in the application of Article 43. This reasoning may be applied to all IHL rules containing military necessity exceptions. However, the Court’s subsequent case law has not fleshed out this suggested limitation. We conclude therefore that the time factor does not in and of itself impose a narrow interpretation of military necessity in the application of IHL rules relating to occupation.

Is the suggestion in favour of limiting the long-term occupier’s powers wrong?<sup>150</sup> Not necessarily. In reality, if we look closely at the examples referred to in relation to these suggestions, we realize that the decisive element lies not with time but with the (*quasi*) absence of hostilities. As was noted earlier, the absence of hostilities is one of the two components of the definition employed by Adam Roberts.<sup>151</sup> Relevant situations in this respect are the occupation of the northern part of Cyprus by Turkey<sup>152</sup> and Western Sahara, to the extent that the territory is considered as being occupied by Morocco.<sup>153</sup> In cases such as these, ‘[w]hen military operations have ceased, military necessities must inevitably be less demanding’.<sup>154</sup> The absence of military operations will have different impacts on military necessity exceptions depending on relevant IHL rules. For example, given the absence of military operations, the absolute necessity of military operations in order to justify destruction of private or public property under Article 53 of the Fourth Geneva Convention will be extremely difficult to invoke. It may be excluded altogether, if one interprets the terms military operations strictly, as covering only ‘movements

paras. 442–449; Syria, Memorandum presented by the Syrian Arab Republic, 30 January 2004, p. 17; Morocco, Written Statement of the Kingdom of Morocco, 30 January 2004, p. 11; Organisation of the Islamic Conference, Written Statement of the Organisation of the Islamic Conference, January 2004, p. 10, para. 35; France, Written Statement of the French Republic, 30 January 2004, p. 10, paras. 42–43; Ireland, Statement of the Government of Ireland, January 2004, pp. 7–8, paras. 2.8–2.9; Sweden, Note Verbale dated 30 January 2004 from the Embassy of the Kingdom of Sweden to the Netherlands, together with the Statement of the Kingdom of Sweden, 30 January 2004, para. 7.

149 Supreme Court of Israel, *Askani* case, above note 9, p. 24, para. 22.

150 See A. Roberts, above note 4, pp. 52–53; C. Chinkin, above note 59, p. 178; O. Ben-Naftali, above note 39, pp. 218–219.

151 A. Roberts, above note 4, p. 47.

152 See above note 30.

153 See above note 31, as well as C. Chinkin, above note 59, pp. 174–178; Stephanie Koury, ‘The European Community and Member States’ duty of non-recognition under the EC–Morocco Association Agreement: state responsibility and customary international law’, in Karin Arts and Pedro Pinto Leite (eds), *International Law and the Question of Western Sahara*, International Platform of Jurists for East Timor, Oporto, 2007, pp. 172–174; Vincent Chapaux, ‘The question of the European Community–Morocco Fisheries Agreement’, in K. Arts and P. Pinto Leite, this note, pp. 224–226.

154 ICJ, *Wall* advisory proceedings, Jordan, Written Statement of the Hashemite Kingdom of Jordan, 30 January 2004, p. 143, para. 5.279.

and activities carried out by armed forces related to hostilities'.<sup>155</sup> On the other hand, according to Article 51, paragraph 2 of the same Convention<sup>156</sup> the needs of the army of occupation may justify forced labour of local people over eighteen. These needs have been interpreted as being limited to maintenance needs of the army.<sup>157</sup> It is obvious that, even though the absence of military operations may result in fewer maintenance needs, the mere presence of the occupying army inside the occupied territory will generate at least some needs covered by Article 51, paragraph 2.

Despite variations resulting from the formulation of the military necessity exceptions, it can be suggested that, in prolonged occupation combined with absence of hostilities, these exceptions will indeed be construed narrowly. Along the same lines, in the *Wall* advisory proceedings, Switzerland underlined that the prolonged character of an occupation implies a more rigorous examination of necessity and proportionality:

The law of armed conflict strikes a balance between humanitarian demands and military needs. . . . Hence, every step taken in the context of hostilities, of a military, security or administrative character, must respect the principle of necessity, proportionality and humanity . . . Any examination of necessity and proportionality in circumstances of *prolonged occupation when hostilities have ceased* must be more rigorous, since stricter conditions govern the imposition of restrictions in such circumstances on the fundamental rights of protected persons.<sup>158</sup>

It is not entirely clear whether Switzerland was referring here to both IHL and IHRL or only to one of these two sets of rules. The formulation of the statement indicates that it covers both.

Two remarks should be made concerning the Swiss statement. The first confirms that, in order for a restrictive interpretation of military necessity to be applied, the prolonged character of the occupation should be combined with the absence of hostilities. Thus, the time element is not the only criterion to be taken into consideration in this respect. The second concerns the reference by Switzerland to human rights. Such reference is not surprising, given that, in cases of (relatively) peaceful prolonged belligerent occupation, the administration of the occupied populations by the Occupying Power will bear some resemblance to that of an

155 See the definition given in Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, 'Article 51', p. 617, para. 1936. For scholars in favour of a narrow interpretation, see among others Iain Scobbie, 'The Wall and international humanitarian law', in *Yearbook of Islamic and Middle Eastern Law*, Vol. 9, 2002–2003, p. 504; Martin B. Carroll, 'Israeli demolition of Palestinian houses in the Occupied Territories: an analysis of its legality in international law', in *Michigan Journal of International Law*, Vol. 11, 1989–1990, pp. 1210–1213.

156 GC IV, Art. 51, para. 2, p. 320: 'The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary . . . for the needs of the army of occupation'.

157 *Commentary GC IV*, above note 5, p. 294; Y. Arai-Takahashi, above note 3, p. 351.

158 Switzerland, *Wall* advisory proceedings, Written Statement of the Swiss Confederation, 30 January 2004, p. 6, para. 26 (emphasis added).

ordinary government. This brings us to the fundamental role that the application of human rights law acquires in situations of prolonged occupation.

## Prolonged occupation and international human rights law

The starting point of this analysis is that IHRL remains applicable in a situation of belligerent occupation.<sup>159</sup> It is therefore important to determine whether the prolonged character of an occupation has an impact on the application of IHRL. The importance of human rights in situations of prolonged occupation has been repeatedly affirmed in the context of the Israeli occupation of Palestinian territories.<sup>160</sup> This has also been stressed by legal scholarship.<sup>161</sup> It is interesting to note here that several fields have been identified where IHL rules are usefully complemented by IHRL. For example, economic, social, and cultural rights of the occupied population, such as the right to adequate food,<sup>162</sup> the right to health,<sup>163</sup> or the right to education,<sup>164</sup> appear to be of particular relevance in situations of prolonged occupation.<sup>165</sup> The limits of this article do not allow an in-depth examination of the application of each relevant human right in long-term occupations. We will rather focus on two general questions: first, the question of the interaction between IHL and IHRL in situations of prolonged occupation, and

159 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports 1996*, p. 240, para. 25 (hereafter *Nuclear Weapons* advisory opinion); ICJ, *Wall* advisory opinion, above note 10, pp. 178–181, para. 106–113; ICJ, *DRC v. Uganda* Judgment, above note 19, pp. 242–243, para. 216; ECHR, *Loizidou v. Turkey (Preliminary Objections)*, above note 30, paras. 62–64; ECHR, *Loizidou v. Turkey*, Judgment, above note 30, paras. 54, 57; ECHR, *Al-Skeini and others v. The United Kingdom*, Case No. 55721/07, Judgment, 7 July 2011, paras. 138–142 (the ECHR judgments are available at: <http://cmiskp.echr.coe.int> (last visited 5 July 2012)).

160 Switzerland, *Wall* advisory proceedings, above note 158, p. 6, para. 27; UN General Assembly, Note by the Secretary General, Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967, 4 October 2001, UN Doc. A/56/440, p. 4, para. 5; UN Economic and Social Council, Commission on Human Rights, above note 93, p. 12, para. 37: ‘A prolonged occupation, lasting for more than 30 years, was not envisaged by the drafters of the Fourth Geneva Convention (see art. 6). Commentators have therefore suggested that in the case of the prolonged occupation, the Occupying Power is subject to the restraints imposed by international human rights law, as well as the rules of international humanitarian law.’

161 See among many, A. Roberts, above note 4, pp. 70–74; R. Falk, above note 4, p. 46; Noam Lubell, ‘Challenges in applying human rights law to armed conflict’, in *International Review of the Red Cross*, Vol. 87, No. 860, 2005, pp. 752–753; Kenneth Watkin, ‘Controlling the use of force: a role for human rights norms in contemporary armed conflict’, in *American Journal of International Law*, Vol. 98, No. 1, 2004, p. 28; Orna Ben-Naftali and Yuval Shany, ‘Living in denial: the application of human rights in the Occupied Territories’, in *Israel Law Review*, Vol. 37, No. 1, 2003–2004, p. 40.

162 Sylvain Vité, ‘The interrelation of the law of occupation and economic, social, and cultural rights: the examples of food, health, and property’, in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 636–642.

163 *Ibid.*

164 Jonathan Thompson Horowitz, ‘The right to education in occupied territories: making more room for human rights in occupation law’, in *Yearbook of International Humanitarian Law*, Vol. 7, 2004, pp. 243–275.

165 Esther Rosalind Cohen, *Human Rights in the Israeli-Occupied Territories, 1967–1982*, Manchester University Press, Manchester, 1985, pp. 244–250.

second, the impact of the duration of the occupation on the possibility of invoking a state of emergency under IHRL.

## Prolonged occupation and the relations between international humanitarian law and human rights law

Before going into the possible influence of the prolonged character of an occupation on the relations between IHL and IHRL, some brief comments should be made on these relations as such. This issue has been dominated by debate over the *lex specialis* character of IHL in relation to IHRL,<sup>166</sup> a debate that has been fuelled by the well-known pronouncements of the ICJ in the *Nuclear Weapons* and *Wall* advisory opinions.<sup>167</sup> Critics of the *lex specialis* approach raise, among others, three points about the *lex specialis* rule: first, it applies to relations between two concrete rules rather than between two normative orders *in abstracto*, especially since these two orders are different in their purposes, areas of applicability, principles, and so forth;<sup>168</sup> second, it has been applied, even by the ICJ itself, not as a rule for the

166 See e.g., Anna Guellali, 'Lex specialis, droit international humanitaire et droits de l'homme: leur interaction dans les nouveaux conflits armés', in *Revue générale de droit international public*, Vol. 111, No. 3 2007, pp. 539–573; Dagmar Richter, 'Humanitarian law and human rights: intersecting circles or separate spheres?', in Thomas Giegerich (ed.), *A Wiser Century? Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years after the Second Hague Peace Conference*, Duncker & Humblot, Berlin, 2009, pp. 257–322; Cordula Droege, 'The interplay between international humanitarian law and international human rights law in situations of armed conflict', in *Israel Law Review*, Vol. 40, No. 2, 2007, pp. 310–355; Cordula Droege, 'Elective affinities? Human rights and humanitarian law', in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 501–548; 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, pp. 34–94; Marco Milanović, 'Norm conflicts, international humanitarian law, and human rights law', in *ibid.*, pp. 95–125; Louise Doswald-Beck, 'The right to life in armed conflict: does international humanitarian law provide all the answers?', in *International Review of the Red Cross*, Vol. 88, No. 864, 2006, pp. 881–904; Anja Lindroos, 'Addressing norm conflicts in a fragmented legal system: the doctrine of *lex specialis*', in *Nordic Journal of International Law*, Vol. 74, No. 1, 2005, pp. 27–66; Theodor Meron, 'The humanization of humanitarian law', in *American Journal of International Law*, Vol. 94, No. 2, 2000, pp. 239–278; Nancie Prud'homme, 'Lex specialis: oversimplifying a more complex and multifaceted relationship?', in *Israel Law Review*, Vol. 40, 2007, pp. 356–395; Louise Doswald-Beck and Sylvain Vité, 'Le droit international humanitaire et le droit des droits de l'homme', in *International Review of the Red Cross*, Vol. 75, No. 800, 1993, pp. 99–128; Dietrich Schindler, 'Human rights and humanitarian law: interrelationship of the laws', in *American University Law Review*, Vol. 31, 1981–1982, pp. 935–978; Constantine Antonopoulos, 'The relationship between international humanitarian law and human rights', in *Revue hellénique de droit international*, Vol. 63, No. 2, 2010, pp. 599–634; Iain Scobbie, 'Principle or pragmatics? The relationship between human rights law and the law of armed conflict', in *Journal of Conflict & Security Law*, Vol. 14, No. 3, 2009, pp. 449–457; Vera Gowlland-Debbas, 'The right to life and the relationship between human rights and humanitarian law', in Christian Tomuschat, Evelyne Lagrange, and Stefan Oeter (eds), *The Right to Life*, Martinus Nijhoff, Leiden and Boston, 2010, pp. 123–150; Heike Krieger, 'A conflict of norms: the relationship between humanitarian law and human rights law in the ICRC customary law study', in *Journal of Conflict & Security Law*, Vol. 11, No. 2, 2006, pp. 265–291.

167 ICJ, *Nuclear Weapons* advisory opinion, above note 159, p. 240, para. 25; ICJ, *Wall* advisory opinion, above note 10, p. 178, para. 106.

168 A. Lindroos, above note 166, pp. 41–42; I. Scobbie, above note 166, p. 453, H. Krieger, above note 166, p. 269; D. Richter, above note 166, p. 319. It has rightly been pointed out that the ICJ itself, in the *Nuclear Weapons* advisory opinion, formulated the *lex specialis* rule in relation to the application of a specific norm, namely that of Article 6 of the International Covenant of Civil and Political Rights (ICCPR),

resolution of conflict norms (dictating which of these norms should prevail over the others)<sup>169</sup> but rather as an interpretative aid in order to avoid norm conflicts;<sup>170</sup> and, third, even if it can be applied in relation to some rules, it is overly simplistic to do justice to the complexity of the relations between the two sets of legal rules.<sup>171</sup>

It can be concluded from the above that the view that IHL entirely supersedes IHRL as *lex specialis* must be rejected. The starting point of the analysis of the relations between these two sets of legal rules is that they are ‘complementary, not mutually exclusive’.<sup>172</sup> This complementarity has been endorsed by the ICJ in the 2004 *Wall* advisory opinion, the 2005 *DRC v. Uganda* judgment, and the order on provisional measures issued by the ICJ on the case concerning the *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)* in 2008.<sup>173</sup> A complementary application of IHL and IHRL, which suggests, in principle, a parallel application of the two sets of legal rules in situations of armed conflict and occupation, can imply a great deal of interaction between them – interaction that has led some scholars to develop what has been called a ‘theory of harmonization’.<sup>174</sup> Thus, for example, IHRL rules may inform the scope of IHL rules, as is the case with the definition of torture for the purpose of applying the relevant IHL prohibition. The opposite is also true: IHL norms may be used to define the scope of IHRL norms. Determining

19 December 1966, *UNTS*, vol. 999, p. 175: see V. Gowlland-Debbas, above note 166, pp. 138–139; M. Milanović, above note 166, p. 99.

169 The UN International Law Commission Study Group on Fragmentation indicates that, while the maxim *lex specialis derogat legi generali* may sometimes appear as a ‘conflict-resolution technique’, this may not always be the case: International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission*, UN Doc. A/CN.4/L.682, 13 April 2006, p. 35, para. 57. For the notion of ‘conflict of norms’, see *ibid.*, pp. 17–20, paras. 21–26.

170 V. Gowlland-Debbas, above note 166, pp. 138–139. This is the case even for the ICJ *Nuclear Weapons* advisory opinion. In that case, what the Court essentially did was to interpret the adjective ‘arbitrary’ in Article 6 of the ICCPR according to IHL, therefore operating a ‘harmonizing interpretation’ rather than excluding the application of one rule over another: see D. Richter, above note 166, pp. 290–291.

171 A. Guellali, above note 166, p. 557; M. Milanović, above note 166, p. 116.

172 UN Human Rights Committee, General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 11.

173 ICJ, *Wall* advisory opinion, above note 10, p. 178, para. 106; ICJ, *Armed Activities* Judgment, above note 19, pp. 242–243, para. 216; ICJ, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, *ICJ Reports* 2008, p. 387, para. 112 (adopted by eight votes to seven, with a highly critical joint dissenting opinion of the seven dissenting judges: *ibid.*, p. 402, para. 10).

174 See C. Droege, above note 166, p. 339 and pp. 340–344 (on the various facets of complementarity); V. Gowlland-Debbas, above note 166, p. 141; N. Prud’homme, above note 166, pp. 386–393. The ECHR also seems to adhere to this view. In an application launched before the Court by Georgia against the Russian Federation following the 2008 hostilities between them, Russia invoked the *lex specialis* rule and argued that, since the alleged violations took place in the context of an international armed conflict, ‘the conduct of the Stat Party’s forces was governed exclusively by international humanitarian law’ and thus lay outside the *ratione materiae* scope of the European Convention on Human Rights: ECHR, *Georgia v. Russia*, Appl. No. 38263/08, Decision, 13 December 2011, pp. 23–24, para. 69. The Court reserved the assessment of the question to the merits stage of the procedures, but not without confirming the applicability of the Convention in cases of armed conflict. It also stated that: ‘Article 2 must be interpreted in so far as possible in the light of the general principles of international law, including the rules of international humanitarian law . . . . Generally speaking, the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part’ (*ibid.*, p. 25, para. 72).

when a deprivation of life is arbitrary under Article 6, paragraph 1 of the International Covenant of Civil and Political Rights (ICCPR) is a case in point.

This does not mean that there are not situations where IHL rules displace IHRL ones. The detention of prisoners of war is a good example. Such detention will be regulated by the detailed provisions of the Third Geneva Convention and detained prisoners of war will not benefit from the rights provided for under Article 9 of the ICCPR or Article 5 of the European Convention on Human Rights.<sup>175</sup>

How is the duration of a belligerent occupation incorporated into this highly complex picture and does it really affect the relationship between IHL and IHRL? As was mentioned before, legal scholarship suggests that:

Situations involving lengthy periods of occupation... further complicate attempts to resolve the interface between human rights law and international humanitarian law. Long-term governance might inevitably create the expectation that international human rights norms associated with peaceful governance will apply.<sup>176</sup>

Indeed, the need to apply human rights 'can be even more acute when dealing with prolonged occupation spanning decades'.<sup>177</sup>

If one follows the complementarity approach, once it is established that situations of occupation trigger the application of human rights instruments,<sup>178</sup> the Occupying Power will be bound by the obligations laid down by the relevant treaties. The ICJ *Wall* advisory opinion has confirmed that an Occupying Power has obligations stemming from the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the UN Convention on the Rights of the Child.<sup>179</sup> However, the Court's analysis shows no influence of the prolonged nature of the occupation on the interpretation of IHRL norms or on their interplay with IHL. The same goes for the ECHR case law relating to the occupied territory of northern Cyprus.<sup>180</sup> The ECHR has up to now systematically avoided confronting the question of the interplay between IHL and the European Convention on Human Rights.<sup>181</sup> Therefore, this case law does not offer any guidance on the influence exercised by the duration of an occupation on this interplay.

175 See M. Sassòli, above note 166, p. 73. Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, UNTS, Vol. 213, p. 221 (hereafter EConvHR).

176 K. Watkin, above note 161, p. 28. See also, Grant T. Harris, 'Human rights, Israel, and the political realities of occupation', in *Israel Law Review*, Vol. 41, Nos 1–2, 2008, p. 104.

177 N. Lubell, above note 161, p. 752.

178 This relates to the question of the extraterritorial application of human rights treaties, a question that goes beyond the scope of this article. The present writer considers, along with the majority of legal scholars, that situations of occupation bring the local population under the jurisdiction of the Occupying Power, rendering IHRL treaties applicable. See, among many, G. T. Harris, above note 176, pp. 112–115, and the references cited therein.

179 ICJ, *Wall* advisory opinion, above note 10, pp. 187–189, paras. 127–131 and pp. 191–192, para. 134.

180 See, among many decisions, the case law cited above note 159.

181 D. Richter, above note 166, pp. 303–306.

The Inter-American Commission for Human Rights offers some indication that the prolonged character of an occupation strengthens the role of IHRL. In a report on terrorism and human rights, the Commission held that

the regulations and procedures under international humanitarian law may prove inadequate to properly safeguard the minimum human rights standards of detainees. . . . in the Commission's view the paramount consideration must at all times remain the effective protection pursuant to the rule of law of the fundamental rights of detainees, including the right to liberty and the right to humane treatment. Accordingly, *where detainees find themselves in uncertain or protracted situations of armed conflict or occupation*, the Commission considers that *the supervisory mechanisms as well as judicial guarantees under international human rights law and domestic law . . . may necessarily supersede international humanitarian law* where it is necessary to safeguard the fundamental rights of those detainees.<sup>182</sup>

This passage suggests that, in situations of prolonged occupation, IHRL may become the special norm prevailing over IHL. Even if one does not subscribe to this inversion of the *lex specialis* approach, the position of the Inter-American Commission confirms the importance attributed to IHRL in situations of prolonged occupation.

Outside the context of detention, this importance can be illustrated if we turn to the example of forced labour. As was previously mentioned, Article 51, paragraph 2 of the Fourth Geneva Convention allows the Occupying Power to compel protected persons who are over eighteen to work 'on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country'.<sup>183</sup> Article 8, paragraph 3 of the ICCPR prohibits forced or compulsory labour, with a series of exceptions.<sup>184</sup> Using the complementary approach and the parallel application of IHL and IHRL as a starting point, one concludes that both sets of legal rules are applicable to a belligerent occupation from the outset of that occupation. Therefore, if the Occupying Power compels protected persons to work for the needs of the occupying army or for the feeding and sheltering of the local population, these actions should be in conformity

182 Inter-American Commission for Human Rights, 'Report on Terrorism and Human Rights', 22 October 2002, OEA/Ser.L/V/II.116, Doc. 5 rev.1 corr, para. 146, available at: <http://www.cidh.org/Terrorism/Eng/toc.htm> (last visited 5 July 2012) (emphasis added).

183 GC IV, Art. 51, p. 320.

184 ICCPR, Art. 8, para. 3: '(a) No one shall be required to perform forced or compulsory labour. (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court. (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include: (i) Any work or service, not referred to in sub-paragraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors; (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community; (iv) Any work or service which forms part of normal civil obligations'.



with both sets of rules. Article 51, paragraph 2 of the Fourth Geneva Convention is clearly not violated. However, given that the situation under consideration does not seem to fall under any of the exceptions provided for by Article 8, paragraph 3 of the ICCPR, the actions in question violate the Covenant.<sup>185</sup> This is a case where the application of the principle of *lex specialis* could be of use. Indeed, unless we consider that Article 51, paragraph 2 of the Fourth Geneva Convention has been abolished by the IHRL prohibition of forced labour,<sup>186</sup> the content of the two rules is contradictory. Therefore, Article 51, paragraph 2 of the Convention will supersede Article 8, paragraph 3 of the ICCPR as *lex specialis*.

Consider now that the occupation has lasted for many years or decades and the Occupying Power continues to compel protected persons to work for the needs of the occupying army or the local population. As was explained above, the formulation of the reasons for compelling protected persons to work is such that it can remain valid throughout a long-term occupation.<sup>187</sup> In other words, even if an occupation lasts for forty years, the occupying army will still have maintenance needs and the local population will still need feeding and sheltering. Does this mean that the Occupying Power will be able to continue this practice without violating either Article 51 of the Fourth Geneva Convention or Article 8, paragraph 3 of the ICCPR, thanks to the *lex specialis* rule? Such an interpretation would lead to the absurd result of allowing an Occupying Power to support its army, at least in part, by exploiting the local population for long periods of time. It is submitted that, in this case, the prolonged character of the occupation breaks the *lex specialis* bond between the two relevant provisions, restoring their parallel application. Thus, the Occupying Power's actions may still be in conformity with IHL, but they will constitute a violation of the ICCPR. This example illustrates the reinforcing influence that the duration of an occupation has on the weight attributed to IHRL rules.

That being said, one final remark is in order. One cannot generally affirm the reinforcement of IHRL in prolonged occupation without taking into account the peaceful character or not of the occupation in question. The long duration of the occupation will raise the impact of human rights rules only in situations not related to the existence of hostilities inside the occupied territory. For example, in the case of inhabitants of the occupied territory taking part in a protest against austerity measures adopted by the Occupying Power in the context of its exercise of administrative functions of the territory, the Occupying Power may not invoke imperative reasons of security for taking safety measures or requiring those inhabitants to live in assigned residence.<sup>188</sup> It can, however, adopt such measures

185 This presupposes that the Occupying Power in question has not invoked Article 4 of the ICCPR in order to derogate from GV IV, Art. 8, para. 3: see ICCPR, Art. 4, para. 2.

186 Which does not seem to be the case, since states continue to acknowledge the power of the occupier to compel members of the occupied population to work: see the military manuals referred to in relation to Rule 95 of the ICRC study on customary IHL, available at: [http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule95](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule95) (last visited 5 July 2012).

187 See above note 157 and accompanying text.

188 GC IV, Art. 78.

with regard to protected persons participating in resistance actions against the occupying army. In short, in cases where hostilities between the Occupying Power and resistance forces continue during the occupation,<sup>189</sup> and in relation to these hostilities, the role of IHL cannot be downplayed, whatever the duration of the occupation. Therefore, as was the case with the interpretation of military necessity, much will depend on the conflictual character – or absence thereof – of the prolonged occupation.

Having explored the impact of the prolonged character of the occupation on the general application of IHRL in situations of occupation, we will now turn to its impact in the case of the Occupying Power derogating from the application of human rights by invoking a state of emergency.

### Prolonged occupation and the invocation of a state of emergency

Several human rights instruments provide for the possibility to derogate from most human rights norms in case of emergency. Among these norms, we find rights that are of particular importance in situations of prolonged occupation, such as the freedom of movement or the right to privacy.<sup>190</sup> According to Article 4 of the ICCPR:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.<sup>191</sup>

Article 15 of the European Convention on Human Rights is drafted in a similar way.<sup>192</sup> The question on which we will focus is whether the Occupying Power may

189 Of course, the existence of large-scale and long-lasting hostilities against the Occupying Power might give rise to the question whether the occupant is in a position to exercise the control necessary for the existence of a belligerent occupation. However, it is accepted that occasional successes of resistance fighters in an occupied territory do not put an end to belligerent occupation. See UK, *Military Manual*, above note 7, p. 277, para. 11.7.1; Canada, *Military Manual*, above note 7, p. 12–2, para. 1203; US, *Law of Land Warfare*, above note 7, p. 139, para. 360; V. Koutroulis, above note 3, p. 54.

190 The freedom of movement is set out in Article 12 of the ICCPR and in Article 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocols, 16 September 1963, *UNTS*, vol. 1496, p. 263. The right to privacy is set out in Article 17 of the ICCPR and in Article 8 of the EConvHR. The articles with respect to which no derogations are permitted are listed in the following two notes.

191 ICCPR, Art. 4, para. 1. Paragraph 2 of the article lists the non-derogable articles of the ICCPR: ‘No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision’.

192 EConvHR, Art. 15: ‘(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. (2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision’.

rely on the prolonged character of the occupation as a factor substantiating such a state of emergency.

It is submitted that it cannot. First of all, we need to determine whether the existence of an armed conflict (and of an occupation<sup>193</sup>) is *ipso facto* considered to constitute a state of emergency permitting the invocation of Article 4 of the ICCPR and Article 15 of the European Convention on Human Rights. As far as Article 4 of the ICCPR is concerned, this seems not to be the case. According to the Human Rights Committee: ‘The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.’<sup>194</sup> The Committee has insisted that ‘measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature and be limited to the extent strictly required’.<sup>195</sup> In this respect, the need for derogations must be justified, the provisions of the Covenant that are subject to derogations must be specified, and sufficient limits must be placed on derogations.<sup>196</sup> In relation to the state of emergency proclaimed by Syria in 1963, the Committee noted that derogations from several articles are provided for by the relevant decree ‘without any convincing explanations being given as to the relevance of these derogations to the conflict with Israel and the necessity for these derogations to meet the exigencies of the situation claimed to have been created by the conflict’.<sup>197</sup>

Aside from these considerations, the Human Rights Committee – while allowing a wide margin of appreciation to the states for determining an ‘emergency which threatens the life of the nation’<sup>198</sup> – does express an opinion on this determination. On the one hand, confronted with a Russian counter-terrorist legislation introducing derogations from the Covenants rights, the Committee held that the measures adopted by the Russian Federation could be justifiable only under the state of emergency regime, and invited the Russian government to adapt the

193 The mere existence of a belligerent occupation, even if it meets with no armed resistance, is constitutive of an international armed conflict: see Article 2 common to the Geneva Conventions, para. 2.

194 Human Rights Committee (HRC), General Comment No. 29: States of Emergency (Article 4), 31 August 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, p. 2, para. 3.

195 HRC, ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Israel’, 3 September 2010, UN Doc. CCPR/C/ISR/CO/3, para. 7.

196 HRC, ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Thailand’, 8 July 2005, UN Doc. CCPR/CO/84/THA, para. 13; HRC, ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Algeria’, 12 December 2007, UN Doc. CCPR/C/DZA/CO/3, para. 14; HRC, ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Israel’, 21 August 2003, UN Doc. CCPR/CO/78/ISR, p. 3, para. 12.

197 HRC, ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Syrian Arab Republic’, 9 August 2005, UN Doc. CCPR/CO/84/SYR, para. 6.

198 For example, Mongolia proclaimed a state of emergency for four days in 2008, in order to stop a demonstration that led to mass disorder and unrest and to prevent the broadening of its scope. The HRC did not question this determination: HRC, ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Mongolia’, 2 May 2011, UN Doc. CCPR/C/MNG/CO/5, para. 12.

legislation in conformity to Article 4 of the ICCPR.<sup>199</sup> On the other hand, the Committee has been critical of situations where the state of emergency has been maintained for a long period. We will come back to this element below.

The interpretation of Article 15 of the European Convention on Human Rights is more difficult in the sense that the state of war is explicitly mentioned in the text of the article itself.<sup>200</sup> To our knowledge, the ECHR has so far treated cases only under the ‘public emergency’ part of Article 15.<sup>201</sup> The Court has constantly recognized that states enjoy a wide margin of appreciation in determining what constitutes an emergency situation justifying the invocation of Article 15.<sup>202</sup> However, while the Court emphasizes its control over whether states have gone beyond what ‘is strictly required by the exigencies’ of the emergency, it does in fact also pronounce on the question of the existence of such a state of emergency in the first place.<sup>203</sup> Thus, it evaluates whether the factual situation inside a state corresponds to a crisis threatening the life of the nation. Up to the time of writing it has accepted the qualifications offered by the respondent state. However, it is possible that the Court may overturn the state’s qualification if need be.

That being said, it seems difficult to argue that every armed conflict will automatically be sufficient to justify derogating from human rights rules.<sup>204</sup> This is particularly the case for situations of international armed conflict, where the threshold of intensity required in order for IHL norms to be applicable is considered to be a low one.<sup>205</sup> The same reasoning can also be applied to situations of belligerent occupation. There, too, the state wishing to derogate from relevant IHRL provisions will be required to justify the need for the specific derogations established in view of the exigencies of the situation. Such justification will prove more demanding in situations of prolonged occupation where hostilities have ceased or radically diminished. It would, for example, be difficult for Turkey or Morocco (had they recognized themselves as Occupying Powers) to invoke the existence of a state

199 HRC, ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Russian Federation’, 24 November 2009, UN Doc. CCPR/C/RUS/CO/6, para. 7.

200 See above note 192.

201 The Court has dealt mainly with what were qualified as ‘terrorist activities’ by the respondent states in relation to Article 15. See, e.g., ECHR, *Lawless v. Ireland*, Appl. No. 332/57, Judgment, 1 July 1961, paras. 23–30; ECHR, *Ireland v. The United Kingdom*, Appl. No. 5310/71, Judgment, 18 January 1978, para. 205; ECHR, *Brannigan and McBride v. The United Kingdom*, Appl. No. 14553/89 and 14554/1989, Judgment, 25 May 1993, paras. 43–47; ECHR, *Aksoy v. Turkey*, Appl. No. 21987/93, Judgment, 18 December 1996, paras. 68–70; ECHR, *Demir and others v. Turkey*, Appl. No. 71/1997/855/1062–1064, Judgment, 23 September 1998, paras. 43–45; ECHR, *Bilen v. Turkey*, Appl. No. 34482/97, Judgment, 21 February 2006, paras. 46–47.

202 See the cases mentioned in the previous note.

203 Again, see the cases mentioned in note 201.

204 Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2004, p. 196.

205 See *Commentary GC IV*, above note 5, pp. 20–21; E. David, above note 7, p. 123; René Kosirnik, ‘Droit international humanitaire et protection des camps de réfugiés’, in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC/Martinus Nijhoff Publishers, Geneva/The Hague, 1984, p. 389; Jean-François Quéguiner, ‘Dix ans après la création du Tribunal pénal international pour l’ex-Yougoslavie: évaluation de l’apport de sa jurisprudence au droit international humanitaire’, in *International Review of the Red Cross*, Vol. 85, No. 850, 2003, p. 275.

of emergency based on the situation in relation to northern Cyprus or Western Sahara respectively.

The practice of states and the Human Rights Committee indicates that the duration of an occupation cannot be invoked to justify a state of necessity in and of itself. Syria is a case in point. The Syrian state of necessity dates back to 1963. Syria contends that the state of emergency consists 'in a real threat of war, the continued occupation of part of the territory of the Syrian Arab Republic and the existence of a real threat of seizure and ongoing occupation of further land' by Israel.<sup>206</sup> Furthermore, it has also invoked the general situation in the Middle East – namely the occupation by Israel of part of southern Lebanon – as well as hostile acts committed by Israel in the region against Syria, Lebanon, and the Palestinians. According to the Syrian argument, these actions 'create an atmosphere conducive to maintenance of the existing state of war'.<sup>207</sup> Thus, while the continuing occupation of Syrian territory is mentioned among the elements on which the existence of a state of emergency is founded, it is hardly the crucial one. The accent is placed rather on the existence of a real threat of attack by Israel. The Human Rights Committee has been unreceptive to this broad construction of the state of emergency:

The Committee is concerned at the fact that Legislative Decree No. 51 of 9 March 1963 declaring a state of emergency has remained in force ever since that date, placing the territory of the Syrian Arab Republic under a quasi-permanent state of emergency, thereby jeopardizing the guarantees of article 4 of the Covenant. It also regrets that the delegation did not provide details of the application of the state of emergency in actual situations and cases.

While noting the information given by the State party's delegation that the state of emergency is rarely put into effect, the Committee recommends that it be formally lifted as soon as possible.<sup>208</sup>

In general, the Committee has adopted a critical stance in regard to long-lasting states of emergency.<sup>209</sup> This has been equally valid for Israel, which has been in a

206 HRC, 'Consideration of reports submitted by States Parties under article 40 of the Covenant, Second periodic report of States Parties due in 1984: Syrian Arab Republic', 25 August 2000, UN Doc. CCPR/C/SYR/2000/2, p. 10, para. 50.

207 Syrian Arab Republic, 'Comments by the Government of the Syrian Arab Republic on the Concluding Observations of the Human Rights Committee: Syrian Arab Republic', 28 May 2002, UN Doc. CCPR/CO/71/SYR/Add.1, para. 4.

208 HRC, 'Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Syrian Arab Republic', 24 April 2001, UN Doc. CCPR/CO/71/SYR, para. 6. See also HRC, UN Doc. CCPR/CO/84/SYR, above note 197, para. 6 (on the concern over the continuing state of emergency).

209 HRC, 'Consideration of report submitted by Algeria', above note 196, para. 14 (state of emergency proclaimed in 1992); HRC, 'Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Egypt', 28 November 2002, UN Doc. CCPR/CO/76/EGY, para. 6. The state of emergency proclaimed by Egypt dates back to 1981: HRC, 'Consideration of reports submitted by States Parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Egypt, Addendum: Comments by the Government of Egypt on the Concluding Observations of the Human Rights Committee', 4 November 2003, UN Doc. CCPR/CO/76/EGY/Add.1, para. 7 (the state of emergency was founded on the need to deal with terrorism and to protect the security and stability of society).

proclaimed state of emergency since 1948<sup>210</sup> and which also made a declaration upon ratification of the ICCPR derogating from Article 9 of the Covenant on the basis of Article 4.<sup>211</sup> The state of emergency was founded on threats of war, armed attacks, and campaigns of terrorism<sup>212</sup> – in other words, not at all in the prolonged character of the occupation.<sup>213</sup> The Committee has indicated its preference for a review of the need to maintain the declared state of emergency.<sup>214</sup>

In view of the above, it can be affirmed that the prolonged character of the occupation cannot be invoked as a factor justifying the existence of a state of emergency. The idea of such a state lasting several decades runs counter to the text of both Article 4 of the ICCPR and Article 15 of the European Convention on Human Rights, according to which the derogative measures adopted should be temporary and ‘strictly required by the exigencies of the situation’.<sup>215</sup> The Human Rights Committee has consistently expressed concern over the existence of ‘a semi-permanent state of emergency’ and has urged states to review the need to maintain it.

Inserting considerations relating to the duration of an occupation among the ‘exigencies of the situation’ actually distorts the application of Article 4 of the ICCPR and Article 15 of the European Convention on Human Rights. As we have seen, derogations are justified by the exigencies of the situation. If the duration of an occupation is incorporated into these exigencies, then the longer an occupation lasts, the easier it will be to invoke these articles and to justify broader derogations. We would therefore end up constantly undermining the human rights protection of the occupied population. Furthermore, experience has shown that the longer an occupation lasts, the more consolidated it becomes. This leads to the following paradox: the longer the occupation is, the easier it will be to invoke a state of emergency, justifying more derogations on behalf of the Occupying Power. The application of these derogations will consolidate the position of the Occupying Power and its control over the occupied territory. This will probably lead to an extension of the duration of the occupation, which can be integrated once again into the ‘exigencies of the situation’, triggering the adoption of more derogations on the basis of the state of emergency. It is obvious that this vicious circle completely distorts application of Article 4 of the ICCPR and Article 15 of the European Convention on Human Rights. Taking the duration of an occupation into consideration for the evaluation of a state of emergency runs counter to the

210 HRC, ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Second Periodic Report, Addendum: Israel’, 4 December 2001, UN Doc. CCPR/C/ISR/2001/2, p. 19, para. 71.

211 HRC, ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Initial report of States Parties due in 1993, Addendum: Israel’, 9 June 1998, UN Doc. CCPR/C/81/Add.13, para. 106.

212 *Ibid.* See also HRC, ‘Consideration of reports submitted by States Parties under article 40 of the Covenant, Third periodic report of States Parties due in 2007: Israel’, 21 November 2008, UN Doc. CCPR/C/ISR/3, pp. 41–42, para. 161.

213 Invoking the existence of an occupation in order to justify the state of emergency is highly unlikely in the case of Israel, since it does not accept that the ICCPR applies to the Occupied Palestinian Territories.

214 HRC, UN Doc. CCPR/CO/78/ISR, above note 196, p. 3, para. 12. The HRC has also indicated that the sweeping nature of measures adopted during this state of emergency goes beyond what is permissible under the ICCPR. See also HRC, UN Doc. CCPR/C/ISR/CO/3, above note 195, para. 7.

215 See above note 192.

exceptional character of the articles in question and is fundamentally inconsistent with the notion of emergency itself.

## Conclusion

This article has shown that the influence of the prolonged character of an occupation over the application of IHL and IHRL should not, as such, be overestimated. More than the time factor, it is other characteristics of prolonged occupations that have an impact on the rules of IHL and IHRL, namely the existence or not of hostilities in the occupied territory.

However, hostilities or not, a prolonged belligerent occupation does raise the challenge of how to co-ordinate the application of IHL and IHRL. The main danger in such occupations is that IHL rules applicable to occupations may be applied in an overly rigid manner, resulting in the 'freezing' of the life of the occupied population and impeding evolution. On the other hand, according too much leeway to the Occupying Power entails the risk of consolidating the occupation and resulting in 'creeping annexation'. Adding human rights norms into the equation is intended to help the occupied population move towards regaining a normal way of life while simultaneously subjecting the Occupying Power to the restraints of an actual government, and thereby limiting the danger of abusive application of IHL.

Despite the possibility of abuse of the various rules applicable in situations of prolonged occupation, it should be kept in mind that it is difficult to draw definite conclusions as to the eventual adjustments of applicable law in prolonged occupations, owing to the fact that the overwhelming majority of state practice and case law relates to a single case: the Israeli occupation of Palestinian territories. The application of IHL in other situations that could be qualified as prolonged occupations has not been recognized by the respective Occupying Powers. One should therefore be prudent when generalizing legal conclusions drawn from a situation as particular as the occupied Palestinian territories. This consideration, combined with the impossibility of defining – and thereby determining the scope of – prolonged occupations, imposes further restraint in identifying and suggesting adaptations of IHL and IHRL for general use.





# The law of belligerent occupation in the Supreme Court of Israel

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## **Abstract**

*Since the 1967 War, in the course of which Israel occupied the West Bank and Gaza, the Supreme Court of Israel has considered thousands of petitions relating to acts of the military and other authorities in those territories (OT). This article reviews the contribution to the law of belligerent occupation of the Court's jurisprudence in these cases. After discussing issues of jurisdiction and the applicable norms, the article reviews the way in which the Court has interpreted military needs, the welfare of the local population, changes in the local law, and use of resources; the attitude of the Court to the long-term nature of the occupation and the existence of Israeli settlements, settlers, and commuters in the OT; the introduction of a three-pronged test of proportionality in assessing military necessity; and hostilities in occupied territories. In the final section, I draw some general conclusions on the Court's contribution to the law of occupation.*

**Keywords:** law of belligerent occupation, Supreme Court of Israel, occupied territories, applicable law, military needs, public welfare, Israeli settlements, proportionality, military necessity, public order and safety.

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The term 'occupied territories' has become associated in contemporary international relations with Israel's continued occupation of the West Bank and Gaza

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(the OT). This is probably the longest occupation in modern international relations, and it holds a central place in all literature on the law of belligerent occupation since the early 1970s.<sup>1</sup> This article is concerned with the approach of the judicial branch of the Occupying Power towards that occupation – an approach that may be examined on at least two levels. The first level relates to how the Supreme Court of Israel has handled a situation in which there is a clear disparity between politics and law, and a tension between state perceptions of security and individual rights. This aspect of the Court's jurisprudence has been discussed elsewhere and shall not be discussed at length here.<sup>2</sup> A second level of discussion relates to the way in which the Supreme Court has interpreted and applied the international law of belligerent occupation. This is the central focus of this article.

The first part of the article is devoted to a brief discussion of the domestic legal and political context and the unique features of the occupation, an appreciation of which is essential in order to understand the Court's jurisprudence on belligerent occupation. In the second part, I review the Court's approach to interpretation of the Hague Regulations Concerning the Laws and Customs of War on Land, 1907 (the Hague Regulations) and the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1949 (Fourth Geneva Convention). More specifically, I dwell on how the Court has understood military needs, its interpretation of Article 43 of the Hague Regulations, and its approach to the long-term nature of the occupation and the establishment of settlements in the OT by the Occupying Power. Over the last decade, the notion of proportionality has played a major role in the way that the Court has reviewed the actions of the military authorities. This notion is discussed in the third part. In the fourth part, I examine the Court's decisions on hostilities in occupied territory. I end the article with some concluding comments.

## Legal and political background

### Jurisdiction of the Court

The West Bank and Gaza were occupied by Israel in the course of the 1967 War between Israel and the surrounding Arab states. Some time after the war ended, Palestinian residents of the OT petitioned the Supreme Court of Israel, sitting as a High Court of Justice (HCJ) that reviews administrative action, in attempts to challenge acts of the military in those territories. At the time, the Attorney General

1 See, e.g., Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967', in *American Journal of International Law*, Vol. 84, No. 1, 1990, pp. 44–103; Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, 1993; Yoram Dinstein, *The Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009.

2 See David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, State University New York Press, New York, 2002; Orna Ben-Naftali, 'PathoLAWgical occupation: normalizing the exceptional case of the Occupied Palestinian Territory and other legal pathologies', in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, Oxford, 2011, pp. 129–200.

of Israel, who represents the government in all court actions, was Meir Shamgar, who had been IDF (Israeli Defence Forces) Advocate General in 1967 and was later to become a judge of the Supreme Court, and eventually its president. Attorney General Shamgar could have contested the Court's jurisdiction to deal with petitions submitted by Palestinian residents of the OT on the grounds that they were submitted by enemy aliens or that they related to acts performed outside Israel's sovereign territory. However, he decided not to do so. In the first few petitions that came before the Court in the early 1970s, the Court accepted government acquiescence as sufficient basis for its jurisdiction.<sup>3</sup> This approach implied that, were the government to change its policy, the Court might have to concede that it had acted without jurisdiction. As more and more cases began to reach the Court it therefore became untenable as a basis for the Court's jurisdiction. Consequently, the Court held that the HCJ's statutory power to issue orders against all 'bodies which perform public functions under law',<sup>4</sup> rather than government acquiescence, was the real legal basis for its jurisdiction.<sup>5</sup> The notion of jurisdiction based on the Court's legislative authority to issue orders against all persons performing public functions under law has since been taken to imply that the writ of the Court extends to reviewing the legality of all acts and decisions of governmental authorities, including the IDF, wherever they may be performed.<sup>6</sup>

Since 1967 the HCJ has heard thousands of petitions relating to acts in the OT. While many petitions have been settled out of court, the Court has handed down judgments in hundreds of cases, thus creating a large body of law relating to the OT.

## Applicable law

In a military order promulgated by the military commanders of the various fronts when the IDF forces entered the OT in 1967, military tribunals were established to try local residents accused of security offences. That military order stated expressly that the military courts were to apply the provisions of the Fourth Geneva Convention, thus reflecting the view of army lawyers that all the territories were subject to the law of belligerent occupation.<sup>7</sup> However, soon after the 1967 War

3 See HCJ 256/72, *Electricity Company for Jerusalem District v. Minister of Defence et al.*, 27(1) PD, p. 124, (1972) (hereafter *Hebron Electricity* case), in which the Court mentioned (at p. 136) that it was following the line taken in the first reported judgment relating to the OT: HCJ 337/71, *Christian Society for the Holy Places v. Minister of Defence*, 26(1) PD, p. 574 (1971). For a review of the Court's jurisdiction in petitions relating to the OT, see Eli Nathan, 'The power of supervision of the High Court of Justice over military government', in Meir Shamgar (ed.), *Military Government in the Territories Administered by Israel, 1967-1980: The Legal Aspects*, Harry Sacher Institute for Legislative Research and Comparative Law, Jerusalem, 1982, pp. 170-103.

4 Article 7(b) of Courts Law, 1957. In 1980 this provision became Article 15(d)(2) of the Basic Law: Judiciary. It now has constitutional status.

5 HCJ 393/82, *Jami'at Ascan et al., v. IDF Commander in Judea and Samaria et al.*, 37(4) PD, p. 785 (1983).

6 See HCJ 102/82, *Tzemel et al., v. Minister of Defence et al.*, 37(3) PD, p. 365 (1983) at para. 11, affirming that the Court had the competence to examine actions of the IDF in Lebanon during the 1982-1983 Lebanon War.

7 Security Provisions Order (West Bank), 1967, Art. 35, in 1 *Proclamations, Orders and Appointments of West Bank Command* 5.

ended, voices were heard both in political quarters and among a number of academic lawyers in Israel that the West Bank and the Gaza Strip, both of which had been part of British Mandatory Palestine, should not be regarded as occupied territories.<sup>8</sup> Under the influence of these voices, a few months after the war ended the military commanders made an amendment to the military order, deleting the provision that mentioned the Fourth Geneva Convention.<sup>9</sup> The Government of Israel adopted the position that the status of the West Bank and Gaza was unclear and that in all events it was questionable whether the Fourth Geneva Convention applied there.<sup>10</sup> At the same time the government declared that the IDF would respect the humanitarian provisions of the Convention.<sup>11</sup>

In the first petitions challenging acts of the military authorities in the OT, the petitioners based their arguments on the norms of belligerent occupation, as expressed in the Hague Regulations and the Fourth Geneva Convention.<sup>12</sup> When the Court required them to reply to these petitions, the authorities were forced to take a position on whether these norms were indeed applicable. They initially attempted to hedge their bets by arguing that, even though it was not clear whether the territories were indeed occupied, in practice the military authorities complied with the norms of belligerent occupation and were therefore prepared for their actions to be assessed under these norms.<sup>13</sup> After a short time this caveat fell away and, alongside the rules of administrative law that apply to actions of all branches of the Israeli executive, the framework of belligerent occupation became the standard legal regime for assessing actions of the authorities in the OT.<sup>14</sup>

The *de facto* acceptance by the authorities that the applicable law in the OT was the law of belligerent occupation freed the Court from having to decide what the constituent elements of occupation are. The Court did, however, relate to these

8 See Yehuda Z. Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria', in *Israel Law Review*, Vol. 3, 1968, pp. 279–301. The territories occupied in 1967 included Northern Sinai, which was returned to Egypt under the peace agreement with that country, and the Golan, part of which is still occupied by Israel. The claims regarding the status of the West Bank and Gaza did not relate to those territories. For a summary of the various arguments that were raised to cast doubt on the status of the West Bank and Gaza as occupied territories, see D. Kretzmer, above note 2, pp. 32–34; Behnam Dayanim, 'The Israeli Supreme Court and the Deportations of Palestinians: The Interaction of Law and Legitimacy', in *Stanford Journal of International Law*, Vol. 30, 1994, pp. 143–150.

9 Security Provisions Order (West Bank), (Amendment No. 9), (Order No. 144), 22 October 1967, in 8 *Proclamations, Orders and Appointments of West Bank Command* 303.

10 See Meir Shamgar, 'The Observance of International Law in the Administered Territories', in *Israel Yearbook on Human Rights*, Vol. 1, 1971, pp. 262–277; D. Kretzmer, above note 2, pp. 33–34.

11 M. Shamgar, above note 10. For a review of the government's position on the application of GC IV, see Nissim Bar-Yaacov, 'The applicability of the laws of war to Judea and Samaria (the West Bank) and to the Gaza Strip (in response to Prof. R. Lapidot)', in *Israel Law Review*, Vol. 24, 1990, pp. 485–506.

12 *Christian Society* case, above note 3; *Hebron Electricity* case, above note 3; H CJ 302/72, *Hilu v. Government of Israel*, 27(2) PD, p. 169, 1972; H CJ 606/78, *Ayyub v. Minister of Defence*, 33(2) PD, p. 113, 1978 (hereafter *Beth El* case).

13 D. Kretzmer, above note 2, pp. 35–40.

14 See H CJ 1661/05, *Gaza Beach Regional Council et al., v. Knesset of Israel et al.*, 59(2) PD, p. 481, 2005, p. 514, where the Court stated that the framework of belligerent occupation has always been accepted by the Court and by all governments that have held office in Israel since 1967. The petitioners – Israeli settlers who were required to leave their homes under a law giving effect to the disengagement plan from Gaza – argued that Gaza (before the disengagement) was not subject to a regime of belligerent occupation. The Court dismissed the argument out of hand (*ibid.*, paras. 76–77).

questions during the Israeli presence in Lebanon in 1982.<sup>15</sup> It later also discussed whether Israel remains an Occupying Power in Gaza after removal of its forces and settlements there.<sup>16</sup> These questions have been discussed at length elsewhere and shall therefore not be addressed here.<sup>17</sup>

In its Advisory Opinion on the *Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice (ICJ) opined that, alongside the law of belligerent occupation, the human rights treaties to which Israel is a party apply to Israel's actions in the OT.<sup>18</sup> This has also been the consistent position of the treaty bodies that monitor implementation of those treaties.<sup>19</sup> The Government of Israel has never accepted this position. The HCJ has refrained from ruling on the formal applicability of human rights treaties, but in many judgments relating to the OT written in recent years it has relied on provisions in these treaties.<sup>20</sup> In most cases it has justified this position by stating that the cited norms are also part of the law of belligerent occupation or of Israeli law that binds the authorities.<sup>21</sup>

## Domestic enforcement of international norms

Although the accepted legal regime in the OT is one of belligerent occupation, application of the norms of this regime by the HCJ must be seen in light of the status of international law before the domestic courts of Israel. Israel follows the English approach, under which norms of customary international law will be enforced by the domestic courts as long as they are not incompatible with

- 15 See, e.g., *Tzemel case*, above note 6, pp. 371–374; HCJ 574/82 *Al Nawar v. Minister of Defence et al.*, 39(3) PD, p. 449, 1985, pp. 458–459.
- 16 HCJ 9132/07, *Jaber Al-Bassiouni Ahmed et al., v. Prime Minister et al.*, Judgment, 30 January 2008, available at: [http://elyon1.court.gov.il/files\\_eng/07/320/091/n25/07091320.n25.pdf](http://elyon1.court.gov.il/files_eng/07/320/091/n25/07091320.n25.pdf) (last visited 22 May 2012).
- 17 See, e.g., Yuval Shany, 'The Law Applicable to Non-Occupied Gaza: A Comment on *Bassiouni v. The Prime Minister of Israel*', in *Israel Law Review*, Vol. 42, No. 1, 2009, pp. 101–116; Shane Darcy and John Reynolds, 'An enduring occupation: the status of the Gaza Strip from the perspective of international humanitarian law', in *Journal of Conflict & Security Law*, Vol. 15, No. 2, 2010, pp. 211–243.
- 18 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, p. 136, paras. 102–114.
- 19 See, e.g. Human Rights Committee, *Concluding Observations on Third Report of Israel* (29 July 2010), 3 September 2010, UN Doc. CCPR/C/ISR/CO/3, para. 5, available at: <http://unispal.un.org/UNISPAL.NSF/0/51410EBD25FCE78F85257770007194A8> (last visited 22 May 2012).
- 20 HCJ 1890/03, *Bethlehem Municipality et al., v. Ministry of Defence et al.*, 59(4) PD, p. 736, 2005 (hereafter *Rachel Tomb case*); HCJ 7957/04, *Zaharan Yunis Muhammad Mara'abe et al., v. The Prime Minister et al.*, 60(2) PD, p. 477, 2005 (hereafter *Alphei Menashe case*); HCJ 10356/02, *Yoav Hess et al., v. The Commander of IDF Forces in the Judea and Samaria et al.*, 58(3) PD, p. 443, 2004; HCJ 7015/02, *Kipah Mahmud Ahmed Ajuri et al., v. IDF Commander in the West Bank et al.*, 56(6) PD, p. 352, 2002; HCJ 769/02, *The Public Committee against Torture in Israel et al., v. The Government of Israel et al.*, Judgment, 14 December 2006 (hereafter *Targeted Killings case*), available at: [http://elyon1.court.gov.il/files\\_eng/02/690/007/e16/02007690.e16.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/e16/02007690.e16.pdf) (last visited 22 May 2012); HCJ 281/11, *Head of Beit Icsa Local Council et al., v. Minister of Defence et al.*, Judgment, 6 September 2011, available in Hebrew at: <http://elyon1.court.gov.il/files/11/810/002/m12/11002810.m12.pdf> (last visited 22 May 2012).
- 21 See, e.g., HCJ 3239/02, *Marab et al., v. IDF Commander in the West Bank et al.*, Judgment, 28 July 2002, English translation available at: [http://elyon1.court.gov.il/files\\_eng/02/390/032/A04/02032390.a04.htm](http://elyon1.court.gov.il/files_eng/02/390/032/A04/02032390.a04.htm) (last visited 4 January 2012); *Hess case*, above note 20.

primary legislation, while the provisions in international conventions that bind the state will not be enforced by the courts unless they have become part of customary law or have been adopted by parliamentary legislation. The courts must interpret legislation according to the presumption of compatibility with Israel's international obligations, but in the case of a clear clash between primary legislation and a norm of customary or conventional international law, the legislation prevails.<sup>22</sup>

When the Court first related to the Hague Regulations and the Fourth Geneva Convention it lumped both these instruments together as treaty law.<sup>23</sup> However, it later admitted that it had been mistaken and that all the provisions of the Hague Regulations are part of customary law.<sup>24</sup> On the other hand, the Court held that the provisions of the Fourth Geneva Convention are not necessarily all part of such law.<sup>25</sup> This ruling is significant, since, although Israel ratified all four Geneva Conventions in 1951, the Conventions have never been incorporated in domestic law.

Despite the above ruling and the fact that the government has questioned the formal application of the Fourth Geneva Convention in the West Bank and Gaza, in recent years the HCJ has been quite ready to rely on the Convention. Sometimes it has done so after government counsel declared that the authorities' action was compatible with provisions of the Convention.<sup>26</sup> At other times the Court has simply relied on provisions of the Fourth Geneva Convention without any explanation.<sup>27</sup> In many cases, the Court has latched onto the government undertaking to abide by the humanitarian provisions of the Convention as the basis for relying on its provisions, without formally ruling whether the Convention applies or may be enforced by domestic courts.<sup>28</sup> In the *Alphei Menashe* case,<sup>29</sup> the Court mentioned that it was aware that the International Court of Justice had opined that the Fourth Geneva Convention applies in the OT and that this was not dependent on the government's undertaking to apply the humanitarian provisions. Nevertheless, the Court stated that, as it was accepted by the government that the

22 In HCJ 253/88, *Sajedia v. Minister of Defence*, 42(3) PD, p. 801, 1988, pp. 815–817, 829, the Court applied this principle to a clash between an Israeli statute and Article 76 of GC IV, which states that protected persons accused of offences shall be detained in the occupied country. For discussion of the status of international law in the domestic courts of Israel, see David Kretzmer, 'Israel', in David Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, Cambridge University Press, Cambridge, 2009, pp. 273–325.

23 *Christian Society* case, above note 3; *Hilu* case, above note 12.

24 *Beth El* case, above note 12, p. 120.

25 *Ibid.*; HCJ 390/79, *Dweikat et al., v. Government of Israel et al.*, 34(1) PD, p. 1, 1979 (hereafter *Elon Moreh* case); *Jami'at Ascan* case, above note 5.

26 See, e.g., *Ajuri* case, above note 20, p. 364; HCJ 2056/04, *Beit Sourik Village Council v. The Government of Israel et al.*, 48(5) PD, p. 807, 2004, p. 827.

27 See, e.g., HCJ 5591/02, *Yassin et al., v. Commander of Ketziot Detention Facility et al.*, 57(1) PD p. 403, 2002, p. 413.

28 See, e.g., *Hess* case, above note 20, para. 8; HCJ 3103/06, *Shlomo Valero v. State of Israel*, Judgment, 6 February 2011, para. 33, available in Hebrew at: <http://elyon1.court.gov.il/files/06/030/031r13/06031030.r13.pdf> (last visited 22 May 2012).

29 *Alphei Menashe* case, above note 20, p. 523.

humanitarian norms of the Convention were applicable, it saw no need to rule on this question.

In conclusion, without ever ruling positively that the Fourth Geneva Convention applies in the OT or that all its provisions are part of customary law, relating to provisions of Fourth Geneva Convention has become part of the Court's standard practice.<sup>30</sup>

## Politics and law

Israel is one of the few Occupying Powers that have formally recognized application of the norms of belligerent occupation in the territory that it occupies. Despite this recognition, politics have often had more influence on the ground than the formal legal framework of occupation law. Hence, many of the policies and actions of the different governments that have been in power since 1967 have not been compatible with norms of the international law of belligerent occupation. The most blatant of these policies has been the establishment of Israeli settlements in the OT. It has been the consistent position of the international community that establishment of such settlements by the Government of Israel is incompatible with Israel's obligation under Article 49, paragraph 6 of the Fourth Geneva Convention not to transfer part of its civilian population into the OT.<sup>31</sup> This position was confirmed by the ICJ in its Advisory Opinion on *Legal Consequences of the Construction of a Wall*.<sup>32</sup>

Given the clear disparity between international law and the establishment of settlements for Israeli citizens in the OT, one would have expected some jurisprudence of the HCJ on this issue. However, the only substantive decisions are those that relate to requisition of private land for settlements. The Court held that if the authorities could show that a settlement was established at a strategic position and that its aim was enhancing defence of the state, requisition of the land could be justified as being for military needs.<sup>33</sup> On the other hand, if the motivation for establishment was political, rather than security, requisition of the private land would be unlawful.<sup>34</sup>

30 In HCJ 2690/09, *Yesh Din et al., v. Commander of IDF Forces in the Judea and Samaria et al.*, Judgment of 28 March 2010, available in Hebrew at: <http://elyon1.court.gov.il/files/09/900/026/n05/09026900.n05.pdf> (last visited 22 May 2012), the petitioners argued that all provisions of GC IV are now regarded as part of customary law. The Court declined to rule on the argument but said that it would continue its practice of respecting the customary provisions of the Convention as part of the applicable law.

31 See, e.g., UNSC Resolution 446, 22 March 1979, UN Doc. S/RES/446 (1979); UNSC Resolution 452, 20 July 1979, UN Doc. S/RES/452 (1979); and UNSC Resolution 465, 1 March 1980, UN Doc. S/RES/465 (1980). The prohibition in GC IV, Art. 49, para. 6, on transfer of civilians of the Occupying Power into the occupied territory is not the only legal basis for the argument that establishment of settlements in the OT is unlawful. For a concise presentation of the other arguments, see Program on Humanitarian Policy and Conflict Research, 'Policy brief: the legal status of Israeli settlements under IHL', available at: <http://opt.ihlresearch.org/index.cfm?fuseaction=Page.viewPage&pageId=773> (last visited 22 May 2012).

32 ICJ, *Wall* case, above note 18, para. 120.

33 *Beth El* case, above note 20; HCJ 258/79, *Amira et al., v. Minister of Defence et al.*, 34(1) PD, p. 90, 1979.

34 *Elon Moreh* case, above note 25.

The Court has done its utmost to avoid having to rule on the general legality of establishing settlements for nationals of the Occupying Power in occupied territory. It ruled that the prohibition in Article 49, paragraph 6 of the Fourth Geneva Convention on transfer of the civilian population of the Occupying Power into occupied territory is not part of customary law that will be enforced by the Court;<sup>35</sup> it refused to rule on use of public land for settlements on grounds of lack of standing;<sup>36</sup> and it held that a petition challenging the entire settlement policy on various legal grounds was non-justiciable.<sup>37</sup> On the other hand, the Court has ruled on more than one occasion that the settlements may remain where they are only as long as Israel retains control over the area, and that a political decision to withdraw from territory will justify dismantling the settlements and requiring the settlers to relocate in Israel.<sup>38</sup>

Avoiding ruling on the lawfulness of the settlements has no doubt enabled the Court to avoid a head-on clash with the government and a large segment of public opinion. Understandable as this may be on the political level, as will be shown below in the discussion of the Court's decisions on the separation barrier, the Court's refusal to rule on this question has somewhat compromised its position.

35 *Beth El* case, above note 20, p. 121; *Elon Moreh* case, above note 25, pp. 14–15.

36 H CJ 277/84, *Ayreib v. Appeals Committee et al.*, 40(2) PD, p. 57, 1986. In this case, a Palestinian resident of the West Bank challenged a decision to declare land as government land, arguing that the land belonged to him. After his claim was rejected by the Appeals Committee that was established by a military order to hear appeals against such declarations, he petitioned the HCJ. The petitioner argued, *inter alia*, that the real intention behind declaring the land to be government land was to facilitate establishment of a settlement there, and that this was unlawful under Article 55 of the Hague Regulations, which deals with use of public land by an Occupying Power. The Court held that, if the land was indeed government land, 'it does not appear from the language [of the text of Article 55] what the standing of petitioner is in this matter and what right he has to raise doubts about the way of dealing with property, which, as we have said, is government and not private property' (*ibid.*, para. 9). This narrow view of the demand for standing in order to challenge the legality of government action has long been abandoned by the Supreme Court in its general jurisprudence: see, e.g., H CJ 910/86, *Ressler v. Minister of Defence*, 42(2) PD, p. 441, 1986. While most of the decisions liberalizing the rules on standing were delivered after the *Ayreib* decision, it is nevertheless difficult to accept that the narrow, formalistic, approach to standing in that decision reflected the general trend of the Court on the issue of standing at the time. In H CJ 3125/98, *I'ad v. IDF Commander in Judea and Samaria*, 58(1) PD, p. 913, 1998, the petitioners challenged a plan for the West Bank that would extend the area of an Israeli settlement. The Court interpreted the *Ayreib* judgment as implying that, as the Palestinian petitioners could not show how use of state lands covered by the plan affected their interests, there was no basis for their argument that in adopting the plan the authorities had exceeded their powers under international law (*ibid.*, p. 916).

37 H CJ 4481/91, *Bargil et al., v. Government of Israel et al.*, 47(4) PD, p. 210, 1993. Chief Justice Shamgar held that the dominant nature of the issue of settlements was political, rather than legal, and that the Court should therefore leave the matter in the hands of the other branches of government. Justice Goldberg referred to the negotiations that were going on at the time between Israel and the Palestinian Liberation Organization, in which the settlements were a major issue of contention. He held that, since the case did not involve the claim of a specific private individual that his rights had been violated, it was one of those rare cases in which the Court should refrain from a judicial ruling that could be interpreted as interference in important political processes. See also *I'ad* case, above note 36. In H CJ 4400/92, *Kiryat Arba Local Council v. Government of Israel*, 48(5) PD, p. 587, 1992, the Court followed the same line when it rejected a petition by Israeli settlers challenging a government decision to freeze all building of settlements.

38 *Beth El* case, above note 12; *Kiryat Arba* case, above note 37; *Gaza Beach* case, above note 14.



## The jurisprudence of belligerent occupation

Judging the contribution of the HCJ to development of the law of occupation is not an easy task. In many of its decisions the Court has preferred to rely on rules of Israeli administrative law, rather than on the international law of belligerent occupation. In others, the Court has concentrated on the specific facts, rather than on the legal principles involved. Finally, in many cases the Court has done its best to avoid ruling on the compatibility of actions or policies with international humanitarian law, either by relying on the distinction between customary and conventional law mentioned above, or by glossing over the issue. In this article I shall concentrate on those issues in which Court has taken a position on the law applicable in occupied territories.

### Interpreting the law: general approach

In the *Afu* case,<sup>39</sup> which dealt with deportation of protected persons on security grounds, the petitioners argued that Article 49, paragraph 1 of the Fourth Geneva Convention prohibits all deportations of protected persons from occupied territory and that this prohibition knows no exceptions. In replying to this argument, Chief Justice Shamgar opined that the provision in Article 49, paragraph 1 could be interpreted in two different ways. In such a case, he held, the Court should adopt the interpretation that is least restrictive of the state's sovereignty. In the case in question this meant adopting an interpretation that allows the state to deport protected persons on security grounds.<sup>40</sup> The principle of interpretation cited and implemented by Chief Justice Shamgar is not mentioned in the Vienna Convention on the Law of Treaties. It is totally out of tune with fundamental principles in interpretation of international conventions that deal with human rights or humanitarian law, whose very object is to grant protection to individuals against abuse of state power. It is also totally inconsistent with the general jurisprudence of the Supreme Court, which holds that legislation should be interpreted so as to protect the fundamental rights of the individual.<sup>41</sup> While the HCJ has never cited or repeated Chief Justice Shamgar's statement, in practice that statement largely reflects the way in which the Court has interpreted protective provisions in the Fourth Geneva Convention and Hague Regulations. In cases relating to Article 49, paragraph 1 of the Fourth Geneva Convention,<sup>42</sup> the majority on the Court have adopted an interpretation that flies in the face of its clear meaning, on the basis of the questionable assumption that the absolute prohibition on deportation of

39 HCJ 785/87, *Afu et al., v. Commander of IDF Forces in the Judea and Samaria et al.*, 42(2) PD, p. 4, 1988, p. 17.

40 For criticism of the interpretation adopted by the Court, see D. Kretzmer, above note 2, pp. 48–52; Yoram Dinstein, 'Deportations from Occupied Territories', in *Tel Aviv University Law Review*, Vol. 13, 1988, pp. 403–416.

41 The leading case is HCJ 73, 87/53, *Kol Ha'am v. Minister of Interior*, 7 PD, p. 871, 1953.

42 Article 49, para. 1 of GC IV states: 'Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive'.

protected persons in that provision had been introduced into the Convention to deal with deportations of the type carried out by the Nazis.<sup>43</sup> In the *Ajuri* case,<sup>44</sup> the Court adopted what it termed a ‘dynamic interpretation’ of Article 78 of the Fourth Geneva Convention, when it held that ‘assigned residence’ for imperative reasons of security could include transferring a West Bank resident to Gaza (before the disengagement).<sup>45</sup>

In a recent case, petitioners challenged the legality of holding prisoners from the OT in prisons in Israel, arguing that this is incompatible with Article 76 of the Fourth Geneva Convention.<sup>46</sup> In her judgment in the case, Chief Justice Beinisch stated that in interpreting the Fourth Geneva Convention heed must be paid to the special circumstances and characteristics of the occupation, and especially ‘the long period of the occupation, in the geographic conditions and the possibility of maintaining contact between Israel and the area’.<sup>47</sup> She ruled that this required giving special weight to protected persons, and particularly to the rights of detainees. What is important is protection of their *substantive* rights, rather than a literal interpretation of the Fourth Geneva Convention. Thus, if the authorities could guarantee better conditions to detainees by holding them in Israel, rather than in the OT as required under Article 76 of the Convention, they were conforming with ‘the substantive provisions of the Geneva Convention relating to conditions of detention’.<sup>48</sup> The *rhetoric* in this judgment would seem to imply that, by holding that the Convention should be interpreted for the benefit of the protected persons, the Court was departing from the approach described above that prefers state interests to the rights of individuals, and was holding that the Convention should be interpreted for the benefit of the protected persons. However, the rhetoric was employed in the concrete case so as to justify the authorities’ refusal to comply with the strict requirements of the Fourth Geneva Convention. The decision therefore appears to be consistent with the general approach of the Court mentioned above, which favours the interpretation that supports the government’s position.

## Military needs and public welfare

It is accepted jurisprudence of the Court that in exercising his powers in occupied territory the military commander must consider two factors: ensuring his military or security needs in the area and ensuring the welfare of the local population.<sup>49</sup> How has the Court understood the term ‘military or security needs’?

43 The cases are discussed in D. Kretzmer, above note 2, pp. 43–52.

44 *Ajuri* case, above note 20.

45 For a critical analysis of this case see O. Ben-Naftali, above note 2, pp. 164–171.

46 Article 76, para 1, GCIV provides: ‘Protected persons accused of offences shall be detained in the occupied country, and if convicted they shall serve their sentences therein...’.

47 *Yesh Din* case, above note 30, para. 7.

48 *Ibid.*, para. 11.

49 *Jami’at Ascan* case, above note 5; *Beit Sourik* case, above note 26, para. 34, in which the Court refers to the many judgments in which it has emphasized this crucial principle of its jurisprudence on belligerent occupation.

The *Beth El* case<sup>50</sup> concerned requisition of private land for establishment of a settlement in a strategic position. Relying on the wording of Article 52 of the Hague Regulations that permits requisition of property ‘for the needs of the army of occupation’, the petitioners argued that this term has a restricted meaning that is limited to the logistical requirements of the army of occupation and does not include the wider security interests of the Occupying Power. In rejecting this argument, Justice Witkon held that in a situation of belligerency the Occupying Power has the responsibility to enforce public order and security in the occupied territory, and it must also deal with dangers from that territory towards the occupied territory itself and towards the territory of the Occupying Power.<sup>51</sup> In his concurring judgment, Justice Landau expressly referred to the wording of Article 52 of the Hague Regulations.<sup>52</sup> After citing various sources which accept that immovable property may be requisitioned for wider military needs, Justice Landau saw fit to add that the main task of the commander in occupied territory is ensuring public order and safety, under Article 43 of the Hague Regulations. He added that ‘anything needed in order to achieve this aim is anyhow needed for the purposes of the occupying army, in the meaning of article 52’.<sup>53</sup> Thus, establishment of a civilian settlement in a strategic position, which, the authorities argued, would facilitate defence of the area, was a military need that could justify requisition of private land.

