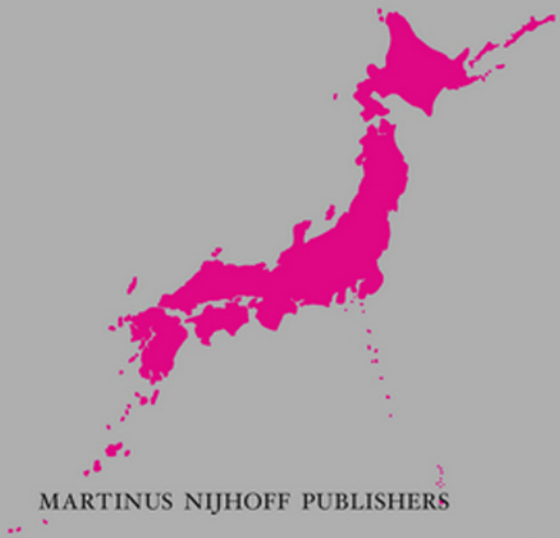
The Law of Occupation

Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law

Yutaka Arai-Takahashi



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By
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EVOLVING ISSUES OF THE LAW OF OCCUPATION

Preface

This book is the product of an endeavour for more than six years of research. It started with the project designed to shed light on a changing legal framework of international humanitarian law (IHL) in the aftermath of the September 11 attacks in 2001 and the Anglo-American invasion and occupation of Iraq in 2003. However, I decided to focus on the analysis of the evolution of the laws of occupation, because I felt that the laws of occupation provided a very useful basis for ascertaining the interaction and dialectical relationship between IHL and international human rights law. Since the latter half of the twentieth century, the fantastic development of international human rights law has made considerable impact upon the laws of occupation. This process has often been facilitated by the malleable nature of the laws of occupation, which have proved instrumental in accommodating evolving standards of international human rights law.

Much of the research undertaken for this book is the product of research carried out at the libraries of the International Committee of the Red Cross (ICRC) and the Graduate Institute of International Studies (HEI or the current Graduate Institute of International and Development Studies) in Geneva. In the academic year 2005–2006, I was a visiting researcher at the Centre Universitaire du Droit International Humanitaire (CUDIH or the current Geneva Academy of International Humanitarian Law and Human Rights) in Geneva. I am particularly indebted to Profs. Louise Doswald-Beck, Marco Sassòli and Robert Kolb, and Ms Pauline Cernaix. At the same time, intellectual discussions that I had with legal advisors of the ICRC proved a constant source of inspiration. I am greatly thankful to them, in particular Antoine Bouvier, Knut Dörmann, Cordula Dröge, Eve La Haye, Jean-Marie Henckaerts, Jelena Pejic, and Sylvain Vité. Valuable research assistance has been provided by superb librarians working at the ICRC's Library and Research Service, and the Archive. They have demonstrated an exceptional degree of patience, efficiency and effectiveness, while creating a welcoming milieu ideal for independent research. My special thanks go to Fabrizio Bensi, Laurence Bozetto, Dominique Callier (Deputy head of the Library and Research Service), Marie Fuselier (Head of the Library and Research Service), Michèle Huang, Isabelle Kronegg, Mara Meriboute, Sophie Rondags, and Véronique Ziegenhagen. I apologise for not being able to include all the individual names of the ICRC librarians to whom I owe much.

I owe much. Special thanks also go to the librarians at the HEI Library, who have always been helpful in finding materials and allowed me to use internet access during my stay in Geneva.

I would also like to thank the staff members at the British Library, the Library of the Institute of Advanced Legal Studies (London), the Swiss Federal Archive (Bern), and the Templemen Library of the University of Kent (Canterbury). The research carried out at these institutions was significant in filling gaps left by my earlier drafts.

Mention must also be made of my friends and colleagues at the Law School of the University of Kent at Canterbury and Brussels, including (but not limited to) Sarah Carter, Diane Raper, Mark Dean, Emily Haslam, Didi Herman, Sian Lewis-Anthony, Gbenga Oduntan, Kasim Shiekh, Wade Mansell, Harm Schepel and John Wightman. They have successfully made our critical law school intellectually engaged and inspiring, and transforming its branch at Brussels (University of Kent at Brussels) into a flourishing, international school as it is now. The administrative staff members at KLS and UKB have always been warm and helpful in facilitating my research project. Special thanks must also go to Diane Sankey, who has provided a valuable and highly efficient aid in correcting my English expression of the earlier draft. Nevertheless, any errors or inaccuracies remain entirely my own responsibility.

I am especially grateful to the British Academy, which granted me research grants that allowed me to carry out research on the *travaux préparatoires* of the Geneva Conventions 1949 at the ICRC archive and the Swiss Federal Archive in 2005. This has borne fruit as Chapters 1, 2 and 12. Equally, the UK's Arts and Humanity Research Council (AHRC) generously provided me with a research fellowship that enabled me to "buy out" one academic term following my sabbatical leave from the Kent Law School in 2006. This allowed me successfully to complete the first draft of this book by the end of 2006. In particular, I was able to finalise the theoretical part dealing with the evolution of customary international humanitarian law (Part V: Chapters 23 and 24). Without the AHRC's generous financial assistance, this book project would have been unfeasible. In this respect, I am grateful to Didi Herman at Kent Law School and Phil Ward at the Research Office of the University of Kent for their effective support and advice, without which I would not have been able to obtain the funding from the British Academy and the AHRC.

Special thanks must also go to Profs James Crawford (Univ. of Cambridge) and Yuji Iwasawa (Univ. of Tokyo) for their steadfast encouragement and support of this project. Without their guidance, the end result of the research project would have been precarious. They have helped me steer clear of "shipwreck" that I might have encountered in this project. I am grateful to them for their constructive criticisms and suggestions that have improved upon the earlier drafts of this book. Thanks are also due to Birgitta Poelmans, Peter Buschman and

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Last but not least, I am most thankful and truly indebted to my wonderful wife, Dr. Mamiko Yokoi, for her constant love, encouragement, support and unfailing patience. My appreciation is all the greater not least because while being pregnant, she has energetically committed herself to research and our family. This book is dedicated to her, and to our three children, Maya-Asuka, Kaya and Kéiya, as well as to the memory of the Chinese and other nationals who were victims of Japan's brutal aggression, occupation, imperialism and colonialism between 1931–1945.

The List of Abbreviations

A	*Publications of the European Court of Human Rights, Judgments and Decisions,* Series A
ACHR	American Convention on Human Rights
AD	*Annual Digest; Annual Digest of Public International Law Cases* (Vols. 1–11); *Annual Digest and Reports of Public International Law Cases* (Vols. 12–16); now renamed *ILR: International Law Reports,* Vols. 17–)
AfCHPR	African Charter on Human and Peoples' Rights
AfCmHPR	African Commission on Human and Peoples' Rights
AfJICL	*African Journal of International and Comparative Law*
AfYbkIL	*African Yearbook of International Law*
AJIL	*American Journal of International Law*
All ER	*All England Law Reports*
Am.Pol.Sci.Rev	*American Political Science Review*
APs	Additional Protocols (Geneva Protocols Additional to the Geneva Conventions of 1949)
API	Additional Protocol I (the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict)
APII	Additional Protocol II (the 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict)
ASIL Proc.	*American Society of International Law, Proceedings of the Annual Meeting*
AU	African Union
AULR	*American University Law Review*
Austl. YbkIL	*Australian Yearbook of International Law*
BFSP	*British and Foreign State Papers*
BGH	Bundesgerichtshof: Germany, Federal Court of Justice
BVerfGE	*Die Entscheidungen des Bundesverfassungsgerichts: decisions of the German Constitutional Court*

BYIL	*British Yearbook of International Law*
Cal. W. Int'l L.J.	C*alifornian Western International Law Journal*
Can. YbkIL	*Canadian Yearbook of International Law*
CCL	Control Council Law
CDDH	Conférence diplomatique sur la réaffirmation et le developpement du droit international humanitaire applicable dans les conflits armés
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
Chicago JIL	*Chicago Journal of International Law*
Colum. JTL	*Columbia Journal of Transnational Law*
Colum. L Rev	*Columbia Law Review*
Consol. T.S.	*Consolidated Treaty Series*
CPA	Coalition Provisional Authority
CUDIH	Centre Universitaire du Droit International Humanitaire, Univ. of Geneva (University Centre for International Humanitarian Law: UCIHL), renamed Geneva Academy of International Humanitarian Law and Human Rights
Dalloz, Rec. pér.	*Dalloz Recueil périodique et critique de jurisprudence, de legislation et de doctrine (Dalloz et Sirey Recueil périodique de doctrine, de jurisprudence et de legislation (1955–)*
DR	*Decision and Reports of the European Commission of Human Rights*
ECHR	European Convention on Human Rights
ECmHR	European Commission of Human Rights
ECtHR	European Court of Human Rigths
EHRLRev	*European Human Rights Law Review*
EHRR	*European Human Rights Report*
ENMOD Convention	UN Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques
EJIL	*European Journal of International Law*
EMRK	Europaische Menschenrechtskonvention (ECHR)
ESC rights	economic, social and cultural rights
ESIL	European Society of International Law
ETS	*European Treaty Series*
FAO	Food and Agriculture Organization
Final Record	*Final Record of the Diplomatic Conference of Geneva of 1949*
FM 27–10	*United States Army's Field Manual* 27–10 *The Law of Land Warfare*

Fordham L.Rev	*Fordham Law Review*
GA	General Assembly
Ga.J.Int'l&Comp.L	*Georgia Journal of International and Comparative Law*
GCs	1949 Geneva Conventions
GCI	1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
GCII	1949 Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
GCIII	1949 Geneva Convention III Relative to the Treatment of Prisoners of War
GCIV	1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War
Geo. Int'l Envtl. L. Rev.	*Georgetown International Environmental Law Review*
Geo. JIL	*Georgetown Journal of International Law*
German YbkIL	*German Yearbook of International Law*
Harvard ILJ	*Harvard International Law Journal*
Harvard LR	*Harvard Law Review*
HMSO	(UK) His/Her Majesty's Stationery Office
HRC	Human Rights Committee
HRLRev	*Human Rights Law Review*
HRQ	*Human Rights Law Quarterly*
IAC	International Armed Conflict
IACmHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICC Statute (or Rome Statute)	Rome Statute of the International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
ICRC	International Committee of the Red Cross

ICRC's Commentary to API (or APII)	ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (edited by Y. Sandoz, C. Swinarski and B. Zimmermann), (Geneva/ the Hague ICRC/Martinus Nijhoff, 1987)
ICRC's Commentary to GCI	*The Geneva Conventions, Commentary, Vol. I, Geneva Convention for the Amelioration of the Wounded and Sick in Armies in the Field*, (Geneva: ICRC, edited by J.S. Pictet, 1952)
ICRC's Commentary to GCIII	*The Geneva Conventions, Commentary, Vol. III,* Geneva Convention Relative to the Treatment of Prisoners of War, (Geneva: ICRC, edited by J.S. Pictet, 1958)
ICRC's Commentary to GCIV	*The Geneva Conventions, Commentary, Vol. IV*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, (Geneva: ICRC, edited by J.S. Pictet, 1958)
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IHRR	*International Human Rights Reports*
ILC	International Law Commission
ILM	*International Legal Materials*
ILR	*International Law Reports*
IMT	International Military Tribunal (Nuremberg Tribunal)
IMTFE	International Military Tribunal for the Far East (Tokyo Tribunal)
Ind. J. Global Legal Stud.	*Indiana Journal of Global Legal Studies*
INTERFET	International Force for East Timor
IRRC	*International Review of the Red Cross*
Israel L. Rev.	*Israel Law Review*
Israel YbkHR	*Israel Yearbook on Human Rights*
Italian YbkIL	*Italian Yearbook of International Law*
J.A.G.S.	United States Judge Advocate General's School
JCSL	*Journal of Conflict and Security Law*
JICJ	*Journal of International Criminal Justice*
J. Int'l L. & Econ.	*Journal of International Law and Economics*
Leiden JIL	*Leiden Journal of International Law*

LNTS	*League of Nations Treaty Series*
Loyola LAICLJ	*Loyola of Los Angeles International and Comparative Law Journal* (currently known as *Loyola of Los Angeles International and Comparative Law Review*)
L.Q.Rev	*Law Quarterly Review*
LRTWC	*Law Reports of Trials of War Criminals – Selected and prepared by the United Nations War Crimes Commission*, (Buffalo, NY/London: William S. Hein & Co., Inc./His Majesty's Stationery Office, 1949, reprinted in 1997)
Maryland J Int'l L & Trade	*Maryland Journal of International Law and Trade*
Max Planck Ybk UN Law	*Max Planck Yearbook of the United Nations Law*
Mich. JIL	*Michigan Journal of International Law*
Mich.L.Rev.	*Michigan Law Review*
MNF - Iraq	Multi-National Force – Iraq
N.A.A.F.I	(UK), Navy, Army & Air Force Institutes
Neth.YbkIL	*Netherlands Yearbook of International Law*
NIAC	Non-International Armed Conflict
NILR	*Netherlands International Law Review*
NJW	*Neue Juristische Wochenschrift*
Nordic JIL	*Nordic Journal of International Law*
NQHR	*Netherlands Quarterly of Human Rights*
N.Y.U. J. Int'l L. & Pol.	*New York University Journal of International Law and Politics*
OAU	Organisation of African Unity
OAS	Organisation of American States
Official Records	*Official. Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*
OJLS	*Oxford Journal of Legal Studies*
Pace Int'l L. Rev	*Pace International Law Review*
Palestinian YbkIL	*Palestinian Yearbook of International Law*
PCIJ	Permanent Court of International Justice
PD	*Piskei Din*
PMCs	private military contractors
PoWs	prisoners of war
PrepCom	Preparatory Commission for the International Criminal Court
RdC	*Recueil des Cours*/Académie de droit international
RGDIP	*Revue Générale de Droit International Public*

RDMDG	*Revue de Droit Militaire et de Droit de la Guerre* (Note that before 1989 this was issued as: *Revue de droit pénal militaire et de droit de la guerre*)
RDTAM	*Recueil des Décisions des Tribunaux Arbitraux Mixtes Institués par les Traités de Paix*
Reg	Regulation
Res.	Resolution
RIAA	*Report of International Arbitral Awards*
SC	Security Council
S.Ct.	US *Supreme Court Reporter*
S.D.N.Y.	United States District Court for the Southern District of New York
S.R.	*Summary Records*
Stan. JIL	*Stanford Journal of International Law*
Stan. L. Rev.	*Stanford Law Review*
Study or ICRC's Customary IHL Study	J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Geneva/Cambridge ICRC/Cambridge Univ. Press, 2005)
Tex. Int'l L J	*Texas Journal of International Law*
Tex.L. Rev.	*Texas Law Review*
UCMJ	US Uniform Code of Military Justice
UK Manual 1958	*The Law of War on Land being Part III of the Manual of Military Law*, (1958)
UK Manual (2004)	UK Ministry of Defence, *The Manual of the Law of Armed Conflict,* (2004)
UKTS	*United Kingdom Treaty Series*
UN	United Nations
UNCIO	United Nations Conference on International Organization
UNJY	*United Nations Juridical Yearbook*
UNMIK	United Mission in Kosovo
UNOSOM	United Nations Operation in Somalia
UNTAC	United Nations Transitional Authority in Cambodia
UNTAET	United Nations Transitional Administration in East Timor
UNTS	*United Nations Treaty Series*
UNWCC	UN War Crimes Commission
U.S.	*United States (Reports)*
Vand. JTL	*Vanderbilt Journal of Transnational Law*
Virginia JIL	*Virginia Journal of International Law*
WTO	World Trade Organization

WW I	World War I
WWII	World War II
Yale JIL	*Yale Journal of International Law*
Yale LJ	*Yale Law Journal*
YbkECHR	*Yearbook of the European Convention on Human Rights*
YbkIHL	*Yearbook of International Humanitarian Law*
YbkILC	*Yearbook of International Law Commission*
ZaöRV	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*

Prolegomenon

This monograph closely examines the evolution of a diverse array of specific rules and principles underpinning the law on belligerent occupation, which have survived the turbulent geopolitical periods of two World Wars and a number of occupation scenarios since 1945. Such examinations may help elucidate whether or not these rules and principles can effectively respond to diverging challenges posed to international humanitarian law (IHL) in the uncertain world after the terrorist attacks on September 11, 2001. It is suggested that the relatively indeterminate nature of many of the IHL rules can explain their sustainability, as they have been adjusted to accommodate changing needs in occupied territory. The malleability of the law of occupation may be highlighted especially in relation to the legislative scope of the occupant. The monograph defends the continued validity and pertinence of both the underlying rationales and fundamental premises of the law of occupation, even in the contemporary context of occupation. Nevertheless, it stresses the crucial need to interpret much of the occupation law in ways that can duly reflect requirements of international human rights law.

The monograph deducts appropriate principles and guidelines from the empirical survey of the relevant domestic and international jurisprudence, and of the literature (classic and modern). Such crude and unalloyed principles and guidelines are tested and given systematic and coherent meaning and place through doctrinal appraisal, which will be carried out in each of the chapters focusing on specific areas of occupation law. The doctrinal appraisal is fully supported by the extensive and thorough empirical investigations into the drafting documents of the relevant humanitarian treaties (the 1874 Brussels Declaration, the 1907 Hague Regulations Respecting the Laws and Customs of War on Land; the four Geneva Conventions of 1949; and the two Additional Protocols to the Geneva Conventions of 1977). The empirical survey was undertaken at the following archives and libraries (the Swiss Federal Archive in Bern, and the archive and the library at the ICRC, Geneva). Clearly, arguments are also corroborated by ample references to the relevant case-law (both national and international) in the context of World War I and World War II, and to modern scenarios of armed conflicts (international and non-international) and occupation.

In relation to its analytical focus, this monograph departs from existing literature in two respects. First, it provides an in-depth assessment of the relationship between international human rights law and the relevant provisions of the law of occupation. It is essential to appraise and demonstrate the ways in which and the extent to which the synergy of IHL and human rights can enhance the effectiveness in guaranteeing rights of protected persons or any other categories of persons. This approach is of special importance to the hitherto vulnerable, victimised, and yet the most invisible and disadvantaged persons in occupied territory, such as women and children. Second, the monograph fully integrates into its doctrinal discourse the assessment of cultural property in occupied territory.

The structure of this monograph can be divided into four main substantive parts. The first part deals with the general principles governing the traditional rubric of the law of occupation. This part generally chimes with the subject-matter of the "classic" treatise on the law of belligerent occupation. In the second part, the examinations turn to the IHL-based rights of individual persons in occupied territories, taking into account the development of fundamental guarantees under the "Geneva law". In the third part, the analysis focuses on the assertive convergence between the IHL rules on rights of individual persons and international human rights law. This part explores broadening parameters of safeguards afforded to individual persons in occupied territory on the basis of the complementary relationship between IHL and international human rights law. The fourth part addresses emerging issues that have been raised in relation to occupation and that bear upon the interaction between IHL and international human rights law. These issues include the extraterritorial application of international human rights law in occupied territories and the application of occupation law by analogy to territories controlled by UN peacekeeping forces. The outcomes of all these assessments will culminate in critical and theoretical examinations in the final Part V, which seeks to offer a coherent explanation for distinctive features of customary IHL applicable in occupied territories (including the greater reliance on *opinio juris* for the purpose of formation of customary IHL rules, their malleable nature, and their intertwined relationship with corresponding customary rules in international human rights law). The overall and systemic analysis is purported to ascertain common threads running through diverging issues of occupation, which help conceptualise an emerging IHL framework.

Part I

The General Principles of the Law of Occupation

Chapter 1

The Scope of Application of the Law of Occupation

1. *Introduction*

The dearth of literature specifically dealing with the law of occupation in the post-colonial, modern world up until the Anglo-American occupation of Iraq (1960–2003)[1] marks a stark contrast to the ample volume of the literature on this subject by classic authors before and soon after World War II.[2] As will be

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[1] See, for instance, E. Benvenisti, *The International Law of Occupation*, (1993); M. Bothe, "Occupation, Belligerent", in: R. Bernhardt (ed.), (1997) 3 *Encyclopedia of Public International Law*, 763, at 763–765; A. Cassese, "Powers and Duties of an Occupant in Relation to Land and Natural Resources", in: E. Playfair (ed.), *International Law and the Administration of Occupied Territories – Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, (1992), Ch. 14, 419; E. David, *Principes de Droit des Conflits Armés*, 3rd ed., (2002), Ch. II, Section 2, I.E, at 497–530; O. Debbasch, *L'Occupation militaire – Pouvoirs reconnus aux forces armées hors de leur territoire national* (1962); Y. Dinstein, "The International Law of Belligerent Occupation and Human Rights", (1978) 8 *Israel YbkHR* 104; D.P. Goodman, "The Need for Fundamental Change in the Law of Belligerent Occupation", (1985) 37 *Stan. L. Rev.* 1573; C. Greenwood, "The Administration of Occupied Territory in International Law", in: Playfair (ed.), *ibid.*, Ch. 7, 241; H. McCoubrey, *International Humanitarian Law – Modern Developments in the Limitation of Warfare*, 2nd ed., (1998), Ch. 7, at 177–209, especially, at 198–205; Lord McNaire and A.D. Watts, *The Legal Effects of War*, 4th ed., (1966), Ch. 17, at 366–423; Adam Roberts, "What is a Military Occupation?", (1984) 55 *BYIL* 249; *idem*, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967", (1990) 84 *AJIL* 44; and *idem*, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967–1988", in: E. Playfair (ed.), *ibid.*, Ch. 1, at 25–85; and C. Rousseau, *Le droit des conflits armés*, (1983), at 133–170; G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Vol. II: The Law of Armed Conflict*, (1968), Part Four, at 163–358.

[2] Major W.E. Birkhimer, *Military Government and Martial Law*, 2nd revised ed., (1904); E. Colby, "Occupation under the Laws of War", (1925) 25 *Colum. L Rev.* 904; *idem*, "Occupation under the Laws of War, II,", (1926) 26 *Colum. L Rev.* 146; G.I.A.D. Draper, *The Red Cross Conventions*, Ch. 2, (1958) at 26–48; E. Fraenkel, *Military Occupation and the Rule of Law*, (1944); E.H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* 12 (1942); J.W. Garner, *International Law and the World War*, (1920), Vol. II, 78 ff.; D.A. Graber, *The Development of*

discussed in Chapter 2, this may be explained by the political stigma attached to the concept of occupation, which has been increasingly characterised as unlawful against the backdrop of the ascendancy of the principle of self-determination of peoples. Along this line, with respect to the state practice in the second half of the twentieth century, most States were reluctant to recognise their control of the territory of another State as "occupation" to justify the exclusion of the law of occupation.[3] Writing in 1976, Veuthey comments that "la notion d'*occupation* est juridiquement inopérante ou contestée dans pratiquement tous les conflits contemporains, y compris ceux de la guérilla.[4] Such tendency has been reinforced by the growing importance of the principle of self-determination and a number of United Nations General Assembly resolutions that condemn foreign occupation on the basis of this principle, equating it to colonialism, which has been increasingly perceived as anachronistic and illegal since the process of decolonisation.

The United Nations General Assembly Resolution 2625 on the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States* provides that "[t]he territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter", characterising "foreign occupation" as illegal. At first glance, Resolution 2625 seems to have modified the law of occupation.[5] Yet, it is suggested that Resolution 2625 is not purported to overhaul the law of

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the Law of Belligerent Occupation 1863–1914 – A Historical Survey, (1949); M. Greenspan, *The Modern Law of Land Warfare*, (1959), Part IV, at 209–310; H.W. Halleck, *Halleck's International Law or Rules Regulating the Intercourse of States in Peace and War*, 4th ed. (by Sir G.S. Baker Br.), vol. II, (1908), Chs XXXIII, at 465–500; C. Meurer, *Die Völkerrechtliche Stellung der vom Feind Besetzten Gebiete*, (1915); L. Oppenheim, *International Law: A Treatise* 432–4, 437, (7th ed., by H. Lauterpacht, 1952); E.H. Schwenk, "Legislative Power of the Military Occupant Under Article 43, Hague Regulations", (1945) 54 *Yale LJ* 393; J.M. Spaight, *War Rights on Land*, (1911); J. Stone, *Legal Controls of International Conflict – A Treatise on the Dynamics of Disputes – and War-Law*, (1954), Ch. XXVI, at 693–732 (1954); and G. Von Glahn, *The Occupation of Enemy Territory – A Commentary on the Law and Practice of Belligerent Occupation*, (1957).

[3] Apart from the case of the Israel-occupied territories, see, for instance, other cases which are less cited: China's occupation and annexation of Tibet; the Indonesian invasion and annexation of East Timor; the Moroccan annexation of Western Sahara in the mid 1970s; Turkey's occupation of Northern Cyprus; South Africa's occupation of Namibia after the termination of the Mandate; the Vietnamese occupation of Cambodia in 1978, the Soviet intervention in Afghanistan in 1979, the US interventions in Grenada in 1983 and Panama in 1989; and the Iraqi invasion and annexation of Kuwait in 1990. See also E. Benvenisti, "The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective", (2003) 23 *Israel Defense Forces Law Review* 1, at 35.

[4] M. Veuthey, *Guérilla et droit humanitaire*, (1976) (reprinted in 1983), at 355.

[5] S. Chesterman, "Occupation as Liberation: International Humanitarian Law and Regime Change", (2004) 18 *Ethics and International Affairs* 51, at 54.

occupation applicable to temporary control of a foreign territory, and certainly not to exclude the applicability of IHL to such "illegal" occupation.[6]

The Anglo-American occupation of Iraq since 2003, however, dispelled any lingering doubt on the continuing validity of the fundamental premises of the law of belligerent occupation. The Security Council Resolution 1483 of 22 May 2003, which was adopted in the aftermath of the War on Iraq (2003), recognises the concept of occupation and the obligations flowing from IHL, despite considerable doubts on the legality of invasion. This may be treated as the "revitalisation" of the traditional law of occupation, which was "dormant" for a long period.[7] This body of law is largely derived from the Hague rules and hardened into customary international law. Many Security Council resolutions, adopted under Chapter VII of the UN Charter, pursued the transformative objectives envisaged by the coalition authorities. Nevertheless, they did not purport to replace the underlying premises of the law of occupation. Inconsistent as it may seem, they required all the states concerned "to comply fully with their obligations of international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907".[8]

The examination of this chapter will firstly deal with the meaning and elements of occupation, and different types of occupation. The inquiry will then focus on sources of the law of occupation. In this respect, the scope of analysis encompasses controversial issues of contemporary concern, such as the customary law nature or not of the rules embodied in the Fourth Geneva Convention (GCIV), the relationship between treaties and customary rules, and the derogability or not of the Security Council resolutions from the conventional and customary laws of occupation. Finally, this section turns to legal implications of the transitional nature of occupation.

2. *The Meaning of Occupation and the Scope of Application* Ratione Materiae *of the Law of Occupation*

2.1. *Overview*

Article 42 of the 1907 Hague Regulations provides that "[t]erritory 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

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[6] General Assembly Resolution 2625, Annex, 25 UN GAOR, Supp. (No. 28), U.N. Doc. A/5217, at 121 (1970).

[7] For the same view that the large corpus of the law of occupation has remained intact, see Benvenisti (2003), *supra* n. 3, at 36.

[8] UN Security Council Resolution 1483 of 23 May 2003, operative para. 5.

been established and can be exercised". The juridical meaning or definition of occupation is closely intertwined with the question of the scope of application *ratione materiae* of the law of occupation.

2.2. *Effective Control*

In this section, the inquiries turn to the question how strictly the effective control test should be applied under Article 42 of the Hague Regulations. The survey of the case-law and writings of publicists reveals that this requirement must not be read too restrictedly. In the *Hostages* trial, when discussing the status of Yugoslavia and Greece during the Second World War, the US Military Tribunal at Nuremberg held that it is sufficient that the occupying forces "could at any time they desired assume physical control of any part of the country", and that the state of occupation is not to be diminished by the fact that the partisans showed a capacity to control part of these countries at many times.[9]

The temporal duration of effective control is immaterial to the juridical notion of belligerent occupation and to the applicability of the law of occupation. This point is made clear in the *Antzar Camp* (or *Ansar Prison*) case, which concerned internment of civilians in the Antzar Camp in South Lebanon, set up by the Israel Defence Forces upon their invasion in June 1982. Justice Shamgar of the Israeli Supreme Court ruled that the area in question constituted an occupied territory subject to the laws of war and GCIV in particular. He concluded that the application of the law of occupation in that area does not necessarily require the existence of a durable belligerent occupation or the establishment of a military administration.[10] Along this line of reasoning, the fact that the occupying power encounters guerrilla operations able to exercise a brief control

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[9] United States Military Tribunal, Nuremberg, *Trial of Wilhelm List and Others (the Hostages Trial)*, (1949) 8 *LRTWC* 34, at 55–56. The same Tribunal held that:

> Whether an invasion has developed into an occupation is a question of fact. 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.

Ibid., at 55–56. Von Glahn observes that "it is not necessary that the invading forces occupy every locality in the hostile area in order to establish a state of effective occupation". Nevertheless, he clearly distinguishes the state of occupation from invasion. He notes that "while invasion represents mere penetration of hostile territory, occupation implies the existence of a definite control over the area involved", and that "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": Von Glahn (1957), *supra* n. 2, at 28.

[10] HC *593/82, Tzemel Adv. Et al. v. (a) Minister of Defence, (b) Commander of the Antzar Prison ("Antzar Prison Case")*; English excerpt in: (1983) 13 *Israel YbkHR* 360, at 363.

over certain sections of the territory does not alter the legal status of occupation.[11] The fact that the Israeli forces and Palestinian terrorist groups have often been engaged in violent clashes and intense fighting, which may even require limited application of a set of rules relating to conduct of hostilities (rather than rules strictly dealing with occupation) does not undermine the legal status of the occupied territory. With respect to occupied Iraq, the occupation by Coalition Provisional Authority (CPA), the Anglo-American "coalition" forces and other states which volunteered to deploy armies since March–April 2003 met with numerous insurgents, guerrillas and terrorists in a complex or chaotic pattern of fighting. Adam Roberts argues that even such almost uncontrollable degree of violence does not, however, negate the legal status of occupation as such.[12] Nevertheless, resistance to occupation and outbreak of hostilities may become so widespread and persistent to deny the legal status of occupation altogether.[13] In the *Einsatzgruppen* case, which related to Nazi Germany's war crimes during its occupation of the Soviet Union during World War II, the Tribunal held that:

> [I]n many of the areas where the Einsatzgruppen operated, the so-called partisans had wrested considerable territory from the German occupant, and . . . military combat action of some dimensions was required to reoccupy those areas. In belligerent occupation the occupying power does not hold enemy territory by virtue of any legal right. On the contrary, it merely exercises a precarious and temporary actual control. This can be seen from Article 42 of the Hague Regulations which grants certain well limited rights to a military occupant only in enemy territory which is 'actually placed' under his control.[14]

The similar approach is followed by the *UK Manual of the Law of Armed Conflict*.[15] Even so, it must be submitted that the degree of effective control and the status of occupation need to be evaluated with respect to specific areas, and

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[11] M. Zwanenburg, "Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation", (2004) *IRRC* No. 856, 745, at 748. However, in case of a sustained control over even a limited portion of the territory, such a portion of the territory should be considered to be under occupation.

[12] Adam Roberts, "The End of Occupation: Iraq 2004", (2005) 54 *ICLQ* 27, at 34.

[13] S. Wills, "Occupation Law and Multi-national Operations: Problems and Perspectives", (2006) 77 *BYIL* 256, at 259.

[14] US Military Tribunal, Nuremberg, *USA v. Otto Ohlendorf et al. (Einsatzgruppen Trial)*, 10 April 1948, (1948) 4 *LRTWC* 411, at 492–3. The excerpt of the judgment (albeit not including the above cited dictum) can be found in (1948) 15 *AD* 656, Case No. 217.

[15] It states that "[w]hether or not a rebel movement has successfully terminated an occupation is a question of fact and degree depending on, for example, the extent of the area controlled by the movement and the length of time involved, the intensity of operations, and the extent to which the movement is internationally recognized": *UK Manual* (2004), at 277, para. 11.7.1.

that the outbreak of hostilities in one area does not alter the status of occupation in other areas.

2.3. *Control of a Territory Beyond the Territorial Boundaries of the Occupying Power*

Apart from the effectiveness of territorial control, such control must be exerted over a territory of a foreign state. Obvious as it seems, this requirement entails complex implications. It ought to be noted that not only a territory of an adverse party to the conflict but also that of neutral powers or even co-belligerents is covered by the notion of occupation. Kolb proposes that the modern juridical concept of occupation should encompass diverse forms of mixed and pacific occupation in addition to the traditional categories (*occupatio bellica* in the classic sense, occupation of a neutral or co-belligerent's territory, and occupation after international armed conflict).[16] Most contentious is the legal characterisation of the control over disputed territories (such as Kashmir, Nagorno-Karabav, Spratley Islands and southern Kuril islands/Northern Territories, to name but a few). Even in such circumstances, juridically speaking, the state exercising actual control over a disputed territory should be prevented from challenging the applicability of the law of occupation on the basis that its control remains within its territorial boundary.

Adam Roberts suggests that the most common trait of military occupation is that military forces of a state intervene and exercise control over a territory beyond the internationally recognised frontiers of that state.[17] As Kolb notes, the deployment of such forces must not be authorised by an agreement with the territorial state.[18] Apart from this general feature, Roberts provides four "markers" that not only help identify the state of a *military* occupation but may necessitate the application of the laws of occupation: (i) there is a military force whose presence in a territory is not sanctioned or regulated by a valid agreement, or whose activities exceed the stipulations agreed upon; (ii) the military force has displaced the territory's "ordinary system of public order and government", replacing it with its own command structure; (iii) there is a difference of nationality and interest between the inhabitants on the one hand and the forces exercising power over them on the other; and (iv) there is a discernible practical need for

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[16] R. Kolb, "Ētude 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", (2002) 10 *AfYbkIL* 267, at 278–279 *et seq.*

[17] Adam Roberts (1984) *supra* n. 1, at 300. See also Kolb, *ibid.*, at 279.

[18] Kolb, *ibid.*

emergency rules to reduce dangers arising from the conflict between the military force and the inhabitants.[19]

As regards the first element ("valid agreement"), the stationing of foreign troops by invitation or consent of a central government[20] falls outside the definition of occupation. Yet, some exceptions need to be discerned: (i) the scenarios in which foreign troops exercise control in transgression of the agreement (*détournement de pouvoir*); (ii) the case in which the legality of a central government's power to represent the state is contested in view of its loss of effective control over much of the territory. Further, the essence of a "valid agreement" needs to be evaluated in the light of the principle of self-determination of peoples.[21] In case of a territory that has hitherto been under occupation, a consent given by a democratically elected government provides the better criterion. There is a danger that states (the host government of the territorial state, and the state invited by the former) may enter into a special agreement to the effect that the conflict is internal and not susceptible of the application of the law of occupation. In case of GCIV, this danger can be averted by the safeguard clauses embodied in Articles 7 and 47, which affirm the inviolability of the rights and safeguards of protected persons in occupied territory.[22]

With respect to the second element, the modification of the local government in occupied territory is hardly of significance. Indeed, one of the most crucial implications of the general principle that occupying powers must not modify existing laws except in case of necessity is that they are prevented from introducing a fundamental change in constitutional or administrative structures of the occupied state (again, subject to the necessity exceptions). In addition, the physical ability of the occupant to exert control is not considered diminished simply by virtue of the fact that the occupant allows the continued operation of a government consisting largely of indigenous population.[23]

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[19] Adam Roberts (1984), *supra* n. 1, at 300–301.

[20] As is well known, visiting forces are governed by the status of forces agreement (SOFA). For detailed examinations on this matter, see D. Fleck (ed.), *The Handbook of the Law of Visiting Forces*, (2001).

[21] For instance, if the South African government during the Apartheid had invited foreign troops to suppress unrest in Bantustaan, these foreign troops, which were allowed to control part of the South African territory, would be deemed an occupying power, despite the consent to their stationing.

[22] Adam Roberts (1984), *supra* n. 1, at 278–279. Adam Roberts also argues that GCIV embodies important general rules safeguarding civilians from a foreign military power, and that these rules should continue to benefit the civilians who fall into the hands of that foreign power, irrespective of whether the situation is classified as occupation or not: *ibid*., at 279. See also Kolb, *supra* n. 16, at 300–301.

[23] Adam Roberts (1984), *ibid*., at 284–285.

In relation to the third element, difference in nationality is no longer as material as the sense of allegiance. As will be discussed in Chapter 12 that deals with the notion of "protected persons" under Article 4 GCIV, allegiance held along an ethnic line acquires greater importance in examining whether a person is considered to fall within the hands of a party to the conflict or occupying power of which s/he is not a national. As concerns the fourth element, this is specifically required for *military* occupation but not for identifying the broader concept of occupation in a modern sense, which calls for the application of law of occupation.

Overall, only the requirement that a state exercises control over a territory outside its frontier without the consent of the territorial state is of decisive importance to the assessment of both the meaning of occupation in a broad sense and the application of law of occupation. Kolb suggests that customary international law which has developed since 1949 has broadened the concept of occupation susceptible to the application of law of occupation. As a result of this, the material scope of application of the customary law may dispense with specific elements embodied in conventional rules, enabling the law of occupation to apply to all scenarios of military presence in a foreign territory.[24] The application of this test by analogy is instrumental in ascertaining the questions whether and to what extent the law of occupation can govern the UN peacekeeping forces or multinational forces that are deployed pursuant to resolutions of the UN Security Council.[25] Kolb proposes that the detailed list of guarantees embodied in Part III of GCIV should by analogy bind the "occupation" effectuated by such international forces in circumstances where they are faced with no armed resistance within the meaning of Article 2(2).[26] In a similar vein, GCIV can be considered applicable to most UN-authorised operations where there is no consent or formal agreement with the territorial state.

2.4. *Irrelevance of "Official" Proclamation by* de facto *Occupying Powers*

For the application of laws of war, it is immaterial whether an annexing State refuses to recognise the territory as being under "occupation". "Official" proclamation by *de facto* occupying powers is of little import to the juridical evalu-

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[24] Kolb, *supra* n. 16, at 280.

[25] Kelly notes that the four elements which Adam Roberts discerns are equally applicable to the UNTAC operation in Cambodia and to the Allied and UN operations in Somalia. Similarly, he argued that GCIV applied to the safe haven created by the western allied operations in Northern Iraq during Operation Provide Comfort and in Southwest Rwanda where the French implemented Operation Turquoise: M.J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations – The Search for a Legal Framework*, (1999), at 155.

[26] Kolb, *supra* n. 16, at 279–280, and 282–285 (proposing the application of guarantees embodied in Part III, Section III of GCIV by analogy).

ations. The Japanese Imperial Army invaded and colonised Manchuria, creating a puppet state called Manchukuo in 1931–1932.[27] As mentioned above, in all the scenarios of occupation that have taken place since 1945, the states which are occupying powers in the legal sense have always refused to characterise the territory as occupied. Even so, these states cannot escape from legal responsibility under IHL behind the camouflage of annexation, incorporation or whatever denomination they may ascribe to their control over a territory outside their boundaries.

In relation to Iraq after 29 June 2004 (namely, after the Coalition Provisional Authority handed over the "full" governmental control to the Interim Government of Iraq on 28 June 2004), the application of the effective control test based on factual analysis clearly suggests that there is continuation of occupation in the juridical sense.[28] While endorsing the continued presence of coalition and other troops ("multinational force") in Iraq based on "the consent of the sovereign Government of Iraq"[29] even after 28 June 2004, Security Council Resolution 1546, adopted under Chapter VII of the UN Charter, recognises the need for continued application of IHL to actions of armed forces in Iraq.[30] Colin Powell's letter annexed to Resolution 1546 (2004) mentions that the multinational forces (MNF) would undertake "combat operations".[31] Indeed, Iraq has seen endemic sectarian violence, and coordinated or isolated attacks against the coalition troops. The US operations in Fallujah in 2004 and Operation Iron Gate and Iron Fist in October and November 2005 demonstrated the continued involvement of

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[27] Another illustrative example is the state of Slovak after German annexation of Czechoslovakia in March 1939. For detailed discussions on this matter, see Adam Roberts (1984), *supra* n. 1, at 284–285.

[28] For the same view, see Adam Roberts (2005), *supra* n. 12, at 37–39. The only but major difference is that the Interim Government enjoyed an expressly recognised right to demand the withdrawal of coalition troops: Adam Roberts, "Transformative Military Occupation: Applying the Laws of War and Human Rights", (2006) 100 *AJIL* 580, at 617.

[29] Security Council Resolution 1546, 8 June 2004, S/RES/1546 (2004), preambular para. 15. More detailed stipulations are provided in operative paragraphs 9–15. Operative para. 9 states that "[Security Council] *[n]otes* the presence of the multinational force in Iraq is at the request of the incoming Interim Government of Iraq and therefore *reaffirms* the authorization for the multinational force under unified command established under resolution 1511 (2003)…". Further, more forcefully, operative para. 10 stipulates the broad ambit of power given to the multinational force, noting that "[Security Council] *[d]ecides* that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq", emphasis in original.

[30] *Ibid.*, preambular para. 17.

[31] Security Council Resolution 1546, S/RES/1546 (2004), 8 June 2004, Annex, Text of letters from the Prime Minister of the Interim Government of Iraq Dr. Ayad Allawi and United States Secretary of State Colin L. Powell to the President of the Council, 5 June 2004, at 11.

the MNF in armed conflict.[32] Akin to the purely factual evaluation of when occupation commences, the end of occupation needs to be appraised in the light of factual circumstances, irrespective of the formal proclamation of the end of occupation.[33] In this respect, Adam Roberts cogently argues that "the *jus in bello* is unlikely to be a perfect fit. It might even be tempting to invoke an emerging concept of *jus post bellum* as a more appropriate basis for handling these situations".[34] In contrast, in view of the transfer of main governmental functions and "the limited restriction" placed on the Iraqi Interim Government/Iraqi Transitional Government, Kelly considers it difficult to sustain the argument that occupation was continuing after 30 June 2004.[35] He added that to the extent that the coalition forces would need to rely on provisions of GCIV relating to security and status of forces to facilitate their task mandated under Security Council Resolution 1546, they could either rely on three legal bases: (i) an agreement with the Iraqi Interim Government; (ii) the CPA provisions[36] that had continuing effect on the basis of the Transitional Administrative Law (unless amended or rescinded by the Iraqi Interim Government); and (iii) the discretionary exercise by the force commander to apply GCIV provisions by analogy to security operations, as the International Force for East Timor (INTERFET) force did in East Timor.[37]

3. *The Scope of Application* Ratione Personae *of the Law of Occupation*

The analysis of the scope of application *ratione personae* of the law of occupation is generally discussed in conjunction with the notion of protected persons within the meaning of Article 4 GCIV. This provision determines the ambit of application *ratione personae* of GCIV, which contains detailed rules applicable to occupied territory (in particular, Part III, Sections I, III and IV). Nevertheless, as will be examined below, the personal scope of application of GCIV contemplated under Article 4 does not exactly overlap with the personal scope of application of the rules specifically governing occupation. In-depth appraisal of

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[32] Wills, *supra* n. 13, at 297.

[33] Adam Roberts (2005), *supra* n. 12, at 47.

[34] *Idem* (2006), *supra* n. 28, at 619.

[35] M.J. Kelly, "Iraq and the Law of Occupation: New Tests for an Old Law", (2003) 6 *YbkIHL* 127, at 162–163.

[36] In this regard, see also CPA Order No. 17, which created what Kelly calls a *de facto* Status of Forces framework: CPA Order No. 17 (revised), Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, CPR/ORD/27 June 2004/17; Kelly (2003), *ibid*., at 163.

[37] Kelly (2003), *ibid*.

the concepts of both protected persons and of civilians will be undertaken in Chapter 12. In this Chapter, the issue of protected persons is touched upon only to the extent necessary for elucidating the personal scope of application of the law of occupation.

The question of the scope of application *ratione personae* is closely connected to that of the scope of application *ratione materiae*. The *ICRC's Commentary on GCIV* states that the guarantees that must be afforded to protected persons under GCIV does not hinge on the definition of occupation within the meaning of Article 42 Hague Regulations. According to the *Commentary*, the meaning of the word "occupation" under GCIV is wider than that of Article 42 Hague Regulations. It notes that the applicability of GCIV in occupied territory depends on the question whether a civilian has fallen into the hands of an adverse party, as stipulated in Article 4 GCIV.[38] Along this line, Thürer, in an ICRC Official Statement, comments that:

> [A] situation of occupation exists whenever a party to a conflict is exercising some level of authority or control over territory belonging to the enemy. So, for example, advancing troops could be considered an occupation, and thus bound by the law of occupation during the invasion phase of hostilities.[39]

The methodology of linking the definition of occupation with the notion of protected persons under Article 4 GCIV stresses the criterion "falling into the hands of an enemy". This maximalist approach nonetheless raises the question of nationality, which no longer corresponds to the subjective sense of captured civilians. In the *Tadić* case, the Appeals Chamber of the ICTY ruled that the determination of individual persons' status as "protected persons" under Article 4 GCIV must focus on their *allegiance* to a party to the conflict in whose hands they fall, rather than on the formal link of nationality.[40]

The approach suggested by Pictet's *ICRC Commentary* has a special merit of enlarging the ambit of captured civilians that can benefit from the large body of rules relating to occupation (Part III, Sections, I, III and IV) under GCIV. In particular, it enables these rules to bind the detaining power even in relation to unprivileged belligerents captured in a combat zone. Veuthey defends the

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[38] *ICRC's Commentary to GCIV*, at 60.

[39] D. Thürer, ICRC Official Statement, "Current Challenges to the Law of Occupation", ICRC, 6th Bruges Colloquium, 20–21 October 2005, available at: http://www.icrc.org/web/eng/siteeng0.nsf/html/occupation-statement-211105 (last visited on 30 April 2008).

[40] ICTY, *The Prosecutor v. Tadić*, Judgment of 15 July 1999, Case No. IT-94-1-A, paras. 165–8; confirmed in: *The Prosecutor v. Delalic, Mucic, Delic and Landzo* (*the Celebici* case), Judgment of 20 February 2001, Case No. IT-96-21-A, paras. 51–106.

See also *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici case)*, Judgment of 16 November 1998, Case No. IT-96-21-T (Trial Chamber, ICTY), at 89–99, paras. 236–66, in particular paras. 251–66.

approach suggested by the *ICRC's Commentary*, remarking that "[l]e critère déterminant pour l'application spatiale du droit humanitaire devrait ainsi être la présence de victimes plus que la qualification juridique ou politique des territories en question".[41] In *Prosecutor v. Naletilić and Martinović*, Trial Chamber I of the ICTY followed this reasoning. The Chamber provided a two-tier form of definition of occupation. It held that with respect to Article 42 Hague Regulations, actual control of, or actual authority over, the relevant territory is needed.[42] Nevertheless, it referred to the *ICRC's Commentary on GCIV*,[43] stating that the law of occupation applicable to "individuals" under GCIV does not depend on the actual authority exerted by the occupying power, and that a state of occupation under GCIV can be established as soon as individuals fall into "the hands of the Occupying Power".[44]

However, as Zwanenburg notes,[45] the *ICRC's Commentary's* approach, which has been endorsed by the Trial Chamber, may be criticised for confusing the definition of "protected persons" under GCIV with the identification of the status of occupation.[46] This approach has difficulty in explaining why the textual structure of both the derogation clause (Article 5) and Part III GCIV is framed in such a manner as to suggest that there are only two categories of civilians protected by Part III: protected persons in enemy territory as regulated by Part III, Sections I, II and IV; and protected persons held in occupied territories as governed by Part III, Sections I, III and IV. Indeed, many of the rules embodied in GCIV assume actual territorial control,[47] just as much as the 1907 Hague

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[41] Veuthey, *supra* n. 4, at 355.

[42] ICTY, *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Judgment of 31 March 2001, Case No. IT-98-34-T, Tr. Ch. 1, para. 218.

[43] *ICRC's Commentary to GC IV*, at 60.

[44] ICTY, *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Judgment of 31 March 2001, Case No. IT-98-34-T, paras. 219–221.

[45] Zwanenburg (2004), *supra* n. 11, at 749.

[46] Note that the ICJ appears to distinguish the question of definition of "protected persons" from the question of the status of occupation. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, it ruled that:

> …the intention of the drafters of the Fourth Geneva Convention [is] to protect civilians who find themselves, in whatever way, in the hands of the occupying Power. Whilst the drafters of the Hague Regulations of 1907 were as much concerned with protecting the rights of a State whose territory is occupied, as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories, as is shown by Article 47 of the Convention.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 136, at 175, para. 95.

[47] See, for instance, GCIV Articles 50 concerning education and 64 relating to penal legislation: M. Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", (2005) 16 *EJIL* 661, at 685.

Regulations. Further, military manuals of many states do not support the argument that occupation must be recognised as soon as a person falls into the hands of an adverse party to the conflict. Instead, they adhere to the traditional criterion based on effective control over a foreign territory.[48]

In the Partial Award of 28 April 2004, the Eritrea Ethiopia Claims Commission was confronted with the question whether the law of occupation embodied under GCIV applied to Eritrean sub-zobas (districts) where Ethiopian armed forces were present only for limited periods. There the Commission took the intermediate position between Article 42 Hague Regulations and the *ICRC's Commentary*, holding that:

> On the one hand, clearly an area where combat is ongoing and the attacking forces have not yet established control cannot normally be considered occupied within the meaning of the Geneva Conventions of 1949. On the other hand, where combat is not occurring in an area controlled even for just a few days by the armed forces of a hostile power, the Commission believes that the legal rules applicable to occupied territory should apply. . . .[49]

This approach dilutes the concept of effective control, albeit still adhering to the need of a territorial locus. It remains to be seen how the juridical notion of occupation will evolve in the practice of international tribunals. Benvenisti observes that the move towards more inclusive definition of occupation can be explained by the shift of focus to the question whether there is a potential conflict of interest between the occupant and the occupied. He argues that issues raised by such possible conflict of interest should be dislodged from the process through which the occupant has established its control.[50] As will be discussed below, this inclusive notion of occupation based on potential conflict of interests can open the way for the analogous application of the law of occupation to situations where UN peace support operations (enforcement and peacekeeping) are deployed.[51]

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[48] Sassòli observes that:

> Everyone who is in the hands of a belligerent that acts in an international armed conflict outside its own national territory could be considered to be perforce on a piece of earth "occupied" by that belligerent. Such a concept would, however, probably be opposed by states not wishing to be labelled as occupying powers where they have no effective overall control of a territory.

Sassòli, *ibid.*, at 686.

[49] Eritrea Ethiopia Claims Commission, Partial Award, Central Front Eritrea's Claims 2, 4, 6, 7, 8 & 22, 28 April 2004, para. 57.

[50] Benvenisti (1993), *supra* n. 1, at 4.

[51] M. Zwanenburg, *Accountability of Peace Support Operations*, (2005), at 196. He refers to UNOSOM II which assumed governmental and quasi-governmental powers.

4. *The Scope of Application* Ratione Temporis *of the Law of Occupation*

4.1. *The Commencement of Occupation*

The application of the law of occupation starts with an adverse party successfully establishing effective control over a territory of another state. The Hague Regulations of 1907, which assumes the precarious nature of occupation as a legal state, takes a purely factual approach to the temporal scope of application of the law of occupation. The rules embodied in Section III (Articles 42–56) apply as soon as the territory is "actually placed under the authority of the hostile army".[52]

4.2. *The Termination of Occupation*

Lauterpacht/Oppenheim note that the occupation terminates with the withdrawal of an occupying army from the territory or when it is driven out of the territory.[53] Schwarzenberger observes that the law of occupation ceases to apply when an occupying power loses effective control over the territory.[54] The *UK Manual* states that the provisions on occupation law (Articles 42–56) embodied in the Hague Regulations shall continue to apply until the end of the occupation.[55] The determination of the temporal scope of occupation is closely bound up with the notion of effectiveness in control as discussed above. The most obvious legal ramification of the termination of the occupation is that the territory which has been hitherto occupied will be restored to the displaced sovereign.

With respect to the Fourth Geneva Convention, the general rule on the temporal period is that the application of its provisions on occupation law ends one year after the general close of military operations ("one-year rule").[56] However, this general rule must be subject to an important qualification. For the duration of occupation, and so long as the occupant exercises the functions of government in the occupied territory, the occupying power is enjoined to respect obligations under 43 main provisions (Articles 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, and 143) of the 159-article Fourth Geneva Conventions.[57] Among

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[52] Kolb, *supra* n. 16, at 289. Once the foreign forces lose control over the territory, the law of occupation ceases to apply.

[53] Oppenheim (7th ed., by H. Lauterpacht, 1952), *supra* n. 2, at 436.

[54] Schwarzenberger, *supra* n. 1, at 317.

[55] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), at 278.

[56] GCIV, Article 6(3).

[57] Within the framework of GCIV, the notion of occupation is slightly extended to cover a period awaiting a treaty of peace. Article 6(3) of GCIV provides that:

> In the 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

those, 30 provisions specifically applicable to occupied territories (except for the general rules embodied in Part I namely Articles 1–12, and Article 143 relating to supervision by the Protecting Power) guarantee fundamental rights of prominent nature that must not be abridged in any circumstances. Kolb describes these rights as "le noyau dur" of the Fourth Geneva Convention, noting that "[l]'article 6(3) permet ainsi de jeter un pont vers le droit des droits de l'homme comme limite minimale".[58] Clearly, when adopting the one-year rule (and the exception of the continued applicability of these fundamental rights), the drafters had in mind the Allied occupation of Germany and the US occupation of Japan after World War II.[59]

The one-year limitation rule has, however, not been followed by the drafters of API in 1977. Instead API reverts to the traditional, factual approach adopted by the Hague law in relation to the end of the application of its rules concerning occupation. Article 3(b) provides that the GCs and API cease to apply only upon the termination of the occupation.[60] Again, just as Part III GCIV, no specific definition is provided as to the concept of occupation. Given that API is not designed to replace but rather to complement the existing framework of IHL, Article 3 assumes the definition of occupation based on the factual control as contemplated in Article 42 of the Hague Regulations.

Article 3 API reiterates the important safeguard. According to this, the provisions of API dealing with detained persons in occupied territory continue to

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be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such 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.

There is an additional guarantee that protected persons who are released, repatriated or re-established after the general close of military operations, "shall meanwhile continue to benefit" from the Fourth Geneva Convention: GCIV, Article 6(4).

[58] Kolb, *supra* n. 16, at 315–316. See also *ibid.*, at 310. Indeed, these rights are of fundamental nature. They include: the general rules on minimum treatment of protected persons (Article 27); state responsibility for ill-treatment (Article 29); protecting powers (Article 30); prohibition of physical or moral coercion (Article 31); prohibition of ill-treatment (Article 32); prohibition of collective punishment, pillage and reprisals (Article 33); prohibition on taking hostages (Article 34); prohibition of deportation (Article 49), prohibition of forced labour (Article 51); rights of workers (Article 52); prohibition of destruction of property (Article 53); rules concerning humanitarian relief supplies (Articles 59–63); and due process guarantees (Articles 64–77).

[59] Indeed, the draft text adopted by the Stockholm Conference followed the clear-cut rule, according to which the Civilians Convention would cease to apply upon the termination of occupation. Nevertheless, at the Diplomatic Conference at Geneva in 1949, some delegates contended that in relation to the prolonged occupation arising after the cessation of hostilities, as in the case of Germany and Japan, there would be a point of time at which the application of the Convention would be no longer justifiable (in view of the handing over of governmental functions to the authorities of the occupied states): *ICRC's Commentary to GCIV*, at 62–63.

[60] API, Article 3(b).

operate until their final release, repatriation or re-establishment, even if this may take place after the termination of occupation.[61] The State parties both to GCs and API continue to be bound by the law of occupation until the termination of occupation. Even after the lapse of one year subsequent to the general close of military operations, they cannot invoke Article 6(3) GCIV to exempt themselves from the obligations that they owe to civilian populations in occupied territory *qua* occupying powers under GCIV.[62] Bothe, Partsch and Solf remark that:

> Article 6(3) of the Fourth Convention of 1949 was a special ad hoc provision for certain actual cases, namely the occupation of Germany and Japan after World War II. There is no reason to continue to keep in force such provisions designed for specific historic cases. In 1972 the majority of government experts expressed a wish to abolish these time limits.[63]

By the same token, Kolb argues that the rules embodied in Article 6(3) can be described even as "la désuétude" and should be discarded "in favour of the continued application of the law of occupation till the disappearance of effective control by a foreign power."[64]

It might be argued that Article 3 API is opposable *erga omnes* on the basis that the abrogation of the one-year rule is recognised under customary IHL. Kolb cautions against such an argument.[65] Indeed, the customary law status of Article 3 API is unclear. The *ICRC's Customary IHL Study* deals neither with the customary law status of the one-year rule, nor with that of the rule embodied in Article 3 API.[66] Attention can be reverted to the *travaux préparatoires* of GCIV as subsidiary means to aid the interpretation of a treaty-based rule. The one-year rule is not intended to undermine the rights and privileges of civilians in occupied territory. On the contrary, it is designed to set a time limit on the broad power of the occupant to resort to exceptional measures in a context of prolonged occupation. Once governmental and administrative duties are handed

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[61] API, Article 3(b). This is the reiteration of Article 6(4) of GCIV. The similar rule is embodied under Article 75(6) of API as one of the minimum safeguards applicable to any persons. See the *ICRC's Commentary to API*, at 68–69, paras. 157–160.

[62] API, Article 3(b). This provision reiterates the principle that the protected persons who are released, repatriated, or re-established after the termination of the occupation "shall continue to benefit" from the relevant provisions of the Fourth Geneva Convention and Additional Protocol I.

[63] M. Bothe, K.J. Partsch and W.A. Solf, *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, (1982), at 59, para. 2.8.

[64] Kolb, *supra* n. 16, at 291 and 295.

[65] *Ibid.*, at 290–291.

[66] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (2005), Vol. I, Chps. 32 (Fundamental Guarantees) and 37 (Persons Deprived of Their Liberty).

over to the authorities of the occupied country, such far-reaching power is considered no longer justifiable.[67]

4.3. *Criteria for Assessing the End of Occupation: Effective Handover and Elections*

One pertinent factor in determining the end of occupation is who exercises effective governmental authority.[68] This question must be analysed not in a formal sense but in a substantive sense. In occupied Iraq, on 13 July 2003, the CPA adopted Regulation No. 6 to establish the Governing Council of Iraq,[69] which was endorsed by Security Council resolutions.[70] However, the Governing Council was limited to a "purely advisory" role, with its decisions subordinated to a "veto" by the CPA.[71] Similarly, the Special Representative of the Secretary-General and his subordinate, United Nations Assistance Mission for Iraq (UNAMI), were not given any role in administration.[72] On 1 June 2004, the Interim Government of Iraq was named, and Security Council Resolution

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[67] The *ICRC's Commentary on GCIV* explains the rationales for the one-year rule in the following manner:

> One year after the close of hostilities, the authorities of the occupied State will almost always have regained their freedom of action to some extent; communications with the outside world having been re-established, world public opinion will, moreover, have some effect. Furthermore, two cases of an occupation being prolonged after the cessation of hostilities can be envisaged. When the occupied Power is victorious, the territory will obviously be freed before one year has passed; on the other hand, if the Occupying Power is victorious, the occupation may last more than a year, but as hostilities have ceased, stringent measures against the civilian population will no longer be justified.

ICRC's Commentary to GCIV, at 63.

[68] Sassòli, *supra* n. 47, at 682.

[69] CPA Regulation No. 6, Governing Council of Iraq, CPA/REG/13 July 2003/06. As Fox notes, the CPA justified this measure by reference to Security Council Resolution 1483: G.H. Fox, "The Occupation of Iraq", (2005) 36 *Geo.JIL* 195, at 204.

[70] See, for instance, Security Council Resolution 1500, 14 August 2003, U.N. Doc. S/RES/1500 (2003), operative para. 1 ("*[w]elcomes* the establishment of the broadly representative Governing Council of Iraq on 13 July 2003, as an important step towards the formation by the people of Iraq of an internationally recognized, representative government that will exercise the sovereignty of Iraq"); and Security Council Resolution 1511, U.N. Doc. S/RES/1511 (adopted under Chapter VII of the UN Charter), operative para. 4 ("[d]etermines that the Governing Council and its ministers are the principal bodies of the Iraqi interim administration, which, without prejudice to its further evolution, embodies the sovereignty of the State of Iraq during the transitional period until an internationally recognized, representative government is established and assumes the responsibilities of the [Coalition Provisional] Authority").

[71] Fox, *supra* n. 69, at 206.

[72] This exemplifies the UN's controversially low profile and "hand-maiden" role in relation to occupied Iraq.

1546 (2004) expressly mentioned that the Council was "looking forward to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq by 30 June 2004".[73] As discussed above, the continued presence of foreign troops does not necessarily suggest the application of the law of occupation, as such presence may be based on the explicit consent of the territorial government (such as that expressed through a status of forces agreement (SOFA). These must not, however, detract from the fact that a large part of the Iraqi territory remained under effective control of the armed forces of the Coalition, which were not under the direction of the Iraqi provisional government.[74] Further, the Multi-National Force (MNF) – Iraq (in particular, the US forces) continued to get heavily involved in combat operations.[75]

It is submitted that the handover of governmental control in the substantive sense can be determined on the basis of the timing of the democratic elections by the local population in occupied territory. The ascendancy of human rights including the principle of self-determination of people reinforces this argument. The ICRC appears to follow this position in relation to armed conflict in Afghanistan. When Karzai was elected by the *Loya Jirga*, the ICRC re-qualified the nature of the conflict in Afghanistan[76] as a non-international armed conflict.[77] Duffy considers the timing of the establishment of the *Loya Jirga* in June 2002 decisive for demarcating the nature of armed conflicts. She contends that unless the Taliban remnants which have been fighting after that can meet the requirement of a "party" to a conflict, a very unlikely scenario, the conflict has been transformed into a non-international variety.[78] A variation of this argument is that occupation can be terminated by agreement with a government that is "genuinely" chosen by the people at an election.[79] Nevertheless, Sassòli warns that holding elections provides only "insufficient indications" of legitimacy. He points out that unless the consent for continued presence of foreign troops is freely given, the legitimacy of a new government in itself may remain controversial.[80] Along the same line, Wills describes the consent given by the

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[73] Security Council Resolution 1546, para. 2.

[74] Sassòli, *supra* n. 47, at 683. In this respect, the fact that the Prime Minister "elected" in the Interim Government had a record of dubious US connections very much undermines the democratic legitimacy: Adam Roberts (2005), *supra* n. 12, at 37–39; and Sassòli, *supra* n. 47, at 684.

[75] Wills, *supra* n. 13, at 299.

[76] For a general assessment of both the conduct of hostilities and treatment of captives during the armed conflicts in Afghanistan, see Adam Roberts, "The Laws of War in the War on Terror", (2002) 32 *Israel YbkHR* 193–245.

[77] Sassòli, *supra* n. 47, at 683, n. 130.

[78] H. Duffy, *The 'War on Terror' and the Framework of International Law*, (2005), at 256.

[79] Wills, *supra* n. 13, at 299.

[80] Sassòli, *supra* n. 47, at 683.

Iraqi Interim Government to the presence of the MNF after 29 June 2004 as a "circumscribed consent", as this "is sufficiently lacking in independence for the principles of the laws of occupation to be considered relevant as a useful framework".[81] Sassòli suggests that UN Security Council resolutions provide a clearer guideline.[82] Nevertheless, a main problem with this suggestion is that Security Council resolutions have often been drafted by dominant western powers (the United States with the drafting assistance of the UK representative) sitting as permanent members of the Security Council, and adopted by a small segment of the states. When specific Council Resolutions contravene fundamental requirements of international human rights law or IHL, their legitimacy (and even legality in some cases) can be called into question. Security Council resolutions may violate the principle of self-determination of peoples.[83] The latter principle features prominently in the normative order of international law, with the International Court of Justice attributing to it the *jus cogens* status.[84] Surely, it is contested whether holding an election is sufficient to meet the requirement of the principle of self-determination of peoples. The implementation of an election is only a first and formal step towards the realisation of the principle. Even so, it is reasonable to assume that with respect to occupied Iraq, it is the election held in January 2005 that marked the devolution of governmental authority to new national authorities.[85]

In relation to Iraq, in an Annex to UN Security Council Resolution 1546, US Secretary of State Colin Powell wrote that coalition forces "are and will remain committed at all times to act[ing] consistently with their obligations under the law of armed conflict, including the Geneva Conventions".[86] The interpretation of this letter gives rise to several strands of legal argument.[87] One possible

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[81] Wills, *supra* n. 13, at 300–1.

[82] Sassòli, *supra* n. 47, at 683.

[83] Gill argues that Security Council must comply with the duty to respect the right to self-determination and human rights, as these are part of the limitations imposed by the Purposes and Principles of the Charter: T.D. Gill, "Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter", (1995) 26 *Neth. YbkIL* 33, at 74–79.

[84] See, for instance, ICJ, *Case Concerning East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, ICJ Rep. 1995, 90, at 102, para. 29. See also the *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment of 5 February 1970, 3, at 32, para. 33.

[85] Sassòli, *supra* n. 47, at 684.

[86] Text of letters from the Prime Minister of the Interim Government of Iraq Dr. Ayad Allawi and United States Secretary of State Colin L. Powell to the President of the Council, 5 June 2004, annexed to SC Res. 1546, 8 June 2004, S/RES/1546 (2004) (adopted under Chapter VII of the UN Charter).

[87] Sassòli cogently provides the following five arguments that explain the legal meaning of this sentence:

interpretation is to argue that the Coalition forces would continue to apply IHL to their conduct, even though Resolution 1546 *constitutively* terminated the legal status of occupation and the *general* applicability of the law of occupation. However, the pitfall of this argument is two-fold. First, it runs counter to the argument that Resolution 1546 may not terminate or abrogate IHL rules of peremptory character, such as those embodied in Part III Section I GCVI, or rules concerning due process guarantees for persons deprived of their liberty in occupied territory as set forth in Part III, Section III GCIV. Second, it would leave the decisions on applicability or not (and the extent of application) of IHL rules to the discretion of *de facto* occupying powers.

The most coherent argument is that Resolution 1546 can modify the law of occupation only to the extent that this is consistent with requirements of such IHL rules as are of peremptory character. In addition, the termination of occupation may not be a clear-cut, overnight phenomenon.[88] Rather, it is a gradual sociological process (in terms of time and geographical locality). At any event, this timing is not so conclusive as lawyers desire. Adam Roberts argues that:

> . . . the formal proclamation of the ending of occupation could also be of limited importance. There could be numerous circumstances after 28 June [2004] that constitute either a general exercise of authority in Iraq similar to that of an occupant, or else an occupation of at least a part of Iraqi territory. In such circumstances the law on occupations would again be applicable.[89]

It can be argued that some time between the end of June 2004 and early 2005 (when the democratically elected Iraqi Government came to assert power), the *overall* legal status of the continued presence of the US and UK armed forces had been transformed into co-belligerents in non-international armed conflict

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(i) the termination of occupation from the point of view of *jus ad bellum*, but the continuing application of the military occupation under *jus in bello*;
(ii) the exclusion of application of IHL in an *overall* context of Iraq, but the Coalition forces nevertheless decided to apply IHL rules to their conduct;
(iii) this sentence is a simple reminder of Article 6(4) GCIV, so that only the 43 provisions relating to fundamental guarantees of protected persons would continue to apply (for instance, to detainees);
(iv) the state of occupation in the legal sense ends, and the US and UK forces would become the allies of the Iraqi Interim Government in a non-international armed conflict, which would be governed by common Article 3 GCs; and
(v) the end of occupation and no need to apply the law of occupation, but the Coalition forces would remain governed by IHL rules relating to conduct of hostilities and detention once they engage in combat and capture members of terrorists or insurgent groups.

Sassòli, *supra* n. 47, at 684–686.

[88] Adam Roberts (2005), *supra* n. 12, at 47.

[89] *Ibid*.

(despite the absence of any difference in the factual circumstances on the ground). This means that the Coalition forces had to release or transfer to the Iraqi authorities all civilian detainees by the time this process was completed. Or if one considers the date of handover (30 June 2004) as the end of occupation as formally recognised by Resolution 1546, then any holding of detainees thereafter as done by the US and UK, constituted a breach of relevant rules of the occupation law as enumerated in Articles 132–134 GCIV.[90] In contrast, Kolb goes further in proposing the functional test of applicability of occupation. According to him, the presence of foreign troops over parcels of land justifies the continued application of the law of occupation.[91]

This situation is akin to the legal nature of the continuing fighting in Afghanistan between the US and UK armed forces on one hand and the Taliban remnants and Mujaheedin fighters on the other.[92] In its Aide-Memoire to the US of 19 November 2002 communicated to states involved in the on-going conflicts in Afghanistan, the ICRC argued that from 19 June 2002 onwards the armed conflict was transformed into a non-international armed conflict, and that GCIII and GCIV no longer provided a legal basis for justifying the continued detention of persons who had been captured between 7 October 2001 and 19 June 2002, unless criminal charges were instituted against them.[93] Adam Roberts criticised this communication, *inter alia*, for ignoring the large involvement of non-Afghan nationals in the Al-Qaeda forces, and for failing to take into account the implications of earlier UN Security Council resolutions,[94] such as Security Council Resolution 1193 of 28 August 1998,[95] which states that the conflict was governed

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[90] Sassòli, *supra* n. 47, at 684.

[91] The tenor or arguments presented by Adam Roberts suggests that he also considers the Geneva Conventions applicable to Iraq even after the establishment of the democratic government in early 2005, so long as the coalition forces are deployed to effectuate control over some areas of the Iraqi territory.

[92] Given the importance of self-determination of peoples, this armed conflict can be considered non-international armed conflict only after the election of Hamid Karzai by the Loya Jirga and the establishment of the Afghan Transitional Government on 19 June 2002. See also Duffy, *supra* n. 78, at 256.

[93] ICRC, "Aide-Mémoire" to US, 19 November 2002, as cited in: Roberts (2002), *supra* n. 76, at 211. Note that despite his repeated requests at the ICRC, the present author was told that this Aide-Memoire remains absolutely confidential and that this cannot be disclosed. Professor Roberts secured an access to it somehow.

[94] Professor Roberts' express reference in this regard is limited to Security Council Resolution 1193 of 28 August 1998.

[95] The relevant passage of this Resolution reaffirmed:

> . . . that all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949 and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches.

by Geneva Conventions.[96] Roberts' argument, however, ought to be qualified on two grounds. First, the involvement of foreign nationals in armed opposition groups is not determinative in characterising international or non-international nature of armed conflict. It does not necessarily transform the character of armed conflict into an international one. Second, Resolution 1193 that he cites was based on the humanitarian objective of affording prisoners of war (PoW) treatment and due process guarantees to captured soldiers in the civil war in Afghanistan. It did not describe the armed conflict (or conflicts) occurring at that material time as international. Indeed, to hold that international armed conflict continued to exist in Afghanistan after the establishment of the Afghan Interim Authority on 22 December 2001 and even after the setting up of the Afghan Transitional Government on 19 June 2002 would entail inimical consequences on humanitarian conditions of captured soldiers. For instance, this would delay their release and repatriation even in absence of criminal charge against them.[97]

5. *The Rules Concerning* Postliminium

The restoration of the legal *status quo ante* following the end of occupation or of hostilities is referred to as *postliminie*,[98] which is contrasted to *uti*

UN Security Council Resolution 1193 of 28 August 1998, S/RES/1193 (1998), operative para. 12.

[96] Adam Roberts (2002), *supra* n. 76, at 211. See also, *ibid*., at 209.

[97] In relation to prisoners of war, see GCIII Article 118; and for civilians, see GCIV, Articles 132–134.

[98] Schwarzenberger, *supra* n. 1, at 346 (see also *ibid*., at 199, 204 and 338). Fauchille provides a cogent explanation as to the attempt to introduce the Roman law of *postliminie* into public international law:

> À Rome, le terme *postliminium* désignait la situation du citoyen qui avait perdu le droit de cité et la liberté parce qu'il avait été fait prisonnier de guerre et qui rentrait en jouissance de ses droits quand il revenait sur le territoire; les auteurs, qui étendent la fiction romaine aux relations publiques, considèrent que le *jus postliminii* est une notion juridique en vertue de laquelle les choses ou les personnes qui sont tombées au pouvoir de l'ennemi recouvrent leur état primitif lorsqu'elles rentrent sous la puissance de la nation à laquelle elles appartenaient avant la guerre, et que dans ce cas elles sont censées n'avoir jamais quittée.
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> …
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> Dans les rapports des États belligérents, le *jus postliminii* est encore inutile, superflu. Il ne peut avoir pour effet de rétablir rétroactivement des droits de souveraineté, qui n'ont point été anéantis. – L'occupant n'est pas devenu souverain du territoire par lui occupé. (…) Après la conclusion de la paix, L'Etat, qui a été momentanément privé de l'exercice de ses droits souverains, le reprend intégralement, l'obstacle de fait ayant cessé. (…) Il n'a pas à tenir compte des actes de disposition que l'occupant a pu accomplir, actes contraires à son droit de domaine, qui ne cessait pas d'exister au fond, juridiquement…

P. Fauchille, *Traité de droit international public*, tome II, (1921), at 1058–59.

possidetis.[99] In terms of legal effects of this state of affairs, it is a general rule that with the termination of occupation, the occupation laws no longer apply, and that appointments of local judges and other public officials will expire, unless the sovereign State reassuming the governing responsibility chooses to extend them.[100]

Several qualifications need to be made with regard to the general rule. First, the acts lawfully performed by the occupying power in conformity with the law of occupation will remain valid, free from any retroactive invalidation. The returning government must recognise the validity of the collection of ordinary taxes by the occupant, and of the sale of fruits from governmental immovables.[101] In contrast, as Morgenstern notes,[102] in case the occupant was considered to have exceeded in their power to perform acts (legislative, administrative or judicial), such acts should be regarded as null and void. This legal nullity must be declared both by the courts of the occupied State during the occupation (if they have the power to do so), and by the returning sovereign. Second, *postliminium* does not encompass the situation in which a belligerent power allied to the occupied State has driven out the occupying power and set up its own transitional administration. The presence of that power's forces can be justified by the consent of the occupied State, excluding the application of the law of occupation.[103] Third, the general rules concerning the *postliminium* may be qualified by the terms of a peace treaty, which may retroactively validate *ultra vires* acts of the occupant. As Dinstein notes,[104] such a treaty may even incorporate provisions concerning waiver of actions on this account.[105]

According to Dinstein, there is a variety of national practice concerning the legal consequences of the nullification of the occupying power's acts.[106] The sale of private property, which is confiscated in a manner inconsistent with the requirements of the Hague Regulations, does not entitle the original owner to claim restitution, where such sale is performed in an open market to a buyer acting in good faith.[107]

The juridical determination of the case of *ultra vires or détournement de pouvoir* may fall on the responsibility of any of the following courts: the occupant's

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[99] *Ibid*.

[100] Dinstein, *supra* n. 1, at 142.

[101] *Ibid*.

[102] F. Morgenstern, "Validity of the Acts of the Belligerent Occupant", (1951) 28 *BYIL* 291, at 301.

[103] Dinstein, *supra* n. 1, at 142.

[104] *Ibid*., at 143.

[105] Colby (1926) *supra* n. 2, at 156–157 (referring to the Acts of Congress of 3 March and 11 May 1866, which prevented recoveries in actions brought later, in relation to acts done under military direction during the American Civil War).

[106] Dinstein, *supra* n. 1, at 142.

[107] Morgenstern, *supra* n. 102, at 301.

courts; courts of the occupied State in occupied territory; courts of the occupied State operating outside the occupied part; or courts of a third country. Dinstein argues that the three courts other than the one operating in occupied territory do not have any expedient reason to refrain from examining such questions.[108]

6. *Different Categories of Occupation*

6.1. *Overview*

The traditional understanding is that belligerent occupation (*occupatio bellica*) refers to the military occupation "*flagrante bello*" that takes place in the period of a state of war between States. This concept is distinguished from pacific occupation (*occupatio pacifica*), which is based on the consent of the territorial State, and from the occupation of foreign territory in a *status mixtus*.[109] Once a territory of a belligerent falls under the (factually) effective occupation by another belligerent, belligerent occupation commences and brings into play the law of occupation, which is part of the laws of war.

The 1949 Geneva Conventions broaden the meaning of occupation in two respects. First, Article 2(2) common to GCs makes it clear that the applicability of the Conventions is extended to cover "all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance".[110] Second, as provided in Article 2(1) common to GCs, the existence of a state of war is not required for the application of the Geneva Conventions.[111] In that sense, the scope of application of the law of occupation set forth under GCIV is much broader than that understood in the traditional context.[112] This is clearly rooted in the historical experience of the Second World War, as in the case of Germany's occupation of Czechoslovakia and Denmark, which were accomplished without military resistance within the meaning of Article 2(2) GCIV.[113]

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[108] See also Dinstein, *supra* n. 1, at 143.

[109] Schwarzenberg argues that the occupation of foreign territory in a *status mixtus* may be justified as a form of reprisal: Schwarzenberger, *supra* n. 1, at 38–45.

[110] GCIV, Common Article 2(2). This provision contemplates occupation meeting with no armed resistance. This type of occupation can be distinguished from the "occupation by hostile forces" as envisaged in Article 2(1): J. Cerone, "Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo", (2001) 12 *EJIL* 469, at 483.

[111] GCs, Common Article 2(1).

[112] Bothe (1997), *supra* n. 1, at 763–765.

[113] While Denmark put up with minimum military resistance to the German invasion, Czechoslovakia was occupied and annexed without military resistance before the outbreak of the war: Adam Roberts (1984), *supra* n. 1, at 252–253. See also *ICRC Commentary to GCIV*, at 21.

6.2. *Post-Armistice Occupation*

It is necessary to make an inquiry into a type of occupation, which is described as armistice occupation "*nondum cessante bello*" (or simply, post-armistice occupation).[114] This type of occupation occurs after the conclusion of a general armistice agreement, or where relevant, subsequent to an armistice or cease-fire resolution. Armistice is an agreement between belligerents to suspend hostilities, and it does not formally terminate a state of war.[115]

Armistice encompasses three categories: (i) suspension of arms; (ii) the local armistice; and (iii) the general armistice.[116] While the first two genres of armistice relate only to part of the belligerent forces and for a relatively short period, a general armistice constitutes a formal interruption of the war throughout the whole region and theatre of war, governing all the belligerent forces.[117] A general armistice was concluded to terminate the hostilities of the First World War (between the Allied and the Associated Powers on one hand and the Central Powers on the other) and of the Second World War (between the Allied and the Axis powers in Europe, with one obvious exception of Germany).

Post-armistice occupation is a type of belligerent occupation governed by the laws of war,[118] because that agreement itself, unlike the peace treaty, is "a belligerent act" entered into between military commanders.[119] A general armistice often

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[114] Spaight contends that:

> . . . an armistice suspends fighting but does not affect the state of war; *Neque pax sunt indutioe; cessat enimpugna, bellum autem manet*. In the absence of a special provision, the invading belligerent's war rights as against the population continue unchanged.

Spaight, *supra* n. 2, at 245–246. Feilchenfeld observes that:

> An armistice agreement is the only one . . . type of voluntary agreement between belligerents, modifying the application of general rules of law. The general rules governing armistices are the rules of war which apply *nondum cessante bello*.

Feilchenfeld, *supra* n. 2, at 110, para. 395. See also *Report of the Second Sub-Commission of the Hague Conference of 1899*, as cited in: Spaight, *ibid.*, 245–247.

[115] M. Bothe, "Occupation After Armistice", in: R. Bernhardt (ed.), (1992) 3 *Encyclopedia of Public International Law*, 761, at 761 *et seq*.; and Schwarzenberger, *supra* n. 1, at 725 et seq.

[116] N. Ando, *Surrender, Occupation, and Private Property in International Law: An Evaluation of US Practice in Japan*, (1991), at 39; *UK Manual* (1958), at 125, para. 418.

[117] See, for instance, *UK Manual* (1958), at 126, para. 423. See also US, FM27–10 (1956), at 172–3, paras. 483–5 (classifying armistice into general armistices, local armistices and suspension of arms).

[118] Schwarzenberger, *supra* n. 1, at 173.

[119] E. Stein, "Application of the Law of the Absent Sovereign in Territory under Belligerent Occupation: the Schio Massacre", (1948) 46 *Mich. L.Rev.* 341, at 353. Colby observes that:

> Armistices are belligerent acts, and quite different from treaties. Not by armistices, therefore, but by treaties, is belligerent occupation terminated . . . In fact, the period between the signing of an armistice and the ratification of a treaty of peace, is the only period which can appropriately be described by the terms *nondum cessante bello*.

provides a legal basis upon which the occupying power modifies the constraints on their prescriptive power embodied in the Hague Regulations. An armistice agreement serves as *lex specialis* vis-à-vis the *lex generalis* of the Hague law.[120]

Within the framework of the Geneva law, whether or not a conflict is regarded as "war" has lost any juridical significance for the application of IHL.[121] The first paragraph of common Article 2 provides the basis for the applicability of GCIV to post-armistice occupation. The *ICRC's Commentary to GCIV* makes it clear that an armistice does not terminate the state of war, and that the occupation arises as a consequence of any inter-state armed conflict.[122]

6.3. *The "Mixed Occupation"* (Mischbesetzung)

The traditional international law up to the first half of the twentieth century was based on a sharp distinction between a state of war in which laws of war operated and a state of peace which was governed by the law of peace. Some German writers in the inter-war period argued that the Allied occupation of the Rhineland under the 1918 armistice[123] was a form of occupation *sui generis*,

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Colby (1925), *supra* n. 2, at 905, 911. Feilchenfeld argues that:

> Admittedly the rules of international law on warfare, including the Hague Regulations on occupants, continue to apply so far as they are not superseded by provisions contained in the armistice agreement. Controversies concern merely the extent to which such superseding does or does not take place.

Feilchenfeld, *supra* n. 2, at 110, para. 396. See also Spaight, *supra* n. 2, at 245–247.

[120] Bothe (1992), *supra* n. 115. Writing in 1954, Stone goes so far as to argue that an armistice agreement may even leave the territory of an occupied State susceptible to annexation by the victor: Stone (1954), *supra* n. 2, at 696, n. 13. However, given the cardinal importance of the principles of non-use of force in international relations, the self-determination of peoples and the sovereign equalities, this view is no longer tenable.

[121] Indeed, this can also be explained by the concurrent trend that since 1949, the term "war" has lost much of juridical significance in international law: C.J. Greenwood, "The Concept of War in Modern International Law", (1987) 36 *ICLQ* 283, at 295, 297 and 304–305.

[122] *ICRC's Commentary to GCIV*, at 22.

[123] Strictly speaking, two distinct periods of occupation can be discerned in the Rhineland: (i) the Armistice period from November 1918 to June 1919; and (ii) the treaty-based or pacific occupation period from 1919 to 1930, which took place subsequent to the Rhineland Agreement of 28 June 1919: K. S. Pinson, *Modern Germany*, 2nd ed., (1966), at 427, as cited in: Kelly (2003), *supra* n. 35, at 135. The Allied and the Associated Powers described the first period as a belligerent occupation and decided to apply the provisions of the Hague Convention of 1907: Fraenkel, *supra* n. 2, at 233–6. While the second period was based on the 1919 Rhineland Agreement, the French and the Belgian forces occupied Ruhr in 1923, separate from this treaty regime, provoking a wave of passive resistance among the inhabitants. Kelly describes this part of occupation as non-belligerent occupation, rather than pacific occupation, on the ground that while no state of war existed, there was no valid consent: Kelly (2003), *ibid.*, at 135–136. However, pacific occupation or *occupatio pacifica* does not

and that this was governed not by the law of belligerent occupation but by the relevant provisions of the armistice agreement.[124]

As Ando notes,[125] this argument was purported to diminish the power that the Hague Regulations conferred upon the occupying powers, and it made inroads into judicial reasoning by German courts.[126] Fraenkel summarises the specious nature of its practical effect (if not the theory itself), arguing that:

> …the *Mischbesetzung* theory made it possible to apply one interpretation to the cases arising in the Rhineland, and another, quite different interpretation to any remaining cases regarding previous occupations by the German armies. Therefore in 1921, at the very time the Reichtsgericht was declaring that the state power of the Rhineland occupants was restricted by the armistice agreement it decided a case arising from the German war time occupation of Poland (103 RGZ 231), and repeated…its old contention that the occupation authorities exercise full state power. (…) the German attitude was…that [during the armistice period] the occupants were not entitled to the rather broad exercise of state power that would have been their right if they had been in belligerent occupation of German territory. On the contrary, according to the general German interpretation, they could exercise only those powers that were expressly granted to them in the armistice agreement.[127]

Akin to the general armistice of November 1918, the cessation of active hostilities was achieved as a result of a general armistice (but short of a peace treaty) during the Second World War (between the Allied and the European Axis powers, bar Germany) and various other wars (most notably in the Korean War). Similarly, the termination of active hostilities can be recognised by the proclamation of unconditional surrender of an enemy state that has accepted foreign occupation without, however, having yet to enter into a peace treaty. These experiences prompted some commentators to propose an intermediate state in which the application of the law of peace or the law of war needed to be flexibly evaluated.[128] The main question is whether the law of occupation can be applied to

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necessarily indicate peaceful occupation: *ibid.*, at 129, n. 94. In that sense, the better view is to treat the French and Belgian occupation of Ruhr as pacific occupation.

[124] For an assessment of such "*Mischbesetzung*" case, see K. Heyland, *Die Rechtsstellung der besetzten Rheinlande nach dem Versailler Friedensvertrag und dem Rheinlandabkommen, Zugleich ein Beitrag zur Lehre von der Besetzung fremden Staatsgebietes*, (1923), at 66–74 and *et seq.*

[125] Ando, *supra* n. 116, at 40.

[126] See, for instance, Germany, Reichsgericht for Criminal Matters, *Rhineland (German Decrees) Case*, Judgment of 29 September 1921, (1919–22) *AD* 450, Case No. 315 (holding that the occupation of the left bank of the Rhine "was a contractual, not a war occupation"). See also Fraenkel, *supra* n. 2, at 186–188.

[127] Fraenkel, *ibid.*, at 187–188.

[128] P.C. Jessup, "Should International Law Recognize an Intermediate Status between Peace and War?", (1954) 48 *AJIL* 98–103 (referring to "a state of intermediacy"; M.S. McDougal and F.P. Feliciano, *The International Law of War – Transnational Coercion and World Public Order*, (1994), at 7–10. Schwarzenberger examines the situation involving compulsory measures short

these instances where the cessation of active hostilities is achieved while awaiting the formal conclusion of a peace treaty. Ando argues that the law of occupation should continue to apply to the scenario of post-armistice occupation such as Rhineland occupied after World War I. Two rationales are put forward. First, not all provisions of the Hague Regulations presuppose the existence of hostilities. Second, the interests of civilian populations must be guaranteed irrespective of the existence or not of hostilities.[129]

6.4. *Post-Surrender Occupation*

Another genre of occupation that requires in-depth evaluations is the post-surrender occupation. It must be noted that there is much of confusion about the *legal* characterisation of this type of occupation. The denomination of this type in political terms obfuscates the fact that it is used to refer to two legally different types of occupation.

In the aftermath of World War II, the post-surrender contexts of Germany and Japan, as opposed to post-armistice (though equally *de facto* post-surrender) occupation of Italy or other European axis powers are of special relevance to the examinations. Some leading commentators in the aftermath of World War II fail to distinguish factual and legal implications of unconditional surrenders with respect to their legal basis and effects. Hersch Lauterpacht/Oppenheim observe as follows:

> . . . while an ordinary armistice – even if dictated by the victor – is still in the nature of an agreement signed by both sides and laying down exhaustively the rights and obligations arising thereunder, this is not the case with regard to an instrument of unconditional surrender. In the latter, there is no legal limit set to the victor's freedom of action – save the implied obligation not to resume hostilities if all his conditions and orders are complied with. These orders may include the total suppression of the Government of the defeated State, as was in fact the case in relation to Germany. A similar right was reserved – though not fully made use of – in the case of Japan . . . .[130]

In a similar tone, Guggenheim notes that:

> Le droit international public de la guerre connait, nous l'avons dit, d'autres formes d'occupation, qui se realisent après que les opérations militaires sont terminées, mais avant que l'état de paix formel soit formellement rétabli. Contrairement à

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of war (the *status mixtus*). He argues that "[w]hether these measures were to be allocated to the laws of peace or war did not depend on any objective test, but only the views taken of these measures by the States directly involved as well as by third parties": Schwarzenberger, *supra* n. 1, at 39.

[129] Ando, *supra* n. 116, at 40–41, and 43.

[130] Oppenheim, (7th ed, by H. Lauterpacht, 1952), *supra* n. 2, at 553, para. 237a.

> l'occupation d'armistice, ces statuts d'occupation reposent soit sur un accord entre Etat vainqueur et Etat vaincu, soit sur une *capitulation inconditionnelle*. . . .[131]

That said, these classic authors err in two respects. First, they fail to distinguish the unconditional surrender based on a sheer absence of central government on one hand (as in the case of Germany in May 1945) and that based on a legal instrument (as in the case of Japan in August 1945). Second, as a consequence, they overlook the fact that in contrast to the German scenario in which the occupying power found itself the sole authority that could exercise legislative capacity,[132] in respect of the Japanese unconditional surrender, there continued to exist a functioning administration capable of entering into an international agreement.[133] This means that with respect to the imperial Japanese government, the factual reality did not exclude the basis for the applicability of the law of belligerent occupation. Any modifications of part of the law of belligerent occupation had to be considered based on the mutual consent of the parties to the instrument of surrender (or on the waiver by the "anticipatory occupied State", namely the state that agreed to be occupied). Guggenheim's assessment does not escape from the same confusion when he observes that "[i]ls [[c]es statuts d'occupation] entrainent des interventions dans la vie politique et economique du territoire occupé, interventions qui peuvent aller au-delà des mesures autorisées par le reglement de La Haye concernant les lois et coutumes de la guerre sur terre".[134]

With respect to the Allies' occupation of Germany after May 1945, after Hitler committed suicide in late April 1945, the infamous High Command,

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[131] P. Guggenheim, *Traité de Droit international public*, Vol. II, (1954), at 468–469, emphasis in original. See also Rousseau, *supra* n. 1, at 209–210, para. 130.

[132] See also Chesterman, *supra* n. 5, at 54. Sassòli discusses the legal effects of unconditional surrender without distinguishing between the surrender based on a treaty and the surrender premised on *debellatio*: Sassòli, *supra* n. 47, at 672. As discussed below, in view of the developments of fundamental human rights and the principle of self-determination, the *debellatio* doctrine is no longer tenable.

[133] See also Debbasch, *supra* n. 1, at 252–253 (discussing the legal effects of the delegation of the supreme authorities that the Allies conferred upon the United States in administering the post-surrender occupation of Japan).

[134] Guggenheim, *supra* n. 131, at 469. He adds that:

> La capitulation sans condition de ces deux États a eu pour conséquence leur soumission à la volonté des États vainquers. Ceux-ci ont toutefois renonceé à l'annexion de la plus grande partie de l'espace de validité des États vaincus. . . . Étant donné l'assujettissement complet des États vaincus aux vainqueurs, ceux-ci sont autorisés, nous l'avons déjà constaté, à proceder à des modification unilaterales du droit d'occupation militaire. . . . En tant que le statu d'occupation n'établit pas de règles autonomes, c'est le droit international coutumier valable en la matière qui est applicable. . . .

Ibid., at 469–472.

led by Admiral Doenitz, signed the Final Act of Unconditional Surrender with the US, UK, and USSR in early May. By that time, the whole territory of the Third Reich was successfully overrun and occupied by the Allied forces, and the members of the High Command were arrested for the purpose of war crimes prosecutions. These events were followed by the Berlin Declaration on 5 June 1945,[135] which provided that:

> The Governments of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not affect the annexation of Germany.[136]

Indeed, many writers appear to assume that the law of occupation was inoperative in respect of the Allied occupation of Germany on the ground that German government ceased to exist.[137] One strand of argument is that the German state as a subject of international law drew to a close as the Allies began to assume supreme authority, and that their role can be assimilated to the concept of condominium. Along this line, it may be contended that the *sovereignty* of the German state was terminated. Kelsen argues 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, the status of war has been terminated, because such a status can exist only between belligerent states.[138]

In another publication, the learned legal theorist of the Vienna school contends that:

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[135] *Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany and Supplementary Statements*, 5 June 1945; reproduced in: (1945) 39 *AJIL Supplement* 171.

[136] *Ibid*., at 171–172.

[137] For detailed evaluations of the post-surrender legal status of Germany after May 1945, see Von Glahn, *supra* n. 2, at 276–285.

[138] H. Kelsen, "The Legal Status of Germany According to the Declaration of Berlin", (1945) 39 *AJIL* 518, at 519. Along this line, Blum comments that "…a considerable number of authors have taken the view that when the last Government of the Third Reich (that of Admiral Dönitz at Flensburg) was dissolved by the Allies on May 23, 1945, the Hague Regulations as such ceased to apply to that situation, since German sovereignty ceased to exist": Y.Z. Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria", (1968) 3 *Israel L. Rev.* 279, at 293.

> . . . 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 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.[139]

Hersch Lauterpacht provides another strand of argument. He considers that the instrument of unconditional surrender proclaimed by the Declaration of Berlin of 5 June 1945 superseded the Act of Surrender, which had been signed at Rheims between the German High Command and the Allied forces on 8 May 1945. According to him, it was this Declaration which furnished the legal bases for the Allies' highly extensive freedom of action in undertaking the wholesale overhaul of German political, legal and social systems.[140] His view attaches normative significance not so much to the factual circumstances (namely, the total collapse of the German government, albeit not the extinction of the sovereign state as such) as to the legal validity and effect of the Berlin Declaration. Along the line suggested by Hersch Lauterpacht, Fox argues that the signing of the act of unconditional surrender by Doenitz militates against the argument based on *debellatio*.[141]

One problem with Lauterpacht's contention is to overlook the fact that by the time of this act of unconditional surrender, there was absolutely no central government in Germany that could exercise any effective control over the population and even its armed forces. Jennings argues that the law of occupation is designed mainly to serve two objectives: (i) protection of the sovereign rights of the legitimate government of the occupied territory; and (ii) protection of the inhabitants of the occupied territory from exploitation pursuant to the occupying power's war efforts. He observes that:

> In Germany there is no longer in existence any German government in which the sovereignty could be said to reside. In these circumstances it must be not only lawful for the occupant to assume powers over and above those necessary for the day-to-day administration of the territory: it is his duty to do so, because being in sole control of the territory he must assume responsibility for carrying on all aspects of government.[142]

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[139] H. Kelsen, "Is a Peace Treaty with Germany Legally Possible and Politically Desirable?", (1947) 41 *American Political Science Review* 1188, at 1188.

[140] Oppenheim, (7th ed. By H. Lauterpacht, 1952), *supra* n. 2, at 553, para. 237a.

[141] Fox, *supra* n. 69, at 292.

[142] R.Y. Jennings, "Government in Commission", (1946) 23 *BYIL* 112, at 135.

Indeed, in the light of the special factual circumstances of the post-surrender Germany, Jennings considers that "the whole *raison d'être* of the law of belligerent occupation is absent in the circumstances of the Allied occupation of Germany, and to attempt to apply it would be a manifest anachronism". This reasoning was based on the fact that the Allies did not annex Germany.[143] Indeed, the final peace settlement was deferred by the 1945 Potsdam Agreement until "the Government of Germany . . . adequate for the purpose is established".[144] This did not take place until the conclusion of the 1990 Treaty on the Final Settlement with Respect to Germany (so-called Two Plus Four Agreement).

The present writer's reasoning differs, albeit reaching the same conclusion that can accommodate a far-reaching degree of transformative objectives pursued by the Allied. Along the train of thought suggested by Kelsen, the capitulation of Nazi Germany ought to be characterised as *de facto* unconditional surrender, which occurred in a conquered State with the total collapse of a central government (*debellatio*).[145] The only difference from Kelsen's view is that the German state did not become extinct, and that the sovereignty has survived.

The similar line of reasoning is presented by Von Glahn. He considers that the state of belligerent occupation was terminated when active hostilities ceased after the arrest of the German High Command and the Berlin Declaration. With the total dissolution of the German government, the subsequent Allies' occupation filled an administrative vacuum in a manner that resembled the character of an occupation by conquest.[146] He argues that "[i]n view of the extinction of what normally would be called a German government (the legitimate sovereign under the Hague Regulations) and of the end of the precarious stage of occu-

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[143] *Ibid.*, at 136. Jennings added that [i]f 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: *ibid.*, at 137. See also the 1958 edition of the *UK Manual*, which drew on Jennings' position, stating that:

> The position in Germany after the unconditional surrender has given rise to much controversy. It was probably not governed by the Hague Rules 42–56. It is equally doubtful whether the Civilian Convention applies to situations – such as that of Germany after 1945 – in which the government of the defeated State ceases to exist and the Occupants assume supreme authority.

UK Manual (1958), at 140, para. 499.

[144] Agreement of the Berlin (Potsdam) Conference, July 17–August 2, 1945, IA(3)(i).

[145] Chesterman, *supra* n. 5, at 54; and Von Glahn, *supra* n. 2, at 275–286.

[146] Von Glahn, *ibid.*, at 281.

pation, the Hague Regulations lost their applicability to the Allied occupation of Germany and no conventional restrictions on the acts of the four occupying powers could be invoked after the unconditional surrender of the Reich and the end of the Dönitz government".[147] He adds that "…Allied rights in Germany rested on a basis of conquest and not on the existence of a state of war – while the applicability of the Hague Regulations seems…to be bound up inextricably with a continuation of hostilities and the existence of a legitimate *and* hostile sovereign".[148]

With respect to any limitations on the rights of the Allied that occupied Germany after May 1945, it is recalled that Lauterpacht envisaged no legal limitation on the rights of the victors except "for the duty not to resume hostilities".[149] Von Glahn takes the view that "only limitations resting on grounds of humanity" could be considered to hamper the freedom of the Allies powers.[150]

Be that as it may, the debate on the legal characterisation of this historical occupation is of little importance to the modern instances. The situations akin to Germany after World War II will be governed by the law of occupation based on GCIV. Under Article 6(3) GCIV, the application of GCIV is nevertheless limited only for one year, with exceptions of provisions on fundamental guarantees.[151]

As Ando notes,[152] in contrast to the post-surrender occupations that took shape in the territory of the former Axis powers in Europe, the Allied (effectively US) occupation of Japan was initiated after the general cessation of hostilities. Contrary to Nazi Germany, which saw the entire collapse of both central and local governmental machineries, the imperial Japan's military government, which was responsible for systematic and widespread atrocities committed by its armed forces against millions of East Asians and tens of thousands of Allied prisoners of war, and hardly cared about the death toll of over a million of Japanese civilians by the American bombardments, survived the war.[153]

The most notable aspect in juridical sense is that the US occupation of Japan was legally grounded on a treaty, the Instrument of Surrender, which incorporated

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[147] *Ibid*.

[148] *Ibid*., at 282, emphasis in original.

[149] Oppenheim, (7th ed. By H. Lauterpacht, 1952), *supra* n. 2, at 553, para. 237a.

[150] Von Glahn, *supra* n 2, at 283.

[151] As discussed elsewhere, API has reverted to the position of the 1907 Hague Regulations, requiring the law of occupation contained in GCIV and API to be applied until occupation in the factual sense terminates.

[152] Ando, *supra* n. 116, at 90–91, and 94–95.

[153] As an aside, Ando notes that the US occupation of Japan is also distinct in terms of the absence of any conflict or even any violence between the inhabitants in occupied territory and the occupation personnel: *ibid*., at 95.

the Potsdam Declaration. These two instruments are international agreements with binding effects on the parties.[154] Ando contends that the binding nature of these agreements is even "contractual" based on mutual consent,[155] however limited the obligations on the side of the US as the occupying power may be.[156] Support for this view can be found in Fitzmaurice's observation that even in the case of unconditional surrender "the elements of mutual agreement is not wholly lacking", and that unconditional surrender may be equated to "a kind of armistice".[157] While not expressly referring to an instrument of surrender, Kolb's analysis of the inviolable nature of fundamental guarantees of GCIV provides succour to this argument. He contends that since 1949, by virtue of Articles 7, 8 and 47 GCIV which stipulate the inviolability of the rights of protected persons in occupied territory, any special agreement concluded between an occupied state and an occupying power must be considered subordinated to the obligations under the law of occupation.[158]

Akin to an armistice agreement, the instrument of surrender serves as *lex specialis* and modifies the terms and conditions stipulated in the Hague Regulations. However, the occupation based on an instrument of surrender does not debar the applicability in itself of the law of occupation. Along this line, the *ICRC's Commentary on GCIV* notes that a capitulation does not formally end the state of war, and that the application of GCIV to territories occupied as a result of a capitulation is covered by the first paragraph (rather than the second paragraph)

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[154] Ando refutes the argument that the Instrument of Surrender was not an international agreement and that the provisions of the Potsdam Declaration were not legally binding on the Allied Powers: *ibid.*, at 87. For the same view, see Kelly (2003), *supra* n. 35, at 157–158. See also R. Cryer, "Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study", (2006) 11 *JCSL* 239, at 241, n. 14.

[155] Ando, *ibid.*, at 65, and 91.

[156] *Ibid.*, at 86–87, 90–95. He argues that the obligations on the Allies as the occupying powers were not to go beyond the terms and conditions stipulated in the Potsdam Declaration, including the pledges not to enslave the Japanese or to destroy Japan as a nation: *ibid.*, at 91–92.

[157] G.G. Fitzmaurice, "The Juridical Clauses of the Peace Treaties", (1948–II) 73 *RdC* 255, at 269, n. 2. He notes that unconditional surrender does not prevent the surrendering belligerents from resuming hostilities if the victor fails to cease active hostilities. When applied to the case of the Japanese unconditional surrender based on the Instrument of Surrender, Fitzmaurice's observation strengthens the argument that some elements of contractual nature are not devoid: Ando, *ibid.*, at 89. See also *Carpenter v. Lauer (Re Orchard)*, Chancery Division, 16 January 1948, (1948) 1 *All ER* 203, at 204. It was held that "when the unconditional surrenders were made and accepted there was an armistice in the sense in which the word is used, that is to say, there was a cessation of hostilities for an unlimited time in the expectation or belief that that was the opening of the end of the chapter" (*per* Vaisey J.).

[158] Kolb, *supra* n. 16, at 311.

of common Article 2.[159] In that sense, post-surrender occupation must be distinguished from the post-*debellatio* occupation, which is discussed below.

6.5. *Post*-Debellatio *Occupation* (*Occupation based on* Debellatio)

Resembling the occupation based on the instrument of surrender but differing in legal basis and effect is the occupation that arises as a result of the complete collapse of a central government (*debellatio* or subjugation).[160] In terms of its legal effects, the subjugation of a vanquished state as in the form of *debellatio* is associated with the right of the victorious powers to impose its will on the territory as it sees fit. According to David, the fundamental feature of this legal regime is that the law of belligerent occupation simply does not apply.[161] As a caveat, it ought to be noted that the doctrine of subjugation was not considered applicable to territory conquered as a result of aggressive war. *In re Goering and Others*, the International Military Tribunal at Nuremberg explained this:

> In the view of the Tribunal it is unnecessary in this case to decide whether this doctrine of subjugation, dependent as it is upon military conquest, has any application where the subjugation is the result of the crime of aggressive war. The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after the 1st September 1939.[162]

The subjugation of an enemy territory is akin to the post-surrender occupation, in the sense that it is observable after the cessation of hostilities ("post-hostilities occupation") and following the unconditional surrender.[163] Yet, the unconditional surrender associated with the post-*debellatio* occupation is discernible in terms of its factual reality rather than of legal nature. Its legal basis does not rest on an

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[159] *ICRC's Commentary to GCIV*, at 22.

[160] See K.-U. Meyn, "Debellatio" in R. Bernhardt *et al.* (eds), (1982) 3 *Encyclopedia of International Law* 145. The Allied occupation of Germany after World War II may be categorised as an example of *debellatio*, with no existing German government. In this regard, see *Grahame v. the Director of Prosecutions*, Germany, British Zone of Control, Control Commission Court of Criminal Appeal, 26 July 1947. There, the Court emphasised the "unprecedented" nature of the Military Government of Germany (the Control Council, and the Zone and Sector Commanders) as being "the supreme organs of government in Germany", noting that this Government was immune from restrictions imposed by the Hague Convention on a belligerent occupant: (1947) 14 *AD* 228, at 233, at 233.

[161] David, *supra* n. 1, at 498–499, para. 2.350.

[162] IMT, *In re Goering and Others*, Judgment, 1 October 1946, (1946) 13 *AD* 203, Case No. 92, at 220.

[163] See Ando's analysis of the applicability of the Hague Regulations to a post-hostilities occupation: Ando, *supra* n. 116, at 38–45.

international agreement such as the instrument of surrender. The Allied occupation of Germany after the Second World War[164] appertains to this category. Further, occupation based on *debellatio* must be distinguished from the situation in which a belligerent conquers the whole territory of an adverse party but meets resistance movements (including those of sporadic nature). Even where such movements may operate without connexion to a government in exile,[165] the applicability of the rules of occupation should be regarded as intact.[166]

The prevailing theory up to the end of World War II was that *debellatio* should be distinguished from belligerent occupation, in that it recognised the transfer of sovereignty through occupation.[167] According to this theory, the situation of *debellatio* is not susceptible to restrictions imposed by the law of occupation, leaving the "occupying" power at liberty to impose its will on the population of "occupied territory". Along this line, Schwarzenberger maintains that with the defunct entity not subordinated to the rules of land warfare or any other rules of international customary law, a state is free to unilaterally annex an enemy State extinguished by *debellatio*, and that this constitutes the only exception to the prohibition of wartime annexation.[168] It ought to be recalled that in relation to the Allies' occupation of Germany after World War II, in *Altstötter and others*

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[164] David succinctly remarks that:

> …si l'occupation du territoire ennemi est consécutive à une reddition totale et inconditionnelle comme dans le cas de l'Allemagne nazie au 8 mai 1945, la subjugation complète du territoire, la disparition de l'armée et du gouvernement ainsi que la cessation de toute lutte ôtent à l'occupation son caractère précaire et la pratique montre que le droit de l'occupation ne s'applique plus.

David, *supra* n. 1, at 499, para. 2.350.

[165] This is the case of independent, organised resistance movements in occupied territory.

[166] Stone refers to the example of German and Soviet partition of Poland in 1939, which did not extinguish the applicability of the law of belligerent occupation in the Polish territory: Stone, *supra* n. 2, at 696, n. 13.

[167] Compare the literature on post-surrender occupation, A. Gerson, "War, Conquered Territory, and Military Occupation in the Contemporary International Legal System", (1977) 18 *Harvard ILJ* 525, at 530–532; Jennings, *supra* n. 142; Debbasch, *supra* n. 1, at 250; and Adam Roberts (1984), *supra* n. 1, at 267–269. Dinstein notes that: "[a]s long as the occupied State exists and does not undergo a process of *debellatio*, no unilateral annexation of the occupied territory – in whole or in part – by the occupying State is possible": Dinstein, *supra* n. 1, at 106. However, he recognises that a continuing, occupying power can exceptionally acquire title to territory through prescription, based on the "continuous and peaceful display of State authority during a long period of time", as the Arbitrator Huber stated in the *Island of Palmas* Case in 1928 (2 *RIAA* 829, at 869).

[168] Schwarzenberger, *supra* n. 1, at 167.

(Justice Trial), the US Military Tribunal at Nuremberg held that the law of occupation did not apply to the Allied military occupation of Germany.[169]

However, in the modern context since 1949, there are two grounds for arguing against the application of the doctrine of *debellatio*. First, as provided in Article 6(3) and (4) GCIV, the temporal scope of application of GCIV goes one year after the general close of military operations. As early as 1958, the *ICRC's Commentary on GCIV* notes that even in a scenario of a capitulation, "the need for international protection is most felt".[170] The *ICRC's Commentary* does not refer to the situation of total defeat of an occupied state which does not have a central government. However, its tenor militates against the application of the *debellatio* doctrine and its adverse implication that humanitarian provisions under GCIV would be debarred from application. Indeed, the rejection of the *debellatio* can be confirmed by Article 3(b) API which requires the continued application of the law of occupation embodied in GCIV and API until the state of occupation ends.[171] Second, the influence of human rights law upon IHL is such that a far-reaching form of subjugation of the vanquished population to the victors' will is no longer justifiable. Many of the elaborate catalogues of human rights recognised in a number of international instruments are applicable even in time of armed conflict and occupation. This means that even though a special agreement such as an armistice agreement or an instrument of surrender can modify the law of occupation as *lex specialis*, the fundamental guarantees of human rights are inviolable even in such emergency situations. As examined in Part III, this argument is fully borne out by Articles 8 (non-renunciation of rights) and 47

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[169] The US Military Tribunal at Nuremberg held that:

> It is [the] fact of the complete disintegration of the government in Germany, followed by unconditional surrender and by occupation of the territory, which explains and justifies the assumption and exercise of supreme governmental power by the Allies. The same fact distinguishes the present occupation of Germany from the type of occupation which occurs when, in the course of actual warfare, an invading army enters and occupies the territory of another State, whose government is still in existence and is in receipt of international recognition, and whose armies, with those of its Allies, are still in the field. In the latter case the occupying power is subject to the limitations imposed upon it by the Hague Convention and by the laws and customs of war. In the former case (the occupation of Germany) the Allied Powers were not subject to those limitations. By reason of the complete breakdown of government, industry, agriculture and supply, they were under an imperative humanitarian duty of far wider scope to reorganise government and industry and to foster local democratic governmental agencies throughout the territory.

US Military Tribunal, Nuremberg, 17 February- 4 December 1947, *In re Altsötter and Others*, (*The Justice Trial*), (1947) 14 *AD* 278 (No. 126); and *LRTWC*, Vol. VI, at 1, Case No. 35, at 29.

[170] *ICRC's Commentary to GCIV*, at 22.

[171] For the same view, see Sassòli, *supra* n. 47, at 672.

GCIV. The latter provision prohibits any agreement that negates or undermines the fundamental guarantees of protected persons in occupied territory.