In a later case, the Court rejected an attempt to further widen the term ‘security military needs’, by including an ideological, political view of the long-term interests of the state.<sup>54</sup> This led Justice Barak to state in a leading judgment:

Both considerations [of the military commander] are directed towards the [occupied] area itself. The commander is not allowed to consider the national, economic or social interests of his own state, to the extent that they do not have implications for his security interests in the area or the interests of the local population. Even military needs are his military needs in the area, and not national security interests in the wide sense. An area subject to belligerent occupation is not a field open to economic or other exploitation.<sup>55</sup>

Despite this dictum, which would seem to imply a narrow interpretation of the term ‘military needs’, the wide view presented by the Court in the *Beth El* case – according to which protecting the security interests of the Occupying Power and its citizens is

50 *Beth El* case, above note 12.

51 *Ibid.*, pp. 117–118.

52 While the authorities themselves relied on Article 52 of the Hague Regulations as the basis for the order requisitioning land, Justice Landau pointed out that it is not clear that this provision relates to immovable property (*ibid.*, pp. 129–131). Be this as it may, the Court accepted that under customary international law the Occupying Power has the authority to requisition land for the needs of the army of occupation. On this issue, see Y. Dinstein, above note 1, pp. 226–230.

53 *Beth El* case, above note 12, p. 131. Justice Landau repeated this approach in the *Elon Moreh* case, above note 25, p. 16.

54 *Elon Moreh* case, above note 25.

55 *Jami’at Ascan* case, above note 5, para. 13.

a legitimate military need – reflects the approach of the Court.<sup>56</sup> In effect the Court has followed Justice Landau's approach, which ties the needs of the army of occupation to the duties of the Occupying Power under Article 43 of the Hague Regulations. These duties have become a central theme in the Court's jurisprudence.

## Article 43 of the Hague Regulations

Article 43 of the Hague Regulations prescribes the fundamental obligations of an Occupying Power. It may therefore be regarded as the 'mini-constitution' of an occupation regime.<sup>57</sup> This article provides:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

This provision deals with two issues: first, the obligation of the Occupying Power to restore and ensure public order and safety; and second, its obligation to respect the laws in force in the country 'unless absolutely prevented'. In the Brussels Project of 1874 and the Oxford Manual of 1880 these two issues appeared in two separate provisions.<sup>58</sup> However, in the final draft of the Hague Regulations they were combined in Article 43. The Supreme Court has drawn a close connection between the two parts, by tying the issue of changes in the law to the obligation of the Occupying Power to restore and ensure public order and safety. I shall, however, treat the issues separately.

### *Restoring and ensuring 'public order and safety'*

In the *Christian Society* case,<sup>59</sup> the first published decision dealing with the OT, Justice Sussman pointed out that the original French version of the Hague Regulations refers to '*l'ordre et la vie publique*', which obviously has a much wider

56 See, e.g., HCJ 202/81, *Tabeeb et al., v. Minister of Defence et al.*, 36(2) PD, p. 622, 1981 (expropriation of land for construction of a road to circumvent a town); HCJ 1987/90, *Shadid v. IDF Commander in Judea and Samaria* (unreported judgment of 15 July 1990) (requisition of land for branch of the civil administration); HCJ 8286/00, *Association for Civil Rights in Israel v. IDF Commander in Judea and Samaria* (unreported judgment of 13 December 2000) (seizure of four schools to serve as military outposts during the first *intifada*); HCJ 401/88, *Rian et al., v. IDF Commander in Judea and Samaria* (unreported judgment of 24 July 1988) (requisition of a private apartment and roof of a building for a temporary military lookout).

57 See E. Benvenisti, above note 1, p. 9. In HCJ 2164/09, *Yesh Din v. Commander of IDF Forces in Judea and Samaria et al.*, Judgment, 26 December 2011 (hereafter *Quarries* case), available in Hebrew at: <http://elyon2.court.gov.il/files/09/640/021/N14/09021640.N14.htm> (last visited 22 May 2012), para. 8, the Court stated: 'As is well known, Article 43 has been recognized in our jurisprudence as a quasi-constitutional framework provision that sets out the general framework for the way the duties and powers of the military commander must be exercised in occupied territory'.

58 *Project of an International Declaration Concerning the Laws and Customs of War*, Brussels, 27 August 1874, Articles 2 and 3; *The Laws of War on Land*, Oxford, 9 September 1880, Articles 43 and 44.

59 *Christian Society* case, above note 3, p. 581.

meaning than the term ‘public order and safety’.<sup>60</sup> It includes all aspects of public or civil life. As explained in a subsequent judgment of the HCJ, the term ‘public life’ includes ‘conducting a proper administration on all its branches accepted nowadays in a well-functioning country, including security, health, education, welfare and also, inter alia, quality of life and transportation...’.<sup>61</sup> The Court held that the notions of ‘proper administration’ cannot be gauged by the *laissez-faire* concepts of government that were prevalent when the Hague Regulations were adopted. They are those that are suited to ‘a modern and civilized state at the end of the twentieth century’.<sup>62</sup>

What interests are involved in assessing the welfare of the local Palestinian population? Generally the Court regards only their narrow economic and material welfare, and ignores issues connected with their political interests in avoiding major changes that further the integration of the West Bank with Israel. Thus, for example, in the *Hebron Electricity* case, the HCJ accepted that attaching the West Bank city of Hebron to the Israeli national electricity grid was for the good of the local population since it would guarantee a reliable source of electricity.<sup>63</sup> Only in one case, which also dealt with supply of electricity, did the Court take an entirely different approach. Relying on Article 43, the HCJ held that the decision of the military commander to place supply of electricity to most of the West Bank in the hands of the Israel Electricity Company rather than the local Palestinian company was unlawful. It explained that, given the importance of electricity, placing the supply of electricity in the hands of a supplier from outside the OT ‘has implications that go beyond the economic and technical aspects of the matter’.<sup>64</sup> This decision was a voice in the wilderness.

Examining the Court’s attitude to the duty to ensure ‘public order and public life’ has been complicated by two phenomena: the long-term nature of the occupation and the presence in the OT of Israeli settlers and other Israelis who travel through the area.

### *Long-term occupation*

In the *Elon Moreh* case, Justice Landau held that

no military government may create in its area facts for its military purposes that are intended from the very start to exist even after the termination of the military rule in that area, when the fate of the territory after termination of the military rule is unknown.<sup>65</sup>

60 See Y. Dinstein, above note 1, p. 89.

61 *Tabeeb* case, above note 56, p. 629.

62 *Jami’at Ascan* case, above note 5, p. 800.

63 *Hebron Electricity* case, above note 3.

64 HCJ 351/80, *Electricity Company for Jerusalem District v. Minister of Energy and Infrastructure*, 35(2) PD, p. 673, 1981, p. 692. For discussion of the difference in the judicial approach between the two electricity supply cases, see D. Kretzmer, above note 2, pp. 64–68.

65 *Elon Moreh* case, above note 25, p. 22.

This case involved requisition of private land for settlement of Israeli nationals. But what of projects whose ostensible object is to benefit the local population? May the military commander decide on long-term projects that will exist even after termination of the occupation?

Justice Barak addressed these questions in the *Jami'at Ascan* case,<sup>66</sup> referred to above, which concerned expropriation of land for the building of a major highway on the West Bank. The Court held that, in considering long-term projects, two conflicting interests were involved: on the one hand, the duty of the military commander to act as a proper government that looks after the interests of the local population; and, on the other hand, the restraints on an Occupying Power as a temporary regime that does not exercise sovereign power but derives its authority from the laws of armed conflict. Applying its theory that the military government must view its governmental powers as those that are suited to 'a modern and civilized state at the end of the twentieth century',<sup>67</sup> the Court held that, in a long-term occupation, investments and projects which have implications that will be felt even when the occupation comes to an end are legitimate, provided that they are planned for the benefit of the local population and do not introduce changes into the basic institutions of the occupied territory. On the basis of this principle, the Court held that building the highway was legitimate since evidence had been produced that it would serve the needs of the local Palestinian population.

The approach presented by Justice Barak was followed in subsequent cases. The theory is that, while the purpose of wielding governmental powers – benefit of the local population – does not change over time, the way that power is implemented must take account of changing conditions and circumstances. Justice Barak repeated this view in a judgment delivered twenty years after his original decision:

True, the belligerent occupation of the area has gone on for many years. This fact affects the scope of the commander's authority... The passage of time, however, cannot expand the authority of the military commander and allow him to take into account considerations beyond proper administration of the area under belligerent occupation.<sup>68</sup>

In a more recent case, the Court explained its position as follows: '... the belligerent occupation of the area by Israel has special characteristics, the main one being the period of time of the occupation which demands fitting the laws to reality on the ground...'.<sup>69</sup> In that case, the issue was whether it was lawful for the military authorities to grant licences to Israeli companies to open and operate stone quarries in the West Bank.<sup>70</sup> The petitioner, an Israeli non-governmental organization,

66 *Jami'at Ascan* case, above note 5.

67 *Ibid.*, p. 800.

68 *Beit Sourik* case, above note 26, pp. 829–830.

69 *Quarries* case, above note 57, para. 10.

70 The issue of quarries had been discussed in a previous case: HCJ 9717/03, *Naale v. Supreme Planning Council in Judea and Samaria*, 58(6) PD, p. 97, 2004. The petitions in this case were submitted by residents of Israeli settlements. While their concern was the pollution caused by a planned quarry in their

argued that the policy was incompatible with the Occupying Power's obligation under Article 55 of the Hague Regulations to manage public property as a usufruct. Furthermore, as the vast majority of stone that is quarried is used in Israel, rather than by Palestinians in the OT, permitting operation of the quarries could not be regarded as having been done for the welfare of the local population.<sup>71</sup>

The authorities were obviously embarrassed by the petition. While they defended their policy in court on the grounds that 'reasonable' use of quarries that did not lead to significant depletion of the area's resources was permissible, they also declared that no new licences would be granted to Israeli companies to open quarries in the West Bank.

The Court held that the petition could have been rejected without going into the matter on the merits. In the first place, the issue of stone quarries was a political issue that had been dealt with in the negotiations between Israel and the Palestinian Liberation Organization and was subject of a provision in the Oslo Agreements. Since no individuals had argued that their rights were violated by operation of the quarries, the matter should be regarded as a political matter that was non-justiciable. Furthermore, the petition was general in its nature and had not presented an adequate factual basis for a judicial decision. Finally, the delay in submitting the petition and the effect that that delay had on the rights of third parties (the companies that had invested in developing the quarries) meant that the petition should be rejected on grounds of laches (undue delay in submitting the petition, which constitutes accepted grounds for rejection of a petition to the HCJ).

Despite its view that the petition should be rejected on the above grounds, the Court proceeded to examine the issue on the merits. It began by trying to show that there were differences of opinion among experts on the interpretation of Article 55 of the Hague Regulations and more specifically on whether an Occupying Power may allow opening and operation of *new* mines or quarries in occupied territories. Having raised this question, the Court ruled in favour of the authorities' position that the quarries were lawful. It based its position on a number of grounds. First, since the quantity of stone that was quarried did not substantially deplete the quarry potential of the area,<sup>72</sup> the Court held that using such stone could be regarded as enjoying the fruits of the quarries, rather than exploiting their capital.<sup>73</sup> The Court decided that, in these circumstances, the real question was whether such action was compatible with the obligation of the Occupying Power under Article 43

area, they argued that permitting operation of the quarry was incompatible with Article 55 of the Hague Regulations. In a brief opinion, the Court held that even if the quarry would be exploiting natural resources this was permissible if it would benefit the local population, among whom Israeli settlers were to be included. Furthermore, the length of the occupation meant that the Occupying Power should be allowed to make changes that would have a long-term effect. As the authorities had shown that some of the stone to be quarried would serve the needs of people in the West Bank, the Court held that allowing opening of the quarry was not incompatible with Article 55 of the Hague Regulations.

71 According to figures submitted to the Court by the authorities, 94% of the stone from the quarries operated by Israeli companies was for use in Israel. *Quarries* case, above note 57, para. 1.

72 According to an estimate submitted by the authorities, even if the Israeli quarries were to continue to operate on the same scale for the next thirty years they would only exploit 0.5% of the quarrying potential on the West Bank: *ibid.*, para. 1.

73 *Ibid.*, para. 11.

of the Hague Regulations. According to the jurisprudence of the Court discussed above, this meant asking whether action was for the welfare of the local population. In giving a positive answer to this question, the Court mentioned a number of factors: some of the quarried stone was used by local Palestinians, the quarry companies paid royalties to the civil administration of the West Bank which were used for furthering local projects, a fair number of local Palestinians were employed in the quarries, and development of the quarries contributed to modernization in the area. In light of these factors, the Court stated that it could not accept the petitioner's view that operation of the quarries by Israeli companies had no relation to the welfare of the local population, 'especially in light of the common economic interests of the Israeli and Palestinian side and the lengthy nature of the occupation'.<sup>74</sup> The Court also took into account the declaration by the government, submitted in response to the petition, that it would not permit opening of any new quarries by Israeli companies.

The Court's judgment in this case raises many questions. In the first place, why should the extent of the stone quarried, in relation to the quarrying potential, be relevant in deciding whether the issue is one of enjoying the fruits of public property or depleting its capital? Non-renewable natural resources can hardly be regarded as fruits of property. Second, by examining the unintended effects of economic activity, rather than the ostensible purpose of the action by the military commander, the Court departed from the position that it had previously taken on this issue. The Court's approach smacks of a colonial approach, under which the activities of the colonial power are claimed to bring benefit to the colonized peoples. Finally, even if one were to accept that opening new quarries would contribute significantly to the local economy, there is no reason why the commander should have allowed Israeli companies, rather than companies belonging to local Palestinian residents, to operate the quarries. All the benefits to the local population (employment, providing some stone for the local construction industry, modernization) could have been achieved by licensing Palestinian companies to operate the quarries.

### *Settlements, settlers, and Israeli commuters*

The main context in which the HCJ has tried to fit the laws to the reality on the ground has been the question of settlements, and more specifically their effect on the interests of 'protected persons'. Under Article 4, paragraph 1 of the Fourth Geneva Convention, this term includes all persons who find themselves in the hands of the Occupying Power, with the exception of its own nationals.<sup>75</sup>

When first considering who was included in the local population, the HCJ ignored the notion of 'protected persons'. Hence, when judging the welfare of the

<sup>74</sup> *Ibid.*, para. 13.

<sup>75</sup> Article 4, para. 1, of GC IV states: 'Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals'.



local population in the *Hebron Electricity* case, the Court declared that ‘for this purpose the residents of Kiryat Arba [an Israeli settlement constructed on the outskirts of Hebron] must be regarded as having been added to the local public, and they are also entitled to a regular supply of electricity’.<sup>76</sup> This approach was retained by the Court in later years, even when it mentioned the Occupying Power’s duty towards protected persons.<sup>77</sup>

In many cases, the authorities argued that a decision or action being challenged, which seemingly served the interests of settlers or other Israeli nationals, was in fact for the benefit of the local Palestinian population. The Court was reluctant to question whether this was indeed the case.<sup>78</sup> It consistently held that the fact that an action by the military commander, such as the building of a new highway, would *also* benefit settlers or Israelis travelling through the area, did not make the action unlawful, provided that the aim was to benefit the local Palestinian population.<sup>79</sup> In many of the cases it seemed that, even if it could be argued that the local Palestinian population would benefit from the challenged action, this was certainly not its main or dominant aim. In a recent case, which dealt with expropriation of private property of Palestinians for the building of a railway line that would join Tel Aviv and Jerusalem, the Court left open the question whether, in order for such expropriation to be lawful, benefit of the local population must be its *dominant* aim, rather than one of its side effects.<sup>80</sup> The Court’s decisions in the *Quarry* cases discussed above<sup>81</sup> would seem to imply that, even if benefit of the local population is a side effect of an action, rather than one of its direct (not to say dominant) aims, the action could be lawful.

As the settler population grew, and especially after the first *intifada* started in 1987, with the consequent heightened tension between Palestinians and Israelis on the West Bank, it was inevitable that there would be a clear clash of interests between the Palestinian and settler populations. How did the Court deal with this?

The case that was to set the tone on this question related to the Beit Hadassah building in the centre of Hebron. After the government allowed Israeli nationals to occupy the upper floors of this building, the military commander constructed a fence around the building that severely restricted access of customers to Palestinian stores on the ground floor of the building. When this act was challenged in court, the commander claimed that the fence was essential to protect the security of the settlers in the building. In considering this claim, the Court saw the matter as self-evident that the authority of the commander to protect security is ‘extremely wide, and includes everybody who is in the area, whether he is one of its

76 *Hebron Electricity* case, above note 3, p. 138.

77 *Hess* case, above note 20, p. 455; HCJ 9717/03, *Naale* case, above note 70, p. 104.

78 See, e.g., *Tabeeb* case, above note 56.

79 *Jami’at Ascan* case, above note 5, p. 811; *Head of Beit Icsa Local Council* case, above note 20.

80 *Head of Beit Icsa Local Council* case, above note 20, para. 27. The Court refused to rule on the merits in this case, as it held that the petition should be rejected on the grounds of laches (i.e. undue delay in submitting the petition).

81 See above note 70 and text accompanying notes 69–74.

permanent residents or one of its new residents'.<sup>82</sup> This was to become the pervasive theme of the Court in dealing with clashes between the interests of both settlers and Israelis visiting the OT and those of protected persons in the area.<sup>83</sup>

The security of the settler population became a major question when the HCJ considered the legality of sections of the separation barrier that was built largely on the West Bank, and that was the subject of the Advisory Opinion of the ICJ in *Legal Consequences of the Construction of a Wall*.<sup>84</sup> In its Advisory Opinion, the ICJ opined that, since the settlements on the West Bank were established in violation of international law, determining the route of the barrier in order to include the settlements on the western side of the barrier was unlawful. The applied assumption was that the object of fixing the barrier with the settlements in mind was to annex those settlements in Israel.<sup>85</sup> The HCJ disagreed. It held that it had been proven that the route was determined by security needs, rather than political considerations.<sup>86</sup> However, the real question was the security of whom? Are the security interests of nationals of the Occupying Power who reside in the occupied territory included in the security interests that the commander has the duty and power to ensure?

As explained above, the HCJ refrained from ruling on the legality of constructing settlements in the OT. While it did not expressly grant legal imprimatur to the settlements, its very refusal to rule on the issue was certainly perceived as legitimization by omission. Consequently, when the separation barrier cases reached the HCJ it was in no position to reverse its position and rule, thirty-five years after the occupation had begun, that settlements established by the government were all unlawful. On the other hand, it was not about to cross spears with the ICJ and rule that the settlements were lawful. It got around this difficulty by ruling that the legality of the settlements was irrelevant in deciding whether the commander could consider the security of the settlers when using his powers to ensure public order. According to the Court's view, the obligation of the commander, under Article 43 of the Hague Regulations, to maintain public order included his duty to protect the lives of all persons in the occupied territory, whether there by right or not. This view first appears in the Court's judgment in the *Alpehi Menashe* case,<sup>87</sup> in which the Court gave detailed consideration to the Advisory

82 HCJ 72/86, *Zalum v. Military Commander*, 41(1) PD, p. 528, 1987, p. 532. It must be pointed out that, in this case, the petitioners' counsel apparently did not argue that the commander may not consider the security of persons other than protected persons. Rather she argued that the real reasons for constructing the fence were to force the Palestinian storekeepers to leave their stores, rather than security.

83 See, e.g., HCJ 4363/02, *Zinbakh v. IDF Commander in Gaza*, Judgment, 28 May 2002, available in Hebrew at: <http://elyon1.court.gov.il/files/02/630/043/A02/02043630.a02.pdf> (visited 22 May 2012); HCJ 4219/02, *Gusin v. IDF Commander in Gaza*, 56(4) PD, p. 408, 2002, at p. 611. In both these cases, the Court rejected the argument that protection of the security of persons in Israeli settlements was not a legitimate security interest. The grounds given by the Court were that under the Oslo Agreements the status of the settlements was to be decided in the final stage agreements, and that until that time the commander was duty-bound to protect the security of all persons in the occupied territory.

84 *Legal Consequences of Construction of the Wall*, above note 18.

85 For discussion of the reasons for tying the legality of the barrier's route to the location of settlements, see David Kretzmer, 'The advisory opinion: the light treatment of international humanitarian law', in *American Journal of International Law*, Vol. 99, No. 1, 2005, pp. 88–102.

86 *Beit Sourik* case, above note 26; *Alpehi Menashe* case, above note 20.

87 *Alpehi Menashe* case, above note 20, p. 498.

Opinion of the ICJ. It has since become standard fare in the Court's separation barrier decisions.<sup>88</sup>

The *Abu Safiyeh* case concerned an order by the military commander on the West Bank prohibiting use of a highway – Highway 443 – by Palestinian vehicles.<sup>89</sup> In a previous case in which expropriation of land for part of this highway was under review, the Court had accepted that the object of building the highway was to benefit the local Palestinian population.<sup>90</sup> The order prohibiting use of the highway by Palestinian vehicles was imposed after a number of drive-by attacks and shootings on Israeli vehicles on the road, some of which ended in death and injury of Israeli drivers and passengers. After dragging its feet on the issue for some time, the HCJ ruled that in totally excluding Palestinian vehicles from use of the road the commander had exceeded his authority. It also held that, in any event, even if the commander had the authority to exclude Palestinian vehicles, his decision to place an absolute ban on use of the highway by such vehicles failed to meet demands of proportionality.<sup>91</sup> One might have thought that, since the road had ostensibly been built for the good of the local Palestinian population, and that ensuring the welfare of that population must guide the commander in his decisions, the Court would have ruled that the commander was duty-bound to allow all Palestinian vehicles to use the highway, and, if possible, to make the necessary security arrangements that would also allow Israeli vehicles to travel on it. The Court did nothing of the sort. It merely declared that the order placing an absolute prohibition on use of the highway by Palestinian vehicles was unlawful and was therefore invalid. It left it to the military commander to make a new order that would provide security to Israeli drivers who used the highway.<sup>92</sup> The implied assumption was that Israeli vehicles could continue to use the highway and that limited provision would be made to allow some Palestinian vehicles to use the highway. Fundamentally, then,

88 See, e.g., HCJ 3680/05, *Tene Local Committee v. Prime Minister of Israel* (2006), para. 8, available in Hebrew at: <http://elyon1.court.gov.il/files/05/800/036/A13/05036800.a13.htm> (last visited 22 May 2012); HCJ 11651/05, *Beit Aryeh Local Council v. Minister of Defence* (2006), para. 8, available in Hebrew at: <http://elyon1.court.gov.il/files/05/510/116/A05/05116510.a05.htm> (last visited 22 May 2012); HCJ 2577/04, *Al Hawaji et al., v. Prime Minister et al.* (2007), para. 31, available in Hebrew at: <http://elyon1.court.gov.il/files/04/770/025/N56/04025770.n56.htm> (last visited 22 May 2012). In all these decisions, the Court repeated that 'the authority of the military commander to construct the separation barrier includes his authority to construct a barrier to protect the lives and security of Israelis who reside in Israeli settlements in the area of Judea and Samaria, even though the Israelis residing in the area are not protected persons, as this term is defined in article 4 of the Fourth Geneva Convention' (*Tene Local Committee* case, para. 8).

89 HCJ 2150/07, *Ali Hussein Mahmoud Abu Safiyeh, Beit Sira Village Council Head, et al., v. Minister of Defence et al.*, Judgment, 29 December 2009, available at: [http://elyon1.court.gov.il/files\\_eng/07/500/021/m19/07021500.m19.pdf](http://elyon1.court.gov.il/files_eng/07/500/021/m19/07021500.m19.pdf) (last visited 22 May 2012).

90 *Jami'at Ascan* case, above note 5.

91 *Abu Safiyeh* case, above note 89.

92 *Ibid.*, para. 39. The Court suspended the declaration that the prohibition on use of the highway by Palestinian vehicles was invalid for a period of five months, in order to allow the commander to make new arrangements. Because of strict security checks at road-blocks, the new order promulgated by the military commander following the Court's judgment still resulted in severe restrictions on use of the highway by Palestinian vehicles. See B'Tselem (The Israeli Information Center for Human Rights in the Occupied Territories), 'Route 443 – West Bank road for Israelis only', available at: [http://www.btselem.org/freedom\\_of\\_movement/road\\_443](http://www.btselem.org/freedom_of_movement/road_443) (last visited 22 May 2012).

the Court tacitly accepted that the main interest to be ensured in use of the highway would be the interest in freedom of movement of Israeli vehicles.

In the *Hess* case, the Court repeated its view that Israeli settlers are included in the local population whose welfare must be promoted by the military commander.<sup>93</sup> That case related to a decision by the military commander to requisition private property alongside the path that settlers and other visitors took on their way to worship at the Cave of the Patriarchs in Hebron, in order to increase protection of the worshippers. While the Court referred to the duty of the military commander under Article 43 of the Hague Regulations to ensure the welfare of protected persons, most of its judgment is devoted to balancing the ‘constitutional rights’ to freedom of religion and property. In upholding the requisition of property, no special weight was attached to the duty of the commander to protect the rights of protected persons.<sup>94</sup>

In summary, the Court has taken a wide view of the term ‘public safety and public life’ mentioned in Article 43 of the Hague Regulations, which incorporates all actions required by a government in a well-ordered society in the contemporary world. By adopting what it has termed a ‘dynamic’ interpretation of the norms of belligerent occupation so as to take consideration of the political reality of the long-term occupation, the Court has somewhat undermined the core meaning of these norms. By including the security of Israeli nationals who have either settled in the OT or travel through the area as a protected interest, and at the same time neither giving priority to the duty of the commander under the Fourth Geneva Convention to ensure the interests of protected persons, nor demanding that the welfare of the local population be the dominant aim, the Court has weakened the legal protection afforded under international law to protected persons.<sup>95</sup>

## Changes in the law

The *Christian Society*<sup>96</sup> case concerned a military order that introduced changes in the local labour law in order to facilitate settlement of labour disputes by compulsory arbitration. The question was whether this change was compatible with the Occupying Power’s duty under Article 43 of the Hague Regulations to respect the local law unless absolutely prevented from doing so.

The Court was divided on the approach to examining the term ‘absolutely prevented’. The majority tied the term to the obligation of the Occupying Power to restore and ensure ‘public order and public life’ and adopted the position that any changes in law whose purpose was to fulfil this obligation could be regarded as

93 *Hess* case, above note 20.

94 See also *Rachel Tomb* case, above note 20.

95 For development of the argument that, in applying universal standards to all persons in the occupied territories, the Court has weakened the special protection that an Occupying Power is supposed to extend to protected persons, see Aeyal M. Gross, ‘Human proportions: are human rights the emperor’s new clothes of the international law of occupation?’, in *European Journal of International Law*, Vol. 18, No. 1, 2007, pp. 1–35.

96 *Christian Society* case, above note 3.

absolutely necessary. The minority judge pointed out that Article 43 speaks of the duty to restore and ensure. He held that one can only restore what existed before and ensuring measures must not change the nature of public order and civil life that existed before. Furthermore, the minority judge added that, since compulsory arbitration is not part of Israeli law, the Occupying Power could not argue that it had no choice but to institute it in the occupied territory. He was thus arguing for a test that has some support in the literature: while the mere fact that certain legislation exists in the occupying state cannot mean that the commander is empowered to introduce such legislation in the occupied territory, the fact that legislation does not exist in the occupying state may be a factor in constraining introduction of such legislation in the occupied territory.<sup>97</sup>

The minority view that legislative changes should be gauged by the duty to 'restore' what existed before the occupation began could not have provided a workable yardstick when the occupation dragged on. It never gained support in the Court, and the majority view has prevailed. Thus legislative changes needed to protect security or to further public welfare will not be illegitimate on the grounds that the commander was absolutely prevented from instituting them.<sup>98</sup>

The approach of the Court to legislative changes may be termed the 'benevolent occupier' approach.<sup>99</sup> Under the guise of changes needed for the benefit of the local population, it has opened the path for wide-scale changes in the law on the West Bank (and in Gaza, before withdrawal of Israeli forces and settlements from that area). When challenged in court, the authorities only have to make out a case that legislative changes were needed for the good of the local population in the wide sense discussed above.

The best example was the *Abu Itta* case, decided in the 1980s.<sup>100</sup> Following legislation that introduced value added tax (VAT) in Israel, the military commanders of the West Bank and Gaza promulgated military orders instituting the same tax in those territories. When the authorities began to enforce the tax, Palestinian merchants petitioned the Court, challenging its imposition. After reviewing a wide range of authorities, Justice Shamgar reached the conclusion that there is no rigid rule against instituting a new type of tax in occupied territory. He held that, as with all other military legislation, legislation introducing a new tax must be gauged according to the principles in Article 43 of the Hague Regulations. At the time that the tax was imposed there were open borders between Israel and the OT. Unless VAT similar to the tax imposed in Israel had been imposed in the OT, the government would have had to restrict the flow of goods and services between Israel and the OT, and this would have had a deleterious effect on the local population in the OT. Furthermore, economic hardship in the OT would have caused discontent and this could have led to security problems. Thus imposition of

97 See Y. Dinstein, above note 1, p. 122, and the authorities cited there.

98 HCJ 69/81, *Abu Itta* et al., v. *IDF Commander in Judea and Samaria* et al., 37(2) PD, p. 197, 1983 (hereafter VAT case).

99 See D. Kretzmer, above note 2, pp. 64–72.

100 VAT case, above note 98.

the new tax could be justified both as a measure imposed for the benefit of the local population and for military needs.

In effect then, despite the strong language of Article 43, which speaks of the Occupying Power being ‘absolutely prevented’ from changing the local law, the Supreme Court has held that the only issue is whether the purpose of the change was a legitimate one: protection of security or furthering the welfare of the local population. The Court has never ruled on legislation that was obviously introduced solely to protect the interests of Israeli settlers.

Notwithstanding its wide approach on the power of the military commander to change local law, the Court has on occasion been prepared to interfere in the contents of legislation on the grounds that the commander has not struck a proper balance between security needs and the welfare of the local population. When lawyers on the West Bank demanded establishment of a bar association under Jordanian law, the military commander amended the law so as to allow appointment of the council members rather than their election. While the Court accepted that there were valid security reasons for limits on the independence of the bar association, it held that the commander has not given adequate weight to finding a balance between security and that independence. It therefore ordered the commander to consider amending the military order so as to allow for limited autonomy for the bar.<sup>101</sup>

## **Military necessity and its constraints: proportionality**

In many cases the law of belligerent occupation allows the Occupying Power to restrict certain rights of protected persons on such grounds as ‘the needs of the occupying army’, ‘imperative reasons of security’, or ‘imperative military reasons’.<sup>102</sup> In the initial period after the occupation began, the Court was reluctant to interfere with the military commander’s assessment that military necessity required a certain measure. It did indeed require the authorities to show the Court the evidence upon which such an assessment was made, but, provided that the authorities showed that their decision was based on a rational assessment of military necessity, the Court refused to interfere in the commander’s discretion.<sup>103</sup> In recent years, the Court has instituted an approach to military necessity based on the three-pronged proportionality test developed in German public law.<sup>104</sup> This test of proportionality

101 HCJ 507/85, *Tamimi et al., v. Minister of Defence et al.*, 41(4) PD, p. 57, 1987.

102 See, e.g., Hague Regulations, Art. 52 (requisitions in kind and services not to be demanded ‘except for the needs of the army of occupation’); GC IV, Art. 27, para. 4 (permitting ‘such measures of control and security in regard to protected persons as may be necessary as a result of the war’); GC IV, Art. 49, para. 2 (total or partial evacuation of a given area permitted where ‘imperative military reasons so demand’); GC IV, Art. 53 (destruction of property forbidden except when ‘rendered absolutely necessary by military operations’); GC IV, Art. 78 (internment or assigned residence of protected persons where the Occupying Power ‘considers it necessary, for imperative reasons of security’).

103 See, e.g., *Hilu* case, above note 12; *Beth El* case, above note 12, pp. 125–126.

104 In German law, the notion is called *Verhältnismäßigkeit*. Originally employed in administrative law, it involves examining three questions: whether there is a rational connection between the administrative act

has little, if anything, in common with the proportionality principle as it is understood in *ius in bello*.<sup>105</sup> It should be recalled, however, that the latter principle is only relevant in the conduct of hostilities, and has no place in the exercise of the powers of a military commander in occupied territory. The function of these powers is to allow the military commander to fulfil his duties to ensure public order and civil life under Article 43 of the Hague Regulations, and to protect the security interests of the occupying army. It is in this context that the Court's test of proportionality must be viewed.

In the *Beit Sourik* case, the Court opined that the three-pronged test of proportionality has become a general test both in domestic law and international law in general, and in the law of belligerent occupation in particular.<sup>106</sup> This case involved a challenge to the legality of one part of the separation barrier or wall that was being constructed in the West Bank. The Court held that, since it had been proved that the object of the barrier was security, the military commander had the power in principle to requisition land required for its construction. However, in examining whether use of that power in a concrete case was 'necessary for security', the commander's decision was to be judged on the basis of the test of proportionality. This meant examining three criteria: whether there was a rational connection between requisitioning the land and the legitimate purpose (security); whether the route chosen was the least invasive way of achieving this purpose; and whether the security benefit of the particular route chosen outweighed the damage caused to the persons affected by that route. This final criterion implied that, if there were an alternative route that could provide security protection, the marginal security advantages of the chosen route had to be weighed against the marginal benefits to the petitioners of the alternative route. In this particular case the Court held that there was a clear rational connection between protecting security and building the barrier on the chosen route, and that the commander had shown why, in his estimation, that route was optimal from the point of view of security. However, on the basis of evidence submitted by the petitioners, the Court held that there was an alternative route that would in the commander's view be less advantageous from a security point of view, but would involve considerably less

and its legitimate purpose; whether it is the least invasive way of achieving that purpose; and whether the benefit outweighs the harm caused to the interests of others. The notion was adopted by the Canadian Supreme Court as a test for examining whether restrictions on liberties protected under the Canadian Charter are necessary in a free and democratic society and is now widely used in Israeli jurisprudence for examining the legality of governmental action and of restrictions on protected liberties. For a full exposition of the development of the term and its use in comparative constitutional law, see Aharon Barak, *Proportionality: Constitutional Rights and their Limitations*, Cambridge University Press, Cambridge, 2011.

105 The classic definition of proportionality in *ius in bello* appears in Article 51, para. 5 of the First Additional Protocol to the Geneva Conventions, according to which an attack will be regarded as indiscriminate if it 'may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'. According to the ICRC Study on Customary International Law, this principle is a norm of customary international law in both international and non-international armed conflicts: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, ICRC/Cambridge University Press, Cambridge, 2005, p. 46.

106 *Beit Sourik* case, above note 26, para. 36.

damage to the petitioners. Failure to choose this route meant that the commander's decision failed to meet the proportionality test.<sup>107</sup> In another case, the Court held that the route chosen failed the proportionality test because the commander had not examined alternative routes that might have been less harmful to the rights of the petitioners.<sup>108</sup>

Following the *Beit Sourik* decision, the three-pronged proportionality test became the standard test for examining other sections of the separation barrier, and the HCJ now regards this test as a general principle that constrains all decisions that rely on military necessity.<sup>109</sup> Ostensibly, the Court's jurisprudence on this issue makes a significant contribution to the limitations on the power of the military in occupied territory. Clear criteria are set for assessing military necessity and balancing it with competing interests. The commander does not have the final word on the issue of military necessity since his decision is open to review by a judicial body. But, as in most other cases, the devil is in the details here. Like the case of considering 'public order and civil life', the question is first and foremost which interests are considered in carrying out the balancing under the various prongs of the test. Which security interests are involved? And what kind of alternatives are to be considered when examining whether the measure chosen is the least invasive measure to protect security? As we have seen above, the Court has held that security involves not only the security of the military forces and of the Occupying Power, but also that of both Israeli nationals who live in settlements in the OT and Israeli commuters who travel through the area. Even if settlers are living in settlements whose construction involved a violation of international law, in considering less invasive ways of protecting their security no consideration is given to requiring them to leave the area. Nor is consideration given to stopping use by nationals of the Occupying Power of a highway built, according to the declaration of the authorities themselves, for the benefit of the local Palestinian population. It has been argued that the way in which the Court has employed the proportionality test has in fact weakened the protection of the rights of protected persons in occupied territory.<sup>110</sup>

Use of the proportionality test must also be seen against the background of the tendency of the Court to prefer interpretations of the law that allow the authorities some degree of discretion to those that mandate or prohibit certain acts. In the *Abu Safiyeh* case,<sup>111</sup> mentioned above, the Court ruled that the commander did not have the authority to exclude Palestinian vehicles from a highway that was ostensibly built for the benefit of the local population. Had it stood on its own, this

107 *Ibid.*, paras. 84–85.

108 *Alpei Menashe* case, above note 20, pp. 553–554. In HCJ 9593/04, *Moraar v. IDF Commander in Judea and Samaria*, 2006 *Dinim* (38), p. 345, the Court referred to the first prong of the proportionality test, namely the requirement for a rational connection between the measure and its security purpose. The Court held that a measure that is arbitrary, unfair, or illogical does not meet this requirement. Thus, imposing restrictions on the movement of Palestinians in order to protect them from potential violence by settlers was not a proportionate measure.

109 *Abu Safiyeh* case, above note 89.

110 Guy Harpaz and Yuval Shany, 'The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law', in *Israel Law Review*, Vol. 43, 2010, pp. 514–550.

111 *Abu Safiyeh* case, above note 89.



would have been a powerful statement. However, the Court saw fit to provide an alternative explanation for the illegality of the commander's decision: it did not meet the test of proportionality. As has been shown by others, the approach to proportionality adopted in this case largely undermined the protection afforded to the local population for whose benefit the highway had ostensibly been constructed.<sup>112</sup>

One of the problematical consequences arising from the dominant place that the three-pronged proportionality test now plays in jurisprudence of the Supreme Court in general, and in its jurisprudence regarding the law of occupation in particular, is the Court's tendency to ignore or gloss over issues of legal authority in favour of judging governmental action in terms of proportionality. This may be discerned in two cases mentioned above. In the *Quarries case*,<sup>113</sup> the issue was the legal authority of the military commander to permit Israeli companies to open and operate new quarries from which they would extract stone, a non-renewable natural resource. While not mentioning the proportionality test by name, the Court held that, since the amount of stone quarried, in relation to the quarrying potential on the West Bank, was small, the quarrying should be regarded as use of fruits rather than depletion of capital resources. But, as noted above, if the commander may not permit new quarries, the issue of degree (or proportionality) is irrelevant. Similarly, in the *Abu Safiyeh* case the Court held that the commander lacked the legal authority to exclude Palestinian vehicles from using Highway 443.<sup>114</sup> Again, as noted above, by introducing the proportionality test as alternative grounds for overruling the commander's decision, the Court weakened the impact of its ruling that the commander had exceeded his authority.<sup>115</sup>

One comes across a similar situation in the first case in which the Court employed the proportionality test in examining a decision of a military commander in the OT. The case related to the punitive demolition of a house after one of its residents had been involved in a terrorist attack.<sup>116</sup> While the Court had on previous occasions refused to interfere with similar decisions of the military commander,<sup>117</sup> in two dissenting opinions one justice on the Court had opined that demolishing a house in which persons not belonging to the nuclear family of the culprit lived would be a form of collective punishment.<sup>118</sup> As such it would exceed the legal authority of the military commander. In the case under consideration, the Court accepted that the commander could not demolish a house if it would mean

112 See G. Harpaz and Y. Shany, above note 110. The writers argue that by including the interests of Israeli commuters on the road when assessing the proportionality of the commander's decision to prohibit use of the road by Palestinian vehicles the Court expanded the powers of a military commander in occupied territory.

113 *Quarries case*, above note 57.

114 *Abu Safiyeh case*, above note 89.

115 See G. Harpaz and Y. Shany, above note 110.

116 HCJ 5510/92, *Turkmahn v. Minister of Defence*, 48(1) PD, p. 217, 1992.

117 See D. Kretzmer, above note 2, pp. 145–163.

118 See the dissenting opinions of Justice Cheshin in HCJ 5359/91, *Khisrahn v. IDF Commander in Judea and Samaria*, 46(2) PD, p. 150, 1992; HCJ 2722/92, *Alamarin v. IDF Commander in Gaza*, 46(3) PD, p. 693.

destroying the home of families other than the nuclear family of the bomber.<sup>119</sup> But, rather than basing this on lack of legal authority, the Court preferred to hold that such a decision would not meet the demands of proportionality.

In conclusion, in adopting the three-pronged test of proportionality in order to assess military necessity the Court has introduced a novel notion into international humanitarian law. While this notion allows for judicial supervision of the way in which military commanders use their discretion in occupied territory, and in the Israeli case has on occasion been employed in order to restrain use of such discretion, the notion may be overused and abused. The Court may employ the notion where it would be more appropriate to examine questions of legal authority. It may also widen the interests to be considered in assessing proportionality, thereby also widening the powers of the commander in occupied territory.

## Hostilities in occupied territories

The Occupying Power has the duty to ensure public order in the occupied territory. In doing so it must exercise 'policing powers'. Its rules of engagement must be consistent with such powers and with the relationship between a government and a civilian population.<sup>120</sup> What is the situation if hostilities break out in the occupied territory between organized armed groups and the forces of the Occupying Power? Which rules apply to the conduct of the Occupying Power in dealing with such hostilities – those of 'policing' or 'law enforcement', or those relating to conduct of hostilities in armed conflict?

Opinions are divided on these questions. Some seem to think that in occupied territory only the policing rules of ensuring public order can apply, and that existence of armed hostilities in the area can have no influence on the applicable legal regime. Thus, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall*, the ICJ failed to address the question of whether there were hostilities on the West Bank, and if so whether these hostilities could be relevant in deciding which legal norms applied.<sup>121</sup> Consequently, it opined that Article 23 of the Hague Regulations, which appears in the section of those regulations relating to hostilities, was inapplicable in deciding on the legality of seizing property.<sup>122</sup> Others clearly distinguish between the rules that apply in the law enforcement (policing) functions of the Occupying Power and those that apply to active hostilities.<sup>123</sup>

Soon after violence broke out in the OT in September 2000, the Judge Advocate of the IDF declared that the situation in the OT was now one of 'armed

119 *Turkmahn* case, above note 116.

120 See Kenneth Watkin, 'Maintaining Law and Order during Occupation: Breaking the Normative Chains', in *Israel Law Review*, Vol. 41, 2008, pp. 175–200.

121 See D. Kretzmer, above note 85.

122 *Legal Consequences of the Construction of the Wall*, above note 18, para. 124.

123 See K. Watkin, above note 120; Y. Dinstein, above note 1, pp. 99–101.

conflict short of war'.<sup>124</sup> The idea was that, given the scope and intensity of violence, the situation was now one of active hostilities in an armed conflict, rather than 'mere' occupation. This approach was adopted by the Government of Israel in its submissions to the Mitchell Commission, which was established to look into the causes of the violence.<sup>125</sup> The Supreme Court accepted the classification of the situation in the OT as one of active hostilities.<sup>126</sup> In doing so it relied on one of the criteria used to assess whether an internal armed conflict exists, namely the scope and degree of armed violence involved.<sup>127</sup> The Court has never examined the second criterion for making such an assessment – the degree of organization behind the armed violence.

In the *Alpehi Menashe* case,<sup>128</sup> the Court noted that in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall* the ICJ opined that Article 23(g) of the Hague Regulations was not applicable, since it appears in the section dealing with 'hostilities'. The Court took issue with this view on two grounds: first, the view held by some experts that the scope of Article 23(g) can be widened so as to include occupied territory; and second, that the situation in occupied territory is not static: 'Periods of tranquillity and calm transform into dynamic periods of combat'.<sup>129</sup> The Court emphasized that the rules applying to such combat will be the rules applying to hostilities in armed conflict.<sup>130</sup> Having said this, the Court did not expressly rule that the law that applied to seizure of property for construction of the separation barrier was the law of hostilities, 'since the general authority granted the military commander pursuant to Regulations 43 and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention are sufficient, as far as construction of the fence goes'.<sup>131</sup>

The potential clash between norms relating to conduct of hostilities and those relating to control of occupied territories has engaged the Supreme Court on a number of occasions.<sup>132</sup> In these cases, that Court has attempted to maintain the principle that, even when hostilities are taking place, the military commander retains his obligation to ensure the welfare of the local civilian population.<sup>133</sup> In the

124 See Giora Eiland, 'The IDF in the second *intifada*: conclusions and lessons', in *Strategic Update*, Vol. 13, No. 3, 2010, pp. 27–37, available at: [http://www.inss.org.il/upload/\(FILE\)1289896504.pdf](http://www.inss.org.il/upload/(FILE)1289896504.pdf). In blue and hyperlinked (last visited 2 July 2012). It has never been clear why the words 'short of war' were added. The idea was probably to make clear that the armed conflict was not one of an international character.

125 See Report of the Sharm el-Sheikh Fact-finding Committee (the Mitchell Report), citing statements submitted by the Government of Israel, available at: [http://www.mideastweb.org/mitchell\\_report.htm](http://www.mideastweb.org/mitchell_report.htm) (last visited 22 May 2012).

126 *Ajuri* case, above note 20, pp. 358–359; *Targeted Killings* case, above note 20.

127 *Ajuri* case, above note 20. The Court listed the number of attacks on Israel and Israeli nationals, and the number of casualties that had been caused since violence started in October 2000.

128 *Alpehi Menashe* case, above note 20.

129 *Ibid.*, para. 17.

130 *Ibid.*

131 *Ibid.*

132 For a principled discussion of this issue, see K. Watkin, above note 120.

133 The main judgment on this question was handed down in HCJ 4764/04, *Physicians for Human Rights v. Commander of the IDF in the Gaza Strip*, Judgment, 30 May 2004, English translation available at: <http://62.90.71.124/eng/verdict/framesetSrch.html> (last visited 22 May 2012). For a detailed review of the

*Marab* case,<sup>134</sup> the Court reviewed the issue of detention during hostilities. It held that, even though it is not possible to conduct judicial review of such detention in the area of the hostilities themselves, once the detainees have been removed from that area the legality of their detention should be subject to judicial review and the detainees should have the right to consult a lawyer.

Following complaints by non-governmental organizations regarding use of Palestinians as ‘human shields’ during the 2002 IDF ‘Defensive Shield’ campaign on the West Bank, the IDF issued orders totally prohibiting use of Palestinian residents as human shields or hostages. However, the orders still allowed military commanders to enlist the assistance of Palestinian residents who agreed to do so to warn neighbours that an IDF force had come to arrest them, provided that the commander assessed that no danger to the life or body of the residents was involved.<sup>135</sup> The authorities argued that this practice reduced the number of casualties among Palestinians.<sup>136</sup> Nevertheless, the Court held that for a number of reasons the practice was unlawful: from the principle in Article 51 of the Fourth Geneva Convention prohibiting enlistment of protected persons to serve in the armed forces of the Occupying Power the Court deduced that it was also prohibited to enlist their help; the Occupying Power has a duty to keep the local population away from military operations; it was doubtful, given the disparity in power relations, whether real consent of the Palestinian residents could be obtained; and finally, it was impossible to know in advance whether the life of the Palestinian resident would be endangered.<sup>137</sup> This is one of the few cases in which the HCJ has ruled that a practice which the authorities claimed justified on security grounds was incompatible with IHL. It is also one of the few decisions in which the Court has prohibited a practice entirely, rather than leaving discretion to the authorities that it should be exercised in a proportionate manner.

The parallel application of norms relating to belligerent occupation and those relating to conduct of hostilities has also been relevant when dealing with the question of targeted killing of suspected terrorists. When, if at all, a state may use lethal force against a suspected terrorist who is not at the time engaged in violent activities has been the subject of much academic discussion since the 11 September 2001 terrorist attacks on the United States.<sup>138</sup> While the HCJ was at first reluctant to deal with the issue,<sup>139</sup> in 2006 it delivered a reasoned judgment devoted

cases, see David Kretzmer, ‘The Supreme Court of Israel: Judicial Review During Armed Conflict’, in *German Yearbook of International Law*, Vol. 47, 2004, pp. 392–456.

134 *Marab* case, above note 21.

135 HCJ 3799/02, *Adalah* et al., v. *Officer Commanding IDF Central Command* et al., 60(3) PD, p. 67, 2006.

136 *Ibid.*, para. 3.

137 *Ibid.*, para. 24.

138 For the most comprehensive discussion of this topic, see Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008. See also David Kretzmer, ‘Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Self-Defence?’, in *European Journal of International Law*, Vol. 16, No. 2, 2005, pp. 171–212; Orna Ben-Naftali and Keren Michaeli, ‘“We Must Not Make a Scarecrow of the Law”: A Legal Analysis of the Israeli Policy of Targeted Killings’, in *Cornell International Law Journal*, Vol. 36, 2003, pp. 233–292.

139 See HCJ 5872/01, *Barakeh* v. *Prime Minister*, 56(3) PD, p. 1, 2002, in which the Court dismissed a petition relating to the issue as non-justiciable.

to it.<sup>140</sup> The Court's judgment has been discussed, analysed, and criticized elsewhere,<sup>141</sup> and I shall therefore confine my remarks to the matter under discussion here.

The Court assessed the legality of targeting specific individuals under the norms relating to conduct of hostilities. It held that members of armed Palestinian groups are civilians who may only be attacked when taking a direct part in hostilities. Having set this legal framework, and adopting a wide interpretation both of 'direct participation in hostilities' and of the time-frame in which a person may be said to be taking direct part in hostilities, the Court laid down certain constraints on the use of lethal force against such persons. The first constraint is that force may not be used if other less harmful means can be employed. While it has been questioned whether such a condition exists in the law of armed conflict,<sup>142</sup> the Court based its view on the notion of proportionality, which it regards as an overriding principle that applies to all uses of governmental power. It admitted that the feasibility of alternative means of neutralizing the threat – namely arrest and detention – does not exist in many combat situations. But it saw fit to add that it is

a possibility which should always be considered. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities (see §5 of the Fourth Geneva Convention).<sup>143</sup>

It is not at all clear to the present writer what the relevance of Article 5 of the Fourth Geneva Convention is to the issue under consideration. Be that as it may, the Court reveals here the potential conflict between a regime of belligerent occupation and one of conduct of hostilities in an armed conflict. The defining feature of occupied territory is that it is under the effective control of the army of the Occupying Power. The fact that hostilities are taking place that meet the level and scope of armed violence and organization for them to be regarded as an armed conflict rather than riots or disturbances does not of itself mean that the Occupying Power has lost its effective control over the area. It retains its duties as an Occupying Power.<sup>144</sup> The members of armed groups fighting against it have a dual status: on the one hand, they are protected persons; on the other hand, they are either civilians taking direct part in hostilities or 'non-privileged combatants'. It seems to me that,

140 *Targeted Killings* case, above note 20.

141 For discussion of various aspects of the Court's decision, see the articles in the *Journal of International Criminal Justice*, Vol. 5, No. 2, 2007: Roy S. Schondorf, 'The *Targeted Killings* Judgment: A Preliminary Assessment', pp. 301–309; Amichai Cohen and Yuval Shany, 'A Development of Modest Proportions: The Application of the Principle of Proportionality in the *Targeted Killings Case*', in *Journal of International Criminal Justice*, Vol. 5, No. 2, 2007, pp. 310–321; Orna Ben-Naftali, 'A Judgment in the Shadow of International Criminal Law', pp. 322–331; William J. Fenrick, 'The *Targeted Killings* Judgment and the Scope of Direct Participation in Hostilities', pp. 332–338; Antonio Cassese, 'On Some Merits of the Israeli Judgment on Targeted Killings', pp. 339–345. See also O. Ben-Naftali, above note 2, pp. 171–177.

142 *Targeted Killings* case, above note 20.

143 *Ibid.*, para. 40.

144 See Y. Dinstein, above note 1, p. 100.

even if it may be doubted whether the balance demanded by the Court applies in all situations of armed conflict,<sup>145</sup> in situations of belligerent occupation it does provide a way of reducing the tension between the two functions of the Occupying Power's military.

## Concluding comments

The Israeli occupation has gone on for a long time – far too long, in fact, for it to be regarded as a normal situation of occupation.<sup>146</sup> It would be naïve to think that a domestic court could deal with such an anomalous situation as if it were an outside, neutral, observer that is oblivious to the political realities in its own country. While commentators may be highly critical, and justifiably so, of the approach of the HCJ on many questions, including, of course, its refusal to rule on the legality of Israeli settlements, it should be appreciated that in Israel itself the Court has been under attack. Its willingness to review all actions of the military authorities – and occasionally to interfere with security decisions – has not been well received in many quarters and has affected the legitimacy of the Court in the eyes of large sections of the Israeli public.

In stressing the centrality of Article 43 of the Hague Regulations, in ruling that military commanders must find a balance between military needs and the welfare of the local population, and in subjecting this balance to the test of proportionality, the Court has helped to develop the law of belligerent occupation. Without belittling this contribution, it seems to me that the Court's real contribution to occupation law lies not on the substantive level but in its very willingness to subject acts of the military authorities in occupied territory to judicial review in real time. Such review has been a welcome innovation. It has had a restraining effect on the acts of the authorities that cannot be judged solely by looking at the Court's jurisprudence. In many cases, the threat of judicial review, submission of a petition, or remarks of the judges during the hearings have led the authorities to reconsider their position and back down, wholly or partially.<sup>147</sup> Alongside this significant restraining influence of judicial review, requiring the military authorities to defend their actions in court on the basis of the norms of the international law of belligerent occupation, and discussing these norms in a judicial forum, may well be the Court's main contribution to law in a situation of belligerent occupation.

145 See A. Cohen and Y. Shany, above note 141.

146 See O. Ben-Naftali, above note 2.

147 See D. Kretzmer, above note 2, pp. 189–191.

# Transformative occupation and the unilateralist impulse

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## **Abstract**

*The 2003 occupation of Iraq ignited an important debate among scholars over the merits of transformative occupation. An occupier has traditionally been precluded from making substantial changes in the legal or political infrastructure of the state it controls. But the Iraq experience led some to claim that this ‘conservationist principle’ had been largely ignored in practice. Moreover, transformation was said to accord with a variety of important trends in contemporary international law, including the rebuilding of post-conflict states along liberal democratic lines, the extra-territorial application of human rights treaty obligations, and the decline of abstract conceptions of territorial sovereignty. This article argues that these claims are substantially overstated. The practice of Occupying Powers does not support the view that liberal democratic transformations are widespread. Human rights treaties have never been held to require states parties to legislate in the territories of other states. More importantly, the conservationist principle serves the critical function of limiting occupiers’ unilateral appropriation of the subordinate state’s legislative powers. Post-conflict transformation has indeed been a common feature of post-Cold War legal order, but it has been accomplished collectively, most often via Chapter VII of the UN Charter. To grant occupiers authority to reverse this trend by disclaiming any need for collective approval of ‘reforms’ in occupied states would be to validate an anachronistic unilateralism. It would run contrary to the multilateralization of all aspects of armed conflict, evident in areas well beyond post-conflict reconstruction.*

**Keywords:** transformative occupation, conservationist principle, legislative authority, Article 43 of the Hague Regulations, extra-territorial application of human rights.



Shortly after the United States and United Kingdom began their occupation of Iraq in April 2003, the two governments announced an ambitious program of reform. The occupiers' governing authority, the Coalition Provisional Authority (CPA), declared that it would exercise 'all executive, legislative and judicial authority' in Iraq to advance 'efforts to restore and establish national and local institutions for representative governance and facilitat[e] economic recovery and sustainable reconstruction and development'.<sup>1</sup> In the fourteen months that followed, the CPA pursued these goals with abandon, issuing decrees that fundamentally remade Iraq's legal, political, military, and economic institutions.<sup>2</sup> If one looked only at Iraq's written law, one might conclude that in just over a year the country had been transformed from an authoritarian one-party state with a centrally planned economy to a liberal democracy with one of the most permissive free-market systems in the world.

The Iraqi reforms posed a dilemma for international lawyers. On the one hand they presented a direct challenge to the traditional law of belligerent occupation. As codified in the 1907 Hague Regulations and the Fourth Geneva Convention of 1949, occupation law casts occupying powers as mere trustees who do not assume the legislative competence of ousted *de jure* sovereigns.<sup>3</sup> Article 43 of the Hague Regulations famously requires occupiers to respect the laws in force in the country 'unless absolutely prevented'.<sup>4</sup> This 'conservationist principle', which limits the occupier's legislative authority, demarcates a critical boundary between occupation and annexation.<sup>5</sup> Occupiers enjoy limited legislative authority because they lack full sovereign rights over the territory, something annexation would presumably supply. But annexation is profoundly antithetical to contemporary international law.<sup>6</sup> In the traditional view, therefore, a 'reformist occupation' is a virtual oxymoron. As the UK Attorney General concluded on the eve of the Iraqi

1 The Coalition Provisional Authority, 'Coalition Provisional Authority Regulation Number 1', 16 May 2003, CPA/REG/16 May 2003/01, sec. 1(2), available at: <http://www.iraqcoalition.org/regulations/> (last visited 15 March 2012).

2 Special Inspector-General for Iraq Reconstruction, *Hard Lessons: The Iraq Reconstruction Experience*, U.S. Government Printing Office, Washington, DC 2009, p. 326: '[t]he CPA adopted a maximalist approach to reconstruction, developing plans to transform every aspect of Iraqi society, from the banking system to traffic laws'; E. Anthony Wayne, Assistant Secretary for Economic and Business Affairs, Testimony Before the Senate Banking Subcommittee on International Trade and Finance, 11 February 2004, available at: <http://2001-2009.state.gov/e/eeb/rls/rm/29288.htm> (last visited 15 March 2012): 'U.S. assistance is predicated on and directed toward reforming Iraq's society and economy. A new, prosperous, peaceful Iraq must be a democratic, free enterprise Iraq, fully integrated into the community of nations.' For a detailed description of the CPA reforms, see Gregory H. Fox, 'The occupation of Iraq', in *Georgetown Journal of International Law*, Vol. 36, No. 2, 2005, p. 197.

3 Regulations Respecting the Laws and Customs of War on Land, annex to Convention [IV] Respecting the Laws and Customs of War on Land, 18 October 1907 (hereafter Hague Regulations), Art. 43; Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (hereafter GV IV), Art. 64.

4 Article 43 provides in full, 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety [civil life], while respecting, *unless absolutely prevented*, the laws in force in the country' (emphasis added).

5 Gregory H. Fox, *Humanitarian Occupation*, Cambridge University Press, Cambridge, 2008, pp. 233–237.

6 See generally, Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice*, Clarendon Press, Oxford, 1996.



invasion, 'wide-ranging reforms of governmental and administrative structures would not be lawful'.<sup>7</sup>

This is not to say that an occupier is without legislative authority. That authority may be quite broad and permit a wide range of changes to local law, but the capacity to legislate must be commensurate with the temporary nature of occupation. Reforms deemed necessary to the tasks of occupation administration or to avoid the occupier enforcing local laws that infringe fundamental human rights are, in this view, necessary consequences of an occupier assuming temporary political authority. That is, they are essential to occupation being both effective and humane. There is even a plausible argument that an occupation lasting for many years (read Israel's) may require more extensive reforms since, as Adam Roberts observes, '[d]uring a long occupation, many practical problems may arise that do not admit of mere temporary solutions based on the idea of preserving the status quo ante'.<sup>8</sup> But reforms explicitly designed to outlast the occupation and address problems unrelated to the occupier's immediate security or governance concerns are not justifiable on ground that they are necessary for efficient administration during the occupation. Instead, as Nehal Bhuta puts it, transformative occupation derives its legitimacy 'from the promise of the order to come'.<sup>9</sup> Such an occupation – again in the traditional view – appropriates legislative authority properly reserved for a locally chosen government that will follow the occupier's departure.<sup>10</sup>

But the transformation of Iraq was not without normative roots.<sup>11</sup> The Iraq reforms seemed to resonate with many important trends in contemporary international law. They explicitly promoted human rights and democratic governance. They sought to bring political stability to a state emerging from armed conflict and years of authoritarian rule, a set of tasks now regularly undertaken by the United Nations and various regional organizations. They sought to open the Iraqi economy to foreign investment and greater integration within the global economy. They seemed consistent with the trajectory of occupation law more generally, which began as a means of securing the military objectives of European powers (though not when they operated outside Christian Europe) but moved in the

7 John Kampfner, 'Blair was told it would be illegal to occupy Iraq', in *New Statesman*, 26 May 2003, pp. 16–17 (reprinting Memorandum from The Rt. Hon. Lord Goldsmith, QC to the Prime Minister, dated 26 March 2003).

8 Adam Roberts, 'Prolonged military occupation: the Israeli-occupied territories since 1967', in *American Journal of International Law*, Vol. 84, No. 1, 1990, p. 52.

9 Nehal Bhuta, 'The antinomies of transformative occupation', in *European Journal of International Law*, Vol. 16, No. 4, 2005, p. 737 (italics omitted).

10 Even the Israeli Supreme Court, which has regularly upheld changes to laws in the Palestinian territories, recognized the illegitimacy of future-oriented reforms. In the *Elon Moreh* case the Court concluded that 'no military government may create in its area facts for its military purposes that are intended from the very start to exist even after the termination of military rule in that area, when the fate of the territory after the termination of the military rule is unknown'. High Court of Justice (HCJ) 390/79, *Dweikat et al. v. Government of Israel et al.*, 1979, 34(1) PD 1, 22.

11 For a creative effort to characterize the Iraq transformation not as regime change but as a by-product of legitimate security-related reforms, see Michael N. Schmitt and Charles H. B. Garraway, 'Occupation policy in Iraq and international law', in Harvey Langholtz, Boris Kondoch, and Alan Wells (eds), *International Peacekeeping: The Yearbook of International Peace Operations*, Vol. 9, 2004, pp. 27, 36, n. 54 ('democratization may certainly be a fortuitous by product of valid security actions, as it is in this case').

post-World War II era to provide a ‘bill of rights’ to inhabitants of all occupied territories.<sup>12</sup> And the Iraqi reforms seemed to confirm the common observation that for most of its history the conservationist principle has been observed only in the breach, flouted and ignored so frequently that its prescriptions bear little relation to state practice of the past few decades.<sup>13</sup> According to this view, the CPA’s blatant disregard for the conservationist principle simply affirmed its anachronism in an age when external reform of national institutions – particularly of the liberal democratic variety – is a common and widely accepted practice.<sup>14</sup>

Each of these arguments figured prominently in the outpouring of scholarly commentary on occupation law in the years following the invasion of Iraq.<sup>15</sup> Professor Adam Roberts introduced the term ‘transformative occupation’ to describe Iraq and other occupations ‘whose stated purpose (whether or not actually achieved) is to change states that have failed, or have been under tyrannical rule’.<sup>16</sup> Much of the commentary recognized the novelty of transformative occupation: unlike earlier innovations such as the Fourth Geneva Convention that sought to protect the population of occupied states from depredations by occupiers,

- 12 Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, 1993, p. 105; Grant T. Harris, ‘The era of multilateral occupation’, in *Berkeley Journal of International Law*, Vol. 24, No. 1, 2006, pp. 15–19; N. Bhuta, above note 9, pp. 728–729.
- 13 N. Bhuta, above note 9, p. 734; Major Breven C. Parsons, ‘Moving the law of occupation into the twenty-first century’, in *Naval Law Review*, Vol. 57, 2009, No. 1, pp. 14–15.
- 14 As one CPA legal advisor put it, ‘[a]t the very least . . . whatever customary law Article 43 purported to declare in 1907, that law appears to have been overtaken by history and the new norms of state-building in failed and post-conflict states’. Brett H. McGurk, ‘Revisiting the law of nation-building: Iraq in transition’, in *Virginia Journal of International Law*, 2004–2005, Vol. 45, pp. 451, 459.
- 15 In addition to the works already cited, the literature includes Ralph Wilde, ‘Complementing occupation law? Selective judicial treatment of the suitability of human rights norms’, in *Israel Law Review*, Vol. 42, No. 1, 2009, pp. 80–100; Eyal Benvenisti, ‘The origins of the concept of belligerent occupation’, in *Law and History Review*, Vol. 26, No. 3, 2008, pp. 621–648; Noemi Gal-Or, ‘Suspending sovereignty: reassessing the interlocking of occupation, failed and fragile state, responsibility to protect, and international trusteeship (lessons from Lebanon)’, in *Israel Law Review*, Vol. 41, 2008, pp. 302–330; Kenneth Watkin, ‘Maintaining law and order during occupation: breaking the normative chains’, in *Israel Law Review*, Vol. 41, 2008, p. 175–200; Aeyal M. Gross, ‘Human proportions: are human rights the emperor’s new clothes of the international law of occupation?’, in *European Journal of International Law*, Vol. 18, No. 1, 2007, pp. 1–35; Hamada Zahawi, ‘Redefining the laws of occupation in the wake of Operation Iraqi “Freedom”’, in *California Law Review*, Vol. 95, No. 6, 2007, pp. 2295–2352; Ebrahim Afsah, ‘Limits and limitations of power: the continued relevance of occupation law’, in *German Law Journal*, Vol. 7, No. 6, 2006, pp. 563–590; John Cerone, ‘Human dignity in the line of fire: the application of international human rights law during armed conflict, occupation, and peace operations’, in *Vanderbilt Journal of Transnational Law*, Vol. 39, 2006, pp. 1447–1510; Steven R. Ratner, ‘Foreign occupation and international territorial administration’, in *European Journal of International Law*, Vol. 16, No. 4, 2005, pp. 695–719; Marco Sassòli, ‘Legislation and maintenance of public order and civil life by occupying powers’, in *European Journal of International Law*, No. 16, No. 4, 2005, pp. 661–694; David W. Glazier, ‘Ignorance is not bliss: the law of belligerent occupation and the U.S. invasion of Iraq’, in *Rutgers Law Review*, Vol. 58, No. 1, 2005, pp. 121–194; Marten Zwanenburg, ‘Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation’, in *International Review of the Red Cross*, Vol. 86, No. 856, 2004, pp. 745–769; Bartram S. Brown, ‘Intervention, self-determination, democracy and the residual responsibilities of the occupying power in Iraq’, in *UC Davis Journal of International Law & Policy*, Vol. 11, No. 1, 2004, pp. 23–73; Mahmoud Hmoud, ‘The use of force against Iraq: occupation and Security Council Resolution 1483’, in *Cornell International Law Journal*, Vol. 36, No. 3, 2004, pp. 435–454.
- 16 Adam Roberts, ‘Transformative military occupation: applying the laws of war and human rights’, in *American Journal of International Law*, Vol. 100, No. 3, 2006, p. 580.

transformative occupation sought to legitimize *rights-enhancing* acts of legislative and constitutional change. Transformative occupation has thus been viewed as involving transformation *away* from repressive closed political systems and *towards* democratic systems that more closely adhere to international standards of governance and individual rights. From this perspective, the countervailing policies represented by the conservationist principle seemed weak indeed. Conserving existing law makes sense when the alternative is repression or even plunder by an occupier. But when the alternative is greater protection of human rights and the introduction of democratic politics, the principle appears regressive and even anachronistic.

These are compelling arguments. In this article I will suggest that they are almost all overstated, in some cases substantially so. The exaggerated nature of the conservationist principle's reported demise is critical in assessing the shifting normative expectations described by the principle's critics. Viewed in isolation, these claims might suggest that the conservationist principle survives with only a tenuous link to the policy assumptions, surrounding doctrines, and factual underpinnings of current international law. But I would like to argue that the conservationist principle retains a critical utility in contemporary law, indeed so critical that, I will argue, a presumption should exist against its demise or replacement by a doctrine of transformative occupation. The exaggerated nature of the criticism suggests that this presumption has not been rebutted in any convincing manner.

One certainly cannot deny that expectations for occupations have radically changed. Despite being outsiders to the territories, occupiers cannot be indifferent to the plight of citizens and so cannot treat their control as no more than an opportunity to bargain with the ousted regime over the terms of its return. The days of occupation as a means to secure the prerogatives of political elites are over, as they are for almost all aspects of armed conflict. But it is one thing to say that occupiers should refrain from neglecting or mistreating inhabitants. It is another to grant them licence to become agents of constitutional revolutions, which was effectively what occurred in Iraq. That task cannot be left to the unilateral discretion of a single state.

In summary, I argue the following. One of the singular achievements of the post-Cold War era has been a move toward realizing the UN Charter's goal of multilateralizing armed conflict. In particular, reconstruction of post-conflict states is now a regular feature of Security Council resolutions, under Chapter VII of the Charter. In assuming the role of an agent for change in post-conflict societies, the Council has performed a critical sorting function: it has *legitimized collective* involvement in matters of governance and social relations that sit at the heart of states' domestic prerogatives, and it has *delegitimized unilateral* efforts to the same ends. Enshrining transformative occupation into doctrine threatens to reverse that hard-won legitimacy, for its only consequence would be to empower *unilateral* state occupiers.

Such a costly step, whatever its purported benefits, should come only after clear and convincing evidence that the conservationist principle has been

thoroughly eroded. That appears lacking. While occupation law more generally has often been honoured in the breach, Iraq literally stands alone as the only example in the post-Cold War era of a liberal and democratic transformative occupation. While some commentators seek to include multilateral post-conflict missions on the list of transformative occupations – a move that would make the practice appear quite common and widely accepted – conflation of multilateral and unilateral transformative projects is highly problematic. The former arose in large part in order to delegitimize the latter. Finally, while the extra-territorial application of human rights obligations is now increasingly accepted, those instruments provide a mandate for legislative change only in a narrow set of circumstances. Those circumstances have yet to find their way before an international court or treaty body, none of which has found human rights instruments to provide a mandate for extra-territorial legislative action.

## How transformation challenges occupation law: refining the problem

The challenge that transformative occupation presents to the conservationist principle is quite unlike the problems previously faced by occupation law. Much of the commentary on transformative occupation misses this disjunction, describing a steady erosion of occupation norms through the second half of the twentieth century, culminating in the wholesale transformation of Iraqi in 2003. Iraq plays such a prominent role in these analyses precisely because it is linked to this prior history.

The Fourth Geneva Convention (and its elaboration in Additional Protocol I) was the last major innovation in occupation law. Geneva law has famously been described as providing a ‘bill of rights’ for the occupied population.<sup>17</sup> After two world wars in which occupiers committed widespread brutalities and sought to bend local law to their own interests, the obvious priority for the treaty’s drafters was to strengthen individual rights protections in the territories.<sup>18</sup> That it did. Seeking to remedy the inadequacies of Hague law, its numerous restraints assumed an occupier unconcerned, to say the least, with the welfare of individuals.<sup>19</sup>

17 E. Benvenisti, above note 12, p. 105.

18 Theodor Meron, ‘The humanization of humanitarian law’, in *American Journal of International Law*, Vol. 94, No. 2, 2000, p. 245 : ‘[t]he Fourth Geneva Convention reflects the felt need to enhance the protection of individuals and populations, especially in occupied territories’. Introducing commentary on the new occupation norms, Pictet summarized the recent history that the Convention was designed to address: ‘[d]uring the Second World War whole populations were excluded from the application of the laws governing occupation and were thus denied the safeguards provided by those laws and left at the mercy of the Occupying Power’. Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross (ICRC), Geneva, 1958, Art. 47, p. 273.

19 Rights protections are dispersed throughout the Fourth Geneva Convention and include protections from discrimination (Art. 27), impositions on honour and dignity (Art. 27), physical or moral coercion (Art. 31), physical suffering (Art. 32), collective punishments (Art. 33), intimidation, retribution, the taking of hostages or pillage (Arts. 33 and 34), mass or individual forced transfers (Art. 49), compulsion to

But transformative occupation does not involve an occupier who seeks to subordinate local institutions, citizens, and resources to its own self-interested goals. It rather assumes an occupier attempting to *enhance* individual rights, build and strengthen local institutions, and increase the occupied state's capacity to use and capitalize on its natural resources (or at least attempt to do these things). This is because reform of the territory is central to both the occupier's initial decision to use force (regulated by the *jus ad bellum*) and its conduct once it gains control over the territory (regulated by *jus in bello*). In other words, a transformative occupier does not seek a purely geostrategic objective in its use of force, one in which occupation appears as merely a phase of the armed conflict. Instead, transformation *accomplishes* the occupier's *jus ad bellum* objective. The traditional concern that an occupier may subordinate rights in the territory to broader military objectives is thus largely absent. Professor Roberts notes this changed rationale in his seminal article,

Put crudely, the traditional assumption of the laws of war is that bad (or potentially bad) occupants are occupying a good country (or at least one with a reasonable legal system that operates for the benefit of the inhabitants). In recent years, especially in some Western democratic states, various schools of thought have been based on the opposite idea, crudely summarized as good occupants occupying a bad country (or at least one with a bad system of government and laws).<sup>20</sup>

Roberts is entirely correct that distinguishing 'good' from 'bad' occupiers is a crude and imprecise distinction, but one that is necessary nonetheless. A rapacious ('bad') occupation is inconsistent with much of existing Geneva law. A transformative ('good') occupation can easily be seen as almost entirely consistent with rights-based Geneva norms. First, a transformative occupier commits no violation of the rights-enhancing provisions that are the distinctive feature of the legal era ushered in by the Fourth Geneva Convention. Its objectives are instead rights-enhancing. Second, a thorough transformation of law and political institutions is future-oriented, seeking as its primary goal not the restraint of an occupier's own propensity to violate rights but the creation of new institutions that will permanently enhance local political culture after the occupation ends. If Geneva law is indeed focused on individuals rather than the state as such,<sup>21</sup> it should present no obstacle to consolidating institutionalization of human rights protections for the time after the occupation ends.

Third, transformation takes as its model not the self-interested acts of predatory occupiers but the multilateral post-conflict reconstruction missions that

serve in the occupier's armed forces (Art. 51), destruction of personal property (Art. 53), altering the status of judges or other public officials (Art. 54), infringements on the free exercise of religion (Art. 58), executing those under 18 (Art. 68), *ex post facto* prosecutions (Art. 70), infringements on due process protections in criminal proceedings (Art. 71), and inhumane conditions for detainees (Art. 76).

20 A. Roberts, above note 16, p. 601.

21 J. S. Pictet, above note 18, Art. 47, p. 274 (the Fourth Geneva Convention's 'object is to safeguard human beings and not to protect the political institutions and government machinery of the State as such').

have proliferated in the last two decades.<sup>22</sup> These missions seek to avoid renewed conflict by creating an inclusive and pluralistic politics in the post-conflict state. Former antagonists can only co-exist peacefully if they can reasonably expect to find their views expressed in national policy. The only system capable of making such an assurance is pluralist democracy. The missions have thus advanced a broad range of majoritarian and counter-majoritarian initiatives designed to convert former military foes into political rivals. This view of ‘statebuilding as a foundation for peace-building’ is also broadly consistent with Geneva law.<sup>23</sup>

Viewed in this light, the case for transformative occupation seems compelling. It implicates none of the prohibitions in Geneva law, instead seeking to further the values embodied in that law. One might conclude that, at worst, apart from the conservationist principle, contemporary occupation law simply does not address transformation. No other provision of the Fourth Geneva Convention prevents an occupier from *enhancing* human rights protections over their prior state. As for the conservationist principle, it appears out of touch with important trends in cognate areas of international law – in particular the proliferation of post-conflict reconstruction missions and the universalization of human rights protections. What’s not to like about transformative occupation?

## Challenging the argument for transformative occupation

Thus conceived, transformative occupation is seen as promoting many widely accepted goals of contemporary international law: the protection of human rights, democratic transitions, post-conflict reconstruction, and the use of force for humanitarian ends. But does state practice actually support such a complete (or almost complete) retreat from the conservationist principle? A closer examination suggests that it does not. The following sections examine three areas of practice often invoked to support a nascent acceptance of transformative occupation: the practice of state occupiers, multilateral post-conflict missions, and the extra-territorial application of human rights treaties.

### State practice of occupiers

The flood of literature that followed the occupation of Iraq leaves the distinct impression that transformative occupations became common in the post-World War II era.<sup>24</sup> This is a highly misleading view. Few occupations in the post-World

22 See, e.g., B. C. Parsons, above note 13, pp. 15 and 16 (describing UN nation-building operations as ‘transformative occupations’ that have ‘impacted the modern law of occupation significantly’).

23 Roland Paris and Timothy D. Sisk, ‘Introduction: understanding the contradictions of postwar statebuilding’, in Roland Paris and Timothy D. Sisk (eds), *The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations*, Routledge, London and New York, 2009, p. 3.

24 Peter M. R. Stirk, *The Politics of Military Occupation*, Edinburgh University Press, Edinburgh, 2009, p. 203 (summarizing recent scholarship claiming that ‘the indifference of the Hague Regulations to the quality of local governance has given way to an age in which regime change is a primary intention of occupiers’); Nicholas F. Lancaster, ‘Occupation law, sovereignty, and political transformation: should the Hague

War II era have even attempted to bring about liberal democratic transformations. While the Iraq occupation certainly did so and produced a rich legal discourse in its wake, Iraq stands as an exceptional case in the universe of post-World War II occupations. The vast majority have been non-transformative and, when transformative, largely illiberal.

There have been nineteen unilateral occupations since 1945, including the immediate post-World War II cases of Germany, Japan, and Austria.<sup>25</sup> This number does not include UN-sponsored nation-building missions, which are addressed separately below.<sup>26</sup> Only four of these nineteen cases involved comprehensive liberal democratic transformations and three of those four cases (Germany, Japan, and Austria) occurred over sixty years ago in the aftermath of World War II. There is only one case of comprehensive liberal reform in the post-Cold War era in which humanitarian concerns were a significant motive for warfare: that of the United States in Iraq. Six cases involved non-liberal transformations: Turkey in Cyprus, Indonesia in East Timor, Vietnam in Cambodia, the Soviet Union in Afghanistan, Iraq in Kuwait, and Israel in the Palestinian territories.<sup>27</sup> In the remaining nine cases, no meaningful transformation occurred.<sup>28</sup> One study of new constitutional orders promulgated under occupation – a related but not entirely identical phenomenon to transformative occupation – found that constitutional change is overwhelmingly the work of a few leading military powers, some democratic and some not.<sup>29</sup> The authors conclude that ‘occupation constitutions should be seen as a

Regulations and the Fourth Geneva Convention still be considered customary international law’, in *Military Law Review*, Vol. 189, 2006, p. 90, (‘Current occupation practice . . . allows for much wider scope of legislation than permitted by the language of the Hague Regulations and Fourth Geneva Convention’); A. Roberts, above note 16, p. 588 (‘In many cases . . . occupants, for a wide variety of reasons, have changed laws in the occupied territory without incurring international criticism’). In Grant Harris’s summary view: ‘Changes in warfare have dramatically altered the nature of modern occupation. Occupations no longer consist of the victor simply leaving local law and institutions intact while temporarily holding the territory hostage for political or territorial concessions. Instead, humanitarian and regime change interventions flip the law of occupation on its head by: (1) making the occupation the end goal rather than a byproduct of the war; (2) undercutting the prime rationale for the creation of the traditional law of occupation; (3) embracing nation-building over the law of occupation; and (4) sometimes reversing the calculus of which power is considered to be “legitimate”’. G. T. Harris, above note 12, p. 33.

25 The cases of occupation discussed in this section are compiled and analysed in greater detail in Gregory H. Fox, ‘Exit and military occupations’, in Richard Caplan (ed.), *Exit Strategies and State Building*, Oxford University Press, Oxford, 2012, pp. 197–223.

26 See below, in the section ‘Inspiration from multilateral missions’.

27 See the discussion of Israel’s occupation below.

28 Soviet Union in Northern Iran (1941–1946), Soviet Union in Czechoslovakia (1968), Libya in Chad (1973), Syria in Lebanon (1976), Tanzania in Uganda (1979), United States in Grenada (1983), United States in Panama (1989), Uganda in the Democratic Republic of the Congo (1998), Ethiopia in Somalia (2006). See G. H. Fox, above note 25, pp. 201–203.

29 Zachary Elkins, Tom Ginsburg, and James Melton, ‘Baghdad, Tokyo, Kabul . . . : constitution making in occupied states’, in *William & Mary Law Review*, Vol. 49, No. 4, 2008, pp. 1139–1178. The authors define occupation constitutions as those ‘drafted or adopted in the extreme condition of one state having explicit sovereign power over another’ (*ibid.*, p. 1140). They have occurred in the majority of occupations: *ibid.*, p. 1152 (new constitutions in 42 of the 107 occupations are examined). The nature of these new constitutions varies widely: some are liberal and some not; some establish entirely new political institutions and some create variations on existing institutions; and some replicate the occupier’s political structures and some do not. Occupation constitutions are typically short-lived, with many barely outlasting the end of the occupation. *Ibid.*, pp. 1157 and 1158.

particular strategy of particular states, rather than a global phenomenon'.<sup>30</sup> In short, transformative occupation is very much the exception in a set of cases dominated by occupations that fit the traditional model comprehensively regulated by Hague and Geneva law.

Instead of examining the entire class of recent occupations, many authors focus only on the immediate post-World War II cases and two more recent high-profile cases: Israel in the Palestinian territories and the United States in Iraq.<sup>31</sup> Such a limited sample obviously cannot support the proposition that parties to the Hague and Geneva instruments have rejected the conservationist principle.<sup>32</sup> Even so, does this small subset of cases represent a unified legal phenomenon?

### *Germany, Austria, and Japan*

Though following very different paths, the occupations of Germany, Japan, and Austria obviously involved liberal democratic transformations. But three factors counsel hesitation in marshalling these cases to argue for the conservationist principle's demise. First, whereas the three western allies used their post-World War II occupations to bring democratic change, the Soviet Union did not. Indeed, if one looks beyond Soviet actions in its East German zone of occupation to its actions elsewhere in eastern Europe, post-World War II practice appears anything but uniformly liberal and democratic.<sup>33</sup> In this sense, the status of occupiers' legislative powers seems to share the stagnant quality that marked so much of international practice in peace and security law during the Cold War.

Second, even assuming the Western occupations launched a challenge to the conservationist principle, that challenge was not taken up when the international community codified occupation law in the light of post-World War II practice. This occurred twice. First, during drafting of the Fourth Geneva Convention of 1949, the United States proposed language that would have effectively validated its actions in Germany and Japan and given occupiers virtually unlimited legislative

30 *Ibid.*, p. 1153.

31 See, e.g., A. Roberts, above note 16, pp. 601–603 (discussion of 'Post-1945 occupations with a transformative purpose' skips from discussion of post-World War II occupations to 'International military actions since the end of the Cold War'); N. F. Lancaster, above note 24, p. 70 (in section on 'Occupations since 1949', discussing Israeli occupation as the only non-UN sanctioned case).

32 Subsequent practice of treaty parties is an accepted source of treaty interpretation. See Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties. But that practice must be 'consistent rather than haphazard and it should have occurred with a certain frequency'. Further, as Article 31(3)(b) itself provides, the practice must 'establish the agreement of the parties regarding its interpretation'. Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff Publishers, Leiden and Boston, 2009, p. 431. Given the reception of the Iraqi and Palestinian occupations by the rest of the international community, such agreement seems absent.

33 While the only other immediate post-World War II Soviet action meeting the definition of occupation occurred in northern Iran, Soviet influence in what became the Warsaw Pact countries soon brought about the demise of liberal democratic institutions. See generally, Tony Judt, *Postwar: A History of Europe since 1945*, Penguin Books, Hammersmith, 2006, pp. 165–196. Later Soviet occupations of Hungary (1956) and Czechoslovakia (1968) graphically illustrate the type of reforms that its occupations occasioned.



discretion.<sup>34</sup> The proposal was opposed by the Soviets, as well as several Western states, and was not adopted.<sup>35</sup> Instead, Article 64 of the Convention reiterated the conservationist principle, though the rights-enhancing provisions elsewhere in the Convention effectively abrogated it for their specific purposes. The second codification was Additional Protocol I of 1977, which addressed a series of occupation law issues. None of its provisions purported to modify the conservationist principle.

Third, the arguments used in the late 1940s to justify the post-World War II occupations have not aged well. Post-World War II Allied lawyers faced a daunting task in justifying de-Nazification in Germany and Austria and the new constitution for Japan drafted by General MacArthur. All appeared blatantly inconsistent with Hague law, a conclusion they strove mightily to avoid. The justifications that these lawyers devised, while clever and even plausible at the time, are hardly replicable today.<sup>36</sup> Most relied on *debellatio* and related principles appurtenant to the right of conquest.<sup>37</sup> In a widely cited article, for example, Robert Jennings argued that, because the victorious allies could have annexed Germany, they were also 'entitled to assume the rights of supreme authority unaccompanied by annexation; for the rights assumed by the Allies are coextensive with the rights comprised in annexation'.<sup>38</sup> These doctrines find scant support in contemporary international law, as they are wholly incompatible with the UN Charter's limitation on the aggressive use of force and affirmation of the sovereign equality of states. As a result, the post-World War II claims have dropped out of scholarly discussion and official justifications of state policy, which focus instead on the human rights-centred justifications examined here.<sup>39</sup> None of the post-World War II justifications are repeated in any of the now voluminous writings on transformative occupation. In short, the post-World War II

34 The US proposal would have replaced the then draft Article 55 with the following language: 'Until changed by the Occupying Power the penal laws of the occupied territory shall remain in force and the tribunals thereof shall continue to function in respect of all offenses covered by the said laws'. See Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff Publishers, Leiden and Boston, 2009, p. 118. The Soviet delegate objected that the US approach would grant occupying powers 'an absolute right to modify the penal legislation of the occupied territory' and would 'greatly exceed the limited right laid down in the Hague Regulations' (quoted in *ibid.*).

35 *Ibid.* (noting opposition of the Soviet Union, Norway, Romania, and Mexico).

36 G. H. Fox, above note 2, pp. 289–294.

37 Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, p. 32.

38 The passage reads in full: 'If, after the German surrender, the Allies had indeed annexed the German state there could have been no doubt about the nature of their right in law to do so; the circumstances would have fitted neatly and unquestionably into the familiar category of subjugation. But if as a result of the Allied victory and the German unconditional surrender Germany was so completely at the disposal of the Allies as to justify them in law in annexing the German state, it would seem to follow that they are by the same token entitled to assume the rights of supreme authority unaccompanied by annexation; for the rights assumed by the Allies are coextensive with the rights comprised in annexation, the difference being only in the mode, purpose, and duration of their exercise, the declared purpose of the occupying Powers being to govern the territory not as an integral part of their own territories but in the name of a continuing German state'. Robert Y. Jennings, 'Government in commission', in *British Year Book of International Law*, Vol. 23, 1946, p. 137.

39 Jennings's article, for example, was cited in in the 1958 edition of the *British Military Manual* but was dropped from the 2004 revised edition. See British Command of the Army Council, *Manual of Military*

occupations are separated by much doctrine and history from contemporary views of liberal democratic transformation. Claims that they support a legally unified conception of transformative occupation are unsustainable.

### *Israel in Palestine*

The problem of legal anachronism is not present in the case of Israeli occupation of the Palestinian territories. Israel's direct administration lasted from its military victory in 1967 to its transfer of civilian authority to the Palestinians in the 1993 Oslo Accords.<sup>40</sup> It is certainly the most-discussed occupation of the modern era and is cited by virtually all commentaries on transformative occupation as supporting the erosion of the conservationist principle.<sup>41</sup> But it is also the most widely condemned: individual states and international organizations have loudly and consistently denounced the occupation itself, the extension of Israeli law to the territories, the proliferation of settlements, and a wide variety of practices that violate the human rights of individual Palestinians.<sup>42</sup> One puzzles over the attempt to claim Israeli actions as precedent for a liberal democratic model of transformation when Israel has been criticized for pursuing precisely the opposite path: *violating* Palestinians human rights and *denying* them the opportunity for democratic self-government that would come with full self-determination.<sup>43</sup> Such condemnations, like those of abuses in other illiberal occupations, find deep resonance in the negative prohibitions of existing occupation law and present no basis for discarding the conservationist principle in search of a new justificatory theory.

Even putting aside these condemnations, Israeli changes to law in the territories have not amounted to comprehensive transformation, let alone a liberal democratic one.<sup>44</sup> Most of the legislative changes (and they were

*Law, Part III, The Law of War on Land*, 1958, p. 230; UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004.

40 See Raja Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories*, Kluwer Law International, Cambridge, MA, 1997.

41 See, e.g., A. Roberts, above note 16; S. R. Ratner, above note 15; M. Sassòli, above note 15; A. M. Gross, above note 15.

42 See A. Roberts, above note 8, p. 67, n. 79 (Security Council and General Assembly resolutions have 'deplored Israel's conduct of the occupation, have condemned as illegal the purported annexation of parts of the occupied territories (including Jerusalem), and have called upon Israel to put an end to its occupation of Arab territories'); G.H. Fox, above note 2, p. 239, n. 264 (collecting Security Council resolutions condemning Israeli occupation practices). Many of these criticisms are addressed and validated in International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, *ICJ Reports* 2004, p. 136 (hereafter ICJ, *Wall* decision).

43 See, e.g., ICJ, *Wall* decision, above note 42, para. 122 (the construction of the security wall 'severely impedes the exercise by the Palestinian people of its right to self-determination').

44 Indeed, the *lack* of coherence in law applicable in the territories was itself a significant problem during the period of Israeli administration. See George E. Basharat, 'Peace and the political imperative of legal reform in Palestine', in *Case Western Reserve Journal of International Law*. Vol. 31, 1999, p. 265 ('a means for assessing the Palestinian community's need for new legislation was never institutionalized and local Palestinian leaders remained perennially reluctant to seek legislative innovations from an occupying power whose legitimacy they refused to acknowledge. Thus, the law remained stagnant in many areas of importance to the Palestinians').

substantial<sup>45</sup>) can be understood as furthering the security and political interests of Israel rather than enhancing the quality of life in the territories.<sup>46</sup> The initial terms of each of the occupations – in the West Bank, Gaza, East Jerusalem, and the Golan Heights – were established in proclamations constituting military administrations for the territories. Each declared that the law in force would continue as long as it did not conflict with the order or subsequent proclamations.<sup>47</sup> The later changes can be grouped into four main areas. The first was the enactment of a substantial body of security-related decrees and the establishment of military courts to hear cases of their alleged violation.<sup>48</sup> Second was extending the jurisdiction of Israeli civilian courts to people, property, and events in the territories in which at least one party was an Israeli citizen.<sup>49</sup> Local courts continued to operate as before, except when claims were brought against the occupying authorities.<sup>50</sup> The extension of jurisdiction followed the growing interaction between Israelis and residents of the territories as the occupation lingered on and provided a means of resolving disputes in an Israeli forum under Israeli law.<sup>51</sup> Third was extending Israeli law and making Israeli courts available to the growing settler population in the territories.<sup>52</sup> The fourth set of changes involved a comprehensive effort to integrate the territories' economies with Israel's, described in the early days of the occupation as a 'common market'.<sup>53</sup> These reforms were extensive and included the abolition of internal customs barriers and creation of a single external barrier for international trade; unification of indirect taxation; facilitation of free passage between the territories and Israel; introduction of Israeli currency into Gaza and the West Bank;<sup>54</sup> amendment of local banking laws to reflect Israeli practices;<sup>55</sup> and even replacement of the local traffic code.<sup>56</sup>

While these measures were expansive and highly intrusive into life in the territories, it would be a category mistake to group them with reforms intended to enhance individual rights and autonomous political decision-making. With some notable exceptions, they were designed primarily to ease the task of administering the territories, promote the security interests of the Israeli Defense Forces, and ensure that Israelis living in or having contact with the territories continued to have recourse to Israeli laws and courts. They neither sought to facilitate a democratic

45 See Neve Gordon, *Israel's Occupation*, University of California Press, Berkeley and Los Angeles, 2008.

46 See David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, State University of New York Press, Albany, NY, 2002, p. 64.

47 The 7 June 1967 Proclamation Concerning Law and Administration (No. 2) for the West Bank, for example, stated: 'The law in existence in the Region on June 7, 1967, shall remain in force, insofar as it does not in any way conflict with the provisions of this Proclamation or any other proclamation or Order which may be issued by me, and subject to modifications resulting from the establishment of government by the Israeli Defense Forces [IDF] in the Region'. Quoted in E. Benvenisti, above note 12, p. 114.

48 *Ibid.*, pp. 115–116.

49 *Ibid.*, p. 129.

50 *Ibid.*, p. 118.

51 *Ibid.*, pp. 129–134.

52 *Ibid.*, pp. 129–139.

53 *Ibid.*, p. 123.

54 *Ibid.*, p. 126.

55 *Ibid.*

56 *Ibid.*, p. 128.

transition nor to protect Palestinians from human rights violations perpetrated by the most powerful political actor in the territories, Israel itself. As a result, most of Israel's actions fit easily within the existing negative protections of the Fourth Geneva Convention.

### *Iraq 2003*

The Iraq occupation was transformative beyond any case since 1945. Its explicit promotion of liberal democratic institutions and massive disregard for existing Iraqi law, as well as the US and UK's direct acknowledgment of their status as Occupying Powers, makes it the paradigmatic case in the current debate. One might argue that, for these reasons alone, it has advanced the legitimacy of transformative occupation.<sup>57</sup> But the legal import of the occupation of Iraq has become something of a Rorschach test. Those who saw a trend toward increasing acceptance of transformation view Iraq as confirming that trend; others who see it as violating existing law do not.<sup>58</sup> More fundamentally, some view occupation law as the critical normative framework for Iraq, while others believe that the Security Council authorized the reforms in Resolution 1483.<sup>59</sup> And some view that resolution as situated within the evolving nature of occupation law, while others view it as an act of legislative fiat that overrode but did not engage with occupation law as such.<sup>60</sup>

Iraq, then, is at this point in history not so much a data point in the evolution of the conservationist principle as a blank canvas on which broader arguments about the legislative power of occupiers are applied. But even those who view Iraq as presaging a crisis for the conservationist principle acknowledge two limitations on its use as precedent for future transformations. The first is that the occupation was extraordinarily mismanaged.<sup>61</sup> The United States' unwillingness or inability to govern the country effectively will probably play an important role in assessing claims that unilateral transformations are essential to moving post-conflict states toward liberal democracy. The second is that to describe Iraq as having been fully transformed by its occupier is inaccurate. Critical aspects of the Iraq transformation took place after the occupation ended on 30 June 2004

57 Even those who view the occupation of Iraq as having significantly eroded the conservationist principle generally limit themselves to the CPA's political reforms. The economic reforms are generally seen as well beyond the scope of an occupier's authority, even as liberally construed.

58 Contrast John Yoo, 'Iraqi reconstruction and the law of occupation', in *UC Davis Journal of International Law & Policy*, Vol. 11, 2004, pp. 7–22, with Rüdiger Wolfrum, 'Iraq: from belligerent occupation to Iraqi exercise of sovereignty: foreign power versus international community interference', in Armin von Bogdandy and Rüdiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, Vol. 9, 2005, pp. 1–45.

59 See Kaiyan Homi Kaikobad, 'II. Problems of belligerent occupation: the scope of powers exercised by the Coalition Provisional Authority in Iraq, April/May 2003–June 2004', in *International and Comparative Law Quarterly*, Vol. 54, No. 1, 2005, pp. 253–264; G. H. Fox, above note 2, pp. 254–262.

60 See M. Zwanenburg, above note 15, pp. 763–767; Eyal Benvenisti, 'The Security Council and the law on occupation: Resolution 1483 on Iraq in historical perspective', in *Israel Defense Forces Law Review*, Vol. 1, 2003, pp. 19–38.

61 See James Fallows, *Blind into Baghdad: America's War in Iraq*, Vintage Books, New York, 2006; Larry Diamond, *Squandered Victory: The American Occupation and the Bungled Effort to Bring Democracy to Iraq*, Owl Books, New York, 2005.

and in response to Security Council demands for an early restoration of local sovereignty.<sup>62</sup> The first legislative elections, the drafting of a new constitution, the election of a new government pursuant to that constitution, and the Status of Forces Agreement providing for the withdrawal of all US combat troops by the end of 2011 all came after the CPA ceased to exist.<sup>63</sup> Of equal importance was that, as the occupation progressed, the United States increasingly sought assistance from the United Nations both to legitimize its actions in Iraq and to perform critical tasks it proved unable to carry out. Grant Harris has described an ‘invisible hand’ exerting pressure on occupiers to multilateralize their operations, and Iraq is his prime example.<sup>64</sup> The fourteen-month US occupation may present less a legacy of unilateral transformation than is often assumed.

### Inspiration from multilateral missions

The second area of practice is multilateral, the mostly UN-authorized missions to post-conflict states that have proliferated since the early 1990s.<sup>65</sup> Much recent literature questioning the conservationist principle cites the UN missions in identifying a trend toward viewing the post-conflict period as a vital opportunity for reform.<sup>66</sup> And, indeed, reconstructing societies emerging from civil war has become a central task of international organizations. Many such missions have an explicitly transformative mandate. The clearest examples are the territorial administrations approved by the Security Council for Bosnia, Kosovo, East Timor, and Eastern Slavonia.<sup>67</sup> In many other cases the UN (with Security Council approval) has been integral in making transformation a part of winding down armed

62 In Resolution 1483, passed on 22 May 2003, the Security Council expressed ‘resolve that the day when Iraqis govern themselves must come quickly’ (UNSC Resolution 1483, 22 May 2003, preambular para. 4). On 16 October 2003 the Council requested the Governing Council and the Occupying Powers to provide a timetable for drafting a new constitution and holding democratic elections no later than 15 December 2003: see UNSC Resolution 1511, 16 October 2003, para. 7. And in Resolution 1546 the Council dictated the occupation’s end: ‘by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty’ (UNSC Resolution 1546, 8 June 2004, para. 2).

63 See James Dobbins, ‘Who lost Iraq: lessons from the debacle’, in *Foreign Affairs*, Vol. 86, No. 5, September–October 2007, pp. 61–74; Trevor A. Rush, ‘Don’t call it a SOFA! An overview of the U.S.–Iraq Security Agreement’, in *Army Lawyer*, No. 432, 2009, pp. 34–60.

64 G. T. Harris, above note 12, pp. 37–38 and 56–68. ‘Despite a primarily unilateral intervention, the U.S. was forced to attempt to multilateralize the occupation. The Bush Administration, even despite strong unilateral impulses and the “bad blood” that lingered from the rancorous international debate that preceded the invasion, realized that international support and resources were prerequisites to a successful occupation of Iraq’ (*ibid.*, p. 57).

65 See generally, Ray Murphy (ed.), *Post-conflict Rebuilding and International Law*, Ashgate, Farnham, 2012.

66 N. Bhuta, above note 9, p. 736 (‘The claimed legitimacy of imposing a new institutional and constitutional structure [in Iraq] was also strengthened by emergent practice of the international administration of territories that has emerged since the end of the Cold War’); B. C. Parsons, above note 13, p. 16; B. S. Brown, above note 15, p. 42; G. T. Harris, above note 12, pp. 25–32.

67 See Carsten Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond*, Cambridge University Press, Cambridge, 2008; Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away*, Oxford University Press, Oxford, 2008; G. H. Fox, above note 5; Richard Caplan, *International Governance of War-torn Territories: Rule and Reconstruction*, Oxford University Press, Oxford, 2005.

conflict: negotiating peace agreements that commit the parties to legal and political reform, crafting a role for the UN as monitor and facilitator of the reforms, providing expertise to implement the reforms, and pronouncing on their consistency with international standards. Examples include UNAMSIL in Sierra Leone,<sup>68</sup> UNOCI in Côte d'Ivoire,<sup>69</sup> ONUB in Burundi,<sup>70</sup> and MINUSTAH in Haiti.<sup>71</sup> In their most robust form, these changes seek to remake the political structures and cultures of states in which warring groups have been unable to co-exist in peaceful political competition. The model favours norms of tolerance, inclusion, and participation. The new institutions are familiar from Western democratic states, pairing majoritarian elections with robust protections of individual and minority group rights.<sup>72</sup>

The parallels to transformative occupation are obvious. Both typically follow the end of major hostilities in armed conflicts. Both favour liberal democratic institutions implanted through wide-ranging legal reforms. Both pay little regard to the formalities of traditional sovereign exclusivity over national governance. Invoking a Chapter VII mandate (for the multilateral missions) or the prerogatives of *de facto* authority (for transformative occupiers), both focus on popular sovereignty rather than effective control as the critical fount of legitimate governmental authority.<sup>73</sup> Finally, both embody the hope – though it is often a hope tinged with scepticism and a sense that the initiatives are the best of a series of bad options – that these new structures will eventually socialize formerly warring factions into peaceful co-existence. The newly implanted democratic institutions are thus valued not only for their own sake but as means of avoiding renewed conflict.<sup>74</sup>

Much thoughtful scholarship has explored a potential convergence between these two forms of post-conflict political transformation.<sup>75</sup> But to conflate multilateral missions with occupation by states acting without a Security Council mandate or authorization would ignore significant differences between the two. These differences flow from one critical fact: multilateral transformation is

68 UNSC Resolution 1270, 22 October 1999.

69 UNSC Resolution 1528, 27 February 2004.

70 UNSC Resolution 1545, 21 May 2004.

71 UNSC Resolution 1542, 30 April 2004.

72 See generally, R. Murphy, above note 65. In its most recent review of peace operations, the United Nations described its tasks as working, *inter alia*, to 'facilitate political processes, protect civilians, help refugees return, support elections, demobilize and reintegrate former combatants, and promote human rights and the rule of law'. See United Nations, *2011 UN Peace Operations Year in Review*, United Nations, New York, 2012, available at: <http://www.un.org/en/peacekeeping/publications/yir/yir2011.pdf> (last visited 15 March 2012).

73 See A. Roberts, above note 16, p. 621: 'Of all the elements of a transformative project, the ones likely to have the strongest appeal include the introduction of an honest electoral system as part of a multiparty democracy'; W. Michael Reisman, 'Sovereignty and human rights in contemporary international law', in *American Journal of International Law*, Vol. 84, 1990, p. 866 (popular sovereignty justification for pro-democratic intervention and regime change); G. H. Fox, above note 5, pp. 52–55 (democracy promotion as central goal of post-conflict reconstruction missions).

74 Gregory H. Fox, 'Democratization', in David M. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century*, Lynne Rienner Publishers, Boulder, CO, 2004, p. 69.

75 Steven Ratner has provided the most comprehensive explication of their similarities. S. R. Ratner, above note 15.

authorized by the UN Security Council under Chapter VII of the UN Charter and transformative occupation is not.

First, approval by the Security Council allows for debate over the wisdom and objectives of the transformation. This prior vetting provides a critical legitimacy for the resulting missions. If Thomas Franck is correct that normative legitimacy emerges from an inclusive and transparent process of law-making, then consideration in the Security Council is critical.<sup>76</sup> An inclusive legislative process is more likely to produce inclusive implementation of transformative measures.<sup>77</sup> Here the international reaction to Iraq provides an object lesson. Facing an occupation that had become a *fait accompli*, following a war they had almost all opposed, members of the Security Council in 2003 provided only tepid support for the US-led reforms.<sup>78</sup> Equally, multilateral planning for an occupation arguably produces better outcomes. Again Iraq is illustrative: US planning for the post-war period was notoriously inept and insensitive to local concerns.<sup>79</sup> It is inconceivable, for example, that a UN-led mission would have disbanded the entire Iraqi army as one of its first actions. Equally, it seems unlikely that the free-market fundamentalism driving so many of the CPA's economic reforms would have survived Security Council consideration. While the UN has made its share of errors in post-conflict states, it has amassed a large repertoire of practice and at least makes a conscious effort to learn from its mistakes.<sup>80</sup>

Second, unilateral intrusions into states' domestic orders are severely limited by contemporary international law. Eliding the distinction between unilateral and multilateral transformation acts requires overlooking these limitations, or at least minimizing their significance. Transformation is often described as seeking goals that are widely shared in the international community, and in a limited sense this is correct. Multilateral instruments have removed human rights and electoral matters from the realm of exclusive domestic jurisdiction. And, as previously noted, reforms in both areas are increasingly seen in particular as critical means of pacifying post-conflict states. But the scope of these normative goals cannot be divorced from the circumstances of their creation. Human rights treaties are carefully negotiated to accommodate states' divergent interests and to provide for limited enforcement mechanisms through national legal institutions and international bodies.<sup>81</sup> UN Security Council involvement in post-conflict

76 Thomas M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, Oxford, 1990.

77 *Ibid.*

78 M. Hmoud, above note 15, pp. 446–447.

79 See sources cited in above note 61.

80 This repertoire of practice has been compiled and assessed by the Peacebuilding Commission, established in 2005. The Commission has established a Working Group on Lessons Learned, which has issued reports on a wide variety of issues in post-conflict reconstruction. See [http://www.un.org/en/peacebuilding/doc\\_lessonslearned.shtml](http://www.un.org/en/peacebuilding/doc_lessonslearned.shtml) (last visited 15 March 2012).

81 In the Nicaragua case, the ICJ suggested that human rights treaties operate as self-contained regimes and preclude other means of enforcement, even those not inconsistent with general international law. ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, *ICJ Reports* 1986, p. 14, para. 267 (hereafter ICJ, *Nicaragua* case): 'where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions

reconstruction is subject to critical procedural limitations, principally the veto. More generally, all forms of state responsibility are specifically denoted as not licensing responses that violate the UN Charter or other serious international legal obligations of the injured state.<sup>82</sup> Normative objectives, in other words, are inseparable from the limited and collective means of their implementation. Human rights and democracy norms have never been understood (at least outside certain powerful states) as a licence for unilateral action.

The reason is clear: states do not trust each other's judgement, in the absence of collective oversight, to determine when and how these norms should be implemented. They fear pretexts. The temptations for political meddling are simply too great. That a prohibition on unilateral intervention is the necessary flip side of robust collective articulation of norms is made clear by the myriad non-intervention norms specifically addressed to unilateral action. The Friendly Relations Declaration, the *Nicaragua* case, the severe limitations on counter-measures, and robust principles of sovereign immunity are but the highlights of a post-World War II legal order that strongly favours the collective over the unilateral.<sup>83</sup>

Are there reasons to exclude transformative occupation from these limiting principles? Not based on the desirability of the goals it seeks, for their collective authors thought them no less desirable but refused to license their unilateral implementation. Not based on the absence of other means of achieving reform, since the Security Council has been authorizing missions to post-conflict states for more than two decades. Not based on the claim that humanitarian law – the primary regime governing occupation – displays a greater tolerance of unilateral acts than human rights law. The usurpation of legislative authority contemplated by transformative occupation is specifically excluded by the law of occupation in its critical distinction between a *de facto* occupier and a *de jure* sovereign.<sup>84</sup> To elide this distinction and allow the former to effectively become the latter would grant occupiers the sole prerogative they lack by virtue of their temporary,

themselves'. While this conclusion is not uncontested, the Court's important distinction between human rights obligations and limited means for their enforcement – particularly in a case in which the US cited Nicaragua's violation of human rights as a justification for the use of force – is indicative of a view pervasive in international law.

82 Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 50(1), in *Report of the International Law Commission on the Work of Its Fifty-third Session*, UN GAOR, 56th Session, Supp. 10, November 2001, UN Doc. A/56/10 (2001) (counter-measures contravening UN Charter or *jus cogens* norms not permitted).

83 Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Resolution 2625, 24 October 1970, UN GAOR, 25th Session, Supp. No. 28, at 121, UN Doc. A/8082 (1970); ICJ, *Nicaragua* case, above note 81; ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Merits, 3 February 2012, (state immunity in national court is not affected by allegation of *jus cogens* violations). See generally, Pierre-Marie Dupuy, 'The place and role of unilateralism in contemporary international law', in *European Journal of International Law*, Vol. 11, No. 1, 2000, pp. 19–29.

84 This is hardly a formalistic distinction. If an occupier makes far-reaching changes in the structure of government, the indigenous regime taking power after the occupation ends may be effectively precluded from reversing the effects of those changes. See Y. Dinstein, above note 37, p. 124: changes to political institutions raise 'the disquieting possibility that profound structural innovations – once the population gets used to them (especially in the course of a prolonged occupation) – may prove hard to eradicate when the occupation is terminated'.



*de facto* assertion of authority.<sup>85</sup> Transformative occupation is unique only in that it presents a propitious opportunity to alter domestic institutions. The defender of those institutions – the ousted regime – has ceased to exist. But to claim that improper unilateral acts can be easily accomplished is not much of an argument either.

Third, assimilating collective and unilateral transformations threatens to permeate the *jus ad bellum/jus in bello* divide. A critical function of a Chapter VII mandate for reform during occupation is to override or displace the conservationist principle. The Security Council exercises legislative authority to render lawful a practice that was (in my view) unlawful under the normally applicable *jus in bello*.<sup>86</sup> But, in so doing, the Security Council does not also legitimize the intervention that enabled foreign forces to occupy the territory. That would have required a separate authorization, one the Security Council (as in the case of Iraq) may have been unwilling to give,<sup>87</sup> and one that would implicate an entirely different body of law: the *jus ad bellum* regulating the initial use of force.

The question is whether the barrier between these two regimes can be maintained when a unilateral occupier, invoking multilateral missions as precedent, transforms the law of the territory it occupies. Answering this question requires understanding the incentives created by the possibility of transformative occupation. Imagine an intervention to halt rampant human rights abuses. To ensure that they do not reoccur once foreign troops leave, the interveners create liberal democratic institutions during the subsequent occupation. What kind of occupier is likely to engage in such actions? Non-democratic occupiers are highly unlikely either to intervene on humanitarian grounds or to engage in democratic reforms. Democratic occupiers may intervene for reasons unrelated to human rights and democracy, but in those cases their likelihood of undertaking a transformative occupation is uncertain. Panama and Grenada are cases of intervention for non-humanitarian reasons that were not followed by transformative occupations, while Iraq and the US/Allied wars against Germany and Japan in World War II are cases where non-humanitarian entry into conflict was followed by transformative occupation. The only scenario in which transformative occupation is almost certain to be attempted – to a greater or lesser degree in each case – is when a liberal democratic state intervenes for humanitarian reasons. For such a power to intervene because human rights abuses have become intolerable but then to leave the abusing government in place and depart would be self-defeating. And, indeed, one common argument made by supporters of transformative occupation is that contemporary warfare has come to be dominated by a transformative objective.<sup>88</sup> As Grant Harris

85 In Julius Stone's words, the difference in legislative authority granted to occupiers and indigenous regimes rests on 'the contrast between the fullness and permanence of sovereign power and the temporary and precarious position of the Occupant'. Julius Stone, *Legal Controls of International Conflict*, Rinehart, New York, 1954, p. 694.

86 See the discussion in below note 113.

87 Some writers argue that the Security Council in fact granted the United States broad latitude to engage in reform in Iraq. See, e.g., E. Benvenisti, above note 60. I have disagreed with that view: G. H. Fox, above note 5, pp. 263–269.

88 See, e.g., P. M. R. Stirk, above note 24, p. 203.

writes, ‘the motivation for much of modern warfare is precisely to reshape occupied territory and intervene in the lives of its inhabitants’.<sup>89</sup> The most likely scenario for transformative occupation becoming a *jus in bello* question, therefore, is one in which it is also an asserted justification under the *jus ad bellum*.

Herein lies the danger. Though unilateral humanitarian intervention is the subject of intense and ongoing debate, international lawyers are virtually unanimous that it contravenes the *jus ad bellum*.<sup>90</sup> If this is correct, how can that prohibition on initiating armed conflict to secure human rights be maintained if an intervener knows that, when it succeeds in occupying a territory, the *jus in bello* will allow it to enact the very reforms that prompted the intervention? Where transformation is the reason for intervention, in other words, the consequences of legitimizing transformation cannot realistically be confined to the *jus in bello*. Justification and purpose cannot be disentangled. As Adam Roberts acknowledges, ‘an element of artificiality marks the proposition that transformative goals may be acceptable, but only as a by-product of military action, not as its real justification’.<sup>91</sup> The danger is avoided when the Security Council must vote separately to legitimize intervention and then reform. But if the latter cases are taken as precedent for acts by unilateral occupiers, then Security Council authorization will have ceased to matter for *jus in bello* purposes. The incentives suggest that it will soon cease to matter for *jus ad bellum* purposes as well.

In sum, conflating unilateral and multilateral transformations creates a dangerously potent incentive for the *jus in bello* to legitimize violations of the *jus ad bellum*. Such a breach of the barrier between these two bodies of law admittedly occurs in the opposite direction from that usually warned against: the division is usually described as preventing claims of *jus ad bellum* legality from justifying violations of the *jus in bello*, such as claims of a just cause legitimizing abuse of detainees. But the problem here is arguably more insidious, for using *jus in bello* legality to justify initiation of an entire armed conflict may well have much farther-reaching consequences than legitimizing specific illegal acts in the course of armed conflict.

### Extra-territorial application of human rights treaty obligations

The third part of the claim for emergence of transformative occupation is the extra-territorial application of an occupier’s human rights treaty obligations. If an

89 Grant T. Harris, ‘Human rights, Israel and the political realities of occupation’, in *Israel Law Review*, Vol. 41, 2008, p. 102.

90 Yoram Dinstein, *War, Aggression and Self-Defense*, 4th edition, Cambridge University Press, Cambridge, 2005, pp. 70–73; Christine Gray, *International Law and the Use of Force*, Oxford University Press, Oxford, 2000, pp. 24–42.

91 A. Roberts, above note 16, p. 581. See also, Robert D. Sloane, ‘The cost of conflation: preserving the dualism of *jus ad bellum* and *jus in bello* in the contemporary law of war’, in *Yale Journal of International Law*, Vol. 34, 2009, p. 108 ([t]he emerging idea of transformative occupation, whatever its other merits, may well be in tension with’ the *jus ad bellum/jus in bello* dichotomy); Rotem Giladi, ‘The *jus ad bellum/jus in bello* distinction and the law of occupation’, in *Israel Law Review*, Vol. 41, Nos. 1–2, 2008, p. 277 (‘Rather than a coincidental by-product of war, occupation is very often the intended result of the war. Often it is a *sine qua non* for meeting the strategic goals for which a state uses force in the first place’).

occupying power displaces the *de jure* government of a state that is bound by human rights treaties, it is argued, the occupier's authority within that state's territory should be subject to the same treaty norms. Otherwise, the population would be divested of the treaty's protection through no actions (or fault) of its own. Further, because human rights treaties require state parties to enact rights-protective legislation at home, the same obligations would apply when they assert governing authority through occupation.<sup>92</sup> The full panoply of treaty obligations effectively functions as a political blueprint for a human-rights-compliant society. Occupiers of illiberal states may thus be compelled to act as social engineers, creating the norms, procedures, and institutions of a treaty-compliant, liberal society. As Grant Harris notes, 'there is no natural ending point for an occupant's obligations to protect human rights short of the creation of a functioning state with permanent institutions capable of doing so'.<sup>93</sup>

The general proposition that states remain subject to at least some of their human rights treaty obligations during an occupation is now well established in international law.<sup>94</sup> But to move from this general principle to legitimizing transformative occupation requires a complex journey. In part this is because much of the jurisprudence on extra-territoriality – apart from that of the European Court of Human Rights – is quite superficial and provides little explanation of how a conflict between human rights (legislative obligations) and humanitarian law (prohibition on legislative changes) is to be resolved. Occupation sits uneasily on the border between armed conflict and peacetime governance. On the one hand, it presents an excellent opportunity to open closed societies to the robust debate and political competition provided by democratic institutions. On the other, the security environment in many occupations is so fragile that the military requires powers unthinkable during peacetime.<sup>95</sup> This duality creates a problem of legal categories. If occupation is viewed primarily as a stage of armed conflict, governance can become a vehicle for human rights protection only when doing so is compatible with the occupier's ability to maintain security. Occupation law tempers its protection of human rights with significant deference to considerations of military

92 Article 2(2) of the International Covenant on Civil and Political Rights (ICCPR) typifies such legislative obligations: 'Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant'.

93 G. T. Harris, above note 89, p. 121.

94 See ICJ, *Wall* decision, above note 42; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, *ICJ Reports* 2005, p. 168; European Court of Human Rights (ECtHR), *Al-Skeini et al. v. The United Kingdom*, Judgment, 7 July 2011, App. No. 55721/07; Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, Oxford, 2011.

95 A well-planned operation will pair traditional security operations with efforts to build the rule of law and strong state institutions, which in the long run are the only effective guardians against civil unrest. See the thorough discussion in Jane Stromseth, David Wippman, and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law after Military Interventions*, Cambridge University Press, Cambridge, 2006, pp. 134–177.

necessity.<sup>96</sup> But the opposite view – regarding occupation as equivalent to peacetime governance – would subject occupiers to human rights treaties that make no concessions to military necessity.

The options for reconciling these two regimes are unsatisfying. Deference to military necessity can obviously be retained by viewing occupation solely as a matter of humanitarian law – perhaps as the *lex specialis* – but this would negate the now-established application of human rights treaties to occupied territories. Alternatively, those treaties could serve as the sole relevant legal framework, but human rights treaties make no accommodation for military necessity since they were designed for peacetime governance.<sup>97</sup> Making no allowance for the military exigencies of occupation would be unworkable and probably unacceptable to most states. While derogation clauses obviously exist in human rights treaties, to invoke them in order to permit necessary security operations would effectively neuter the greater protections offered by human rights treaties and render the protections offered by the two regimes substantially similar.<sup>98</sup> The same would be true of a ‘flexible’ interpretation of the treaties to limit the scope of rights when they affect security concerns. The more nuanced approach of the International Court of Justice (ICJ)’s *Nuclear Weapons* opinion, which views humanitarian law as the *lex specialis* to be applied in the event of conflict with particular human rights norms,<sup>99</sup> promises a more fact-specific analysis but would similarly privilege military necessity over rights protection.

Even if one could overcome this doctrinal incoherence and occupiers were deemed fully bound by their human rights treaty obligations, legislative change in the occupied territory would only be required in a narrow set of circumstances. And those are circumstances in which the occupier’s justification for acting without a Security Council mandate – that is, acting pursuant to occupation law as opposed to Chapter VII authorization – is at its weakest. A conflict between human rights treaty obligations and the conservationist principle would only arise if an occupier could not comply with the treaty without undertaking legislative action.<sup>100</sup> Human rights treaties contain three distinct forms of obligation: states parties must themselves refrain from violating protected rights; they must ensure that others within their jurisdiction refrain from such violations; and they must act affirmatively to ensure that right-protective procedures exist, remedies are provided, and victims are

96 Y. Dinstein, above note 37, p. 115: ‘[t]he tension between military necessity and humanitarian considerations permeates ... the law of belligerent occupation’.

97 See Michael J. Dennis, ‘Application of human rights treaties extraterritorially in times of armed conflict and military occupation’, in *American Journal of International Law*, Vol. 99, No. 1, 2005, pp. 119–141.

98 It is arguable that the ICCPR’s derogation was designed only ‘to permit the suspension of *domestic laws* of states parties during periods of public emergency, including periods of armed conflict’ (*ibid.*, pp. 136–137). This view is supported by the fact that, as of 2005, no state party to the Covenant had submitted a notice of derogation in relation to actions outside its national territory (*ibid.*, pp. 125–126).

99 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports* 1996, p. 226, para. 25. See also ICJ, *Wall* decision, above note 42, para. 106.

100 As Dinstein observes, ‘[a]s long as there is no head-on collision between the exigencies of the occupation and the political institutions existing in the occupied territory, there is no real necessity for the Occupying Power to tinker with the latter’. Y. Dinstein, above note 37, p. 124.

compensated.<sup>101</sup> I argue that only the third form presents an obvious conflict with the conservationist principle.

First and foremost, states parties must themselves refrain from violating protected rights. This is a purely negative obligation. Occupiers may comply by issuing orders to their military forces and civilian administrators that rights not be violated. Such inaction is hardly inconsistent with the conservationist principle. No new legislation is needed in order for occupiers themselves to act with restraint.

One might respond that an occupier will frequently govern through existing laws and institutions. If those violate human rights treaties in and of themselves (as opposed to the way in which they were applied by the ousted regime), then legislative change would become essential to compliance with the treaties. But this argument will apply only to a rather small category of laws that *require* government officials to violate human rights. If the law simply *allows* such violations – for example, by permitting discrimination against classes of citizens, permitting police to use abusive practices, permitting courts to truncate due process, or permitting governmental censorship, and so forth – the source of any violation would be an official's choice to violate rights, not a legal compulsion to do so. Ensuring that local administrators do not continue to exploit the law's permissiveness to violate rights would be a matter of the occupier's issuing clear instructions for the laws' implementation.

Second, states parties must ensure that others in territory they control do not violate rights. In the *Congo/Uganda* case the ICJ described this as an obligation 'to protect the inhabitants of the occupied territory against acts of violence, and *not to tolerate such violence by any third party*'.<sup>102</sup> In an occupied territory, such third parties can usefully be grouped into two categories. The first are those in a subordinate relationship to the occupier, such as a compliant local administration or an allied armed group. While restraining such third parties will certainly require more affirmative acts than when an occupier simply restrains itself, in essence the obligation is still to abstention from human rights violations: the third parties must not torture, rape, murder, or discriminate, for example. They might be restrained by direct orders, or more active follow-up by the occupier might be needed, such as ensuring that orders filter down through a chain of command and that obstinate officials are relieved of their duties. All such acts would meet the ICJ's requirement that third-party acts not be tolerated. If the relationship is truly one of superior-subordinate, there seems no reason why a change to existing law should be expected to bring third-party violators to heel, when directly ordering – and perhaps even compelling – their compliance has not.

The second category of third parties are those not in a subordinate relationship to the occupier. Indeed, they may be insurgents who directly target the occupier. Not to 'tolerate' violations by such independent or hostile groups would involve maintaining security in the territory, a basic obligation of

101 These categories obviously do not neatly capture all cases, and the acts of some occupiers will almost certainly defy this typology.

102 ICJ, *Armed Activities on the Territory of the Congo*, above note 94, para. 178 (emphasis added).

occupation law.<sup>103</sup> Because non-subordinate third parties do not act through the apparatus of state power, their human rights violations would not involve the sort of official misconduct that might require new legislation. As in the *Congo* case itself, violations by these groups are likely to involve independent acts of violence that can only be deterred or ended through enhanced security measures.<sup>104</sup> New legislation would do little to address these groups' violations.

Only a third form of treaty obligation might require legislative action. In addition to the negative obligation to refrain from abuse, human rights treaties also require states to act affirmatively in order to prevent violations, investigate abuses, punish violators, and ensure justice to victims.<sup>105</sup> If existing law does not create these institutionalized monitoring and enforcement mechanisms, states parties can only comply by creating them through legislation. Some rights by their nature require institutional mechanisms, such as democratic elections and fairness in prosecuting criminal defendants. Such rights involve entitlements to a particular institution or procedure. Other rights may require expanding institutions to meet previously unaddressed challenges, such as violence against women in the private sphere. The degree of institutional change needed to protect rights with important procedural components can be quite far-reaching.<sup>106</sup>

This third category presents a clear conflict with the conservationist principle. The first thing to be said is that there is literally no support in existing jurisprudence on extra-territoriality for the proposition that occupiers must build institutions and reform laws. All of the extra-territoriality cases against occupying powers before the ICJ and the European Court of Human Rights have involved human rights abuses by the occupiers themselves.<sup>107</sup> Each involved acts that could have been halted or prevented without changing the laws in force. One can also

103 The obligation derives from the injunction in Article 43 of the Hague Regulations that an occupier 'take all the measures in his power to restore and ensure, as far as possible, public order and safety'.

104 This certainly seemed to be the ICJ's view of Uganda's obligations as an occupier, finding it responsible for 'any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account'. ICJ, *Armed Activities on the Territory of the Congo*, above note 94, para. 179.

105 As the Human Rights Committee notes in regard to the ICCPR, 'Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations'. General Comment 31, above note 94, para. 7.

106 Anja Seibert-Fohr summarizes the affirmative implementation measures required by the Human Rights Committee of parties to the ICCPR: 'the Committee has elaborated a whole series of obligations of conduct concerning the status of the Covenant in domestic law, i.e. the obligation to codify the Covenant rights, to accord to it a status superior to domestic legislation, to ensure the conformity of domestic law including the Constitution with it and to incorporate it into the Constitution. Specific measures to prevent and punish violations of the Covenant as elaborated by the Committee in the reporting system (i.e. law enforcement, institutional and procedural safeguards, monitoring and control mechanisms, contextual measures, information and education) are additional examples of obligations of conduct'. Anja Seibert-Fohr, 'Domestic implementation of the International Covenant on Civil and Political Rights pursuant to its article 2 para. 2', in *Max Planck Year Book of United Nations Law*, Vol. 5, 2001, pp. 467–468.

107 ICJ, *Wall* decision, above note 42 (construction of a wall by Israel in occupied Palestine); ICJ, *Armed Activities on the Territory of the Congo*, above note 94 (conduct of Ugandan armed forces in the occupied portion of the DRC); ECtHR, *Al-Skeini*, above note 94 (acts of British occupying forces in Iraq); ECtHR, *Al-Jedda v. The United Kingdom*, Judgment, 7 July 2011, App. No. 27021/08 (acts of British occupying forces in Iraq); ECtHR, *Loizidou v. Turkey*, Judgment, 18 December 1996, App. No. 15318/89 (acts of Turkish occupying forces in Cyprus); ECtHR, *Andreou v. Turkey*, Decision on Admissibility, 3 June 2008,

observe that this category does not involve the worst human rights abuses in occupied territories. Few truly egregious acts – massacres, rapes, torture, plunder, mass expulsion, persecution of disfavoured groups – require legislative solutions. If history is any guide, these are almost always the acts of occupying forces themselves or their close allies. They fall into the first or second categories described above and the parties can stop these actions by restraining themselves. The Iraqi plunder of occupied Kuwait in 1990–1991, for example, could have been halted by orders given down the chain of command.

But even if the cases are few, the question remains whether this third category of affirmative obligations should be applied extra-territorially. Here the discussion must inevitably turn to the type of occupation that the international community chooses to validate. For, as the prior discussion suggests, only a limited class of reform-minded occupiers is likely to pursue broad legislative change. From recent occupation experience, two specific scenarios seem to implicate this category. The first is a prolonged occupation in which no plans are made for an immediate return to local control and the occupier assumes responsibility for the territory over the long term. The second is where an occupation is commenced for the specific purpose of legal and political reform, namely a transformative occupation. In both situations the occupier makes governance decisions based not only on the pragmatic necessities of the moment (including compliance with the individual rights provisions of Geneva law) but also to address perceived long-term problems in the territory. In the case of prolonged occupation, the problem is legal stasis over time. As the Israeli Supreme Court has observed, '[a] prolonged military occupation brings in its wake social, economic and commercial changes which oblige him [the occupier] to adapt the law to the changing needs of the population'.<sup>108</sup> In the case of transformative occupation the problem is the many maladies of a closed authoritarian society.

Should human rights treaties enable such occupations, whose long-term strategic objectives and reform agendas are inexorably intertwined? If one answers yes, one must be prepared to defend the proposition that human rights treaties can permit (or even compel) the *de facto* annexation of occupied territory.<sup>109</sup> Legislating reforms intended to be permanent is fundamentally incompatible with the temporary nature of occupation.<sup>110</sup> Such fundamental policy decisions are the prerogative of the indigenous sovereign, and to appropriate them is to assume the mantle of that sovereign. As Pictet observes, the 'temporary, *de facto*' nature of

App. No. 45653/99 (acts of Turkish occupying forces in Cyprus); ECtHR, *Al-Saadoon and Mufdhi v. The United Kingdom*, Judgment, 2 March 2010, App. No. 61498/08 (acts of British occupying forces in Iraq).

108 HCJ 337/71, *Christian Society for the Holy Places v. Minister of Defense*, 26(1) Piskei Din 574 (1972).

109 As Professor Roberts states forthrightly, 'transformative occupation may be considered to have emerged as a more honorable, but still deeply controversial, successor to the discredited notion of annexation'. A. Roberts, above note 16, p. 585.

110 Christopher Greenwood, 'The administration of occupied territory in international law', in Emma Playfair (ed.), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation in the West Bank and Gaza Strip*, Clarendon Press, Oxford, 1992, p. 247: '[a]n occupant may, therefore, suspend or bypass the existing administrative structure where there is a legitimate necessity of the kind discussed... but any attempt at effective permanent reform or change in that structure will be unlawful'.

the foreign presence is ‘what distinguishes occupation from annexation’.<sup>111</sup> The ICJ’s holding that the Israeli security wall could become ‘tantamount to *de facto* annexation’ because it would ‘create a *fait accompli* on the ground that could well become permanent’<sup>112</sup> invokes a similar idea: when an occupier assumes powers reserved to the *de jure* sovereign – in the *Wall* case the demarcation of boundaries – it effectively treats the territory as its own, even without its formal incorporation.

## The multilateral option

The attraction of transformative occupation is twofold. First, it promises to move illiberal state institutions toward compliance with international standards of human rights and democratic governance. Second, it takes advantage of a unique moment in which transformation appears possible. No forces stand between a reform-minded occupier and necessary political change. The conservationist principle can well appear unnecessarily obstructionist and even anachronistic in rejecting both of these justifications as unconvincing. The criticisms above, focusing on the agent of change – a state acting unilaterally – do not address these points.

But this Manichean view of transformation – as either a *de facto* annexation or a critical opportunity to advance human rights – is itself an anachronism. It assumes that the agent of transformation will be a state, since only states are limited by the conservationist principle and would be the only agents of change liberated by its obsolescence.<sup>113</sup> But a third option exists: authorization by the Security Council under Chapter VII.<sup>114</sup> Few doubt that if the Security Council were to authorize an occupier to reform local laws and institutions its legislative authority would override the conservationist principle.<sup>115</sup> As a result, its actions would cease to be governed by occupation law, at least in regard to limits on the occupier’s legislative authority. Instead, such occupation would be akin to the many missions that the Security

111 J. S. Pictet, above note 18, Art. 47, p. 275, available at: <http://www.icrc.org/ihl.nsf/COM/380-600054?OpenDocument> (last visited 16 March 2012).

112 ICJ, *Wall* decision, above note 42, para. 121.

113 While some suggest that international organizations may be bound in some respects by the law of occupation, that possibility remains hypothetical, since neither the United Nations nor any other international organization has ever acknowledged itself to be an occupier for humanitarian law purposes. See G. H. Fox, above note 5, pp. 222–225. Further, as explained below, even if the United Nations were so bound, the Security Council could exempt the organization from the conservationist principle via Chapter VII.

114 For a discussion of various forms of potential Security Council involvement in setting mandates for occupiers, see G. T. Harris, above note 89, pp. 168–171.

115 See A. Roberts, above note 16, p. 622; S. R. Ratner, above note 15, p. 710; B. S. Brown, above note 15, p. 60; David J. Scheffer, ‘Beyond occupation law’, in *American Journal of International Law*, Vol. 97, No. 4, 2003, p. 851. The Security Council’s authority to supersede existing treaty norms is grounded in Article 103 of the UN Charter, whose pre-emptive authority was affirmed by the ICJ in its provisional measures opinion in the Lockerbie case. ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, 14 April 1992, *ICJ Reports* 1992, p. 3, para. 39; ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, 14 April 1992, *ICJ Reports* 1992, p. 114, para. 42. See generally, Stefan Talmon, ‘The Security Council as world legislature’, in *American Journal of International Law*, Vol. 99, No. 1, 2005, pp. 175–193.



Council has created over the past two decades with detailed mandates to advance human rights and political democracy in post-conflict states.

That so much energy would be expended in arguing to expand the unilateral authority of Occupying Powers is itself surprising. The goal of the UN peace and security regime has been to multilateralize all aspects of armed conflict.<sup>116</sup> In the post-Cold War era it has largely succeeded. According to two important datasets of armed conflict,<sup>117</sup> there were ten major inter-state armed conflicts between 1990 and 2010.<sup>118</sup> All but two of these were addressed in one form or another by the UN Security Council, which took actions ranging from authorizing intervention to supporting regional peace processes.<sup>119</sup> The Council's involvement has not been episodic but holistic, as it regularly addresses all aspects of armed conflict from inception to termination.<sup>120</sup> It seeks to mediate disputes that appear likely to result in armed conflict; authorizes responses to cross-border incursions; condemns violations of humanitarian law in the course of armed conflicts, including referring matters to the International Criminal Court; assists in negotiating ceasefires and eventual peace agreements; and, as has been noted, dispatches reconstruction missions to post-conflict states.<sup>121</sup> The UN (via Security Council action) has moved well beyond simply responding to aggression to deploy sophisticated strategies of prevention, mediation, reconciliation, reconstruction, and exit from conflict zones.<sup>122</sup>

This move to multilateralism has been particularly evident at the post-conflict stage.<sup>123</sup> The UN has become the indispensable actor in such transitional

116 In Thomas Franck's words, the central purpose of the UN collective security system 'is to replace the outmoded, dangerous national self-reliance on unilateral force with a workable global police system, capable of protecting the weak against the strong and of responding, quickly, with levels of force appropriate to a specific circumstance of lawlessness'. Thomas M. Franck and Faiza Patel, 'UN police action in lieu of war: "The old order changeth"', in *American Journal of International Law*, Vol. 85, No. 1, 1991, p. 73.

117 The Correlates of War Project, available at: <http://www.correlatesofwar.org> (last visited 16 March 2012) and the Uppsala Conflict Data Program/Peace Research Institute Oslo, available at: <http://www.prio.no/CSCW/Datasets/Armed-Conflict/UCDP-PRIO/> (last visited 16 March 2012).

118 The major armed conflicts were the Gulf War (1991), the Bosnian War of Independence (1992), the Azerbaijan–Armenia War (1993–1994), the Eritrea–Ethiopia War (1998), the Kosovo Conflict (1999), the US invasion of Afghanistan (2001), the US invasion of Iraq (2003), and the Eritrea–Djibouti conflict (2008). India and Pakistan had several conflicts during this period and they are treated differently by the two datasets.

119 The Security Council did not take any action on the Kashmir conflict between India and Pakistan, which flared into armed conflict ten times during this period, or on the Ecuador–Peru Cenepa Valley War of 1995. The Cenepa conflict was resolved by a regional treaty group, the Protocol of Rio de Janeiro, and guaranteed by a monitoring mission dispatched by the Protocol member states: see Glenn R. Weidner, 'Operation Safe Border: the Ecuador–Peru crisis', in *Joint Forces Quarterly*, Spring 1996, pp. 52–58.

120 See the varied discussions in Vaughan Lowe, Adam Roberts, Jennifer Welsh, and Dominik Zaum (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, Oxford University Press, Oxford, 2008.

121 See generally, Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect*, Cambridge University Press, Cambridge, 2006.

122 Touko Piiparinen, *The Transformation of UN Conflict Management: Producing Images of Genocide from Rwanda to Darfur and Beyond*, Routledge, London and New York, 2010.

123 Thorsten Benner, Stephan Mergenthaler, and Philipp Rotmann, *The New World of UN Peace Operations: Learning to Build Peace?*, Oxford University Press, Oxford, 2011; Michael W. Doyle and Nicholas

operations, displaying an evident learning curve and increasing store of institutional expertise. To ensure the organization continues to learn from both its successes and its failures, in 2005 the Security Council created the Peacebuilding Commission, with a mandate to ‘bring together all relevant actors to marshal resources and to advise on and propose integrated strategies for post-conflict peacebuilding and recovery’, as well as to ‘focus attention on the reconstruction and institution-building efforts necessary for recovery from conflict’.<sup>124</sup> Reviewing the UN post-conflict record in 2006, Doyle and Sambanis concluded that the organization is most successful when it is involved in all aspects of a transition from conflict resolution to stable peacetime governance.<sup>125</sup> A *greater* role for the United Nations thus *enhances* the effectiveness of post-conflict reconstruction.

With the entire trajectory of international conflict management moving toward collective responses, and with the UN more experienced at reform than any national military (including that of the United States), an expansion of an occupier’s prerogatives via occupation law seems a throwback to a time when collective options were either non-existent (before World War II) or non-functional (the Cold War era). Enhancing unilateralism is out of touch with the many areas in which international law in the post-World War II era has refused to license unilateral action, even when that action is described as essential to achieving humanitarian objectives. Examples include a general rejection of unilateral humanitarian intervention, a reluctance to endorse broad conceptions of universal jurisdiction, and refusal to recognize human-rights-inspired exceptions to sovereign immunity in national courts. It is also out of touch with the many ways in which the Security Council has integrated human rights and democracy concerns into its strategy for post-conflict states. Indeed, the Security Council has pursued these objectives to such an extent that some scholars argue that they are being introduced too quickly into politically fragile societies.<sup>126</sup> In the early twenty-first century, enhancing unilateral authority over domestic affairs is the real anachronism.

Of course, the multilateral option will not always be available. Vetoes by permanent members, a lack of political will, local resistance to reform, and a host of other factors may all render the Security Council incapable of approving reforms. As of the time of writing, the Security Council’s inability to address the Syrian crisis in a meaningful way seems a case in point. But this observation does not necessarily provide affirmative support for the unilateral option, for the Security Council may be unavailable on fewer occasions than might be supposed. If an occupier has received Security Council approval for an initial use of force for the purpose of transformation, the Security Council is quite unlikely to refuse support for the

Sambanis, *Making War and Building Peace: United Nations Peace Operations*, Princeton University Press, Princeton, 2006.

124 UNSC Resolution 1645, 20 December 2005, para. 2.

125 M. Doyle and N. Sambanis, above note 123, pp. 349–350: ‘The defining characteristic of all the successful operations is that they each achieved a comprehensive peace agreement – one involving the UN in the entire peace process, from the signing of the first cease-fire to the restoration of the last structures of government’.

126 See Jack Snyder, *From Voting to Violence: Democratization and Nationalist Conflict*, W.W. Norton & Company, New York, 2000.

transformation itself. Security Council refusal only seems likely where an occupier has either failed to seek approval at all for the intervention or approval was sought and refused.<sup>127</sup> In such cases, the Security Council would not be asked to approve reforms until after an occupation had become a *fait accompli*. At that point, with the occupier in place, many of the strongly held reasons why Security Council members might have opposed the initial intervention would lose their potency. The invaded state's sovereignty would have been compromised, the occupier would have gained a foothold in a region from which certain Security Council members might want it excluded, and the geopolitical consequences of the intervention, if any, would have occurred. None of those feared eventualities could be reversed by opposing a resolution sanctioning reform in the territory. Perhaps more importantly, the Security Council would be given an opportunity to dictate the parameters of the occupation. In short, the incentives in such circumstances would seem to be aligned against Security Council refusal to approve reforms. The limited possibility that the multilateral option might fail thus provides only weak support for radically expanding the unilateral option.

Seen in this light, the conservationist principle is not a proxy for international law abdicating responsibility for needed legal change in occupied territories. It is instead a limitation on unilateral self-help that finds much support elsewhere in contemporary doctrine.

## Conclusions

The Iraq occupation spawned an important debate over the role of occupiers in territories in substantial need of legal reform. The central problem was not the one traditionally facing occupation law: how to protect inhabitants from a rapacious or brutal occupier that subordinates their wellbeing to its own political objectives. It was rather what to make of an occupier that seeks to *enhance* the inhabitants' wellbeing. Some commentators found little reason to prevent such an occupier from legislating new standards of human rights and democratic government now well established in international law. In particular, the conservationist principle that restrained such supposedly beneficial legislation was anachronistic. It was inconsistent with post-World War II occupation practice, failed to follow the lead of UN-authorized post-conflict reconstruction missions, and was incompatible with an occupier's extra-territorial human rights obligations.

Each of these grounds for declaring the conservationist principle an anachronism, however, turned out to be substantially overstated. Iraq was the only case in the era of Geneva law in which an occupier has legislated for an explicitly transformative purpose. UN-authorized missions, while seeking similar goals, differ

127 An occupier might not seek Security Council approval either because it might believe it to be futile or because it believed it was acting in self-defence, for which no Security Council approval is needed. Article 51 of the UN Charter does require states acting in self-defence to report their actions immediately to the Security Council.

in significant ways from unilateral occupations, which make their invocation as legal precedent highly problematic. And the extra-territorial application of human rights treaty obligations has been used only to restrain occupiers from committing or tolerating abuses. No international court or tribunal has found an occupier in violation of its treaty obligations for failing to legislate in foreign territory it controls.

None of these responses to the supposed emergence of transformative occupation is dispositive in the sense that it reveals transformation to be necessarily incompatible with contemporary occupation law or that state practice shows definitively negative reactions to particular cases of transformation. But the bar need not be set that high. It is sufficient for the purposes of the argument I have made that these claims are only moderately persuasive. That is because they carry a substantial burden of showing why the legislative powers of occupiers should be exempt from the general trend of multilateralizing all aspects of armed conflict. The arguments supporting transformative occupation fail to carry this burden.

# Use of force during occupation: law enforcement and conduct of hostilities

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## **Abstract**

*This article explores the law governing the maintenance of public order and safety during belligerent occupation. Given the potential for widespread violence associated with international armed conflict, such as occurred in 2003–2004 in Iraq, it is inevitable that military and police forces will be engaged in activities that interface and overlap. Human-rights-based norms governing law enforcement, such as the right to life, are found in humanitarian law, permitting an application of both law enforcement and conduct of hostilities norms under that body of law. This results in the simultaneous application of these norms through both humanitarian and human rights law, which ultimately enhances the protection of inhabitants of the occupied territory.*

**Keywords:** occupation, use of force, law enforcement, conduct of hostilities, security situation Iraq, insurgency and counter-insurgency, policing and maintenance of order, human rights and international humanitarian law.



\* The author also participated in the Third Meeting of Experts: The Use of Force in Occupied Territory, 29–30 October 2009, Geneva, that resulted in the International Committee of the Red Cross (ICRC) report *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory*, prepared and edited by Tristan Ferraro, ICRC, Geneva, March 2012.

Notwithstanding the significant body of treaty and customary international law dealing with occupation, there remain a number of unresolved issues concerning how law and order is maintained in an occupied territory. The debate often centres on whether the use of force by an occupier is governed by international humanitarian law (IHL) or human rights law. This article will review that issue by looking at belligerent occupation where violent resistance is occurring; outline the legal norms governing the use of force by an occupier in maintaining law and order; and assess how the law applies in these complex security situations.

The article is divided into six parts. The first part outlines the law governing occupation; it includes a discussion of the sources of normative obligations requiring an occupier to maintain order, and when those obligations begin. In the second part, the nature of the security threats – ranging from organized armed groups participating in an ongoing international armed conflict to ordinary criminal activity – will be discussed to provide a better understanding of the complex security situation within which order often has to be maintained. This analysis will refer to occupation during World War II and use the 2003–2004 Iraq War as an example of ‘violent’ occupation. Particular emphasis will be placed on the Iraq conflict, in order to provide a contemporary example of the complexity of the security situation during such occupation. The third part will address the similarities between maintaining order in occupation and conducting a counter-insurgency campaign in non-international armed conflict. In particular, the important role of policing during such a campaign will be outlined. This will highlight the unique environment in which security forces must operate when conducting operations among the population of an occupied territory.

Having established the nature of the security threats, the fourth part outlines the limitations prescribed by humanitarian and human rights norms regarding the use of force. It also looks at the requirements of accountability under IHL and human rights law. This will establish the normative limits on the use of force and set the scene for a discussion of the options available to the Occupying Power to maintain security. The fifth part discusses the principle of *lex specialis derogate lex generali* (*‘lex specialis’*) in order to assess the interface between human rights law and its humanitarian law counterpart. Particular emphasis is placed on looking at the long-standing integration of human rights norms into humanitarian law. In this respect, a distinction is made between norms or standards, such as the right to life, and the legal regimes (human rights and humanitarian law) within which they are situated. This integration supports an interpretation that there is no ‘conflict of norms’ in respect of law enforcement within occupied territory. In this respect, the human-rights-based law enforcement norms operate within both the international human rights and the humanitarian law frameworks. Finally, the article looks at the practical application of the use of force during belligerent occupation. This analysis will highlight that the use of human-rights-based law enforcement or conduct of hostilities norms (i.e. targeting, and precautions in the attack)

to govern the use of force will be dependent upon the nature of the threat being faced.