6.6. *Pacific Occupation* (Occupatio Pacifica)

Some observations are needed as to the traditional international law concept of pacific occupation, namely, the genre of military occupation of the territory of a foreign state without the existence of a state of war. This form of occupation was contemplated to comprise two types: occupation based on an agreement; and coercive occupation, which may include invitation by a host state to intervene.[172] As Bothe notes, this distinction has lost any juridical significance in the modern context. Many instances of coercive form of occupation can be assimilated into the concept of belligerent occupation.[173]

On a factual level, pacific occupation may be observed as a continuation of belligerent occupation, and there may be no apparent change in the structure of occupation personnel and forces after the conclusion of a peace treaty *post bellum*. However, it ought to be stressed that the legal basis for the continued military presence is changed. The legal ground for the presence of foreign armies may be found either in a peace treaty in itself,[174] or in a separate international agreement concluded thereafter. There is a significant change in the legal nature and effect of such occupation. The pacific occupation based on an agreement is generally not susceptible to the application of the laws of war. The presence and activities (including the waiver of immunity by a host state etc) of military forces are governed by the Status of Force Agreement (SOFA).[175] However, as David notes, the law of occupation provides the role of "garde-fou", ensuring

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[172] Kelly (2003), *supra* n. 35, at 129, n. 94. Kelly envisages four other scenarios of non-belligerent occupation, namely (i) acquiescence in occupation by foreign powers; (ii) humanitarian intervention, (iii) "occupations of a collapsed state"; and (iv) "*de facto* military occupation of territory whose status was uncertain". At any event, as he notes, the very distinction between belligerent or non-belligerent occupation has become less important or even irrelevant, following the entry into force of the GCIV.

[173] M. Bothe, "Occupation, Pacific", in: R. Bernhard (ed), (1997) 3 *Encyclopedia of Public International Law* 767, at 768.

[174] The terms of the peace treaty may determine the scope of power allocated to the occupation authorities. By ratification and proclamation, the treaty will become the supreme law of the land, and the questions of government and administration of justice will be dealt with in the realm of constitutional law, and not of the law of belligerent occupation. If the *post bellum* occupation is envisaged in a peace treaty as being of temporary nature, such occupation is "military in name only" without contemplating the application of the laws of war, and this can be more aptly described as a "garrisoning": Colby (1925), *supra* n. 2, at 904–905, and the cases cited in n. 2.

[175] For detailed assessment of these issues, see D. Fleck (ed.), *The Handbook of the Law of Visiting Forces*, (2001).

that in no circumstances can such an agreement accord less favourable treatment of individual persons.[176]

The term "pacific" does not mean that such modality of occupation is "peaceful" in the sense of no hostility. Nor is pacific occupation necessarily identical to the concept of non-belligerent occupation.[177] The latter notion encompasses occupation by agreement, namely, pacific occupation. Yet, it includes all situations of occupation, which have taken shape outside the context of the state of war, such as re-establishment of domestic order in a foreign country, or occupation pursuant to defence of a friendly government from internal or external enemies.[178] As Kelly observes,[179] the genesis of the legal principles relating to non-belligerent occupation can be found in the practice of western military powers in the nineteenth century, which had resort to occupation by military forces outside the context of the state of war between the "sovereign" states, namely between the so-called "civilised" (that is, western) states. This trend was no doubt driven by the expansion of imperialism pursued by the western powers and Russia in the nineteenth century, a geopolitical order later joined by Japan since 1890s. These powers flexed their military muscles to impose their will and colonial rules on non-European societies. In a move clearly full of racial overtones, they described their "occupation" of non-western societies as falling outside the transactions between equal sovereign states.[180] Indeed, in manifold instances, the fact that most annexations of non-European territories did not take place in a peaceful manner (including coercion or military threat, or invasion which secured the conclusion of treaties) was not considered to undermine their legal nature as *occupatio pacfica*.[181]

Be that as it may, it ought to be recalled that common Article 2(1) GCs departs from the traditional laws of war, with their application not dependant upon the declaration of war and the state of war. This has made the distinction between belligerent occupation and non-belligerent occupation obsolete.[182] The GCIV specifically contemplates a broader scope of application *ratione materiae* to

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[176] David, *supra* n. 1, at 501, para. 2.354.

[177] Kelly (1999), *supra* n. 25, at 129–143.

[178] *Ibid*., at 130.

[179] *Ibid*., at 130–131.

[180] For elaborate discussions on this issue, see A. Anghie, Imperialism, *Sovereignty and the Making of International Law*, (2005).

[181] Kelly (1999), *supra* n. 25, at 130. See also M. Craven, "Continuity of the Hawaiian Kingdom", 12 July 2002, available at: http://www.hawaiiankingdom.org/pdf/Continuity_Hawn_Kingdom.pdf (last visited on 30 August 2008); and F. Llewellyn Jones, "Military Occupation of Alien Territory in Time of Peace", (1924) 9 *Transactions of Grotius Society* 150.

[182] Adam Roberts (1984), *supra* n. 1, at 276.

encompass all forms of occupation other than treaty-based occupation.[183] Article 2(2) GCs stipulates that apart from a state of war or armed conflict between or among high contracting parties, as contemplated in the first paragraph, the Convention applies to "all cases of partial or total occupation of the territory of a high contracting party, even if the said occupation meets with no armed resistance". Roberts contends that "[o]ne might hazard as a fair rule of thumb that every time the forces of a country are in control of foreign territory, and find themselves face to face with the inhabitants, some or all of the provisions on the law on occupations are applicable".[184] He adds that "[t]he broad terms of common Article 2 establish that the 1949 Geneva Conventions apply to a wide range of…occupations – including occupations in time of so-called peace".[185] The intention of drafters to decouple the application of GCs from the state of war can be clearly verified in the ICRC's *Report on the Work of the Conference of Government Experts* of 1947, which states that the Convention "is equally applicable to cases of occupation of territories in the absence of any state of war".[186] In sum, the key to determining the applicability of the law of occupation is shifted to the existence or not of an element of "domination or authority" exercised by armed forces of a state over (part of) the inhabited territory outside the accepted international frontiers of their State and its dependencies.[187]

7. *Basic Rules on the Law of Belligerent Occupation*

7.1. *The Transitional Nature of Occupation*

One of the general principles underlying Article 43 of the Hague Regulations is that belligerent occupation is a precarious and transitional authority with no conferral of sovereignty upon the occupying power.[188] As a corollary to this, in case an occupying power introduces permanent changes in the constitutional structure and governmental institutions of the occupied territory, such as the

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[183] Kelly (1999) *supra* n. 25, at 149.

[184] Adam Roberts (1984), *supra* n. 1, at 250.

[185] *Ibid*., at 253.

[186] ICRC, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims*, (Geneva, April 14–26, 1947), at 8 (Report of the First Commission, which dealt with the revisions of the Geneva Convention of July 27, 1929 for the Relief of Wounded and Sick in Armies in the Field). See also the *ICRC's Commentary to GCIV*, at 18.

[187] Adam Roberts (1984), *supra* n. 1, at 300.

[188] L. Oppenheim, *International Law: A Treatise*, Vol. II: *Disputes, War and Neutrality*, (6th edition by. H. Lauterpacht, 1944), at 432–4; *UK Manual* (1958), para. 510; *US FM 27–10*, para. 358; Greenwood (1992), *supra* n. 1, at 244.

establishment of military or political organisations and the dissolution of the State, as widely seen during the Second World War, there is a strong presumption, though subject to the necessity exception, that it is an infringement of this provision.[189]

Two more subsidiary principles may be extrapolated from the transitional character of occupation. First, inhabitants in occupied territory owe an oath of obedience, and not an oath of allegiance, to the occupying power. Second, the occupying power must not annex occupied territory. These principles need elaborate assessment.

7.2. *Oath of Obedience, and not Oath of Allegiance*

Departing from the position of some classic scholars in the nineteenth century,[190] the Hague rules on occupation stipulate that the occupation authorities can require inhabitants of the occupied territory to swear an oath of obedience to facilitate effective administration, but not the oath of allegiance.[191] The underlying rationale is that the occupation authorities serve merely as a transitional or precarious power and not as a sovereign power. The traditional laws of occupation classify offences committed by the inhabitants of occupied territory against an occupying power (namely, "war treason")[192] as distinct from war crimes.[193]

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[189] *ICRC's Commentary to GCIV*, 273. Article 43 of the 1907 Hague Regulations "protects the separate existence of the State, its institutions, and its laws": *ibid*.

[190] For instance, Birkhimer notes that the relationship between the occupying power and the inhabitants of occupied territory can be characterised as "temporary allegiance": Birkhimer, *supra* n. 2, at 64, para. 26. See also *United States v. Rice*, (U.S. 1819), in which the US Supreme Court held that the goods imported into Castine in the State of Maine, which was under the British occupation during the Anglo-American War in 1815, were not subject to duties under the revenue laws of the United States. The Court held that:

> By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose.

4 *Wheaton* 246, at 254.

[191] Hague Regulations (1907), Article 45. See also Spaight, *supra* n. 2, at 366. Schwarzenberger describes this rule as declaratory of international customary law: Schwarzenberger, *supra* n. 1, at 173. For the discussion of the oath of obedience, see R.R. Baxter, "The Duty of Obedience to the Belligerent Occupant", (1950) 27 *BYIL* 235; and Stone, *supra* n. 2, at 723–726.

[192] For the origin of the term "war treason", see L. Oppenheim, "On War Treason", (1917) 33 *L.Q.Rev.* 266, at 281–283.

[193] Dinstein, *supra* n. 1, at 110.

The *US Field Manual 27–10* stipulates that a duty of obedience of a general nature is imposed upon the population of occupied territory. They are required "to behave in an absolutely peaceful manner, to take no part whatever in the hostilities carried on, to refrain from all injurious acts toward the troops or in respect to their operations, and to render strict obedience to the orders of the occupant". This form of the duty of obedience, albeit sweeping at first glance, must be qualified by the necessity test. To demand and enforce general obedience can be made only pursuant to three purposes: first, "the security of its forces"; second, "the maintenance of law and order"; and third, "the proper administration of the country".[194] The necessity test based on these legitimate purposes corresponds to the test expressly set out in Article 64 GCIV, which allows exceptions to the general rule prohibiting change in existing legislation of occupied territory.

The necessity test approximates the duty of obedience to the duty of cooperation on the part of the population of occupied territories. A general duty of obedience that inhabitants owe to the occupying power is increasingly questionable in modern IHL,[195] especially in view of the development of human rights law. As a consequence, the relationship between the occupying power and the inhabitants can be more aptly described as a "minimum cooperation".[196]

7.3. *The Interdiction of Annexation*

The occupying power is forbidden from annexing part or whole of the occupied territory. Article 47 GCIV makes clear that an attempt to annex the whole or part of the occupied territory by the occupant or any agreement to the effect of annexation must not deprive the inhabitants in occupied territory of the benefits of the Convention.

The principle that annexation of occupied territory is interdicted has been firmly anchored in the customary law and international judicial practice. Recognition of this principle can be confirmed in several arbitration awards in the inter-war period, which enunciated that unlike a peace treaty, an armistice agreement did not provide a basis for annexation of occupied territory. The *Ottoman Debt Arbitration* (1925) concerned the Peace Treaty of Neuilly of 1919, whereby

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[194] *US FM 27–10*, para. 432.

[195] Greenwood (1992), *supra* n. 1, at 252. Bothe argues that in the modern laws of war, there is no international legal duty of obedience for the civilian population in the occupied territory, and that the capacity of the occupying power to enforce respect is derived more from sheer superior military power, which can in turn enforce obedience of its orders within the bounds of the GCIV and the Hague Regulations: Bothe (1997), *supra* n. 1, at 763–765. See also Baxter (1950), *supra* n. 196.

[196] F. De Mulinen, *Handbook on the Law of War for Armed Forces*, (1987), at 177, para. 806.

Bulgaria had ceded part of her territories to the Allied and Associated Powers. Bulgaria contended that its responsibility for these territories was terminated since they were occupied by the Allied and Associated Powers. The territories in question were occupied after the signature (but not ratification) of the Armistice Convention of September 29, 1918. Eugène Borel, the Sole Arbitrator, found that the belligerent occupation of these territories alone could not effectuate a transfer of sovereignty, and that unless stated otherwise in the Peace Treaty, the transfer of the territories could be recognized only after the entry into force of that Treaty.[197] The similar reasoning was enunciated in other judicial practice. In the *Iloilo Claims* (1925), the British-American Arbitral Tribunal held that the armistice occupation of the Philippines by the US did not amount to a transfer of sovereignty from Spain to the US, on the basis that the sovereignty *de jure* did not begin until the ratification of the Peace Treaty of Paris of 10 December 1898 between Spain and the US.[198] Further, in *Kemeny v. Yugoslavia* (1928), the Hungaro-Yugoslav Mixed Arbitral Tribunal ruled that the conclusion of an armistice agreement on November 3, 1918 between Hungary and the Government of the Serbs, Croats and Slovenians did not transfer the relevant Hungarian territories under enemy occupation to Yugoslavia so as to terminate the jurisdiction exercised by the Hungarian Department of Mines over these territories. The Tribunal fixed the timing of such termination as the entry into force of the Peace Treaty of Trianon on July 26, 1921.[199]

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[197] Citing Fauchille, (*Traité de Droit international public*, 8th ed., Vol. II, No. 1157), Borel observes that:

> Dès lors, le transfert de souveraineté ne peut être considéré comme effectué juridiquement que par l'entrée en vigueur du Traité qui le stipule et à dater du jour de cette mise en vigueur. (…) Le Traité de Neuilly ne contient aucune disposition analogue fixant rétroactivement à une date antérieure à la mise en vigueur le transfert de souveraineté pour les changements territoriaux qu'il consacre.

The *Ottoman Public Debt Arbitration*, award of 18 April 1925, 1 *RIAA* 529, at 555. Note that Article 51 of the Peace Treaty of Versailles of 1919, which allowed Alsace-Lorraine (originally, the regions of the Holy Roman Empire, which became part of France between 1648 and 1871) to be reintegrated into France from the date of the Armistice (11 November 1918), may be seen as derogating from the principle of interdiction of annexation of occupied territories.

[198] The British-American Arbitral Tribunal, *Iloilo Claims*, 19 November 1925, 6 *RIAA* 158, at 159–160; and (1925–26) *AD* 336, No. 254. See also the case of *Forêts du Rhodope Central (Forest of Central Rhodope)* (Merits) (*Bulgaria v. Greece*) concerning sovereignty over the territories, which the Ottoman Empire ceded to Bulgaria in the Peace Treaty of Constantinople of 1913. There, the sole arbitrator, Prof. Östen Undén of Sweden stated that such sovereignty passed to Bulgaria "définitivement" only after the Peace Treaty came into force: award of 29 March 1933, 3 *RIAA* 1405, at 1428.

[199] *Alexandre Kemeny v. Serbo-Croate-Slovenia*, 13 September 1928, (1929) 8 *RDTAM* 588, No. 224, at 593.

8. *The Exclusion of Applicability of the Law of Occupation?*

8.1. *Overview*

Apart from the questions of the scope of application in strict sense, two related issues need to be resolved to examine the applicability or not of the law of occupation to a specific territory. First, it must be questioned whether the illegality or not of the initial recourse to use of force in *jus ad bellum* may cast doubt on the legality of occupation, and even on the applicability of the law on occupation. Second, inquiries will be made into the so-called missing reversioner theory developed in the context of the Israeli occupation of the West Bank and the Gaza Strip.

8.2. *The Relationship between the Legality in* Jus ad Bellum *and the Applicability of the Law of Occupation*

With respect to the first issue, it must be noted that the binding effect of the principles governing laws of occupation do not hinge on the origin of international armed conflict, and even on its legality.[200] The fact that a belligerent resorted to use of force to capture the territory of another state without any justificatory grounds under *jus ad bellum* does not invalidate the application of the law of occupation. This was affirmed in *United States v. List*, in which the US Military Tribunal at Nuremberg held that:

> International Law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory . . . . Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.[201]

In so doing, the Tribunal rejected the contention of the Prosecution that since Germany's war against Yugoslavia and Greece were aggressive wars in breach of the Kellogg-Briand Pact, Germany could not obtain any rights as an occupant. Much less, a breach of *jus ad bellum* exempts the invading power from the duties as the occupant.

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[200] Greenwood (1992), *supra* n. 1, at 243. See also *idem*, "The Relationship between Ius ad Bellum and Ius in Bello", (1983) 9 *Review of International Studies* 221.

[201] US Military Tribunal, Nuremberg, *In re List and Others (Hostages Trial)*, 19 February 1948, 15 *AD* 632, at 637.

8.3. *A Brief Examination of the "Missing Reversioner" Theory*

Brief remarks must be made with respect to the so-called "missing reversioner" theory, a controversial theory proposed by Yehuda Blum.[202] This theory starts with the two assumptions underlying the traditional law of belligerent occupation. First, a power that is ousted from the occupied territory must be the legitimate sovereign. Second, the ousted legitimate sovereign has been at war with the government of the occupying power, which qualifies as a belligerent in relation to the territory. In strict concordance with these assumptions, it is argued that the laws on occupation are inapplicable to the scenario in which the displaced power was not the lawful sovereign, or in which such power was simply missing, in the occupied territory.[203] According to this theory, the absence of a reversioner that acted as a legitimate sovereign, to which the territory is to revert, would preclude obligations of the Geneva Conventions. The effect of this theory is to exempt Israel from obligations embodied in the Fourth Geneva Convention, at least to the extent that they are not of customary nature.

As a corollary of the premises of the missing reversioner theory, Gerson has developed another controversial theory, the "trustee-occupant" theory,[204] for the purpose of stressing the special status of the West Bank and the Gaza Strip and skirting the application of GCIV. This theory characterises Israel in relation to the West Bank and the Gaza Strip as a trustee-occupant rather than a belligerent occupant. As Weston and Falk criticise,[205] the bulk of this argument is to leave a wide scope of discretion to Israel than allowed under the Fourth Geneva Convention, making it the *de facto* sovereign power.

Apparently on the basis of the missing reversioner theory, Israel has, though recognising the Hague Regulations as customary rules applicable to its occupied territories (West Bank, bar East Jerusalem, and Gaza Strip), continued to object to

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[202] Blum, *supra* n. 138. For a criticism of this doctrine, see G. von Glahn, "Obiter Dictum: An Unofficial Expression of Opinion on the VAT Case Judgment", (1987–88) 4 *Palestinian YbkIL* 210, at 214; W.T. Mallison and S.V. Mallison, *The Palestine Problem in International Law and World Order*, (1986); and *idem*, "A Juridical Analysis of the Israel Settlements in the Occupied Territories", (1998–99) 10 *Palestinian YbkIL* 1, at 10–20; and E. Nathan, "The Power of Supervision of the High Court of Justice over Military Government", in: M. Shamgar, *Military Government in the Territories Administered by Israel (1967–1980) – The Legal Aspects*, Vol. I, (1982), 109, at 129.

[203] Blum, *ibid.*, at 293.

[204] A. Gerson, "Trustee-Occupant: The Legal Status of Israel's Presence in the West Bank", (1973) 14 *Harvard ILJ* 1.

[205] R.A. Falk and B.H. Weston, "The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza", in: Playfair (ed.), *supra* n. 1, at Ch. 3, 125–149, at 132.

the *de jure* applicability of the Fourth Geneva Convention to these territories.[206] It has, however, stated that it has "decided to act *de facto* in accordance with the humanitarian provisions of the Convention".[207]

In contrast to earlier writings of some publicists who staunchly supported the position of Israel,[208] Israel's official position that it applies *de facto* the humanitarian provisions has been consistently contested in the doctrinal discourse

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[206] Shamgar, then the Attorney General of Israel, and later the President of the Supreme Court, averred that "…*de lege late*, the automatic applicability of the Fourth Convention to the territories administered by Israel is at least extremely doubtful, to use an understatement, and automatic application would raise complicated juridical and political problems.…": M. Shamgar, "The Observance of International Law in the Administered Territories", (1971) 1 *Israel YbkHR* 262, at 263. However, Israel has affirmed the applicability of humanitarian provisions of the Fourth Geneva Conventions. For the assessment of the Israeli occupation in the light of the laws of occupation, see E.R. Cohen, *Human Rights in the Israeli-Occupied Territories 1967–1982*, (1985), at 43–56; Falk and Weston, *ibid.*, at 125: Adam Roberts (1990), *supra* n. 1; *idem* (1992), *supra* n. 1; and Shamgar (ed), *supra* n. 202, Chs. 1, 4, 5, and 7 (especially, at 31–43).

[207] Shamgar (1971), *ibid.*, at 266. Lapidoth notes that Israel has introduced more progressive changes into the occupied territories than required under the laws of occupation, referring to its decision not to apply the death penalty even to heinous crimes, and to grant to the inhabitants in occupied territories the possibility of submitting petitions to Israel's Supreme Court against the Government and its officials: R. Lapidoth, "The Expulsion of Civilians from Areas Which Came under Israeli Control in 1967: Some Legal Issues", (1990) 2 *EJIL* 97, at 100.

[208] See, for instance, Blum, *supra* n. 138; S.M. Schwebel, "What Weight to Conquest?", (1970) 64 *AJIL* 344 (suggesting that the principle that no weight should be given to conquest requires modification in case of "unlawful" use of force by Arab neighbours against Israel in June 1967, and that weight should be given to "defensive" action by Israel to ensure that the Arab territories taken over by Israel "will not again be used for aggressive purposes against Israel": *ibid.*, at 346–347. Along this line, Elihu Lauterpacht contends that:

> Territorial change cannot properly take place as a result of the *unlawful* use of force. But to omit the word "unlawful" is to change the substantive content of the rule and to turn an important safeguard of legal principle into an aggressor's character. For if force can never be used to effect lawful territorial change, then, if territory has once changed hands as a result of the unlawful use of force, the illegitimacy of the position thus established is sterilized by the prohibition upon the use of force to restore the lawful sovereign. This cannot be regarded as reasonable or correct.

E. Lauterpacht, "Jerusalem and the Holy Places", Anglo-Israel Association, Pamphlet, No. 19 (1968), at 52; as cited in: Schwebel, *ibid.*, at 347.

(both Israeli and non-Israeli writers)[209] and in the UN Security Council[210] and General Assembly.[211] Criticisms have been levelled at the failure of the Israeli government to clarify which humanitarian provisions of GCIV are applicable to its occupied territories,[212] and the extent to which the actual practice has honoured such humanitarian obligations (whether customary or constitutive rules under GCIV).[213] Indeed, the Israeli Supreme Court (sitting as a High Court of Justice)[214] has not hesitated to recognise that the West Bank is under the "belligerent occupation" of Israel.[215] Nor has it outright rejected the applicability of

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[209] For a criticism of this position in an unambiguous manner, see Cohen (1985), *supra* n. 206, at 51–56; Dinstein, *supra* n. 1, at 107; and T. Meron, "West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition", (1979) 9 *Israel YbkHR* 106, at 108–119. A more subtle criticism can be discerned in: N. Bar-Yaakov, "The Applicability of the Laws of War to Judea and Samaria (The West Bank) and the Gaza Strip", (1990) 24 *Israel L. Rev.* 485, at 493–494 and 504–506; and Adam Roberts (1990), *supra* n. 1, at 66. See also the literature cited in: T. Meron, "Applicability of Multilateral Conventions to Occupied Territories", (1978) 72 *AJIL* 542, at 548–549, n. 31.

[210] See, for example, UN General Assembly Resolution 43/58 of 6 September 1988, Section B.

[211] See, for instance, Security Council Resolution 607 of 5 January 1988.

[212] See, *inter alia*, Bar-Yaakov, *supra* n. 209, at 493–494; Benvenisti (1993), *supra* n. 1, at 109–112; Lapidoth, *supra* n. 207, at 101; M. Qupty, "The Application of International Law in the Occupied Territories as Reflected in the Judgements of the High Court of Justice in Israel", in: Playfair (ed), *supra* n. 1, 87, at 111–116; Adam Roberts (1990), *supra* n. 1, at 66; and M. Shamgar, "Legal Concepts and Problems of the Israeli Military Government – The Initial Stage", in: Shamgar (ed) (1982), *supra* n. 202, at 31–43.

[213] In this regard, see, in particular, R. Shehadeh, *Occupier's Law*: *Israel and the West Bank*, revised ed., (1988).

[214] For the examination of judicial review carried out by the Israeli High Court of Justice, see E. Cohen, "Justice for Occupied Territory? The Israeli High Court of Justice Paradigm", (1986) 24 *Colum.JTL* 471, at 497; and D. Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories*, (2002).

[215] See, for instance, H.C. *390/79, Mustafa Dweikat et al., v the Government of Israel et al.* (the *Elon Moreh* Case), 34(1) *Piskei Din* 1; excerpted in: (1979) 9 *Israel YbkHR* 345; and H.C. *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: (1984) 14 *Israel YbkHR* 301, at 302. In H.C. *61/80, Haetzni v. Minister of Defence et al.*, Landau J.P. observed as follows:

> One should not confuse the problem of sovereignty over Judea and Samaria according to international law, with the right and duty of the Military Commander to maintain public order in the area in order to ensure his control there, and to establish a system of the rule of law there, for the benefit of the inhabitants of the area. (…) the Commander of the Region acted within the ambit of the powers vested in him by international law…without…being required to look into the question of sovereignty over the area.

34(3) *Piskei Din* 595; English excerpt in: (1981) 11 *Israel YbkHR* 358, at 359.

customary IHL, which is comprised of many rules embodied in GCIV, to cases emanating from the West Bank and the Gaza Strip.[216]

Prima facie, the reference to "a territory of the High Contracting Parties" might give merit to the Israeli government's argument, presupposing that the occupied territory ought to be the territory of a high contracting party. The technique of restrictive interpretation may corroborate this methodology. However, the Israeli government's argument overlooks the fundamental assumption that the applicability of the GCIV does not depend on the recognition of titles.[217] Several counterarguments can be made out.

First, as for the scope of application *ratione materiae* of GCIV, Article 2(2) of GCIV provides that "[t]he Convention shall also apply to *all* cases of partial or total occupation of a territory of the High Contracting Parties"[218] The ordinary textual interpretation of this provision requires it to be read together with the first paragraph of Article 2, which does not mention a "territory of the High Contracting Parties". According to Article 31(1) of the Vienna Convention on the Law of Treaties 1969, "ordinary meaning" must be given to the terms of the treaty "in their context and in the light of its object and purpose".[219] Article 2(2) should be construed as supplementary to the general rule embodied in the first paragraph. It is purported to complement, rather than circumscribe, the scope of application *ratione materiae* of GCIV.[220] This is also consistent with the

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[216] See, for instance, H.C. *337/71, The Christian Society for the Holy Places v. Minister of Defense et al.*, 26(1) *Piskei Din* 574, at 580 (1972), English excerpt in: (1972) 2 *Israel YbkHR* 354, at 356 (*per* Sussman J.). In *Sheikh Suleiman Abu Hilu et al.* case, the Supreme Court recognised the competence to scrutinise the case in the light of customary international law and did not outright reject the submission based on Article 49 of GCIV. However, in that case, the application of Article 49 was rejected on the basis that this provision was inapplicable to the case where civilians were transferred from one place to another within the territory of the Military Government and not from such occupied territory to the territory of Israel: H.C. 302/72, *Sheikh Suleiman Abu Hilu et al., v. State of Israel et al.*, 27(2) *Piskei Din* 169, at 177; English excerpt in (1975) 5 *Israel YbkHR* 384, at 386–387 (*per* Landau J.) (1975). See also Dinstein, *supra* n. 1, at 108.

[217] Cohen (1985), *supra* n. 206, at 53; Dinstein, *supra* n. 1, at 107; F. Kalshoven, *Belligerent Reprisals*, 2nd ed., (2005), at 317–318; and Kolb (2002) *supra* n. 16, at 294.

[218] GCIV, Article 2(2), emphasis added.

[219] In that sense, it would be incoherent to argue that GCs apply to all cases of inter-state armed conflict (as in the case of the Six-Day War in 1967) but is precluded from being applicable to the territories occupied as a consequence of that armed conflict.

[220] Kolb provides a very cogent argument in this respect:

> Il faut souligner que le paragraphe 2 de l'article 2 ne consomme pas le paragraphe 1 selon l'argument que le cas spécial de l'occupation est réglé par le paragraphe 2 en dérogation (*lex specialis*) du paragraphe 1. S'il y a hostilités – et occupation – la Convention entre en vigueur selon le paragraphe 1; s'il y a occupation sans hostilités, la Convention entre en vaguer selon le paragraphe 2. (…) Le paragraphe n'est donc pas concurrent du paragraphe

understanding of the *travaux préparatoires*.[221] This interpretation is clear from the applicability of the Convention "*also*" to cases of occupation, including even that which does not meet with no armed resistance, as provided in the second paragraph.[222] It may be that the second paragraph of Article 2 contemplates the case of occupation, which does not meet armed resistance, as the third scenario in which the GCIV is to be applied, in addition to the two scenarios of declared war and armed conflict.[223]

Second, with respect to the personal scope of application in case of occupation, Article 4 refers to those persons who fall under the hands of an occupant in any manner whatsoever. The application of GCIV is not dependent on the concept of territorial sovereignty.[224] Third, Article 4 of API prescribes that the application of GCIV and API must not affect the legal status of an occupied territory.[225]

Fourth, special regard must be had to a general principle of IHL, according to which any restrictions on the rights granted to individual persons must be construed narrowly.[226] Article 47 GCIV lays down the "inviolability" of rights of protected persons guaranteed under GCIV.[227] It stipulates that the protected persons

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1 mais cherche à le completer, comblant une lacune, pour le seul cas d'une occupation sans hostilité, et visant à render la Convention applicable meme dans ce cas.

Kolb (2002), *supra* n. 16, at 277.

[221] The *ICRC's Commentary to GCIV* states that:

> It [the second paragraph of Article 2 GCs] does not refer to cases in which territory is occupied during hostilities; in such cases the Convention will have been in force since the outbreak of hostilities or since the time war was declared. The paragraph only refers to cases where the occupation has taken place without a declaration of war and without hostilities, and makes provision for the entry into force of the Convention in those particular circumstances. The wording of the paragraph is not very clear, the text adopted by the Government of Experts being more explicit.... Nevertheless, a simultaneous examination of paragraphs 1 and 2 leaves no doubt as to the latter's sense: it was intended to fill the gap left by paragraph 1.

ICRC's Commentary to GCIV, at 21. According to this *Commentary*, the cases of post-armistice occupation and post-capitulation occupation are covered by the first paragraph of Article 2, as they result from declared war or other inter-state armed conflicts: *ibid.*, at 22.

[222] Dinstein, *supra* n. 1, at 107; Kalshoven (2005), *supra* n. 217, at 317–318; and Kolb, *supra* n. 16, at 294.

[223] Kolb, *supra* n. 16, at 276.

[224] Dinstein, *supra* n. 1, at 107.

[225] *Ibid.*

[226] This general principle of IHL is reflected in Article 47 of GCIV. See Kolb, *supra* n. 16, at 301.

[227] Kolb, *ibid.*, at 296–317. He notes that these rights form "un standard minimum absolu ou indérogable", and that this provision must be read together with Articles 7 and 8 of GCIV: *ibid.*, at 297.

in occupied territory must not be deprived of the benefits of the Convention either through the change introduced after the commencement of occupation, or by any agreement entered into with the occupied power, or by any annexation of the territory in whole or in part. No unilateral statement or decision on the part of the occupying power can have any legal effect of unfavourably affecting the status of the civilian population in occupied territory.[228] Note must also be taken of all-inclusive phrases used in the first paragraph of common Article 2 ("shall apply to *all* cases of declared war or of *any* other armed conflict") and in common Article 1 ("…undertake to respect and to ensure respect for the present Convention in *all* circumstances").[229]

All these suggest that the law of belligerent occupation is applicable even where a displaced power was not a lawful sovereign.[230] In the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice authoritatively confirmed that both West Bank and Gaza Strip constitute the occupied territories.[231] The sustainability of the theory of missing reversioner or that of trustee-administrator in the doctrinal discourse is very doubtful.

9. *Conclusion*

The foregoing examinations have ascertained the meaning and constitutive elements of occupation, the scope of application of the law of occupation, a set of basic rules governing the law of occupation, and different theories designed to exclude the application of the law of occupation. The underlying assumption of all those rules follows a distinction between the rules on conduct of hostilities on one hand, and the rules applicable to occupied territory on the other. The former rules are generally perceived as inapplicable to situations of occupation. Before turning to the analysis of the sources of the law of occupation, it is

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[228] Cohen (1985), *supra* n. 206, at 53; and Kalshoven, *supra* n. 217, at 319.

[229] Emphasis added.

[230] For a concurring view, see Greenwood (1992), *supra* n. 1, at 244.

[231] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ, Rep. 2004, 136, at 177 and 185, paras. 101 and 125. For the examination of this advisory opinion, see "Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory", (2005) 99 *AJIL* 1, especially, A. Imseis, "Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion", *ibid.*, at 102–119; and D. Kretzmer, "The Advisory Opinion: The Light Treatment of International Humanitarian Law", *ibid.*, at 88–101.

essential to analyse implications of this distinction in the modern context of occupation.

The 1907 Hague Regulations distinguish between the rules contained in Section II which govern the conduct of hostilities and the rules under Section III which are applicable to occupied territory. Similarly, the Fourth Geneva Convention draws a line between the provisions of Part II, which are applicable to combat zones, and those of Part III specifically elaborated for the purpose of safeguarding rights of protected persons in occupied territory or in enemy territory. However, this distinction must not be overemphasised. This doctrinal dichotomy overlooks the modern state of occupation. When the Hague Regulations were adopted, the factual nature of occupation was understood as a relatively stable state. This marks a stark contrast to an uncertain and fluid state of occupation in the modern context, in which turmoil may easily turn into intense and protracted fighting.

In the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ took the view that the rules relating to conduct of hostilities are excluded from application to West Bank.[232] As Kretzmer notes,[233] the ICJ failed to adduce elaborate reasoning for this conclusion. One can nonetheless speculate two rationales for the Court's conclusion: the Court took the view that according to evidence available to it, the level and intensity of fighting in the occupied territory was not sufficient to be characterised as armed conflict; or it considered that the application of the rules on conduct of hostilities was totally excluded in occupied territory even where there were protracted violence reaching the threshold of an armed conflict. The former position is very unlikely. On the other hand, it is difficult to sustain the latter position, which is based on the sharp distinction between the conduct of warfare and occupation.[234] The better view is to consider many rules on conduct of hostilities pertinent to a type of occupation where sporadic fighting ensues, as in the case of the West Bank, the Gaza Strip since 1967, and the occupied Iraq since 2003. The rules on conduct of hostilities (not only the

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[232] The ICJ ruled out the applicability to West Bank of Article 23(g) of the 1907 Hague Regulations, which prohibits the destruction and the seizure of land, except in case of imperative military necessity: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ, Rep. 2004, 136, at 185, para. 124.

[233] Kretzmer (2005), *supra* n. 231, at 96.

[234] For the same view, *ibid*.

customary rules derived from Section II of the Hague Regulations and Part II of GCIV, but also many rules on conduct of warfare embodied in API) should be deemed applicable even to a small-scale fighting in occupied territory.[235]

[235] Schwarzenberger follows the same line of thought, recognising the applicability of the rules on destruction and seizure of private property during hostilities to occupied territory when combat operations are needed to deal with a local rebellion or partisans. He observes that:

> Destruction of individual property in occupied territory for purposes of restoring or maintaining public order is permissible.... *A fortiori*, this must be so when, as for instance in the case of a local rebellion or in operations against partisans... military operations in occupied territories become necessary. It is also possible to arrive at the same conclusion by the *analogous application of Article 23(g)* of the Hague Regulations....

Schwarzenberger (1968), *supra* n. 1, at 257, emphasis added. For the same view, see Kretzmer (2005) *ibid*, at 96; and Sassòli, *supra* n. 47, at 665–666 (discussing the rules on conduct of hostilities and those relating to law enforcement operations in occupied territory). Kretzmer criticises the failure of the ICJ in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* to examine "whether the situation on the West Bank is merely an occupation or an occupation in which hostilities amounting to armed conflict are taking place": *ibid*. *Contra*, see David, who seems to draw a strict line between rules on conduct of hostilities and those on occupation. This can be seen in his assertion that contrary to Article 23 of the 1907 Hague Regulations, which "ne concerne que les situations d'affrontement", the general rule that forbids the occupying power from destroying public or private property of the occupied state is not expressly enunciated in the 1907 Hague Regulations: David, *supra* n. 1, at 519.

Chapter 2

Sources of the Law of Occupation

1. *Introduction*

Three systems of law apply in territory under an enemy occupation: the indigenous law of the sovereign state, to the extent that the occupant does not perceive it necessary to suspend it; the laws (legislation, orders, decrees, proclamations, and regulations) enacted by the occupant; and the customary and conventional international law on belligerent occupation.[1] Apart from treaties and customs, other international legal instruments applicable in occupied territory encompass general principles of law and Security Council resolutions. The growing reliance on the Council resolution in authorising deployment of troops in a foreign land and delegating enforcement action necessitates a complex assessment of the legal nature and effect of the Council resolution adopted under Chapter VII of the UN Charter. It is of special significance to analyse the relationship between the Council resolution and the requirements of the law of occupation, including the derogability or not of the Council resolution from obligations flowing from the law of occupation.

2. *Treaty Law*

The conventional laws relating to occupation consist of: the Regulations annexed to the Hague Convention No. IV Respecting the Laws and Customs of War on Land, 1907 ("the Hague Regulations"), which was the amended version of its precursor, the 1899 Hague Convention No. II Respecting the Laws and Customs of War on Land adopted at the Hague Peace Conference of 1899;[2] the Geneva

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[1] G. Von Glahn, *Law Among Nations*, 6th ed., (1992), at 774.

[2] For the assessment of the Hague Peace Conference, see A. Eyffinger, *The 1899 Hague Peace Conference – 'The Parliament of Man, the Federation of the World'*, (1999); and J.B. Scott, *The Hague Peace Conferences of 1899 and 1907*, Vols. I and II, (1909).

Convention No. IV Relative to the Protection of Civilian Persons in Time of War, of 1949 ("the Fourth Geneva Convention"); and supplementary rules found in Additional Protocol I of 1977.[3] Article 154 of GCIV makes it clear that the Geneva Civilians Convention serves to supplement, rather than replace, Section II (the rules concerning the conduct of hostilities) and Section III (the rules relating to occupation) of the 1907 Hague Regulations. With respect to the rules on belligerent occupation embodied in the Hague Regulations, the International Military Tribunal at Nuremberg held these rules as declaratory of customary international law.[4]

Other conventional laws relating to specific fields are applicable to belligerent occupation. The Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (1980) specifically recognises its scope of application and that of its annexed Protocols in the situations mentioned in common

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[3] As will be examined in the subsequent discussions, the API does not provide significant additions to the rules on protection of civilians in occupied territory. It has expanded the rules concerning the work of civil defence organisations in occupied territory (Article 63), duties of occupying powers relating to food and medical supplies (Article 69(1)) and relief actions (Articles 69(2) and 71). It also prescribes measures of protection for women (Article 76) and children (Article 77) in occupied territory and anywhere affected by hostilities: see A. de Zayas, "Civilian Population, Protection" in: R. Bernhardt (ed.), (1992) 1 *Encyclopedia of Public International Law*, 606, at 606–611.

[4] The International Military Tribunal held that:

> The rules of land warfare expressed in the [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 Charter.

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", (1947) 41 *AJIL* 172, at 248–249. See also US Military Tribunal, Nuremberg, *The German High Command Trial (Trial of Wilhelm Von Leeb and Thirteen Others)*, 30 December 1947–28 October 1948, (1949) 12 *LRTWC*, 1, at 87. The International Military Tribunal for the Far East (1948) held that "[a]lthough the obligation to observe the provisions of the Convention as a binding treaty may be swept away by operation of the 'general participation clause' . . . the Convention remains as good evidence of the customary law of nations, to be considered by the Tribunal along with all other available evidence in determining the customary law to be applied in any given situation": *In re Hirota and Others*, International Military Tribunal for the Far East, Tokyo, Judgment of 12 November 1948, [1948] *AD*, Case No. 118, at 366. See also E. Benvenisti, "The Security Council and The Law on Occupation: Resolution 1483 on Iraq in Historical Perspective", (2003) 1 *Israel Defense Forces Law Review* 19, at 27, n. 18.

Articles 2 GCs, and the situation contemplated by Article 1(4) of API.[5] With respect to the protection of cultural property, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict must be taken into account.[6] The 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, though generally classified as a treaty of arms control, extends the duty to destroy or ensure the destruction of all anti-personnel mines in mined areas to occupied territory.[7]

The large part of the rules embodied in the 1907 Hague Regulations and API concerns the conduct of warfare (means and methods of warfare) rather than regulations of belligerent occupation. This explains why the classic treatises and contemporary writings of the law on belligerent occupation have dealt only with the rules specifically designated as applicable to occupied territory. Nevertheless, as briefly discussed in the concluding observations of the previous chapter, the situation of occupation is often precarious and beset with sporadic and at times even intense fighting between the occupation army on one hand, and members of remaining armed forces of an occupied state, of resistance movements, or of unprivileged belligerents on the other. Where fighting even of a small scale takes place in occupied territories, the occupying power must take into account the rules governing conduct of hostilities.

3. *Customary International Humanitarian Law*

Customary international law has long served as the most important source of the laws of war. Indeed, many of the famous Lieber Code, which was designed as the military manual of the US army during the American Civil War, may be considered codification (rather than new development) of pre-existing customary rules. As discussed above, with respect to the rules on belligerent occupation embodied in the Hague Regulations, the International Military Tribunal at Nuremberg held that these rules had hardened into the realm of customary international law before 1939.

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[5] The Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (1980), Article 1. See also Article 7(4) and 9(2) of the same Convention.

[6] See the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 5, which specifically deals with duties of the occupying power.

[7] 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Article 5(1), "under its jurisdiction or control".

In the context of IHL, the *Nicaragua* case[8] entails several crucial implications on the relationship between treaty provisions and customary norms. First, for a State that is not a party to a relevant IHL treaty, it is still governed by customary rules, which serve as a "gap filler". In the area of international armed conflict, given the existence of a large number of IHL and arms control treaties, and especially in the light of the comprehensive nature of regulations by the Geneva Conventions and API, this possibility may seem of little practical importance. However, in the context of the Eritrea-Ethiopia Claims Commission, customary humanitarian norms served as the most important sources of law, as Eritrea did not accede to the 1949 Geneva Conventions until August 2000, that is, after the occurrence of the contested events.[9]

Second, the role of customary rules as "gap filler" may also be seen in areas which have yet to be governed by treaty provisions. This is especially the case with regard to IHL rules relating to the area of internal armed conflict that may take place in occupied territories. As the experience of the ICTY demonstrates, the identification of customary rules in this area is highly significant for balancing the need for international criminal justice and the requirement of the legality principle.

Third, customary rules may serve to clarify the status of treaty provisions which were considered innovative developments at the time of their adoption. API is intended to harmonise the Hague rules on conduct of warfare and the Geneva rules designed to protect persons hors de combat. When adopted, many, if not most, of its provisions were not deemed codificatory of pre-existing customary rules. It then needs to be explored whether these provisions have since then turned into customary rules and hence become binding on states not parties to API. Despite the ratification by the majority of the States, API has yet to muster as universal a level of ratification as the 1949 Geneva Conventions. Surely, the rules relating to occupation under API are very limited. Yet, this does not diminish the importance of clarifying the customary law status or not of the rules embodied in API.

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[8] ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ, Rep. 14, 1986.

[9] The Eritrea Ethiopia Claims Commission, Partial Award, *Civilians Claims, Eritrea's Claims 15, 16, 23 and 27–32*, Award of 17 December 2004, (2005) 44 *ILM* 601, para. 28. The Commission assumes that all the provisions of the Geneva Conventions have formed part of customary international law, noting that "those Conventions have largely become expressions of customary international humanitarian law". Indeed, the Commission recognised that "most of the provisions of [Additional] Protocol I expressed customary international humanitarian law": *ibid.*, at 607–608, para. 29.

Fourth, customary rules may play a crucial role in developing new and more "progressive" (more victim-friendly) rules which may go beyond the requirements of relevant treaty provisions. It is possible to contemplate the dynamism of customary law in influencing the interpretation and application of conventional IHL norms, which are considered expressive of customary rules. In this regard, Part III will investigate how the parallel development of customary international human rights norms, especially rules concerning non-derogable rights which are applicable even in time of war, has impacted upon the scope of application of IHL provisions.

4. *The Fourth Geneva Convention as Customary International Law*

It may be examined whether and to what extent the rules embodied in the Geneva Conventions have acquired customary law status and hence binding character on all states. The appraisal will start with the question whether GCs are declaratory or constitutive of pre-existing customary international law. Two opposing schools of thought may be contrasted. In the first place, inquiries will be made into Pictet's observations. On one hand, he admitted that the Fourth Geneva Convention deals with "un domaine juridique entièrement nouveau", particularly relating to the treatment of civilians in occupied territory as covered by the GCIV.[10]

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[10] J.S. Pictet, "La Croix-Rouge et les Conventions de Genève", (1950) 76 *RdC* 1, at 97. He adds that:

> …il résulte qu'on s'aventurait sur un terrain beaucoup moins solide que par le passé. Il fallait éviter avec soin que l'introduction de règles dont l'obsevation serait incertaine ne vienne compromettre la validité du droit de Genève et le credit qui s'y attaché.

Ibid., at 98. In the *ICRC's Commentary to GCIV*, Pictet observes as follows:

> In 1921 the Committee [the International Committee of the Red Cross] proposed to an International Red Cross Conference that the text of a Convention for the protection of civilians should be studied at the same time as the Prisoners of War Code. Assured of the support of the Red Cross Conferences, it prepared a preliminary draft Convention, the main provisions of which prohibited the deportation of the inhabitants of occupied countries and the execution of hostages and guaranteed the right of civilians to exchange correspondence and receive relief. Civilians in enemy territory were to be allowed to return to their home country unless there were reasons of State security to prevent this; internees were to enjoy the same conditions as prisoners of war. The Committee's efforts did not meet with success, however. (…) The International Committee persevered in its efforts and prepared a new and more complete draft which was adopted by the International Red Cross Conference in Tokyo in 1934. As soon the war [WWII] began, the International Committee of the Red Cross proposed that the belligerent States should bring the Tokyo Draft into force. The Powers concerned were reluctant to fall in with this proposal, and the Committee then suggested a partial solution to meet the case of civilians who were in enemy territory when hostilities opened: namely, that the provisions of the 1929 Convention

On the other, he forcefully argues that the GCs are declaratory of customary law as already existed in 1949. He states that:

> The Convention does not strictly speaking introduce any innovation in this field of international law. It does not put forward any new ideas. But it reaffirms and ensures, by a series of detailed provisions, the general acceptance of the principle of respect for the human person in the very midst of war – a principle on which too many cases of unfair treatment during the Second World War appeared to have cast doubt.[11]

Yingling and Ginnane, who were members of the US delegation at the Geneva Conference of 1949, take a more mixed view as to the legal nature (declaratory or progressive development) of the GCs. They observe that "[t]he new Civilian Convention is an extension and codification of earlier international rules and practices governing the treatment of alien enemies in a belligerent country and the treatment of the inhabitants of territory under military occupation".[12] Similarly, Gutteridge notes that "[t]o some extent it [the Convention] is declaratory of existing principles of international law but in a large measure it lays down new principles which are to become part of that law."[13] Along this line, Schwarzenberger observes that:

> The question whether Geneva Red Cross Convention IV is declaratory or constitutive is not settled conclusively in the Convention. It is merely stated that the Convention is "supplementary" to the corresponding sections of the Regulations of 1899 and 1907.... Some of its provisions are not more than attempts to clarify existing rules of international customary law. This is probably true in particular of those articles in Section I of Part III of the 1949 Convention in which a number of requirements of the standard of civilisation, such as the prohibition of taking of hostages, are codified.... The same applies to the prohibition of the deportation of inhabitants of occupied territories.... To the extent, however, to which existing legal

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> relative to the treatment of prisoners of war should be applied by analogy to any such civilians who had been or would be interned. The belligerents expressed a preference for this latter solution and arrived [at] an agreement of a kind, through the medium of the International Committee. (...) No provision was made, however, for civilians in occupied territories; they too would have received protection under the Tokyo Draft if it had been adopted. (...) In 1945 the work of revising the Conventions was overshadowed by the imperative necessity of extending their benefits to civilians. (...) The undertaking was an arduous one, however. The legal field in question was completely new. (...) it was now necessary to include an unorganized mass of civilians scattered over the whole of the countries concerned.
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> *ICRC's Commentary to GCIV*, at 4–5.

[11] *ICRC's Commentary to GCIV*, at 9.

[12] R.T. Yingling and R.W. Ginnane, "The Geneva Conventions of 1949", (1952) 46 *AJIL* 393, at 411.

[13] J.A.C. Gutteridge, "Geneva Conventions of 1949", (1949) 26 *BYIL* 294, at 318–319.

> duties of Occupying Powers are not merely elaborated, but enlarged, the Convention must be treated as constitutive and applicable only between the parties....[14]

By the same token, Oppenheim/Lauterpacht claim that "[t]he Geneva Convention of 1949 on the Protection of Civilian Persons in Time of War... contains detailed provisions, which in many ways go beyond the obligations of customary International Law, with regard to the treatment of enemy aliens... in the territory of the belligerent."[15] These authors' views are echoed by President Shamgar of the Supreme Court of Israel in his lengthy opinion in the *Abd al Nasser al Aziz Abd al Affo et al.* case (1988). There, he ruled that "[a]t the time no basis was given for the argument that Article 49 expresses a customary rule of international law; (...) the armed conflicts that have occurred since 1949 (India-Pakistan, Cyprus and others) have not brought about legal decisions that would shed a different light on the issue".[16] Writing in 1993, Dinstein follows this narrow view, maintaining that only "some" provisions of the GCIV are declaratory of customary international law.[17]

Notwithstanding Pictet's idealistic view, the prevailing view of the leading commentators makes it safe to contend that at the time of 1949, the GCIV

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[14] G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. II: *The Law of Armed Conflict*, (1968), at 165–166.

[15] L. Oppenheim, *International Law*, (7th ed., by H. Lauterpacht, 1952), at 313, para. 100b. When writing in 1966, Seyersted argued that the fact that "many" of the Hague Conventions and the other even older conventions were "recognized as general (customary) international law and... binding *ipso facto* upon all States, as well as upon the United Nations... is, however, not true of all provisions of the modern and detailed conventions, notably the Geneva Conventions of 1949 and the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict": F. Seyersted, *United Nations Forces in the Law of Peace and War*, (1966), at 314.

[16] Israel, the Supreme Court sitting as the High Court of Justice, HC *785/87, 845/87 and 27/88*, *Abd al Nasser al Aziz Abd al Affo et al. v. Commander of the IDF Forces in the West Bank et al.*, 42(2) *Piskei Din* 4; English summary in: (1990) 29 *ILM* 139.

[17] Y. Dinstein, "The Israel Supreme Court and the Law of Belligerent Occupation: Deportation", (1993) 23 *Israel YbkHR* 1, at 13. As discussed below in the context of the prohibition of deportation and forcible transfer, he does not, however, provide analysis of the evolution of customary law that may have taken place in a way that became largely parallel to the (large) body of this treaty since 1949. See also T. Meron, "West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition", (1979) 9 *Israel YbkHR* 106, at 111–112. Meron suggests that:

> ...account must be taken of the fact that *some* provisions of the [Fourth] Geneva Convention are, indeed, declaratory of customary international law. (...) Rather than view all the provisions of the Geneva Convention as reflecting conventional international law and therefore as non-invocable in domestic courts, it is suggested that the High Court of Justice should, in the future, examine each relevant provision of that Convention in order to determine whether it is declaratory of customary international law or not.

Ibid., emphasis in original.

represented the mixture of both declaratory and constitutive elements to reflect the experience of World War II. The extent to which the provisions incorporated into GCIV were constitutive remains unresolved. Even interpreted *in extenso*, in the light of the drafting records, one may at most argue that less than half of the provisions of GCIV were declaratory. This can be corroborated by the 1921 text and the 1934 Tokyo Draft Articles which, as analysed in Chapter 12, provided the basis for the later Geneva Civilians Convention. However, this conclusion does not exclude the argument that the rules adopted in GCIV, which were innovative in 1949, have subsequently attained the status of customary law.

In the *Nicaragua* case, the ICJ held that common Articles 1 and 3 of the Geneva Conventions are general principles of humanitarian law as part of customary law, and hence they were binding on the United States.[18] The Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) for the former Yugoslavia (the Kalshoven Commission) did not go so far as to recognise all the provisions of GCs as customary international law.[19] It states that the "body of customary international law applicable to international armed conflicts includes the concept of war crimes, and a wide range of provisions also stated in Hague Convention IV of 1907, the Geneva Conventions of 1949 and, to some extent, the provisions of Additional Protocol I.[20]

Since 1990s, the overwhelming majority of modern publicists have taken the view that the bulk of the provisions of GCIV have now hardened into customary international law. With respect to laws of occupation, there has emerged a consensus among the scholars that at least, most provisions concerning occupation under GCIV, including Articles 47–78 in Section III of Part III, have been distilled into customary law. Departing from his earlier view,[21] Meron observes that "the impact of Nicaragua on the subsequent development of the law was such that the customary law character of Articles 1 and 3, and practically of *the entire corpus of the Geneva Conventions*, is now taken for granted and virtually never questioned".[22]

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[18] ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ, Rep. 14, 1986, paras. 218–20.

[19] Zwanenburg does not consider all the provisions of the 1949 Geneva Conventions to be of customary law character, pointing out that some of the technical rules in GCs have never been implemented in practice: M. Zwanenburg, *Accountability of Peace Support Operations*, (2005), at 200.

[20] *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/1994/674–27 May 1994, Section II, Subsection C "Customary international law of armed conflict".

[21] Meron (1979) *supra* n. 17, at 111–112.

[22] T. Meron, "Revival of Customary Humanitarian Law", (2005) 99 *AJIL* 817, at 819, emphasis added. See also T. Meron, "Geneva Conventions as Customary Law", (1987) 81 *AJIL* 348; and *idem, Human Rights and Humanitarian Norms as Customary Law*, (1989).

Meron's view is borne out by the judicial decisions of various international tribunals. In the *Tadić* case, the Appeals Chamber of the ICTY has suggested that Article 3 of the ICTY Statute (relating to violations of the laws or customs of war) encompasses all (serious) violations of international humanitarian law, namely both Geneva and Hague rules, except for grave breaches of the Geneva Conventions (as prescribed by Article 2 of the Statute), genocide (Article 4) and crimes against humanity (Article 5).[23] The implication of this dictum is that all the Geneva (and the Hague) rules have acquired customary law status (and controversially, even applicability to internal armed conflict).[24] In the subsequent judgments, the Trial Chamber has followed the reasoning of the Appeals Chamber, taking it for granted that GCs are expressive of customary IHL.[25]

In the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ held that:

> …great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*I.C.J. Reports 1949*, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States *whether or not they have ratified the conventions* that contain them, because they constitute intransgressible principles of international customary law.[26]

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[23] ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Appeal on Jurisdiction, 2 October 1995, reprinted in: (1996) 35 *ILM* 32, at 49–50, 71, paras. 87–88, 137.

[24] The ICTY presupposes the existence of customary law applicable to non-international armed conflict outside the framework of common Article 3 of GCs, Protocol II and Article 19 of the 1954 Hague Convention on Cultural Property. It ought to be noted, however, that the ICTY did not endorse a mechanical transplant of the Hague and Geneva rules to non-international armed conflict (NIAC). Instead, it has ruled that the general essence of these rules, and not the detailed regulation they contain, has acquired applicability to NIAC: ICTY, *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Decision of 2 October 1995, No IT-94-I-AR72, para. 126. For criticism of this "over-inclusive" approach of the ICTY, see G.H. Aldrich, "Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia", (1996) 90 *AJIL* 64, at 67–68; T. Meron (1996), "The Continuing Role of Custom in the Formation of International Humanitarian Law", (1996) 90 *AJIL* 238, at 243; and L. Moir, *The Law of Internal Armed Conflict*, (2002), at 188–189.

[25] See ICTY, *Prosecutor v. Tadic*, Judgment of 7 May 1997, IT-94-1-T, at 199–200, para. 577; and *Prosecutor v. Delalic (Čelebici)*, IT-96-21-T, Judgment of 16 November 1998, p. 113, paras. 305 and 316.

[26] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Rep. 1996, 226, para. 79, emphasis added. The ICJ also found that "[t]he extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles": *ibid.*, para. 82.

Similarly, the Eritrea-Ethiopia Claims Commission treated the four Geneva Conventions as "largely . . . expressions of customary international humanitarian law".[27] The Commission ruled that the provisions relating to the rights of civilians enjoy the presumptive customary law status, and that the onus of proof would have been placed on the Party asserting to the contrary.[28]

Support for the customary law status of the Geneva Conventions can also be found in the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*,[29] which was unanimously approved by the Security Council Resolution 827 (1993). This Report states that "[t]he part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims . . .".[30] Further, the *ICRC's Customary IHL Study* cites approvingly the dictums of the ICJ. It points out that the main reason for its focus on the customary law status or not of rules embodied in treaties which have yet to muster universal ratification (such as the Additional Protocols, the Hague Convention for the Protection of Cultural Property, and specific conventions dealing with the use of weapons) is precisely that "[t]he great majority of the provisions of the Geneva Conventions" have already been hardened into customary law.[31]

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[27] Eritrea-Ethiopia Claims Commission, *Partial Award in Eritrea's Prisoners of War Claims*, 1 July 2003, para. 38, as cited in: *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 and 27–32*, 17 December 2004, Eritrea Ethiopia Claims Commission, (2005) 44 *ILM* 601, at 607, para. 28.

[28] Eritrea Ethiopia Claims Commission, *Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 and 27–32*, 17 December 2004, (2005) 44 *ILM* 601, at 626, para. B. 2. See also *ibid.*, at 607, para. 28. The Commission held that "[m]ost of the provisions of Protocol I of 1977 to the Geneva Conventions, including Article 75 thereof, were expressions of customary international humanitarian law applicable during the conflict". It added that the relevant provisions of API entertains the presumptive customary law status as well, with the burden of proof on the State party asserting otherwise: *ibid.*, para. B. 4.

[29] *The Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), presented on 3 May 1993*, (S/25704).

[30] *Ibid.*, para. 35. The Report also refers to three other treaties: the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945.

[31] J.-M. Henckaerts, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict", (2005) 87 *IRRC* 175, at 187.

5. *General Principles of International Law*

5.1. *Overview*

Apart from conventional and customary rules, belligerent occupants are required to abide by another principal "source" of international law: general principles of law. General principles of international law must be clearly distinguished from general principles of law derived from national laws. The former is "sweeping and loose standards of conduct" that can be deduced from customary rules and treaty rules by way of extraction and generalisation of some of their most significant common denominators.[32]

In the context of international human rights law, Simma and Alston argue that apart from reading the Universal Declaration of Human Rights as authoritative interpretation of the UN Charter provisions on human rights, the identification of fundamental and non-derogable rights can be effectuated through the means of general principles of law. They argue that while general principles of (international) law smack of natural law flavour, this approach remains within the traditional, consensualist paradigm, contrary to the mainstream US approach which they criticise for reflecting "normative chauvinism".[33] They add that the phenomena of normative hierarchisation and relativity (such as the concepts of *jus cogens* and the obligations *erga omnes*) can be much more coherently explained through the vehicle of general principles of international law, rather than through theories of customary international law.[34]

The principle of self-determination of peoples and the fundamental and non-derogable obligations of human rights can be considered part of the general principles of international law. They serve to constrain the power of the occupant to act within the legal framework of occupation recognised by the 1907 Hague Regulations and the Fourth Geneva Convention. While assessment of human rights is made in separate chapters, brief discussions on the principle of self-determination of peoples are provided here.

5.2. *The Principle of Self-Determination*

The principle of self-determination of peoples,[35] whose origin traces back to the French Revolution, was endorsed by both Woodrow Wilson and Vladimir Lenin during and after World War I. It has come to be perceived as one of the

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[32] A. Cassese, *International Law*, 2nd ed., (2005), at 188.

[33] B. Simma and P. Alston "The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles, (1988–89) *Austl. YbkIL* 82, at 94.

[34] *Ibid.*, at 107.

[35] For the general assessment of the right of self-determination of peoples, see, for instance, A. Cassese, *Self-Determination of Peoples – A Legal Reappraisal*, (1998); K. Knop, *Diversity and*

fundamental principles of international law in the latter half of the twentieth century. The process of decolonisation and the change in the membership of the "international community" have provided special impetus to the consolidation of this concept, as evidenced in the UN Charter Articles 55 and 56, common Article 1 of the ICCPR and the ICESCR, the African Charter of Human and Peoples' Rights, as well as in a number of General Assembly resolutions.[36] This principle is now widely recognised as having attained the status of *jus cogens*.[37]

As a consequence of this development, up until the Anglo-American occupation of Iraq (2003), the state of occupation was increasingly perceived as conflicting with the principle of self-determination of people in occupied territory. Indeed, this principle was considered to approximate foreign occupation to colonialism and apartheid, giving the state of occupation the (political) stigma of illegality. The "illegalisation" of occupation can be found in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, which states that "[t]he territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter."[38] In the same vein, Article 5 of the *Declaration on the Right to Development* states that:

Self-Determination in International Law, (2002); and R. McCorquodale, "Self-Determination: A Human Rights Approach", (1994) 43 *ICLQ* 857.

[36] Note, however, that the General Assembly Resolution 3314, which contains the *Definition of Aggression*, does *not* make reference to occupation in relation to the right of self-determination: General Assembly Resolution 3314 (XXIX) of 14 December 1974.

[37] ICJ, *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)*, Judgment 3 February 2006, available at www.icj-cij.org/ (last visited on 30 April 2008), Separate Opinion of Judge ad hoc Dugard, paras. 4 and 10. This is the first case whereby the Court has provided support to the notion of *jus cogens: ibid.*, para. 64. See also the International Law Commission's Draft Articles on State Responsibility, with Commentaries, Report of the International Law Commission, 53rd session, UN Doc. A/56/10 (2001), at 85 (Commentary on Article 26, para. (5)), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) (last visited on 30 April 2008); reproduced in: J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002). For the opinions of publicists, see: A. Cassese, *Self-Determination of Peoples – A Legal Reappraisa*l (1995), 320; G. Espiell, "Self-Determination and *Jus Cogens*", in A. Cassese (ed.), *U.N. Law/Fundamental Rights: Two Topics in International Law* (1979) 167; S. Wheatley, "The Security Council, Democratic Legitimacy and Regime Change in Iraq", (2006) 17 *EJIL* 531, at 538.

[38] *The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, General Assembly Resolution 2625, Annex, 25 UN GAOR, Supp. (No. 28), U.N. Doc. A/5217, at 121 (1970), First principle, para. 11. See also Article 5 of the *Declaration on the Right to Development*, adopted by General Assembly Resolution 41/128 of 4 December 1986.

> States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.

Even so, as Benvenisti notes, references to illegal "foreign occupation" must be understood as a politically motivated assertion. They should not be read as undermining the conceptual edifice of the law of occupation as a temporary modality of administration during international armed conflict.[39] He contends that the changes in the traditional law of occupation, as introduced by this principle, can be saliently seen in two respects: first, the transformation of armed struggle based on self-determination of peoples under three salient regimes (colonial rules, racist regimes or apartheid, and foreign occupation) into international armed conflict under Article 1(4) API; and second, the fact that the situations of hostage taking pursuant to these three forms of regimes is placed outside the scope of application of the 1979 International Convention against the Taking of Hostages.[40]

Another significant implication flowing from the principle of self-determination on the law of occupation is that this can attenuate the rigidity of the conservationist premises of the law of occupation.[41] In case of prolonged occupation, the occupying power must duly take into account the will of the indigenous population manifested through the genuine degree of their participation in local elections. There may be a special need to review whether the law in force ought to be reformed or modified to accommodate views of the dynamic social, economic and political forces in occupied territory.

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[39] E. Benvenisti, *The International Law of Occupation*, (1993), at 187.

[40] *Ibid*. Article 12 of this Convention reads that:

> In so far as the Geneva Conventions of 1949 for the protection of war victims or the Additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

[41] See R. 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", (2002) 10 *AfYbkIL* 267, at 313.

5.3. *General Principles of International Humanitarian Law and the Martens Clause*

In the context of IHL, the list of general principles of international law[42] encompasses such intrinsic and fundamental principles as the principle of distinction, the principle of necessity, and the prohibition on causing unnecessary suffering or superfluous injury.[43] Another potential candidate for the general principle of IHL is the "elementary considerations of humanity", namely the Martens Clause,[44] which is explicitly incorporated into the preamble of many IHL treaties.[45] The Martens Clause has been recognised in the Nuremberg Judgment. The IMT held that:

> Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of International Law, but in complete disregard of the elementary dictates of humanity. Civilian populations in occupied territories suffered the same fate.[46]

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[42] For the examination of the general principles of IHL, see, R. Abi-Saab, "The 'General Principles' of Humanitarian Law According to the International Court of Justice", (1987) *IRRC*, No. 259, 367, at 367–375 (asserting that the ICJ in the *Nicaragua* case considered "the fundamental general principles of humanitarian law" to form part of the general international law and hence applicable in all circumstances); and I.P. Blischchenko, "Les principles du droit international humanitaire" in: C. Swinarski (ed), Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet, (1984), 291; D.W. Greig, "The Underlying Principles of International Humanitarian Law", (1985) 9 *Austl. YbkIL* 46; J. Pictet, *Development and Principles of International Humanitarian Law*, (1985). See also T.L.H. McCormack, "A *Non Liquet* on Nuclear Weapons – The ICJ Avoids the Application of General Principles of International Humanitarian Law", (1997) *IRRC*, No. 316, 76, especially at 84–88 and 90–91 (criticising that the Court's failure to translate the general principles of IHL into a substantive prohibition on the use of nuclear weapons was a missed opportunity in utilising the general principles in tune with technological developments in weapons).

[43] M. Sassòli and A.A. Bouvier, *Un Droit dans la Guerre? – Cas, Documents et supports d'enseignement relatifs à la pratique contemporaine du droit international humanitaire*, 2nd ed., Vol. 1, (2003), Partie 1, chapitre 4, Section III, at 145–146.

[44] For examinations of the Martens Clause, see A. Cassese, "The Martens Clause: Half a Loaf or Simply Pie in the Sky?", (2000) 11 *EJIL* 187; T. Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience", (2000) 94 *AJIL* 78; and R. Ticehurst, "The Martens Clause and the Laws of Armed Conflict", (1997) *IRRC*, No. 317, 125.

[45] The Martens Clause was originally stipulated as "the principles of the law of nations, as they result…from the laws of humanity and the dictates of the public conscience": the preamble of the Hague Convention (IV) Respecting the Laws and Customs of War on Land 1907. This is reiterated, with a small change in the terminology, in GCI, Article 63 (4); GCII, Article 62(4); GCIII, Article 142 (4); GCIV, Article 154(4); API, Article 1(2); APII, preamble; and the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, preamble.

[46] IMT, *The Trial of German Major War Criminals*, Judgment of 30 September 1946, Judgment of the International Military Tribunal, 226, at 227; *Proceedings of the International Military*

The ICJ in the *Corfu Channel* case specifically emphasised the notion of "elementary considerations of humanity".[47] The clause provides the rationale underpinning of IHL.

The juridical nature and status of the Martens Clause remains controversial. The inception of this Clause was a crucial spin-off that was purported to provide a compromise to one of the thorniest questions raised at the Hague Peace Conferences of 1899. It was intended to fill any lacunae in the treatment of civilians who took up arms against an occupying force ("resistance fighters"). Many military powers suggested that such civilians should be treated *francs-tireurs* susceptible of executions. In contrast, many small states, justifiably fearful of the prospect of their territories becoming occupied by big powers, argued that they should be regarded as combatants.[48]

In its *Nuclear Weapons* Advisory Opinion, the International Court of Justice came to describe the Martens Clause as part of customary international law. It held that "all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law, such as the Martens Clause, reaffirmed in the first article of Additional Protocol I".[49] On this matter, Judge Shahabuddeen, in his dissent, has provided detailed examinations.[50] He contends that the Clause is not devoid of normative substance, and that it has its own distinct "normative character". It can "exert legal force" rather than merely serve as a reminder of the existence of other norms of international law.[51]

Cassese argues that the Martens Clause, which was inserted as "a diplomatic gimmick" to break a deadlock at the 1899 Hague Peace Conference, is instru-

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Tribunal Sitting at Nuremberg, Germany (1950), Part 22, at 450; *Nazi Conspiracy and Aggression – Opinion and Judgment of the United States Chief of Counsel for Prosecution of Axis Criminality*, (1947), at 57.

[47] ICJ, *The Case Concerning the Corfu Channel (Merits)*, Judgment of 9 April 1949, ICJ Rep. 1949, 4, at 22.

[48] F. Kalshoven and L. Zegveld, *Constraints on the Waging of War – an Introduction to International Humanitarian Law*, (2001), at 22; and Ticehurst, *supra* n. 44, at 125–126.

[49] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Rep. 1996, 226, at 259, para. 84. See also *ibid*., at 257, para. 78.

[50] Dissenting opinion of Judge Shahabuddeen, *ibid*., at 405–411.

[51] *Ibid*., at 405–408. He added that:

> . . . the Martens Clause provided its own self-sufficient and conclusive authority for the proposition that there were already in existence principles of international law under which considerations of humanity could themselves exert legal force to govern military conduct in cases in which no relevant rule was provided by conventional law. Accordingly, it was not necessary to locate elsewhere the independent existence of such principles of international law; the source of the principle lay in the Clause itself.

Ibid., at 408.

mental in enabling, for the first time, the question of the laws of humanity to be treated not as a purely moral issue, but "from an *apparently positivist* perspective". It is "an ingenious blend of natural law and positivism".[52] In view of decentralised nature of international society where there is no central law-making body, there inevitably exists a considerable delay between the formation of moral standards among international public opinions and the development of positive legal norms manifesting such standards.[53] The intrinsic question is how to push up the boundaries to assert more humane rules faced with more "realist" oppositions of military powers. Ticehurst observes "[t]he Martens Clause provides a link between positive norms of international law relating to armed conflicts and natural law".[54] He adds that while natural law has been criticised for being subjective, the Martens Clause provides "an objective means of determining natural law" based on the concept of dictates of public conscience.[55]

With respect to the functional nature of the Martens clause, Cassese delineates three arguments.[56] In the first place, it can be argued that at the interpretation level, the Clause precludes possible *a contrario* argument, according to which the fact that certain matters have yet to be regulated by the Hague Convention would enable belligerents to behave freely, without being bound by any possible limitations of other (customary or conventional) international rules.[57] This strand of argument may be redundant as it states the obvious. In the second place, it may be contended that the Clause creates two new sources of law (the laws of humanity and the dictates of public conscience).[58] According to this understanding, the Martens Clause was designed to heed the view, expressed by the Belgian Delegate at the Hague Conference of 1899, that all inhabitants of a country invaded and occupied by the enemy had the right to resist occupation, the right not included in the 1874 Brussels Declaration.[59] Nevertheless,

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[52] Cassese (2000), *supra* n. 44, at 188, emphasis in original. Similarly, Ticehurst stresses the special role of the Martens Clause in injecting moral precepts into positivist thinking, contending that it "provides a link between positive norms of international [law] relating to armed conflicts and natural law": Ticehurst, *supra* n. 44, at 132–133.

[53] *Ticehurst, ibid.*

[54] *Ibid.*, at 133.

[55] *Ibid.*, at 133–134. Indeed, he considers it contradictory that western military powers such as the US and UK have opposed the influence of natural law on the laws of armed conflict while it was these states that invoked the concept of natural law to determine the culpability of Nazi atrocities at the Nuremberg.

[56] Cassese (2000), *supra* n. 44, at 189–192.

[57] *Ibid.*, at 192–193.

[58] *Ibid.*, at 191, and 193–8.

[59] *Conférence Internationale de la paix, La Haye, 18 mai-29 juillet 1899, Trosième Partie*, (1899) 112–113 (statement of Mr Beernaert of Belgium), Deuxième Commission, Deuxième Sous-Commission (presided by de Martens).

as Cassese notes,[60] such understanding was not followed in the development of customary law until Article 4A(2) GCIII of 1949 was adopted.[61] After in-depthly surveying the international and national case-law that drew on the Clause, Cassese concludes that the Clause was invoked more for the purpose of paying lip service to humanitarian demands rather than recognising two new sources of international law.[62]

There is an abundant body of international and national case-law in which reliance is made on the Martens Clause.[63] As discussed above, in the *Legality of the Threat or Use of Nuclear Weapons* case, the ICJ assumes that the Clause has hardened into customary law.[64] However, it fails to provide explanations as to how this has happened, and what would be the legal implications.[65] The argument that the Martens clause is part of customary law may be supported by the fact that the Clause places the "laws of humanity" and the "dictates of public conscience" on the same level as the "usages of states".[66] Cassese argues that when one ascertains the emergence of a principle of general rule anchored in the laws of humanity (or the dictates of public conscience), the Clause has an effect of relaxing the requirement of *usus* and placing more emphasis on the requirement of *opinio iuris* or *opinio necessitatis*.[67]

It can be argued that the Clause forms a general principle of IHL.[68] The precise content of the standard implied by the principles of humanity and the dictates of public conscience needs to be ascertained in the light of changing circumstances, technological developments affecting means and methods of warfare and the level of tolerance of the international community.[69]

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[60] Cassese (2000), *supra* n. 44, at 198.

[61] Article 4A(2) of GCIII upgrades partisans and members of organised resistance movements in occupied territory to the rank of lawful combatants, subject to the condition that they meet the four established conditions for prisoners of war qualification.

[62] Cassese (2000), *supra* n. 44, at 208.

[63] For detailed assessment, see *ibid.*, at 202–208 and the cases cited therein.

[64] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Rep. 1996, 226, at 259, para. 84.

[65] Cassese (2000), *supra* n. 44, at 206.

[66] See the Martens Clause embodied in the preambular paragraph of the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land.

[67] Cassese (2000), *supra* n. 44, at 214. See also Dissenting Opinion of Judge Shahabuddeen, ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Rep. 1996, 226, at 409–411.

[68] Cassese considers that the Martens clause allows "principles or rules of customary *international law*… [to be derived] from the laws of humanity and the dictates of public conscience": *ibid.*, at 188–9, emphasis in original. See also *ibid.*, at 213 (suggesting that the Clause serves as a general principle of IHL).

[69] See also ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, dissenting opinion of Judge Shahabuddeen, ICJ Rep. 1996, 226, at 406.

6. *Security Council Resolutions Adopted under Chapter VII of the UN Charter*

6.1. *Overview*

Security Council resolutions adopted under Chapter VII may be described as "secondary legislation"[70] in relation to the primary (multilateral) treaty rules on which they are based. In view of Articles 25 and 103 of the UN Charter, Chapter VII-based Council Resolutions are binding on all member states (or indeed, by virtue of Article 2(6), on all States, irrespective of the UN membership). The Security Council resolutions are increasingly perceived as providing an important basis for a separate legal source, such as the Statutes of the ICTY and of the ICTR.

6.2. *Derogability of Security Council Resolutions from the Law of Occupation*

It must be ascertained whether or not binding Security Council resolutions can alter the existing law of occupation. Similarly, it must be examined whether Council resolutions can be considered sources of the law of occupation. These questions can be addressed by analysing the competence and the power delegated by the member states to the Council acting under Chapter VII. As a preliminary matter, it can be assumed that due to such delegation of special power and competence by the member states, the Security Council must act responsibly and bona fide.[71] Further, the delegation of the authority by the member states as a whole suggests that the Security Council must exercise its powers within the confines of such delegated authority.[72] This issue is linked to the overarching

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[70] For an argument that Security Council resolutions may be approximated to another source of international law, see, L. Condorelli, "Les attentats du 11 septembre et leurs suites: où va le droit international?", (2001) 105 *RGDIP* 829, at 834 *et seq* (concerning Resolution 1373).

[71] E. de Wet, *The Chapter VII Powers of the United Nations Security Council*, (2004), at 195; and F. Kirgis, "Security Council Governance of Post-Conflict Societies: A Plea for Good Faith and Informed Decision-Making", (2001) 95 *AJIL* 579, at 581. Franck observes that:

> Substantively, "enforcement measures" may be taken whenever the requisite Council majority is convinced that there exists "any threat to the peace, breach of the peace, or act of aggression"... for which such remedies are appropriate. It is apparent that the Council has broad discretion, but that it is to be exercised bona fide and *intra vires*, in accordance with [the] specific procedural and substantive standards spelled out in the Charter.

T.M. Franck, *Fairness in International Law and Institutions* (1995), at 220.

[72] Bowett cogently argues that the Council's decision under Chapter VII cannot be equated to the Charter's *treaty* obligation, and that "the Council decisions are binding only in so far as they are in accordance with the Charter". He adds that "[t]hey [the Council decisions] may spell out, or particularize, the obligations of members that arise from the Charter. But they may

questions whether the advisory jurisdiction of the ICJ provides a mechanism for judicial review of Security Council actions,[73] and whether judicial review as such can be described as an emerging, general principle of law that influences contentious proceedings before the ICJ.[74]

Clearly, the Security Council must operate within the parameters of power and competence set by the Charter.[75] In the *Reparations (Count Bernadotte)* case, the ICJ has recognised that the functions of the UN do not have to be explicitly provided in the Charter, but can be implicitly deduced from the constituent

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not create totally new obligations that have no basis in the Charter…": D.W. Bowett, "The Impact of Security Council Decisions on Dispute Settlement Procedures", (1994) 5 *EJIL* 89, at 92–93. Indeed, he asserts that the Council decisions are prima facie to be presumed valid and binding, but that their binding force may be rebutted on the evidence that they are *ultra vires* or at variance with the UN Charter: *ibid.*, at 93. For a proposal for a more vigilant role of the Security Council in retaining "overall authority to exercise command and control" over the exercise of delegated powers under Chapter VII, see D. Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the Security Council of its Chapter VII Powers*, (1999), at 159–160. Sarooshi stresses that the Council's supervision over the exercise of delegated powers by member states pursues two objectives of (i) determining when the Council's stated objective has been attained; and (ii) ensuring that delegated powers are exercised in a suitable manner pursuant to the objective: *ibid.*, at 160.

[73] For detailed assessment of this issue, see de Wet, *supra* n. 71, Ch. 2, at 25–68. See also J.E. Alvarez, "Judging the Security Council", (1996) 90 *AJIL* 1 at 8; D. Akande, "The Role of the International Court of Justice in the Maintenance of International Peace", (1996) 8 *AfJICL* 592; *idem*, "The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of Political Organs of the United Nations?", (1997) 46 *ICLQ* 309; and K. Roberts, "Second-Guessing the Security Council: the International Court of Justice and its Power of Judicial Review", (1995) 7 *Pace Int'l L. Rev* 281.

[74] De Wet, *supra* n. 71, Ch. 3, at 69–129.

[75] M. Zwanenburg, "Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation", (2004) *IRRC* No. 856, 745, at 759. See also ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR 72, Appeals Chamber, Decision of 2 October 1995. There, the Appeals Chamber held that:

> The Security Council is…subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).

Ibid., para. 28.

documents (*pouvoirs implicites*)[76] or developed from practice.[77] Article 2(2) of the Charter requires the Council to act in good faith.[78] Article 24 UN Charter provides that Council assumes the "primary responsibility" for maintaining international peace and security. Nevertheless, it adds that the Council must comply with the Purposes and Principles of the United Nations, which include the maintenance of international peace and security, and the conformity with the principles of justice and international law, as set out in Article 1(1) of the Charter. De Wet provides three-fold reasons to defend the thesis that the Security Council, as an organ of the UN, is bound by "the core principles of international humanitarian law". First, the principal elements of IHL, such as the basic rules designed to protect civilians and to govern means and methods of warfare, constitute elements of the purposes of the United Nations. Second, the UN has committed itself to these fundamental IHL norms in a manner that has created a legal expectation that it will respect them when authorising military operations under Chapter VII of the Charter. According to her, this aspect is reinforced by the good faith principle embodied in Article 2(2) of the

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[76] R. Kolb, G. Porretto and S. Vité, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationals – Forces de paix et administrations civiles transitoires*, (2005), at 123. For the assessment of the implied powers, see H.G. Schermers and N.M. Blokker, *International Institutional Law – Unity within Diversity*, 4th revised ed., (2003), at 175–183, paras 232–236.

[77] The Court held that "… the rights and duties of an entity such as the [United Nations] Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice": ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Rep. 1949, 174, at 180.

[78] While *prima facie*, this obligation is addressed only to member states, the reading of the first sentence of Article 2 suggests that it can apply to the UN as an organ: de Wet, *supra* n. 71; and Zwanenburg (2005), *supra* n. 19, at 146. De Wet explains that the principle of good faith governs the UN organ through its linkage to the notion of equitable (promissory) estoppel:

> In the United Nations system the obligation of the organisation to act in good faith is closely related to the concept of equitable (promissory) estoppel, which had initially been developed in inter-state relations. Equitable estoppel implies that where one party has reasons to believe, based on the actions or words of another party, that a situation or occurrence would or would not in future change in a particular manner, the other party may not change the situation in that manner.… It is an important outgrowth of the doctrine of good faith, as it protects the belief of the party invoking estoppel. (…) Although the concept of equitable estoppel mainly applies to inter-state relations, it is a general principle of law and can as such also be used to bind organs of international organisations to the legitimate expectation created by their actions.… As in the case of inter-state relations, it would imply an objective assessment of whether an organ of the United Nations acted in accordance with a legitimate expectation it had created and, in turn, whether the organ acted in accordance with the meaning and spirit of good faith.…

De Wet, *ibid.*, at 195 and 197.

Charter. Third, she argues that the core IHL norms form elements of *jus cogens* that must be honoured by states and organs of the UN alike.[79]

What compounds the matter is that no outright obligation to abide by international law is incumbent on the Security Council acting under Chapter VII of the UN Charter.[80] The juridical basis for the requirement that the UN must act consistently with international law can be found in Article 1(1) of the UN Charter, which provides that one of the purposes of the UN is:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes which might lead to a breach of the peace.

It must, however, be noted that reference to "conformity with the principles of justice and international law" appears only in relation to settlement of international disputes, and not in the context of collective enforcement measures to deal with threats to the peace, acts of aggression, or other breaches of the peace. From the position of this reference, it can be argued that the Security Council, acting to implement enforcement measures, can derogate from the rules of international law.[81] In the *Lockerbie* case, Judge Schwebel, in his dissenting

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[79] De Wet, *ibid*., at 215.

[80] Zwanenburg (2004), *supra* n. 75, at 760.

[81] Kelsen explains that:

> In taking enforcement actions under Article 39, the Security Council is bound to act 'in accordance with the Purposes and Principles of the United Nations' (Article 24, paragraph 2). But Article 1, paragraph 1, of the Charter, determining the Purposes, restricts the rule to act 'in conformity with the principles of justice and international law' to the function of 'bringing about by peaceful means adjustment or settlement of international disputes or situations' (*i.e.*, the functions of the Security Council under Chapter VI) and thus excludes this rule from the function of taking 'effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression and other breaches of the peace' (*i.e.*, the functions of the Security Council under Chapter VII, especially Article 39). The statement of the Preamble: that the peoples of the United Nations are determined 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained,' is hardly applicable to an enforcement action under Article 39; and even if applicable, and even if the formula 'in conformity with the principles of justice and international law' in Article 1, paragraph 1, were not restricted to the function of adjustment or settlement of disputes and other situations by peaceful means but would refer also to the effective collective measures for the maintenance or restoration of peace, the Security Council would not be bound to maintain or restore the existing law. For the Council would be empowered to establish justice if it considered the existing law as not satisfactory, and hence to enforce a decision which it considered to be just though not in

opinion, stated that "the reference to the principles of justice and international law designedly relates only to adjustment or settlement by peaceful means, and not to the taking of effective collective measures for the prevention and removal of threats to and breaches of the peace. It was deliberately so provided to ensure that the vital duty of preventing and removing threats to and breaches of the peace would not be limited by existing law".[82] Indeed, as Zwanenburg notes,[83] this interpretation is borne out by the *travaux préparatoires*. At the San Francisco Conference, with respect to purposes of the UN, the Report of Rapporteur of Committee 1 to Commission I comments that:

> When the [United Nations] Organization has used the power given to it and the force at its disposal to stop war, then it can find the latitude to apply the principles of justice and international law, or can assist the contending parties to find a peaceful solution.
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> The concept of justice and international law can thus find a more appropriate place in context with the last part of the paragraph dealing with disputes and situations. There, it can find a real scope to operate, a more precise expression and a more practical field of application. There was no intention to let this notion lose any of its weight or strength, as an over-ruling norm of the whole Charter.[84]

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conformity with existing law. The decision enforced by the Security Council may create new law for the concrete case.

H. Kelsen, *The Law of the United Nations*, (1951), at 294–295. See also B. Martenczuk, "The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?", (1999) 10 *EJIL* 517, at 545; G.H. Oosthuizen, "Playing the Devil's Advocate: the United Nations Security Council is Unbound by Law", (1999) 12 *Leiden JIL* 549, at 552–553; and Zwanenburg (2005), *supra* n. 19, at 142.

[82] ICJ, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom; Libya v. United States of America)*, Preliminary Objections, Judgment of 27 February 1998, ICJ, Rep. 1998, 115, dissenting opinion of President Schwebel, *ibid.*, 155, at 167; reproduced in: (1998) 37 *ILM* 587, at 627.

[83] Zwanenburg (2005), *supra* n. 19, at 140.

[84] *The Report on the Preamble, Purposes and Principles, Documents of the United Nations Conference on International Organization, San Francisco*, 1945, *UNCIO*, Vol. VI, Commission I, General Provisions, at 453–454. See also, *ibid.*, at 25 (observations made by Lord Halifax); Summary Report of Third Meeting of Committee I/1, Doc. 197 (English), I/1/9, May 10, 1945, *ibid.*, at 282; Summary Report of the Ninth Meeting of Committee I/1, Doc. 742 (English), I/1/23/ June 1, 1945, *ibid.*, 317, at 318. Note should be taken of the Amendments Proposed by the Governments of the United States, the United Kingdom, the Soviet Union, and China, which were submitted on 5 May 1945 at the San Francisco Conference. Under the amendments, paragraph 1 of Chapter I Purposes (now Article 1(1)) reads that:

> To maintain international peace and security; and to that end to take effective collective measures for the prevention and removal of threats to the peace and the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, *and with due regard for principles of justice and international law*, adjustment or settlement of international disputes which may lead to a breach of the peace.

The Committee I/1, which was responsible for drafting the Preamble, Purpose and Principles of the UN Charter, took the vote on the proposal that the words "in conformity with the principles of justice and international law" be placed in the first line after the words "peace and security". It turned out that only 19 voted in favour and 15 against. Due to the lack of a two-thirds majority, this proposal was not adopted.[85] In sum, by placing enforcement action under Chapter VII outside the general rules they embody, Articles 24(1) and 1(1) of the UN Charter implicitly recognise that Security Council decisions made pursuant to Chapter VII may derogate from otherwise binding obligations of international law.[86] As examined here, this possibility is fully borne out by the *travaux préparatoires* of the UN Charter.[87]

The argument that the UN Security Council, acting under Chapter VII of the UN Charter, can supersede obligations of international law is recognised under Article 103 of the UN Charter. That provision explicitly allows the obligations under the Charter, which include those derived from the binding decisions of the Security Council,[88] to prevail over those under any other international agreement. In its Order on provisional measures in the *Lockerbie* case, the ICJ confirmed the authority of Security Council's binding decisions to supersede other international treaty obligations in the hierarchical, normative order of international law.[89] It ought to be noted that Article 103 governs only the conflict between the obligations under the Charter and those under *treaties*. In the *Lockerbie* case (Provisional Measures), Judge Bedjaoui, in his dissenting opinion, cogently contended that Article 103 "does not cover such rights as may have

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Doc. 2 (English), G/29, May 5, 1945, *UNCIO*, Vol. III, at 622 (emphasis in original). There is a note which states that the words "with due regard for principles of justice and international law" were underscored in order to indicate that these were added passages.

[85] Summary Report of the Ninth Meeting of Committee I/1, Doc. 742 (English), I/1/23/ June 1, 1945, *UNCIO*, Vol. VI at 317–318, at 318.

[86] Zwanenburg (2004), *supra* n. 75, at 760.

[87] See also Verbatim Minutes of First Meeting of Commission I, Doc. 1006 (English), I/6, June 15, 1945, *UNCIO*, Vol. VI, 12–34, at 34 (the adoption of what would later become Article 1(1)).

[88] R. Bernhardt, "Article 103", in: B. Simma (ed), *The Charter of the United Nations: A Commentary*, 2nd ed., (2002) 1292, at 1293–1294.

[89] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, ICJ Rep. 1992, 3, at 16, para. 39. Judge Oda, in his declaration, went so far as to state that "under the positive law of the United Nations Charter a resolution of the Security Council may have binding force, irrespective of the question whether it is consonant with international law derived from other sources": *ibid.*, at 17. This statement is oblivious of the possibility that Security Council resolutions may run counter to obligations arising from *jus cogens*. As examined below, in such a scenario, even binding decisions of the Security Council should be considered to have their legal effect nullified.

other than conventional sources and be derived from general international law".[90] However, Bernhardt explains that at the San Francisco Conference a proposal to include the possibility that customary international law could be overridden by the Charter did not bear fruit.[91] The subsequent practice of the UN seems to corroborate the view that Article 103 of the Charter allows Security Council resolutions to override any inconsistent customary rules.[92] It may be suggested that any conflict between the UN Charter and customary international law can be resolved by the general rule embodied in Article 25 of the Charter, according to which all member states must accept and carry out decisions of the Security Council, irrespective of their illegality.[93]

These examinations demonstrate that the Security Council acting under Chapter VII of the UN Charter can abrogate the law of occupation, including restrictions on the legislative power of the occupying power under Article 43 of the 1907 Hague Regulations and Article 64 of GCIV.[94] Some authors argue

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[90] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom; Libya v. United States of America)*, Provisional Measures, Order of 14 April 1992, ICJ Rep. 1992, 3, Dissenting Opinion of Judge Bedjaoui, para. 29.

[91] Bernhardt, *supra* n. 88, at 1293.

[92] ILC, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission*, Finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682, 13 April 2006, at 176, para. 345; A.E. Cassimatis, "International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law", (2007) 56 *ICLQ* 623, at 636. *Contra*, Bowett, *supra* n. 72, at 92; H.-P. Gasser, "Collective Economic Sanctions and International Humanitarian Law", (1997) 57 *ZaöRV* 871, at 885; A. Orakhelashvili, "The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions", (2005) 16 *EJIL* 59, at 69. See also L.M. Goodrich, E. Hambro and A.P. Simmons, *The Charter of the United Nations – Commentary and Documents*, 3rd and revised ed., (1969), at 614–616 (examining the conflict between obligations under the Charter and obligations under other agreements, albeit without discussing the conflict between the obligations under the Charter and customary international law).

[93] Zwanenburg (2004), *supra* n. 75, at 761. See also M. Reisman, "The Constitutional Crisis in the United Nations", (1993) 87 *AJIL* 83, at 93 (arguing that "[t]he synergy of Articles 25 and 103 . . . trumps all contrary non-Charter legal obligations").

[94] T.H. Irmscher, "The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights, and the Law of Occupation", (2001) 44 *GermanYbkIL* 353, at 383; and M. Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", (2005) 16 *EJIL* 661, at 680–681. See also J. Cerone, "Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo", (2001) 12 *EJIL* 469, at 484–485, n. 83 (stressing the power of the Security Council to abrogate certain "non-fundamental norms of humanitarian law, as with human rights law"). See also M. Bothe, "Occupation, Pacific", in: R. Bernhard (ed), (1997) 3 *Encyclopedia of Public International Law* 767, at 768 (recognising the parallel application of the law of belligerent occupation and the

that the Council's power of derogation can be extensive enough to end the legal status of occupation susceptible to the law of occupation by labelling it as an international transitional administration, even though the facts on the ground remain the same.[95]

6.3. *Can the Security Council Acting under Chapter VII of the Charter Override Obligations under IHL and International Human Rights Law?*

It is suggested that the term "principles of justice and international law" within the meaning of Article 1(1) of the UN Charter, which do not constrain the Security Council's enforcement power under Chapter VII of the Charter, refer to all sources of international law.[96] This means that "principles of international law" encompass obligations under international human rights law and IHL. Even so, Article 1(3) of the Charter provides that one of the purposes of the UN is "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion". Can the Security Council override obligations under international human rights law and IHL if acting pursuant to Chapter VII of the Charter?

It might even be contended that if the Security Council is not bound by rules of international law when acting under Chapter VII of the Charter, then it can

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law based on the Chapter VII-based authorisation given by the Security Council in case of deployment of member states' troops under enforcement action.

[95] S. Vité, "L'applicabilité du droit international de l'occupation militaire aux activités des organizations internationals", (2004) 86 *IRRC* No. 853, 9, at 28. See also M. Ottolenghi, "The Stars and Stripes in Al-Fardos Square: The Implications for the International Law of Belligerent Occupation", (2003–2004) 72 *Fordham L. Rev.* 2177, at 2210–2211 and 2216–2217. Sassòli is cautious about this conclusion: Sassòli *ibid.*, at 680.

[96] R. Wolfrum, "Article 1" in: Simma (ed) (2002), *supra* n. 88, 39, at 43, para. 18 (referring even to the linkage to natural law). See also the dissenting opinion of Judge Weeramantry in *Lockerbie* (Provisional Measures) (1992), who stated that:

> . . . whatever the resolution [the resolution 731 adopted under Chapter VI of the UN Charter] purported to do was required by Article 24(2) of the Charter to be in accordance with international law. (. . .) it is within the competence of the Court and indeed its very function to determine any matters properly brought before it in accordance with international law. Consequently, the Court will determine what the law is that is applicable to the case in hand and would not be deflected from this course by a resolution under Chapter VI.

Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom; Libya v. United States of America), Provisional Measures, Order of 14 April 1992, ICJ Rep. 1992, 3, at 66.

trump even requirements of international human rights law.[97] However, it must be countered that as noted above, the obligation to promote and encourage respect for human rights is enunciated as an intrinsic purpose of the UN under Article 1(3). Despite its extensive capacity, when acting under Chapter VII, to derogate from principles of international law under Article 1(1) of the Charter, Security Council cannot be exempted from the obligation to respect human rights under Article 1(3), a separate clause stipulating the UN's main purpose.[98] The wording of Article 1(3) is reiterated in Article 55 of the UN Charter, which affirms the duty of the UN to promote, among others, universal respect for, and observance of, human rights and fundamental freedoms without distinction as to race, sex, language, or religion. In this light, it is not unreasonable to extend the obligation to promote fundamental aspects of human rights to cover basic duties to protect, respect and ensure rights of individual persons as embodied under IHL.[99] It is submitted that even the Security Council's nearly unfettered discretionary power derived from Chapter VII of the UN Charter is constrained by the customary rules of international human rights law and IHL.[100] In this

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[97] See, for instance, A. Vradenburgh, "The Chapter VII Powers of the United Nations Charter: Do They 'Trump' Human Rights Law?", (1991–1992) 14 *Loyola LAICLJ* 175, at 184 (arguing that "…the drafters' refusal to amend article 1 to restrict collective measures to those taken in accordance with international law…substantiates the fact that all other purposes in the Charter are subordinate to the drafters' primary concern of maintaining peace and security, because human rights law is subsumed by international law").

[98] Zwanenburg (2005), *supra* n. 19, at 148.

[99] Orakhelashvili, *supra* n. 92, at 66–67; and Zwanenburg (2005), *ibid*., at 148–149. Gardam argues that:

> …the reference to human rights in the purposes of the Charter not only must be broad enough to include within its compass principles that have the potential to provide very real protection to individuals in that most destructive of activities – armed conflict – but should have a meaning outside the narrow context of how a State treats its own subjects. This approach is warranted by the overall context of the reference to human rights in Article 1(3), emphasizing as it does the resolution of problems of a humanitarian character and the promotion of fundamental freedoms.

J.G. Gardam, "Legal Restraints on Security Council Military Enforcement Action", (1995–1996) 17 *Mich. JIL* 285, at 301–302. Indeed, this approach can be corroborated by the suggestion that the purposes and principles of the UN, which constitute substantial limits on the power of the Council in accordance with Article 24(2) of the Charter, must be read in a progressive manner in the light of changes in international law: V. Gowlland-Debbas, "Security Council Enforcement Action and Issues of State Responsibility", (1994) 43 *ICLQ* 55, at 91 (arguing that "…the purposes and principles stated in Articles 1 and 2 of the Charter…reflect the human rights, humanitarian, economic and social concerns of the UN…[which] are not static but evolutionary, and should reflect the changes which have taken place in the international legal order since 1945").

[100] Cassimatis, *supra* n. 92, at 637. He criticises the reasoning provided by the English Court of Appeal in the *Al-Jedda* case to dismiss the challenge to the legality of the applicant's continued

respect, it is proposed that Security Council resolutions ought to be interpreted by analogy in the light of the rules on treaty interpretation as formulated in Article 31 of the Vienna Convention on the Law of Treaties (VCLOT).[101] These rules include Article 31(3)(c), which refers to other relevant rules of customary international law. It is in this context that many authors propose that if the Security Council intends to derogate from the law of occupation, it ought to do so "explicitly" and not in an ambiguous manner.[102]

Judge ad hoc Lauterpacht in his separate opinion in the *Genocide* case (*Provisional Measures*) has stressed that:

> Nor should one overlook the significance of the provision in Article 24(2) of the Charter that, in discharging its duties to maintain international peace and security, the Security Council shall act in accordance with the Purposes and Principles of the United Nations. Amongst the Purposes set out in Article 1(3) of the Charter is that of achieving international co-operation "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion".[103]

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detention under the UK's Human Rights Act, the decision confirmed by the House of Lords. It was held that the obligation under the Chapter VII-based Security Council Resolution 1546 (2004), which referred to the authority of the multinational forces to operate a system of internment for imperative reasons of security, prevailed over the requirements under the European Convention on Human Rights: *R (on the application of Al-Jedda) v. Secretary of State for Defence*, [2007] UKHL 58, 12 December 2007 (on appeal from [2006] EWCA Civ 327, 29 March 2006).

[101] See M.C. Wood, "The Interpretation of Security Council Resolutions", (1998) 2 *Max Planck Ybk UN Law* 73, at 92–3; Cassimatis, *ibid.*, at 636–7. Note that in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, the Court held that "[i]n view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council": Advisory Opinion of 21 June 1971, ICJ Rep. 1971, 16, at 53, para. 114. Compare this with the *Case concerning the Right of Passage over Indian Territory (Portugal v. India) (Preliminary Objections)*, in which the Court stressed that a treaty-interpretation rule should be applied by analogy to a unilateral instrument of a state: Judgment of 26 November 1957, ICJ Rep. 1957, 125, at 142 ("[i]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it").

[102] Sassòli (2005), *supra* n. 94, at 681; and Zwanenburg (2004), *supra* n. 75, at 767.

[103] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Further Requests for the Indication of Provisional Measures, Order of 13 September 1993, ICJ Rep. 1993, 325, separate opinion of Judge *ad hoc* Lauterpacht, *ibid.*, 407, at 440, para. 101.

In the similar vein, albeit without providing express juridical grounds, Meron contends that measures authorised by the Security Council must be implemented in a manner harmonious with the obligations of IHL.[104]

6.4. *Security Council Resolutions Must Abide by* Jus Cogens

Far-reaching and sweeping as its power under Chapter VII of the Charter may be, the Security Council must act in conformity with *jus cogens*.[105] Gill argues that "[w]hile the Council clearly has the right to impose conditions upon a defeated aggressor State in the context of the exercise of its enforcement powers in order to restore the peace or prevent a renewed threat to the peace, these conditions may not contravene the Principles and Purpose of the Charter which include fundamental rules of a *jus cogens* character, such as the rules pertaining to the non-acquisition of territory by force and the territorial integrity of States".[106] Zemanek contends that "[t]he Security Council is . . . bound by the norms of *jus cogens* in the same manner as the States composing it, and its decisions are null and void if they conflict with a peremptory norm. It is equally inconceivable that a decision by the Security Council, invoking the duty under Article 25 of the Charter, should oblige members of the United Nations to violate their obligations under human rights conventions".[107] In the above-cited *Genocide* case, Judge ad hoc Lauterpacht, in his separate opinion, explored this question in detail, holding that:

> The concept of jus cogens operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the

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[104] With respect to the relationship between the embargo authorised by Security Council Resolution 661 of 6 August 1990 and GCIV, Meron argues that:

> It would be unconscionable if, despite its powers under Articles 25 and 103 of the Charter, the Security Council deliberately adopted rules falling below the humanitarian standards of the Geneva Conventions. Any fair interpretation of Security Council resolutions should avoid such a result.

T. Meron, "Prisoners of War, Civilians and Diplomats in the Gulf Crisis", (1991) 85 *AJIL* 104, at 108. See also the case of a possible and inadvertent conflict between Article 118 of GCIII and Security Council Resolution 598 of 20 July 1987 concerning the release and repatriation of prisoners of war in relation to the Iran-Iraq War, as cited by Meron: *ibid*., n. 39.

[105] Orakhelashvili, *supra* n. 92, at 63–67; Sassòli, *supra* n. 94, at 681; and Wheatley, *supra* n. 37. *Contra*, Zwanenburg (2005), *supra* n. 19 at 144–145; and ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, ICJ Rep., 2002, 3; reproduced in (2002) 41 *ILM* 536.

[106] T.D. Gill, "Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter", (1995) 26 *Neth. YbkIL* 33, at 89.

[107] K. Zemanek, "The Legal Foundations of the International System", (1997) 266 *RdC* 9, at 231.

> Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens*.[108]

It may then be questioned whether many rules of the law of occupation are considered to have attained such peremptory status. If this question is answered in the positive, such peremptory IHL norms can preclude Security Council resolutions from altering or abrogating them. Without expressing the peremptory status or not, Bowett avers that because these obligations of the Charter [the binding obligations on member states in respect of actions of the Security Council, which arise from Articles 2(5) and 25 of the UN Charter] "cannot be said to inure to the individual, the fact that it is a United Nations Force in occupation of the territory should not derogate from the standards of treatment of person or property owed to the civilian population".[109] It is possible to argue that the duties of the occupying power with respect to fundamental guarantees of individual persons in occupied territory, such as those guaranteed in Part III, Section I of GCIV, are of peremptory nature, and hence that any Security Council resolution contravening or undermining them is unlawful.[110]

The gist of the analysis then will have to turn to the identification of specific rules of the law of occupation, which have matured into peremptory norms. Even so, there will remain a problem of the absence of a third-party adjudicator that can determine whether or not the Security Council has violated *jus cogens*. It is in this context that the role of the ICJ in reviewing Security Council's decisions is of special importance.

With respect to the ambit of non-derogable rules of the law of occupation, Sassòli argues that "IHL obligations . . . fall under *jus cogens*".[111] He nevertheless does not refer to "the" IHL obligations or specify contents of peremptory rules. Scheffer takes a much narrower view, noting that "[g]iven the widely varying circumstances that may trigger and even justify military occupation, it would be a mistake to regard many of the codified provisions of occupation law as

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[108] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, Further Requests for the Indication of Provisional Measures, Order of 13 September 1993, ICJ Rep. 1993, 325, Separate Opinion of Judge Lauterpacht, ICJ Reports 4, at 440 ff., paras. 100 *et seq* (inquiries into the question whether, by depriving Bosnian Muslims of the means to fight against aggressive war involving alleged genocide, arms embargo imposed by the Security Council might contravene the *jus cogens* norm deriving from the prohibition of genocide).

[109] D.W. Bowett, *United Nations Forces*, (1964), at 491.

[110] Zwanenburg observes that "[t]he Security Council, acting under Chapter VII of the UN Charter, appears able to derogate from at least those rules of the law of occupation which do not constitute peremptory norms of international law": Zwanenburg (2004), *supra* n. 75, at 767.

[111] Sassòli, *supra* n. 94, at 681.

peremptory norms of international law applicable in all situations of military occupation without deviation or qualification".[112]

In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ recognises that some norms of IHL may have hardened into peremptory rules that cannot be superseded. It has held as follows:

> Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.[113]

As noted by many authors,[114] the language employed by the Court appears to draw heavily on the principles relating to *jus cogens* as embodied in Chapter III entitled "Serious breaches of obligations under peremptory norms of general international law" (Articles 40–41) of the ILC's Draft Articles on State Responsibility.[115] Article 41(1) of the Draft Articles provides that "[s]tates shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40". The second paragraph stipulates the responsibility of other states, providing that "[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation". The question will then have to turn to the meaning of "a serious breach". According to Article 40, this can be identi-

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[112] D.J. Scheffer, "Beyond Occupation law", (2003) 97 *AJIL* 842, at 852.

[113] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 136, at 200, para. 159.

[114] Sassòli, *supra* n. 94, at 681; Zwanenburg (2004), *supra* n. 75 at 762; and *idem* (2005), *supra* n. 19, at 145.

[115] These provisions relate to "the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law": The International Law Commission's Draft Articles on State Responsibility, with Commentaries, Report of the International Law Commission, 53rd session, UN Doc. A/56/10 (2001), *supra* n. 37, Chapter III, Articles 40–41.

fied by two criteria: (i) a breach of an obligation arising under a peremptory norm of general international law; and (ii) a serious violation arising from "a gross or systematic failure by the responsible State to fulfil the obligation". The *ILC's Commentaries* make clear that the second criteria relate to the "scale or character" of breaches.[116] Applying this understanding to the ICJ's dictum, the ICJ's reasoning suggests that it views at least some rules of the law of occupation as of a peremptory nature. While recognising the applicability of the law of occupation to the territory at issue, the Court stated that all states are under an obligation not to recognise the illegal situation arising from the construction of the wall, calling on them to ensure that irregularities created by the wall are to be terminated.[117]

In the *Kupreškić* case, the ICTY Trial Chamber held that "*most* norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character".[118] The conclusion of this dictum as to war crimes based on grave breaches of GCs, crimes against humanity and genocide is unassailable. Yet, while invoking the concept of *jus cogens* in the context of discussing the inapplicability of the *Tu Quoque* principle, the Trial Chamber failed to articulate the specific rules of IHL, which are of such peremptory status. The rules regulating belligerent occupation set forth in the 1907 Hague Regulations and the 1949 GCIV are very extensive and detailed while some of the GCIV rules are technical in nature. It is difficult to see how the international community as a whole, as mentioned in Article 53 Vienna Convention on the Law of Treaties, has recognised and accepted the peremptory status of such specific rules as public health measures, and technical rules concerning the role of the Protecting Power.

6.5. *The Relationship between Security Council Resolution 1483 and the Law of Occupation*

The above examinations of whether or not Security Council resolutions can derogate from the requirements of the law of occupation are of marked importance to Security Council Resolution 1483. That Resolution has provided a controversially extensive and overarching legal framework of occupied Iraq, constitutively

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[116] *Ibid.*, at 113 (Commentary on Article 40, para. (7)).

[117] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ, Rep. 2004, 136, at 199–200, paras. 153–159.

[118] ICTY, *Prosecutor v. Zoran Kupreškić et al.*, Judgment, Case No. IT-95-16-T, Tr. Ch. II, 14 January 2000, para. 520, emphasis added.

delegating the wide range of legislative capacity to the Coalition Provisional Authority (CPA).[119] Further, Resolution 1483 recognised the US and the UK as the occupying powers that must comply with the "obligations under applicable international law".[120] Some authors argue that this resolution gave authorisation to the occupation of Iraq by the Anglo-American forces.[121] As Chesterman notes, this resolution is a fruit of "an uncomfortable compromise that straddled [the] divide" between the limits set by IHL on the capacity of an occupying power to change the status of existing laws on one hand, and the desire of the US/UK to pursue regime change on the other.[122] Scheffer characterises this resolution's "synthesis" of the broad range of power and obligations conferred upon the occupying power on the basis of Council powers and occupation law as "both unique and exceptionally risky".[123]

A number of issues are discernible, which show a discrepancy between the requirement under Resolution 1483 and the obligations under the law of occupation. Such a gap was created largely as a result of the ambitious, transformative objectives pursued by the Anglo-American Coalition States in economic fields. In Iraq, the Coalition initiated a sweeping form of economic and financial reforms with a view to transforming the Iraqi society into a free-market oriented state.[124] These reforms amended or abrogated existing Iraqi laws on investment, company and taxation, even though it is very difficult to argue that the CPA was "absolutely prevented" under Article 43 of the Hague Regulations from pre-

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[119] See also Security Council Resolution 1511 which reaffirmed "the temporary nature of the exercise by the Coalition Provisional Authority…of the specific responsibilities, authorities, and obligations under applicable international law recognized and set froth in resolution 1483 (2003)": Security Council Resolution 1511 of 16 October 2003, adopted under Chapter VII of the UN Charter, S/RES/1511 (2003).

[120] Security Council Resolution 1483, preambular para. 13.

[121] C. Stahn, "Enforcement of the Collective Will After Iraq", (2003) 97 *AJIL* 804, at 822; T.D. Grant, "The Security Council and Iraq: An Incremental Practice", (2003) 97 *AJIL* 823, at 825. *Contra*, see R.A. Falk, "What Future for the UN Charter System of War Prevention?", (2003) 97 *AJIL* 590, at 596.

[122] S. Chesterman, "Occupation as Liberation: International Humanitarian law and Regime Change", (2004) 18 *Ethics and International Affairs* 51, at 61.

[123] Scheffer, *supra* n. 112, at 846.

[124] See CPA Order No 39, which stipulates that:

> *Acting* in a manner consistent with the Report of the Secretary General to the Security Council of July 17, 2003, concerning the need for the development of Iraq and its transition from a non-transparent centrally planned economy to a market economy characterized by sustainable economic growth through the establishment of a dynamic private sector, and the need to enact institutional and legal reforms to give it effect…

CPA Order No. 39, Foreign Investment, CPA/ORD/19 September 2003/39, 19 September 2003, as amended in 20 December 2003, preambular para. 8.

serving the existing laws in these fields.[125] Other areas where measures adopted by the Coalition states seem to go beyond the bounds of exceptional measures allowed under the law of occupation included the extensive scope of legislative power conferred upon the Coalition States by Resolution 1483, and the legal status of the states that contributed troops to the Coalition States. To resolve these issues, analysis must turn to the interpretation of the terms of Security Council Resolution 1483.

Indeed, the CPA assumed a fairly broad range of *general* powers to introduce changes in existing laws and institutions on the basis of its laws (regulations, orders and memoranda). CPA Regulation No. 1 provided a constitutional foundation for its authority. Section 1(2) reads that:

> The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority shall be exercised by the CPA Administrator.