## Occupation and the rule of law

### Establishment of occupation

There are a number of challenging issues associated with the concept of occupation. They include categorizing occupations in general; establishing what constitutes 'occupation' for the purposes of IHL; determining when occupation begins; and establishing how legal rights, such as the right to life, are extended to inhabitants of occupied territory. The term 'occupation' has been used to describe a wide range of activity that fundamentally involves territory being put under the control of a foreign state, international organization, or entity that has no sovereign title. Adam Roberts has identified seventeen types of occupation, ranging from wartime and post-war to peacetime. Other possible categories include control of all or part of a territory by forces acting under the authority of the United Nations<sup>1</sup> and occupation by a non-state entity.<sup>2</sup> There is a school of thought that supports a broad application of the law of occupation,<sup>3</sup> although classic 'belligerent occupation' remains the iconic standard against which the law of occupation is normally assessed.<sup>4</sup>

Yoram Dinstein notes that belligerent occupation, which only arises in the context of an international armed conflict between states, is often shrouded in the myth that it is an anomaly or even an aberration of international law.<sup>5</sup> However, it is a common and integral part of armed conflict since '[o]nce combat stabilizes along fixed lines, not coinciding with the original international frontiers, the cross-border areas seized and effectively controlled by a Belligerent Party are deemed to be subject to belligerent occupation'.<sup>6</sup> The challenge often appears to be one of getting a state to admit that it is an occupier.<sup>7</sup> Eyal Benvenisti has observed that modern occupiers prefer, for a variety of reasons, not to establish direct forms of administration. In his view, an acknowledgment of 'the status of occupant is

1 Adam Roberts, 'What is a military occupation?', in *British Year Book of International Law*, Vol. 55, No. 1, 1984, p. 261. See also Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, 1993, p. 4, and Gregory H. Fox, *Humanitarian Occupation*, Cambridge University Press, Cambridge, 2008, p. 4, where he suggests there is a form of humanitarian occupation which is defined as 'the assumption of governing authority over a state or a portion thereof, by an international actor for the express purpose of creating a liberal, democratic order'.

2 A. Roberts, above note 1, pp. 292–293.

3 *Ibid.*, p. 250; E. Benvenisti, above note 1, p. 4.

4 A. Roberts, above note 1, pp. 261–262. He notes that *occupation bellica* is more or less synonymous with the term 'occupation of enemy territory', having the characteristics of being carried out by a belligerent state on the territory of an enemy state, during the course of an armed conflict and before a general armistice agreement is concluded. See also Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, pp. 31–32.

5 Y. Dinstein, above note 4, p. 1.

6 *Ibid.*

7 See Hans-Peter Gasser, 'Protection of the civilian population', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edition, Oxford University Press, Oxford, 2008, p. 276.

the first and the most important indication that the occupant will respect the law of occupation'.<sup>8</sup> Therefore, a key issue is the determination of when occupation is established at law.

Article 42 of the 1907 Hague Land Warfare Regulations sets out the legal test for occupation: 'Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.'<sup>9</sup> An aspect of this definition impacting directly on the question of the responsibility of the Occupying Power for law enforcement is what establishing and exercising authority actually mean. Assistance in that regard is available by referring to Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention.<sup>10</sup> The occupier is required by Article 43 of the Hague Regulations to 'take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.<sup>11</sup> This obligation is also reflected in Article 64 of the Fourth Geneva Convention, which states: '[t]he Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations . . . to maintain the orderly government of the Territory . . .'.<sup>12</sup> That Convention also requires that 'protected persons' are protected against all acts or threats of violence, and establishes rules governing the maintenance of laws, courts, internment, and so forth.<sup>13</sup>

It has been noted that, in a technical sense, 'the precise moment when an invasion turns into an occupation is not always easy to determine'.<sup>14</sup> Two interpretations have traditionally been suggested. The first approach applies a restrictive meaning to occupation as is reflected in the Hague Regulations (the 'narrow interpretation'). The second, found in the commentary to the Fourth Geneva Convention by Jean Pictet,<sup>15</sup> interprets 'occupation' in that Convention

8 E. Benvenisti, above note 1, p. 5.

9 Regulations Respecting the Laws and Customs of War on Land, annex to Hague Convention Respecting the Laws and Customs of War on Land (hereafter Hague Regulations), 18 October 1907, Art. 42.

10 The four Conventions are: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135 (hereafter the Third Geneva Convention or GC III); and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. (hereafter the Fourth Geneva Convention or GC IV).

11 Hague Regulations, Art. 43. Y. Dinstein, above note 4, p. 89. Dinstein notes that the official French text of Article 43 refers to 'l'ordre et la vie publics' (public order and life) and, as a result, the interpretation of the word 'safety' in the English text must be viewed in that context. See also E. Benvenisti, above note 1, p. 7, n. 1; and Marco Sassòli, 'Legislation and maintenance of public order and civil life by Occupying Powers', in *European Journal of International Law*, Vol. 16, No. 4, 2005, p. 663.

12 GC IV, Art. 64, para. 3.

13 *Ibid.*, Arts. 27 and 47 *et seq.*

14 A. Roberts, above note 1, p. 256.

15 Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (hereafter Geneva Convention IV Commentary), ICRC, Geneva, 1958, Art. 6, p. 60.



more broadly (the 'broad interpretation'). Regarding the first approach, Leslie Green indicates that '[t]erritory is occupied only when it is actually under the control and administration of an occupant and extends only to those areas in which he is actually able to exercise such control'.<sup>16</sup> This interpretation reflects the view that there must be no authority exercised other than that imposed or allowed by the occupier, that local forces are no longer effective in the area, that the population is disarmed, and that the Occupying Power is 'effectively maintaining law and order with the troops available or easily secured to assist in the task if needed'.<sup>17</sup> In this respect, 'while invasion represents mere penetration of hostile territory, occupation implies the existence of definite control over the area involved'.<sup>18</sup> The 1948 *Hostage* case (*United States of America v. Willem List, et al.*)<sup>19</sup> distinguished between invasion and occupation as follows:

The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied.<sup>20</sup>

The requirement for a significant level of control is consistent with the International Court of Justice's decision in the 2005 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, which held that physically stationing troops at an airport did not 'allow the Court to characterize the presence of Ugandan troops stationed at Kisangani Airport as occupation in the sense of Article 42 of the Hague Regulations of 1907'.<sup>21</sup> Instead it must be shown that troops 'were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government'.<sup>22</sup> Neither this case, nor the 2004 *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* opinion,<sup>23</sup> addressed the question of a broader interpretation of 'occupation' under the Fourth Geneva

16 Leslie C. Green, *The Contemporary Law of Armed Conflict*, 3rd edition, Manchester University Press, Manchester, 2008, p. 285; Y. Dinstein, above note 4, pp. 38–42. Lassa Oppenheim, *International Law: A Treatise*, ed. Hersch Lauterpacht, Longmans, Green and Co., London, 1952, p. 434, wrote: 'Now it is certain that mere invasion is not occupation. . . . Occupation is invasion plus taking possession of enemy country. . . . an occupant sets up some kind of administration, whereas the mere invader does not'.

17 L. C. Green, above note 16, p. 258.

18 Gerhard von Glahn, *The Occupation of Enemy Territory*, Lund Press, Inc., Minneapolis, 1957, p. 28.

19 *United States of America v. Willem List, et al.*, Case No. 7, 19 February 1948, Trials of War Criminals Before the Nuremberg Military Tribunals, Vol. 11, Government Printing Office, Washington, 1950 (hereafter *Hostage* case).

20 *Ibid.*, p. 1243.

21 International Court of Justice (ICJ), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005, p. 231, para. 177, available at: <http://www.icj-cij.org/docket/files/116/10455.pdf> (last visited 26 September 2011) (hereafter *Congo* case).

22 *Ibid.*, p. 230, para. 173.

23 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, p. 136, available at: <http://www.icj-cij.org/docket/files/131/1671.pdf> (last visited 18 October 2011) (hereafter *Wall* case).

Convention.<sup>24</sup> Under such an interpretation, the occupier must be in a position to carry out governance over the occupied territory even though it does not exercise sovereignty.<sup>25</sup> However, where an occupation is established at law, the failure to set up an administration does not relieve the occupier of its obligations under IHL.<sup>26</sup>

The broader, Pictet, interpretation maximizes the protection provided to civilians. The *Geneva Convention IV Commentary* suggests that the application of the Convention to individuals ‘does not depend upon the existence of a state of occupation within the meaning of Article 42’ and that the provisions of the Convention would extend to the invasion phase before the establishment of a stable regime of occupation.<sup>27</sup> This would include situations when a patrol ‘penetrates into enemy territory without any intention of staying there’.<sup>28</sup> A broader interpretation of occupation has been applied by the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v. Naletilic*<sup>29</sup> and has been recognized in academic literature.<sup>30</sup> However, it has also been the subject of criticism.<sup>31</sup> The present approach of the International Committee of the Red Cross (ICRC) is to look to Article 42 of the Hague Regulations as providing the legal benchmark for determining the existence of an occupation, while at the same time recognizing that the theory put forward by Jean Pictet lowers the threshold application of certain Fourth Geneva Convention norms so that their application during an invasion phase can result in greater humanitarian protection for protected persons found in invaded territory that is not yet occupied as a matter of law.<sup>32</sup>

Although driven by humanitarian concerns, the extension of the Fourth Geneva Convention obligations as a matter of treaty law to invasions, patrols, and raids is challenging from a practical perspective. Any military force attempting to apply the interpretation would be forced to identify a more limited set of Fourth Geneva Convention provisions that can be practically applied in a situation where control of the territory is limited in both a substantive and a temporal sense.<sup>33</sup>

24 Marten Zwanenburg, ‘Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation’, in *International Review of the Red Cross*, Vol. 86, No. 856, December 2004, p. 749.

25 Yoram Dinstein, ‘International law of belligerent occupation and human rights’, in *Israel Year Book of Human Rights*, Vol. 8, 1978, pp. 105–106; E. Benvenisti, above note 1, pp. 5–6.

26 E. Benvenisti, above note 1, p. 5.

27 *Geneva Convention IV Commentary*, above note 15, Art. 6, p. 60.

28 *Ibid.*

29 ICTY, *Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Judgment, Case No. IT-98-34-T, 31 March 2003, pp. 74–75, paras. 219–223. However, the court applied the ‘narrow interpretation’ to its analysis of Article 42 regarding the determination of the status of occupation and a ‘broad interpretation’ to its assessment of Article 43 of the Hague Regulations in respect of ‘individuals’.

30 See A. Roberts, above note 1, p. 256.

31 Y. Dinstein, above note 4, pp. 38–42. See also M. Zwanenburg, above note 24, p. 749, where, in respect of the *Prosecutor v. Naletilic* decision, he suggests that the Trial Chamber’s interpretation of Geneva Convention IV ‘is questionable’.

32 See Tristan Ferraro, in this edition.

33 However, see H.-P. Gasser, above note 7, pp. 276–277, Rule 528, para. 3. It is suggested there that a list of provisions found in Part II of GC IV (Articles 13–26) would apply in contested areas regarding the general protection of the population.

Meeting the Hague Regulations and Fourth Geneva Convention obligations to restore and ensure order would prove particularly challenging, if not impossible, where control is not effective. As will be discussed, effective law enforcement requires a level of control that cannot easily be attained in the transitory and rapidly evolving situation inherent in the early stages of invasion, or while conducting a patrol.

In any event, when dealing with the civilian population, the military commander must comply with well-established general principles of humanitarian law that protect the civilian population even when the territory is not occupied. As is reflected in the ICRC *Customary International Humanitarian Law* study,<sup>34</sup> custom can provide a source for such rules. In that context, principles found in the Fourth Geneva Convention may inform those customary rules. For those seeking a treaty-based authority regarding the treatment of civilians during such transitory situations, Article 75 of Additional Protocol I<sup>35</sup> applies where persons under the power of a party to the conflict do not benefit from more favourable treatment under the Conventions or the Additional Protocol.<sup>36</sup> Similarly, Article 75 may inform the customary rules applicable in these situations.<sup>37</sup>

## Rule of law

The maintenance of order within an occupied territory requires a clear commitment to the rule of law.<sup>38</sup> This is linked to the issue of rights for the inhabitants of the territory. In respect of humanitarian law, Article 43 of the Hague Regulations has been described as a ‘mini-constitution for the occupation administration’,<sup>39</sup> while the Fourth Geneva Convention is referred to as a ‘bill of rights for the occupied population, a set of internationally approved guidelines for the lawful administration of the occupied territories’.<sup>40</sup> Human rights norms, including the right to

34 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, Cambridge University Press, Cambridge, 2005 (hereafter *ICRC Customary Law Study*).

35 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature December 12, 1977 1125 UNTS 3 (hereafter Additional Protocol I or AP I).

36 Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, para. 3015 (hereafter *Additional Protocol I Commentary*), which states: ‘[t]he protections which follow from Article 75 apply above all to those who cannot lay claim to application of the Conventions or to their application in full . . .’.

37 Marko Milanovic, ‘Article 75 AP I and US opinio juris’, in *European Journal of International Law: Talk!*, 9 March 2011, available at: <http://www.ejiltalk.org/article-75-ap-i-and-us-opinio-juris/> (last visited February 2012), for a discussion of the customary law status of AP I, Art. 75.

38 See Ian Brownlie, *The Rule of Law in International Affairs*, Martinus Nijhoff Publishers, The Hague, 1998, pp. 213–214. The elements of the rule of law are indicated to be that the exercise of power by officials must be based on authority conferred by law; law must conform to standards of substantial and procedural justice; the executive, the legislature, and the judicial functions must be separated; the judiciary should not be controlled by the executive; and all legal persons are subject to the law.

39 E. Benvenisti, above note 1, p. 9.

40 *Ibid.*, p. 105. See also Yoram Dinstein, ‘The international law of inter-state wars and human rights’, in *Israel Yearbook of Human Rights*, Vol. 7, 1977, p. 149, where he states: ‘The human rights of civilians in

life, are specifically protected in the Hague Regulations,<sup>41</sup> the Fourth Geneva Convention,<sup>42</sup> and Article 75 of Additional Protocol I.<sup>43</sup> This is also reflected in the *Geneva Convention IV Commentary*, which states: ‘[i]t must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests’.<sup>44</sup>

Human rights law also protects the rights of persons in occupied territory. In the 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,<sup>45</sup> the International Court of Justice held that the two sets of legal regimes apply together, in the sense that human rights law applies in times of war and humanitarian law acts as a form of *lex specialis* for determining what constitutes an arbitrary deprivation of the right to life under human rights law during hostilities. Further, as the Court stated in the 2004 *Wall* case,<sup>46</sup> ‘there are thus 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’.<sup>47</sup>

Human rights law is applicable in occupied territory either as a matter of treaty law or as customary international law. While certain states, such as the United States, take the position that human rights treaty law does not have extra-territorial application,<sup>48</sup> customary international human rights law is not territorially limited.<sup>49</sup> As David Kretzmer has noted, to suggest that a state does not have obligations towards a person affected by its actions ‘would be incompatible with the

time of war – mainly in occupied territories – are incorporated in the Hague Regulations and in the [F]ourth Geneva Convention’.

- 41 See Hague Regulations, Art. 46: ‘Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated’.
- 42 See GC IV, Art. 27, para. 1 and Arts. 48 *et seq.* Art. 27, para. 1 states: ‘Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity’. As the *Geneva Convention IV Commentary*, above note 15, Art. 27, p. 201, notes in respect of the right to life: ‘[u]nlike Article 46 of the Hague Regulations the present Article does not mention it specifically. It is nevertheless obvious that this right is implied, for without it there would be no reason for the other rights mentioned’.
- 43 For example, as AP I, Art. 75 states, in part: ‘75. 2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: (a) violence to the life, health, or physical or mental wellbeing of persons, in particular: (i) murder; (ii) torture of all kinds, whether physical or mental; (iii) corporal punishment; and (iv) mutilation.’
- 44 *Geneva Convention IV Commentary*, above note 15, Art. 2, p. 21.
- 45 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226, p. 240, para. 25, available at: <http://www.icj-cij.org/docket/files/95/7495.pdf> (last visited February 2012) (hereafter *Nuclear Weapons* case).
- 46 *Wall* case, above note 23, pp. 45–46, para. 105.
- 47 *Ibid.*, at p. 178, para. 106.
- 48 Noam Lubell, *Extraterritorial Use of Force Against Non-state Actors*, Oxford University Press, Oxford, 2010, pp. 197–198, discussing the United States position; Michael J. Dennis, ‘Application of human rights treaties extraterritorially in times of armed conflict and military occupation’, in *American Journal of International Law*, Vol. 99, No. 1, 2005, p. 119.
- 49 Major Sean Condon (ed.), *Operational Law Handbook*, Judge Advocate General’s Legal Center and School, Charlottesville, VA, 2011, p. 45, available at: [http://www.loc.gov/tr/frd/Military\\_Law/pdf/operational-law-handbook\\_2011.pdf](http://www.loc.gov/tr/frd/Military_Law/pdf/operational-law-handbook_2011.pdf) (last visited February 2012), which notes that ‘[t]he Restatement makes no qualification as to where the violation might occur, or against whom it may be directed.

very notion of the universality of human rights'.<sup>50</sup> The scope of such customary law is reflected in the *Restatement of the Law: The Foreign Relations Law of the United States*, which indicates that it includes protection from murder, torture, or other cruel, inhuman, or degrading treatment or punishment or prolonged arbitrary detention.<sup>51</sup> Of particular note in respect of law enforcement, the *Restatement of Foreign Relations Law* specifically links human rights norms to policing. It is indicated that, while murder is stated to be a violation of international law, this would not be the case where it is necessary to take life in exigent circumstances, 'for example by police officials in line of duty in defense of themselves or of other innocent persons, or to prevent serious crime'.<sup>52</sup> Therefore, the inhabitant's rights to life, and other rights, are protected under both IHL and human rights law.

It is in the context of maintaining public order and safety that the issue often arises of how the two governing frameworks of humanitarian and human rights law interact with each other. Since the occupation of territory does not end the armed conflict, it is inevitable, as Richard Baxter noted in 1950, 'that inhabitants of an occupied area will chafe under enemy rule . . . and that they will in numerous instances, acting singly or in concert, commit acts inconsistent with the security of the occupying forces'.<sup>53</sup> This reality is reflected in the reference to 'organized resistance movements' in the Third Geneva Convention.<sup>54</sup> It is also relevant to the

Therefore, it is the CIL [customary international law] status of certain human rights that renders respect for them a legal obligation on the part of U.S. forces conducting operations outside the United States, and not the fact that they may be reflected in treaties ratified by the United States. Practitioners must nevertheless look to specific treaties, and to any subsequent executing legislation, to determine if this general rule is inapplicable in a certain circumstance'. See also N. Lubell, above note 48, p. 235; Noam Lubell, 'Challenges in applying human rights law to armed conflict', in *International Review of Red Cross*, Vol. 87, No. 860, December 2005, p. 741; Y. Dinstein, above note 4, p. 71. As Dinstein notes, while the Covenant and the European Convention are limited in their application to Contracting parties, '[c]ustomary human rights are conferred on human beings wherever they are'. See also *Nuhanovic v. The State of the Netherlands*, Court of Appeal in The Hague, case number 200.020.174/01, 5 July 2011, p. 17, para. 6.3, available at: <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5388> (last visited 4 November 2011), in which the Court stated '[a]dditionally, the Court will test the alleged conduct against the legal principles contained in articles 2 and 3 ECHR and articles 6 and 7 ICCPR (the right to life and the prohibition of inhuman treatment respectively), because these principles, which belong to the most fundamental legal principles of civilized nations, need to be considered as rules of customary international law that have universal validity and by which the State is bound'; *Mustafic-Mujic et al. v. The State of the Netherlands*, Court of Appeal in The Hague, case number 200.020.173/01, 5 July 2011, p. 18, para. 6.3, available at: <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5386> (last visited February 2012).

- 50 David Kretzmer, 'Targeted killing of suspected terrorists: extra-judicial executions or legitimate means of self-defence?', in *European Journal of International Law*, Vol. 16, No. 2, 2005, p. 184.
- 51 *Restatement of the Law: The Foreign Relations Law of the United States*, Vol. 2, American Law Institute Publishers, St. Paul, MN, 1987, pp. 161–175 (hereafter *Restatement of Foreign Relations Law*).
- 52 *Ibid.*, pp. 163–164, para. f.
- 53 Richard R. Baxter, 'The duty of obedience to the belligerent occupant', in *British Year Book of International Law*, Vol. 27, 1950, p. 235.
- 54 GC III, Art. 4(A)(2). Resistance during occupation is distinguished from participation in fighting an invading force. Hague Regulations, Art. 2 and GC III, Art. 4(A)(6) provide lawful belligerent status to what has been termed the *levée en masse* and with it the right to be treated as a prisoner of war upon capture. The *levée en masse* is described as inhabitants of a non-occupied territory who, upon the approach of an enemy, spontaneously take up arms to resist invasion without having had time to form themselves into regular armed units. They must carry arms openly and respect the laws and customs of war. What is unclear is the degree of organization that the inhabitants must have in order to be considered lawful participants in armed conflict, although historically it was considered not to include individual

concept of ‘armed combatants’ in Article 44(3) of Additional Protocol I, where there are special rules regarding the retention of combatant status ‘in situations of armed conflict where, *owing to the nature of hostilities*, an armed combatant cannot so distinguish himself.’<sup>55</sup> A number of states have limited the claim for combatant status in those circumstances to occupied territory and armed conflicts involving national liberation.<sup>56</sup> Further, the Fourth Geneva Convention provides for the administrative detention of civilians in internment and assigned residence<sup>57</sup> and for taking penal action against persons who commit offences intended to harm the Occupying Power.<sup>58</sup>

At the same time the maintenance of public order requires that, as in any society, the population be policed.<sup>59</sup> Unfortunately, neither the Hague Regulations, nor the Geneva Conventions, nor Additional Protocol I refer directly to policing, although such activity is an inherent part of the detention, internment, and prosecution of criminals or security detainees authorized by humanitarian law.<sup>60</sup> Furthermore, the treaty law does not specifically outline how policing interacts with the conduct of hostilities against those participating in the ongoing armed conflict. However, prior to looking at how policing and military operations interact it is first necessary to gain an appreciation of the complex security challenge that can be presented during occupation. It is to that issue that the analysis will now turn.

## The complex security situation in occupied territory

The complexity of the security challenge occurring during occupation will first be addressed by discussing the concept of ‘violent’ as opposed to ‘calm’ occupation. Historical examples of violent occupations from World War II, and particularly the more recent 2003–2004 occupation of Iraq, will be used to highlight the nature, scope, and intensity of hostilities that can occur during such occupations. This will

participation. See James Molony Spaight, *War Rights on Land*, MacMillan, London, 1911, pp. 51–56. Inhabitants who rose to fight in territory that was occupied originally had no right to do so; however, provision was made in 1949 in Art. [Art.] 4(A)(2) of GC III to provide prisoner-of-war status to members of organized resistance movements belonging to a party to a conflict. Those members have to meet specific conditions of being under responsible command, wearing a fixed distinctive sign recognizable at a distance, carrying arms openly, and conducting their operations lawfully. However, these conditions for legitimate status for members of organized resistance movements are largely seen as being unrealistic in practice. See Howard Levie, ‘Prisoners of war in international armed conflict’, in *International Law Studies*, Vol. 59, 1977, p. 42.

55 AP I, Art. 44(3) (emphasis added). In those circumstances, the combatant must carry arms openly during each military engagement and during such time that he or she is visible to an adversary while engaged in a military deployment preceding the launching of an attack.

56 For example, see the Reservations made by Canada, the United Kingdom, France, and Germany, available at: <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P> (last visited February 2012.).

57 GC IV, Art. 78.

58 *Ibid.*, Art. 68.

59 John Keegan, *A History of Warfare*, Vintage Books, New York, 1993, p. 57: ‘[t]he civilized societies in which we best like to live are governed by law, which means that they are policed’.

60 GC IV, Arts. 64–78.

serve to better situate the following legal discussion of the frameworks governing the maintenance of order in occupied territory. Owing to the diverse types of occupations and the unique relationship between the Occupying Power and the inhabitants of an occupied territory, there is sometimes a tendency to view the law of occupation as a body of law distinct from the humanitarian law that generally governs hostilities. It has been suggested that military occupation 'lies midway between war and peace'<sup>61</sup> and that 'there are no major military operations in the occupied zone'.<sup>62</sup> Similarly, when restoring public order, every Occupying Power is confronted 'with problems more typical of peacekeeping operations than of traditional inter-state war'.<sup>63</sup> The nature of the security situation in the territory can be such that there is no regular violence occurring. In that case, it is described as a 'calm' occupation, or when violence does occur it is viewed as an 'outbreak' or 'resumption' of hostilities.<sup>64</sup>

There is no doubt that there are situations of occupation of relative calm, where no hostilities are being conducted or have been conducted for a period of time. However, the use of such terms is problematic to the extent that they may be interpreted as suggesting that peaceful coexistence is the norm and the conduct of hostilities is the exception during a belligerent occupation, or that occupation law is not an integral part of international humanitarian law. Belligerent occupation is fundamentally a product of war<sup>65</sup> and the history of warfare establishes that an occupying force can be confronted with a wide range of security challenges. Rather than being 'calm', there can be situations of elevated, widespread, and protracted violence.

These more violent situations are reflected in the occupations of World War II and more recently in Iraq. The World War II examples are relevant since the 1949 Fourth Geneva Convention was drafted with the scope, scale, and violence of that conflict in mind. These rules governing the protection of the civilian population and the treatment of those threatening the security of the Occupying Power are designed to be applied universally, regardless of the identity of that Power or the organized resistance. An overview of the nature and organization of resistance to

61 Danio Campanelli, 'The law of military occupation put to the test of human rights', in *International Review of the Red Cross*, Vol. 90, No. 871, September 2008, p. 654.

62 *Ibid.*, p. 659.

63 M. Sassòli, above note 11, p. 662. See also Joshua S. Goldstein, *Winning the War on War: The Decline of Armed Conflict Worldwide*, Dutton, New York, 2011, p. 130. Although referring to a non-occupation situation, he notes: '[p]eace operations and counterinsurgency operations have grown closer in nature, as seen in Afghanistan today where civil/political and military elements of counterinsurgency mix fluidly with humanitarian assistance, intertribal conflict resolution, and civil society capacity building, all under a UN mandate, but with a large heavily armed NATO force carrying it out'.

64 University Centre for International Humanitarian Law, *Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation*, held at Geneva, 1–2 September 2005, pp. 22–23, available at: [http://www.geneva-academy.ch/docs/expert-meetings/2005/3rapport\\_droit\\_vie.pdf](http://www.geneva-academy.ch/docs/expert-meetings/2005/3rapport_droit_vie.pdf) (last visited February 2012) (hereafter UCIHL Meeting Report). See also Louise Doswald-Beck, 'The right to life in armed conflict: does international humanitarian law provide all the answers?', in *International Review of the Red Cross*, Vol. 88, No. 864, December 2006, pp. 892–894.

65 Y. Dinstein, above note 4, p. 1.

occupation will illustrate the complexity of the security situation that can arise during ‘violent’ occupation.

## Resistance groups during World War II

World War II provides perhaps the most diverse examples of groups resisting occupation. Owing to the global scale of the conflict, such operations ‘world-wide varied considerably in size, composition, motivation, mission, and effectiveness’ and ‘one resistance action often bore only generic resemblance to another’.<sup>66</sup> It has been noted that, in light of the initial swift German victories in Europe ‘and the general absence of pre-war planning, it is surprising how quickly national resistance movements sprang up across Europe’.<sup>67</sup> During most of World War II the resistance in Poland, Czechoslovakia, Norway, Denmark, Holland, Belgium, France, and Italy, applied a more subtle type of guerrilla warfare than that practised in the Soviet Union or Yugoslavia, owing to a lack of suitable terrain for sanctuary, inadequate communications, conflicting temperaments, and political attitudes. Generally, the resistance operated as individuals or small groups carrying out tasks of ‘terror, subversion or sabotage’, intelligence-gathering, and activities such as helping downed Allied airmen, while attempting to build secret guerrilla armies.<sup>68</sup>

In contrast, partisan units in central and northern Russia often operated in operational brigades of guerrillas controlling large areas, with between 12,000 and 20,000 personnel.<sup>69</sup> Their activities ranged from small-unit ambush and sabotage to co-ordinated operations with the Red Army.<sup>70</sup> In the complex political environment of Yugoslavia there were two main resistance groups. The nationalist Chetniks and Tito’s Communist Partisans began the resistance together, although an irreparable rift developed between them.<sup>71</sup> Tito worked to develop a regular military organization,<sup>72</sup> but also employed what the German occupiers called ‘Home Partisans’. At the same time as killing soldiers and conducting sabotage, they operated as a shadow government.<sup>73</sup>

It has been noted that two strategies developed for resistance groups: ‘one conservative and the other revolutionary’.<sup>74</sup> Russia provides an example of the conservative strategy, where operations were conducted to restore the former regime, while Tito’s partisans, who were fighting to take power from the exiled

66 Robert B. Asprey, *War in the Shadows*, Vol. I, Doubleday & Co. Inc., Garden City, NY, 1975, p. 409.

67 John Shy and Thomas W. Collier, ‘Revolutionary war’, in Peter Paret (ed.), *Makers of Modern Strategy from Machiavelli to the Nuclear Age*, Princeton University Press, Princeton, 1986, p. 833.

68 R. B. Asprey, above note 66, pp. 417–418.

69 *Ibid.*, p. 460.

70 *Ibid.*, p. 461.

71 *Ibid.*, p. 472.

72 See John Ellis, *From the Barrel of a Gun: A History of Guerrilla, Revolutionary and Counter-insurgency Warfare, from the Romans to the Present*, Greenhill Books, London, 1995, pp. 165–166, for a discussion of the development of units organized into brigades, divisions, and corps capable of conducting operations ‘half way between guerrilla operations proper and full-scale positional warfare’.

73 R. B. Asprey, above note 66, p. 481.

74 J. Shy and T. W. Collier, above note 67, p. 833.



regime, represented the 'revolutionary' strategy.<sup>75</sup> This indicates that resistance movements can be motivated not only by a desire to end the occupation but also by political objectives of their own that affect the conduct of hostilities.

Mao Tse Tung's book *On Guerrilla Warfare*<sup>76</sup> is often associated with revolutionary warfare in the wake of World War II. However, it was published in 1937 in the context of the war against Japanese invaders occupying China. In describing such warfare, Mao points out that guerrilla units may be organized from a variety of entities: the masses of the people, regular army units, local militia, the police, the ranks of the enemy, and even bandit groups.<sup>77</sup> Operationally, their 'primary field of activity is in the enemy's rear area', reinforcing the fact that armed conflict often continues once territory is occupied.<sup>78</sup> Guerrilla forces were assessed as being 'particularly effective in the Far East where Chinese Communist Guerrillas helped KMT [Kuomintang] regular divisions tie down some 25 Japanese Divisions for most of the war'.<sup>79</sup>

While it might be tempting to view the violent activities of the World War II resistance movements as a relic of a bygone era, the more recent example of Iraq suggests otherwise. Some sixty years after World War II a diversity of resistance groups, methods of operation, motivations, and levels of violence was evident. Further, in respect of maintaining law and order, the occupation of Iraq highlights the challenges of containing criminal activity while addressing the significant security threats posed by insurgent activity. A more detailed overview of the complexity of the security situation in the aftermath of the 2003 invasion of Iraq is particularly helpful in understanding the nature of a 'violent' occupation.

## The complex security situation in Iraq

The swift and largely conventional Coalition military operation against Iraq that commenced on 20 March 2003 came to a close on 1 May 2003 with the declaration by President Bush that: '[m]ajor combat operations have ended'.<sup>80</sup> While the exact time period of the occupation of Iraq has been the subject of debate,<sup>81</sup> it is widely considered to have begun on 1 May 2003 and ended on 28 June 2004.<sup>82</sup> Even before

75 *Ibid.*

76 Mao Tse-Tung, *On Guerrilla Warfare*, trans. Samuel B. Griffith, University of Illinois Press, Champaign, IL, 2000.

77 *Ibid.*, pp. 71–76.

78 *Ibid.*, pp. 52–53.

79 J. Ellis, above note 72, p. 200.

80 Thomas E. Ricks, *Fiasco: The American Military Adventure in Iraq*, Penguin Press, New York, 2006, p. 145. See also European Court of Human Rights (ECtHR), *Case of Al-Skeini and Others v. The United Kingdom*, application no. 55721/07, 7 July 2011, para. 10, available at: <http://www.unhcr.org/refworld/pdfid/4e2545502.pdf> (last visited February 2012) (hereafter *Al Skeini* case).

81 See Robert Kolb, 'Occupation in Iraq since 2003 and the powers of the UN Security Council', in *International Review of the Red Cross*, Vol. 90, No. 869, 2008, p. 29; M. Zwanenburg, above note 24, p. 745; Adam Roberts, 'The end of occupation in Iraq (2004)', in *International and Comparative Law Quarterly*, Vol. 54, January 2005, p. 27; and Adam Roberts, 'Transformative military occupation: applying the laws of war and human rights', in *American Journal of International Law*, Vol. 100, No. 3, 2006, pp. 608–613.

82 See *Al Skeini* case, above note 80, para. 143: 'This aim was achieved by 1 May 2003, when major combat operations were declared to be complete and the United States and the United Kingdom became

the *de jure* commencement of occupation, looting and civil disorder began as the United States military reached the centre of Baghdad on 9 April 2003. The Iraqi police and government authority disappeared, and invading military forces largely stood by and watched. It has been noted that: '[o]nce it became clear that US soldiers were not going to intervene, public exuberance, joy at liberation, and economic opportunism quickly darkened into a systemic effort to strip the capital's stores and public institutions of everything of value'.<sup>83</sup> The disappearance of central authority, as well as Saddam Hussein's release of 38,000 inmates from prison in 2002, resulted in criminal elements embarking on a wave of violence including murders, kidnappings, rapes, and home invasions.<sup>84</sup> It has been remarked that: '[b]y conservative estimates, 10,000 Iraqi civilians were killed in the year following the US intervention'.<sup>85</sup>

Military planners had not adequately prepared for the breakdown in public order. The mass disintegration of what had been a police force of questionable quality was exacerbated by a subsequent decision on 23 May 2003, Coalition Provisional Authority Order Number 2 to disband Iraqi Entities. As Thomas Ricks has written, '[t]his included not only the army, but also police and domestic security forces of the Ministry of the Interior'.<sup>86</sup> While significant efforts were made to reconstitute an Iraqi police force, there remained a significant gap in the Coalition's ability to police the occupied territory. The looting in Baghdad made restarting the electrical grid more difficult, which 'further undermined a burgeoning security problem' and encouraged crime.<sup>87</sup> While British forces in Basra moved quickly to adopt a 'hearts and minds' approach towards the population at the end of the initial combat phase,<sup>88</sup> they also struggled to maintain law and order.<sup>89</sup> The gap in law enforcement capability might have been filled by Coalition or even international police forces; however, it had wrongly been anticipated that Iraqi security personnel would stay in place.<sup>90</sup> Further, there appeared to be little support within the United States Government for that approach in the early months of the occupation.<sup>91</sup>

The threat to public order was not limited to ordinary crime and lawlessness. The growing insurgency also manifested itself in attacks against

Occupying Powers within the meaning of Article 42 of the Hague Regulations', and *ibid.*, para. 148: 'the occupation came to an end on 28 June 2004, when full authority for governing Iraq passed to the Interim Iraqi Government from the Coalition Provisional Authority, which then ceased to exist'.

83 David H. Bayley and Robert M. Perito, *The Police in War: Fighting Insurgency, Terrorism, and Violent Crime*, Lynne Rienner Publishers, Boulder, CO, 2010, p. 6.

84 *Ibid.*, p. 7. See also John Keegan, *The Iraq War*, Key Porter Books, Toronto, 2004, pp. 206–207.

85 D. H. Bayley and R. M. Perito, above note 83, p. 7.

86 T. E. Ricks, above note 80, p. 162. See also *Coalition Provisional Authority Order Number 2: Dissolution of Entities*, 23 May 2003, available at: [http://www.iraqcoalition.org/regulations/20030823\\_CPAORD\\_2\\_Dissolution\\_of\\_Entities\\_with\\_Annex\\_A.pdf](http://www.iraqcoalition.org/regulations/20030823_CPAORD_2_Dissolution_of_Entities_with_Annex_A.pdf) (last visited February 2012).

87 Michael R. Gordon and General Bernard E. Trainor, *Cobra II: The Inside Story of the Invasion and Occupation of Iraq*, Pantheon Books, New York, 2006, p. 468.

88 J. Keegan, above note 84, p. 182.

89 *Al-Skeini* case, above note 80, para. 22, quoting from the 2008 Aitken Report.

90 D. H. Bayley and R. M. Perito, above note 83, p. 6.

91 *Ibid.*, p. 11.

Coalition forces with improvised explosive devices (IEDs).<sup>92</sup> In what has been termed the ‘war of the roadside bomb’, the ‘insurgents usually used 155 millimeter artillery shells and a variety of mortar rounds, and occasionally TNT or plastic explosive’.<sup>93</sup> It is estimated that the average number of daily bomb, mortar, and grenade attacks on US troops rose from twenty-five a day in January 2004 to double that number by June of the same year.<sup>94</sup> There were also battles for the control of whole cities and areas of Iraq.<sup>95</sup> In the *Al-Skeini* case it is stated that, as of 30 June 2004, in the Multinational Division (South East) area of operations, the violence had included 1,050 violent attacks involving 5 anti-aircraft attacks, 12 grenade attacks, 101 attacks and 52 attempted attacks involving IEDs, 145 mortar attacks, 147 rocket propelled grenade attacks, and 535 shootings.<sup>96</sup>

Ultimately, a broad spectrum of attacks in Iraq occurred, not only against US and Coalition military forces, but also against senior Iraqi political figures, foreign companies, Iraqi security officers and services, Iraqis collaborating with occupation authorities, critical infrastructure (such as power stations, liquid natural-gas plants, and oil installations), and symbolic targets such as the Jordanian Embassy and the UN Headquarters.<sup>97</sup> The ICRC headquarters in central Baghdad was also attacked with a vehicle-borne IED, resulting in twelve deaths.<sup>98</sup> These are not the weapons, tactics, or level of violence that law enforcement authorities are ordinarily equipped or trained to confront, although they do deal with isolated acts of terrorism.

A further indication of the warlike violence is evident in the fighting that took place in Baghdad and other cities such as Fallujah and Najaf. In Sadr City, an area of Baghdad, armed fighters from Moqtadr al-Sadr’s ‘Mahdi army’ took over all eight police stations and engaged in a firefight with US forces, resulting in the deaths of a reported eight US soldiers (with fifty-one wounded) and an estimated several hundred Iraqi fighters.<sup>99</sup> The conflict spread to cities in southern Iraq under the

92 See also J. Keegan, above note 84, p. 207, where he states in respect of the insurgents: ‘[t]heir methods, familiar to Israeli troops fighting the intifada but also to British with experience in Northern Ireland, were those of terrorism – attacks on patrols by gunmen who disappeared into side streets, roadside bombs – intensified by the self-sacrifice of suicide bombers’.

93 T. E. Ricks, above note 80, p. 217. Sergio Catignani, ‘The Israel Defense Forces and the Al-Aqsa Intifada: when tactical virtuosity meets strategic disappointment’, in Daniel Marston and Carter Malkasian (eds), *Counterinsurgency in Modern Warfare*, Osprey Publishing, Oxford, 2010, p. 235, notes that such weapons have also been used by groups resisting other occupation forces, as seen in the 2000–2005 Al-Aqsa Intifada against Israeli occupation, where ‘the placement of improvised explosive devices (IEDs) on roads leading to settlements was an especially lethal tactic that accounted for numerous military and civilian casualties’.

94 T. E. Ricks, above note 80, p. 329. See also *ibid.*, p. 337. The violence against occupation forces in early 2004 rose from ‘about 280 incidents in the last week of March, then about 370 in the first week of April, then 600 in the second week’.

95 *Ibid.*, p. 345.

96 *Al Skeini* case, above note 80, p. 10, para. 23.

97 Ahmed S. Hashim, *Insurgency and Counter-insurgency in Iraq*, Cornell University Press, Ithaca, NY, 2006, pp. 188–200.

98 BBC News, ‘Baghdad terror blasts kills dozens’, 27 October 2003, available at: <http://news.bbc.co.uk/2/hi/3216539.stm> (last visited February 2012).

99 T. E. Ricks, above note 80, p. 338. See also A. S. Hashim, above note 97, pp. 256–264, for a discussion of Moqtada al-Sadr and the revolt of 2003–2004; Patrick Cockburn, *Muqtada Al-Sadr and the Shia Insurgency in Iraq*, 2008, Faber and Faber, London, pp. 172–186, discussing the siege of Najaf; and Bing

control of Italian, Spanish, Polish, Ukrainian, and Salvadorian troops.<sup>100</sup> The US effort to take control of Sunni-dominated Fallujah started during the occupation (April 2004) and ran until November 2004. Although unconfirmed, it was reported that the number of dead ‘exceeded 600, including insurgents and civilians, and other accounts said more than 1,000 had been wounded.’<sup>101</sup> An attack on the city in April 2004 against an estimated 500 insurgents<sup>102</sup> involved 150 air strikes and destroyed between 75 and 100 buildings.<sup>103</sup> Although carried out after the official end of occupation, the subsequent November 2004 operation, which was, in effect, a successful completion of the previous attempts to seize Fallujah, involved attacks against 1,000 ‘hard core and two thousand part-timers’,<sup>104</sup> incorporating 500 air strikes, 14,000 artillery and shells, and 2,500 tank main gun rounds and significantly more destruction.<sup>105</sup> The twenty-one-month struggle resulted in 151 American troops killed and more than 1,000 wounded.<sup>106</sup> The scope of combat highlights the high levels of violence that can occur when fighting organized armed groups. The battles in Iraqi cities such as Fallujah and Najaf reflected a shift away from the traditional guerrilla operations in rural areas to ones carried out in urban terrain.<sup>107</sup>

Although primarily, but not exclusively, a Sunni-based insurgency,<sup>108</sup> the organized groups engaged in combat with Coalition forces were diverse. One clash between American forces and locals in Fallujah, described as ‘more of a tribal war than a resistance force’, resulted from what was perceived to be poor treatment of the tribes by the military forces.<sup>109</sup> In his assessment of the Iraqi insurgency, Ahmed Hashim has identified what he describes as a remarkable number of insurgent organizations varying ‘widely in levels of skill, functional specialization, professionalism, number of personnel, modus operandi, targeting and longevity’.<sup>110</sup> Insurgent groups included combat cells ranging from large and well-developed organizations,

West, *No True Glory: A Frontline Account of the Battle for Fallujah*, Bantam Dell, New York, 2005, pp. 61–62.

100 P. Cockburn, above note 99, pp. 181–182; T. E. Ricks, above note 80, pp. 337–338.

101 John F. Burns, ‘The struggle for Iraq: the occupation; troops hold fire for negotiations at 3 Iraqi cities’, in *New York Times*, 12 April 2004, available at: <http://www.nytimes.com/2004/04/12/world/struggle-for-iraq-occupation-troops-hold-fire-for-negotiations-3-iraqi-cities.html?pagewanted=print> (last visited February 2012).

102 B. West, above note 99, p. 256. However, see Thom Shanker and John Kifner, ‘The struggle for Iraq: troops; suited to guerrillas, a dusty town poses tricky perils’, in *New York Times*, 25 April 2004, available at: <http://www.nytimes.com/2004/04/25/world/struggle-for-iraq-troops-suited-guerrillas-dusty-town-poses-tricky-perils.html?pagewanted=all&src=pm> (last visited February 2012), where it is indicated that United States intelligence believed there were ‘2,000 hard-core insurgents, including 200 foreign fighters’.

103 B. West, above note 99, p. 315.

104 *Ibid.*, p. 256.

105 *Ibid.*, pp. 315–316. It is estimated that 18,000 of Fallujah’s 39,000 buildings were damaged or destroyed.

106 *Ibid.*

107 Richard H. Shultz Jr. and Andrea J. Dew, *Insurgents, Terrorists and Militias: The Warriors of Contemporary Combat*, Columbia University Press, New York, 2006, pp. 253–254.

108 A. S. Hashim, above note 97, p. 60.

109 Zaki Chehab, *Inside the Resistance: The Iraqi Insurgency and the Future of the Middle East*, Nation Books, New York, 2005, p. 18.

110 A. S. Hashim, above note 97, p. 170.

referred to as squadrons, battalions, or brigades, to part-time participants.<sup>111</sup> Support for the insurgency came from Arab nationalists, disgruntled Muslims, foreign fighters, and Sunni extremists. The significance of the relatively small number of foreign terrorists and religious extremists was as a force multiplier, owing to their willingness to participate in operations such as suicide attacks and massive car bombs.<sup>112</sup> The insurgency was also supported by financial facilitators and through the proceeds of crime.<sup>113</sup> By the summer of 2004 it became evident that the Coalition forces were fighting a significant insurgency. With the official end of the occupation, the conflict became non-international in character, although the nature of the attacks against the governing authorities did not change. Accordingly, the Coalition developed a campaign plan that 'called for containing the insurgent violence, building up Iraqi security forces, rebuilding economically and reaching out to the Sunni community'.<sup>114</sup>

This recognition of the resistance as an insurgency introduces a framework within which the interface between policing and conduct of hostilities can be assessed. This includes looking at the primary role performed by the police in counter-insurgency and the complementary activities of military forces. However, the law enforcement role must also be assessed in terms of the practical limits that arise when employing police forces in high-threat situations. It is to those issues that the analysis will now turn.

## Occupation, counter-insurgency, and policing

### Insurgency and counter-insurgency

The connection between insurgency and occupation can be found in *The U.S. Army, Marine Corps Counterinsurgency Field Manual*,<sup>115</sup> which was developed in response to the security situation confronting US military forces in Iraq and Afghanistan. An insurgency is described as 'an organized, protracted politico-military struggle designed to weaken the control and legitimacy of an established government, *occupying power*, or other political authority while increasing insurgent control'.<sup>116</sup>

111 *Ibid.*, pp. 158–160. See also Z. Chehab, above note 109, pp. 6–8. He describes a June 2003 meeting with a five-person Sunni group armed with hand grenades, AK-47 machine guns, RPG-7s, and a 62 mm mortar which started out as an independent nationalist group, but which at that point had growing ties to groups with Islamic backgrounds, ex-Ba'athists, and members of the Fedayeen Saddam.

112 A. S. Hashim, above note 97, pp. 138–139.

113 R. H. Shultz and A. J. Drew, above note 107, pp. 240–242; A. S. Hashim, above note 97, p. 169.

114 T. E. Ricks, above note 80, pp. 392–393.

115 *The U.S. Army, Marine Corps Counterinsurgency Field Manual*, U.S. Army Field Manual No. 3-24, Marine Corps Warfighting Publication No. 3-33.5, University of Chicago Press, Chicago, 2006 (hereafter *Counterinsurgency Manual*).

116 *Ibid.*, p. 2, para. 1–2 (emphasis added). The potential link between insurgency and occupation was recognized in Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (III) Geneva Convention Relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, Art. 4, p. 58, where, in order to counter a perspective that providing prisoner-of-war status to members of organized resistance movements was legitimizing insurgency, it is stated: 'In our view, the stipulation that organized resistance

Classic counter-insurgency doctrine focuses on good governance, with a primary role for policing in countering the insurgent threat. It is as applicable in a situation of occupation as it is in an internal armed conflict. This is reflected in the fact that the nature of the security threat facing state authorities (either Coalition or Iraqi) did not change when the occupation legally ended but the struggle to control the violence continued.<sup>117</sup>

As Sir Robert Thompson stated in 1966: '[a]n insurgent movement is a war for the people. It stands to reason that government measures must be directed towards restoring government authority and law and order throughout the country so that control over the population can be regained and its support won'.<sup>118</sup> The link between governance, the maintenance of law and order, and counter-insurgency operations is reflected in contemporary military doctrine.<sup>119</sup> The conduct of a counter-insurgency campaign places a premium on the employment and, if necessary, development of police and internal intelligence services. Police play a particularly important role in gathering intelligence on insurgent activities.<sup>120</sup>

The maintenance of law and order requires respect for the rule of law. The indicia of a functional legal system include the police, a law code, judicial courts, and a penal system.<sup>121</sup> This is generally reflected in humanitarian law, which provides for the continuance in force of the laws of the occupied territory,<sup>122</sup> the continued functioning of tribunals<sup>123</sup> and the maintenance of the status of public officials and judges.<sup>124</sup> As James Spaight noted in 1911, seeing that justice is done and 'malefactors are brought to book, is an essential condition of good government and promotes the submission of the inhabitants to the rule of the stranger'.<sup>125</sup> However, '[n]o conventional rules govern the special problem of indigenous law-enforcement

movements and members of other militias and members of other volunteer corps which are independent of the regular armed forces must belong to a Party to the conflict, refutes the contention of certain authors who have commented on the Convention that this provision amounts to a "ius insurrectionis" for the inhabitants of an occupied territory'.

117 A. Roberts, 'Transformative military occupation', above note 81, p. 617, who notes that 'even if the occupation was theoretically over, the likelihood remained that uses of force, perhaps even exercises of administrative authority, that closely resembled a situation of occupation would occur'.

118 Robert Thompson, *Defeating Communist Insurgency*, Hailer Publishing, St. Petersburg, 1966, p. 51. See also David Galula, *Counterinsurgency Warfare: Theory and Practice*, Frederick A. Praeger, New York, 1964, pp. 89–90; and Frank Kitson, *Low Intensity Operations: Subversion Insurgency and Peacekeeping*, Faber & Faber, London, 1971, p. 49. For an overview of the history of counter-insurgency theory, see Daniel Marston and Carter Malkasian, 'Introduction', in D. Marston and C. Malkasian, above note 93, pp. 13–19.

119 *Counterinsurgency Manual*, above note 115, pp. 360–361, paras. D-38–D-39.

120 R. Thompson, above note 118, pp. 104–106; *Counterinsurgency Manual*, above note 115, pp. 229–230, paras. 6–90–6–91; D. H. Bayley and R. M. Perito, above note 83, p. 78.

121 *Counterinsurgency Manual*, above note 115, pp. 360–361, paras. D-38–D-39; D. H. Bayley and R. M. Perito, above note 83, p. 79.

122 Hague Regulations, Art. 43. This article indicates respect for existing laws is required 'unless absolutely prevented'. See also GC IV, Art. 64, where provision is made for the repeal or suspension of penal laws 'by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention'.

123 GC IV, Art. 64.

124 *Ibid.*, Art. 54.

125 J. M. Spaight, above note 54, p. 358.

agencies in occupied territories'.<sup>126</sup> The practice of Occupying Powers has been varied. Historically, it has included substituting their own armed forces for existing police agencies; retaining existing police forces after vetting; and even infiltrating sympathizers from the occupied territory into positions of control over existing forces.<sup>127</sup>

### Policing and the maintenance of order

In the immediate aftermath of the 2003 Iraq invasion, the Iraqi police apparently disappeared even before the occupation was legally established, in what has been described as a situation that probably could not be averted.<sup>128</sup> This situation was not helped by the disbandment of Iraqi security forces. Halting the looting, lawlessness, and crime therefore became the responsibility of the invading Coalition. It has been noted that '[t]he occupant must maintain law and order, and he is not at liberty to tolerate a situation of lawlessness and disorder in the occupied territory'.<sup>129</sup> Although some Iraqi police returned to duty, and programmes to train new Iraqi police forces were eventually established,<sup>130</sup> it was military forces that had to fill the security void. As is evident in the Iraq occupation, and in other counter-insurgencies of the twenty-first century, such as that in Afghanistan, military forces will sometimes be required to perform police-like functions such as 'protecting key installations, controlling access to relatively secure areas, manning checkpoints, or detaining spoilers'.<sup>131</sup> However, this is far from ideal since they are not necessarily trained for those duties and '[f]oreign stability forces must serve as role models with respect to the separation of military and police forces'.<sup>132</sup> This reality also necessitates military forces employed on law enforcement duties being trained and equipped with appropriate weapons (including less lethal weapons such as riot-control agents). They must further be required to use appropriate levels of force applicable to the performance of such duties.

### *The challenges of maintaining law and order in situations of occupation*

At the same time, there are limits to how police forces can and should be employed. This is important in assessing the applicability of a law enforcement normative framework. As demonstrated by the Iraq occupation, and the occupations of World War II before it, international armed conflict can continue throughout the period of occupation. Even during the long occupation of the West Bank and Gaza, the Second Intifada that started in 2000 demonstrated that hostilities at the armed

126 G. von Glahn, above note 18, p. 136.

127 *Ibid.*

128 J. Keegan, above note 84, p. 206.

129 Y. Dinstein, above note 25, pp. 105–106. This also extends to the actions of the occupying forces. See Y. Dinstein, above note 4, p. 208; *Congo* case, above note 21, para. 323, in which the Court indicates that every belligerent party has a duty of vigilance to ensure that its forces do not engage in pillage.

130 D. H. Bayley and R. M. Perito, above note 83, pp. 8–17.

131 *Ibid.*, pp. 77 and 80.

132 *Ibid.*, p. 81.

conflict end of the spectrum could re-ignite after periods of relative calm or low levels of violence.<sup>133</sup>

The level of violence may not be consistent in intensity or scale across the territory. In what has been referred to as a ‘mosaic’ war, it is often difficult to confine the insurgent activity of a resistance movement to one area or period of time. For instance, insurgents may use ‘guerrilla tactics in one province while executing terrorist attacks and an urban approach in another’.<sup>134</sup> The resistance may be organized in a similar manner to a conventional force and may seek to control territory or a city. However, attacks are often made by a guerrilla force that seeks to hide among the population, resulting in what has been called a ‘war amongst the people’.<sup>135</sup> The scale of the violence is often far beyond that associated with normal criminal activity. Attacks and defensive operations conducted by organized armed groups armed with mortars, suicide bombs, car bombs, IEDs, anti-tank rockets, and automatic weapons are not readily amenable to being dealt with by a police force.

The security continuum can include war, insurgency, subversion (i.e. terrorism or sabotage), disorder (i.e. strikes, demonstrations, mass rallies), and normal crime, all of which can occur concurrently,<sup>136</sup> which makes ‘determining the police role very difficult’.<sup>137</sup> The police are not necessarily the best trained or equipped to address this full spectrum of security threats. Generally, police functions can be divided into six categories: uniformed general duties police, non-uniformed criminal investigators, covert intelligence, border police, and stability police units for controlling strikes and demonstrations as well as protecting installations and personnel.<sup>138</sup> The first two categories are viewed as ‘core police’ duties that are fundamental for demonstrating that the ‘government can provide security and justice in response to the needs of individuals’.<sup>139</sup> The core police, along with emergency medical personnel, fire-fighters, and humanitarian workers, are often most at risk from insurgent attack.<sup>140</sup> The result is that there must be co-ordination between the military forces performing the counter-insurgency role and police forces focused on protecting the population. However, it has been suggested that ‘[i]f proactive force is required, it should be done by the military as a means to support core policing, and not as a substitute for it’.<sup>141</sup>

Furthermore there is the issue of the degree to which the civilian population is willing to co-operate. Notwithstanding the fact that the occupier is dealing

133 S. Catignani, above note 93, p. 235, who notes that the violence ‘took on a decidedly different character from the First Intifada’, extending to gunfire being directed at Israeli vehicles, ambushes, and the placement of improvised explosive devices.

134 *Counterinsurgency Manual*, above note 115, p. 14, para. 1–37.

135 General Rupert Smith, *The Utility of Force: The Art of War in the Modern World*, Penguin Books, London, 2007, pp. 3–4.

136 D. H. Bayley and R. M. Perito, above note 83, pp. 71–72.

137 *Ibid.*

138 *Ibid.*, p. 73. See also *Counterinsurgency Manual*, above note 115, p. 230, para. 6–92. The *Manual* identifies four major categories of police: criminal and traffic police, border police, transport police, and ‘[s]pecialized paramilitary strike forces’.

139 D. H. Bayley and R. M. Perito, above note 83, pp. 73–74.

140 *Ibid.*, p. 75.

141 *Ibid.*, p. 77.



with enemy civilians, the nature of a counter-insurgency is such that ‘in a guerrilla struggle one must seek their sympathy and support’.<sup>142</sup> As was evident in the Iraq occupation, the failure to maintain law and order can create animosity towards the Occupying Power and contribute to a broader insurgency,<sup>143</sup> although it is recognized that the motives for the Iraq insurgency were multi-faceted.<sup>144</sup> Even if reliance on a narrow interpretation of the law discussed above means that the legal obligation to maintain law and order does not commence until occupation is established, there remains a strong moral and operational advantage in limiting criminal activity where feasible. In any event, an occupation of territory will not always be unpopular in the eyes of the inhabitants. This security situation may be even more complex where the occupation ends up being a transformative one, with various factions within the territory vying for political control.<sup>145</sup>

### *The legitimacy of belligerent acts and the implication of the local police*

Another factor that can complicate the role of the Occupying Power in maintaining law and order is the issue of the interaction between foreign security forces and those of the occupied territory. Article 51 of the Fourth Geneva Convention bans the forced participation of protected persons in the armed or auxiliary services of the Occupying Power or their being compelled to ‘undertake any work which would involve them in the obligation of taking part in military operations’.<sup>146</sup> However, the Convention does not specifically make reference to indigenous police forces and their interface with the ongoing hostilities in the context of law enforcement. In addressing the complex security situation created by armed resistance, the *Geneva Convention IV Commentary* does seek to provide some guidance. That commentary indicates that police personnel of the occupied territory ‘cannot under any circumstances *be required* to participate in measures aimed at opposing *legitimate* belligerent acts, whether commenced by armed forces hostile to the Occupying Power, by corps of volunteers or by organized resistance movements’.<sup>147</sup> Presumably, those personnel could agree to do so voluntarily. The *Commentary* also notes that, owing to the criminal nature of acts occurring outside those contemplated by Article 4 of the Third Geneva Convention, it appears that ‘the

142 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Basic Books, New York, 1977, pp. 186–187.

143 T. E. Ricks, above note 80, pp. 135–138; D. H. Bayley and R. M. Perito, above note 83, p. 10; A. S. Hashim, above note 97, pp. 19–20.

144 A. S. Hashim, above note 97, pp. 59–124, where the origins and motives of the insurgency are identified as including the protection of Sunni identity; dissolution of the Iraqi security forces; nationalism, honour, revenge, and pride; tribal motives; religion; and political goals including ejecting the foreign occupation.

145 A. Roberts, ‘Transformative military occupation’, above note 81, pp. 615–616.

146 GC IV, Art. 51.

147 *Geneva Convention IV Commentary*, above note 15, Art. 54, p. 307 (emphasis added). See Kenneth Watkin, ‘Maintaining law and order during occupation: breaking the normative chains’, in *Israel Law Review*, Vol. 41, 2008, pp. 182–184, for a more detailed discussion of the issue of employing local police forces.

Occupying Power is entitled to require the local police to take part in tracing and punishing hostile acts',<sup>148</sup> whatever the motivation of the actors.

A key factor for deciding to involve the local police therefore appears to be the lawfulness of the activities carried out by insurgents who cannot claim legitimate belligerent status. While terms such as 'combatant' or 'fighter' are sometimes used in a generic sense<sup>149</sup> when referring to 'unprivileged belligerents',<sup>150</sup> the use of such terminology does not change the result that direct participation in hostilities without the benefit of lawful combatant status can lead to prosecution.<sup>151</sup> In respect of the law governing occupation, the recognition that an Occupying Power may enact penal provisions and take measures 'to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication' reflects the unlawful nature of most resistance activities.<sup>152</sup>

This linking of the legitimacy of participants in hostilities and the enforcement of the law means that police forces of the occupied territory can lawfully be employed against insurgents in all but the most exceptional of circumstances, since the likelihood of a resistance movement meeting the requirements of Geneva Convention III has long been viewed as very remote.<sup>153</sup>

148 *Geneva Convention IV Commentary*, above note 15, Art. 54, p. 307.

149 *ICRC Customary Law Study*, above note 34, p. 3, where it is stated that '[t]he term "combatant" . . . is used in its generic meaning, indicating persons who do not enjoy the protection of attack accorded to civilians, but does not imply a right to combatant status or prisoner of war status'. See Michael N. Schmitt, Charles H. B. Garraway, and Yoram Dinstein, *The Manual of the Law of Non-international Armed Conflict With Commentary*, International Institute of Humanitarian Law, Sanremo, 2006, p. 4: 'fighters include both members of the regular armed forces fighting on behalf of the government and members of armed groups fighting against the government. The term "fighters" has been employed in lieu of "combatants" in order to avoid any confusion with the meaning of the latter term in the context of the international law of armed conflict'. See also 'Third Meeting of Experts: The Use of Force in Occupied Territory, 29–30 October 2009, Geneva', in ICRC, *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory*, report prepared and edited by Tristan Ferraro, ICRC, March 2012 (hereafter 'Use of Force in Occupied Territory'), where the term 'fighter' is used to describe those fighting occupation forces. (in this edition)

150 Richard R. Baxter, 'So-called "unprivileged belligerency": spies, guerrillas, and saboteurs', in *British Year Book of International Law*, Vol. 28, 1951, p. 323, where the term 'unprivileged belligerent' is defined as 'persons who are not entitled to treatment as either peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949'. However, see Knut Dörmann, 'The legal situation of "unlawful/unprivileged" combatants', in *International Review of the Red Cross*, Vol. 85, No. 849, March 2003, pp. 45–74, who notes that the terms unlawful/unprivileged combatant/belligerent are not found in international humanitarian treaty law, and who provides an outline of the protections available to persons termed as such.

151 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd edition, Cambridge University Press, Cambridge, 2010, pp. 36–37. In referring to such participants as 'unlawful combatants', he notes 'in contradistinction to a lawful combatant, an unlawful combatant fails to reap benefits of the status of a prisoner of war. Hence, although he cannot be executed without trial, he is susceptible to being prosecuted and punished by military tribunal'. See also L. C. Green, above note 16, p. 137, where he notes that those who fail to comply with the requirements of AP I, Art. 44(3) to carry arms openly during an attack or while deploying prior to an attack 'may find themselves treated as unlawful combatants'.

152 GC IV, Art. 64(2); see also Arts. 65–68.

153 G. von Glahn, above note 18, pp. 51–52. See also Colonel G. I. A. D. Draper, 'The legal classification of belligerent individuals', in Michael A. Meyer and Hilaire McCoubrey (eds), *Reflections on Law and Armed*

In this respect, requirements such as carrying arms openly, or 'having a fixed distinctive sign recognizable at a distance', can be particularly difficult to meet for organized groups operating within occupied territory, thereby potentially criminalizing their activity. Even where parts of uniforms and other symbols have been worn, that, in itself, has not necessarily proved sufficient to have the members of a resistance group viewed as lawful belligerents.<sup>154</sup> Such participation in hostilities has long been viewed as 'criminal' in nature, leading to it being subjected to police attention as well as military activity. The reliance on local police forces to maintain order during occupation can be controversial, particularly as it can put them in opposition to groups and others who are their fellow nationals. As the *Geneva Convention IV Commentary* notes, internal laws and regulations should be issued to define those duties, so that the police can operate 'with complete loyalty without having to fear the consequences, should the terms of the Convention be liable to be interpreted later in a manner prejudicial to them'.<sup>155</sup>

### 'Belonging to a Party to the Conflict'

Another way in which the status of the members of an organized resistance movement as lawful belligerents may become an issue concerns whether the armed group 'belongs' to a Party to the Conflict.<sup>156</sup> It has been suggested that hostilities between an Occupying Power and organized armed groups that do not 'belong' to a Party to the Conflict could be considered non-international in character. Under that approach, the threshold for engaging such groups would depend upon active hostilities reaching a certain level associated with the *Tadić* criterion for conflicts not of an international character (involving organized armed groups and a certain intensity of conflict).<sup>157</sup> However, the threshold for non-international armed

*Conflict: The Selected Works on the Laws of War by the Late Professor Colonel G.I.A.D. Draper, OBE*, Kluwer Law International, London, 1998, p. 201; H. Levie, above note 54, pp. 39–40.

154 *Hostage* case, above note 19, p. 1244, which notes, in respect of the organized resistance in Yugoslavia, 'The evidence shows that the bands were sometimes designated as units common to military organization. They, however, had no common uniform. They generally wore civilian clothes although parts of German, Italian, and Serbian uniforms were used to the extent they could be obtained. The Soviet star was generally worn as insignia. The evidence will not sustain a finding that it was such that it could be seen at a distance. Neither did they carry their arms openly except when it was to their advantage to do so.'

155 *Geneva Convention IV Commentary*, above note 15, Art. 54, p. 307 and n. 7, where reference is made to a draft 'Declaration applying to Police Officers the Geneva Convention of August 12th, 1949, concerning the protection of civilians in wartime', which provides that '[d]uring or after occupation, Police officers may in no case be subjected to penalty or compulsion by reason of the execution by them of an order of any authority which could in good faith be regarded as competent especially if the execution of this order was a normal part of their duty'.

156 GC III, Art. 4 A (2).

157 'Use of Force in Occupied Territory', above note 149, pp. 18–21; Jelena Pejić, 'The protective scope of Common Article 3: more than meets the eye', in *International Review of the Red Cross*, Vol. 93, No. 881, March 2001, pp. 191–193. See also ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-A, Decision of 2 October 1995, para. 70; ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgment (Trial Chamber), 7 May 1997, paras. 562–568; ICTY, *Prosecutor v. Ljube Boskoski*, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, paras. 175 *et seq.*

conflict is open to interpretation. For example, in *Juan Carlos Abella v. Argentina*<sup>158</sup> the Inter-American Commission on Human Rights applied humanitarian law norms in assessing hostilities involving forty-two armed individuals attacking government forces over a thirty-hour period.<sup>159</sup> This suggests either different criteria than that contemplated by the jurisprudence of the ICTY, or the application of a relatively low threshold when considering the necessary intensity and duration of violence.<sup>160</sup> In this respect, to the extent that criteria for assessing the organization of an armed group – such as the existence of a command structure, disciplinary rules and mechanism within the armed group, the existence of a headquarters, logistics, the planning and conduct of operations, and so forth – are relied on,<sup>161</sup> those criteria need to be applied contextually. This is particularly evident in situations of occupation, where organized armed groups conducting network-centric guerrilla warfare normally operate in a less hierarchical and more decentralized fashion than conventional forces that have a traditional headquarters, formal command structure, and the like.<sup>162</sup> One of the challenges in assessing thresholds for internal conflict is the reality that '[d]istinguishing between international and non-international conflicts is particularly difficult in contemporary conflict situations, which often present aspects of both'.<sup>163</sup> As a result, there is 'no agreed-upon mechanism for definitively characterizing situations of violence'.<sup>164</sup>

158 Inter-American Commission on Human Rights, *Juan Carlos Abella v. Argentina*, Case 11.137, in *Inter-American Yearbook on Human Rights*, Vol. 13, 1997, 602 (Commission report) (hereinafter the *Abella Report*).

159 Lindsay Moir, 'Law and the Inter-American Human Rights System', in *Human Rights Quarterly*, Vol. 25, pp. 189–190. For a discussion of the *Abella Report* regarding its reliance on humanitarian law norms.

160 See Susan Breau, Marie Aronsson, and Rachel Joyce, 'Discussion paper 2: drone attacks, international law, and the recording of civilian casualties of armed conflict', Oxford Research Group, June 2011, available at: <http://www.google.com/search?q=Discussion+Paper+2%3A+Drone+Attacks%2C+International+Law%2C+and+the+Recording+of+Civilian+Casualties+of+Armed+Conflict%E2%80%9D%2C&sourceid=ie7&rls=com.microsoft:en-us:IE-SearchBox&ie=&oe=> (last visited February 2012), for reference to the *Abella* case in the context of applying the intensity and duration criterion for assessing the threshold for a non-international armed conflict.

161 See J. Pejic, above note 157, p. 192, for an outline of the organization 'criterion' in the ICTY jurisprudence.

162 Stanley A. McCrystal, 'It takes a network: the new frontline of modern warfare', in *Foreign Policy*, March/April 2011, available at: [http://www.foreignpolicy.com/articles/2011/02/22/it\\_takes\\_a\\_network?print=yes&hidecomments=yes&page=full](http://www.foreignpolicy.com/articles/2011/02/22/it_takes_a_network?print=yes&hidecomments=yes&page=full) (last visited February 2012). As General McCrystal noted, there was an initial attempt to assess Al Qaeda in Iraq in terms of a traditional military structure: 'But the closer we looked, the more the model didn't hold. Al Qaeda in Iraq's lieutenants did not wait for memos from their superiors, much less orders from bin Laden. Decisions were not centralized, but were made quickly and communicated laterally across the organization. Zarqawi's fighters were adapted to the areas they haunted, like Fallujah and Qaim in Iraq's western Anbar province, and yet through modern technology were closely linked to the rest of the province and country. Money, propaganda, and information flowed at alarming rates, allowing for powerful, nimble coordination. We would watch their tactics change (from rocket attacks to suicide bombings, for example) nearly simultaneously in disparate cities. It was a deadly choreography achieved with a constantly changing, often unrecognizable structure'.

163 Theodor Meron, 'The humanization of humanitarian law', in *American Journal of International Law*, Vol. 94, No. 2, 2000, p. 261.

164 *Ibid.* See also S. Breau *et al.*, above note 160, p. 5, who note that 'what level [of organization] this is has not been agreed upon, but it appears to be the consensus that an insurgent group must be organised enough to fulfil the obligations imposed upon them by Article 3 in order to be a "party" to an armed conflict'.

While the theory of applying non-international armed conflict thresholds may offer some attraction as a means to limit the violence during occupation when there are sporadic or renewed hostilities, it would have limited relevance to the violent occupations of World War II or Iraq, given the scope, level, and intensity of those conflicts.<sup>165</sup> In addition, there remains the question of whether a non-international armed conflict threshold would apply as a matter of law, or simply provide a practical means of identifying renewed hostilities as a matter of policy. The least controversial position is that the threshold can be of use from a practical perspective. In any event, with respect to the employment of police forces for dealing with the insurgents, applying the law of non-international armed conflict would actually highlight the ‘criminal’ nature of the insurgent activities. This is because the legitimate status of the members of the organized armed group would no longer be an issue: the category of prisoner of war is not available in non-international armed conflict.<sup>166</sup>

Furthermore, viewing hostilities between resistance movements and an Occupying Power as a non-international armed conflict raises a number of additional practical and legal complexities. It introduces a body of law: that governing non-international armed conflict, which is not as clearly proscribed in treaty law as the law applicable to international armed conflict. And, as will be discussed, suggesting that the hostilities between the Occupying Power and certain organized armed groups could be viewed as a non-international armed conflict is also inconsistent with traditional and long-standing interpretations of the law.

Hostilities conducted by an Occupying Power are carried out in the context of an international armed conflict. A state of occupation only exists during such conflict. The occupier is not the ‘sovereign’ of the territory, but rather is carrying out obligations imposed on it by the law governing international armed conflict. The resistance may include a variety of organized armed groups, as well as individuals who are taking a direct part in hostilities, or otherwise acting against the security interests of the occupier. In this respect, resistance during violent occupation often

165 UCIHL Meeting Report, above note 64, p. 29, which suggests ‘that the threshold for determining the existence of a Common Article 3 NIAC [non-international armed conflict], i.e., armed violence of a certain intensity and duration, provided a useful threshold for determining whether there has been a “resumption” or “outbreak” of hostilities in the relevant part of the occupied territory where the hostilities stem from resistance activity’.

166 Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, Oxford University Press, Oxford, 2010, p. 78, where it is noted that there is no equivalent status to prisoner of war in non-international armed conflict and ‘[w]hile the law of non-international armed conflict does not expressly prohibit or criminalize participation . . . international law does not immunize such participation from the operation of domestic law’. See also Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, p. 60: ‘[o]nce rebels are captured, or otherwise rendered unable to continue fighting . . . they become *hors de combat* and are entitled to the same level of treatment as civilians. Their legal status nevertheless remains unchanged, exposing them to the full force of the State’s criminal law’; and Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p. 36 : ‘armed opposition groups cannot, on the basis of Common Article 3, claim immunity from prosecution and punishment when captured by the territorial state for their acts contrary to the laws of the territorial state’.

involves a complex interrelationship between numerous armed groups, suggesting co-operation and co-belligerency rather than operating under one command or even for the political power whose authority over the territory has been displaced by the occupation. While not all organized armed groups resisting occupation are linked to a state, particularly in the strict formal sense established under the Third Geneva Convention for the narrow purpose of determining prisoner-of-war status, this does not make the hostilities in fact or in law any less international in character. Relying on prisoner-of-war status criteria to categorize the conflict appears to introduce an unnecessary element of formalism and to overreach the scope of the Third Convention. Members of some resistance groups fighting during occupation may get prisoner-of-war status because they belong to a Party to the Conflict, but that is the extent of the effect of those provisions of the Convention. The provisions do not speak to either the nature or categorization of the conflict itself. Further, in practical terms there may be no difference in organization or tactics of the variously backed organized armed groups engaged in the conflict, regardless of their affiliation. These groups, often acting as co-belligerents, fight the same Occupying Power, which attained that status at law as a result of the ongoing international armed conflict. It is difficult to see what advantage is gained in seeking to subdivide this conflict into different categories in what is an integrated operational and security environment involving protection of the same population.