In respect of the applicable law in occupied Iraq, Section 2 provides that:

> Unless suspended or replaced by the CPA or superseded by legislation issued by democratic institutions of Iraq, laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA.

Section 3(1) regulates normative hierarchy of the applicable laws, stipulating that Regulations and Orders were purported to "take precedence over all other laws and publications to the extent such other laws and publications are inconsistent".[126]

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[125] The UK Secretary of State for Foreign and Commonwealth Affairs claimed that "Security Council Resolution 1483 provides a sound legal basis for the policy goals of the CPA Foreign Investment Order": HC Debs, 20 Nov. 2003, vol. 413, col. 1304 W. Sassòli recognises that Security Council Resolution 1483 adopted under Chapter VII of the UN Charter may modify existing IHL laws. Nevertheless, modifications of such an important body of international law as IHL must be made in a clear and explicit manner. He argues that "[a] simple encouragement of international efforts to promote legal and judicial reform by an occupying power is certainly too vague to justify an occupying power to legislate beyond what IHL permits". With respect to the legal and judicial reform of occupied Iraq, Resolution 1483 only refers, among the responsibilities of the Special Representative, to the promotion, in coordination with the occupying powers, of "economic reconstruction and the conditions for sustainable development", without making explicit reference to measures that overstep the necessity exceptions allowed under the law of occupation: Sassòli *supra* n. 96, at 681–682; and Security Council Resolution 1483, 22 May 2003, para. 8(e).

[126] CPA, Regulation No. 1, CPA/REG 16 May 2003/01, Section 3(1).

Another element of controversy concerns the question whether the CPA had the remit to give its laws effects going beyond its dissolution.[127] As Fox notes,[128] this element was manifested through two steps taken by the CPA just before its disbandment. First, Transitional Administrative Law specifically mentioned that all the laws enacted by the CPA "shall remain in force until rescinded or amended by legislation duly enacted and having the force of law".[129] Second, just before it devolved the administrative power into the provisional Iraqi government in June 2004, the CPA enacted numerous orders dealing with issues that would arise in the post-handover period. These orders largely related to the transitional political process. They encompassed an electoral system,[130] political parties,[131] disqualification of certain persons for holding public office,[132] and the creation of an independent electoral commission. The CPA also adopted a regulation that appointed the Joint Detainee Committee to coordinate issues of detention between the Interim Government and the Anglo-American Coalition forces.[133] Further, it issued an Order No. 100 on 28 June 2004, providing amendment to many CPA's legislative instruments to substitute the names of the Interim Iraqi authorities for the CPA personnel.[134] The CPA's prescriptive power[135] also related to the decision of the Iraqi Governing Council to establish the Iraqi Special Tribunal to deal with the crimes committed by the past regime. It may be seriously questioned whether the delegation of legislative power that went beyond the ordinary scope *ratione materiae* (such as investment and company laws) can also be extended *ratione temporis*.

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[127] The basic constitutional legal framework that governed the process of transition from the CPA to the election for the Iraqi Transitional Government and to the adoption of the permanent constitution was provided by the Transitional Administrative Law (TAL): Law of Administration for the State of Iraq for the Transitional Period. This interim constitution was enacted by the Iraqi Governing Council on 8 March 2004 in the process mandated by SC Resolution 1511.

[128] G.H. Fox, "The Occupation of Iraq", (2005) 36 *Geo.JIL* 195, at 227–228.

[129] Law of Administration for the State of Iraq for the Transitional Period, 8 March 2004, Article 26(C).

[130] CPA Order No. 92, The Independent Electoral Commission of Iraq, CPA/ORD/31 May 04/92; and CPA Order No. 96, The Electoral Law, CPA/ORD/7 June 04/96.

[131] CPA, Order No. 97, Political Parties and Entities Law, CPA/ORD/7 June 2004/97.

[132] CPA, Order No. 62, Disqualification from Public Office, CPA/ORD/26 February 2004/62.

[133] CPA, Order No. 99, Joint Detainee Committee, CPR/ORD/27 June 2004/99.

[134] CPA, Order No. 100, Transition to Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority, CPA/ORD/28 June 2004/100.

[135] Actions of the Governing Council were attributable to the Coalition states as the occupying powers under Article 47 GCIV: Sassòli, *supra* n. 94, at 675.

In relation to the issue of the legal status of the states that contributed troops to the Stabilization Force Iraq at the request of the occupying powers, as Zwanenburg notes,[136] Security Council Resolution 1483 refers to "other States that are not occupying powers". These states are classified in a manner distinct from the US and the UK[137] which are expressly characterised as the occupying powers.[138] It may be queried whether or not the preambular paragraphs can entail *constitutive* effect of determining the legal status of troop-contributing states.[139] Zwanenburg suggests that a Council resolution may remove the status of occupying powers from those states,[140] departing from the rule under the law of occupation that the determination of the status of occupation (and hence of occupying powers) is purely the question of facts. Even so, the Security Council cannot exempt those troop-contributing states from the responsibility for guaranteeing fundamental rights of protected persons in occupied territory. Such an exemption would clearly run counter to Article 47 GCIV. As seen above, many (if not most) of the fundamental guarantees embodied in Part III, to which Article 47 refers, are of inviolable and even peremptory character.

7. *Conclusion*

Since 1949, the parameters of the sources of the laws of occupation have seen the expansion in terms of the conventional rules. Customary IHL nonetheless remains of special significance to states not parties to appropriate IHL treaties. It is against such a background that the ICRC has successfully undertaken the highly laborious task of ascertaining customary IHL.[141] Bethlehem argues that the inclination towards deducing custom in an area heavily regulated by treaties and by heavy reliance on treaties may risk obscuring legal certainty.[142] As a corollary of this, it is contended that the methodology of deriving customs especially in relation to (if not in total reflection of) treaty-based norms may negatively

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[136] Zwanenburg (2004), *supra* n. 75, at 756.

[137] See also the legal status of Australia, which provided both uniformed and civilian personnel with the CPA administration, but it did not deploy troops in control of any part of Iraqi territory: M.J. Kelly, "Iraq and the Law of Occupation: New Tests for an Old Law", (2003) 6 *YbkIHL* 127, at 132.

[138] See Security Council Resolution 1483, preambular paras. 13–14.

[139] Zwanenburg (2004), *supra* n. 75, at 756.

[140] *Ibid.*, at 756 and 764. In contrast, Chesterman seems susceptible to this possibility: Chesterman, *supra* n. 122, at 61.

[141] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, (2005).

[142] D. Bethlehem, "The Methodological Framework of the Study", in: E. Wilmshurst and S. Breau (eds), *Perspectives on the ICRC Study on Cusotmary International Humanitarian Law*, (2007), Ch. 1, 3, at 8.

impact on the likely acceptance by states that stand outside the treaty regime in relation to their compliance and enforcement. These states may persistently object to the customary law status of norms, viewing the attempt to derive customary IHL as a way to circumvent express consent necessary for a state to be bound by treaty-based rules.[143] Conversely, it may be argued that if most of the norms set out in certain IHL treaties are regarded as customary IHL, states which are not parties to them may find no incentive to ratify them, as they are bound by these norms at any event.[144] Further, for all its malleable nature that serves to accommodate changing needs, customary law is inherently indefinite and ambiguous, which in turn gives rise to difficulties in interpreting and applying it.[145] The customary rules which are mirror images of treaty-based norms may be criticised for being deduced from the latter. Admittedly, the customary rules may acquire precision and clarity if they correspond to treaty-based rules. Yet, this will raise the question of the relationship between customary norms and treaty-based norms, the vexed question that will be analysed in Part V. Further, the ambiguous nature of customary rules may be considered ill-suited to the determination of individual criminal responsibility before domestic courts.[146]

Turning to Security Council resolutions as sources of the laws of occupation, the perusal of the *travaux préparatoires* confirms that the Council can act contrary to requirements of international law, if acting under Chapter VII. However, its power is constrained by the fundamental rules derived from both international human rights law and IHL. The problem is that even the ICJ has refrained from articulating the boundaries and contents of the growing body of such fundamental rules that can be opposed to the Council's binding resolutions. On this matter, the most contentious question relates to the capacity of the Council to broaden the power of the occupant to carry out drastic change and reform in the governmental powers (in particular, the legislative power) of the occupied state, often pursuant to transformative objectives. To obtain greater insight into this question, examinations now turn to the scope of prescriptive powers accorded to the occupant under the Hague and Geneva rules.

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[143] *Ibid.*, at 9.
[144] *Ibid.*
[145] *Ibid.*
[146] *Ibid.*

Chapter 3

The Legislative Competence of the Occupying Power under Article 43 of the 1907 Hague Regulations

1. *The Scope of Legislative Power under Article 43 of the 1907 Hague Regulations*

The legislative power of the belligerent occupant is prescribed in Article 43 of the 1907 Hague Regulations, the authentic French text of which reads:

> 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.

The English version of this provision translated by the ICRC[1] reads:

> 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]

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[1] See the ICRC website, *Treaties Home*, http://www.icrc.org/ihl.nsf/0/1d1726 425f6955aec1256 41e0038bfd6?OpenDocument (last visited on 30 April 2008).

[2] It is often affirmed that the English expression "public order and safety" is a mistranslation of the original French "l'ordre et la vie publics": A.P. Higgins, *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War – Texts of Conventions with Commentaries*, at 244 (1909). See also Y. Dinstein, "The Israel Supreme Court and the Law of Belligerent Occupation: Deportations", (1993) 23 *Israel YbkHR* 1, at 20.

Both the International Court of Justice[3] and publicists[4] confirm that Article 43 of the Hague Regulations is declaratory of customary international law. Most notably, the International Military Tribunal at Nuremberg held in 1946 that this provision was part of customary international law.[5] More recently, the ICJ, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, endorsed the customary law status of Article 43 of the Hague Regulations.[6] Indeed, by the time the Second World War erupted in 1939, not only Article 43 Hague Regulations but also the entire corpus of rules contained in the 1899 and 1907 Hague Conventions was fully established as codified customary law.

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[3] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 136, at 172 and 185, paras. 89 and 124.

[4] E. Benvenisti, *The International Law of Occupation* (1993), at 8; D. Kretzmer, *The Occupation of Justice – The Supreme Court of Israel and the Occupied Territories*, (2002), at 57; M. Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", (2005) 16 *EJIL* 661 at 663. Von Glahn notes that the rules contained in the 1899 and 1907 Hague Conventions are "codified customary law of nations", and that the Republic of San Marino, the only State party to the First World War, which was a party neither to the 1899 nor to the 1907 Hague Conventions, was still bound by the rules enumerated therein when it entered the war against Austria-Hungary in 1915 (Compare Brazil, Bulgaria, Greece, Italy, Montenegro, Serbia and Turkey, which, while being parties to the 1899 Convention, had not ratified the 1907 Convention, at the outbreak of World War I): G. Von Glahn, *The Occupation of Enemy Territory – A Commentary on the Law and Practice of Belligerent Occupation* (1957), at 10–12. For the recognition of the customary law status of the Hague Regulations by municipal courts, see Philippines, the Court of First Instance of Manila, *Hongkong and Shanghai Banking Corporation v. Luis Perez-Samanillo, Inc., and Register of Deeds of Manila*, 14 October 1946, (1946) 13 *AD* 371, Case No. 157, at 372 (holding that the Hague Regulations was part of the fundamental law of the Philippine Commonwealth pursuant to Section 3 of Article 11 of its Constitution). For analysis of this issue, see F. Morgenstern, "Validity of Acts of the Belligerent Occupant", (1951) 28 *BYIL* 291, at 292.

[5] The IMT held that:

> The rules of land warfare expressed in the [Hague] Convention [of 1907] 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 Charter.

IMT, *The Trial of the Major War Criminals*, Judgment of 30 September and 1 October 1946, *Judgment of the International Military Tribunal of Nuremberg*, at 65; reprinted in: "Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences", (1947) 41 *AJIL* 172, at 248–249.

[6] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, paras. 89 and 124.

2. *The Origin of Article 43 of the 1907 Hague Regulations – Articles 2 and 3 of the Brussels Declaration of 1874*

A close look at the drafting record of this provision offers an important clue as to the bounds of the occupant's legislative power. The examination turns to Articles 2 and 3 of the Brussels Declaration of 1874, which were the precursors to Article 43 of the Hague Regulations. Article 2 of the Brussels Declaration reads that:

> 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 the Declaration provides that:

> 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.

While the first provision suggests a broad legislative competence of the occupant, the second provision confines this competence to circumstances justified by the concept of necessity. A similar structure of provisions appeared in corresponding Articles 43–44 of the *Oxford Manual*, adopted by the Institute of International Law in 1880.[7]

The two apparently contradictory provisions of the Brussels Declaration were integrated into the single provision in the 1899 Hague Regulations. This was prompted by the need to resolve the controversy over whether Article 3 of the Brussels Declaration should be retained to prevent sweeping changes in the law of an occupied territory,[8] or whether it should be deleted to allow the occupant

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[7] Article 43 of *The Oxford Manual of Land War* (1880), (English translation of the French text, the authentic language) reads that "[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 "[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 ICRC's database: <http://www.icrc.org/ihl.nsf/>. (last visited on 30 April 2008).

[8] At the 7th Session of the Hague Conference on 8 June 1899, a proposal was made by Mr. Beernnaert (Belgium) to suppress the provision of Article 3 of the Brussels Declaration, because he considered it superfluous. This provoked much discussion among the representatives. Mr. Lammasch (Austro-Hungary) considered that the retention of this provision was important for small powers in view of the restriction on the belligerent occupant by the words "que s'il y a nécessité". Baron de Bildt (Sweden and Norway) followed the view expressed by the representative of the Habsburg Empire. The vote was taken, and this provision was provisionally maintained by 13 votes against 10 and one abstention: *Conférence Internationale de la Paix – La Haye 18 mai-29 juillet 1899*, (1899), Sommaire général, Troisième partie [Deuxième Commission], at 120–121.

a limited scope of obligations (and hence, a greater scope of legislative power).[9] Bihourd, the representative of France, suggested a compromise to the effect that while Article 3 should be eliminated, its spirit should be incorporated into Article 2, with the phrase "en respectant, sauf empêchement absolu, les lois en viguer dans le pays".[10]

At first sight, with the phrase, "prendra toutes les mesures . . . en vue de rétablir et d'assurer . . . l'ordre et la vie publique", Article 2 of the Brussels Declaration allows the exercise of the prescriptive/legislative power of the occupying power only for the objective of restoring and ensuring public order and civil life. A strictly literal interpretation of the original text might result in the unrealistic assumption that the military occupant is precluded from exercising legislative power to seek other objectives, such as military interests. Obviously, such restrictive interpretation is not consistent with the underlying premise of Article 43 of the 1907 Hague Regulations, which acknowledges the factual reality that the entire authority of the legislative power has passed into the hands of the occupant.[11] Writing during World War II, Meurer argued that even if the "necessity"

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[9] See the statement of Baron de Bildt (Sweden and Norway), who refered to de Marten's view that it was important "de trouver les obligations du vainqueur limitées et circonscrites": the statement of Barond de Bildt: *ibid.*, at 120.

[10] At the 8th session held on 10 June 1899, the unanimity was achieved around the compromise clause proposed by Mr. Bihourd: *ibid.*, at 126–127.

[11] As Schwenk notes, the commentators often do not recognise this inherent contradiction: E.H. Schwenk, "Legislative Power of the Military Occupant under Article 43, Hague Regulations", (1945) 54 *Yale LJ* 393, at 395–6. Meurer seems to be the first to have recognised this inherent incongruency, noting that:

> Der Art. 43 der Landkriegsordnung, welcher die Gesetzgebungsgewalt des Siegers nur insoweit erwähnt, als er ihr Schranken setzt, nennt in diesem Zusammenhang allerdings nur die Gesetzgebung zur Wiederherstellung der öffentlichen Ordnung und des öffentlichen Lebens. Das kann aber schon aus dem Grund keine Einengung der gesetzgeberischen Zuständigkeit sein, weil die ganze Bestimmung nur als Ausfluß des umfassenderen Grundsatzes erscheint, daß die gesamte gesetzmäßige Gewalt tatsächlich in die Hände des Besetzenden übergegangen ist. (. . .) Souverän ist freilich noch der alte Herrscher; aber die Ausübung der Souveränitätsrechte steht beim Besetzenden. Die Schranken der Gesetzgebungsgewalt des Besetzenden sind teils einfache Begriffsfolgen, ergeben sich also von selbst aus dem Wesen der Besetzung, teils gehen sie auf eine ausdrückliche Abkommensbestimmung zurück.

C. Meurer, *Die Völkerrechtliche Stellung der vom Feind Besetzten Gebiete*, (1915), at 18–19. These passages in English read as follows:

> Article 43 of the Hague Land Warfare Regulations, which refers to the legislative power of the victorious power only insofar as it sets its limit, mentions indeed, in this context, only the legislation for the purpose of restoring public order and safety. This can, however, be no narrowing of the legislative competence [of the occupant], because the entire provision seems to be only the result of the comprehensive principle, according to which the total, legislative power is transferred to the hands of the occupant. (. . .) The sovereign

test under Article 43 Hague Regulations is understood in harmony with strictly literal interpretation and would only relate to the legislative competence to restore public order and civil life, this could be invoked to justify laws enacted in the general interest of the inhabitants *and* pursuant to its military interests. Yet, he contended that when the occupying power invokes its military interests, its legislative competence must be constrained by the requirements of war usage, morals and humanity as enunciated in the Martens Clause.[12]

Given that Articles 2 and 3 of the Brussels Declaration must be interpreted in conjunction, it is possible to argue that not only the power to modify, suspend or replace under Article 3, but also the power to enact ("prendra toutes les mesures) under Article 2, can be exercised in case of necessity. Further, the objectives of restoring and ensuring public order and civil life stated in the adverbial

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> is naturally still the old ruler; but the exercise of sovereign rights rests on the occupant. The restrictions on the legislative capacity of the occupant are partly simple conceptual outcomes, naturally resulting from the essence of the occupation. They partly derive from an express provision of an agreement.

English translation by the present author. See also E.H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (1942), at 89. Stauffenberg refers to "[d]er Zwang des Krieges" as one of the three elements that constitute the notion of necessity under Article 43 of the Hague Regulations (the other two elements are "die öffentliche Sicherheit", and "das Wohl der Bevölkerung"): Graf Stauffenberg, "Vertragliche Beziehungen des Okkupanten zu den Landeseinwohnern", (1931) 2 *ZaöRV* 87, at 103.

[12] Meurer observes as follows:

> Der Art. 43 erwähnt die Notwendigkeitsschranke ausdrücklich nur für das Gebiet der öffentlichen Ordnung und des öffentlichen Lebens, man wird sagen können: für den Bereich der allgemeinen oder Volksinteressen. Nachdem aber…durch den Art. 43 der Umfang der gesetzgeberischen Zuständigkeit nicht eingeengt werden will, erhält auch die Notwendigkeitsklausel eine allgemeinere Bedeutung. Diese erfaßt somit auch die Gesetze, welche der Besetzende zur Förderung seiner militärischen Interessen erlässt. Bei anderer Auffassung wäre zu sagen: Der Art. 43 lässt für die Gesetzgebung im militärischen Interesse eine Lücke, welche nach der Martensschen Klausel durch die Grundsätze des Kriegsgebrauchs, der Moral und der Menschlichkeit auszufüllen ist. Das führt aber dann wohl auch zu einer Beschränkung der Militärgesetze auf das Notwendigste.

Meurer, *ibid.*, at 23. The English Translation of this passage reads as follows:

> Article 43 refers to the necessity restrictions expressly only in the area of public order and safety, and one can say that this is for the purpose of protecting the general or national interests. Since the extent of the legislative competence must not, however, be narrowed through Article 43, the necessity clause entails a more general meaning. The necessity clause encompasses even such law that the occupant enacts for the purpose of furthering its military interests. According to another interpretation, it could be stated that Article 43 leaves for the legislation, enacted pursuant to the military interest, a gap, which is to be filled by the Martens Clause through the principles of war usage, moral and the humanity. This does, however, lead to narrowing military laws [of the occupant] in the most urgent cases.

English translation by the present author.

phrase "en vue de…" under Article 2 must be construed as exemplary and not exhaustive. At any event, the integration of two provisions (Articles 2 and 3) of the Brussels Declaration into a single text under the Hague Regulations confirms that both the legislative power of the occupants and their obligation to respect local laws are part of general principles.[13]

3. *The Meaning of the Expression "vie publique"*

Assessment of the rights and duties of the belligerent occupant necessitates the interpretation of the phrase in the authentic French text, "en vue de rétablir et d'assurer…l'ordre et la vie publics" ("to restore and ensure…public order and safety [civil life]") under Article 43 of the Hague Regulations. At the time of the Brussels Conference of 1874, Baron Lambermont interpreted "l'ordre" as only "la sécurité ou la sûreté générale" ("security or general safety"). In contrast, the expression "vie publique" has a wider meaning, denoting "des fonctions sociales, des transactions ordinaires, qui constituent la vie de tous les jours".[14] Subsequently, this wider construction was endorsed by a tribunal set up in the British occupied zone of Germany after World War II. In *Grahame v. the Director of Prosecutions*, the French phrase "l'ordre et la vie publics" was found to relate to "the whole social, commercial and economic life of the community".[15] Along this line, in the case of *A Teachers' Housing Cooperative Society*, the Supreme Court of Israel held that the obligation to restore and ensure public life and order encompasses "a variety of aspects of civil life, such as the economy, society, education, welfare, health, transport and all other aspects of life in a modern society".[16] Many

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[13] Sassòli (2005), *supra* n. 4, at 663; and Schwenk, *supra* n. 11, at 397.

[14] *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), at 23 (protocole No. 10, séance de 12 août).

[15] Germany, British Zone of Control, Control Commission Court of Criminal Appeal, *Grahame v. Director of Prosecutions*, 26 July 1947, 14 *AD* 228, at 232 (1947). However, in that case, the Court made it clear that the Military Government of Germany set up by the four Allied Powers were "unprecedented" as being "the supreme organs of government in Germany", and that at any event the legislative power of the Control Council and the Zone and Sector Commanders were not restricted by the limitations imposed by the Hague Convention relating to belligerent occupation: *ibid.*, at 233.

[16] HC *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. (A Teachers' Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region)*, (1983) 37(4) *Piskei Din* 785; English summary in: (1984) 14 *Israel YbkHR* 301, at 306. The Court held that the obligation to restore and ensure public life and order consists of two requirements: (i) the requirement to restore public order where it was disturbed; and (ii) the requirement to ensure that public order

publicists follow this broader interpretation of the expression "vie publique", referring to a number of elements relating to welfare of civilians.[17] As will be examined in the subsequent chapter, the broadening parameters of the concept "vie publique" furnish a useful vehicle for adjusting measures adopted by the occupying power to special needs relating to economic, social and cultural rights of inhabitants in occupied territory.

4. *The Meaning of the Words "les lois en viguer"*

The meaning of the words "les lois en viguer" can be clarified when examined in relation to the corresponding phrase "les lois qui étaient en viguer dans le pays en temps de paix" used in the Brussels Declaration.[18] Two implications can be drawn from this drafting history. First, the limitations on prescriptive power of the occupant in Article 43 of the Hague Regulations relate to all the field of legislation,[19] including tax collection, requisitions and private property. Similarly, Article 43 is applicable not only to laws in a strict sense but also to decrees and ordinances.[20] Second, following the commencement of occupation,

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can be continued: *ibid*. In H.C. *202/81*, *Tabib et al., v. (a) Minister of Defence, (b) Military Governor of Tulkarem*, Justice Shilo opined that under Article 43 of the Hague Regulations, the occupying power is obliged "to maintain an orderly administration, including all branches existing nowadays in an enlightened country, such as security, health, education, welfare, as well as equality of life and of transportation": 36(2) *Piskei Din* 622; English excerpt in: (1983) 13 *Israel YbkHR* 364, at 365. See also Sussman J., H.C. *337/71, The Christian Society for the Holy Places v. Minister of Defense et al*., (1972) 26(1) *Piskei Din* 574, English summary in: (1972) 2 *Israel YbkHR* 354, at 355 (holding that "[t]he words 'absolutely prevented' in Article 43 should…be interpreted with reference to the duty imposed upon [an occupant] vis-à-vis the civilian population, including the duty to regulate economic and social affairs").

[17] See, for instance, Von Glahn, *supra* n. 4, at 97; M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order* (1961); reprinted as *idem*, *The International Law of War – Transnational Coercion and World Public Order*, (1994), at 746; T. Meron, "Applicability of Multilateral Conventions to Occupied Territories", (1978) 72 *AJIL* 542, at 549; L. Oppenheim, *International Law* 434 (7th ed., by H. Lauterpacht, 1952); Schwenk, *supra* n. 11, at 393, n. 1; and 400–01. See also Benvenisti, *supra* n. 4, at 9; and D. Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories* (2002), at 58–59.

[18] Y. Dinstein, "Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peace Building", Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series, Fall 2004, Number 1, at 4.

[19] Schwenk, *supra* n. 11, at 397.

[20] *Ibid*., at 397–8. For the exclusion of such extraordinary laws from the scope of the legislative power of the occupant, see Holland, District Court of Rotterdam, *Cillekens v. DeHaas*, 14 May 1919 (recognising that an order issued on 5 January 1916 by the German Governor General in Belgium, which terminated a moratorium granted by the King of Belgium during the First

the occupant is not bound by any laws enacted by the "absent" sovereign of the occupied territory.[21]

5. *The Obligation to Restore and Ensure Public Order and Civil Life*

5.1. *The Nature of Obligations*

The obligations contained in Article 43 of the Hague Regulations can be classified according to their nature (positive or negative): first, the obligation to restore, and ensure, as far as possible, public order and life in the occupied territory; and second, the obligation to respect the laws in force in the occupied territory except in case of "empêchement absolu". The first obligation, which must be implemented by the executive and the judicial branch of the military government of the occupying power, calls for positive action. On the other hand, the second obligation is primarily based on the negative duty, prohibiting the repealing or suspension of existing laws, unless justified by "empêchement absolu".[22] Both the first and second obligations are subject to qualifying phrases: "autant qu'il est possible" for the first obligation; and "empêchement absolu" for the second.[23] Justice Shamgar of the Israeli Supreme Court further classifies the first duty into two parts: the duty to restore public order and safety as an "immediate and primary duty"; and the duty to ensure public order and safety as a "subsequent and continuous" duty, which is incumbent on the occupant during the period of occupation, and which needs to be adjusted to changing social needs relating to security, economy, health and transport.[24]

5.2. *The Obligations Relating to* Public Order

The duty of the occupying power to restore and ensure public order in occupied territory is the most obvious, as this is in the interests of both the occupying authorities (armed forces and administration) and civilians in occupied territory. To implement this duty, the occupying power is required to undertake meticulous evaluations of specific circumstances to arrest offenders without using firearms at first. Failing this, it can have recourse to lethal weapons but must minimise

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World War was compatible with Article 43 of the Hague Regulations and valid); J.F. Williams and H. Lauterpacht (eds), (1919–1922) 1 *AD* 471, No. 336.

[21] E. Stein, "Application of the Law of the Absent Sovereign in Territory under Belligerent Occupation: The Schio Massacre", (1947–48) 46 *Mich.LRev* 341, at 349.

[22] Dinstein (2004), *supra* n. 18, at 3.

[23] *Ibid.*

[24] H.C. *69 +493/81, Abu Aita et al. v. Commander of the Judea and Samaria Region et al.*, 37(2) *Piskei Din* 197; English excerpt in: (1983) 13 *Israel YbkHR* 348, at 356–357.

damage and injury to respect and protect human life not only of bystanders but also of offenders.[25] In some cases, carefully coordinated joint operations of law enforcement officers and the military may be necessary.

With respect to occupied Iraq, the earlier period of occupation in 2003 saw large-scale looting of public buildings (governmental offices, hospitals, universities, schools, power plants, oil facilities, nuclear facilities, and museums) and of private property. Further, there has been an abundant report of Coalition forces (especially, the US forces) that resorted to excessive use of force against civilians and causing many civilian deaths.[26] Scheffer criticises the "failure of the occupying powers to establish and maintain public order and safety and effective and comprehensive law enforcement capabilities during the early months of the occupation", as required by Article 43 of the Hague Regulations and Articles 27 and 64 of GCIV.[27] The fundamental pitfall lies in the fact that the Anglo-American coalition forces lacked sufficient means and efforts to prevent and stop such foreseeable problems relating to law enforcement.[28] Belatedly though, the CPA set up and put into practice certain mechanisms for law and order.[29]

5.3. *The Obligation to* Ensure *Public Order and Civil Life*

The textual reading of Article 43 of the Hague Regulations clearly suggests that an occupant can legislate not only to restore but also to *ensure* public order and civil life.[30] Leurquin observes that:

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[25] Sassòli (2005), *supra* n. 4, at 666. See also *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the 9th UN Congress on the Prevention of Crime and Treatment of Offenders, Havana, 27 Aug.–7 Sept. 1990.

[26] Human Rights Watch, *Hearts and Minds: Post-war Civilian Deaths in Baghdad Caused by US Forces*, October 2003, Vol. 15, No. 9(E), at 34–38 (killing of persons at a checkpoint); and Amnesty International, *Iraq: Looting, Lawlessness and Humanitarian Consequences*, 11 April 2003, MDE 14/083/2003.

[27] D.J. Scheffer, "Beyond Occupation Law", (2003) 97 *AJIL* 842, at 855.

[28] Adam Roberts, "The End of Occupation: Iraq 2004", (2005) 54 *ICLQ* 27, at 27–29; Scheffer, *ibid*., at 853–856; Sassòli, *supra* n. 4, at 667–668; and Amnesty International, *Iraq: The Need for Security*, 4 July 2003, MDE 14/143/2003. Scheffer comments that "[p]rimary catalysts for such possible violations [of occupation law] were . . . the failure of the occupying powers to deploy a sufficient number of military personnel and international civilian police to the region early enough to make the critical difference on the ground, particularly with respect to law and order . . .": *ibid*., at 856.

[29] See CPA, *An Historical Review of CPA Accomplishments* (2004).

[30] Schwenk, *supra* n. 11, at 399. Nevertheless, the German-Belgian Arbitration Tribunal in *Ville d'Anvers v. État allemand* left this question open, when criticising the German decree of February 3, 1915 applicable in occupied Belgium for being unnecessary either for restoring or maintaining public order and civil life: German-Belgian Mixed Arbitral Tribunal, *Ville d'Anvers v. État allemand*, 19 October 1925, (1926) 5 *RDTAM* 712; and G.H. Hackworth, *Digest of International Law*, Vol. VI, (1943), at 395–396. The Belgian courts provided the conflicting

> L'article 43 de la Convention de la Haye du 18 octobre 1907, concernant l'autorité militaire sur le territoire de l'Etat ennemi, charge l'occupant de prendre toutes les mesures qui dépendent de lui pour assurer l'ordre et la vie publics, 'en respectant, sauf empêchement absolu, les lois en vigueur dans les pays . . . lorsque l'occupation se prolonge, lorsque, par suite de la guerre, la situation économique et sociale du pays occupé subit des changements profonds, il est bien évident que de nouvelles mesures législatives doivent tôt ou tard s'imposer.[31]

Leurquin's view suggests that in some instances the occupant is even *obliged* to enact legislation designed to "ensure . . . public order and civil life". This is supported by the majority of commentators.[32] The judicial practice also corroborates this view. In *United States v. List*, the United States Military Tribunal at Nuremberg held that:

> The status of an occupant of the territory of the enemy having been achieved, International Law places the responsibility upon the commanding general of preserving order, punishing crime, and protecting lives and property within the occupied territory. His power in accomplishing these ends is as great as his responsibility. But he is definitely limited by recognized rules of International Law, particularly the Hague Regulations of 1907.[33]

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views as to the validity of a German Order of 8 August 1918, which rendered void all purchases of vegetables not yet gathered. Compare *Bochart v. Committee of Supplies of Corneux* with *De Brabant and Gosselin v. T. and A. Florent*: Belgian Court of Appeal of Liège, *Bochart v. Committee of Supplies of Corneux*, 28 February 1920 (confirming the validity of the Order as being in furtherance of "regulating and diminishing the exorbitant price of vegetables . . . in conformity with the provisions of Article 43 of the Hague Convention"); (1919–1922) 1 *AD* 462, No. 327; and Belgian Court of Appeals of Brussels, *De Brabant and Gosselin v. T. and A. Florent*, 22 July 1920 (ruling that the Order was "not made with a view to assuring public order and security, but to starving the population" . . . [which] went beyond the powers given to the occupant by Article 43 of the Hague Convention"); (1919–1922) 1 *AD* 463, No. 328.

[31] A. Leurquin, "L'occupation allemande en Belgique et l'article 43 de la Convention de la Haye du 18 octobre, 1907", (1916) 1 *International Law Notes* 54, at 54–55. The English translation of this part (given by Flowerdew & Co.) in the same journal reads that:

> Article 43 of The Hague Convention of the 18th October, 1907, concerning military authority in the territory of the enemy State, enjoins upon the occupant to take all measures in his power to ensure public order and safety, "observing, save where there is absolute hindrance, the laws of the country." . . . When the occupation is prolonged, and when owing to the War the economic and social position of the occupied country undergoes profound changes, it is perfectly evident that new legislative measures are essential sooner or later.

Ibid., at 55.

[32] See, for instance, C. Greenwood, "The Administration of Occupied Territory in International Law", in: E. Playfair (ed.), *International Law and the Administration of Occupied Territories – Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, (1992), Ch. 7, 241, at 246.

[33] US Military Tribunal, Nuremberg, 8 July 1947–19 February 1948, *Trial of Wilhelm List and Others (Hostages Trial)*, (1949) 8 *LRTWC* 34, at 57 (section iv "The Status of Yugoslavia, Greece and Norway, and of the Partisan Group Operating Therein, at the Relevant Time").

This dictum clearly indicates that the affirmative duty of the occupying power to implement good administration in occupied territory.

6. *Laws Enacted by "Absent" Sovereign*

With respect to laws enacted by "absent" sovereigns, both the writings of publicists and the case-law have qualified the general rule that the occupant is free from the obligations of laws promulgated by the absent sovereign. First, the occupying power is not precluded from endorsing certain legislation enacted by the absent sovereign.[34] Such an approach can be justified insofar as this is consistent with the obligations under GCIV and the Hague Regulations, including obligations based on humanitarian purposes. This was recognised in the case of *Schio* massacre which took place in part of Italy under the Allied military occupation.[35] While not recognising any duty imposed on the occupying power to give effect to the "absent" sovereign's new laws under the Hague Regulations, Feilchenfeld observes that:

> Nevertheless, one would go too far in assuming . . . that an absent sovereign is absolutely precluded from legislating for occupied areas. The sovereignty of the absent sovereign over the region remains in existence and, from a more practical point of view, the occupant may and should have no objection to timely alterations of existing laws by the old sovereign in those fields which the occupant has not seen fit to subject to his own legislative power.[36]

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[34] Dinstein (2004), *supra* n. 18, at 4. Compare this with Hyde, who observes that "if the absent territorial sovereign, through some quasi-legislative decree, forbids its nationals to comply with what the occupant has ordained, obedience to such command within the occupied territory would not safeguard the individual from prosecution by the occupant": C.C. Hyde, *International Law – Chiefly as Interpreted and Applied by the United States*, 2nd revised edition, (1947), at 1886.

[35] The Allied Military Government in the post-armistice occupation commuted the defendants' sentences to life imprisonment by an act of pardon, though the law enacted by the fascist prior to the occupation stipulated capital punishment for such cases. The new Italian Government enacted Decree 224, abolishing death penalty in the meantime, but its administration dealt only with the unoccupied territory. The Allied measure was justified on the basis of "public policy" of the Allied forces. The end of hostilities in Italy in the spring of 1945 finally made it possible to argue that the Allied occupation was a post-armistice occupation in the normal sense: Stein, *supra* n. 21, at 366–8. See also Israel's decision not to apply capital punishment for offences committed in West Bank: Greenwood (1992), *supra* n. 32, at 248–9.

[36] Feilchenfeld, *supra* n. 11, at 135, para. 463. However, he cautiously adds that in view of the physical power of the occupant to prevent laws and decrees of the absent sovereign from being enforced, or even being duly promulgated, it may be difficult to treat them as a positive law: *ibid.*, at 136, para. 464.

Similarly, McNair argues that "[p]rinciple seems to demand that, assuming the new law [of an absent sovereign] to fall within the category of that large portion of national law which persists during the occupation and which the enemy occupant cannot lawfully change or annul, it ought to operate in occupied territory".[37]

Second, in the case of any possible conflicting instructions issued by the occupying power and the absent sovereign, primacy should be given to the instruction of the occupant. This is clear in view of its power of enforcement in the occupied territories.[38] Third, the absent sovereign is entitled to enforce criminal legislation relating to treason, which has been enacted during the period of occupation. The returning power can justify such measures on the basis that belligerent occupation is not supposed to alter the sense of allegiance owed by the population of the territory to it.[39]

7. *Exceptions to Article 43 of the 1907 Hague Regulations*

7.1. *"Empêchement absolu"*

Despite the general prohibition on making alterations to existing legal systems of the occupied territory, Article 43 of the Hague Regulations allows exceptions to this rule, as shown by the phrase "sauf empêchement absolu". The term "empêchement absolu" corresponds to the concept of "nécessité" used in Article 3 of the 1874 Brussels Declaration. This term does not denote such rigour as implied in the use of adjective "absolu". It has been construed as the concept of military necessity or its equivalent.[40] While suggesting that the term, "empêchement

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[37] A.D. McNair, "Municipal Effects of Belligerent Occupation", (1941) 57 *L.Q.Rev*. 33, at 73.

[38] Feilchenfeld, *supra* n. 11, at 135–6, para. 463–64.

[39] Norway, Supreme Court [Appellate Division], *Public Prosecutor v. Reidar Haaland*, (1943–45) 12 *AD* 444. In that case, the defendant acted as a member of the Norwegian Nazi party during the German occupation during World War II. He was indicted for treason and torture in accordance with the Norwegian Penal Law of 1902 and a Royal Decree issued by the Norwegian Government-in-exile in London during the occupation, which reinstituted the death penalty for acts of treason and ill-treatment of Norwegian patriots. His appeal was based on the argument that the Sovereign-in-exile could not take legislative measures with binding effect in Norwegian territory while that territory was occupied. The Court rejected the appeal, holding that since the Sovereignty was not legally changed by the occupation, the Norwegians continued to owe allegiance to it, and that the lawful Norwegian authorities were not prevented from issuing criminal legislative measures: *ibid*., at 444–445.

[40] Benvenisti, *supra* n. 4, at 14; Y. Dinstein, "The International Law of Belligerent Occupation and Human Rights", (1978) 8 *Israel YbkHR* 104, at 112; *idem* (2004), *supra* n. 18, at 4; Oppenheim (1952), *supra* n. 17; Schwenk, *supra* n. 11, at 393; and M. Zwanenburg, "Existentialism in

absolu", should mean "absolute necessity",[41] Schwenk contends that to restrict it to the military necessity of the occupant is too narrow, and even undesirable, especially in the case of prolonged military occupation.[42] He argues that the restoration of public order and civil life is primarily in the interests of the population.[43]

Yet, the necessity exception must be narrowly construed.[44] This point was confirmed in the authority of the Mixed Arbitral Tribunals established under the Peace Treaties of 1919–1920. In *Milaire v. Germany* (1923), the Belgo-German Arbitral Tribunal ruled that "article 43 [of the Hague Regulations] a pour objet non de mettre l'occupant au benefice d'un privilège ou d'un droit, mais, au contraire, de lui imposer une obligation".[45] In *Ville d'Anvers v. Germany* (1925), the same Tribunal was confronted with three contested measures issued by the German Governor-General in response to acts of mob violence against German nationals in occupied Belgium, namely the partial abrogation of the Decree of Vendémiaire, the disseisin of the Belgian courts and the creation of the special tribunals. It held that these measures exceeded the necessities of war within the meaning of "absolutely prevented" and ran contrary to Article 43 of the Hague Regulations.[46]

Iraq: Security Council Resolution 1483 and the Law of Occupation", (2004) *IRRC* No. 856, 745, at 750. See also M. Bothe, "Occupation, Belligerent", in: R. Bernhardt (ed.), (1997) 3 *Encyclopedia of Public International Law* 763, at 763–765. Note that Greenspan refers to "exigencies of war" in order to justify the measures to eliminate undemocratic and inhumane institutions: M. Greenspan, *The Modern Law of Land Warfare* (1959), at 224. In the *Tabib* case, the Supreme Court of Israel held that the term "absolute prevention" under Article 43 of the Hague Regulations should be interpreted as "necessity which may be derived from the legitimate interests of the occupant or from concern for the civilian population": H.C. *202/81, Tabib et al. v. (a) Minister of Defence, (b) Military Governor of Tulkarem*, 36(2) *Piskei Din* 622 (*per* Justice Shilo); English excerpted in: (1983) 13 *Israel YbkHR* 364, at 365.

[41] Schwenk, *supra* n. 11, at 400–401.

[42] *Ibid*.

[43] *Ibid*.

[44] G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Vol. II: The Law of Armed Conflict*, (1968), at 182–183.

[45] German-Belgian Mixed Arbitral Tribunal, *Milaire v. État allemand*, (1923), 2 *RDTAM* 715, No. 168, at 719.

[46] German-Belgian Mixed Arbitral Tribunal, *Ville d'Anvers v. État allemand*, 19 October 1925, (1926) 5 *RDTAM* 712, at 716–717. The Tribunal held that:

> La composition du tribunal, la prépondérance accordée a l'élément allemand, la faculté pour le président allemand de faire cesser toute opposition de la part d'un assesseur en requérant son remplacement par un assesseur nommé par l'autorité allemande, la procedure sommaire adoptée, la suppression de toutes formalités gênantes…, le caractère définitif et sans appel des condamnations, la riguer de la proceédure d'exécution, tout cela s'explique, non par le souci de l'ordre public, mais par le désir d'accorder des avantages particuliers aux

Once such necessity is recognised, the occupying power is allowed to repeal, suspend or modify existing legal systems, and to enact new laws. The legislation enacted by the occupying power is of transitional validity, namely applicable only during the period of occupation. Yet, the returning sovereign is free to endorse (part of) such legislation for practical reasons, especially in the case of prolonged occupation.[47]

In relation to the writings of publicists, despite the narrow interpretation given by the post-World War I practice of the Mixed Arbitral Tribunals, the commentators in the inter-war period flexibly interpreted the notion of necessity to suit special needs of occupation. Hall succinctly notes that a change in legislation is allowed by "military necessity".[48] Feilchenfeld proposes a very broad construction, recognising a change in the laws if such a change is "sufficiently justified". The only condition he suggests is that when making alterations in laws, the benefit of doubt should be given to the old, not to the new, laws.[49]

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demandeurs en grande majorité ressortissants de l'État occupant, en privant les communes défenderesses des garanties correspondantes, et c'est ce que l'art. 43 de la Convention de la Haye n'autorisait évidemment pas.

Ibid., at 717.

[47] Lord McNair and A.D. Watts, *The Legal Effects of War*, (4th ed, 1966), 388–389. Verzijl recognises "the necessity or opportunity of provisionally maintaining in force for practical reasons after the cessation of hostilities legal enactments issued by the enemy occupant during his administration of the country". He refers to the military occupation of the Southern Low Countries by the "Maritime Powers", England and the Netherlands, during the War of the Spanish Succession (since 1706) as one of the historical precedents of such "successional" effect: J.H.W. Verzijl, *International law in Historical Perspective, Part IX-A, The Laws of War*, (1978), at 160.

[48] On the basis of the flexible notion of necessity, Hall recognises a very broad scope of prescriptive power given to the occupant. He maintains that:

> …he [the invader] has the right of exercising…such control only, within the occupied territory, as is required for his safety and the success of his operations. But the measure and range of military necessity in particular cases can only be determined by the circumstances of those cases. It is consequently impossible formally to exclude any of the subjects of legislative or administrative action from the sphere of the control which is exercised in virtue of it; and the rights acquired by an invader in effect amount to the momentary possession of all ultimate legislative and executive powers. (…) In its exercise…this ultimate authority is governed by the condition that the invader, having only a right to such control as is necessary for his safety and the success of his operations, must use his power within the limits defined by the fundamental notion of occupation, and with due reference to its transient character.

W.E. Hall, *A Treatise on International Law*, 8th Ed., (1924), § 155, at 559–560. Compare Hall's view with the much narrower notion of "military necessity" proposed by Oppenheim: L. Oppenheim, "The Legal Relations between an Occupying Power and the Inhabitants", (1917) 33 *L.Q.Rev.* 363, at 365.

[49] Feilchenfeld, *supra* n. 11, at 89, para. 325.

Since the second half of the twentieth century onwards, the concept of necessity has been the subject of elaborate discussions. This is especially the case with respect to the approach and reasoning of the Israeli Supreme Court, which is distinctive in terms of its power to review measures taken by military authorities in occupied territories. In the earlier period of occupation, the approach of the Supreme Court was to apply a very broad scope of the notion of military necessity. This notion was interpreted as including not only the immediate needs of the army itself, but both the need to safeguard public order and security as stipulated in Article 43 of the Hague Regulations, and "what the army needs in order to fulfil its task of defending the occupied area against hostile acts which may originate from outside".[50] In the *Beth El Case*, the Court held that the establishment of civilian settlements on private lands requisitioned from Arab landowners did not violate customary international law on the ground that the two settlements in question were considered to serve Israel's military and security needs.[51] In the subsequent *Elon Moreh* case concerning the similar issue, however, the Court declared the requisition order issued against the lands owned by the petitioners null and void. Emphasising the need to carry out separate examinations of military purposes on individual cases, the Court distinguished the present case from the *Beth El* case on two grounds: first, there was an extraneous factor other than military and security needs (namely, political consideration), which played a preponderant role in the establishment of the civilian settlement in question; second, the Elon Moreh settlement was designed from the outset to be of permanent nature, which was contrary to the requirement under Article 43 of the Hague Regulations.[52]

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[50] H.C. *390/79, Mustafa Dweikat et al., v the Government of Israel et al.* (*Elon Moreh* Case), 34(1) *Piskei Din* 1; excerpted in: (1979) 9 *Israel YbkHR* 345, at 348 (*per* Landau D.P.).

[51] Israel, Supreme Court, sitting as a High Court of Justice, H.C. *606/78, Ayyoub v. Minister of Defence (Beth El Case)*, 33(2) *Piskei Dinn* 133; English summary in: (1979) 9 *Israel YbkHR* 337 *et al.*

[52] H.C. *390/79, Mustafa Dweikat et al., v. the Government of Israel et al.* (*Eloln Moreh* Case), 34(1) *Piskei Din* 1; English excerpt in: (1979) 9 *Israel YbkHR* 345, at 349–350 (*per* Landau D.P.).

7.2. *Welfare of the Population*

Since the end of the Second World War, many commentators[53] and the decisions of the Israeli Supreme Court[54] suggest that the welfare of the population of the occupied territory should be included within the notion of necessity under Article 43 of the Hague Regulations. The growing recognition of the interlocking relationship between human rights law and humanitarian law provides succour to this argument. Further, the needs of civilians are not static but susceptible to constant change. This suggests that a military commander is not only entitled, but in certain circumstances even obliged, to adapt to changing civilian needs. This view is confirmed by writings of publicists[55] and again in the decisions of the Israel Supreme Court. In the *Christian Society for the Holy Places* case, Sussman J. held that "a prolonged military occupation brings in its wake social, economic and commercial changes which oblige [an occupant] to adapt the law to the changing needs of the population".[56]

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[53] A. Gerson, "War, Conquered Territory, and Military Occupation in the Contemporary International Legal System", (1977) 18 *Harvard ILJ* 525, at 538–539 (referring to "the principles of self-determination and fundamental human rights"); and Von Glahn, *supra* n. 4, at 97. Debbasch observes that "[l]a formule de l'article 43 du Règlement de La Haye… permet à l'occupant d'exercer une compétence réglementaire limitée par ce double but: la securité de l'armée et l'ordre public local. Pour rendre compte de ce qui est permis à l'occupant, et de ce qui lui est interdit, on peut faire appel aux deux notions implicitement visées par l'institution de l'occupation militaire: la compétence de <<gestion>> et la compétence de <<disposition>>"; O. Debbasch, *L'Occupation militaire – Pouvoirs reconnus aux forces armées hors de leur territoire national* (1962), at 172.

[54] See, for instance, H.C. *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. (A Teachers' Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region*), (1983) 37(4) *Piskei Din* 785; English summary in: (1984) 14 *Israel YbkHR* 301, at 304 (*per* Barak J.).

[55] Feilchenfeld observes that "[u]nder modern conditions, countries are frequently in a stage of profound transition which tends to be accelerated during a long war. Should this transition and acceleration be interrupted in occupied countries and should their structure be frozen?": Feilchenfeld, *supra* n. 11, at 24. Colby implicitly endorses this view: E. Colby, "Occupation under the Laws of War" (2nd part), (1926) 26 *Colum. L.Rev*. 146, at 159.

[56] H.C. *337/71, The Christian Society for the Holy Places v. Minister of Defense et al.*, 26(1) *Piskei Din* 574 (1972), English summary in: (1972) 2 *Israel YbkHR* 354, at 355. See also H.C. *393/82*, in which Barak J. held that "[t]he authority of a military administration applies to taking all measures necessary to ensure growth, change and development", and hence that "a military administration is… required to ensure the changing needs of a population in a territory under belligerent occupation": H.C. *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. (A Teachers' Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region*), (1983) 37(4) *Piskei Din* 785 (*per* Barak J.); English summary in: (1984) 14 *Israel YbkHR* 301, at 309. He added that "[i]n exercising this authority [governmental authority] cognizance must be taken of the fact that the military administration in question functions

As Zwanenburg notes, a caveat must nonetheless be entered with respect to the assessment of socio-economic interests of inhabitants. The determination of what is necessary in socio-economic circumstances always entails risk of abuse.[57] In the case of *A Teachers' Cooperative Society*, Barak J. held that the temporary nature of the authority of the military commander requires that s/he must not be allowed to take into account any national, economic or social interest of his/her own States, and even national security interests, but only his/her own military needs and those of the local population.[58]

8. *State Practice in Relation to Article 43 of the 1907 Hague Regulations during the Two World Wars*

During the First World War, the German occupying forces in Belgium introduced sweeping forms of changes in legislation. The rationale for this occupation policy was that during the period of occupation, Article 43 of the Hague Regulations allowed the "authority" to prescribe a full range of issues to be transferred to the German "Government General" as the occupying power.[59] The implementation of this policy resulted in considerable modifications of administrative structure of the territory, including the attempted alterations in occupied Belgium's political framework in favour of the Flemings.[60] Rousseau refers to the less known example of the British occupying power in Ottoman Turkey's Mesopotamia during the First World War, the area in which the British later created the Kingdom of Iraq. The British commander-in-chief promulgated in 1915 the "Iraq Occupied

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for a prolonged period, during which the local population undergoes fundamental changes", so that "a military administration is authorized to initiate underlying fundamental investments and long-range projects for the benefit of the local population": *ibid.*, at 312–313.

[57] Zwanenburg, *supra* n. 40, at 751.

[58] H.C. *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. (A Teachers' Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region)*, (1983) 37(4) *Piskei Din* 785 (*per* Barak J.); English summary in: (1984) 14 *Israel YbkHR* 301, at 304.

[59] C. Rousseau, *Le droit des conflits armés*, (1983), at 140, para. 93. See also Benvenisti, *supra* n. 4, at 46; and M. Ottolenghi, "The Stars and Stripes in Al-Fardos Square: The Implications for the International Law of Belligerent Occupation", (2003–2004) 72 *Fordham L.Rev.* 2177, at 2188.

[60] According to Rousseau, the German occupying power issued the decree (*arrêté*) of 27 March 1917, which introduced the separation of administration between the Flanders and the Wallonia, and created the Council of Flanders. He also refers to another anomalous practice of the Central Powers in Russia during the First World War: the creation of the Council of regency that exercised the supreme power and which was formed by the Archbishop of Warsaw and two secular citizens; and the proclamation of independence of Ukraine by the pro-German Rada of Kiev: Rousseau, *ibid.*, at 140, para. 93.

Territories Code" based on the civil and criminal codes of India, initiating profound changes in the local laws and judiciary. Rousseau describes such changes as "errements" akin to the practice of the Germans in Belgium.[61]

Clearly, Germany's extreme form of interpretation designed to justify its extensive prescriptive power during World War I was inconsistent with the meaning of Article 43 of the Hague Regulations. It was vehemently contested in a number of Belgian court decisions. Some of the decisions concerned the German Order of August 8, 1918, which banned the sale of vegetables before they had been gathered.[62] In the case of *Mathot v. Longué*,[63] the Court of Appeal of Liège, reversing its earlier decisions with respect to the German Order of 8 August 1918,[64] flatly rejected any room for legislative scope for 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".[65] By rejecting the interpretation that the Hague Regulations conferred upon the occupant the "positive right to legislate", the Belgian Court held that the German order had possessed "no legal value".[66] Underlying the Belgian courts' decisions lay another peculiar mode of interpretation, the so-called "Belgian doctrine", according to which Article 43 of the Hague Regulations denies conferral of any legislative power on the occupying power.[67]

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[61] *Ibid.*, at 153, para. 99.

[62] See, for instance, the Court of Appeal of Brussels, *De Brabant and Gosselin v. T.& A., Florent*, 22 July 1920, (1919–1922) 1 *AD* 463, No. 328; and Belgium, the Court of Appeal of Liège, *Mathot v. Longué*, 19 February 1921, 1 *AD* 463, No. 329. Compare these with *Bochart v. Committee of Supplies of Corneux* (28 February 1920). In that case, the Court of Appeal of Liège held that the Order of the German Governor-General in Belgium, which declared void all purchases of vegetables not yet gathered, was consistent with Article 43 of the 1907 Hague Regulations: (1919–1922) 1 *AD 462*, No. 327.

[63] Belgium, the Court of Appeal of Liège, *Mathot v. Longué*, 19 February 1921, 1 *AD* 463, No. 329.

[64] See, for instance, the Court of Appeal of Liège, *Bochart v. Committee of Supplies of Corneux*, 28 February 1920, 1 *AD* 462, No. 327.

[65] The Court of Appeal of Liège, *Mathot v. Longué*, 19 February 1921, 1 *AD* 463, No. 329, at 464.

[66] *Ibid.* The Court added that:

> …it is unacceptable to say that by virtue of the [Hague] Convention the occupant 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 occupant and not to give him or recognize him as possessing any authority in the sphere of law…The law remains the apanage of the national authority exclusively, the occupant possessing *de facto* power and nothing more.

Ibid.

[67] Rousseau, *supra* n. 59, at 139 and 153, paras. 92 and 99, and the cases cited therein. See also Benvenisti, *supra* n. 4, at 46–47.

It is well-known that during the Second World War, the Axis powers and the USSR initiated much more far-reaching changes in local laws in occupied territories, totally abrogating or ignoring the local laws affording basic civil liberties of civilians in occupied territories.[68] Flagrant violations of Article 43 of the Hague Regulations can be most exemplified by the abhorrent nature of Nazi racial and eugenic laws, which provided the basis for exterminating the Jewish and Roma peoples, communists, homosexuals and handicapped persons, and for enslaving millions of Slavic people in Nazi occupied territories.

9. *Abrogation of Fascist Laws under the Necessity Test*

The general principle based on the conservation of existing local laws in occupied territories must not be so rigorously interpreted as yielding an unreasonable result. Clearly, the occupant is not required blindly to comply with local laws, which entail egregious disregard of human rights.[69] During the Second World War, Nazi Germany introduced a totalitarian politico-economic structure in a large part of its occupied territories in Europe, whereas the USSR transformed the three Baltic countries, Bessarabia, and other occupied or conquered territories into Soviet systems. One can readily recognise that political systems based on exceedingly heinous ideologies such as Nazism, fascism and militarism, fall within the necessity exceptions based on the two grounds: a grave threat to the maintenance and security of the military forces of the occupants under Article 43 Hague Regulations,[70] and to the well-being of the population in the occupied territory under GCIV. In that sense, the concept of "absolute necessity" justifies or even requires changes in, or total demolition of, such structures.[71] Toward the end of the Second World War, the Allied forces abolished Italy's fascist political structures in Sicily and the other occupied provinces. After the total collapse of the Nazi's central governmental machinery, the Allied occupation forces

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[68] Rousseau, *ibid*., at 153, para. 99.

[69] Schwenk, *supra* n. 11, at 403.

[70] McDougal and Feliciano put greater emphasis on the security needs of occupying forces when interpreting the phrase "unless absolutely prevented". They note that:

> The Allied belligerent occupants may fairly be said to have been "absolutely prevented" by their own security interests from respecting, for instance, the German laws with respect to the Nazi Party and other Nazi organizations and the "Nuremberg" racial laws. It is indeed difficult to envisage how the Allied occupants could be expected to protect their security interest if they were required to respect such laws.

McDougal and Feliciano (1994) *supra* n. 17, at 770.

[71] Greenspan, *supra* n. 40, at 225; N. Ando, *Surrender, Occupation, and Private Property in International Law – An Evaluation of US Practice in Japan*, (1991), at 107; and Schwenk, *supra* n. 11, at 403 and 407.

introduced a sweeping form of democratisation measures. It was imperative to abrogate the egregious Nuremberg laws and other civil and criminal laws based on fanatic ideology of racial and eugenic purity. No doubt, these measures were fully justifiable under the rule of absolute necessity. In Japan, in harmony with the Instrument of Surrender that incorporated the Potsdam Declaration, drastic measures were implemented by the American occupying power. These measures were purported to eradicate Imperial Japan's militarist and fascist ideological backbones that unleashed brutal aggression against China and Southeast Asian countries pursuant to its empire building in East Asia. As Ando notes, the dissolution of the zaibatsu and the land reform implemented by the US occupying power in Japan was absolutely necessary to eliminate any remnant of militaristic ideology that totally controlled Imperial Japan in the 1930s and 40s.[72]

Specifically referring to the abrogation of notorious racial laws undertaken by the Allies in Germany and Italy, H. Lauterpacht/Oppenheim observed that:

> . . . in the exceptional cases in which the law of the occupied State is such as to flout and shock elementary concepts of justice and of the rule of law, the occupying State must be deemed entitled to disregard it. The authors of the Hague Regulations did not envisage dictatorial régimes – such as that of National-Socialist Germany – utterly contemptuous of human rights and of modern conceptions of legality . . . It may be said, without unduly straining the interpretation of Article 43, that the Western Powers were "absolutely prevented" from administering laws and principles the application of which within occupied territory was utterly opposed to modern conceptions of the rule of law.[73]

Reference to elementary concepts of justice is reminiscent of both the Martens Clause and natural law. Appeal to the concept of natural justice to justify departure from the conservationist premises of the Hague law[74] is discernible in a modern context as well. In *H.C. 61/80*, the Israeli High Court (*per* Landau J.P.)

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[72] Ando, *ibid*., at 108.

[73] Oppenheim (1952), *supra* n. 17, § 172, at 446–7. On this matter, note should be taken of *The Military Government Proclamation No. 1*, which read that "[w]e shall overthrow the Nazi rule, dissolve the Nazi Party and abolish the cruel, oppressive and discriminating laws and institutions which the Party has created". Article II of Law No. 1 stipulated that "[n]o German law . . . shall be applied judicially or administratively within the occupied territory in any instance where such application would cause injustice or inequality . . . (b) by discriminating against any person by reason of his race, nationality, religious beliefs or opposition to the National-Socialist Party or its directives": Oppenheim (1952), *ibid*., at 447, n. 1. See also K. Loewenstein, "Law and the Legislative Process in Occupied Germany: I", (1948) 57 *Yale LJ* 724; *idem*, "Law and the Legislative Process in Occupied Germany: II"; (1948) 57 *Yale LJ* 994; and Schwarzenberger, *supra* n. 44, at 195 (referring to the "standard of civilisation" and to "a civilised Occupying Power".

[74] See Schwenk, *supra* n. 11, at 407.

observes that "a military commander should not uphold the validity of a law whose content is contrary to fundamental principles of justice and morality".[75]

10. *Waiver of Article 43 of the 1907 Hague Regulations by a Subsequent Agreement?*

It must be questioned whether the requirements of the Hague Regulations may be altered by an agreement entered into by belligerent parties.[76] Many authors[77] take the view that modifications by agreement among states are permissible. While recognising such a possibility, Davidonis nevertheless suggests that it is preferable to rely on the flexible construction of the concept of "military necessity" under the Hague Regulations. It is suggested that this flexible interpretation suffices to overcome the "inadequate" nature of Hague Regulations when faced with modern warfare.[78]

The practice supports the waiver of Article 43 (and other provisions) of the Hague Regulations by agreement. With respect to the post-armistice occupation by the Allied forces in Rhineland after World War I,[79] this was not considered susceptible to the application of the Hague Regulations. The armistice occupation derived its authority to introduce sweeping alterations in laws from the consent of the occupied state, which was given by way of the 1918 armistice agreement.[80] Feilchenfeld observes that the Hague Regulations survived the armistice occupation, as the Allied and Associated powers treated it as *sui generis*.[81]

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[75] H.C. *61/80, Haetzni v. Minister of Defence et al.*, 34(3) *Piskei Din* 595; English excerpt in: (1981) 11 *Israel YbkHR* 358, at 360.

[76] Schwenk, *supra* n. 11, at 408–410. He argues that this possibility is one of the three circumstances where the application of Article 43 of the 1907 Hague Regulations may be excluded (the other two circumstances are: the case of unconstitutional laws; and the possibility of delegation of a broad ambit of legislative power under the statutes of the occupied State).

[77] See, for instance, Feilchenfeld, *supra* n. 11, at 114, para. 407; and A.C. Davidonis, "Some Problems of Military Government", (1944) *Am.Pol.Sci.Rev.* 460, at 467.

[78] Davidonis, *ibid*.

[79] For the assessment of the (post-)armistice occupation of Rhineland by the Allied after World War I, see E. Fraenkel, *Military Occupation and the Rule of Law, Occupation Government in the Rhineland*, 1918–1923, (1944); and G. Zieger, "Rhineland Occupation after World War I", in: R. Bernhardt (ed.), (1982) 4 *Encyclopedia of Public International Law* 190.

[80] Benvenisti, *supra* n. 4, at 57.

[81] Feilchenfeld notes that:

> When, after the Armistice of November, 1918, allied powers and successor states became occupants themselves, and consequently became interested in the broadening of powers of occupants, their legal arguments were not based on attacks against the structure of Section III of the Hague Regulations, but on theories under which armistice occupations were supposed to possess a special and semifinal character. . . . The rules of Section III

As discussed in Chapter 1, the same reasoning can apply to the US occupation administration in post-World War II Japan. The Instrument of Surrender, which was agreed by Imperial Japan and the Allies, and which incorporated the Potsdam Declaration, explicitly allowed the occupying Allied power to go far beyond the permissible bounds of legislative competence envisaged under Article 43 of the Hague Regulations.[82]

With respect to changes introduced by an armistice agreement, Feilchenfeld comments that "[t]he only possible controversy today concerns the question whether modern international law restricts the validity of armistice stipulations which provide for harsher treatment than that permitted under the Hague Regulations". He refers to the question whether an armistice agreement furnishing more oppressive treatment than under the Hague rules may be regarded as void, provoke reprisals, or allow the withholding of any external recognition for rights of occupants. He observes that while "[t]here is no evidence in state practice that such restrictive rules have become a part of international law . . . [i]t is, of course, conceivable that the whole armistice agreement may be void if it does not meet the validity requirements of international law; for instance, if duress has been used against negotiators".[83]

Even if such waiver by agreement is recognised, the occupant remains bound to ensure that its discretion in prescriptive power can be exercised only insofar as it is necessary for the purpose of the agreement.[84] Needless to say, it is unlawful

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> survived again although actual practice was modified . . . . Their [the victors'] practice, as well as that of the international post-war tribunals . . . was based on the assumption that the validity of the rules of Section III had not been modified even in details and that every deviation from such details created a reparation claim. There was no opposition from the German Republic, which appeared to be keen to demonstrate its own regard for orthodox international law.

Feilchenfeld, *supra* n. 11, at 22, paras. 90–91.

[82] See, for instance, Ando, *supra* n. 71, at 110. The last sentence of the Instrument of Surrender provides that "[t]he authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender".

[83] Feilchenfeld, *supra* n. 11, at 114, n. 2. As to the armistice provisions of 1919, he noted that the recognition of its "harsh" nature "at least does not give any historical support to theories which deny validity to oppressive stipulations. This does not mean, of course, that modern practice is necessarily bound by past events": *ibid*.

[84] Ando, *supra* n. 71, at 110. In one case where a plaintiff argued that Article 46 of the Hague Regulations was breached by virtue of the compulsory transfer of his immovable private property to the Japanese Government under the US occupation, the District Court of Tokyo held that:

> [C]onsidering that . . . special agreements like the Instrument of Surrender are generally to be interpreted restrictively in the interest of the occupied, the authority of [the Supreme Commander for the Allied Powers] to effectuate the provisions of the said Instrument

to alter the obligations of the occupant by an agreement in such a manner as to thwart the fundamental interests of civilians in occupied territory.

11. *Conclusion*

The examinations of the practice of Article 43 of the Hague Regulations demonstrate that contrary to the literal meaning of the words "absolute necessity", the exception to the conservationist premise of this provision has been recognised in a flexible manner. The need for drastic modifications of existing legislative and institutional structures of an occupied state was keenly felt by the Allies in relation to the ghastly state systems imbued with the ideologies of Nazism, fascism and militarism during the Second World War. As discussed in the first chapter, on this matter, the Allied forces provided different legal justifications for radical departure from the conservationist approach of the Hague Regulations. It ought to be heeded that among necessity grounds, the welfare of civilian populations in occupied territories has come to gain special importance in the practice of prolonged occupation in the late twentieth century, a phenomenon that was unknown at the time Article 43 of the Hague Regulations was crafted. This necessity ground needs to be closely analysed in the light of the rules embodied in Article 64 GCIV, to which the appraisal now turns.

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of Surrender should not be understood to be entirely discretionary so far as it concerns restriction or deprivation of the rights or freedom of the inhabitants of the occupied territory, but the exercise of [this] authority shall be admitted only as far as it is necessary for the achievement of its purpose; that is to say, as far as it is objectively considered necessary for the effectuation of the provisions of the Instrument of Surrender".

Tokyo District Court, 28 February 1966, *Kakyu Saiban-sho Minji Saiban-Rei-Shu (Reports of Lower Courts' Judgments: Civil Cases)*, Vol. 17, nos. 1–2, at 131 *et seq* (for an English translation, see (1966) 10 *Japanese Annual of International Law,* 197 *et seq*). In that case, Ando notes that the fact that this agreement was imposed by one side on the other does not negate its binding effect: *ibid*., at 116.

Chapter 4

The Legislative Competence of the Occupying Power under the Fourth Geneva Convention

1. *Introduction*

As stated in Article 154 GCIV, the Geneva law is not purported to replace the Hague law but to supplement it. However, Benvenisti refers to three major differences in approaches and underlying objectives. As recognized in *the ICRC Commentary*, the first such difference is the shift in emphasis from the military advantage of the ousted sovereign to the protection of inhabitants under an enemy's hands.[1] Benvenisti even asserts that the GCIV "delineates a bill of rights for the occupied population, a set of internationally approved guidelines for the lawful administration of occupied territories".[2] Along the same line, Kolb argues that:

> …la Convention de Genève IV n'est pas fondée sur l'optique inter-étatique. En toute logique, elle s'oriente vers l'octroi de garanties individuelles selon le modèle d'un *Bill of Rights*. L'optique est individuelle. Ce n'est pas par hazard si l'on a très tôt rapproché la Convention IV du droit des droits de l'homme, estimant que les deux relevaient d'une souche commune, que la Convention IV relevait, en fait, d'une approche des droits de l'homme.[3]

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[1] The *ICRC Commentary* notes that "the Hague Regulations codify the laws and customs of war and are intended above all to serve as a guide to the armed forces, whereas the Fourth Convention aims principally at the protection of civilians": *ICRC Commentary to GCIV*, at 614.

[2] E. Benvenisti, "The Security Council and The Law on Occupation: Resolution 1483 on Iraq in Historical Perspective", (2003) 1 *Israel Defense Forces Law Review* 23, at 28.

[3] R. 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", (2002) 10 *AfYbkIL* 267, at 270–271, emphasis in original. See also *idem*, "Aspects historiques de la relation entre le droit international humanitaire et les droits de l'homme", (1999) 37 *Can. YbkIL* 57, at 73–74 and 80–83; and J.A.C. Gutteridge, "The Geneva Convention of 1949", (1949) 26 *BYIL* 296, at 300–301.

Second, the structure of the occupying power's duties and powers under the GCIV is very much different from the Hague rules.[4] The GCIV requires the occupying power to assume the role of regulator of socio-economic issues and of provider of services to meet needs of local population. The duties on the occupant are not merely of negative nature, but also of positive nature encompassing the duty to prevent and protect inhabitants from inhumane treatment. As such, the list of duties incumbent on the occupant under GCIV is very much expanded.

Third, under the Geneva law the primacy given to private property under the Hague law, which largely reflects the prevailing laissez-faire philosophy of the late nineteenth century, has undergone a substantial overhaul in the Geneva law, reflecting the concern of the western occupying powers to rebuild post-World War II economies in occupied territories along the New Deal thinking.[5]

The outcome of the first two fundamental changes in the nature of belligerent occupation is that a broader mandate of legislative power is granted to occupying powers under Article 64 GCIV. This can be recognised by comparing a categorical prohibition of prescriptive powers as seen in the phrase "unless absolutely prevented" under Article 43 Hague Regulations, with the more nuanced phrase "may subject . . . to provisions which are essential to enable . . ." under Article 64 GCIV.[6] At least on the matter of the prescriptive power of the occupying power, the Hague Regulations are replaced by the rules under GCIV. The *ICRC's Commentary* indicates that "when a State is party to the Fourth Geneva Convention of 1949, it is almost superfluous to enquire whether it is also bound by the Fourth Hague Convention of 1907 or the Second of 1899".[7]

2. *Article 64 of GCIV and the Necessity Exceptions*

2.1. *Article 64 of GCIV*

Article 64 of GCIV reads 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. Subject to the latter consideration and to the necessity for ensuring

[4] Benvenisti (2003), *supra* n. 2, at 29.
[5] E. Benvenisti, *The International Law of Occupation*, (1993), at 30–31.
[6] *Ibid.*, at 102.
[7] *ICRC's Commentary to GCIV*, at 614.

> 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 fulfill 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.

Article 64 recognises the concept of necessity that may allow the occupying power to change the existing legal system in the occupied territory. The most salient and controversial question concerns the legislative scope of occupying powers, which are addressed in the first sentence of the first paragraph, and in the second paragraph. The second sentence of the first paragraph relates to the question of the judiciary. As will be seen below, the occupant is required to maintain the judiciary, except in case of hindrance to the application of GCs or in case of the need to ensure "effective administration of justice".

2.2. *Drafting Records of Article 64 of GCIV*

The drafting records of GCIV suggest a flexible approach to the occupant's legislative power under GCIV. The original draft approved by the XVIIth International Red Cross Conference at Stockholm (1948) allowed the occupant's legislative powers only pursuant to the interest in the security of its forces and their property. Article 55 (the initial number of Article 64) of the draft provides that:

> The penal laws of the occupied Power shall remain in force and the tribunals thereof shall continue to function in respect of all offenses covered by said laws.
>
> The occupying Power may, however, subject the population of the occupied territory to provisions intended to assure the security of the members and property of the forces or administration of the occupying Power, and likewise of the establishments used by the said forces and administration.[8]

The Stockholm text provided a basis for discussions at the subsequent Geneva Conference in 1949. At the 18th Meeting of the Committee III,[9] which was entrusted with the drafting of the Civilians Convention, discussions turned to

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[8] ICRC, *Revised and New Draft Conventions for the Protection of War Victims – Texts Approved and Amended by the XVIIth International Red Cross Conference* (revised translation), (1948), at 131; and *Final Record*, Vol. I, at 122.

[9] *Final Record*, Vol. II-A, at 669–671 (Committee III, 18th Meeting, 18 May 1949).

the US amendment to draft Article 55, which was submitted on 16 May 1949. This amendment reads that:

> (1) Delete first paragraph and substitute the following:
>
> 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 offences covered by the said laws.
>
> (2) Delete paragraph two.[10]

The US amendment was designed to provide an unlimited power of legislation to the occupying power. The US was confronted with the Nazi's egregious racial laws and judicial systems in part of occupied Germany where it assumed responsibility for administration.[11] The US amendment, however, prompted the objections of several delegates (USSR, Norway, Romania and Mexico).[12] The USSR Delegate, Mr. Morosov, criticised that this would give the Occupying Power "an absolute right to modify the penal legislation of the occupied territory", which "greatly exceeded the limited right laid down in the Hague Regulations, as well as in the Stockholm text."[13]

In the following 19th Meeting, Mr. Day of the UK proposed that the first paragraph of draft Article 55 should take account of cases where local courts were unable to function, and that in the second paragraph should be included the right of the occupying power to take such legislative measures as might be necessary to "secure the application of the Convention and the proper administration of the territory".[14] The UK amendment to draft Article 55, which was submitted on 28 May 1949, follows this line of thought. It reads that:

Delete Article 55 and substitute:

> The penal laws of the occupied territory shall remain in force unless they contravene the principles of this Convention or endanger the security of the Occupying Power. Subject to the same considerations, and to the necessity for securing the effective dispensation of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.
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> The Occupying Power may subject the population of the occupied territory to provisions which are essential to ensure the application of this Convention and the orderly government of the territory, and to provisions intended to assure the security of the members and property of the forces or administration of the

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[10] *Final Record*, Vol. III, at 139, No. 294.

[11] *Final Record*, Vol. II-A, at 670 (Committee III, 18th Meeting, 18 May 1949).

[12] *Ibid.*, at 671 (Committee III, 18th Meeting, 18 May 1949, Mr. Castberg of Norway, Mrs. Manole of Rumania and Mr. De Alba of Mexico).

[13] *Final Record*, Vol. II-A, at 670 (Committee III, 18th Meeting).

[14] *Ibid.*, at 672 (Statement of Mr. Day of the United Kingdom, Committee III, 19th Meeting, 19 May 1949).

> Occupying Power, and likewise of the establishments used by the said forces and administration.[15]

Subsequently, on 5 July 1949, the Drafting Committee No. 2 adopted two texts of draft Article 55, which reads that:

> Text of the Majority
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> 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 menace to the security of the Occupying Power or an obstacle to the application of this 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.
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> 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 this 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.
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> Text of the Minority
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> The penal laws of the occupied Power shall remain in force and its courts shall continue to act in respect of all offences covered by the said laws, except in cases where this constitutes a menace to the security of the Occupying Power.
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> The Occupying Power may, however, subject the population of the occupied territory to (penal) provisions intended to assure the security of the members and property of the forces or administration of the Occupying Power, and likewise of the establishments used by the said forces and administration.[16]

The text of the majority of the Drafting Committee, which largely resembled the UK amendment, was adopted by 20 votes to 8 at 43rd Meeting of Committee III.[17]

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[15] *Final Record*, Vol. III, Annexes, at 139, No. 295.

[16] *Ibid.*, at 139–140, No. 296.

[17] *Final Record*, Vol. II-A, at 771 (Committee III, 43rd Meeting, 8 July 1949). On other hand, the text of the minority of the Drafting Committee was rejected by 16 votes to 9: *ibid.*

3. *The Scope of Legislative Power of the Occupant under Article 64 of GCIV*

3.1. *Three Elements of Incoherence*

As Dinstein notes,[18] the structure of Article 64 seems incoherent in three respects. Firstly, while the first paragraph of Article 64 deals only with penal laws, the second paragraph concerns legislation of a general nature ("provisions"). Secondly, the list of exceptions to the general rule prohibiting the repealing or suspension of existing laws does not exactly overlap in the first and second paragraphs. On one hand, the first paragraph is subject to two exceptions: where such penal laws constitute a threat to the security of the occupying power; and where they become an obstacle to the application of GCIV. On the other, the second paragraph refers to three objectives that can furnish exceptions to the general rule: the need to fulfil the obligations under GCIV; 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. Thirdly, while the exceptions in the first paragraph relate to the repealing or suspension of existing legislation, those in the second paragraph concern the case of subjecting the population to *provisions* (the case of prescribing rules). The strict textual interpretation would allow the necessity test based on the maintenance of orderly government to be invoked only in the case of the second paragraph, and not for the purpose of repealing or suspending existing legislation.

3.2. *The Relationship between Article 43 of the 1907 Hague Regulations and Article 64 of GCIV*

These three apparent "contradictions", which are *prima facie* observable under Article 64 of GCIV, can, however, be resolved by a systematic interpretation of this provision in comparison with its predecessor, Article 43 of the Hague Regulations. Indeed, this question is closely intertwined with the relationship between the two provisions. The systematic interpretation needs to be advanced in such a manner as to provide elements of coherence to the meaning and the scope of application of Article 64 GCIV, taking into account its supplementary character in relation to Article 43 of the Hague Regulations. As Dinstein observes,[19] the text of Article 64 of GCIV is not designed to overhaul, let alone

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[18] Y. Dinstein, "Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peace Building", Program on Humanitarian Policy and Conflict Research, Harvard Univ., Occasional Paper Series, Fall 2004 [Dinstein (2004)a], Number 1, at 5.

[19] *Ibid.*

supersede, the terms of Article 43 Hague Regulations. Rather, the former should be regarded as an "amplification" of the laconic terms of the latter.[20] The *ICRC's Commentary to GCIV* describes Article 64 GCIV as expressing the terms of Article 43 Hague Regulations "in a more precise and detailed form".[21]

With respect to the scope and type of legislation contemplated by Article 64 GCIV, it is generally agreed among the commentators that despite the reference to penal laws in the first paragraph, the two paragraphs must be read in conjunction so as to encompass the *whole* legal system.[22] The *ICRC Commentary* states that "there is no reason to infer *a contrario* that the occupation authorities are not bound to respect the civil law of the country, or even its constitution".[23] Reference only to penal laws in Article 64(1) GCIV should not be interpreted as the omission of the framers of Article 64. Rather, this should be read as their intention to highlight that abuse of legislative power by the occupant is most salient in relation to the repealing or suspension of penal laws and hence deserving of a specific reference.[24]

The harmonious interpretation of the two paragraphs of Article 64 GCIV must also be applied to the evaluation of the necessity test based on any of the three objectives.[25] This means that the occupying power is given parameters of discretion to repeal or suspend existing legislation, or enact new laws, whether of penal, administrative or civil nature,[26] on the basis of any of the three exceptional grounds outlined in the second paragraph. As examined below, both the additional element of necessity based on the fulfilment of obligations under the Geneva Conventions and the underlying idea of the occupying power serving as a quasi-welfare-state confirm that the latitudes of prescriptive power conferred upon the occupant under Article 64 GCIV are broader than those contemplated under Article 43 Hague Regulations.[27] Indeed, the *ICRC's Commentary* recognises

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[20] R.T. Yingling and R.W. Ginnane, "The Geneva Conventions of 1949", (1952) 46 *AJIL* 393, at 422.

[21] *ICRC Commentary to GCIV*, at 335.

[22] Dinstein (2004), *supra* n. 18 at 6; and H.P. Gasser, "Protection of the Civilian Population", in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, (1995), 209, at 255.

[23] *ICRC Commentary to GCIV*, at 335.

[24] *Ibid*.

[25] Dinstein (2004), *supra* n. 18, at 6.

[26] At the Diplomatic Conference of Geneva (1949), the Drafting Committee No. 2 could not agree on whether to qualify the term "provisions" in the second paragraph of draft Article 55 (now Article 64) with an adjective "penal". While the majority chose not to refer to this adjective, the minority text mentions the word "penal" within the bracket: *Final Record*, Vol. III, Annexes, at 139–40, No. 296.

[27] Sassòli seems to agree with this view: M. Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", (2005) 16 *EJIL* 661, at 670 and 672–673. In contrast,

that the legislative power of the occupying power is "very extensive and complex".[28] Along this thinking, the *UK Manual* states that the broad parameters of legislative power accorded to the belligerent occupant in amending existing local laws or promulgating new laws can be justified by three legitimate objectives: exigencies of armed conflict; the maintenance of order; and the duty to ensure welfare of the population.[29]

Von Glahn[30] and Greenspan[31] maintain that the necessity test allows the occupying power to enact laws restricting or suspending constitutional safeguards for civil and political rights in occupied territory for the duration of the occupation.[32] Along the line of extensive prescriptive power in respect of amendment or

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Schwarzenberger takes a more cautious view as to the ambit of legislative power of the occupying power under Article 64 GCIV. He contends that in drawing up the list of purposes for which the Occupying Power was entitled to enact its own legislation, the Geneva Conference of 1949 "took it for granted that it had not extended the traditional scope of occupation legislation": G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Vol. II: The Law of Armed Conflict*, (1968), at 194.

[28] *ICRC's Commentary to GCIV*, at 337.

[29] The *UK Manual* recognises the legality of enacting regulations designed to fix prices or to secure equitable distribution of food and other commodities, apparently on the second and the third grounds: *UK Manual* (2004), at 284, para. 11.25.1.

[30] Von Glahn notes that "[t]he occupant will naturally alter, repeal, or suspend all laws of a political nature as well as political privileges . . . and all laws which affect the welfare and safety of his commands": G. Von Glahn, *The Occupation of Enemy Territory – A Commentary on the Law and Practice of Belligerent Occupation*, (1957), at 98. See also C. Greenwood, "The Administration of Occupied Territory in International Law", in: E. Playfair (ed.), *International Law and the Administration of Occupied Territories – Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, (1992), 241, at 247–8.

[31] Greenspan observes that:

> Naturally, the occupant will suspend or amend laws which are essentially political in nature, and political or constitutional privileges, as well as laws which adversely affect the welfare and safety of his command. Examples are laws relating to recruiting for the enemy forces, the right to bear arms, the right of assembly, the right to vote, freedom of the press, and the right to travel freely in the territory or leave it.

M. Greenspan, *The Modern Law of Land Warfare*, (1959), at 223.

[32] The old *UK Manual* (1958) reads that:

> Political laws and constitutional safeguards are as a matter of course suspended during occupation: for example, the laws concerning liability to military service, suffrage, the right of assembly, the right to bear arms, and the freedom of the press. Special orders may, however, have to be published to make the suspension of the laws known to the population of the occupied territory.

The Law of War on Land, being Part III of the Manual of Military Law, (1958), at 145, para. 519. See also *UK Manual* (2004), which provides more elaborate rules concerning the extent to which human rights of inhabitants may be lawfully circumscribed: *UK Manual* (2004), at 286–288, paras. 11.34–11.41.

promulgation of laws, the *UK Manual* allows a wide range of power to suspend civil liberties of inhabitants in occupied territory.[33]

4. *Three Elements of Necessity under Article 64 of GCIV*

4.1. *Overview*

The three necessity exceptions stipulated in Article 64 of GCIV are: (i) the need to fulfil the obligations under GCIV; (ii) the need to maintain the orderly government of the territory; and (iii) the need to ensure the security of the occupying power, of the members and property of the occupying forces or administration.[34] Obviously, these three grounds of necessity are closely connected with each other. Justifying a specific measure to abrogate existing laws or to enact new laws may be readily explained by more than one of these grounds. The three elements reflect a delicate equilibrium between two diametrically opposed poles of fundamental interests underlying the entire system of IHL: military necessity on one hand, and humanitarian considerations on the other.[35] As early as 1945, Schwenk recognises that the legislative competence vested in the occupant is wide enough to take into account the humanitarian considerations of the civilian population under occupation, especially by reference to the purpose of restoring public order and civil life, as recognized under Article 43 of the Hague Regulations.[36] In the context of Article 64 GCIV, humanitarian considerations are fully embodied in the first and second elements of necessity.

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[33] *UK Manual* (2004), at 284, para. 11.25, emphasis added.

[34] The *US FM 27–10* allows the occupying powers to alter, repeal or suspend laws of the following categories:

a. Legislation constituting a threat to its security, such as laws relating to recruitment and the bearing of arms.

b. Legislation dealing with political process, such as laws regarding the rights of suffrage and of assembly.

c. Legislation the enforcement of which would be inconsistent with the duties of the occupant, such as laws establishing racial discrimination.

US FM 27–10, para. 371.

[35] Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, (2004) [Dinstein (2004)b], at 16–20.

[36] E.H. Schwenk, "Legislative Power of the Military Occupant Under Article 43, Hague Regulations", (1945) 54 *Yale LJ* 393, at 400–401. He argues that "a construction which confines the term "empêchement absolu" [under Article 43 of the 1907 Hague Regulations] to the military interest of the occupant seems too narrow, if not actually incorrect": *ibid.*

What is not clear is whether these three elements of the necessity test are of exhaustive character. Dinstein[37] argues that the list of necessity can be open-ended. He contends that there are other circumstances that would allow occupying powers to repeal or suspend existing laws, or to enact new laws. Reference is made to circumstances in which the law in occupied territory recognises a right of appeal from local courts to a higher instance of appeal in an unoccupied part of the country.[38] However, the phrases used in both the first and second paragraphs of Article 64 GCIV are clear. The intention of the framers was to confine exceptions to the general rule only to those objectives expressly stated in Article 64. The scenario relating to procedural matters, as suggested by Dinstein, can be encompassed within the notion of "orderly government", the maintenance of which is one of the stated purposes underlying the concept of necessity.

4.2. *The Necessity Test Based on Security Grounds*

The occupying power is allowed to enact provisions to counter any direct threat to its security, as understood in a broad sense (which includes the security of the occupying power, of the personnel and property of the occupying forces or administration, as well as lines of communication). Penal provisions may be introduced so as to ban the possession of firearms, and to strengthen the punishment of acts of terrorism and sabotage directed against the occupant's personnel or facilities.[39] Dinstein describes the necessity relating to security grounds as "fundamental" and "unassailable". He argues that the occupying power is given "more than some latitude" in taking legislative measures to circumscribe the general welfare and rights of inhabitants, which are deemed as necessary for the security of its armed forces and administration.[40]

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[37] Dinstein (2004)a, *supra* n. 18, at 6.

[38] *Ibid.*, at 6. On this matter, note should be taken of Fairman's criticism of the decision of the Italian Supreme Court of Cassation, which allowed itself to exercise the jurisdiction over appeals from the Court of Appeal of Trieste. The Italian Supreme Court did so, notwithstanding that Trieste, while becoming the Free Territory, continued to be administered by the Allied military commanders, pursuant to the Treaty of Peace. Fairman argues that it is unreasonable for the occupying power to be compelled, under Article 43 of the Hague Regulations, to abide by the legislation that is in force in occupied territory, which concerns appellate jurisdiction and allows appeals from the local courts to be carried to the higher courts of the enemy country. He forcefully contends that principles of the law of occupation must be applied not only "with due respect for 'the laws in force', but with a sturdy determination, too, to substitute liberal for Fascist principles in law and administration": C. Fairman, "Asserted Jurisdiction of the Italian Court of Cassation over the Court of Appeal of the Free Territory of Trieste", (1951) 45 *AJIL* 541, at 548.

[39] Dinstein (2004)a, *supra* n. 18, at 6.

[40] *Ibid.*, at 12. See also Greenwood, *supra* n. 30, at 247.

Von Glahn[41] and Greenspan[42] argue that the necessity test based on the maintenance of order and the ensuring of security entitles the occupying power to constrain or hold in abeyance many civil and political rights of inhabitants in occupied territory.[43] Clearly, national military manuals describe security interests as the most salient ground for derogating from fundamental rights in occupied territory.[44] The *UK Manual* states that the occupying power may suspend "*any* of those laws that affect its own security". Extraordinary powers exercised by the occupant can have bearing on conscription, electoral enfranchisement, freedom of public assembly, the bearing of arms, and the freedom of the press.[45] However, recourse to security grounds would easily lead to abusive powers of states. To avoid such danger, derogating measures must be proportionate to the exigencies of security needs in occupied territory.

In occupied Iraq, as Kelly notes,[46] the Coalition Provisional Authority (CPA) enacted a number of specific security provisions, including the Orders banning the bearing of arms during assemblies authorised by the CPA,[47] concerning border security,[48] demonstrations,[49] and weapons control.[50] With respect to on-going irregular forces and militias, the Transitional Administrative Law prohibited any "armed forces and militias not under the command structure of the Iraqi Transitional Government . . . except as provided by federal law".[51] The CPA also issued an order to control the media,[52] which belongs to the areas where

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[41] Von Glahn, *supra* n. 30, at 98.

[42] Greenspan, *supra* n. 31, at 223.

[43] See also Greenwood, *supra* n. 30, at 247–248.

[44] *UK Manual* (1958), at 145, para. 519; *UK Manual* (2004), at 286–288, paras. 11.34–11.41. See also US FM 27–10, para. 371.

[45] *UK Manual* (2004), at 284, para. 11.25, emphasis added.

[46] M.J. Kelly, "Iraq and the Law of Occupation: New Tests for an Old Law", (2003) 6 *YbkIHL* 127, at 144.

[47] CPA, Order No. 19: Freedom of Assembly, CPA/ORD/09 July 2003/19, Section 6.

[48] CPA Order No. 16 CPA/ORD/04 June 2004/16: Temporary Control of Iraqi Borders, Ports and Airports.

[49] CPA, Order No. 19: Freedom of Assembly, CPA/ORD/09 July 2003/19.

[50] CPA Order No. 3, Weapons Control, CPA/ORD/31 December 2003/3.

[51] Law of Administration for the State of Iraq for the Transitional Period, 8 March 2004, Article 27(B). Note that the CPA provided an exception to this provision, allowing disbandment of militias meeting specific security criteria (including registration, transparency, non-aggression, non-criminality etc) to be disbanded gradually: CPA Order No. 91, Regulation of Armed Forces and Militias Within Iraq, CPA/ORD/02June2004/91, para. 4. This exception did not, however, apply to militias not fulfilling these criteria, who were treated as criminals: *ibid.*, para. 6. See also G.H. Fox, "The Occupation of Iraq", (2005) 36 *Geo.JIL.* 195, at 212.

[52] CPA Order No. 14, Prohibited Media Activity, CPA/ORD/10 Jun 2003/14.

occupying powers have a broad discretion, including the seizure of all means of communication and appliances for transmission.[53]

Another salient issue that arose in relation to security concerns in Iraq was oil smuggling that took place when oil was transported from refineries and oil lines to truck tankers and merchant vessels. As Kelly notes,[54] the legal basis for the CPA to deal with these issues can be understood as: (i) the necessity exception allowed on security grounds under Article 64 GCIV; (ii) Security Council Resolution 1483;[55] (iii) the appropriate Iraqi laws (which established state ownership of all natural resources and recognised the crime of theft of state property under the Penal Code of 1969);[56] (iv) the UN Convention on the Law of the Sea;[57] and (v) the relevant rules of naval warfare.[58] The CPA took a specific legislative measure to tackle oil smuggling, including an Order allowing civil confisation without convictions against individual persons.[59]

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[53] Von Glahn, *supra* n. 30, at 139 and 215.

[54] Kelly, *supra* n. 46, at 149–151.

[55] UN Security Council Resolution 1483, para. 20. (management of oil resources).

[56] Iraqi Penal Code of 1969, Ministry of Justice – Statutory Notice, STS 251/88, The Penal Code with Amendments, 3rd ed., para. 444(11), available at the database of the *Grotian Moment: The International War Crimes Trial Blog*, the Case Western Reserve Univ., School of Law.

[57] See UN Convention on the Law of the Sea, Articles 19 (innocent passage) and 27 (criminal jurisdiction on board a foreign ship).

[58] See, for instance, the *San Remo Manual on the Law of Naval Warfare*, Section II, para. 120. which reads that:

A neutral merchant vessel is exempt from the exercise of the right of visit and search if it meets the following conditions:

(a) it is bound for a neutral port;
(b) it is under the convoy of an accompanying neural warship of the same nationality or a neutral warship of a State with which the flag State of the merchant vessel has concluded an agreement providing for such convoy;
(c) the flag State of the neutral warship warrants that the neutral merchant vessel is not carrying contraband or otherwise engaged in activities inconsistent with its neutral status; and
(d) the commander of the neutral warship provides, if requested by the commander of an intercepting belligerent warship or military aircraft, all information as to the character of the merchant vessel and its cargo as could otherwise be obtained by visit and search.

Kelly argues that there continued to exist a state of hostilities to justify the application of the rules embodied in the *San Remo Manual*: Kelly, *supra* n. 46 at 150. Nevertheless, whether occupied Iraq encountered a level of hostilities that would allow application of IHL rules on conduct of hostilities needs to be determined on a specific context basis, rather than on an overall basis. For instance, violent clashes in Falujah would not justify resort to lethal force pursuant to IHL rules on conduct of hostilities in other occupation areas, which remained calm. Compare his view with CUDIH, *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation*, 1–2 September 2005, Geneva, Section E.

[59] CPA Order No. 25, Confiscation of Property Used in or Resulting from Certain Crimes, CPA/ORD/31 August 2003/25. See also CPA Order No. 36, Regulation of Oil Distribution, CPA/ORD3 October 2003/36.

The CPA established the Central Criminal Court of Iraq (CCCI), which was assigned to deal, *inter alia*, with crimes of transnational implications, such as terrorism, organised crime, acts intended to destablise democratic institutions or processes, and violence based on race, nationality, ethnicity or religion.[60] Prior to 1 July 2004, the CPA Administrator (Paul Bremer) retained the authority to select and refer cases to the CCCI,[61] whose judges were appointed by him.[62] At the same time, the CPA revised the Iraqi Criminal Procedure Code (but retained its fundamental principles that complied with requirements of international human rights law, such as the inquisitorial system) and set up a Judicial Review Committee.[63] The applicable law of CCCI was the existing Iraqi criminal law as modified by the CPA.[64] Such a measure is justifiable and even necessary to maintain public order and security.[65] To reinforce standards of justice and judicial independence, the CPA re-established the Council of Judges to supervise the judicial and prosecutorial systems.[66] Kelly comments that all these measures "proved to be an important contribution to the effective prosecution of serious crime in Iraq and over 100 cases were referred to it during the CPA tenure."[67]

Security Council Resolution 1483 specifically referred to the need for "accountability for the crimes and atrocities committed by the previous Iraqi regime".[68] Deriving authority from this binding resolution, the CPA authorised the Governing Council of Iraq to establish an Iraqi Special Tribunal "to try Iraqi nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws".[69] The CPA was heavily involved in the drafting of the Statute of this Tribunal in collaboration with the Governing Council. As Fox notes,[70] the CPA Administrator's role was of "pre-eminence" even after the Tribunal started to function. He had "the authority to alter the

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[60] CPA, Order No. 13 (revised) (amended), The Central Criminal Court of Iraq, CPA/ORD/X 2004/13, Section 18 (originally, CPA/ORD/7 October 2003/13).

[61] CPA Order No. 13, ibid., Section 19.

[62] *Ibid*., Section 5.

[63] CPA, Order No. 15: Establishment of the Judicial Review Committee, CPA/ORD/26 June 2003/15.

[64] CPA, Order No. 13 (revised) (amended), the Central Criminal Court of Iraq, Section 4.

[65] Kelly, *supra* n. 46, at 143.

[66] CPA, Order No. 35, Re-Establishment of the Council of Judges, CPA/ORD/13 Sep 2003/35.

[67] Kelly, *supra* n. 46, at 143.

[68] Security Council Resolution 1483, 22 May 2003, S/RES/1483 (2003), preambular para. 11.

[69] CPA Order No. 48, Delegation of Authority Regarding an Iraqi Special Tribunal, 10 December 2003, Section 1(1).

[70] Fox, *supra* n. 51, at 214–215.

statute creating the Iraqi Special Tribunal, or any elements of crimes or rules of procedure developed for the Tribunal, if required in the interests of security".[71] In the event of "a conflict between any promulgation by the Governing Council or any ruling or judgment by the Tribunal and any promulgation of the CPA, the promulgation of the CPA shall prevail".[72] In relation to offences of core crimes, to leave them unpunished in occupied Iraq may be considered to pose security threat to the occupying powers and to the *ordre public* of inhabitants in occupied territory. Further, the power to set up a special tribunal, as far as core crimes are concerned, was even required by the customary law obligation to try and punish offenders of core crimes present in their jurisdiction.

4.3. *The Necessity of Maintaining Public Order and Civil Life*

The necessity ground based on the maintenance of orderly government must be conceived as a broader concept that deals with the preservation of public order and civil life in general (*ordre public* in French). It is fully recognised under customary IHL since the 1907 Hague Regulations that as in the case of security grounds, the maintenance of *ordre public* constitutes one of the essential grounds providing exceptions to the general rule that local laws must be conserved.

In view of its flexible nature, this necessity ground serves as a vehicle for extending the prescriptive power of the occupant to go beyond duties relating to issues of restoring, maintaining or ensuring public order, or to the security of the population under occupation. For example, the occupying powers are allowed to impose longer prison sentences to deter looting or sabotage of infrastructure in occupied territory.[73] They must also be able to deal with issues affecting economic and social life such as the circulation of currency[74] and changes to the traffic code.[75] Nevertheless, the bounds of this prescriptive power need to be assessed against the welfare of the civilian population in occupied territory. As discussed above, in occupied Iraq, particularly questionable is the legality of a number of wholesale economic measures adopted by the CPA along strictly free-market or neo-liberal economic thinking. These include the simplification of the procedure of concluding public contracts, amendment of the Iraqi company law, and the

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[71] *Supra* n. 69, Section 1(6).

[72] *Ibid.*, Section 2 (3).

[73] M. Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", (2005) 16 *EJIL* 661, at 678. In occupied Iraq, the CPA imposed such measures: CPA, Order No. 31, Modifications of Penal Code and Criminal Proceedings Law, CPA/ORD/10 Sep 2003/31.

[74] CPA, Order No. 43: New Iraqi Dinar Banknotes, CPA/ORD/14 October 2003/43.

[75] CPA, Order No. 86: Traffic Code with Annex A, CPA/ORD/19 May 2004/86.

liberalisation of trade and foreign investment.[76] Foreign investors have been allowed to own Iraqi companies with no duty to return profits into Iraq,[77] a measure which was allowed by the previous Iraqi Constitution only to citizens of Arab countries. These measures must be criticised for clearly overstepping the boundaries of necessity in breach of IHL requirements.[78]

Surely, the notion of civil life that needs to be maintained and ensured by the occupying power embraces the duty to enhance the humanitarian guarantees of the civilian population in occupied territory. In this regard, the positive duties imposed on the occupying power take on special significance. The occupying power may be required to amend or repeal existing legislation in force in the occupied territory, or to enact new laws, in order to take into account changing social and economic needs and interests of the population in the territory.[79] These considerations are more acutely felt in case of prolonged occupation. In occupied Iraq, the CPA implemented a wide range of reforms, adopting the law prohibiting child labour, and setting up the property reconciliation and claims institutions.[80]

During World War I and thereafter until the establishment of the Mandate for Palestine, the British military authorities, which occupied the Ottoman province of Palestine, introduced changes into the Ottoman legislation, issuing notices concerning, *inter alia*, cruelty to animals, the restriction on the raising of rents, and the preservation of antiquities, all of which were enforced by the military magistrate. Similarly, criminal procedures were amended so as to allow witnesses at the investigation to be examined in the presence of the accused, and

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[76] See, *inter alia*, CPA Order No. 54: Trade Liberalization Policy 2004 with Annex A, 2004 CPA/ORD/24 February 2004/54; CPA, Order No. 56: Central Bank Law, CPA/ORD/1 March 2004/56; CPA, Order No. 87: Public Contracts, CPA/ORD/14 May 2004/87; CPA, Order No. 39: Foreign Investment, CPA/ORD/19 September 2003/39, (Amended by Order No. 46, CPA/ORD/20 December 2003/46), CPFR/ORD/20 Dec. 2003/39; and CPA, Order No. 64: Amendment to the company Law No. 21 of 1997, CPA/ORD/29 February 2004/64.

[77] See CPA Order No. 39, CPA/ORD/19 September 2003/39, Section 7(2)(d); and CPA Order No. 46, CPA/ORD/20 December 2003/46 (which revised Order No. 39).

[78] For the concurring view, see M. Zwanenburg, "Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation", (2004) *IRRC* No. 856, 745 at 757–759; and Sassòli, *supra* n. 73, at 679.

[79] Schwenk, *supra* n. 36, at 401. See also Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967", (1990) 84 *AJIL* 44, at 94.

[80] See, for instance, CPA, Regulation No. 4: Establishment of the Iraqi Property Reconciliation Facility, 25 June 2003 CPA/REG/25 June 2003/04; Regulation No. 8: Delegation of Authority Regarding an Iraq Property Claims Commission (Amended by Reg. 12), CPA/REG/14 Jan. 2004/08; and Regulation No. 12: Iraq Property Claims Commission, with Annex A (Establishment of the Iraq Property Claims Commission, as amended and restated), CPA/REG/23 June 2004/12.

to require a proof of the voluntary nature of the confession for it to be admissible as evidence.[81] These measures can be warranted on the ground of necessity of maintaining "orderly government" of the occupied territory.[82]

In assessing whether the enactment of particular provisions in occupied territory is lawful pursuant to the interests of "orderly government", two caveats ought to be entered. Firstly, laws promulgated even pursuant to allegedly humanitarian objectives that accord with the accepted moral or cultural standards of the occupying power may be suspected by the population as a pretext for annexation of the territory by the occupying power.[83] Secondly, such a fear among the population may be reinforced in case specific measures designed to enhance particular cultural values are involved. As Pellet notes, the occupant is not the territorial sovereign and not authorised to legislate in the same manner as it does in its home territory.[84]

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[81] N. Bentwich, "The Legal Administration of Palestine under the British Military Occupation", (1920–21) 1 *BYIL* 139, at 145–146.

[82] Dinstein (2004)a, *supra* n. 18, at 8.

[83] *Ibid*. Gerson refers to this danger when discussing the trustee-like obligations incumbent on the occupying power. He observes that:

> …"humanitarian" motives were suspect. The ease with which such an exception to the prohibition of institutional change could serve as a ruse for creation of *faits accomplis* to the occupant's advantage was well known. Claims by occupants that such change as they initiated was humanitarian, dictated by "the imperative needs of the population", would, during the course of occupation, be exceedingly difficult to disprove. To prevent this possibility of abuse the Hague Regulations adopted the measure of common law jurisprudence regarding trustees. An occupant, like a trustee, would be severely restricted in his authority, not because certain activities could not be honestly done, but because of the extreme difficulty of proving them to have been dishonest….

A. Gerson, "War, Conquered Territory, and Military Occupation in the Contemporary International Legal System", (1976–77) 18 *Harvard ILJ* 525, at 538.

[84] A. Pellet, "The Destruction of Troy Will Not Take Place", in: Playfair (ed.), *supra* n. 30, at 169, 201. Pellet warns the danger of "ethnocentrism" underlying occupation measures, contending that:

> …the occupier is not the territorial sovereign. He cannot legislate for the occupied people as he does within his own frontiers. (…) there is nothing to stop him [the occupier] taking into consideration the legislative and statutory evolution of the country whose territory is occupied and considering this evolution as worthy of note, it being understood that he is free to take it into account or not. A solution of this type would have the advantage of countering the risk of opposition to progress entailed in an occupation which is excessively prolonged while not falling into the disadvantages of ethnocentrist subjectivity. (…) The lawfulness of the occupier's conduct…can, and should, be judged in relation to a far more objective element, the criterion of the sovereign rights of the people whose territory is occupied.

Ibid., at 201–202. With specific regard to Israel's occupation measures, it is worth citing Raja Shehadeh, who argues that:

> The establishment of settlements was justified on security grounds. The High Court then began to consider Jewish settlers in the area as constituting part of the local population.

Dinstein suggests that the key to understanding the necessity of *order public* is whether the measures taken by the occupying authorities are not dissimilar to those implemented in their home countries.[85] As Meron notes, Dinstein's "litmus test" works only when the answer is provided in the negative.[86] Absence of a corresponding measure in a metropolitan territory would cast doubt on the occupant's measure at issue, as the occupied territory must not serve as an experimental ground for hitherto untested laws, taxes or other measures. Dinstein argues that in case the answer to his litmus test is positive, the occupying power may be given the benefit of doubt, "absent a serious indication of ulterior motives".[87] Yet, it remains unresolved how to determine such extraneous motives, and whether motives alone, rather than objectives/purposes, suffice to provide *prima facie* legality to a measure at issue. If an "ulterior motive" is alleged to be absent on the ground that the occupying power, acting in good faith, considers a certain measure to be in the best interest of the occupied population,[88] then does this *a fortiori* mean the legality of such a measure? As stated above, what may be viewed as innocuous measures in home territory may not be acceptable for locals embracing different cultural, social and economic values and traditions in the occupied territory. The measures imposed without the consultation of the local population may risk flouting the requirement of self-determination of peoples.[89]

> As a consequence, any activity such as the West Bank road plan which is designed for the benefit of the settlers has been justified by the court as being for the benefit of the population. The principle in international law, of course, is that such changes in occupied territories are justifiable if they are for the benefit of the occupied population, not the occupier's. In assessing Israel's claim that certain changes are justified as being for the benefit of the Palestinian population, Israel's declared aim of eventually annexing the occupied territories must be kept in mind. This ultimate illegal objective violates the presumption that certain actions are done for the benefit of the population. (…) Israel has pursued a determined settlement policy. The link between the Jewish settlements and Israel is so far-reaching that it amounts to annexation in all but name.
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> R. Shehadeh, *Occupier's Law: Israel and the West Bank*, revised ed., (1988), at 13.

[85] Dinstein (2004)a, *supra* n. 18, at 9.

[86] Meron observes that:

> If legislative changes introduced by an occupant, ostensibly in order to benefit the local population, do not correspond to the law in force in the occupant's own territory, there may be an immediate case for suspecting the occupant's animus. One should, however, be wary of carrying such a test, inconclusive as it is, beyond this point. In practice the standard implicit in the test may be abused by an occupant interested in a gradual extension of its laws to the occupied territory under a strategy of creeping annexation.
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> T. Meron, "Applicability of Multilateral Conventions to Occupied Territories", (1978) 72 *AJIL* 542, at 549–550.

[87] Dinstein (2004)a, *supra* n. 18, at 9.

[88] It may also be questioned whether motives correspond to any of the three objectives expressly enumerated under Article 64 of GCIV.

[89] Sassòli adverts to two cogent examples: the right to fair trial, whose standards and requirements may vary between the (Anglo-Saxon) common law on one hand, and the civil law countries

In view of these, when combined with the scrutiny of ulterior motives, Dinstein's litmus test supplies a useful guideline in general, provided that it is implemented in a manner that duly heeds sensitivity of different cultural values.

Evaluating changing social needs of the population by reference to the necessity of maintaining "orderly government" is of a highly delicate nature. This can be well illustrated in the judgment of the Israeli Supreme Court in H.C. *337/71*,[90] which concerned a labour dispute between the Christian Society for the Holy Places and hospital workers on strike, whom the Society employed. The local Jordanian Labour Law predating the occupation provided a procedure for compulsory arbitration, according to which the arbitrators were to be appointed from among the employers' and employees' associations. However, because such associations did not exist in Jordan, the Israeli Regional Commander issued an order amending the Jordanian law to allow the possibility of compulsory arbitration (by way of appointing an arbitrator by the Officer in Charge of Labour Affairs). The majority of the Israeli Supreme Court held that under Article 43 of the Hague Regulations, the occupying power was entitled to modify the local laws to reflect evolving social needs of the civilian population. However, as Justice Cohn observed in his dissenting opinion, compulsory arbitration in labour disputes was yet to be introduced in Israel. In view of this, Dinstein argues that the relevant military authorities overstepped their bounds of discretion in assessing the concept of necessity.[91]

4.4. *The Necessity of Fulfilling the Obligations under the Geneva Conventions*

Four preliminary observations need to be made on this necessity ground. First, as Dinstein notes, despite the use of the permissive word "may", the occupying power is not only allowed, but even obligated, to give effect to the Geneva Conventions in accordance with common Article 1 GCs ("…to respect and to ensure respect for the present Convention in all circumstances"). Second, the necessity of fulfilling the obligations under the Geneva Conventions should be understood as encompassing any obligations under conventional or customary international humanitarian law.[92] The occupying power is bound to give *effect* to its task of implementing these obligations. The effective interpretation requires

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on the other; and labour regulations concerning rules on hiring and firing (which may be very flexible in Anglo-Saxon countries based on the neo-liberal, capitalist ideology but not in other states, such as continental European countries and Japan, which are anchored in a social-democratic model): Sassòli (2005), *supra* n. 73, at 677.

[90] *H.C. 337/71, The Christian Society for the Holy Places v. Minister of Defense et al.*, 26(1) *Piskei Din* 574, English summary in: (1972) 2 *Israel YbkHR* 354.

[91] Dinstein (2004)a, *supra* n. 18, at 10.

[92] *Ibid.*, at 6. Dinstein notes that the occupying power is allowed to repeal discriminatory provisions based on race, religion or political opinion, as this is contrary to Article 27 of GCIV.

the occupying power to assume a diverse layer of obligations. For instance, it is bound to respect, protect, and ensure rights of civilians under occupation in a practical and effective manner and not merely in a theoretical or formalistic manner.[93] As a result of the extensive nature of obligations under IHL, the ambit of legislative powers of the occupant is broadened.[94] Third, as a corollary of the first aspect, in case any legislation in force in occupied territory is incompatible with requirements of the Geneva Conventions, the occupying power is bound to amend, repeal or suspend such legislation and, if necessary, enact new laws. The obligation is not restricted to provisions on grave breaches and universal jurisdiction, as stipulated in Article 146 GCIV. Indeed, it is extended to cover entire provisions of GCs.

In occupied territory, the occupying power is prevented from invoking local laws to justify its failure to implement the Geneva Conventions, which must prevail over any inconsistent legislation in the territory.[95] In accordance with Article 27 of the Vienna Convention on the Law of Treaties, a Contracting Party may not invoke domestic provisions to justify failure to perform a treaty. Dinstein criticises the Israeli practice of invoking Emergency Regulations, which originated from the British Mandate and were in force in the West Bank and the Gaza Strip when the occupation commenced. These old Regulations have been invoked to justify demolitions of Palestinian houses, which served as the bases for launching terrorist attacks. Private property has been destroyed as a punitive measure, even in circumstances where this cannot be justified by the absolute necessity test under Article 53 of GCIV, or under Article 23(g) of the Hague Regulations if rules concerning conduct of hostilities are applied.[96]

In terms of the scope of application *ratione materiae* of the obligations under IHL, the drafters of the Geneva Conventions, who apparently drew on the Keynesian, interventionist economic model and the welfare state concept, envisaged a diverse array of duties relating to social and economic matters, which the occupying power must undertake within the framework of the Geneva Conventions. They specifically incorporated issues of child welfare, labour, food, hygiene and

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[93] The underlying rationale for effective interpretation lies in the distinct feature of IHL treaties. Together with international human rights treaties, they form part of law-making treaties, rather than contractual treaties. Recourse to effective interpretation is most saliently seen in the context of the ECHR. See P. Van Dijk, F. Van Hoof, A. Van Rijn and L. Zwaak (eds), *Theory and Practice of the European Convention on Human Rights*, 4th ed., (2006), at 560–563 (in the context of Article 6 of the ECHR); and C. Ovey and R. White, *Jacobs and White, The European Convention on Human Rights*, 4th ed., (2006), at 47–48.

[94] Greenwood even goes so far as to state that the extensive nature of duties imposed on the occupying power correspondingly allow "far-reaching" form of legislative powers: Greenwood, *supra* n. 30, at 247.

[95] Dinstein (2004)a, *supra* n. 18, at 7; and *ICRC Commentary to GCIV*, at 336.

[96] Dinstein (2004)a, *ibid*.

public health in GCIV.[97] The obligations incumbent on the occupying powers under IHL are accordingly wide-ranging, allowing (or necessitating) both the abrogation of existing laws incompatible with IHL rules and the adoption of new laws to realise effective guarantees of rights of protected persons under GCIV. In relation to occupied Iraq, Security Council Resolution 1483 applied an all-embracing welfare concept, calling upon CPA "to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which Iraqi people can freely determine their own political future".[98]

Issues directly touching on civil liberties, such as the freedom from discrimination recognised as one of the general principles under Article 27(3) GCIV, can be understood as pursuant to the obligations under IHL (and as based on the necessity ground relating to the maintenance of public order).[99] In Iraq, the CPA carried out a sweeping reform of laws for the purpose of making Iraqi laws compatible with requirements of international human rights. As Kelly notes,[100] this can be saliently seen in the field of criminal and criminal procedural laws. The CPA suspended some aspects of political offences in the Iraqi Penal Code while subjecting others to the approval of the Administrator. The Orders adopted by the CPA required the courts to apply the law in an impartial and non-discriminately manner and strictly prohibited torture, inhumane and degrading treatment.[101] The CPA's ambitious reforms based on the requirements of international human rights in the field of criminal procedural law include the recognition of the right to remain silent, the prohibition on drawing adverse inference from silence, the right to defence counsel (including the funded scheme), the requirement for the

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[97] *Final Record*, Vol. II-A, at 672 (19th meeting of Committee III, 19 May 1949, statement of Mr. Quentin-Baxter of New Zealand concerning the regulation on distribution of food supplies); *ibid*., at 833 (*Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva*, which refers to "the purpose of ensuring the conditions of living of the civilian population by the maintenance of the essential public utility, relief distribution and rescue services").

[98] Security Council Resolution 1483, preamble, paras. 4 and 5. This was endorsed by Security Council Resolution 1500 (2003) (which welcomed the establishment of the Governing Council of Iraq).

[99] Clearly bearing in mind the egregious, anti-Jewish and other racial laws adopted in Nazi Germany and other European fascist states during the Holocaust, the *ICRC's Commentary to GCIV* refers to the abrogation of laws that discriminate against racial or religious minorities: *ICRC's Commentary to GCIV*, at 335.

[100] Kelly, *supra* n. 46, at 139–142.

[101] CPA Order No. 7: Penal Code, CPA/ORD/9 June 2003/07; and the later amendments in CPA Order No. 31, CPA/ORD/10 Sep 2003/31.

advice of rights,[102] and the guarantee of fundamental due process for detainees.[103] These were supplemented by the reforms in the penitentiary system, which drew on the UN standard rules for prisons.[104]

4.5. *The Necessity of Fulfilling Obligations under International Human Rights Law?*

It may be questioned whether an additional list of objectives is needed to give effect to fundamental human rights, whether or not specific rights are considered to have acquired the status of *jus cogens*. While arguing that international human rights law binds the occupying power, many writers do not specifically analyse whether or not the obligations under human rights provide a separate ground of exception to the general rule under Article 64 GCIV.[105] The necessity of fulfilling obligations under international human rights law in occupied territory can be fully encompassed within the two necessity grounds specifically enumerated under Article 64 GCIV: the necessity for maintaining public order; and the necessity of fulfilling the obligations under IHL. The four elements of human rights obligations (respect, protection, prevention and fulfilment) require the occupying power to adopt positive action, including enactment of new laws. As Sassòli notes,[106] in occupied Iraq, the CPA adopted measures to take Iraqi laws towards the appropriate international human rights standards, such as the prohibition of child labour as explained above.[107]

Indeed, in the *Congo* Case, the ICJ found Uganda to be the occupying power in the Ituri region at the material time and held that:

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[102] CPA Memorandum No. 3: Criminal Procedures, CPA/MEM/27 June 2003/03, Section 4.

[103] CPA, Order No. 10: Management of Detention and Prison Facilities, CPA/ORD/8 June 2003/10; and CPA, Memorandum No. 2: Management of Detention and Prison Facilities, CPA/MEM/8 Jun 2003/02.

[104] Kelly, *supra* n. 46, at 139.

[105] See, for instance, Sassòli (2005), *supra* n. 73, at 676. In contrast, Wills, referring to the reasoning advanced by Sedley LJ in *Al-Skeini and others v. Secretary of State for Defence*, suggests that the phrase "l'ordre et la vie publics" of the Hague Regulations can be interpreted as "encompass[ing] a requirement that the occupant respect and ensure 'as far as possible' the international human rights standards protected by customary international law and those treaties to which it is a party": S. Wills, "Occupation Law and Multi-national Operations: Problems and Perspectives", (2006) 77 *BYIL* 256, at 267; and *The Queen on the application of Mazin Jumaa Gatteh Al-Skeini and others v. Secretary of State for Defence*, [2005] EWCA Civ 1609, 21 December 2005, paras. 195–196. See also UK, the House of Lords, *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.

[106] Sassòli (2005), *supra* n. 73, at 676.

[107] CPA, Order No. 89, Amendment to the Labor Code – Law No. 71 of 1987, CPA/ORD/30 May 2004/89.

> 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 [Democratic Republic of Congo]. 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.
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> The Court . . . finds that Uganda's responsibility is engaged both for any acts of its military that violated 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.[108]

As will be examined in Part III, the assertive convergence between IHL and international human rights law enables the requirement to fulfil obligations under IHL to be construed in a sufficiently broad manner to give effect to fundamental guarantees of individual persons in occupied territory.

5. *Conclusion*

The examinations of this chapter demonstrate how the concept of necessity under Article 64 GCIV has been transformed from the concept associated with military necessity as envisaged by drafters of the Hague Regulations into a broader concept that can accommodate diverging needs of inhabitants in occupied territories. The expansion of this concept is in parallel to the shift of emphasis from needs of occupying authorities to the rights and interests of civilian populations. As discussed above, this transformation has been underpinned by the New Deal thinking and the welfare or interventionist state concept. Such conceptual shift has become of vital importance in the modern phenomenon of occupation that is no longer transitional and precarious, but of prolonged nature whose duration may be shrouded in uncertainty. The elusive nature of the notion of necessity leaves ample scope of teleological construction that can take into account changing social and economic needs of the population.

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[108] ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, available at www.icj-cij.org/ (last visited on 30 April 2008), paras. 178–9.

Chapter 5

The Administrative and Judicial Structures in Occupied Territory

1. *Introduction*

Having analysed the general principles concerning the legislative scope of the occupying powers, assessment now turns to the specific implication of the conservationist premises of the laws of occupation on administrative and judicial structures in occupied territories. Examinations start with the occupant's authority to effectuate change in administrative institutions in occupied territories. Inquiries will then be made into administration of justice. In this context, detailed analysis of so-called "occupation courts" will be undertaken.

2. *The Administrative Structures in Occupied Territory*

2.1. *Overview*

The authority for belligerent occupation derives less from an international legal institution than from the sheer fact that they exert military power sufficient to control the territory.[1] This means that irrespective of the civil or military character of administration established in occupied territories, it is a government backed by superior force of the occupant, in whose hands legislative and executive powers

[1] C. Greenwood, "The Administration of Occupied Territory in International Law", in: E. Playfair (ed.), *International Law and the Administration of Occupied Territories – Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, (1992), Ch. 7, 241, at 250–1. See also L. Oppenheim, *International Law: A Treatise*, Vol. II, (7th ed., by H. Lauterpacht, 1952), at 437.

are vested *de facto*.[2] The laws of war recognise such factual reality and provide belligerent occupants with a legal framework of their rights and duties while striking a balance between military necessity[3] and humanitarian considerations for the population of the occupied territory.[4]

2.2. *Three Basic Principles*

Whether the occupant can introduce institutional changes in administration of the occupied territory must be examined by reference to three guiding principles. The first principle is that the occupying power must not tamper with the fundamental structure and institutions of the government in occupied territory. This can be deduced from the general principle that the occupying power is a transitional authority without assuming sovereign power. It is implicit in Article

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[2] Y. Dinstein, "The International Law of Belligerent Occupation and Human Rights", (1978) 8 *Israel YbkHR* 104 at 109; and M. Mössner, "Military Government", in: R. Bernhardt (ed.), (1982) 3 *Encyclopedia of International Law* 270. See also *US Field Manual 27–10*, which states that:

> It is immaterial whether the government over an enemy's territory consists in a military or civil or mixed administration. Its character is the same and the source of its authority the same. It is a government imposed by force, and the legality of its acts is determined by the law of war.

US FM 27–10, para. 368. For examinations of historical origins of the military and martial laws, see W.S. Holdsworth, "Martial Law Historically Considered", (1902) 18 *L.Q.Rev* 117.

[3] In the *Hostages* case, the US Military Tribunal at Nuremberg held that:

> Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill.

Trial of Wilhelm List and Others (Hostages Trial), 8 July 1947–19 February 1948, (1949) 8 *LRTWC* 34, Case No. 47; (1948) 15 *AD* 632, at 646. Friedman observes that the genesis of this definition formulated in the *Hostages* case can be found in the Lieber Code of 1863: L. Friedman (ed.), *The Law of War, A Documentary History*, Vol. I, (1972), at 158. See also Y. Dinstein, "Military Necessity", in R. Bernhardt (ed.), (1982) 3 *Encyclopedia of Public International Law* 274, at 275. Dinstein argues that the notion of military necessity as an exception to general prohibitions does not have to be prescribed in a conventional provision, but that its basis can be found in customary international law: *ibid.*, at 276.

[4] This balance is already evidenced in the 1868 St Petersburg Declaration which states in its Preamble that "the necessities of war ought to yield to the demands of humanity": Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, as reprinted in: Friedman (ed.), *ibid.*, at 192; and A. Roberts and R. Guelff (eds.), *Documents on the Laws of War*, 3rd ed., (2000), at 54.

43 of the Hague Regulations of 1907. Fauchille notes that "Comme la situation de l'occupant est éminemment provisoire, il ne doit pas bouleverser les *institutions* du pays".[5] Feilchenfeld observes that "an occupant has no right to transform a liberal into a communist or fascist economy, except so far as military or public-order needs should require individual changes".[6] By the same token, Dinstein argues that unless there is "head-on collision" between the existing political institutions and the occupying authorities, there would be no necessity that would justify measures to alter administrative structure, including the transforming of a centralised system of a state into a federal one.[7] Even if transformations are designed to be of a temporary nature, and do not purport to deny the civilian population the rights and benefits under IHL, they may entail "enduring effect" as the actual occupation period prolongs.[8]

Second, in assessing the possibility of modifying administrative structures, note should be taken of the principle, as embodied in Article 47 GCIV,[9] that protected persons must not be deprived of benefits and rights derived from IHL in general, and most notably from GCIV.[10] The *ICRC Commentary* states that Article 47 is designed "to safeguard human beings and not to protect the political institutions and government machinery of the state as such".[11] This suggests that alterations in administrative structure may be exceptionally justified for the purpose of enhancing the welfare of inhabitants in occupied territory, without

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[5] P. Fauchille, *Traité de droit international public*, Vol. II, *Guerre et Neutralité*, (1921), § 1166 (1), at 228 (emphasis in original). He adds that <<[i]l n'appartient pas à l'occupant . . . de modifier ou encore moins de supprimer l'organisation juridique telle qu'elle a été créé par la législation du pays, ni d'interrompre le fonctionnement de l'organisme administratif>>: *ibid*. See also A.C. Davidonis, "Some Problems of Military Government", (1944) 38 *Am.Pol.Sci.Rev*. 460, at 467; and E.H. Feilchenfeld, *The International Economic Law of Belligerent Occupation*, (1942), at 89–90, paras. 326–31.

[6] Feilchenfeld, *ibid*., at 90, para. 331. See also E.H. Schwenk, "Legislative Power of the Military Occupant Under Article 43, Hague Regulations", (1945) 54 *Yale LJ* 393, at 403.

[7] Y. Dinstein, "Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peace Building", Program on Humanitarian Policy and Conflict Research, (Harvard University, Occasional Paper Series, Fall 2004), Number 1, at 10.

[8] Dinstein (2004), *ibid*.

[9] Article 47 of GCIV reads that "[p]rotected 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".

[10] Dinstein (2004), *supra* n. 7, at 10.

[11] *ICRC's Commentary to GCIV*, at 274.

infringing Article 47.[12] The remaining question would be how far the occupant can remould governmental systems of occupied territory.

Third, it is forbidden for the occupant to extend its own administration to the occupied territory. Such a move may be viewed as a pretext for *de facto* annexation,[13] as seen in instances of Tibet, East Timor (until it gained independence from Indonesia), Western Sahara, South West Africa (current Namibia), and Golan Heights and East Jerusalem.[14] Creating a separate administrative structure modelled on those of the occupying power in occupied territories would run the risk of the officials paying more attention to the interests of the occupying power rather than the interests of the inhabitants of the territory.[15]

2.3. *The Remoulding of Administrative Structures in Occupied Territory: Exceptions to the Three Basic Rules*

While bearing in mind those three principles, both writings of publicists and the case-law recognise the (limited) possibility of remoulding the administrative structure of occupied territory. Draper suggests that the occupying power should be able to make "the minimum alteration" in the existing administration, though without adducing rationales.[16] McNair and Watts argue that modifications in administration can be exceptionally recognised "in so far as it may be necessary for the maintenance of order, the safety of his forces and the realization of the legitimate purpose of his occupation".[17] The Israeli Supreme Court, while stressing the non-sovereign and temporary nature of the military administration, ruled that "far-reaching permanent modifications in the political, administrative or judicial institutions" can be recognised only "in exceptional cases where the contents of the existing institutions run counter to the basic concepts of justice and morality."[18]

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[12] Dinstein (2004), *supra* n. 7, at 10.

[13] Lord McNaire and A.D. Watts, *The Legal Effects of War*, 4th ed., (1966), at 369; and Greenwood (1992), *supra* n. 1, at 260.

[14] Security Council Resolution 497 condemned the 1981 Israeli law extending "the law, jurisdiction and administration" of the State of Israel to the Golan Heights: Greenwood (1992), *ibid*., at 260. For the Knesset law (Golan Heights Law, 5742/1981), see (1982) 21 *ILM* 163.

[15] Greenwood, *supra* n. 1, at 260–1. See also HC *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. (A Teachers' Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region)*, (1983) 37(4) *Piskei Din* 785; English summary in: (1984) 14 *Israel YbkHR* 301, at 304.

[16] G.I.A.D. Draper, *The Red Cross Conventions*, (1958), at 39.

[17] McNair and Watts, *supra* n. 13, at 369.

[18] H.C. *61/80, Haetzni v. Minister of Defence et al*., 34(3) *Piskei Din* 595; English excerpt in: (1981) 11 *Israel YbkHR* 358; and Barak J. in H.C. *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. (A Teachers' Housing Cooperative Society v. The Military Commander of the*

The *US Field Manual 27–10* endorses a much broader ambit of discretion of the occupying power. This can be inferred from its rule that "[t]he functions of the hostile government – whether of a general, provincial, or local character – continue only to the extent they are sanctioned by the occupant", and subject to its "paramount authority".[19]

It is submitted that any attempt to introduce permanent reform or change in existing administrative structure should be presumed to be a clear violation of the law of occupation, and of the principle of self-determination of peoples.[20] Exceptions to this presumptive rule must be confined to humanitarian needs (including the welfare) of the inhabitants, and to security needs of occupying forces and administration. As discussed in the preceding chapters, such exceptional needs can be readily recognised with respect to the occupying power confronted with odious regimes based on highly dangerous and egregious ideological underpinnings in occupied territory, as in the case of Nazism in Germany and Austria, fascism (Italy and other Axis powers such as Croatia, Hungary, Romania, and Slovakia in Europe), and militarism and fascism in Imperial Japan during and after World War II. In these instances, it is abundantly clear that the occupying power is entitled and even obligated to dissolve terrorising bodies and machineries such as secret police, which served to imbue the general population in occupied territory with fanatical ideas and indoctrination.

With respect to occupied Iraq, the Coalition forces dissolved the Ba'ath Party, purged its members from the administrative institutions[21] and established an Interim Governing Council[22] with a view to introducing a federal, democratic and pluralistic state system.[23] The transformation of the brutal and authoritarian

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Judea and Samaria Region), (1983) 37(4) *Piskei Din* 785; English summary in: (1984) 14 *Israel YbkHR* 301, at 308.

[19] US FM 27–10, para. 367.

[20] Oppenheim, (7th ed., by H. Lauterpacht), *supra* n. 1, at 437; and G. Von Glahn, *The Occupation of Enemy Territory – A Commentary on the Law and Practice of Belligerent Occupation*, (1957), at 96. Stone notes that "[t]he most widely approved line of distinction [between Occupant and Sovereign] is that the Occupant, in view of his merely provisional position, cannot make permanent changes in regard to fundamental institutions, for instance, change a republic into a monarchy". Nevertheless, he admits the difficulty of identifying which institutions are of fundamental character that must be immune from changes: J. Stone, *Legal Controls of International Conflict – A Treatise on the Dynamics of Disputes – and War-Law*, (1954), at 698.

[21] CPA, Order No. 1: De-Ba'athification of Iraqi Society, CPA/ORD/16 May 2003/01; CPA, Memorandum No. 1: Implementation of De-Ba'athification Order No. 1, CPA/MEM/ 3 June 2003/01; CPA Order No. 2: Dissolution of Entitities (And Annex), CPA/ORD/23 May 2003/02.

[22] CPA, Regulation No. 6: Governing Council of Iraq, 13 July 2003, CPA/REG/13 July 2003/06.

[23] CPA, Law of Administration of for the State of Iraq for the Transitional Period, 8 March 2004, Article 4.

regime into a democratic and federal state with equal participation of people without discrimination based on gender, ethnicity, religion and other grounds is fully compatible with the welfare objective of the inhabitants in occupied territory. This is clearly corroborated by the successful democratisation processes in post-World War II Germany, Austria, Italy and Japan. The establishment of the interim government can be considered to fall within the purview of the exceptional power granted to the occupant based on the necessity test.

2.4. *Introduction of Democratic Governance*

It may be questioned whether the occupying power, which is generally forbidden from introducing changes in the existing administrative structure, except in the case of necessity, is obliged to introduce democratic governance (going beyond a mere consultative capacity). This question is pertinent especially in the case of protracted occupation.[24] Can the principle of self-determination of peoples be invoked to justify the affirmative answer to this question? It may be suggested that an element of democracy should be the more desirable criterion than the "*bonus paterfamilias*" test,[25] with a view to assessing the case for the occupant to change existing laws to promote and ensure "l'ordre et la vie publics". Orakhelashvili argues that the occupying power must not act in a way inconsistent with the principle of self-determination that can be manifested through the channel of the popular, democratic election.[26] On other hand, there is a danger that the transformation of political structure into a democratic system may be abused. Greenwood cautiously observes that while mechanisms for consultation and other forms of involvement of the local population are desirable, "anything which smacks of a permanent constitutional change will be unlawful and other democratic involvement will be workable only in the event that there is a basic willingness to co-operate on both sides".[27]

2.5. *Alterations in Boundaries of Occupied Territories*

With regard to the boundaries of existing administrative units, or demarcation of administrative divisions, it may be suggested that military needs based on

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[24] Greenwood (1992), *supra* n. 1, at 264.

[25] This test is based on whether the occupant has adopted similar legislation in its own territory: Greenwood (1992), *ibid.*, at 264. Compare Dinstein (1978), *supra* n. 2, at 113, with A. Pellet, "The Destruction of Troy Will Not Take Place", in Playfair (ed.), *supra* n. 1, Ch. 5, 169, at 201.

[26] Orakhelashvili also considers that respect for the permanent sovereignty over natural resources is an obligation of peremptory character: A. Orakhelashvili, "The Post-War Settlement in Iraq: the UN Security Council Resolution 1483 (2003) and General International Law", (2003) 8 *JCSL* 307, at 311–313.

[27] Greenwood (1992), *supra* n. 1, at 264–5.

proximity of areas to a combat zone, troop concentrations, as well as displacement of refugees, all militate in favour of the right of the occupant to modify them.[28] This can also be supported in the case of prolonged military occupation where population shift necessitates the change in the scope of territorial jurisdiction of administration.[29] It must, however, be noted that creating new divisions of the territory for political enrichment purpose only is a clear violation of Article 43 of the Hague Regulations.[30] Benvenisti[31] and Dinstein[32] criticise the inconsistency of the State practice, specifically referring to the instances of German occupied Belgium during the First World War and the UK occupation of Libya during the Second World War. While the German division of occupied Belgium into two provinces in 1917 along the linguistic line was widely condemned, the British division of the Italian conquered and colonised Libya into two districts, Cyrenaica and Tripolitania,[33] did not meet much objection among the western Allies.

2.6. *The Prohibition of Coercion or Discrimination against Public Officials or Judges in Occupied Territory*

Article 54(1) GCIV prohibits the occupying power from taking any measures of sanction, or measures of coercion or discrimination against public officials or judges in occupied territories, when their abstention from administrative functions is based on conscience. It is a well-established principle that an occupying power cannot compel nationals of the occupied country to participate in military operations against their own country, even if they were in the belligerent's

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[28] *Ibid*., at 258. Greenwood thus suggests that the occupant may divide the territory into combat and rear zones, the boundaries of which depend on the dictates of military considerations.

[29] *Ibid*.

[30] Oppenheim, *supra* n. 1, at 437; and von Glahn, *supra* n. 20, at 96.

[31] E. Benvenisti, *The International Law of Occupation*, (1993), at 77–81.

[32] Dinstein (2004), *supra* n. 7, at 10–11.

[33] In contrast, Watts justified the British policy, arguing that the administration of the Italians, who conquered and colonised Libya, was "harsh and oppressive… [and] in some respects a brutal regime", and that the local inhabitants generally reacted to the changes introduced by the British indifferently. He also adds that the administrative void created by the exodus of the Italians in Cyrenaica justified the need to treat this region differently from Tripolitania, in which the majority of Italians remained: G.T. Watts, "The British Military Administration of Cyrenaica, 1942–1949", (1951) 37 *Transactions of the Grotius Society* 69, at 70–73. As an aside, note should also be taken of the fact that hundreds of thousands of Libyans were killed in desert concentration camps set up by the Italians to stifle a revolt against the colonial rule, which was exacerbated by Benito Mussolini's racial policy against the Jewish population: R. Ben-Ghiat and M. Fuller (eds), *Italian Colonialism*, (2005).

service prior to the initiation of armed conflict.[34] By analogy of this, it may be contended that the police that the occupying power has maintained or created *de novo* must not be compelled to act against lawful combatants, such as resistance movements that meet the criteria of distinction.[35]

2.7. *Removal of Public Officials and the Necessity Test*

With respect to the staff members of administration, Article 54(2) of GCIV recognises the "right" of the occupant to remove public officials from their posts. This has been supported in the long usage.[36] Reference to the "right" is, however, somewhat misleading. The "right" can be exercised only as an exception to the rule that the occupying power may not alter the status of the officials of the occupied territory.[37]

The modification, or even the dissolution, of the existing administrative personnel, can be justified only by reference to necessity grounds: the need to meet the demand of the armed forces; and the necessity of complying with the obligations under the Hague Regulations and the Fourth Geneva Convention.[38] Ensuring the welfare of the local population, as laid down in Article 64, should be added as another necessity ground. This consideration is gaining importance due to the ascendance of the principle of self-determination of peoples. The occupant must not give short shrift to the genuinely expressed or manifested wishes of the local population to replace or remove those officials associated with a previous, oppressive regime. The *UK Manual* emphasises that the right of dismissal must not be exercised in an arbitrary fashion, such as for reasons unrelated to the official's work, or for reasons based on his/her refusal to comply with orders inconsistent with international law.[39]

2.8. *Local Government*

With regard to local government, it may be suggested that further down the administrative hierarchy, the more diminished may become military or security grounds, and hence the need to supersede the existing administration.[40] Similar

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[34] Hague Regulations (1907), Article 23(2). See also M. Bothe, "Occupation, Belligerent", in: R. Bernhardt (ed.), (1997) 3 *Encyclopedia of Public International Law* 763.

[35] For the concurring view, see *UK Manual* (2004), at 283, para. 11.21.1.

[36] *ICRC's Commentary to GCIV*, 308. See also Oppenheim, *supra* n. 1, at 445.

[37] Bothe, *supra* n. 34, at 66.

[38] Greenwood (1992), *supra* n. 1, at 256.

[39] *UK Manual* (2004), *supra* n, at 283, para. 11.22. See also *Mr P (Batavia) v. Mrs S (Bandoeng)*, (1947) 14 *AD*, Case No. 118, 260.

[40] Greenwood (1992), *supra* n. 1, at 257.

logic suggests that authorities of local and even provincial governments, and elections for them, must be generally allowed to continue unless they constitute a threat to the occupant's security.[41] The only condition is that the local officials and authorities may be required to furnish evidence of cooperation with the occupying forces".[42] This marks a contrast to the general ban on the inhabitants participating in national elections of the enemy state or in any political campaigns linked to the government of the non-occupied portions of the enemy state.

The *US Field Manual* states that "[t]he occupant may, while retaining its paramount authority . . . call upon the local authorities to administer designated rear areas, subject to the guidance and direction of the occupying power".[43] Such measures are deemed consistent with the law of occupation, "so long as there exists the firm possession and the purpose to maintain paramount authority".[44]

3. *Judicial Structures in Occupied Territory*

3.1. *Administration of Justice*

The occupying power is generally required to maintain local courts and must not alter the status of judges.[45] In case judges decide to remain during the occupation, their right to pass judgment must not be interfered with by the occupant.[46] Nor can they be coerced to render judgments in the name of the occupant.[47] Article 64(1) GCIV provides that the tribunals of the occupied territory must be allowed to continue functioning to deal with offences against the penal laws of the territory, subject to "the necessity for ensuring the effective administration of justice". This rule can be contrasted to relatively wide bounds of discretion entrusted to the occupant to repeal or suspend penal laws of occupied territory.

While Article 54(1) GCIV refers to both public officials and judges, Article 54(2) mentions the right of the occupying power to remove public officials,

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[41] Von Glahn, *supra* n. 20, at 98. Note that in the *Amar et al.* case, the Israeli Supreme Court held that "the Occupying State is prevented from denying the right of the indigenous population to vote for its local authorities so long as the latter perform purely municipal functions": HC *774/83*, *Amar et al. v. Minister of Defence, Military Commander of the Judea and Samaria Region, and Head of the Civil Administration*, 38(4) *Piskei Din* 645, English excerpt in: (1985) 15 *Israel YbkHR* 274, at 275 (*per* Ben Porat J.).

[42] Von Glahn, *ibid*.

[43] US FM 27–10, para. 367.

[44] *Ibid*.

[45] This principle is clearly recognised in GCIV, Articles 54(1) and 64(1).

[46] Schwenk, *supra* n. 6, at 406; and Oppenheim, *supra* n. 1, at 447, para. 172.

[47] Schwenk, *ibid*.; and Oppenheim, *ibid*.

and not judges. The *ICRC's Commentary* states that the occupant is nevertheless entitled to dismiss judges from their office in the same manner. It adds that this right, which is "of very long standing, . . . is an important exception to the rule enjoining respect for the status of persons holding public posts, set forth in paragraph 1".[48]

The necessity for effective administration of justice may justify the creation of a new court structure.[49] However, it would be too far-fetched to argue that the occupant should be given a general entitlement to appoint judges not only from the ranks of local lawyers but also from judges of its own nationality.[50]

The *US Field Manual* allows the suspension of "ordinary courts of justice" in occupied territory only in relation to any of the three circumstances: (i) where judges and magistrates abstain from their functions as envisaged in Article 54(1) GCIV; (ii) where the courts are corrupt or "unfairly constituted"; and (iii) where local judicial administration has collapsed during the hostilities prior to the occupation, requiring the occupant to set up its own courts to deal with offences against the local law.[51] When taking measures to create ordinary courts of its own, the occupying power must notify the inhabitants of these measures.[52]

3.2. *The Personal Scope of Jurisdiction in Occupied Territory*

With respect to the jurisdiction *rationae personae*, the applicable law (either the law of occupied State or that of an occupying power) is determined by the nature (civil or criminal) of the proceedings. In case of civil laws, this is further dependent on the nationality of affected persons. The general rule is that the local courts have no jurisdiction, civil or criminal, over members of the occupying power's armed forces and administration, as well as other nationals of the occupying power who accompany their armed forces.[53] In case members of the

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[48] *ICRC Commentary to GCIV*, at 308. See also Greenwood (1992), *supra* n. 1, at 261.

[49] Dinstein (1978), *supra* n. 2, at 114–15.

[50] Greenwood recognises such entitlement, however, without explaining any specific grounds: Greenwood (1992), *supra* n. 1, at 261–2.

[51] US FM 27–10 (1956), para. 373.

[52] *Ibid*.

[53] Dinstein (1978), *supra* n. 2, at 115. Von Glahn observes that:

> . . . the indigenous courts cannot be used by the inhabitants of an occupied territory to sue the occupant, even in the case of contracts entered into between such inhabitants and the occupation authorities. Owing to his military supremacy and his alien character, an occupant is not subject to the laws or to the courts of the occupied enemy state . . . nor have native courts jurisdiction over members of the occupying forces.

Von Glahn, *supra* n. 20, at 108. See also US FM 27–10, para. 374 (entitled "Immunity of Occupation Personnel from Local Law"), which states that:

> Military and civilian personnel of the occupying forces and occupation administration and persons accompanying them are not subject to the local law or to the jurisdiction

occupying power's armed forces and administration, as well as other nationals of the occupying power who accompany their forces, have committed criminal offences, they are subordinate to the military law of the occupying power.[54]

With respect to civil jurisdiction, three scenarios can be envisaged. First, the civil disputes and commercial transactions among members of the occupying forces, or those members of the administration *inter se*, are regulated by the civil law and commercial law of the occupying power. The courts of the occupant are entitled to exercise jurisdiction over such transactions.[55] Second, as regards civil disputes among the inhabitants of occupied territory, these are governed by the local laws of the territories, as may be amended by the belligerent occupant on the basis of the necessity test. According to Article 23(h) of the Hague Regulations, the rights and legal action of the inhabitants in the occupied territory must be preserved, and such rights and action must not be subject to any declaration that they are abolished, suspended or inadmissible. This means that civil proceedings must continue to be held valid as if the occupation had not occurred.[56] One possible exception to this rule would be the cases in which a local law allows an appeal from local courts in the occupied territory to a court of higher instance in an unoccupied part of the country concerned. The crude reality of occupation means that the occupying power may hinder such possibility.[57] Third, with respect to civilian nationals of the occupying power, who are not associated either with the occupying forces or with the occupation administration, and who happen to be in the occupied territory, they are governed by the local law, as modified by the occupying power on the basis of the necessity test. They may fall under the jurisdiction either of local courts in relation to civil proceedings, or of the military courts in cases of criminal proceedings.[58]

3.3. *Judicial Review of* Ultra Vires *Acts of the Occupant?*

The judicial review undertaken by the judiciary in the territory of an occupying power in relation to the acts of the occupation administration does not breach

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of the local courts of the occupied territory unless expressly made subject thereto by a competent officer of the occupying forces or occupation administration. The occupant should see to it that an appropriate system of substantive law applies to such persons and that tribunals are in existence to deal with civil litigation to which they are parties and with offenses committed by them.

[54] Dinstein notes that the basis of this jurisdiction can be found "on the strength of the so-called allegiance (or active personality) principle": Dinstein (1978), *supra* n. 2, at 115.

[55] *Ibid*.

[56] *Ibid*.

[57] *Ibid*. See also C. Fairman, "Asserted Jurisdiction of the Italian Court of Cassation over the Court of Appeal of the Free Territory of Trieste", (1951) 45 *AJIL* 541, at 548.

[58] Dinstein (1978), *ibid*., at 115–116.

the requirement of Article 66 GCIV. This provision in essence requires the occupying power to establish military courts (and court of appeal), preferably in occupied territory. It is designed to prevent an occupant from extending its domestic court system to occupied territory,[59] in such a manner as to effectuate a creeping form of annexation.

In contrast, it is highly controversial whether or not, and if so, to what extent, indigenous courts in occupied territory are entitled to review compliance of occupation measures with the requirements of Article 43 of the Hague Regulations.[60] Put differently, the question is whether native courts are competent to annul legislative measures of the occupant in case it is found to transgress the bounds of discretionary authority conferred upon it by that provision. Further, can the judicial review conducted by the courts in occupied territory address the question whether or not extraterritorial effect should be given to legislative measures adopted by the occupant?[61] The survey of the case-law reveals that the answers to these questions are divided.

On one hand, it has been expressed that the Hague Regulations do not recognise the competence of local tribunals in occupied territories to review measures issued by the military occupant. Writing in 1915, Meurer argues that such competence lies solely in the hands of the occupant, observing that "[f]reilich das Urteil darüber, ob der Fall der Notwendigkeit eingetreten ist, steht . . . dem Besetzenden selbst zu und unterliegt keiner rechtlichen Nachprüfung. . . ."[62] Similarly, Leurquin contends that "[i]t appears very doubtful . . . whether the Hague Convention meant to sanction this [the judicial review of an occupation measure]. It is difficult to assume that ordinary judges and sometimes justices of the peace or their substitutes are in a position to decide whether a law

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[59] Von Glahn, *supra* n. 20, at 116. See also E. Nathan, "The Power of Supervision of the High Court of Justice over Military Government", in: M. Shamgar, *Military Government in the Territories Administered by Israel 1967–1980 – Legal Aspects*, Vol. 1, (1982) 109, at 113–114.

[60] Von Glahn, *ibid.*, at 109. With regard to the question whether the occupying power is allowed to pronounce judgment on constitutionality of specific laws, Schwenk observes that in case there is no special procedure for constitutional review, the occupant should be allowed to pass its own judgment: Schwenk, *supra* n. 6, at 410.

[61] See Holland, District Court of Rotterdam, *Cillekens v. De Haas*, 14 May 1919, [1919–1922] 1 *AD* 471, No. 336, (1932) (recognising that the German Governor-General's repeal of a legal moratorium during the First World War was aimed at re-establishing and ensuring public order and safety in Belgium in conformity with Article 43 of the 1907 Hague Regulations).

[62] C. Meurer, *Die Völkerrechtliche Stellung der vom Feind Besetzten Gebiete*, (1915), at 22. It reads that "[n]aturally, the judgement as to whether the case of necessity occurred is attributed . . . to the occupying state itself and is not subject to any review" (English translation by the present author).

was necessary".[63] The judges of the Dutch Supreme Court during World War II, albeit against the backdrop of the harsh occupation in which they were strictly fettered by Germany's power of dismissal, generally followed this line of argument.[64] They generally recoiled from reviewing whether legislative acts of the German occupying authorities, including even the persecution of Jewish citizens, were compatible with Article 43 of the Hague Regulations.[65]

On the other hand, many national courts, in their decisions made during the First and Second World Wars, asserted their power to review legislative acts of an occupant in the light of the requirements of the Hague Regulations. When necessary, they even declared the acts illegal and devoid of legal effect.[66] Writings of some post-World War II publicists corroborate such power of review.[67]

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[63] A. Leurquin, "The German Occupation of Belgium and Article 43 of the Hague Convention of the 18th October 1907", (1916) 1 *International Law Notes* 55, at 56.

[64] Holland, Supreme Court, *In re Jurisdiction of the Dutch Supreme Court for Economic Matters*, 12 January 1942, (1919–42) 11 *AD* (supplementary) 288, Case No. 161 and Note. See also C. Rousseau, *Le droit des conflits armés*, (1983), at 146, para. 95.

[65] See also a decision by the Court of Cassation of Belgium, May 18, 1916, (1916) 1 *International Law Notes* 136. The Court of Cassation held that:

> . . . the difficulties with regard to the alleged non-compliance with . . . the manner in which the occupant has discharged his duty merely concern international relations . . . .
>
> That if they attempted to solve these difficulties, the judicial authorities of the occupied territory would encroach upon the prerogative of the competent national power, that they must therefore abstain from doing so under a pain of acting *ultra vires*;

Ibid., at 138. Compare this with Feilchenfeld, *supra* n. 5, at 148, paras. 498–9.

[66] See, for instance, Holland, District Court of Breda, *Oesterrieth & Co. v. Emile Dierck*, 22 May 1917, [1917] *Nederlandse Jurisprudentie* 594; translated and reprinted in: (1917) 2 *International Law Notes* 127. See also Schwenk, *supra* n. 6, at 411 and the cases cited therein. Note should also be taken of the *German Military Courts in Greece* Case, which concerned some Greek civilian nationals, who were accused of civil offences of theft of railway material and brought before the military court set up by the occupying German forces. The military court found them not guilty, and the question was whether they could be tried again for the same offence. The Court of Appeal of Athens held that the accused could not be tried again on the ground that the German military courts' decisions entailed the authority of *res judicata (chose jugée)*, and with reference to the principle of *non bis in idem*: Greece, Court of Appeal of Athens, *German Military Courts in Greece Case*, Judgment No. 645 of 1945, (1943–45) 12 *AD* 433, Case No. 149. See also Burma, High Court of Judicature, *The King v. Maung Hmin et al.*, Judgment of 11 March 1946, (1946) *AD* 334, Case No. 139.

[67] Morgenstern argues that "courts, both international and municipal, retain a considerable power of declaring acts of the occupant to be devoid of legal effect" in the light of Articles 43 and 52 of the Hague Regulations: F. Morgenstern, "Validity of the Acts of the Belligerent Occupant", (1951) 28 *BYIL* 291, at 309. Similarly, Von Glahn endorses such power of scrutiny, while referring to the difficulty of how to enforce such power: Von Glahn, *supra* n. 20, at 110.

As Morgenstern notes,[68] the prevailing tendency of native courts in Norway, Greece and Belgium even *during* the period of occupation relating to the First and Second World Wars is characterised by their assertion of the right of review. Nevertheless, in most instances they jibbed at actually exercising such right. During World War I, la Cour d'appel de Liège in German occupied Belgium held that in case the decrees of the occupant were in breach of Article 43 of the Hague Regulations,[69] "le pouvoir judiciare devrait nécessairement refuser l'application de ces décrets pris en violation de la Convention de la Haye".[70] Similarly, in the *Armistice Agreement (Coblenz)* case (1921), the German *Reichtsgericht* in Civil Matters held that the proclamation of the US occupying army was not in accordance with Article 43 of the Hague Regulations. As such, this was found unable to affect the contractual relations of private law between private persons.[71]

In the *Øverland* case, a Norwegian District Court held on 25 August 1943 that a decree of the occupant, which set aside the Norwegian allodial law (based on old custom and the Norwegian Constitution of 1814), was unenforceable. The reason was that "the courts will in all circumstances be obliged to refuse to base their decisions on legislation which is obviously in contradiction to Article 43 of the Hague Regulations".[72] A similar train of thought is observable in the judgment of the Greek Court of Cassation in 1944, which held that the occupant transgressed international law by setting up tribunals other than those envisaged in

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[68] Morgenstern, *ibid*., at 303–303.

[69] See also a decision of the Belgian Court of Cassation of 14 June 1917, cited in Ch. De Visscher, "L'Occupation de Guerre – D'après la jurisprudence de la Cour de Cassation de Belgique", (1918) 34 *L.Q.Rev* 72, at 81. De Visscher explains the abuses of legislative competence by an occupant by reference to the French administrative law doctrine of l'*excès de pouvoirs* and *le détournement de pouvoirs*:

> L'abus 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 veritable de sa mission en pays occupé.
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> …
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> Il y a là une limitation d'ordre subjectif qui rappelle la distinction établie par la juridiction administrative française entre l'excès de pouvoirs et le détournement de pouvoirs et qui offre dans les circonstances actuelles un intérêt particulier.

Ibid.

[70] See a decision of the Court of Appeal of Liége (Belgium), 13 February 1917, (1917) 44 *Journal du Droit International (Clunet)* 1809, at 1813 (modifications on the regime of succession and the law relating to divorce and family).

[71] Germany, Reichsgericht in Civil Matters, *Armistice Agreement (Coblenz)* case, 19 April 1921, (1919–1922) 1 *AD* 440, Case No. 305.

[72] Norway, District Court of Aker, *Øverland* case, 25 August 1943, (1943–5) 12 *AD* 446, Case No. 156, at 447.

Article 43 Hague Regulations. It added that the judgment of a German military tribunal, which ordered the total confiscation of the defendant's property, was contrary to the Greek law (which allowed only partial confiscation), and that this sentence had to be quashed "as null and of no effect".[73]

Not surprisingly, the assertiveness of national tribunals in occupied territory in scrutinising the validity of legislative acts of occupants by reference to Article 43 of the Hague Regulations is much more salient in their decisions made *after* the liberation. In France, after World War I, la Cour de Douai was confronted with a string of cases emanating from an "abnormal tribunal" ("*un tribunal anormal*") created by the German military governor of Maubeuge by the decree (*un arrête*) of 18 October 1914. Faced with the irregularity of criminal procedures of this tribunal, which denied the right to defence to the charged, the Court ruled that:

> . . . en constituant cette juridiction, l'autorité allemande a outrepassé les droits que lui conférait, le cas échéant, l'article 43 de la Convention de la Haye. . . . Les circonstances seules de sa creation rendent ce tribunal inexistent sans qu'il soit nécessaire de rechercher et d'établir . . . qu'au point de vue de la nomination de ses members, de sa composition, de sa competence, de sa procedure, il est contraire à toutes les règles du droit francąis.[74]

In the Judgment No. 106 of 1945, the Criminal Court of Heraklion in Greece suggested that it was competent to examine whether the occupying power overstepped the bounds of the occupation law. In that case, the Court held, *obiter*,

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[73] Greece, Areopagus, Court of Cassation, *In re S.*, Judgment No. 255 of 1944, (1943–5) 12 *AD* 436, Case No. 150, at 437.

[74] France, Cour de Douai 15 May 1919, (1919) 46 *Journal du droit international (Clunet)* 770, at 771 (Morgenstern errs in citing this case as the judgment of the Court of Appeal of Douai).

See also the case of *Ville d'Anvers v. État allemand*, which raised the question whether Germany had to reimburse the amount of compensation, which the city of Antwerp had been ordered to pay for German ship owners by the arbitral tribunal set up by the German governor general during World War I. The German-Belgium Mixed Arbitral Tribunal, which was established after the First World War, held that the decree of 3 February 1915 issued by the governor general to establish this arbitral tribunal could not be justified by the exception based on "empêchment absolu" within the meaning of Article 43 of the 1907 Hague Regulations, as the objective of this decree was to provide favourable treatment to claims of German nationals. The Mixed Arbitral Tribunal called into question the legality of this arbitral tribunal itself, ruling that "l'institution de ce tribunal ayant été contraire à la Convention de la Haye, ses décisions doivent etre tenues pour nulls et non avenues": The German-Belgium Mixed Arbitral Tribunal, *Ville d'Anvers v. État allemand*, 19 October 1925, (1926) 5 *RDTAM* 712, at 716–718. In a similar vein, see also *In re András*, where the Supreme Court of Hungary held that a sentencing judgment given by a Romanian Court, which the occupying Romanian authorities set up in Temesvár, "had no jurisdiction either by virtue of Hungarian law or according to the provisions of the Hague Convention [and hence] does not possess the characteristics of a real *res judicata*" Hungary, Supreme Court, *In re András*, 14 September 1932, (1931–2) 6 *AD* 448, Case No. 232.

that private rights derived from the legislation of the occupying power (the German and Italian armies) can retain validity "solely in the case where such legislation is so permitted by international law". According to the Court, other private rights derived from the law enacted by the commander of the occupying force on security grounds have only "a provisional validity, lasting as long as the occupation itself but extinguished simultaneously therewith".[75] In numerous other cases, national courts, in their decisions made after liberation, found to be null and void the acts of requisition issued by the occupant, including the occupant's attempt to pass, by recourse to such acts, title to a private purchaser.[76]

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[75] Greece, Criminal Court of Heraklion (Crete), *Re A.*, Judgment No. 106 of 1945, (1943–5) 12 *AD* 454, Case No. 162, at 455. A similar effect can be seen in Greece, Criminal Court of Heraklion (Crete), *In re G.*, Judgment No. 107 of 1945, *ibid.*, 437 Case No. 151, at 439–441 (the Judgment and the Note). See also *V. v. O (Italy in Corfu Case)*, where the Court of First Instance of Corfu ruled that the law enacted by the Italian occupying power, which suspended the operation of the Greek law prohibiting the acquisition of immovable property by foreigners in the frontier districts of Greece, could not be justified under the 1907 Hague Convention, on the ground that it was not pursuant to the safety of the occupant. The Court held that the contract concluded between a Greek citizen and an Italian national was "null and void": (1947) 14 *AD* 264, Case No. 121, at 265.

In the case of *Ko Maung Tin v. U Gon Man*, the High Court of Burma held that the Japanese military authorities in Burma during World War II acted in excess of their authority under international law by issuing a system of currency parallel to the currency set up by the lawful government. This was one of the reasons adduced to hold that a "promissory note" issued by the Japanese occupying power was of no legal effect as a negotiable instrument: Burma, High Court (Appellate Civil), *Ko Maung Tin v. U Gon Man*, 3 May 1947, (1947) 14 *AD* 233, Case No. 104, at 234 (*per* E. Maung, J.).

[76] See, *inter alia*, Italy, Court of Venice, *Mazzoni v. Ministry of Finance*, 8 January 1927, (1927–8) 4 *AD* 564, Case No. 384 (holding that the title of the original owners did not extinguish, in view of the unlawful seizure of bonds and shares by the Austro-Hungarian occupying power); Estonia, Court of Cassation, *City of Pärnu v. Pärnu Loan Society*, 28 February 1921, (1935–7) 8 *AD* 503, Case No. 231 (finding that the lease granted by the German occupying forces to a private society was in contravention of Article 46 of the 1907 Hague Regulations and hence "null and void"); France, Tribunal Civil of Peronne, *Secret v. Loizel*, 18 January 1945, (1943–5) 12 *AD* 457, Case No. 164 (granting the restitution of a mare unlawfully requisitioned by the German occupying power during the Second World War); Poland, Supreme Court, Third Division, *Siuta v. Guzkowski*, 15 February 1921, (1919–1921) 1 *AD* 480, Case No. 342 (recognising the right of the original owner of horses unlawfully requisitioned by the Ukrainian forces during their occupation in Mościska in 1919); Philippines, Court of First Instance of Manila, *Hongkong and Shanghai Banking Corporation v. Luis Perez-Samanillo, Inc. and Register of Deeds of Manila*, (1946) 13 *AD* 371, Case No. 157, at 374 (denying the legal effect to the measures of sequestration taken by the Japanese occupying authorities in the Philippines during World War II).

On the liberation of its territory after World War II, the Dutch government suspended the members of the Supreme Court.[77] As discussed above, during the Second World War that Court had endorsed the view that the native courts did not possess the competence to challenge legislative acts enacted by the German occupant. The change in judicial reasoning was brought about in *Re Contractors Knols*. There the Dutch Special Court of Cassation found that the Hague Convention allowed the courts to scrutinise the validity of rules enacted by the occupant by reference to the annexed Regulations.[78]

Surely, it is difficult to give effects to the judicial review exercised by local courts during occupation unless evidence of illegality of the acts of an occupant is manifest. Indeed, the occupant tends to invoke various facets of necessity grounds to justify contested acts. The case-law stemming from national tribunals in occupied territory during the two World Wars demonstrate their recognition of some latitudes of discretion left to the occupying power. In its decision of 13 February 1917 during the First World War, la Cour d'appel de Liège stated that:

> Attendu . . . que . . . l'intervention de l'occupant n'est légitime que s'il y a empêchement absolu de dénouer la crise au moyen de la législation en viguer;
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> Attendu qu'il n'appartient pas au pouvoir judiciare de verifier si cette condition existe, celui auquel incombe le maintien de l'ordre et de la vie publics étant, comme il resort d'ailleurs des travaux préparatoires, seul juge de la nécessité, de l'opportunité et de l'efficacité des moyens auxquels il convient de recourir pour remplir, dans les limites tracées par la Convention de La Haye, la mission que l'art. 43 lui impose. . . .[79]

Similarly, in the *Halvorsen* case decided on 10 February 1941 during the Second World War, the Norwegian Supreme Court held that the occupying power was empowered to enact new laws where the "*Notwendigkeit*" (necessity) arose. However, it was quick to add that "ob eine solche Notwendigkeit, ein dringendes Bedürfnis nach einer gesetzlichen Regelung, vorliegt, ist eine Frage der Gesetzgebungspolitik, die dem Ermessen des Okkupanten selbst als dem Ausüber der gesetzmäßigen Macht in dem besetzten Gebiet überlassen werden

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[77] Penal sanctions were introduced against the President of the Supreme Court during the occupation, Prof. von Loon, who was nominated by Germany, after the former president Dr. Visser was sacked on the ground that he was Jewish: Rousseau, *supra* n. 64, at 146, para. 95.

[78] Dutch Special Court of Cassation, *In re Contractors Knols*, 2 December 1946, (1946) *AD* 351, Case No. 144 (holding that requisitioning services to construct airfields was unlawful under Article 52 of the 1907 Hague Regulations and constituted the crime of collaboration).

[79] Belgium, Cour d'appel de Liège, 13 February 1917, (1917) 44 *Journal du Droit International (Clunet)* 1809, at 1813.

muß und die einer Machtprüfung durch richterliche Behörden nicht unterworfen werden kann."[80]

In the post-World War II developments, the Israeli Supreme Court,[81] sitting as the High Court of Justice, has assumed its power of judicial review over

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[80] Norwegian Supreme Court, *Halvorsen*, 10 February 1941, (1942–3) 11 *ZaöRV* 599, at 603–4 (*per* Judge Vasbotten). The relevant part can be translated into English as follows:

> whether such necessity, an urgent need for a legislative act exists is a question of the legislative politics, which should be left to the discretion of the occupant as the legislative power in the occupied territory, and this question cannot be subjected to judicial review.

English translation by the present author. Judge Vasbotten adds that:

> Eine Ordnung, nach der die Handlungen des Okkupanten der völkerrechtlichen Kontrolle und Entscheidung der Gerichte des besetzten Landes unterworfen sind, erscheint im Ganzen unhaltbar und wäre mit der Machtstellung des Okkupanten nicht vereinbar. Unter solchen Umständen sind die notwendigen Voraussetzungen für ein richterliches Prüfungsrecht durch die Gerichte des besetzten Landes nicht vorhanden.
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> . . .
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> Wenn die Gerichte . . . die Verordnungen der Okkupationsmacht für völkerrechtswidrig und daher rechtlich für die Verhältnisse in dem okkupierten Staat unverbindlich erklärten, würde dieses auf der einen Seite zu nichts führen, da die Entscheidungen der Gerichte gegen den Willen der Okkupationsmacht nicht durchgesetzt werden könnten. Dagegen könnte andererseits ein solcher Konflikt mit der Okkupationsmacht je nach den Umständen die ernstesten Folgen für das Rechtsleben des besetzten Landes haben und im Ganzen die Gefahr unübersehbar bedenklicher Konsequenzen im Widerstreit zu den Interessen des besetzten Landes mit sich führen.

Ibid., at 604–605. The English translation of this passage is as follows:

> An rule, according to which the deeds of the occupant are subordinated to international law-based control and decisions of the courts of occupied country, appears entirely untenable and would be incompatible with the position of power of the occupant. In such circumstances the necessary conditions for a right of judicial review by the court of occupied countries are not available.
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> . . .
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> If the court declared the regulations of the occupying power as contrary to international law and hence for these conditions as legally non-binding in the occupied state, on one hand, these would lead to nowhere, since the decisions of the courts against the will of the occupying power could not be enforced. However, on the other hand, such a conflict with the occupying power would, depending on the circumstances, would have the most serious results for the legal sphere of the occupied country and lead to, by and large, unforeseeable, disturbing consequences in conflict with the interests of the occupied country.

English translation by the author.

[81] Nathan explains that the Israeli Supreme Court's competence to review acts and to exercise supervisory jurisdiction over tribunals and persons that exercise judicial or quasi-judicial functions is based on section 7 of the Courts Law, 1957, which provides that:

> Without prejudice to the generality of the provisions of section n(a), the Supreme Court sitting as a High Court of Justice shall be competent –
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> . . .
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> (2) to order state authorities, local authorities and officials of state authorities or local authorities and such other bodies and individuals as exercise any public functions by

measures taken by the Military Governments in occupied territories on the basis of the personal jurisdiction.[82] Barak J. held that "according to Section 7 of the Courts Law-1957, the High Court is invested with the right of judicial review over the activity of the Military Government, the ground for this review being that the Military Government and his subordinates are public officials exercising public functions by virtue of law".[83] Further, in another case which involved the refusal of the occupying authorities to grant a Palestinian a permit of permanent residence for the purpose of being reunited with his wife living in the West Bank,

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virtue of law to do or refrain from doing any act in the lawful exercise of their functions, or if they have been unlawfully appointed or elected to refrain from acting.

As cited in: *ibid.*, at 115. In this respect, Nathan, after examining the case-law *in extenso*, comments that "notwithstanding that a petitioner praying for relief against the Military Commander of the Administered Territories will not generally be able to found his cause of action upon the violation of a statutory right under Israeli law, the Court will nevertheless have jurisdiction to deal with his complaint either under section 7(a) or under section 7(b)(2) of the Courts Law": *ibid.*, at 120.

The Israeli Supreme Court can entertain personal jurisdiction over an individual exercising a public function, who is appointed under Israeli law. This means that acts or failure of the military commander in the Administered Territories may be subject to its jurisdiction, while account needs to be taken of the territorial link between the commander and the State of Israel. Further, the Israeli Supreme Court can interpret an Israeli statute in the light of relevant principles of international law: Nathan, *supra* n. 59, at 110–112.

The first petition brought against the Military Commander and heard by the Supreme Court of Israel sitting as a High Court of Justice was *Stekol v. Minister of Defence*, 20 June 1967 (unreported), where the Attorney-General, acting on behalf of the State of Israel, did not contest the Court's competence to review the acts of the military authorities in the administered territories. In a subsequent petition, the Attorney-General did not challenge that these acts had been reviewed on the basis of the relevant rules of international law set out in the Hague Regulations and in the Geneva Conventions. Nathan, however, remarks that the only time that the Court raised the question of its jurisdiction *proprio motu* was in HC *302/72*, *Sheikh Suleiman Abu Hilu (or Helou) et al. v. State of Israel et al.*, 27(2) *Piskei Din* 169, English excerpt in: (1975) 5 *Israel YbkHR* 384: Nathan, *ibid.*, at 114–115. See also, *inter alia*, H.C. *802/79, Samara and Ne'imat v. Commander of the Judea and Samaria Region*, 34(4) *Piskei Din* 1; English excerpt in: (1981) 11 *Israel YbkHR* 362; H.C. *69 +493/81, Abu Aita et al. v. (a) Commander of the Judea and Samaria Region, (b) Officer-in-Charge of Customs and Excise*; English excerpt in: (1983) 13 *Israel YbkHR* 348; and H.C. *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. (A Teachers' Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region)*, (1983) 37(4) *Piskei Din* 785; English summary in: (1984) 14 *Israel YbkHR* 301, at 312 (*per* Barak J.).

[82] See Nathan, *supra* n. 59, at 109–169.

[83] H.C. *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. (A Teachers' Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region)*, (1983) 37(4) *Piskei Din* 785; English summary in: (1984) 14 *Israel YbkHR* 301, at 312 (*per* Barak J.).

Barak J. rejected the argument that the discretion exercised by the commander based on security considerations would be of non-justiciable nature. He held that "there is no difference between the justicialibity of the Commander's discretion in regard to reunion of families and his discretion in matters of seizure of land, and just as the latter is justiciable . . . so is the present case".[84] However, Nathan notes that the competence of the Israeli Supreme Court to review legislation promulgated by the military authorities in the occupied territories is very limited, leaving them a wide ambit of discretion. He adds that the Court generally follows a restrained approach, unless it perceives *ultra vires* laws manifestly exceeding the powers of the Military Commander.[85]

It may be suggested that local courts are "ill equipped" to determine the necessity for a specific enactment of the occupant, and that they should refrain from handing down a decision on controversial matters.[86] Relying on English law understanding of administrative law concerning the (very limited) scope of judicial competence to scrutinise the discretion exercised by administrative bodies,[87] Morgenstern contends that the decisions of an occupant on administrative matters cannot be reviewed on merits, and that claims alleging an abuse of its discretion are left to the settlement by an "impartial tribunal".[88] Nevertheless, it is significant that in the aforementioned *Halvorsen* case, the Norwegian Supreme Court, whose judges were appointed by the Nazi occupant, implicitly recognised the possibility that it could annul a legislative measure issued by the occupant

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[84] H.C. *802/79, Samara and Ne'imat v. Commander of the Judea and Samaria Region*, 34(4) *Piskei Din* 1; English excerpt in: (1981) 11 *Israel YbkHR* 362, at 363. Barak J., who described the present case as of "humanitarian and exceptional" nature, furnished two main grounds: first, that the essence of the contention related to the reunion of husband and wife, "the fundamental family unit"; and second, that it was his illness that prevented him from exercising a permit that he had previously obtained: *ibid.*, at 364. For the recognition of the justiciability of measures to seize land, reference was made to HC *606/78, Ayoub et al. v. Minister of Defense et al. (Beth El Case)*, 33(2) *Piskei Din* 113, English excerpt in: (1979) 9 *Israel YbkHR* 337; and H.C. *390/79, Mustafa Dweikat et al., v. the Government of Israel et al.*, (*Elon Moreh* Case), (1979) 9 *Israel YbkHR* 345.

[85] The Court does not challenge the Military Commander's exercise of discretion unless the discretion is exercised in bad faith or pursuant to extraneous objectives: Nathan, *supra* n. 59, at 149–168, especially at 153, 161, and 167.

[86] Von Glahn, *supra* n. 20, at 110.

[87] Morgenstern refers to E.C.S. Wade and G.G. Phillips, *Constitutional Law*, 4th. Ed., (1950), at 289; Morgenstern, *supra* n. 67 at 307.

[88] Morgenstern, *ibid*. See also Von Glahn, *supra* n. 20, at 110. However, both Morgenstern and Von Glahn fail to specify what it is meant by such "impartial tribunal", albeit they seem to contemplate the tribunal that is in operation after the cessation of occupation.

that plainly overstepped the bounds of discretion accorded by Article 43 of the Hague Regulations.[89]

In the context of modern IHL, the requirements derived from evolving human rights standards place an important curb on the power of the occupant. The native courts (and the occupation courts established by the occupant) are obliged to treat any laws infringing fundamental rights of individual persons such as those embodied in Article 67[90] and other provisions of GCIV as unenforceable. They must annul such laws as void and of no legal effect.[91] It is submitted that judicial bodies in occupied territory, or those in non-occupied territory of the same country, during and after the occupation period, should be allowed to scrutinise the legality of occupation measures, taking into account the three legitimate purposes as provided in Article 64 GCIV.

4. *Occupation Courts*

4.1. *Overview*

Historically, the occupying power has always been vested with the power to set up military tribunals of its own to try offences committed by native population against members of occupation forces or administration.[92] The

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[89] The Court stated that "[e]in Recht der Gerichte, die Notwendigkeit der Verordnungen des Okkupanten nachzuprüfen und sie unter Umständen wegen Verstoßes gegen Artikel 43 für ungültig zu erklären, könnte höchstens gegenüber Verordnungen in Betracht kommen, die ganz offensichtlich über die Grenzen jedes pflichtmäßigen Ermessens hinausgingen": Norwegian Supreme Court, *Halvorsen*, 10 February 1941, (1942–3) 11 *ZaöRV* 599, at 604 (*per* Judge Vasbotten). The English translation of this part reads that "a right of the Court to examine the necessity of ordinances of the occupants and, in some circumstances, to declare such ordinances to be invalid because of the contravention of Article 43 could be taken into account, at most in relation to the ordinances that very obviously overstep the limit of any obligatory discretion" (translation by the present author). It must be submitted that any precedential value of this judgment, which refrained from judicial review in the end, must be measured against the background of Nazi occupation of Norway. Judges of the Court were appointed by the occupying power who was anxious to see its legislative measures upheld. The need of such sober assessment is recognised by Morgenstern, who distinguishes between the decisions given during the period of occupation and the judgments rendered after the liberation of the territory Morgenstern, *supra* n. 67, at 302–5, and 307.

[90] The first sentence of Article 67 of GCIV provides that "[t]he courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence".

[91] For same view, see Morgenstern, *supra* n. 67, at 304.

[92] See, for instance, E. Catellani, "Le Sentenze Civili Pronunciate nel Dodecaneso durante L'Occupazione Italiana", (1914) 8 *Rivista Di Diritto Internazionale* 22; H.W. Halleck, "Military

experience of occupation courts set up by the Allied occupation during and in the aftermath of the two World Wars provides a rich source of legal assessment.[93] For instance, immediately after the Allied Forces successfully entered Germany in September 1944, the Supreme Commander, General Dwight D. Eisenhower issued a number of legislative measures, including the Proclamation Number 1, which furnished a basis for the establishment of the Military Government of Germany. Ordinance Number 2 set up three types of Military Government Courts: General, Intermediate, and Summary.[94]

Tribunals and their Jurisdiction", (1911) 5 *AJIL* 958; Meurer, *supra* n. 62, at 27–28 (discussing courts and other quasi-judicial organs in occupied France during the Prussian occupation of France in 1870–71); and Rousseau, *supra* n. 64, at 150–151, para. 98. See also L. Maccas, "Salonique Occupée et Administrée par les Grecs", (1913) 20 *RGDIP* 207, at 238–241. He argues that the abolition of Ottoman tribunals in Salonica "ne constitute pas une dérogation au principe admis en droit international, mais qu'elle a été précisément édictée parce que les conditions indispensables pour l'observation de ce principe faisaient défaut dans la prise de Salonique par les Grecs". He adds, in a rather discriminatory tone that was no doubt considered common at that time, that "[u]ne guerre d'affranchissement, entre deux États qui possèdent une mentalité et une conception juridique différentes, entre deux États absolument inégaux au point de vue de la civilization, ne présente pas en effet le caractère et ne doit pas comporter les conséquences d'une guerre ordinaire entre pays civilisés": *ibid.*, at 240–241.

[93] For the examination of occupation courts in relation to World War I, see: Lieut.-Col. N. Bentwich, "The Legal Administration of Palestine under the British Military Occupation", (1920–21) 1 *BYIL* 139; W.R. Bisschop, "German War Legislation in Occupied Territory of Belgium", (1919) 4 *Transactions of Grotius Society* 110, at 135–138; Lieut.-Col. H. de Watteville, "The Military Administration of Occupied Territory in Time of War", (1922) 7 *Transactions of Grotius Society* 133, at 143. See also S. Cybichowski, "La compétence des tribunaux à raison d'infractions commises hors du territoire", (1926–II) *RdC* 247, at 335–337 (examining "les tribunaux d'occupation" in Russian-occupied Galicia in 1914–1915). The Russian *gouverneur militaire* issued an order ("*ordonnance*") to the effect that the conseils de guerre could prosecute all those that participated in the perpetration of an offence ("*délit*") committed by persons subject to the criminal tribunals in Galicia. Establishing special competence was considered necessary to extend the military jurisdiction to persons who were not subordinated to the *conseils de guerre: ibid.*, at 335.

For the assessment of occupation courts in Germany during World War II, see A.G. Green, "The Military Commission", (1948) 42 AJIL 832; K. Löwenstein, "Reconstruction of Justice in American-Occupied Germany", (1948) 61 *Harvard LR* 419; and E.E. Nobleman, "American Military Government Courts in Germany", (1946) 40 *AJIL* 803. These can be usefully compared with the experience of occupation courts in Italy, see I. Campbell, "Some Legal Problems Arising out of the Establishment of the Allied Military Courts in Italy", (1947) 1 *International Law Quarterly* 192; and M. Ploscowe, "Purging Italian Criminal Justice of Fascism", (1945) 45 *Colum. L Rev* 240.

[94] Military Government – Germany, Supreme Commander's Area of Control, Ordinance No. 2, "Military Government Courts", MGR 23–215, Article III, as cited in: Nobleman, *ibid.*, at 805.

The jurisdiction of such tribunals ("occupation courts") is parallel to that entertained by existing indigenous courts.[95] On one hand, native tribunals deal with offences committed by inhabitants against other inhabitants or their property in occupied territory. On the other, occupation courts address all offences against security of the occupation army or administration, and violations of laws and customs of war, including damage to communications and to the property of the occupying authorities.[96] The local courts are not allowed to try offences committed by nationals (members of army or of administrative personnel) of the occupying power, and those of its allies.[97]

Von Glahn[98] suggests that occupying powers can establish three categories of occupation courts: (i) the court designed to fill the vacuum of the judicial system, which became dysfunctional; (ii) the tribunals entrusted with the jurisdiction to try and punish offences committed by native inhabitants against occupation personnel; and (iii) the tribunals intended to deal with native violations of orders, proclamations, laws and other legislative measures issued by the occupant over the occupied territory. The first scenario covers the case of the complete collapse

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[95] The question may arise whether local courts can try and sentence an inhabitant in occupied territory, who has already been tried and sentenced by a military (occupation) court. Von Glahn suggests that in case of such jurisdictional conflicts, civil courts must give into the jurisdiction exercised by the occupation court on the basis of the maxim *inter arma leges silent*: Von Glahn, *supra* n. 20, at 114. Due account must be taken of human rights requirements such as the prohibition of double jeopardy and other procedural rules.

[96] Von Glahn, *ibid*., at 112; and Catellani, *supra* n. 92, at 22–31.

[97] Von Glahn, *ibid*. Earlier writers argued that even where acts committed by nationals of occupying powers constituted war crimes, the native courts were not allowed to try them. For instance, Finch argues that:

> . . . the highest judicial authority in the United States has declared it to be a principle of public international law that the local territorial courts have no jurisdiction to try enemy persons for acts committed during and as a part of belligerent operations, even although such acts be acknowledged war crimes or are alleged to have been committed in violation of the laws of war. The principle has been consistently followed throughout a variety of changing conditions: (1) where a recognized war crime was committed in occupied territory and the local court secured jurisdiction of the offender after the occupation had ceased; (2) where the local court in occupied territory attempted to take jurisdiction of an alleged violation of the laws of war during the period of enemy occupation; and (3) where the alleged violation of the laws of war was committed during an enemy raid and the local court subsequently obtained jurisdiction of the person of one of the members of the raiding party.

G.A. Finch, "Jurisdiction of Local Courts to Try Enemy Persons for War Crimes", (1920) 14 *AJIL* 218, at 223. However, this view has long been superseded by the fundamental rule of modern, international criminal law, according to which all states, in whose territory persons suspected of having committed war crimes, crimes against humanity or genocide are found, must try and prosecute them or extradite them to other States willing to establish criminal jurisdiction for this purpose.

[98] Von Glahn, *ibid*., at 111.

and disorganisation of local administration of justice.[99] The second and the third scenarios may be combined to refer to the tribunal designed to try offences committed by citizens of the occupied territory against the authority of the occupying forces, or against members of the occupant's armed forces, or violations of security/penal regulations issued by the occupant.[100] Schwenk suggests another special tribunal, which the occupant may set up to try offences committed by members of the military forces of the occupant.[101] However, this tribunal is of the kind of court-martials. It cannot be classified as an occupation court, as its legal basis is found in the occupant's domestic statutes. A "true" occupation tribunal must rest on international law for its creation and competence.[102]

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[99] J.W. Garner, *International Law and the World War*, Vol. II, § 378, at 91; and Schwenk, *supra* n. 6, at 405. Fauchille notes that « [s]i la justice locale est complètement desorganisée par l'invasion, par exemple si les judges du pays occupé refusent de sieger, l'occupant est autorisé à etablir des tribunaux provisoires ». He cites the examples of Lord Roberts in Transvaal in 1900, and the French decree of 6 May 1916 and 12 January 1917 (Journal officiel des 9 mai 1916 et 18 janvier 1917) in the German colony of Cameroon. He also argues that there was "empêchement absolu" against the maintenance of local tribunaux de baillage in Alsace when the French occupied this disputed territory in 1914: Fauchille, *supra* n. 5, §§ 1169(3)–(4), at 235–236. See also E. Colby, "Occupation under the Laws of War", (1926) 26 *Colum. L. Rev.* 146, at 159, who refers to the case-law connected to the US Civil War: *Heffernan v. Porter* (Tenn. 1869) 6 Cold. 391, in which it was held that "[t]he power to create civil courts exists by the laws of war in a place held in firm possession by a belligerent military occupant; and [that] if their judgments and decrees are held to be binding on all parties during the period of such occupation, as the acts of a *de facto* government, no valid ground can be assigned for refusing to them a like effect, when pleaded as *res judicata* before the regular judicial tribunals of the State since the return of peace".

[100] Garner observes that "[t]he right of a military occupant to deprive the existing courts of their jurisdiction of offences against the authority of the occupying power as well as of offences against persons belonging to his armed forces is recognized by most writers on international law, and in practice military occupants have usually acted in accordance with this theory": Garner, *ibid.*, § 375, at 85. Fauchille observes that:

> Reconnaissons donc à l'armée d'occupation, à ses conseils de guerre, juridiction sur tous les individus, qui sont auteurs ou complices de crimes attentatoires à la sûreté des troupes. – Cela est universellement admis en droit international public et par les legislations positives particulières.

Fauchille, *ibid.*, § 1170, at 237. The most salient example of such special tribunals is the military commissions set up by the Allies after World War II to try and punish German and Japanese (and some Italian) war criminals. Schwenk refers to two major precedents in the pre-1945 period: the "Military Commission" established by General Scott during the war between the United States and Mexico (1846–48); and the provost courts, military commissions and a court for vagrants and juveniles established in the Rhineland during the First World War: Schwenk, *supra* n. 6, at 405, n. 68.

[101] Schwenk, *ibid.*, at 405.

[102] Von Glahn, *supra* n. 20, at 111.

The *UK Manual* (2004) follows Article 66 GCIV, the provision that will be discussed below. It states that the occupation courts must be non-political military courts established by the occupying power to try offences created by its own legislation. It adds that these tribunals are "in addition to . . . others that have to be established by the occupying power to administer the law of the occupied territory if officials and judges have left their posts".[103] This is the correct use of the term "occupation courts". In terms of von Glahn's classification, only the second and the third categories may be described as occupation courts.

Until just after the Second World War, the *US Field Manual* envisaged three types of occupation courts: military commissions,[104] superior provost courts; and inferior provost courts.[105] Subsequently, the type of tribunals called "military government courts" (which is basically the military commissions) has taken over those three earlier categories of occupation courts to try offences committed by inhabitants of occupied territory.[106] The military government courts are appointed by the military governor of the occupied territory. Their jurisdiction, composition and procedure are prescribed in ordinances of military government authorities.[107] They are not regulated by the provisions of the *Manual for Courts-Martial* or by the Articles of War, which contain limitations on courts-martial.[108]

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[103] *UK Manual* (2004), at 294, para. 11.59.

[104] The history of military commissions can date back to the US War of Independence, and they were also widely used during the US-Mexico War of 1846–48 and the US Civil War: see R.P. Masterton, "Military Commissions and the War on Terrorism", (2002) 36 *International Lawyer* 1165; and Rousseau, *supra* n. 64, at 152, para. 99.

[105] The United States Army and Navy Manual of Military Government and Civil Affairs, FM27–5, OPNAV 50E-3, 22 December 1943, Section VII, paras. 38–47. See also Green, *supra* n. 93, at 833. On the basis of Article II of Proclamation No. 4 of *Allied Military Government of Occupied Territory Plan, Proclamations, and Instructions*, which was inaugurated for the military government of Sicily, three types of military courts were established: the general military court, akin to the military commission; the superior military court, which corresponded to the superior provost court; and the summary military court, similar to the inferior provost court: Green, *ibid.*, at 833. For a detailed assessment of the Anglo-American operation, known as AMGOT (Allied Military Government of Occupied Territory) in Sicily, see H.M. Adams, "Allied Military Government in Sicily, 1943", (1951) 15 *Military Affairs* 157.

[106] Von Glahn, *supra* n. 20, at 112. Von Glahn notes that this court was divided into three types: general military courts, which were competent to impose any lawful penalty including capital punishment; intermediate military courts, which were authorised to impose any lawful sentence except death, imprisonment in excess of ten years, or a fine in excess of 10,000 dollars; and summary military courts, which were allowed to impose any lawful sentence bar death, imprisonment in excess of one year, or a fine in excess of 1,000 dollars: *ibid*.

[107] Von Glahn, *ibid*. Von Glahn explains that general courts are normally comprised of five members, intermediate courts of three members and summary military courts of one member: *ibid*.

[108] *Ibid.*, at 113.

The *US Field Manual (1956)* contemplates a separate structure of the judiciary, which is designed to deal with civil litigations among members of the occupying armed forces, or accompanying civilians, and to try breaches of internal discipline that they have committed. Its paragraph 374 states that:

> Military and civilian personnel of the occupying forces and occupation administration and persons accompanying them are not subject to the local law or to the jurisdiction of the local courts of the occupied territory unless expressly made subject thereto by a competent officer of the occupying forces or occupation administration. The occupant should see to it that an appropriate system of substantive law applies to such persons and that tribunals are in existence to deal with civil litigation to which they are parties and with offences committed by them.[109]

By the same token, the 1958 edition of the *UK Manual* contemplates that members or "followers" of the occupying force are immune from the jurisdiction of the local courts but must be tried under the military laws of their own army.[110]

4.2. *Occupation Courts under GCIV*

The Fourth Geneva Convention provides some clarity as to the jurisdiction and competence of occupation courts, and elaborated procedures that they must follow.[111] The possibility of repealing or suspending penal laws of the occupied territory, as recognised under Article 64 GCIV, suggests that when exercising its prescriptive power, the occupant is entitled to establish its military courts.[112] As briefly noted above, this is given an express recognition under Article 66, which allows the occupying power to hand over the accused to its "properly constituted, non-political military courts".[113] Such military courts are given the jurisdiction to try breaches of the penal provisions that the occupying power has promulgated.

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[109] US FM 27–10 (1956), para. 374.

[110] The old *UK Manual* (1958) para. 522, which read that:

> The officers, men, and "followers" of the occupying force, however, are not answerable to the jurisdiction of the local courts; they are dealt with by the military law of their own army.

The Law of War on land being Part III of the Manual of Military Law, (1958), at 145.

[111] The relevant rules are laid down in GCIV, Articles 5, 64 through 78.

[112] Von Glahn. *supra* n. 20, at 115 (referring to the cases of a breakdown of judicial systems, human failure and a flight of personnel). As examined above, the suspension of local criminal laws was inserted at the proposal of the United States delegation to tackle exceedingly egregious elements of Nazi penal laws: Committee III, 18th Meeting, 18 May 1949; and 19th Meeting, 19 May 1949, *Final Record*, Vol. II-A, at 670–672 (in particular, the statement of Mr. Ginnane of the US, at 670–671).

[113] The underlying objective of this provision is to prevent the occupying power from extending its domestic court system into an occupied territory: Von Glahn, *ibid.*, at 116.

The trial courts must sit in the occupied territory, and this rule applies, whenever possible, to courts hearing appeals from occupation courts.[114]

The reference to military courts under Article 66 raises the question on the composition of occupation courts. They may be comprised of either military or civilian judges, insofar as the latter are answerable to the military authorities of the occupying administration.[115] In the post-surrender Germany after the Second World War, the US occupation courts that had been set up originally under the authorities of the armed forces were transferred to the control of the Department of State. Yet, the latter was subject to the US President who acted as the commander in chief of the armed forces. Viewed in this way, the US occupation courts that operated in Germany after May 1945 can be described as "military courts".[116]

The occupation courts must comply with an ample list of procedural requirements. Detailed examinations of these requirements are undertaken in Chapter 20 that deals with the procedural safeguards of protected persons. However, an overall procedural framework of occupation courts can be briefly explained. With respect to appeals, while the last sentence of Article 66 speaks of a preference that an appellate system should be set up in occupied territory, the occupying power is not necessarily obliged to create a system of appeal within the framework of the occupation courts. Article 73(2) GCIV allows an appeal by convicted persons to the "competent authority of the Occupying

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[114] GCIV, Article 66, 2nd sentence. This provision mentions that "[c]ourts of appeal shall preferably sit in the occupied territory".

[115] Von Glahn, *supra* n. 20, at 116. See also *UK Manual* (2004), at 294, para. 11.59.1.

[116] Von Glahn, *ibid*. This was the reasoning followed by the US Supreme Court in *Madsen v. Kinsella*, in which the Supreme Court took note of the fact that the Military Government Courts for Germany since its outset had a less military character than that of courts-martial, and that the judges serving on these occupation courts were civilians. Nevertheless, it held that:

> The government of the occupied area . . . passed merely from the control of the United States Department of Defense to that of the United States Department of State. The military functions continued to be important and were administered under the direction of the Commander of the United States Armed Forces in Germany. He remained under orders to take the necessary measures, on request of the United States High Commissioner, for the maintenance of law and order and to take such other action as might be required to support the policy of the United States in Germany.

Madsen v. Kinsella, 28 April 1952, 343 *US* 341, at 357–358. For a commentary of this case, see J.M. Raymond, "Madsen v. Kinsella – Landmark and Guidepost in Law of Military Occupation", (1953) 47 *AJIL* 300. However, as Von Glahn notes, practically speaking, it is very likely that any future use of occupation courts are under direct military control and authority, and that the example of post-hostilities occupation courts in Germany after World War II marked exceptions: Von Glahn, *ibid*., at 116–117.

Power", which is likely to be the theatre commander of the occupying power or a military governor.[117]

It is incumbent on the occupation courts to apply only those provisions of the penal laws that were applicable at the time of the commission of the offence, and which are "in accordance with general principles of law. These include, in particular, the requirement that the penalty shall be proportionate to the offence".[118] As an additional guarantee for the accused, the occupying power must take account of the fact that the accused is not a national of the occupying power.[119]

4.3. *Occupation Courts and War Crimes*

With respect to offences in occupied territory, the occupying power is empowered to enact or amend penal/security laws with a view to trying and punishing offenders. This task can be assigned either to local courts that are allowed to "continue to function" in occupied territory within the meaning of Article 64(1) GCIV, or to the occupation court under Article 66 GCIV. Further, in the absence of an appropriate, enabling legislation in occupied territory, the concept of necessity of abiding by obligations under IHL can be adduced to require the occupying power to legislate to try and punish persons who have committed grave breaches, as required by the Geneva Conventions.[120]

The occupying power may enact laws that furnish occupation courts with the jurisdiction to try cases of alleged war crimes.[121] In that way, the jurisdiction *ratione materiae* of the occupation court can be broadened to cover core crimes committed pursuant to or in connection to the armed conflict that has resulted in

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[117] Von Glahn, *ibid.*, at 117.

[118] GCIV, Article 67, first sentence.

[119] GCIV, Article 67, 2nd sentence.

[120] M. Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", (2005) 16 *EJIL* 661, at 675; *UK Manual* (2004), at 284, para. 11.26, n. 54. However, both Sassòli and the *UK Manual* do not address the question whether this obligation is extended to cover the duty to try and punish offenders of an expanded category of grave breaches under Article 85 API.

[121] *UK Manual* (2004), at 294, para. 11.59.1. Compare this with the 1958 edition of the *UK Manual*, which largely incorporated the principles embodied in Articles 64 and 66 GCIV. It provided that:

> While, in general, the Occupant is bound to maintain the jurisdiction of the ordinary criminal courts in occupied territory, in case of a breach of criminal laws promulgated by him he may hand over the accused to his properly constituted non-political military courts, provided that such courts sit in the occupied territory. Courts of appeal should also preferably sit in occupied territory.

The Law of War on Land being Part III of the Manual of Military Law, (1958), at 158, para. 568, footnote omitted.

the state of occupation. For instance, during the Second World War, the British introduced into its occupied Cyrenaica (a former Italian occupied territory and now part of Libya) in 1941 a system of criminal courts called "British Courts", which were equipped with jurisdiction over offences against the ordinary criminal law, offences against occupation laws it proclaimed, and war crimes.[122]

It must, however, be analysed whether the remit of the occupying power can be extended to include the power to set up a war crimes tribunal designed to try and punish core crimes which were committed not in the course of, or in relation to, the armed conflict that has led to occupation. It is submitted that the establishment of a special tribunal to deal with core crimes committed in the past can be defended on the necessity ground of implementing IHL.[123] It can also be argued that to leave unpunished the core crimes committed by the old regime of the occupied state would pose a security threat to the occupying forces and the occupation administration, and provide serious obstacles to the public order in terms of national reconciliation.

As briefly discussed before, in occupied Iraq, the CPA, through the medium of the Iraqi Governing Council, adopted legislation aimed at penalising international crimes which were committed by the Baathist regime prior to the occupation.[124] In view of Article 47 GCIV, the conduct of the Governing Council is attributable to the responsibility of the occupying powers.[125] Sassòli argues that the establishment of the Iraqi Special Tribunal in occupied Iraq infringed IHL on the basis that it "was not lawfully constituted" as required by Article 66 of GCIV. The only way of rendering it legal was for the Interim Government of Iraq to establish it,[126] or to endorse it retroactively. Nevertheless he recognises that past core crimes can be punished either by an occupation court or by a local court in occupied territory.[127]

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[122] M.J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations – The Search for a Legal Framework*, (1999), at 124. The structure of these courts was modelled on the British military court. There was no appeals structure, but convicted persons were allowed to petition the Commander-in-Chief: *ibid*.

[123] Sassòli affirms that the occupying powers in Iraq had the authority to set up a tribunal to try and punish international crimes committed by the former regime: Sassòli (2005), *supra* n. 120, at 675.

[124] Governing Council, The Statute of the Iraqi Special Tribunal, 10 December 2003, "Annex" to CPA Order No. 48: Delegation of Authority Regarding an Iraqi Special Tribunal, 10 December 2003 CPA/ORD/9 Dec 2003/48.

[125] Sassòli (2005), *supra* n. 120, at 675 and 682.

[126] *Ibid*., at 675.

[127] *Ibid*.

5. *Conclusion*

The administrative and institutional structures of occupied territories are governed by the general rule based on the conservationist rationale. Yet, as examined in this chapter, there have been numerous examples of state practice effectuating the alterations in the administrative and judicial machineries on the basis of necessity exceptions. The introduction of a democratic political system is increasingly recognised as an indispensable requirement on the basis of the principle of self-determination of peoples. At the same time, this principle serves to fend off the risk of the occupying power abusing its power.

With respect to the judiciary, it is of special importance that courts of the occupying power should be allowed to review the legality of measures it adopts in the occupied territories. In view of the ineffectiveness or inability of enforcing rulings by local (native) tribunals in occupied territories, and in the absence of other third-party adjudications, granting such jurisdiction to the judiciary of the occupant is an essential safeguard against abuse that may be committed by occupying authorities. As concerns occupation courts, it is possible to assign to them the remit to try and punish offenders not only of any core crimes committed during an international armed conflict that has led to the occupation in question, but also the past crimes committed by the egregious regime that the occupying power has dethroned. In view of the *erga omnes* obligations of rules concerning genocide, crimes against humanity, and war crimes based on grave breaches of the Geneva Conventions, there is a duty to prosecute the offenders. Even so, it is preferable that appropriate measures should be taken, either by the occupying power that is a party to the ICC Statute, or by the Security Council, to refer to the ICC, insofar as the core crimes in question fall within the ICC's temporal jurisdiction.[128]

[128] With respect to international crimes that took place prior to the entry into force of the ICC Statute, the better option would be to set up an ad hoc international war crimes tribunal under the auspices of the Security Council.

Chapter 6

Regulations of the Economy in Occupied Territory

1. *Introduction: The General Principle of Good Administration of the Economy*

The Hague rules and the accumulated case-law provide detailed rules specifically dealing with economic affairs. First, the economy of an occupied territory can be required to bear the cost of the occupation, on condition that this does not outweigh the expenses that the local economy is expected to sustain, in particular, taking into account the needs of the population of the occupied territory.[1] It is generally accepted that the Hague Regulations[2] and the Fourth Geneva Convention prohibit the exploitation of the economy of the occupied territory to enrich the occupant's economy or to damage the local economy.[3] Second, the occupying power is not entitled to impose pecuniary duties as form of a collective punishment.[4] Third, the occupying power is obliged to ensure good economic governance and financial management of the occupied territory, when dealing with specific issues such as exchange rates, the amount of money in circulation

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[1] IMT, *Judgment of the International Military Tribunal at Nuremberg, Trial of the Major War Criminals before the International Military Tribunal (IMT)*, Vol. XXII, 482.

[2] Hague Regulations (1907), Article 49.

[3] *UK Manual* (2004), at 286. See also the Israel Supreme Court decisions: H.C. *69 +493/81, Abu Aita et al., v. (a) Commander of the Judea and Samaria Region, (b) Officer-in-Charge of Customs and Excise*, 37(2) *Piskei Din* 197; English excerpt in: (1983) 13 *Israel YbkHR* 348 (holding that an occupied territory is not an "open field for economic or other exploitation"); and H.C. *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. (A Teachers' Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region*), 37(4) *Piskei Din* 785; English summary in: (1984) 14 *Israel YbkHR* 301, at 304.

[4] Hague Regulations (1907), Article 50.

and customs tariffs.[5] Von Glahn notes that customary international law enables an occupying power to set the rates of exchange between the currency of the occupied area and the currencies of other states participating in the belligerent occupation, but with special regard to "the financial implications" of Article 43 of the 1907 Hague Regulations.[6]

Two specific rules can be derived from the general principle of good administration of economy. First, the occupying power must not create a monetary system parallel to that established in the occupied state.[7] Second, while there is no legal impediment to the creation of new central banks by an occupant, such banks must not serve as mere tools for perpetrating its unlawful acts.[8]

With respect to occupied Iraq in 2003, Security Council Resolution 1483 set out the obligations of the US and UK in relation to the Development Fund for Iraq (DFI), the management of petroleum, petroleum products and natural gas.[9] Scheffer argues that these obligations constituted areas of obligations that exceeded the bounds of power allowed for the occupying power under the law of occupation, but that they were constitutively created and thrust upon the Anglo-American Coalition by virtue of the binding effect of this resolution.[10] There has also been a criticism of some "financial irregularities" relating to the management of the DFI, to which Security Council, by its Resolution 1483 of 22 May 2003, transferred 6 billion dollars left over from the UN Oil for Food Programme, the sequestered and frozen assets, and revenue from resumed oil exports.[11]

Clearly, the regulation of economy in occupied territory encompasses matters concerning investment, taxes, and property. Issues of taxes and other money

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[5] The *UK Manual* states that it is forbidden to debase the currency or impose artificial exchange rates, and that the occupying power may issue vouchers to be used by members of its forces and by civilian members in the occupying forces' installations, shops and canteens: *UK Manual* (2004), at 286, para. 11.33.

[6] G. Von Glahn, *The Occupation of Enemy Territory – A Commentary on the Law and Practice of Belligerent Occupation*, (1957), at 204–205.

[7] See, for example, Burma, High Court (Appellate Civil), *Ko Maung Tin v. U Gon Man*, 3 May 1947, (1947) 14 *AD* 233, Case No. 104, at 233–255.

[8] Von Glahn (1957), *supra* n. 6, at 205. He observes that the occupying power has a "virtually unlimited" right to control over new or existing central banks, in relation to the right to pool cash reserves, control over the extension of credit and the institution of credit moratoria, and the imposition of restrictions on withdrawals of deposits: *ibid*.

[9] UN Security Council Resolution 1483, S/RES/1483 (2003), 22 May 2003, operative paras. 12–14, 17, 20, and 22–23.

[10] D. Scheffer, "Beyond Occupation Law", (2003) 97 *AJIL* 844, at 846. See also M. Zwanenburg, "Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation", (2004) *IRRC* No. 856, 745, at 759.

[11] E. Harriman, "Where Has All the Money Gone?", *London Review of Books*, Vol. 27, No. 13, 7 July 2005.

contributions may be discussed in the context of private property,[12] but the complexity of these issues calls for specific treatment of public finance under a separate sub-heading.

2. *Investments in Occupied Territory*

Occupying powers must be cautious in executing fundamental investments likely to bring about permanent alterations in occupied territory.[13] This principle must be observed irrespective of the claimed good intention of the occupant. This can be readily explained by the general principle under Article 43 of the Hague Regulations that no permanent change can be introduced, save in cases of necessity, and by the principle of self-determination of people that will be examined below.

Considerable controversy remains as to whether the occupying power is entitled to grant new concessions in occupied territory. On one hand, it may be suggested that it is the legitimate sovereign that can exercise the power to do so. On the other hand, the GCIV recognises the enhancement of the welfare of civilian populations in occupied territory as one of the legitimate objectives. As discussed above, this constitutes an exception to the conservationist premise of Article 43 of the Hague Regulations.[14] Von Glahn observes that "an occupant

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[12] See, for instance, Y. Dinstein, "The International Law of Belligerent Occupation and Human Rights", (1978) 8 *Israel YbkHR* 104, at 139–140.

[13] Von Glahn's seminal work on the law of occupation does not specifically deal with issues of investment. However, he mentions that "an occupant possesses an unquestioned right to supervise private business and to regulate in any manner considered desirable from the viewpoint of military interest or the needs of the native population": Von Glahn (1957), *supra* n. 6, at 207. In accordance with the general principles embodied in Article 43 of the Hague Regulations and Article 64 GCIV, it can be suggested that the occupying authorities are allowed to evaluate the modality and extent of investments in occupied territory, while bearing in mind the duty to ensure the welfare of inhabitants in that territory.

[14] Bordwell observes that:

> Measures for the permanent benefit of the community should be left, when it is possible, to the legitimate power, but there may be cases where the needs of the community are so pressing as to admit of no delay, and if in such a case a contract is let for the work which extends beyond the period of occupation, such contract is valid even then, if it was reasonably within the scope of the occupant's essentially provisional powers.

P. Bordwell, *The Law of War between Belligerents – A History and Commentary*, (1908), at 329. See also *the United States Judge Advocate General's School, Law of Belligerent Occupation* (J.A.G.S.), No. 11, at 76–77 (stating that "[a]lthough the granting of new concessions should be left to the legitimate sovereign, there may be situations where the needs of the community necessitate immediate action by the occupant and a concession granted by him in such circumstances would seem a proper exercise of his duty to maintain law and safety").

in principle ought to be free to grant concessions for the exploitation of the usufruct of public real or immovable property with the obvious reservation that no such concession could exceed the duration of belligerent occupation".[15]

The occupying powers must measure investments against the benchmark of the necessity test, in particular, the necessity ground based on the welfare of the civilian population in occupied territory.[16] In the *Teachers' Cooperative Society* case, Barak J. of the Israeli Supreme Court held that a "proper balance" must be established between the obligations of a military administration to function as a "regular government" and the specific nature of military administration.[17] According to Barak J., the criteria for such a balance are two-fold: first, the benefit of the local population, and second, the absence of investments that would trigger an "essential modification" in the "basic institutions" of occupied territory.[18] It is reasonable to assume that unless there is a demonstration of opinions to the contrary among the majority of the population, the military authorities can make initial evaluation of the effect of projected investment. They must, however, duly take into account whether this would produce "essential" alterations in the institution of the occupied territory.

In occupied Iraq, the Coalition States, acting through the CPA, have introduced a far-reaching extent of economic and financial reforms in the existing Iraqi laws, opening up the Iraqi economy to foreign investment and ownership. As examined in Chapter 4, these include Order No. 39 that allowed foreign

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[15] Von Glahn (1957), *supra* n. 6, at 209.

[16] Landau J. in H.C. *256/72*, took the view that investments intended to improve the electricity supply to an occupied territory were lawful under Article 43 of the 1907 Hague Regulations in view of the occupant's obligation to ensure the "economic welfare" of the population: Israel, H.C.*256/72, Electric Corporation for Jerusalem District Ltd. V. Minister of Defence et al.*, 27(1) *Piskei Din* 124 (1973); excepted in (1975) 5 *Israel YbkHR* 381. See also H.C. *351/80, Jerusalem District Electricity Company, Ltd v. (a) Minister of Energy and Infrastructure, (b) Commander of the Judea and Samaria Region*, 35(2) *Piskei Din* 673, (*per* Cahan J.); excerpted in (1981) 11 *Israel YbkHR* 354 (concerning the legality of the notices, which had been issued by the Minister of Energy and Infrastructure and the Commander of the Judea and Samaria Region for the purpose of purchasing the concession and undertaking of electricity supply to East Jerusalem and to the West Bank).

[17] HC *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., (A Teachers' Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region)*, 37(4) *Piskei Din* 785, English summary in: (1984) 14 *Israel YbkHR* 301, at 309–310.

[18] Barak J. observes that:

> Long-term fundamental investments in an occupied area bringing about permanent changes that may last beyond the period of the military administration are permitted if required for the benefit of the local population – provided there is nothing in these investments that might introduce an essential modification in the basic institutions of the area.

Ibid., at 310.

investors to own Iraqi companies with no obligation to give back gain into the Iraqi society,[19] a measure which had been hitherto applicable only to citizens of Arab countries. These "reforms" were the product of the ruggedly neo-liberal market-oriented thinking. Whether they were reconcilable with the primordial importance of enhancing the welfare of the Iraqi people is highly debatable.[20]

In the latter half of the twentieth century, one of the most dramatic principles that have successfully pierced through the traditional web of international rules anchored in the bedrock of predominantly western ideas is the principle of self-determination of people. This principle assumes special importance in respect of investments relating to use of land, and to the exploitation of natural resources in occupied territory. Clearly, apart from economic dimension of self-determination of peoples, the cultural dimension of this principle must be taken into account. The occupying power must ensure that investment will not cause damage to particular religious or cultural sites that are symbols or identities of distinct cultural values held by inhabitants in occupied territory.

3. *Public Finance*

3.1. *Taxes*

With regard to taxation, the Hague Regulations allow the occupying powers either to collect existing taxes as regulated by Article 48, or to levy "other money contributions", as provided in Article 49. The term "taxes" includes direct and indirect dues, covering customs, duties, excises and tolls of all kinds, which are compulsory payments prescribed for the benefit of the displaced government.[21] In Kosovo, the Special Representative of the UN Secretary-General introduced extensive indirect taxation, including excise taxes, sales tax, and service taxes.[22] All these were designed to contribute to the budget of the United Mission in

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[19] CPA, Order No. 39, Foreign Investment, CPA/ORD/19 September 2003/39; and CPA Order No. 46, CPA/ORD/20 December 2003/46 (which revised the former).

[20] Nevertheless, Kelly, referring to absence of "free-market" economies in Iraq prior to the occupation, recognises the need to introduce laws providing the framework on banking, currency, insurance, securities, fair competition, environmental protection, social security, anti-money laundering and other corruption measures: M.J. Kelly, "Iraq and the Law of Occupation: New Tests for an Old Law", (2003) 6 *YbkIHL* 127, at 159.

[21] Y. Dinstein, "Taxation under Belligerent Occupation", in: J. Jekewitz, K.H. Klein, J.D. Kühne, H. Petersmann and R. Wolfrum (eds), *Das Menschen Recht zwischen Freiheit und Verantwortung, Festschrift für Karl Josef Partsch zum 75. Geburtstag*, (1989) 115.

[22] UNMIK Reg. 2000/2 of 22 January 2000 (excise taxes); UNMIK Reg. 2000/3 of 22 January 2000 (sales tax); and UNMIK Reg. 2000/5 of 1 February 2000 (hotel, food and beverages service tax), as amended by Regulation No. 2000/31 of 23 May 2000.

Kosovo (UNMIK),[23] the UN administration to which, as will be analysed in Chapter 22, the present writer proposes the application of the laws of occupation by analogy.

As for the competence of the occupying power to collect existing taxes, dues, tolls or other revenues as it appears in Article 48, this competence is constrained by two conditions. First, to the extent feasible, the collection of such taxes must be based on the rules of assessment and incidence in force. As Zwanenburg notes, in occupied Iraq, the CPA Order No. 37 which set out the strategy of revising the tax system of Iraq violated Article 48 of the Hague Regulations.[24] When necessary, the occupying powers can raise the rates of assessment. Such necessity may be recognised in case of lengthy occupation.[25] Further, given that the collection of taxes is purported to cover the cost of the administration of occupation, the rates can be increased when such cost grows as in the case of inflation.[26]

Second, the purpose of imposing taxes must be limited to the administrative needs of occupation. Plainly, such administrative needs cover the tasks of restoring and ensuring public order and safety in occupied territory. These objectives correspond to those explicitly embodied in Article 43 of the Hague Regulations. The question of the relationship between the general clause of Article 43 and the specific rule provided in Article 48 will be closely examined with respect to the entitlement or disentitlement of the occupant to introduce new taxes. In case the occupying power intends to use taxes for other purposes, such as to defray needs for its occupation army, then the only avenue that can be lawfully pursued as a substitute for new taxation is the money contribution stipulated in Article

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[23] T.H. Irmscher, "The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights, and the Law of Occupation", (2001) 44 *German YbkIL* 353, at 389.

[24] Zwanenburg, *supra* n. 10, at 758.

[25] E.H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (1942), at 49, para. 201. For criticism of the Israel's imposition of heavy taxes in its occupied territories, see E. David, *Principes de Droit des Conflits Armés*, 3rd ed., (2002), at 510, para. 2.371; and UN General Assembly, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, A/RES 45/74A, 11 December 1990, para. 8 c; *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, A/RES/46/47A, 9 December 1991, para. 8 c (referring to "[i]llegal imposition and levy of taxes and dues"); and *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, A/57/207, 16 September 2002, para. 80 (concerning "the occupied Syria Arab Golan").

[26] Dinstein (1989), *supra* n. 21, at 116.

49 of the Hague Regulations.[27] From this second condition can be inferred an obligation for the occupant to make at least the same extent of contribution to expenses of the administration of the occupied territory as the displaced government was so bound. Further, the occupying power must ensure that the public services in occupied territories are not to be undermined, as compared with the level of services prior to occupation.[28]

There exists no reference to taxes due for local government (municipalities, prefectures, provinces etc.) under the Hague Regulations. Article 48 of the Hague Regulations refers to taxes, dues, and tolls for the benefit of the occupied *state* (rather than municipalities). However, the classic publicists agree that as a general rule, all forms of taxes collected by local authorities for local use must not be impinged upon by the occupying powers.[29] The exception may be recognised only where such revenues are intended for purposes hostile to the occupying authorities.[30] To avoid such danger, the occupants should be allowed to exercise the right of supervision over the collection of local taxes.[31] With respect to the discretion of local governments to increase the rates of taxes or to introduce new levies, Von Glahn notes that they should be allowed to do so, subject to the approval of specific agencies of the occupying power.[32]

3.2. *"Other Money Contributions"*

Apart from the ordinary types of taxes that the occupying power may exact from the inhabitants, Article 49 of the Hague Regulations allows the occupying power

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[27] *Ibid*.

[28] Dinstein (1978), *supra* n. 12, at 139.

[29] Von Glahn (1957), *supra* n. 6, at 152; and J.M. Spaight, *War Rights on Land*, (1911), at 378 (discussing the Japanese occupation of Korea in 1904 during the Russo-Japanese War). See also *Commune de Grace-Berleur c. Charbonnages de Gosson Lagasse et Consorts, etc*. In that case, the German Governor General's order, which substituted the approval of the occupying power for resolutions of communal councils that levied communal taxes, was found to be illegal, on the ground that the order did not contribute to the restoration of public order and safety under Article 43 of the 1907 Hague Regulations: the Belgian Court of Cassation, *Commune de Grace-Berleur c. Charbonnages de Gosson Lagasse et Consorts, etc*. 29 July 1919; as cited in: G.H. Hackworth, *Digest of International Law*, Vol. VI, (1943), at 393–394.

[30] Von Glahn (1957), *ibid*., at 152. See also Dinstein (1989), *supra* n. 21, at 115–116.

[31] Von Glahn (1957), *ibid*. Von Glahn notes that in case remaining local governmental organs are allowed to collect taxes for their own purposes, the occupying power may authorise them to increase existing tax rates or to levy new taxes, insofar as these increases in rates or the next taxes are consistent with the objectives of the occupation: *ibid*.

[32] *Ibid*., at 152–153. He adds that once a general permission is granted, there is no need for indigenous local governments to obtain specific permission for each of financial measures that they pursue: *ibid*.

to levy "other money contributions". Like requisition regulated under Article 52 of the Hague Regulations, the occupant can demand other money contributions from all inhabitants in the occupied territory, irrespective of nationality.[33] According to Holland, this arrangement enables (or obligates!) the entire inhabitants in occupied territory to bear the brunt of the cost of war and occupation more equitably. It avoids inflicting the disproportionate burden only on individual owners of the property susceptible of requisition.[34] Other money contributions must be subject to technical conditions stipulated in Article 51 of the Hague Regulations. First, the collection of such contributions may be imposed by a written order of a commander-in-chief only. This marks a contrast to requisitions (in kind and in service) regulated under Article 52 of the Hague Regulations, which can be demanded by a mere commander in locality.[35] Second, to the extent possible, the collection of the contributions must be done in conformity to the rules of assessment and incidence of the taxes in force. Third, a receipt must be given to the contributors for every contribution.

Apart from these technical or procedural conditions, the legal technique of money contributions must satisfy the material conditions akin to requisitions in kind or in services under Article 52 of the Hague Regulations. Having recourse to money contributions must be based on two legitimate purposes (meeting the needs either of the army or of the occupying administration). The origin and limitation of the right to collect money contributions as a form of "war taxes" is the concept of military necessity.[36] The occupying power must not collect or divert such money contributions to support the war effort in general, or as a means to punish the civilian population.[37] Presumably to avoid such eventuality of abuse, the *UK Manual* (2004) confines the levying of money contributions only to circumstances where existing taxes are insufficient to meet the needs of the occupation army.[38] Admittedly, the occupant is not hindered from levying money contributions in lieu of existing taxes, or collecting both, with contribu-

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[33] E. Castrén, *The Present Law of War and Neutrality*, (1954), at 241.

[34] T.E. Holland, *The Laws of War on Land (Written and Unwritten)*, at 55 (1908), at 55, para. 109.

[35] L. Oppenheim, *International Law*, (7th ed, by H. Lauterpacht, 1952), Vol. II, 412, para. 148.

[36] Castren, *supra* n. 33, at 241; and David, *supra* n. 25, at 509–510, para. 2.369.

[37] Garner argues that though the phrase 'needs of the army' under Article 49 of the 1907 Hague Regulations is "very elastic", "it was clearly not the intention of the Hague Conference to authorize military commanders to exact contributions for the enrichment of the occupying belligerent, for the purpose of covering the expenses of the war, or to impose fines under the disguise of contributions": J.W. Garner, "Contributions, Requisitions, and Compulsory Service in Occupied Territory", (1917) 11 *AJIL* 74, at 80; and C.C. Hyde, *International Law – Chiefly as Interpreted and Applied by the United States*, 2nd revised edition, (1947), Vol. III, at 1889.

[38] *UK Manual* (2004), at 285, para. 11.31.

tions serving as "surtaxes" for military needs.[39] Further, the occupying power is not precluded from collecting money contributions as dealt with in Article 49 of the Hague Regulations to finance requisitions in kind provided in Article 52.[40]

As Dinstein notes, the receipt mentioned in Article 51 of the Hague Regulations must be distinguished from the receipt that must be issued for contributions (or requisitions) in kind governed by Article 52. In contrast to the latter, the former is intended only as a confirmation of payment. It does not necessarily engage the responsibility of the occupant for redeeming it in cash at a later date.[41]

3.3. *Permissibility of Introducing New Taxes*

The majority of classic legal publicists have excluded the authority of the occupying power to create new taxes in occupied territories. Spaight[42] provides answers in the negative, on the basis that the prerogative for introducing new taxes is considered as part of sovereign attributes.[43] Similarly, Fauchille observes that "[l]'occupant doit, en tant qu'*impôts*, se borner à percevoir les contributions directes ou indirectes établies par L'Etat dont il a envahi le territoire; il ne peut pas *légitimement* créer des impôts nouveaux."[44]

In contrast, a small number of publicists in the inter-war period gave a circumspect approval of the entitlement of the occupant to institute new taxes in

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[39] I. Seidl-Hohenveldern, "Contributions", in: R. Bernhardt (ed), (1982) 3 *Encyclopedia of Public International Law* 125, at 125–126.

[40] Oppenheim notes that "commanders-in-chief may levy contributions…in case they do not possess cash for payment of requisitions": Oppenheim (7th ed., H. Lauterpacht, 1952), *supra* n. 35, at 410 and 412.

[41] As Dinstein notes, money contributions stipulated in Articles 49 and 51 of the 1907 Hague Regulations must not be confused with contributions (or requisitions) in kind governed in Article 52 of the Hague Regulations. The only similarity is that both provisions employ the term "contribution" as euphemism (in view of the involuntary nature of the exaction). Yet, the differences are seen both in the purpose of such exaction and in the legal effect of receipts. First, while money contributions under Articles 49 and 51 can be exacted not only for the needs of the occupation army, but also of the administration, contributions under Article 52 can be collected only to satisfy the needs of occupation army. Second, Article 51 envisages a receipt only as evidence of payment, and the occupying power is not obligated to redeem it in cash. In contrast, a receipt, which must be issued for contributions in kind if the occupying power is unable to make payment for them, is redeemable in cash at a later date: Dinstein (1978), *supra* n. 12, at 139; and *idem* (1989), *supra* n. 21, at 117.

[42] Spaight, *supra* n. 29, at 378–79.

[43] *Ibid*.

[44] P. Fauchille, *Traité de Droit International Public* (1921), Vol. II, § 1189, at 264 (emphasis in original).

occupied territory. Bisschop argues that the introduction of new taxes is not in itself unlawful as *ultra vires.* In his view, each of such taxes must be evaluated in the light both of their execution and the extent to which they are required for the purpose of defraying the expenses of the army or the administration.[45] In a similar tone, Hyde observes that while the US War Department Rules of Land Warfare of 1934 denied the possibility of imposing new taxes as an infringement of an attribute of sovereignty, this prohibition on occupying powers was not repeated in the 1940 edition.[46]

The conclusion that Article 48 of the 1907 Hague Regulations rules out the possibility of imposing new taxes can be reached on the basis of systematic interpretation. Admittedly, this provision starts with a conditional clause that adverts to the collection of taxes with the use of a conjunctive "if". It might be inferred from the use of this conditional clause that Article 48 deals only with the instance of *collection* of existing taxes, without necessarily negating the possibility of establishing new taxation.[47] However, Dinstein points out that this inference squarely runs counter to the principle of interpretation *expressio unius est exclusio alterius*.[48] If the occupant is allowed to exact new taxes in such a manner and for such purposes as it sees fit, then it does not make sense that Article 48 provides detailed conditions on the modality of collecting existing taxes. The occupant would simply create new taxes without bothering to comply with such conditions.[49] Further, the interpretation permissive of new taxes under Article 48 would render the system of money contributions under Article 49 superfluous. Reliance on money contributions can be recognised only pursuant to the need to cover the expenses of the army and the administration of the occupation.[50]

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[45] W.R. Bisschop, "German War Legislation in the Occupied Territory of Belgium", (1919) 4 *Transactions Grotius Society* 110, at 141.

[46] Hyde, *supra* n. 37, at 1887.

[47] As Dinstein notes, this is one of the two lines of legal reasoning that the Supreme Court of Israel in the *VAT* cases provided to endorse the introduction of new taxes in the occupied territory (as explained below, the other line of argument is that the necessity test under Article 43 of the 1907 Hague Regulations is applicable to the special rules embodied under Article 48 of the Hague Regulations): H.C. *69 +493/81*, *Abu Aita [or Abu Ita] et al. v. Commander of the Judea and Samaria Region et al.*, 37(2) *Piskei Din* 197, at 254–62; English excerpt in: (1983) 13 *Israel YbkHR* 348; Dinstein (1989), *supra* n. 21, at 119.

[48] Dinstein (1989), *ibid.*, at 120. With respect to the use of a conditional clause, Dinstein argues that this can be explained by "psychological inhibitions" of drafters, namely, their desire to stress what the occupant is disallowed rather than allowed to do, so as to avoid the impression that they gave the occupant an explicit endorsement or even encouragement of collecting taxes: *ibid.*, at 119.

[49] *Ibid.*

[50] *Ibid.*

With respect to the literature developed since the period of World War II, the writings of leading publicists remain divided. Many publicists, such as Debbasch[51] and David,[52] still follow the strict construction of Article 48 of the Hague Regulations and deny the competence of the occupying power to levy new taxes. Similarly, Von Glahn, in his 1957 book, *The Occupation of Enemy Territory*, states that "such a power [to create new and additional taxes] is vested exclusively in the absent legitimate sovereign and not in the temporary belligerent occupant"[53] Along this line, in his written opinion[54] submitted to the Israeli High Court by the petitioners in a series of law suits (so-called *Value-Added Tax Case* Judgment as examined below) in which plaintiffs unsuccessfully challenged the value-added tax imposed in the Gaza Strip and the West Bank, he observes that he "fail[s] to see what considerations of public order and safety are relevant to the creation of new taxes".[55]

In contrast, a large segment of Anglo-American and Israeli academics cautiously endorse the power of the occupant to create new taxes in occupied territory. Yet, they fail to furnish sufficiently articulated, still less elaborated, legal reasoning. Feilchenfeld observes that:

> It is not clear that the occupant may introduce new taxes and custom duties . . . There have been several instances of such practices. Article 48 does not authorize them expressly but they may be justifiable in individual cases under the occupant's power to restore and ensure public order. The revenue laws of an occupied country may provide for inadequate revenue; the amount of revenue produced by any one tax

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[51] Debbasch observes that «[l]a faculté de lever de nouveaux impôts . . . n'est exclue qu'indirectement et *a contrario*, pusique l'occupant ne peut percevoir que ceux déjà etablis au profit de l'État»: O. Debbasch, *L'Occupation militaire – Pouvoirs reconnus aux forces armées hors de leur territoire national* (1962), at 39.