As was demonstrated in World War II, armed resistance groups can serve diverse ranges of competing political interests, but at the same time, for a variety of reasons, act together against a common enemy.<sup>167</sup> This was seen again during the 2003–2004 Iraq Occupation.<sup>168</sup> However, this does not change the overarching law governing the activities of the Occupying Power, including the conduct of hostilities. As was indicated in the 1948 *Hostage* case, in respect of countering diverse organized resistance movements in Yugoslavia and Greece, the actions of the Occupying Power in ‘preserving order, punishing crime, and protecting lives and property within the occupied territory’ are ‘definitely limited by recognized rules of international law,

167 R. B. Asprey, above note 66, pp. 434–435, where it is indicated that in February 1943 the organized resistance in France consisted of five distinct groups. One of the most effective organizations was not linked to the occupied state: the Communist ‘Front National’, which provided nearly a third of the Maquis in a group called the ‘Franc Tireurs et Partisans’, did not give up control of their units but did co-operate with the Allied Powers and other groups in seeking to establish a secret army ‘more by need for recognition, arms, and money than by patriotism’. Similarly, the resistance in Yugoslavia presented another complicated situation. Tito’s Partisans were seeking to oust the exiled regime and by ‘November 1941, the communists and monarchists were at each other’s throats’. See Matthew Bennett, ‘The German Experience’, in Ian F. W. Beckett (ed.), *The Roots of Counterinsurgency: Armies and Guerrilla Warfare 1900–1945*, Blandford Press, London, 1988, p. 74. Notwithstanding this inter-group conflict, operations by and against the German occupier occurred in the context of an international armed conflict and not an internal one.

168 A. S. Hashim, above note 97, pp. 170–176, who notes that in Iraq there were nearly twenty different armed groups engaged in the resistance. While a linkage between most of these groups and the previous regime of Saddam Hussein would have been unlikely, that did not make the conduct of hostilities by or against the occupying Coalition forces any less international in character.

particularly the Hague Regulations of 1907'.<sup>169</sup> Although the conflict in Iraq was also subject to the provisions of the later 1949 Geneva Conventions, those Conventions did not change the basic premise of the *Hostage* case judgment.<sup>170</sup>

It should be of particular concern that claiming that the law governing internal conflicts readily applies to occupation may call into question the broader applicability of the Fourth Geneva Convention. This may particularly arise in situations where a majority or all of the resistance forces have little or no connection to the displaced regime. It also introduces additional levels of complexity, with the Occupying Power being asked to attempt a simultaneous application of the law governing international armed conflict with its internal counterpart. Such situations can occur; however, from the viewpoint of a practical and consistent application of the law they should be avoided whenever possible. There is also the potential for multiple separate non-international armed conflicts occurring where there are numerous different armed groups engaged in hostilities. Moreover, in focusing on the legitimacy of organized armed groups the theory fails to address the situation where individual civilians take a direct part in hostilities. It is not clear whether they would be considered to be participants in an international or a non-international armed conflict.

While it is the international law of armed conflict that applies to the occupier, this does not mean that non-international armed conflicts can never occur in occupied territory. As the *Tadić* decision contemplates, an armed conflict may occur when two organized armed groups fight one another. In the context of an occupation, such fighting between these groups could be seen as a conflict not of an international character. However, this is the exception rather than the rule. In any event, as has been noted, suggesting that a conflict is non-international in character reinforces the argument that police forces have a role to play in dealing with such illegal activity. While not necessarily encompassing traditional crimes such as theft or drug trafficking, participation by non-state actors in internal conflicts has long been viewed by states in particular as 'criminal' in nature. Acts that are carried out contrary to the security interests of the state in such conflicts may be treated as crimes. This inevitably points towards involvement of the criminal justice system, of which policing is such an integral part.

In the final analysis, hostilities conducted against the Occupying Power, including those carried out by a diverse range of organized armed groups, fit comfortably within the law governing international armed conflicts, including occupation law. It is difficult to see how any limited benefits gained from introducing the law governing non-international armed conflict outweigh the application of the better-developed and articulated law applicable to international conflicts. Overall this self-imposed interpretive complexity is neither necessary nor desirable from the broader perspective of protecting the inhabitants of the occupied territory.

169 *Hostage* case, above note 19, pp. 1243–1244.

170 GC III, Art. 135 and GC IV, Art. 154. The 1949 Geneva Conventions are supplementary to the 1907 Hague Regulations.

## The primacy of the police function

In respect of the performance of a policing function ‘occupation authorities, being responsible for maintaining law and order, are within their rights in claiming cooperation of the police’ regarding the suppression of criminal activity.<sup>171</sup> While it is open for public officials such as police to abstain from filling their functions for reasons of conscience,<sup>172</sup> the *Geneva Convention IV Commentary* recognizes that it is the moral duty for such officials ‘to remain at their posts in the interests of their fellow citizens’.<sup>173</sup> Ultimately, their employability may depend on the degree to which they are willing, able, and capable of engaging in police duties that could involve using force against insurgents. However, as occurred in Iraq, the establishment of a new governing authority – and with it security forces – increases the likelihood that the police forces become engaged in the counter-insurgency campaign.

It is clear that policing remains of fundamental importance during occupation, both in terms of general law enforcement and as part of a security campaign designed to counter the illegal activities of insurgent groups. However, separating the law enforcement role from the conduct of hostilities aspect of an insurgency is neither factually nor legally simple. As discussed above, factors, such as the intensity of the hostilities and the organization of the parties to the conflict might provide useful practical indicators of insurgent activity.<sup>174</sup>

If an ‘organized resistance movement’ meeting the criteria of Article 4 of the Third Geneva Convention was threatening the Occupying Power, then identification of the threat could be significantly easier.<sup>175</sup> However, as happened in Iraq, it is more likely that organized groups that do not meet the requirements of lawful belligerency and civilians taking a direct part in hostilities will carry out insurgent activities.<sup>176</sup> Further, police will often find themselves on the frontlines of the conflict owing to their integration into local communities, and, through the assignment of roles such as defending property and personnel, subject to attack.

To be consistent with traditional counter-insurgency doctrine, operational planning should rely on the ‘police primacy principle’.<sup>177</sup> That principle recognizes that a key objective is to reduce military involvement and increase local police

171 *Geneva Convention IV Commentary*, above note 15, Art. 54, p. 307. See M. Sassòli, above note 11, p. 665, who takes the view that ‘[p]olice operations are not directed at combatants (or civilians directly participating in hostilities) but against civilians (suspected of crimes threatening public order)’.

172 GC IV, Art. 54.

173 *Geneva Convention IV Commentary*, above note 15, Art. 54, p. 306.

174 ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, above note 157, para. 70.

175 *Hostage* case, above note 19, p. 1244. In limited circumstances some groups may operate as lawful combatants. The court noted ‘[t]here is convincing evidence in the record that certain band units in both Yugoslavia and Greece complied with the requirements of international law. . . . But the greater proportion of the partisan bands failed to comply with the rules of war entitling them to be accorded the rights of a lawful belligerent’.

176 M. Sassòli, above note 11, p. 665, n. 21. See also D. Kretzmer, above note 50, p. 207.

177 D. H. Bayley and R. M. Perito, above note 83, pp. 68–69. This principle is discussed in the context of a foreign intervention focused on the creation of a self-sustaining legitimate government. However, it has equal applicability to the maintenance of public order in a situation of occupation.



capacity. This is so that primary personnel deployed among the population to deal with the insurgency are trained to use minimum force and expected to exercise individual discretion.<sup>178</sup> However, insurgent activity can impact on what the police can do as '[i]nsecurity indicates both a need for police and an impediment to their effectiveness'.<sup>179</sup> It is also evident that the nature and scale of the threat posed by ongoing hostilities, as well as the organization, training, traditional role, and equipment of police forces, means that they are not the only security forces engaged either in law enforcement or in countering the insurgency during an occupation. Military forces of the Occupying Power will be required to participate in hostilities, fill gaps in the policing capacity, and provide support to police operations.<sup>180</sup> The issue raised above in the section 'Occupation and the rule of law' remains of how the legal frameworks governing the use of force in law enforcement and the conduct of hostilities in this complex security environment relate to one another. Having established the factual reality of 'violent' occupation and the significant challenges facing security forces, it is to that issue that the analysis will now turn.

## Legal frameworks governing the use of force in hostilities and policing

One commentator has suggested that '[p]ublic order is restored through police operations, which are governed by domestic law and international human rights, and not through military operations governed by IHL on the conduct of hostilities'.<sup>181</sup> However, that assessment was tempered with the acknowledgement that continuing organized armed resistance makes the distinction between the conduct of hostilities and police operations directed against criminal activity more difficult to establish.<sup>182</sup> While a preference for a clearly bifurcated system of normative frameworks to govern police and military operations in occupied territories is understandable, the complex security situation requires a more integrated and nuanced approach. In this respect it is not clear how the maintenance of 'public order and safety' can be limited to police operations, either factually or legally. Public order is a broader concept than 'law and order',<sup>183</sup> which itself has been interpreted to be more than simply the enforcement of criminal law.

178 *Ibid.*, p. 69. It is noted by authors that four characteristics distinguishing the police from the military are their being lightly armed, or not at all; their deployment as individuals or small groups; the exercise of more individual discretion; and an organizational structure separate from the military.

179 *Ibid.*

180 *Ibid.*, p. 77.

181 M. Sassòli, above note 11, p. 665.

182 *Ibid.*

183 Y. Dinstein, above note 4, pp. 91–94. In relying on the original wording of the preceding 1874 *Brussels Project of an International Declaration on the Law and Customs of War* and the 1880 *Oxford Manual of the Laws of War on Land*, he adopts a broad interpretation of Article 43 of the Hague Regulations to include public order and life, and states: '[i]t is not enough for the Occupying Power to conscientiously protect life and limb. . . . The military government cannot observe with equanimity an economy under occupation in a shambles or a social breakdown causing distress to the civilian population' (*ibid.*, p. 93).

Maintaining ‘law and order’ can involve preventing and responding to crimes, controlling public demonstrations, disarming individuals or groups, and preventing serious crimes such as genocide, war crimes, and crimes against humanity.<sup>184</sup> As has been noted, unless members of an organized resistance movement have attained the status of lawful belligerents, their activities can be subject to criminal prosecution. It is therefore necessary to look at the normative frameworks of human rights and humanitarian law, which govern security operations, to determine their relative roles in maintaining security. This will be done by setting out the basic differences between the two frameworks, assessing factors impacting on their relative applicability (such as exercising control over territory), and looking at the application of the *lex specialis* rule.

### The use of force under the human rights and humanitarian normative frameworks

The normative framework governing law enforcement addresses the use of force in a fundamentally different manner than the conduct of hostilities. Law enforcement, based on a human rights normative framework, seeks to limit the use of force to situations of absolute necessity.<sup>185</sup> A ‘shoot to kill’ policy is strictly avoided.<sup>186</sup> Accordingly, deadly force is only employed when it is strictly unavoidable.<sup>187</sup> There is a clear preference demonstrated for capturing rather than killing a suspect.<sup>188</sup> The use of force is governed by the principles of necessity and proportionality, with firearms

permitted in self-defense or the defense of others against the imminent threat of death or serious injury; to prevent a particularly serious crime involving grave threat to life; to arrest a person presenting such a danger and resisting their authority; or to prevent his or her escape.<sup>189</sup>

See also E. Benvenisti, above note 1, pp. 9–11, for a discussion of the differing views of the scope of ‘public order’.

184 Timothy McCormack and Bruce M. Oswald, ‘The maintenance of law and order in military operations’, in Terry Gill and Dieter Fleck (eds.), *The Handbook of the International Law of Military Operations*, Oxford University Press, Oxford, 2010, p. 445, para. 1.

185 ECtHR, *McCann et al. v. United Kingdom*, Application no. 18984/91, Judgment of 27 September 1995, para. 148 (hereafter *McCann*); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August–7 September 1990, para 9, available at: <http://www2.ohchr.org/english/law/pdf/firearms.pdf> (last visited February 2012) (hereafter UN Basic Principles on Use of Force).

186 ECtHR, *McKerr v. United Kingdom*, Application no. 28883/95, Judgment of 4 May 2001, para. 100 (hereafter *McKerr*), for reference to the term ‘shoot to kill’.

187 UN Basic Principles on Use of Force, above note 185, para. 9.

188 See the Israeli High Court of Justice (HCJ), *Public Committee Against Torture in Israel v. Government of Israel*, HCJ 769/02, Judgment of 11 December 2005, para. 40, available at: <http://www.law.upenn.edu/academics/institutes/ilp/targetedkilling/papers/IsraeliTargetedKillingCase.pdf> (last visited February 2012) (hereafter *Targeted Killing* case), relying in part on the European Court of Human Rights decision in *McCann*, above note 185, p. 148, para. 235, for a discussion of human-rights-based principles regarding law enforcement and the preference for arrest, investigation, and trial.

189 The Public Commission to Examine the Maritime Incident of 31 May 2010 (Turkel Commission), Report, Part I, January 2011, p. 233; UN Basic Principles on Use of Force, above note 185, para. 9.

In terms of accountability, the case law in the European Court of Human Rights extends the requirement for an investigation beyond ‘all *suspected* cases of extra-legal, arbitrary and summary executions’, as set out in the United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions<sup>190</sup> to the broader requirement of having an ‘effective official investigation when individuals have been killed as a result of the use of force’.<sup>191</sup> The form of investigation is not limited to a criminal inquiry; however, it must be independent of state authorities and comply with universal standards. The investigation can include a review not only of the security personnel involved but also of issues such as training, planning, rules of engagement, and orders.<sup>192</sup>

In contrast, humanitarian law recognizes that the use of deadly force is an inherent part of the conduct of hostilities. Lawful combatants receive immunity for killing carried out in accordance with the law. Members of state security forces are specifically trained, ordered, and expected to use such force, although attacks must be limited to valid military objectives (either persons or objects).<sup>193</sup> Lawful targets during international armed conflict, which encompasses periods of occupation, include members of the regular armed forces of states, irregular armed forces belonging to a party to the conflict, and civilians taking a direct part in hostilities.<sup>194</sup> Those using force must distinguish between lawful targets and civilians not taking an active part in hostilities and civilian property. However, under the humanitarian law concept of ‘proportionality’, collateral death, injury, or damage may result owing to their proximity to lawful targets.<sup>195</sup>

International humanitarian law also has an accountability structure, although, since it is not focused on preventing a ‘shoot to kill’ policy, it does not require an investigation whenever a person is killed. Rather, investigations deal primarily with alleged breaches of international criminal and domestic law such as war crimes, crimes against humanity, or breaches of military law. For example, in the 1998 Rome Statute of the International Criminal Court, the war crime relating to collateral injury or death is established when there is the ‘intentional launching of an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated’.<sup>196</sup> The initiation of a criminal or other investigation would only be required, as a matter of law, if there were a reasonable

190 United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Economic and Social Council Res. 1989/65, 24 May 1989, Annex, in Economic and Social Council Official Records, 1989, Supp. No. 1, p. 52, UN Doc. E/1989/89, para. 9 (emphasis added).

191 *McKerr*, above note 186, p. 599, para. 111.

192 Kenneth Watkin, ‘Controlling the use of force: a role for human rights norms in contemporary armed conflict’, in *American Journal of International Law*, Vol. 98, No. 1, 2004, pp. 19–20.

193 AP I, Arts. 43, 48, and 50–52.

194 ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, ICRC, Geneva, February 2009, p. 25.

195 AP I, Arts. 51(5)(b) and 57.

196 Rome Statute of the International Criminal Court, 17 July 1998, A/CONF. 183/9, Art. 8(2)(b)(iv), available at: <http://www.unhcr.org/refworld/docid/3ae6b3a84.html> (last visited February 2012) (hereafter Rome Statute).

suspicion that such excessive collateral injury, death, or destruction had occurred. Depending upon the circumstances, and the level of information available to a commander, an initial fact-finding inquiry may be directed in order to determine whether a criminal or other investigation is necessary.<sup>197</sup> Of course, this would not preclude the ordering of an investigation, as a matter of policy, whenever any injury, death, or damage occurs, as can happen in the context of certain operations such as counter-insurgencies.

In addition, administrative or operational investigations may be ordered for a variety of operational and policy reasons: for example, under circumstances where a weapons system does not perform as expected and strikes an unintended target, personnel do not follow established procedures, or a pattern of misconduct emerges that is of concern to a military commander.<sup>198</sup> Liability can be incurred for individual acts or omissions and as a result of command or superior responsibility.<sup>199</sup> While the human rights accountability structure has been traditionally viewed as better developed and utilized, there has been continued application of national humanitarian-law-based investigations and an increasing involvement of international criminal courts.<sup>200</sup> The operation of this humanitarian law accountability process is often masked internationally by its reliance on domestic courts and tribunals for the prosecution of war crimes and investigations of alleged wrongdoing.<sup>201</sup>

## Occupied territory and ‘control’

The application of the normative frameworks governing the conduct of hostilities and law enforcement in respect of operations undertaken to maintain public order is affected by the degree of control that the Occupying Power exercises over the territory where the resistance is operating. The issue of control is relevant in two

197 Michael N. Schmitt, ‘Investigating violations of international law in armed conflict’, in *Harvard National Security Journal*, Vol. 2, 2011, p. 63, who notes that such an initial inquiry has been formalized by Australia in the form of a Quick Assessment (QA) ‘in which a military member appointed by the officer concerned examines the facts and circumstances of a matter within twenty-four hours. . . . The primary purpose of the QA is to determine whether further action is required’.

198 Canadian Broadcasting Corporation, ‘Afghan deaths focus of special forces probe’, 14 September 2010, available at: <http://www.cbc.ca/news/canada/story/2010/09/14/sand-trap.html> (last visited February 2012), where it is indicated that, in addition to a criminal investigation into alleged wrongdoing, ‘a military board of inquiry, which investigates major problems within the Canadian Forces, is looking into administrative and non-criminal issues surrounding the case, and is hearing 100 witnesses as it conducts its probe’.

199 Rome Statute, above note 196, Arts. 25–28.

200 Antonio Cassese, *International Criminal Law*, 2nd edition, Oxford University Press, Oxford, 2008, pp. 435–444, for a discussion of the need for international trials. See also *ibid.*, p. 6. International criminal law is unique, as it derives its origins from humanitarian law, human rights law, and national criminal law.

201 See Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd edition, Cambridge University Press, Cambridge, 2010, p. 64. The authors indicate that international crimes are primarily intended to be prosecuted at the domestic level. Further, war crimes ‘have been regulated in domestic law the longest and have been prosecuted most often’ and are often considered to be a preferable option in political, sociological, practical, and legitimacy terms. However, see also *ibid.*, p. 580, where it is noted that international tribunals have arisen because of an absence or failure of national justice efforts, ‘but are not meant to replace them’.

ways. First, there is the question of whether the Occupying Power is exercising sufficient control over the territory to conclude that it is occupied. If it is not occupied, then the obligation to maintain public order under the Fourth Geneva Convention does not apply as a matter of treaty law, although this does not mean that such forces will not be tasked to intervene to suppress criminal acts that they observe during the conduct of operations. Second, there is the question of control over the area where operations are being conducted by security forces. In this respect, even where there is a requirement to maintain public order, the ability to conduct law enforcement operations may be considerably diminished by the prevailing security situation.

Should an organized group, or the armed forces of the other party, regain control of the territory, then operations against the group by the occupier would, in effect, be the same as a re-invasion.<sup>202</sup> In this respect an analogy has been drawn between occupation and blockade. Like a blockade, an occupation cannot merely exist on paper.<sup>203</sup> However, temporary dispossession of territory does not necessarily mean that the occupation has ended. A key issue appears to be whether the Occupying Power can send security forces to ensure that its authority is effective. As has been noted, '[s]hould the Occupying Power manage to display resilience in the face of temporary adversity, it would not lose effective control'.<sup>204</sup> Further, it appears that pockets of resistance would not render the whole territory 'unoccupied', as 'the presence of isolated areas in which that [legitimate] authority is still functioning does not affect the reality of the occupation if those areas are effectively cut off from the rest of the occupied territory'.<sup>205</sup>

During the Iraq conflict, the periodic control exercised by insurgent forces over cities or parts of cities, such as in Fallujah and Najaf, did not mean that the Coalition forces had been ousted as the Occupying Power in those locations.<sup>206</sup> However, a sufficient loss of control appears to have occurred in some instances in Russia during World War II<sup>207</sup> and perhaps in parts of Yugoslavia as well.<sup>208</sup> This

202 G. von Glahn, above note 18, p. 29. See also Elbridge Colby, 'Occupation under the laws of war', in *Columbia Law Review*, Vol. 25, No. 7, 1925, p. 910 : if an occupation is '[f]ounded by force it may be overthrown by force'; *Einsatzgruppen case (United States of America v. Otto Ohlendorf, et al.)* (Case No. 9), 8–9 April 1948, *Trials of War Criminals Before the Nuremberg Military Tribunals*, Vol. IV, Government Printing Office, Washington, 1950, p. 492 (hereafter *Einsatzgruppen case*): partisans had 'wrested considerable territory from the German occupant' and '[i]n reconquering enemy territory which the occupant has lost to the enemy, he is not carrying out a police performance but a regular act of war'.

203 G. von Glahn, above note 18, p. 29.

204 Y. Dinstein, above note 4, p. 45. See also *Hostage case*, above note 19, p. 1243. The case held that, although the partisans in Greece and Yugoslavia were able to control sections of the country, it remained occupied as 'it is established that the Germans could at any time they desired assume physical control of any part of the country'.

205 L. C. Green, above note 16, p. 286.

206 B. West, above note 99; and P. Cockburn, above note 99, pp. 184–185, where it is noted that in April 2004 the Mehdi Army had taken over a vast cemetery in central Najaf and 'the street fighting was very intense with the American troops staying inside their tanks while we tried to hit them from all directions'.

207 See *Einsatzgruppen case*, above note 202, p. 492, for reference to the partisans having wrestled territory from the German occupier. Further, in reconquering the territory, the occupant 'is not carrying out a police performance but a regular act of war'.

208 See J. Ellis, above note 72, pp. 167–168. Tito's Partisans set up 'liberated areas' which were 'miniature states controlled by the administrative machinery of AVNOJ [the Partisan Anti-Fascist Council of

view that mere physical presence of an armed group does not normally oust the occupier also supports the narrower interpretation of occupation by which simply placing ‘boots on the ground’ during a patrol, raid, or invasion does not create an occupation at law.<sup>209</sup> If that were the case, then organized resistance movements conducting the patrols, raids, or other operations could theoretically easily extinguish the obligations of the occupier.

Barring a complete ousting of the Occupying Power, the treaty obligation to maintain order still exists, despite a temporary loss of control over an area. However, law enforcement operations are unlikely to be a viable option for maintaining order in those areas, either on the ground or at law. That is because the conduct of law enforcement requires a very significant level of control over the security situation being addressed. Policing is effective because of the degree of control that can be exercised by state authorities, including by the use of undercover operatives, by electronic surveillance, and through the collection of human intelligence. In this respect, domestic security agencies are integrated into the lives of citizens as a result of the high levels of control that a state ordinarily enjoys.

For example, it is the ability to geographically isolate a suspect (who is normally lightly armed, if at all) and then use an overwhelming physical presence and the threat of force to effect an arrest, or otherwise resolve the situation, which makes policing so effective. In contrast, it is the inability to exercise sufficient control over an area that often makes the use of military force to remove the security threat the most realistic option for dealing with insurgents. Even when charting a unique approach to targeting law by incorporating law enforcement norms in the 2006 *Public Committee Against Torture in Israel v. Government of Israel* case, the Israeli Supreme Court identified two factors that could impact on its stated preference for arrest, investigation, and trial. Those factors were the risk to the lives of soldiers and civilians, and the issue of control.<sup>210</sup> While the court indicated a law enforcement response might be particularly practical during belligerent occupation, it was in respect of a situation ‘in which the army controls the area where the operation is taking place’.<sup>211</sup> For example, a commander may be confronted with a situation where a military force potentially has to fight its way into, or away from, an objective where a capture is being considered. A force may also be under risk of ambush or attack while conducting the operation. In those situations, a commander would have to weigh the feasibility of the operation, considering both the importance of the enforcement action and the attendant risk to the security forces and uninvolved civilians. Such limits for the application of a law enforcement response during occupation are also reflective of the training, equipment, and ordinary role of police forces.

Liberation]. In this way the Communists both created a uniform administration in all the areas they controlled and also, particularly towards the end of the war, gradually built up the framework of a future national administration’.

209 However, see G. von Glahn, above note 18, p. 29, who took the view that ‘an occupation would be terminated at the actual dispossession of the occupant, regardless of the source of such dispossession’.

210 *Targeted Killing* case, above note 188, para. 40.

211 *Ibid.*

However, even where sufficient control is exercised to effectively carry out law enforcement functions, this does not mean that hostilities will not occur in that territory. Although some countries develop units with special capabilities,<sup>212</sup> and sometimes local police are trained and employed as ‘little soldiers’,<sup>213</sup> ‘[u]ltimately police contribute to counterinsurgency by winning the allegiance of the population: the military contributes . . . by eliminating threats of violence’.<sup>214</sup> In very practical terms, RPGs (hand-held anti-tank grenade launchers), mortars, vehicle-borne or suicide bombs, and IEDs are not the weapons of ordinary criminals controllable through a law enforcement response. It is reported that a SAM-7 ground to air missile was used by insurgents to down an attack helicopter in April 2004.<sup>215</sup> Similarly, the use of RPGs to shoot down helicopters in Somalia,<sup>216</sup> Afghanistan,<sup>217</sup> and Iraq<sup>218</sup> provided clear examples of the significant risk attendant in dealing with armed groups equipped with such weapons of war. There are limits to what police and other law enforcement authorities can do without being turned into soldiers conducting hostilities. The nature of the threat, the capabilities of the security forces, the degree of control exercised over territory, and the normative rules governing the use of force are inevitably linked.

### The principle of *lex specialis*

Given the availability of two normative frameworks to govern the use of force, and the complex security situation often prevalent during an occupation, the question remains as to how they apply to controlling the use of force. Certainly, the principle of *lex specialis* provides a starting point for addressing this issue. However, there is an increasingly complex discussion developing over what *prima facie* appears to be a fairly straightforward application of the *lex specialis* principle presented by the International Court of Justice in the *Nuclear Weapons* case.<sup>219</sup>

212 M. Sassòli, above note 11, p. 668, referring to the military forces familiar with law enforcement of France, Italy, and Spain such as the gendarmerie, carabinieri, and guardia civil. See also Grant Wardlaw, *Political Terrorism: Theory, Tactics and Counter-measures*, Cambridge University Press, Cambridge, pp. 97–100.

213 D. H. Bayley and R. M. Perito, above note 83, p. 76.

214 *Ibid.*, pp. 76–77.

215 J. F. Burns, above note 101, who notes that: ‘[t]he insurgents inflicted a new blow when they shot down an Apache attack helicopter about three miles west of the Baghdad airport, killing both crewmen’.

216 Mark Bowden, *Blackhawk Down: A Story of Modern War*, Grove Press, New York, 2010, p. 79.

217 Ray Rivera, Alissa J. Rubin, and Thom Shanker, ‘Copter downed by Taliban fire; elite U.S. unit among dead’, in *New York Times*, 6 August 2011, available at: <http://www.nytimes.com/2011/08/07/world/asia/07afghanistan.html?pagewanted=all> (last visited February 2012).

218 Rory Carroll, ‘11 killed as civilian helicopter is shot down in Iraq’, in *The Guardian*, 21 April 2005, available at: <http://www.guardian.co.uk/world/2005/apr/22/iraq.rorycarroll> (last visited February 2012).

219 *Nuclear Weapons* case, above note 45, p. 240, para. 25. For an example of an approach that blends IHL, human rights law, and general international law, see Nils Melzer, ‘Conceptual distinction and overlaps between law enforcement and the conduct of hostilities’, in T. Gill and D. Fleck, above note 184, p. 33. Melzer introduces a concept of the ‘law enforcement’ and ‘hostilities’ paradigms, both of which would include humanitarian law, human rights law, and general international law. The interaction of these two paradigms would then be governed by the *lex specialis* principle. See *ibid.*, p. 43.

In what can be termed an interpretive ‘struggle’, the *lex specialis* principle has been said to be ‘descriptively misleading, vague in meaning, and of little practical use in application’.<sup>220</sup> One interpretation has been described as broadly exclusionary in nature, seeing ‘the speciality of IHL operating at a very general level, so that IHL would replace IHRL [international human rights law] altogether in times of armed conflict’.<sup>221</sup> Attributed to states such as the United States and Israel, this approach has been called ‘radical’.<sup>222</sup> It has been indicated that a more correct interpretation of *lex specialis* is one applied on a case-by-case basis to certain individual rights in situations where there is an actual conflict such that, where a norm cannot be applied without violating another, ‘the special norm of IHL should prevail’.<sup>223</sup> However, it is also suggested that what can be used is the *lex specialis completat legi generali* principle, where both branches of the law are applied simultaneously, such that human rights norms ‘have to be interpreted in light of IHL norms’.<sup>224</sup> Reflecting this interpretive uncertainty, Françoise Hampson has stated, in regard to the *lex specialis* principle, that ‘[i]t is not clear whether this means only that the special prevails over the general, or whether it means that the former actually displaces the latter’.<sup>225</sup> Another analysis reaches the conclusion that international humanitarian and human rights treaties can ordinarily be reconciled, but that there will be instances where that will not occur, leading to a political choice as to which of the conflicting norms will be given priority.<sup>226</sup>

An approach allowing for the application of human rights law, even when IHL applies, has been to interpret *lex specialis* as a ‘rule governing conflicting norms’.<sup>227</sup> This interpretation gives ‘precedence to the rule that is most adapted and

220 Marko Milanovic, ‘Norm conflicts, international humanitarian law and human rights law’, in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, Oxford, 2011, p. 124. See also Françoise J. Hampson, ‘The relationship between international humanitarian law and human rights from the perspective of a human rights treaty body’, in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 562, who writes that ‘[s]ome way needs to be found to develop a coherent approach to the problem’. See also L. Doswald-Beck, above note 64, pp. 898–900.

221 Andrea Gioia, ‘The role of the European Court of Human Rights in monitoring compliance with humanitarian law in armed conflict’, in O. Ben-Naftali, above note 220, p. 213.

222 *Ibid.*

223 *Ibid.*, p. 214.

224 *Ibid.*

225 F. J. Hampson, above note 220, p. 558. Hampson goes on to suggest two other possible interpretations: first, that IHL prevails where it contains an express provision that addresses a similar field to that of a human rights norm; and, second, that the *lex specialis* depends upon the issue at stake – if the right is not covered by IHL then human rights will prevail. See, generally, *ibid.*, pp. 558–562.

226 M. Milanovic, above note 220, p. 124.

227 See Cordula Droegge, ‘Elective affinities? Human rights and humanitarian law’, in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 524. The alternate interpretation of the *lex specialis* rule is based on the work of Martti Koskeniemi, ‘Study on the function and scope of the *lex specialis* rule and the question of “self contained regimes”’, UN Doc. ILC(LVI)/SG/FIL/CRD.1 and Add. 1, 2004. See also Marco Sassòli, ‘The role of human rights and international humanitarian law in new types of armed conflicts’, in O. Ben-Naftali, above note 220, pp. 34 and 71, where he suggests resolving conflicting norms by favouring the norm with the broadest application, that with the greatest precision, that having explicit application, and that with the most restrictive application; and Marco Sassòli and Laura M. Olson, ‘The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts’, in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 603–604.



tailored to the specific situation'.<sup>228</sup> In this respect, 'the most important indicators are the precision and clarity of a rule and its adaptation to the particular circumstances of the case'.<sup>229</sup> However, this 'conflicting norms' approach has to be reconciled with the specific wording in the *Nuclear Weapons* case, which characterized humanitarian law as a tool for interpreting human rights law. One way of dealing with the wording of that case and the *Wall* case has been to suggest that, since there is no reference to the *lex specialis* principle in the subsequent *Congo* case, 'it is not clear whether the omission was deliberate and shows a change in the approach of the Court'.<sup>230</sup> However, it is not evident how an omission in that case, assuming that there was one, would actually constitute a reversal of the specific language found in two previous judgments by the same court, particularly given the importance of those decisions.<sup>231</sup> Perhaps the most apt explanation of the *lex specialis* principle in respect of the law of occupation is that it acts as a 'prism filtering human rights during armed conflict'.<sup>232</sup>

However, a more fundamental question needs to be asked regarding the humanitarian law obligation to maintain order in occupied territory as to whether the issue even needs to be looked at as a 'conflict' of human rights norms. In this respect, humanitarian and human rights law govern the same activity: the policing of territory. When a 'conflicting norms' approach is suggested, in respect of either internal armed conflicts<sup>233</sup> or occupation,<sup>234</sup> the legal paradigm applicable to law enforcement is almost invariably suggested to be human rights law. Such an interpretation is reinforced by a view that, since Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention do not provide any detail regarding the use of potentially lethal force, it is human rights law that 'would govern the use of force by the OP [Occupying Power] with respect to the OP's entitlement and obligation to restore and maintain public order and safety'.<sup>235</sup> In effect, while the obligation is found in international humanitarian treaty law, the actual maintenance of order would have to be put into operation by the application of international human rights law.

To the extent that this argument is based on the view that humanitarian law lacks specific treaty provisions governing how order is to be maintained, it might even be argued that the principle of *lex specialis*, as set out in the International Court of Justice cases, would not have to be applied. Human rights law would then

228 C. Droege, above note 227, p. 524.

229 *Ibid.*

230 See *ibid.*, p. 522. See also M. Milanovic, above note 220, p. 100.

231 Y. Dinstejn, above note 151, p. 23. Dinstejn suggests that 'this lapse does not prove much'.

232 Y. Dinstejn, above note 4, p. 86.

233 William Abresch, 'A human rights law of internal armed conflict: the European Court of Human Rights in Chechnya', in *European Journal of International Law*, Vol. 16, No. 4, 2005, p. 747, who states that '[t]he rationale that makes resort to humanitarian law as *lex specialis* appealing – that its rules have greater specificity – is missing in internal armed conflicts . . . the humanitarian law of internal armed conflict is quite spare and seldom specific'.

234 C. Droege, above note 227, p. 538, where it is stated: '[i]n abstract legal terms, the answer must be . . . where the occupying power has effective control, is in a law-enforcement situation and capable of making arrests, it should act in compliance with the requirements of human rights law'.

235 UCIHL Meeting Report, above note 64, p. 21.

apply as the general law, without the *lex specialis* principle even having to be considered. However, there cannot be a conflict of norms unless the *lex specialis* of humanitarian law specifically governs law enforcement activities in occupied territory. In this respect, the suggestion that there is a conflict is an acknowledgment that humanitarian law does in a substantive way govern the maintenance of order in occupied territory. The question is how and to what extent that occurs. These are fundamental issues regarding the application of the *lex specialis* principle, however that principle might be interpreted.

Any conclusion that human rights law exclusively governs policing in occupied territory would have to address the fact that the Hague Regulations, the Geneva Conventions, and Additional Protocol I incorporate substantive rights, such as the right to life, upon which the law enforcement model is fundamentally based.<sup>236</sup> There is a parallelism of content regarding rights such as the right to life; prohibition against torture and cruel, inhuman, or degrading treatment; due process; the prohibition on discrimination; the protection of family honour and rights; and a prohibition against arbitrary detention.<sup>237</sup> Further, it is significant that the recognition of human rights for inhabitants of occupied territories, as well as the obligation under Article 43 of the Hague Regulations to restore and ensure public order and safety, pre-dated the substantive development of treaty-based human rights law at the end of World War II.<sup>238</sup> Such norms, including those relating to law enforcement, have been and remain part of ‘the general principles of law recognized by civilized nations’.<sup>239</sup> In addition, those rights have continued to be recognized

236 For example, in respect of the European Court of Human Rights and its application of the European Convention on Human Rights provisions, see *McCann*, above note 185, on Art. 2(2) (the right to life); *McKerr*, above note 186, on Art. 2(2), Art. 13 (the right to an effective remedy), and Art. 14 (the prohibition against discrimination) of the European Convention on Human Rights. Similarly, in respect of the application of the European Convention of Human Rights provisions, see *Makaratzis v. Greece*, Application no. 50385/99, 20 December 2004, on Arts. 2, 3 (the prohibition against torture or inhuman or degrading treatment or punishment), and 13; *Nachova and Others v. Bulgaria*, Application nos 43577/98 and 43579/98, 6 July 2005, on Arts. 2, 13, and 14; *Kakoulli v. Turkey*, Application no. 38595/97, 22 November 2005, on Arts. 2(2), 8 (respect for private and family life), and 14; *Huohvanainen v. Finland*, Application no. 57389/00, 13 March 2007, on Art. 2; and *Giuliani and Gaggio v. Italy*, Application no. 23458/02, 25 August 2009, on Arts. 2(2), 3, 6 (the right to a fair trial), and 13.

237 For example, see Hague Regulations, Art. 46. This provision establishes the requirement to uphold family honour and rights, the lives of persons, religious convictions, and private property. This is also reflected in GC IV, Art. 27, and AP I, Art. 75. See also T. Meron, above note 163, p. 266, for a discussion on the parallelism of content between humanitarian and human rights law.

238 Reference to calling upon the population to assist in policing is found in the Great Britain War Office, *Manual of Military Law*, His Majesty’s Stationary Office, London, 1914, pp. 291–292, para. 381; and the American *Rules of Land Warfare*, Government Printing Office, Washington, DC, 1914, 10/917, p. 114, para. 319. See also Leslie C. Green, ‘The relations between human rights law and international humanitarian law: a historical overview’, in Susan C. Breau and Agnieszka Jachec-Neale (eds), *Testing the Boundaries of International Humanitarian Law*, British Institute of International and Comparative Law, London, 2006, p. 49, where Green discusses the historical integration of human rights norms into IHL.

239 Statute of the ICJ, Art. 38(1). See Malcolm N. Shaw, *International Law*, 6th edition, Cambridge University Press, Cambridge, 2008, p. 98, for a discussion of this general principle of law. The long-standing nature of the norms underpinning law enforcement can be also seen in *Geneva Convention IV Commentary*, above note 15, p. 36, on Article 3, where it is noted that, in respect of a conflict not of an international character, ‘no Government can object to observing, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, even when dealing with common criminals’. See Richard B. Jackson, ‘Perfidy in non-international armed

and integrated into humanitarian treaty and customary international law since that time. As a result, the normative rules for carrying out policing or other law enforcement activity during occupation are not uniquely found in human rights law as a governing legal framework. They are based on human rights norms that are a fundamental part of both bodies of law. In this respect, it has been noted that the *Nuclear Weapons* case discussed the application of the *lex specialis* principle in the context of *norms* rather than governing *legal regimes*.<sup>240</sup> Both human rights norms and the unique norms applicable to the conduct of hostilities are part of humanitarian law.

These human rights norms are also an integral part of customary international humanitarian law. As the *ICRC Customary Law Study* indicates, the prohibition against murder, the requirement for humane treatment of detained persons, the prohibition against torture and other cruel or inhuman treatment, trial affording all essential judicial guarantees, and other protections relevant to law enforcement are norms of customary humanitarian law in international armed conflict.<sup>241</sup> This application of customary IHL is as important as its customary human rights law counterpart in ensuring that there are no gaps in the law.

In respect of treaty law, Article 75 of Additional Protocol I was clearly influenced by human rights documents such as the 1948 Universal Declaration on Human Rights<sup>242</sup> and the 1966 International Covenant on Civil and Political Rights (ICCPR).<sup>243</sup> For example, the *Additional Protocol I Commentary* states in respect of Article 75: '[m]ost of the guarantees listed in sub-paragraphs (a)–(j) [related to due process] are contained in the Conventions and the Covenant on Human Rights', although a difference is that, unlike the Covenant, the Additional Protocol provision is not subject to derogation.<sup>244</sup> Protection is provided against discrimination; violence to life, health, or physical or mental well-being; torture and humiliating and degrading treatment; and threats to carry out such acts.<sup>245</sup> And provision is made for trial before an impartial and regularly constituted court.<sup>246</sup> As one commentator has indicated, the post-World War II relationship between IHL and human rights law 'is expressed in the adoption of major human rights principles in Article 75 AP I'.<sup>247</sup> It has been noted that 'states did not include other specific guarantees provided

conflicts', in Kenneth Watkin and Andrew J. Norris (eds), *Non-international Armed Conflict in the Twenty-first Century*, U.S. Naval War College International Law Studies, Vol. 88, Naval War College, Newport, RI, 2012, p. 251.

240 See M. Milanovic, above note 220, p. 99.

241 *ICRC Customary Law Study*, above note 34, pp. 299–383.

242 Universal Declaration of Human Rights, 1948, in Ian Brownlie and Guy S. Goodwin-Gill (eds), *Basic Documents on Human Rights*, 5th edition, Oxford University Press, Oxford, 2006, p. 23.

243 International Covenant on Civil and Political Rights, 1966, in I. Brownlie and G. S. Goodwin-Gill, above note 242, p. 358.

244 *Additional Protocol I Commentary*, above note 36, Art. 75, para. 3092. However, see D. Campanelli, above note 61, p. 666; and E. Benvenisti, above note 1, p. 189, where it is indicated that civil and political rights are ignored in GC IV and AP I. However, this discussion appears to centre around political rights and civil liberties such as the freedom of speech and freedom of movement (see *ibid.*, p. 16).

245 AP I, Arts. 75(1) and (2).

246 AP I, Art. 75(4).

247 See Christopher Greenwood, 'Scope of application of humanitarian law', in D. Fleck, above note 7, p. 74, Rule 254.

for in the ICCPR within either Protocol, such as the right to liberty of movement and freedom of expression and association'.<sup>248</sup> However, the list of incorporated rights is lengthy, and those rights have a particular relevance to law enforcement.

As a result, the States Parties to Additional Protocol I, and those that accept that Article 75 of that Protocol reflects customary international law, are obligated to apply these *human rights norms* as an integral part of their compliance with IHL.<sup>249</sup> This obligation exists in occupied territories and in other military operations such as during patrols, raids, and invasions, although, as has already been discussed, the ability to do so will still be dependent upon factors such as whether the Occupying Power exercises sufficient control over the territory to conduct law enforcement operations. In this respect it should be noted that a major non-signatory to the Protocols, the United States, indicated in March 2011 that it will, out of a sense of 'legal obligation', apply the norms of Article 75 in international armed conflict.<sup>250</sup> While not a statement acknowledging these norms as customary IHL,<sup>251</sup> the language of obligation raises the issue of '*opinio juris*'. In addition, it had been noted by an official from a previous administration that the United States did 'regard the provisions of article 75 as an articulation of the safeguards to which all persons in the hands of the enemy are entitled'.<sup>252</sup>

The complex relationship between 'human rights law and the laws of war is not just a simple confrontation between the *lex generalis* of human rights and the *lex specialis* of the laws of war'.<sup>253</sup> International human rights law covers areas that

248 Michael J. Dennis, 'Application of human rights treaties extraterritorially in times of armed conflict and military occupation', in *American Journal of International Law*, Vol. 99, No. 1, 2006 p. 138.

249 Federal Court of Canada, *Amnesty International Canada and British Columbia Civil Liberties Union v. Chief of Defence Staff for the Canadian Forces, et al.*, Case File No. T-324-07, Respondent's Factum, 18 January 2008, p. 26, para. 83, available at: [http://web.ncf.ca/fk624/data/Factum%20-%20Crown%20\(Charter,%20Jan%2008\).PDF](http://web.ncf.ca/fk624/data/Factum%20-%20Crown%20(Charter,%20Jan%2008).PDF) (last visited February 2012). The Canadian Government argued before the Federal Court of Canada that, during armed conflict, Common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol I apply as a matter of treaty or customary law to guarantee fundamental rights of a detained person charged with a criminal offence that are virtually identical to norms found in international human rights law. For the purposes of the litigation, the conflict in Afghanistan was considered to be a non-international armed conflict. *Ibid.*, p. 3, para. 9, note 1.

250 Hillary Rodham Clinton, 'Reaffirming America's commitment to humane treatment of detainees', Press Statement, 7 March 2011, available at: <http://www.state.gov/secretary/rm/2011/03/157827.htm> (last visited February 2012).

251 See John B. Bellinger III and Vijay M. Padmanabhan, 'Detention operations in contemporary conflicts: four challenges for the Geneva Conventions and other existing law', in *American Journal of International Law*, Vol. 105, No. 2, 2011, p. 207, where the authors note that 'the administration neither stated that Article 75 is customary international law nor agreed to apply Article 75 in non international armed conflicts, such as the conflict with Al Qaeda'. However, see also Supreme Court of the United States, *Salim Ahmed Hamdan v. Donald H. Rumsfeld et al.*, 548 U.S. 557, 2006, No. 05.184, 29 June 2006, p. 633, where a plurality of judges of the US Supreme Court held that Article 75 of Additional Protocol I applied as a matter of customary international law in respect of a non-international armed conflict with Al Qaeda.

252 William H. Taft IV, 'The law of armed conflict after 9/11: some salient features', in *Yale Journal of International Law*, Vol. 28, No. 1, 2003, p. 322. See also Michael J. Matheson, 'Session one: the United States position on the relation of customary international law to the 1977 Protocols Additional to the 1949 Geneva Conventions', in *American University Journal of International Law and Policy*, 1987, Vol. 2, p. 427; Michael J. Matheson, 'Continuity and change in the law of war: 1975 to 2005: detainees and POWs', in *George Washington International Law Review*, Vol. 38, No. 3, 2006, pp. 547-548.

253 A. Roberts, 'Transformative military occupation', above note 81, p. 594.

are not included in humanitarian law.<sup>254</sup> However, there are also significant and important areas of overlap. There does not always need to be an interpretive struggle seeking to apply one body of law in preference to the other. As has been noted, the *Wall* case addressed the issue of simultaneous application when it was noted that there are rights that ‘may be matters of both these branches of international law’.<sup>255</sup> For example, the right to individual self-defence, normally assessed according to human right norms, is recognized under humanitarian law as a matter of both treaty<sup>256</sup> and customary international law.<sup>257</sup>

The same can be said about the rights of inhabitants of the occupied territory regarding their right to life, and other rights associated with law enforcement. While the right to life is interpreted differently when targeting combatants, members of organized armed groups, or persons taking a direct part in hostilities, it is not in respect of civilians not actively engaged in the conflict.<sup>258</sup> Therefore, it is human rights standards that would be applied in assessing any use of force against them by security forces. In this respect, the application of these human rights norms recognized in humanitarian law substantively matches that reflected in human rights law.

Given this incorporation of these human rights norms, it can be argued that there is limited potential for a ‘conflict of norms’ between the two bodies of law.<sup>259</sup> To the extent that there is a conflict, it is most likely to arise where an attempt is made to apply human-rights-based law enforcement norms to a situation of hostilities, such as targeting, or to introduce humanitarian law norms to ordinary policing. The question would have to be asked in each case why it would be necessary or legally appropriate to do so.<sup>260</sup>

254 *Ibid.*, p. 594; Y. Dinstein, above note 4, pp. 84–85.

255 *Wall* case, above note 23, p. 131. See also Jochen Abr. Frowein, ‘The relationship between human rights regimes and regimes of belligerent occupation’, in *Israel Yearbook on Human Rights*, Vol. 28, 1998, p. 8, who notes that ‘humanitarian law may also be referred to in order to support the application of human rights law in situations of armed conflict’.

256 See GC I, Arts. 22(1) and 22(2) regarding arming medical personnel and sentries, etc.; AP I, Arts. 65(3) and 67(1)(d) regarding arming persons for self-defence relating to civil defence. See also the Rome Statute, above note 196, Art. 31(1)(c).

257 ICTY, *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgment, 26 February 2001, para. 451.

258 Geoffrey Corn, ‘Mixing apples and hand grenades: the logical limit of applying human rights norms to armed conflict’, in *Journal of International Humanitarian Legal Studies*, Vol. 1, 2010, p. 61 : ‘Armed forces have increasingly come to terms with the reality that even during armed conflict, their authority in relation to interactions with individuals falling outside the category of operational opponents – namely civilians or former enemy combatants who are *hors de combat* – is operationally similar to the authority of police officers interacting with the public during times of peace’.

259 Yuval Shany, ‘Human rights and humanitarian law as competing legal paradigms for fighting terror’, in O. Ben-Naftali, above note 220, p. 25, where it is noted that the ‘normative gaps between “law and order” and the “armed conflict” paradigms are narrowed’ in part ‘due to numerous obligations pertaining to the respect for the rights of individuals in occupied territories, which limit the counter-terrorism options available to occupying forces’. This statement was supported by reference to GC IV, Art. 27, and ICCPR, Arts. 17 and 23. While this does not appear to go as far as stating that there is a complete congruence between the two normative frameworks, it is indicative of similar outcomes in applying law enforcement and hostilities norms in this area.

260 G. Corn, above note 258, pp. 55–56, where he notes that ‘without careful and critical assessment of when and where human rights norms are logically applicable during armed conflict and where that logic

In applying a complementary approach, if any gaps exist, they can be addressed by the application of human rights law, as a matter of either treaty or customary law.<sup>261</sup> Any court or tribunal interpreting the human rights norms guaranteed by IHL can look to the same ‘soft law’ instruments outlining the principles governing law enforcement that are applied under the human rights accountability regime.<sup>262</sup> In *Prosecutor v. Kunarac*, the Trial Chamber of the ICTY noted that ‘[b]ecause of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights law’.<sup>263</sup> Further, the decisions of domestic courts and regional human rights bodies assessing law enforcement activities under human rights law can also be considered. As has been noted, one of the sources of international law is ‘the general principles of law recognized by civilized nations’, such as those appearing in municipal law.<sup>264</sup> An assessment of the general principles of law enforcement applied in domestic jurisdictions, whether as a matter of common law or as one of civil law, also has the advantage of enhancing the identification of universal standards of conduct.

There are numerous distinct advantages to applying human-rights-based law enforcement norms as part of IHL rather than as a discrete application of human rights law. First, whether these norms are applied as a matter of treaty or customary international humanitarian law, the difficult debate over the extra-territorial application of human rights treaty law can be prevented. Armed conflict may occur in what has been termed the ‘area of war’, comprising the territories of the parties to the conflict as defined by national boundaries, the high seas, and the exclusive economic zone, although military operations may more narrowly occur in operational zones or theatres of war.<sup>265</sup> During such conflict, some provisions of IHL may have broad application to the entire territory of the Parties to a Conflict and ‘not just to the vicinity of actual hostilities’.<sup>266</sup> This would include the law of occupation with its provisions governing the maintenance of public order, which extend to the entire territory that is occupied.<sup>267</sup> As a result, human rights norms

dissipates, the risk of overbroad application creates the potent[ial] to disable the efficacy of military operations’.

261 C. Droege, above note 227, pp. 512–522, for a discussion of the meaning of ‘complementarity’.

262 For example, the UN Basic Principles on Use of Force, above note 175.

263 ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T and IT-96-23/1-T, 22 February 2001, p. 160, para. 467.

264 M. N. Shaw, above note 239, pp. 98–99; and *Restatement of Foreign Relations Law*, above note 51, p. 152, para. 701(c), where it is indicated that a state is required to respect the human rights of a person subject to its jurisdiction ‘that it is required to respect under general principles of law common to the major legal systems of the world’.

265 C. Greenwood, above note 247, pp. 59–62.

266 *Tadić*, Decision on the Defence Motion, above note 157, para. 68.

267 *Geneva Convention IV Commentary*, above note 15, p. 47, where it is noted in respect of the jurisdiction of the Fourth Geneva Convention referring to persons being in the hands of a Party to the Conflict, that ‘[t]he mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or “hands” of the Occupying Power. It is possible that this power will never actually be exercised over the protected person: very likely an inhabitant of an occupied territory will never have anything to do with the Occupying Power or its organizations. In other words, the expression “in the hands of” need not necessarily be understood in the physical sense; it simply means that the person is in

incorporated under humanitarian law would have application to the occupied territory even if the Occupying Power took the position that its human rights law obligations did not have extra-territorial application to such territory.<sup>268</sup>

Second, it avoids the risks inherent in adopting an exclusionary approach for either body of law. Advocating the exclusive application of humanitarian law without acknowledging the norms governing the use of force in a law enforcement context potentially puts peaceful civilians at risk, since the conduct of hostilities norms (i.e. precautions in targeting<sup>269</sup>) are not designed for policing. Conversely, a unique application of human rights law will be challenged to deal with the elevated levels of threat inherent in the violence that can occur during occupation. Failure to address those threats put not only the security forces at risk but also the civilians whom they are obligated to protect.

Third, while there are regional human-rights-treaty-based bodies that deal with breaches of human rights committed by security forces in occupied territory, their jurisdiction is restricted to certain states.<sup>270</sup> This limitation can be addressed by relying on mechanisms for the application of human rights norms through the enforcement of humanitarian law, since that law has a more universal application to countries not subject to oversight by those bodies. This broad applicability of IHL means that some states will be subject to both the jurisdiction of regional human rights bodies and the parallel frameworks of accountability under humanitarian law. This is not problematic, as both are dealing with issues of law enforcement, and it potentially significantly enhances accountability.<sup>271</sup>

Fourth, in terms of accountability, dealing with the misapplication of force as a breach of humanitarian law means that the incident is amenable to being handled as a 'war crime'.<sup>272</sup> A violation of human rights law would probably have to

territory which is under the control of the Power in question'. See also Y. Dinstein, above note 4, pp. 47–48, who indicates that, in respect of belligerent occupation, effective control established by the Occupying Power on land even extends to 'any abutting maritime areas and to the superjacent air space'.  
268 'Use of Force in Occupied Territory', above note 149, pp. 111 and 117–119, where it is noted that such a result may be an appropriate way to bridge the gap between supporters of the application of human rights and those suggesting an exclusive application of humanitarian law.

269 AP I, Art. 57(2).

270 A. Cassese, above note 200, p. 389, who notes that regional supervisory mechanisms include judicial bodies such as the European Court of Human Rights, the Inter-American Commission, and the Inter-American Court of Human Rights. There is also the African Court on Human and People's Rights, as well as the monitoring body, the African Commission on Human Rights and the Rights of Peoples.

271 *Congo* case, above note 21, p. 245, para. 220, where the Court found that Uganda was responsible for violations of both international human rights law and IHL. See also Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted on 29 March 2004 (2187th meeting), CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 11: 'As implied in General Comment 29, the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive'.

272 A. Cassese, above note 200, p. 81, where he states that '[w]ar crimes are serious violations of customary or treaty rules belonging to the corpus of the international law of armed conflicts'. See also T. Meron, above note 163, p. 266, who notes that 'the offences included in the ICC Statute under crimes against humanity and common Article 3 are virtually indistinguishable from major human rights violations. They overlap with violations of some fundamental human rights law, which thus become criminalized under an instrument of international humanitarian law'.

be dealt with as a potential crime against humanity. That offence has additional criteria for culpability relating to the act being widespread or systemic that could be limiting in its application.<sup>273</sup>

Finally, recognizing that human rights norms applicable to law enforcement in occupied territory are found within the body of IHL provides a more holistic approach towards applying the law. This allows for easier integration and socialization within the doctrine and training of military forces tasked with maintaining public order, whether it is ordinary policing or countering the threats posed by an insurgent force. Ultimately, respect for the broad range of legal rights applicable in wartime is enhanced, and greater protection is provided to the civilian population.

## Resolving practical issues

It is also important to be clear what the recognition of human-rights-based law enforcement norms within humanitarian law will not do. It will not simplify the interface between law enforcement and the conduct of hostilities during belligerent occupation. These challenges remain the same whether human rights norms are applied as a matter of international humanitarian law or human rights law. The threats to the security of the occupier and the inhabitants of the territory can be organized, diverse, complex, and extremely violent, particularly because of the organization of the armed resistance groups. Those threats can extend far beyond those normally associated with law enforcement. In such situations, force used by security forces is governed by legal norms linked to the threat being posed. The maintenance of public order and safety cannot be effectively addressed by viewing the situation as being exclusively one of law enforcement or the conduct of hostilities, nor can such exclusivity exist in the application of the governing norms.

Where the threat is from organized resistance movements meeting the legal criteria for combatant status, from other involved organized armed groups, or from civilians taking a direct part in hostilities, the conduct of hostility norms governing the use of force will apply. Attacks can only be directed against lawful military objectives.<sup>274</sup> Where insecurity is caused by civilians not involved in the hostilities but engaged in 'riots, isolated and sporadic acts of violence and acts of a similar nature',<sup>275</sup> then human-rights-based law enforcement norms govern the activities of the security forces. In practical terms, this division of application of norms is also

273 A. Cassese, above note 200, p. 98; Cryer *et al.*, above note 201, p. 233, where it is noted that 'crimes against humanity require a context of widespread or systematic commission, whereas war crimes do not; a single isolated act can constitute a war crime'. See also Darryl Robinson, 'Defining "crimes against humanity" at the Rome Conference', in *American Journal of International Law*, Vol. 93, No. 1, 1999, p. 48, who notes that an accused can be criminally liable for a single inhumane act (such as murder) as long as it was committed as part of a broader attack.

274 AP I, Arts. 48, 50, 51, 52(2), and 57. As Art. 57(2) states, everything feasible must be done to ensure that attacks are not directed at civilians or civilian objects.

275 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977, opened for signature 12



largely reflected in the different doctrine, training, and equipment of police forces and military forces.<sup>276</sup>

Both police and military forces may be employed in situations governed by law enforcement or hostilities norms and can be confronted with threats emanating from either end of the conflict spectrum. Many of those threats will comfortably fit within the normative structure of law enforcement or conduct of hostilities respectively. However, in line with the complexity of the security situation, the two normative frameworks will at times intersect and even overlap. The threat may initially appear to be one arising in a law enforcement context, but may in reality be related to the ongoing armed conflict. For example, as occurred in Iraq, security personnel may be employed on checkpoint duty, which is often viewed as a law enforcement function. Those security personnel, civilian or military, must be trained and required to use force associated with law enforcement in order to deal with persons who are not members of organized armed groups or civilians taking a direct part in hostilities. In those situations, force must be used in the last resort, proportionately and primarily in self-defence.

However, such duties can be contextually nuanced. The checkpoint may be guarding a military base or access to an area of military operations rather than being a traffic-style vehicle checkpoint. While the default position will be to apply law enforcement norms, the escalation in the use of force associated with those norms (verbal and visual warnings, warning shots, etc.) can act as a discriminator for screening out and identifying more serious threats than those posed by ordinary criminals. In this respect, the necessity to operate in this merged security environment where insurgents hide among the population lends itself to Rules of Engagement (ROE) that reflect both human rights and humanitarian norms rather than using separate ROE cards for law enforcement and conduct of hostilities respectively. Once it becomes evident that the threat is emanating from a member of an organized armed group or a civilian taking a direct part in hostilities, such as by

December 1977, U.N.T.S. 609, Art. 1(2). These examples found in the Protocol are widely accepted as being indicative of criminal activity.

276 The doctrine, training, and equipment for both military and police forces generally match the primary roles that they are assigned in counter-insurgency. For military forces, that role includes offensive operations against insurgents and the maintenance of a 'defensive cordon around areas largely cleared of insurgent violence'. D. H. Bayley and R. M. Perito, above note 83, p. 53. See also *Counterinsurgency Manual*, above note 115, pp. 60–66, paras 2-19–2-22, for an outline of the range of offensive, defensive, and stability operational roles assigned to US armed forces. This can be contrasted with the police role, which is focused on law enforcement and dealing with subversion within the established cordon. D. H. Bayley and R. M. Perito, above note 83, p. 53. This does not mean that the military force will not be required to perform law enforcement functions, particularly in the absence of an effective police force, or when tasked with stability operations. However, military forces must be equipped and trained to conduct full-spectrum operations. In contrast, while the police may become involved in counter-insurgency operations, their primary role is, and should be, that of core policing (*ibid.*, pp. 75–76). The different nature of the policing role is reflected in training provided in 2006 to police forces in Iraq. That training focused on democratic policing, criminal investigation, anti-terrorism, survival skills, defensive tactics, and firearms (*ibid.*, p. 106). The difference in police training is also practically reflected in the *Counterinsurgency Manual*, above note 115, p. 232, para. 6–99, where it is indicated that when military forces are tasked to train local police it is the military police who are especially suited to teach basic policing skills: higher-level skills, 'such as civilian criminal investigation procedures, antiorganized crime operations, and police intelligence operations – are best taught by civilian experts'.

means of a vehicle-borne IED, then the conduct of hostilities framework would apply at law. In that situation, the use of force is not limited by law enforcement, although such norms would continue to govern the use of force against civilians who are not direct participants in hostilities.<sup>277</sup> When the soldier or police personnel reasonably believe<sup>278</sup> that the threat is directly linked to those engaged in hostilities, the force used is governed by humanitarian law principles such as distinction, proportionality, and not causing unnecessary suffering or superfluous injury.

In reaching that belief, the soldier is entitled to consider a number of factors, including available intelligence, feasible steps taken to warn the oncoming vehicle, the reaction or failure to react by the driver of the vehicle, the location of the checkpoint, what is being guarded (if anything), and the propensity of insurgents to use that method of warfare. The situation may result in force being applied in the same way as might have occurred under the law enforcement construct when reacting to a threat in self-defence. In this situation, the soldier may only have time to act in the face of an immediate threat. However, that will not always be the case, and the force permitted, at law, to counter an IED or suicide bomb by members of organized armed groups or a civilian taking a direct part in hostilities is governed by conduct of hostilities norms. For example, the soldier may be aware from information provided by aerial surveillance, human intelligence, other observation posts and checkpoints, or perhaps even the observation of certain tactics and procedures, that an attack is about to take place. That soldier does not have to wait until the attack is imminent, or the attacker is physically in close proximity and ready to set off explosives, before taking action to remove the threat. In addressing that threat, the soldier can use force governed by conduct of hostilities norms.

The setting off of bombs in crowded markets and urban areas during armed conflict is a significant threat to civilians and security personnel. It has been equated to acts of warfare.<sup>279</sup> That threat can be met with overwhelming force and not solely the type of proportionate force contemplated by law enforcement norms. It is not the activity such as maintaining a checkpoint that is the overriding determinant of which norms apply. When the threat is presented by members of the organized resistance movement or civilians taking a direct part in hostilities,

277 See N. Melzer, above note 219, p. 44, who suggests that opening fire against a car for failing to stop at a checkpoint is normally governed by human rights law applicable to police operations and concludes that ‘any reaction against the car approaching the checkpoint must aim to minimize, to the greatest extent possible, the use of lethal force and may involve killing of the driver only where strictly necessary to protect the operating soldiers or others from an imminent threat to life’. However, this conclusion is based on ‘forcible measures specifically directed against persons or objects protected from direct attack’. See also M. Sassòli, above note 11, p. 666, who suggests that, in a checkpoint situation, ‘the law enforcement officials must try to arrest the offender without using firearms and minimize damage and injury’.

278 ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment, Trial Chamber, 5 December 2003, para. 58.

279 Roger Trinquier, *Modern Warfare: A French View of Counterinsurgency*, Praeger Security International, Westport, CT, 2006, p. 21, n. 1, where Yassef Saddi, chief of the Autonomous Zone of Algiers, is quoted as stating after his arrest: ‘I had my bombs planted in the city because I didn’t have the aircraft to transport them. But they caused fewer victims than the artillery and bombardments of our mountain villages. I’m in a war, you cannot blame me.’

the response can be governed by conduct of hostilities norms regardless of the activity being performed by the security forces at the time. This same blending of hostilities and law enforcement can arise where insurgents fire from among a crowd of rioters.

However, this does not mean that the response will always be an extremely violent one. A soldier's response when guarding a checkpoint or dealing with rioters is not restricted to law enforcement norms when attacked by insurgents. However, the use of deadly force against the insurgents in such situations can carry with it the potential for significant collateral civilian casualties. As happened in Iraq, such collateral deaths or injuries to civilians can have an adverse impact on the counter-insurgency campaign.<sup>280</sup> As a result, while humanitarian law may provide for a robust response and even permit collateral civilian casualties, commanders may choose in the ROE, as a matter of policy, to limit the force that can be used.<sup>281</sup>

A further example of the necessary nuanced application of the law is that, even when force is considered under humanitarian normative rules, the result may not be a 'kinetic' one, such as that involving the use of firearms, artillery, or aerial delivered ordnance. The law, and therefore any resulting force, must be contextually applied. As occurred in Fallujah, the tactical situation may be such that the conflict between the security forces seeking to enter a city and an organized armed group dug into defensive positions resisting that operation could result in the use of both direct and indirect fire (artillery or air power).<sup>282</sup> In another circumstance, such as when targeting an unarmed low-level member of an armed group hiding in a built-up area, a commander may determine, after applying the targeting precautions, that the relative military advantage to be gained from a kinetic attack is outweighed by the potential collateral death of, injury to, or damage to civilians.<sup>283</sup> In seeking to avoid or minimize the collateral impact on civilians, attempting to capture the individual may be the legally appropriate option under the circumstances. However, a more important target may change the military advantage to be gained from

280 Such a situation occurred in April 2003 in Fallujah, Iraq. See T. E. Ricks, above note 80, pp. 138–142; B. West, above note 99, pp. 12–13. However, in *Iraq: Violent Response: The U.S. Army in al-Falluja*, Vol. 15, No. 7 (E), June 2003, p. 2, Human Rights Watch took the view that the riot was a law enforcement situation requiring the use of those means. A similar incident occurred in Mosul, Iraq. See Linda Robinson, *Masters of Chaos: The Secret History of the Special Forces*, Public Affairs, New York, 2004, pp. 337–338.

281 *Counterinsurgency Manual*, above note 115, p. 54, para. 2–4.

282 Another example is the NATO airstrikes in Tripoli during the campaign in support of Libyan rebels seeking to take control of that country. See 'Nato air strikes hit Tripoli in heaviest bombing yet', in *The Guardian*, 24 May 2011, available at: <http://www.guardian.co.uk/world/2011/may/24/nato-airstrikes-tripoli-heaviest-bombing-libya> (last visited February 2012). This bombing did not occur in the context of an occupation; however, it highlights that air power may be used in urban areas, particularly in light of the concentration of opposing forces operating among the population in such areas.

283 The example of an unarmed insurgent located in peaceful civilian-filled surroundings is often provided when considering the use of force under IHL or human rights law. For example, see the *Interpretive Guidance*, above note 194, p. 81; M. Sassòli, above note 227, p. 85; and C. Droegge, above note 227, p. 529. However, the outcome of the application of conduct of hostilities and law enforcement norms in situations such as these may not be as different as is sometimes believed.

conducting an operation, thereby providing justification for the strike once appropriate precautions are taken.

Given the complexity of the situation on the ground and the diversity of the threats inherent in a belligerent occupation, it is inevitable that there will be both interface and overlap in the application of the two legal regimes. The challenge for courts, tribunals, state legal advisers (both military and civilian), and legal analysts will be to avoid formalistic assessments of the law that do not address the complexity of the threat and the capabilities or tactical limitations of the security forces involved. However, what is clear is that the maintenance of public order and safety in occupied territory under IHL is primarily and predominantly a law enforcement function. This is the situation regarding ordinary dealings with civilians in the occupied territory,<sup>284</sup> and extends to law enforcement activity that is an essential part of a counter-insurgency effort designed to counter criminal acts by insurgent groups. In this respect, the Occupying Power is in a similar position to that of the displaced government if it was dealing with an insurgency during an internal conflict. The activity performed by either police or military forces must conform with the widely accepted human rights norms governing law enforcement, regardless of whether a humanitarian or a human rights law framework is applied to determine accountability for the use of any force. It points to a default position of applying human-rights-based law enforcement norms in meeting the Occupying Power's humanitarian law mandate to maintain order, unless the security situation engages the conduct of hostilities framework.<sup>285</sup>

## Conclusion

As this analysis has demonstrated, belligerent occupation – such as occurred in Iraq from 2003 to 2004 – can present a complex and violent security challenge to the Occupying Power. The obligation to restore and maintain public order and safety, as far as possible, has long made the Occupying Power responsible for policing the inhabitants of the occupied territory. At the same time, the Occupying Power may be engaged in hostilities with those wishing to participate in the ongoing international armed conflict. Inevitably, the maintenance of security involves an integration, and at times an overlap, of effort between law enforcement and military forces. This arises from the requirement to police the population and the predominate role that police forces play in countering an insurgency.

Human rights norms associated with law enforcement activity, such as the right to life, are an integral part of IHL. This is consistent with the obligations on the

284 Elbridge Colby, 'Occupation under the laws of war II', in *Columbia Law Review*, Vol. 26, 1926, p. 151.

285 There will continue to be a requirement to separate policing governed by human rights norms and the conduct of hostilities. See René Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2002, pp. 349–350, who notes that 'while there is indeed space for enlightened cross-pollination and better integration of human rights and humanitarian law, each performs a task for which it is better suited than the other, and the fundamentals of each system remain partly incompatible with that of the other'.

Occupying Power to maintain order established in that body of law. These rights are also applicable under human rights law as a matter of treaty or customary international law. As a result, the two bodies of law substantively overlap in terms of the normative structure placed over security forces engaged in carrying out law enforcement duties. There are numerous advantages in applying that protection under the framework of humanitarian law. This includes the existence of parallel normative frameworks and attendant accountability structures that enhance the protection provided to the civilian population. That said, regardless of whether human rights norms are applied as a matter of humanitarian law or of human rights law, there will remain limits on the scope of each body of law in effectively addressing the complex security situation during occupation. In this respect, the norms applicable to the threat being faced will ultimately govern the force permitted at law.



# Human rights obligations in military occupation

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## **Abstract**

*This article examines the applicability of international human rights law in situations of military occupation. Proceeding from the position that human rights obligations can exist in these circumstances, the article provides an analysis of the precise modalities of application. It examines the tests for the determination of human rights applicability, and how these are linked to the concept of occupation. Finally, it recognizes the practical and legal challenges to the implementation of human rights obligations, and argues for a contextual approach that provides for human rights protection while recognizing the realities of military occupation.*

**Keywords:** military occupation, human rights obligations, applicability, occupying power, territorial control, contextual approach, economic, social and cultural rights.

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This article examines the applicability of international human rights law in situations of military occupation. That human rights obligations exist in some form in these circumstances should, by now, be firmly established and have wide support. Nonetheless, there remains room for further analysis of the precise modalities of application, questioning how far the human rights obligations stretch, and how this notion might be affected by practical and legal challenges to implementation. The article begins with an examination of the tests for determination of applicability of human rights law, and the link between the established authority of an Occupying Power and the notion of territorial control required for human rights law obligations. Recognizing the possible impediments to total fulfilment of all rights, an analysis is provided, suggesting the need for a contextual

approach to obligations. Finally, the source of the obligations – those of the occupying power or the occupied state – is also addressed.