[52] While he does not explicitly mention this, the tenor of his arguments suggests that he excludes the possibility of new taxes: David, *supra* n. 25, at 509–510, para. 2.369. He criticises that "[l]'État hebreu prélève des impôts plus élevés que ceux qu'il prélève sur les territories où il est établi depuis 1948", and that "il sanctionnne très lourdement les contribuables palestiniens et arabes qui ne peuvent payer ces impôts": *ibid.*, at 510, para. 2.371.

[53] Von Glahn (1957), *supra* n. 6, at 150–151.

[54] Von Glahn adds that "[i]f unsuitable conditions in the occupied area required expenditure for order and safety above revenues received from existing taxation, such funds could be raised either by increasing tax rates or by levying money contributions under the provisions of Articles 49 and 51 of the *Regulations*": Israel Supreme Court sitting as High Court of Justice, HC *493/81*, *Omar Abd el-Kader Kandil et al. v. Customs Officers, Gaza District Region et al.*, 37 (2) *Piskei Din* 197; (1987–88) 4 *Palestinian YbkIL* 186 at 199; and G. Von Glahn, "*Obiter Dictum: An Unofficial Expression of Opinion on the VAT Case Judgment", ibid.*, at 210–21.

[55] Supreme Court of Israel sitting as a High Court of Justice, H.C. *69 +493/81, Abu Aita et al. v. Commander of the Judea and Samaria Region and Staff Officer for Customs and Excise*, Judgment of 5 April 1983, (1983) 37(2) *Piskei Din* 197; English excerpt in: (1983) 13 *Israel YbkHR* 348, at 354; and (1987–88) 4 *Palestinian YbkIL* 186.

> may change materially in war time; new needs may call for new revenue; if the occupation lasts through several years the lawful sovereign would, in the normal course of events, have found it necessary to modify tax legislation. A complete disregard of these realities may well interfere with the welfare of the country and ultimately with "public order and safety" as understood in Article 43.[56]

Feilchenfeld's approach suggests two lines of thought. First, a prolonged occupation may enhance justifications for new taxes and customs duties. The second line of reasoning is that such new taxes may be introduced if this is in the public interest in ensuring the welfare of the population. Nevertheless, there is no elaborate legal explanation for such a public-interest (necessity) ground that can be invoked as a special rule under Article 48 of the Hague Regulations.

Even so, Feilchenfeld's second line of reasoning based on the necessity test is endorsed by the US and UK military manuals. Article 426(b) of the *U.S. Army's Field Manual 27–10, The Law of Land Warfare* (1956) states that "[u]nless required to do so by considerations of public order and safety, the occupant must not create new taxes".[57] The 1958 edition of the *UK Manual of Military Law* followed the same approach.[58] However, the 2004 edition of the *UK Manual* is silent on this matter.[59]

As for the case-law, apart from the *VAT* Judgment given by the Israeli Supreme Court, to which an examination will shortly turn, a reference should be made to *Ligabue v. Finanze* case (1952). There an Italian tribunal in Venice recognised the power of creating new taxes, but only in a laconic fashion that discloses no reasoning. It held that "[i]t is the opinion of writers, and it appears, indeed, from the wording of that Article [48], that the obligation to respect so far as is possible the tax system already in force in the occupied territory . . . does not

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[56] Feilchenfeld, *supra* n. 25, at 49, para. 202.

[57] *US Field Manual 27–10, The Law of Land Warfare* para. 426(b). Von Glahn criticises this provision, stating that "[i]t is regrettable that para. 426–b was inserted in *Land Warfare* at all, for if it is interpreted by an occupant as a given permission to create new taxation, it could easily lead to the very abuses that were corrected by the binding provisions of Article 48 of the [Hague] *Regulations*": Israeli Supreme Court sitting as High Court of Justice, HCJ *493/81*, *Omar Abd el-Kader Kandil et al. v. Customs Officers, Gaza District Region et al.*, in: (1987–88) 4 *Palestinian YbkIL* 186, at 199.

[58] This paragraph reads that:

> Unless required to do so by considerations of public order and safety, the Occupant must not create new taxes, as this is the right of the legitimate Sovereign and temporary possession does not confer it. However, as will be seen, he may raise money by way of contributions.

UK Manual (1958) (*The Law of War on Land being Part III of the Manual of Military Law*), at 146, para. 528.

[59] *UK Manual* (2004), at 285, para. 11.31.

disable the Occupying Power from imposing new taxes or abolishing or modifying those already in existence".[60]

In the *Value-Added Tax Case* Judgment,[61] the Supreme Court of Israel ruled that the occupying authorities in the West Bank and the Gaza Strip were entitled to introduce the contested value added tax, akin to the one already in force in Israel. The reason is that the languages of Articles 48 and 49 of the Hague Regulations do not provide an absolute ban on the possibility of instituting new taxes, and that the most that can be said is that the former provision deals specifically with the *collection* of taxes. Further, it was held that even if the general prohibition on introducing new taxes may be recognised under Articles 48 and 49 of the Regulations, the necessity for maintaining the "orderly government" under Article 43 can justify exceptions to such prohibition, and this, without having to classify such taxes under the rubric of "other money contributions" under Article 49. In the Judgment, Justice Shamgar engaged in lengthy examinations. He adverted to the rule found in the US and the UK military manuals, according to which new taxes cannot be instituted unless required by the necessity of public order and safety. While describing this rule as reflecting customary international law, he held that no contrary customary rule existed that would ban the creation of new taxes.[62] Further, he contended that the test of necessity based on public order and safety is relevant to the assessment of the lawfulness of new taxes on the ground that the term "*l'ordre et la vie publics*" encompasses the entire social and economic life of the community.[63]

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[60] Italy, Tribunal of Venice, *Ligabue v. Finanze*, 28 January 1952, 19 *ILR* 616, (1952), Case No. 137, at 617. However, in that case, the Tribunal found that the German exemption orders contravened the law of belligerent occupation, on the ground that it was "effected under colour of the Occupant's power of taxation by particular orders, and creating in effect privileges for individuals prejudicial to the general civil order which the Occupant is bound to maintain": *ibid.*, at 618.

[61] H.C. *69 +493/81, Abu Aita [or Abu Ita] et al. v. Commander of the Judea and Samaria Region et al.*, 37(2) *Piskei Din* 197; English excerpt in: (1983) 13 *Israel YbkHR* 348; and in (1987–88) 4 *Palestinian YbkIL* 186–209.

[62] *Ibid.*, (1983) 13 *Israel YbkHR* 348, at 355–56; and (1987–88) 4 *Palestinian YbkIL* 186, at 193, 195, 198, 201, and 202–203. Justice Shamgar adduced another ground for justifying new taxation. He distinguished ordinary taxation stipulated in Article 48 from money contributions regulated in Article 49 of the 1907 Hague Regulations. He described the latter as the forced collection of funds to cover a direct flow into the coffers of the occupation army, which was lawful, or to exploit the population in violation of the laws of war. He then argued that if it was permissible to levy a contribution, it was *ipso facto* permissible to take a more moderate step of a new taxation: (1987–88) 4 *Palestinian YbkIL* 186, at 194–195.

[63] *Ibid.*, (1983) 13 *Israel YbkHR* 348, at 355–56; and (1987–88) 4 *Palestinian YbkIL*, 186, at 204–207 (Justice Shamgar stating that the passage of time of the military government is determinative of the nature of the necessity: *ibid.*, 205–207).

In relation to the avowed economic benefits of the VAT for the inhabitants as mentioned in this judgment, von Glahn criticises that the Israeli Supreme Court failed to mention the harsh circumstances in which many Palestinians in refugee camps endured their lives in the occupied territory. In view of the dubious nature of the purposes of the contested VAT and of its alleged economic advantages for the civilians in occupied territory, he concludes that this VAT violates both Article 43 of the Hague Regulations and the corresponding customary rule.[64]

The Israeli Supreme Court's legal methodology for recognising the competence to institute new taxes is "the grafting of Article 43 onto Article 48 (and its related clauses)".[65] Admittedly, Articles 48 and 49 as *lex specialis* must in normal circumstances be given primacy over the general rule embodied in Article 43 in interpreting the Hague Regulations. However, according to this methodology, in exceptional circumstances where the test of necessity is invoked, the general rule under Article 43 of the Hague Regulations may supply a basis for necessity exceptions ("to ensure, as far as possible, public order and safety").[66] Dinstein cautiously supports the Court's reasoning in the VAT Judgment. He comments that the methodology of subordinating the general strictures under Articles 48 and 49 to the necessity exceptions concerning the prescriptive power of the occupant under Article 43 "is far from self-evident but it is not incongruous".[67]

In effect, this VAT Judgment has induced Von Glahn himself to change his position on the permissibility of new taxes. In his 6th edition of the book *Law Among Nations* (1992), he refers to the rule embodied in the *US Field Manual 27–10, The Law of Land Warfare*, whereby "unless required to do so by considerations of public order and safety, the occupant must not create new taxes".[68] He observes:

> That view appears to be shared by a majority of governments and of commentators. In view of the fact that "public order and safety" are now considered to include the needs and welfare of the indigenous population under the phrase of "civil life", a new tax may be introduced by a belligerent occupant only if it is designed to clearly further one of two lawful purposes: to meet financial needs of the occupation forces (security and administration) or the needs and welfare of the civilian population of the occupied territory. Any new "national" tax levied

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[64] Von Glahn (1987–88), *supra* n. 54, at 219–220.

[65] Dinstein (1989), *supra* n. 21, at 122–123.

[66] *Ibid.*

[67] Y. Dinstein, "Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peace Building", Program on Humanitarian Policy and Conflict Research, (Harvard University, Occasional Paper Series, Fall 2004), Number 1, at 11. See also *idem* (1989), *supra* n. 21, at 123.

[68] *US Field Manual 27–10, The Law of Land Warfare* para. 426(b).

> without genuinely meeting either purpose would be unlawful under the provisions of Hague Regulations Article 43.[69]

Nevertheless, the type of necessity grounds which can be invoked to justify new taxes is limited to the financial needs of the occupying authorities (security and administration), and to the needs and welfare of the civilian population in occupied territory.[70] It must be submitted that any new "national" tax levied without "genuinely" meeting either of these two purposes contravenes Article 43 of the Hague Regulations.[71]

3.4. *Immunity of Occupation Authorities from Local Tax*

It is generally recognised that an occupying power is exempt from many forms of local taxes. The only exception to this rule arises in a very unlikely event of occupation authorities waiving their sovereign immunity. Apart from local direct taxes, the occupation authorities, by way of an order, may exempt their agencies, personnel and property from indirect taxes, such as excise taxes or indirect sales taxes.[72] In occupied Iraq in 2004, the CPA Order No. 17 specifically provided that:

> The MNF [Multi-National Force], Sending States and Contractors shall be exempt from general sales taxes, Value Added Tax (VAT), and any similar taxes in respect of all local purchases for official use or for the performance of Contracts in Iraq. With respect to equipment, provisions, supplies, fuel, materials and other goods and services obtained locally by the MNF, Sending States or Contractors for the official and exclusive use of the MNF or Sending States or for the performance of Contracts in Iraq, appropriate administrative arrangements shall be made for the remission or return of any excise or tax paid as part of the price. In making purchases on the local market, the MNF, Sending States and Contractors shall, on the basis of observations made and information provided by the Government in that respect, avoid any adverse effect on the local economy.[73]

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[69] G. Von Glahn, *Law Among Nations – An Introduction to Public International Law*, 6th revised ed., (1992), at 795. The issue of taxation is entirely omitted in the new edition: G. von Glahn and J.L. Taulbee, *Law Among Nations – An Introduction to Public International Law*, 8th. Ed., (2007).

[70] Von Glahn (1992), *ibid*., at 795.

[71] *Ibid*.

[72] *Ibid*., at 796.

[73] CPA/ORD/27 June 2004/17, Coalition Provisional Order No. 17 (Revised), Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, Section 10.1.

As Wills notes,[74] three problematic features of this measure can be highlighted. First, it is not clear what is meant by the duty to "avoid any adverse effect on the local economy", much less the modality of supervision based on "observations" and "information" provided by the Government. Second, contractors and international consultants were exempted from taxes on their earnings in Iraq and were declared exempt from Iraqi legal processes.[75] Third, the CPA Order No 17 was conveniently revised on 27 June 2004 in such a manner as to remain in force even after the hand-over of governmental control to the Iraqi Interim Government on 28 June 2004.

4. *Conclusion*

The general principle of good administration of economy and financial matters in occupied territories is again governed by the conservationist principle and the necessity exceptions. The most controversial are the admissibility of instituting new taxes in occupied territories and legal justifications for this. The more prolonged the duration of occupation becomes, the more urgent becomes the need for such new fiscal measures to finance diverging social and economic measures adopted by the occupying authorities pursuant to welfare objectives of inhabitants in occupied territories. In this regard, however, it is essential to be vigilant of any misuse and abusive levying on the part of the occupying power. The danger of abuse based on the amorphous concept of necessity is perhaps even more corrosive and inimical in respect of the power of the occupant to grant concessions to multinational companies for investments, for instance, in areas that were hitherto publicly owned (such as telecommunications and public utilities) and in relation to the exploitation of natural resources.

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[74] S. Wills, "Occupation Law and Multi-national Operations: Problems and Perspectives", (2006) 77 *BYIL* 256, at 296.

[75] CPA/ORD/27 June 2004/17, Coalition Provisional Order No. 17 (Revised), Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, Section 10.2.

Chapter 7

The Prohibition of the Destruction of Enemy Property in Occupied Territory

1. *Introduction*

The prohibition of the destruction of enemy property is a well-established principle in customary law. This can be traced back to the 1794 Jay Treaty,[1] which obliged the US and the UK not to confiscate the other nationals' property even in wartime. Schwarzenberger argues that with respect to the immunity especially of private property from destruction, this principle reflects the Rousseau-Portalis doctrine, according to which war was contemplated as an exclusive state of affairs between belligerent states, which ought to minimise detrimental impacts on private citizens as much as possible.[2] The exception to the general rule on the sacrosanct nature of private property[3] is allowed only where such destruction or seizure is "imperatively demanded by the necessities of war".

Article 23(g) of the 1907 Hague Regulations provides that it is forbidden to destroy or seize the adverse party's property. This provision embodies a general rule on conduct of hostilities,[4] Under the Hague Regulations, this general clause is subject to *lex specialis* as stipulated in Articles 52 and 53 relating to occupied territory. The Hague Regulations 1907 contain no specific rule that prohibits

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[1] Treaty of Amity, Commerce and Navigation between Great Britain and the United States, No. 129, 1794, 52 Consol. T.S. p. 243.

[2] G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Vol. II: The Law of Armed Conflict*, (1968), at 259. See also N. Ando, *Surrender, Occupation, and Private Property in International Law – An Evaluation of US Practice in Japan*, (1991), at 35.

[3] In case of doubt as to the private or public nature of the ownership of property, the presumption is that it is publicly owned until and unless private ownership is established: G. Von Glahn, *The Occupation of Enemy Territory – A Commentary on the Law and Practice of Belligerent Occupation*, (1957), at 179.

[4] E. David, *Principes de Droit des Conflits Armés*, 3rd ed., (2002), at 519.

the occupying power from destroying public or private property of the occupied state. Yet, this can be implicitly derived from the restrictions on its right to appropriate enemy property as provided in Articles 46, 47 and 53.[5] Another methodology is to propose that *certain* rules on conduct of hostilities enumerated in *Section II – Hostilities*, including Article 23(g), should serve as an interpretative aid in filling gaps left by specific rules embodied in *Section III – Military Authority Over the Territory of the Hostile State* of the Hague Regulations, not only in the case of the eruption of small-scale fighting and skirmishes that may be described as (international or non-international) armed conflict, but also in respect of "calm" occupation.

Within the realm of the law of occupation under GCIV, Article 53 reinforces the rule laid down in Article 23(g) of the 1907 Hague Regulations. It broadens the general obligation imposed on the occupying power to prohibit destruction of property. Going beyond the property (real or personal) of protected persons (owned individually or collectively), it covers properties pertaining to the state, or to other public authorities, or to social or cooperative organisations.[6] In that way, Article 53 GCIV bolsters the prohibition of destruction already implicit in Articles 46 and 56 of the Hague Regulations. These provisions require the occupying power to respect private property and the property of municipalities respectively.

As Article 53 GCIV prohibits only "destruction", the occupying power reserves the right to requisition private property. With respect to public property, it is entitled to confiscate any movable property belonging to the occupied State for the purpose of military operations, and to administer real property belonging to that State.[7]

2. *A Scorched Earth Policy*

A so-called scorched earth policy involves the systematic destruction of whole areas by occupying forces in their withdrawing phrase before the arrival of the enemy forces. This is a typical example of conduct of hostilities, but it is relevant to highly volatile states of occupation. It may be suggested that the distinction between the general devastation type which is forbidden and the lawful destruction imperatively demanded by military operations is "one of fact and degree

[5] *Ibid.*
[6] See *ICRC's Commentary to GCIV*, at 301.
[7] *Ibid.*

to be determined in each case".[8] In *the German High Command Trial*, the US Military Tribunal at Nuremberg held that:

> The devastation prohibited by the Hague Rules and the usages of war is that not warranted by military necessity. This rule is clear enough but the factual determination as to what constitutes military necessity is difficult. Defendants in this case were in many instances in retreat under arduous conditions wherein their commands were in serious danger of being cut off. Under such circumstances, a commander must necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to him under such circumstances. What constitutes devastation beyond military necessity in these situations requires detailed proof of an operational and tactical nature.[9]

However, with respect to such a factual evaluation, the nature and scope of the destruction of property must be in stringent proportion to the specific military objectives attainable in the *specific* locality. This policy or practice of scorched earth must be presumed to be unlawful.[10] In the first place, this squarely contravenes

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[8] UK Ministry of Defence, *Manual of the Law of Armed Conflict*, (2004), at 305, para. 11.91.1.

[9] US Military Tribunal, Nuremberg, *The German High Command Trial, Trial of Wilhelm von Leeb and Thirteen Others*, 30 December 1947–28 October 1948, (1949) 12 *LRTWC* 1, at 93–94. See also the *In re von Lewinski (called von Manstein)*, in which the British Military Court at Hamburg held that:

> For a retreating army to leave devastation in its wake may afford many obvious disadvantages to the enemy and corresponding advantages to those in retreat. That fact alone, if the words in this article [Article 23(g) of the 1907 Hague Regulations] mean anything at all, cannot afford a justification. Were it to do so, the article would become meaningless. . . . It is essential that you should view the situation through the eyes of the accused and look at it at the time when the events were actually occurring. It would not be just or proper to test the matter in the light of subsequent events, or to substitute an atmosphere of calm deliberation for one of urgency and anxiety. You must judge the question from this standpoint: whether the accused having regard to the position in which he was and the conditions prevailing at the time acted under the honest conviction that what he was doing was legally justifiable. If, in regard to any particular instance of seizure or destruction, you are left in doubt upon the matter, then the accused is entitled to have that doubt resolved in his favour.

British Military Court, Hamburg, *In re Von Lewinski (called von Manstein)*, 19 December 1949, (1949) 16 *AD* 509, Case No. 192, at 522 (see also *ibid.*, at 511–513). In this case, the evidence proved overwhelmingly against the accused. The Court ruled that "so far from this destruction being the result of imperative necessities of the moment, it was really the carrying out of a policy planned a considerable time before, a policy which the accused . . . was carrying out in its entirety and carrying out irrespective of any question of military necessity": *ibid.*, at 522–523.

[10] *UK Manual* (2004), at 305, para. 11.91.1. See also US Military Tribunal, Nuremberg, *The German High Command Trial, Trial of Wilhelm von Leeb and Thirteen Others*, 30 December 1947–28 October 1948, (1949) 12 *LRTWC* 1, at 93–94; and British Military Court at Hamburg, *In re von Lewinski (called von Manstein)*, 19 December 1949, (1949) 16 *AD* 509, Case No. 192, at 511–513 and 521–523.

the fundamental principle of the protection of property in occupied territory, the violation of which, as discussed below, may call for criminal sanctions based on a grave breach form of war crimes. Second, it may flout the principle of protection of the natural environment in international armed conflict, the importance of which is recognised by the possible criminal sanction as war crimes based on "other serious violations of the laws and customs applicable in international armed conflict" under the ICC Statute. Article 8(2)(b)(iv) of the ICC Statute describes as a war crime the acts of "[i]ntentionally launching an attack in the knowledge that such attack will cause . . . widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated".[11] It might be proposed that since a contravention of these rules relating to the protection of property or environment could involve individual criminal responsibility, the proportionality test must not be scrutinised with too much rigour.[12] However, this consideration does not lessen the presumptive illegality of a scorched earth policy.

3. *Destruction of Property and the Military Necessity Test*

Exceptions to the general rule that prohibits the destruction of property are recognised only where there is imperative military necessity.[13] It is up to the occupying powers to evaluate the importance of such military necessity. This may entail the risk of unscrupulous recourse to exceptional destruction. The *ICRC's Commentary* emphasises the application of the proportionality test, requiring

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[11] This incorporates the rule embodied under Articles 35(3) and 55 of API. Two caveats must be entered. First, no comparable provision for individual criminal responsibility is embodied under the ICC Statute with respect to the acts of attack causing such environmental damage in non-international armed conflict, which includes hostilities arising in occupied territories. Second, this rule requires the effect of environmental damage to be widespread, long-term, *and* severe. This cumulative condition can be compared with a lower threshold for state responsibility under Article 1 of the 1976 UN Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention), which prohibits the military or any other hostile use of environmental modification techniques, whose effect is "widespread, long-lasting or severe".

[12] This point is recognised by Kretzmer in relation to the evaluation of Article 49(6) of GCIV (transfer of the population of the occupying power into occupied territory): D. Kretzmer, "The Advisory Opinion: The Light Treatment of International Humanitarian Law", (2005) 99 *AJIL* 88, at 91.

[13] Article 53 of GCIV recognises an exception to the ban on destroying property "where such destruction is rendered absolutely necessary by military operations". See also *UK Manual* (2004), at 303, para. 11.86.

the occupying power to balance the military advantages to be gained and the extent of damage.[14]

As David notes,[15] the Israeli policy of demolishing houses belonging to a family of Palestinian terrorists in the West Bank and Gaza Strip has been consistently condemned by the UN General Assembly.[16] The ICRC expressed "la vive pré-occupation" concerning such practice, describing it as incompatible with Articles 33 and 53 GCIV.[17] The Israeli Government's explanation was that its owner or tenant was suspected of providing assistance to saboteurs.[18] Kalshoven argues that this practice, which amounts to collective punishment against inmates of the house other than the terrorist suspect,[19] cannot be justified under the rubric of absolute necessity.[20] The UN General Assembly also condemned the practice of Serbian and Croatian forces in Bosnia-Herzegovina,[21] even though it was difficult to pinpoint which areas were occupied territories at the time when such destruction took place. The UN Declaration on the Protection of Women and Children in Emergency and Armed Conflict qualified the destruction of dwellings as "criminal".[22]

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[14] *ICRC's Commentary to GCIV*, at 302.

[15] David, *supra* n. 4, at 519.

[16] See, for instance, General Assembly, A57/207, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, 16 September 2002, paras. 30, 34 and 35; A58/311, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, 22 August 2003, paras. 45–48 and 50.

[17] (1969) 9 *Revue internationale de la Croix-Rouge*, at 98.

[18] See T.S. Kuttner, "Israel and the West Bank: Aspects of the Law of Belligerent Occupation", (1977) 7 *Israel YbkHR* 166, at 218–219.

[19] Such collective punishment or reprisals against civilians is unreservedly prohibited under Article 33 GCIV.

[20] F. Kalshoven, *Belligerent Reprisals*, 2nd ed., (2005), at 320. He argues that this practice might be one of the reasons, additional to the official one, why Israel refused to recognise the applicability of GCIV to its occupied territory: *ibid.*, at 319. He also criticises the absence of a fair and regular trial, which preceded the execution of this punitive measure and which aimed to establish the liability of persons in question, noting that this right was classified as non-derogable under Article 5 of GCIV: *ibid.*, at 320–321.

[21] See, for example, GA Resolution 50/193, *Situation of Human Rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)*, A/Res, 50/193, 11 March 1996, operative paras. 2 and 6; 51/116, 12 December 1996, para. 2; GA Resolution 51/116, *Situation of Human Rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)*, A/RES/51/116, 7 March 1997, operative para. 2; GA Resolution 52/147, *Situation of Human Rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia*, A/RES/52/147, 10 March 1998, operative para. 3.

[22] General Assembly Resolution 3318, (XXIX), 14 December 1974, operative para. 5.

The heart of the problem is that the test of military necessity and its component element of proportionality remain unelaborated and crude in the practice of IHL. Indeed, the application of the proportionality test under Article 53 GCIV has become one of the main controversies surrounding the ICJ's Advisory Opinion on *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In that case, the Court found Israel to have violated Article 53 GCIV in relation to the destruction of private property, ruling that:

> . . . the military exigencies contemplated by these texts [Article 49(1) and 53 GCIV] may be invoked in occupied territories even after the general close of the military operations that led to their occupation. However, on the material before it, the Court is not convinced that the destructions carried out *contrary to the prohibition in Article 53* of the Fourth Geneva Convention were rendered absolutely necessary by military operations.[23]

With respect, this dictum discloses two elements of confusion. In the first place, as Kretzmer notes,[24] the concept of military necessity is inherent and built-in under the rule embodied in Article 53 GCIV. As such no violation or illegality of the destruction of property under this provision can be "pre-emptively" found without at first evaluating whether this concept was applied in a correct manner. In other words, the test of military necessity is not a ground precluding unlawfulness but "an integral part" of the given IHL rule.[25] In the present case, Judge Buergenthal considered that the Court had insufficient evidence to evaluate specific aspects of alleged violations of IHL in its Advisory Opinion, including the lawfulness of the destruction of property.[26]

The second element of confusion, which is incidental to the examinations of the military necessity test constraining the destruction of property, is that it is not clear why the Court mentioned the applicability of the relevant provisions (Articles 49(1) and 53 GCVI) to occupied territory "even after the general close

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[23] ICJ, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 136, at 192, para. 135, emphasis added.

[24] Kretzmer, *supra* n. 12, at 98–99.

[25] This point is also recognised by Greenwood with respect to his comments on the phrase "all feasible precautions shall be taken to ensure their [prisoners of war's] safety" under Article 41(3) API. He states that "the reference to 'all feasible precautions' illustrates that many of the rules of humanitarian law already make allowance for considerations of military necessity. In such cases military necessity does not override the law, it is an integral part of it": C. Greenwood, "Historical Development and Legal Basis", in: D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (1995), 1, at 33, para. 132.

[26] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 136, Declaration of Judge Buergenthal, 240, at 240 and 245, paras. 1 and 10.

of the military operations". Is this not self-evident? These two provisions, which are laid down in Part III, Section III of GCIV, specifically relate to belligerent occupation. The first sentence of the Court's statement quoted above recognises that the test of military exigencies is applicable both during hostilities and in time of occupation. Does this suggest that the Court has not drawn a sharp distinction between the two areas of *jus in bello*, contrary to what it made explicit in the same Advisory Opinion? It must be recalled that the Court stated that "[o]nly Section III [of the Hague Regulations of 1907, which deals with military authority in occupied territories] is currently applicable in the West Bank and Article 23(g) of the Regulations, in Section II [which deals with hostilities], is thus not pertinent".[27] The only possible way to resolve this apparent incongruency is to argue that the Court understood the meaning of the military necessity (or military exigencies) test to be undifferentiated, so that more or less identical meaning is applicable both during hostilities (such as Article 23(g) Hague Regulations) and during occupation (such as Article 53(2) GCIV).[28] It is doubtful whether this assumption is tenable.

The Court reached the conclusion that the wall *as a whole* violates certain basic principles of IHL, including the prohibition of the destruction of property, the conclusion that Judge Buergenthal described as "sweeping". In view of the ample and reliable evidence submitted on detrimental humanitarian and socio-economic impacts of the construction of the wall, the majority of the Court did not feel troubled in examining the merits of the case without obtaining the relevant information and evidence on the side of Israel.[29] Kretzmer criticises the Court's methodology of interpreting the test of military necessity to reach that conclusion. He comments that "[w]hile the damage to property in many, or even most, segments of the barrier may well have been so great as to exclude any possible justification, the presumption that it was so in *all* cases hardly provides a sound basis for a judicial finding that relates to the whole barrier".[30]

Judge Owada, in his separate opinion, stated that even in absence of the information adduced by Israel, "the political, social, economic and humanitarian

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[27] *Ibid.*, at 185, para. 124.

[28] With respect, the ICJ seems to have been confused when referring to the concept of necessity under customary international law, which is embodied under Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Act: *ibid.*, at 195, para. 140.

[29] In that case, Israel was not obliged to produce such evidence, even though it would have been a wise policy decision to do so: *ibid.*, Declaration of Judge Buergenthal, 240, at 245, para. 10. Judge Owada recognised the possibility of unfairness, referring to the absence of evidence and information as to the necessity of the Wall on the side of Israel: Separate Opinion of Judge Owada, *ibid.*, 260, at 268, para. 22.

[30] Kretzmer, *supra* n. 12, at 99–100, emphasis added.

impacts of the construction of the wall, as substantiated by ample evidence supplied and documented in the course of the present proceedings . . . are so overwhelming that . . . no justification based on the 'military exigencies', even if fortified by substantial facts, could conceivably constitute a valid basis for precluding the wrongfulness of the act on the basis of the stringent conditions of proportionality".[31] The implication of Judge Owada's observation is that in case of such an "overwhelming" extent of evidence based on humanitarian considerations, the balance to be struck in assessing the military necessity test swings in favour of the overall illegality predicated on humanitarian considerations. This is a sensible departure from the traditional approach whereby in view of their military expertise, the commanders in the local area are given a benefit of doubt and very generous scope of discretion, for instance relating to the seizure, destruction, confiscation or requisition of property in occupied territory. The evaluation of the Wall as a whole would then be up to the weight of evidence or its cumulative effects. On closer scrutiny, the Court's reasoning was not merely based on the *cumulative* effect doctrine, according to which even if each of the specific acts does not in itself reveal a violation, the effect of these actions as a whole would amount to such a violation. Rather, the Court's assessment is an *overall* approach, without looking at specific details of some segments of the Wall, which might (or might not) satisfy the proportionality requirement. The overall approach is bolstered by the Court's finding that "the construction of the wall and its associated regime 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. (. . .) That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination".[32]

True, the rigorous assessment of proportionality generally requires a more differentiated appraisal of each of the acts in *specific* contexts (or in the present case, of *particular* segments of the wall). In the present writer's view, the overall assessment pursued by the Court in itself is not necessarily unsound as a methodology of proportionality assessment.[33] This is especially the case where the impact of the Wall as a whole on the lives of the many affected Palestinian

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[31] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 136, Separate Opinion of Judge Owada, at 269, para. 24.

[32] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 136, at 184, paras. 121–122.

[33] It must be recalled that in the context of *jus ad bellum*, Israel has often relied on the cumulative effect doctrine ("accumulation of events") to justify its armed reprisals against insurgent forces in Lebanon: Y. Dinstein, *War, Aggression and Self-Defence*, 4th ed., (2005), at 230–231. See also D. Bowett, "Reprisals Involving Recourse to Armed Force", (1972) 66 *AJIL* 1, at 7.

people is found to be compelling on the basis of authentic evidence available before it. In such circumstances, the impact can be considered to neutralise any lawful elements associated with the *specific* segments of the Wall that might otherwise stay within the strict bounds of proportionality.

4. *Extensive Destruction and Appropriation of Property as a Grave Breach of GCIV*

"Extensively" destroying and appropriating property, not justified by military necessity and carried out "unlawfully and wantonly" is a grave breach of the Geneva Conventions[34] and punishable as such, as recognised in Articles 147 and 148 GCIV (and Article 85(2), API). Such extensive destruction or appropriation amounts to a grave breach form of war crimes under the ICC Statute,[35] provided that the *mens rea* requirement of "unlawfulness or "wantonness" is met.[36] In the *Blaskic* case, the Trial Chamber of the ICTY held that:

> An occupying Power is prohibited from destroying movable and non-movable property except where such destruction is made absolutely necessary by military operations. To constitute a grave breach, the destruction unjustified by military necessity must be extensive, unlawful and wanton. The notion of "extensive" is evaluated according to the facts of the case – a single act, such as the destruction of a hospital, may suffice to characterise an offence under this count. . . .[37]

The criminalisation of extensively destroying and appropriating property is of special importance to the objects indispensable to the survival of the civilian population, such as food, agricultural areas, drinking water installations, and supplies and irrigation works, as stipulated in Article 54 API.[38]

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[34] Obviously, such a grave breach of GCIV results in the obligations on all States to try and punish the offender: GCIV, Article 146.

[35] ICC Statute, Article 8(2)(a)(iv). This is a progeny of Article 6(b) of the Charter of the International Military Tribunal at Nuremberg, ("the wanton destruction of cities, towns or villages or devastation not justified by military necessity").

[36] GCIV, Article 147; and API, Article 85(2). See also API, Article 54 (protection of objects indispensable to the survival of the civilian population).

[37] ICTY, Judgment of 3 March 2000, *Prosecutor v. Tihomir Blaskic*, IT-95-14-T, para. 157.

[38] See also API, Articles 35(3) and 55 (protection of environment).

5. *Conclusion*

As Kretzmer notes,[39] the concept of necessity as a general ground precluding unlawfulness cannot be raised against violations of IHL, in that the norms of IHL already incorporate the test of military necessity. In the similar vein, the present writer suggests that reliance on the notion of necessity is excluded because the military necessity test is built into the IHL norms *in general* (if not in all the specific norms). The Report of the ILC of 1980 commented as follows:

> The Commission finally came to consider the cases in which a State has invoked a situation of necessity to justify actions not in conformity with an international obligation under the law of war and, more particularly, has pleaded a situation coming within the scope of the special concept described as "necessity of war". There has been much discussion . . . on the question whether or not "necessity of war" or "military necessity" can be invoked to justify conduct not in conformity with that required by obligations of the kind here considered. (. . .) The principal role of "military necessity" is not that of a circumstance exceptionally precluding the wrongfulness of an act which, in other circumstances, would not be in conformity with an obligation under international law. Military necessity appears in the first place as the underlying criterion for a whole series of substantive rules of the law of war and neutrality, namely, those rules which, by derogation from the principles of the law of peace, confer on a belligerent State the legal faculty of resorting, against the enemy and against neutral States (and against their nationals), to actions which meet the needs of the conduct of hostilities. In relation to those rules . . . what is involved is certainly not the effect of "necessity" as a circumstance precluding the wrongfulness of conduct which the applicable rule does not prohibit, but rather the effect of "non-necessity" as a circumstance precluding the lawfulness of conduct which that rule normally allows. It is only when this "necessity of war", the recognition of which is the basis of the rule and its applicability, is seen to be absent in the case in point, that this rule of the special law of war and law of peace prohibiting certain actions again prevails.[40]

This understanding is reiterated in a succinct manner in the ILC's Text on *Articles on State Responsibility* which was completed in 2001. With respect to the relevance to the laws of war of the concept of necessity (*état de necessité*) under Article 25 of the text, it was stated as follows:

> As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of "military necessity". It is true that in a few cases, the plea of necessity has been invoked to excuse military action abroad, in particular in the context of claims to humanitarian intervention. . . . The same thing is true

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[39] Kretzmer, *supra* n. 12, at 99.

[40] *Report of the International Law Commission on the Work of Its Thirty-second Session*, [1980] *Ybk ILC*, Vol. 2, Part 2, A/CN.4/SER.A/1980/Add.1 (Part 2), at 45–46, para. 27.

> of the doctrine of "military necessity" which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty provisions in the field of international humanitarian law. . . . In both respects, while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations.[41]

The confusion surrounding the continued application of the necessity exception in occupied territories can be explained partly by the argument that the exchange of fires, even that of small scale, in occupied territories may be characterised as a resumption of international armed conflict, or as an initiation of non-international armed conflict. Indeed, the rules concerning the destruction of property straddle the boundaries between the body of rules concerning conduct of hostilities and the body of rules governing occupation. That such boundaries are often blurred in the modern context of occupation can be highlighted in the examination of the distinction between "calm" occupation and "volatile" occupation, the issue which will be undertaken in the Second Part of this monograph.

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[41] J. Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries*, (2002), at 185–186.

Chapter 8

The Prohibition of the Seizure and Use of Public Property in Occupied Territory

1. *Introduction: The Distinction between Private and Public Property*

With respect to the seizure and use of enemy property, the law of belligerent occupation gives primacy to private over public property. In the 1921 Award in *the Cession of Vessels and Tugs for Navigation on the Danube Case*, which involved the confiscation of private property during the First World War, the Arbitrator Hines held that "[t]he purpose of the immunity of private property from confiscation is to avoid throwing the burdens of war upon private individuals, and is, instead, to place those burdens upon the States which are the belligerents".[1] The strict distinction between private and public property under the Hague rules largely reflect the laissez-faire philosophy of the late nineteenth century.[2] Nevertheless, since the Great Depression in the 1920s, the tone of decision-making policies in assessing regulations of economy and property rights in occupied territory has been very much influenced by the idea of a welfare state based on public intervention and joint (public and private) ownerships.

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[1] 2 August 1921, 1 *RIAA* 97, at 107. Hines added that "[i]n cases where a belligerent State has employed private property for military purposes under arrangements whereby the State undertakes to return the property to its owner, the appropriation of the property by the Enemy State would not place the burden of the loss upon the private owner, but would place it upon the owner's State, which would be under an obligation to make compensation to the owner": *ibid.*, at 107–108.

[2] Watts cogently summarises this philosophical ethos of the drafters of the Hague Regulations, noting that "[t]he liberal-minded statesmen and their assistants who drafted The Hague Conventions of 1907 were . . . earnestly concerned to arrive at a clear-cut distinction between private and public property . . .": G.T. Watts, "The British Military Occupation of Cyrenaica, 1942–1949", (1951) 37 *Transactions of the Grotius Society* 69, at 80.

In case there is doubt as to public or private ownership of property found in the occupied territory, such property may be treated as public unless and until it is rebutted by the clear demonstration of its private character.[3] In case both public and private interests in property coexist, the occupying power is entitled to seize or confiscate the property but liable to compensate private individuals as far as the value of their interest is concerned.[4] In this chapter, the appraisal focuses on the seizure and use of only *public* property.

2. *State Property*

2.1. *Overview*

With respect to the property of an occupied state, the Hague law has drawn a distinction between immovable and movable property. Further, it is possible to distinguish between immovable of civilian character and that of military character, albeit this distinction is not expressly provided in the Hague law. Along this line, the UK *Manual of the Law of Armed Conflict* classifies real property of the occupied State into two categories: the real property which is used for military purposes; and that which is essentially civilian in character.[5]

2.2. *Immovable State Property (Land and Buildings) of a Civilian Character*

With respect to immovable state property of civilian character found in occupied territory, Article 55 of the Hague Regulations recognises the occupying power only as administrator and usufructuary of such property, and not as its owner. The application of the Roman law concept of usufruct to state immovable property under the law of belligerent occupation was conceived in the Brussels Conference of 1874, which formulated the original draft of Article 55. This concept was applied by the Franco-Chilean Arbitration Tribunal in the *Guano* case.[6] There, the three Swiss members that formed the tribunal examined the

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[3] The *UK Manual* refers to bank deposits, stores and supplies obtained from contractors as such examples. It also states that in case a public authority possesses property on behalf of a private person, as in the case of private bank deposits in state-owned banks, such property must be treated as private: UK Ministry of Defence, *Manual of the Law of Armed Conflict* [hereinafter referred to as *UK Manual*] (2004), at 304, para. 11.90.

[4] *Ibid.*, at 304–5, para. 11.90.

[5] *Ibid.*, at 303, paras. 11.85–11.86.

[6] The Tribunal held as follows:

> Attendu que l'occupation militaire d'un territoire ennemi entraine incontestablement, suivant les principes du droit des gens, certaines conséquences relatives aux propriétés publiques de l'Etat souverain de ce territoire…; qu'on distingue à cet égard…entre la propriété mobilière de l'Etat ennemi, qui est considérée comme un butin de guerre, et la propriété immobilière,

effect of the Chilean occupation of the Peruvian territory of Tarapaca upon the legal position of the guano deposits in that occupied province. The Tribunal held that if the guano was treated as immovable State property, Chile was entitled as a "usufructuary" to "*les fruits, tant naturels que civils*" of the property. It nevertheless added that until Chile had extracted and appropriated the guano, it remained Peruvian property.[7]

Since Article 55 Hague Regulations is the verbatim reiteration of Article 7 of the Project of an International Declaration concerning the Laws and Customs of War of 1874 (Brussels Declaration), it attracted little discussion at the Hague Peace Conference of 1899. The delegates were satisfied with voting on the Brussels text of this Article, with their focus placed more on a newly inserted Article 54 and other specific elements.[8]

Obviously, real estate (public buildings, land, forests, agricultural estates, and "permanent structures on land and other appurtenants to the real estate") constitutes important state property of civilian character.[9] The occupying powers are required to safeguard the capital of such properties and administer them in harmony with the rules of usufruct. The usufructuary rule prohibits any measure to decrease their value. Stone observes that the power of the occupant as the governing authority *pro tempore* "is measured not by his own needs but by the duty to maintain integrity of the *corpus*".[10] By exercising usufruct, the occupying power is allowed to make both use (*jus utendi*), such as billeting of armies in

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sur laquelle l'occupant exerce tous les droits de l'usufruitier, en faisant siens les fruits, tant naturels que civils; mais qu'en l'espèce la distinction importe peu, parce que les effets de l'occupation relativement aux droit constitués par le Pérou sur le guano seraient identiques, soit qu'on fît rentrer le guano non extrait dans la catégorie des choses mobilières, soit qu'on l'envisageât comme immobilisé par incorporation ou accession au sol;

Attendu en effet, dans la première hypothèse, que l'occupation n'a pu avoir pour effet de transporter immédiatement au Chili la propriété de toutes les choses mobilières appartenant au Pérou dans les territoires occupés; que le Chili acquérait seulement le droit de se les approprier; que jusqu'au moment où il usait effectivement de ce droit, elle ne changeaient pas de maître; qu'ainsi, le Chili n'est devenue propriétaire du guano des gisements occupés qu'au fur et à mesure des actes d'appropriation qu'il a accomplis, le Pérou demeurant dans l'intervalle libre de disposer de ce guano, et par conséquent de le vendre ou de s'engager à le livrer;

Guano case, Award of 5 July 1901, 15 *RIAA* 77, at 367.

[7] *Ibid*., at 367.

[8] A. Mérignhac, *La Conférence internationale de la paix, Étude historique, exégétique et critique des travaux et des Résolutions de la Conférence de la Haye de 1899*, (1900), at 234.

[9] E.R. Cummings, Note, "Oil Resources in Occupied Arab Territories under the Law of Belligerent Occupation", (1974) 9 *J. Int'l L. & Econ.* 533, at 558. The *UK Manual* refers to public buildings, real estates (land), forests, parks, farms, and coal mines: *UK Manual* (2004), *supra* n. 3, at 303, para. 11.86.

[10] J. Stone, *Legal Controls of International Conflict – A Treatise on the Dynamics of Disputes – and War-Law*, (1954), at 714.

buildings owned by the occupied state, and consumption of fruits (*jus fruendi*), such as the crops harvested from agricultural lands pertaining to the occupied state.[11] Similarly, within this usufructuary legal framework, the occupying power is entitled to subject state public buildings and real estate to long-term lease or any other contractual arrangement, which does not lead to the long term alienation or disposal of the property.[12]

Under the usufructuary rule, the title and the ownership of immovable public property do not pass on to the occupants which only acquires possession. The absence of ownership means that the occupying powers are forbidden from selling it.[13] In contrast, the occupying powers are allowed freely to dispose of and to sell fruits, such as crops and mined ores.[14]

2.3. *Immovable State Property (Land and Buildings) of a Military Nature*

With respect to the occupied state's real estate (land and buildings) of a military nature, two views can be contrasted. The first view is to consider that such real estate is regulated by the same rule as embodied in Article 55 of the Hague Regulations. While noting that the list of state owned immovable property is hardly exhaustive, Dinstein argues that this administrator-usufructuary rule should apply to state immovable property even of military use, such as army barracks, airfields and railroads.[15] The second view is to allow occupying powers to exercise greater latitudes of discretion in relation to such State immovable property. Stone argues that during the period of occupation the occupying power is entitled to dispose of real property belonging to the occupied state, which is of military character (forts, arsenals, dockyards, magazines, aerodromes, barracks and railways, canals, bridges, piers and wharves, submarine cables).[16]

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[11] Von Glahn notes that "[i]n accordance with Roman law (*ususfructus est jus alienis rebus utendi, fruendi, salva rerum substantia*) the occupant is obliged to respect the substance, the capital, of the enemy public property but is entitled to its use and to complete control over the product or proceeds arising out of the property in question": Von Glahn, *The Occupation of Enemy Territory* (1957), at 176–177.

[12] M.J. Kelly, "Iraq and the Law of Occupation: New Tests for an Old Law", (2003) 6 *YbkIHL* 127, at 158.

[13] Y. Dinstein, "The International Law of Belligerent Occupation and Human Rights", (1978) 8 *Israel YbkHR* 104, at 129. See also Von Glahn (1957), *supra* n. 11, at 178.

[14] Von Glahn (1957), *ibid.*, at 177. The *UK Manual* recognises that the occupying power, while not enjoying the right of disposal or sale, may let or use such public land and buildings, or make transactions of the fruit of the land, such as selling crops, cutting and selling timber and exploiting mines: *UK Manual* (2004), *supra* n. 3, at 303, para. 11.86.

[15] Dinstein (1978), *supra* n. 13, at 129.

[16] Stone, *supra* n. 10, at 714. Along this line, the *UK Manual* recognises that the occupying power is at liberty to dispose of real property that appertains to the occupied state and has been used for military purposes. Such real property encompasses supply depots, arsenals, dockyards and

According to him, the Hague rules on occupation leave the question open, enabling the occupying power to damage or destroy such property in the interest of the military occupation.[17] Clearly, the standard of military necessity that would exceptionally allow destruction of state property which is of military nature under Article 53 of GCIV becomes less stringent than that of the necessity test applicable to immovable state property of a civilian character.

2.4. *Movable State Property*

As for the status of governmental movable property, Article 53(1) of the Hague Regulations contemplates that occupation armies may take possession of two types of movable property. The first type involves financial assets, encompassing cash, funds, and realisable (negotiable) securities which are strictly the property of the occupied state. The second type relates both to the movable property that is susceptible to military use in nature, and to the property that is for dual use (civilian and military). It covers depots of arms, means of transport, stores and supplies and, generally, all movable property belonging to the state, which may be used for military operations. Article 53(2) of the Hague Regulations stipulates that the occupying power may seize such movable property as appliances designed to transmit news or to transport persons or goods, and all kinds of munitions of war. Apart from the two types of state movable property, the occupying power is allowed to seize taxes, dues and tolls imposed in the occupied territory, as recognised in Article 48 of the Hague Regulations. As discussed in the section on taxes and contributions, collecting public revenue and taxation will engage the liability of the occupying power to bear the expenses of administering the occupied territory.[18]

The wording of Article 53 of the Hague Regulations suggests that the occupying forces may obtain title to such movable properties as expressly mentioned in that provision. Schwarzenberger argues that in terms of legal effects, the treatment of movable state property in occupied territory is little distinguishable from that of such property captured or found on a battlefield, which becomes legitimate objects of war booty.[19] In contrast, in *Public Prosecutor v. N.*, which concerned

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barracks, as well as airfields, ports, railways canals, bridges and piers: *UK Manual* (2004), *supra* n. 3, at 303, para. 11.85.

[17] Stone, *ibid.*, at 714.

[18] *UK Manual* (2004), *supra* n. 3, at 304, para. 11.88.

[19] G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. II: *The Law of Armed Conflict* (1968), at 310. See also *ibid.*, at 293. Dinstein follows this argument: Dinstein (1978), *supra* n. 13, at 130. In the *Mazzoni* case, the Court of Venice correctly distinguished war booty based on the Roman law concept from pillage which was strictly forbidden

a theft of a bicycle belonging to the State of the Netherlands shortly after the German occupation during World War II, the Dutch Supreme Court held that "the occupant does not become the owner of those means of conveyance by the sole fact of occupying the area concerned, but is only entitled to appropriate them by taking possession of them".[20] Along this line, the *UK Manual of the Law of Armed Conflict* restrains the latitudes of the occupant to dispose of movable state property. It notes that to obtain its ownership, the occupying power must make actual appropriation of public movable property, going beyond mere occupation of it.[21]

Several additional comments can be made. First, the list of movable property of which an occupying army can take possession is very comprehensive, leaving little scope of any movable State property that is immune from seizure. The only movable property that must be free from possession by occupying forces is limited to the type of property not enumerated in this provision and of little military use (namely, of little service to military operations even *indirectly*),[22] such as non-military books and artistic work.[23] Second, the reference to "all movable property…which may be used for military operations" under Article 53(1) of the 1907 Hague Regulations raises the question whether the occupant seizing the movable state property is required to use it only for military purposes (as opposed to commercial ends). Cummings strictly construes this phrase and confines disposal of such movables only for the purpose of military operations.[24] In contrast, Dinstein favours a wider scope of discretion of occupants, arguing that even when occupying forces sell movables belonging to occupied State, the proceeds from the sale may be used to defray the cost of military personnel or equipment.[25] In his view, reference to realisable securities susceptible to seizure

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under Article 47 of the 1907 Hague Regulations. It stated that the former were things left by the other belligerent, which could be appropriated and used for war purposes: the Court of Venice, *Mazzoni v. Ministry of Finance*, 8 January 1927, (1927–28) 4 *AD* 564, Case No. 384, at 564–565.

[20] Holland, Supreme Court, *Public Prosecutor v. N.*, 26 May 1941, (1919–42) *11 AD Supplementary*, Case No. 162, 296.

[21] *UK Manual* (2004), *supra* n. 3, at 304, para. 11.881.

[22] A.V. Freeman, "General Note on the Law of War Booty", (1946) 40 *AJIL* 795, at 798.

[23] *Ibid.*, at 799.

[24] In the light of the case-law following World War II, Cummings concludes that "even the property that is least protected under the law of belligerent occupation – property that may be appropriated under Article 53(1) of the Hague Regulations – may not be appropriated if the intention of the occupying power is to exploit that property for commercial purposes": Cummings, *supra* n. 9, at 576–577.

[25] Dinstein (1978), *supra* n. 13 at 131. However, he does not provide any rationale for this view, merely observing that such narrow interpretation is not corroborated in the text of Article 53(1) of the 1907 Hague Regulations.

under Article 53(1) is an implicit recognition that the occupants are allowed freely to sell governmental movables to ameliorate their financial burden during the war.

2.5. *Debt*

The wording "realisable securities" used in Article 53 of the 1907 Hague Regulations is a translation of the authentic French expression *valeurs exigibles*.[26] According to Von Glahn, this English translation has resulted in a confusion of the terms "debts" and "securities".[27] It may be questioned whether or not the expression "realisable securities" under Article 53 of the Hague Regulations should encompass debts of all kinds owed to an occupied State.[28] Inquiries need to be made into whether, and if so, to what extent, the occupying power is authorised to appropriate "realisable securities" which are strictly the property of the occupied state.

There is little disagreement over the occupant's entitlement to appropriate specie, paper money, and bullion belonging to the occupied country in accordance with Article 53(1) of the Hague Regulations.[29] Issuing paper money in particular has been widely recognised as lawful insofar as this is pursuant to the needs of the occupation forces or of the civilian population in occupied territory.[30] More vexatious, however, is the question of the right of the occupant to

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[26] Article 53 of the 1907 Hague Regulations in the authentic, French text reads:

> L'armée qui occupe un territoire ne pourra saisir que le numéraire, les fonds et les valeurs exigibles appartenant en propre à l'Etat, les dépôts d'armes, moyens de transport, magasins et approvisionnements et, en général, toute propriété mobilière de l'Etat de nature à servir aux opérations de la guerre.

See *Recueil Général des Lois et Coutumes de la Guerre, terrestre, maritime, sous-marine et aérienne*, (1943), at 276.

[27] Von Glahn (1957), *supra* n. 11, at 158.

[28] *Ibid.*, at 156–159. See also Dinstein (1978), *supra* n. 13, at 131.

[29] Freeman, *supra* n. 22, at 802.

[30] This practice, which can be even traced back to the American War of Independence, is fully anchored in state practice, including the practice of the Confederate States during the US Civil War, the British practice during the Transvaal war, and the Japanese practice during the Russo-Japanese War, as well as the practice of both sides during the First and Second World Wars: C. Rousseau, *Le droit des conflits armés* (1983), at 147, para. 96. In the absence of specific rules in the 1907 Hague Regulations, the national courts have justified this measure on the basis of general principles of international law (albeit providing little specific reasoning) and of the concept of military necessity. See, for instance, Philippines, Supreme Court, 9 April 1948, *Haw Pia v. China Banking Corporation*, (1951) 18 *ILR* 642, Case No. 203, at 642–661; and *Gibbs et al. v. Rodríguez et al.*, 3 August 1949 and 21 December 1950, (1951) 18 *ILR* 661, Case No. 204, at 661–677 (concerning the power of Imperial Japan as the occupant to issue currency during World War II). *Contra*, see Burma, High Court, *Ko Maung Tin v. U Gon*

collect debts owed to the occupied state when these are evidenced by written instruments such as bonds, negotiable instruments and similar securities, or ordinary debts not so evidenced.[31]

Von Glahn contends that insofar as an occupying power enjoys only *de facto* governmental power without possessing any legal title to them, it cannot collect debts owed to the legitimate government. According to him, it cannot even reduce such debts, waive them entirely, or influence their status in any manner or by any method.[32]

In contrast, other commentators consider that the occupying power is entitled to collect all debts and monetary demands owed to or collectible by the displaced, legitimate sovereign, on condition that they have matured or fallen due during the period of belligerent occupation.[33] Writing in 1915, Meurer maintained that:

> Der Besetzende ist mangels staatsrechtlicher Sukzession natürlich nicht verpflichtet, die Ansprüche des Privaten an die Staatskasse zu befriedigen. Umgekehrt aber darf er die eintreibbaren Forderungen des Staates an Private, gleichgultig, ob sie öffentlich- oder privatrechtlich sind, auf Grund ausdrücklicher Gleichstellung mit den Wertbeständen für sich einziehen. *Er kann darnach die Leistung fälliger Geldschulden an den feindlichen Staat verbieten und verlangen, daß an ihn selbst bezahlt werde*.[34]

Similarly, Huber recognises the authority of the occupying power to collect interest payable during the occupation on debts owed to the absent sovereign. According to him, the occupant is also entitled to confiscate for its own benefit

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Man, 3 May 1947, (1947) 14 *AD* 233, Case No. 104; and *U Hoke Wan v. Maung Ba San*, 26 August 1947, (1947) 14 *AD* 235, Case No. 105, at 235–236 (finding that Japan exceeded in its competence in issuing a system of paper money parallel to that issued by the "lawful" British government in Burma). See also Burma, Supreme Court, *Dooply v. Chan Taik*, 29 June 1950, 18 *ILR* 641, Case No. 202, at 641–642 (citing approvingly *Ko Maung Tin v. U Gon Man*).

[31] Freeman, *supra* n. 22, at 802.

[32] Von Glahn (1957), *supra* n. 11, at 156.

[33] See the view taken by older writers, as cited in: Von Glahn (1957), *supra* n. 11, at 160, n. 29 (referring to Alfred Verdross and Alphonse Rivier).

[34] C. Meurer, *Die völkerrechtliche Stellung der vom Feind besetzten Gebiete*, (1915), at 51, emphasis added (footnote omitted). The English translation of this passage reads as follows:

> The occupying power is, in the absence of succession under constitutional law, naturally not obliged, to satisfy the claims of the private person on the state treasury. Conversely, however, the occupant may collect the recoverable claims of the state against a private person, irrespective of whether these claims are made under public or private law, on the basis of express parity with stable value. It [the occupant] can accordingly prohibit the payment of due debt to an enemy state and demand that this must be paid only to him.

Translation into English by the the present writer.

certain limited categories of debts under Article 53 of the Hague Regulations, such as interest-bearing securities held by the enemy state and sight drafts.[35]

A similar line of reasoning has been taken by the writings of many publicists since the Second World War. Freeman contends that bearer instruments pertaining to the legitimate sovereign may be appropriated as booty by the occupying power. Yet, he delimits the scope of such authority of the occupying power, arguing that it may not sell securities payable to the occupied government. The reasoning is that the occupying power is not the legal successor to the legitimate government and hence is incapable of passing title to such securities.[36]

Feilchenfeld recognises the occupant's entitlement to collect debts which are owed to the occupied country, insofar as they have become due (*dettes exigibles*). He argues that the right of seizure granted to the occupying power is tantamount to the entitlement to collect and appropriate all *dettes exigibles*. Feilchenfeld refers to two arguments to support this assumption. First, the occupying power must ensure that outstanding debts are properly collected as part of their duty to maintain law and order. Second, once such debts are collected, the proceeds become state funds *strictu sense*, which in turn become liable to seizure and subject to contribution levies.[37] This argument must, however, be distinguished from the understanding, which is false, that the occupying power may be assimilated to a successor state on this matter.[38] As Feilchenfeld notes,[39] the right of the occupying power to seize and dispose of debts represented entirely by tangible

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[35] Huber observes as follows:

> Le droit de butin s'applique aux *valeurs*, c'est-à-dire aux droits de créance, qui sont reconnus par écrit sur un titre et qui donnent au titulaire le droit de toucher des intérêts ou des dividendes périodiques, et, en générale aussi, de recevoir le remboursement du capital ou une part de l'actif; tels son les obligations, actions, titres de rente, effets de commerce et autres valeurs analogues. Ces objets, à la vérité, ne sont pas expressément mentionnés dans les articles 53 des Règlements de la Haye; mais il faut sans nul doute les comprendre parmi les <<fonds>> (*funds, Wertbestände*) ou parmi les <<valeurs exigibles>> (*realizable securities*).
>
> . . .
>
> L'occupant peut indubitablement se mettre en possession de ces valeurs. Il peut détacher les coupons échus et les encaisser conformément aux règles qui régissent les créances échues. Il peut de même se faire rembourser les titres échus et les titres payables à vue. Il peut employer à sa guise argent qu'il se sera procuré de cette façon.

M. Huber, «La propriété publique en case de guerre sur Terre», (1913) 20 *RGDIP* 657, at 669–670 (emphasis in original). See also *ibid.*, at 664–665.

[36] Freeman, *supra* n. 22, at 802.

[37] E.H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (1942), at 65.

[38] *Ibid.*

[39] Feilchenfeld argues that bearer certificates, such as bearer bonds and bearer shares, may be deemed debts, the treatment of which can be assimilated to that of tangible assets: *ibid.*, at 66.

property, such as bearer bonds, may be readily recognised on the basis of Article 53 of the Hague Regulations.[40]

Apart from debts owed to the occupied state, examinations are needed as to debts owed by the occupied state. As discussed above, the occupying power is entitled to collect taxes to defray administration of the occupied territory. It may then be asked whether the duty of defraying expenses under Article 48 of the Hague Regulations encompasses the obligation to pay all debts owed by the occupied state.[41]

With respect to private deposits with state banks and public treasuries, and public savings banks, the occupying power is under no obligation to assume such debts with its own assets.[42] While private property is given protections against confiscation and repudiation, no such safeguard exists against unpunctual payment or defaults as a consequence of the impoverishment of the debtor through contributions or other financial measures imposed by the occupying power.[43] In relation to pensions and unemployment payments, Feilchenfeld considers it doubtful that they can be included under necessary administrative expenses.

As regards expenses relating to real estate seized by the occupying power, the occupant is obliged to defray current expenses while administering such property. Implicit support for this obligation can be found in Article 55 of the Hague Regulations, which requires the occupant to "safeguard the capital of these properties".[44] While this provision does not mention an obligation to pay debts, if debts are not paid, then creditors would demand and exercise the right to attach the property. Surely, such possibility may not be feasible in occupied territory. Until necessary amounts are collected by taxation or contributions, an

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[40] Huber takes the view that Article 53 of the 1907 Hague Regulations applies only to bearer bonds and shares, as the occupant is not a successor. He observes that while an occupant may sell bearer bonds akin to tangible property, s/he cannot validly sell other bonds as s/he is not a successor. His cogent assessment is worth citing here:

> En ce qui concerne la vente du titre, considéré comme support de la créance-capital, on doit distinguer les titres au porteur dont la propriété peut se transmettre par tradition et les titres nominatifs et à ordre. Pour les premiers, il faut admettre le même principe d'acquisition de la propriété que pour les choses corporelles. Mais tout autre doit être la solution en ce qui touche les titres nominatifs ou à ordre: l'aliénation de titres par l'occupant ne saurait avoir d'efficacité, car l'occupant est un simple possesseur et non pas le successeur juridique de son adversaire: pas plus qu'il ne peut escompter des créances non exigibles, il ne peut accomplir d'autres opérations juridiques qui supposent qu'il s'est substitue à la personne du précédent ayant-droit.

Huber, *supra* n. 35, at 664–665.

[41] Feilchenfeld, *supra* n. 37, at 67–68.

[42] *Ibid.*, at 68.

[43] *Ibid.*

[44] *Ibid.*, at 69.

impoverished occupying power may wish to prevent creditors from attaching the property on the basis of "safeguarding the capital", or arguing that its right of possession under Article 55 prevails over conflicting private claims.[45]

Further, with respect to debts contracted by the occupant, it must be recalled that Article 55 of the Hague Regulations strictly requires the occupying power to act as an administrator and usufructuary and to safeguard the capital of these properties. This seems to exclude the possibility of any new debt contracted by the occupant. Feilchenfeld[46] seems to follow this reasoning, averring that "an occupant cannot validly burden the treasury of the occupied state with new debts".[47] More unambiguously, Von Glahn maintains that an occupying power, as a mere *de facto* authority and not a *de jure* authority, may not contract new debts on behalf of the occupied territory,[48] or collect taxes to pay interest on such unlawful debt.[49]

3. *Special Categories of Property*

3.1. *Overview*

Article 56(1) of the Hague Regulations fictitiously classifies the property of municipalities, and that of institutions dedicated to religion, charity and education, the arts and sciences, even when pertaining to the property of enemy state, as private property. This provision essentially relates to three categories of public property: first, the property of local governments; second, property of civilian hospitals and civil defence, as indicated in the wording "institutions dedicated to . . . charity"; and third, property of educational, scientific and cultural institutions, including historical monuments, works of art and science. Falling within the third category of property are such institutions as places of worship (churches, mosques, temples, synagogues, shrines etc.), schools, universities, museums and the like.[50]

Dinstein[51] describes the three categories of property under this fictitious rule as "extraordinary property", which is subject to rules distinguishable from ordinary private properties. Article 56(2) of the Hague Regulations furnishes two

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[45] *Ibid.*

[46] *Ibid.*, at 69–70.

[47] *Ibid.*, at 69, para. 269.

[48] Von Glahn (1957), *supra* n. 11, at 159, n. 34.

[49] *Ibid.*, at 159.

[50] Compare this provision with API, Article 85(4)(d), which provides that it is a grave breach of API wilfully to make internationally recognised historic monuments, works of art or places of worship the object of attack , and to cause their extensive destruction.

[51] Dinstein (1978), *supra* n. 13, at 132–134.

distinct rules applicable to these three categories of "private" property. First, it is forbidden not only to destroy or wilfully to damage such property, but also to seize such property. Second, the High Contracting Parties must ensure that any breach of this rule will be made the subject of legal proceedings.

Due to its distinct and elaborate legal framework, the issues relating to the protection of cultural property in occupied territory will be dealt with in Chapter 10. Further, the protection of *movable* cultural property in occupied territory will be examined in Chapter 9. The appraisal in this section concentrates on property of local governments, civil hospitals, and the property of civil defence.

3.2. *Property of Municipalities*

Article 56 of the 1907 Hague Regulations originates from Article 8 of the Brussels Declaration of 1874. From the drafting records of the Brussels Conference, the phrase "the property of municipalities" (or "*les biens des communes*" in the authentic French text)[52] under Article 56 of the 1907 Hague Regulations should be understood as suggesting communal property dedicated to public ends such as archives, public records or land registry, regardless of their ownership.[53] What matters most is "the non-military nature of such properties and the outstandingly worthy causes to which they are dedicated".[54] Other properties owned by municipalities or any other local authorities are classified as "ordinary private property".[55]

3.3. *Civilian Hospitals*

The words "institutions dedicated to . . . charity" under Article 56 of the Hague Regulations include civilian hospitals. On this matter, as Dinstein notes,[56] the general rule embodied in this provision is now slightly modified by the specific rule under Article 57 of GCIV. The occupying power can requisition them, but this power can be exercised only temporarily and in cases of urgent necessity for the care of military wounded and sick. In addition, in order for requisitions to be lawful, suitable arrangements must be made to accommodate civilian patients. Further, the occupying forces are forbidden from requisitioning the material and stores of civilian hospitals insofar as they are necessary for the needs of the civilian population.

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[52] A.P. Higgins, *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War – Texts of Conventions with Commentaries*, (1909), at 244 and 250.

[53] W.M. Franklin, "Municipal Property under Belligerent Occupation", (1944) 38 *AJIL* 383, at 390–392 and 395–396.

[54] *Ibid.*, at 391.

[55] Dinstein (1978), *supra* n. 13, at 133.

[56] *Ibid.*, at 132.

The occupying power's capacity to requisition civilian hospitals is given more elaborate treatment under Additional Protocol I. The general rule is that the occupying power is not allowed to requisition civilian medical units, their equipments, their *matériel*[57] (and the services of their personnel). Requisitioning them remains prohibited, so long as these equipments and *matériel* are necessary for either of the two purposes: (i) providing adequate medical services to the civilian population; and (ii) ensuring continuing medical care of any wounded and sick already under treatment.[58] Akin to the debate on the concept of necessity used to claw back human rights, the occupying power may be given some leeway in assessing the rigour of the term "necessary". Nevertheless, it is essential to avoid risk of requisitions based on a lax criterion. The *ICRC's Commentary on API* suggests that any requisition that "manifestly jeopardize" any of the two aforementioned purposes in a medical sense should be forbidden.[59]

Exceptionally, requisitions may be recognised where three conditions are met. First, resources are necessary for the adequate and immediate medical treatment of the wounded and sick members of the armed forces of the occupying power, or those of captured prisoners of war. The elements of immediacy and adequacy are inserted to tighten the leeway of the occupant.[60] Second, this exceptional requistion is allowed only so long as medical necessity continues to exist throughout the period of requisition. Third, immediate arrangements must be made to ensure that medical needs of the civilian population, and those of any wounded and sick under treatment, continue to be satisfied.

3.4. *Property of Civil Defence*

Requisition of the property belonging to civil defence organisations is governed under Article 63 API. The occupying power is forbidden from requisitioning, or diverging from their proper use, buildings or *matériel* belonging to or used by civil defence organisations, where such requisition or diversion would be harmful to the civilian population.[61] The prohibition of diversion means that the occupant is forbidden from using the objects belonging to civil defence bodies

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[57] The *matériel* includes not only surgical instruments, medication, but also linen, food and any other objects indispensable for the proper functioning of the unit: *ICRC's Commentary to API,* at 183, para. 587.

[58] API, Article 14(2).

[59] *ICRC's Commentary to API*, at 184, para. 591.

[60] The term "immediate" suggests that the material resources of the civilian hospital must be used without delay to treat wounded and sick soldiers or prisoners of war. On the other hand, the word "adequate" demands that requisitioned objects correspond to the medical needs of such soldiers and prisoners of war: *ibid*., at 186, at para. 598.

[61] API, Article 63(4).

for purposes other than that intended. Further, the occupying power cannot secure them to meet needs of occupying forces or administration.

Nevertheless, the effect of these two forms of prohibition is attenuated by the qualifying clause "if such diversion or requisition would be harmful to the civilian population". Hence, exceptionally, the occupying power is allowed to take measures of requisition or diversion with respect to the property of civil defence organisations. It must, however, evaluate any adverse impact of such diversion or requisition on civilians throughout the period while this takes place.[62]

The occupying power's capacity to requisition property of civil defence bodies is further circumscribed by two cumulative conditions. First, the buildings or *matériel* requisitioned or diverted from their proper use must be necessary for other needs of the civilian population. Second, such requisition or diversion is allowed only when there is continuing need for the property.[63] The second condition suggests that diverted or requisitioned goods no longer necessary to meet needs of the civilian population must be restored to the civil defence body, even if they are not essential for its task. As the *ICRC's Commentary* notes, the requisitioned goods that were initially made to serve the interests of the civilians cannot be allocated to a different use.[64]

Moreover, it is absolutely forbidden to divert or requisition shelters needed by, or provided for the use of, the civilian population in occupied territory.[65] As the draft records show, this prohibition covers all shelters available to the civilian population, public or private.[66] With respect to private shelters, primacy must be given to the need of the civilian population in occupied territory, with due account taken of means and methods of air raids.

3.5. *Property Permanently Assigned to Civil Defence Organisations under Military Command*

Slightly different rules apply to the *matériel* and buildings of military units permanently assigned to civil defence organisations and exclusively devoted to the performance of civil defence tasks. The occupying power (and any other belligerents) must not divert such *matériel* and buildings from their civil defence

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[62] *ICRC's Commentary to API*, at 756, paras. 2525–2530.

[63] API, Article 63(5).

[64] *ICRC's Commentary to API*, at 756, para. 2531. Note that the 1972 draft text contained more stringent conditions, which were based on the urgent need for requisition and its temporary nature: *O.R.*, Vol. XII, at 123, CDDH/II/SR.65, para. 35.

[65] API, Article 63(6).

[66] The applicability of Article 64(6) to *private* shelters can be defended on the ground that a separate paragraph has been inserted to relate solely to shelters, which do not always fall under the responsibility of civil defence bodies: *ICRC's Commentary to API*, at 758, para. 2537.

purpose while they are required for such tasks.[67] Article 67(4) API stipulates that such *matériel* and buildings are governed by the "laws of war", which no doubt refer to the Hague Regulations of 1907. As examined elsewhere in detail, this means that such movable or immovable property must be free from pillage. It must not be destroyed or seized, unless such destruction or seizure is imperatively demanded by the necessities of war. In contrast, the occupant may seize movable property of the enemy state as war booty, without need of restitution or compensation.[68] As concerns immovable property assigned to civil defence organisations under military control, this may be used by the occupant acting as an administrator and usufructuary.[69] In that sense, the occupying power may use both movable and immovable objects of such civil defence bodies as they fit.

The discretion of the occupant to divert the objects from their proper use must be delimited by either of the following three conditions. First, diversion of such objects must be demanded by an "imperative military necessity". Second, the objects must no longer be essential for performing civil defence tasks. Third, if the objects are still necessary for the civil defence tasks, arrangements must be made to ensure adequate provision for the needs of the civilian population.[70] These three conditions largely correspond to those embodied in Article 14 API relating to the limitations on the requisition of civilian medical units. The difference is that in the latter context, the conditions are cumulative rather than disjunctive, with the occupant accorded a much narrower scope of leeway. In the context of the objects assigned to civil defence organisations under military command, the susceptibility of such objects to requisition can be moderated by the requirement that a proper balance must be struck between military advantages anticipated and the injury to the civilian population.[71]

4. *Exploitation of Natural Resources*

4.1. *General Rules*

It is generally agreed that the usufructuary rules laid down in Article 55 of the Hague Regulations applies to natural resources, so that the occupying power is not allowed to exploit consumption of such resources in a manner that undermines

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[67] API, Article 67(4).

[68] Hague Regulations (1907), Articles 23(1)(g), 28, 47, 53(1) and 56.

[69] Hague Regulations (1907), Article 55.

[70] Note that while Article 67(4) of API does not use a conjunctive "and" or "or", the list of these conditions can be interpreted in a disjunctive ("or") manner: *ICRC's Commentary to API*, at 803, para. 2760.

[71] *Ibid.*, at 804, para. 2764.

the capital.[72] This underlying assumption has led the majority of the publicists to take the view that the occupying powers are forbidden both from exploiting a mine at a rate more rapid than the previous level of production,[73] and from opening mines that were not in use prior to occupation.[74] Leigh comments that the usufructuary is disentitled to open new mines and to exploit them even at a reasonable rate.[75] In contrast, McDougal and Feliciano observe that "[a]s a practical matter, the applicable specific prohibitions are simply that the occupant may not wantonly dissipate or destroy the public resources and may not permanently (i.e. for the indefinite future) alienate them (*salva rerum substantia*)".[76] The policy-oriented approach of McDougal and Feliciano is to qualify the usufructuary rule, to the effect that Article 55 of the Hague Regulations proscribes only the wanton dissipation of natural resources.

Whichever position on the effect of usufuctuary principle under Article 55 Hague Regulations is taken, there has been abundance of state practice flouting the core of this general principle. During the First World War, the German Governor General in Belgium established the Central Coal Office, which set prices and organised distribution, but mainly to the benefit of the German war effort.[77] The International Military Tribunal at Nuremberg, when confronted with issues of wholesale economic exploitation of occupied territories during the Second World War, decided not to define the war crime of "plunder of public or private property"[78] by reference to specific provisions of the Hague Regulations (such as Article 47 which prohibits pillage). Instead, the approach of the Tribunal was to provide in general terms "the outside limits of permissible

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[72] Dinstein (1978), *supra* n. 13, at 129.

[73] M. Leigh, "Department of State Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez", (1977) 16 *ILM* 733, at 737 and 740; and Von Glahn (1957), *supra* n. 11, at 177. Fauchille refers to the French protocol annexed to the additional Convention of 1871, according to which the French government refused to give recognition of any legal validity to the alienations of the felled trees, which were consented to during the Franco-Prussian war: P. Fauchille, *Traité de droit international public*, Vol. II, *Guerre et Neutralité*, (1921), at 254, para. 1182. See also the judgment of La Cour de Nancy of 3 August 1872, which declared null the Prussian army's sale of oak trees in the forest in the Meurthe and the Meuse to the bankers in Berlin. The occupant was held to be in excess of the annual rate of cutting: Dalloz, *Rec. pér.*, 72, 2, 229; as cited in: Fauchille, *ibid.*, at 254, para. 1182.

[74] Leigh, *ibid.*, at 737.

[75] *Ibid.*, at 737.

[76] M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order*, (1961), at 812–13.

[77] M. Ottolenghi, "The Stars and Stripes in Al-Fardos Square: The Implications for the International Law of Belligerent Occupation", (2003–2004) 72 *Fordham L.Rev.* 2177, at 2190.

[78] Charter of the International Military Tribunal (Nuremberg), August 8, 1945, Article 6(b).

economic exploitation" of occupied territories by belligerent occupants.[79] In the *Krupp* case, after referring to the general restrictions on economic exploitation by belligerent occupants, the Tribunal held that:

> The Articles of the Hague Regulations . . . are clear and unequivocal. Their essence is: if, as a result of war action, a belligerent occupies a territory of the adversary, he does not, thereby, acquire the right to dispose of property in that territory, except according to the strict rules laid down in the Regulations.[80]

Clearly, the prohibition on pillaging as embodied in Article 47 of the Hague Regulations and Article 33 GCIV encompasses duties of a positive nature. In the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the ICJ affirmed that Uganda, as the occupying power in the Ituri region in the Democratic Republic of Congo, had to take adequate measures to ensure that the Uganda Peoples' Defense Forces (UPDF) whose actions it held to be imputable to Uganda did not engage in looting, plundering and exploitation of natural resources in occupied territory. It stressed that the duty of preventing the looting, plundering and exploitation of natural resources in the occupied territories is extended to cover private persons, including commercial entities.[81]

Among natural resources in occupied territory, exploitation of oil in state practice has been one of the most contentious issues for the interpretation of Article 55 of the Hague Regulations. One vexatious question is whether crude oil lying underground should be classified as immovable property. It must be noted that other natural resources such as coal, mineral and guano[82] need to be extracted from rocks or soils before they can be treated as movables. Dinstein favours assimilation of oil into movable property.[83] His reasoning is that contrary

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[79] Schwarzenberger, *supra* n. 19, at 250. See also B.M. Claggett and O.T. Johnson Jr., "May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?", (1978) 72 *AJIL* 558, at 580.

[80] US Military Tribunal, Nuremberg, *In re Krupp* and Others, Judgment of 30 June 1948, (1948) 15 *AD* 620, Case No. 214, at 622. See also the Clagett and Johnson, *ibid*., at 584, and the post-World War II cases cited in n. 126.

[81] ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, paras. 245–249.

[82] See the *Guano* case (1901), in which the Franco-Chilean Arbitration Tribunal held that irrespective of whether the guano, which had yet to be extracted from the soil, was classified as movable or immovable property, the occupation could not justify a seizure of the guano. It also ruled that if the guano was to be treated as Peru's movable state property, Chile was, by way of occupation, given only the right to appropriate the guano: *Guano* Case, award of 5 July 1901, 15 *RIAA* 77, at 367.

[83] In that way, he appears to justify the Israeli practice of oil exploitation in Sinai and Gulf of Suez, the territories that Israel occupied after the Six-Day War in 1967.

to coal, which needs to be extracted from rock, there is no profound distinction between oil already pumped on the ground and oil as exists in a liquid state underground, which can be ready for use by mere drilling.[84] Similarly, the *UK Manual*, without making a distinction between crude oil underground and that pumped on the ground, treats oil as movable property within the meaning of Article 53 of the Hague Regulations, which may be subject to temporary seizure (and to restoration to the owners when peace is made).[85]

However, most commentators[86] and the case-law[87] follow the reasoning that oil in the ground is an "immovable" property, just as are appurtenances to real estate generally. Indeed, even in relation to the oil pumped into artificial reservoirs on the ground, there remains controversy over their status as movable property.[88]

While being appurtenant to the real estate, the immovable such as growing crops can be classified as movables once severed from the land. Yet, as Cummings notes,[89] the difficulty of applying the domestic (civil) law concept of usufruct by analogy to international law is that in the case of belligerent occupation, if the occupying power does not have a right to the immovable, then it would not be entitled to sever that immovable to transform it into a movable, which might be characterised as *munitions de guerre*.

In *N. V. de Bataafsche Petroleum Maatschappij v. The War Damage Commission* (1956), the Court of Appeal in the then British colony of Singapore ruled that crude oil in the ground was "immovable" property.[90] It held that the Japanese Imperial Army's seizure of oil resources in the East Indies during the Second World War contravened the requirement of laws of occupation on two grounds. First, this seizure was designed "not merely for the purpose of meeting the requirements of an army of occupation but for the purpose of supplying the naval, military and civilian needs of Japan, both at home and abroad".[91] As such it constituted a form of systematic plunder, as formulated by the Nuremberg Tribunal in relation to blatant examples involving German industrialists, such

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[84] Dinstein (1978), *supra* n. 13, at 130.

[85] *UK Manual* (2004), *supra* n. 3, at 301, at para. 11.81.1.

[86] Cummings, *supra* n. 9, at 557–558; and Leigh, *supra* n. 73, at 735.

[87] See Singapore, Court of Appeal, *N.V. de Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission*, 13 April 1956, 23 *ILR* 810.

[88] Dinstein (1978), *supra* n. 13, at 130.

[89] Cummings, *supra* n. 9, at 558–559.

[90] Singapore, Court of Appeal, *N.V. de Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission*, 13 April 1956, 23 *ILR* 810, at 822 and 824. (*per* Whyatt C.J.). See also Cummings, *ibid*., at 557 (citing this case with approval).

[91] Singapore, Court of Appeal, *N.V. de Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission*, 13 April 1956, 23 *ILR* 810, at 821 (*per* Whyatt C.J.).

as the cases of *Flick and Others*,[92] *Krupp*,[93] and *Krauch*.[94] Second, at any event, the crude oil in the ground was not classified as "*munitions de guerre*" within the meaning of Article 53 of the Hague Regulations, as it was an immovable raw material.[95] The Court took the view that as a general rule, Article 53 of the Hague Regulations was purported to apply only to movables. Only in case of things that may appertain, in part, to the realty, as in the case of "appliances for the transport of persons or things" referred to in the second paragraph of this provision, is it possible exceptionally to expand the concept of *munitions de guerre* to include immovables.[96] Before becoming of any use, crude oil requires extraction from underground reservoirs, transportation to a refinery, and then a complicated refining process. Hence, the crude oil in the ground was not considered to have "a sufficiently close connexion with direct military use to bring it within the meaning of 'munitions-de-guerre' in Article 53".[97] This case also raises the question whether an underground oil reservoir pertaining to *private* persons is classified as *munitions de guerre* within the meaning of Article 53(2). This issue will be dealt with in the next chapter concerning private property.

In relation to the Israeli exploitation of oil fields in the Sinai Peninsula, many publicists argue that Israel violated Article 55 of the Hague Regulations, on the ground that it was exploiting the economic resources of an occupied territory mainly for the purpose of domestic consumption, going far beyond the level necessary to meet the expenses of occupation.[98] Cummings observes that "[b]ecause of the unanimity in the Roman law, civil law, and common law on the issue of exploiting mineral resources under the concept of 'usufruct' (as used in Article 55 of the Hague Regulations), it can be concluded that an occupying power does not have a right to exploit oil from an area such as the West Bank where oil resources were not exploited prior to commencement of the occupation".[99] In contrast, Gerson, while applying a distinctly policy-oriented set of arguments, supports the Israeli policy. He argues that as a usufructuary in the territorial sea, Israel was obliged to ensure that "the corpus of the ousted power's territory temporarily in its possession" should be conserved, and that

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[92] United States Military Tribunal, Nuremberg, *Flick and Others*, 22 December 1947, (1949) 9 *LRTWC* 1; and (1947) 14 *AD* 266, Case No. 122.

[93] US Military Tribunal, Nuremberg, *Krupp and Others*, 30 June 1948, (1949) 10 *LRTWC* 69; (1948) 15 *AD* 620, Case 214.

[94] US Military Tribunal, Nuremberg, *Krauch and Others (I.G. Farben Trial)*, Judgment of 29 July 1948, (1949) 10 *LRTWC* 1; (1948) 15 *AD* 668, Case No. 218.

[95] Singapore, Court of Appeal, *N.V. de Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission*, 13 April 1956, 23 *ILR* 810, at 822 (*per* Whyatt C.J.).

[96] *Ibid.*, at 823.

[97] *Ibid.*, at 823.

[98] Clagett and Johnson Jr., *supra* n. 79, at 584–85; and Ottolenghi, *supra* n. 77, at 2190.

[99] Cummings, *supra* n. 9, at 565.

the exploitation of previously unexploited oil fields is lawful under Article 55 of the Hague Regulations, provided that this enhances the value of the occupied territory.[100]

As briefly mentioned above, one of the controversies relates to the legality of extracting oil at rates going beyond the previous average rates. Many take the view that such extraction would be at variance with the fundamental objective of the usufructuary rule. In contrast, another strand of argument is that insofar as such accelerated extraction can enhance the value of the occupied territory, this must be regarded as lawful.[101] It may be argued that the usufrutuary rule vested in Article 55 of the Hague Regulations allows the occupying authorities to employ innovative technologies and oil field engineering practices to maximise resource recovery.[102] Indeed, Langenkamp and Zedelis go so far as to suggest that "even complete and exhaustive utilization of finite resources in some identifiable deposits could be preferable to inefficient, quick-and-dirty tapping of such resources on a haphazard and widespread basis".[103]

A number of important questions arose in relation to the exploitation of Iraqi oil after the war in 2003. These include the permissible rate of oil production and concessions given to private companies, and the extent to which the proceeds from the sale of oil need to be used for the benefit of the Iraqi population under Article 55 of the Hague Regulations as modified by the principle of self-determination of peoples.[104] With specific regard to the rates of production of Iraqi oil during the occupation, Paust criticises that "an occupying power cannot engage or participate in 'privatization' of Iraqi oil or the state-owned oil production and distribution industry and must not tolerate rates of extraction beyond prior 'normal' rates of extraction or excessive fees or profits by others administering such properties".[105] In contrast, Langenkamp and Zedalis unconvincingly suggest that Iraq's abundant oil reserves and explorations of new wells would help replenish oil resources when the occupation was to be ended, dispelling the concern over the diminution (or even depletion) of the total amount of recoverable oil.[106]

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[100] A. Gerson, "Off-Shore Oil Exploration by a Belligerent Occupant: The Gulf of Suez Dispute", (1977) 71 *AJIL* 725, at 732–733.

[101] Gerson argues that the exploration of new oil deposits in the occupied sea areas in the Gulf of Suez can enhance the value of the Gulf waterway while not impairing the permanent corpus and the value of the occupied territory: *ibid.*, at 732.

[102] R.D. Langenkamp and R.J. Zedalis, "What Happens to the Iraqi Oil?: Thoughts on Some Significant, Unexplained International Legal Questions Regarding Occupation of Oil Fields", (2003) 14 *EJIL* 417, at 424–425.

[103] *Ibid.*, at 424.

[104] For analysis, see, *ibid.*

[105] J.J. Paust, "The United States as Occupying Power over Portions of Iraq and Special Responsibilities under the Laws of War", 27 *Suffolk Transnational Law Review* (2003) 1, at 12–13.

[106] Langenkamp and Zedalis, *supra* n. 102, at 427 and 429.

Nevertheless, they contend that the production at rates above pre-existent regulatory limits imposes an onus on the occupying power to establish that the excessive rate conforms to the optimising resource production without hampering the capacity to recover from the reservoir.[107]

4.2. *The Impact of the Principle of Self-Determination of Peoples upon the Rules on Exploitation of Natural Resources in Occupied Territory*

Of special relevance to considerations of exploitation of resources in occupied territory is the implication of the principle of self-determination on economic aspects. A series of UN General Assembly resolutions have provided rules that depart from those derived from occupation law relating to the exploitation of natural resources. In line with emerging legal concepts of permanent sovereignty over natural resources,[108] and new international economic order,[109] Article 16 of the *Charter of Economic Rights and Duties of States* (1974)[110] provides that:

> It is the right and duty of all States, individually and collectively, to eliminate colonialism, *apartheid*, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination, and the economic and social consequences thereof, as a prerequisite for development. States which practice such coercive policies are economically responsible to the countries, territories and peoples affected for the restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and peoples. It is the duty of all States to extend assistance to them.
>
> No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force.[111]

These resolutions should not be interpreted as overhauling the Hague rules on belligerent occupation.[112] Even so, it is at least clear that the investments in occupied territory to exploit natural resources must be carried out in a manner

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[107] *Ibid.*, at 428.

[108] This concept was recognised in UN General Assembly Resolution 1803 (XVII) of 14 December 1962, albeit there is no reference to occupation in this resolution. For analysis of this, see A. Anghie, *Imperialism, Sovereignty and the Making of International Law*, (2005), at 216; and I. Brownlie, "Legal Status of Natural Resources in International Law (Some Aspects)", (1979–I) 162 *RdC* 245, at 262.

[109] See J.N. Bhagwati (ed.), *The New International Economic Order – The North-South Debate*, (1977); R.J. Dupuy (ed.), R.-J. Dupuy (ed.), *The New International Economic Order – Commercial, Technological and Cultural Aspects, Workshop* The Hague, 23–25 October 1980, (1981); J. Makarczyk, *Principles of a New International Economic Order: A Study of International Law in the Making*, (1988).

[110] This is contained in General Assembly Resolution 3281 (XXIX) of 12 December 1974.

[111] See also Article 5 of the General Assembly Resolution 41/128 of 4 December 1986 containing the *Declaration on the Right to Development.*

[112] E. Benvenisti, *The International Law of Occupation*, (1993), at 187.

that does not divest the people in that territory of the effective exercise of their rights to development and self-determination in economic matters. As concerns the exploitation organised by the Coalition Provisional Authority (CPA) in occupied Iraq in favour of the multinational companies connected to the Coalition States,[113] the crucial litmus test derived from the right of self-determination of the Iraqis is to ensure that the Iraqis would not be deprived of the substantial gains of such exploitation.

5. *Conclusion*

The foregoing assessment demonstrates that the law of occupation, fostered by the prevailing laissez-faire theory in the nineteenth century, has accorded public property in general less privileged position than private property. Fictitiously categorising three genres of property of public or quasi-public nature (the property appertaining to municipalities, institutions dedicated to education, religion, culture and science, and to civilian hospitals and civil defence organisations) as private property allows these distinct genres to be given special protections in occupied territories. With regard to the exploitation of natural resources, the underlying rationale of the usufructuary rules embodied in Article 55 of the Hague Regulations is bolstered by the principle of self-determination of peoples, which is geared towards maintaining natural resources in occupied territories.

[113] Paust expresses special concern over a contract given to Halliburton, a US company, to control and operate both the Iraqi oil fields and the distribution of oil: Paust, *supra* n. 105, at 12–13. *Contra*, Langenkamp and Zedalis, *supra* n. 102, at 434. They argue that "… the occupant would be permitted to rely on the talent and supplies of companies of its nationality, so long as the selection was economically sound, made in good faith, and not somehow inuring to the occupant's 'own enrichment'". Their argument was partly on the basis that "an obligation to arbitrarily diversify contractors and suppliers by nationality or otherwise simply does not appear in international law".

Chapter 9

Private Property in Occupied Territory

1. *Introduction*

As discussed, the laissez-faire philosophy that constitutes one of the rationale underpinnings of the Hague Law explains the primacy given to the protection of private property over that of public property in occupied territory. Article 46 of the 1907 Hague Regulations lays down the general requirement of respecting private property in occupied territory.[1] More specifically, an occupying power is forbidden from confiscating private property in occupied territory.[2] The special importance attached to the notion of private property, which includes commercial rights, can be illustrated in the *Lighthouses Arbitration* (1956) between France and Greece. There, the main issue was whether Greece, as an occupying power during the Balkan Wars, was obliged to pay lighthouse dues to a French company that had been granted a concession by the Ottoman Porte in 1860, even in relation to ships that were requisitioned pursuant to the Greek war effort. Invoking Article 46 of the Hague Regulations, the Tribunal ruled that Greece was liable to pay the dues for ships under her flag in Turkish waters, on the ground that the rights under the concession contract were acquired rights of the private company, which were to be respected under the law of belligerent occupation, and hence opposable to the occupying power.[3] It must, however, be noted that despite its sacrosanct nature, the Hague Regulations envisage certain restrictions on private property. Along the line suggested by Dinstein,[4] this sub-section classifies three categories of private property: immovable property; movable property; and taxes and contributions. Each will be closely examined in sequence.

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[1] Hague Regulations (1907), Article 46(1).

[2] Hague Regulations (1907), Article 46(2).

[3] *Administration of Lighthouses Arbitration, (France v. Greece)*, Award of 24/27 July 1956, (1962) 12 *RIAA* 155, at 201–202.

[4] Y. Dinstein, "The International Law of Belligerent Occupation and Human Rights", (1978) 8 *Israel YbkHR* 104, at 134–140.

2. *The Prohibition of Pillage*

Pillage in occupied territory is absolutely prohibited under Article 47 Hague Regulations[5] and Article 33(2) GCIV. Dinstein defines pillage as "robbery or theft of property by individual soldiers for their own private ends".[6] It applies both to private and public property. It is forbidden to commit not only pillage through individual acts, but also collective, organised or state-sponsored pillage in a manner that would make wholesale treatment of enemy property as war booties to be distributed among soldiers.[7] The collective form of pillage was massively carried out by Germany and the USSR in Europe and by Japan in East Asia during the Second World War. Article 33(2) GCIV expands the scope of application of this rule to include both occupied territories and territories of the parties to the conflict.

3. *Temporary Use of Immovable Private Property*

3.1. *Overview*

Under the Hague Regulations, contrary to privately owned movables which are subject to detailed rules, there is no express reference to *immovable* private property in occupied territory. The general principle is that under no circumstances and conditions, immovable private enemy property may be appropriated by an occupying power (or by any invading belligerent).[8]

Article 52 of the Hague Regulations deals only with requisitions in kind[9] (and services). *Prima facie*, the use of private *immovable* property is not regulated under this provision. Nevertheless, many publicists have claimed that the right of the occupant to requisition *immovable* property for temporary use is unhindered.

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[5] See also Article 28 of the Hague Regulations (1907), which is specifically applicable as part of the rules on conduct of hostilities.

[6] Dinstein, *supra* n. 4 at 128.

[7] *ICRC's Commentary to GCIV,* at 226. Rousseau refers to the practice of the USSR which, after its invasion in Manchuria in violation of the neutral treaty between USSR and Japan, seized all the Japanese enterprises located in Manchuria as war booty in 1946. This practice was contested by the US (notes of 9 February 1946) and by China, which regarded it as exceeding the notion of war booty understood in the practice of international law: (1946) 40 *AJIL* 584; and C. Rousseau, *Le droit des conflits armés* (1983), at 164–165, para. 104.

[8] L. Oppenheim, *International Law – A Treatise, Vol. II, Disputes, War and Neutrality*, 7th edition (edited by H. Lauterpacht, 1952), at 403, para. 140.

[9] Lauterpacht/Oppenheim defines requisition in kind as "the demand for the supply of all kinds of articles necessary for an army, such as provisions for men and horses, clothing, or means of transport": *ibid.*, at 409, para. 147.

Two approaches have been suggested. The first approach is very straightforward. It can be contended that Article 52 covers the requisition of immovable private property. Schwarzenberger takes the view that the requisitions in kind under Article 52 encompass the temporary use of land.[10] Nonetheless, he adds that "any unauthorised interference" with private property would amount to unlawful confiscation under Article 46.[11] The question remains as to the boundaries between an unauthorised interference with private land or buildings, which amounts to confiscation prohibited under Article 46 on one hand, and the temporary use of such private immovable property on the other. It ought to be noted that the temporary requisition of private land or buildings, which serves as a pretext for semi-permanent dispossession of the property and *de facto* transfer of title to the occupant, is tantamount to confiscation.

In the second place, it may be suggested that though the material scope of application under Article 52 of the Hague Regulations is restricted to requisitions of movable property (and of services), the seizure of property may be justified under Article 46. Along this line, Hersch Lauterpacht observes that while Article 52 of the Hague Regulations relates only to *movables*,[12] the prohibition on confiscation in Article 46(2) does not apply to "the temporary use of private…buildings for all kinds of purposes demanded by the necessities of war."[13] Yet, he argues that by way of analogy, the use of immovable private property is governed by rules relative to requisitions under Article 52, including the requirement of payment of cash or a receipt.[14] The occupant must pay "compensation" for the use of the private immovable property in a manner *analogous* to the requisition of private movable property.[15] As examples of lawful temporary requisition of private land and buildings, Lauterpacht/Oppenheim refer to the possibility that, akin to utilisation of public buildings, immovable private property may be converted into hospitals, barracks, and stables without

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[10] G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals,* Vol. II: *The Law of Armed Conflict,* (1968), at 245–246. He claims that "*Ratione materiae*, the emphasis in seizure and requisition [under Articles 53 and 52 of the 1907 Hague Regulations, respectively] is on movables but, in the case of requisition, the wording of Article 52 is sufficiently wide to include immovables": *ibid.*, at 269.

[11] *Ibid.*, at 266.

[12] Oppenheim, *supra* n. 8, at 403, at 411–412, para. 147 (referring to the quartering of soldiers in private houses as "a special kind of requisition in kind").

[13] *Ibid.*, at 403, para. 140.

[14] *Ibid.*, at 411–412, para. 147.

[15] Dinstein, *supra* n. 4, at 134. See also Oppenheim, *ibid.*, at 411–412, para. 147. Oppenheim/Lauterpacht do not refer to the term "compensation". They note that commanders are not obliged to pay the prices requested by the inhabitants, but that they can fix the prices, on condition that "they shall be fair": *ibid.*, at 412, para. 147.

compensation for the proprietors.[16] They also refer to the quartering of soldiers in the houses of private inhabitants in occupied territory as "a special kind of requisition".[17] These inhabitants may be ordered to furnish lodging and food for them, (and stabling and forage for their horses!) as a special kind of requisition which is implicitly governed by Article 52 of the Hague Regulations.[18]

Other experts recognise the requisition of private immovable property for *temporary* use, without, however, adducing elaborate legal reasoning for such a power.[19] Von Glahn observes that "[u]nder normal circumstances an occupant may not appropriate or seize on a permanent basis any immovable private property but on the other hand a temporary use of land and buildings for various purposes appears permissible under a plea of military necessity".[20] Whichever approach is followed, it must be emphasised that the compensation only for the use of private immovable property does not give the occupants title to that property. Hence, they are disentitled to sell it.[21]

In the Advisory Opinion on *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ found that Israel flouted Articles 46 and 52 of the Hague Regulations.[22] As discussed elsewhere, the Court followed a formalistic approach and drew a sharp distinction between rules governing the conduct of hostilities on one hand and those relating to occupation on the other. The Court excluded the application of the former category of rules, including Article 23(g) that prohibits destruction and seizure of property unless the test of imperative military necessity is satisfied. Kretzmer[23] criticises

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[16] *Ibid*., at 403–404, para. 140.

[17] *Ibid*., at 411–412, para. 147.

[18] *Ibid*., at 411.

[19] *ICRC's Commentary to GCIV,* at 301; G. Von Glahn, *The Occupation of Enemy Territory – A Commentary on the Law and Practice of Belligerent Occupation*, (1957), at 186. Gasser argues that "seizure of land may be only temporary". He implicitly allows the requisition of private land for temporary duration under Article 46(2) of the 1907 Hague Regulations. This can be inferred *a contrario* from his reference to the general principle embodied under that provision, according to which "[a]ll private property shall be protected from *permanent* seizure": H.-P. Gasser, "Protection of the Civilian Population", in: D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, (1995), Ch. 5 209, at 261–262, emphasis added.

[20] Von Glahn, *ibid*., at 186.

[21] Lord McNair and A.D. Watts, *The Legal Effects of War*, 4th ed., (1966), at 394. They note that this marks a contrast to the cases of a valid requisition under Article 52 of the 1907 Hague Regulations, which generally entail a legal effect of enabling the occupant to acquire a good title to the requisitioned property: *ibid*.

[22] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 136, at 189, para. 132. See also the separate opinion of Judge Higgins, *ibid*., 207, at 213, para. 24.

[23] D. Kretzmer, "The Advisory Opinion: The Light Treatment of International Humanitarian Law", (2005) 99 *AJIL* 88, at 98.

the Court's reasoning to reach this conclusion, arguing that it failed to examine the distinction between confiscation prohibited under Article 46 on one hand, and the temporary requisition of land and buildings which may be justified for needs of the occupation army under Article 52 on the other. As he notes, there is some incoherence in the Court's reasoning. While referring to the absence of any qualifying phrase under Article 46 of the Hague Regulations, the Court did not mention the qualifying phrase "needs of the army of occupation" under Article 52. It seems that the Court in the *Wall* case started with the premise that *all* instances of the taking of property from inhabitants by the Israeli authorities in the affected part of the occupied West Bank amounted to confiscation as prohibited under Article 46 Hague Regulations.[24] Its underlying assumption is that *all* these instances are not of temporary nature, despite the Israeli Government's insistence that they remain so,[25] but are tantamount to *de facto* semi-permanent deprivation of property, even when done so against payment. Because Article 46 does not allow any derogation, it is considered unnecessary to evaluate needs of the occupation army or any other security considerations, the evaluation that would otherwise be required under Article 52 of the Hague Regulations. At the same time, by reference to Article 52, which allowed derogation in case of military necessity, the Court focused more on the actual destruction done on some segments of private property, rather than on the act of seizure and temporary requisition or confiscation of them. It is in the light of such circumstances that the Court's apparent failure to examine the conditions for Article 52 should be understood. Admittedly, this still leaves incongruency as to the "gap" between the Court's finding of a violation of Article 52 and its failure to undertake any examinations of the lawful conditions for requisition of land under that provision.

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[24] With respect to the Court's finding of a violation of Article 53 GCIV in relation to the destruction of property, Kretzmer, referring to the criticism of Judge Thomas Buergenthal, contends that the Court's judgment on the test of military necessity was made without sufficient evidence: *ibid*., at 99; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* separate opinion of Judge Thomas Buergenthal, ICJ Rep. 2004, 136, at 240–241, para. 3.

[25] The ICJ stated that "[w]hilst the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature, it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudge the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access": *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* ICJ Rep. 2004, 136, at 184, para. 121. For Israel's argument that the contested wall remains of temporary nature, see *ibid*., at 182, para. 116.

3.2. *Justification for Requisitioning Private Immovable Property for Temporary Use: "Needs of the Army of Occupation" or "Imperative Military Necessity"?*

It is clear that the test of imperative military necessity serves to curb an abuse by the commander in ordering temporary use of private land and buildings. The *UK Manual* allows temporary requisitions of private immovable property on the basis of the military necessity test. It recognises that land and building may be used temporarily for the needs of the occupying forces. However, it attaches a stringent condition that such temporary requisition must satisfy the test of imperative military necessity.[26] Subject to meeting this stringent test, inhabitants may be evicted for quartering troops. The occupying army may even clear private land and buildings to open up a field of fire or the materials used for bridges, roads or fuel.[27]

Many experts who recognise the requisition of private land for temporary use do not refer to a specific provision of the 1907 Hague Regulations (Article 46 or 52) as a legal basis for this power. Nor does the *UK Manual* provide any elaborate reasoning for incorporating the test of imperative military necessity. Two approaches can be suggested to justify the introduction of the military necessity test: first, the approach of importing into Article 52 the qualifying phrase "imperative military necessity" ("*empêchement absolu*") used in Article 43; and second, the interpretation of the term "needs of the army of occupation" so flexibly as to encompass a wider range of security and military interests than its textual language suggests. However, the first approach poses the question whether it is a sound interpretation to introduce the term and condition associated with a *lex generalis* into the reading of a *lex specialis* under Article 52. The second ground contradicts the explicit wording of Article 52, which limits the legitimate purpose that can be adduced to justify requisition in kind only to the needs of the occupying army.

Nevertheless, the application of the general test of imperative military necessity may be justified if one considers that the specific legal basis for the temporary

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[26] According to the *UK Manual,* the notion of imperative military necessity covers needs relating to quartering, construction of defensive positions, observation or reconnaissance, for the accommodation of the wounded and sick: the *UK Manual* (2004), at 300–1, para. 11.79. In such circumstances, the occupying forces must ensure that impediments to private lives of the inhabitants should be minimum, so that the inhabitants should be given notice and facilities to take essential baggage. Even in case items are taken from unoccupied buildings for military purposes, a note should be left to that effect: *ibid*.

[27] According to the *UK Manual* (2004), owners of property may claim neither rent nor compensation. The only thing that the occupying power must do is to ensure that a note of the use or damage should be kept or given to the owners for providing evidence to support their claim for compensation when this becomes available at the close of hostilities: *ibid*., at 300, para. 11.78.

requisition of private land and buildings rests in the *a contrario* reading of Article 46(2) of the 1907 Hague Regulations. It may not be unsound to interpret that the implicit power derived from a specific rule embodied in Article 46(2) can be subordinated to the general test of military necessity. This methodology is premised on two grounds. In the first place, the power of a commander to order temporary requisition of private land and buildings can be implicitly derived from Article 46(2). This provision forbids confiscation, namely, the permanent taking of private immovable property with the transfer of a title to it. Confiscation can be distinguished from requisition of private immovable property, which must intrinsically be of a temporary nature and which allows the occupant only to obtain the possession of such property, but not the title to it.[28] Temporary requisition of land and buildings can be defended, subject to the stringent condition that it does not serve as a pretext for a permanent deprivation of property. In the second place, Article 46(2) makes no reference to any qualifying phrase, such as needs of the occupation army or the broader notion of military necessity.

Clearly, the needs of the occupying forces constitute a ground narrower than the concept of "imperative military necessity". Similarly, Kretzmer[29] recognises the difference in the scope of application *ratione materiae* of these two terms. In the *Beth El* case, the Israeli Supreme Court did not distinguish between the two grounds, approximating the narrow military needs of the army to the wider security grounds of the state, as contemplated in the test of imperative military necessity.[30] To justify this approximation, the Supreme Court held that the legitimate objective of safeguarding public order and security as provided in Article 43 of the 1907 Hague Regulations can be *ipso facto* required for the needs of the army of occupation. However, great care must be taken in importing the condition used in the general rule under Article 43 into a specific rule under Article 52. Such special care is all the more necessary because a curtailment of the rights of private property is at stake. Another implicit rationale adduced by the Israeli Supreme Court in that case is to understand that the term "needs of the army of occupation" is inserted in Article 52 to emphasise the point that requisitioned property in occupied territory must not be diverted and exploited for the war economy of the occupying power.[31] In that connection, the Court

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[28] Kretzmer (2005), *supra* n. 23, at 98.

[29] *Ibid*., at 97–98.

[30] HC *606/78* and HC *610/78, Ayoub [or Sulayman Tawfiq Ayyub] et al. v. Minister of Defense et al.* (*Beth El Case*); and *Jamil Arsam Matawa and Others v. The Minister of Defence et al*.; 33(2) *Piskei Din* 113 (*per* Landau D.P.); English excerpt in: (1979) 9 *Israel YbkHR* 337; and M. Shamgar (ed.), *Military Government in the Territories Administered by Israel 1967–1980*, (1982), 371, at 391–392.

[31] Schwarzenberger follows this line of reasoning: Schwarzenberger, *supra* n. 10, at 270.

refers to Oppenheim's *International Law* (7th edition by H. Lauterpacht).[32] However, neither Oppenheim's treatise nor the Supreme Court's judgment touches upon the drafting records of Article 52.

The approach of reading "needs of the army of occupation" so broadly as to include whole military necessities and security considerations has been criticised by several experts.[33] Be that as it may, in the subsequent cases (*Elon Moreh* and *Cooperative Society*),[34] the Israeli Supreme Court itself seems to have abandoned this approach, narrowing down the material scope of "needs of the army of occupation" within the meaning of Article 52 of the Hague Regulations. It stressed that security grounds must not include the national, economic, or social interests of the occupying power, or national security needs in a broad sense. However, in a further twist, the Supreme Court, in the later *Beit Sourik*

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[32] Oppenheimer/Lauterpacht seems to suggest this argument, referring to the practice of exploitation in breach of Article 52 of the 1907 Hague Regulations pursued by the German occupying forces in Belgium and part of France during the First World War: Oppenheim, *supra* n. 8, at 410, para. 147, n. 2.

[33] Gasser, *supra* n. 19, at 262 (arguing that the extension of the concept of security as an exception to the guarantee of property is "excessive", in view of its effect of nullifying the guarantee of property). In the same vein, Kretzmer critically comments on the dictum of the Israeli Supreme Court in the *Beth El* case, arguing that:

> Because the main function of any army is defense of its own country, the Court was on firm ground in holding that the "needs of the army of occupation" should indeed include needs connected with defense of the occupying power's country. This does not mean, however, that all actions taken to further the security interests of the occupying power may be regarded as needs of the army of occupation. As the Court's view on the security function of civilian settlements reveals, adopting the broader view paves the way for actions that are incompatible with the occupying power's fundamental duty not to use the occupation as a means of acquiring territories by use of force…

D. Kretzmer, *The Occupation of Justice: the Supreme Court of Israel and the Occupied Territories*, (2002), at 83.

[34] In the *Elon Moreh* case, the Israeli Supreme Court ruled that "the military needs referred to in that Article [Article 52 of the 1907 Hague Regulations] cannot include, on any reasonable interpretation, national-security needs in the broad sense": H.C. *390/79, Mustafa Dweikat et al., v the Government of Israel et al.* (*Elon Moreh* Case), 34(1) *Piskei Din* 1; excerpted in: (1979) 9 *Israel YbkHR* 345; and Shamgar (ed.), *supra* n. 30, at 404–441, at 422, at 404–441, at 422 (*per* Landau D.P.). In the *Cooperative Society* case, Barak J. considered it one of the established principles in the Court's jurisprudence that "[t]he Military Commander is not allowed to consider any national, economic or social interests of his own State; not even national security interests, but only his own military needs and those of the local population": HC *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. (A Teachers' Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region)*, (1983) 37(4) *Piskei Din* 785, at 795; English excerpt in: (1984) 14 *Israel YbkHR* 301, at 304.

case which concerned the legality of the construction of a controversial wall (or separation fence) in the occupied territories, referred to "military needs" and "military necessity". The reference to these terms was made in a manner that appears at first glance interchangeable with a view to justifying requisitions of the Palestinian land under Articles 23(g) and 52 of the Hague Regulations.[35] The Supreme Court did not examine the distinction between the needs of the occupation army and necessities of war.

It may be argued that the Israeli Supreme Court in the *Beit Sourik* case did not revert to the earlier position based on a broader concept of military necessity *specifically under Article 52*. To justify the seizure of private land and houses, the Supreme Court invoked not only Article 52 but also Article 23(g), which is applicable during armed conflict as a rule on the conduct of warfare. This is because the Supreme Court has assumed that even in occupied territory, the occurrence of protracted violence in a pocket of the territory justifies the application of rules on conduct of warfare, in addition to the rules on occupation, to that part of the territory.[36] Viewed in that way, it is possible to argue that a reference was made to both terms ("military needs", which correspond to the "needs of the army of occupation", and "military necessity") simply in harmony with the wordings of both Articles 23(g) and 52. The Supreme Court may have interpreted the condition for lawful requisitions in kind under Article 52, without reading the term "needs of the army of occupation" under that provision so broadly as to make it synonymous with the test of military necessity.

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[35] HC *2056/04, Beit Sourik Village Council v. The Government of Israel and Commander of the IDF Forces in the West Bank,* Judgment of 30 June 2004; reproduced in: (2004) 43 *ILM* 1099, at para. 32.

[36] The present writer has repeatedly mentioned the applicability of the rules on the conduct of warfare to occupied territory in case of the eruption of sporadic but intense fighting and hostilities. See *infra*, Chapter 12. For the same view, see Kretzmer (2005), *supra* n. 23, at 96; and Schwarzenberger, *supra* n. 10, at 257. Schwarzenberger observes that:

> Destruction of individual property in occupied territory for purposes of restoring or maintaining public order is permissible.... *A fortiori,* this must be so when, as for instance in the case of a local rebellion or in operations against partisans.... military operations in occupied territories become necessary.

Ibid.

4. *Movable Private Property*

4.1. *Four Categories of Private Movable Property*

The Hague Regulations contemplate four categories of movable property owned by private persons: (i) all private movables essentially of non-military nature, which are subject to requisition under Article 52; (ii) appliances for transmitting news or transportation, depots of arms and munitions of war, which may be susceptible of seizure under Article 53(2); (iii) submarine cables linking an occupied territory with a neutral territory, which must not be seized or destroyed except in case of absolute necessity, as laid down in Article 54; and (iv) works of art and sciences which are absolutely immune from seizure, destruction or wilful damage, as governed under Article 56.

Two general rules governing all private property (movable or immovable) must be noted. First, pillage is absolutely prohibited,[37] and punishable under national military laws.[38] Second, reprisals against the property of protected persons are forbidden.[39]

4.2. *Private Movables Essentially of a Non-Military Nature*

Article 52 of the 1907 Hague Regulations recognises that occupying powers may requisition movables belonging to inhabitants in occupied territory. This provision treats private movables and movables belonging to municipalities in the same manner. Four cumulative conditions must be met to justify such requisition in kind: (i) needs of the army; (ii) the proportionate relationship to the resources in occupied territory; (iii) the demand of requisitions being made only by a commander; and (iv) payment for requisitions.[40] Each of these requirements now needs to be explored.

First, the lawful purpose for such requisitions is confined to the needs of their armies. This is solidly anchored in the case-law dating back from post-World War I jurisprudence.[41] The occupying powers are not allowed to carry out req-

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[37] Hague Regulations (1907), Article 47; and GCIV, Article 33(2).

[38] See, for instance, UK, Naval Discipline Act 1957, SS 5, 35A; Army Act 1955, s. 30; and Air Force Act 1955, s. 63.

[39] GCIV, Article 33(3).

[40] Dinstein (1978), *supra* n. 4, at 134–135.

[41] Among the vast pool of national cases, see for instance, Poland, Supreme Court, *Siuta v. Guzkowski*, Third Division, 15 February 1921, (1919–1921) 1 *AD* 480, Case No. 342 (unlawful requisition of horses by the Ukrainian forces in 1919); France, Tribunal Civil of Pêronne, *Secret v. Loizel*, 18 January 1945, (1943–5) 12 *AD* 457, Case No. 164, at 458 (recognising the recovery of the horses, which were requisitioned not to serve military purposes, but to

uisitions intended to supply their general needs[42] or to meet domestic needs of their home states and armies in battlefields, much less to engage in general exploitation or in private enrichment.[43] However, as the Anglo-German Mixed Arbitral Tribunal affirmed,[44] the fact that goods requisitioned in accordance with Article 52(1) of the 1907 Hague Regulations are used for the occupying State's army other than the one that occupies the relevant territory does not necessary divest such requisition of its lawful character.

Second, requisitions must be proportionate to the resources of the occupied country.[45] It is suggested that the balance should be weighed not against resources of individual persons whose property is requisitioned, but against those of the occupied country.[46] The International Military Tribunal at Nuremberg condemned the German army's massive pillage of private (and public) properties in occupied eastern European countries, which "were requisitioned in a manner out of all proportion to the economic resources" of these countries.[47] McDougal and Feliciano argue that account must be taken not of entire occupied territory but of locality that becomes the specific subject of requisition.[48] However, as required under Article 55(2) GCIV,[49] when requisitioning private movable property, the occupying power must give primacy to the needs of the civilian population in the occupied territory over those of its forces or administration.[50]

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compensate certain farmers whose animals had been requisitioned, and to punish those who provided aged and unfit beasts).

[42] Oppenheim, *supra* n. 8, Vol. II, 409–410.

[43] *UK Manual* (2004), at 302, para. 11.83.2.

[44] C.M. Picciotto, "The Anglo-German Mixed Arbitral Tribunal", Notes, (1923–1924) 4 *BYIL* 179, at 179–180. In the case of *Tesdorff and Co. v. The German Government*, the Anglo-German Mixed Arbitral Tribunal ruled that the mere fact that the coffee, which was requisitioned by the German Governor of the Fortress of Antwerp in occupied Belgium, was used for the German Army other than that which occupied Belgium was not such as to deprive the requisitioning of the "character and effects" under international law: *ibid*.

[45] Hague Regulations (1907), Article 52. In case of requisitions in services, another condition is that they must not be of such a nature as to require the inhabitants to participate in military operations against their own country: Article 52(1). Note that Article 46(1) of the 1907 Hague Regulations stipulates that "…private property…must be respected", while the second paragraph forbids the confiscation of private property.

[46] Dinstein, *supra* n. 4, at 135.

[47] "Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences", (1947) 41 *AJIL* 172, at 236.

[48] M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order* (1961) at 820.

[49] The principle of the primacy of civilian needs is recognised in that provision with special reference to foodstuffs, articles, and medical supplies. It is considered applicable to other private moveable property of non-military character as well.

[50] Gasser, *supra* n. 19, at 260, para. 555.

Third, requisitions may be demanded only by the commander in the locality and not by individual soldiers or officers.[51] This condition is purported to avoid any abuse of the right to issue requisitions by occupying armies, which would constitute far-reaching encroachments on private persons' right to property. Any seizure of goods without at least the authority of a commander in the locality[52] amounts to pillage, which is, as explained elsewhere, forbidden in all circumstances.[53]

Fourth, according to Article 52(3) of the 1907 Hague Regulations, requisitions must, as far as possible, be paid for in cash.[54] If that is not feasible, this must be acknowledged by a receipt given to the owner, and the payment for the due amount must be made "as soon as possible".[55] Yet, the commanders-in-chief may levy contributions if they do not possess sufficient cash.[56] The wording "as soon as possible" suggests that after issuing a receipt, the occupants must redeem it within a reasonable period.[57] The failure to do so will render the requisition "unlawful and ineffective" for the purpose of transferring ownership to the occupant.[58] The Mixed Arbitral Tribunals set up after World War I made it clear that a requisition which was originally made lawfully could become contrary to international law in the absence of forthcoming, adequate compensation.[59]

The requisitions undertaken pursuant to these four conditions under Article 52 of the Hague Regulations may be considered to transfer to the occupant the title to the relevant property, for which s/he has paid compensation.[60] Schwarzenberger observes that "on completion of a lawful requisition, ownership in

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[51] Hague Regulations (1907), Article 52(2). See also Oppenheim, *supra* n. 8, Vol. II, at 410.

[52] McDougal and Feliciano, *supra* n. 48, at 821.

[53] Hague Regulations (1907), Article 47; and GCIV, Article 33(2).

[54] Clearly, from this requirement can be inferred the general rule that private enemy property must be exempted from appropriation by an invading army: Oppenheim, *supra* n. 8, Vol. II, 410, para. 147.

[55] *Ibid*.

[56] *Ibid*.

[57] The *UK Manual* requires that requisitions must be paid for "immediately". Otherwise, a receipt must be given to the owner, and subsequent payment made "without undue delay": *UK Manual* (2004), at 302, para. 11.84.

[58] McDougal and Feliciano, *supra* n. 48, at 821.

[59] Special Arbitral Tribunal between Romania and Germany, *Romania v. Germany (Goldenberg & Sons v. Germany)*, Judgment of 27 September 1918, (1927–1928) *AD* 542, Case No. 369, at 545; and Germano-Greek Mixed Arbitral Tribunal, *Karmatzucas v. Germany*, 23 August 1926, (1925–1926) *AD* 478, Case No. 365, at 479 (holding that "only such requisitions were lawful as complied with the provisions of Article 52, namely, that payment of the amount due should be made as soon as possible after the requisition").

[60] McNair and Watts observe that in contrast to cases of seizure, "[t]he legal effect of a valid requisition under Article 52 is usually regarded as being that the occupant may acquire a good title to the requisitioned property": McNair and Watts, *supra* n. 21, at 394.

any requisitioned movable, in contrast to any seized movable, should pass to the Occupying Power".[61] Along this line, the *UK Manual* recognises that requisitioned goods become the property of the occupying power.[62] This means that there is no requirement to return that property to the original owner.[63] In contrast, Rousseau argues that the fact that Article 52 requires the occupying power to restitute the seized property after the end of hostilities implies that the title to the property does not transfer to the occupant, disabling the latter to sell it to a third party.[64]

The commodities that can be requisitioned include food, liquor and tobacco, fuel and material for uniforms and boots.[65] It is incumbent on the occupying power to maintain sufficient provision of food and medical supplies for the civilian population as part of their duty to ensure "public order and safety" within the meaning of Article 43 of the Hague Regulations. The *UK Manual* recognises that the occupying forces may requisition or order compulsory sales of hoarded foodstuffs, medical supplies and other items essential for the civilian population.[66] Such measures should be considered lawful subject to the payment of "fair value" for requisitioned goods.

With specific regard to foodstuffs, articles or medical supplies belonging to private persons in occupied territory, Article 55(2) of GCIV allows the occupying power to requisition such movable properties only exceptionally. The decision to make requisitions in kind may be unilaterally taken. This may be considered a form of expropriation or requisition recognised in Article 52 of the Hague Regulations.[67] Nevertheless, requisitions of these relief supplies cannot be considered lawful unless they satisfy the following four conditions. First, the requisitions must be intended only for use by the occupation forces and administration personnel. Second, the requirements of the civilian population must

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[61] He refers to the decision of the Anglo-German Mixed Tribunal in *Tesdorf and Co. v. Germany* (1922–23) (reported in: Picciotto, *supra* n. 44), which distinguished the legal effects of seizure and those of requisitions: Schwarzenberger, *supra* n. 10, at 274–276.

[62] *UK Manual* (2004), at 302, para. 11.84.1.

[63] Dinstein, *supra* n. 4, at 135.

[64] Rousseau, *supra* n. 7, at 167–168, para. 105D and the cases cited therein. See, in particular, Belgium, Court of Appeal of Liège, *Delville v. Servais,* 19 October 1945, (1943–45) *AD*, Case No. 157, at 448–450; and Belgium, Court of Cassation, *Bonaventure v. Ureel,* 20 May 1946, (1946) 13 *AD* 378, Case No. 161, at 378–379.

[65] *UK Manual* (2004), at 302, para. 11.83.1.

[66] The *UK Manual* states that this is obviously to avert the unreasonable scenario in which the occupying power may be required to release their own goods for the civilian population in the occupied territory, only to requisition others from the civilian population for their own use: *ibid.*, at 302, para. 11.83.3.

[67] *ICRC's Commentary to GCIV*, at 311.

be taken into account. Third, "fair value" must be paid for requisitioned goods, in accordance with the provisions of other international Conventions, such as Article 52 of the Hague Regulations.[68] This requirement is a reaffirmation of the rule already laid down in that provision.[69] Fourth, the protecting power must, "at any time", be entitled to verify the state of the food and medical supplies in occupied territories so as to ensure that a proportionate balance is struck between the needs of the population and those of occupation authorities (both armed forces and administration). Its activities may be restricted only in case of imperative military necessity.[70] Further, it must be recalled that if these relief supplies are requisitioned on an excessive scale, this will constitute an "extensive appropriation of property, not justified by military necessity", which is a grave breach of GCIV[71] and a war crime under the ICC Statute.[72]

4.3. *Appliances of Communication or Transportation, Depots of Arms and* Munitions de Guerre

Article 53(2) of the Hague Regulations stipulates that the three categories of items (all appliances of communication or transport, save where regulated by naval law; depots of arms; and generally, all kinds of *munitions de guerre*) belonging to private persons, may be seized by occupying powers. The only condition is that seized items need to be restored and compensation fixed when peace is made.

According to the *Oxford English Dictionary*, the term "appliance" means "a device or piece of equipment used for a specific task".[73] The connotation of this term does not fit into means of transport such as vehicles, ships and aircrafts owned by private individuals in occupied territory. However, the phrase "[a]ll appliances, whether on land, at sea, or in the air, adapted . . . for the transport of persons or things", as drafted in 1907,[74] reflects the nascent technological standard at that time. The apparently all-encompassing purpose of this phrase, as can be inferred from the words "all" and "whether on land, at sea, or in the

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[68] *Ibid*., at 311.

[69] However, as the *ICRC's Commentary* notes, the reiteration of this principle was considered necessary in view of the flagrant violation of this rule in two World Wars: *ibid*., at 311.

[70] GCIV, Article 55(3).

[71] GCIV, Article 147.

[72] ICC Statute, Article 8(2)(a)(iv).

[73] *Concise Oxford Dictionary*, 10th ed., (edited by J. Pearsall), (1999).

[74] The original, Article 52(3) of the 1899 Hague Regulations Respecting the Laws and Customs of War on Land, annexed to the Second Hague Convention with respect to the Laws and Customs of War on Land, contemplates only land-based lines, referring to "land telegraphs, telephones".

air", suggests that it is susceptible to flexible construction in the light of present-day circumstances so as to refer to modern means of transport.[75]

There is much controversy as to the material scope of *munitions de guerre*.[76] Smith contends that the term "all kinds of war materials" (*toute espèce de munitions de guerre*) under the second paragraph of Article 53 of the Hague Regulations covers "all movable articles for which a modern army can find any normal use", including food, drink and even tobacco (but not scent, cosmetics or silk stockings).[77] Fraleigh suggests that the sequestration even of bank accounts may be justified as the belligerent occupant's right to seize *munitions de guerre*.[78]

In contrast to such a broad interpretation of this term, Elihu Lauterpacht argues that the term *munitions de guerre* refers to "such articles as can reasonably be employed in the actual conduct of hostilities".[79] The commodity in question does not have to be fit only for exclusive use by an army or for purposes of offence or defence.[80] Dinstein appears to take a narrower interpretation, observing that food and clothing fall within the scope of application *ratione materiae* of Article 52 of the Hague Regulations, which essentially deals with the first category of private movables (namely, those essentially of non-military nature), and is subject to the four conditions explained above. Still, he does recognise broad latitudes of discretion given to occupying powers, noting that these four conditions are inapplicable to *munitions de guerre*. According to him, the occupying power is not required scrupulously to delve into the adverse impact of seizing movable articles upon the resources of the occupied country, as would otherwise be demanded by the notion of proportionality. The scope of purposes for which requisitions may be made is wider, encompassing purposes other than the needs

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[75] Dinstein shares this view, albeit without adducing elaborate grounds: Dinstein, *supra* n. 4, at 137.

[76] The *UK Manual* recognises the seizure of movable private property such as cables, telegraph and telephone equipment, buses, trucks, cars, trailers, railway rolling-stock, ships in port, river and canal craft, aircraft, arms, munitions, and all kinds of property that may serve as war materiel (including raw materials such as crude oil): *UK Manual* (2004), at 301, para. 11.81.1.

[77] H.A. Smith, "Booty of War", (1946) 23 *BYIL* 227, at 228–229. Smith provides a useful definition, noting that *munition de guerre* encompasses any items that are issued from the quartermaster's stores or sold by the N.A.A.F.I organisation or equivalents: *ibid.*, at 229.

[78] A. Fraleigh, "The Validity of Acts of Enemy Occupation Authorities Affecting Property Rights", (1949–50) 35 *Cornell Law Quarterly* 89, at 107.

[79] E. Lauterpacht, "The Hague Regulations and the Seizure of Munitions de Guerre", (1955–56) 32 *BYIL* 218, at 242.

[80] *Ibid*. According to Elihu Lauterpacht, "the object which is made the subject of seizure should, without substantial modification, be capable of playing a part in battle, in the sense either of causing or preventing physical injury to persons or military objectives": *ibid*.

of occupation armies, such as those of general war efforts at the front. Further, there is no requirement for payment until peace is concluded.[81]

Another controversy relates to purposes for which occupying powers can use such seized *munitions de guerre*. Contrary to Article 52 of the Hague Regulations, which restricts requisitions of privately held movables only to meeting the needs of occupation armies, Article 53 (2) is silent on this matter. The fact that this provision relates to movables of immediate military use suggests that the use of such movables should be limited to the purpose of general war efforts (and hence wider in scope than in the case of Article 52). Both Jessup and Dinstein take a broader view, proposing that the occupying powers should be entitled to seize vehicles and take them to their own country even for the purpose of farm transport.[82] Nonetheless, the duty of restitution at the time of the conclusion of peace means that occupants do not obtain title to such seized *munitions de guerre*,[83] so that they are prevented from selling them.[84] This is confirmed by the Austrian Supreme Court in the *Requisitioned Property* Case (1951), when it held that:

> The seizure of property referred to in Article 53(2) of the Hague Regulations and belonging to private individuals, including property used for the transport of persons and goods, does not result in a change of ownership, because such property has to be returned upon the conclusion of peace.[85]

Further, Dinstein argues that underlying Article 53(2) of the Hague Regulations is an implicit but important presumption that in order to be entitled to protections (derived from being) *qua* private property, such as restoration and compensation, the *munitions de guerre* must not actually be used in warfare against the occupant at the time of seizure. In an Arbitral Award in the *Cession*

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[81] Dinstein, *supra* n. 4, at 136.

[82] Jessup argues that "[b]ecause of their military use it seems to be assumed that they [the types of enemy private property of military use, such as arms, munitions and means of communication and of transport] will be taken and pressed into immediate military service, but there would be no violation of law if the occupant seized the property and shipped it back to his own country, as to relieve a shortage of farm transport": P.C. Jessup, "A Belligerent Occupant's Power over Property", (1944) 38 *AJIL* 457, at 459. See also Dinstein, *supra* n. 4, at 137.

[83] Jessup, *ibid.*, at 459.

[84] Dinstein, *supra* n. 4, at 137.

[85] Austrian Supreme Court, *Requisitioned Property (Austria) (No. 2) Case*, 20 June 1951, (1951) 18 *ILR* 696, Case No. 216. The case concerns the seizure of a motor-car of a private individual, which had been requisitioned by the German army during the Second World War and then seized by the UK occupation authorities as a war booty on an erroneous belief that this belonged to the German army. The motor-car was subsequently handed over to the Austrian authorities, which then gave it to another private person.

of Vessels and Tugs for Navigation on the Danube Case (1921), the Arbitrator Hines held that:

> Article 53, which speaks of restoration of, and compensation for, privately owned means of transport and privately owned ammunition of war, does not contemplate war material in actual hostile use at the time of seizure, and no one seriously contends that the Article has so been applied as to require restitution of, and compensation for, war material in actual use as such.[86]

The arbitrator took the view that in case privately held *munitions de guerre* was actually used against the occupant, they could be confiscated, in spite of the general principle, set forth under Article 46 of the Hague Regulations, which forbids the confiscation of private property during the warfare.[87] Dinstein refers to a cogent example of a privately held gun. In case this was a mere private collection not actually used against the occupant, this, though subject to seizure, must be restored to the owner when peace is made. On the other hand, if such a gun was stolen and used by a saboteur, this would deprive it of its private nature and assimilate it to public property.[88]

One of the most contentious questions is whether *munitions de guerre* encompass an underground oil reservoir which belongs to private persons. As examined in Chapter 8, during World War II the Japanese Imperial army occupied the then Dutch colony of Sumatra and seized the installations belonging to three Dutch companies, extracted oil and maintained it in storage tanks in Singapore. Toward the end of the war, the British re-imposed its colonial rule in Singapore and seized the relevant oil as booty of war. The issue turned on whether these Dutch companies were entitled to claim ownership of the oil and indemnity for the seizure. The Court of Appeal in Singapore found in their favour, with the majority (*per* Whyatt, C.J.) holding that a raw material such as oil, while remaining underground, could not be deemed as falling within the ambit of *munitions de guerre*, on the grounds that it was immovable property, and that it was not susceptible to direct military use without extraction and refining in installations. It ruled that the seizure of the oil-wells by the Japanese violated the laws of war, bringing about no transfer of title from the appellant companies to the occupying power.[89] In contrast, the minority (*per* Whitton, J.) held that if the Japanese occupying forces found the oil ready for immediate use, they would have been entitled to seize it as *munitions de guerre*. The upshot of the

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[86] 2 August 1921, (1948–1949) 1 *RIAA* 97, at 105–106.

[87] *Ibid.*, at 105.

[88] Dinstein, *supra* n. 4, at 138.

[89] Singapore, Court of Appeal, *N V de Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission* 13 April 1956, (1956) 23 *ILR* 810, at 822–824. See also "The Case of the Singapore Oil Stocks – 'B'", (1956) 5 *ICLQ* 84.

minority judgment is that crude oil, even while still underground and before extraction, may be described as *munitions de guerre*.[90]

4.4. *Submarine Cables Linking an Occupied Territory with a Neutral Territory*

Article 54 of the 1907 Hague Regulations treats submarine cables linking an occupied territory with a neutral territory as a special category of property.[91] Irrespective of its ownership (private or public),[92] though generally publicly held, it is forbidden to seize or destroy them,[93] except in case of absolute necessity. However, the occupying power (and other belligerents) may seize appliances and installations designed for the transmission of news and use them for their own purposes.[94] Submarine cables used (and damaged) by the occupant must be restored and compensation[95] fixed upon the commencement of peace.[96] In case such submarine cables are State owned, this rule can be interpreted in a manner similar to Article 56 of the Hague Regulations concerning works of art and sciences pertaining to state properties. These public properties will be assimilated into private properties, (or fictitiously these state properties will be treated as private ones), which are subject to more stringent regulations than in the case of state properties.

4.5. *Works of Art and Science*

The fourth category of private movables relates to works of art (in a broad sense, which may include music, literature, films, indigenous art forms such as the tea ceremony and ikebana) and works of science. Article 56 of the Hague Regulations sets forth that under any circumstances, the appropriation, seizure, use and destruction of such movables, or wilful damage done to them are absolutely

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[90] Singapore, Court of Appeal, *N V de Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission* 13 April 1956, (1956) 23 *ILR* 810, at 847.

[91] Von Glahn, *supra* n. 19, at 215–216.

[92] Von Glahn notes that "the occupying power may reserve for itself the right to control, supervise, and censor all communications sent through these installations, regardless of whether they belong to the enemy state or are the property of private interests": *ibid*., at 215.

[93] If any destruction or seizure takes place, the occupying power must notify the affected neutral power immediately: *ibid*., at 216.

[94] *Ibid*.

[95] Von Glahn suggests that initially the affected neutral power may appeal to the belligerent occupant responsible for the destruction, and only later to the legitimate government of the occupied State, if no payment is made by that former occupant: *ibid*.

[96] Hague Regulations (1907), Article 54, second sentence.

prohibited,[97] and ought to be made the subject of legal proceedings.[98] Lauterpacht/Oppenheim refer to the well-known facts of systematic *and* widespread plunder of works of art carried out by Germany in the occupied territories during World War II.[99] The International Military Tribunal at Nuremberg included within its indictment of the major German war criminals the war crimes and crimes against humanity based on the systematic looting of art and other cultural objects directed against Jewish populations,[100] and "systematically" pursued in the occupied territory of Eastern Europe and the USSR.[101] The Tribunal flatly rejected

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[97] Oppenheim, *supra* n. 8, Vol. II, 404–405, para. 142. For instance, even if the metal of which a statute is cast may be of great value for guns, this must not be touched: *ibid*.

[98] Hague Regulations (1907), Article 56.

[99] They observe that:

> In the Second World War Germany embarked upon a systematic campaign of plunder, and economic exploitation in complete disregard of Article 56 – and other Articles – of the Hague Regulations.
>
> . . . the Tribunal [the International Military Tribunal at Nuremberg] found that there had taken place wholesale seizures of art treasures, furniture, textiles and similar articles, and that museums, palaces and libraries in the occupied territories of Russia were systematically looted.

Oppenheim, *supra* n. 8, Vol. II, at 400–401, para. 138b.

[100] As the Tribunal notes, on 1 March 1942, Hitler issued a decree authorising Rosenberg (who was designated the Head of the Centre for National Socialist Ideological and Educational Research, so-called, "Einsatzstab Rosenberg") to search libraries, lodges, and cultural establishments, to seize cultural treasures owned by Jewish people: "Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences" October 1, 1946", (1947) 41 *AJIL* 172, at 237 ("War Crimes and Crimes against Humanity"). For evaluations of Nazi looting of cultural treasures owned by Jewish people during the Holocaust, see L.H. Nicholas, *The Rape of Europa – the fate of Europe's treasures in the Third Reich and the Second World War,* (1994). For litigations on this issue, see US, *Republic of Austria v. Altmann,* 7 June 2004, 541 *US* 677 (2004); *United States v. Portrait of Wally, A Painting by Egon Schiele (Portrait of Wally I),* 105 F.Supp. 2d 288 (S.D.N.Y. 2000); *United States v. Portrait of Wally,* 2002, 2002 WL 553532 (S.D.N.Y.); *Adler v. Taylor*, 2005 US Dist. LEXIS 5862 (C.D.Cal. 2005); *United States v. One Oil Painting Entitled "Femme en Blanc" by Pablo Piccaso,* 362 F. Supp. 2d 1175 (C.D. Cal. 2005). For analysis, see P. Gerstenblith, "From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century", (2006) 37 *Geo. JIL* 245, 258; and D.B. Vogt, "U.S. District Court Decision Allows Lawsuit Claiming Looted Artworks in Austria to Proceed", (2002) 11 *International Journal of Cultural Property* 80.

[101] The Tribunal stated that:

> Museums, palaces, and libraries in the occupied territories of the USSR were systematically looted. Rosenberg's Einsatzstab, Von Ribbentrop's special "Battalion", the Reichscommissars and representatives of the Military Command seized objects of cultural and historical value belonging to the People of the Soviet Union, which were sent to Germany. Thus the Reichtscommissar of the Ukraine removed paintings and objects of art from Kiev and Kharkov and sent them to East Prussia. Rare volumes and objects of art from the palaces of Peterhof, Tsarkoye Selo, and Pavlovsk were shipped to Germany.

any suggestion that the purpose of the seizure of art treasures was protective and meant for their preservation. It referred to the specific intention of Himmler (the Reich Commissioner) and other Nazi officials to enrich "Germanism".[102]

As will be discussed in Chapter 10, corresponding protection is expressed in Article 4(3) of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. This provision goes further, prescribing the positive duty on the High Contracting Parties in relation to acts of private individuals. They are bound both to prevent and to stop any form of theft, pillage or misappropriation of, and acts of vandalism directed against such cultural movable properties.

5. *Expropriation*

Expropriation is defined as the compulsory acquisition of private land by the authorities against the payment of compensation.[103] Article 46 of the Hague Regulations prohibits confiscation of private property in any circumstances (even in cases of imperative military necessity). Oppenheim/Lauterpacht contend that Article 46 covers the ban on both appropriation and expropriation of immovable private enemy property.[104] In contrast, many experts argue that expropriation[105] lawfully undertaken pursuant to the law in force in the occupied country is not forbidden.[106] According to Schwarzenberger, the principle of inviolability of private property under Article 46 is subject to three exceptions. Apart from the two exceptions of requisition (Article 52) and seizure (Article 53), which are expressly mentioned in the Hague Regulations, he refers to expropriation. He argues that this is implicitly allowed insofar as it conforms to the peacetime local law of the occupied territory.[107]

"Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences", (1947) 41 *AJIL* 172, at 238 ("War Crimes and Crimes against Humanity").

[102] *Ibid*.

[103] Kretzmer (2005), *supra* n. 23, at 97.

[104] Oppenheim, *supra* n. 8, at para. 403, para. 140, Nevertheless, as mentioned elsewhere, Oppenheim/Lauterpacht allow the temporary use of private land and buildings for purposes based on the necessities of war: *ibid*.

[105] Schwarzenberger notes that in the law of peace, confiscation indicates unlawful expropriation, which is undertaken for reasons other than the public interest and without adequate compensation: Schwarzenberger, *supra* n. 10, at 245.

[106] E. David, *Principes de Droit des Conflits Armés*, 3rd ed., (2002), at 511; T.S. Kuttner, "Israel and the West Bank – Aspects of the Law of Belligerent Occupation", (1977) 7 *Israel YbkHR* 166, at 219. See also Poland, Supreme Court, 1st Division, *Marjamoff and Ohters v. Włocławek*, 5 December 1924, (1923–24) 2 *AD* 444–445.

[107] Schwarzenberger, *supra* n. 10, at 266.

Differences between requisitions and expropriations lie in the objectives pursued by these measures. On one hand, as provided in Article 52 of the Hague Regulations, requisitions can be carried out only for the purpose of obtaining means to sustain an army in the field. On the other, writing during World War II, Feilchenfeld argues that expropriation can be undertaken to maintain public order and safety,[108] in the interest either of the population or the sovereign.[109] Von Glahn restricts the purpose of expropriations "solely for the benefit of the native population".[110] Akin to the discussions on the elements of necessity under Article 64 GCIV, the broad concept of *ordre public* can be invoked to allow the occupying power to carry out expropriation to fulfil the obligations under IHL and international human rights law. For instance, the introduction of an expropriation measure may be considered reasonable to accomplish land reform in occupied territories where there exists systematic and grave forms of exploitation similar to a feudal form of serfdom.

The legality of expropriation depends on three factors: (i) the existence of its legal basis in the laws of the occupied state, as required under Article 43 of the Hague Regulations; (ii) the objective pursued by the expropriating measure; and (iii) the fairness of the procedure followed. The relevant case-law provides some guidelines as to lawful expropriation in occupied territory. In H.C. *393/82* (*A Teachers' Cooperative Society* case), Barak J. of the Israeli Supreme Court held that the occupying authority, relying on the local laws allowing expropriation or seizure of private property in the Israeli occupied territory, must meet three cumulative conditions. First, the execution of expropriation must be in accordance with the local laws. Second, such execution is designed to benefit the local population within the meaning of Article 43. Third, the execution must be carried out pursuant to rules of Israeli administrative law, including the right of hearing before the expropriation or seizure.[111] With respect to the first

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[108] E.H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (1942), at 50–51.

[109] Feilchenfeld observes that:

> The regulations on the requisitioning of real estate do not answer the question of the extent to which an occupant may provide for expropriation in connection with civil legislation passed for the maintenance of law and order. But in this case the expropriations would be for the benefit of the sovereign, not for that of the occupant. . . .

Ibid., at 38. Similarly, he notes that "[d]uring an occupation the occupant's right and duty to maintain public order and safety . . . may involve expropriation. As measures for the benefit of the occupied country they differ, of course from requisitions": *ibid.*, at 50. See also M.J. Kelly, "Iraq and the Law of Occupation: New Tests for an Old Law", (2003) 6 *YbkIHL* 127, at 155.

[110] Von Glahn, *supra* n. 19, at 186.

[111] Barak J. in HC *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. (A Teachers' Housing*

condition, it is suggested that the rules of procedure for expropriation can be exceptionally those of the occupation authorities. This was already affirmed by the Polish Supreme Court in the post-World War I case of *Marjamoff and Others v. Włocławek*, which related to the changes in the law concerning expropriation for public utility purposes.[112]

6. *Conclusion*

As discussed above, the classic economic liberal idea formed part of the ideological lynchpins of the Hague law. In contrast, the Geneva Civilians Convention have largely reflected the value of a welfare state, which has been inculcated in many western states since the inter-war period. The writings of modern publicists and judicial practice suggest general willingness to recognise that the occupying powers are entitled to interfere with private property rights pursuant to the objective of enhancing public welfare. Above all, the power of the occupant to expropriate private land is recognised as an implicit right, even though the concept of expropriation as such is not expressly mentioned in the conventional law of occupation.

Cooperative Society v. The Military Commander of the Judea and Samaria Region), (1983) 37(4) *Piskei Din* 785; English excerpt in (1984) 14 *Israel YbkHR* 301, at 311–312.

[112] While formerly the order of expropriation could be made only by the Russian Emperor, the Court endorsed the decree issued by the German Governor-General of the Russian part of Poland (occupied by German armies during World War I), which modified the law relating to expropriation to extend the district hospital: Polish Supreme Court, First Division, *Marjamoff and Others v. Włocławek (Communal District of),* 5 December 1924, (1923–24) *AD* 444, Case No. 243, at 445.

Chapter 10

The Protection of Cultural Property in Occupied Territory

1. *Introduction*

The protection of cultural property has long been recognised under international humanitarian law. The Lieber Instructions of 1863, which played a highly crucial role in the shaping and development of the laws of war, classified certain cultural property as private property, with special protections.[1] These elements were later incorporated into the unratified Brussels Declaration of 1874, the fruit of the Brussels Conference held at the initiative of Henry Dunant, and with the assistance of Czar Alexander II of Russia. Additional rules aimed at respecting and protecting cultural property were incorporated into this aborted

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[1] See Lieber Instructions 1864, Articles 34–36:

> Article 34. As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations of the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character – such property is not to be considered public property in the sense of paragraph 31; but it may be taxed or used when the public service may require it.
>
> Article 35. Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.
>
> Article 36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.
>
> In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.

D. Schindler and J. Toman (eds), *The Laws of Armed Conflicts – A Collection of Conventions, Resolutions and Other Documents*, 4th revised and completed edition, (2004), at 8.

treaty.[2] The Hague Law contains three rules on the protection of cultural property, namely, Articles 27 and 56 of the Regulations annexed to the 1899 Hague Convention II and to the 1907 Hague Convention IV, and Article 5 of the 1907 Hague Convention IX. It is Article 56 of the Hague Regulations of 1907 that deals specifically with occupied territory. This provision fictitiously classifies the property (immovable or movable) of institutions devoted to arts and sciences as private property,[3] giving it a privileged position in terms of its protected scope. In the inter-war period, apart from a regional treaty among American states, the Washington Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact) of 1935, there was an attempt by the

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[2] Projet d'une Déclaration internationale concernant les lois et coutumes de la guerre (Project of an International Declaration Concerning the Laws and Customs of War) (Brussels Declaration of 1874), Articles 8, 13, 16 and 17. Article 8 of the Brussels Declaration, which corresponds to Article 56 of the 1907 Hague Regulations, reads that:

> Les biens des communes, ceux des établissements consacrés aux cultes, à la charité et à l'instruction, aux arts et aux sciences, même appartenant à l'Etat, seront traités comme la propriété privée.
>
> Toute saisie, destruction ou dégradation intentionnelle de semblables établissements, de monuments historiques, d'oeuvres d'art ou de science, doit être poursuivie par les autorités compétentes.
>
> The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences even when State property, shall be treated as private property. All seizure or destruction of, or wilful damage to, institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities.

Translation into English by the ICRC, available at: http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument (last visited on 30 June 2008). With respect to sieges and bombardment, Article 17 of the Brussels Declaration, which was later incorporated into Article 27 of the 1907 Hague Regulations, reads that:

> En pareil cas, toutes les mesures nécessaires doivent être prises pour épargner, autant qu'il est possible, les édifices consacrés aux cultes, aux arts, aux sciences et à la bienfaisance, les hôpitaux et les lieux de rassemblement de malades et de blessés, à condition qu'ils ne soient pas employés en même temps à un but militaire.
>
> Le devoir des assiégés est de désigner ces édifices par des signes visibles spéciaux à indiquer d'avance à l'assiégeant.
>
> In such cases [of sieges and bombardments] all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science, or charitable purposes, hospitals, and places where the sick and wounded are collected provided they are not being used at the time for military purposes.
>
> It is the duty of the besieged to indicate the presence of such buildings by distinctive and visible signs to be communicated to the enemy beforehand

Translation into English by the ICRC, available at: http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument (last visited on 30 June 2008). See also Schindler and Toman (eds) (2004), *supra* n. 1, at 24–25.

[3] Hague Regulations of 1907, Article 56(1).

International Museums Office[4] to prepare a "Preliminary Draft International Convention for the Protection of Historic Buildings and Works of Art in Time of War". The Preliminary Draft was purported to reconcile the exigencies of war with the maximum degree of safety for threatened monuments and works of art, with account taken of both military necessity and the requirements of protection.[5] The outbreak of World War II frustrated the adoption of the text. However, after the Second World War, this draft Convention provided a basis for the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

After the massive pillage and plunder of cultural objects committed by Nazi Germany and the USSR in occupied territories during and immediately after the Second World War, the UNESCO took an initiative to adopt the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict in 1954. According to the *ICRC's Customary IHL Study*, "the fundamental principles of protecting and preserving cultural property" embodied in the Cultural Property Convention are distilled into customary international law,[6] which has acquired applicability even to non-international armed conflict.[7] Article 1 of the 1954 Hague Convention broadly defines cultural property as all "movable or immovable property of great importance to the cultural heritage of every people", referring as examples to monuments of architecture, art or history, whether religious or secular, archaeological sites, buildings of historical or artistic interest, works of art, manuscripts, books and other objects of artistic, historical or archaeological interest, as well as scientific collections and important

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[4] This was set up in 1927 under the auspices of the League of Nations.

[5] J. Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, (1996), at 18–19.

[6] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (eds), (2005), Vol. I., at 129. Note should be taken of the *Annotated Supplement to the US Naval Handbook*, which states that:

> While the United States is not a Party to the 1954 Hague Convention, it considers it to reflect customary law. U.S. and other Coalition forces followed the Convention throughout the Persian Gulf War.

US, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* (1997), § 8.5.1.6 (Religious, Cultural, and Charitable Buildings and Monuments), n. 122.

[7] In the *Tadic* case, the Appeals Chamber of the ICTY noted that Article 19 of the 1954 Hague Convention, which requires the High Contracting Parties to apply, "as a minimum", the provisions of the Convention relating to respect for cultural property in non-international armed conflicts, is a treaty rule that has "gradually become part of customary law": ICTY, Appeals Chamber, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 98. In the same case, the Appeals Chamber held that "it cannot be denied that customary rules have developed to govern internal strife. These rules…cover such areas as…protection of civilian objects, in particular cultural property": *ibid.*, para. 127.

collections of books or archives.[8] In relation to cultural property that is not of "great importance for the cultural heritage of peoples", State parties to the UNESCO's Hague Convention of 1954 are bound by the obligation to protect cultural property under Articles 27 and 56 of the Hague Regulations of 1907 and Article 5 of the Hague Convention IX of 1907.[9]

Albeit not directly related to occupied territories (unless there is resumption of international armed conflict in part of the occupied territory), Article 53 API incorporates detailed rules on the conduct of hostilities with respect to the protection of cultural property that "constitute[s] the cultural or spiritual heritage of peoples". The protection of cultural property under this provision is the *lex specialis* to the *lex generalis* affording protections for civilian objects.[10] The *ICRC's Commentary* to API notes that Article 53 API and the provision under the 1954 Hague Convention which defines cultural property embody the same basic idea. Nevertheless, reference to "peoples" under Article 53 API suggests the universal recognition of their cultural values and the higher threshold for the cultural objects protected under that provision.[11]

Furthermore, the UNESCO's active standard-setting role has borne fruit in two specific treaties relevant to occupied territory: the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970; and the Convention concerning the Protection of the World Cultural and Natural Heritage 1972. The former contains the rules concerning illicit trade in cultural property. The latter contemplates the List of World Heritage in Danger, which is again of special importance in occupied territory. This List must include "only such property forming part of the cultural

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[8] For assessment of the definition of "cultural property" under the 1954 Hague Convention, see R. O'Keefe, "The Meaning of 'Cultural Property' under the 1954 Hague Convention", (1999) 46 *NILR* 26.

[9] *ICRC's Commentary to API*, at 645, para. 2060.

[10] ICTY, *Prosecutor v. Dario Kordic and Mario Cerkez*, Judgment of 26 February 2001, IT-95-14/2-T, para. 361; and Judgment of 17 December 2004, IT-95-14/2-A, paras. 89–90.

[11] This is borne out in the *travaux préparatoires.* The cultural and spiritual objects safeguarded under this provision are limited to such objects whose value transcends geographical boundaries and which possess unique character intimately associated with the history and culture of a people: *O.R.* Vol. XV, at 220, CDDH/III/SR.59, para. 68 (statement of Mrs Mantzoulinos of Greece). See also *ICRC's Commentary to API*, at 646, para. 2064. The *ICRC's Customary IHL Study* follows this view, noting that reference to "cultural or spiritual heritage of peoples" (rather than "people") suggests that the cultural or spiritual importance must be recognised as such by the whole of humanity (not limited to a particular people). In that way, the *ICRC's Customary IHL Study* contends that the scope of application *ratione materiae* of the API is in effect narrower than the 1954 Cultural Property Convention, with the former covering "only a limited amount of very important cultural property": Henckaerts and Doswald-Beck (eds), *supra* n. 6, Vol. I, at 130 and 132.

and natural heritage as is threatened by serious and specific dangers, such as…the outbreak or the threat of an armed conflict…".[12]

Inadequacy and ineffectiveness of the 1954 Convention in providing viable safeguards for cultural property during armed conflict are highlighted in numerous armed conflicts in the latter half of the twentieth century (in the former Yugoslavia, etc.). This led to the international call for an additional treaty that can fill loopholes left by the 1954 Convention (ambiguity of conditions for resort to derogation/waiver etc) and fully keep abreast with the contemporary development of international law (individual criminal responsibility etc). The result is the adoption of the Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict in 1999. The Second Protocol contains numerous breakthroughs. These include the elaborations on conditions for invoking "imperative military necessity" and the clauses dealing with individual criminal responsibility and (quasi-)universal jurisdiction.[13]

2. *The Obligation to Assist, Preserve and Notify*

Three paragraphs of Article 5 of the 1954 Hague Convention on Cultural Property embody three-pronged affirmative obligations specifically relating to occupied territory.[14] First, the occupying power is duty bound to provide assistance to competent authorities of the occupied state to safeguard and preserve its cultural

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[12] The Convention concerning the Protection of the World Cultural and Natural Heritage 1972, Article 11(4). See also the following declaration made by Syria when acceding to this Convention:

> The Government of the Syrian Arab Republic views that the obligation under Article 4 [the duty of identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage] covers the occupied Arab territories and consequently, the Israeli occupation authorities are under obligation to preserve the cultural and natural heritage existing in the occupied territories in view of the fact that occupation does not eliminate sovereignty and that the occupation authorities are considered internationally responsible for any attenuation of the cultural and natural heritage even if Israel has not acceded to the Convention.

Declaration of Syrian Arab Republic, available at the UNESCO's website: <http://portal.unesco.org.> (last visited on 30 August 2008), from which a section on legal instruments can be found.

[13] For an assessment of achievements of the Second Protocol, see J.-M. Henckaerts, "New Rules for the Protection of Cultural Property in Armed Conflict: The Significance of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict", (1999) *Humanitäres Völkerrecht – Informationsschriften*, No. 3, 147–154.

[14] For examinations of the rules applicable to occupied territory on this matter, see K.J. Partsch, "Protection of Cultural Property", in: D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, (1995), 377, at 395–397, paras. 918–922.

property.[15] This rule is solidly grounded in the body of customary law.[16] O'Keefe explains that the terms "safeguarding" and "preserving" suggest two distinct aspects. On one hand, the former corresponds to measures of safeguard required by Article 3. It denotes measures to protect cultural property from the foreseeable effects of armed conflict. On the other, the latter concept is purported to indicate measures that must be taken after the cessation of active hostilities to conserve and protect cultural property in occupied territory.[17] This second element is a broad concept that can be invoked to require the occupying power to undertake specific positive duties such as compliance with local planning regulations, enforcement of penal sanction against illegal trade in antiquities and any other practical measures.[18] In case the competent national authorities, in coordination with the occupying power, request technical assistance from the UNESCO under Article 23(1) in organising the protection of their cultural property, or in case UNESCO offer them assistance *proprio motu* under Article 23(2), the obligation of assistance under Article 5(1) clearly covers the duty of the occupying power to facilitate the access by the Organisation's representatives to the property in question and to provide necessary assistance.[19] Following Israel's invasion and occupation of Southern Lebanon (1982), the Lebanese Government requested the Director-General of UNESCO to dispatch a personal representative to the archaeological site at Tyre. The Director-General appointed an expert to supervise the placing of protective signs of the Convention around the site.[20]

The second paragraph of Article 5 provides that in case cultural property, which is located in occupied territory, is damaged by military operations and in need of preservation, and if the competent national authorities of the occupied State are unable to take necessary measures, the occupying power must, in close cooperation with such authorities, take "the most necessary measures of preservation".[21] The occupying power is required to take steps to prevent the deterioration of cultural property damaged in the course of hostilities. Yet, the undertaking of this obligation is limited to the most urgent cases.[22] Indeed,

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[15] The 1954 Hague Conventions for the Protection of Cultural Property in the Event of Armed Conflict, Article 5(1).

[16] See R. O'Keefe, *The Protection of Cultural Property in Armed Conflict*, (2006), at 341.

[17] *Ibid*., at 136.

[18] *Ibid*.

[19] *Ibid*., at 136–137.

[20] UNESCO, General Conference, *Report on the Activities Undertaken to Safeguard the Entire Archaeological Site of Tyre and its Surrounding Area*, 22C/INF.8, 12 September 1983, paras. 7–8, available at http://unesdoc.unesco.org/images/0005/000572/057227eo.pdf (last visited on 30 August 2008).

[21] The 1954 Hague Conventions for the Protection of Cultural Property in the Event of Armed Conflict, Article 5(2).

[22] O'Keefe (2006), *supra* n. 16, at 137–138.

such measures need to be taken only where: (i) they are strictly necessary; (ii) the competent national authorities show inability to undertake such measures by themselves; and (iii) the occupying power collaborates with the competent national authorities. If anything, the occupying power must at first allow the competent national authorities to request the UNESCO's technical assistance and to facilitate the latter's task.

The third paragraph of Article 5 demands that "[a]ny High Contracting Party whose government is considered their legitimate government by members of a resistance movement, shall, if possible, draw their attention to the obligation to comply with those provisions of the Convention dealing with respect for cultural property". This notification requirement clearly indicates that the government of the occupied State must apprise any resistant movements operating on its behalf in the occupied territory of the obligation to comply with the provisions in the 1954 Hague Convention relating to the respect for cultural property.[23]

3. *The Principle That All Seizure or Destruction of, or Wilful Damage Done to, Institutions Dedicated to Religion, Charity, Education, the Arts and Sciences, Historic Monuments and Works of Art and Science is Prohibited*

With specific regard to occupied territory, Article 56 of the Hague Regulations of 1907 accord special protections to the property of institutions dedicated to religion, charity, education, the arts and sciences.[24] The occupying powers are absolutely prohibited from seizing, destroying or causing wilful damage to institutions of this character, historic monuments, and works of art and science. Any such unlawful act must be made the subject of legal proceedings.[25] No derogation

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[23] The 1954 Hague Conventions for the Protection of Cultural Property in the Event of Armed Conflict, Article 5(3). Innovatively, the addresses of the obligations of respect for cultural property are expanded to include members of resistance movements: Article 19(1).

[24] Hague Regulations of 1907, Article 56(1).

[25] Hague Regulations of 1907, Article 56(2). As one of the earlier examples of the modern period, Rousseau refers to the destruction of cultural property done by the Anglo-French forces during the second Opium War (Arrow War) (1856–1860), one of the turning points in the East Asian geopolitical setting in the nineteenth century. During their invasion and occupation of the areas outside Beijing in China, they pillaged and destroyed, most notably, both the Old and New Summer Palaces of the Qing (Manchu) Dynasty (by the order of Lord Elgin). Remarkably, this violation is noted by Rousseau, a rarity for western international lawyers: C. Rousseau, *Le droit des conflits armés* (1983), at 160, para. 102. Note that while the Boxer rebellions in 1899–1900, which arose in response to western and Japanese colonial exploitations in China, committed many atrocities, the "International" expedition forces sent to suppress the rebellions, which

is permissible from this rule. The *ICRC's Customary IHL Study* suggests that this rule has long been recognised as part of customary international law.[26]

4. *The Obligation to Prohibit, Prevent and Stop any Form of Theft, Pillage or Misappropriation of, and Any Acts of Vandalism Directed against, Cultural Property of Great Importance to the Cultural Heritage of Every People*

In occupied territory, the occupying power must prohibit, prevent and stop any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, the cultural property as defined in Article 1 of the 1954 Convention.[27] The prohibition on the pillage of cultural property is *lex specialis* to the general prohibition of pillage.[28]

Inquiries need to be made into three implications flowing from this rule. First, this is an absolute obligation without any possibility of waiver/derogation based on imperative military necessity. Second, as can be seen from the wording of Article 4(3), "undertake to prohibit, prevent and…put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism…", the obligation is not limited to simply refraining from these unlawful acts. It is necessarily broadened to encompass affirmative duties. The occupying power must ensure that no armed groups, mobs or other individual persons can take advantage of chaotic circumstances in occupied territory to engage in any of the prohibited acts. Third, the *ICRC's Customary IHL Study* describes this obligation as part of customary international law,[29] referring to the UNESCO General Conference[30] and to the practice of states not parties to the Convention.[31] However, the *Study* refers only to the rule *prohibiting* the unlawful acts. If this view were upheld and strictly applied, the occupying power that is not a party to the 1954 Convention would not be bound to take specific necessary measures to *prevent* or *stop* the prohibited acts committed by individual persons in occupied territory,

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consisted of the eight imperialism-pursuing nations (Austria-Hungary, France, Germany, Italy, Japan, Russia, UK and US), engaged in the lootings and killings that were no less massive.

[26] Henckaerts and Doswald-Beck (eds), *supra* n. 6, Vol. I, at 132, Rule 40A.

[27] The 1954 Hague Conventions for the Protection of Cultural Property in the Event of Armed Conflict, Article 4(3), first sentence.

[28] See, for instance, the 1907 the Hague Regulations, Articles 28 and 47; and GCIV, Article 33(2).

[29] Henckaerts and Doswald-Beck (eds), *supra* n. 6, Vol. I, at 134.

[30] UNESCO General Conference, Res. 3.5.13 November 1993, preamble.

[31] US, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* (1997), § 8.5.1.6., footnote 122.

an absurd result that would contradict the object and purpose of the treaty. It may be interpreted that the obligation of prohibition alone inherently entails a positive duty relating to prevention and stopping of such acts.[32] Be that as it may, the *ICRC's Customary IHL Study* is not conclusive as to the possibility of deducing additional forms of positive duties. While the tenor of the argument may support the affirmative view, the *Study* seems deliberate in choosing the word "prohibition".[33]

5. *The Prohibition on Requisitioning Cultural Property in Occupied Territory*

For any High Contracting Parties to the 1954 Cultural Property Convention, it is forbidden to requisition *movable* cultural property in the territory of any High Contracting Parties, including in particular occupied territories.[34] Examples of such movable objects include (but are not limited to) books, paintings, music notes etc. There is uncertainty as to the customary law status of this rule. The *ICRC's Customary IHL Study* does not deal with requisitions of cultural property.[35]

Two aspects deserve specific comments. First, the ban on requisitions of movable cultural objects equally applies to both state and private property. It constitutes an important exception to Article 52 of the 1907 Hague Regulations, which furnishes the general rule recognising the entitlement of the occupant

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[32] Such methodology can be supported by the case-law concerning the anti-torture provisions of international human rights treaties (Article 7 of the ICCPR and the equivalent provisions of regional human rights treaties). The fact that the obligations of these provisions relate only to the prohibition of torture or other ill-treatment (without explicitly referring to prevention or punishment), has not prevented the monitoring bodies from developing positive obligations imposed on the state parties to prevent, investigate and punish offences of torture or other forms of ill-treatment committed by private persons.

[33] The *Study* mentions that "[t]he fundamental principles of protecting and preserving cultural property in the [1954] Hague Convention are widely regarded as reflecting customary international law.…". Yet, the *Study* does not clarify how far such "fundamental principles" can be deduced by implication or by teleological construction of existing principles: Henckaerts and Doswald-Beck (eds), *supra* n. 6, Vol. I, at 134.

[34] The 1954 Hague Conventions for the Protection of Cultural Property in the Event of Armed Conflict, Article 4(3), second sentence.

[35] Henckaerts and Doswald-Beck (eds), *supra* n. 6, Vol. I, at 127–138. Indeed, the *Study* does not even include any rule concerning the *requisition* of property. The closest that can be found is Rule 50 (the prohibition of seizure (and destruction)) of the property of an adversary, unless justified by imperative military necessity). Reference should also be made to Rule 51(a) (the permissibility of confiscation of movable public property that can be used for military operations); and Rule 51(c) (the prohibition on confiscating private property): *ibid.*, at 175–182.

to demand requisitions in kind from private persons in occupied territory. Second, as suggested in Chapter 9 that deals with requisitions of private land and buildings, the occupant is entitled to requisition *immovable* cultural property, but only for temporary use.[36]

6. *The Obligation to Prohibit and Prevent Illicit Export of Cultural Property from Occupied Territory*

Under the 1954 First Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the obligation to prohibit and prevent the exportation of cultural property from occupied territory is incumbent not only on the occupying power but also on any other state parties to this Protocol (such as co-belligerents or allies of the occupying power).[37] The *ICRC's Customary IHL Study* confidently asserts that this obligation is now part of customary law.[38]

This rule is reinforced by the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (hereinafter, the Convention on the Illicit Trade in Cultural Property) which applies both in time of war and peace. Under Article 2(2) of this Convention, any High Contracting Parties must prevent the practice of illicit trade (import, export, or transfer of ownership) in cultural property and make necessary reparations.[39] With specific regard to the occupied territory, Article 11 of the Convention provides that "the export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit".

The broad scope of the obligations under the 1970 Convention ought to be highlighted. First, positive obligations are incumbent upon the occupant

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[36] For the possibility of the occupant making temporary use of immovable property, see G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Vol. II: The Law of Armed Conflict,* (1968), at 266; and L. Oppenheim, *International Law*, (7th edition by H. Lauterpacht, 1952), at 403, at 411–412, para. 147.

[37] Paragraph 1 of the 1954 First Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict provides that "[e]ach High Contracting Party undertakes…", without qualifying such a party as an occupying power.

[38] Henckaerts and Doswald-Beck (eds), *supra* n. 6, Vol. I, at 135. O'Keefe also supports this conclusion: O'Keefe (2006), *supra* n. 16, at 342.

[39] Article 2(2) of the 1970 Convention on the Illicit Trade in Cultural Property stipulates that "[t]he States Parties undertake to oppose such practices [the illicit import, export and transfer of ownership of cultural property] with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations".

(or any other contracting states) to take necessary measures to prevent private persons engaging in such illicit trading in occupied territory. Second, the 1970 Convention includes obligations to take measures of reparations where necessary. Third, the prohibition relates not only to the taking away (export or transfer of ownership) of cultural property out of occupied territory, but also to the import of such property. Fourth, the ban on illicit trading is enlarged to include the unlawful trading conducted on "indirect compulsion". There is ambiguity as to the meaning of this phrase, which is susceptible to variable interpretations.[40]

The prohibition on illicit trading in cultural property is reinforced by the 1999 Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Under Article 9(1)(a) of the Second Protocol, again, the obligation of the occupying power (or any other High Contracting Parties) goes beyond a mere negative duty. The occupant is required to ban "any illicit export, other removal or transfer of ownership of cultural property". This rule encompasses the affirmative duty to prevent private persons being involved in such illicit acts.[41]

7. *The Obligation to Return Cultural Property Exported from Occupied Territory*

The obligation to return cultural property plundered from occupied territory is explicitly contained in the Treaty of Peace between the Allied and Associated

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[40] Toman is silent on this issue: Toman, *supra* n. 5, at 359–365.

[41] For the prohibition of transfer of property in general from occupied territory, see also the Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation and Control, London, 5 January 1943. The governments of the Allies issued a warning that:

> . . . they intend to do their utmost to defeat the methods of dispossession practiced by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled. Accordingly, the governments making this Declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect of the Governments with which they are at war, or which belong, or have belonged to persons (including juridical persons) resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

Available at the website of the Commission for Looted Art in Europe: <http://www.lootedartcommission.com/inter-allied-declaration> (last visited on 30 June 2008). See also Henckaerts and Doswald-Beck (eds), *supra* n. 6, Vol. II, at 804–805, para. 437.

Powers and Italy (1947).[42] A similar duty was embodied in the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation,[43] under which Germany was required to establish an agency to search for, recover and restitute cultural property that it massively looted and removed from occupied territories in Eastern Europe and the former USSR during World War II.[44] Yet, even at the beginning of the new millennium, not all the consequences of the spoliation and plunder of private and public treasures (paintings, ceramics, books, religious treasures etc.) systematically orchestrated by the Nazis during the Holocaust (1933–1945) were fully accounted for.

The First Protocol to the 1954 Hague Convention fully recognises the restitution requirement under its paragraph 3.[45] This obligation is addressed not only to the occupying power but also to any other States parties to the Protocol, to which the relevant cultural property is exported. The customary law status of the duty to return cultural property illicitly exported from occupied territory can be corroborated in the Security Council resolutions adopted against Iraq

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[42] The Treaty of Peace between the Allied and Associated Powers and Italy, Articles 12 and 37, as cited in: Henckaerts and Doswald-Beck (eds), *ibid.*, at 136. Under this Peace Treaty, Italy was required to return cultural property it looted from the territories of Yugoslavia and Ethiopia, which it occupied during the Second World War. However, it was only in 2006 that the Italian government finally decided to return the obelisk that Mussolini plundered from Ethiopia, which was occupied well before the eruption of World War II.

[43] The 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation, signed at Bonn, 26 May 1952, as amended by Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, signed at Paris, 23 October 1954; entry into force on 5 May 1955. This treaty is documented in: (1955) 49 *AJIL, Supplement* 69 *et seq*.

[44] Chapter Five, Article 1(1), which provides that:

> Upon the entry into force of the present Convention, the Federal Republic [of Germany] shall establish, staff and equip an administrative agency which shall . . . search for, recover and restitute jewellery, silverware and antique furniture (where individual articles are of substantial value), and cultural property, if such articles or cultural property were, during the occupation of any territory, removed therefrom by the forces or authorities of Germany or its Allies or their individual members (whether or not pursuant to orders) after acquisition by duress (with or without violence), by larceny, by requisitioning or by other forms of dispossession by force.

[45] Paragraph 3 of the 1954 First Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict provides that:

> Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph [the obligation to prevent the exportation from occupied territory the cultural property as defined in Article 1 of the 1954 Convention]. Such property shall never be retained as war reparations.

after its invasion and occupation of Kuwait in 1990. These demanded Iraq to return stolen property, especially archives, to Kuwait.[46]

However, the *ICRC's Customary IHL Study* suggests that no practice was found to show the customary law obligation of *third parties* to return cultural property illicitly transferred to and situated on their territory. In that sense, it was suggested that the restitution obligation is narrow in effect, binding only the occupying power.[47] Further, the third party owners who have acquired in good faith illicitly exported cultural property are to be compensated.[48]

With respect to the obligation of restitution, paragraph 3 of the First Protocol to the 1954 Hague Convention prohibits the retention of cultural property seized or pillaged from occupied territory as war reparations. As the *ICRC's Customary IHL Study* notes,[49] the Russian authorities have continuously refused to return treasures seized from occupied Germany during and after World War II on the ground that these constitute compensatory restitution for war reparations.[50]

8. *The Obligations to Prohibit or Prevent Archaeological Excavations in Occupied Territory*

Article 9(1)(b) of the Second Protocol requires the occupying power to prohibit and prevent any archaeological excavation in occupied territory, unless this is "strictly required" for the purpose of safeguarding, recording or preserving cultural property.[51] Article 9(2) in turn stipulates that "[a]ny archaeological excavation of,

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[46] Security Council Resolutions 686, 2 March 1991, S/RES/0686 (1991) (adopted under Chapter VII of the Charter), operative para. 2(d); 687, para. 15; and 1284, 17 December 1999, S/RES/1999 (adopted under Chapter VII of the Charter), preambular para. 9, and operative para. 14. The Iraqi government declared that it was ready to restitute the archives in 2002: Press Release SC/7431, Press Statement on Kuwaiti Properties Report by President of Security Council, 21 June 2002. See also E. David, *Principes de Droit des Conflits Armés*, 3rd ed., (2002), at 522.

[47] See Henckaerts and Doswald-Beck (eds), *supra* n. 6, Vol. I, at 136–137.

[48] Paragraph 4 of the First Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

[49] Henckaerts and Doswald-Beck (eds), *supra* n. 6, Vol. I, at 137–138.

[50] See Article 6 of Russia's Law on Removed Cultural Property, refers to:

> all cultural values located in the territory of the Russian Federation that were brought [as a result of the Second World War] into the USSR by way of exercise of its right to compensatory restitution . . . pursuant to orders of the Soviet Army Military Command, the Soviet Military Administration in Germany or instructions of other competent bodies in the USSR.

as cited in: Henckaerts and Doswald-Beck (eds), *supra* n. 6, Vol. II, at 808–809.

[51] The Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 9(1)(b).

alteration to, or change of use of, cultural property in occupied territory shall, unless circumstances do not permit, be carried out in close co-operation with the competent national authorities of the occupied territory."

With specific regard to the obligations to prohibit or prevent archaeological excavations, Rousseau refers to a dispute between Israel and UNESCO, which arose from Israel's refusal to comply with the invitations by UNESCO to abstain from the excavations in its occupied territories since 1956 and especially since 1967.[52] The polemics related to Israel's extensive digs in the West Bank, and in particular, the Old City of Jerusalem. As concerns occupied Iraq, UN Security Council Resolution 1546 of 8 June 2004 belatedly called for all the parties "to respect and protect Iraq's archaeological, historical, and religious heritage".[53] O'Keefe comments that the insertion of both Article 9(1)(b) and 9(2) specifically referring to archaeological excavations in occupied territories is the fruit of the controversy over the lacunae in the 1954 Convention in this respect.[54] The *ICRC's Customary IHL Study* is silent on the customary law status or not of the prohibition or prevention relating to excavation of archaeological sites or alterations of cultural property.

It may be suggested that a prohibition on the conduct, sponsorship or authorisation of archaeological digging by the occupying power without the agreement of the competent national authorities is *implicit* in the obligation of safeguarding and preservation under Article 5 of the 1954 Convention. This obligation may be interpreted as of general nature dealing with all aspects of cultural property in occupied territories, save for specific rules contemplated in Article 4(3) of the Convention and under customary IHL.[55] The argument that the parties to the Convention consider the duty to abstain from conducting, sponsoring or authorising archaeological digging to form part of Article 5 may be weakened by the adoption of Articles 9(1)(b) and 9(2) of the Second Protocol. Even so, it may still be countered that these provisions are designed to give clarity to such an implicit duty under Article 5 of the Convention.[56] O'Keefe observes that state practice is too ambivalent to yield sufficient evidence to establish that Article 5, Article 4(3) or any other provisions of the 1954 Convention covers the ban on the act, sponsorship or authorisation of archaeological excavation by an occupying power without consent of the competent national authorities.[57]

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[52] Rousseau, *supra* n. 25, at 149, para. 96C.

[53] UN Security Council Resolution 1546 of 8 June 2004, S/RES/1546 (2004), preambular para. 9.

[54] O'Keefe (2006), *supra* n. 16, at 138.

[55] *Ibid.*, at 138–139.

[56] *Ibid.*, at 139.

[57] *Ibid.* Indeed, he concludes that the practice rather militates in favour of the contrary view.

9. *The Obligations to Prohibit or Prevent the Alterations to (or the Change of Use of) Cultural Property in Occupied Territory*

Article 9 of the Second Protocol consolidates the obligations on the safeguarding and preservation of cultural property in occupied territory. Article 9(1)(c) of the Second Protocol requires the occupying power to prohibit and prevent "any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence". History reveals ample examples of such practice in conquered or occupied territories. The UN General Assembly Resolution 3525D condemned Israel for changing "the institutional structure and established religious practices" of the Mosque of Ibrahim in the City of Al-Khalil.[58] Like two other obligations set forth under Article 9(1) of the Protocol and the obligations under Article 4(3) of the 1954 Convention, this obligation is extended to cover acts committed by private persons.[59]

As can be seen from the wording "intended to" rather than "likely to", the threshold of *mens rea* for determining state responsibility of the occupying power is set high, as this excludes gross negligence. In theory, the occupying power may not be held responsible for the alteration to, or change of use of, cultural property, unless the intention of harmful consequences (concealment or destruction of evidence) is established. However, in practice it is difficult to contend that the occupying power can be immune from the liability in case it should have been aware of the risk of irreparable damage to cultural property.

10. *The Prohibition of Reprisal against Cultural Property*

Article 4(4) of the 1954 Hague Convention provides that the High Contracting Parties must not carry out any act of reprisals against cultural property.[60] Clearly, this rule primarily contemplates a rule for the conduct of hostilities. The prohibition of reprisal against cultural property is not without importance in occupied territories.[61] As with the rule on prohibition of reprisal in general, the absence of an inquiry into this rule under the *ICRC's Customary IHL Study* suggests that it does not treat this rule as reflecting customary international

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[58] UN General Assembly Resolution 3525D (XXX), 15 December 1975, preamble, third recital and para. 1.

[59] O'Keefe (2006), *supra* n. 16, at 260.

[60] The 1954 Hague Conventions for the Protection of Cultural Property in the Event of Armed Conflict, Article 4(4).

[61] For instance, the occupying power may resort to measures of demolishing or damaging cultural property situated in occupied territory with a view to putting an end to similar acts done by a co-belligerent of the occupied state.

law. Even so, as a policy choice, occupying powers should be wisely advised to refrain from engaging in reprisals against cultural property situated in occupied territory.

11. *The Protection of Cultural Property in Occupied Territory and War Crimes*

11.1. *Overview*

As examined above, Article 56 of the 1907 Hague Regulations forbids the occupying power from engaging in "the seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science", without any possibility of waiver based on imperative military necessity. As early as 1919, the Report of the Commission on Responsibility established after the First World War characterised the "wanton destruction of religious, charitable, educational and historic buildings and monuments" as a violation of the laws and customs of war that gave rise to criminal prosecution.[62] After World War II, Article 56 of the Hague Regulations provided a basis for individual criminal responsibility at the Nuremberg and other *ad hoc* war crimes tribunals set up by the Allies, which dealt with, *inter alia*, destruction and pillage of cultural property systematically committed by Nazi Germany on an immense scale in its occupied territory.[63]

Violations of Article 56 of the Hague Regulations are expressly included as one of five exemplary (namely, open-ended) categories of "violations of the laws or customs of war" within the meaning of Article 3(d) of the ICTY Statute. On the other hand, the ICC Statute does not verbatim incorporate this rule into one of the specific categories of "other serious violations of laws and customs".

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[62] The Commission on Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference, March 29, 1919*, Chapter II Violations of the Laws and Customs of War, category (20), 29 March 1919, (1920) 14 *AJIL* 95. The excerpts of this *Report* can be found in: J.C. Watkins, Jr. and J.P. Weber, *War Crimes and War Crime Trials: From Leipzig to the ICC and Beyond – Cases, Materials and Comments*, (2006), 28–35, at 32–33. See also Henckaerts and Doswald-Beck (eds), *supra* n. 6, Vol. II, at 728, para. 28.

[63] In this regard, see, for instance, US, Military Tribunal, Nuremberg, *Von Leeb (The High Command Trial)* case, Judgment, 28 October 1948; and US Military Tribunal, Nuremberg, *In re Weizsaecker and Others (Ministries Trial)*, Judgment, 14 April 1949, (1949) 16 *AD* 344, Case No. 118; and US Military Tribunal, Nuremberg, *Weizsaecker and Others (Ministries Trial)*, Judgment, 14 April 1949, (1949) 16 *AD* 344, Case No. 118. See also France, Permanent Military Tribunal, Metz, *Trial of Karl Lingenfelder*, Judgment of 11 March 1947, (1949) 9 *LRTWC* 67, Case No. 51, at 67–68 (destruction of the marble slabs bearing the names of the dead during World War I, and the breaking of the statue of Joan of Arc).

Instead, the approach of the ICC Statute is not to provide a *specific* war crimes provision for the protection of cultural property *in occupied territories*. As will be examined below, this is governed by the general prohibition on destroying or seizing enemy property.

Further, it may be suggested that the offences of destroying or wilfully damaging cultural property are covered by one of the specific offences relating to conduct of hostilities, namely, of attacks intentionally directed against immovable cultural property as a specific category of war crimes under Article 8(2)(b)(ix).[64] This provision criminalises wilful attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments and so forth, on condition that they are not serving as military objectives.

The 1954 Hague Convention envisages individual criminal responsibility. Article 28 stipulates that:

> High Contracting Parties undertake, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.

However, as Henckaerts notes, this provisions has remained a dead letter, as it does not specify the list of violations that call for a criminal sanction.[65]

11.2. *General Remarks on the War Crimes Based on Seizure of, Destruction of, or Wilful Damage Done to, Cultural Property in General*

Article 3(d) of the ICTY Statute designates as war crimes based on violations of laws and customs of war the seizure of, destruction or wilful damage done to, institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science. For the purpose of analysis, it is pertinent to distinguish the rule prohibiting the seizure of cultural property on one hand, and the rule forbidding the destruction or damage of cultural property on the other.

11.3. *War Crimes of Seizure of Cultural Property*

The seizure of cultural property not imperatively demanded by the necessities of war is a war crime provided under Article 8(2)(b)(xiii) of the ICC Statute, which forms as part of "[o]ther serious violations of laws and customs applicable in international armed conflict". Nevertheless, the criminalisation of this act is

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[64] In the absence of qualifying phrases such as "in occupied territory" or "conduct of hostilities", the offence of destruction or wilful damage can be recognised both during active hostilities and in situations of "calm" occupation.

[65] Henckaerts, *supra* n. 13, at 151.

subordinated to the condition that such act is not "imperatively demanded by the necessities of war", the condition that is absent in the context of Article 56 Hague Regulations and Article 3(d) ICTY Statute. Ascertaining the existence of this type of war crimes requires the definition of the concept of seizure. Yet, the distinction between lawful requisition and unlawful seizure may not be so facile as it seems. It may be suggested that the act of seizure that is serious enough to give rise to individual criminal responsibility is more identifiable.[66] However, the writings of leading publicists are hardly conclusive on this matter.[67]

11.4. *War Crimes Based on Extensive Destruction and Appropriation of Cultural Property in Occupied Territory*

Any extensive destruction and appropriation of cultural property, "which is not justified by military necessity and carried out unlawfully and wantonly" constitute a grave breach of GCIV.[68] Such a grave breach is punishable as a war crime relating to the protection of property in general, and states parties must establish jurisdiction over such a crime.[69] The grave breach is incorporated into Article 2(d) of the ICTY Statute and into Article 8(2)(a)(iv) of the ICC Statute. As its definitional element suggests, this category of war crimes can be identified only subject to two ambiguous conditions (military necessity; and unlawfulness and wantonness).

11.5. *Criminalisation under the 1999 Second Hague Protocol*

Criminalisation is one of the major breakthroughs in the 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict. Article 15(1) of the Second Protocol provides the definition of "serious violations" of this Protocol. Among the five categories of acts susceptible to individual criminal responsibility are two acts specifically relevant in occupied territories: "extensive destruction or appropriation of cultural property protected under

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[66] *The ICRC Commentary to GCI* attempts to draw a line between the two:

> There is a distinction in law between seizure and requisition. Seizure applies primarily to State property which is war booty; requisition only affects private property. There are, however, certain cases mentioned in Article 53, paragraph 2, of the Hague Convention in which private property can also be seized; but such seizure is only sequestration, to be followed by restitution and indemnity, whereas requisition implies a transfer of ownership.

ICRC's Commentary to GCI, at 279, n. 1.

[67] See K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court – Sources and Commentary*, (2003), at 256–257, n. 15 (referring to the views of Greenspan, Freiherr von der Heydte, Oppenheim/Lauterpacht, Fauchille, Schwarzenberger, etc.).

[68] GCIV, Article 147.

[69] GCIV, Articles 146 and 147.

the Convention and this Protocol" under subparagraph (c);[70] and "theft, pillage or misappropriation of, or acts of vandalism directed against, cultural property protected under the Convention" under subparagraph (e).[71] These acts must be committed intentionally *and* in violation of the Convention or this Protocol.

The offences described in subparagraph (e) suggest "normal war crimes", which are derived from the Hague rules and reflective of existing customary international law. On the other, Dörmann suggests that the offences mentioned in subparagraph (c) are considered by negotiators as progressive development of international law.[72] This observation must, however, be qualified. Since 1949, extensive destruction and appropriation of *any* property (cultural or otherwise) has been recognised as amounting to grave breaches of GCs I, II and IV.[73] The acts described in subparagraph (c), though not explicitly mentioned as such, are elevated to "grave breaches".[74] They are subject to mandatory universal jurisdiction within the meaning of Article 16(1) of the Second Protocol.[75]

12. *Conclusion*

It ought to be noted that the law of occupation as part of IHL developed at the time when the underlying assumption was that occupied territories remained relatively calm and stable, and that the occupying power's duties in respect of cultural property were primarily of negative nature (not to seize, destroy, or to cause wilful damage to it). This classic understanding requires much overhaul in the modern context of occupation. In the first place, the welfare-based concept of necessity has gradually acquired special importance in understanding the nature of duties imposed on the occupying power. Hence, as examined above, the occupying power is required to take specific affirmative duties to safeguard and preserve cultural property in occupied territory. Clearly, it is bound to take necessary measures to prohibit and prevent private individuals engaging in theft, pillage or misappropriation of, or vandalism against, cultural property, which is situated in the occupied territory or transported from or through the territory.

In the second place, it ought to be noted that as discussed elsewhere, modern examples of occupation may be characterised by a volatile state, which is beset

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[70] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999), Article 15(1)(c).

[71] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999), Article 15(1)(e).

[72] Dörmman, *supra* n. 67, at 221.

[73] GCI, Article 50; GCII, Article 51; and GCIV, Article 147.

[74] Dörmman, *supra* n. 67, at 221; and Henckaerts, *supra* n. 13, at 152.

[75] Dörmman, *ibid.*, at 221.

by eruptions of violence. Such violence may take place even among different insurgent groups. Against such a turbulent background of occupation, the occupying power may feel justified in relieving itself of the duty to safeguard and preserve cultural property in occupied territory by shifting the applicable laws from the IHL rules on occupation to those dealing with conduct of hostilities. This is especially the case in a specific area where the intensity of fighting is such as to disable the occupying power to maintain order by way of law enforcement measures. The application of rules on the conduct of hostilities in turn necessitates the occupying power to undertake careful appraisal of the applicable rules. Indeed, at the Diplomatic Conference of Geneva in 1974–1977, many western military powers even declared that the absence of a waiver under Article 53 API would not preclude cultural property becoming the object of attack when it is used, illegally, for military purposes.[76] This demonstrates the fragile nature of the protection of cultural property, which may be at the mercy of the legal categorisation of specific violence that erupts in occupied territory. Nevertheless states parties to the Second Protocol to the Hague Convention must be mindful of elaborate details of the term "imperative military necessity", which circumscribes the parameters within which it can invoke lawful derogation.

[76] Federal Republic of Germany, Statement at the CDDH, *O.R.* Vol. VI, CDDH/SR.42, 27 May 1977, at 225–226, Annex to the summary record of the forty-second plenary meeting; Netherlands, Statement at the CDDH, *O.R.*, Vol. VII, CDDH/SR.53, 6 June 1977, at 161–162, Annex to the summary record of the fifty-third plenary meeting; UK, Statement at the CDDH, *O.R.,* Vol. VI, CDDH/SR.42, 27 May 1977, pp. 238–239, Annex to the summary record of the forty-second plenary meeting; US, Statement at the CDDH, *O.R.*, Vol. VI, CDDH/SR.42, 27 May 1977, at 240–241 Annex to the summary record of the forty-second plenary meeting.

Part II

IHL-Based Rules concerning Fundamental Guarantees for Individual Persons in Occupied Territories

Having analysed principles and rules applicable to the laws of war classically understood (except for some fundamental rights incorporated in GCIV), the next task will be to examine fundamental guarantees derived from IHL in occupied territories. The appraisal turns to (i) general principles of IHL governing the protection of fundamental rights, as derived from GCIV; (ii) the concept of protected persons and the notion of direct participation in hostilities in occupied territories; (iii) specifically prohibited acts in occupied territories (forced labour, deportation etc); (iv) economic, social and cultural rights of protected persons in occupied territories; and (v) other specific rights based on IHL treaties, which are guaranteed for protected persons in occupied territories.

Chapter 11

General Principles Governing the Protection of Fundamental Rights in International Humanitarian Law

1. *Introduction*

In this chapter, the appraisal starts with the question whether or not the existing framework of IHL confers *rights* upon individual persons in the sense of the entitlement to raise complaints of violations of specific rules of IHL treaty provisions. It defends the argument that many IHL treaty-based rules specifically provide rights to individual persons. In the second section, the examinations turn to what may be considered general principles of IHL, which govern the protection of individual persons. These principles encompass: the horizontal application of IHL rules; the state responsibility of a violation of IHL rules in parallel to individual criminal responsibility; and the right of individual persons to claim reparations. The third section will briefly analyse the structure of the rights guaranteed under GCIV. In the fourth section, detailed examinations will focus on what may be described as general principles of GCIV, namely the set of rules regulating all the GCIV provisions dealing with the rights of individual persons in occupied territories. It is suggested that these general principles can be comprised of three minimum core guarantees recognised under Article 27 GCIV (respect for lives, honour, family rights, religious convictions and practices, and manners and customs; rights of women in relation to the protection of their dignity, and physical and mental integrity; and the right to equality and to non-discrimination); the inviolability of the fundamental guarantees of protected persons in occupied territories; measures of control and security that can be taken by the occupant to deal with security needs and other concerns in occupied territories; and the general derogation clause, as embodied in Article 5 GCIV, which the occupying power can invoke. The last section closely examines specific elements of the rights to humane treatment elaborated under Part III,

Section I of GCIV. This assessment draws heavily on the drafting records of the Geneva Conference or even the earlier, 1934 Tokyo draft.

2. *Conferral of Rights upon Individual Persons under IHL Treaty-Based Rules*

According to Provost, the fact that most IHL provisions are addressed to the "Parties to the conflict" suggests that the specific humanitarian rights anchored in the principle of humanity "are not directly attached to the human person, but instead stem from international public order requirements".[1] Nevertheless, whether or not the existing framework of IHL confers *rights* upon individual persons to raise complaints of violations of this body of international law is increasingly answered in the affirmative among human rights lawyers (and increasingly among IHL experts as well).[2] It is suggested that the rights enunciated in IHL treaty-based rules accord individual persons rights, and that violations of such rights can give rise to justiciable rights of individual victims.[3]

The justiciability of IHL rules can be borne out at least on two grounds. First, as will be analysed in Chapter 17, there has been a growing recognition that the "cross-fertilisation" of IHL and international human rights law is needed to accomplish the common aim of enhancing effective guarantee of rights of individual persons in armed conflict.[4] Meron comments that the "parallelism and

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[1] R. Provost, *International Human Rights and Humanitarian Law, (*2002), at 34.

[2] For instance, see G. Abi-Saab, "The Specificities of Humanitarian Law", in: C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, (1984), pp. 265, at 269; F. Kalshoven, "State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of the Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and Beyond", (1991) 40 *ICLQ* 827; E.-C. Gillard, "Reparation for Violations of International Humanitarian Law", (2003) *IRRC*, No. 851, 529; T. Meron, "The Humanization of Humanitarian Law", (2000) 94 *AJIL* 239, 246–247 (referring to the rights of protected persons under the First Geneva Convention to invoke their rights against the detaining power without relying on diplomatic protection) and 251–253. See also ICRC, *Commentary on the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 84 (J. Pictet ed., 1952). According to Kalshoven, the draft records of the Second Hague Peace Conference 1907 suggest that Article 3 of the Hague Convention IV of 1907 recognises the right of individual victims of laws of war to receive indemnities from a violating state: *ibid*., at 830–832.

[3] Kleffner and Zegveld suggest that this right should not be related solely to grave breaches of IHL but to other violations of IHL: J.K. Kleffner and L. Zegveld, "Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law", (2000) 3 *YbkIHL* 384–401, at 392–394.

[4] *Ibid*., at 393; and Meron (2000), *supra* n. 2, at 266–273. See also R.E. Vinuesa, "Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law", (1998) 1 *YbkIHL* 69, at 72–76.

growing convergence enriches humanitarian law, as it does international human rights".[5] Second, many IHL treaty provisions are couched in terms based on the notion of rights of individual persons. Writing in 1977, Dinstein argues that several provisions of IHL create rights for individual persons, in lieu of rights or duties for states. He observes that:

> . . . the laws of war, like the laws of peace, also prescribe rights and duties assumed directly by individual human beings. In all the branches of the laws of warfare – whether customary or conventional, and, if the latter, whether codified in Geneva or at The Hague – the accent is on State rights and duties. But in all branches of the laws of warfare, without distinction, there is a segment which creates human rights and human duties.[6]

Dinstein corroborates this argument by reference to two general principles embodied in the Geneva Law (Articles 6 and 7 of GCI-GCIII, and Articles 7 and 8 of GCIV).

A plethora of IHL treaty provisions employ terms explicitly recognising individual persons' rights, such as "rights", "entitlement" or "benefit".[7] Kleffner and Zegveld argue that apart from these "clear-cut" examples, the idea of "individual humanitarian rights" can be bolstered by teleological interpretation. They refer to the grave breach provisions that may be understood as conferring rights upon individual victims.[8] Obviously, when the Hague Regulations were drafted in 1899, the idea of *international* human rights, as opposed to the ideas of civil liberties and human rights under national constitutional laws, had yet to emerge. To interpret the rules of the Regulations as providing a basis for rights of individuals may have been far-fetched. The limited scope of protections afforded to civilians under the Hague Regulations can be explained by the fact that hostilities in the nineteenth century took place near the battlefront far from places where civilians resided. As such, the need to protect civilians was not felt as an urgent matter.[9]

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[5] Meron (2000), *ibid.*, at 266.

[6] Y. Dinstein, "The International Law of Inter-State Wars and Human Rights", (1977) 7 *Israel YbkHR* 139, at 147.

[7] See, for instance, APII, Article 4; GCIII, Article 78; GCIV, Article 30. See also Kleffner and Zegveld, *supra* n. 3, at 392–393.

[8] *Ibid.*, at 393. However, in other context, they note that the distinction between grave breaches and "non-grave breaches" outside the context of individual criminal responsibility is "highly arbitrary". They refer to the example of an unjustifiable delay in the repatriation of prisoners of war or civilians, which is committed *not willfully*, contrary to the mental requirement specifically stipulated in Article 85(4) chapeau and (b) of API. They add that it does not matter to victims whether such an unjustifiable delay was the outcome of willfulness or negligence: *ibid.*, at 391, n. 29.

[9] A.M. de Zayas, "Civilian Population, Protection", in: R. Bernhardt (ed.), (1992) 1 *Encyclopedia of Public International Law* 606, at 606–611.

Further, the prevailing understanding at that time tipped the balance in favour of military necessity against a humanitarian concern for civilians.

Even so, the rights of individual persons can be contemplated with respect to the modicum of provisions embodied in the 1907 Hague Regulations. Some provisions of the Regulations are purported specifically to safeguard fundamental aspects of individual persons, such as their lives, respect, dignity and honour, prohibition of collective punishment, as well as the right of property. Indeed, these provisions can be understood as providing a basis for rights of individual persons.[10] This methodology can be defended on the ground that they correspond to the provisions under Part III, Section I of GCIV, which elaborates the concept of humane treatment in different forms. It ought to be recalled that the GCIV is not designed to replace the Hague rules[11] but only to supplement them.[12] Further, the "rudimentary" safeguards embodied in the Hague Regulations proffer evidence that the corresponding but more elaborate rules laid down in GCIV are declaratory of pre-existing customary IHL rules.

3. *General Principles of IHL Relating to the Protection of Rights of Individual Persons*

3.1. *Horizontal Effects – Positive Obligations*

Article 1(1) GCIV, as a general clause, refers to the duty of contracting parties to "ensure respect for the present Convention in all circumstances". Similar wording is reiterated in Article 1(1) of API. These suggest that many provisions of GCIV and API require the Contracting Parties to discharge positive obligations. Condorelli observes that in contrast to human rights law, the *Drittwirkung* (or horizontal effects) has had "consolidated presence" in the long lineage of humanitarian law.[13] The question of horizontal effects is of special importance to the law of occupation. This body of law consists of a detailed list of positive

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[10] Indeed, this is the approach assumed by Dinstein in his seminal article in 1978: Y. Dinstein, "The International Law of Belligerent Occupation and Human Rights", (1978) 8 *Israel YbkHR* 104.

[11] In relation to 1899/1907 Hague Conventions, understandably, weaker states insisted that the occupying power's duties towards local population should be extensive: E. Benvenisti, *The International Law of Occupation*, (1993), at 10.

[12] With specific regard to Article 47 GCIV, the *ICRC's Commentary* observes that "[t]his provision [Article 43 of the Hague Regulations] does not become in any way less valid because of the existence of the new Convention, which merely amplifies it so far as the question of the protection of civilians is concerned": *ICRC's Commentary to GCIV*, at 273–4.

[13] L. Condorelli, "The Imputability to States of Acts of International Terrorism", (1989) 19 *Israel YbkHR* 233, at 242–244. See also L. Condorelli and L. Boisson de Chazournes, <<Quelques

duties imposed on an occupying power to maintain, restore and ensure public order and safety of civilians in occupied territory. For instance, the occupying power is obliged to take an "appropriate measure" to protect the population against criminal activities of other individuals, such as bandits, saboteurs, terrorists and insurgents that threaten the lives of civilians in occupied territory.[14] The recognition of positive duties can also be seen in respect of specific aspects of an economic, social and cultural nature, in particular, in relation to food and medical supply.[15]

3.2. *State Responsibility for Violations of Rights of Civilians in Occupied Territory*

Clearly, the identification of individual criminal responsibility for war crimes and other core crimes on the basis of serious violations of core IHL rules will not obliterate the concurrent responsibility of the state on behalf of which or in coordination with which individual perpetrators have acted. Article 29 GCIV recognises this dual responsibility, stipulating that Parties to the conflict cannot claim immunity from their responsibility for ill-treatment committed by their agents by reference to their individual criminal responsibility. The two distinct responsibilities are supplementary to each other. The *ICRC's Commentary on GCIV* explains that since the question of individual criminal responsibility is formulated in Articles 146 and 147 in Part IV of GCIV, Article 29 only deals with the responsibility of the State.[16]

3.3. *The Right of Individual Persons to Claim Reparations*

A belligerent party must be liable to pay compensation for all acts committed by members of its armed forces. This principle dates back to Article 3 of the Hague Convention IV of 1907.[17] Seventy years later, the corresponding provision was incorporated into API as Article 91. The *ICRC's Commentary on API* states that Article 91 API is codificatory of the pre-existing customary norm derived from

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remarques à propos de l'obligation des États de 'respecter et faire respecter' le droit international humanitaire 'en toutes circonstances'>>, in: Swinarski (ed.), *supra* n. 2, Ch. II, pp. 17–35.

[14] See Condorelli, *ibid*., at 243; and Dinstein (1978), *supra* n. 10, at 119.

[15] GCIV, Article 55 GCIV; and API, Article 69.

[16] *ICRC Commentary to GCIV*, at 209–210.

[17] The 1907 Hague Regulations are almost identical to the earlier Regulations of 1899, except for the insertion of Article 3, and for small modifications in other provisions: J.M. Mössner, "Hague Peace Conferences of 1899 and 1907", (1995) 2 *Encyclopedia of Public International Law* 671.

Article 3 of the 1907 Hague Convention IV.[18] This principle also finds expression in Article 38 of the 1999 Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. The *ICRC's Commentary on API* explains the intention of the drafters, noting that:

> Such a provision [Article 3 of the 1907 Hague Convention IV] . . . corresponded to the general principles of law on international responsibility. Moreover, any recourse by wronged persons to the law was considered illusory if this could not be exercised against the government of the perpetrators of these violations, through their own government. . . . The practice of States has fallen far short of these laudable intentions. In fact, there has always been a tendency for the victors to demand compensation from the vanquished, without reciprocity and without making any distinction between the damages and losses resulting from lawful or unlawful acts of war.[19]

There have been several national cases which negated the right of individuals for compensation for violations of IHL rules in national courts on the basis of the doctrine of sovereign immunity.[20] In contrast, there has been an array of national cases that expressly endorse such rights accruing to individual persons. In the *Forced Labour* case in 1996, the German Constitutional Court held *obiter* that there had not existed a rule of general international law that precluded the payment of compensation to individuals for violations.[21] In the *Distomo* case, the German Federal Court, however, retreated from this position, holding that in relation to atrocities committed during the Second World War, states are

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[18] *ICRC's Commentary to API*, at 1053, para. 3645. See also *ibid*., at 1056–57, para. 3657–3659.

[19] *Ibid*., at 1053–1054, para. 3646. As the *Commentary* notes, the underlying ethos of Article 3 of the 1907 Hague Convention IV and Article 91 API is the same as the provisions of the GCIV relating to the responsibilities of the contracting parties for grave breaches (GCI, Article 51; GCII, Article 52; GCIII, Article 131; and GCIV, Article 148). These provisions share the stipulation that "[n]o High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article". The *ICRC's Commentary to API* explains that "[t]he purpose of this provision is specifically to prevent the vanquished from being compelled in an armistice agreement or peace treaty to renounce all compensation due for breaches committed by persons in the service of the victor": *ibid*., at 1054, para. 3649.

[20] US, Court of Appeals for the District of Columbia Circuit, *Hugo Princz v. Federal Republic of Germany*, Judgment of 1 July 1994, (1994) 26 F 3d 1166, (1996) 103 *ILR* 604, overruling *Hugo Princz v. Federal Republic of Germany*, 813 F Supp (DDC 1992). For the Japanese case-law, see *infra* Ch. 15, section 2.5.

[21] Federal Republic of Germany, Second Chamber of the Constitutional Court, *Forced Labour* case, Judgment of 13 May 1996, *BVerfGE*, Vol. 94, 315. See also J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law*, (2005), Vol. II, Part 2, at 3561, para. 192; and A. Gattini, "War Crimes and State Immunity in the Ferrini Decision", (2005) 3 *JICJ* 224, at 226–7.

responsible for paying compensation vis-à-vis another state but not vis-à-vis individual victims.[22]

Strong criticism must be directed against the highly positivist proclivity of the Japanese courts. With some notable exceptions,[23] they employed formalistic legal techniques to deny the claims for individual compensation raised by victims of atrocities committed by the Japanese Imperial Army during the Second World War (slave labour imposed on hundreds of thousands of Chinese and other Asian workers, victims of sex slavery systematically inflicted on tens of thousands of East Asian and Dutch women, who were forcibly drawn from Japanese colonies (Korea and Taiwan) and occupied territories (China and South East Asian countries), and slave labour inflicted on the Allied soldiers).[24] Indeed, by way of effective interpretation of the relevant IHL treaty-based rules, individual persons who are victims of violations of IHL can be deemed entitled to claim necessary reparations. It is possible to contend that such rules have become customary norms.[25] Further, the scope of application *ratione materiae* of this norm can be considered to embrace violations of all substantive IHL rules.[26] The *ICRC's Customary IHL Study* confidently asserts that the rule that a state responsible

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[22] Federal Republic of Germany, Federal Court of Justice, *Distomo Massacre* case, Decision of 26 June 2003, BGH, III ZR 245/98, published in (2003) *NJW* 3488 *et seq*.

[23] See, for instance, Japan, Yamaguchi District Court, *Korean "comfort women" v. Japan*, Shimonoseki, Branch, Yamaguchi District Court, Judgment of 27 April 1998, 1642 *Hanrei Jiho* (1998) 24–50. However, this was overruled by the Hiroshima High Court in its Judgment of 29 March 2001, 1759 *Hanrei Jiho* (2001) 42–58; and 1081 *Hanrei Taimuzu* (2002) 91–154 (acknowledging nonetheless that "considering the serious damage the applicants have suffered, we understand their dissatisfaction caused by the State's omission of legislation": Henckaerts and Doswald Beck, *supra* n. 21, Vol. II, Part 2, at 3565, para. 200.

[24] See, *inter alia*, *Philippine "comfort women" v. Japan*, Tokyo District Court, 9 October 1998, 1683 *Hanrei Jiho* (1999) 57–80 and other cases cited in: Shin Hae Bong, "Compensation for Victims of Wartime Atrocities – Recent Developments in Japan's Case-Law", (2005) 3 *JICJ* 187. For more details, see *infra*, Ch. 15, section 2.5. See also the *Shimoda* case in 1963, in which the Tokyo District Court held that the doctrine of sovereign immunity precluded individual victims of atomic bombs in Hiroshima and Nagasaki exercising a direct right to compensation for breaches of IHL under international law: Tokyo District Court, *Ryuichi Shimoda and Others v. The State of Japan (Shimoda* case*)*, Judgment of 7 December 1963, *Hanrei Jiho*, Vol. 355, 17; translated in (1964) 8 *Japanese Annual of International Law* 231.

[25] Gillard, *supra* n. 2, at 529–553; and L. Zegveld, "Remedies for Victims of Violations of International Humanitarian law", (2003) *IRRC*, No. 51, at 497–527. See also N. Ronzitti, "Compensation for Violations of the law of War and Individual Claims", (2002) 12 *Italian YbkIL* 39–50. For detailed assessment of this issue, see P. D'Argent, *Les réparations de guerre en droit international public. La responsabilité internationale des États à l'épreuve de la guerre*, (2002); H. Fujita, I. Suzuki and K. Nagano, *Senso to Kojin no Kenri (War and the Rights of Individuals – Renaissance of Individual Compensation)*, (1999).

[26] See Henckaerts and Doswald-Beck (eds), *supra* n. 21, Vol. I, at 537–550, Rule 150. See also *UK Manual* (2004), para. 16.15.

for violations of IHL is liable to make "full reparation" for the loss or injury caused is expressive of customary international law. According to the *Study*, this obligation encompasses reparations sought directly by individuals. It describes the rights of individual victims of violations of IHL to seek compensation as "an increasing trend", referring to ample national practice.[27] As it acknowledges,[28] the only problem is that Article 3 of the Fourth Hague Convention and Article 91 API neither specify whether recipients are only the states acting on behalf of individual persons through diplomatic protection, nor provide procedural mechanisms for instituting claims for compensation.

Article 33(2) of the *ILC's Articles on State Responsibility* provides that "[t]his Part (Part Two: "Content of the International Responsibility of a State") is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State".[29] The inviolability of rights of individual victims to seek reparations is confirmed in the *ILC's commentary* on Article 33, which states that:

> When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights.[30]

4. *The Fourth Geneva Convention and the Protection of Rights of Individual Persons*

4.1. *Overview*

The GCIV requires an occupying power to undertake a broad range of positive duties. The corresponding rights of protected persons in occupied territory are largely influenced by the development of international human rights law (IHRL). Lauterpacht/Oppenheim explains that the flagrant violations committed by Nazi Germany over its occupied territories in Eastern Europe during the Second World

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[27] Henckaerts and Doswald-Beck (eds), *ibid.*, Vol. I, at 541. See the ample body of case-law cited in: *ibid.*, Vol. II, part 2, at 3560–3569, paras. 190–209.

[28] *Ibid.*, Vol. I, at 544.

[29] J. Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (2002), at 209.

[30] *Ibid.* This is of special relevance to victims of sex slavery, one of the most notorious atrocities committed by the Japanese Imperial Army before and during the Second World War.

War provided the primary catalyst for vesting this treaty with elaborate details of fundamental guarantees for civilians in occupied territory.[31]

Part II of GCIV (Articles 13–26) encompasses a number of provisions that are purported to apply to any protected persons. The provisions of Part II are generally related to conduct of hostilities. They assume special importance in volatile or turbulent occupied territory where international armed conflict between the occupying power and the occupied state has resumed, or where non-international armed conflict between different factions or between an occupying power and an insurgent group (or a resistance group) has erupted. These scenarios will be examined in Chapter 12. Indeed, for the purpose of the assessment of rights of protected persons in occupied territories, it is the detailed guarantees embodied under Part III of GCIV that are of the greatest significance in occupied territory: first, the general provisions under Section I (Articles 27–34) applicable to both protected persons in alien territory and to those in occupied territory; second, the provisions under Section III (Articles 47–78) specifically designed for inhabitants of occupied territory; and third, the elaborate rules on treatment of internees under Section IV.

4.2. *The Rights Guaranteed under Part III of GCIV*

The rules embodied in GCIV, Part III, Section I embody the duty of the contracting parties to safeguard highly important rights of protected persons, both in the territories of the parties to the conflict, and in occupied territories. Schwarzenberger argues that even before 1949, "the standard of civilisation . . . is prominent in its application to the treatment of the inhabitants of occupied territories". He contends that the rules enumerated in Part III, Section I (Articles 27–34) relate to "the most extreme breaches of the minimum standards".[32]

The rights recognised under Part III, Section I are of a fundamental nature. Except for the right to be free from discrimination, and the right to religion, all these rights are related to specific elements of the right to life, and the freedom from torture or other forms of ill-treatment. The inventory of the rights elaborated in this section are: the right to respect for their persons, honour, family rights, religious rights and customs (Article 27); the freedom from human shield (Article 28); the freedom from physical or moral coercion (Article 31); the freedom from measures causing physical suffering or extermination, including murder, torture, corporal punishment, mutilation and medical or scientific experiments not demanded by medical treatment (Article 32); the freedom

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[31] L. Oppenheim, *International Law*, (7th ed., by H. Lauterpacht, 1952), at 448–53.

[32] G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Vol. II: The Law of Armed Conflict*, (1968), at 78. For the elaboration of "the standard of civilisation" in the laws of war, see *ibid*., at 109–127.

from collective punishment (Article 33(1));[33] the freedom from reprisals against persons and their property (Article 33(3)); and the freedom from hostage-taking (Article 34). These will be examined in detail in a section below. Writing in 1968, Schwarzenberger argued that in contrast to the provisions relating to legal duties of occupying powers, which "are not merely elaborated, but enlarged", the provisions embodied in Section I of Part III "probably" reflected "no more than attempts to clarify existing rules of international law". Hence, he suggested that they were declaratory of customary international law.[34] Indeed, the rights enumerated in Section I largely correspond to the catalogue of human rights which are non-derogable and peremptory in nature.

5. *General Principles of the Fourth Geneva Convention Relating to the Protection of Fundamental Rights*

5.1. *Three "Minimum Core Guarantees" Recognised under Article 27 of GCIV*

Article 27 GCIV provides general principles governing the whole provisions of Part III of GCIV. The first three paragraphs recognise three minimum core guarantees for protected persons. The three guarantees are: (i) the respect for life, honour, family rights, religious convictions and practices, and manners and customs; (ii) fundamental rights of women in respect of the protection of their dignity, and physical and mental integrity; and (iii) the right to equality and non-discrimination. The *ICRC's Commentary* adequately captures the "constitutional" significance of this provision, describing it as "the basis of the Convention, proclaiming . . . the principles on which the whole of 'Geneva Law' is founded".[35] The *Commentary* designates these guarantees as "absolute rights"

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[33] See also the 1907 Hague Regulations, Article 50. Indeed, the prohibition of collective penalties was incorporated in the 1919 List of War Crimes, which was prepared by the Responsibilities Commission of the Paris Peace Conference in 1919, as a customary rule: Crime number 17, reprinted in J.J. Paust, M.C. Bassiouni, M. Scharf, J. Gurulé, L. Sadat, B. Zagaris and S.A. Williams, *International Criminal Law – Cases and Materials*, 2nd ed., (2000), at 32–33. See also J.J. Paust, "The United States as Occupying Power over Portions of Iraq and Special Responsibilities under the Laws of War", (2003) 27 *Suffolk Transnational Law Review* 1, at 7.

[34] Schwarzenberger, *supra* n. 32, at 165. However, he noted that "[t]o the extent, however, to which existing legal duties of Occupying Powers are not merely elaborated, but enlarged, the Convention must be treated as constitutive and applicable only between the parties": *ibid.*, at 166. As discussed in Chapter 2, this argument, while probably valid when the GCIV was drafted, needs to be overhauled to take into account the developments since 1949.

[35] *ICRC's Commentary to GCIV*, at 199–200. It adds that "Article 27 is a characteristic manifestation of the evolution of ideas and law": *ibid.*, at 200.

or "supreme rights" of protected persons,[36] the terms suggestive of normative hierarchy and *jus cogens*.

5.2. *The Respect for Lives, Honour, Family Rights, Religious Convictions and Practices, and Manners and Customs*

All protected persons are entitled to have their persons,[37] honour, family rights,[38] religious convictions and practices,[39] and manners and customs respected "in all circumstances".[40] This rule dates back to Article 46 of the Hague Regulations,[41] which emphasises the respect for lives, physical (and mental) integrity or dignity, religion, and property. The right to humane treatment largely corresponds to the freedom from torture, cruel, inhuman or degrading treatment or punishment under Article 7 of the ICCPR. It requires the state parties not only to refrain from inflicting ill-treatment, but also to undertake positive duties based on precaution, prevention, and assistance.[42] As a logical corollary of this fundamental right, all protected persons must be treated humanely "at all times" and "be protected especially against all acts of violence or threats thereof and against insults and public curiosity".[43] The most brutal forms of inhumane treatment are specifically enumerated under Article 32 GCIV, which will be examined separately.

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[36] *ICRC's Commentary* describes the rights recognised in Articles 27(1)–(3) GCIV as "absolute rights" and "supreme rights": *ibid.*, at 202 and 207.

[37] The term "persons" is purported to be broad, encompassing physical, moral and intellectual integrity of human persons (which in turn includes private aspects): *ibid.*, at 201.

[38] Family rights under occupied territory are given concrete substance under Articles 82 (family unity in case of internment), 25 (family correspondence), 26 (inquiries into dispersed family), and 50 (rights of children).

[39] *ICRC's Commentary* recognises that the right to religious practice, akin to the equivalent rights in the ICCPR and in regional human rights treaties, is subject to limitations "necessary for the maintenance of public law and morals": *ICRC's Commentary to GCIV*, at 203. See also Article 46 of the Hague Regulations (the right to respect "religious convictions and practice"), and the right of internees to receive spiritual assistance from ministers of their faith, which is recognised under Article 58 GCIV (occupied territory).

[40] GCIV, Article 27(1). The right to religion must be read together with Article 58 of GCIV, which requires the occupying power to allow ministers of religion to give spiritual assistance to the members of their religious communities. Under this provision, the occupying power is also obliged to accept consignments of books and articles for religious needs and to facilitate their distribution among the civilian population in occupied territory. The religious rights under GCIV are supplemented by Article 69(1) of API, which requires the occupying power to ensure, among others, the provision of objects necessary for religious worship.

[41] Article 46 of the 1907 Hague Regulations provides that "[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected".

[42] *ICRC's Commentary to GCIV*, at 204.

[43] GCIV, Article 27(1), second sentence.

5.3. *The Right to Equality and to Non-Discrimination*

All protected persons in occupied territory (and in territories of parties to the conflicts) are entitled to the fundamental principle of equality of treatment and non-discrimination. The wording "in particular" suggests that the discriminatory grounds of race, religion or political opinion are given merely as examples. The *ICRC's Commentary on GCIV* notes that other criteria such as language, colour, social position, financial circumstances, and birth may be added.[44] Problematically, the *Commentary* fails to mention the discriminatory badges based on sex, gender, sexual orientation and disability. It explains that in view of the need to take into account the state of health, age and sex of protected persons, the principle of equality is understood as requiring differential treatment in some instances.[45] Clearly, the principle of equality calls for specific measures of a positive nature. For instance, in an occupied territory, Article 64(1) GCIV requires the occupying power to abrogate discriminatory laws in force.[46]

Contrary to Article 13, the criterion of nationality is not expressly stated as a discriminatory ground under Article 27(3). The tenor of the discussions at the Diplomatic Conference of 1949 ruled out the possibility that this criterion could be implicitly covered.[47] The exclusion of nationality ground can be explained by the fact that the status of protected persons under Article 4 largely depends on nationality.[48] However, as examined in the context of "protected persons" status, the focus of analysis ought to be shifted from the formal test of nationality to the substantive test based on the sense of allegiance. This consideration must be equally applied to the non-discrimination principle.

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[44] *ICRC's Commentary to GCIV*, at 206.

[45] *Ibid*. See also the principle that persons in different situations must be treated differently: ECtHR, *Thlimmenos v. Greece,* Judgment of 6 April 2000.

[46] *ICRC's Commentary to GCIV*, at 207.

[47] See, in particular, the statement of Mr. Bammate (Afghanistan), Committee III, 8th. Meeting, 4 May 1949, *Final Record*, Vol. II-A, at 641; and Statements of Miss Jacob (France) and of Mr. Pilloud (ICRC), Committee III, 9th Meeting, 5 May 1949, *ibid*., at 641–642.

[48] Nevertheless, if the criterion of nationality is understood as akin to the notion of allegiance and loyalty, then Article 4 should not be so formally interpreted as to deny the benefit of some rights under GCIV to a civilian who has participated in hostilities while holding the same nationality as the captor or detaining power. The only persons whose nationality are likely to pose an obstacle to their protected person's status would then be nationals of a State not party to the GCs within the meaning of Article 4(2). In view of the near universal participation in the GCs, such persons are becoming rarity.

5.4. *The Inviolability of the Fundamental Guarantees of Protected Persons in Occupied Territory*

Another general principle governing the law of occupation is the principle of intangibility of fundamental guarantees of protected persons in an occupied territory.[49] This principle is embodied in Article 47 GCIV, which reads that:

> 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.

This principle is the specific embodiment of the general rules laid down in Article 7 (the prohibition on adversely affecting the situation of protected persons by way of special agreements) and in Article 8 (non-renunciation of rights) GCIV. Protected persons in occupied territories must not be deprived of the rights under the GCIV by any change introduced into the institutions or government of the occupied territory as a result of the occupation, or of any annexation of the whole or part of the occupied territory.[50] Likewise, their rights cannot be abridged by way of an agreement concluded between the occupying power and the authorities of the occupied territory. The occupying power cannot rely on its unilateral statement or decisions to undermine the status and rights of civilians in the occupied territory.[51] These principles reflect the general rule that in view of their humanitarian objectives, any limitations on the applicability of the Geneva Conventions must be interpreted as narrowly as possible.[52] In case of Article 47, the rights of protected persons in an occupied territory must not be derogated from by way of unilateral act (such as annexation), or by an agreement entered into by parties to the conflict. This provision prohibits only negative derogation (*la dérogation négative*). It does not prevent parties from entering into agreements to broaden the ambit of rights for protected persons (la *dérogation positive*).[53] Kolb describes Article 47 as organising "un régime de

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[49] R. 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", (2002) 10 *AfYbkIL* 267, in particular, at 296–321.

[50] GCIV, Article 47. See also Article 8 of the GCIV which prohibits protected persons from renouncing in part or in entirety the rights guaranteed in GCIV.

[51] F. Kalshoven, *Belligerent Reprisals*, 2nd ed., (2005), at 319.

[52] Kolb, *supra* n. 49, at 301.

[53] *Ibid.*, at 299–300 and 310.

standard minimum impératif, protégé contre tout accord visant ou ayant pour effet d'en abaisser le seuil".[54]

Article 47 GCIV is equally of special importance to the assessment of the co-existing relationship between on one hand the law of occupation, and on the other an armistice agreement, or a treaty authorising the stationing of foreign military forces (status of forces agreement or SOFA), which is concluded between the occupied country and the occupying power. If an agreement is reached without coercion, this agreement may terminate the legal status of occupation and preclude the scope of application *ratione materiae* of GCIV. The only exceptions would be the main forty-three provisions, which Article 6(3) specifically describes as continuously binding upon the occupying power for the duration of occupation. In contrast, if there is an element of coercion, such an agreement is deprived of legal force by virtue of Article 47.[55]

In the period preceding the Second World War, it was understood that the law of occupation could be subject to a special agreement, such as in the case of the West Bank of the Rhine in 1919. Since the adoption of the Geneva Conventions in 1949, this understanding has been drastically changed by virtue of the introduction of Articles 7, 8 and 47 GCIV. Within the current legal framework, it is a special agreement that must be subordinated to the obligations under the law of occupation.[56] Along this line, Adam Roberts argues that agreements such as those concluded between the USSR and other Warsaw Pact forces on one hand, and Hungary in 1956 or Czechoslovakia in 1968 on the other,[57] "have no more power than any other agreement to affect the application of the 1949 Geneva Convention IV: the provisions of Articles 7, 8 and 47 seem unambiguous".[58] It is suggested that even where occupation is effectuated with the indigenous authorities in post, the refusal by those authorities to categorise the circumstances as occupation does not affect the *de jure* applicability of the law of occupation.[59]

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[54] *Ibid*., at 300.

[55] *Ibid*., at 311.

[56] Kolb, *supra* n. 49, at 311.

[57] The Agreement Concerning the Legal Status of Soviet Forces Temporarily Stationed in the Territory of the Hungarian People's Republic, signed in Budapest 27 May 1957 (UN Treaty Series, Vol. 407, at 170); and the Treaty Between the Government of the USSR and the Government of the Czechoslovak Socialist Republic on the Conditions of Temporary Sojourn of Soviet Forces on the Territory of the Czechoslovak Socialist Republic, signed in Prague 16 October 1968, (1968) 7 *ILM*, at 1334.

[58] Adam Roberts, "What is a Military Occupation?", (1984) 55 *BYIL* 249, at 288.

[59] *Ibid*.

5.5. *Measures of Control and Security*

Article 27(4) GCIV provides that States parties to the conflict are entitled to take such "measures of control and security" as are considered necessary to deal with consequences of the war.[60] Such measures of control and security are not confined to relatively mild restrictions such as the duty of registering with, and periodic reporting to, the occupying authorities, or a ban on the carrying of arms. The occupying power is entitled to take stringent measures such as the prohibition on change in place of residence without permission, and restrictions on movement, or more harsh measures of depriving individual persons of their liberty (assigned residence or internment).[61] Placing individual persons in assigned residence or interning them is the severest form that the occupying power can take on security grounds, and without any charge against a protected person under penal/security law in an occupied territory.[62]

Conditions for lawful deprivation of liberty of protected persons in an occupied territory will be closely analysed in Chapter 20. It suffices here to stress that to justify the deprivation of the liberty of protected persons, three conditions must be met. First, there must be no abridgement of specific safeguards of humane treatment, as elaborated in Part III, Section I. Second, deprivation of liberty must not be applied in a discriminatory manner.[63] Third, measures of control and security must fulfil the principle of proportionality, with respect to their scope of application *ratione materiae* (type of measures, including the least onerous etc), *ratione loci* (geographical scope of measures), *ratione temporis* (duration of measures), and *ratione personae* (category of persons who are considered suitable addressees).[64] Further, only "imperative reasons of security" must be adduced to justify assigned residence or internment of civilians.[65]

6. *Derogation under Article 5 of GCIV*

6.1. *Overview*

In case measures of control and deprivation of liberty contemplated in Article 27(4) GCIV and in the relevant provisions of Part III, Section III of GCIV are considered ineffective to deal with unprivileged belligerents, the occupying

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[60] GCIV, Article 27(4).
[61] *ICRC's Commentary to GCIV*, at 207.
[62] See GCIV Article 78(1). For protected persons in enemy territory, see GCIV, Articles 41–43.
[63] GCIV, Article 27(3).
[64] For instance, control and security measures necessary for the protection of minors may not be needed for adults.
[65] GCIV, Article 78.

power can invoke the derogation clause under Article 5 GCIV, depriving them of the rights of communications. According to this provision, civilians who have taken part in espionage, sabotage or hostilities will lose many rights and privileges guaranteed under GCIV. The extent of the loss of rights and privileges, however, varies. The civilians captured in an occupied territory are much more privileged than those held in the enemy territory. The latter may endure greater limitations on their rights, insofar as the exercise of these rights is deemed to threaten the security of the detaining power.