## The determination of applicability

Before engaging in an examination of the substance of human rights obligations, it is first necessary to establish that this branch of international law does in fact apply to situations of occupation. Two objections have been raised to its applicability: whether international human rights law applies to extraterritorial conduct – in this case, in an occupied territory; and whether the human rights obligations, as a whole, are set aside in favour of international humanitarian law (IHL).<sup>1</sup> Both these objections have been covered extensively in the literature, and are therefore only mentioned here briefly at the start.<sup>2</sup> The latter objection can be dismissed with comparative ease. While IHL applies only in the context of armed conflict, international human rights law is not a mirror-opposite that only applies in times of peace. In fact, international human rights law applies at all times, regardless of peace or war. This is supported by numerous arguments, state practice, and jurisprudence of the International Court of Justice (ICJ) as well as of the regional and UN human rights bodies.<sup>3</sup> Accordingly, if the situation is one to which IHL applies – and military occupation is such a case – then the bodies of law are

- 1 See, for example, the questions and debates in G. I. A. D. Draper, 'The relationship between the human rights regime and the law of armed conflicts', in *Israel Yearbook on Human Rights*, Vol. 1, 1971, pp. 191–207; Keith Suter, 'An inquiry into the meaning of the phrase "human rights in armed conflicts"', in *Revue de droit pénal militaire et de droit de la guerre*, Vol. 15, 1976, pp. 393–439; Michael J. Dennis, 'ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: application of human rights treaties extraterritorially in times of armed conflict and military occupation', in *American Journal of International Law*, Vol. 99, No. 1, 2005, pp. 119–141.
- 2 These issues have been examined on numerous occasions, including in the following: Louise Doswald-Beck and Sylvain Vité, 'International humanitarian law and human rights law', in *International Review of the Red Cross*, Vol. 33, No. 293, 1993, pp. 94–119; Raúl Emilio Vinuesa, 'Interface, correspondence and convergence of human rights and international humanitarian law', in *Yearbook of International Humanitarian Law*, Vol. 1, 1998, pp. 69–110; Cordula Droegge, 'The interplay between international humanitarian law and international human rights law in situations of armed conflict', in *Israel Law Review*, Vol. 40, No. 2, 2007, pp. 310–355; UN Sub-Commission on the Promotion and Protection of Human Rights, *Administration of Justice, Rule of Law and Democracy: Working Paper on the Relationship Between Human Rights Law and International Humanitarian Law by Françoise Hampson and Ibrahim Salama*, 21 June 2005, E/CN.4/Sub.2/2005/14; Noam Lubell, 'Challenges in applying human rights law to armed conflict', in *International Review of the Red Cross*, Vol. 87, No. 860, 2005, pp. 737–754; Nancie Prud'homme, 'Lex specialis: oversimplifying a more complex and multifaceted relationship?', in *Israel Law Review*, Vol. 40, No. 2, 2007, pp. 356–395; Orna Ben-Naftali and Yuval Shany, 'Living in denial: the application of human rights in the Occupied Territories', in *Israel Law Review*, Vol. 37, No. 1, 2003–2004, pp. 17–118.
- 3 International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory opinion, 8 July 1996, *ICJ Reports* 1996, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, *ICJ Reports* 2004, para. 106 (hereafter *Wall case*); ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, *ICJ Reports* 2005, para. 216; Inter-American Court of Human Rights, *Juan Carlos Abella v. Argentina*, Case 11.137, Report No. 55/97, OEA/Ser.L/V/II.95 Doc. 7 rev. at 271, 1997; Human Rights Committee, 'General Comment 29: states of emergency (Article 4)', UN Doc. CCPR/C/21/Rev.1/Add.11, 2001, para. 3; Committee on Economic, Social and Cultural Rights, 'Concluding



applicable concurrently. This then raises other questions concerning concurrent applicability and whether it affects the substance of obligations under either of these two frameworks – a matter that will become relevant later in this analysis.<sup>4</sup>

The question might be raised at this early stage as to whether many – if not most – of the human rights obligations that will be found applicable and viable do not in fact already exist in IHL rules such as prohibitions on harming civilians and those relating to treatment of detainees. The simple answer is that it is not always the case that human rights obligations are mirrored in IHL.<sup>5</sup> Furthermore, the applicability of human rights law brings additional elements that IHL does not provide, chief among them being the possibility to seek recourse from international human rights mechanisms.

The other objection regarding the applicability of international human rights law centres upon the fact that the Occupying Power is not acting within its own sovereign territory. Consequently, the question is raised as to whether human rights obligations extend to actions taken extraterritorially. While there is strong reason to support extraterritorial human rights obligations in a wide range of situations,<sup>6</sup> it must be acknowledged that there are certain circumstances in which extraterritorial applicability is unclear and subject to debate.<sup>7</sup> Nonetheless, military occupation is perhaps one of the least controversial circumstances, and there is a solid foundation for the assertion that the Occupying Power must abide by international human rights law. This has been confirmed by numerous international bodies, including the ICJ.<sup>8</sup> The basis for this can be argued to rest on the premise that the Occupying Power is acting as the administrator of the territory and, as such, must abide by human rights obligations in its dealing with individuals in the territory under its control. In light of the above, this article proceeds from a starting point accepting the potential applicability of international human rights law in situations of military occupation, and places the focus not on the question of whether it can apply but rather on the tests behind such a determination, the ways in which this applicability might be manifested, and the extent of obligations created.

observation: Israel', UN Doc. E/C.12/1/Add.69, 31 August 2001; see also discussion in the articles listed in note 2 above.

4 See below, in the section on the content of obligations and legal restrictions imposed by IHL.

5 See the discussion below of economic, social, and cultural rights.

6 See analysis in Noam Lubell, *Extraterritorial Use of Force Against Non-state Actors*, Oxford University Press, Oxford, 2010, ch. 8.

7 *Ibid.*; see also further analysis of this issue in Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, Oxford, 2011.

8 ICJ, *Wall case*, above note 3, paras. 107–112; ICJ, *DRC v. Uganda*, above note 3, paras. 216–220; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel*, 18 August 1998, CCPR/C/79/Add.93; Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel*, 31 August 2001, E/C.12/1/Add.69; *Report on the Situation of Human Rights in Kuwait under Iraqi Occupation, prepared by Mr. Walter Kälin, Special Rapporteur of the Commission on Human Rights, in Accordance with Commission Resolution 1991/67*, E/CN.4/1992/26, 15 January 1992, paras. 55–59; European Court of Human Rights (ECtHR), *Loizidou v. Turkey (Preliminary Objections)*, Application No. 15318/89, Judgment of 23 March 1995, Series A No. 310, paras. 62–64; ECtHR, *Cyprus v. Turkey*, Application No. 25781/94, Judgment of 10 May 2001, para. 77.

As will be seen, the specific reasoning behind the conclusion of applicability in an individual case may affect the assessment of the content of the obligations. The European jurisprudence, in particular, has provided more than one route to the finding of extraterritorial applicability of human rights law, as seen in the differing tests advanced most explicitly in the case law of *Al-Skeini v. UK*.<sup>9</sup> The first test has been described as that of ‘state agent authority’, and the European Court of Human Rights, using the term ‘state agent authority and control’,<sup>10</sup> summarizes it thus:

It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual.<sup>11</sup>

The other test is that of ‘effective control over an area’, referring to situations ‘when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory’.<sup>12</sup> The Court has created a significant difference between the two tests, in that the ‘state agent authority’ test creates obligations only with regard to the rights ‘that are relevant to the situation of that individual’,<sup>13</sup> whereas under the ‘effective control over an area’ test

The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights.<sup>14</sup>

At first sight, situations of military occupation appear to be a prime example in which the ‘effective control over an area’ test is satisfied; indeed, it was a previous case dealing with occupation that at least in part formed the basis for the approach in the above case.<sup>15</sup> After all, the essence of occupation revolves around the Occupying Power’s control of the area, as is clear from Article 42 of the Hague Regulations: ‘Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised’. Accordingly, one could be forgiven for assuming that a military occupation might automatically be considered

9 *The Queen ex parte Al-Skeini and Others v. Secretary of State for Defence*, England and Wales Court of Appeal [2005] EWCA Civ 1609, 21 December 2005; Opinions of The Lords of Appeal for Judgment in the Case *Al-Skeini and Others (Respondents) v. Secretary of State for Defence (Appellant) Al-Skeini and Others (Appellants) v. Secretary of State for Defence (Respondent) (Consolidated Appeals)*, 13 June 2007, [2007] UKHL 26; ECtHR, *Al-Skeini and Others v. the United Kingdom*, Application No. 55721/07, Judgment of 7 July 2011.

10 ECtHR, above note 9, *Al-Skeini*, paras. 133–137.

11 *Ibid.*, para. 137.

12 *Ibid.*, para. 138.

13 *Ibid.*, para. 137.

14 *Ibid.*, para. 138; ECtHR, *Cyprus v. Turkey*, above note 8, para. 77.

15 *Ibid.* For further discussion of the notion of control, see M. Milanovic, above note 7, pp. 135–151.

a situation in which human rights obligations are applicable as a result of effective control over the area. Not everyone agrees, however. Notably, in the *Al-Skeini* case the UK argument differentiated between being an Occupying Power and having control as required to trigger human rights obligations. According to Brooke LJ in the UK Court of Appeal:

it is quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time.<sup>16</sup>

The European Court, while taking a different route, did not settle the debate over the 'effective control over an area' test. On the one hand, the Court disagreed with the UK submission and ruled that the circumstances in this case did entail a jurisdictional link that created human rights obligations. On the other hand, despite this being a situation of occupation – which by definition is linked to notions of territorial control – the European Court did not fully rely on the 'effective control over an area' test, and appears to have included elements of the 'State agent authority' test:

It can be seen, therefore, that following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, *the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq*. In these exceptional circumstances, the Court considers that the United Kingdom, *through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals* killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.<sup>17</sup>

This conclusion appears to be a badly mixed cocktail, unsuccessfully attempting to fuse concepts of control over the territory with the question of state agent authority. While noting the UK's territorial authority, the Court proceeds to make its determination based on the authority exercised by state agents over individuals. After appearing to acknowledge the validity of the two tests, it would have been preferable for the Court to apply either one (or both) of the tests from start to finish. The first possibility would have been to reject the UK position and to clarify that the authority and control that had been recognized in order to establish the existence of a military occupation must itself serve as proof of the requisite control over the area necessary to find the applicability of human rights law. Alternatively, each of the individual cases could have been examined as to whether they satisfy the 'state agent authority' test – it is submitted here that this test extends beyond the strict confines

16 *Al-Skeini*, Court of Appeal, above note 9, Brooke LJ, para. 124. See also para. 127.

17 ECtHR, *Al-Skeini*, above note 9, para. 149 (emphasis added).

of formal detention, and can include many situations such as those which arose in this case.<sup>18</sup>

The purported obstacle to the equation of military occupation with the human rights ‘effective control over an area’ test stems from the suggestion that, in situations of control over territory, the state is bound to uphold the entire range of its human rights treaty obligations. This is said to be an ‘utterly unreal’ proposition.<sup>19</sup> This ‘all or nothing’ approach is raised as an objection to equating military occupation with the human rights notion of control over an area. It is argued, for example, that, despite a situation being recognized as occupation, the Occupying Power may not have the requisite forces on the ground to exercise the control required under the human rights test for applicability.<sup>20</sup> Moreover, it is claimed that, as a matter of law, the ability of the Occupying Power to abide by human rights obligations is curtailed by the limitations imposed on its authority through occupation law.<sup>21</sup> There is merit in the criticism from both directions. It would be disconnected from the realities of occupation to assume that full applicability of human rights law under an ‘effective control over an area’ test could equate occupied territory with the state’s own territory. Practical impossibilities of life on the ground and legal obstacles may all play a part in limitations on the Occupying Power’s ability to implement the obligations in the same manner as it does domestically. At the same time, the existence of certain impediments cannot overshadow the fact that, by definition, the Occupying Power has the control and responsibility for the territory, and with it the human rights obligations that are attached to its authority. Ultimately, the ‘all or nothing’ standpoint is likely to lead either to an unrealistic ‘all’ or to an obligationless vacuum of ‘nothing’. Neither one is completely satisfactory, and, as noted by Sedley LJ in the UK Court of Appeal:

[I]t is not an answer to say that the UK, because it is unable to guarantee everything, is required to guarantee nothing. The question is whether our armed forces’ effectiveness on the streets in 2003–4 was so exiguous that despite their assumption of power as an occupying force they lacked any real control of what happened from hour to hour in the Basra region. My own answer would be that the one thing British troops did have control over, even in the labile situation described in the evidence, was their own use of lethal force. Whether they were justified in using it in the situations they encountered, of which at least four of the cases before us are examples, is precisely the subject of the inquiry which the appellants seek. It is in such an inquiry that the low ratio of troops to civilians, the widespread availability of weapons and the prevalence of insurgency would fall to be evaluated.<sup>22</sup>

The solution may be found by suggesting that, while the starting assumption may presuppose the full range of obligations, there is need for a contextual examination

18 N. Lubell, above note 6, ch. 8.

19 *Al-Skeini*, Court of Appeal, above note 9, Brooke LJ, para. 124.

20 *Al-Skeini*, Court of Appeal, above note 9, paras. 119–124, 194.

21 ECtHR, *Al-Skeini*, above note 9, para. 114.

22 *Al-Skeini*, Court of Appeal, above note 9, Sedley LJ, para. 197.

of the circumstances in each case. Turning for a moment to the ‘state agent authority’ test, it is clear that a contextual approach is not only possible, but also desirable. The ‘state agent authority’ test, according to the European Court, is already one that recognizes the need to consider the circumstances when determining the extent of the state’s obligations.<sup>23</sup> These obligations arise only with regard to those rights that the state agents have the power to control in the circumstances. The logic behind this is based on the fact that, absent wider control of the circumstances and the necessary ability to perform certain acts, the state cannot be expected to uphold every one of the individual’s rights. However, if some of the individual’s rights are *de facto* directly in the control of state agents – lawfully or unlawfully – then the state is obligated to uphold those rights that are in its power to control. For example, freedom from arbitrary detention would be applicable when detaining an individual, and the right to life would be applicable when using force against an individual.<sup>24</sup>

Accordingly, under the ‘state agent authority’ approach, the context can affect the actual *applicability* of obligations. However, our current concern focuses not on control over individuals outside territorial control but on occupied territory where – by definition – the Occupying Power has an element of authority and control over territory. Returning therefore to the ‘effective control over an area’ test, while there is a presumption of wide-ranging applicability of human rights obligations, it is submitted here that the context can nevertheless affect the *substantive content* of the obligations. An example of this can be found in the ICJ Advisory Opinion on the *Wall*, where the following is stated:

[T]he territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.<sup>25</sup>

The ICJ thus recognizes that, while the International Covenant on Economic, Social and Cultural Rights (ICESCR) applies as a whole by virtue of Israel being an Occupying Power, the substantive obligations must be determined in a context that takes into account the existence of the Palestinian Authority and the role that it plays in the territory. Notably, while the context may modify the substance of the obligation, it does not remove it altogether; Israel is required not to actively raise

23 ‘... relevant to the situation ...’, in ECtHR, *Al-Skeini*, above note 9, para. 137.

24 N. Lubell, above note 6, ch. 8; O. Ben-Naftali and Y. Shany above note 2, p. 64. In situations of armed conflict there is also, of course, the question of how the concurrent applicability of international human rights law and IHL might affect the nature of the obligations. This is a separate question, which has been examined often elsewhere, and with no conclusive or agreed answer. The focus of this article is not on how to manage concurrent applicability, but on the earlier stage of determining the scope of applicable human rights obligations.

25 ICJ, *Wall case*, above note 3, para. 112.

obstacles with regard to the rights that the Palestinian Authority is administering. Other cases have also recognized context in relation to territorial control.<sup>26</sup>

According to such an approach, territorial control – including occupation – does trigger the applicability of the full range of human rights obligations that the state is committed to uphold. Nonetheless, the substantive elements of the obligations and the assessment of whether a violation has occurred, must be determined in the light of the context, including both the situation on the ground and legal restraints. These could include questions of logistical ability to act in a certain way; or, for example, obligations might be affected by the legislative restrictions placed on the Occupying Power under occupation law.<sup>27</sup> Nonetheless, neither of these types of concern provide a ready-made justification for wholesale discarding of obligations. While aspects of the obligations may be modified in light of the context, the overall applicability of international human rights law is established and an element of obligation will always exist.

## The content of human rights obligations

Based on the above examination, international human rights law obligations are applicable to situations of military occupation, but the precise behaviour considered sufficient to satisfy the obligation must be determined in the light of the legal and practical context in which the Occupying Power is operating. Context may be difficult to define in advance, but it is impossible to create precise laws for every possible scenario without ultimately allowing Occupying Powers to evade responsibilities that they should have fulfilled or, alternatively, to place unrealistic obligations that do not stand the chance of being implemented owing to impossible circumstances. The likeliest route to achieving protection of human rights wherever possible is to have a general principle determining the applicability of international human rights law, while allowing for a case-by-case approach that takes the context into account when determining the precise content of the obligation. This section uses examples of certain key areas of concern to demonstrate how such an approach can work in practice. At its foundation is the understanding that, while human rights obligations may remain applicable at all times, their *mode of application* – as opposed to their *applicability* – may differ in accordance with the ruling circumstances. This is neither new nor unique to situations of military occupation; the precise actions that a state takes in relation to a specific right can be affected by various circumstances. For example, the right to privacy would prevent a state from having the entire population's private post being read and censored on a regular basis, but it may be implemented differently in the context of mail delivered to inmates at a high-security prison facility.<sup>28</sup>

26 ECtHR, *Ilașcu and Others v. Moldova and Russia*, Application No. 48787/99, Judgment of 8 July 2004.

27 Whether or not this is the case will be discussed further below.

28 The Committee accepts that it is normal for prison authorities to exercise measures of control and censorship over prisoners' correspondence. Nevertheless, article 17 of the Covenant provides that "no one shall be subjected to arbitrary or unlawful interference with his correspondence". This requires that any

In many cases, the language of the human rights conventions explicitly allows for certain restrictions that take context into account, by having the description of the right itself accompanied by statements such as those making room for 'limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.<sup>29</sup> Derogations are an additional route to possible limitations:<sup>30</sup> for example, permitting a state experiencing a calamitous natural disaster to restrict movement on the streets so as to allow emergency services to function effectively. Financial circumstances may also be taken into account in certain cases, as is evident from the phrase in the ICESCR referring 'to the maximum of its available resources'. There are occasions when the context may not even be one that was necessarily originally envisaged, but must nevertheless be taken into account. For example, when the detention of an individual occurs on the high seas, 5,500 kilometres from the state's territory, the obligation to bring him or her 'promptly' before a judge can allow for sixteen days to elapse, despite such a period being remarkably longer than that usually permitted.<sup>31</sup> The above examples demonstrate that context indeed can be – and is – taken into account when determining the content of human rights obligations in specific circumstances.

The notion of positive and negative obligations is another useful tool for discussing the substantive elements of a human rights obligation. This identification of positive and negative obligations is not a means to differentiate between groups of different rights. Rather, it is that within most rights there are both positive and negative elements. These distinctions can be understood through referring to the three-tiered approach of 'respect, protect, and fulfil'. This structuring of rights has received much attention in the sphere of economic, social, and cultural rights, but it is also pertinent to civil and political rights.<sup>32</sup> The respect/negative element of a right

such measures of control or censorship shall be subject to satisfactory legal safeguards against arbitrary application (see para. 21 of the Committee's views of 29 October 1981 on communication No. R.14/63 [63/1979]). Furthermore, the degree of restriction must be consistent with the standard of humane treatment of detained persons required by article 10 (1) of the Covenant. In particular, prisoners should be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, by correspondence as well as by receiving visits'. Human Rights Committee, *Miguel Angel Estrella v. Uruguay*, Communication No. 74/1980, UN Doc. CCPR/C/OP/2 at 93 (1990), para. 9.2.

29 International Covenant on Civil and Political Rights (ICCPR), UN General Assembly res. 2200A (XXI), UN Doc. A/6316 (1966), entered into force 23 March 1976, Art. 18, para. 3 (on the manifestation of freedom of religion).

30 ICCPR, Art. 4; Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, entered into force 3 September 1953, as amended by Protocols Nos. 3, 5, 8, and 11, which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively, Art. 15; American Convention on Human Rights (ACHR), O.A.S. Treaty Series No. 36, 1144 UNTS 123, entered into force 18 July 1978, Art. 27.

31 ECtHR, *Rigopoulos v. Spain*, Application No. 37388/97, Decision of 12 January 1999; see also ECtHR, *Medvedev and Others v. France*, Application No. 3394/03, Grand Chamber, Judgment of 29 March 2010, paras. 127–134.

32 'Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights'. Theo van Boven, Cees Flinterman, and Ingrid Westendorp (eds), *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, SIM, Utrecht, 1996, para. 6; Committee on Economic, Social and Cultural Rights, 'General comment no. 12: right to adequate food (Art. 11)', Twentieth session, 12 May 1999, UN Doc. E/C.12/1999/5, para. 15; Committee on

obliges the state to refrain from taking action that would directly contravene the right. In most cases, this primarily requires the state to refrain from certain actions, ‘not to deprive people of what they have rights to’, and as such does not normally create a significant burden.<sup>33</sup> It should be noted, however, that the contextual approach advanced in this article does not rely on a differentiation between negative and positive obligations as such. Rather, this distinction is only relevant insofar as in most contexts negative obligations are unlikely to present a challenge for implementation. Ultimately, the test for all types of obligation is one of assessing each one in the light of the context, rather than categorizing an obligation as negative or positive.

Notwithstanding the above observation, positive duties of protecting and fulfilling a right are, however, likely to raise further concerns that must be examined, especially in situations such as military occupation. With regard to civil and political rights, the positive obligation to protect can manifest itself in a number of ways, for example by ensuring the protection of life in certain circumstances in the form of ‘a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual’.<sup>34</sup> This entails the existence of a law enforcement system capable of protecting the rights in the required manner. The *Al-Skeini* case provides a useful example as to whether such protection can be demanded from an Occupying Power. The UK Government asserted that it was unable to maintain law and order in south-east Iraq owing to a combination of too few troops and the breakdown of local law enforcement systems, which gave rise to widespread crime.<sup>35</sup> The UK argument was presented as a basis for denying the applicability of the European Convention on Human Rights (ECHR) since the described situation was said to contradict the existence of effective control. In contrast to the UK argument, and based on the earlier analysis in this article, the UK position can be described as being back to front: the correct approach begins with an agreed determination that the UK was an Occupying Power; as such the requisite control for the applicability of human rights obligations is inherently established. Arguing that an Occupying Power’s inability to enforce law and order proves the inapplicability of human rights obligations goes against not only the correct approach to human rights applicability but also the obligations under the laws of occupation. Article 43 of the Hague Regulations states the following:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and

Economic, Social and Cultural Rights, ‘General comment no. 13: the right to education (Article 13 of the Covenant)’, Twenty-first session, 8 December 1999, UN Doc. E/C.12/1999/10, paras. 46–47.

- 33 ‘Negative duties – duties not to deprive people of what they have rights to – are, and must be, universal. A right could not be guaranteed unless the negative duties corresponding to it were universal, because anyone who lacked even the negative duty not to deprive someone of what she has rights to would, accordingly, be free to deprive the supposed right-bearer. Universal negative duties, however, are no problem (if “opportunity costs” are ignored). I can easily leave alone at least five billion people, and as many more as you like’. Henry Shue, ‘Mediating duties’, in *Ethics*, Vol. 98, No. 4, 1988, p. 690.
- 34 ECtHR, *Osman v. The United Kingdom*, Application No. 23452/94, 87/1997/871/1083, Judgment of 28 October 1998, para. 115.
- 35 ECtHR, *Al-Skeini*, above note 9, para. 112.



ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.<sup>36</sup>

The duties of an Occupying Power under this provision, and the entailment of human rights obligations in this regard, were addressed by the ICJ in its examination of Uganda's actions:

The Court thus concludes that Uganda was the occupying Power in Ituri at the relevant time. As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.

The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.<sup>37</sup>

Accordingly, by virtue of being an Occupying Power a state can be expected to attempt to ensure that law and order prevails in the occupied territory,<sup>38</sup> if it is already required to do so under the law of occupation, it cannot proclaim a failure to abide by its IHL obligation as a justification for denying the applicability of human rights obligations. IHL requires the Occupying Power to take positive action. As for the substance of the human rights obligations, clearly the negative tier of respecting the rights can be demanded, while the positive elements will, at the very least, be the same ones as required by the already existing IHL obligations. An inability to fulfil positive duties in particular situations does not negate the applicability of human rights obligations; however, it may lead to a determination that in the circumstances the state did what it could so as not to contravene its obligations. In such situations, although the applicability of human rights obligations can be asserted, there is still room to debate whether the circumstances affect the ability to fulfil the obligations.<sup>39</sup>

36 Regulations Annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907, Art. 43.

37 ICJ, *DRC v. Uganda*, above note 3, paras. 178–179.

38 On the Article 43 obligation to restore and ensure public order and life, see Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, pp. 91–94.

39 See above discussion in previous section on applicability. 'When faced with a partial or total failure to act, the Court's task is to determine to what extent a minimum effort was nevertheless possible and whether it should have been made'. ECtHR, *Ilaşcu and Others*, above note 26, para. 334. See also the reference to 'due diligence' in *M. Milanovic*, above note 7, p. 141.

Accordingly, one could argue that the negative tier of the human rights obligations must be adhered to, and therefore the state is prohibited from acting in a way that does not respect the rights of the population. The positive elements of protect and fulfil would, however, be dependent on context. For example, while perhaps not being able to carry out the equivalent of total police protection against criminal activity throughout the whole territory, troops must not themselves engage in arbitrary acts of killing or detention. Moreover, in circumstances where troops have the requisite ability, they must also be responsible for the positive elements – for instance, they cannot stand aside and witness a violent crime when they have the ability to step in and prevent it. How far beyond this they will be expected to go, may be affected by issues such as sufficient capabilities in the light of the prevailing level of violence on the streets. Likewise, in a detention facility the occupying forces would be required not only to refrain from directly causing harm to the detainee but also to comply with all positive duties arising from the right (such as feeding the detainee or protecting him/her from other detainees). Any assessment must therefore consider the circumstances at hand. An example of recognizing the need to utilize a realistic understanding of the situation can be found in the European Court's treatment of the *Al-Skeini* case:

The Court takes as its starting point the practical problems caused to the investigatory authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war. These practical problems included the breakdown in the civil infrastructure, leading *inter alia* to shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time. As stated above, the Court considers that in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators.<sup>40</sup>

A separate issue is the denial of human rights obligations in situations of occupation, based on perceived legal obstacles. The law of occupation places certain restrictions on the Occupying Power, and these have been raised as an impediment to fulfilling human rights obligations.<sup>41</sup> Article 43 of the Hague Regulations appears to present a problem in this regard, requiring the Occupying Power to respect, 'unless absolutely prevented, the laws in force in the country'. Similarly, Article 64 of the Fourth Geneva Convention states that:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.<sup>42</sup>

40 ECtHR, *Al-Skeini*, above note 9, para. 168.

41 *Ibid.*, para. 114.

42 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, entered into force 21 October 1950 (hereafter GC IV), Art. 64.

The expectation that occupation should be a temporary affair, and that sovereignty – as opposed to authority – is not transferred to the Occupying Power, requires rules designed to minimize the possibility of the occupier creating changes that would endanger these assumptions. Nonetheless, the limitations are not absolute, and certain changes might not only be allowed but – if required for complying with the obligation to ensure or restore public life – they might even be mandatory. Article 43 must not become ‘an extremely convenient tool’ allowing the Occupying Power to intervene when it suits, and to hide behind claims of limitations when it does not.<sup>43</sup> Combined interpretations of the above provisions can allow for changes that are in line with the objectives of the law of occupation. These include the responsibility for public order, which, recalling the original French text, has the wider notion of public life, rather than just matters of law and order.<sup>44</sup> While there are risks and potential for abuse in the form of changes motivated by self-interest,<sup>45</sup> there is reason to prefer the arguments for allowing – and even requiring – changes that are based on adherence to international human rights law and are designed to benefit the rights of the inhabitants in the occupied territory.<sup>46</sup> In particular, prolonged occupation may require active intervention in numerous areas, if only to prevent economic, social, and legal stagnation. The duration of the occupation is therefore also part of the context in which human rights obligations must be assessed.<sup>47</sup>

## Economic, social, and cultural rights

The applicability and level of human rights obligations is equally a matter for concern in relation to economic, social, and cultural (ESC) rights. There is no well-grounded basis for disregarding this set of rights in situations of occupation, and all the arguments for applicability arise with similar force with respect to these rights as they do for civil and political rights. Indeed, the UN human rights bodies and the ICJ have confirmed that the ICESCR applies to the actions of an Occupying Power.<sup>48</sup> Moreover, for the populations of an occupied territory, it is often precisely

43 Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, NJ, 2004, p. 11.

44 *Ibid.*, pp. 9–11; Y. Dinstein, above note 38, p. 89.

45 See discussion in Y. Dinstein, above note 38, pp. 120–123.

46 See discussion in *ibid.*, pp. 46, 112–123. On development of interpretations in this regard, see E. Benvenisti, above note 43, pp. xi–xiv. See also the analysis of legislation by occupying powers in Marco Sassòli, ‘Legislation and maintenance of public order and civil life by occupying powers’, in *European Journal of International Law*, Vol. 16, No. 4, 2005, pp. 661–694. While there is room for changes based on human rights obligations, Sassòli notes that the interpretation and implementation must endeavour to respect local society and customs (*ibid.*, pp. 676–677).

47 For discussion of the particular challenges in cases of prolonged occupation, see Adam Roberts, ‘Prolonged military occupation: the Israeli-occupied territories 1967–1988’, in *American Journal of International Law*, Vol. 84, No. 1, 1990, pp. 44–103.

48 ICJ, *Wall case*, above note 3, paras. 107–112; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel*, above note 8; see also Sylvain Vité, ‘The interrelation of the law of occupation and economic, social and cultural rights: the examples of food, health and property’, in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 629–651.

these rights that are of the greatest concern. While there can be no true expectation that a military occupation will guarantee the same civil and political freedoms as a self-governing democracy, the inhabitants of the territory require their health, education, and employment situation to continue in as uninterrupted a manner as possible. Indeed, a significant amount of the work on the ground in situations of occupation revolves around these concerns.<sup>49</sup> Notwithstanding, here too there is a need for a contextual approach when determining the level of obligations and the precise duties that must be implemented by the Occupying Power. Objections might be raised to the notion of obligations in this area, since ESC rights are said to involve significant financial and logistical commitment, which one cannot expect from a temporary Occupying Power. This type of argument is often at the heart of the more general discussions differentiating between civil and political rights and ESC rights. The claim is not entirely accurate, however, either in the context of occupation or outside it. Most rights can ultimately entail financial commitments, and civil and political rights can also be a costly affair. Consider, for example, rights related to detention and trial: a functioning police force, a judicial system, trained judges and lawyers, courthouses, and prisons – all these are far from being cost-free. It is perhaps more useful to return to the earlier mentioned three-tiered approach of respect/protect/fulfil, and to note that all rights entail some obligations that are relatively cost-free (for example, not to torture a detainee, not to prevent an individual from accessing a hospital) and other obligations that require investment (e.g. a judicial system that is capable of preserving justice, a health system that provides basic health care). However, and notwithstanding this observation that all rights include the different tiers of obligation, there is some credence to the view that the individual claims associated with civil and political rights tend to centre upon the negative/respect obligations (such as the individual's desire to remain free from arbitrary intrusions), while ESC rights are more likely to revolve around the positive/fulfil elements of the right (e.g. demanding health care). The possibility that the context of military occupation requires a differentiation between the different elements of obligations therefore takes extra significance when dealing with ESC rights. In other words, can the Occupying Power be expected to carry out the 'fulfil' aspects of ESC rights?

First, it is important to note that, as with the earlier discussion of law and order, here too IHL already imposes certain obligations upon the Occupying Power with regard to matters such as food,<sup>50</sup> health,<sup>51</sup> and education.<sup>52</sup> The question before us now is whether the applicability of human rights obligations adds any substantive duties to those in the law of occupation.<sup>53</sup> Although the Fourth Geneva Convention imposes certain positive obligations such as provision of medical

49 For example, see the work of Physicians for Human Rights – Israel, available at: <http://www.phr.org.il/default.asp?PageID=21> (last visited 24 April 2012).

50 GC IV, Art. 55.

51 *Ibid.*, Arts. 55–56.

52 *Ibid.*, Art. 50.

53 As noted earlier, even with regard to existing IHL obligations, the fact that these are also part of human rights law can trigger the possibility for monitoring by human rights treaty bodies.

supplies, this is not the case with all ESC rights. For example, on matters of work and employment, the Convention focuses on questions of forced labour, requisitioning services, and more generally the issue of protected persons working at the behest of the Occupying Power.<sup>54</sup> The law of occupation thus provides little protection with regard to the right to work outside these circumstances. Looking at the example of the Israeli–Palestinian conflict, it is clear that concerns over work can be a major problem for the population in an occupied territory, and that actions of the Occupying Power can have a serious detrimental effect on the occupied population in this regard. The ICJ Advisory Opinion on the *Wall* highlighted some of these issues, and it has been well documented that the physical barriers created by this construction, as well as numerous other restrictions on movement, have had a negative impact on the ability of the Palestinian population to go about earning their livelihood.<sup>55</sup> In the Advisory Opinion, after noting the applicability of the ICESCR, the ICJ proceeded to determine the violation of the right to work as one of the transgressions of international law.<sup>56</sup> International human rights law can therefore add protection with regard to certain rights that may not be fully protected in the law of occupation. Notably, in the above example, the focus is not upon the positive duties of this right (such as vocational training programmes to raise employment opportunities)<sup>57</sup> but on the respect/negative duties of not acting in such a way as to harm the employment and ability to work of the individuals in the occupied territory. Human rights obligations of this type must be respected by occupying powers.

The greater challenge arises from the fulfil/positive aspect of rights, including those that do receive mention in the law of occupation. Taking the example of the right to health, it is clear from the Fourth Geneva Convention that the Occupying Power has duties with regard to ensuring medical supplies and the maintenance of hospitals and certain public health services.<sup>58</sup> Moreover, while there is reference in the Convention to co-operation with local authorities, the ultimate responsibility is on the Occupying Power to ensure the ‘adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics’.<sup>59</sup> It is therefore clear that in the area of ESC

54 GC IV, Art. 51–52.

55 ICJ, *Wall case*, above note 3, paras. 133–134. See also the description given by the non-governmental organization B’Tselem: ‘Within the West Bank, the restrictions make it very hard for Palestinians to get to their jobs and to transport goods from area to area. This has led to an increase in transportation costs and consequently to lower profits. Trade from one section to another in the West Bank has become expensive, uncertain, and inefficient. The economy in the West Bank has been split into smaller, local markets. Restrictions on access of West Bank farmers to their lands in the “seam zone” and in the Jordan Valley have severely harmed the farming sector in these areas.’ B’Tselem, ‘Effect of restrictions on the economy’, 1 January 2011, available at: [http://www.btselem.org/freedom\\_of\\_movement/economy](http://www.btselem.org/freedom_of_movement/economy) (last visited 24 April 2012).

56 ICJ, *Wall case*, above note 3, paras. 130, 133, and 134.

57 As required by the International Covenant on Economic, Social and Cultural Rights (ICESCR), UN General Assembly res. 2200A (XXI) of 16 December 1966, entered into force 3 January 1976, Art. 6, para. 2.

58 GC IV, Arts. 55 and 56.

59 *Ibid.*, Art. 56. See also Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949, Commentary, Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva,

rights also, the duties of the Occupying Power go beyond non-interference and negative/respect obligations to include positive obligations. But how far do the positive obligations stretch? Those that can be drawn from the Fourth Geneva Convention are not many, since beyond the above example the Convention does not elaborate on the meaning of ensuring the work of medical services. This might be the point at which human rights law can assist because it does contain greater detail on ESC rights and the obligations that they entail. While there is some description of specific obligations in the ICESCR itself, there is abundant and detailed further explanation of the related duties in the General Comments produced by the Committee on Economic, Social and Cultural Rights, such as can be found in their General Comment on the right to health.<sup>60</sup> Many of the core obligations found by the Committee are not too dissimilar from the requirements for basic health services and medical supplies that exist in the law of occupation. However, there are also demands placed upon the state to invest in long-term strategies for advancing health care in the country.<sup>61</sup>

The ICESCR itself allows for the possibility that states may not be able to put all arising duties into effect immediately, and includes the notion of progressive realization, taking into account the state's 'maximum of its available resources'.<sup>62</sup> This, together with the fact that the healthcare duties in the Fourth Geneva Convention are prefaced by the phrase '[t]o the fullest extent of the means available to it',<sup>63</sup> might lead one to the conclusion that the obligations are to be determined on the basis of available resources, the Occupying Power being required to do whatever its resources allow. At first sight, this might provide a solution for situations of occupation where it might not be feasible to expect the Occupying Power to engage in all the positive and long-term duties required in order to fulfil the right. However, under human rights law, it is not simply a question of budgetary capabilities. Even without huge resources, progressive realization does not remove an obligation to action: while it recognizes that immediate change might not be possible, it nonetheless requires steps in the direction of

1958, pp. 313–314 : 'It is possible that in certain cases the national authorities will be perfectly well able to look after the health of the population; in such cases the Occupying Power will not have to intervene; it will merely avoid hampering the work of the organizations responsible for the task. In most cases, however, the invading forces will be occupying a country suffering severely from the effects of war; hospitals and medical services will be disorganized, without the necessary supplies and quite unable to meet the needs of the population. The Occupying Power must then, with the co-operation of the authorities and to the fullest extent of the means available to it, ensure that hospital and medical services can work properly and continue to do so. The Article refers in particular to the prophylactic measures necessary to combat the spread of contagious diseases and epidemics. Such measures include, for example, supervision of public health, education of the general public, the distribution of medicines, the organization of medical examinations and disinfection, the establishment of stocks of medical supplies, the despatch of medical teams to areas where epidemics are raging, the isolation and accommodation in hospital of people suffering from communicable diseases, and the opening of new hospitals and medical centres.'

60 Committee on Economic, Social and Cultural Rights, 'General Comment no. 14: the right to the highest attainable standard of health (Art. 12)', Twenty-second session, 11 August 2000, UN Doc. E/C.12/2000/4.

61 *Ibid.*, para. 36.

62 ICESCR, Art. 2.

63 GC IV, Arts. 55 and 56.

change.<sup>64</sup> Conversely, would this mean that a relatively wealthy Occupying Power, who cannot easily plead a lack of resources, would suddenly have to pour huge sums into building new national healthcare systems in the occupied territory? At this juncture, it is necessary to return to the earlier discussion of context.

The theatre of operations of occupied territory is far removed from the circumstances of a state operating domestically, in a myriad of ways. Above all, a military occupation is meant to be a temporary affair, and the Occupying Power is not encouraged to envisage itself administering the state into the distant future. An argument could therefore be made that the human rights obligations of the Occupying Power, in addition to the negative/respect duties, are limited to those positive actions required to fulfil the core obligations such as ensuring basic sanitation, safe water, and essential drugs,<sup>65</sup> while not including engagement in long-term matters such as investing in the creation of new medical schools. Context, however, works in both directions. While it may limit the positive obligations of an Occupying Power in the light of the nature of military occupation, if the circumstances are that of an occupation that does not adhere to the expectation of temporariness – for example, Israel remaining an Occupying Power for more than four decades – the context may then require a more expansive approach to positive duties. Although there are limitations, the Occupying Power is allowed to engage in certain activities that change the status quo for the benefit of the local population.<sup>66</sup> In a prolonged occupation, it may be incumbent upon the Occupying Power not only to engage in the core minimum of obligations but also to ensure the long-term strategic aspects of fulfilling the population's rights.

Attention must also be given to the principle of non-discrimination. This is a paramount principle cutting across all areas of human rights law. Continuing with the example of the right to health, the issue of discrimination raises an interesting question in the context of military occupation. States are required to implement the right to health in a non-discriminatory fashion;<sup>67</sup> how does this translate to

64 '[T]he fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal'. Committee on Economic, Social and Cultural Rights, 'General Comment no. 3: the nature of States Parties obligations, Art. 2, para. 1 of the Covenant', Fifth session, 14 December 1990, para. 9.

65 GC IV, Art. 56; Committee on Economic, Social and Cultural Rights, General Comment no. 14, above note 60.

66 See earlier discussion; note, however, that a common assumption is that the 'local population' refers to the protected persons and original inhabitants of the occupied territory. Widening this to include others such as nationals of the Occupying Power (e.g. the Israeli settlers) creates significant challenges and potential for distorting the crucial balance between the needs of the occupier and those of the protected persons. For discussion of related issues, see Aeyal M. Gross, 'Human proportions: are human rights the emperor's new clothes of the international law of occupation?', in *European Journal of International Law*, Vol. 18, No. 1, 2007, pp. 1–35.

67 ICESCR, Art. 2, para. 2; Committee on Economic, Social and Cultural Rights, 'General Comment no. 20: non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant

occupation? There may be a vast difference between the health services that a state provides in its own territory and those of the occupied territory, and it is probably not feasible to expect the health situation in the two areas to be the same – the UK was clearly not going to extend its famous National Health Service to southern Iraq. Indeed, while requiring equal medical treatment for aliens in the territory of a party to the conflict,<sup>68</sup> the Fourth Geneva Convention does not do the same for protected persons in an occupied territory, and complete equality cannot be expected between the residents of the Occupying Power back in its own territory and the population of the occupied territory. The human rights principle of non-discrimination will, however, remain pertinent to the manner in which health services are provided within the occupied territory. The principle may therefore be relevant to situations such as those in which a civilian population from the Occupying Power is living in the occupied territory (e.g. the Israeli settlers) and has access to a higher level of health care than their local neighbours.<sup>69</sup>

## The source of human rights obligations

While there is considerable support for asserting the duty of occupying powers to abide by international human rights law, a question may still be asked as to the source of the precise obligations. Namely, which human rights obligations are we speaking of: those which the occupier is bound to uphold based on its own treaty ratifications, or those of the state that it is occupying? Applying those accepted by the occupier might be seen as enforcing a set of international principles upon the population of a state that did not agree to them. Conversely, basing the obligations on those of the occupied state might place the occupier in a position of being bound by obligations to which it had not itself agreed. In fact, there are arguments to the effect that the suggested solution is not a straightforward reliance on either of these alone, but a combination of both.

First, however, it should be noted that, although the source of the treaty obligations must be further identified, there is not the same obstacle for customary international law. Fundamental rights such as the right to life, freedom from arbitrary detention, and the prohibition of torture will bind all states under customary international law.<sup>70</sup> Accordingly, regardless of the treaties to which the

on Economic, Social and Cultural Rights), Forty-second session, 2 July 2009, E/C.12/GC/20; Committee on Economic, Social and Cultural Rights, 'General Comment no. 14', above note 60, paras. 12(b), 18–19.

68 GC IV, Art. 38.

69 See Israel High Court of Justice, 168/91 *Morcu v. Minister of Defence*, and the requirement of non-discrimination with regard to distribution of gas masks to both settlers and the Palestinian population.

70 Bertrand Ramcharan 'The concepts and dimensions of the right to life', in Bertrand Ramcharan (ed.), *The Right to Life in International Law*, Martinus Nijhoff, Dordrecht, 1985, pp. 1–32; W. Paul Gormley, 'The right to life and the rule of non-derogability: peremptory norms of *jus cogens*', in *ibid.*, pp. 120–159; International Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Anto Furundzija*, IT-95-17/1, Trial Chamber, Judgment of 10 December 1998, paras. 153–157; ECtHR, *Al-Adsani v. The United Kingdom*, Application No. 35763/97, Judgment of 21 November 2001, paras. 60–61; Richard B. Lillich, 'The growing importance of customary international human rights law', in *Georgia Journal of International and Comparative Law*, Vol. 25, No. 1, pp. 5–6; Restatement (Third) of the Foreign Relations Law of the United



Occupying Power and occupied state are party, the occupier will be bound by all human rights obligations that are part of customary international law.

As for the treaty obligations, where both the occupier and the occupied are party to the same treaties, there is less of a difficulty. In examining alleged human rights violations by Uganda in the Democratic Republic of the Congo (DRC), the ICJ determined the applicability of a number of instruments, including the International Covenant on Civil and Political Rights (ICCPR), and noted that both states were party.<sup>71</sup> However, not all instances of occupation involve two states equally bound by the same human rights treaties. In such a situation, a number of cases support the principle of holding the occupier to the standards to which it is bound by its own treaty obligations. The *Al-Skeini* case centres upon the obligations of the UK under the ECHR – clearly not a convention to which Iraq was party. The UK, recognized as being in occupation of parts of Iraqi territory, was held to standards appearing in its own human rights treaty obligations.<sup>72</sup> Likewise, in numerous cases before international bodies dealing with the Israeli occupation of Palestinian territory, Israel was required to abide by the human rights obligations created by the treaties to which it was party. The ICJ held that Israel's obligations under the ICCPR, the ICESCR, and the Convention on the Rights of the Child were all applicable to its actions as an Occupying Power in the West Bank.<sup>73</sup> UN human rights treaty bodies – such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights – have likewise determined Israel's treaty obligations to be applicable within the Occupied Palestinian Territories.<sup>74</sup> This approach demonstrates the notion underlying extraterritorial applicability: that the basic premise of human rights as a safeguard for human dignity and a tool for protecting all individuals from abuse of power remains applicable to the actions of a state, whether acting on its sovereign territory or elsewhere.

Nonetheless, the human rights obligations of the occupied state also remain of relevance to situations of occupation. In fact, the law of occupation may necessitate the observance, by the Occupying Power, of certain human rights obligations to which the occupied state is party. The first reason for this stems from the requirement to uphold domestic law: if the law of the land includes the incorporation of international human rights standards taken upon itself by the occupied state, the Occupying Power must not act in contravention to them.<sup>75</sup> That being said, as seen in the earlier discussion there may be reason to distinguish between not taking direct action that impedes rights and finding an obligation actively to fulfil certain rights. Principles of continuity of obligations and

States, section 702, 1987 (referring to 'prolonged arbitrary detention'); Human Rights Committee, 'General Comment no. 24: issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant', Fifty-second session, 4 November 1994, UN Doc. CCPR/C/21/Rev.1/Add.6, para. 8.

71 ICJ, *DRC v. Uganda*, above note 3, paras. 217, 219.

72 ECtHR, *Al-Skeini*, above note 9.

73 ICJ, *Wall case*, above note 3, paras. 102–113.

74 Committee on Economic, Social and Cultural Rights, 'Concluding observation: Israel'; above note 3; *Concluding observations of the Human Rights Committee: Israel*, CCPR/C/ISR/CO/3, 3 September 2010.

75 Hague Regulations, Art. 43.

non-regression could provide a further argument for preserving those rights guaranteed to the population through the original obligations of the occupied state. The UN Human Rights Committee, in General Comment 26, held the following:

The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.<sup>76</sup>

One may question whether an Occupying Power is an exception to this notion, since it is a temporary authority rather than a change of government. But, so long as it provides the *de facto* government of the territory, the idea that the rights are vested with the people in the territory may place the obligation to protect these rights on the shoulders of the Occupying Power. Additional support for this approach, this time in the context of economic, social, and cultural rights, can be found in the presumption against deliberate retrogressive measures.<sup>77</sup>

This notion will clearly be a debatable proposition, as it appears to imply the imposition of international obligations on a third party without its consent.<sup>78</sup> It is not argued here, however, that the Occupying Power becomes bound directly by the international treaties ratified by the state whose territory it is occupying. Rather, it is a question of whether these obligations arise by osmosis through the domestic legislation in force in the occupied territory, and via the IHL obligations in relation to this domestic law. Moreover, as noted above, while this might require the Occupying Power to refrain from acting in contravention of domestic law and the international human rights elements contained therein, it would not necessarily entail an obligation to take extensive measures of actively fulfilling these laws.

Ultimately, this question of the treaty source of human rights obligations will, for a number of reasons, often remain a question of theory with relatively little impact in practice: many of the fundamental rights will apply through customary international law; the widespread ratification of treaties makes it likely that the Occupying Power and the occupied state will be party to the same instruments; when they are not the same, certain recent cases before international bodies have relied upon the international human rights law treaty obligations of the Occupying Power, in circumstances when these in fact placed obligations from instruments to which the occupied state/territory was not party.<sup>79</sup> In other words, determining the

76 Human Rights Committee, 'General Comment no. 26: continuity of obligations', 8 December 1997, CCPR/C/21/Rev.1/Add.8/Rev.1, para. 4.

77 Committee on Economic, Social and Cultural Rights, 'General Comment no. 3', above note 64, para. 9.

78 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 8 ILM 679, entered into force 27 January 1980, Art. 34.

79 See the above discussion of the UK in Iraq under the ECHR, and the cases covering the Israeli occupation of the Palestinian Territories.

source of obligation would not present a serious obstacle if the less controversial source of treaty obligations resulted in an ostensibly higher level of human rights protection. Finally, the earlier discussion of context must be recalled here. Whether applying the human rights obligations of the Occupying Power itself or those that were in place in the occupied state, the legal and practical context of occupation may affect the substantive content of these rights and their implementation.

## Conclusion

That international human rights law may be applicable during military occupation should not, by now, be a surprising conclusion. Although controversies remain over the full extent of circumstances in which human rights obligations apply extraterritorially, and the modalities of concurrent applicability of IHL and human rights law continue to be debated, there is now a weight of opinion and cases to support applicability of human rights law in military occupation. Moreover, the prevailing approach points to the full spectrum of human rights obligations being applicable when a state exercises territorial control, a criterion argued here to be inherent in the definition of occupation. However, such a conclusion risks placing impractical – perhaps even impossible – demands upon the Occupying Power. Clearly, situations of occupation may involve volatile circumstances far removed from the possible tranquillity within a state's own territory. While the Occupying Power will always be required to act to the best of its ability, the circumstances – legal and factual – of each case will affect its capabilities in dispatching its duties. This article has argued that, although the full applicability of international human rights law can be presumed in military occupation, the precise requirements necessary to fulfil the obligations, and any assessment of whether they have been adhered to, must proceed based on a contextual approach.



## COMMENTS AND OPINIONS

# The occupation of Iraq: a military perspective on lessons learned

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*'You break it, you own it.'*<sup>1</sup> This was the warning that United States Secretary of State Colin Powell allegedly gave to President George W. Bush prior to the decision to invade Iraq in 2003, and it alluded to the responsibilities of an Occupying Power, the status that a state assumes after it exercises authority over the territory of a hostile state.<sup>2</sup> International law governing occupation is primarily codified in two treaties:

\* The views expressed in this article are those of the author and do not necessarily reflect the positions of the U.S. Government, Department of Defense, or the U.S. Army.

the 1907 Hague Regulations Respecting the Laws and Customs of War on Land and the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. Much has been written about the continuing relevancy of the law of occupation in the light of modern-day occupations such as that of Iraq from May 2003 to June 2004. Others have written about whether the US and UK occupiers fulfilled their obligations under occupation law. Instead of following those themes, this note will briefly describe the US military perspective preceding the Iraqi occupation and highlight some of the primary lessons learned from it. Those lessons fall into three main categories: planning, training, and inter-agency execution.

## Military operational planning

It has been stated that a military can overcome tactical errors as long as it is backed by sound strategy, but that sound tactics cannot overcome poor strategy. Germany in World War II is offered as just one example: the German military was generally superior to the Allies at the tactical level, but strategic missteps cost them the war. Current US joint planning includes the requirement to plan for all six phases of a mission, which include Shape (Phase 0), Deter (Phase I), Seize the Initiative (Phase II), Dominate (Phase III), Stabilize (Phase IV), and Enable Civil Authority (Phase V). Occupation is included in Phase IV (Stabilize),<sup>3</sup> but faulty planning for this phase at both the strategic and operational level unfortunately doomed the tactical execution of the occupation in Iraq from the start.

In modern US military planning, Combatant Commands conduct operational planning with strategic input from the Chairman of the Joint Chiefs of Staff (CJCS), the Secretary of Defense (SECDEF), and the President.<sup>4</sup> The US Central Command (CENTCOM) was the Combatant Command responsible for the operational planning of the invasion of Iraq. The infamous quote from the Deputy Secretary of Defense Paul Wolfowitz in February 2003 sums up the faulty assumptions underlying the lack of strategic planning for the occupation: '[W]e're not talking about the occupation of Iraq. We're talking about the liberation of Iraq. . . . Therefore, when that regime is removed we will find [the Iraqi population] . . . basically welcoming us as liberators'.<sup>5</sup> After General Eric Shinseki, the Army Chief of Staff, disagreed and estimated before Congress that 'something on the order of

- 1 Bob Woodward, *Plan of Attack*, Simon and Schuster, New York, 2004, p. 150.
- 2 Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907 (hereafter Hague Regulations), Art. 42.
- 3 Joint Chiefs of Staff, *Joint Publication 5-0, Joint Operation Planning*, 11 August 2011, Chapter III, Section C (hereafter Joint Pub. 5-0). See also Joint Chiefs of Staff, *Joint Publication 3-07, Stability Operations*, 29 September 2011, p. III-4 (hereafter Joint Pub. 3-07).
- 4 See generally Joint Pub. 5-0, above note 3, Chapter II.
- 5 Paul Wolfowitz, interview with Melissa Block (National Public Radio), 19 February 2003, available at: <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=1937> (last visited February 2012).

several hundred thousand soldiers' would be required to maintain security during the occupation, Wolfowitz responded to Congress that Shinseki's estimate was 'wildly off the mark', and he reportedly believed that the occupation force could be just 30,000 within a few months of the invasion.<sup>6</sup> While this sort of strategic miscalculation certainly did not help the US military in any way, the military planners must shoulder some of the blame as well.

At the time, the military did not want to be involved in stability operations, and it was attempting to avoid nation-building at all costs. Perhaps the military establishment was simply reflective of its Secretary of Defense, Donald Rumsfeld, who said prior to the invasion: 'We're not interested in nation-building. This is not what we do. This is not what we're going to do.'<sup>7</sup> But this is no excuse for military planners to ignore the critical components of planning for Phase IV. It is inaccurate to say that CENTCOM did not plan for the occupation or that nobody recognized the nature of the challenge ahead of them, but there was minimal emphasis on Phase IV compared to the planning for the initial phases. And the planning that did occur did not effectively account for ethnic and sectarian tensions, cultural differences, the failed state of the Iraqi economy, the possibility of an insurgency, how the occupation would be funded at the tactical level, and how to maintain continuity of government.

A look back at history reveals that this was in stark contrast to military planning for the occupation of Germany during World War II. First of all, the US Army began preparing and training for German occupation four years prior to execution.<sup>8</sup> There was a separate Operational Plan (OPLAN)<sup>9</sup> for the occupation, and the effort was spearheaded by General Lucius Clay. There were 6,000 military civil affairs officers trained for the task, and they were embedded with US and British forces as they advanced across Europe. As the units captured German cities, they left behind civil affairs teams to begin the process of military governance. These teams answered to the European Civil Affairs Division, which was ultimately responsible for the occupation. They were prepared to continue or restore civilian government, police, and judicial functions under their control. Despite this prior planning and organization, the occupation still had many difficulties, and it lasted for four years, only ending with significant assistance from Marshall Plan funding.<sup>10</sup> Iraq arguably presented an even more difficult scenario owing to the greater cultural, ethnic, and religious differences between the occupier and the occupied

6 Thomas E. Ricks, *Fiasco: The American Military Adventure in Iraq*, Penguin Press, New York, 2006, pp. 95–97.

7 Anthony Cordesman, interview with PBS for 'The Lost Year in Iraq', available at: <http://www.pbs.org/wgbh/pages/frontline/yeariniraq/interviews/cordesman.html> (last visited February 2012). Cordesman is an expert in Middle East and national defense policy at the Center for Strategic and International Studies.

8 George F. Oliver, *Rebuilding Germany after World War II*, Naval War College 3040, 2008, pp. 4–19, article on file with the author.

9 An operation plan (OPLAN) is 'any plan for the conduct of military operations prepared in response to actual and potential contingencies'. This level of advanced planning is typically reserved for a contingency that is critical to national security; in addition to explaining the concept of operations, the plan also specifies the forces, functional support, and resources required to execute it. See Joint Pub. 5–0, above note 3, p. II–24.

10 G. F. Oliver, above note 8, pp. 15–30.

populace. The historical lesson from Germany should have provided military planners of Operation Iraqi Freedom with a good idea of the significant challenges that were ahead in Phase IV; yet, as happens too often, history was either ignored or discounted. As a result, poor strategic and operational planning led to the next topic of discussion: lack of tactical training for the tasks that would follow the ‘shock and awe’ of Phase III.

## Training for Phase IV

In addition to failing to plan properly for Phase IV in Operation Iraqi Freedom, or perhaps as a result of it, military units at the tactical level also failed to train properly for the occupation. Training bridges the gap between military doctrine and the force’s readiness to accomplish its mission. An After Action Review (AAR) completed by the US Army’s 3rd Infantry Division (Mechanized), one of the two main forces that made the initial push to Baghdad in March–April 2003, acknowledged that, in addition to ‘lack[ing] a plan for Phase IV operations’, it did not focus on civil–military operations training prior to the initiation of combat operations.<sup>11</sup> Owing to the fact that civil affairs officers and units were in short supply, this lack of training was extremely detrimental to initial stability operations, because these civil–military operations tasks fell to combat units untrained for the job.<sup>12</sup> This was particularly true during the days and weeks following the fall of Baghdad, when the military had the initiative but had also created a power vacuum in Iraq. One Army general commented that, despite knowing about military doctrine which accounted for Phase IV operations, he watched looting occur in Baghdad without the understanding that it was up to him and his soldiers to stop it.<sup>13</sup> This is a clear indication of a training failure, and combat troops in Baghdad found themselves untrained and unfamiliar with tasks that they needed to accomplish to secure victory, such as restoring civil order, creating an interim government, establishing essential services, and ensuring that the judicial system was operational.<sup>14</sup>

Additional training deficiencies were observed. The few civil affairs assets that were sent to Iraq (a total of 1,800 civil affairs soldiers, as opposed to the 6,000

11 ‘Third Infantry Division (Mechanized) After Action Report: Operation IRAQI FREEDOM’, 2003, available at: <http://www.globalsecurity.org/military/library/report/2003/3id-aar-jul03.pdf> (last visited February 2012), pp. 18 and 281.

12 Broadly speaking, civil–military operations focus on immediate or near-term issues such as health service infrastructure; movement, feeding, and sheltering of dislocated civilians; police and security programmes; building host-nation government legitimacy; synchronization of civil–military operations support to tactical commanders; and the co-ordination, synchronization, and, where possible, integration of inter-agency, intergovernmental organization, and non-governmental organization activities with military operations. Joint Chiefs of Staff, Joint Publication 3–57, Civil-Military Operations, 8 July 2008, Chapter I, p. I–5.

13 T. E. Ricks, above note 6, p. 152.

14 *Ibid.*, p. 150.



officers alone trained and sent to Germany) complained of pre-deployment training focused on dealing with internally displaced persons, burning oil fields, and chemical decontamination, instead of concentrating on the Iraqi government, the legal system, infrastructure, and local leadership.<sup>15</sup> Likewise, cultural training for troops deploying to Iraq concentrated on avoiding actions that might offend Iraqis, which is important, but the training would have been more beneficial had it focused on topics that would be of assistance during stabilization: the tribal system, religion, how Iraqis negotiate, cultural customs, and the local leadership structure. Another specific example of training deficiency is that military lawyers found themselves responsible for cobbling the Iraqi judicial system back together (75% of its infrastructure was destroyed during the invasion and subsequent looting),<sup>16</sup> yet they had not been trained on the civil law system or on Iraqi law, procedure, or custom. A Marine attorney said:

We wasted so much time just learning their system that could have been put to better use actually doing something. We lost at least a month just trying to understand how the Iraqi system operated. By losing that month we lost a lot of local goodwill that we had to struggle to get back.<sup>17</sup>

The combat troops responsible for other stabilization tasks echoed this observation regarding lost opportunities in the summer of 2003 due to a lack of training and confusion regarding their new mission. A look at recent history reveals that institutional defects within the US Army partially led to the problem.

The Army's doctrine in the 1980s and 1990s, and more importantly its major training centres where units practised the execution of their doctrine during realistic force-on-force training, focused primarily on winning battles and not necessarily on winning wars.<sup>18</sup> After the main battles simulated at these training centres, the units packed up and redeployed to their home stations. The Gulf War in 1991 reinforced this thinking after the US and its coalition won a fast victory and quickly redeployed home without the requirement to stabilize Kuwait or Iraq. Even Afghanistan at the time involved a quick victory in Phase III with a very small footprint on the ground afterwards, and the insurgency there had not blossomed at the time of planning for Operation Iraqi Freedom. With the benefit of hindsight, it is difficult to fathom how the Army's training could have made it so short-sighted regarding what would be required after they removed Saddam Hussein from power. Yet, this was the mind-set that pervaded the Army in 2003, and it is why soldiers were focused on going home in April 2003 instead of being prepared to tackle the stabilization tasks needed

15 Center for Law and Military Operations, *Forged in the Fire: Legal Lessons Learned During Military Operations 1994–2008*, The Judge Advocate General's Legal Center and School, September 2008, (hereafter *Forged in the Fire*), pp. 12–16.

16 Center for Law and Military Operations, *Lessons Learned from Afghanistan and Iraq, Volume II: Full Spectrum Operations (2 May 2003–30 June 2004)*, The Judge Advocate General's Legal Center and School, 2005, pp. 20–21.

17 *Forged in the Fire*, above note 15, p. 14, n. 39.

18 T. E. Ricks, above note 6, p. 132.

to secure victory. The Director of National Security Affairs at the US Army War College's Strategic Studies Institute worried that top US military commanders might have confused winning the battle of Baghdad with winning the war for Iraq,<sup>19</sup> and the tactical units trained accordingly. The result of the poor planning and training for Phase IV was a military that was spinning its wheels in an unfamiliar type of conflict, and this directly impacted on its ability to carry out the responsibilities of an occupier under international law. The military was losing the initiative quickly, owing to lack of planning and training for the occupation, and the structure of the US-led occupying administration and some of its resulting decisions also prevented them from getting things back on course in a timely manner.

### **Structure of the occupation authority: the need for inter-agency execution**

Although the acronym 'CPA' officially stood for the Coalition Provisional Authority in Iraq, it is telling that the military had a different interpretation: 'Can't Produce Anything'.<sup>20</sup> While some level of inter-agency friction is commonplace and expected in the US Government, and perhaps even healthy, the relationship between the CPA (Department of State) and the military (Department of Defense) during the occupation of Iraq was poisonous. Just as the intelligence failures prior to the terrorist attacks of 11 September 2001 were partially caused by a failure of inter-agency co-ordination and co-operation, so too were the difficulties experienced by the CPA and the military. An occupation requires a level of inter-agency execution between civilian and military personnel that the US entities were neither prepared for nor accustomed to at the time. However, before addressing these inter-agency lessons learned, a preceding question to deal with is that of whether a military officer or a statesman should lead an occupation.

It is well known that the United States brought in Ambassador Paul Bremer soon after the fall of Baghdad to lead the CPA. The military criticized several key CPA decisions that had a negative impact on their ability to maintain security. The most notable were the orders of de-Ba'athification and dissolution of Iraqi security and military institutions, which created thousands of unemployed men and potential insurgents while also reducing the forces that the occupying military could use to maintain security.<sup>21</sup> On the question of whether a military leader should have led the occupation instead of a statesman, history and doctrine once again inform the issue.

Prior to the occupation of Germany, President Roosevelt felt that the task was of a civilian nature, but he changed his mind after failures of the Department

19 Antulio J. Echevarria II, *Toward an American Way of War*, US Army War College Strategic Studies Institute, March 2004, available at: <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=374> (last visited February 2012).

20 T. E. Ricks, above note 6, p. 204.

21 G. F. Oliver, above note 8, p. 3.

of State during the stabilization in North Africa.<sup>22</sup> Roosevelt therefore gave the Department of Defense control over the occupation of Germany, and he appointed General Lucius Clay to be the military governor. General Clay was responsible for leading the military government teams and implementing the OPLAN, during what is generally considered to have been a successful occupation. However, this example does not prove that a military-led occupation would have avoided the problems seen in Iraq. In fact, de-Nazification in Germany caused similar problems to those resulting from de-Ba'athification in Iraq, and the occupation in Germany required four years to seat a German government capable of leading the country. Nevertheless, having a military leader of the occupation, at least for the beginning of the transition from Phase III to Phase IV, has military advantages, including unity of command and the ability to tap into the military's planning and logistics capabilities. Regardless, although history may indicate that a military leader would be preferable to a statesman to lead an occupation, current US government policy and military doctrine foresee occupation as a civilian-led enterprise.

National Security Presidential Directive-44 (NSPD-44) of 2005 identified the Department of State as the lead agency for stabilization and reconstruction activities.<sup>23</sup> A subsequent Department of Defense Directive also acknowledged the Department of State's lead role, but Defense doctrine also recognizes reality.<sup>24</sup> Consequently, Joint Publication 3-07, Stability Operations, states that joint military forces may lead stabilization efforts until other US government agencies, foreign governments and security forces, or intergovernmental organizations are able to assume the role; Appendix D, which provides doctrine for a transitional military authority, certainly contemplates the military in the lead.<sup>25</sup> However, the policy and doctrine is consistent in that the Department of State will have the lead when this is possible, and an important aspect of NSPD-44 is that it increases inter-agency co-ordination and planning, thereby reducing the concern, at least theoretically, about what agency is in the lead on the ground.

The Directive was intended to act upon some of the lessons learned from Iraq, and it consequently generated a comprehensive inter-agency planning process for future occupations, which begins at the national strategic level and extends all the way down to the tactical level. The new military doctrine, citing what it 'has learned through the difficult experiences of both Iraq and Afghanistan', also places the importance of stability operations on an equal footing with conventional combat operations.<sup>26</sup> Importantly, NSPD-44 sets up permanent organizations that will force interaction between agencies, so that the art of co-operation between the agencies is not lost. This was evidently the case during the occupation of Iraq, where

22 *Ibid.*, pp. 5–8.

23 The White House, 'National Security Presidential Directive/NSPD-44', Washington DC, 7 December 2005, available at: <http://www.fas.org/irp/offdocs/nspd/nspd-44.html> (last visited February 2012).

24 Thomas S. Szayna, Derek Eaton, and Amy Richardson, *Preparing the Army for Stability Operations: Doctrinal and Interagency Issues*, RAND Corporation, Santa Monica, CA, 2007, p. 8.

25 Joint Pub. 3–07, p. 1–2.

26 *Ibid.*, p. 1–1.

two agencies with different organizational cultures were not accustomed to working with one another, and did not want to. It was unfortunate, because the stakes were so high. As time progressed however, the parties increased their inter-agency co-operation and created a level of synergy, best illustrated by the Department of State-led provincial reconstruction teams (PRTs), prevalent in Iraq in the latter stages of military involvement there.<sup>27</sup>

## Conclusion

Operation Iraqi Freedom forever changed the US military, and the occupation in 2003–2004 played a large role in its transformation. It is hard to argue that failed planning, training, and inter-agency execution of the occupation did not have a significant role in the development of the insurgency that erupted in late 2004 and caused US involvement in Iraq to continue for seven more years. Poor strategic and operational planning for the occupation led to the failure of tactical units to train for the tasks that would help them to maintain security and fulfil their other responsibilities as occupying forces. The military therefore squandered the initiative that they had gained after quickly toppling Saddam Hussein's regime. The military's subsequent acts or omissions alienated the Iraqi population and further contributed to the conditions for an insurgency. Once the occupation began, poor inter-agency execution – primarily between the CPA and the military – further exacerbated the declining situation. The enormous human and material cost of the war in Iraq was a severe price to pay to learn a lesson, but it does appear that that lesson has been institutionalized in policy and doctrine to avoid past mistakes in the future. It is now up to current and future leaders to ensure that history does not repeat itself.

27 Provincial reconstruction teams were 'relatively small operational units comprised not just of diplomats, but military officers, development policy experts (from the U.S. Agency for International Development, the Department of Agriculture, and the Department of Justice), and other specialists (in fields such as rule of law, engineering, and oil industry operations) who work[ed] closely with Iraqi provincial leaders and the Iraqi communities that they serve[d]. While PRTs dispense[d] money for reconstruction projects, the strategic purpose of these civil–military field teams [was] both political and economic'. US Department of State, 'Provincial Reconstruction Teams', available at: <http://www.state.gov/p/nea/ci/iz/c21830.htm> (last visited February 2012).

## REPORTS AND DOCUMENTS

# **31st International Conference of the Red Cross and Red Crescent, Geneva, 28 November – 1 December 2011**

## **Council of Delegates of the International Red Cross and Red Crescent Movement, Geneva, 26 November 2011**

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## 31st International Conference of the Red Cross and Red Crescent



### Interview with Philip Spoerri

Director for International Law and Cooperation, International Committee of the Red Cross.

*From 28 November to 1 December 2011, the 31st International Conference of the Red Cross and Red Crescent took place in Geneva. Every four years, the Conference brings together the components of the Red Cross and Red Crescent Movement as well as the States party to the Geneva Conventions. It aims to address some of the most important questions regarding the development of humanitarian law and humanitarian action.*

*In the following section Philip Spoerri, Director for International Law and Cooperation at the International Committee of the Red Cross (ICRC), introduces the resolutions adopted at the 31st Conference and reflects on its outcome from the ICRC's perspective. This section also includes the full texts of the resolutions adopted.*

*Philip Spoerri began his career with the ICRC in 1994. Following a first assignment in Israel and the occupied and autonomous territories, he went on to be based in Kuwait, Yemen, Afghanistan and the Democratic Republic of the Congo. In Geneva, he headed the Legal Advisers to Operations Unit. He returned to Afghanistan as head of the ICRC delegation there from 2004 to 2006, when he took up his current position. Before joining the ICRC, Philip Spoerri worked as a lawyer in a private firm in Munich. He holds a PhD in law from Bielefeld University and has also studied at the universities of Göttingen, Geneva and Munich.*

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## **What is the importance of the International Conference of the Red Cross and Red Crescent?**

The International Conference is an exceptional event since it brings together not only all States party to the Geneva Conventions, but also the 187 National Societies (including our newest member, the Maldives), the International Federation of Red Cross and Red Crescent Societies (IFRC) and, of course, the ICRC. Every four years, all these entities come together to discuss challenges to international humanitarian law (IHL) and humanitarian action, and to set a common humanitarian agenda for the years to come. It is a unique event because unlike other meetings, which bring States together in UN-style fora, the Conference involves non-State participants (the National Societies, the ICRC and the IFRC), all sitting around the same table and entitled to the same voting rights as States.

Even for diplomats used to working in a multilateral context, such as in intergovernmental organizations and the United Nations, it is a special experience to work in such an unusual setting. For a start, they may find it a challenge to engage and negotiate with actors other than their usual counterparts and fellow diplomats.

The format and the pre-consultations are also different because it is often either the ICRC or the IFRC that take the lead in the pre-negotiations; the Conference does not have formal preparatory commissions like many diplomatic conferences.

The challenges for States therefore lie in the format and the working methods, which break with the usual conference routine for diplomats in this field. This is what sets the Conference apart and perhaps also what makes it so interesting. In fact, some diplomats have said that, compared to other conferences, they find this one very rewarding and actually very productive.

On another, related, point, given that many of today's humanitarian questions are linked to access and local capacity, the Conference offers a rare opportunity for outreach work and dialogue between States and civil society partners on those matters.

For the ICRC, this event is hugely important because it is a unique platform to garner support for our ambitions, both operational and legal. Don't forget that every major advance in the development of IHL over the past 150 years has passed, in one way or another, through the International Conference. The Conference gives the ICRC the opportunity to adopt a strong stance on IHL and demonstrates the special status of the ICRC and the Movement's components in relation to States.

The work leading up to the Conference and the high-level diplomatic support pledged at the event can indirectly help strengthen the ICRC's foothold with its interlocutors, thereby benefiting our operations in the field.

## **How does the International Conference help shape the future of humanitarian action?**

At the International Conference, States come together with National Societies and draw up an agenda that is usually ambitious and focuses not only on promoting

IHL, but also on issues of specific concern for humanitarian action at that moment in time. Together, National Societies and governments usually set out how to tackle those issues over the period until the next Conference. For the most crucial topics, we strive to outline our common goals, usually by adopting resolutions and action plans.

### **What does the preparatory process for the Conference involve?**

The IFRC and the ICRC are the co-organisers of the Conference and have a long history of organizing the event jointly. Hence, we work hand-in-hand on both organizational matters and on drawing up the agenda and comparing notes about the substance of the discussions.

Of course, before that stage, the Movement coordinates and prepares the Conference agenda through the mechanism of the Standing Commission of the Red Cross and Red Crescent, which acts as the trustee of the International Conference between Conferences. The Standing Commission, made up of members of National Societies, the ICRC and the IFRC, has a unique role in preparing the programme and the draft agenda, which it submits for approval to the Council of Delegates of the Red Cross and Red Crescent Movement, comprising representatives of all the Movement's components.

### **What is your assessment of the 31st International Conference?**

The Conference went very well, with a record of 164 governments sending high-level representatives, 183 of 187 National Red Cross and Red Crescent Societies in attendance, and 56 observer organizations. The Conference lasted three and a half days and included two thematic plenaries, five commissions, seven workshops, 22 side events and various other events dealing with a wide range of humanitarian issues.

Of particular importance, of course, was the drafting of the outcomes of the Conference. Nine resolutions were adopted and more than 395 pledges were made by the participating governments, National Societies and observers on issues linked to the Conference's objectives and on which they intend to work until the next International Conference in four years' time.