Two caveats ought to be heeded for the occupying power invoking the derogation clause under Article 5 GCIV. First, its capacity to rely on the derogation clause is circumscribed by the stringent requirement of absolute military security as set forth in Article 5(2) GCIV. Second, the second sentence of Article 5(3) specifically requires that "the full rights and privileges of a protected person" under GCIV must be restored as soon as the security needs no longer justify the loss of the rights.

6.2. *Derogation from Rights of Protected Persons in Occupied Territory*

Article 5(2) GCIV stipulates that spies, saboteurs and others (such as partisans and "underground activists") captured in occupied territory are considered to forfeit only their right of communication with the Protecting Power, the ICRC and family members.[66]

It has been suggested that the captives in occupied territory may be detained "without limitation of time (as long as military security requires it)".[67] This far-

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[66] Note that the State Parties to API are bound to provide even such unprivileged belligerents with "protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol": API, Article 44(4).

[67] Dinstein (1978), *supra* n. 10, at 111. Draper argues that under Article 5 GCIV the latitude of the occupying power to take detention measures on security grounds is very broad, referring to the limited capacity of the Protecting Power on this matter:

> Article 5, as framed, gives a considerable latitude to the Occupant in matters of military security, and in a context where the Protecting Power is virtually precluded from opening up the decision of the Occupant upon any security matter. If the Occupant informs the Protecting Power that a person is detained as a spy or saboteur, or is suspected of these activities, there is no provision in the Convention for forcing the Occupant to disclose the basis for its assertion. The proper application of this provision resides in the good faith of the Occupant. If it is not there, the Occupant can place large numbers of persons in detention on the general ground of security suspects. It is clear that the article does not compel the Occupant to bring such persons to trial. There is no provision that they must be released if not brought to trial. The real sting of the article is that such suspects have forfeited their rights of communication "in those cases where absolute military security so requires". The protecting Power cannot be the arbiter of that matter.

G.I.A.D. Draper, "The Geneva Conventions of 1949", (1965) 114 *RdC* 63, at 131.

fetched suggestion must be severely qualified in several respects. The detention is allowed only so long as military security needs demand, and detainees must be given effective guarantees of procedural safeguards. The occupying power must ensure that detention does not lead to "indefinite" detention. Periodic review must be undertaken so as to verify whether there continue to exist sufficient security grounds to justify deprivation of liberty.

The scope of derogable rights recognised with respect to the civilians in an occupied territory is limited to the rights of communications.[68] Even protected persons convicted of espionage, sabotage or murder are entitled to an elaborate list of the rights in Section III of Part III, such as the freedom from forcible transfer and deportation, and due process guarantees (including the right to legal assistance, the right to present evidence, and call witnesses,[69] as well as the right to appeal).[70]

With respect to the right of communications, Article 45(3) of API nullifies the possibility of detention incommunicado, providing unprivileged belligerents (except for spies) in an occupied territory with the right of communications. Among the unprivileged belligerents mentioned in Article 5 GCIV, only spies remain at the risk of being held in indefinite detention incommunicado. However, the traditional rationale that such risk helps dissuade espionage is increasingly challenged. This must be balanced against the understanding that spies can contribute to compliance with the fundamental principles of IHL such as the principles of distinction, proportionality and precaution through their intelligence gathering on military objectives.[71]

6.3. *Two Non-Derogable Rights Expressly Mentioned in Article 5 of GCIV*

The first sentence of Article 5(3) provides two non-derogable rights: the right to humane treatment;[72] and "the rights of fair and regular trial". It seems contradictory that while the second paragraph of Article 5 confines the scope of derogation *ratione materiae* only to rights of communications, the third paragraph mentions only two non-derogable rights, hinting derogability from other rights. Indeed, this apparent contradiction was the subject of debate in the drafting process

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[68] GCIV, Article 5(2).

[69] GCIV, Article 72.

[70] GCIV, Article 73.

[71] See CUDIH, *Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict*, Geneva, 24–25 July 2004, at 17 (most experts agreeing on the need to prevent even spies facing dangerous conditions of indefinite detention incommunicado).

[72] With respect to protected persons held in the territory of a party to the conflict, Article 37 of GCIV reiterates the requirement that such detained persons, while awaiting proceedings or serving a sentence, must be humanely treated.

of GCIV in 1949. It was the USSR Delegation who pointed out this problem and raised the danger of inserting a derogation clause of general nature.[73] It can be argued that reference to the two rights is merely illustrative. The rights of humane treatment and fair trial guarantees, no doubt among the most cardinal human rights, are considered among the most vulnerable during armed conflict and occupation. The notion of inhumane treatment is specifically elaborated in Part I, Section I of GCIV, which will be examined below. In relation to the "rights of fair and regular trial", it ought to be noted that the protected persons held in occupied territory are fully entitled to due process guarantees stipulated in Articles 64–75 in Section III of Part III. Persons other than protected persons within the meaning of Article 4 GCIV, who are detained by the occupying power, can benefit from the minimum safeguards of IHL. These are derived from common Article 3 GCs and Article 75 API, and the customary rules corresponding to these treaty-based rules. Common Article 3 GCs includes the requirement to establish a "regularly constituted court" equipped with "all the judicial guarantees . . . recognized as indispensable by civilized peoples".[74]

7. *The Specific Elaborations of the Rights of Humane Treatment*

7.1. *General Remarks*

Clearly, the concept of humane treatment, which is balanced against the countervailing interest of military necessity, has been the underlying rationale of all IHL rules. Common Article 3 GCs and Article 27 GCIV reiterate this overarching concept. Common Article 3 GCs prohibits "cruel treatment" and furnishes core safeguards applicable to any persons both in international and non-international armed conflicts. On the other, Article 27 GCIV enunciates the general principle that all protected persons in occupied territories or in the territory of a party to the conflict must be humanely treated. It ought to be understood that the concepts "cruel treatment" and "humane treatment" used in IHL treaty-based rules are broader in their meaning[75] than the equivalent term "cruel, inhuman

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[73] Statement of Mr. Morosov of the USSR, 49th Meeting of Committee III (18 July 1949, 3pm), *Final Record*, Vol., II-A, at 797.

[74] With respect to protected persons captured in the enemy territory, there are no specific provisions concerning due process guarantees. In this context, the due process requirements embodied in common Article 3 GCs can fill a gap: the *ICRC's Commentary to GCIV*, at 58.

[75] For instance, Paust invokes this concept in the sphere of economic, social and cultural rights, noting that the intentional failure to provide adequate medicine, other medical supplies and medical treatment, and a policy of neglect that involves similar and foreseeable consequences, would violate the prohibition of "cruel treatment": Paust, *supra* n. 33, at 10.

treatment" within the meaning of Article 7 ICCPR and Article 16 of the UN Convention against Torture.

The concept of humane treatment is given elaborate substance under specific provisions under Part III of GCIV, all of which admit of no derogation. These specific rules are: (i) the right not to be used as human shields;[76] (ii) the right to be free from physical or moral coercion;[77] (iii) the freedom from measures causing physical suffering or extermination;[78] (iv) the right not to be subject to pillage; (v) the freedom from reprisals against them and their property; and (vi) the right not to be taken as hostages.[79] While these treaty-based rules specifically deal with protected persons captured in occupied territories or in the territory of adverse parties to the conflict, it ought to be understood that *any* individual persons are considered entitled to these rights under customary IHL. Queries now turn to each of these egregious acts.

7.2. *The Prohibition of Physical and Moral Coercion*

Article 31 GCIV stipulates that "[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from their parties". This customary rule of a fundamental nature proscribes torture or other coercive measures, be they physical or psychological. Three crucial implications can be drawn from this rule. First, it strengthens the well-established customary rule, embodied in Article 44 of the Hague Regulations, that the occupying power must not compel the civilians in an occupied territory to provide military information.[80] Second, the words "in particular" suggest that the purpose of obtaining information is merely of exemplary nature. No derogation from this fundamental right is allowed, irrespective of the purpose of such coercion.[81] It may be argued that the purpose of obtaining information on imminent attacks or other kind of military or security information is of little importance for identifying a violation of this rule. Indeed, the absence of purpose does not exculpate the offenders of this fundamental rule. Such coercion must be prohibited even without any purpose at all.[82] Third, with respect to a protected person detained on a charge of offences against penal laws in occupied territory, or of violations of IHL (including war crimes), the occupying power

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[76] GCIV, Article 28.

[77] GCIV, Article 31.

[78] GCIV, Article 32.

[79] GCIV, Article 34.

[80] Hague Regulations, Article 44. The scope of Article 31 GCIV is more general than Article 44 of the Hague Regulations: the *ICRC's Commentary to GCIV*, at 220.

[81] *Ibid.*, at 220.

[82] *Ibid*. This Commentary emphasises that the old practice of an invading army forcing the inhabitants of an occupied country to serve as "guides" is now prohibited: *ibid.*

must treat as inadmissible any evidence obtained by another belligerent party that has employed coercive means or methods against such a person or other persons.[83]

7.3. *The Prohibition of Measures Causing Physical Suffering or Extermination*

7.3.1. *Overview*

Article 32 GCIV prohibits the occupying powers (and any belligerent parties) from applying measures causing physical suffering or extermination on protected persons in their hands. No doubt, this is a reflection of crimes against humanity committed by Axis powers against civilian populations in invaded and occupied territories during World War II. It specifically refers to the most brutal forms of inhumane treatment that must be absolutely prohibited in tandem with the general rule embodied under Article 27(1) GCIV.[84] The prohibited measures include murder, torture, corporal punishment, mutilation, and medical or scientific experiments not required by medical treatment, as well as "any other measures of brutality" committed either by civilian or military agents. The catalogue of these egregious acts largely corresponds to acts constituting grave breaches of GCIV embodied in Article 147 ("wilful killing, torture, or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health").

7.3.2. *Drafting Records*

The primordial nature of the rules embodied in Part I, Section I of GCIV means that violations of virtually all these rules may amount to crimes against humanity if committed against civilians in a widespread or systematic manner.[85] Article 32 GCIV did not exist under the original Stockholm draft text. At the Diplomatic Conference of Geneva in 1949, what is now Article 32 was introduced into the Stockholm text as Article 29A, after both the USSR and the USA submitted their amendments to draft Article 29 (now Article 31, which concerns the pro-

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[83] See UK House of Lords, *A and others (FC) and others v. Secretary of State for the Home Department (conjoined appeals)*, Judgment of 8 December 2005, [2005] UKHL 71.

[84] *Ibid.*, at 204.

[85] Some Delegates, while referring to the Nuremberg trials, specifically recognised that the acts inscribed under draft Article 29A (now Article 32) amount to crimes against humanity. See Committee III, 11th Meeting, 9 May 1949, Statements of Mr. Mevorah (Bulgaria), Mr. Morosov (USSR), and of the Chairperson, Mr. Georges Cahen-Salvador (France), *Final Record*, Vol. II-A, at 647–648. The US delegate explicitly invoked the natural law concept, noting that the acts outlawed under Section I cover "particularly outrageous offences against international morality": Committee III, 11th Meeting, 9 May 1949, Statement of Mr. Clattenburg (US), *ibid.*

hibition of physical or moral coercion).[86] The English translation of the USSR amendment[87] read that:

> The Contracting States undertake to prohibit, and to consider as a serious crime, all murder, torture, maltreatment, mutilation, medical or scientific experiments not necessitated by medical treatment, as also all other means of exterminating the civilian population.
>
> Furthermore, all other measures of brutality used against protected persons in the hands of the Contracting Parties are prohibited whether applied by civilian or military agents.[88]

The US proposal in turn read that:

> The Contracting States specifically agree that each of them is prohibited from taking any measure which has as an object the physical suffering or extermination of protected persons in its power. The prohibition of this Article extends not only to murder, torture, corporal punishment, mutilation, and medical or scientific experiments not related to the necessary medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military administrators.[89]

These amendments were prompted by the desire of the majority of the Delegates to expand the meaning of the second paragraph of Stockholm draft of Article 29, which dealt with the prohibition of torture and corporal punishment. The

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[86] The Stockholm text of Article 29 of the Civilians Convention, which corresponds to the current Article 31 GCIV, read that:

> No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from their parties.
>
> Torture and corporal punishments are prohibited.

Final Record, Vol. I, at 118.

[87] The USSR amendment submitted to the Stockholm draft text of Article 29A on 14 June 1949. This original amendment in French read that:

> Les États contractants s'engagent à interdire et à qualifier comme un grave crime tous meurtres, tortures, supplices, mutilations, expériences médicales ou scietifiques non nécessitées par le traitement médical ainsi que tous les autres moyens d'extermination de la population civile.
>
> En outre, sont interdites en ce qui concerne les personnes protégées se trouvant au pouvoir des Parties contractantes toutes autres mesures de brutalité, qu'elles émanent d'agents civils ou militaires.

Actes de la Conférence Diplomatique de Genève de 1949, Vol. III, Annexes, at 118, para. 231.

[88] *Final Record*, Vol. III Annexes, at 116, para. 231. As discussed in the 10th Meeting of Committee III, the English translation had an error with respect to the absence of the words «causing death»: Committee III, 10th Meeting, 6 May 1949, *Final Record*, Vol. II-A, at 645. The Soviet amendment encompassed the term "extermination" in an open-ended fashion, as can be seen from the expression "all other means of exterminating the civilian population".

[89] Committee III, 11th Meeting, 9 May 1949, Statement of Mr. Clattenburg (US), *Final Record*, Vol. II-A, at 647.

main differences between the two proposed amendments relate to two aspects: (i) the USSR amendment described the prohibited acts of cruelty as "un grave crime"; and (ii) it used the expression "other means of exterminating the civilian population" in lieu of the words "other measures of brutality". The majority of the Delegates considered that the first aspect was addressed by the Joint Committee (which was assigned to work on common provisions of the four draft Geneva Conventions) in the context of draft Article 130 on grave breaches. They also took the view that the second aspect of the USSR proposal would overstep the remit of Committee III, on the basis that it related to means of warfare regulated in the Hague law. In hindsight, the USSR amendment would have an advantage of a broader scope of application. It would have been applied to any civilians, irrespective of where they were, such as civilians killed in bombardment or bombing.[90] In the end, the text finally adopted by the Drafting Committee[91] came closer to the US amendment. The majority of the Drafting Committee opted to confine the scope of application to avoid any possible encroachment on: (i) the grave breach clause discussed within the framework of the Geneva Convention (as concerns war crimes); (ii) the Hague Regulation (concerning means of warfare); and (iii) the draft Genocide Convention (as to extermination).[92]

The responses of the Delegates of Committee III were very much divided along the nascent cold war rivalry. The USSR and Eastern European delegates strongly defended the wider scope of application *ratione materiae* and *ratione personae* embodied in the USSR amendment. The Ukrainian Delegate, supporting the USSR amendment, emphasised the importance of extending the ambit of protection to cover the whole civilian population (not limited to occupied

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[90] *The ICRC's Commentary to GCIV*, at 222. See also the reference to German airmen machine-gunning women and children in the fields: Committee III, 11th Meeting, 9 May 1949, Statement of Mr. Morosov (USSR), *Final Record*, Vol. II-A, at 648.

[91] This text reads that:

> Les États contractants s'interdisent expressément toute mesure destinée à provoquer des souffrances physiques ou l'extermination des personnes protégées en leur prouvoir. Cette interdiction vise non seulement le meutre, la torture, les peines corporelles, la mutilation et les expériences médicales ou scientifiques non nécessitées par le traitement médical d'une personne protégée, mais également toutes autres mesures de brutalité, qu'elles emanent d'agents civils ou militaires.

Actes de la Conference Diplomatique de Geneve de 1949, Vol. III, Annexes, at 118, para. 232.

[92] See Committee III, 29th Meeting, 13 June 1949, Statement of Colonel Du Pasquier (Switzerland), *Final Record*, Vol. II-A, at 715; and the Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva, *ibid*., at 822. The USSR Delegate had to defend its position, expressly stating that its amendment was not purported to ban the use of laser weapons (such as the V.2): Committee III, 29th Meeting, 13 June 1949, Statement of Colonel Du Pasquier (Switzerland), *Final Record*, Vol. II-A, at 715.

territory), irrespective of where they live.[93] In contrast, many western States adhered to a narrower position.[94] Most regrettably, the draft records reveal that while these Delegates spoke of millions of deaths suffered by their fellow citizens at the hands of the Nazis,[95] no single word was recorded about the victims of the Holocaust or genocide (the Jewish, Roma and other groups). The text of the Drafting Committee, as slightly amended by the Belgian proposal, was adopted to avoid the applicability to civilians in a battlefield, as can be seen in the wording "protected persons in their hands".[96]

7.3.3. *Ramifications*

Several comments can be made on this fundamental rule. According to the *ICRC's Commentary*, the textual structure of Article 32 GCIV, which starts with the wording "the High Contracting Parties specifically agree that each of them is prohibited", suggests that the ban on measures to cause physical suffering or extermination is binding on insurgents or other armed groups under the authority and control of the Parties.[97] Indeed, this understanding is consistent with the general "duty to ensure respect" embodied in common Article 1 of the Geneva Conventions. It may be argued that the *Commentary* intends to highlight the case of state responsibility arising in circumstances where armed groups operate under "effective or overall control" or authority of the state parties.

The positive obligations that must be undertaken by the occupying power (and other belligerent parties) encompass the prevention and punishment of responsible persons (including members of the armed groups), and the protection of victims. When faced with egregious criminal laws in occupied territory,

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[93] Committee III, 30th Meeting, 15 June 1949, Statement of Mr. Baran (Ukraine), *Final Record*, Vol. II-A, at 717. The vigor with which the delegates of the USSR and many Eastern European countries defended the wider protection of civilians is commendable. This is comprehensible, given that during World War II, they endured much larger suffering at the hands of Nazism and fascism than western states. In this regard, see the statement of Mr. Haraszti (Hungary) (however, failing to mention the Hungarian atrocities committed against its Jewish citizens or other minority groups): Committee III, 30th Meeting, 15 June 1949, *Final Record*, Vol. II-A, at 717.

[94] Yet, clearly it is difficult to read into this voting position any moral superiority on the part of the USSR. Apart from the atrocities committed by the Soviet forces in Poland, Baltic countries and Bessarabia that they occupied during World War II, note that millions of Soviet citizens and enemy prisoners of war were sent to gulags in Siberia and Central Asia for slave labour purposes.

[95] For atrocities against civilians committed by Imperial Japan, see the statement made by Mr. Wu (China), who spoke of the Japanese order of poisoning drinking wells, and the planting of poppies to spread the habit of opium smoking: Committee III, 30th Meeting, 15 June 1949, Statement of Mr. Wu (China), *Final Record*, Vol. II-A, at 717.

[96] Committee III, 30th Meeting, 15 June 1949, *Final Record*, Vol. II-A, at 719 (27 votes to 8).

[97] *ICRC's Commentary to GCIV*, at 221.

such as the Nazi laws based on fanatic racial and eugenic theories, the occupying power is not only allowed but even obligated to repeal such laws. As examined in Chapter 4, this is specifically envisaged under Article 64(1) GCIV. The aspect of protection can be considered to encompass the duty to pay appropriate compensation for victims.

As with the prohibition of coercion embodied in Article 31 GCIV, any measures occasioning physical suffering or extermination must be absolutely forbidden irrespective of the intention or purpose of the parties.[98] The dispensation of the intention requirement can be corroborated by the expression "any measure *of such a character as to* cause the physical suffering or extermination" under Article 32.[99] Absence of reference to intent signifies that violations of this rule can be identified by the objective fact alone, namely that such egregious results have taken place. Indeed, this is borne out by the drafting record. At the Diplomatic Conference of Geneva in 1949, this expression was substituted for the expression used in the Drafting Committee's text "aiming at". Georges Cahen-Salvador (France), who was a Chairperson of Committee III highlighted that "[t]he measure need not then be taken with intent to cause suffering, and criminals would have no defence based on their alleged intentions".[100]

The inventory of grossly inhumane acts set forth in Article 32 is open-ended, as the expression "other measures of brutality" suggests.[101] This interpretation is akin to the rationale for the insertion of subparagraph (k) "[o]ther inhumane acts of a similar character…" under Article 7 of the ICC Statute which relates to crimes against humanity.[102]

The Soviet amendment for linking this provision with war crimes, while supported by delegates of Eastern European countries, did not muster the majority. The majority voted against this proposal on the basis that reference to war crimes should be accompanied by sanction, which was already dealt with under the Stockholm draft text of Article 130 (now Article 146).[103]

7.4. *The Prohibition of "Measures of Intimidation or of Terrorism"*

Article 33(1) GCIV guarantees the right of protected persons to be free from any "measures of intimidation or of terrorism". Reference to terrorism must not,

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[98] *Ibid.*, at 222.

[99] An extract from the first sentence of Article 32 of GCIV, emphasis added.

[100] Committee III, 30th Meeting, 15 June 1949, Statement of Mr. Georges Cahen-Salvador (France), *Final Record*, Vol. II-A, at 719 (concerning draft Article 29A).

[101] *ICRC's Commentary to GCIV*, at 224. See also the expression "all acts of violence" under Article 27(1) of GCIV.

[102] This open-ended nature of the clause can be explained by the fact that the evil imagination of humans cannot be underestimated.

[103] *Final Record*, Vol. I, at 138.

however, be confused with the modern concept that denotes an indiscriminate attack carried out against civilian population in peacetime, often pursuant to a certain political cause. Indeed, according to the *ICRC's Commentary to GCIV*, the notion of terrorism under Article 33(1) ought to be interpreted narrowly. It can be understood as an "intimidatory" or terrorising measure equivalent in severity and cruelty to the practices that the Axis powers and the Soviet forces imposed on the civilian population during World War II.[104]

7.5. *The Prohibition of Belligerent Reprisals*

7.5.1. *The Prohibition of Belligerent Reprisals against Protected Persons Who Fall in the Hands of the Adversary*

Article 33(3) GCIV categorically rules out any recourse to reprisals against protected persons, namely, civilians who find themselves in the hands of the adversary (whether in the territory of the adversary or in occupied territory). Reprisals committed against civilians amount to a form of collective punishment, which is outlawed under Article 33(1). The *ICRC's Commentary* notes that there is no justification for reprisals based on military necessity.[105] The *Commentary* explains that this prohibition was successfully inserted because of the introduction of alternative means of ensuring compliance with the laws of war, such as the supervision exercised by the Protecting Powers, and the obligation to suppress offenders of grave breaches.[106] Indeed, belligerent reprisals[107] against all other persons protected by GCI, GCII and GCIII (the wounded, sick and shipwrecked, medical and religious personnel, and captured combatants) are strictly prohibited.[108]

7.5.2. *Belligerent Reprisals against Civilians of an Adverse Party During the Conduct of Hostilities*

Some remarks need to be made in relation to belligerent reprisals directed against enemy civilians in the course of conduct of hostilities (namely, reprisals against enemy civilians, who are not unprivileged belligerents held in a combat zone). This issue can be explored to the extent that it helps better comprehend the nature of armed conflict, be it international or non-international, which may take place in a volatile occupied territory. In contrast to belligerent reprisals against persons who are protected by the Geneva Conventions and have fallen

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[104] *ICRC's Commentary to GCIV*, at 225–226.
[105] *Ibid.*, at 228.
[106] *Ibid.*, at 228.
[107] For in-depth examinations, see Kalshoven (2005), *supra* n. 51.
[108] GCIV, Article 46; GCII, Article 47; and GCIII, Article 13(3).

under the hands of states parties, controversy remains over the customary law status or not of the prohibition of such reprisals. Such coercive measures are prohibited under Article 51(6) API. Similarly, reprisals against civilian objects are forbidden under Article 52(1) API. The absolute ban on belligerent reprisals against civilians and civilian objects during hostilities marks a significant departure from the practice against enemy civilians widely followed by both the Axis and the Anglo-American air forces during the Second World War. When the draft provisions of API were adopted at the Diplomatic Conference, the prohibition of reprisals embodied in Article 51(6) API was considered a new rule.[109] In a vote specifically relating to Article 51 (draft Article 46) as a whole, France voted against and 16 states abstained.[110] Nevertheless, as the *ICRC's Customary IHL Study* notes, since then, 10 of the abstaining states have become parties to API without formulating a reservation.[111] Admittedly, some western military powers have continued to reserve the rights to visit reprisals upon enemy civilians as a lawful measure during the conduct of hostilities. Indeed, highly controversially, the United Kingdom is among the diminishing number of states that have expressly reserved such a right, attaching a lengthy reservation to Article 51 upon ratification.[112] Any moral qualm over lives of innocent civilians cannot be dispelled by the fact that the *UK Manual* set forth stringent conditions for

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[109] Henackaerts and Doswald-Beck (eds), *supra* n. 21, Vol. I: Rules, at 520.

[110] The abstaining states were: Afghanistan, Algeria, Cameroon, Colombia, Federal Republic of Germany, Italy, Kenya, Republic of Korea, Madagascar, Mali, Monaco, Morocco, Senegal, Thailand, Turkey and Zaire: CDDH, *O.R.*, Vol. VI, summary record of the forty-first plenary meeting, CDDH/SR.41, 26 May 1977, at 163, para. 118.

[111] Algeria, Cameroon, Colombia, Democratic Republic of Congo, Kenya, Republic of Korea, Madagascar, Mali, Monaco and Senegal: Henckaerts and Doswald-Beck (eds), *supra* n. 21, Vol. I, at 520, n. 69. The *Study* also notes that three states, which have yet to ratify the API (Indonesia, Malaysia and Morocco), gave support to the rule prohibiting reprisals against civilians in general: *ibid.*, n. 70.

[112] *UK Manual* (2004), at 420–421, para. 16.19.1; and Henckaerts and Doswald-Beck (eds), *ibid.*, Vol. I, at 521. Egypt, France, Germany and Italy also made a declaration upon ratification of API in respect of the provisions concerning protection of civilian population. The *ICRC's Customary IHL Study* comments that these declarations "are ambiguous in that they indicate that these States will react to serious and repeated violations with means admissible under international law to prevent further violations". The *Study* adds that "[i]n referring back to what is lawful under international law, these declarations beg the question as to whether reprisals against civilians are lawful or not": Henckaerts and Doswald-Beck, *ibid.*, at 521. Indeed, as the *Study* notes, it is possible to consider that these states have either prohibited reprisals against civilians (Egypt, France and Germany), or like the UK, confined its possibility only to very narrow circumstances (Italy).

having resort to this measure.[113] From the standard points of the convergence between international human rights law and the Martens Clause, Provost forcefully argues that:

> A theory of human rights, while not necessarily rejecting the relevance of a person's connection to a community, emphasizes the primary importance of the individual. (…) The legality of reprisals, then, with their necessary disregard for the innocence and integrity of the victims of the measures, will slowly come to an end as human rights norms progressively take on the universal and concrete character they were designed to possess.[114]

With respect to the United States, the *US Field Manual* seems to rule out the possibility of reprisals against enemy civilians during the conduct of hostilities.[115] Nevertheless, the US Government on several occasions expressed its opposition to the view that Article 51 has acquired customary law status. At the *Sixth Annual American Red Cross – Washington College of Law Conference on International Humanitarian Law (1987)*, the legal advisers at the US Department of State objected to the customary law status being granted to this rule. Judge Sofaer noted that:

> If article 51 were to come into force for the United States, an enemy could deliberately carry out attacks against friendly civilian populations, and the United States would be legally forbidden to reply in kind. As a practical matter, the United States might, for political or humanitarian reasons, decide in a particular case not

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[113] The UK attached a statement to the API for this purpose. This reads that:

> The obligations of Articles 51 to 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.

The UK *Manual* (2004), at 420–421, para. 16.19.1.

[114] R. Provost, "Reciprocity in Human Rights and Humanitarian Law", (1994) 65 *BYIL* 383, at 427.

[115] The *US Field Manual* allows reprisals only against enemy troops. This suggests *a contrario* the prohibition of reprisals against enemy civilians: *FM27–19*, July 1956, at 177–178, para. 497(c).

> to carry out retaliatory or reprisal attacks involving unfriendly civilian populations. To formally renounce even the option of such attacks, however, removes a significant deterrent that presently protects civilians and other war victims on all sides of a conflict.[116]

In the *Kupreškić* case,[117] the Trial Chamber of the ICTY affirmed that the rule interdicting reprisals against civilians during hostilities is clearly reflective of customary IHL.[118] The Trial Chamber stressed that:

> It cannot be denied that reprisals against civilians are inherently a barbarous means of seeking compliance with international law. The most blatant reason for the universal revulsion that usually accompanies reprisals is that they may not only be arbitrary but are also not directed specifically at the individual authors of the initial violation. (…) These retaliatory measures are aimed instead at other more vulnerable individuals or groups. (…) they may share with them only the links of nationality and allegiance to the same rules.[119]

The Trial Chamber laboriously examined "whether these provisions [Articles 51(6) and 52(1) of the First Additional Protocol of 1977], *assuming that they were not declaratory of customary international law,* have subsequently been transformed into general rules of international law".[120] Its methodology of ascertaining customary rules is that even in the absence of sufficient *usus* for their customary status, greater emphasis should be accorded to the role of *opinio juris sive necessitatis*:

> Admittedly, there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely *usus* or *diuturnitas* has taken shape. This is however an area where *opinio juris sive necessitatis* may play a much greater role than *usus*, as a result of the…Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent.[121]

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[116] The remarks made by Judge Abraham D. Sofaer, the Legal Adviser, the US Department of State, the Sixth Annual American Red Cross – Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, (1987) 2 *American University Journal of International Law and Policy*, at 469. See also remarks made by M.J. Matheson, the Deputy Legal Advisor at the US Department of State, at the same Conference: *ibid.*, at 426.

[117] ICTY, *Prosecutor v. Zoran Kupreškić and Others*, Judgment of 14 January 2000, IT-95-16-T, paras. 527–34 (Judges Antonio Cassese, Richard May and Florence Ndepele Mwachande Mumba).

[118] Henckaerts and Doswald-Beck (eds), *supra* n. 21, Vol. I, at 519.

[119] ICTY, *Prosecutor v. Zoran Kupreškić and Others,* Judgment of 14 January 2000, IT-95-16-T, para. 528.

[120] *Ibid.*, para. 527, emphasis added.

[121] *Ibid.*, para. 527.

The Trial Chamber noted that the states that have taken part in hostilities have generally refrained from claiming that they had rights to visit reprisals upon enemy civilians. While referring to the practice of Iraq (during the Iran-Iraq War of 1980–1988), France (at the draft stage of API in 1974)[122] and the United Kingdom (at the time of ratifying API in 1998), it downplayed the normative significance of such practice. In response, controversially, the *UK Military Manual (2004)* even goes so far as to comment that:

> …the court's reasoning [reasoning provided by the ICTY Trial Chamber in the *Kupreskic* judgment in 2000 as seen above] is unconvincing and the assertion that there is a prohibition in customary law flies in the face of most of the state practice that exists. The UK does not accept the position as stated in this judgment.[123]

However, in so doing, the *UK Manual* fails to invoke any contrary practice.

With respect to the practice of the states not parties to API during actual armed conflict, the *ICRC's Customary IHL Study* refers to the practice of both sides in the Iran and Iraq War in 1980–1988 as the only practice.[124] It provides the following observations on the customary law status or not of the rule prohibiting reprisals against enemy civilians during the conduct of hostilities:

> Because of existing contrary practice, albeit very limited, it is difficult to conclude that there has yet crystallized a customary rule specifically prohibiting reprisals against civilians during the conduct of hostilities. Nevertheless, it is also difficult to assert that a right to resort to such reprisals continues to exist on the strength of the practice of only a limited number of states, some of which is also ambiguous. Hence, there appears, at a minimum, to exist a trend in favour of prohibiting such reprisals.[125]

7.6. *The Prohibition on Taking Individual Persons as Hostages*

7.6.1. *Overview*

In the post-World War II development, the prohibition of hostage-taking has hardened into a customary rule of non-derogable character. This normative development can be readily recognised mainly in two respects: (i) the mandatory nature attributed to this rule in the relevant IHL treaty rules; and (ii) the criminal sanction against hostage-taking. Common Article 3(1)(b) GCs expressly designates the prohibition on taking hostages as one of the minimum safeguards

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[122] Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Geneva 1974–77, *Official Records*, Vol. VI, 1977, summary record of the forty-first plenary meeting, 26 May 1977, at 162, paras. 111–116. France voted against the provision banning reprisals: *ibid*., at 163, para. 118.

[123] *The UK Manual* (2004), at 421, n. 62.

[124] Henckaerts and Doswald-Beck (eds), *supra* n. 21, Vol. I, at 521–522.

[125] *Ibid*., at 523.

that must be complied with in both non-international and international armed conflicts. The *ICRC's Commentary on GCIV* defines hostage as "nationals of a belligerent State who of their own free will or through compulsion are in the hands of the enemy and are answerable with their freedom or their life for the execution of his orders and the security of his armed forces".[126] The ban on taking hostages is specifically reiterated in an unqualified manner under Article 34 GCIV, which applies to protected persons in both occupied territory and in enemy territory. Just as with all the other rights of civilians, which are recognised in GCIV Part III Section I, the nature of this prohibition is absolute and mandatory in any circumstances.[127] The minimum protection clause contained under Article 75 API reaffirms the non-derogable nature of this principle.[128] Further, taking hostages in contravention of common Article 3 GCs and Article 34 GCIV amounts to a grave breach of GCIV, the violation of which incurs individual criminal responsibility under Article 8(2)(a)(viii) of the ICC Statute.[129]

The non-derogable character of the prohibition on taking hostages can be reinforced by the conceptual framework of human rights law that has seen fantastic development in the latter half of the twentieth century. Acts of hostage-taking infringe such primordial rights as the right to life, freedom from torture, freedom from arbitrary deprivation of liberty, and freedom from collective punishment. Even in relation to acts of hostage-taking conducted by non-state actors, the responsibility of a state party can arise if the government has tolerated, accepted or acquiesced in such act.[130] Further, the ambit of the duty of protection is expanded through the doctrine of positive obligations. It is the established jurisprudence of international human rights law that acts of homicide, torture or other forms of ill-treatment carried out by private individuals or other non-state actors, may engage the responsibility of a state in circumstances where the latter ought to have taken necessary steps (the prevention of such acts or the

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[126] *ICRC's Commentary to GCIV*, at 229.

[127] Dinstein (1978), *supra* n. 10, at 119.

[128] Article 75(2) API elaborates on the minimum safeguards contained under common Article 3(1) GCs. The elements of the right to a fair trial are elaborated in detail under Article 75(3) and (4) API. Note ought to be taken of the fact that Article 75(2) API emphasises the irrelevance of the capacity of offenders ("whether committed by civilian or by military agents").

[129] See also ICTY Statute, Article 2(h).

[130] In this regard, see Article 11 of the ILC's *Articles on State Responsibility,* which was adopted in 2001, and its commentaries in: Crawford, *supra* n. 29, at 121–123. Article 11, which is entitled "Conduct acknowledged and adopted by a State as its own", reads that "[c]onduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own".

protection of individuals placed at serious risk of their lives or limbs), but did not do so.[131]

7.6.2. *Historical Evolution of the Prohibition on Taking Hostages*

Modern warfare, including the two World Wars, has frequently seen hostage-taking used as a specific method of warfare to obtain certain military gains. This heinous offence is purported to intimidate the population so as to weaken its spirit of resistance and to prevent sabotage or other breaches of occupation law.[132]

The Hague Convention of 1907 makes no express reference to hostage-taking. However, it can be argued that already before the eruption of the Second World War, there evolved a customary rule that forbade the practice of killing hostages taken from the population of occupied territory.[133] Support for this view can be seen in the inclusion of the ban on hostage-taking in the 1921 draft text of a Convention for the protection of civilians as well as in the more elaborate 1934 Tokyo draft text.[134]

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[131] See, for instance, ECtHR, *Osman v. UK*, Judgment of 28 October 1998, paras. 116 and 121 (Grand Chamber).

[132] *ICRC's Commentary to GCIV*, at 230.

[133] See US Military Tribunal, Nuremberg, *Trial of Wilhelm List and Others (Hostages Trial)*, 8 July 1947–19 February 1948, (1949) 8 *LRTWC* 34, Case No. 47, at 60. For the literature supporting this conclusion, see Lord Wright, "The Killing of Hostages as a War Crime", (1948) 25 *BYIL* 296, at 299–306. *Contra*, see E. Hammer and M. Salvin, "The Taking of Hostages in Theory and Practice", (1944) 38 *AJIL* 20, in particular at 29. Meurer, who acted as the principal rapporteur of the Commission, established in 1919 by the German Reichstag to investigate charges of violations of the laws of war during the First World War, justified the indiscriminate killing of hostages. He observed that:

> In war every one is a sacrificial lamb. What appears to be humane is, from a higher standpoint, often the most inhumane. Is it not the innocent soldier who falls victim to the war crime on the part of the inhabitant, and is not the killing of hostages meant to prevent this?… The commander who wishes to be humane may in fact prove very inhumane in relation to the soldiers entrusted to him and thus incur a grave responsibility.

Das Völkerrecht im Weltkrieg, Vol. II, p. 221, as cited in: H. Lauterpacht, "The Law of Nations and the Punishment of War Crimes", (1944) 21 *BYIL* 58, at 85.

[134] See *ICRC's Commentary to GCIV*, at 4–5. The Tokyo Draft Convention was adopted unanimously in the Resolution XXXIX entitled *Projet de convention concernant la condition et la protection des civils de nationalité ennemie qui se trouvent sur le territoire d'une belligérant ou sur un territoire occupé par lui "Projet de Convention concernant le sort des civils de nationalité ennemie"*. This resolution states that:

> Considérant le voeu No. VI contenu dans l'Acte Final de la Conférence diplomatique de Genève du 27 juillet 1929, tendant à ce que des études approfondies soient enterprises en vue de la conclusion d'une convention internationale concernant la condition et la protection des civils de nationalité ennemie qui se trouvent sur le territoire d'une État belligérant ou sur le territoire occupé par lui,
>
> Reconnaît tout l'intérêt du projet de Convention ci-annexé concernant ce sujet,

Taking civilians as hostages and killing them pursuant to reprisals in retaliation for hostile acts against the occupying armed forces was widely and systematically practiced by Germany in modern warfare,[135] including the Franco-Prussian War in 1870 and the two World Wars.[136] Great Britain also engaged in this unsavoury practice during the War of Transvaal.[137] Yet, this was arguably considered limited to the circumstances where it was necessary to ensure the security of the wounded or the sick soldiers who fell into the hands of the enemy, and of the prisoners taken by the "irregular troops" and "armed civilians" ("civils armés). Rousseau argues that the British practice of taking hostages up to the Second World War could be understood as extension of the method of reprisals.[138] Both France and the US reserved the right to take hostages in their manuals. Still, according to Rousseau, these two countries did not usually engage in this practice.[139]

In the inter-war period, the ICRC examined the possibility of outlawing the taking of hostages. As briefly discussed above, the ICRC's Tokyo 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, contained two provisions relating to hostage-taking: Article 11 which categorically prohibited hostage-taking in respect of enemy civilians in the territory of a belligerent; and Article 19(a) which dealt with hostage-taking of enemy civilians in occupied territory. Unlike the former, the latter provision allowed the taking of hostages, providing that "[i]n the event of it appearing, in an exceptional case, indispensable for an occupying Power to take hostages, the latter shall always be treated humanely. Under no pretext shall they be put to death or submitted to corporal punishments".[140]

Le recommande expressément, sous reserve de modifications éventuelles, à l'attention des Gouvernments,

Et charge le Comité international de la Croix-Rouge de faire toutes demarches utiles pour faire aboutir une Convention dans le plus bref délais possible.

La Quinziéme Conférence Internationale de la Croix-Rouge, tenue à Tokio, du 20 au 29 octobre 1934, Compte Rendu, at 262. For the full text of this draft Convention, see *ibid.*, at 203–209. See also the *Rapports Présentés à la XVe Conférence Octobre 1934*, Vol. I, Document No. 9, at 1–8 (explanatory notes) and 9–14 (the full text).

[135] C. Rousseau, *Le droit des conflits armés* (1983), at 156, para. 101B.

[136] *Ibid.*, See also *Trial of Wilhelm List and Others (Hostages Trial)*, US Military Tribunal, Nuremberg, 8 July 1947–19 February 1948, (1949) 8 *LRTWC* 34, Case No. 47, at 63.

[137] See the Proclamation of Lord Roberts of 19 June 1900, paragraph 2, (1901) *RGDIP*, at 166 en note; as cited in: Rousseau, *supra* n. 135, at 156, para. 101B.

[138] Rousseau, *ibid.*, at 156, para. 101B.

[139] *Ibid.*

[140] *Conférence diplomatique pour la révision et la conclusion d'accords relatifs à la Croix-Rouge*, document préliminaire no. 6, Berne, January 1939, at 12, reprinted at D. Schindler and J. Toman (eds), *The Laws of Armed Conflicts – A Collection of Conventions, Resolutions and Other*

In the *Wilhelm List and Others* case (the *Hostages Trial),* a US Military Tribunal at Nuremberg held that the taking and shooting of hostages could be exceptionally justified in accordance with customary laws of war. The Tribunal provided six cumulative conditions: (i) "precautionary measures" had to be given to the civilian population; (ii) the evidence that the population generally was a party to the offence, "either actively or passively"; (iii) there had to be "some connection" between the population from whom the hostages were taken and the offence committed, which in turn led the occupying power to resort to the shooting; (iv) a proclamation had to be made, so as to notify the population of the names and addresses of hostages taken, and of the decision to shoot them upon the recurrence of offences of "war treason"; (v) there had to be a proportionate relationship in terms of the number of hostages shot, which did not exceed in gravity the offences that the shooting was purported to deter; and (vi) an order of a military commander for the killing of hostages was based on the finding of "a competent court martial".[141]

This dictum, which justified the taking and the shooting of hostages, has become the subject of much criticism.[142] In immediate response to this judgment, Lord Wright argued that the positive obligation to respect individual life and the prohibition of collective penalty embodied respectively in Articles 46 and 50 of the Hague Regulations clearly militated against the killing of hostages.[143]

7.6.3. *Criminalisation of Hostage-Taking since 1945*

Acts of taking hostages committed both in peacetime[144] and in wartime have become the subject of criminal sanction. As the *ICRC's Customary IHL Study*

Documents, 4th revised and completed ed. (2004), at 445–451; and ICRC website: <www.icrc.org/ihl.nsf> (last visited on 30 June 2008); Univ. of Minnesota Human Rights Library: <www1.umn.edu/humanrts/instree/1934b.htm> (last visited on 30 June 2008). See also *ICRC's Commentary to GCIV*, at 231.

[141] US Military Tribunal, Nuremberg, *Trial of Wilhelm List and Others (Hostages Trial)*, 8 July 1947–19 February 1948, (1949) 8 *LRTWC* 34, Case No. 47, at 62; and 15 *AD* 632, at 643–644.

[142] Dinstein (1978), *supra* n. 10, at 119.

[143] Wright, *supra* n. 133, at 302, and 308–310.

[144] With respect to the offence of hostage-taking committed in peacetime, this is specifically governed by the 1979 International Convention against the Taking of Hostages. It defines this offence as the seizure, or detention of a person (hostage), combined with threat to kill, to injure or to continue to detain the hostage, for the purpose of compelling a third party to do or to abstain from doing any act as an explicit or implicit condition for the release of the hostage. Article 1 of this Convention reads that:

> Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person . . . in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons to

notes,[145] the *Elements of Crimes for the International Criminal Court* expands the material scope of this offence to encompass the circumstances in which behaviour of the third party is demanded for the purpose of the safety of the hostage.

In relation to war crimes of hostage-taking, the Trial Chamber of the ICTY in the *Blaskic* case stressed that "[t]he definition of hostages must be understood in the broadest sense".[146] It provides definitional elements of this offence as follows:

> The definition of hostages must be understood as being similar to that of civilians taken as hostages within the meaning of grave breaches under Article 2 of the Statute [of the ICTY], that is – persons unlawfully deprived of their freedom, often wantonly and sometimes under threat of death. The parties did not contest that to be characterised as hostages the detainees must have been used to obtain some advantage or to ensure that a belligerent, other person or other group of persons enter into some undertaking.[147]

Several comments can be made on the ramifications of this dictum. First, its scope of application *ratione personae* is broader, covering persons other than civilians. Second, the reference to the word "wantonly", which is close to the concept "recklessly" rather than to the generally required mental element "intentionally",[148] must not be overemphasised. This element is related only to the deprivation of freedom. Indeed, for the offence of hostage-taking to materialise, a higher threshold of *mens rea* is generally needed. As the Trial Chamber stressed, this offence requires the specific intent to use persons deprived of liberty to obtain some advantage or to ensure that a belligerent or other persons or groups enter into some undertaking.[149]

The Trial Chamber in the *Blaskic* case ruled that the taking of hostages was a violation of the laws and customs of war based on common Article 3(1)(b) GCs. This judgment was endorsed in the *Kordic and Cerkez* case. There, the Trial Chamber of the ICTY found that "an individual commits the offence of taking

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> do or to abstain from doing any act as an explicit or implicit condition for the release of the hostage, commits the offence of taking of hostages.

Article 12 of this Convention states that the scope of application of the Convention excludes acts of hostage-taking committed in armed conflicts where the Geneva Conventions or the Additional Protocols are applicable and where the Geneva Conventions require the state parties to prosecute or hand over the hostage-takers.

145 Henckaerts and Doswald-Beck (eds), *supra* n. 21, Vol. I, at 336.

146 ICTY, Trial Chamber, *Prosecutor v. Tihomir Blaskic*, IT-95-14-T, Judgment, 3 March 2000, para. 187.

147 *Ibid.*

148 J. Allain and J.R.W.D. Jones, "A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind", (1997) 8 *EJIL* 100, at 106.

149 ICTY, Trial Chamber, *Prosecutor v. Tihomir Blaskic*, IT-95-14-T, Judgment, 3 March 2000, para. 187.

civilians as hostages when he threatens to subject civilians, who are unlawfully detained, to inhuman treatment or death as a means of achieving the fulfilment of a condition".[150]

7.6.4. *The Scope of Application* Ratione Personae *of the Victims of Hostage-Taking*

Article 8(2)(a)(viii) of the ICC Statute, which characterises the taking of hostages as a grave breach form of war crimes, contemplates the scope of application *ratione personae* as corresponding to "persons . . . protected under the provisions of the relevant Geneva Conventions".[151] The meaning of the persons protected under the Geneva Conventions raises a question concerning the chapeau of Article 8(2)(a), which delimits the personal scope of application for grave breach forms of war crimes. It is submitted that the ICC should follow the teleological interpretation given by the ICTY in this regard. There has been recognition that the sense of allegiance based on ethnicity, rather than a formal criterion of nationality, should be the criterion for assessing protected persons within the meaning of Article 4 GCIV.[152] The Preparatory Commission for the International Criminal Court (PrepCom) finally decided not to insert any material elements that would delimit the scope of persons protected by Article 8(2)(a).[153] This may be understood as giving the ICC discretion to follow the approach of the ICTY or to develop its own position on this question.[154]

As the *ICRC's Customary IHL Study* notes,[155] the customary rule that prohibits hostage-taking contemplates a wider scope of protection *ratione personae*, embracing such acts carried out against *any* persons. This means that the

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[150] ICTY, Trial Chamber, *Kordic and Cerkez* case, IT-95-14/2-T, Judgment, 26 February 2001, para. 319. See also ICTY, *Karadzic and Mladic* case, Initial Indictment, 24 July 1995, IT-95-5-I, para. 46-48; ICTY, *Karadzic and Mladic* case, Review of the Indictments 11 July 1996, IT-95-5R61; and IT-95-18-R61, para. 89 (taking of UNPROFOR soldiers as hostages); *Prosecutor v. Karadzic*, Amended Indictment, 28 April 2000, para. 55; and *Prosecutor v. Mladic,* Amended Indictment, 10 October 2002, paras. 13, 25, 45 and 46.

[151] ICC Statute, Article 8(2)(a). It must be noted that although the category of war crimes laid down in Article 8(2)(a) are based on grave breaches of the Geneva Convention, the GCs I, II and III do not envisage the taking of hostage as a grave breach: GCI, Article 50; GCII, Article 51; and GCIII, Article 130.

[152] ICTY, *Prosecutor v. Tadić*, Judgment of Appeals Chamber, 15 July 1999, Case No. IT-94-1-A, paras. 165–8. This was one of the concerns raised at the Rome Conference (1998): K. Dörmann, *Elements of War Crimes* (2002), at 28–29.

[153] See, United Nations, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 June 1998, Official Records, Vol. III, Reports and others documents*, A/CONF.183/13 (Vol. III), (2002), at 15–16.

[154] Dörmann, *supra* n. 152, at 29.

[155] Henckaerts and Doswald-Beck (eds), *supra* n. 21, Vol. I, at 336.

protected victims encompass not only the civilians who have not taken a direct part in hostilities within the meaning of Articles 50–51 API, but also "unprivileged belligerents" captured and continuously held in a battlefield.[156] It can be argued that the reference to "persons . . . protected under . . . the relevant Geneva Conventions" under Article 8(2)(a)(viii) of the ICC Statute embodies part of the jurisdictional ground relating to the war crime of taking hostages, and that it does not indicate the definition of this specific war crime.

8. *Conclusion*

The foregoing assessment has briefly dealt with the core guarantees (or specifically prohibited forms of inhumane acts) that are embodied in Part III, Section I. Their intrinsically fundamental character can be recognised in many respects. First, at the time of the Diplomatic Conference of Geneva in 1949, all these rules were considered codificatory of pre-existing customary rules. Second, many of these rules are now viewed as eligible for *jus cogens*. Indeed, their peremptory status can be corroborated by the built-in principle of intangibility of the rights as embodied in Articles 7, 8 and 47 GCIV. Third, violations of many of these rules have been incorporated into elements of war crimes and crimes against humanity under the relevant instruments of international criminal tribunals. All those rules set forth in Part I, Section I fully overlap with the catalogue of non-derogable human rights, namely the right to life, the prohibition of slavery, and freedom from torture or other forms of ill-treatment. As examined in Chapter 19, these rights cannot be suspended even in time of war and other public emergencies under ICCPR (Article 4), ACHR (Article 27) and ECHR (Article 15).

[156] The scope of application *ratione personae* of this customary rule is broader than the minimum standard guaranteed under common Article 3 *qua* a treaty norm. The latter provision applies only to "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause".

Chapter 12

Hostilities in Occupied Territory, Protected Persons, and Participants in Hostilities

1. *The Threshold for Determining Hostilities in Occupied Territory*

1.1. *The Resumption of Hostilities or the Outbreak of New Hostilities*

Hostilities in a juridical sense can be considered to arise from activities of members either of armed forces of an occupied country or of armed resistance groups.[1] In assessing this, the occupying power must take into consideration such elements as the intensity, duration and geographical scope of violence, any linkage to the occupied state or any foreign state. If the law enforcement measures are considered sufficient to apprehend members of armed groups and to capture their bases (including arsenals or factories of munitions) without significant risk to law enforcement officers, then the law enforcement measures of arrest and capture must be favoured over resort to lethal force.

It may be suggested that the occupying power should be able to invoke IHL rules on the conduct of warfare once the existence of international armed conflict (IAC) or non-international armed conflict (NIAC) is established.[2] The hostilities may be classified as resumption of IAC if the protagonists of hostilities are members of armed forces of the occupied state. They may form independent militia or volunteer corps who belong to the State parties to the conflict and meet the conditions set out in Article 4A(2) GCIII. In contrast, if an armed group is not deemed "belonging to a Party to the conflict" within the meaning

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[1] CUDIH, *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation,* Geneva, 1–2 September 2005, at 26–27. Eruptions of violence and disorder in occupied territories do not necessarily mean that there exist "hostilities" in legal terms: *ibid*., at 27.

[2] *Ibid*., at 28 (a view by one expert).

of Article 4A(2) GCIII, the hostilities may be described as the start of NIAC.[3] In this context, the determination of the existence of a NIAC depends on the applicability of common Article 3 GCs. In *Prosecutor v. Tadic*, the Appeals Chamber of the ICTY enunciated that the threshold for identifying non-international armed conflict can be established if there exists armed violence between governmental authorities and organised armed groups or between such groups within a state of certain intensity and duration between an armed group and a state, and if such armed violence meets the requisite elements of: (i) intensity; (ii) large-scale nature; and (iii) protracted duration.[4] As is well-known, the standard set forth by common Article 3 GCs[5] is lower than the threshold for determining NIAC under APII, which requires more detailed and stringent criteria: the existence of responsible command; the sufficient degree of control over a part of the adverse state's territory to enable them to launch sustained and concerned military operations and to implement APII.[6] Admittedly, the threshold for determining the applicability of common Article 3 GCs in itself is unclarified. There is a downward trend based on humanitarian grounds[7] to lower the threshold level of this common provision. Greenwood proposes that

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[3] In contrast to the standard "belonging to a Party to the conflict", the four conditions set out in GCIII Article 4A(2) for qualifying for a prisoner of war (PoW) should *not* be considered relevant to determining whether international armed conflict exists. These four conditions are strictly for establishing the qualification of captured soldiers for PoW status. The fact that the captured members of the resistance movement fail to meet any of these conditions collectively and individually, and that they hence risk being treated as unprivileged belligerents does not change the legal characterisation of the armed conflict in question. Insofar as their allegiance lies in the occupied state which supports, endorses or acquiesces in their action as its own within the meaning of Article 11 of the ILC's Draft Articles on State Responsibility, then it is clear that the hostilities in question are international armed conflict. Article 11 of the Draft Articles read that "[c]onduct which is not attributable to a State…shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own".

[4] ICTY, *Prosecutor v. Tadic,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, Case No. IT-94-1-AR72, para. 70. As for the threshold for an international armed conflict, in the same passage in *Tadic*, the Appeals Chamber held that an international armed conflict can be identified "whenever there is resort to armed force between states": *ibid*.

[5] Indeed, isolated, sporadic attacks against the occupying power by a resistance movement are not sufficient to trigger the application of common Article 3 GCs: CUDIH, *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation*, Geneva, 1–2 September 2005, at 29.

[6] APII, Article 1(1).

[7] This downward trend may not be necessary, if the monitoring bodies of international human rights law continue to expand the scope of protection of the right to life to encompass armed conflict situations.

the standard of applicability of APII should be lowered to the same as that appropriate for common Article 3 GCs.[8]

Common Article 3 GCs can be applied at a level lower than that for triggering the application of IHL rules regulating *conduct of warfare* in NIAC. Even isolated and sporadic attacks against the occupying power by a resistance movement can be considered sufficient for the application of common Article 3 GCs.[9] The legal interests contemplated by common Article 3 GCs are different from those envisaged by the rules on conduct of hostilities. Common Article 3 GCs provides the minimum standards of treatment and procedure for the persons captured in armed conflict, without succumbing to the countervailing notion of military necessity. On the other hand, the rules on conduct of hostilities are purported to minimise loss, injuries and damage. They are susceptible to an intrinsic balance that must be struck against the varying standard of military necessity. The threshold for applying the law on conduct of hostilities depends on whether an occupying power has lost the capacity to mount effective law-and-order operations.[10]

1.2. *The Resumption of Hostilities in Occupied Territory*

The standard of ascertaining the resumption of hostilities in an occupied territory is the same as the threshold for determining an outbreak of an IAC. This is set at a low level under Article 2 common to GCs.[11] Even so, the assessment of the existence of hostilities must be geographically specific. An outbreak of one violent incident that can be described as the resumption of hostilities in one pocket of the occupied territory does not allow the occupying power to shift its operational rules to IHL rules on conduct of hostilities in other areas of the occupied territory, which remain calm and stable. The occupying power is entitled to apply IHL rules "only with respect to that incident and only for as long as the incident occurs".[12]

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[8] C. Greenwood, "International Humanitarian Law (Laws of War)", in: F. Kalshoven (ed), *The Centennial of the First International Peace Conference – Reports and Conclusions*, (2000) 161, at 232.

[9] See CUDIH, *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation,* Geneva, 1–2 September 2005, at 29 (all the experts present rejecting the view that such attacks were sufficient to trigger the application of common Article 3 GCs).

[10] *Ibid.*, suggestion by some experts.

[11] CUDIH, *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation*, Geneva, 1–2 September 2005, at 27.

[12] *Ibid.*, at 28.

1.3. *Outbreak of Non-International Armed Conflict in Occupied Territory*

It is possible to contemplate at least three scenarios in which NIACs have taken place in an occupied territory: (i) hostilities between the occupying power and the armed groups who are not resistance movements within the meaning of Article 4A(2) GCIII; (ii) hostilities between different armed groups in an occupied territory; and (iii) hostilities between the occupying power and the foreign nationals who infiltrate into occupied territories and form an armed group to fight against the occupying power, without belonging to parties to the conflict.

1.4. *Hostilities between the Occupying Power and the Armed Groups Who Are Not Resistance Movements within the Meaning of Article 4A(2) of GCIII*

Protracted violence of a "warlike" nature such as the fighting between Hamas and the Israeli Defence Force may be considered to fall into a grey zone between purely internal armed conflict and international armed conflict.[13] Three methodologies can be suggested to explain the legal character of such violence. First, one can stretch the definition of an IAC beyond the paradigm of inter-state conflicts. Second, it is suggested that the definition of NIAC should be broadened to include an armed conflict taking place even across the border.[14] A third approach, suggested by Kretzmer, is to view such violence as an armed conflict of a mixed character, which requires careful determinations of the spheres in which either IHL or international human rights law (IHRL) needs to be applied.[15] The essence of this methodology is that whenever an occupying power exercises a sufficient control over a portion of the occupied territory, it must generally apply the law enforcement measures, and that these must be regulated by the standards of IHRL.

Cassese follows the first approach, offering three reasons. First, internal armed conflicts are those between a central government and a group of insurgents belonging to the same State, or between two or more insurrectional groups belonging to that State. The second reason is more policy-oriented and teleological. The fact that IAC is governed by much more detailed and protective rules than NIAC is not harmonious with the object and purpose of IHL. It is suggested that in case of doubt, the appropriate IHL rules should be construed as expansively as possible to dispel any asymmetrical degree and scope of safeguards. Third, it would be inconsistent to subordinate the hostilities between the occupying forces and rebels or insurrections to the IHL rules on conduct

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[13] D. Kretzmer, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?", (2005) 16 *EJIL* 171, at 177.

[14] *Ibid.*, at 190.

[15] *Ibid.*, at 201–204.

of hostilities relative to NIAC while belligerent occupation is governed by the rules on IAC embodied in the GCIV and customary IHL.[16]

Cassese's argument, albeit not his reasoning as such, was fully endorsed by the Israeli Supreme Court in the *Public Committee Against Torture in Israel v. The Government of Israel* (so-called *Targeted Killing* judgment).[17] There, the Israeli Supreme Court, sitting as a High Court of Justice (HCJ), handed down a meticulously reasoned judgment as to the legality of so-called targeted killing policies adopted by the Israeli government pursuant to its strategy of preventative self-defence. The Court qualified the armed conflict between Israel and the terrorist organisations in the occupied territories (West Bank and Gaza Strip) as IAC subject to the IHL rules on IAC. Referring to the opinion of Cassese,[18] President (emeritus) Barak rendered a carefully thought-out judgment, ruling that "the fact that the terrorist organizations and their members do not act in the name of a state does not turn the struggle against them into a purely internal state conflict".[19] Schondorf argues that the normative shadow cast by this judgment on the analysis of the Israel-Hezbollah conflict in 2006 might be considerable. The main implications of the judgment are two-fold. First, this conflict would be regarded as IAC. Second, Hezbollah fighters can be regarded as civilians, who have nonetheless taken direct part in hostilities. This judgment would compel Israel to readjust its targeting policies against Hezbollah in line with the stringent conditions of proportionality articulated in the judgment, the crucial issue that will be discussed in Chapter 18.[20]

1.5. *Cross-Border Hostilities between a State and Non-State Actors as Non-International Armed Conflicts*

The present writer argues that an armed conflict that has taken place between occupying forces and a rebel or an insurrection force should be regarded as NIAC. The following discussions will provide answers to Cassese's three points of criticism directed against this argument.

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[16] A. Cassese, *International Law*, 2nd ed., (2005), at 420.

[17] HC *769/02*, *The Public Committee Against Torture in Israel v. The Government of Israel*, Judgment of 11 December 2005, available at the website of the Israeli Supreme Court http://www.court/gov.il (last visited on 30 June 2008).

[18] Cassese, *supra* n. 16, at 420.

[19] HC *769/02*, *The Public Committee Against Torture in Israel v. The Government of Israel*, Judgment of 11 December 2005, para. 21, available at <http://www.court/gov.il> (last visited on 30 June 2008).

[20] R.S. Schondorf, "The Targeted Killings Judgment – A Preliminary Assessment", (2007) 5 *JICJ* 301, at 305. He argues that even the application of the IHL rules concerning IAC to hostilities between the occupying power and rebels or insurgent groups in an occupied territory remains of doubtful nature: *ibid*., n. 33.

With respect to the first limb of his criticism, it is submitted that NIAC can embrace cross-border conflicts between governmental forces of one state and armed groups operating in other countries.[21] Kretzmer argues that "[t]here is no substantive reason why the norms that apply to an armed conflict between a state and an organized armed group within its territory should not also apply to an armed conflict with such a group that is not restricted to its territory".[22] In *Hamdan v. Rumsfeld*, the majority of the US Supreme Court ruled that on the basis of common Articles 2 and 3 GCs, NIACs can encompass any conflict that is not a conflict between states.[23] The Appeals Chamber of the ICTY in the *Tadic* case has held that the fighting which took place across the boundaries of states does not necessarily internationalise the non-international nature of armed conflict in a legal sense. There, the Appeals Chamber of the ICTY has held that NIAC can be transformed into IAC only in two circumstances:

> . . . in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflicts act on behalf of that other state.[24]

The criterion "act on behalf of" a third state is a key to determining the international or non-international nature of an armed conflict that involves an armed group operating from outside an international boundary.[25]

As Kretzmer notes,[26] a major difficulty with this argument is that the scope of application *ratione materiae* of common Article 3 GCs[27] and APII[28] envisages

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[21] See D. Jinks, "September 11 and the Law of War", (2003) 28 *Yale JIL* 1, at 38–39; and Schondorf, *ibid.*, at 304.

[22] Kretzmer, *supra* n. 13, at 195.

[23] US Supreme Court, *Hamdan v. Rumsfeld,* Judgment of 29 June 2006, 126 S.Ct. 2749 (2006), at 2795–2796. The Court refers to the *ICRC's Commentary to APs,* at 1351, para. 4458 ("in a non-international armed conflict the legal status of the parties involved in the struggle is fundamentally unequal").

[24] ICTY, *The Prosecutor v. Tadić*, Judgment of Appeals Chamber, 15 July 1999, Case No. IT-94-1-A, at 34, para. 84.

[25] For instance, the armed conflict between Israel and Hezbollah operating in Lebanon in 2006 can be considered to consist of two types in juridical sense: (i) a non-international armed conflict between Israel and Hezbollah; and (ii) an international armed conflict between Israel and Lebanon.

[26] Kretzmer, *supra* n. 13, at 189 and 194–195.

[27] Common Article 3 GCs mentions "the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . .".

[28] Article 1(1) APII limits the material scope of application of APII to non-international armed conflicts that "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible com-

conflicts taking place *within* the territory of a state party. It can, however, be countered that the material scope of application of these treaty-based rules do not necessarily overlap with that of customary IHL relative to NIAC. This can be borne out in the *Nicaragua* case where the declaratory character of common Article 3 GCs and its applicability even to IAC was affirmed.[29] With respect to the rules set out in APII, the argument based on customary IHL rules proves more difficult, as not all its provisions have yet to be recognised as customary law.[30]

As regards the second aspect of Cassese's criticism, it is true that the IHL rules on NIAC are much less elaborated and articulated than the IHL rules on IAC, especially in relation to the notion of combatants, conduct of hostilities (means and methods of warfare), and individual criminal responsibility.[31] Yet, both the "crystallisation" of customary IHL rules through the accumulated case-law of the UN ad hoc war crimes tribunals and the articulation of customary rules by the *ICRC's Customary IHL Study* have partially resolved this problem.

In relation to Cassese's third point of criticism, it is not contradictory to envisage multiple armed conflicts, even of different legal characters, which take place in occupied territories. For instance, in occupied Iraq (2003-onwards), one can discern at least three different types of armed conflicts. First, the Anglo-American occupation as a whole was governed by the law of occupation derived from the 1907 Hague Regulations, GCIV and customary IHL, as amended by the relevant Security Council resolutions adopted under Chapter VII of the UN Charter. Second, the fighting between the Anglo-American "Coalition" forces on one hand and various insurgents groups, which have carried out attacks against

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mand, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".

[29] In the *Nicaragua* case, the International Court of Justice held that common Article 3 GCs "defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which also apply to international conflicts": ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment of 27 June 1986, ICJ Rep. 1986, 14, at 113–114, para. 218.

[30] Kretzmer, *supra* n. 13, at 195; and L. Moir, *The Law of Internal Armed Conflict* (2002), at 109.

[31] This unsatisfactory situation, as compared with more elaborate counterparts governing international armed conflict, arguably remains true, even after the publication of the *ICRC's Customary IHL Study*. The uncertain nature of IHL rules on conduct of hostilities in NIAC is most salient in relation to those rules whose breaches give rise to individual criminal responsibility for war crimes. Article 8(2) ICC Statute envisages limited scenarios of war crimes arising from NIAC. See D. Turns, "At the 'Vanishing Point' of International Humanitarian Law: Methods and Means of Warfare in Non-international Armed Conflicts", (2002) 45 *German YbkIL* 115. See also *idem*, "Weapons in the ICRC Study on Customary International Humanitarian Law", (2006) 11 *JCSL* 201.

Coalition and UN personnel (and even against members of humanitarian relief organisations) may be classified as NIAC. Third, the fighting between different ethnic or religious groups (for instance, between Turkomen and Kurds, or between Shia militias and Sunni militias) that occurred within the border of occupied Iraq can be clearly described as NIAC.

2. *The Definition of Protected Persons and Civilians*

Next, inquiries will be made into the category of persons who are immune from direct attack during the conduct of hostilities which occur in occupied territory. For this purpose, the examinations must turn to the definition of protected persons within the meaning of Article 4 GCIV and that of civilians under API.

2.1. *Protected Persons under Article 4 of GCIV*

The scope of application *ratione personae* of GCIV is determined by the concept of "protected persons" within the meaning of Article 4 GCIV. Article 4 GCIV delineates the scope of application *ratione personae* of GCIV. The first paragraph provides the general rule that the civilians classified as "protected persons" under GCIV 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". The scope of application is narrowed down by the qualifications of the second and fourth paragraphs. The fourth paragraph refers to those who fall under the protections of GCI-III as not "protected persons" of the GCIV.

According to Article 4(2) of GCIV, whether or not captives are entitled to protections under GCIV depends on their nationality and how to characterise a territory as a battleground or occupied territory. In the case of nationals of co-belligerent states, the rule is straightforward. They are excluded from the scope of application *ratione personae* of GCIV, except in circumstances where those co-belligerent states do not have "normal diplomatic representation" in the belligerent party or in the occupying power.

In contrast, the scope of protection of neutral nationals is broader. Unlike nationals of co-belligerents, if they are captured in an occupied territory, they are still entitled to the status of protected persons under GCIV. The only condition is that the states of which they are nationals do not maintain diplomatic relations with the occupying power. This means that in case of neutral nationals in occupied territory, their status may be "dual": "their status as nationals of a neutral State, resulting from the relations maintained by their Government with the Government of the Occupying Power, and their status as protected persons".[32]

[32] The *ICRC's Commentary* to GCIV, at 48.

With respect to nationals of a neutral state who find themselves in the territory of a party to the conflict, they are not protected persons unless their state lacks normal diplomatic representation in the detaining power.

The distinction between neutral nationals in occupied territory and those in the territory of a belligerent party is defensible. Apparently, relying on the reasoning presented at the Committee III, which was designed to examine the draft text of Civilians Convention at the Diplomatic Conference of Geneva (1949),[33] the *ICRC's Commentary* notes that in the territory of the belligerent States, the nationals of neutral States can benefit from treaties concerning the legal status of aliens and their diplomatic representatives. On the other hand, in an occupied territory, the diplomatic representatives of neutral states, even if they remain there, are accredited only to the occupied power, and not to the occupying power which is not bound by the treaties regulating the legal status of aliens.[34]

Some authors argue that just as nationals of allies, nationals of neutral parties in an occupied territory, while their own government maintains normal diplomatic relations with the occupant, should be excluded from the status of protected persons under GCIV.[35] However, this restrictive interpretation is contrary to the express wording of Article 4(2), which refers to nationals of neutral states "in the territory of a belligerent State" as among those individuals disentitled to the protections under GCIV.[36]

The concept of nationality must not, however, be over-emphasised in appraising the status of protected persons. In the *Tadić* case, the Appeals Chamber of the ICTY ruled that the determination of individual persons' status as "protected persons" must focus on their *allegiance* to a party to the conflict in whose hands they fall, rather than on the formal link of nationality.[37] On this matter, some

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[33] See the Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva, 2 *Final Record*, Vol. II-A, at 814.

[34] *ICRC's Commentary to GCIV*, at 48–49.

[35] H.-P. Gasser, "Protection of the Civilian Population", in: D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, (1995), Ch. 5, at 241; and G. von Glahn, *The Occupation of Enemy Territory…A Commentary on the Law and Practice of Belligerent Occupation* (1957), at 91–92.

[36] The *Final Record of the Geneva Conference* also suggests that the drafters contemplated the protection of all neutrals in occupied territory under GCIV. The drafters distinguished neutrals in the home territory of a belligerent state from neutrals in occupied territory, in that diplomatic representatives of the latter may be accredited to the overthrown government in occupied territory, but not accredited to occupying authorities: *Final Record,* Vol. II-A, at 814 (1949).

[37] ICTY, *Prosecutor v. Tadić*, Judgment of Appeals Chamber, 15 July 1999, Case No. IT-94-1-A, paras. 165–8; confirmed in *Prosecutor v. Delalic, Mucic, Delic and Landzo* (*the Celebici* case) (judgment), Judgment of Appeals Chamber, 20 February 2001, Case No. IT-96-21-A, paras. 51–106. See also *Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici case)*, Judgment of Trial Chamber, 16 Nov. 1998, Case No. IT-96-21-T, paras. 236–66, in particular paras. 251–66.

remarks need to be made as to certain categories of soldiers captured in occupied Afghanistan (2001–2002) and occupied Iraq (2003–onwards). If one applies the allegiance test based on the humanitarian rationale for the expansive scope of guarantees of GCs,[38] it becomes apparent that Al-Qaeda members in occupied Afghanistan or terrorist infiltrators in occupied Iraq, who were of co-belligerents' nationality, had to be treated in the same manner as Afghan comrades or Iraqi civilians who took a direct part in hostilities respectively. They qualified as protected persons. Nevertheless, they were unprivileged belligerents who were stripped of substantive rights under the derogation clause (Article 5 GCIV).

In contrast to the second and the fourth paragraphs that limit the scope of application, the third paragraph of Article 4 GCIV refers to the broader ambit of protection of some provisions of GCIV. It stipulates that the personal scope of application of the provisions of Part II (*General Protection of Populations against Certain Consequences of War*) is wider than the ambit of "protected persons". These provisions (Articles 13–26) serve as a "safety net" for any persons that fall outside the ambit of "protected persons". The *ICRC's Commentary* states that "Part II has the widest possible field of application . . . cover[ing] the whole population of the Parties to the conflict, both in occupied territory and in the actual territory of those Parties. . . . It could have formed a special Convention on its own".[39]

The examinations of the meaning of Article 4 make it clear that those *disentitled* to claim the status of "protected persons" under GCIV are limited to the four categories:

(i) nationals of a state which is not party to the Convention;
(ii) nationals either of a party to the conflict or of occupying power in whose hands they are;
(iii) persons protected by GCI, GCII, or GCIII; and
(iv) nationals either of a neutral State captured in the territory of a belligerent State, or of a co-belligerent State, which is able to exercise normal diplomatic representation in the detaining State.

The scope of "protected persons" defined in Article 4 is wider than the two genres of civilians specifically mentioned in Article 5: first, alien enemies (or enemy nationals), namely persons in the hands of a country with which their country is at war; and second, the population of occupied territory, bar citizens either of the occupying power or co-belligerent powers. Accordingly, the scope

[38] See R. Provost, *International Human Rights and Humanitarian Law*, (2002), at 39–40.
[39] *ICRC's Commentary to GCIV*, at 50.

of application *ratione personae* of the GCIV covers civilians in combat zones, whether or not they were engaged in hostile activities.

2.2. *Deprivation of Protected Persons Status?*

Armed groups may find themselves at liberty in some pockets of the occupied land, where autonomy is granted to the indigenous population. In case their authority is either unwilling or unable genuinely to take necessary action to arrest, and punish or extradite them, it must be asked whether persons finding themselves in such areas can be described as "protected persons" within the meaning of Article 4 GCIV. This provision refers to the phrase "in the hands of" the occupying power in lieu of the "population of the territory".[40] On one hand, it may be argued that the wording "in the hands of" signifies that the occupying power must exercise some degree of control over the territory in order for the persons in the territory to be characterised as protected persons. In essence, the requisite degree of control over the area can correspond to the level of control required for the area to be deemed occupied.[41] Accordingly, the notion of protected persons within the meaning of Article 4 GCIV is not considered synonymous with the population of the territory of the country occupied, but only with the population of that territory that is actually occupied.[42] On the other hand, it can be advanced that what matters most is the control over persons, and not the control over a particular territorial locality. This debate is closely connected with issues of the extraterritorial application of human rights in occupied territories, which will be analysed in Chapter 21.

2.3. *The Concept of Civilians under API*

Article 50 API provides the expanded scope of civilians and civilian populations. A civilian is defined as any person that does not fall within the definition of prisoners of war under Article 4A(1)-(3) and (6) GCIII and under Article 43 API.[43] Along this line, in the *Blaskic* case, the Trial Chamber of the ICTY defined civilians as "persons who are not, or no longer, members of the armed forces".[44] The *ICRC's Customary IHL Study* suggests that the definition of civilians as

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[40] See CUDIH, *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation,* Geneva, 1–2 September 2005, at 21–22, n. 33.

[41] *Ibid.*

[42] All experts that attended the CUDIH's *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation*, at Geneva on 1–2 September 2005 agreed on this view: *ibid.*

[43] API, Article 50(1), first sentence.

[44] ICTY, *Prosecutor v. Blaskic*, Judgment of Trial Chamber, 3 March 2000, IT-95-14-T, para. 180.

persons who are not members of the armed forces is now accepted as customary international law.[45]

Several corollaries of the civilian status need to be highlighted. First, as stipulated in Article 50(1) API, in case of doubt, persons must be presumed to enjoy civilian status.[46] Second, the presence within the civilian population of individuals who are not civilians does not automatically disentitle the population to its civilian character.[47] Third, with respect to the rules governing conduct of hostilities, civilians are immune from direct attacks unless and for such time as they do not take a direct part in hostilities. The *Study* regards this rule, which is laid down in Article 51(3) API, as forming part of customary international law.[48]

3. *"Combatants" in Occupied Territories*

3.1. *Members of Lawful Combatants of International Armed Conflict in Occupied Territory*

Until occupation becomes effective, there are three types of lawful resistance fighters, who can qualify as lawful combatants taking part in IAC: (i) members of the armed forces of the occupied country; (ii) individuals belonging to organised resistance movements; and (iii) individuals participating in a *levée en masse*.[49] They must, however, comply with the conditions for lawful combatants as embodied in GCIII and API. In particular, they must distinguish themselves from civilians by carrying arms openly during deployments and engagements, in accordance with the rules embodied in Articles 43 and 44 of API, which provide conditions more lax than those under Article 4A(2) GCIII. If they fail to abide by those conditions, they would be characterised as unprivileged belligerents,[50] forfeiting the right to be treated as prisoners of war.

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[45] J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law* (2005), at 17, Rule 5.

[46] API, Article 50(1), second sentence. The *ICRC's Customary IHL Study* is silent on the customary law status or not of this rule in the specific context of definition of civilians. See *ibid.*, Vol. I, Chap 1: Distinction between Civilians and Combatants (Rules 1–6). This point is echoed by D. Bethlehem, "The Methodological Framework of the Study", in: E. Wilmshurst and S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, (2007), 3, at 12–13.

[47] API, Article 50(3).

[48] Henckaerts and Doswald-Beck (eds), *supra* n. 46, Vol. I, at 19, Rule 6.

[49] GCIII, Article 4A(6).

[50] For analysis of unprivileged belligerents, see R.R. Baxter, 'So-called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs', (1951) 28 *BYIL* 323; Y. Arai-Takahashi, "Disentangling Legal Quagmires: The Legal Characterization of the Armed Conflicts in Afghanistan and the Prisoners

More complicated is the determination of the types of belligerents that can be lawfully engaged in fighting against the occupying power after the latter has established effective control over the territory. *Levée en masse* is no longer permissible after the establishment of effective occupation. Yet, the determination of when the occupation becomes effective may be as difficult as the ascertainment of when the rebel or insurgent group has terminated an occupation.[51] Only members of the armed forces that have yet to surrender and those of organised resistance movements (including national liberation movements that have obtained international recognition under API) are entitled to continue their fighting as lawful combatants in IAC between the occupying power and the occupied state. During deployments and engagement, they must, however, comply with the rules of distinction under Article 44 (3) API so as to enable the occupying power to differentiate them from civilians.[52]

With respect to members of armed forces who have not surrendered, it ought to be noted that the surrender of a commander has a binding effect only under the chain of his/her command, but not in relation to members under other commands.[53] As regards national liberation movements, they represent a people fighting against colonial domination, alien occupation and racist regime. Article 1(4) of API fictitiously elevates such fighting to international armed conflict. Further, Article 96(3) of API allows such movements to declare adherence to the rules of API to make the Geneva Conventions and API immediately binding on them as parties to the conflict.

3.2. *Participants in Non-International Armed Conflict in Occupied Territory*

3.2.1. *Three Categories of Individual Persons Affected by Non-International Armed Conflict in Occupied Territory*

One of the marked deficiencies of IHL treaty-based rules relating to NIAC is that unlike the concept of civilians defined in Article 13 APII, that of combatants is not expressly spelt out. Even so, a legal concept of combatants can be deduced from some indicators. First, the reference to the category of civilians *ipso facto* suggests the category of non-civilians, namely combatants.[54] This is

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of War Status", (2002) 5 *YbkIHL* 61; and K. Dörmann, "The Legal Situation of 'Unlawful/ Unprivileged Combatants' ", (2003) 85 *IRRC* 45. See also *UK Manual* (2004), at 279. Another obvious genre of unprivileged belligerents is mercenaries, as provided in Article 47, API.

[51] *UK Manual* (2004), *ibid.*

[52] API, Article 44(3).

[53] Such surrender is certainly not effective with respect to those serving in allied or other foreign forces: *UK Manual* (2004), at 279.

[54] CUDIH, *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation*, Geneva, 1–2 September 2005, at 36.

corroborated by the qualifying phrase "unless and for such time as they take part in hostilities", which is attached to the principle of civilian immunity from attacks under Article 13(3) APII.

It is possible to contemplate three categories of persons who are involved in NIACs that occur in occupied territory: (i) members of the occupying power's armed forces; (ii) members of rebel or armed opposition groups who are not members of independent militia or volunteer corps within the meaning of Article 4A(2) GCIII, and who *regularly* participate in hostilities; and (iii) civilians who take part in hostilities (*sporadically*) and can become lawful military targets only for such time as they do.[55] A modified version of this argument is to discard the distinction between the second and the third categories, and to propose a broader notion of civilians to encompass members of rebels or armed opposition groups.[56] As will be in-depthly analysed below, there is prevailing authority for the argument that rebels remain civilians unless the test based on direct participation in hostilities is met, the test which is widely recognised as the benchmark for determining civilian status in customary IHL.[57]

3.2.2. *Rebels and the "Revolving Door" Scenario*

It may be proposed that international human rights law should be more extensively applied to NIAC situations than in the case of IAC to enable this body of law to fill a normative gap left by IHL rules on conduct of warfare in NIAC. In contrast, it may be contented that the application of international human rights law in NIAC would place members of the government forces at a disadvantage as compared with members of a rebel or armed opposition group. Rebels may come back and forth between fighting and ordinary civilian lives. This "revolving door" situation[58] may be seen to create an imbalance.[59] While government forces may be targeted at any time by rebel forces, the lawful targeting of rebel forces is limited to the temporal framework (for such time as they directly participate in hostilities). It may be argued that this "revolving door" interpretation of the IHL rules relative to NIAC jeopardises lives of "pure civilians", giving disincentives

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[55] *Ibid*.

[56] Surely, this approach recognises that the members of rebels or armed opposition groups lose civilians' privileges for such time as they directly participate in hostilities.

[57] While one expert at the CUDIH, *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation*, Geneva, 1–2 September 2005 pointed out that this benchmark was not reflected in customary international law, the majority seemed to agree that this was the case, as formulated in the *ICRC's Customary IHL Study*, Henckaerts and Doswald-Beck (eds), *supra* n. 45, Vol. I, Rule 6, at 19–24.

[58] See W.H. Parks, "Air War and the Law of War", (1990) 32 *Air Force Law Review* 1, at 118–120.

[59] CUDIH, *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation*, Geneva, 1–2 September 2005, at 41.

for potential members of rebel groups to stay away from hostilities.[60] Further, the introduction of the standards developed in the context of the right to life may be considered to perpetuate this revolving door imbalance. While governmental forces are enjoined to implement law enforcement measures, rebels are always determined to attack members of governmental armed forces. However, this interpretation misses two points. First, rebels never acquire any legal entitlement to attack armed forces of the government. Second, they would risk being prosecuted as common criminals.

3.2.3. *The Distinction between Current and Former Members of Armed Forces of the Occupied State*

It may be questioned whether a distinction can be drawn between former and current members of these forces with respect to members of the armed forces of the occupied state. It is clear that the former membership of the forces alone does not justify the measure of targeting and killing them on sight.[61] The security measures (administrative detention and internment) of which the occupying power can legitimately avail themselves is generally sufficient to address any potential threat and hostile activities that they may pose.[62]

Opinions may be divided as to the legality of killing on sight the current members of the armed forces of the occupied country, while they are not fighting in the occupied territory.[63] It may be suggested that even in calm occupied areas, current members of the armed forces of the occupied country may be reserved or mobilised for an operation in another area of the occupied country, where hostilities break out or resume. In such circumstances, the question is whether the targeted killing is the only effective alternative to avoid the scenario in which the persons to be targeted are ready to join their forces in areas of hostility and to reinforce their fighting capacities.

However, as discussed above, it is essential to differentiate between "calm occupation areas" where the law enforcement model should prevail and the occupied zones in which IHL rules on conduct of hostilities may come into play. In "calm" occupied zones, if current members of armed forces can be captured, and insofar as they are not taking direct part in hostilities in the occupied territory, on-sight targeting and killing must be regarded as unlawful. Their allegiance to their armed forces which fight against the occupying power is irrelevant.[64]

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[60] *Ibid.*, at 42.
[61] *Ibid.*, at 23.
[62] *Ibid.*, at 24.
[63] A different strand of argument is that international armed conflict can be considered on-going throughout the occupied territory. In the similar vein, arms factories may be bombarded in occupied territory even during a "calm" occupation: *ibid.* (views of minority experts present).
[64] *Ibid.*, at 24.

3.2.4. *Classification of Foreign Infiltrators as Unprivileged Belligerents*

A difficult question arises with respect to on-sight targetability of foreign nationals who have infiltrated into an occupied territory to fight against the occupying power. The fact that an armed group to which these persons belong has been regularly involved in hostilities against the occupying power, is not sufficient to make them legitimate military targets *at all times*.[65] The persons crossing the border may not be considered "belonging to a Party to the conflict" within the meaning of Article 4A(2) GCIII. It may well be that they do not appertain to members of the armed forces of the third state. Further, they may not be sent by that state, or acting on its behalf. In such circumstances, their acts cannot be attributed to that third state. As a consequence, their action does not trigger IAC. In the context of IAC, such persons can be classified as *unprivileged belligerents.*

The problem is that unless the outbreak of new hostilities is characterised as a resumption of hostilities that led to the state of occupation at the outset, the hostilities are categorised as NIAC. [66] This compounds the determination of both the legal status of those infiltrators and the scope of guarantees to which they are entitled. To introduce the notion of unprivileged belligerents in the context of NIAC is all the more difficult, because, as discussed above, even the notion of combatants is left ambiguous in that context.[67] One practically meaningful solution would be to employ the concept "direct part in hostilities" as a guideline for distinguishing between combatants and non-combatants in NIAC. Viewed in that way, the infiltrators ought to be treated as civilians governed by law enforcement measures, insofar as they do not meet the test of "direct participation in hostilities".[68]

In contrast, in case persons infiltrating into occupied territory are acting on behalf of, or sent by, a third state to fight against the occupying power, this can be considered sufficient to establish the outbreak of IAC. As a result, it may be argued that the occupying power is entitled to target such persons on sight as lawful combatants.[69] However, the sending of *only one saboteur or assassin* to destabilise the calm occupied zone is certainly not sufficient to trigger an IAC

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[65] *Contra*, *ibid.*, at 25 (a view expressed by one expert).

[66] *Ibid.*, at 24.

[67] It must be questioned whether infiltrators of third-party nationality, who fail to meet requisite conditions for prisoners of war, can be described as "unprivileged belligerents", even in the context of non-international armed conflict.

[68] *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation*, Geneva, 1–2 September 2005, at 25 (a view expressed by one expert).

[69] *Ibid.*, at 24 (all the experts agreeing on this position).

between the occupying power and the third state to which acts of the saboteur or assassin can be imputed.[70]

4. *Unprivileged Belligerents in Occupied Territory*

4.1. *Overview*

Having identified the category of unprivileged belligerents (or unlawful combatants) operating in occupied territory, this section needs to explore the nature of this controversial category of persons in the specific context of occupation. They are those individuals who have taken direct part in hostilities without meeting the qualification for prisoners of war status. The issues of their legal status and the extent of rights and privileges to which they are entitled under IHL are inextricably intertwined with the definition of protected persons under Article 4 GCIV, as examined above.

In relation to the legal status of terrorists, saboteurs, spies, mercenaries and other categories of persons participating in hostilities under IHL, two different approaches may be discerned. As analysed above, the first view is to classify persons affected by armed conflicts into only two categories: civilians and combatants. Within this dichotomy, civilians are defined in a negative manner, namely any individual persons that do not qualify as combatants. Accordingly, those controversial categories of participants in hostilities are all considered civilians. It is, however, clear that they risk being deprived of many of their rights on the basis of the derogation clause under Article 5 GCIV. The second view, which is the position of the present writer, is to introduce the notion "unprivileged belligerents" (or unlawful combatants) as a third category of persons.

As examined above, in the *Public Committee Against Torture in Israel v. The Government of Israel* (so-called *Targeted Killing* judgment),[71] the Israeli Supreme Court, sitting as a High Court of Justice (HCJ) offered a thorough legal assessment as to the extent to which so-called targeted killings can be lawfully conducted. The Court rejected the argument that at present there exists the third legal category of persons called unlawful combatants in the relevant treaties

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[70] *Ibid.*, at 24 and 27. There is some contradiction on the conclusion unanimously reached by the experts. While proposing the "very low" threshold of IAC, specifically noting that sending (an indefinite number of) individual persons by a third state to occupied territory is sufficient to trigger IAC, they seem to set the threshold of "hostilities" in occupied territory much higher.

[71] HC *769/02, The Public Committee Against Torture in Israel v. The Government of Israel*, Judgment of 11 December 2005, available at http://www.court/gov.il (last visited on 30 June 2008).

(Hague Regulations and GCIV) and in customary IHL.[72] This did not prevent the Court referring to the term "unlawful combatants" to describe members of terrorist organisations. Nevertheless, according to the Court's view, unlawful combatants are specific sub-categories of civilians (as opposed to "innocent civilians").[73] One crucial ramification of this judgment is that since such terrorist members are classified as civilians, they could be detained in accordance with the legal framework on civilian detainees as regulated in Part III, Sections III and IV of the GCIV. Though describing terrorists and other irregular fighters as civilians, the Israeli Supreme Court in the *Targeted Killing* judgment held that they risk forfeiting privileges associated with civilians *so long as they take a direct part in hostilities*.

4.2. *Three Strands of Argument on the Scope of Protection of GCIV in Relation to Unprivileged Belligerents*

Opinions among publicists are divided as to the personal scope of application of GCIV in relation to unprivileged belligerents. Apart from an extreme view that negates any protections under IHL,[74] three strands of argument can be discerned. The first line of argument is that all categories of unprivileged belligerents are excluded from the scope of protection *ratione personae* of GCIV. According to this, only civilians, who have not taken part in hostilities and are held either in a territory of an adverse party or in occupied territory, can claim entitlement to GCIV.[75] Nevertheless, all unprivileged belligerents remain beneficiaries of the

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[72] *Ibid*., para. 28. Nevertheless, the tenor of the judgment might be taken as not excluding the possibility of a future customary norm that recognises the concept of unlawful or unprivileged belligerents. The Court held that "[i]t does not appear to us that we were presented with data sufficient to allow us to say, at the present time, that such a third category has been recognized in customary international law": *ibid*.

[73] See, for instance, *ibid*., para. 40.

[74] In fact, Detter goes so far as to argue that unprivileged belligerents are placed outside any protection of international humanitarian law: I. Detter, *The Law of War*, (2002), at 136.

[75] Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, (2004), at 29–33; R.K. Goldmann and B.D. Tittemore, "Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights under International Humanitarian and Human Rights Law", available at <http://asil.org/taskforce/goldman.pdf> (last visited on 30 June 2008), at 38; and Adam Roberts, "The Laws of War in the War on Terror", in: W.P. Heere (ed), *Terrorism and the Military-International Legal Implications,* (2003), 65–92, at 82. Greenwood seems to exclude the applicability of GCIV to unprivileged belligerents. According to him, members of the Taliban and the Al-Qaeda who do not "belong" to a State and fail to meet either of the four requirements for prisoners of war status are entitled to "a right to humane treatment under customary international law", as provided in Article 75 API, and that they must not be subject to "the imposition of penalties without a fair trial which meets basic international standards". However, he does not make any reference to the Civilians Convention: C. Greenwood,

minimum safeguards of IHL rules, which are derived from the Martens Clause,[76] common Article 3 GCs and Article 75 API, as well as corresponding customary rules. This view is confirmed in the Inter-Am CmHR's *Report on Terrorism and Human Rights.*[77]

The second strand of argument is to confine the applicability of GCIV only to two groups: (i) enemy nationals in the territory of a belligerent state; and (ii) the population of occupied territory. According to this argument, among unprivileged belligerents, only battlefield unprivileged belligerents, namely those who are captured in a combat zone (civilians who have taken part in hostilities; and members of independent militia or independent volunteer corps, who fail to meet the four conditions for prisoners of war within the meaning of Article 4A GCIII), would be excluded from the scope of application *ratione personae* of GCIV.[78] Again, such battlefield unprivileged belligerents would be entitled

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"International Law and the 'War against Terrorism'", (2002) 78 *International Affairs* 301, at 316–317.

[76] In its Advisory Opinion on *Nuclear Weapons*, the International Court of Justice stated that the Martens Clause "has proved to be an effective means of addressing the rapid evolution of military technology": ICJ, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of 8 July 1996, para. 78.

In his dissenting opinion, Judge Shahabuddeen took the view that the Martens Clause was part of customary international law. He referred to the US Military Tribunal at Nuremberg in the *Krupp* case (1948), according to which:

> The Preamble [of Hague Convention IV of 1907] is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare. . . .

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, ICJ Rep. 1996, 226 Dissenting Opinion of Judge Shahabuddeen, *ibid.*, at 407; US Military Tribunal, Nuremberg, *Krupp and Others,* 30 June 1948, (1949) 10 *LRTWC* 69; (1948) 15 *AD* 620, Case 214, at 622. See also the dissenting opinion of Judge Weeramantry in *Legality of the Threat or Use of Nuclear Weapons*, who argues that "[t]he Martens Clause has thus become an established and integral part of the corpus of current customary international law": *Legality of the Threat or Use of Nuclear Weapons, ibid.*, Dissenting Opinion of Judge Weeramantry, at 486.

[77] IACmHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/-V/II.116 Doc. 5 rev.1corr., 22 October 2002, paras. 76–78.

[78] Draper argues that:

> Such individuals [individual members of the group, who as a majority fail to meet the requirements for prisoners of war status as stipulated in Article 4A(2) GCIII] will, upon capture, be entitled to the limited protection afforded to civilians as a 'protected' person by Article 5 of the Geneva (Civilians) Convention, 1949 . . . assuming that they were operating in occupied territory or in that of the enemy and were nationals of a State Party to that Convention. If they were operating in neither type of territory, their position is far from clear and their protection is speculative.

to the minimum safeguards, which consist of common Article 3 GCs, Article 75 API, and the *Martens* Clause, as well as the customary law equivalents of the IHL treaty-based rules.[79] The ICRC's *Rules Applicable in Guerrilla Warfare* (1971), which were prepared for the purpose of discussing draft articles of API, follows the second strand of reasoning.[80] Academic opinions are further divided.

G.I.A.D. Draper, "The Status of Combatants and the Question of Guerrilla Warfare", (1971) 45 *BYIL* 173, at 197–198. Similarly, Kalshoven observes that:

> . . . the protections offered here [Article 27 in Section I of Part III of GCIV] extends to <<aliens in the territory of a Party to the conflict>> (Section II) and to protected persons in <<occupied territories>> (Section III), and not to enemy aliens in non-occupied enemy territory. . . . Technically . . . the provisions of these Sections do not apply to guerrillas who are captured and held by the enemy in their own territory, so long as that cannot be regarded as occupied territory":

F. Kalshoven, "The Position of Guerrilla Fighters under the Law of War", (1972) 11 *Revue de droit penal militaire et de droit de la guerre* 55, at 70–74, in particular at 70–71. See also J. Callen, "Unlawful Combatants and the Geneva Conventions", (2004) 44 *VaJIL* 1025, at 1033; A. Rosas, *The Legal Status of Prisoners of War*, (1976), at 411 *et seq;* and R.T. Yingling and R.W. Ginnane, "The Geneva Conventions of 1949", (1952) 46 *AJIL* 393, at 411.

[79] Draper argues that:

> They [individual members of the group, who as a majority fail to meet the requirements for prisoners of war status as stipulated in Article 4A(2) GCIII] probably remain protected by the general requirement implicit in the de Martens Preamble to the Hague Convention No. IV of 1907, of humane and civilized treatment . . . as part of the general principles of law recognized by civilized nations. This would . . . demand fair trial and conviction before execution.

Draper, *ibid.*, at 197–198. Similarly, Kalshoven contends that:

> . . . when an invading army is opposed by guerrilla activities . . . the guerrilla fighter who falls into enemy hands will not enjoy the full protection extended to protected persons in occupied territory. It is submitted, however, that he will not be entirely without protection. The principle expounded in Article 3 for non-international armed conflict provides at the same time a minimum below which belligerents may not go in other situations either. In support of this argument one may point to Article 158, para. 4 of Convention No. IV which obligates the belligerents to respect in all circumstances <<the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience>>. . . . To my mind, the strongest argument in favour of this thesis lies precisely in the element of their foreign nationality and, hence, allegiance to the opposite Party from the one which holds them in its power.

Kalshoven (1972), *ibid.*, at 71.

[80] It is stated that "guerrillas who do not meet these conditions [the conditions of Article 4A(2) of GCIII] and who operated in occupied territory are protected by Geneva Convention IV": *Rules Applicable in Guerrilla Warfare*, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May–12 June 1971, Paper submitted by the International Committee of the Red Cross, Geneva, January 1971, at 19.

On one hand, Rosenblad takes a broader approach, arguing that GCIV should apply even to members of organised resistance movements who fail to meet the four conditions for prisoners of war status.[81] On the other hand, Baxter seems to take a restrictive view, confining the applicability of GCIV to unprivileged belligerents operating in occupied territory.[82] However, it is possible to surmise that when writing this article, Baxter was more concerned with proffering some rights to unprivileged belligerents in occupied territory, who had been hitherto hardly protected.[83]

The second strand of argument can be corroborated by the structure of Part III of GCIV and that of Article 5 GCIV. Part III of the Civilians Convention distinguishes between those provisions (Articles 35–46) relating to "aliens in the territory of a party to the conflict" (Section II) and those (Articles 47–78) concerning "occupied territories" (Section III), while classifying Articles 27–34 as the provisions "common both to the territories of the parties to the conflict and to occupied territories" (Section I). As discussed in Chapter 11, Article 5 GCV follows the same classification. Derogation from rights and privileges of civilians engaged in hostile activities can be recognised only in the two circumstances (in the territory of a party to the conflict; and in occupied territory).

Further, the second line of argument is consistent with the *travaux préparatoires.* The Final Act of the Geneva Conference of 1929 (*Actes de la Conférence diplomatique de Genève juillet 1929*) expressed the wish, among others, that an exhaustive study should be made to prepare an international convention relative

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[81] Rosenblad argues that detained members of organised resistance movements, who fail to meet the conditions under Article 4A(2) of GCIII, are entitled to humane treatment, and the rights of fair and regular trial, albeit they are subject to Articles 5 and 68(2) of GCIV: E. Rosenblad, "Guerrilla Warfare and International Law", (1973) 12 *Revue de Droit Penal Militaire et de Droit de la Guerre,* at 98.

[82] Baxter (1951), *supra* n. 50, at 328 *et seq.,* and 343 *et seq*.

[83] In other context, Baxter argues as follows:

> The treaties [the Hague Regulations and the Geneva Conventions of 1949] did not, except as to occupied areas, give any clear guidance about the treatment to be accorded to individuals who did not identify themselves as members of the armed forces and yet engaged in acts of hostility. They did not qualify as prisoners of war and they might likewise fail to come within the ambit of the Geneva Civilians Convention, which for the most part confined its protection to those civilians who lived in areas occupied by the adversary or who were within the domestic territory of the adversary…Such individuals who upon capture were not entitled to be treated either as prisoners of war or as peaceful civilians fell outside the protected categories and, subject to the requirement of a fair trial, were therefore at the mercy of the Detaining Power.

R.R. Baxter, "The Duties of Combatants and the Conduct of Hostilities (Law of The Hague)", in: Henry Dunant Institute and UNESCO (ed), *International Dimension of Humanitarian Law*, (1988) 93, at 105–106.

to the condition and protection of civilians of enemy nationality in the territory of a belligerent or in the territory occupied by a belligerent.[84] The Draft Civilians Convention (*Projet de Convention internationale concernant la condition et la protection des civils de nationalité ennemie qui se trouvent sur le territoire d'une belligerent ou sur un territoire occupé par lui*) was approved at the XVth International Red Cross Conference at Tokyo in 1934 and transmitted by the ICRC to the Conseil fédéral suisse in August 1935.[85] This Draft Convention envisaged the protection of civilians only in relation to those held in occupied territory or in the territory of an adverse party to the conflict.

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[84] See Acte Final de la Conférence diplomatique du 27 juillet 1929, in: Actes de la Conférence diplomatique de Genève juillet 1929, *Actes de la Conférence diplomatique convoquée par le Conseil fédéral suisse pour la révision de la Convention du 6 juillet 1906 pour l'amélioration du sort des blessés et malades dans les armées en campagne et pour l'élaboration d'une Convention relative au traitement des prisonniers de guerre et réunie à Genève du 1er au 27 juillet 1929,* (1930), at 725–732 (in particular, 731–732). With respect to the project on regulations of civilians, the original text reads that: "[l]a Conférence, faisant siennes les resolutions unanimes de ses deux Commissions, exprime le voeu que des études approfondies soient entreprises en vue de la conclusion d'une Convention internationale 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": *ibid.*, at 732. With special regard to the draft Civilians Convention, see *Rapports Présentés à la XVe Conférence Octobre 1934*, Vol. I, Document No. 9, at 2.

[85] This draft Convention was adopted unanimously in the Resolution XXXIX entitled "*Projet de Convention concernant le sort des civils de nationalité ennemie*". This resolution states that:

> Considérant le voeu No. VI contenu dans l'Acte Final de la Conférence diplomatique de Genève du 27 juillet 1929, tendant à ce que des études approfondies soient enterprises en vue de la conclusion d'une convention internationale concernant la condition et la protection des civils de nationalité ennemie qui se trouvent sur le territoire d'une État belligérant ou sur le territoire occupé par lui,
>
> Reconnaît tout l'intérêt du projet de Convention ci-annexé concernant ce sujet,
>
> Le recommande expressément, sous réserve de modifications éventuelles, à l'attention des Gouvernments,
>
> Et charge le Comité international de la Croix-Rouge de faire toutes demarches utiles pour faire aboutir une Convention dans le plus bref délai possible.

La Quinzième Conférence Internationale de la Croix-Rouge, tenue à Tokio, du 20 au 29 octobre 1934, Compte Rendu, at 262. For the full text of this draft Convention, see *ibid.*, at 203–209. See also the *Rapports Présentés à la XVe Conférence Octobre 1934*, Vol. I, Document No. 9, at 1–8 (explanatory notes) and 9–14 (the full text).

Note should also taken of the *Memorandum of the World Jewish Congress of the Draft Convention for the Protection of Civilian Persons in Time of War, submitted to the XVIIth International Red Cross Conference, Stockholm, August 1948* (deposited in the ICRC Archives), at 2.

5. *The Concept of Direct Participation in Hostilities*

5.1. *Overview*

In preceding sections, the present writer has highlighted that the most decisive factor for ascertaining the civilian status of individual persons is that they have refrained from taking direct part in hostilities. It is now necessary to engage in thorough appraisal of the concept of direct participation in hostilities. Several preliminary comments can be made on the concept of "direct part in hostilities".[86] First, even if terrorists and other irregular fighters are classified as civilians, they clearly risk forfeiting privileges associated with civilians so long as they take direct part in hostilities.[87] Second, *a contrario*, once international human rights law is recognised as a default legal regime, with the concept of direct participation in hostilities serving as a benchmark for appraising civilian status, the fact that an individual is a member of a rebel or armed opposition group alone cannot justify his/her on-sight targetability of lethal means.[88] Third, it must be noted that intention or knowledge of direct participants in hostilities is of special relevance to their individual criminal responsibility, as will be examined below.

The concept of direct participation in hostilities should be considered applicable both to IAC and to NIAC. Although common Article 3 GCs uses the terminology "active part in hostilities" instead of "direct part in hostilities", the ICTR in the *Akayesu* case ruled that they should be interpreted synonymously.[89] In the *Targeted killings* judgment, the Israeli Supreme Court (sitting as the High Court of Justice) held that Article 51(3) API in its entirety represents customary

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[86] See M.N. Schmitt, "'Direct Participation in Hostilities' and 21st Century Armed Conflict", in: H. Fischer (ed), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck* (2004), 505–529, at 507 [Schmit (2004)a]; and J.K. Kleffner, "From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities – on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference", (2007) 54 *NILR* 315.

[87] The ICRC and the Asser Institute have been jointly carrying out expert meetings on the notion of direct participation in hostilities. For the most recent document, see *Draft Interpretive Guidance on the Notion of "Direct Participation in Hostilities" prepared for the Fourth Expert Meeting on the Notion of "Direct Participation in Hostilities",* Geneva, 27/28 November 2006 (prepared by N. Melzer).

[88] See, however, CUDIH, *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation,* Geneva, 1–2 September 2005, at 39 (divided opinions among the experts on this matter).

[89] ICTR, *Prosecutor v. Jean-Paul Akayesu*, Judgment of Trial Chamber, 2 September 1998, Case ICTR-96-4-T, para. 629. This point is also recognised in: *ICRC's Commentary to APII,* at 1453, para. 4787 ("[t]he term 'direct part in hostilities' is recognised taken from common Article 3, where it was used for the first time").

international law.[90] It extrapolated and analysed three essential elements of this provision: (i) "taking…part in hostilities";[91] (ii) "takes a direct part";[92] and (iii) "for such time".[93] The most controversial is the third element, to which examinations must now turn.

5.2. *The Temporal Element "For Such Time"*

In the *Targeted Killings* judgment,[94] the Israeli Supreme Court pointed out that there is no agreed definition of the temporal element "for such time" within the notion of direct participation in hostilities. It recognises that individuals regain civilians' privilege of immunity from direct attack once they cease to take a direct part in hostilities. President Barak's case-by-case analysis was firstly to identify clear-cut and extreme ends and then gradually to shrink the definitional spectrum of this element in search for "cores" implicit in this element. Cassese comments that this helps delimit "*the grey area* between the two extremes".[95] On one end of the extreme, President Barak identified a civilian who takes direct part in hostilities one single time, or sporadically, but who later dissociates him/herself from that activity. He found that these persons could be classified as civilians entitled to immunity from direct attack once they are detached from that activity. On the other end, he referred to the case of a "civilian" who has joined a terrorist organisation as a "full-time" member, and within its organisational framework continuously commits a series of hostilities, with short interval of rest. He held that the temporal notion "for such time" applies to the whole period of his/her organisational membership.[96] It is submitted that even in relation to the persons

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[90] HC *796/02, Public Committee Against Torture in Israel v. The Government of Israel,* Judgment of 11 December 2005, para. 30; available at http://www.court/gov.il (last visited on 30 June 2008).

[91] *Ibid*., para. 33.

[92] *Ibid*., paras. 34–37.

[93] *Ibid*., para. 38–40.

[94] *Ibid*.

[95] A. Cassese, "On Some Merits of the Israeli Judgment on Targeted Killings", (2007) 5 *JICJ* 339, at 343, emphasis in original.

[96] Israel, HC *796/02, Public Committee Against Torture in Israel v. The Government of Israel,* Judgment of 11 December 2005, para. 39, available at http://www.court/gov.il (last visited on 30 June 2008). This view is endorsed in: W.J. Fenrick, "The Targeted Killings Judgment and the Scope of Direct Participation in Hostilities", (2007) 5 *JICJ* 332, at 337. Statman provides a very hawkish view on this matter, arguing that:

> …let us now consider a…case, where the enemy chief-of-staff is now targeted while riding in his armed car or while sitting in his headquarters, but while on a family vacation with his family. A sniper manages to get close enough to the hotel they are staying at and shoots the chief-of-staff, or a soldier dressed as a waiter poisons him while he is eating dinner. (…) While we do feel some initial revulsion toward it…it is not easy to explain why killing an

who continuously engage in organisational activities, their occasional leisure time spent in a peaceful civilian manner, however brief, should fall outside the temporal framework required by the notion "for such time".[97]

5.3. *Direct Participation or Indirect Participation?*

The ICRC's Commentary on API encapsulates the difficulty in assessing the notion "taking a direct part" under Article 43 API:

> Undoubtedly there is room here for some margin of judgment: to restrict this concept to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad . . . as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly.[98]

The general essence of the notion of direct participation in hostilities lies, according to the *ICRC's Commentary* on API in "a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place".[99] According to the *ICRC's Commentary on APII*, this causal link must be strictly interpreted so as to require an immediate consequence.[100] Apart from a causal relationship, the same *Commentary* stresses

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> enemy officer in a hotel would not be morally legitimate, but killing him on the way to his office or in his office would be. The problem is that it is morally justified for *Q* to kill *P* in self-defense only because *P* poses a serious threat to *Q* that cannot be neutralized in any other way. But if this is the case, why should *P's* location be relevant to the question of whether or not he can justifiably be killed? It would be relevant if self-defense were allowed only in cases of a direct and imminent threat. (. . .) A change in one's location (from office to home or from headquarters to a hotel) cannot provide moral immunity from attack to a person who might otherwise be killed in self-defense, assuming . . . that the permission to kill him does not rest on his posing an immediate threat.

D. Statman, "Targeted Killing", (2004) 5 *Theoretical Inquiries in Law* 179, at 195–196. He argues that the prohibition against targeted killing is not intrinsically valid as a moral principle, and that compliance with this must depend on reciprocity between a state and a targeted terrorist group. Both of his suppositions must be countered on the basis of the growing influence of the elaborate elements of the right to life under international human rights law, as explained in Chapter 18.

[97] For instance, snipers employed by the occupying power to liquidate a terrorist member resting at home may confidently assert their skills in "precision attack" so that their lethal force is very unlikely to cause any injury or killing on the targeted person's family members or friends. Nevertheless, killing a terrorist in front of his/her family members may constitute mental ill-treatment (inhuman or degrading treatment) of the family members.

[98] *ICRC's Commentary to API*, at 516, para. 1679.

[99] *Ibid.*

[100] The *ICRC's Commentary to APII*, at 1453, para. 4787.

the test based on both the nature and purpose of impugned acts.[101] In relation to Article 51(3) API, the *ICRC's Commentary on API* notes that hostile acts, the abstention from which is required for civilians to claims immunity from attack, refer to "acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces".[102] On the basis of the similarly rigorous test, Gasser suggests that even persons employed in the armaments industry are not necessarily participating in hostilities. Even so, he concedes that since factories of this industry normally constitute lawful military objectives, they may be subject to the risk of collateral or incidental damage.[103] While giving passing acknowledgment to this *Commentary*, Schmitt takes a slightly broader view. He suggests that the concept of direct participation requires "but for" causation (namely, the results would not have been yielded but for the act in question). Still he stresses "causal proximity to the foreseeable consequences of the act".[104]

In the *Targeted killings* judgment, the Israeli Supreme Court provided a fairly broad notion of direct participation in hostilities by reference to the function of individuals. This notion is considered to encompass: (i) "a person who collects intelligence for the army, whether on issues regarding the hostilities . . . or beyond those issues . . ."; (ii) "a person who transports unlawful combatants to or from the place where hostilities are taking place"; (iii) "a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may".[105]

Opinions are, however, divided over the legal characterisation of persons driving trucks carrying ammunition, as described in the above second category.[106] On one hand, such persons may be regarded as taking direct part in hostilities

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[101] The test based on a causal relationship is also emphasised in relation to APII. With respect to Article 13(3) APII, the ICRC*'s Commentary* notes that "[t]he term 'direct part in hostilities' . . . implies that there is a sufficient causal relationship between the act of participation and its immediate consequences": *ICRC's Commentary to APII*, at 1453, para. 4787.