Purely in terms of attendance figures, this Conference was the biggest yet. Furthermore, the feedback from States and National Societies was very encouraging.

If you look at other success factors, the Conference went very smoothly in terms of organization. As for outcomes, all nine substantive resolutions went through and were adopted. We had a large number of side events and other events which were very well attended and demonstrated the great interest exhibited at this Conference. In addition to the adoption of the resolutions, we had a record number of pledges, confirming the commitment of States and National Societies to work on these issues over the next four years. So in that sense the Conference was not only a success in terms of attendance statistics, but also in terms of substance.



## **In your opinion, how do states perceive the work of the International Red Cross and Red Crescent Movement?**

We probably have to analyse this question not just in terms of the work of the Movement as a whole, but of the work of its individual components. There is a clear perception at the ICRC of the increasingly important role played by National Societies, particularly in countries affected by conflicts and in other emergencies such as natural disasters. In many situations, the National Societies are central to the humanitarian response as well as being more heavily involved in international responses to conflicts and other emergencies.

One of the reasons for this is that many National Societies over the past decades have gained in capacity. National Societies operating in countries facing crises have had to do so, but this is also true of other National Societies, which are now able to support the former as part of the international response. There is clearly an awareness on the part of States of the added value of this enormous network enabling an unprecedented response by National Societies.

As regards the ICRC, we of course feel strongly that the ICRC's unique role and mandate are well recognized, as are the specific topics it brings to this event.

## **What is the process for drafting a resolution and what are the similarities or differences with other fora?**

One difference from the outset is that, when the resolutions are tabled, they are dealt with in drafting committee, where the members are all Conference participants. This means that it is not only all the States that participate, but also all the National Societies, the IFRC and the ICRC. For States to find themselves with the same voting rights as National Societies is already a different experience – meaning that they have to engage with and lobby more actors.

In addition, as I mentioned, in preparing the substantive issues for discussion during the Conference, you have to consult with both the States and all the components of the Movement. In the process of presenting a resolution to the Conference, you have to make sure that all the participants are well informed and on board. This is a considerable exercise in outreach work and preparation, something we focused on at the 31st Conference. Some resolutions required up to three years of preparatory work to be finally tabled at the Conference.

It is clear that there is still at times a discrepancy between State diplomats, who are well versed in working in such settings and participating in the drafting process, and National Society representatives who are generally less used to attending conferences and participating in deliberations. What was encouraging at this International Conference, however, was to see the growing number of National Societies that were actively involved in the drafting process.

## **What has been the outcome of the International Conference, in particular for the ICRC?**

This was a very significant conference for the ICRC as there were a number of important issues on which we were hoping to gain the support of States and National Societies for the next few years.

During this International Conference we set a very strong agenda that revolved around international humanitarian law. The centrepiece was our initiative called ‘Strengthening IHL’. Careful research over the previous three years into gaps in the law and the humanitarian problems in the field had led us to identify four areas where, we believed, there were important humanitarian issues at stake and particular work was necessary. After thorough consultations with States and National Societies, we gave priority to two issues, for which we hoped to garner support at the Conference: compliance mechanisms and continuing to strengthen IHL as applied to persons who are detained or deprived of their liberty. The International Conference was the culmination of our consultation process, where we were able to hear from all the States and National Societies and gained their support for the resolution we tabled.

The theme of the Conference was ‘Strengthening IHL and humanitarian action’ and, significantly for the ICRC, we gained support for three substantive issues.

1. The resolution ‘Strengthening legal protection for victims of armed conflicts’ provides a sound basis to step up our work on strengthening IHL in these two areas where gaps have been identified and acknowledged by the participants of the International Conference.

As regards compliance mechanisms, we are not talking about repressive mechanisms as part of judicial processes but about measures that can be taken while conflicts are on-going and that can foster greater compliance with IHL or stop violations from happening. Some examples are investigative mechanisms, fact-finding commissions and mechanisms of that type. Clearly, there was a feeling that whatever exists in IHL today is insufficient and that something should be done to bring about greater compliance.

The issue of persons deprived of liberty in situations of armed conflict relates in particular to non-international armed conflicts and to areas where issues are insufficiently regulated. For instance, procedural safeguards for people that are not held for judicial purposes but for security reasons, a lack of rules applicable to particularly vulnerable persons such as women, children and persons with disabilities, and the lack of rules relating to material conditions of detention.

At the Conference, we realized that there was strong support for these two issues and the final resolution gave the ICRC the green light to pursue further research on these topics, and to make proposals and recommendations as to how the law can be strengthened. This is not to say that the process will lead to a new treaty, but it gives the ICRC an opportunity to explore every possible

avenue for concrete proposals about how IHL may indeed be strengthened in practice.

2. We also sought the adoption of a four-year IHL action plan, which is structured around topics on which we were hoping to reach a consensus and achieve a strong buy-in from the Conference participants. The Conference adopted the four-year action plan for implementing international humanitarian law, whereby all members of the Conference will work together in a highly consensual manner on five objectives:
  - enhanced access by civilian populations to humanitarian assistance in armed conflicts;
  - to enhance the specific protection afforded to certain categories of persons, in particular children, women and persons with disabilities;
  - enhanced protection of journalists and the role of the media with regard to international humanitarian law;
  - to improve the incorporation and repression of serious violations of international humanitarian law;
  - arms transfers.
3. Lastly, the Conference was also a milestone in terms of support and backing for our ‘Health Care in Danger’ project, which aims to reduce the many obstacles to health care provision as a result of security threats encountered in the field. This is a phenomenon whose importance goes unrecognized. In today’s conflicts, people who are wounded are denied access to health care or they, and those who come to their aid, are subject to direct attacks. The ICRC has launched a worldwide initiative to humanize this brutal reality and to make a difference to people affected on the ground. The key resolution adopted at the Conference on this is ‘Health Care in Danger: Respecting and Protecting Health Care’, which recalls the obligation to respect and protect medical personnel and facilities. It also calls upon the ICRC to initiate consultations with experts from the health-care sector, such as States, National Societies and the wider health-care community, with a view to formulating practical recommendations for making the delivery of health care safer in dangerous situations and to report to the next International Conference on the progress made.

So far, of course, I have addressed the outcome of the Conference from an ICRC perspective, but it is also very important to stress that many important topics and resolutions were dealt with by the IFRC. The IFRC did excellent work in many other areas that also met with much success, such as on migration and disaster response. As a result the Conference adopted several important resolutions on: 1) Migration: Ensuring Access, Dignity, Respect for Diversity and Social Inclusion; 2) Furthering the auxiliary role: Partnership for stronger National Societies and volunteering development; 3) Health inequalities: reducing burden on women and children; 4) Strengthening normative frameworks

and addressing regulatory barriers concerning disaster mitigation, response and recovery.<sup>1</sup>

The adoption of these resolutions was resounding proof of the States and National Societies' willingness to work together over the coming years.

### **Looking back on the Conference, what impressed you in particular? What was truly special about it?**

Before the Conference, there were a lot of question marks. This is because 2011 was characterized by a multitude of operational contexts and a great deal of uncertainty, including as a result of the global financial crisis.

Despite it being such a difficult year, the Conference was a success and there was agreement on so many issues. This positive atmosphere conveyed a strong message about the unity of the Movement, as well as paving the way for cooperation between all the Conference participants. So it was a real morale boost and gave us the impetus to tackle a huge number of challenges in the coming years. The proof of this success, of course, will depend on the concrete action taken to translate all these initiatives into tangible, practical results. It is crucial that we periodically take stock over the next four years, assess the progress made on these tasks (including in terms of the pledges), keep States informed, and maintain a lively interaction between all the components. This will ensure that, in four years' time, we will be in a position to show that this has led to practical and measurable results.

1 All resolutions and documents from the 31st International Conference of the Red Cross and Red Crescent can be found at: <http://rcrcconference.org/en/resolutions-and-reports.html> (last visited 12 March 2012).

# Resolutions\*

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## Resolutions of the 2011 Council of Delegates:

- Resolution 1** Working towards the elimination of nuclear weapons
- Resolution 2** Movement components' relations with external humanitarian actors 7
- Resolution 3** Strategy for the International Red Cross and Red Crescent Movement (Movement Strategy)
- Resolution 4** Revision of National Society statutes and legal base
- Resolution 5** Implementation of the Memorandum of Understanding and Agreement on Operational Arrangements, dated 28 November 2005, between the Palestine Red Crescent Society and the Magen David Adom in Israel
- Resolution 6** Preserving the historical and cultural heritage of the International Red Cross and Red Crescent Movement
- Resolution 7** National Societies preparing for and responding to armed conflict and other situations of violence
- Resolution 8** Agenda and programme of the 31st International Conference of the Red Cross and Red Crescent
- Resolution 9** Proposal of persons to fill the posts of officers at the 31st International Conference of the Red Cross and Red Crescent

## Resolutions of the 31st International Conference of the Red Cross and Red Crescent:

- Resolution 1** Strengthening legal protection for victims of armed conflicts
- Resolution 2** 4-year action plan for the implementation of international humanitarian law
- Resolution 3** Migration: Ensuring access, dignity, respect for diversity and social inclusion

\* The resolutions are available on the websites of the International Committee of the Red Cross ([www.icrc.org](http://www.icrc.org)), the International Federation ([www.ifrc.org](http://www.ifrc.org)) and the Standing Commission ([www.standcom.ch](http://www.standcom.ch)) in the sections devoted to the 2011 Council of Delegates and the 31st International Conference of the Red Cross and Red Crescent. All documents related to the 31st International Conference remain available on its website at [www.rcrcconference.org](http://www.rcrcconference.org).

- Resolution 4** Furthering the auxiliary role: Partnership for stronger National Societies and volunteering development
- Resolution 5** Health care in danger: Respecting and protecting health care
- Resolution 6** Health inequities with a focus on women and children
- Resolution 7** Strengthening normative frameworks and addressing regulatory barriers concerning disaster mitigation, response and recovery
- Resolution 8** Implementation of the Memorandum of Understanding and Agreement on Operational Arrangements, dated 28 November 2005, between the Palestine Red Crescent Society and the Magen David Adom in Israel
- Resolution 9** Our World. Your Move – For Humanity

## Resolution 1 of the 2011 Council of Delegates

### WORKING TOWARDS THE ELIMINATION OF NUCLEAR WEAPONS

The Council of Delegates,

*deeply concerned* about the destructive power of nuclear weapons, the unspeakable human suffering they cause, the difficulty of controlling their effects in space and time, the threat they pose to the environment and to future generations and the risks of escalation they create,

*concerned* also by the continued retention of tens of thousands of nuclear warheads, the proliferation of such weapons and the constant risk that they could again be used,

*disturbed* by the serious implications of any use of nuclear weapons for humanitarian assistance activities and food production over wide areas of the world,

*believing* that the existence of nuclear weapons raises profound questions about the extent of suffering that humans are willing to inflict, or to permit, in warfare,

*welcoming* the renewed diplomatic efforts on nuclear disarmament, in particular the commitments made by States at the 2009 United Nations Security Council Summit on Nuclear Non-Proliferation and Nuclear Disarmament, the 2010 Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons and the Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms,

*welcoming* also the commitments made by States at the highest levels in the above fora to create the conditions for a world free of nuclear weapons through concrete actions in the fields of nuclear non-proliferation and nuclear disarmament,

*recalling* the 1996 advisory opinion of the International Court of Justice, which confirmed that the principles and rules of international humanitarian law apply to nuclear weapons and concluded that the threat or use of such weapons would generally be contrary to the principles and rules of international humanitarian law,

*drawing upon* the testimony of atomic bomb survivors, the experience of the Japanese Red Cross Society and the International Committee of the Red Cross (ICRC) in assisting the victims of the atomic bomb blasts in Hiroshima and Nagasaki and the knowledge gained through the ongoing treatment of survivors by the Japanese Red Cross Atomic Bomb Survivors Hospitals,

*bearing in mind* the resolutions on weapons of mass destruction in general and the abolition of nuclear weapons in particular, adopted by the International Conferences of the Red Cross and Red Crescent in 1948, 1952, 1957, 1965, 1969, 1977 and 1981 and by the Council of Delegates in 2009, and the statements on

nuclear weapons made by the President of the ICRC to the Geneva diplomatic corps in April 2010 and by the President of the International Federation of Red Cross and Red Crescent Societies to Nobel laureates in Hiroshima in November 2010,

*convinced* that the International Red Cross and Red Crescent Movement (Movement) has an historic and important role to play in efforts to create the conditions for a world without nuclear weapons,

1. *emphasizes* the incalculable human suffering that can be expected to result from any use of nuclear weapons, the lack of any adequate humanitarian response capacity and the absolute imperative to prevent such use;
2. *finds* it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law, in particular the rules of distinction, precaution and proportionality;
3. *appeals* to all States:
  - to ensure that nuclear weapons are never again used, regardless of their views on the legality of such weapons;
  - to pursue in good faith and conclude with urgency and determination negotiations to prohibit the use of and completely eliminate nuclear weapons through a legally binding international agreement, based on existing commitments and international obligations;
4. *calls on* all components of the Movement, utilizing the framework of humanitarian diplomacy:
  - to engage, to the extent possible, in activities to raise awareness among the public, scientists, health professionals and decision-makers of the catastrophic humanitarian consequences of any use of nuclear weapons, the international humanitarian law issues that arise from such use and the need for concrete actions leading to the prohibition of use and elimination of such weapons;
  - to engage, to the extent possible, in continuous dialogue with governments and other relevant actors on the humanitarian and international humanitarian law issues associated with nuclear weapons and to disseminate the Movement position outlined in this resolution.

### **Resolution co-sponsors:**

#### **ICRC**

Australian Red Cross  
Austrian Red Cross  
Red Crescent Society of Azerbaijan  
Belgian Red Cross  
Bulgarian Red Cross  
The Canadian Red Cross Society  
Cook Islands Red Cross Society



Czech Red Cross  
Danish Red Cross  
Fiji Red Cross Society  
Red Crescent Society of the Islamic Republic of Iran  
Japanese Red Cross Society  
Jordan National Red Crescent Society  
Kiribati Red Cross Society  
Lebanese Red Cross  
Malaysian Red Crescent Society  
Red Cross Society of Micronesia  
Mozambique Red Cross Society  
The Netherlands Red Cross  
New Zealand Red Cross  
Norwegian Red Cross  
Palau Red Cross Society  
Papua New Guinea Red Cross Society  
The Philippine National Red Cross  
Samoa Red Cross Society  
Swedish Red Cross  
Swiss Red Cross  
Tonga Red Cross Society  
The Trinidad and Tobago Red Cross Society  
Vanuatu Red Cross Society

## Resolution 2 of the 2011 Council of Delegates

### MOVEMENT COMPONENTS' RELATIONS WITH EXTERNAL HUMANITARIAN ACTORS

The Council of Delegates,  
*recalling* the 2009 Council of Delegates workshop on “Relations with Actors Outside of the Movement,”

1. *welcomes* the background report submitted to the 2011 Council of Delegates on ‘Movement components’ relations with external humanitarian actors’;
2. *adopts* the following recommendations of the report:
  - a) all Movement components should promote to external humanitarian actors how they work in accordance with the Fundamental Principles;
  - b) the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, in consultation with National Red Cross and Red Crescent Societies, should continue to analyse the need for and, where relevant, further develop guidance, with particular attention to:
    - i. coordination with UN agencies and coordinating bodies, including for resource mobilization;
    - ii. relationships with various country coordination mechanisms and bodies (including country teams and clusters), including in changing contexts, e.g. when conflict erupts where a natural disaster emergency operation is underway (or vice versa);
    - iii. the evolving role played by civil protection and military and civil defence assets in disaster and crisis situations;
    - iv. the use of the emblem by all components of the Movement in operations led by other organizations;
    - v. ways to engage with the private sector as an operational partner;
    - vi. strengthening the capacities of all Movement components to develop and manage relationships with external humanitarian actors, in line with the Fundamental Principles, Movement Statutes, policies and guidelines;
    - vii. maintaining an overview of existing policies, strategies and guidance relating to relations with external humanitarian actors and making these available in a user-friendly manner;
  - c) all Movement components should continue to strengthen Movement coordination mechanisms at country and regional level, to use this as a means to improve relations with external humanitarian actors and capture and share experiences of this in order to serve the most vulnerable better.

## **Resolution 3 of the 2011 Council of Delegates**

### **STRATEGY FOR THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT (MOVEMENT STRATEGY)**

#### **1. Background**

The Strategy for the International Red Cross and Red Crescent Movement (Movement) was first adopted at the Council of Delegates in 2001. It was updated by the 2005 Council of Delegates, as some actions were considered completed and to review the relevance of the remaining actions. The number of actions was reduced from 17 to 10 while the strategic objectives remained unchanged:

- strengthening the components of the Movement;
- improving the Movement's effectiveness and efficiency through increased cooperation and coherence;
- improving the Movement's image and the components' visibility and relations with governments and external partners.

The 2009 Council of Delegates in Nairobi found it reasonable to assume that the Strategy and most of its actions would be completed by 2011, after 10 years of work. It therefore requested the Standing Commission, with the International Federation of Red Cross and Red Crescent Societies (International Federation) and the International Committee of the Red Cross (ICRC), to present to this Council an evaluation of the achievement of the strategic objectives and the expected results in the ten actions of the Strategy.

The main findings and recommendations of the evaluation are presented in the report on the Strategy for the Movement. The full evaluation report is available to Council members upon request.

The Nairobi resolution further invited the Standing Commission to continue its work on reducing the complexities of the Movement fora, and to present its proposals for change, as relevant, to this Council.

Encouraging improvements in consulting National Red Cross and Red Crescent Societies (National Societies) in the preparation of various Movement fora have been recorded, as called for by National Society leaders in comprehensive reviews on the issue at hand. However, key issues concerning questions of frequency and duration along with options for aligning or even merging some of the fora require more discussion on options to move forward.

#### **2. Decision**

As the trustee of the International Conference of the Red Cross and Red Crescent, and as the permanent Movement body where all components are represented

and which provides strategic guidance in matters which concern the Movement as a whole, the 2011 Council of Delegates ***calls on the incoming Standing Commission:***

- 2.1. to finalize the work on Movement fora and to submit change proposals, as relevant, for decision by the 2013 Council of Delegates, and to this end create an ad hoc working group representing National Societies with a wide range of expertise, including a youth representative;
- 2.2. to base this work on the outcomes of the comprehensive reviews already undertaken by the outgoing Standing Commission on the Movement with the aim of reaching agreement on concrete changes in the interest of greater efficiency and effectiveness and reduced costs and environmental impact of meetings involving all Movement components;
- 2.3. to update, in close cooperation with all components of the Movement, the open-ended actions of the present Strategy, in order to implement them and consequently report to the 2013 Council. This effort should focus on coordinated and efficient Movement-level cooperation, to strengthen the Movement's image and performance in agreed key areas, in order to deliver on our mission for the most vulnerable. It should also take into account trends in the internal and external working environments;
- 2.4. to review the findings of the International Federation and the ICRC's monitoring of the implementation of resolutions, including information from their regional structures, with a view to improving follow-up and reporting and planning for future Movement-level meetings.

### **3. Follow-up**

- The Standing Commission shall regularly report on progress through its newsletter
- The Commission's [www.standcom.ch](http://www.standcom.ch) website shall be used as one channel of regular feedback to/from National Societies on the work in progress

## Resolution 4 of the 2011 Council of Delegates

### REVISION OF NATIONAL SOCIETY STATUTES AND LEGAL BASE

The Council of Delegates,

*reaffirming* the objective of Action 3 of the Strategy for the International Red Cross and Red Crescent Movement (Movement), which called upon all National Red Cross and Red Crescent Societies (National Societies) to examine their statutes and related legal texts and where necessary, to adopt new constitutional texts, in accordance with the “Guidance for National Societies Statutes” (Guidance document) and relevant resolutions of the International Conference of the Red Cross and Red Crescent (International Conference),

*recalling* Resolution 3 of the 2009 Council of Delegates urging National Societies to continue to work closely with the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (International Federation), and to consult with the Joint ICRC/International Federation Commission for National Society Statutes (Joint Statutes Commission) in order to ensure that all National Societies have examined and updated their statutes and related texts by the end of 2010,

*welcoming* the report of Joint Statutes Commission, which summarizes the progress achieved, the experience gained and the work still to be undertaken,

*taking note* with appreciation that close to 90 per cent of all National Societies have initiated a process of review of their statutes and related legal texts since the adoption of the 2001 Strategy for the Movement, while *acknowledging* however that significant work is still required by many National Societies in order to bring their constitutional and statutory base instruments in line with the minimum requirements of the Guidance document,

*expressing its deep appreciation* to those National Societies which have successfully completed a revision of their Statutes and related legal texts in accordance with the Guidance document,

*noting* that many National Societies continue to face challenges in their efforts to work in accordance with the Fundamental Principles in their respective operational contexts, and *reiterating* the crucial importance of high-quality statutes, and the imperative of a strong legislative base for National Societies in domestic law in order to ensure their ability and capacity to deliver services to people in need effectively,

*recognizing* that the regular and periodical review of a National Society’s legal base instruments (e.g. every 10 years) is important in assisting National Societies to adapt to new challenges and circumstances,

*recognizing* the many challenges which National Societies may face in order to comply fully with the minimum requirements and recommendations defined in the Guidance document due to their respective contexts of operation,

*reaffirming* in this regard the primary responsibility of National Societies at the level of their leadership and management to ensure that adequate constitutional and statutory instruments are in place and duly implemented,

1. *congratulates* National Societies for their continuing and considerable efforts invested in the last decade in the revision of their statutes and related legal texts and in the strengthening of their legal base in domestic law;
2. *expresses its appreciation* to National Societies who have established a constructive dialogue with the ICRC and the International Federation, as well as with the Joint Statutes Commission, which has allowed the Movement to progress toward fulfilling the objective of strengthening National Societies' legal base;
3. *recommends* that National Societies which have not yet initiated or successfully completed a statutes revision process undertake the necessary steps in order to update their statutory or constitutional base instruments in accordance with the Guidance document and relevant Council of Delegates and International Conference resolutions;
4. *invites* National Societies undertaking a revision of their statutes and related legal texts to pay special attention to the following questions identified by the Joint Statutes Commission as the issues most often at variance with the Guidance document, including the definition of
  - the National Society's relationship with its public authorities, in particular its status and role as an auxiliary in the humanitarian field, in line with the Fundamental Principle of independence;
  - the National Society's governing bodies (composition, duties, procedures and rotation);
  - the roles and responsibilities of governance and management;
  - the National Society's membership;
  - the branch structure (e.g. how branches are created, what bodies govern them and the relationship between branches and headquarters);
5. *encourages* National Societies to initiate or pursue a dialogue, as required, with their national authorities in order to strengthen their legal base in domestic law, through high-quality Red Cross/Red Crescent laws, so as to formalize their auxiliary role in the humanitarian field and to recognize the commitment of national authorities to respect the ability of National Societies to work and operate in accordance with the Fundamental Principles;
6. *calls upon* National Societies, in particular at the level of their respective leadership, to continue working closely with ICRC and International Federation delegations in the revision of their statutes and related legal texts and in the strengthening of their legal base in domestic law, to take the recommendations of the Joint Statutes Commission into account, as well as to keep the Joint Statutes Commission duly informed of any progress or new developments;
7. *calls upon* the ICRC, the International Federation and the Joint Statutes Commission to pursue actively their support to National Societies and to seek ways of increasing their capacity and the effectiveness of their working methods. In their work to support National Societies, they should pay particular

attention to National Society laws and regulations, to develop new advisory notes for National Societies as needed, and to ensure that the new institution-building mechanisms and tools established within the Movement duly include and reflect the objective of strengthening the legal and statutory base instruments of National Societies;

8. *invites* the ICRC and the International Federation to initiate a consultation with National Societies on the most effective ways to continue the process of strengthening National Society legal base instruments in the future, and thus to explore and implement new and innovative ways and models to support National Societies, and to draw further on existing resources, partnerships and legal expertise within the Movement, including the use of new learning platforms and relevant National Society capacities and networks;
9. *invites* the ICRC and the International Federation to draw on the work of the Joint Statutes Commission in order to report on the achievement of the ongoing objective of strengthening the legal and statutory base instruments of National Societies to the 2013 and subsequent Councils of Delegates.

## Resolution 5 of the 2011 Council of Delegates

### IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING AND AGREEMENT ON OPERATIONAL ARRANGEMENTS, DATED 28 NOVEMBER 2005, BETWEEN THE PALESTINE RED CRESCENT SOCIETY AND THE MAGEN DAVID ADOM IN ISRAEL

The Council of Delegates,

*recalling* the MoU signed by PRCS and MDA on 28 November 2005, in particular the following provisions:

1. *MDA and PRCS will operate in conformity with the legal framework applicable to the Palestinian territory occupied by Israel in 1967, including the Fourth Geneva Convention of 1949 on the protection of Civilians in Time of War.*
2. *MDA and PRCS recognize that PRCS is the authorized national society in the Palestinian territory and that this territory is within the geographical scope of the operational activities and the competences of PRCS. MDA and PRCS will respect each other's jurisdiction and operate in accordance with the Statutes and Rules of the Movement.*
3. *After the Third Additional Protocol is adopted and by the time MDA is admitted by the General Assembly of the International Federation of Red Cross and Red Crescent Societies:*
  - a. *MDA will ensure that it has no chapters outside the internationally recognized borders of the State of Israel;*
  - b. *Operational activities of one society within the jurisdiction of the other society will be conducted in accordance with the consent provision of resolution 11 of the 1921 international conference,*

*taking note*, with appreciation for his work, of the report presented to the Council by Minister (Hon.) Pär Stenbäck, the independent monitor appointed by the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (International Federation) with the agreement of MDA and the PRCS upon request of the International Conference to monitor progress achieved in the implementation of the MoU and the AOA of 28 November 2005 between the PRCS and the MDA,

*recalling* Resolution 5 adopted by the Council of Delegates on 25 November 2009 concerning the implementation of the MoU and AOA between PRCS and MDA,

*recalling* Resolution 5 adopted by the 30th International Conference of the Red Cross and Red Crescent concerning the implementation of the MoU and AOA between PRCS and MDA,

*reaffirming* the importance of operating in accordance with international humanitarian law and with the Statutes, rules, and Fundamental Principles of the International Red Cross and Red Crescent Movement,



*noting* that National Societies have an obligation to operate in compliance with the Constitution of the International Federation of Red Cross and Red Crescent Societies and the existing policy “on the protection of integrity of National Societies and bodies of the International Federation” adopted in November 2009,

*reaffirming* the necessity for effective and positive coordination between all components of the Movement of Red Cross and Red Crescent for the full implementation of the MoU between the PRCS and MDA,

1. *notes* the reported progress that has been made with respect to implementation and commends the efforts of both National Societies;
2. *notes with regret* that full implementation of the MoU has not yet been realized as observed by the monitor;
3. *strongly urges* MDA to fulfil its obligations without further delay and complete the efforts under way to bring its operations into compliance with the geographic scope provisions of the MoU;
4. *requests* the ICRC and the International Federation to reaffirm the mandate of the monitoring process and to continue to support and strengthen the monitoring process of the implementation of the MoU;
5. *decides* that the monitoring process will continue until such time as the MoU is implemented in full and requests that regular reports on the monitoring mechanism are issued as deemed necessary;
6. *requests* National Societies to respond favourably to any request for assistance and support in the monitoring process;
7. *requests* the ICRC and the International Federation to arrange for the provision of a report on implementation of the MoU to the next Council of Delegates and through it to the International Conference.

## Resolution 6 of the 2011 Council of Delegates

### **PRESERVING THE HISTORICAL AND CULTURAL HERITAGE OF THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT**

The Council of Delegates,

*recognizing* the universal value of the historical and cultural heritage of all the components of the International Red Cross and Red Crescent Movement (Movement), that is, the International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies (International Federation) and National Red Cross and Red Crescent Societies (National Societies),

*emphasizing* the paramount importance of safeguarding this humanitarian heritage, of disseminating it and promoting it by all appropriate means, with the aim of fostering a better awareness and understanding of the roles and the identity of the Movement among current and future generations in order to inspire them to undertake humanitarian work in aid of vulnerable individuals and communities,

*recalling* that awareness of the history and operational experience of the components of the Movement is crucial to current and future deliberations about its humanitarian work and modes of action,

*emphasizing* the joint responsibility of all components of the Movement for ensuring that the Movement's historical and cultural heritage is preserved, safeguarded and promoted,

*recalling* the sustained efforts undertaken thus far by the components of the Movement to make this heritage accessible to as many people as possible,

*recalling* the role played by the International Red Cross and Red Crescent Museum in enhancing the prominence and influence of the historical and cultural heritage of the Movement,

*welcoming* the cooperation with National Societies initiated by the Museum, intended to assist in the preservation and promotion of their own heritage in museums and other heritage facilities in their own countries and regions,

*mindful* of national and international legal and ethical rules and principles governing the preservation, archiving and dissemination of historical data, in particular with regard to the protection and accessibility of personal data,

*recognizing* the breadth of experience and expertise of the components of the Movement, in terms of conserving, preserving and managing the Movement's historical and cultural heritage, and also in terms of disseminating and promoting that heritage,

*welcoming* the entry of the International Prisoners-of-War Agency's archives (1914–1923) into UNESCO's Memory of the World Register in 2007,

1. *asks* all components of the Movement to raise the priority accorded to the preservation and utilization of their historical and cultural heritage, to make it

better known and appreciated by means of museums, exhibitions, archives, other heritage facilities, and through promotional activities, and to make effective use of this wealth of knowledge and experience in their current humanitarian activities;

2. *encourages* all components of the Movement to share their experience in preserving and promoting their historical and cultural heritage and to call upon the good offices of the International Red Cross and Red Crescent Museum in Geneva and the expertise of the International Federation and the ICRC as needed;
3. *requests* the International Red Cross and Red Crescent Museum, the International Federation and the ICRC, in consultation with National Societies, to present recommendations to the Council of Delegates in 2015 on preserving and promoting the Movement's historical and cultural heritage, based on the experiences and the concrete action taken by the different components of the Movement in this domain.

## Resolution 7 of the 2011 Council of Delegates

### **NATIONAL SOCIETIES PREPARING FOR AND RESPONDING TO ARMED CONFLICT AND OTHER SITUATIONS OF VIOLENCE<sup>1</sup>**

#### **I. Background**

Situations of violence can develop at any time and anywhere, as recent events demonstrate. They often give rise to issues of humanitarian concern that require an immediate response by National Red Cross or Red Crescent Societies (National Societies). In addition, armed conflicts, chronic and sometimes protracted over several years or decades, require similar forms of humanitarian response. Demonstrations which lead to violence pose another kind of challenge to the humanitarian sector – to adapt its working procedures, designed primarily for rural settings, to urban environments as well.

To enhance access to people and communities affected by armed conflict and other situations of violence,<sup>2</sup> and to respond effectively to their needs, it is essential that all the components of the International Red Cross and Red Crescent Movement (Movement) work together in preparedness, response and recovery, to maximize their respective capacities and competencies.

#### **Converging and Complementary Movement Mandates and Capacities**

National Societies have a mandate, as described in the Statutes of the International Red Cross and Red Crescent Movement (Statutes) to “organize, in liaison with the public authorities, emergency relief operations and other services to assist the victims of armed conflicts as provided in the Geneva Conventions, and the victims of natural disasters and other emergencies for whom help is needed.”<sup>3</sup> A number of resolutions adopted at Councils of Delegates and International Conferences of the Red Cross and Red Crescent reinforce the mandate of National Societies to act as auxiliaries to the public authorities in the humanitarian field<sup>4</sup> and to provide humanitarian assistance and protection to those in need, including those

1 Other situations of violence as a component of the National Societies’ overall mandate, as set out in the Statutes of the Movement.

2 An ICRC description of ‘Other situations of violence’ can be found in the Background Report supporting this resolution.

3 Article 3, clause 2 of the Statutes of the International Red Cross and Red Crescent Movement.

4 Two such recent resolutions are: Resolution 2 of the 30th International Conference and Resolution 3 of the 2007 Council of Delegates on the “Specific nature of the International Red Cross and Red Crescent Movement in action and partnerships and the role of National Societies as auxiliaries to the public authorities in the humanitarian field.”

affected by armed conflict and other situations of violence within their own countries.<sup>5</sup>

The International Committee of the Red Cross (ICRC) has a statutory mandate “to endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife<sup>6</sup> – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results.”<sup>7</sup> In such situations, the ICRC works in close partnership with the National Society of the affected country as well as with participating National Societies and the International Federation of Red Cross and Red Crescent Societies (International Federation) to prepare and carry out emergency humanitarian operations.

The International Federation’s statutory mandate includes the following: “to inspire, encourage, facilitate and promote at all times all forms of humanitarian activities by the National Societies, with a view to preventing and alleviating human suffering and thereby contributing to the maintenance and the promotion of peace in the world”; “to act as the permanent body of liaison, coordination, and study between the National Societies and to give them any assistance they might request”; and “to bring help to victims of armed conflicts in accordance with the agreements concluded with the International Committee.”<sup>8</sup>

The mandates and capacities, as well as the unique positioning of each of the Movement’s components, must be taken fully into consideration when preparing for and responding to armed conflict and other situations of violence, in order to maximize the impact of the protection and assistance provided to the populations most in need. Activities should be allocated bearing these factors in mind as well as considering the level of acceptance provided to the various Movement components and whether the ICRC, the National Society or the two together would be better placed to respond. Improved Movement coordination and further discussion among the components of the Movement on the specific questions raised by ‘other situations of violence’ which results in an increased convergence of preparedness, response and recovery actions is required, in accordance with Movement agreements and mechanisms, and on the basis of context-specific circumstances and needs, to enhance access and response to the humanitarian needs of people and communities affected by armed conflict and other situations of violence.

5 For example, the General Principles contained in Resolution XIV of the 10th International Conference in 1921, on Civil War, state: “The Red Cross (...) affirms its right and duty of affording relief in case of civil war and social and revolutionary disturbances (...) In every country in which civil war breaks out, it is the National Red Cross Society which, in the first place is responsible for dealing, in the most complete manner, with the relief needs of the victims ...”

6 As defined in Part II, Article 5, clause 2 (b) of the Seville Agreement, internal strife “does not necessarily imply armed action but serious acts of violence over a prolonged period or a latent situation of violence, whether of political, religious, racial, social, economic or other origin, accompanied by one or more features such as: mass arrests, forced disappearances, detention for security reasons, suspension of judicial guarantees, declaration of state of emergency, declaration of martial law.”

7 Article 5, clause 2 (d) of the Statutes of the International Red Cross and Red Crescent Movement.

8 Article 6, clauses 3 and 4 (i) of the Statutes of the International Red Cross and Red Crescent Movement.

## The ICRC's Response to a Request by National Societies

To adapt to the ever-changing environment, many National Societies have taken important measures in recent years to strengthen their response during armed conflict and other situations of violence.

Based upon the best practices of National Societies, the ICRC developed the Safer Access Framework.<sup>9</sup> This Framework outlines the numerous interconnected actions that a National Society needs to carry out in order to increase its acceptance by individuals, communities, weapon-bearers and authorities and thereby gain safer access to people and communities during armed conflict and other situations of violence.

During a plenary session at the 2009 Council of Delegates,<sup>10</sup> National Societies requested the ICRC to develop operational guidance for National Societies working in armed conflict and other situations of violence. It was determined through a comprehensive consultation process with National Societies that the Safer Access Framework and the lessons learned from current National Society experience would be used as the foundation to develop a practical guide to strengthen the capacity of all National Societies to prepare for and respond to armed conflict and other situations of violence.

The guide will also enhance the practical application of the Seville Agreement and its Supplementary Measures, in particular by providing support for host National Societies to fulfil their mandates and play their roles in a Movement-coordinated response to armed conflict or to other situations of violence.

## II. Challenges

Today, armed conflict and other situations of violence pose new, evolving challenges for the Movement's response. Some of the most significant are set out below.

Recurrent attacks against Movement personnel, including National Society staff and volunteers, their facilities and equipment, and the harm caused to beneficiaries are causing alarm.

Some National Societies are prevented, by all those who can influence access to beneficiaries, from providing humanitarian services to those in need on all sides of an armed conflict or other situation of violence, or they are challenged or

9 The Safer Access Framework is based on the concept of applying the Fundamental Principles and other Movement policies during response operations, which helps to position a National Society to secure greater acceptance and safe access to beneficiaries. Its elements include context/risk analysis, National Society legal and policy base to respond in armed conflict and other situations of violence, securing the organization's acceptance, acceptance of the National Societies' staff, volunteers and members, identification of the National Societies' people, facilities and vehicles, internal and external communications and security management (guidelines and protective measures).

10 2009 Council of Delegates, Workshop 5 (Improving our Combined Output by Fostering Collective Responsibility and Partnerships) and the plenary linked to the discussion of the Seville Agreement and its Supplementary Measures.

even harassed when they attempt to do so. In this respect, there is, in some countries, a need to strengthen the National Society's statutory and legal instruments to better reflect its role in armed conflicts and other situations of violence. This should take into account the Fundamental Principle of independence, which balances the autonomy of National Societies with their status and role as auxiliaries to the public authorities in the humanitarian field.

There are many recent examples of well-coordinated Movement responses during armed conflict and other situations of violence. However, our response to the humanitarian needs of the people and communities affected could be improved. It is important to deepen our shared Movement knowledge and understanding of emerging trends in such situations and their consequences for humanitarian action, in order to improve the quality of our response and develop a uniform Movement approach. Overall, the Movement's components need to improve their level of readiness to respond to the needs of affected people rapidly and effectively in a coordinated and complementary manner, taking into account the changing environments in which they work. The ICRC and National Societies should pay particular attention to developing contingency plans that are coordinated and complement one another, to guide their responses during armed conflict and other situations of violence.

Adherence to the Fundamental Principles, and fostering respect in others for our adherence to the principles, are permanent challenges for all Movement components and are vitally important in increasing the degree of acceptance that is required to secure safer access to the people and communities affected by armed conflict and other situations of violence. The Statutes of the Movement and relevant Councils of Delegates resolutions<sup>11</sup> emphasize this point.

### III. Decisions

Recognizing the mandate of National Societies as per the Statutes of the Movement to operate and respond to armed conflict, natural disasters and other emergencies including internal strife and other situations of violence and in order to strengthen the Movement's response to armed conflict and other situations of violence, the 2011 Council of Delegates:

1. *encourages* National Societies to intensify their commitment and efforts to adopt appropriate security/risk management systems, and to take other concrete measures to increase their safer access in armed conflict and other situations of violence. This includes the need to enhance the operational

11 For instance: 2009 Council of Delegates, Resolution 8, Respecting and protecting health care in armed conflict and other situations of violence; 30th International Conference, 2007, Resolution 1, Annex Declaration: Together for humanity; 2005 Council of Delegates, Resolution 7, Relations between the components of the Movement and military bodies; 2003 Council of Delegates, Resolution 9, Promote respect for diversity and fight discrimination and intolerance – clause 4 (f) of the annex to the Resolution.

application of the Fundamental Principles and other relevant Movement policies as well as to obtain insurance coverage<sup>12</sup> for staff and volunteers working in crises, to adequately compensate them for possible injury, including psychological trauma/stress, or death in the line of duty;

2. *urges* National Societies, where necessary, to engage in a dialogue with all concerned governments on the need for access to all populations affected by armed conflict and other situations of violence and to exert influence, where possible, on all those who can influence access to beneficiaries to respect the National Societies' role to provide neutral, impartial and independent humanitarian services, (as defined by the Fundamental Principles), with the support and involvement of the ICRC as appropriate;
3. *urges* National Societies, the ICRC and the International Federation to continue to explore and analyse emerging trends and challenges to humanitarian action during armed conflict and other situations of violence, with a view to making such shared analyses the basis of coordinated contingency planning for the provision of rapid, effective and coherent response to the humanitarian needs of people and communities affected, while also strengthening their resilience;
4. *encourages* National Societies to further define their mandates, roles and responsibilities in armed conflict and other situations of violence within their statutory and legal base instruments, as appropriate, and to promote their role broadly, both within their National Society, and with external actors and communities;
5. *invites* the ICRC and the International Federation to work closely with National Societies to define how the mandates, roles and responsibilities of National Societies in armed conflict and other situations of violence may best be reflected in National Societies' statutory and legal base instruments and to advise National Societies engaged in revising their statutes accordingly;
6. *recommends* that National Societies, as part of their permanent dialogue with their respective governments, work towards strengthening domestic legislation, policies, agreements and plans in order to establish the framework required to enable them to provide effective assistance and protection to populations affected by armed conflict and other situations of violence;
7. *invites* the components of the Movement to continue to develop a practical guide, to further clarify the term 'other situations of violence' and to strengthen the capacity of all National Societies to prepare for and respond to armed conflict and other situations of violence – based on the Fundamental Principles, the Statutes of the Movement, relevant Movement policies and current National Society experience, as a valuable contribution towards building a Movement approach in this area;

12 Ideally, insurance coverage should be provided to all volunteers, particularly those involved in emergency response operations, by the National Society through a national insurance company that provides insurance appropriate to the context and adapted to local realities. To deal with situations where this is not available, the Secretariat of the International Federation has put in place global accident insurance available through the headquarters of all National Societies.



8. *encourages* the International Federation to work closely with the ICRC and National Societies to develop effective mechanisms that ensure the aforementioned guide and the ICRC's programmes and capacity strengthening expertise that support National Societies to prepare for and respond to armed conflict and other situations of violence, are taken into account in the approach toward the development of strong National Societies, with a particular emphasis on incorporating relevant elements into emergency preparedness, response, recovery and organizational development initiatives.

#### **IV. The Background Report and Annex**

The Background Report and Annex are for information purposes only and are not a part of decisions.

#### **V. Follow-up**

All the components of the Movement are requested to consider including the decisions listed above in their strategies, plans and objectives, where relevant.

Progress in implementing the decisions listed above will be included in the report to the Council of Delegates on the Implementation of the Seville Agreement and its Supplementary Measures in 2013 and 2015.

The ICRC, with the continued involvement of National Societies and the Secretariat of the International Federation, will develop the practical guide, which will address many of the challenges identified in this resolution, and more. It will be completed by the end of 2012 and will be introduced to Movement partners in 2013.

#### **Resolution co-sponsors:**

The Canadian Red Cross Society  
Colombian Red Cross  
Jamaica Red Cross  
Nepal Red Cross Society  
Red Cross Society of Panama  
Paraguayan Red Cross  
Red Cross Society of Saint Lucia  
The Trinidad and Tobago Red Cross Society  
Tunisian Red Crescent  
The Uganda Red Cross Society

## **Resolution 8 of the 2011 Council of Delegates**

### **AGENDA AND PROGRAMME OF THE 31ST INTERNATIONAL CONFERENCE OF THE RED CROSS AND RED CRESCENT**

The Council of Delegates,

*having examined* the Provisional Agenda and adopts the Agenda and Programme of the 31st International Conference of the Red Cross and Red Crescent, prepared by the Standing Commission of the Red Cross and Red Crescent,

*adopts* the Agenda and Programme of the 31st International Conference of the Red Cross and Red Crescent.

## Resolution 9

### PROPOSAL OF PERSONS TO FILL THE POSTS OF OFFICERS AT THE 31ST INTERNATIONAL CONFERENCE OF THE RED CROSS AND RED CRESCENT

The Council of Delegates,

*having examined* the list of candidates nominated by the Standing Commission for election as officers of the 31st International Conference of the Red Cross and Red Crescent (International Conference),

*endorses* the list of candidates (see annex) and *requests* the Chairman of the Council to transmit it to the 31st International Conference for approval.

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## Annex – Resolution 9

### PROPOSAL OF PERSONS TO FILL THE POSTS OF OFFICERS AT THE 31ST INTERNATIONAL CONFERENCE OF THE RED CROSS AND RED CRESCENT

Reference: Article 14/Statutes of the Movement: *“When meeting prior to the opening of the International Conference, the Council shall propose to the Conference the persons to fill the posts mentioned in Article 11, paragraph 3: the Chairman, the Vice Chairmen, Secretary General, Assistant Secretaries General and other officers of the Conference”*

Chair of the Conference: **Ms Niki Rattle** (Cook Islands Red Cross Society)

Chair of the Drafting Committee: **Ambassador Maria Farani Azevêdo** (Brazil)

Vice-Chair, political issues: **Ambassador Peter Gooderham** (United Kingdom)

Conference Vice-Chairs and Chairs of Thematic Plenary sessions

Plenary on IHL: **Ms Liesbeth Lijnzaad** (The Netherlands)

Plenary on Disaster Laws: **Mr Fernando José Cardenas Guerrero** (Colombian Red Cross Society)

Conference Vice-Chairs and Chairs of Thematic Commissions

Commission A: Migration: **Dr Muctarr Jalloh** (Sierra Leone Red Cross Society)

Commission B: Partnership for stronger National Societies & volunteering development: **Dr Dragan Radovanovic** (Red Cross of Serbia)

Commission C: Health Care in Danger: **Dr Mamdouh Gabr** (Egyptian Red Crescent Society)

Commission D: Inequitable access to health care: **Ms Fatima Gailani** (Afghan Red Crescent Society)

Commission E: Humanitarian access and assistance: **Vice-Minister Gómez Robledo** (Mexico)

Other officers

Rapporteur of the Conference: **Ambassador Minelik Alemu Getahun** (Ethiopia)

Elections: **Ms Annemarie Huber-Hotz** (Swiss Red Cross)

Pledges: **Mr Christian Ndinga** (Congolese Red Cross)

Secretary-General of the Conference: **Ambassador Jean-François Paroz** (Switzerland)

Assistant Secretaries-General: **Mr Frank Mohrhauer** (International Federation) and **Mr Bruce Biber** (ICRC)

## **Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent**

### **STRENGTHENING LEGAL PROTECTION FOR VICTIMS OF ARMED CONFLICTS**

The 31st International Conference of the Red Cross and Red Crescent (International Conference),

*deeply concerned* that armed conflicts continue to cause enormous suffering, including violations of international humanitarian law, such as murder, forced disappearance, the taking of hostages, torture, cruel or inhumane treatment, rape and other forms of sexual violence, and that such suffering affects entire populations, including among the most vulnerable, in various parts of the world,

*stressing* that greater compliance with international humanitarian law is an indispensable prerequisite for improving the situation of victims of armed conflict and *reaffirming* the obligation of all States and all parties to armed conflict to respect and ensure respect for international humanitarian law in all circumstances,

*recalling* the universal ratification of the 1949 Geneva Conventions,

*expressing* the hope that other international humanitarian law treaties will also achieve universal acceptance, and *inviting* all States to consider ratifying or acceding to international humanitarian law treaties to which they are not yet party,

*recalling* Resolution 3 on the “Reaffirmation and implementation of international humanitarian law,” adopted by the 30th International Conference,

*reiterating* that international humanitarian law remains as relevant today as ever before in international and non-international armed conflicts and continues to provide protection for all victims of armed conflict,

*recognizing* the importance of having due regard to humanitarian considerations and military necessity arising from armed conflict, with the objective of ensuring that international humanitarian law remains essential in providing legal protection to all victims of armed conflict and that States and other parties to armed conflicts fully implement their obligations in this regard,

*mindful* of the need to strengthen international humanitarian law, in particular through its reaffirmation in situations when it is not properly implemented and its clarification or development when it does not sufficiently meet the needs of the victims of armed conflict,

*emphasizing* the primary role of States in the development of international humanitarian law,

*recalling* that one of the important roles of the International Committee of the Red Cross (ICRC), in accordance with the Statutes of the International Red Cross and Red Crescent Movement (Movement), is in particular “to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof,” and *further*

*recalling* the respective roles of the ICRC and National Red Cross and Red Crescent Societies (National Societies) in the promotion, dissemination, implementation and development of international humanitarian law,

*recalling* that the functions of the International Conference, in accordance with the Statutes of the Movement, include “to contribute to the respect for and development of international humanitarian law and other international conventions of particular interest to the Movement,”

*taking note* of the 2003 ICRC summary report on regional expert seminars related to improving compliance with international humanitarian law presented to the 28th International Conference, as well as the 2009 report on a conference of experts entitled “60 Years of the Geneva Conventions and the Decades Ahead” prepared by the Swiss Government and the ICRC,

1. *thinks* the ICRC for the report outlining the main conclusions of its study on strengthening legal protection for victims of armed conflicts and for the consultations carried out with States in this regard;
2. *acknowledges* that the report identifies serious humanitarian concerns and challenges that need to be addressed, in particular those related to the protection of persons deprived of their liberty in relation to armed conflict and the need to ensure greater compliance with international humanitarian law, and that, on the basis of the consultations, the report calls for concrete and coordinated action to address these concerns;
3. *recognizes* the importance of analysing the humanitarian concerns and military considerations related to the deprivation of liberty in relation to armed conflict with the aim, *inter alia*, of ensuring humane treatment, adequate conditions of detention, taking into account age, gender, disabilities and other factors that can increase vulnerability, and the requisite procedural and legal safeguards for persons detained, interned or transferred in relation to armed conflict;
4. *recognizes*, taking into account questions raised by States during the preparation of and in the debates at the 31st International Conference, that further research, consultation and discussion are needed to assess the most appropriate way to ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict;
5. *recognizes*, taking into account questions raised by States during the preparation of and in the debates at the 31st International Conference, the importance of exploring ways of enhancing and ensuring the effectiveness of mechanisms of compliance with international humanitarian law, with a view to strengthening legal protection for all victims of armed conflict;
6. *invites* the ICRC to pursue further research, consultation and discussion in cooperation with States and, if appropriate, other relevant actors, including international and regional organizations, to identify and propose a range of options and its recommendations to: i) ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict;

- and ii) enhance and ensure the effectiveness of mechanisms of compliance with international humanitarian law; and *encourages* all members of the International Conference, including National Societies, to participate in this work while recognizing the primary role of States in the development of international humanitarian law;
7. *notes* that such work should be carried out taking into account existing relevant international legal regimes and other international processes on similar issues; in this sense *expresses its appreciation* to the government of Switzerland for its commitment to explore and identify concrete ways and means to strengthen the application of international humanitarian law and reinforce dialogue on international humanitarian law issues among States and other interested actors, in cooperation with the ICRC;
  8. *invites* the ICRC to provide information on the progress of its work at regular intervals to all members of the International Conference and to submit a report on this work, with a range of options, to the 32nd International Conference for its consideration and appropriate action.

## **Resolution 2 of the 31st International Conference of the Red Cross and Red Crescent**

### **4-YEAR ACTION PLAN FOR THE IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW**

The 31st International Conference of the Red Cross and Red Crescent (International Conference),

1. *adopts* the Action Plan in Annex 1;
2. *urges* all members of the International Conference to implement the actions set out in the Action Plan, in accordance with their respective powers, mandates, capacities and applicable obligations under international humanitarian law, with a view to reaching the objectives defined in the Action Plan;
3. *reminds* States of the auxiliary role of National Red Cross and Red Crescent Societies to the public authorities in the humanitarian field, in particular where they work in the framework of national international humanitarian law committees or similar bodies, and *encourages* States to cooperate with them, as appropriate, in implementing the actions set out in the Action Plan;
4. *takes note* of existing initiatives by other humanitarian actors and organizations in certain areas covered by this Action Plan and stresses the need to ensure synergies between such initiatives and this Action Plan in cooperation with States;
5. *invites* all members of the International Conference to submit pledges, either individually or jointly, in relation to the recommendations contained in the Action Plan;
6. *invites* international and regional organizations to implement the actions contained in the Action Plan which relate to their activities;
7. *requests* all members of the International Conference to make every possible effort to ensure that all actors concerned implement, as appropriate, the Action Plan,
8. *invites* all members of the International Conference to inform the International Committee of the Red Cross on progress made on implementation of the Action Plan, with a view to the presentation of a report on implementation to the 32nd International Conference in 2015;
9. *requests* the members of the International Conference to report to the 32nd International Conference in 2015 on the follow-up to their pledges.



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## **Annex 1: Action plan for implementing international humanitarian law**

### **Objective 1: Enhanced access by civilian populations to humanitarian assistance in armed conflicts**

States reaffirm the right of civilian populations in need to benefit from impartial humanitarian relief in accordance with international humanitarian law. States will ensure, to the fullest extent of the means available to them, that the civilian population is adequately provided with supplies in accordance with relevant provisions of international humanitarian law.

States will also, in accordance with international humanitarian law, allow and facilitate safe, rapid and unimpeded passage of impartial humanitarian relief for civilian populations in need and will respect and protect humanitarian personnel and objects.

The components of the International Red Cross and Red Crescent Movement (Movement) must be able to deliver humanitarian assistance at all times in conformity with the Fundamental Principles of humanity, impartiality, neutrality and independence. States will respect the adherence by all components of the Movement to these Fundamental Principles.

#### **a) Remove administrative barriers to the rapid delivery of humanitarian assistance for victims of armed conflicts**

States consider, including through enacting domestic legislation or concluding agreements with components of the Movement:

- facilitating the rapid issuance of valid documents allowing the mission of members of components of the Movement access across the international borders of the State and within the State concerned;
- expediting procedures for monitoring the entry and distribution of humanitarian goods of components of the Movement;
- exempting personnel and goods of components of the Movement from taxes, duties and fees where necessary.

States endeavour to make available the necessary telecommunication facilities to components of the Movement, taking into account the need of the Movement for two-way wireless telecommunication means when normal communication facilities are interrupted or not available, in accordance with Resolution 10 of the 2000 World Radiocommunication Conference. They assign to the components of the Movement the minimum number of necessary working frequencies in accordance with the applicable Radio Regulations and take all practicable

steps to protect such communications from harmful interference. States which have not already done so consider acceding to the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations.

#### b) Establishing and maintaining an environment conducive to dialogue

The International Committee of the Red Cross (ICRC) and the host National Red Cross or Red Crescent Society (National Society) concerned will establish and maintain a constructive dialogue with all parties to armed conflicts in order to obtain access to victims and the necessary security guarantees for its staff. States respect the need for such dialogue and reaffirm the unique position and contribution of the ICRC and National Societies in this regard.

Components of the Movement will continue to ensure that in the planning, delivery and monitoring of humanitarian assistance the specific needs of victims of conflicts as well as local capacities are taken into account.

States and components of the Movement continue their dialogue to ensure a better complementarity between and effective international coordination with different humanitarian actors, taking into account their respective roles and mandates.

#### c) Implementation and enforcement

States ensure that instruction is provided to members of their armed forces to respect the physical integrity and unimpeded passage of humanitarian personnel and objects in accordance with international humanitarian law.

States adopt adequate measures at a domestic level, including national legislation, to comply with their international obligations concerning arbitrary obstruction of humanitarian assistance and to prevent and sanction attacks on humanitarian personnel and objects.

States ensure that perpetrators of attacks against humanitarian personnel, including personnel using the distinctive emblems in accordance with the Geneva Conventions and their Additional Protocols, are held accountable, by encouraging disciplinary measures and criminal prosecutions.

### **Objective 2: To enhance the specific protection afforded to certain categories of persons, in particular children, women and persons with disabilities**

Specific protection is due to certain categories of persons in recognition of factors such as age, gender or disabilities, which make such persons more vulnerable in times of armed conflicts. To safeguard adequate protection for all victims of armed

conflicts, including in situations of occupation, without discrimination, such factors must be taken into account.

## Objective 2.1: To enhance the protection of children in armed conflict

States, National Societies and the ICRC will raise awareness of the protection of children in armed conflict by international law, in particular international humanitarian law.

### *a) Prevention of recruitment of children in armed forces or armed groups*

States take effective measures to register children immediately after birth and endeavour to establish supplementary identification and registration systems for all children, including for particularly vulnerable children like internally displaced children and refugee children, to protect them from unlawful recruitment.

States consider establishing domestic inspection regimes independent from the armed forces, such as ombudspersons or annual external inspections commissioned by civilian governmental authorities, to monitor the compliance of armed forces with the prohibition of child recruitment.

States, in cooperation with National Societies and the ICRC, design and set up educational and vocational training programmes where possible, in combination with employment opportunities, to offer boys and girls viable alternatives to recruitment.

### *b) Ratification, national implementation and enforcement of international law relevant to the prevention and repression of participation in hostilities by children and the recruitment of children into armed forces or armed groups*

States which have not already done so consider ratifying or acceding to the 2000 Optional Protocol to the Convention on the Rights of the Child on involvement of children in armed conflict.

States which have not already done so also consider adhering to the 2007 Paris Principles and Commitments to protect children from unlawful recruitment or use by armed forces or armed groups.

States which have not already done so consider enacting national legislation or other measures to regulate the minimum age of recruitment into armed forces and armed groups and to prevent the involvement of children in armed conflict in accordance with the Optional Protocol to the Convention on the Rights of the Child on involvement of children in armed conflict.

States ensure that those who unlawfully recruit children are held accountable for their acts through appropriate measures, *inter alia*, by referral to courts especially when it constitutes a war crime, in accordance with applicable international law.

### *c) Protection of education in armed conflict*

States reaffirm that attacks against civilians, including children and teachers, are prohibited, unless and for such time as they are directly participating in hostilities. States also reaffirm that attacks against civilian buildings dedicated to education are prohibited unless they make an effective contribution to military action by their nature, location, purpose or use and their total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. In case of doubt whether civilians or civilian objects lose protection from attack, States treat them as civilians and civilian objects.

States take all feasible precautions to protect children and teachers, as well as civilian buildings dedicated to education, from the effects of attacks in accordance with international humanitarian law.

States take all feasible measures to prevent civilian buildings dedicated to education from being used for purposes that could cause them to lose their protection under international humanitarian law.

### *d) Rehabilitation of children affected by armed conflicts*

States ensure that specific provisions for the release of children associated with armed forces and armed groups, for disarmament, demobilization and reintegration of such children, for the care of internally displaced children, and for medical care, psychosocial support and economic inclusion of all children affected by armed conflicts, are included in peace agreements. The different needs of boys and girls are given particular attention in such agreements.

Donor States endeavour to ensure long-term funding for the reintegration of children formerly associated with armed forces or armed groups.

### *e) Juvenile justice*

States consider children who have been unlawfully recruited by armed forces or armed groups and are accused of committing domestic or international crimes associated with a conflict primarily as victims, not only as alleged perpetrators.

States consider granting children formerly associated with armed forces or armed groups amnesty from prosecutions brought solely on account of their membership in armed forces or armed groups.

Whenever appropriate and desirable, States resort to measures other than judicial proceedings for dealing with alleged child offenders formerly associated with armed forces or armed groups.

States foster gender-sensitive rehabilitation and reintegration of children formerly associated with armed forces or armed groups when sentencing them and consider alternatives to imprisonment, such as care, guidance and supervision orders, probation, foster care or education and vocational training programmes.

## Objective 2.2: To enhance the protection of women in armed conflict

### *a) Ratification, implementation and enforcement of relevant international law*

States take appropriate legislative, judicial and administrative measures to implement their obligations regarding the protection of women and girls under international humanitarian law.

States take all feasible measures to reduce the impact of armed conflict on women and girls, and to ensure that their specific protection and assistance needs are met.

States commit themselves to putting an end to impunity and to prosecute in accordance with their obligations under international law – serious violations of international humanitarian law involving sexual and other forms of violence against women and girls, and for this purpose, enhance their capacity to prevent, monitor and document acts of sexual violence and other serious violations of international humanitarian law, and to this end, to cooperate, in conformity with their international obligations, both at inter-State level and with international criminal tribunals and courts.

### *b) Prevention of sexual and other gender-based violence against women*

States ensure that all feasible measures are employed to prevent all serious violations of international humanitarian law involving sexual and other forms of gender-based violence against women. Such measures include:

- pre-deployment and in-theatre gender training of armed forces on their responsibilities, as well as the rights and particular needs and protection of women and girls;
- military disciplinary measures and other measures, such as reporting requirements on incidents of sexual violence to avoid impunity;
- ensuring that female detainees and internees are supervised by women and separated from male detainees and internees, except where families are accommodated as family units;
- ensuring, whenever possible, that female personnel are present during the interrogation of female detainees; and
- ensuring, whenever possible, women's participation in decision-making in peace processes.

### *c) Displaced women*

Recognizing the great number of women among displaced persons, including in their role as heads of households, States take appropriate measures to ensure their physical and mental integrity, as well as to respect their dignity. Particular attention should be paid to ensuring their meaningful participation in decision-making, to

protective measures for internally displaced persons against gender-based violence, such as location and protection of shelter, identified support and reporting systems, as well as access to female and child health-care services and those who provide it.

### **Objective 2.3: To enhance the protection of persons with disabilities during armed conflicts**

States recognize that under international humanitarian law, persons with disabilities may fall within the category of the wounded and sick or civilians enjoying particular respect and protection, such as the infirm.

States take all possible measures to ensure access by persons with disabilities to the specific medical care and attention, physical rehabilitation, as well as socioeconomic inclusion required by their condition, especially in remote rural areas.

States, in cooperation with components of the Movement, facilitate steps taken to search for, collect and evacuate persons with disabilities to ensure the appropriate medical care and attention, physical rehabilitation, as well as socio-economic inclusion, required by their condition, in accordance with international humanitarian law.

States and components of the Movement take the specific needs of persons with disabilities into account in the planning, delivery and monitoring of their humanitarian assistance efforts, including with regard to access to shelter, water, sanitation, food distribution, education, medical care, physical rehabilitation, transportation, communication, and socio-economic inclusion programmes. They consult, when feasible, at all relevant stages of planning and implementation of their humanitarian assistance activities with the persons themselves, their families or local organizations of persons with disabilities.

Donor States consider the specific needs of persons with disabilities with regard to accessibility of humanitarian assistance in their funding guidelines.

### **Objective 3: Enhanced protection of journalists and the role of the media with regard to international humanitarian law**

States and components of the Movement recognize that the work of journalists, other media professionals and associated personnel (hereinafter: journalists) may make an important contribution to the public knowledge about and the recording of information on violations of international humanitarian law. Thereby, journalists may assist in preventing violations of international humanitarian law as well as in facilitating the fight against impunity for such violations. States and components of the Movement also recognize that journalists may affect the respect for international humanitarian law in other ways, such as the obligation to protect detainees against public curiosity.

States reaffirm that journalists engaged in dangerous professional missions in areas of armed conflict are civilians and shall not be the object of attacks, unless

and for such time as they are directly participating in hostilities. This is without prejudice to the right of war correspondents accredited to the armed forces to the status of prisoners of war provided for in Article 4.A.4 of the Third Geneva Convention.

States also reaffirm that media equipment and installations shall be considered as civilian objects and in this respect shall not be the object of attack, unless they make an effective contribution to military action by their nature, location, purpose or use, such as by the transmission of military intelligence or military orders, and their total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

States integrate in the international humanitarian law training of members of their armed forces specific components on the protection of journalists in armed conflicts.

States and components of the Movement continue their efforts to disseminate relevant international humanitarian law on the rights and responsibilities of journalists, as well as to provide security training to journalists to prepare them for eventualities arising in armed conflicts.

States take adequate measures in their domestic legal orders, including criminal and mutual legal assistance legislation, to prevent and sanction serious violations of international humanitarian law against civilians, including against journalists, and ensure that such violations do not go unpunished.

#### **Objective 4: To improve the incorporation and repression of serious violations of international humanitarian law**

##### **a) National incorporation**

States – where applicable, with the assistance of national international humanitarian law commissions or similar bodies – identify the extent of all their international obligations related to the repression of serious violations of international humanitarian law and ensure their incorporation in the domestic legal order.

In light of the right of families to know the fate of their relatives as referred to in Article 32 of the 1977 Additional Protocol I, as applicable, States consider enacting appropriate legislation or arrangements to ensure adequate participation and representation of victims and their families as well as access to justice and protection of victims and witnesses, especially of women and children, in proceedings before their courts and in other transitional justice mechanisms concerning serious violations of international humanitarian law.

States recognize the importance of redressing gross violations of international humanitarian law. States also consider providing appropriate means to assist victims of violations of international humanitarian law together with appropriate resources for the implementation of these mechanisms, recalling in this regard the work of the ICRC discussing the framework of reparations, taking

into account the primary role of States in the development of international humanitarian law.

States recognize the importance of complementary approaches to criminal sanctions and put in place mechanisms for the effective application of disciplinary, financial or other sanctions on violations of international humanitarian law.

## b) Roles of Movement and States

National Societies, within their mandate and in their role as auxiliaries to the public authorities in the humanitarian field, assist States in the incorporation of serious international humanitarian law violations into the domestic legal orders, in particular where they work in the framework of national international humanitarian law commissions or similar bodies. The ICRC continues to provide technical assistance for the incorporation of such crimes.

States, in cooperation with the ICRC and National Societies, pay special attention to the dissemination of international humanitarian law to legal professionals, including prosecutors and judges. States commit to fulfil their existing obligations under international humanitarian law, including the Geneva Conventions, and to ensure respect thereof in accordance with Article 1 common to the four Geneva Conventions.

The ICRC will continue its efforts to make the content of international humanitarian law accessible to parties to armed conflicts and to provide appropriate training to them so that the consequences of non-compliance are adequately internalized by their members.

States cooperate with one another and with international criminal tribunals, in accordance with their obligations under applicable international law, to ensure:

- adequate knowledge of international humanitarian law by legal professionals, including lawyers, prosecutors and judges;
- gathering and sharing of evidence;
- provision of information to victims and their communities on their rights and the protection of victims and witnesses;
- respect for rights of fair trial of the accused;
- provision of an appropriate remedy to victims;
- enforcement of sentences.

## Objective 5: Arms transfers

States and components of the Movement note the importance attached by previous International Conferences to ensuring that the use of all weapons in armed conflict complies with the principles and rules of international humanitarian law.

The ICRC and National Societies promote public awareness of the human cost of poorly regulated transfers of arms and ammunition.



The ICRC and National Societies, aware that work is under way in the UN context to address this issue, encourage effective arms transfer controls that include criteria so that arms do not end up in the hands of those who may be expected to use them to violate international humanitarian law.

Recalling their obligation to respect and ensure respect for international humanitarian law, States strengthen controls on the transfer of weapons so that they do not end up in the hands of those who may be expected to use them to violate international humanitarian law, and, in this context recall Resolution 3 of the 30th International Conference of 2007 and Final Goal 2.3. of the Agenda for Humanitarian Action, adopted by the 28th International Conference of 2003.

Reaffirming Final Goal 2.3 of the Agenda for Humanitarian Action, adopted by the 28th International Conference of 2003, States should make respect for international humanitarian law one of the important criteria on which arms transfer decisions are assessed. States are encouraged to make efforts to incorporate such criteria into national laws or policies and into regional and global norms on arms transfers.

## **Resolution 3 of the 31st International Conference of the Red Cross and Red Crescent**

### **MIGRATION: ENSURING ACCESS, DIGNITY, RESPECT FOR DIVERSITY AND SOCIAL INCLUSION**

The 31st International Conference of the Red Cross and Red Crescent (International Conference),

*acknowledging* the importance of respect for the human dignity and protection of all migrants, and expressing its deep concern about the continued suffering of those migrants that may live outside conventional health, social and legal systems and for a variety of reasons may not have access to processes which guarantee respect for their fundamental rights,

*recognizing* the many benefits of migration and acknowledging the contributions of migrants to countries of origin, transit and destination as well as the challenges that international migration may present,

*recalling* the Declaration “Together for humanity” (Declaration) adopted by the 30th International Conference, which reaffirmed “the importance of examining ways and means to reinforce international cooperation at all levels to address the humanitarian concerns generated by international migration.”,

*recalling* further that the Declaration acknowledged “the role of governments, within the framework of national laws and international law, especially international human rights law, refugee law and international humanitarian law, to address the humanitarian needs of persons negatively affected by migration, including families and communities, and to take effective measures.”,

*reaffirming* as set out in the Declaration “the role of National Societies, based on the principles of humanity and impartiality, and in consultation with public authorities, in providing humanitarian assistance to vulnerable migrants, irrespective of their legal status.”,

*expressing* concern about the often alarming humanitarian situation of migrants in situations of vulnerability, at all stages of their journey and ongoing risks that migrants, in situations of vulnerability, face in regards to their dignity, safety, access to international protection as well as access to health care, shelter, food, clothing and education,

*recalling* previous commitments made by States and the International Red Cross and Red Crescent Movement (Movement) to engage in the promotion of non-violence, respect for diversity and social inclusion of all migrants,

*recalling* the responsibility of National Red Cross and Red Crescent Societies (National Societies) to act at all times in accordance with the Fundamental Principles and the Statutes of the Movement,

*welcoming* the background report highlighting the progress achieved in carrying out the commitments undertaken at the 30th International Conference

and the Policy on Migration adopted by the 17th Session of the General Assembly of the International Federation of Red Cross and Red Crescent Societies (International Federation) and endorsed by the Council of Delegates in 2009,

*recognizing* that acting in accordance with the Statutes of the Movement, in particular Article 3.1, National Societies should enjoy effective access to all migrants, irrespective of their legal status, in order to deliver humanitarian assistance and protection services without being penalized, both in their role as auxiliaries to the public authorities in the humanitarian field at all levels and under their general humanitarian mandate,

1. *requests* States, in consultation with National Societies, to ensure that relevant laws and procedures are in place to enable National Societies, in conformity with the Statutes of the Movement and, in particular, the Fundamental Principles, to enjoy effective and safe access to all migrants without discrimination and irrespective of their legal status;
2. *calls upon* States, within the framework of applicable international law, to ensure that their national procedures at international borders, especially those that might result in denial of access to international protection, deportation or interdiction of persons, include adequate safeguards to protect the dignity and ensure the safety of all migrants. States are also called on, in line with such relevant international law and national legislation, to grant to migrants appropriate international protection and to ensure their access to relevant services, such as Restoring Family Links. States and National Societies are invited to consult in the implementation of the aforementioned safeguards, as appropriate;
3. *strongly encourages* enhanced cooperation between public authorities, at all levels, and National Societies to pursue practical actions in formal and non-formal settings:
  - a. to promote respect for diversity, non-violence and social inclusion of all migrants;
  - b. to enhance cultural awareness between migrant and local communities;
  - c. to promote through formal and non-formal education, humanitarian values and the development of interpersonal skills to live peacefully together; and
  - d. to enhance social cohesion through the engagement of local and migrant populations and civil society organizations in voluntary service, community and sport programmes;
4. *encourages* States and the components of the Movement, in conformity with the Fundamental Principles and Statutes of the Movement, to continue to collaborate and build partnerships which recognize the role of the Movement in working with migrants and which could include relevant partners from international organizations (such as the International Organization for Migration (IOM), the Office of the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Office

on Drugs and Crime (UNODC)), nongovernmental organizations and the private sector;

5. *requests* the International Federation to submit to the 32nd International Conference in 2015 a report on the measures taken in implementing the provisions of this resolution.

## **Resolution 4 of the 31st International Conference of the Red Cross and Red Crescent**

### **FURTHERING THE AUXILIARY ROLE: PARTNERSHIP FOR STRONGER NATIONAL SOCIETIES AND VOLUNTEERING DEVELOPMENT**

The 31st International Conference of the Red Cross and Red Crescent (International Conference),

In terms of

#### **(I) Furthering the auxiliary role and strengthening National Red Cross and Red Crescent Societies (National Societies):**

*recalling* Resolution 2 of the 30th International Conference (Geneva, 26–30 November 2007) whereby States and National Societies, the latter as auxiliaries to their public authorities in the humanitarian field, enjoy a specific and distinctive partnership at all levels, entailing mutual responsibilities and benefits, and based on international and national laws, in which the State and the National Society agree on the areas in which the latter supplements or substitutes for public humanitarian services,

*recalling* that National Societies, in the fulfilment of their auxiliary role, may provide valuable support to their respective public authorities, including in the implementation of their obligations under international law (in particular, international humanitarian law) and by cooperation in related tasks, such as health and social services, disaster management and restoring family links,

1. *calls upon* National Societies and their respective public authorities at all levels to pursue and enhance balanced partnerships with clear and mutual responsibilities;
2. *encourages* National Societies to initiate or pursue a dialogue, as required, with their national authorities with a view to strengthening their legal base in domestic law, in accordance with the standards of the International Red Cross and Red Crescent Movement (Movement), through sound Red Cross Red Crescent laws, so as to strengthen their auxiliary role in the humanitarian field and to formalize the commitment of national authorities to respect the duty and ability of National Societies to abide by the Fundamental Principles of the Movement, in particular the principle of independence;
3. *requests* States, National Societies, the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (International Federation) to enhance their work to strengthen the legal base of National Societies, specifically in regard to the statutes of National

Societies in view of creating more effective, accountable and transparent National Societies that are able to adhere at all times to the Fundamental Principles, and welcomes the continued commitment of National Societies to achieve this goal;

4. *calls* upon States to create the conditions for more favourable and effective access for National Societies to people in need, which is a primary challenge in organizing a sustainable response;
5. *encourages* relevant government departments and other donors to provide a predictable and regular flow of resources adapted to the operational needs of their National Societies;
6. *stresses* in this regard the importance of States' long-term support and resourcing to contribute to the good functioning and development of National Societies as their auxiliaries in the humanitarian field as appropriate to ensure relevance of National Society activities within their national context, ability to undertake core functions, such as emergency response, as well as National Society stability, adaptability, accountability through sustainable organizational development;
7. *invites* the International Federation and the ICRC, in consultation with States and National Societies, to make available and further develop relevant information material for National Societies, the public authorities and other interested bodies, including guidance on partnerships with public administration, legal advice and best practices on Red Cross Red Crescent law with examples of tax exemptions and specific provisions on resource distribution.

## **(II) Volunteering development**

*recognizing* that volunteers have been at the core of the Movement since it was first conceived of in 1859 and that today, as ever, they are central to all the activities of the Movement, contributing to the success of National Societies, and assisting millions of vulnerable people in times of greatest need,

*acknowledging* thereby that volunteer development is a key prerequisite to strengthening National Societies, an essential element of their operational efficiency and of the role they play as auxiliaries to the public authorities in the humanitarian field,

*recalling* the Fundamental Principle of voluntary service, and the centrality of volunteering and the spirit of voluntary service within the Movement,

*recognizing* the outstanding contribution of 13.1 million Red Cross and Red Crescent volunteers to meeting the needs of vulnerable people, and the opportunity for public authorities at all levels to take positive actions to understand and improve the environment within which volunteers operate in order for National Societies to be able to increase the scale and the scope of volunteer service delivery,

*recalling* the Youth Declaration adopted by the Red Cross and Red Crescent volunteers at the commemoration of the 150th anniversary of the battle of Solferino in 2009, reiterating their commitment to promote the cause of humanity worldwide,

*recognizing* the wider benefits of volunteering within society, and that public authorities have a responsibility to deepen understanding of the value of, and take practical measures to encourage volunteering,

*understanding* that one such practical measure includes developing applicable legal and policy contexts in which volunteering occurs,

*recalling* that the 27th International Conference in 1999 recognized the importance of volunteers for National Societies, and Resolution 1, Annex 2 (Plan of Action), Final Goal 3.3 para. 13(b) placed the responsibility on States to “review and where necessary, introduce or update legislation so as to facilitate the efficient work of relevant voluntary organizations,”

*recalling* the pledge by the International Federation at the 27th International Conference to, *inter alia*, “cooperate with governments to broaden the existing legal, fiscal and political bases for volunteering, and to mobilize increased public support,”

*recalling* the guidance document issued in 2004 by the International Federation, the Inter-Parliamentary Union and the United Nations Volunteers, *Volunteerism and Legislation: A Guidance Note* and its valuable contribution,

*noting with appreciation* the work done by the United Nations Volunteers in undertaking a study in 2009, *Laws and Policies Affecting Volunteerism Since 2001*, culminating in the United Nations Volunteers 2010 guidance note on “*Drafting and Implementing Volunteerism Laws and Policies*”,

*noting* also with appreciation the International Federation’s complementary study on the specific legal issues arising in regard to the particular context of volunteers working in emergency and disaster situations,

*understanding* that in order to ensure a protective and enabling legal environment for volunteering to function, in all settings including emergencies and disaster situations, the following aspects of national volunteering law and policy are critical:

- i. appropriate legal recognition of volunteers/volunteering activities,
- ii. clarity with regard to employment and volunteering,
- iii. laws facilitating volunteering from all sectors of society, regardless of employment status, gender, age, and any other forms of discrimination,
- iv. appropriate protection for volunteers including clarity in responsibilities and liabilities and assurances for the health and safety of volunteers,

*noting* the Declaration of the 1st Global Volunteer Conference jointly organized by the United Nations Volunteers and the International Federation as part of the tenth anniversary of the International Year of Volunteers recognizing the role of volunteers in contributing toward the Millennium Development Goals (MDGs) and sustainable development,

1. *in this regard calls upon* States and National Societies to create and maintain an enabling environment for volunteering. In particular, respective public authorities at all levels are encouraged to:
  - a. in light of the work done by the United Nations Volunteers and the International Federation, undertake a review of relevant

- national law and policies and work to strengthen such frameworks as appropriate;
  - b. ensure safe access for Red Cross and Red Crescent volunteers to all vulnerable groups in their respective countries;
  - c. integrate volunteer capacity into domestic emergency response plans at all levels;
  - d. promote volunteering through measures encouraging citizens' engagement in such activities;
  - e. deepen their understanding of the role and impact that Red Cross and Red Crescent volunteers have in national social and economic development, as well as in responding to crises;
  - f. facilitate the voluntary work of their National Society and support its efforts to mobilize recruit, train and retain volunteers;
2. *encourages* National Societies to include adequate provisions defining the status, as well as the rights and duties, of volunteers in their statutory and constitutional base instruments.



## **Resolution 5 of the 31st International Conference of the Red Cross and Red Crescent**

### **HEALTH CARE IN DANGER: RESPECTING AND PROTECTING HEALTH CARE**

The 31st International Conference of the Red Cross and Red Crescent (International Conference),

*noting* that the purpose of this resolution is to raise awareness and promote preparedness to address the grave and serious humanitarian consequences arising from violence against the wounded and sick, health-care services, personnel, facilities and medical transports,

*stressing* that this resolution does not give rise to new obligations under international law,

*also stressing* that this resolution does not expand or modify the mandates, roles and responsibilities of the components of the International Red Cross and Red Crescent Movement (Movement) as prescribed in the Statutes of the Movement,

*recognizing* the importance of the auxiliary role of National Red Cross and Red Crescent Societies (National Societies) to their public authorities in the humanitarian field,

*reaffirming* the roles and responsibilities of the International Committee of the Red Cross (ICRC) and National Societies in responding to the needs of the wounded and sick in situations of armed conflict,

*recalling* that in accordance with Article 5 of the Statutes of the Movement, the ICRC operates mainly in armed conflicts and often together with National Societies, and bearing in mind that it may take any humanitarian initiative in situations of violence as prescribed in the Statutes on a case-by-case basis and acts only with the full knowledge and consent of the State concerned, in accordance with its roles and responsibilities prescribed in such Statutes,

*deeply concerned* that the wounded and sick might be prevented from receiving the care and protection that they require by attacks and other impediments to the delivery of health care, and by threats and attacks endangering health-care personnel and facilities, and medical vehicles, and services to the wounded and sick,

*noting* that providing adequate health care for the wounded and sick and the civilian population and securing access for medical services lies at the heart of the mission of the Movement, and is one of its main priorities, and recognizing the unique, privileged and complementary role of the components of the Movement in providing preventive, curative and rehabilitative health care and humanitarian relief to persons in need,

*recalling* that the respect and protection of the wounded and sick, and of authorized medical personnel, facilities and transports, are enhanced through the

use of the distinctive emblems recognized by the Geneva Conventions and, where applicable, their Additional Protocols,

*recalling* Resolution 3 of the 30th International Conference, on the “Reaffirmation and implementation of international humanitarian law: Preserving human life and dignity in armed conflict,” in particular “the obligation to respect and to protect medical personnel, including Red Cross and Red Crescent workers, their means of transport, as well as medical establishments and other medical facilities at all times, in accordance with international humanitarian law,”

*expressing* its appreciation for the work and efforts of all the components of the Movement that have engaged in addressing this important humanitarian concern in their operations throughout the world, and welcoming the global communication campaign, which aims to raise international awareness of the violence, both real and threatened, against health-care workers and facilities and the wounded and sick and to promote measures to mitigate them,

*taking note* of the research done by the ICRC for preparing *Health Care in Danger: A Sixteen-Country Study, July 2011*,

*bearing in mind* that international humanitarian law applies only to situations of armed conflict, and *recognizing* that international humanitarian law and applicable international human rights law provide a framework for protecting health care,

*recalling* the basic obligation to provide all possible health care to the wounded and sick without discrimination,

*stressing* in this regard, the prohibitions against attacking the wounded and sick and health-care personnel and facilities, as well as medical vehicles, against arbitrarily denying or limiting access for the wounded and sick to health-care services, and against molesting, threatening or punishing health-care personnel for carrying out activities compatible with medical ethics,

*recognizing* the importance of health-care personnel having sufficient practical knowledge of their rights and obligations, and the imperative need for them to have unimpeded access to any place where their services are required in accordance with international law,

*emphasizing* that domestic implementation measures, including training and education, are prerequisites for ensuring that States and their armed forces and security forces comply with their obligations under relevant international legal regimes to respect medical services and provide safe access for health-care personnel to the wounded and sick,

*stressing* that States should ensure an effective system for establishing criminal responsibility for crimes committed against health-care personnel and facilities, and medical vehicles, and against the wounded and sick, in their domestic courts or under competent international jurisdictions where applicable; and that they should also ensure means for the effective suppression of such crimes,

1. *recalls* the obligations to respect and protect the wounded and sick, as well as health-care personnel and facilities, and medical vehicles, and to take all reasonable measures to ensure safe and prompt access for the wounded and

- sick to health care, in times of armed conflict or other emergencies, in accordance with the applicable legal framework;
2. *urges all* States that have not yet done so to intensify their efforts to adopt the required domestic *implementation* measures based on relevant international legal obligations pertaining to the protection of the wounded and sick and health-care services, including, *inter alia*, through the adoption of legislative, regulatory or practical measures;
  3. *calls upon* States to fully respect and implement their obligations under the relevant provisions of international humanitarian law concerning the protection and use of the distinctive emblems, and *further calls upon* States to adopt, where appropriate, the legal measures, including enforcement measures, pertinent to the use and the protection of the distinctive emblems recognized by the Geneva Conventions and their Additional Protocols;
  4. *calls upon* States to ensure, when circumstances require, adequate marking of medical facilities and vehicles with the distinctive emblems and signs, and their use of distinctive signals for the purposes of identification and protection;
  5. *calls upon* States to ensure that their armed forces and security forces implement all applicable international legal obligations in relation to armed conflict, including situations of occupation, with regard to protection for the wounded and sick, as well as for health-care services, including through the development and adoption of appropriate doctrine, procedures, guidelines and training;
  6. *calls upon* States to ensure effective investigation and prosecution of crimes committed against health-care personnel – including Movement personnel – their facilities and their means of transportation, especially attacks carried out against them, and to cooperate to this end, in conformity with their international obligations, at the inter-State level and with international criminal tribunals and courts, and *calls upon* States to prevent the deliberate and arbitrary obstruction of the delivery of health care;
  7. *calls upon* the ICRC, National Societies and the International Federation of Red Cross and Red Crescent Societies (International Federation) to enhance understanding, on the national and the international level, of the major humanitarian problem of violence against patients and health-care workers and facilities, and work with States and others to identify and promote potential solutions;
  8. *calls upon* National Societies, the ICRC and the International Federation to continue supporting and strengthening the capacity of local health-care facilities and personnel around the world and to continue providing training and instruction for health-care staff and volunteers by developing appropriate tools on the rights and obligations of health-care personnel and on protection for and the safety of health-care delivery;
  9. *calls upon* National Societies with the support of the ICRC and the International Federation, to train their staff and volunteers in the provision of effective medical assistance and in matters pertaining to their own security;

10. *calls upon* the ICRC, National Societies, and where appropriate, the International Federation, to coordinate and cooperate with other humanitarian actors to ensure that the wounded and sick are provided with adequate health care;
11. *calls upon* National Societies to engage with their respective States, in accordance with their status and role as auxiliaries to the public authorities in the humanitarian field, to explore ways to address the violence, both real and threatened, against health-care workers and facilities, and beneficiaries, in their own country;
12. *invites* National Societies to increase their efforts to disseminate information on the obligations under international humanitarian law and human rights law to respect and protect health care, and to promote and support the domestic implementation of these obligations;
13. *encourages* National Societies to intensify their commitment and efforts to adopt concrete measures for, *inter alia*, creating safer access for their health-care services and personnel to people affected in situations covered in the present resolution;
14. *calls upon* the ICRC to initiate consultations with experts from States, the International Federation, National Societies and other actors in the health-care sector, with a view to formulating practical recommendations for making the delivery of health care safer in situations covered in the present resolution, and to report to the 32nd International Conference in 2015 on the progress made.

## **Resolution 6 of the 31st International Conference of the Red Cross and Red Crescent**

### **HEALTH INEQUITIES WITH A FOCUS ON WOMEN AND CHILDREN**

The 31st International Conference of the Red Cross and Red Crescent (International Conference),

*agreeing* with the World Health Organization that “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being” and *noting* that according to the World Health Organization: “[w] here systematic differences in health are judged to be avoidable by reasonable action they are, quite simply, unfair. It is this that we label health inequity. Putting right these inequities – the huge and remediable differences in health between and within countries – is a matter of social justice. Reducing health inequities is, for the Commission on Social Determinants of Health (hereafter, the Commission), an ethical imperative. Social injustice is killing people on a grand scale.”,

*recognizing* that to reach Millennium Development Goal 3, Millennium Development Goal 4 and Millennium Development Goal 5, social and gender inequalities need to be addressed,

*being fully aware* that health inequities are not limited to women and children,

*noting for* the purposes of this resolution that whenever speaking about children, adolescents, and young adults it should be understood that actions proposed should be undertaken with due regard to age and maturity,

*being concerned* that health inequities in many circumstances may be the result of human rights violations, and other economic and social factors,

*recognizing* that no single actor can tackle health inequities alone,

*recognizing* that addressing health inequities includes addressing social determinants of health,

*acknowledging* that reducing health inequities requires the strong leadership, political will, and financial commitment of governments as well as strong international cooperation,

*recognizing* that dismantling barriers to health equity can strengthen community resilience,

*recalling* the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention on the Elimination of all Forms of Discrimination against Women as important legal frameworks to strengthen protection against health inequities for women and children,

*recalling* Resolution 2 of the 30th International Conference recognizing the special partnership between public authorities and National Red Cross and Red Crescent Societies (National Societies) as auxiliaries in the humanitarian field, a

partnership that entails mutual responsibilities and benefits. In agreement with public authorities, National Societies deliver humanitarian services, many of which contribute to removing barriers to care and increasing the equitable delivery of prevention, treatment, care and support,

1. *calls on* States and National Societies, in accordance with the special status of National Societies as auxiliaries to the public authorities in the humanitarian field, to work together to commit to reducing health inequities, beginning with removing obstacles to reproductive, maternal, newborn and child health through a needs-based approach informed by human rights, with a particular emphasis on the rights of the child;
2. *encourages* international organizations, such as the United Nations, the World Health Organization and the World Bank, and relevant regional organizations to increase their efforts in reducing health inequities, including through implementation of the 2011 Rio Political Declaration on Social Determinants of Health;
3. *invites* partnership at community, national, regional and global levels with States, civil society, donors and the private sector to reduce health inequities most quickly and effectively;
4. *strongly encourages* States and calls upon National Societies to work together and commit to action in the following three key areas, articulated to guide a needs-based and strategic approach to health inequities: 1) provision of health-care services, 2) promotion of knowledge and 3) commitment to gender equality and non-discrimination.

## **I. Provision of health-care services: Provide prevention, treatment, care and support when and where they are needed to women and children**

*National Societies are called upon to:*

- 1) scale up efforts to bridge gaps between communities and health facilities, and between pre-pregnancy and child care, and improve access to prevention, treatment, care and support to those women and children, as well as adolescents and young adults, who would otherwise have limited or no access;
- 2) establish links with States and civil society organizations to survey, evaluate and measure the state of health inequities and the impact of policies and programmes to reduce health inequities, using existing frameworks and tools;
- 3) use their status as auxiliaries to their public authorities at all levels to engage in dialogue, review existing health plans and where necessary advocate for equity;
- 4) monitor and evaluate progress towards equitable health, including access to and quality of reproductive, maternal, newborn and child health, as well as that of adolescents and young adults;

*States are strongly encouraged to:*

- 5) remove legal and regulatory barriers in the formal health sector and other government services where barriers exist;
- 6) allocate available health resources according to need;
- 7) aim at ensuring available and safe, accessible and affordable and adapted to the local context, quality health care for all women and children;
- 8) aim at improving prevention, treatment, care and support for women and children who have the least access to health care without compromising the quality of prevention, treatment, care and support for other segments of society;
- 9) encourage the formal health sector to ensure non-discrimination and improve the quality and character of patient-provider interactions by increasing ethical practices and professional health-care standards: possible examples include posting patients' rights in health centres, adopting ethical charters, forming independent ethics commissions and training health-care workers on ethical practices and gender sensitivity;
- 10) address the critical shortage of 'human resources for health' and to support national strategies for 'human resources for health' retention, education and deployment;
- 11) further research into health inequities in countries where, in addition to the burden of reproductive events, women also face a disproportionate burden of chronic diseases.

## **II. Promotion of knowledge: Provide reliable and accurate information on health and encourage health-seeking behaviours, for women and children, as well as for adolescents and young adults**

*National Societies are called upon to:*

- 1) scale up and measure efforts in providing reliable, accurate information on reproductive, maternal, newborn and child health;
- 2) scale up and measure efforts to encourage appropriate health-seeking behaviours and break down local barriers to safe motherhood and healthy childhood;
- 3) engage in advocacy on health-seeking behaviour and strengthen partnerships with States and civil society organizations to extend advocacy effectiveness;

*States are strongly encouraged to:*

- 4) recognize that quality, reliable, and up-to-date health education is essential to reducing health inequities and to enabling women and, when appropriate, children, adolescents and young adults, to make informed, autonomous decisions on health;

- 5) take the lead in providing education on healthy behaviour and practices that account for the specific local context;
- 6) ensure that education campaigns target the information needs of the population as a whole and pay special attention to the needs of those in vulnerable situations;
- 7) stimulate multi-sectoral action to support healthy choices;
- 8) create policies that encourage appropriate health-seeking behaviours and enable health promotion strategies;
- 9) involve civil society organizations in implementing campaigns to disseminate health information.

### **III. Commitment to gender equality and non-discrimination: Promote gender equality, non-discrimination and end violence against women and children**

*National Societies are called upon to:*

- 1) scale up efforts for social inclusion by non-discrimination programming and by ending violence against women and children;
- 2) set the example of gender equality in their own policies and programmes and to serve as role models for governments, civil society organizations and the private sector;
- 3) as auxiliaries, encourage States to adopt the principle of equity in legislation and public policies, and set the example of ensuring children's rights by considering the needs and rights of children in programme and policy making, as well as serving as role models for States, civil society organizations and the private sector;
- 4) encourage women for greater decision making and ownership and enable men to take on their responsibilities linked to sexual activity and fatherhood;

*States are strongly encouraged to:*

- 5) make a firm commitment to gender equality, non-discrimination, and to ending violence against women and children, in their constitutions, legislation and national policies, including health policies, and to ensure appropriate enforcement mechanisms;
- 6) engage in gender mainstreaming in programmes and policies;
- 7) empower women and girls, and engage men and boys in empowering women and girls, in the planning process and delivery of outreach on gender equality, non-discrimination, and ending violence against women and children, and engage men and boys in challenging damaging gender stereotypes;
- 8) give special attention to early child development in all public policies and social and health services.



## **Resolution 7 of the 31st International Conference of the Red Cross and Red Crescent**

### **STRENGTHENING NORMATIVE FRAMEWORKS AND ADDRESSING REGULATORY BARRIERS CONCERNING DISASTER MITIGATION, RESPONSE AND RECOVERY**

The 31st International Conference of the Red Cross and Red Crescent (International Conference),

*concerned* about the growing impact of natural disasters on the lives, livelihoods and well-being of people around the world, and in particular the poorest and most vulnerable communities,

*recalling* Resolution 4 of the 30th International Conference in 2007, which adopted the Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance (also known as the “IDRL Guidelines”) and encouraged States to make use of them,

*recalling* Resolutions 65/264 and 65/133 of 2010, 64/251 and 64/76 of 2009, and 63/141, 63/139 and 63/137 of 2008 of the United Nations General Assembly and Resolutions 2010/1 of 2010, 2009/3 of 2009, and 2008/36 of 2008 of the UN Economic and Social Council, which equally encouraged States to strengthen their regulatory frameworks for international disaster assistance, taking the IDRL Guidelines into account,

*recalling* Final Goal 3.1 of the Agenda for Humanitarian Action adopted by the 28th International Conference in 2003, which called on States to “review their existing legislation and policies to fully integrate disaster risk reduction strategies into all relevant legal, policy and planning instruments in order to address the social, economic, political and environmental dimensions that influence vulnerability to disasters.”,

*recalling* the Hyogo Framework for Action of 2005, which called on States, *inter alia*, to make disaster risk reduction a national and local priority with a strong institutional basis for implementation, including through developing policy, legislative and institutional frameworks, allocating dedicated resources and promoting community participation,

*noting* that, at the 15th General Assembly of the International Federation of Red Cross and Red Crescent Societies (International Federation) in 2005, National Red Cross and Red Crescent Societies (National Societies) determined to scale up the capacity of the International Federation and its members to provide emergency shelter in their response to the humanitarian needs following natural disasters and endorsed the International Federation’s offer to the Emergency Relief Coordinator to take a leadership role in the global “cluster” system in this respect,

*welcoming* the International Federation’s background documents on progress in the implementation of the IDRL Guidelines, on law and disaster risk

reduction at the community level, and on addressing regulatory barriers to the rapid and equitable provision of emergency and transitional shelter after disasters,

*welcoming* the important progress made thus far in implementing the IDRL Guidelines at the national level in some States and in mainstreaming their use at the regional and global levels,

*noting with concern* the International Federation's finding that many States' legal and institutional frameworks nevertheless remain under-prepared to manage common regulatory problems in international disaster response operations,

*noting with concern* the shared findings of the International Federation, the United Nations International Strategy for Disaster Reduction's (UNISDR) Mid-Term Review of the Hyogo Framework for Action, and the Global Network of Civil Society Organizations for Disaster Reduction's surveys of 2009 and 2011 that progress in implementing effective disaster risk reduction action is often faltering at the community level and that many communities feel inadequately engaged and supported on the issue,

*noting with concern* the International Federation's finding that regulatory barriers are among the biggest obstacles the Red Cross and Red Crescent and its humanitarian partners face in providing emergency and transitional shelter in a rapid and equitable manner after disasters, may be an important cause of the prolonged suffering of affected persons,

*reaffirming* that States have the primary duty to take effective action to protect their citizens from the effects of natural disasters, to provide them with any necessary humanitarian assistance in their aftermath as well as to promote their recovery, and that National Societies are committed to supporting them as their auxiliaries in the humanitarian field,

*reaffirming* the sovereign right of affected States to seek, accept, coordinate, regulate and monitor disaster relief and recovery assistance provided by assisting actors in their territory,

## **Strengthening legal preparedness for international disaster response**

1. *reiterates* the urgency for States to be prepared to facilitate and regulate any international disaster assistance they may require, in order to ensure that the affected persons receive timely and effective relief;
2. *calls on* those States that have not already made use of the IDRL Guidelines to examine and, where appropriate, strengthen their national legal, policy and/or institutional frameworks to consider doing so, with support from their National Societies, the International Federation, the United Nations and other relevant partners;
3. *encourages* States and National Societies to continue to promote the IDRL Guidelines to relevant public authorities at all levels;
4. *invites* regional and international organizations to continue to make use of the IDRL Guidelines in developing and strengthening norms and

- mechanisms for cooperation in providing disaster relief and initial recovery assistance;
5. *welcomes* the efforts of the International Federation, the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) and the Inter-Parliamentary Union to develop a “Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance” to assist States interested in incorporating the recommendations of the IDRL Guidelines in their legal frameworks; and
  6. *invites* further consultation with States and other stakeholders on the use of the model act as a reference tool;

### **Enhancing disaster risk reduction at the community level through legislation**

7. *reiterates* that legislation is one of a number of key tools available to States to ensure that disaster risks are effectively addressed;
8. *affirms* that domestic legislation is one of a number of instruments able to promote community-level activity to reduce risks as well as the empowerment of communities with respect to risk reduction;
9. *encourages* States, with support from their National Societies, the International Federation and other relevant partners, such as the United Nations Development Programme (UNDP), to review their existing legislative frameworks at all levels to assess whether they adequately:
  - a. establish disaster risk reduction as a priority for community-level action;
  - b. promote disaster risk mapping at the community level;
  - c. promote communities’ access to information about disaster risk reduction;
  - d. promote the involvement of community representatives, National Societies, other civil society actors and the private sector in disaster risk reduction activities at the community level;
  - e. allocate adequate funding for disaster risk reduction activities at the community level;
  - f. ensure that development planning adequately takes into account local variability in hazard profiles, exposure, vulnerability and cost-benefit analysis;
  - g. ensure full implementation of building codes, land-use regulations and other legal incentives, taking into account areas of competence of various levels of government within countries to reduce disaster risk at the community level in a manner that does not impinge unnecessarily on livelihoods or rights; and
  - h. promote strong accountability for results in reducing disaster risks at the community level;
10. *invites* National Societies and States to cooperate in widely disseminating information about existing legislation relevant to disaster risk reduction at the community level;

## **Addressing regulatory barriers to the rapid and equitable provision of emergency and transitional shelter after disasters**

11. *affirms* the importance of finding practical solutions (both formal and informal) for quickly addressing regulatory barriers related to the provision of emergency and transitional shelter after disasters;
12. *calls on* States, the components of the International Red Cross and Red Crescent Movement and relevant humanitarian organizations to make every effort to assure equitable shelter assistance as between all persons in need, including as between those who possess formal legal title to land or real property and those who do not, as well as between women and men;
13. *encourages* States, with support from their National Societies, the International Federation and other relevant partners, such as the United Nations and the World Bank, to review their existing regulatory frameworks and procedures relevant to post-disaster shelter to determine if they adequately:
  - a. provide for rapid measures to assign and/or temporarily requisition land for emergency and transitional shelter, if needed;
  - b. address how to provide shelter assistance to persons who lack documented title to their damaged or destroyed homes;
  - c. reduce the potential for any ambiguities or disputes with regard to land or property ownership to delay or hamper the provision of emergency and transitional shelter;
  - d. allow for tailored building standards relevant to the emergency and/or transitional shelter context; and
  - e. include measures to mitigate the heightened risk of corruption associated with the provision of assistance in the wake of a natural disaster;

## **Extending support and partnerships**

14. *encourages* National Societies, as auxiliaries to their public authorities in the humanitarian field, to continue to provide advice and support to their governments in the development of effective legal and policy frameworks relevant to disaster management at all levels, in particular with respect to the areas of concern mentioned in this resolution;
15. *requests* the International Federation to continue to support National Societies and States in the field of disaster laws, including with respect to the areas of concern mentioned in this resolution, through technical assistance, capacity building, the development of tools, models and guidelines, advocacy and ongoing research;
16. *invites* the International Federation and National Societies to continue to strengthen their partnerships with relevant stakeholders in the area of disaster laws, including OCHA, UNISDR, UNDP and the World Bank, as well as other international, regional and non-governmental organizations and academic experts;

## Ensuring dissemination and review

17. *invites* States, the International Federation, and National Societies to disseminate this resolution to appropriate stakeholders, including by bringing it to the attention of relevant international and regional organizations;
18. *affirms* the role of the International Conference as a key international forum for continued dialogue on the strengthening of disaster laws and on recovery action in synergy with actions conducted by States and international organizations;
19. *requests* the International Federation, in consultation with National Societies, to submit a progress report on the implementation of this resolution to the 32nd International Conference.

## **Resolution 8 of the 31st International Conference of the Red Cross and Red Crescent**

### **IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING AND AGREEMENT ON OPERATIONAL ARRANGEMENTS, DATED 28 NOVEMBER 2005, BETWEEN THE PALESTINE RED CRESCENT SOCIETY AND THE MAGEN DAVID ADOM IN ISRAEL**

The 31st International Conference of the Red Cross and Red Crescent,

1. *notes* the adoption of Resolution 5 of the Council of Delegates on 26 November 2011 on the Implementation of the Memorandum of Understanding and Agreement on Operational Arrangements, dated 28 November 2005, between the Palestine Red Crescent Society and the Magen David Adom in Israel (See annex for the text of the resolution); and
2. *endorses* this resolution.

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#### **Annex – Resolution 5**

#### **ADOPTED RESOLUTION**

### **IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING AND AGREEMENT ON OPERATIONAL ARRANGEMENTS, DATED 28 NOVEMBER 2005, BETWEEN THE PALESTINE RED CRESCENT SOCIETY AND THE MAGEN DAVID ADOM IN ISRAEL**

The Council of Delegates,

*recalling the MoU signed by PRCS and MDA on 28 November 2005, in particular the following provisions:*

1. *MDA and PRCS will operate in conformity with the legal framework applicable to the Palestinian territory occupied by Israel in 1967, including the Fourth Geneva Convention of 1949 on the protection of Civilians in Time of War.*
2. *MDA and PRCS recognize that PRCS is the authorized national society in the Palestinian territory and that this territory is within the geographical scope of the*

*operational activities and the competences of PRCS. MDA and PRCS will respect each other's jurisdiction and operate in accordance with the Statutes and Rules of the Movement.*

3. *After the Third Additional Protocol is adopted and by the time MDA is admitted by the General Assembly of the International Federation of Red Cross and Red Crescent Societies:*
  - a. *MDA will ensure that it has no chapters outside the internationally recognized borders of the State of Israel;*
  - b. *Operational activities of one society within the jurisdiction of the other society will be conducted in accordance with the consent provision of resolution 11 of the 1921 international conference,*

*taking note*, with appreciation for his work, of the report presented to the Council by Minister (Hon.) Pär Stenbäck, the independent monitor appointed by the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (International Federation) with the agreement of MDA and the PRCS upon request of the International Conference to monitor progress achieved in the implementation of the MoU and the AOA of 28 November 2005 between the PRCS and the MDA,

*recalling* Resolution 5 adopted by the Council of Delegates on 25 November 2009 concerning the implementation of the MoU and AOA between PRCS and MDA,

*recalling* Resolution 5 adopted by the 30th International Conference of the Red Cross and Red Crescent concerning the implementation of the MoU and AOA between PRCS and MDA,

*reaffirming* the importance of operating in accordance with international humanitarian law and with the Statutes, rules, and Fundamental Principles of the International Red Cross and Red Crescent Movement (Movement),

*noting* that National Societies have an obligation to operate in compliance with the Constitution of the International Federation of Red Cross and Red Crescent Societies and the existing policy "on the protection of integrity of National Societies and bodies of the International Federation" adopted in November 2009,

*reaffirming* the necessity for effective and positive coordination between all components of the Movement of Red Cross and Red Crescent for the full implementation of the MoU between the PRCS and MDA,

1. *notes* the reported progress that has been made with respect to implementation and commends the efforts of both National Societies;
2. *notes with regret* that full implementation of the MoU has not yet been realized as observed by the monitor;
3. *strongly urges* MDA to fulfil its obligations without further delay and complete the efforts under way to bring its operations into compliance with the geographic scope provisions of the MoU;
4. *requests* the ICRC and the International Federation to reaffirm the mandate of the monitoring process and to continue to support and strengthen the monitoring process of the implementation of the MoU;

5. *decides* that the monitoring process will continue until such time as the MoU is implemented in full and requests that regular reports on the monitoring mechanism are issued as deemed necessary;
6. *requests* National Societies to respond favourably to any request for assistance and support in the monitoring process;
7. *requests* the ICRC and the International Federation to arrange for the provision of a report on implementation of the MoU to the next Council of Delegates and through it to the International Conference.



## Resolution 9 of the 31st International Conference of the Red Cross and Red Crescent

### OUR WORLD. YOUR MOVE – FOR HUMANITY

The 31st International Conference of the Red Cross and Red Crescent (International Conference),

*taking account* of the views expressed during this International Conference on its four main objectives – strengthening international humanitarian law, strengthening disaster laws, strengthening local humanitarian action and addressing barriers to health care,

*welcoming* the many pledges made by members and observers of this International Conference in pursuit of these four main objectives,

*taking note with appreciation* of the measures taken by States and the components of the International Red Cross and Red Crescent Movement to implement the resolutions and the Declaration “Together for humanity” as well as the associated pledges, as requested in Resolution 1 of the 30th International Conference, and *welcoming* the follow-up report prepared by the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (International Federation) on the progress made,

1. *urges* all members of the International Conference to include the resolutions adopted and their pledges made at the International Conference in their efforts to optimize interaction and partnerships among themselves;
2. *invites* all members of the International Conference to review in 2013 progress made with respect to the implementation of the resolutions of the International Conference, as well as of their pledges, and to report on their implementation to the 2015 International Conference;
3. *requests* the ICRC and the International Federation to report to the 32nd International Conference on the follow-up by International Conference members to the resolutions and pledges of this International Conference;
4. *decides* to hold an International Conference in 2015, the date and place of which is to be determined by the Standing Commission of the Red Cross and Red Crescent.



## REPORTS AND DOCUMENTS

# What's new in law and case law across the world

Biannual update on national legislation and case law  
July–December 2011

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The biannual update on national legislation and case law is an important tool in promoting the exchange of information on national measures for the implementation of international humanitarian law (IHL). The ICRC was entrusted with this task in a resolution adopted by the 26th International Conference of the Red Cross and Red Crescent in 1996.

The laws presented below were either adopted by states in the second half of 2011 (July–December) or collected during that period. They cover a variety of topics linked to IHL, including protection of the emblems, reparations for conflict victims, and prohibitions or restrictions on the use of certain weapons. The full texts of these laws can be found in the ICRC's database on national implementation at: <http://www.icrc.org/ihl-nat>.

### ICRC Advisory Service

The ICRC's Advisory Service on International Humanitarian Law aims to provide a systematic and proactive response to efforts to enhance the national implementation of international humanitarian law (IHL). Working worldwide, through a network of legal advisers, its three priorities are: to encourage and support adherence to IHL-related treaties; to assist states by providing them with the technical expertise required to incorporate international humanitarian law into their domestic legal frameworks; and to collect and facilitate the exchange of information on national implementation measures.

The inclusion of selected case law illustrates, among other things, the growing number of domestic prosecutions for violations of IHL and other international crimes, and shows the practical application of domestic implementing measures to punish these crimes. National IHL committees and other similar bodies are also increasing in number. More and more states find them an important tool in facilitating national implementation measures. The recent creation of an IHL committee in Turkmenistan has brought their total number worldwide to 101 at the end of 2011.

To further its implementation work, the ICRC organized a number of workshops and national and regional events during the period under review. Of particular note was the 31st International Conference of the Red Cross and Red Crescent.<sup>1</sup> This conference, which takes place every four years, brought together the States Parties to the Geneva Conventions, the world's National Red Cross and Red Crescent Societies, the International Federation of Red Cross and Red Crescent Societies, and the International Committee of the Red Cross in order to discuss the strengthening of IHL and humanitarian action. More than 2,000 delegates debated and adopted a series of resolutions on action to boost legal protection for victims of armed conflict, strengthen disaster law, enhance local humanitarian work, and address barriers to health care.

Universal participation in international treaties is a vital first step toward respect for life and human dignity in armed conflict, and is therefore a priority for the ICRC. In the period under review, seven of the twenty-eight IHL conventions and protocols were ratified or acceded to, showing a steady growth in the number of States Parties to the Protocols Additional to the 1949 Geneva Conventions and the Convention on Cluster Munitions. By the end of 2011 a total of sixty-seven states had become party to the latter treaty, which was adopted at the end of 2008 and came into force on 1 August 2010 (the complete list can be found at: <http://www.icrc.org/ihl>).

1 See: <http://www.rcrcconference.org/en/introduction.html> (last visited March 2012).

Conventions	States	Ratification date	Total number of ratifications (as of 31 December 2011)
2005 Protocol III additional to the 1949 Geneva Conventions	Armenia	12.08.2011	<b>59</b>
	Cook Islands	07.09.2011	
	Timor-Leste	29.07.2011	
2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	San Marino	26.09.2011	<b>144</b>
1998 Rome Statute of the International Criminal Court	Cape Verde	10.10.2011	<b>120</b>
	Maldives	21.09.2011	
	Philippines	30.08.2011	
	Vanuatu	02.12.2011	
1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction	Burundi	18.10.2011	<b>165</b>
2003 Protocol V of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as amended on 21 December 2001	Argentina	07.10.2011	<b>76</b>
	Poland	26.09.2011	

(Cont.)

<b>Conventions</b>	<b>States</b>	<b>Ratification date</b>	<b>Total number of ratifications (as of 31 December 2011)</b>
1997 Anti-Personnel Mine Ban Convention	South Sudan	11.11.2011	<b>159</b>
	Tuvalu	13.09.2011	
2008 Convention on Cluster Munitions	Afghanistan	08.09.2011	<b>67</b>
	Cook Islands	23.08.2011	
	Czech Republic	22.09.2011	
	Dominican Republic	20.12.2011	
	Italy	21.09.2011	
	Senegal	03.08.2011	
	Swaziland	13.09.2011	
	Trinidad and Tobago	21.09.2011	

## Ratifications July–December 2011

### National implementation of international humanitarian law

#### A. Legislation

##### Belarus

#### *Law of the Republic of Belarus No. 282-3 of 3 July 2011 on issues pertaining to fulfilment by the Republic of Belarus of its obligation under international humanitarian law to protect the emblems*

On 3 July 2011, the Republic of Belarus adopted Law No. 282-3 on protection of the emblems under the Geneva Conventions and their Protocols, amending the Belarus Criminal Code and the Law of the Republic of Belarus on the Use and Protection of the Red Cross and Red Crescent Emblems of 12 May 2000.

Law No. 282-3 extends the scope of the regulations on the use of the protected emblems by adding the term ‘red crystal’ in various provisions of the Criminal Code and articles of the Law of 12 May 2000. Article 1 of the Law of 12 May 2000 now reads: ‘International Obligations of the Republic of Belarus in the Field of Use and Protection of the Emblems of the Red Cross, Red Crescent, and Red Crystal’. The Law also amends the Code of the Republic of Belarus on Administrative Violations of 21 April 2003. The term ‘red crystal’ is inserted into the name and the first paragraph of Article 23.40.

Article 4 of Law No. 282-3 grants the Council of Ministers of Belarus a period of two months in which to execute its provisions, and Article 5 states that the Law will come into force retroactively as from the date on which Protocol III additional to the 1949 Geneva Conventions came into force in Belarus, namely September 2011.

##### Colombia

#### *Decree No. 3750 of 10 October 2011 on humanitarian demining activities by civil-society organizations<sup>2</sup>*

On 10 October 2011, the Colombian government adopted Decree No. 3750 on humanitarian demining that regulates Article 9 of Law 1421 of 2010 on humanitarian demining activities by civil-society organizations, thus giving effect to the Mine Ban Treaty.<sup>3</sup>

2 Decreto Número 3750 de (octubre 10) 2011 por medio del cual se reglamenta el artículo 9 de la Ley 1421 de 2010, ‘por la cual se prorroga la Ley de 1997, prorrogada y modificada por las Leyes 548 de 1999, 782 de 2002 y 1106 de 2006’.

3 The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction is available at: <http://www.apminebanconvention.org/> (last visited March 2012).

Under Article 9 of Law 1421 of 2010, humanitarian demining is a priority for the Colombian government in so far as it guarantees effective respect for the fundamental rights and liberties of the communities affected by violence in the country. The recent Decree provides guidance on carrying out humanitarian demining.

More specifically, its various articles establish that the process of demining is to be conducted by the government zone by zone and in conformity with international standards and humanitarian principles (Article 2). Civil-society organizations may, however, carry out certain predefined demining tasks (Article 1) as long as they have received preliminary authorization from the government to do so (Article 4). In order to co-ordinate action by the government and civil-society organizations, the Decree states that the National Commission on Anti-Personal Mines will provide support for civil-society organizations and that an agency for humanitarian demining will be set up within the Ministry of Defence (Article 6). This agency will determine/identify the areas that need to be demined (Article 12) and the civil-society organization that 'can partake in the demining activities' (Article 6).

*Decree No. 4100 of 2 November 2011 on the establishment and organization of a national system of human rights law and international humanitarian law<sup>4</sup>*

On 2 November 2011, the Republic of Colombia adopted Decree No. 4100 on the establishment and organization of a national system of human rights law and international humanitarian law, modifying at the same time the mandate of the existing Committee on Human Rights and International Humanitarian Law and abolishing Law 321 of 2000, which established the Permanent Inter-Sectorial Committee for Human Rights Law and International Humanitarian Law (Article 20).

The first part of the Decree deals with the national system of human rights law and international humanitarian law (IHL), defining it as encompassing principles, norms, policies, programmes, courts, and public institutions relating to the promotion, implementation, and evaluation of policies on human rights law and IHL and follow-up given to them (Article 2). Article 4 states that this system shall operate in conformity with the principles and criteria enshrined in the constitution and in international treaties on human rights law and IHL, such as the principles of equality, complementarity, and subsidiarity. The objective of the system is to strengthen the country's capacity to monitor, evaluate, and guarantee respect for those principles and criteria (Article 6).

The second part of the Decree discusses the role of the Committee on Human Rights and International Humanitarian Law, taking into account the recent

4 Decreto Número 4100 de (Noviembre 2) 2011 por el cual se crea y organiza el Sistema Nacional de Derechos Humanitaria, se modifica la Comisión Intersectorial de Derechos Humanos y derecho Internacional Humanitario y se dictan otras disposiciones.



modifications, which is to plan, harmonize, co-ordinate, and define the actions that are needed under the national system to promote, implement, and evaluate the objectives of human rights law and IHL (Article 9). The Committee will in turn receive logistical support from the Technical Secretariat (Article 12) – which works under the authority of the Presidential Programme on Human Rights and International Humanitarian Law – and from technical groups (Article 14).

## France

### *Law No. 2011-1862 of 13 December 2011 on the distribution of litigation and on relief from certain court proceedings*<sup>5</sup>

On 13 December 2011, the President of France promulgated Law No. 2011-1862 on the distribution of litigation and on relief from certain court proceedings. The Law was published on 14 December in the *Official Gazette* and entered into force on 1 January 2012.<sup>6</sup>

Law No. 2011-1862 removes jurisdiction from the military courts for crimes against humanity, war crimes, and acts of torture, transferring such jurisdiction to the Tribunal de Grande Instance, a lower court in Paris. In its Chapter VIII on the ‘regrouping of certain criminal litigation in specialized courts’, Articles 22 and 23 set up a special unit to deal with crimes against humanity, war crimes, and acts of torture within the Tribunal de Grande Instance. ‘The special investigating unit, composed of dedicated lawyers and investigators, will . . . deal with all cases opened in France related to crimes against humanity, including genocide, crimes of war and acts of torture’.<sup>7</sup> Article 22 also specifies that the investigators may conduct hearings on foreign territory, with the prior consent of the relevant authorities. To that effect, the authorities will issue them with an international rogatory letter.

## Guatemala

### *Decree No. 27-2011 of 8 December 2011 amending the Law on the Protection and Use of the Emblem of the Red Cross*

On 8 December 2011, the Congress of Guatemala passed Decree No. 27-2011 amending the Law on the Protection and Use of the Emblem of the Red Cross

5 Loi n° 2011-1862 du 13 décembre 2011 relative à la répartition des contentieux et à l’allègement de certaines procédures juridictionnelles.

6 Chapter VIII of the Law came into force on 1 January 2012 but the rest of the provisions (Chapter I–VII) will not come into force until 1 January 2013.

7 More information available at: <http://www.hirondellenews.org/other-courts/326-oc-other-courts/25306-en-en-050711-francejustice-new-law-creating-a-special-investigative-unit-adopted-by-french-deputies-1435714357> (last visited March 2012).

(Decree No. 102-97). The Decree modifies Article 1 of Decree No. 102-97, extending its scope to cover the use of the emblem by different units and medical transports (in conformity with Protocol I additional to the 1977 Geneva Conventions) and the use of the red crescent and the red crystal as substitutes for the red cross emblem.

Decree No. 27-2011 modifies Article 2 of Decree No. 102-97 by stating that the red cross emblem, also known as the ‘cross of Geneva’, must always be used in conformity with the Geneva Conventions and their Additional Protocols. It also states that the Guatemalan Red Cross is the only civil-society organization authorized to use the denomination ‘red cross’.

The new Decree furthermore modifies Article 11 of the Law on Sanctions by stating that any person who uses the emblem of the red cross, the red crescent, or the red crystal or any imitations thereof, without prior authorization, for purposes other than those defined in the Law, could face four to six years’ imprisonment and a fine of 50,000 to 100,000 quetzals.

## Ireland

### *Biological Weapons Act No. 13 of 10 July 2011*

On 10 July 2011, the Irish Parliament adopted the Biological Weapons Act, which gives further effect, in Irish domestic law, to the country’s international obligations under the 1925 Geneva Protocol, the 1972 Biological and Toxin Weapons Convention, and UN Security Council Resolution 1540 of 2004.<sup>8</sup>

The Act defines a number of key terms in Section 1, then proceeds to set out offences in Section 2, the extra-territorial applicability of the law in Section 3, the penalties that a person guilty of an offence might face in Section 4, the evidence needed in proceedings for offences committed outside the state in Section 5, the principle of double jeopardy in Section 6, the presumption relating to conduct referred to in the Convention in Sections 7 and 8, liability for offences committed by corporate bodies in Section 9, forfeiture to the state of any material seized or retained after conviction in Section 10, forfeiture to the state of any biological agent or toxin on application to the District Court in Section 11, forfeiture of related fixtures used for the purpose of producing a biological weapon<sup>9</sup> in Section 12, amendments made to the Bail Act of 1997 in Section 13 so as to include ‘offences relating to biological weapons’, the expenses of the relevant minister in the administration of this Act in Section 14, and the short title of the Act in Section 15.

<sup>8</sup> See: <http://debates.oireachtas.ie/seanad/2011/06/08/00008.asp> (last visited March 2012).

<sup>9</sup> *Ibid.*

## **Kosovo**

### *Law No. 04/L–023 of 14 September 2011 on missing persons*

On 14 September 2011, the Assembly of the Republic of Kosovo, basing its action on Article 65(1) of the country's constitution, approved Law No. 04/L–023 on missing persons. The Law came into force fifteen days after its publication in the *Official Gazette* of the Republic of Kosovo. Its aim is to protect the rights and interests of missing persons and their family members, in particular the right of family members to know the fate of persons reported missing during the period 1 January 1998 to 31 December 2000 in connection with the 1998–1999 war in Kosovo (Article 1).<sup>10</sup>

Chapter II of the Law enumerates the rights of missing persons and their family members. Under Chapter III, all requests concerning missing persons must be submitted to the Government Commission on Missing Persons, a body created to lead, supervise, harmonize, and co-ordinate such activities, together with local and international institutions (Articles 7 and 8). Finally, under Chapter IV of the Law, the Commission is to establish and maintain a Central Register on Missing Persons (Article 13), in which it will place all data collected in order to facilitate access to it by relevant state organizations, in particular for the purpose of research.

## **Sultanate of Oman**

### *Royal Decree No. 110/2011 on the Military Judiciary Law*

On 21 October 2011, his Majesty Sultan Qaboos bin Said issued Royal Decree No. 110/2011 promulgating the country's Military Judiciary Law. Under Chapter 3, the Law defines crimes of genocide, crimes against humanity, war crimes, crimes of captivity, ill-treatment of the wounded, spoliation, squander and pillage, and other crimes as punishable offences. The provisions of this Chapter came into force immediately.

Article 2 of the Decree states that a 'Founding Committee shall be constituted to prepare for the enforcement of the attached law', which will come into force in its entirety two years from its date of publication.

## **United Kingdom**

### *Police Reform and Social Responsibility Act 2011*

On 15 September 2011, the Parliament of the United Kingdom approved the Police Reform and Social Responsibility Act, which deals, in part, with restrictions on the issue of arrest warrants for certain extra-territorial offences, limiting such arrests under universal jurisdiction. The Act, which had been proposed as a bill in

<sup>10</sup> See <http://www.ic-mp.org/wp-content/uploads/2007/11/law-on-missing-persons-republic-of-kosovo.pdf> (last visited March 2012).

December 2010, 'removes the exclusive power of granting arrest warrants from local magistrates, requiring that all such warrants receive approval from the Director of Public Prosecutions' (Article 153, Subsection 4(A)).<sup>11</sup> Article 153, Subsection 4(C), states that

Subsection 4(A) applies to (a) a qualifying offence which is alleged to have been committed outside the United Kingdom, or (b) an ancillary offence relating to a qualifying offence where it is alleged that the qualifying offence was, or would have been, committed outside the United Kingdom.

The Act entered into force on 25 April 2012.

## United States

### *Presidential Study Directive on Mass Atrocities of 4 August 2011*

On 4 August 2011, the White House released the Presidential Study Directive on Mass Atrocities, with the aim of creating an Interagency Atrocities Prevention Board within 120 days from the date of the Directive. According to the Directive, which took effect immediately, 'the Secretary of State will determine which criminals or violators will be allowed into the US'.<sup>12</sup>

The purpose of the Interagency Board is to coordinate the government's approach to mass atrocities by ensuring that United States authorities recognize early indicators, implement prevention and response strategies, and develop doctrine for their foreign and armed services with a view to engaging as many actors as possible in the process and working with 'allies' to share the burden of prevention and response.

## B. National Committees for the Implementation of International Humanitarian Law

### The Czech Republic

#### *Law of 10 October 2011 on the setting up of a National Committee for the Implementation of International Humanitarian Law*<sup>13</sup>

On 10 October 2011, the Czech Republic passed a law on the setting up of a National Committee for the Implementation of International Humanitarian Law.

11 A. Malatesta, 'UK passes law limiting arrests under universal jurisdiction', in *Jurist*, 16 September 2011, available at: <http://jurist.org/paperchase/2011/09/uk-passes-law-limiting-arrests-under-universal-jurisdiction.php> (last visited March 2012).

12 C. Morris, 'Obama bars war criminals, rights violators from entering US', in *Jurist*, 4 August 2011, available at: <http://jurist.org/paperchase/2011/08/obama-bars-war-criminals-rights-violators-from-entering-us.php> (last visited March 2012).

13 Ujednání o ustavení Národní skupiny pro implementaci mezinárodního humanitárního práva.

The founding bodies of the Committee are the Ministry of Foreign Affairs, the Ministry of Defence, and the Czech Red Cross. The laws and principles governing it will be decided by the Committee itself, which is composed of a chairman, a national secretary, and other representatives of the founding bodies. The chairman, who is from the Ministry of Foreign Affairs, will select a representative of the Ministry of Defence or of the Czech Red Cross to assist him or her. They must have expertise in the field of international humanitarian law (IHL). The national secretary, also from the Ministry of Foreign Affairs, takes part in all the negotiations and meetings of the Committee.

The aim of this inter-ministerial Committee is to serve as a permanent co-ordinating and advisory body on issues relating to IHL. The Committee will promote and disseminate IHL within the government, the armed forces, the police, schools, and universities. It will also monitor and evaluate current IHL developments and implementation of the law by judicial and administrative bodies and by the armed forces. The Committee is empowered to adopt resolutions containing recommendations for stakeholders, such as the adoption of legislative measures to comply with state obligations under IHL or to push for ratification of and accession to IHL treaties.

## **Turkmenistan**

### *Resolution 117886 setting up a Committee for the Implementation of International Humanitarian Law*

On 12 August 2011, the government of Turkmenistan approved Resolution 117886 setting up a Committee for the Implementation of International Humanitarian Law. The Committee's main objectives will be to co-ordinate the efforts of various ministries to implement Turkmenistan's commitments in the field of international human rights law and international humanitarian law (IHL), to draft national implementation reports for submission to the relevant international bodies, to monitor the harmonization of national legislation with international standards in the area of human rights law and IHL, and to make recommendations on aligning national legislation with the provisions of international human rights law and IHL.

The Committee is made up of the Head of the Human Rights Committee attached to the Mejlis (parliament), the Director of the Institute of State and Law under the authority of the President of Turkmenistan, the Deputy Minister of Foreign Affairs, the Deputy Minister of Defence, the Deputy Minister of Justice (Adalat), the Deputy Minister of the Interior, the Deputy Head of the Supreme Court, the Deputy General Prosecutor, the Deputy Minister of TV and Radio Broadcasting, the Deputy Minister of Education, the Deputy Minister of Health and Medical Industries, the Deputy Minister of Labour and Social Welfare, the Deputy Minister of Economy and Development, the Deputy Chairman of the State Statistics Committee, the Deputy Chairman of the Gengeshi (Council) on Religious Affairs, the Chairman of the Trade Union, the Chairwoman of the Women's Union, the

Chairman of the Youth Union, and the Chairwoman of the National Red Crescent Society of Turkmenistan.

The Committee is chaired by the Deputy Prime Minister and the Minister of Foreign Affairs, and the seat of vice-chairman is held by the Director of the Turkmen Institute for Democracy and Human Rights.

## C. Case law

### Bosnia

*Prosecutor v. Radoje Lalović and Soniboj Škiljević*, Case No. S1 1 K 005589 11 Kžk, Appellate Division of the War Crimes Chamber of the Court of Bosnia and Herzegovina, 11 July 2011

On 16 June 2010, under Article 172(1)(h) of the country's Criminal Code, the Court of Bosnia and Herzegovina found Mr Radoje Lalović, in his capacity as warden of the Butmir Correctional Institution (KPD) in Kula, and Soniboj Škiljević, in his capacity as deputy warden, guilty of crimes against humanity and sentenced them respectively to five and eight years' imprisonment.

On 11 July 2011, the Appellate Chamber of the Court of Bosnia and Herzegovina acquitted Radoje Lalović and Soniboj Škiljević of all charges, pursuant to Article 284(c) of the country's Code of Criminal Procedure. The Appellate Chamber found that the prosecutor had not determined, beyond a reasonable doubt, that the accused had committed the crimes with which they had been charged and therefore agreed that they should be acquitted of

having participated, in collaboration with members of military, police and political structures of the then Serbian Republic of Bosnia and Herzegovina, in a systematic joint criminal enterprise from May to December 1992 with the aim of persecuting, detaining civilians, intentionally depriving people of [their] lives, torturing and forcing people to commit hard labour.<sup>14</sup>

Moreover, the Appellate Chamber found that the prosecutor had not proved that the accused had effective control over the functioning of the Correctional Institution or that they could have prevented forced labour but failed to do so (para. 255). Finally, the state prosecutor had not proved, beyond a reasonable doubt, that the accused had discriminatory intentions towards the non-Serb detainees or had 'approved, consented or contributed to ill-treatment of the non-Serb detainees' (para. 262).

The Appellate Chamber concluded by stating that Lalović and Škiljević were exempted from paying the costs of the criminal proceedings (para. 264) and

<sup>14</sup> See Balkan Investigative Reporting Network, Justice Report, 12 July 2011, available at: <http://www.bim.ba/en/278/10/32957/> (last visited on March 2012).

advised the injured parties to file civil suits in order to settle their property and legal claims (para. 265).

*Prosecutor v. Slavko Lalović*, Case No. S 1 1 K 002590 10 Kri,  
Trial Chamber of the Court of Bosnia and Herzegovina, 29 August 2011

On 29 August 2011, the Trial Chamber of the Court of Bosnia and Herzegovina found Slavko Lalović, a former member of the reserve police force at the Kalinovik Public Security Station, guilty of war crimes against civilians, pursuant to Articles 173(1)(c)(e), 31, and 180(1) of the Criminal Code of Bosnia and Herzegovina. He was sentenced to five years' imprisonment.<sup>15</sup>

The Trial Chamber stated that Lalović '[had] assisted in the commission of rape and [had] applied terror and intimidation measures' against civilians<sup>16</sup> when, in late August 1992, he allowed two soldiers of the army of the Serbian Republic of Bosnia and Herzegovina to enter and commit violence against civilians detained in the Miladin Radojević elementary school building.

The accused was further charged with intimidating and terrorizing civilians detained in the same facility in August 1992: 'He did this by depriving them of water and not letting them use the toilet on one occasion. Lalović intimidated the civilians by telling them that he would kill them unless they gave him their money and other valuables'.<sup>17</sup>

However, the Trial Chamber acquitted Lalović of any criminal responsibility for the injury of one female detainee, under Article 173(1)(c), pursuant to Article 180(1) of the Criminal Code of Bosnia and Herzegovina.

Lalović was to remain in custody until the end of his trial in May 2012.

*Prosecutor v. Velibor Bogdanović*, Case No. S1 1 K 003336 10 Krl,  
Trial Chamber of the Court of Bosnia and Herzegovina, 29 August 2011

On 29 August 2011, the Trial Chamber of the Court of Bosnia and Herzegovina found Velibor Bogdanović, a former member of the HVO Croatian Defence Council, guilty of war crimes against civilians, pursuant to Articles 173(1)(e) and 180(1) of the Criminal Code of Bosnia and Herzegovina. He was sentenced to six years' imprisonment.<sup>18</sup>

The Trial Chamber stated that Bogdanović, 'acted in contravention of the rules of international humanitarian law and in violation of Articles 3(1)(a) and (c), 27(2) and 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949' (p. 2) when, in May 1993, he unlawfully

15 See case information of the Court of Bosnia and Herzegovina, available at: <http://www.sudbih.gov.ba/index.php?opcija=predmeti&id=339&jezik=e> (last visited March 2012).

16 See Balkan Investigative Reporting Network, 'Slavko Lalovic sentenced to five years', 29 August 2011, available at: <http://www.bim.ba/en/285/10/33214/> (last visited March 2012).

17 *Ibid.*

18 See case information of the Court of Bosnia and Herzegovina, available at: <http://www.sudbih.gov.ba/index.php?opcija=predmeti&id=343&jezik=e> (last visited March 2012).

entered the apartment of a Bosnian couple in Mostar, subjected them to humiliating and degrading treatment, raped the woman, unlawfully detained her husband in the prison of Heliodrom (and other detention facilities) for more than thirty days, and looted their property.<sup>19</sup>

The Trial Chamber concluded its decision by stating that the injured parties were advised to file civil suits in order to settle their property claims, pursuant to Article 198(2) of the Code of Criminal Procedure of Bosnia and Herzegovina.

## Colombia

*Fredy Rendón Herrera Case*, No. 2007 82701, Supreme Tribunal of Bogotá, 16 December 2011

On 16 December 2011, the Supreme Tribunal of Bogotá handed down the world's first decision ordering reparations to be paid for the 'illegal conscription of child soldiers'. Fredy Rendón Herrera, also known as 'El Alemán', former leader of the armed Élder Cárdenas paramilitary group (AUC), active in Colombia from 1995 to 2006, was sentenced, pursuant to Article 24 of Law 975 of 2005, to pay reparations in the form of monetary compensation and medical and psychological care for more than 300 minors illegally recruited by his group.<sup>20</sup>

In its ruling, the Tribunal classified the type of conflict being waged between armed groups such as the AUC and the Colombian government as an 'armed conflict', and concluded that the illegal conscription of minors as child soldiers was a violation of international humanitarian law (para. 507). The Tribunal then proceeded to look at the international and national law applicable to the case. It stated that Article 24 of the Fourth Geneva Convention of 1949 and the obligations under Article 77(2) of Protocol I of 1977 additional to the Geneva Conventions (providing that 'the parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces' (para. 524)), and Article 4(3) of Additional Protocol II were applicable. The Tribunal also mentioned that States Parties to the Convention on the Rights of the Child were obliged to take 'all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of... armed conflicts' under Article 39 (para. 525).

The Tribunal then determined the material and psychological damages to which the conscripted children were entitled. With regard to material damages, the Tribunal's main concern was to establish whether there was a presumption that the minors should have received a salary for the number of months they were part of the AUC (para. 762). Given that the vast majority of minors were known to have

<sup>19</sup> *Ibid.*

<sup>20</sup> 'Colombia ruling on reparations for child soldiers', in *Politics of International Justice*, 8 February 2012, available at: <http://politicsofjustice.wordpress.com/2012/02/08/colombia-ruling-on-reparations-for-child-soldiers/> (last visited March 2012).



joined the AUC for financial reasons, it was decided that they should have received at least the minimum wage, which could vary from 250,000 to 400,000 Colombian pesos (para. 766). With regard to psychological damages, defined as ‘pain, moral anguish and emotional distress that affect the individual’, the Tribunal stated that, pursuant to Article 97 of the country’s Criminal Code, moral damages could total up to 1,000 statutory monthly wages (para. 797).

After having taken these elements into account, the Tribunal sentenced Fredy Rendón Herrera to pay reparations to more than 300 minors ‘for approximately 15 months of work at minimum wage, with higher payments to those who were recruited at an earlier age’.<sup>21</sup>

As mentioned above, this ruling is ground-breaking in that it is the first to order reparations for the illegal conscription of child soldiers. The Tribunal acknowledged this fact in paragraph 522, which states that national and international jurisprudence contain no examples of reparations having been ordered for the crime of conscripting minors.

## Guatemala

*The Dos Erres Trial (Manuel Pop Sun, Reyes Collin Gualip, Daniel Martinez and Carlos Antonio Carias)*, Criminal Tribunal of First Instance of Guatemala City, Decision C-01076-2010-00003, 2 August 2011

On 2 August 2011, the Criminal Tribunal of First Instance of Guatemala City sentenced four former military officers, Manuel Pop Sun, Reyes Collin Gualip, Daniel Martinez, and Carlos Antonio Carias, to more than 6,000 years’ imprisonment each for the ‘Dos Erres’ massacre of 201 villagers in 1982, during the Guatemalan civil war (1960–1996).<sup>22</sup>

The Court sentenced Manuel Pop Sun, Reyes Collin Gualip, and Daniel Martinez, three former members of the Kaibiles unit, to ‘30 years for each death, plus 30 years for crimes against humanity’. Carlos Antonio Carias, who was a second lieutenant, received an extra six years for stealing the victims’ belongings and providing information to the army that led to the massacre.<sup>23</sup>

This landmark case is an important step in the struggle ‘for the recognition of heinous atrocities sanctioned and carried out by the state during Guatemala’s 36-year long civil war’ and in the fight against military impunity in Guatemala.<sup>24</sup>

21 *Ibid.* (view link at bottom of text).

22 William Moore, ‘The Dos Erres Trial: justice and politics in Guatemala’, in *Council on Hemispheric Affairs*, 9 August 2011, available at: <http://www.coha.org/the-dos-erres-trial-justice-and-politics-in-guatemala/> (last visited March 2012).

23 ‘Guatemalan soldiers jailed for more than 6,000 years over massacre’, in *The Guardian*, 3 August 2011, available at: <http://www.guardian.co.uk/world/2011/aug/03/guatemala-soldiers-jailed-massacre> (last visited March 2012).

24 W. Moore, above note 22.

## India

### *Nandini Sundar and Ors. v. State of Chhattisgarh*, Supreme Court of India, 5 July 2011<sup>25</sup>

On 5 July 2011, the Supreme Court of India gave a ground-breaking judgment on the use of special police officers (SPOs) in the armed insurgency in Chhattisgarh in India. The Court ‘delivered a striking defense of peoples’ rights and condemnation of state-sponsored aggression’.<sup>26</sup>

The petitioners in the case, Ms Sundar and others, alleged that there were ‘widespread violations of the human rights of people in Dantewada District and its neighbouring areas in the State of Chhattisgarh, on account of the ongoing armed Maoist/Naxalite insurgency, and the counter-insurgency offensives launched by government authorities in Chhattisgarh’. The petitioners referred specifically to the state practice of hiring local tribal youth as SPOs and arming them to fight the Maoists, claiming this practice to be illegal and unconstitutional.

One of the arguments used by the respondent, the State of Chhattisgarh, was that it had the right, under the constitution, to arm local tribal youth with guns to fight the battle against ‘extremist Maoists’.

The Court’s rulings specifically addressed the ill-treatment, torture, murder, and forced displacement suffered by local people, reducing them to a ‘sub-human existence’ resulting from disproportionate action on the part of the State of Chhattisgarh. It reaffirmed the unconstitutionality of such action and specified that the state had to adhere to the rule of law. In order to do so, the Court ordered the State of Chhattisgarh to stop using SPOs immediately; to desist from funding the recruitment of other vigilante groups; to recall all firearms issued to SPOs; to make arrangements to provide protection for previously appointed SPOs; to commit to filing ‘First Information Reports’; and to ensure diligent prosecution for the crimes of SPOs.

## Mexico

### Decision 912/2010 of the Supreme Court of Mexico on jurisdiction over cases of human rights violations committed against civilians by military personnel, 14 July 2011<sup>27</sup>

On 14 July 2011, the Supreme Court of Mexico, following instructions given by the Court in a previous case (Case No. 912/2010 of 7 September 2010),

25 The case is available at: <http://www.scribd.com/doc/59445570/Salwa-Judum-Order-July-2011> (last visited March 2012).

26 Javed Iqbal, ‘India’s highest court lays bare assaults on the country’s poorest peoples’, in *MAC: Mines and Communities*, 18 July 2011, available at: <http://www.minesandcommunities.org/article.php?a=11049> (last visited March 2012).

27 Resolución para resolver el expediente ‘varios’ 912/2010, relativo a la instrucción ordenada por el Tribunal Pleno de la Suprema Corte de Justicia de la Nación, en la resolución de fecha siete de septiembre de dos mil diez, dictada dentro del expediente ‘varios’ 489/2010.

made a ground-breaking decision whereby military personnel accused of having committed human rights violations against civilians would no longer be judged by military tribunals but would fall under the jurisdiction of civil tribunals. This decision, which led to a major change in Mexico's judiciary order, could have a bearing on military legislation and procedure in the future. For the time being, no military tribunal has yet had to take up the issue.

## Philippines

*Bayan Muna v. Alberto Romulo (in his capacity as executive secretary)*,  
Supreme Court of the Philippines, 1 February 2011

On 1 February 2011, the Supreme Court of the Philippines dismissed a claim by Bayan Muna ('the petitioner'), a 'duly registered party-list group set up to represent the marginalized sectors of society', which sought to nullify the Non-Surrender Agreement ('the Agreement') concluded between the Republic of the Philippines and the United States of America.

According to the petitioner, the Agreement contravened the obligations of the Philippines under the Rome Statute of the International Criminal Court (ICC), which had been signed (but not ratified) by the Philippines. The petitioner also argued that the Agreement was void *ab initio* because it created obligations that were immoral or that were contrary to universally recognized principals of international law.

Regarding the petitioner's first argument, the Supreme Court concluded that the Agreement did not undermine or contravene the Rome Statute. On the contrary, the Court held that the Agreement and the Rome Statute complemented each other and thus conformed to the ICC's 'principle of complementarity'. The Court added that:

it is abundantly clear to us that the Rome Statute expressly recognizes the primary jurisdiction of states, like the RP [Republic of the Philippines], over serious crimes committed within their respective borders, the complementary jurisdiction of the ICC coming into play only when the signatory states are unwilling or unable to prosecute. (p. 27)

Regarding the petitioner's second argument, namely that the Agreement was immoral because 'it leaves criminals immune from responsibility for unimaginable atrocities that deeply shock the conscience of humanity' (p. 32), the Court also disagreed. It stated that the Agreement 'is an assertion by the Philippines of its desire to try and punish crimes under its national law' and that it 'is a recognition of the primacy and competence of the country's judiciary to try offenses under its national criminal laws and dispense justice fairly and judiciously' (p. 33). The Court did not concur with the petitioner's opinion that the Agreement would allow

Americans and Filipinos to commit grave international crimes with impunity. The Court explained that people who

may have committed acts penalized under the Rome Statute can be prosecuted and punished in the Philippines or in the US; or with the consent of the RP [Republic of the Philippines] or the US, before the ICC, assuming . . . that all the formalities necessary to bind both countries to the Rome Statute have been met.

It also stated:

With the view we take of things, there is nothing immoral or violative of international law concepts in the act of the Philippines of assuming criminal jurisdiction pursuant to the Non-Surrender Agreement over an offense considered criminal by both Philippine laws and the Rome Statute. (p. 34)

## United Kingdom

*Regina v. Mohammed Gul [2012]*, Court of Appeal of England and Wales, Criminal Chamber 280

The appellant, Mohammed Gul, was convicted, among other charges, of terrorism in early 2011 for uploading videos on the Internet inciting people to fight against coalition forces in Afghanistan. In his appeal, the applicant's counsel used both criminal law and international humanitarian law (Geneva Conventions and customary law) to uphold the contention that combatants from non-governmental armed factions who attacked military forces were immune from prosecution under domestic criminal law, even in non-international armed conflicts, owing to the fact that they were engaged in a struggle against the government.

The argumentation was twofold: the counsel first stated that the notion of terrorism in international law excluded those 'engaged in an armed struggle against a government who attacked the armed forces of that government' and, second, highlighted the need to make a clear distinction in international humanitarian law (IHL) between attacks on the military and attacks on civilians. The Court noted the government's argument whereby IHL provided no status or protection for armed groups against criminal prosecution but underlined that the criminal liability of 'insurgents' was at the discretion of national law.

The Court then considered the notion of terrorism, stating that there was no internationally accepted definition of that crime. It questioned whether, under customary international law, an attack conducted by an armed fighter in a non-international armed conflict could be considered as a terrorist act under international law. To do so, it referred to various conventions and domestic laws that excluded from the notion of terrorism armed struggles waged by national liberation movements and other movements made up of 'freedom fighters'. It concluded that the question had no clear answers as there was no *opinio iuris* or

state practice that prohibited treating individuals who attacked combatants as terrorists. This reasoning allowed the Court to affirm that no norms of international law could compel it to interpret British law as authorizing the use of force by civilians against the military.

The Court therefore concluded that British law relative to terrorism prohibited attacks on military forces by civilians:

The definition in s.1 is clear. Those who attacked the military forces of a government or the Coalition forces in Afghanistan or Iraq with the requisite intention set out in the Act are terrorists. There is nothing in international law which either compels or persuades us to read down the clear terms of the 2000 Act to exempt such persons from the definition in the Act.

## Uganda

### *Thomas Kwoyelo v. Attorney General*, High Court Miscellaneous Application No. 162 of 22 September 2011

On 6 September 2010, the Director of Public Prosecutions (DPP) indicted Thomas Kwoyelo for grave breaches of the Geneva Conventions, namely: '53 counts of willful killing, hostage taking, destruction of property and causing injury' during the Ugandan civil war from 1992 to 2005.<sup>28</sup> Kwoyelo petitioned the High Court of Uganda in 2011, stating that the refusal of the DPP and the Amnesty Commission to grant him a certificate of amnesty while the same had been granted to other applicants in circumstances similar to his, was discriminatory and unconstitutional under the 1995 Constitution of Uganda.<sup>29</sup> The Constitutional Court, in its ruling No. 36 of 2011, concluded that Kwoyelo was entitled to amnesty as he had renounced his rebel activities.

In the present case (High Court Miscellaneous Application No. 162 of 22 September 2011), Kwoyelo petitioned the High Court for an order of *mandamus* (judicial remedy) against the Amnesty Commission and the DPP as they had failed to provide him with the certificate of amnesty granted by the Constitutional Court's ruling No. 36 of 2011. The prosecution's argumentation was twofold: first, it stated that the Constitutional Court's ruling did not order the DPP or the Amnesty Commission to grant the accused amnesty but solely to cease their action against him; second, the DPP had instructed the Amnesty Commission not to deliver the amnesty writ as the appellant had been charged with grave breaches of the Geneva Conventions, for which amnesty could not be granted.

28 Hillary Stemple, 'Uganda appeals court grants ex-LRA rebel amnesty', in *Jurist*, 23 September 2011, available at: <http://jurist.org/paperchase/2011/09/uganda-court-grants-ex-lra-rebel-amnesty.php> (last visited March 2012).

29 Judgment available at: [http://www.kituoachakatiba.org/index2.php?option=com\\_docman&task=doc\\_view&gid=1451&Itemid=27](http://www.kituoachakatiba.org/index2.php?option=com_docman&task=doc_view&gid=1451&Itemid=27) (last visited March 2012).

The High Court ruled in favour of Kwoyelo, granting him the *mandamus*, in order to compel the DPP and the Amnesty Commission to deliver a certificate of amnesty to the applicant, as the grave breaches had been committed in the exercise of the rebellious activities for which he was granted amnesty under Uganda's Amnesty Act.

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