[102] *ICRC's Commentary to API*, at 618, para. 1942.

[103] Gasser, *supra* n. 36, at 232–233, para. 518.

[104] Schmitt (2004)a, *supra* n. 86, at 508.

[105] HC *796/02, Public Committee Against Torture in Israel v. The Government of Israel*, Judgment of 11 December 2005, para. 35.

[106] On this matter, see J.R. Heaton, "Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces", (2005) 57 *Air Force Law Review* 155, at 171 (discussing the so-called revolving door problem of civilians taking up arms) and 174 (concerning civilian employees and contractors); Parks, *supra* n. 59, at 112–145, in particular, 116–121, and 132; Schmitt (2004)a, *supra* n. 87, at 507; L.L. Turner and L.G. Norton, "Civilians at the Tip of the Spar", (2001) 51 *Air Force Law Review* 1, at 29–32 (examining civilians who perform functions classified as "direct support", and other civilian contractors).

and directly attacked.[107] As seen above, the Israeli Supreme Court in the *Targeted killings* judgment found such drivers to meet the test of "direct participation" and to forfeit immunity from attacks.[108] On the other, it may be contended that if they are unaware of, or negligent in understanding, what they transport, they can be considered to retain the status of civilians. Admittedly, the assessment of *mens rea* is tricky, depending on such relevant factors as their affiliation with (or the degree of connection to) an armed group, the type of contents transported, and the circumstances of bombing. Once attack is carried out, any injury or death caused on them may be viewed as collateral or incidental damage in relation to direct and concrete military advantage accruing from the attack against the convoys or the trucks, which are military objectives.[109]

Controversy also remains as to the legality of targeting civilians who serve as a "human shield" for terrorists taking a direct part in hostilities. On this matter, the Israeli Supreme Court in the *Targeted Killings* case distinguished two different groups of civilians: (i) those civilians who are forced to do so by terrorists against their will and therefore who are "innocent civilians"; and (ii) those civilians who do so "of their own free will, out of support for the terrorist organization", who can be regarded as taking direct part in hostilities.[110] On this matter, Schondorf criticises "overly expansive" interpretation of the notion

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[107] Schmitt distinguishes between truck drivers who transport ammunition from the factory to ammunition depots, who do not "clearly" meet the test of "direct participation in hostilities", and those drivers who deliver it to the front lines, who "arguably" would do so: Schmitt (2004)a, *ibid.*, at 508. See also Dinstein, *supra* n. 76, at 27; A.P.V. Rogers, *Law on the Battlefield*, 2nd ed (2004), at 10–12; and A.P.V. Rogers and P. Malherbe, *Fight it Right – Model Manual on the Law of Armed Conflict*, (1999) at 29 (stating that it is forbidden for civilians to "act . . . as drivers delivering ammunition to firing positions").

[108] HC *796/02, Public Committee Against Torture in Israel v. The Government of Israel*, Judgment of 11 December 2005, para. 35; available at http://www.court/gov.il (last visited on 30 June 2008).

[109] Turner and Norton, *supra* n. 106, at 31–32 (arguing, however, that on *policy* grounds, civilians who directly support the war effort should not be targeted).

[110] HC *796/02, Public Committee Against Torture in Israel v. The Government of Israel,* Judgment of 11 December 2005, para. 36; available at http://www.court/gov.il (last visited on 30 June 2008). For the same view, see Schmitt (2004)a, *supra* n. 87, at 521–522 (except for children who act as "voluntary" shields due to the lack of their mental capacity to form the necessary intent to participate in voluntary shielding action). In another context, Schmitt argues that:

> . . . human shields are deliberately attempting to preserve a valid military objective for use by the enemy. In this sense, they are no different from point air defenses, which serve to protect the target rather than destroy inbound aircraft . . . Voluntary shielding is unquestionably direct participation.

M.N. Schmitt, "Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees", (2004) 5 *Chicago JIL* 511, at 541 [Schmitt (2004)b].

"direct part in hostilities", warning the risk of abuse by an occupying power.[111] The thrust of this argument lies in the difficulty of fathoming the motivation behind acts of persons shielding terrorists (protection of terrorists or defence of their houses against possible military attacks). Accordingly, the test based on *mens rea* (volition and motives) is impracticable and unsuitable. Any direct attack against such persons should be considered unlawful.[112] Accordingly, the suggestion that civilians would lose their immunity from attacks even on the basis of the *mens rea*[113] must be outright rejected.

The *mens rea* of such civilians nonetheless constitute relevant factors in two respects. First, the fact that civilians knowingly decided to stay in the targeted building can be taken into account in the assessment of proportionality of an attack on the building.[114] Second, this is also of special pertinence to the appraisal of compensation for the victims (and their families).[115]

Excluded from the concept of "directness" in relation to modalities of participation in hostilities are persons who take "indirect" part in hostilities. These indirect participants cover: (i) "a person who sells food or medicine to an unlawful combatant"; (ii) "a person who aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid"; and "a person who distributes propaganda supporting those unlawful combatants".[116] The *UK Manual* states that civilians who only indirectly take part in hostilities, as in the case of providing information or materiel, assistance of

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[111] Schondorf comments that:

> . . . how can one know whether a civilian who in the face of an attack on his apartment building (in which terrorist organizations store weapons) climbs to the roof of the building does so in order "to support [a] terrorist organization", or in order to protect his apartment from destruction? How can one know if he was forced to do so or if he has done so "of [his] own free will"?

Schondorf, *supra* n. 20, at 308.

[112] *Ibid*., at 308.

[113] Gasser goes so far as to suggest that ". . . not only direct and personal involvement but also preparation for a military operation and *intention to take part therein* may suspend the immunity of a civilian": Gasser, *supra* n. 35, at 232, para. 518, emphasis added. He thus suggests that in relation to modalities of participation, the preparation of taking direct part in hostilities requires the volitional element.

[114] Schondort, *supra* n. 20, at 308.

[115] The requirement to assess the amount of compensation on the basis of the knowledge or the degree of negligence may be of special significance, for instance, to the drivers of bombs, who may become the victims of lawful target of lethal force. The *mens rea* of such drivers may be inferred from the specific circumstances of the case.

[116] HC *796/02, Public Committee Against Torture in Israel v. The Government of Israel*, Judgment of 11 December 2005, para. 35; available at http://www.court/gov.il (last visited on 30 June 2008).

escapers, and hiding weapons, may be subject to punishment solely pursuant to laws or regulations promulgated by the occupying power.[117]

6. *Conclusion*

One of the primary concerns of this Chapter is to delineate the boundaries between civilians entitled to immunity from attacks and those who lose such immunity in an occupied territory. The concept of "direct part in hostilities" is the subject of on-going debates among IHL experts.[118] The fact that a civilian is considered to take a direct part in hostilities does not *ipso facto* justify the shift of applicable laws from the law enforcement model based on international human rights to the IHL rules. Indeed, it is proposed that the key to determining the applicable laws should be the sufficient degree of control exercised by the occupying power to arrest individual persons. In that sense, the distinction between civilians who have taken direct part in hostilities and those who have not is of special importance to the question of the scope of guarantees of the rights accorded to individual persons under IHL.

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[117] *UK Manual* (2004), at 280, para. 11.14.

[118] ICRC and TMC Asser Institute, *Third Expert Meeting on the Notion of Direct Participation in Hostilities, Geneva, 23–25 October 2005, Summary Report*. See also Chatham House, *The law of Armed Conflict: Problems and Prospects, Transcripts and summaries of presentations and discussions*, 18–19 April 2005, London, at 7 (presentation by J.-M. Henckaerts).

Chapter 13

Specifically Prohibited Acts in Occupied Territory

1. *Introduction*

In this chapter, the examinations will turn to two specific prohibited acts in occupied territory: (i) deportation or forcible transfer of protected persons; and (ii) forced labour. With respect to the former issue, there is ample body of case-law, which is derived both from the international jurisprudence and from national case-law, which has engendered complex doctrinal discourse on specific elements of deportation or forcible transfer. In-depth inquiries are needed to discern general principles on this matter.

2. *Deportation or Forcible Transfer of Protected Persons*

2.1. *Overview*

Article 49(1) of GCIV forbids deportation or forcible transfer of protected persons from the occupied territory to the territory of the occupying power or to that of any other country. This prohibition is absolute, subject to no derogation. Persons not nationals of the occupying power are entitled to leave the occupied territory.[1]

Historically, the massive and systematic form of deportation was practiced by many military powers in modern warfare. Great Britain engaged in this practice against thousands of French Canadians in Acadia in the French-Indian War at the end of eighteenth century and against the "Afrikaans" during the Boer War at the turn of the twentieth century. Wilhelm II's German Empire was involved in the sombre practice of deporting civilians in Belgium and Northern France in 1916 during World War I.[2] Nevertheless, no doubt Article 49(1) GCIV has

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[1] GCIV, Article 48.

[2] C. Rousseau, *Le droit des conflits armés* (1983), at 1258, para. 101C.

been inserted in response to the Nazi Germany's abominable policy of uprooting and deporting millions of civilians (mostly Jewish people, but also Slavic populations, Romas, homosexuals, mentally handicapped, or communists and others) into extermination or slave labour camps on the basis of the Nazi's egregious racial theory.[3] This practice was intrinsically intertwined with genocidal intent with respect to the Jewish and Roma population. Similarly, in the European theatre, hundreds of thousands of civilians in three Baltic countries and other territories occupied by the USSR were sent to gulags in Siberia, even though this was not intended for an extermination purpose.[4] Prior to the outbreak of the Second World War, Mussolini's Italian army invaded Libya and built desert concentration camps to which thousands of Libyans were transferred to die through executions and starvation.[5] In East Asia during the Second World War, the Japanese Imperial Army forcibly deported hundreds of thousands of civilians in East Asian countries that it colonised or occupied,[6] and tens of thousands of Allied prisoners of war, to slave labour camps in utterly abhorrent conditions. This practice, albeit not designed for an extermination purpose, had shockingly high mortality rate, and this was readily recognised as amounting to the nascent concept of crimes against humanity. In the aftermath of World War II, the USSR deported approximately 600,000 Japanese and Korean prisoners of war and civilians to gulags in Siberia and Central Asia, as it did in relation to a vast number of nationals of European Axis powers (Germany, Italy, Hungary, Romania etc.). In the post-1945 order, the concepts of deportation and forcible transfer have been closely intertwined with "ethnic cleansing", as borne out in the context of the partition of India and Pakistan in 1947, the war of independence of Bangladesh (the former East Pakistan) in 1971, the former Yugoslavia in early 1990s,[7] Darfur and in many other places.

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[3] See, for instance, *Final Record,* Vol. II-A, Committee III, 16th Meeting, 16 May 1949 and 40th Meeting, 6 July 1949, at 664 and 759–760 respectively (regarding draft Article 45). See also the remark concerning the Imperial Japanese Army's abominable practice, during the Second World War, of transferring numbers of women and children to unhealthy climates and forced to build roads, which resulted in high death tolls: *ibid*., at 664.

[4] Sight must not be lost of the fact that albeit not in the context of occupation, in the same period, the Chechnyans, the Crimean Tatars and the Volga Germans were all uprooted from their native homelands and forcibly sent to slave labour camps in Siberia or Central Asia.

[5] See R. Ben-Ghiat and M. Fuller (eds), *Italian Colonialism*, (2005).

[6] During World War II, hundreds of thousands of Koreans and Taiwanese civilians, who were colonial subjects of the Imperial Japan, were also forced to work in Japanese factories and mines virtually as slave labourers, often in extremely dangerous and appalling conditions with high mortality rates.

[7] This point is recognised in the *Simić* case: ICTY, *Prosecutor v. Blagoje Simić, Miroslav Tadić, and Simo Zarić*, Judgment of Trial Chamber, 17 October 2003, IT-95-9-T, para. 133.

The prohibition of deportation or forcible transfer of the civilian population has been fully anchored in international criminal law. Article 6(b) of the Charter of the IMT at Nuremberg provides that "deportation to slave labour or for *any other purpose* of civilian population of or in occupied territory" amounts to a war crime.[8] Deportation or forcible transfer of civilians may constitute grave breaches under Article 147 GCIV and Article 85 API. Under the ICC Statute, this may reach the threshold of crimes against humanity under Article 7(1)(d) as examined above. Further, it may give rise to two forms of war crimes. First, the "[u]nlawful deportation or transfer" of persons protected under the Geneva Conventions amounts to a grave breach form of war crimes under Article 8(2)(a)(vii) ICC Statute. Second, "the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory" constitutes a war crime recognised as "[o]ther serious violations of the laws and customs of war under Article 8(2)(b)(viii) ICC Statute, which largely reiterates Article 49(1) and (6) GCIV.

As a corollary of the absolute character of the rules embodied in Article 49 GCIV, three crucial implications can be drawn. First, the deportation or forcible transfer of protected persons must be prohibited, irrespective of the motive (and hence purpose) of such displacement. The existence of a illegal purpose such as slave labour, as set out in an *exemplary* manner in the IMT Charter, is not necessary for the purpose of ascertaining deportation or forcible transfer set out in Article 49 GCIV. The requirement of illegal purpose is dispensed with. An analogy can be drawn from the absence of specific purposes under anti-torture provisions of the ICCPR (Article 7) and those of three regional human rights treaties,[9] (albeit not under Article 1 of the UN Convention against Torture).[10] Second, any alleged consent on the part of persons deported or transferred is

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[8] Charter of the International Military Tribunal (Nuremberg), Article 6(b), emphasis added. See also Article 23 of the Lieber Code, which stipulates that "private citizens are no longer . . . carried off to distant parts".

[9] See ECHR, Article 3; ACHR, Article 5(2); and AfCHPR, Article 5.

[10] The relevant part of Article 1 of the UN Convention against Torture provides that:

> . . . the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

This suggests that any of the following four specific purposes may be needed under the UN Convention: (i) obtaining information from the victim or others; (ii) punishment; (iii) intimidation or coercion; and (iv) discrimination.

invalid. This can be already inferred from the general principle, as embodied in Article 8 GCIV, that protected persons cannot abrogate their rights under GCIV. Third, the facts that the nationals of the occupied territory have been prosecuted for offences such as terrorism, sabotage or espionage in an occupied territory, and that their deportation has been undertaken fully in compliance with the fair judicial procedure, are simply immaterial.

As regards specific elements of the rules laid down under Article 49 GCIV, two brief observations need to be made. First, as the *Elements of Crimes* adopted by the Preparatory Commission for the ICC notes, the forcible nature of deportation or evacuation is not limited to physical force, but may encompass psychological force.[11] This can be clearly inferred, by analogy, from the established jurisprudence on anti-torture provisions of international human rights treaties. Second, the destination of deportation or forcible transfer is irrelevant to the assessment of its illegal nature. In the *Krnojelac* case, the ICTY Appeals Chamber confirmed this, ruling that "[t]he forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent".[12]

2.2. *The General Scope of Application* Ratione Personae *of Article 49(1) of GCIV*

The question of the personal scope of application of Article 49(1) GCIV arises precisely because of the controversy over the entitlement or not to this provision of spies, saboteurs, terrorists or other persons engaged in hostile activities in occupied territory. Clearly, in the absence of any express specific rule to the contrary, the scope of application *ratione personae* of Article 49(1) corresponds to the general rule laid down in Article 4 GCIV.[13] According to this general rule, the scope of application *ratione personae* of GCIV is very broad, embrac-

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[11] The *Elements of Crimes* states that:

> The term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse or power against such person or persons or another person, or by taking advantage of coercive environment.

ICC, Elements of Crimes, n. 12 in respect of Article 7(1)(e) Crime against humanity of deportation or forcible transfer of population.

[12] ICTY, *Prosecutor v. Milorad Krnojelac*, Judgment of Appeals Chamber, 17 September 2003, Case No. IT-97-25A, para. 218.

[13] It must be recalled that Article 4 GCIV contemplates a broad scope of application *ratione personae*. Eligible for protected persons under Article 4 GCIV are not only civilians who have resided in the occupied territory, but also tourists who have happened to be in occupied territory, and those shipwrecked who have reached the shore of the occupied territory: *ICRC's Commentary to GCIV*, at 47. Dinstein follows this line of argument: Y. Dinstein, "The Israel Supreme Court and the Law of Belligerent Occupation: Deportations", (1993) 23 *Israel YbkHR* 1, at 17.

ing even persons who have engaged in espionage, sabotage, terrorism or other hostile activities that may endanger the public security in occupied territory.[14] As discussed in Chapter 11, Article 5 GCIV stipulates that in the occupied territory, the ambit of derogable rights is limited only to the rights of communications. No derogation can be made from Article 49(1) that prohibits the deportation of protected persons from occupied territory.[15] As noted above, the fact that the deportation order is issued pursuant to the judicial proceeding is irrelevant to this rule.

In relation to the protected persons *suspected of* having been involved in espionage and sabotage, the maximum security measure that the occupying power is authorised to take is to place them in assigned residence or more seriously, to intern them in accordance with Article 78 GCIV. In case they have *actually* engaged in espionage, sabotage or murder in occupied territory, the occupying power can prosecute and punish them either by using an occupation court or an existing local court, which may apply an appropriate penalty as provided in Article 68(2) GCIV.[16] On the other hand, Article 49 GCIV prohibits the occupying power from deporting persons from the occupied territory to the territory of the occupying power to try persons engaged in serious crimes in occupied territories. In occupied Iraq, the Coalition powers, consistent with Article 49 GCIV, decided to refer such cases to the Central Criminal Court of

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[14] *ICRC's Commentary to GCIV* states that:

> The words "at a given moment and in any manner whatsoever" [under Article 4(1) GCIV] were intended to ensure that all situations and cases were covered. The Article refers both to people who were in the territory before the outbreak of war (or the beginning of the occupation) and to those who go or are taken there as a result of the occupation) and to those who go or are taken as a result of circumstances: travelers, tourists, people who have been shipwrecked and even, it may be, spies or saboteurs.

ICRC's Commentary to GCIV, at 47. See also Dinstein (1993), *ibid*., at 13. *Contra*, see Justice Shamgar's opinion in HC *785/87, 845/87 and 27/88*, *Abd al Nasser al Aziz Abd al Affo et al. v. Commander of the IDF Forces in the West Bank et al*. ("Affo" judgment), 42(2) *Piskei Din* 4; available in: (1990) 29 *ILM* 139, at 152–155 (describing the interpretation presented by the petitioners, who placed emphasis on the words "regardless of their motive" under Article 49(1) GCIV, as amounting to the outcome that is "manifestly absurd or unreasonable" within the meaning of Article 31 of the 1969 Vienna Convention the Law of Treaties).

[15] This view is confirmed in the dissenting opinion of Justice Bach in HC *785/87, 845/87 and 27/88*, *Abd al Nasser al Aziz Abd al Affo et al. v. Commander of the IDF Forces in the West Bank et al*. ("Affo" judgment), 42(2) *Piskei Din* 4; available in: (1990) 29 *ILM* 139, at 176–181, especially at 178 (accepting the argument, presented by Prof. Kretzmer who acted as counsel for the Association for Civil Rights in Israel, that Article 49 should be read together with Article 78 GCIV).

[16] This provision allows application of the death penalty to cases of murder, sabotage or espionage. However, in view of the world-wide trend toward the abolition of capital punishment, including even the death penalty in wartime, the present writer argues that the application of capital punishment must be dissuaded.

Iraq (CCCI) in lieu of opting for the deportation of the suspected offenders to their home countries (or of using an occupation court).[17]

2.3. *Deportation of Infiltrators of Foreign Nationality*

It remains disputed whether Article 49(1) GCIV prohibits deportation of non-residents of foreign nationality (namely, non-citizens of the occupied State) who have infiltrated into the occupied territory with a view to endangering public security in the occupied territory, including for espionage, sabotage or other hostile purposes. It is claimed that the scope of protected persons within the meaning of Article 4 GCIV does not embrace infiltrators aiming to engage in hostile activities (sabotage, espionage, terrorism etc.) in the occupied territory, and that these infiltrators are disentitled to claim benefit under Article 49 GCIV.[18] The exclusion of such persons from the scope of application *ratione personae* of GCIV is straightforward, obliterating the need to delve into underlying rationales of this provision.[19] Dinstein argues that such persons must be

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[17] The option to set up an occupation court for trying CPA *civilian* personnel was excluded on the several grounds, including, cost-effectiveness, administrative burden, the risk that the absence of Iraqi participation may give a wrong impression, and the perception that murder against CPA civilian personnel would have been treated differently than those who murdered Coalition military personnel: M.J. Kelly, "Iraq and the Law of Occupation: New Tests for an Old Law", (2003) 6 *YbkIHL* 127, at 148.

[18] Dinstein (1993), *supra* n. 13, at 18. In the *Kawarawi et al.* case, the Supreme Court of Israel confirmed this view, ruling that:

> Article 49 of the 1949 Fourth Geneva Convention, dealing with the deportation of protected persons, is irrelevant to the expulsion of infiltrators. Whatever the interpretation of Article 49 may be, it is not applicable to the expulsion of a person who enters an area illegally after the commencement of its belligerent occupation. (…) The fact that prior to their departure to one of the Arab countries enumerated in the Infiltration Order and to their subsequent illegal entry into the Area the petitioners had been legal inhabitants of the Area has no bearing on their actual status as infiltrators.

H.C. *454/85* etc, *Kawarawi et al. v. Minister of Defence et al.,* 39(3) *Piskei Din* 401, at 410 and 412; as excerpted in (1986) 16 *Israel YbkHR* 332, at 334, paras. (f) and (h) (*per* President Shamgar, joined by Justices D. Levin and S. Levin). While the former part of the dictum is acceptable to many scholars, the latter part of this dictum, which ignored the fact that the petitioners had been legal inhabitants of the occupied territories and they appeared in the population census, reveals too rigid a form of legalism.

[19] In this context, President Shamgar of the Supreme Court of Israel in the *Abd al Nasser al Aziz Abd al Affo* case asserted that Article 49(1) GCIV was crafted in specific response to the Nazi atrocities of deporting millions of Jewish or other civilians to concentration camps for extermination or slave labour purposes during the Second World War. On that basis, he argued that to read the scope of application *ratione materiae* of Article 49(1) to embrace cases of deportation of foreign infiltrators who have attempted or actually committed acts endangering public security in occupied territory would be "manifestly absurd or unreasonable" within the meaning of Article 31 of the 1969 Vienna Convention on the Law of Treaties: HC *785/87,*

strictly distinguished from tourists and the shipwrecked in terms of the absence of lawfulness (as in the case of tourists) or involuntary and emergency nature (as in the instance of the shipwrecked).[20] A variation of this argument is to read the requirement of residence in Article 4 GCIV to exclude such foreigners that voluntarily enter occupied territory with the determination to engage in espionage, sabotage, terrorism or other hostile activities. However, the pitfall of the latter construction is to exclude from the personal scope of application of GCIV tourists and even members of NGOs or journalists involved in humanitarian and related activities.

Dinstein's interpretation may be countered in two respects. First, it does not accord with the textual interpretation of Article 4 GCIV. This provision does not refer to any illegal purpose for entry into occupied territory as a ground for demarcating the personal scope of application of GCIV. Second, this narrow construction does not tally with the humanitarian object and purpose of GCIV *qua* a law-making treaty, which is designed to provide broader scope of protections to individual persons. Foreigners infiltrating into occupied territory, including even those with full-blown intention to commit terrorism, meet the literal condition for protected persons within the meaning of Article 4 GCIV. Against the understandable background of security risks such persons may pose to occupying powers, the occupying power is fully entitled to detain those individuals on security grounds without criminal charge in accordance with Articles 27(4) and 78(1) GCIV. In case they are found to have committed acts of espionage, sabotage or murder (terrorism), it is allowed duly to punish them under penal and security laws, albeit in harmony with the fair trial guarantees recognized in Part III, Section III (in particular Articles 68–77) of GCIV.

2.4. *Controversy over the Customary Law Status of Article 49(1) of GCIV*

The *ICRC's Customary IHL Study* states that the prohibition on deporting or forcibly transferring the civilian population of an occupied territory, in whole or in part, is recognised as customary international law.[21] In contrast, the Supreme Court of Israel has negated the customary law status of Article 49(1) GCIV as a whole. It has been confronted with a number of cases concerning the order of deportation issued against individuals in the occupied territories on the alleged ground of hostile activity (including terrorism) and propaganda of terrorism. In

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845/87 and 27/88, Abd al Nasser al Aziz Abd al Affo et al. v. Commander of the IDF Forces in the West Bank et al. ("Affo" judgment), 42(2) *Piskei Din* 4; available in: (1990) 29 *ILM* 139, at 152–154.

[20] Dinstein (1993), *supra* n. 13, at 18.

[21] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, (2005), Vol. I, at 457, Rule 129A.

the *Kwasme and Others* case, which concerned the deportation of mayors from the West Bank to Lebanon, the Supreme Court, on the basis of its judgment in the *Abu Awad* case, firstly explained that the underlying objective of Article 49 GCIV was to prevent *mass* deportation as conducted by Nazi Germany during the Holocaust.[22] It rejects the view that the *entire* rule embodied in Article 49 GCIV has attained the status of general international law, which would be applicable in the Israeli occupied territories.[23] The Supreme Court accorded the commander wide parameters of discretion as to the choice of means (administrative arrest or deportation) to deal with danger to public safety.[24] In his dissenting opinion, Cohn J.D.P. distinguished the two acts prohibited under Article 49 GCIV. He took the view that while the prohibition of deportation is declaratory of pre-existing customary law, the prohibition of forcible transfer is merely

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[22] Israel, H.C. *97/79, Abu Awad v. Commander of the Judea and Samaria Region*, 33(3) *Piskei Din* 309 (*per* Sussman P.); as excerpted in: (1979) 9 *Israel YbkHR* 343, at 345.

[23] Landau J.P. stated that:

> All of Article 49, as the Fourth Geneva Convention in general, does not form part of *customary* international law, and therefore the deportation orders do not contravene the domestic law of the State of Israel or of the Judea and Samaria Region, according to which an Israeli court reaches its decisions. . . .

H.C. *698/80*, *Kawasme et al., v. Minister of Defence et al.*, 35(1) *Piskei Din* 617; as excerpted in (1981) 11 Israel YbkHR 349, at 350 (*per* Landau, J.P., emphasis in original). The Justice Landau argued that the GCIV only constitutes conventional and not customary international law, and hence that there is no customary law prohibiting the deportation of individual citizens from occupied territories. He referred to the work, among others, of Von Glahn and Pictet, and to the 1958 edition of the *UK Manual* on this matter: G. Von Glahn, *The Occupation of Enemy Territory – A Commentary on the Law and Practice of Belligerent Occupation*, (1957), at 20; *ICRC's Commentary to GCIV,* at 5; and *UK Manual of Military Law, Part III*, at 162 (1958). However, the references can be criticised for some inadequacies and mistakes. For instance, on the cited page, Von Glahn's position concerning provisions of GCIV which are declaratory or constitutive in nature is unclear. Similarly, the paragraph dealing with transfers of protected persons under the *1958 UK Manual* (Justice Landau cited the wrong page), while reiterating the obligations under Article 49 GCIV, is silent on the customary law nature or not of this provision: *UK Manual of Military Law, Part III*, at 155, para. 560. With respect to the *ICRC's Commentary to GCIV,* edited by Pictet, the tenor of the comments is capable of supporting either constitutive or declaratory nature of many (if not most) provisions relating to occupied territory under GCIV. On one hand, the *Commentary* refers to the 1921 draft text and the 1934 Tokyo draft text, both of which already included the prohibition on deporting inhabitants of occupied countries. On the other, it notes that "[t]he legal field in question [revising the Geneva Conventions and extending their benefits to civilians in occupied territory] was completely new": *ICRC's Commentary to GCIV*, at 4–5.

[24] H.C. *698/80, Kawasme et al., v. Minister of Defence et al.,* 35(1) *Piskei Din* 617; as excerpted in (1981) 11 *Israel YbkHR* 349, at 352 (*per* Landau, J.P.).

constitutive.[25] The position that there has yet to be developed a customary norm corresponding to the rule embodied in Article 49 GCIV (for both deportation and forcible transfer) is confirmed in the later cases,[26] including the *Mahmud Nazal and Others* case,[27] and the *Abd el Afu et al* case.[28]

The denial of customary law status of Article 49 is forcefully defended by one of the most learned scholars of IHL, Professor Yoram Dinstein. Writing 44 years after the adoption of the Geneva Conventions, Dinstein emphatically argues that:

> While the [Fourth] Geneva Convention has some declaratory provisions . . . in essence it is constitutive in nature. One cannot seriously maintain that the [Fourth] Geneva Convention in its entirety reflects customary international law.[29]

His reasoning can be summarised as follows. The scope of application *ratione materiae* of Article 49 GCIV is designed to go beyond the Nazi-style barbarities, which are the most brutal and the narrowest parameters of its application, and to fully embrace "*any* deportation of protected persons from occupied territories".[30] This, according to him, partly explains the innovative and constitutive character of the rule embodied in this provision.

The Hague Regulations do not deal with the prohibition of deportation of civilians in occupied territory. The *ICRC's Commentary on GCIV* explains that this silence "was probably because the practice of deporting persons was regarded at the beginning of this century [the twentieth century] as having fallen into

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[25] H.C. *698/80, Kawasme et al., v. Minister of Defence et al.*, 35(1) *Piskei Din* 617; as excerpted in (1981) 11 *Israel YbkHR* 349, at 352–353 (dissenting opinion of Cohn J.D.P.). He adds that while distinction can be drawn between deportation of its own citizens, and the deportation of aliens, which is lawful under customary international law, persons in occupied territories may nonetheless "enjoy the right under international law to live on their land and not to be expelled from it": *ibid.*, at 353–354.

[26] Note that the *Kawasme* ruling was confirmed in H.C. 5973/92, which concerned the deportation to Lebanon of 415 inhabitants of the West Bank and Gaza Strip, who were allegedly members of the Hamas and the Islamic Jihad Organisations: H.C. *5973/92 (Twelve Petitions), The Association for Civil Rights in Israel et al. v. Minister of Defence et al.*, (1993) 23 *Israel YbkHR* 353.

[27] H.C. *513/85*, *Mahmud Nazal et al., v. IDF Commander of the Judea and Samaria Region*, 39(3) *Piskei Din* 645; as excerpted in (1986) 16 *Israel YbkHR* 329 (*per* Shamgar J.P.).

[28] HC *785/87, 845/87 and 27/88*, *Abd al Nasser al Aziz Abd al Affo et al. v. Commander of the IDF Forces in the West Bank et al.* ("Affo" judgment), 42(2) *Piskei Din* 4; available in: (1990) 29 *ILM* 139, at 149 (*per* President Shamgar).

[29] Dinstein (1993) *supra* n. 13, at 13. He also forcefully asserts that "[t]he prohibition of deportations in Article 49 of the [Fourth] Geneva Convention incontrovertibly goes beyond customary international law": *ibid.*

[30] *Ibid.*, at 14, emphasis in original.

abeyance".[31] Lamentably, this historical evaluation made in 1958, is, however, at odds with the practice of deportation and internment of civilians in German occupied territories during the First World War,[32] and the British practice against Afrikaans during the Boer War. As examined above, the extent to which provisions of GCIV were declaratory or constitutive in nature at the time of its adoption in 1949 is highly debatable. While the drafting of Article 49 GCIV (draft Article 45) was no doubt triggered by the Nazi atrocities of the Holocaust,[33] it is intended to provide a safeguard against a broader range of abuses. Similarly, the inclusion of *individual* forcible transfers under this provision may be understood as innovative.[34]

What is, however, missing in Dinstein's otherwise erudite and densely reasoned analysis is the assessment of the evolution of a customary norm that has developed. The controversy over the constitutive or declaratory nature of rules embodied in Article 49 GCIV does not preclude or "freeze" the concurrent development of a customary law whose content corresponds to the norm embodied in Article 49 GCIV. This is so, even if one recognises so-called Baxter's paradox. Writing in 1989, Meron argues that "at least the central elements of Article 49(1), such as the absolute prohibitions of forcible mass and individual transfers and deportations of protected persons from occupied territories…are declaratory of customary law even when the object and setting of the deportations differ from those underlying German World War II practices which led to the rule set forth in Article 49". With respect to individual deportation as well, in light of the overwhelming *opinio juris* condemnatory of this practice, he adds

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[31] *ICRC's Commentary to GCIV*, at 279.

[32] M. Stibbe, "The Internment of Civilians by Belligerent States during the First World War and the Responses of the International Committee of the Red Cross", (2006) 41 *Journal of Contemporary History* 5–19.

[33] See, *Final Record*, Vol. II-A, at 664 (16th Meeting, 16 May 1949), 759–760 (40th Meeting, 6 July 1949); and 827–828 (Report of the Committee III the Plenary Assembly of the Diplomatic Conference of Geneva). Reference was, however, made to the brutal practice of the Japanese Imperial Army during World War II in deporting civilians for slave labour purposes: *ibid*., at 664.

[34] See, *ibid*., at 827 (Report of the Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva). The present writer dismisses the argument that only a series of individual forcible transfer, which may become "mass" as a whole, can meet the threshold of Article 49(1). For the same view, see Dinstein (1993), *supra* n. 13, at 12–17; and the dissenting opinion of Justice Bach in HC *785/87, 845/87 and 27/88*, *Abd al Nasser al Aziz Abd al Affo et al. v. Commander of the IDF Forces in the West Bank et al*. ("Affo" judgment), 42(2) *Piskei Din* 4, at 71; available in: (1990) 29 *ILM* 139, at 176–181, in particular at 177 (Justice Bach arguing that "the Article [49 of the Fourth Geneva Convention] applies not only to mass deportations but to the deportations of individuals as well, and that the prohibition was intended to be total, sweeping and unconditional – 'regardless of their motive'").

that while its customary law status in 1949 was "less clear", this prohibition has matured into customary law.[35]

2.5. *The Collective or Individual Deportation?*

There has been controversy over whether Article 49(1) GCIV prohibits only "mass" removal of persons as opposed to "individual" deportation. It may be suggested that individual expulsion should be distinguished from the mass deportation of protected persons from occupied territory. Along this line, Lapidoth argues that the interdiction of individual expulsion has yet to harden into customary law.[36] As discussed above, the Israeli Supreme Court has repeatedly emphasised that Article 49(1) GCIV was drafted specifically in the light of the Nazi atrocities of deporting millions of Jewish or other civilians to extermination or slave labour camps during the Holocaust.[37] The gist of this argument is that Article 49(1) proscribes only *mass* (as against individual) and arbitrary removal of civilians on a scale comparable to the Nazi atrocities for various cruel reasons.[38] The *Abu Awad* case related to the order of deportation issued against a Jordanian citizen to Lebanon on the basis of the British Mandatory Government's Regulation 112(1) of the Defence (Emergency) Regulations of 1945. The Supreme Court asserted that Article 49(1) was not purported to apply to the "deportation of

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[35] T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), at 48–49.

[36] R. Lapidoth, "The Expulsion of Civilians from Areas Which Came under Israeli Control in 1967: Some Legal Issues", (1990) 2 *EJIL* 97, at 105.

[37] H.C. *97/79*, *Abu Awad v. Commander of the Judea and Samaria Region*, 33(3) *Piskei Din* 309 (per Sussman P.); as excerpted in: (1979) 9 *Israel YbkHR* 343, at 345. See also J. Stone, *No Peace No War in the Middle East* (1969), at 17 (arguing that "…it seems reasonable to limit the sweeping literal words of Article 49 to situations at least remotely similar to those contemplated by the draftsmen, namely the Nazi World War II practices of large-scale transfers of populations, whether by mass transfer or transfer of many individuals, to more hostile or dangerous environments, for torture, extermination or slave labour.…").

[38] The Supreme Court of Israel has, on many occasions, expressed this line of interpretation. See H.C. *97/79, Abu Awad v. Commander of the Judea and Samaria Region*, 33(3) *Piskei Din* 309; (1979) 9 *Israel YbkHR* 343, at 344–345 (*per* Sussman P.); H.C. *698/80, Kawasme et al., v. Minister of Defence et al.*, 35(1) *Piskei Din* 617, at 626–628; (1981) 11 *Israel YbkHR* 349, at 352 (dissenting opinion of Cohn J.D.P.). See also Justice Landau's opinion in *Kawasme et al.*, in which Justice Landau, referring to Stone (1969) (*ibid.*, at 17), analysed the drafting history of Article 49(1) GCIV; as cited in Justice Shamgar's opinion in HC *785/87, 845/87 and 27/88*, *Abd al Nasser al Aziz Abd al Affo et al. v. Commander of the IDF Forces in the West Bank et al.* ("Affo" judgment), 42(2) *Piskei Din* 4; available in: (1990) 29 *ILM* 139, at 149.

selected individuals for reasons of public order and security",[39] which fell within the purview of Article 43 of the Hague Regulations.[40]

This line of reasoning prevailed in the *Abd al Nasser al Aziz Abd al Affo* case. There, President Shamgar of the Supreme Court of Israel invoked the object and purpose of Article 49(1) GCIV to depart from the textual and ordinary meaning of this provision. Apparently, he deliberately chose restrictive interpretation to justify the argument that the scope of application *ratione materiae* of Article 49(1) would be limited only to *mass* deportations of an arbitrary nature, to the exclusion of *individual* deportations.[41] In the subsequent case of *the Association of Civil Rights in Israel et al. v. The Minister of Defence et al.* (H.C. *5973/92* etc.), which concerned the deportation orders and actual deportation to Lebanon of more than 400 persons suspected of being members of fundamentalist organisations in the West Bank and the Gaza Strip, the Supreme Court found that the "deportation orders under discussion…were essentially individual in nature, not collective, the 415 orders being a *collection of personal orders*".[42]

Under Article 49(1) GCIV, while the prohibited act of forcible transfers is qualified by the wording "individual or mass", no such qualification is attached to deportations. As explained above, surely the Nazi-style deportations of civilians in occupied territory was the primary driving force behind the drafting of this provision. However, Article 49(1) was purported to go beyond this narrow scope of protection and to cover individual expulsions. The textual interpretation is clear along this line of argument. The legal reasoning employed in H.C. *5973/92 etc* marks a highly legalistic and "narrow interpretation". Dinstein comments that this interpretation revealed "the artificiality of the distinction between individual and collective deportations".[43] The methodology of reading the distinction between individual or collective expulsion in Article 49(1) GCIV

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[39] H.C. *698/80, Kawasme et al., v. Minister of Defence et al.,* 35(1) *Piskei Din* 617; as excerpted in (1981) 11 *Israel YbkHR* 349, at 350 (citation by Landau J.P. of the dictum of Sussman J.P. in the *Abu Awad* case).

[40] H.C. *97/79*, *Abu Awad v. Commander of the Judea and Samaria Region*, 33(3) *Piskei Din* 309 (*per* Sussman P.); as excerpted in: (1979) 9 *Israel YbkHR* 343, at 345.

[41] HC *785/87, 845/87 and 27/88*, *Abd al Nasser al Aziz Abd al Affo et al. v. Commander of the IDF Forces in the West Bank et al.* ("Affo" judgment), 42(2) *Piskei Din* 4; reproduced in: (1990) 29 *ILM* 139 at 154–155 (*per* President Shamgar P.).

[42] H.C. *5973/92 etc., The Association of Civil Rights in Israel et al. v. The Minister of Defence et al.*, 47(1) *Piskei Din* 267 (unanimous decision by seven judges: President Shamgar, Deputy President Elon, Justices Barak, Netanyahu, Goldberg, Or and Mazza); as excerpted in (1993) 23 *Israel YbkHR* 353, at 356, emphasis added. It is in this context that Dinstein criticises the approach of the Supreme Court of Israel in drawing a line between individual and collective deportations as an "artificiality": Dinstein (1993), *supra* n. 13, at 16–17.

[43] Dinstein (1993), *ibid.*, at 16. He adds that the distinction between Nazi-style deportation resulting in slave labour or extermination, which is manifestly prohibited, and "mere exile" even

greatly diminishes the humanitarian objective of this provision. Indeed, the war crime of "[u]nlawful deportation or transfer" of civilians based on grave breaches of GCs under Article 8(2)(a)(vii) does not require such prohibited acts to take place on a collective basis.

2.6. *Forcible Transfer of Civilians within Occupied Territory*

The Israeli Supreme Court has held that the GCIV is silent on the transfer of civilians or the civilian population from one place to another *within* the occupied territory.[44] This view is contrasted to the jurisprudence of the ICTY. In the *Krstić* case, the Trial Chamber held that while both deportation and forcible transfer involve "the involuntary and unlawful evacuation of individuals from the territory in which they reside", the case of Bosnian Muslim civilians being forcibly transferred from one area to another within Bosnia amounted to forcible transfer rather than deportation.[45] Similarly, in the *Naletilić* case, the ICTY Trial Chamber has found that forcible transfers embrace displacement *within* national borders, as distinguished from deportation, referring to paragraph 1 of Article 49 GCIV ("individual or mass forcible transfers, *as well as* deportation of protected persons from the occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not").[46] This reasoning was followed in the *Simić* case, where the ICTY Trial Chamber II defined forcible transfer as "a forced removal or displacement of people from one area to another which may take place *within* the same national borders".[47] Along this line, the ICC Statute contemplates the displacement of civilians within the occupied territory. Article 7(1)(d) of the Statute which relates to crimes against humanity does not exclude the intra-transfer of the civilians within the occupied territories. Further, Article 8(2)(b)(viii) concerning war crimes expressly contemplates the internal displacement, as can be seen from the wording ("within or outside this territory").

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on a large scale, which is tolerated, is a "narrow interpretation of international humanitarian law [that] will attract much support": *ibid.*, at 17.

[44] This point is illustrated in the decision of the Supreme Court of Israel in H.C. *302/72, Sheikh Suleiman Abu Hilu et al. v. State of Israel et al.*, 27(2) *Piskei Din* 169, as excerpted in (1975) 5 *Israel YbkHR* 384, at 387 (the rejection of the customary principle embodied in Article 49 GCIV in the case of internal transfer of Bedouin tribes who were removed from their dwelling places in Sinai, which was then occupied by Israel: *per* Landau J.).

[45] *Prosecutor v. Krstić,* Judgment of Trial Chamber, 2 August 2001, IT-98-33-T, para. 521.

[46] ICTY, *Naletilić and Martinović,* Judgment of Trial Chamber, 31 March 2003, Case No. IT-98-34-T, paras. 516–521, and 670 (emphasis added).

[47] ICTY, *Prosecutor v. Blagoje Simić, Miroslav Tadić, and Simo Zarić*, Judgment of Trial Chamber, 17 October 2003, IT-95-9-T, para. 122.

2.7. *The Question of Nationality and the Internal or External Nature of Deportation/Transfer*

Closely related to the issue of deportation or forcible transfer *within* the occupied territory is the question of nationality possessed by the inhabitants of occupied territory. Writing in 1971, Shamgar argues that in view of the Jordanian citizenship held by the Palestinian peoples in the West Bank, the deportation of Palestinians from the West Bank to the East Bank does not contravene Article 49(1) GCIV.[48] Two specific criticisms can be made in relation to this restrictive interpretation. First, there is no reference to a nationality criterion under Article 49. Again, to read such a criterion in this provision to constrain the parameters of the rights runs counter to the humanitarian object and purpose of this provision. Second, obviously, this interpretation does not accord with the reality of the Palestinian population. The possession of nationality presents only a nominal link between the Palestinian population in the West Bank and the Kingdom of Jordan. The approach followed in the jurisprudence of the ICTY demonstrates the emphasis placed more on the sense of allegiance rather than on a formal linkage of nationality.[49] Shamgar's interpretation ought to be criticised for being incompatible with the general rule of interpretation under Article 31 of the Vienna Convention on the Law of Treaties, which specifically requires a treaty to be construed not only pursuant to the ordinary meaning of its terms but also in the light of its specific object and purpose. This may even be considered to yield the result that is "manifestly absurd or unreasonable" within the meaning of Article 32 of the Vienna Convention.

2.8. *Unlawful Deportation or Transfer of Protected Persons as a Grave Breach Form of War Crimes*

Unlawful deportation or transfer of a protected person amounts to a grave breach of GCIV and constitutes a war crime under the ICC Statute.[50] On the basis

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[48] M. Shamgar, "The Observance of International Law in the Administered Territories", (1971) 1 *Israel YbkHR* 262, at 274 (describing the deportation of a person to Jordan as "more a kind of return or exchange of a prisoner to the power which sent him and gave him its blessing and orders to act", denying the applicability of the rule embodied in Article 49 GCIV to such a situation). Dinstein supports this argument, noting that it "is sound and cannot be gainsaid": Dinstein (1993), *supra* n. 13, at 23.

[49] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment, 15 July 1999, para. 166.

[50] GCIV, Article 147; and ICC Statute, Article 8(2)(a)(vii). See also Article 85(4)(a) of API, which defines as grave breaches not only wilful acts of deporting or transferring all or parts of the population of the occupied territory, but also wilful acts of transferring parts of its own civilian population into the occupied territory.

of the assessment of the dictums in the cases of *Milch*,[51] *Krupp*,[52] and *Von Leeb and Others*,[53] Dörmann highlights that with respect to the material element, war crimes of deportation can be determined either when deportation is unlawful

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[51] Judge Philipps in his concurring opinion in the *Milch* case stated that:

> If the transfer is carried out without a legal title, as in the case where people are deported from a country occupied by an invader while the occupied enemy still has an army in the field and its still resisting, the deportation is contrary to international law.... [I]t is manifestly clear that the use of labour from occupied territories outside of the area of occupation is forbidden by the Hague Regulation. The second condition under which deportation becomes a crime occurs when the purpose of compelling the deportees to manufacture weapons for use against their homeland or to be assimilated in the working economy of the occupying country.
>
> ...
>
> The third and final condition under which deportation becomes illegal occurs whenever generally recognized standards of decency and humanity are disregarded. This flows from the established principle of law that an otherwise permissible act becomes a crime when carried out in a criminal manner. A close study of the pertinent parts of Control Council Law No. 10 strengthens the conclusions... that the deportation of the population is criminal whenever there is no title in the deporting authority or whenever the purpose of the displacement is illegal or whenever the deportation is characterized by inhumane or illegal methods.

US Military Tribunal, Nuremberg, *Trial of Erhard Milch*, 20 December 1946–17 April 1947, Concurring opinion of Judge Phillips, (1948) 7 *LRTWC* 27, at 45–46. See also *ibid.*, at 55–56; (1947) 14 *AD* 299, Case No. 129, at 302.

[52] The Tribunal approvingly cited the opinion of Judge Phillips in *Milch* in relation to the elements of war crimes of deportation: US Military Tribunal, Nuremberg, *The Krupp Trial (Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others)*, 17 November 1947–30 June 1948, (1949) 10 *LRTWC* 69, Case No. 58, at 144; (1948) 15 *AD* 620, at 626.

[53] The US Military Tribunal held that:

> There is no international law that permits the deportation or the use of civilians against their will for other than on reasonable requisitions for the needs of the army, either within the area of the army or after deportation to rear areas or to the homeland of the occupying power.... There is no military necessity to justify the use of civilians in such manner by an occupying force.

US Military Tribunal, Nuremberg, *Trial of Wilhelm Von Leeb and Thirteen Others (The High Command Trial)*, 30 December 1947–28 October 1948, (1949) 12 *LRTWC* 1, Case No. 72; (1948) 15 *AD* 376, at 393–394. See also *I.G. Farben Trial* in which the accused were charged with war crimes and crimes against humanity under Article II of the Control Council Law No. 10, in relation to their participation, *inter alia*, in the enslavement and deportation to slave labour of the civilian population of the territory which was occupied or otherwise controlled by Germany. It was claimed that these acts "have been committed unlawfully, willfully, and knowingly and to constitute violations of international conventions... of the laws and customs of war, of the general principles of criminal law as derived from the criminal laws of the countries in which such crimes were committed, and of Article II of Control Council Law No. 10: US Military Tribunal, Nuremberg, *Trial of Carl Krauch and Twenty-Two Others (I.G. Farben Trial)*, Judgment of 29 July 1948, (1949) 10 *LRTWC* 1, Case No. 57, at 4–5; (1948) 15 *AD* 668, Case No. 218, at 679.

in violation of international conventions, or in case of deportation in disregard of "generally recognised standards of decency and humanity".[54] In relation to mental elements, this category of war crimes may be identified when committed "wilfully and knowingly in violation of international conventions".[55]

3. *Evacuation*

3.1. *Overview*

The occupying powers can take measures of temporary evacuation of civilians, total or partial[56] when their presence is deemed as an obstacle to military operations.[57] However, in such circumstances, evacuation is lawful only when and so long as required by "imperative military reasons".[58] On the other hand, when faced with an imminent and foreseeable danger, as in the case of bombardment or other intense military operations by enemy forces in the occupied territory, it is the duty of the occupying power to evacuate protected persons for security

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[54] K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court – Sources and Commentary,* (2003), at 111.

[55] In the *Flick Trial*, the indictment alleged that the accused have committed the acts of enslavement and deportation of hundreds of thousands of the civilian population occupied or otherwise controlled by Germany to concentration camps "unlawfully, willfully and knowingly and in violation of international conventions . . . of the laws and customs of war, of the general principles of criminal law as derived from the criminal laws of all civilised nations, of the internal penal laws of the countries in which such crimes were committed, and of Article II of Control Council Law No. 10": US Military Tribunal, Nuremberg, *Flick Trial, Trial of Friedrich Flick and Five Others*, 20 April–22 December 1947, (1949) 9 *LRTWC* 1–59, Case No. 48, at 3; (1947) 14 *AD* 266, Case No. 122. See also US Military Tribunal, Nuremberg, *Trial of Carl Krauch and Twenty-Two Others (I.G. Farben Trial)*, Judgment of 29 July 1948, (1949) 10 *LRTWC* 1–68, Case No. 57, at 4 (the Indictment charging that the accused committed deportation and other acts constituting war crimes and crimes against humanity, "unlawfully, willfully, and knowingly"); (1948) 15 *AD* 668, Case No. 218, at 676 ("knowingly"); US Military Tribunal, Nuremberg, *The Krupp Trial, (Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others)*, 17 November 1947–30 June 1948, 10 *LRTWC* 69, Case No. 58, at 74–75 (the indictment charging the accused for having participated in war crimes and crimes against humanity based on, *inter alia*, extermination, enslavement and deportation of civilian populations under territories occupied, or otherwise controlled by Germany "unlawfully, willfully and knowingly"); (1948) 15 *AD* 620, Case No. 214, at 625–626 and 627.

[56] GCIV, Article 49(2). See also the corresponding provisions on hospital and safety zones, neutralised zones, and the evacuation of besieged or encircled areas: GCIV, Articles 14, 15 and 17.

[57] *ICRC's Commentary to GCIV*, at 280.

[58] GCIV, Article 49(2), first sentence. *ICRC's Commentary to GCIV* does not clarify the meaning of the term "imperative military necessity" under this provision: *ICRC's Commentary to GCIV*, at 280.

reasons.[59] As a general rule, the displacement of protected persons outside the occupied territory is prohibited. Exceptions to this rule can be recognised only where to do otherwise is impossible for material reasons.[60] Evacuated persons have the right to be repatriated to their homes upon the termination of hostilities in the area.[61] When implementing transfers or evacuation of civilians, the occupying power must ensure their economic and social rights (suitable accommodation, proper feeding and sanitary arrangements),[62] and family rights (non-separation of members of the same family from one another).[63] Apart from these conditions, in order for transfers or evacuations to be lawful, the occupying power must inform the Protecting Power of such measures.[64] Notification given *a posteriori* is sufficient. This notification requirement enables the Protecting Power to monitor evacuated persons and to ensure their communication to avoid possible disappearance and their humane treatment.[65]

3.2. *Derogation from Article 49(1) of GCIV?*

The *ICRC's Customary IHL Study*[66] recognises two exceptions to the customary rule that parties to an international armed conflict must not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part: (i) security of the civilians; and (ii) imperative military reasons. These grounds are imported from the rule concerning evacuations laid down in Article 49(2) GCIV. On one hand, the interconnected nature of the first and the second paragraphs of Article 49 can be recognised by the word "[n]evertheless", which introduces the second paragraph.[67] On the other, subsuming into the scope of application *ratione materiae* the possibility of derogation contradicts the claim that the

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[59] *Ibid.*

[60] GCIV, Article 49(2), 2nd sentence. The phrase "except when . . . displacement" is understood as when there is no alternative: *UK Manual* (2004), at 293, para. 11.55.

[61] GCIV, Article 49(2), 3rd sentence.

[62] See also J. Pejic, "The Right to Food in Situations of Armed Conflict: The Legal Framework", (2001) 83 *IRRC*, No. 844, 1097, at 1100.

[63] GCIV, Article 49(3). The non-separation of the same family members is supplementary to the family rights recognised under Article 27. For comparable clauses relating to family unity or unification, see GCIV, Articles 25, 26 and 82.

[64] GCIV, Article 49(4).

[65] *ICRC's Commentary to GCIV*, at 281–282.

[66] Henckaerts and Doswald-Beck, *supra* n. 21, Vol. I, Rule 129, at 457.

[67] This points is mentioned in Justice Shamgar's opinion in: HC *785/87, 845/87 and 27/88*, *Abd al Nasser al Aziz Abd al Affo et al. v. Commander of the IDF Forces in the West Bank et al.* ("Affo" judgment), 42(2) *Piskei Din* 4; available in: (1990) 29 *ILM* 139, at 152. As noted above, Shamgar suggests that the scope of application *ratione materiae* of Article 49(1) should be circumscribed to exclude the case of evacuation, as explicitly mentioned in the second paragraph, and the case of infiltrators on the basis of the object and purpose of the first paragraph.

prohibition of deportation or forcible transfer of civilians is non-derogable under Article 5(2) GCIV. The more coherent view is to highlight the non-derogable nature of the rule forbidding deportation and forcible transfer and to treat the evacuation as a separate rule that falls outside the definitional scope of the rule set forth in Article 49(1).[68]

3.3. *Additional Requirements concerning Evacuation under API*

Some remarks are needed in relation to the rules on evacuation provided in API.[69] These rules are related to conduct of hostilities, which have special relevance to the resumption of hostilities (IAC) or the eruption of NIAC in occupied territory. According to Article 58(a) API, once a portion of occupied territory becomes a lawful military target, the occupying power must remove civilians under their control from the vicinity of such objectives.[70] This obligation must be undertaken without prejudice to the requirements of Article 49 GCIV concerning evacuation (imperative military reasons, security of the population, proper accommodation to receive evacuated persons, and satisfactory conditions of transfer/evacuation, notification to the protecting power etc).[71] The *ICRC's Customary IHL Study* notes that this obligation forms part of customary international law and applies to international armed conflicts.[72] The US *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, states that "a party to an armed conflict has an affirmative duty to remove civilians

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[68] This conceptual understanding of the rule embodied in Article 49(1) GCIV is given an implicit support by Dinstein, who argues that "[s]ecurity considerations are conceded as relevant in manifold contexts in the Geneva Convention – e.g., the second paragraph of Article 49 which pertains to evacuations . . . but they are conspicuously omitted from the first paragraph concerning deportations": Dinstein (1993), *supra* n. 12, at 19. This argument is put forward in his criticism of Justice Ben-Porat's interpretation of Article 49 GCIV, in tandem with Article 43 of the Hague Regulations in HC *785/87, 845/87 and 27/88, Abd al Nasser al Aziz Abd al Affo et al. v. Commander of the IDF Forces in the West Bank et al.* ("Affo" judgment), 42(2) *Piskei Din* 4; available in: (1990) 29 *ILM* 139, at 140.

[69] See also H.-P. Gasser, "Protection of the Civilian Population", in: D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts,* (1995), at 253, para. 544.

[70] The phrase "to the maximum extent feasible" under Article 58 chapeau API finds an equivalent phrase in other provisions of API. The term "feasible" is used only to indicate that the parties to the conflict are not required to do the impossible: *ICRC's Commentary to API*, at 692, para. 2245. See also Henckaerts and Doswald-Beck, *supra* n. 21, Vol. I, at 70–71 (explaining that this phrase reflected the concern of small and densely populated countries faced with difficulty of separating civilians ((and civilian objects)) from military objectives).

[71] This is explicitly stated in API, Article 58(a). See also *ICRC's Commentary to API*, at 693, para. 2248.

[72] Henckaerts and Doswald-Beck, *supra* n. 21, Vol. I, Rule 24, at 74–76. The *Study* explains that no reservation was attached to Article 58(a) API, which was adopted by 80 votes against none, with 8 abstentions: *ibid.*, at 74, n. 35.

under its control as well as the wounded, sick, shipwrecked, and prisoners of war from the vicinity of targets of likely enemy attack".[73]

Further, in accordance with Article 58(c) API,[74] the occupying power must take "the other necessary precautions" to protect the civilian population and individual civilians under their control against dangers arising from military operations.[75] The *ICRC's Commentary on API* does not elaborate on "precautionary measures", except for a brief reference to appropriate shelters.[76] On the other hand, the *ICRC's Customary IHL Study* clarifies the nature and scope of this obligation relating to conduct of hostilities. While describing this rule as part of customary international law,[77] it provides examples of specific measures: shelters, digging of trenches, distribution of information and warnings, withdrawals of the civilian population to safe places, direction of traffic, guarding of civilian property and the mobilisation of civil defence organisations.[78]

4. *Free Movement of Protected Persons*

As one of the lessons from the experience of the Second World War, Article 49(5) GCIV requires that the occupying power must recognise the right of protected persons to move freely from one place to another in the occupied territory.[79] Akin to the exceptions to the general rule on evacuation, the detention of protected persons may be exceptionally allowed only in accordance with the security of the population, or with "imperative military reasons".[80] The *ICRC's Commentary* stresses that in each case, the existence of "real necessity" must

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[73] *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, (1997), § 11.2.

[74] The ICRC's *Customary IHL Study* notes that Article 58(c) API was adopted by 80 votes against none, with 8 abstentions, and without any reservation: Henckaerts and Doswald-Beck, *supra* n. 20, Vol. I, at 68, n. 1.

[75] API, Article 58(c).

[76] *ICRC's Commentary to API*, at 694–695, para. 2257.

[77] Henckaerts and Doswald-Beck, *supra* n. 21, Vol. I, Ch. 1. Rule 22, at 68–71.

[78] *Ibid*., at 70.

[79] Note should be taken of the remark made by the *ICRC Commentary* in relation to one of many such examples:

> It will be enough to remember the disastrous consequences of the exodus of the civilian population during the invasion of Belgium and Northern France. Thousands of people died a ghastly death on the roads and these mass flights seriously impeded military operations by blocking lines of communication and disorganizing transport.

ICRC's Commentary to GCIV, at 283.

[80] GCIV, Article 49(5).

be established to prevent abuse.[81] Conversely, it is evident that the occupying power must not detain protected persons in "an area particularly exposed to the dangers of war".

5. *Deportation or Transfer by the Occupying Power of Part of its Own Population into the Occupied Territory*

5.1. *Overview*

Article 49(6) GCIV provides that the occupying power is not allowed to deport or transfer parts of its own civilian population into the territory it occupies.[82] This is a logical corollary of the general rule that proscribes fundamental change in the status of occupied territory, as derived from Article 43 of the 1907 Hague Regulations. The primary rationale behind the drafting of this provision was to avoid the Nazi practice of displacing the indigenous population in Eastern Europe with German settlements, which was systematically conducted on political, and egregious racial grounds during the Second World War.[83] Since the decolonisation period in the latter half of the twentieth century, this rule has acquired increasing importance along with the evolution of the principle of self-determination of the inhabitants in the occupied territory. A systematic change in the demographic composition of occupied territory is unlawful. Still, since the end of World War II, there have been numerous instances of colonisation in occupied and annexed territory.[84]

The textual interpretation of Article 49(6) seems to leave two scenarios outside its scope of application: (i) the scenario in which the occupying power transfers civilians of other nationality to the territory it occupies; and (ii) the situation in which a state occupying one area of another state transfers its own population into other areas of the occupied state, which are occupied by its co-belligerent (one hypothesis may be the US transferring its citizens to UK occupied Basra in Iraq in 2003). Clearly, the principle of self-determination of peoples needs to be taken into account in these contexts. It is also possible to apply Article 49(6) or its customary concomitant by analogy. In relation to the first scenario, the cogency of analogous interpretation can be strengthened if the civilians trans-

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[81] *ICRC's Commentary to GCIV*, at 283.

[82] GCIV, Article 49(6).

[83] The *ICRC's Commentary to GCIV*, at 283.

[84] These include the case of China's settlement of predominantly Han ethnic group in Tibet, Israel's practice in West Bank, and Gaza Strip, and East Jerusalem and Golan Heights, Turkish settlement in N. Cyprus, Morocco's settlement policy in West Sahara etc. See on this subject E. David, *Principes de Droit des Conflits Armés*, 3rd ed., (2002), at 514–518, paras. 2.379–2.381.

ferring to occupied territory, albeit being foreign nationals, have been resident in the territory of the occupying power. Similarly, with respect to the second scenario, the two occupying powers concerned may be seen as "co-occupants", despite the different areas they administer.

5.2. *Is Coercion an Element of Transfer of the Civilians of the Occupant into Occupied Territory?*

One of the most contentious issues concerning the transfer of civilians of the occupant to the territory it occupies is whether the term "transfer" used in Article 49(6) GCIV is limited to coercive transfer, as in the case of "forcible transfers" under Article 49(1). In its *General Comment No. 29*, the Human Rights Committee takes the view that the prohibition of transfer only of *coercive* nature forms part of the expanded list of non-derogable rights.[85]

However, Article 49(6) GCIV does not employ any qualifying phrase "coercive" or "forcible", suggesting that an element of coercion is unnecessary. This is consonant with the underlying objective of this provision to safeguard the interests of civilians in occupied territory.[86] In the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ confirms this. It held that this provision "prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory".[87]

5.3. *The Distinction between Transfer pursuant to a Policy and Voluntary Settlement?*

Dinstein distinguishes between the transfer of people, which is prohibited under Article 49(6) GCIV, and the voluntary settlement of nationals of the occupant in occupied territory. He argues that the latter form is "not necessarily illegitimate", provided that this is not pursuant to the interests of the occupying power, and that it does not take place in a systematic or institutional fashion.[88] Dinstein's

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[85] HRC, *General Comment No. 29, States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 13.

[86] E. Benvenisti, *The International Law of Occupation* (1993), at 140; and D. Kretzmer, "The Advisory Opinion: The Light Treatment of International Humanitarian Law", (2005) 99 *AJIL* 88, at 91.

[87] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 136, at 183–184, para. 120.

[88] Y. Dinstein, "The International Law of Belligerent Occupation and Human Rights", (1978) 8 *Israel YbkHR* 104, at 124.

argument suggests that in the absence of coercive (namely, involuntary) *and* systematic nature (namely, pursuant to policies of the occupying power), the transfer of the population into the occupied territory may be lawful under Article 49(6). The effect of his view is to justify the voluntary Jewish settlements in the West Bank and the Gaza Strip that have taken place since 1967.[89]

Two qualifications need to be made. First, when assessing the element of systematicity, due account must be taken of the tolerance or acquiescence, or any other form of passive or implied approval on the part of the occupying authorities. Article 11 of the ILC's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* provides that "[c]onduct which is not attributable to a State . . . shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own".[90] Second, in view of the importance of the right of self-determination, even in case of voluntary settlement, the occupying power owes an affirmative duty to ensure that the cumulative effect of such settlement will neither disturb the administrative structure nor upset a delicate demographic balance of the occupied territory.

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[89] With respect to Jewish settlements in West Bank and Gaza Strip, Blum was quoted as arguing that Article 49(6) contemplates its application only to the case of the occupant displacing the population of the occupied territory, as was the practice of the Nazi Germany during the Second World War: the statement of Dr. Y. Blum in: "The Colonization of the West Bank Territories by Israel", Hearings Before the Subcommittee on Immigration and Naturalization of the U.S. Senate Committee on the Judiciary, 95th. Cong., 1st Sess., p. 24 (17 October 1977); as referred to, in: W.T. Mallison and S.V. Mallison, "A Juridical Analysis of the Israel Settlements in the Occupied Territories", (1998–99) 10 *Palestinian YbkIL* 1, at 11, n. 49 and 18–19. This view is echoed by Professor Julius Stone who observes that:

> The issue is rather whether the Government of Israel has any obligation under international law to use force to prevent the voluntary (often the fanatically voluntary) movement of these [Gush Emunim] individuals.
>
> On that issue, the terms of Article 49(6), however they are interpreted, are submitted to be totally irrelevant. To render them relevant, we would have to say that the effect of Article 49(6) is to impose on the state of Israel to ensure (by force if necessary) that these areas, despite their millennial association with Jewish life, shall be forever *judenrein*. Irony would thus be pushed to the absurdity of claiming that Article 49(6), designed to prevent repetition of Nazi-type genocidal policies of rendering Nazi metropolitan territories *judenrein*, has now come to mean that Judea and Samaria (the West Bank) must be made *judenrein* and must be so maintained, if necessary by the use of force by the government of Israel against its own inhabitants.

J. Stone, *Israel and Palestine: Assault on the Law of Nations*, at 180 (1981). However, as Mallison and Mallison argue, the Nazi practice of displacement, while no doubt being the gravest, constitutes only part of the circumstances covered by Article 49(6) GCIV: *ibid.*, at 19.

[90] *ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts*, ILC, 53rd. Session (2001).

In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ took an *overall* approach to the characterisation of the Jewish settlements in Israel's occupied territory. It held that "since 1977, Israel has conducted a *policy* and developed *practices* involving the establishments in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6".[91] The ICJ concluded that "the construction of the wall and its associated regime [the establishment of the Israeli settlements], by contributing to the demographic changes . . . contravene Article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council resolutions [449 of 22 March 1979, 452 of 20 July 1979, and 465 of 1 March 1980]".[92] It is possible to argue that behind this dictum lies the reasoning that the prohibition on causing a change in demographic composition of the occupied territory is anchored in "a general principle in international customary law".[93] In contrast, Kretzmer criticises that even if this reasoning is sustainable, it must not be confused with the material scope of application of Article 49(6), which is, contrary to the ICJ, limited to acts specified in that provision.[94]

5.4. *Indirect Measure of Transfer?*

Closely related to the issue of voluntary settlement is the controversy over the extent of "indirect" transfer, which is prohibited under Article 49(6) GCIV. Kretzmer casts doubt on the argument that *any* measures taken by the occupying power, which result in such population transfer, is unlawful under Article 49(6).[95] The essence of his reasoning is two-fold. First, Article 8(2)(b)(viii) of the ICC Statute adds the phrase "directly or *indirectly*" to qualify the prohibited act of transfer by the occupying power of its own population into the occupied territory. According to him, the insertion of the word "indirectly" extends the material scope of this war crime beyond the ambit contemplated under Article 49(6) GCIV. This is because if the prohibition under the latter provision were interpreted as covering any *indirect* measures, the use of the word "indirectly" under the ICC Statute would be superfluous. Second, given that violations of Article 49(6) lead to individual criminal responsibility, caution must be taken in extending the parameters of the prohibited conduct.[96] He argues that the ICJ in the *Wall* case fell into a trap in confusing the object of a treaty provision (Article

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[91] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 136, at 183–184, para. 120, emphasis added.
[92] *Ibid.*, at 191–192, para. 134.
[93] Kretzmer (2005), *supra* n. 86, at 94.
[94] *Ibid.*
[95] *Ibid.*, at 91.
[96] *Ibid.*

49(6) GCIV) that serves as a relevant factor in interpreting that provision, and the terms of the provision itself. According to him, the prohibition on altering the demographic composition of occupied territory as an essential objective of Article 49(6) does not necessarily lead to the ban on any acts of transfer of a population, which brings about such alteration.[97] In effect, this would overstretch the permissible bounds of teleological interpretation.

However, it can be argued that when drafted, Article 8(2)(b)(viii) of the ICC Statute was understood as not constitutive but declaratory of customary international law, and as corresponding to the material scope of Article 49(6) GCIV that is construed sufficiently broadly to embrace indirect measures. With respect to criminal sanction, the ICJ has not suggested that *any* measures that bring about population transfers will automatically give rise to individual criminal responsibility. Indeed, the determination of individual liability, far from being light-touched, is a highly laborious process based on meticulous examinations of proof of both material and mental elements of the offender.

5.5. *Transfer by the Occupying Power of its own Population into Occupied Territory as a War Crime*

It is a grave breach of API for the occupant to transfer its own population into territory it occupies.[98] This is incorporated into Article 8(2)(b)(viii) of the ICC Statute. As discussed above, this provision designates both direct and indirect transfer of the occupying power's population into occupied territory as a war crime based on "other serious violations of laws and customs".

6. *Prohibition of Forced Labour*

Protected persons have the right not to be compelled to serve in armed or auxiliary forces of occupying powers. Not only pressure but also propaganda by the occupying power, which is intended to secure voluntary enlistment, is prohibited.[99] As Gasser notes,[100] this rule is instrumental in reinforcing the well-established customary rule that prohibits the Parties to the conflict from forcing persons to participate in military operations against their own country.[101]

Occupying powers are nevertheless allowed to compel the protected persons in occupied territory to carry out work, provided that they meet the specific

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[97] *Ibid.*, at 93–94.
[98] API, Article 85(4)(a).
[99] GCIV Article 51.
[100] Gasser, *supra* n. 69, at 263, para. 562.
[101] This rule is codified in Article 23(2) of the 1907 Hague Regulations.

conditions. The protected persons must be over eighteen years old. Compulsory work must be related to such work that is necessary for any of three legitimate objectives: needs of the occupation army, the public utility services, or the general well-being (feeding, sheltering, clothing, transportation or health) of the population of the occupied country.[102] The work requisitioned from civilians in the occupied territory must not involve military operations. The detailed safeguards laid down for civilians whose service may be requisitioned are designed to avoid an immense scale of slave labour committed by the Nazi Germany, the USSR and Imperial Japan against inhabitants of occupied territories during World War II.

It is forbidden to requisition labour from the inhabitants in the occupied territory, which would lead to a "mobilization of workers in an organization of a military or semi-military character".[103] The *ICRC's Commentary* notes that work designed to meet the needs of the army of occupation encompasses "a wide variety of services". These include the work relating to public transport, repairment of roads, bridges, or harbours, or laying telephone lines.[104] On the other hand, it is clear that such work as the construction of trenches, fortifications or airstrips is not of the type to which the civilians in occupied territory may be requisitioned to render service.[105] It may be argued that this type of work risks contributing to war efforts of the armed forces, and that all work that offers benefit to the occupying forces should be banned.[106]

It is interdicted to compel protected persons to employ forcible means to ensure the security of the installations where their compulsory labour takes place.[107] In terms of the territorial scope, compulsory work can be carried out only in the occupied territory in which reside the protected persons whose services are requisitioned.[108] Clearly, civilians who are compelled by the occupying power to work never lose their civilian status.[109]

To compel civilians in occupied territory to serve in the armed forces of the occupying power is a grave breach of GCIV[110] which is punishable as a war

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[102] GCIV, Article 51(2). The *UK Manual* recognises the requisition of such services as repair of road, bridges or railways, and the burial of the dead or the removal of refuse: *UK Manual* (2004), at 292, para. 11.52.1.

[103] GCIV, Article 51(4). The *UK Manual* refers to requisitioning services concerning the construction of military defences or airfields, the production of munitions, the movement of military supplies, or the laying or lifting of minefields: *ibid*., para. 11.53.1.

[104] *ICRC's Commentary to GCIV,* at 294.

[105] Gasser, *supra* n. 69, at 264, para. 564.

[106] *Ibid*.

[107] GCIV, Article 51(2), 3rd sentence.

[108] GCIV, Article 51(3).

[109] Gasser, *supra* n. 69, at 264, para. 564.

[110] GCIV, Article 147.

crime under the ICC Statute.[111] This principle is well recognised since the post-WWII war crimes trials. In *re Von Leeb and Others*, the US Military Tribunal at Nuremberg decisively ruled that:

> There is no international law that permits the deportation or the use of civilians against their will for other than on reasonable requisitions for the needs of the army, either within the area of the army or after deportation to rear areas or to the homeland of the occupying power.... There is no military necessity to justify the use of civilians in such manner by an occupying force. If they were forced to labour against their will, it matters not whether they were given extra rations or extra privileges, for such matters could be considered, if at all, only in mitigation of punishment and not as a defence to the crime.[112]

Similarly, in the *I.G. Farben* case, the same tribunal held that:

> It is enough to say here that the utilization of forced labour, unless done under such circumstances as to relieve the employer of responsibility, constitutes a violation of that part of Article II of Control Council Law No. 10 which recognizes as war crimes and crimes against humanity the enslavement, deportation, or imprisonment of the civilian population of other countries.... The use of concentration camp labour and forced foreign workers at Auschwitz with the initiative displayed by the officials of Farben in the procurement and utilization of such labour, is a crime against humanity and, to the extent that non-German nationals were involved, also a war crime, to which the slave labour programme of the Reich will not warrant the defence of necessity.[113]

In the *Krnojelac* case, the Appeals Chamber of the ICTY upheld the Prosecutor's argument that the forced labour was inflicted on Muslim and other non-Serbian male civilian detainees with discriminatory intent within the meaning of the crime of persecution under Article 5 of the ICTY Statute.[114]

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[111] ICC Statute, Article 8(2)(a)(v). For analysis of this war crime, see Dörmann, *supra* n. 54, at 97–99 (reference to cases relating to forced labour of prisoners of war, albeit not of protected persons).

[112] US Military Tribunal, Nuremberg, *Von Leeb and Others*, 28 October 1948, (1948) 15 *AD* 376, at 394.

[113] US Military Tribunal, Nuremberg, *Trial of Carl Krauch and Twenty-Two Others* (*The I.G. Farben Trial*), 29 July 1948, (1949) 10 *LRTWC* 1, Case No. 57 at 53; and (1948) 15 *AD* 668, at 679.

[114] ICTY, *Prosecutor v. Milorad Krnojelac*, Judgment of Appeals Chamber, 17 September 2003, IT-97-25-A, paras. 199–203. Compare this with the Trial Judgment, which the Appeals Chamber found to have erred on this matter: Judgment of Trial Chamber, 15 March 2002, IT-97-25-T, para. 471.

7. *Conclusion*

The foregoing assessment suggests that as compared with rules concerning forced labour, a number of divisive issues remain with respect to rules relative to deportation or forcible transfer of protected persons. When drafted in 1949, some specific rules embodied under Article 49 GCIV were innovative and not reflective of pre-existing customary international law. The drafters broadened the scope of prohibited acts to encompass acts going beyond the Nazi practice, such as the individual deportation of civilians in an occupied territory, or the forcible transfer of civilians within the occupied territory. As authoritatively confirmed by the *ICRC's Customary IHL Study*, such innovative elements can be considered to have hardened into customary international law. Still, certain states, including Israel, may contest that the weight of *opinio juris* of other states, however numerous, cannot be sufficient to override their persistent objection to two aspects: the formation of new customary rules such as the ban on individual deportation; and hence the binding effect of such rules on those objecting states.

Chapter 14

Economic, Social and Cultural Rights in Occupied Territory

1. *Introduction*

As explained above, the Hague law which was the product of the laissez-faire thinking of the late nineteenth century confines the duty of the occupying powers only to that of maintaining and ensuring public order and security in occupied territory. In contrast, the concept of a welfare state and the idea of New Deal form one of the ideological backbones of the expansive scope of positive duties embodied in GCIV, which must be undertaken by occupying powers in the interests of the civilian population in an occupied territory.[1] Such positive duties cover a range of economic, social and cultural (ESC) rights. Additional Protocol I sets forth many provisions based on positive duties, which are of special importance in occupied territories.

This chapter starts with analysing a limited set of ESC rights embodied in IHL treaty-based rules, which deal specifically with the protection of civilian population in occupied territories. Next, it explores the significance and applicability, in occupied territories, of ESC rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other human rights treaties. In this respect, the question of derogability of the ICESCR will be examined on the basis of its *travaux préparatoires* and publicists' opinions. The rights of women and children in occupied territories, which are derived from IHL treaty-based rules, are mostly of ESC nature, but they will be examined in a separate chapter.

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[1] H.-P. Gasser, "Protection of the Civilian Population", in: D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, (1995), at 266, para. 567.

2. *The Right to Adequate Working Conditions and the Prohibition on Causing Unemployment*

Under Article 51(3) GCIV, protected persons whose work may be requisitioned are entitled to the continued application of local laws concerning working conditions and safeguards (wages, hours of work, equipment, preliminary training and compensation for occupational accidents and diseases).[2] It is forbidden to take any measures calculated to cause unemployment or restricting employment opportunities so as to induce workers in an occupied territory to work for the occupying power.[3] Any worker whose service is requisitioned is entitled to communicate with the representatives of the Protecting Power to seek its intervention. The safeguards concerning working conditions are the result of the cooperation with the International Labour Organisation (ILO).[4] As Dugard notes, in view of their benefit to the population of an occupied territory, the relevant ILO agreements on the protection of workers must be considered to remain in force in occupied territory.[5]

3. *Rights to Food and Medical Supplies, and Other Humanitarian Relief Supplies*

3.1. *Obligations to Furnish Humanitarian Relief Supplies*

The civilians in need in occupied territory have the right to receive humanitarian relief essential for their sustenance and health.[6] They are entitled to receive individual relief consignments sent to them. Restrictions on their rights can be recognised only in case there exist "imperative reasons of security".[7] The right of

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[2] GCIV, Article 51(3). Compare this with Article 95(4) for working conditions and compensation for employment of internees.

[3] GCIV, Article 52(2).

[4] *ICRC's Commentary to GCIV*, at 298.

[5] J. Dugard, "Enforcement of Human Rights in the West Bank and the Gaza Strip", in: E. Playfair (ed), *International Law and the Administration of Occupied Territories – Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, (1992), 461, at 484.

[6] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (2005), Vol. I, at 199.

[7] GCIV, Article 62. For protected persons who are interned in occupied territory (or anywhere), see GCIV Article 108, which guarantees their right to receive individual parcels or collective shipments. Compare this with the corresponding right of protected persons in the territory of an adverse party to the conflict as guaranteed in GCIV Article 38(1), which can be compromised only in case measures of control are applied on the basis of the general limitation clause (Article 27(4) or Article 41).

civilians in an occupied territory to receive humanitarian relief can be implicitly recognised on the basis of their right to apply to the protecting powers, the ICRC, or a National Red Cross or Red Crescent Society, or to any other organisation.[8] This right may also be deduced as a necessary corollary of the right to an adequate standard of living guaranteed under Article 11 of the ICESCR.

The occupying powers must ensure that foodstuffs, medical stores and other articles essential to the survival of the civilian population are adequately provided.[9] In case resources are inadequate in an occupied territory, they must furnish necessary humanitarian relief from its own resources, or appeal to the ICRC and other impartial humanitarian organisations.[10] They must also allow local authorities or private persons to import the goods from a third state or from the unoccupied part of their own country.[11] API expands the categories of goods that need to be supplied beyond foodstuffs and medical supplies. Article 69(1) requires the occupying power to furnish the civilian population in an occupied territory with "basic needs, such as clothing, bedding, means of shelter, other supplies essential to their survival",[12] as well as objects for religious worships. The term "other supplies essential to the survival of the civilian population" must be flexibly interpreted in specific context.[13]

3.2. *Free Passage of Consignments*

As a necessary precondition for the effective guarantee of the right of inhabitants in an occupied territory to receive relief consignments, Article 23(1) GCIV requires that all the parties to the GCIV must allow the free passage of such consignments. On the basis of its detailed empirical evidence,[14] the *ICRC's Customary IHL Study* recognises that the general duty of allowing and facilitating

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[8] GCIV, Article 30(1) (a provision in Part III, Section I). The *ICRC's Customary IHL Study* notes that another tacit support for this right can be seen in Article 70(1) of API, which stipulates that "relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken": Henckaerts and Doswald-Beck, *supra* n. 6, Vol. I, at 199. Note, however, that Article 70(1) of API states itself to be inapplicable to occupied territory.

[9] Any exceptions to this rule based on resource constraints must be evaluated in the light of the requirement that such supplies must be facilitated "[t]o the fullest extent of the means available to it". GCIV, Article 55(1).

[10] GCIV, Article 59(2). The ICRC's *Customary IHL Study* notes that while not yet clear in practice, it is desirable to require all parties to a conflict to appeal for international assistance for their populations.

[11] Gasser, *supra* n. 1, at 266, para. 567.

[12] API, Article 69 (1).

[13] Gasser refers to fuel for heating as an example: Gasser, *supra* n. 1, at 267, para. 567.

[14] This includes: the 1991 Memorandum of Understanding on the Application of International Humanitarian Law between Croatia and the SFRY, para. 9; and the 1992 Agreement on the

"rapid and unimpeded passage of humanitarian relief for civilians in need" has become part of customary law.[15] According to the *ICRC's Study*, this customary law obligation is incumbent not only on occupying powers but also on all the parties to the GCIV. They are obliged to ensure that relief action is conducted in an impartial manner and without any adverse distinction.[16] While the requirement of impartiality is mentioned in Article 70(1) of API, a provision expressly stating itself to be inapplicable to occupied territory, no doubt this requirement is considered a customary rule applicable to any civilians, including those in an occupied territory.

Article 23(1) GCIV distinguishes two types of consignments: first, all consignments of medical and hospital stores, and objects necessary for religious worship, which are intended only for civilians; and second, all consignments of essential foodstuffs, clothing and tonics which are to be used solely for children under fifteen, expectant mothers and maternity cases.[17] These consignments must not be regarded as war contrabands and cannot be seized. As the *ICRC Commentary* notes, these two classes of consignments are strictly distinguishable in terms of their nature and addressees from other deliveries. The first category of consignments cannot by nature serve as means to reinforce the war economy, and can be sent to the civilians as a whole. On the other hand, the second category can benefit from free passage only when destined for use solely by children under fifteen, expectant mothers and maternity cases. The rationale is to avoid the consignments being used to reinforce the economic potential or general war efforts of the enemy if directed to other recipients.[18]

The principle of free passage of relief consignments is, however, subject to three cumulative conditions designed to fend off the risk of abuse by the occupant. These conditions are: (i) the interdiction of misappropriation; (ii) the supervision by the protecting power, neutral powers or humanitarian organisations;[19] and

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Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, para. 2.6; as cited in: Henckaerts and Doswald-Beck, *supra* n. 6, Vol. II, paras. 1177 and 4186–4187.

[15] Henckaerts and Doswald-Beck, *ibid.*, Vol. I, at 193, Rule 55.

[16] The element of non-discrimination is stated in Articles 69(1) of API.

[17] GCIV, Article 23(1) (a provision of Part II).

[18] While the first category is by nature not of benefit to military efforts or potential war economy, the second category might be diverted from the use for children under fifteen, expectant mothers and maternity cases: *ICRC's Commentary to GCIV*, at 179–180.

[19] The supervision encompasses surveillance of the receipt of consignments sent to intended destination, spot checks in depots and warehouses, and periodical verification of distribution plans and reports: *ICRC's Commentary to GCIV*, at 183. While Article 23(3) GCIV refers only to protecting powers, to which the task of supervision may be entrusted, appeal may be made to good offices of other neutral powers or any impartial humanitarian organisation such as the ICRC: *ibid.*, at 183–184.

(iii) the prohibition on obtaining "definite advantage" ("*avantage manifeste*") either to military or economic positions of the enemy. However, to invoke these conditions, belligerents must demonstrate the existence of "serious reasons" for fearing that consignments may be diverted from their humanitarian purposes and give undue advantage to the enemy.[20]

The general principle of free passage of consignments is elaborated in the specific context of occupied territory. The occupying power and other belligerents must allow and *guarantee* the free passage of relief supplies, which encompass consignments of foodstuffs, medical supplies and clothing.[21] Their duty goes further than the mere negative duty of lifting the blockade and refraining from attacking or confiscating the goods. As the term "guarantee" denotes, it extends to the positive duty of protecting such relief consignments,[22] against risk of pillage by mobs or attack by an insurgent group.

3.3. *Duties on Transit States to Allow Free Passage of Relief Consignments*

Transit states must allow unimpeded passage of consignments to a territory occupied by an adverse party to the conflict.[23] All the contracting parties are duty bound to allow the transit and transport, free of charge, of relief consignments destined for an occupied territory.[24] On the other hand, the transit States are given the right of control and supervision over relief consignments to assure themselves that the goods granted the free passage are not diverted for any use other than for strictly humanitarian purposes. They can also appeal to the Protecting Power to ensure that these consignments are used for the relief of the civilian population and not destined to serve the occupying power.[25]

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[20] The subjective and inherently vague nature of this evaluation may be criticised for jeopardising the principle of free passage laid down in Article 23(1). Yet, as the *ICRC's Commentary* notes, at the Diplomatic Conference of 1949, these conditions were inserted in the second paragraph so as to make the first paragraph mandatory rather than optional: *ICRC's Commentary to GCIV*, at 183.

[21] GCIV, Article 59(1) and (2).

[22] *ICRC's Commentary to GCIV*, at 322.

[23] GCIV, Article 59(3). The similar duty is stated in API, Article 70 (2). Yet, according to Article 69(2) (and Article 70(1)), the provisions in Article 70 are inapplicable to relief actions destined for the civilian population in occupied territory. This restrictive view is confirmed in the *ICRC's Commentary to API*, at 823, para. 2826 ("paragraph 2 of Article 70 concerns only the passage of relief consignments intended for civilian populations other than those of occupied territories").

[24] GCIV, Article 61(3).

[25] GCIV, Article 59(4).

4. *The Requirement of Respecting and Protecting Humanitarian Relief Personnel, Civil Defence Organisations, Medical Personnel, Civilian Hospitals and Medical Units*

4.1. *Overview*

The rules governing the requirement to respect and protect humanitarian relief personnel, civil defence organisations, medical personnel, civilian hospitals and medical units are applicable in any territories affected by armed conflict. While this rule is generally discussed in the context of conduct of hostilities, brief analysis is necessary to the extent that these rules are of special relevance in occupied territories.

4.2. *The Requirement of Respecting and Protecting Humanitarian Relief Personnel*

Humanitarian relief may be carried out by impartial humanitarian organisations, such as the ICRC.[26] While consent for relief action needs to be obtained from the Party in whose territory action is undertaken,[27] this must not be withheld on an arbitrary basis.[28] Upon such approval, members of the personnel and their objects used for humanitarian relief operations must be respected and protected.[29] Whether committed in an occupied territory or elsewhere in relation to armed conflict, it is a war crime intentionally to direct attacks against such personnel or against installations, material, units or vehicles involved in a humanitarian assistance mission pursuant to the UN Charter.[30]

The free movement of humanitarian relief personnel is essential to the exercise of their humanitarian functions. Limitations on this right can be recognised only where there is "imperative military necessity", and only for a temporary period.[31] This rule is a corollary to the duty of the occupying power to provide unimpeded access to humanitarian relief for civilians in an occupied territory. It is classified as part of customary international law in the *ICRC's*

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[26] GCIV, Article 59(2).

[27] API, Article 71(1). As Dinstein notes, it is obvious that this Party refers to a Power occupying the area where relief personnel perform their task: Y. Dinstein, "The International Law of Belligerent Occupation and Human Rights", (1978) 8 *Israel YbkHR* 104, at 120.

[28] See Henckaerts and Doswald-Beck, *supra* n. 6, Vol. I, at 197.

[29] API, Articles 71(2) (respect for and protection of humanitarian relief personnel) and 70(4) (protection of relief consignments).

[30] ICC Statute, Article 8(2)(b)(iii). For assessment of this type of war crimes, see K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court – Sources and Commentary*, (2003), at 153–160.

[31] API, Article 71(3).

Study.[32] In return, the occupying power may demand humanitarian relief personnel to respect domestic law and other security requirements in force in an occupied territory.[33]

It is clear that national Red Cross or Red Crescent societies must be allowed and facilitated to pursue their activities in accordance with the Red Cross principles.[34] Other relief societies must also be entitled to continue their humanitarian activities under similar conditions. For this purpose, the occupying powers must not call for any changes in the personnel or structure of these societies in a manner that would prejudice their humanitarian activities.[35] Nevertheless, for urgent reasons of security, the occupying authorities may impose temporary and exceptional measures of restrictions on activities of the Red Cross.[36] Gasser suggests that restrictions on a National Red Cross or Crescent Society should be limited to the circumstances where the society breaches its obligation to remain neutral. Otherwise, the activities of the Red Cross must not be seen as a security risk for the occupying authorities.[37]

In order to facilitate the distribution of relief consignments among the inhabitants in occupied territories, occupying powers may seek cooperation of the Protecting Powers in supervising such distribution. The task of monitoring the distribution of relief supplies can be delegated to a neutral Power, the ICRC, or to any other impartial humanitarian body.[38]

The occupying powers must not impose on relief consignments any charges, taxes or customs duties.[39] The Diplomatic Conference of Geneva of 1949, however, attached a "reservation" to the effect that charges may be levied on relief consignments when this is in the interests of the economy of the territory. The purpose of this "reservation" is to ensure that certain relief consignments may be provided under a long-term arrangement between governments. Account was also taken of both the danger of inflation, and of the possible burden on a small

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[32] Henckaerts and Doswald-Beck, *supra* n. 6, Vol. I, at 200, Rule 56.

[33] This rule is embodied in API, Article 71(4) (adopted by consensus).

[34] This principle, as embodied in GCIV, Article 63 and API, Article 81(3), is closely associated with the duties of occupying powers relating to relief schemes (GCIV Articles 59–62).

[35] GCIV, Article 63(1)(a) and (b). Similarly, the occupying power must not hamper the activities of the Red Cross Societies by requisitioning the property of the Red Cross Society, except in case of absolute necessity, and only as a temporary measure: *ICRC's Commentary to GCIV*, at 332. It is bound to apply the same basic principles to activities and personnel of special organisations of a non-military character, which already exist or which may be established, and whose objectives are to ensure the living conditions of civilian population by maintaining essential public utility services, distributing relief, and organising rescues: GCIV, Article 63(2).

[36] GCIV, Article 63(1) chapeau.

[37] Gasser (1995), *supra* n. 1, at 270–271, para. 571.

[38] GCIV, Article 61(1).

[39] GCIV, Article 61(2).

neutral power facilitating the passage of large supplies to occupied territory.[40] However, as the *Commentary on GCIV* notes, the occupying power (and any other belligerents) must treat this as "absolutely exceptional". The exemption of relief supplies from all charges is in the best interest of the needy population.[41]

4.3. *The Duty to Respect and Protect Civil Defence Organisations*

Again, the duty to respect and protect civil defence organisation must be applied not only in an occupied territory but also in any territories affected by armed conflict.[42] There is an affirmative duty imposed on the occupying power to provide necessary facilities for civil defence organisations[43] in an occupied territory.[44] Further, Article 63 API requires the occupant to discharge specific duties relating to civil defence organisations.[45] First, the effective functioning

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[40] Note that the second paragraph of draft Article 52 (now 61) of the original Stockholm text prohibited the raising of any transport or other charges in relation to relief supplies: *Final Record*, Vol. II-A, Committee III, 38th Meeting, 30 June 1949, at 752 (see, in particular, the failed proposal by Mr Sokirkin of the USSR to delete the second paragraph of draft Article 52, which would allow the levying of taxes on relief consignments in certain circumstances) and 832 (Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva) Article 52). The USSR's amendment proposed that the second paragraph be deleted, and that the Stockholm text of that paragraph be restored, on the ground that the occupying power would be given discretion to impose charges on relief consignments. Yet, this was defeated by the vote (25 votes to 9, with 5 abstentions): *ibid.*, Vol. II-B, 27th Plenary Meeting, 3 August 1949, at 422–423.

[41] *ICRC Commentary to GCIV*, at 327.

[42] The *ICRC's Study on Customary IHL* is silent on the customary law status of this rule. Members of armed forces and military units assigned to civil defence organisations must be respected and protected: API, Article 67(1).

[43] In occupied territories (and in battlefields), civil defence personnel, including military personnel serving within civil defence organisations, must wear a distinctive international sign and carry identity cards certifying their status (Articles 66 (3) and 68(1)(c) of API). Upon capture, military personnel participating in civil defence organisations are entitled to prisoners of war status. In occupied territory, they may be employed on civil defence tasks, but only under two conditions. First, such tasks are in accordance with the interests of the civilian population in occupied territory. Second, in case of dangerous work, such employment can be done only on a voluntary basis (Article 67(2) of API).

[44] API, Article 63(1), first sentence. Special reference must be made to the *travaux préparatoires*. The Report of Committee II notes that:

> Article 55 [now Article 62] applies to both occupied and non-occupied territory. Article 56 [now Article 63] is thus supplementary to Article 55 as far as occupied territories are concerned.

CDDH/406/Rev. 1, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*, Vol. XIII, at 369, para. 49.

[45] Note that Bothe, Partsch and Solf compress the categories of the obligations on the occupying power under Article 63 to three: (i) a duty to grant necessary facilities for civil defence; (ii) a

of civil defence organisations must not be hindered.[46] Disarming members of civil defence organisations is allowed only for reasons of security.[47] Second, the structure or personnel of civil defence organisations must not be altered in such a manner as to jeopardise the efficiency in performing their duties.[48] Third, such organisations must not be compelled to give priority to nationals or interests of the occupying power.[49] Fourth, the occupant must not compel, coerce or induce civilian defence organisations to carry out tasks in a manner prejudicial to the interests of the civilian population.[50]

4.4. *The Requirement of Respecting and Protecting Medical Personnel*

As noted by the *ICRC's Customary IHL Study*,[51] it is one of the well-established customary IHL rules that medical personnel, including the personnel involved in search for, and removal, transportation and care of civilians who are wounded, sick and infirm, and maternity cases must be respected and protected in all circumstances, whether in an occupied territory or elsewhere affected by armed conflict.[52] Medical personnel forfeit their protection only when committing

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duty to abstain from acts of interference with the proper performance of civil defence tasks and with their way of performing duties; and (iii) a duty to abstain from requisitioning or diverting from their proper use civil defence buildings or material, or shelters: M. Bothe, K.J. Partsch and W.A. Solf, *New Rules of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, (1982), at 405.

[46] API, Article 63(1), second sentence.

[47] API, Article 63(3).

[48] API, Article 63(1), third sentence.

[49] API, Article 63(1), fourth sentence.

[50] API, Article 63(2). The duty of the occupant to abstain from requisitioning or diverting from their proper use civil defence buildings or material (save where very stringent conditions are met), or shelters (under any circumstances) is provided in paragraphs 4–6 of Article 63. This will be discussed under the subsequent section on "The Prohibition of Requisitioning Relief Supplies, and Immovable Property Belonging to Relief Organisations".

[51] In relation to the definition of the term medical personnel, the *ICRC's Study* refers to Article 8(c) of API (adopted by consensus), which is widely followed in state practice. It is defined as "personnel assigned, by a party to the conflict, exclusively to the search for, collection, transportation, diagnosis or treatment, including first-aid treatment, of the wounded, sick and shipwrecked, and the prevention of disease, to the administration of medical units or to the operation or administration of medical transports": Henckaerts and Doswald-Beck, *supra* n. 6, Vol. I, at 81. By virtue of Article 15 of Additional Protocol I, the scope of protection is broadened to cover civilian medical personnel in addition to military medical personnel: *ibid.*, at 79.

[52] With respect to occupied territory or any other area affected by *international* armed conflict, see GCIV, Article 20. Note that since medical personnel are authorised to use the distinctive emblems of the Geneva Conventions, any attacks intentionally directed against such personnel amounts to a war crime: ICC Statute, Article 8(2)(b)(xxiv) (international armed conflict); and Article 8(2)(e)(ii) (non-international armed conflict).

"acts harmful to the enemy" outside their humanitarian function.[53] The term "acts harmful to the enemy" may give rise to controversy. The *ICRC's Customary IHL Study* defines it as equivalent to acts of "taking a direct part in hostilities, in violation of the principle of strict neutrality and outside the humanitarian function of medical personnel".[54]

The API has broadened the scope of obligations to respect and protect medical personnel to cover civilian medical personnel in addition to military medical personnel.[55] The *ICRC's Customary IHL Study* highlights the customary law nature of the rule that both civilian and military medical personnel must be respected and protected in all circumstances.[56] In order to guarantee medical needs of the civilian population in an occupied territory,[57] the occupant must assist civilian medical personnel optimally to perform their tasks.[58] It is forbidden to compel civilian medical personnel to prioritise treatment of any person except on medical grounds, or to undertake tasks incompatible with their humanitarian mission.[59] Clearly, it squarely runs counter to customary IHL to punish a person for performing medical duties compatible with medical ethics, or to force a person engaged in medical activities to perform acts against medical ethics.[60]

4.5. *The Requirement of Respecting and Protecting Civilian Hospitals and Medical Units*

With respect to medical units, the *ICRC's Study*[61] affirms that it is a customary rule to require any belligerent party, including the occupying power, to respect and protect medical units exclusively assigned to medical purposes.[62] The medical

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[53] Henckaerts and Doswald-Beck, *supra* n. 6, Vol. I, at 79, Rule 25.

[54] *Ibid.*, at 85. The mere caring for enemy wounded and sick military personnel or the mere wearing of enemy military uniforms does not constitute a hostile act. Similarly, medical personnel do not lose protection if they are escorted by military personnel, or if they are in possession of small arms and ammunition taken from their patients (and not yet handed over to the relevant service): *ibid*. Note should, however, be taken of the statement of the US Delegate at the Diplomatic Conference in 1973–77, which resulted in the adoption of the Additional Protocols, to the effect that "in occupied territory…the right of the party in control of the area to disarm such personnel [medical personnel] should be reserved": *ibid.*, at 86; and *ibid.*, Vol. II, Ch. 7, § 224.

[55] API, Article 15.

[56] See Henckaerts and Doswald-Beck, *supra* n. 6, at 79, Rule 25.

[57] API, Article 14(1).

[58] API, Article 15(2).

[59] API, Article 15(3).

[60] See Henckaerts and Doswald-Beck, *supra* n. 6, Vol. I, at 86, Rule 26. This principle is embodied in Article 16 of API.

[61] *Ibid.*, at 91, Rule 28.

[62] GCIV, Article 18 (civilian hospitals) and API, Article 12 (medical units). It is a war crime in international law intentionally to direct attacks against "hospitals and places where the sick

units lose their protection if they are used, outside their humanitarian function, to commit "acts harmful to the enemy".[63] All members of hospital personnel and transport vehicles operating in an occupied territory must be immune from attack.[64]

5. *The Protection of Public Health and Hygiene*

In collaboration with national and local authorities, the occupying powers must ensure and maintain the medical and hospital establishments and services, public health and hygiene in the occupied territory. The protection of such public health establishments is absolutely essential when the occupying power adopts and implements prophylactic and preventive measures to combat the spread of contagious diseases and epidemics.[65] When issuing public health measures, the occupying power must duly take account of particular cultural values ("the moral and ethical susceptibilities") of the inhabitants in occupied territory.[66]

6. *The Prohibition on Requisitioning Relief Supplies, and Immovable Property Belonging to Relief Societies etc.*

6.1. *The Prohibition on Requisitioning Relief Supplies*

As a general rule, the occupying power must not requisition foodstuffs, articles or medical supplies available in an occupied territory.[67] Exceptionally, however,

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and the wounded are collected, provided they are not military objectives". Similarly, war crimes arise from intentional attack against "medical units… using the distinctive emblems of the Geneva Conventions in conformity with international law": ICC Statute, Article 8(2)(b)(ix) (international armed conflict); and Article 8(2)(e)(ii) and (iv) (non-international armed conflict). For the case-law concerning the destruction of religious or education institutions, see, in particular, ICTY, *Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-T, Judgment of Trial Chamber, 26 February 2001, paras. 359 and 361 (material and mental elements). For a detailed assessment, see Dörmann, *supra* n. 31, at 215–228.

The genesis of this rule on war crimes can be found in post-WWII war crimes trials. In the *Kurt Student* case, the accused was charged with bombing "a hospital which was marked with a Red Cross": *Kurt Student* case, British Military Court, Luneberg, Germany, 6–10 May 1946, (1948) 4 *LRTWC* 118, at 120 *et seq*; and (1946) 13 *AD* 296.

[63] Reference can be made to API, Article 12(4), first sentence, which provides that "[u]nder no circumstances shall medical units be used in an attempt to shield military objectives from attack".

[64] This fundamental principle is recognised in Articles 20 and 21, as well as 56(2) of GCIV.

[65] GCIV, Article 56(1).

[66] GCIV, Article 56(3).

[67] GCIV, Article 55(2).

the occupying powers are allowed to do so if they satisfy three cumulative conditions. First, the need of the civilian population must at first be taken into account. Second, requisitions must be destined for use by the occupation forces and administration personnel. Third, necessary arrangements must be made to ensure the payment of fair value for any requisitioned goods.[68] For the purpose of ensuring compliance with these principles, the Protecting Power must be given the opportunity to verify the state of food and medical supplies in occupied territories.[69] Exceptions to this right of supervision are recognised only for temporary duration and by "imperative military requirements".[70] The exceptions to the requirement of verification are very narrowly defined to prevent any risk that they may become of habitual or permanent nature.[71]

6.2. *Diversion of Relief Consignments?*

According to Article 60 GCIV, relief consignments are not to relieve the occupying powers of their responsibilities relating to food and medical supplies, public health measures, and to relief schemes for population in an occupied territory.[72] As a general rule, the occupying powers must not divert relief consignments from their intended purpose,[73] and the possibility of requisitioning relief supplies is excluded. It constitutes an exception to Article 55(2) GCIV, which recognises the requisitioning of food and medical equipment and supplies in occupied territory.[74] Nevertheless, the diversion of consignments is allowed in exceptional circumstances.[75] However, the occupying power must satisfy three cumulative conditions: (i) existence of urgent necessity; (ii) conformity to the interests of the population of the occupied territory; and (iii) consent of the Protecting Power.[76] The supervisory role of the Protecting Power is instrumental in ensuring that the exceptional measure of diversion is not taken to benefit occupying troops or personnel, or the civilian population of the occupying power.[77]

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[68] GCIV, Article 55(2).

[69] Protecting Power may effectively lend their good offices for the importing of food and medicaments: *ICRC's Commentary to GCIV*, at 312.

[70] GCIV, Article 55(3).

[71] *ICRC's Commentary to GCIV*, at 312.

[72] GCIV, Article 60. Their responsibilities for food and medical supplies are stipulated in GCIV, Articles 55, 56 and 59. Article 60 is purported to emphasise that relief consignments do not represent the normal source of supply but only something extra for civilian population in great distress: *ICRC's Commentary to GCIV*, at 323.

[73] GCIV, Article 60.

[74] *ICRC's Commentary to GCIV*, at 323–324.

[75] The *ICRC's Commentary* refers, as examples, to the case of epidemics, and to the case of "insuperable" transport difficulties, which prevented relief consignments from being sent to the intended area: *ICRC's Commentary to GCIV*, at 324.

[76] GCIV, Article 60, second sentence.

[77] *ICRC's Commentary to GCIV*, at 324.

6.3. *Requisition of Civilian Hospitals*

As a general rule, it is prohibited to requisition civilian hospitals in an occupied territory. Exceptions to this rule are allowed only subject to stringent conditions. First, such requisition must be of temporary duration. Second, there must exist "urgent necessity" for the care of military wounded and sick. Third, states parties must ensure that "suitable arrangements" for hospital accommodation must be made in due time to provide care and treatment of the patients, and to meet needs of the civilian population.[78] Further, the material and stores of civilian hospitals must not be requisitioned insofar as they are essential for needs of civilian population in occupied territories.[79]

Article 14(2) API specifically forbids the requisitioning of civilian medical units, their equipment, their *matériel*, and service of their personnel.[80] This prohibition must be sustained so long as these resources are "necessary" for providing adequate medical services for the civilian population and for continuing medical care of any wounded and sick already under treatment.[81] The concept of necessity, which may take a varying standard, needs to be assessed in a specific context.[82] The *ICRC's Customary IHL Study* is silent on the customary law status of this rule.[83]

6.4. *Requisition of Shelters*

The exceptional possibility of requisitioning does not, however, apply to shelters, which are either provided for the use of the civilian population or needed by such population.[84] At the Diplomatic Conference of Geneva in 1976,[85] the

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[78] GCIV, Article 57(1).

[79] GCIV, Article 57(2).

[80] Note that the prohibition on requisitioning services of the personnel of medical units is already covered by Article 15 API: *ICRC's Commentary to API*, at 184, para. 587.

[81] API, Article 14(2).

[82] The *ICRC's Commentary to API* explains:

> Any requisition which manifestly jeopardizes, in a medical context, any of the purposes for which the resources are intended, is prohibited. For examples, it would not be permissible to requisition the only surgeon of a hospital containing a large number of wounded. On the other hand, a certain degree of flexibility is possible, depending on the circumstances, with regard to resources which are useful without being indispensable (for example, it might be possible to make a slight reduction in the number of orderlies if the hospital had a very large staff).

ICRC's Commentary to API, at 184, para. 591.

[83] It only refers to attacks directed against medical objects displaying the distinctive emblems of the GCs as a customary rule: Henckaerts and Doswald-Beck, *supra* n. 6, Vol. I, at 102, Rule 30.

[84] API, Article 63(6).

[85] *O.R.* Vol. XII, at 123, CDDH/II/SR. 65, para. 34 (statement of Mr. Martin, a Swiss delegate, 65th Meeting of Committee II, 7 May 1976).

proposal was accepted to extend the prohibition on requisitioning shelters to cover all types, including private shelters in the interests of civilian population in an occupied territory.[86]

6.5. *The Prohibition on Requisitioning, or Diverging from Their Proper Use, Building or* Matériel *Belonging to, or Used by, Civil Defence Organisations*

With respect to buildings or *matériel*[87] belonging to or used by civil defence organisations,[88] Article 63(4) API forbids either the requisitioning of such resources, or their diversion from their proper use, if such requisition or diversion would be harmful to the civilian population.[89] The *ICRC's Commentary on API* suggests a stringent obligation imposed on the occupying power with respect to the assessment of the "harm" test. Detrimental effects of requisition must be evaluated not only at the time when objects are requisitioned, but also throughout the duration of such requisition.[90]

Nevertheless, Article 63(5) API recognises exceptions to this general rule. Buildings or *matériel* belonging to, or used by, civil defence organisations may be requisitioned or diverged, if such resources are necessary for "other needs" of the civilian population. The requisition or diversion may be made only while such necessity continues to exist.[91] Reference to "other needs" of civilians suggests that such resources, if requisitioned or diverged, must at first be evaluated in the light of needs of civilians. This precludes the occupying power automatically allocating such resources to its own needs.[92] As Bothe, Parsch and Solf note,[93] the constraint on the power of the occupant to requisition civil defence buildings or *matériel* is very stringent. Comparison can be made with the broader capacity of the occupant to requisition medical units and their equipments, which can be recognised even for the needs of occupying armies. Further, stringent

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[86] *ICRC's Commentary to API*, at 757–758, para. 2536.

[87] The term "matériel" of civil defence organisations is defined as encompassing "equipment, supplies and transports used by these organisations for the performance of the tasks": API, Article 61(d).

[88] The term "civil defence" denotes "the performance of…humanitarian tasks intended to protect civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival": API, Article 61(a).

[89] API, Article 63(4).

[90] *ICRC's Commentary to API*, at 756, para. 2530.

[91] API, Article 63(5). Two more stringent conditions (urgent need for requisition and its temporary character), which were proposed in the 1972 draft text were not adopted in the end: *ICRC's Commentary to API*, at 757, para. 2533; and *O.R.* Vol. XII, at 123, CDDH/II/SR.65, para. 35 (statement of Swiss delegate, Mr. Martin, 65th Meeting of Committee II, 7 May 1976).

[92] See also *ICRC's Commentary to API*, at 756, para. 2531.

[93] Bothe *et al., supra* n. 46, at 406.

interpretation of the second condition excludes the possibility of reassigning the resources, which were initially requisitioned in the interests of the civilian population, for other purposes at a later time.[94]

If relief materials or the immovable property of relief organisations are requisitioned on excessive scale, this, akin to any other requisitions on such a proportion, may be described as a form of the extensive appropriation of property.[95] If this is not justified by military necessity and carried out unlawfully and wantonly, it clearly amounts to a grave breach of GCIV[96] and a war crime under the ICC Statute.[97]

7. *Rationales for Applying International Human Rights Law of Economic, Social and Cultural Nature in Occupied Territories*

Having analysed the treaty-based IHL rules that provide basis for economic, social and cultural rights (ESC rights) in occupied territory, this section focuses on the appraisal of rationales for applying the ICESCR and other ESC-related treaties in occupied territories. At first glance, for protected persons in occupied territory, IHL seems to proffer a more detailed set of ESC rights than human rights treaties may offer. However, deploying concepts and standards of international human rights law of ESC nature is of crucial significance during armed conflict (and *ipso facto*, in an occupied territory). This methodology can be defended on the basis of three rationales.

First, many (if not most) IHL treaty provisions (especially, GCIV) focus only on the ways to achieve operational effectiveness of the work relating to food, public health, and medical and humanitarian relief supplies.[98] The FAO's *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* furnish a prototype that reaffirms the special significance of GCIV and API with respect to food safety in occupied

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[94] *ICRC's Commentary to API*, at 756, para. 2531.

[95] *ICRC's Commentary to GCIV*, at 312.

[96] GCIV, Article 147.

[97] ICC Statute, Article 8(2)(a)(iv). The war crimes of extensive appropriation of property has been discussed above in relation to treatment of property in occupied territory. It suffices to mention that in the post-WWII war crimes trials, the terms "plunder", "spoliation" and "exploitation" were synonymously used with the term "appropriation": Dörmann (2003), *supra* n. 31, at 92. *Krauch and Others* (*I.G. Farben Trial*), US Military Tribunal at Nuremberg, 29 July 1948, (1948) 15 AD 668, at 673.

[98] See also N. Lubell, "Challenges in Applying Human Rights Law to Armed Conflict", (2005) 87 *IRRC* 737, at 751.

territories.[99] Second, as suggested by some commentators,[100] the three monitoring bodies (the Committee of Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women, and the Committee on the Rights of the Child) have furnished intricate details of the contents of ESC rights in state reports and their general comments.[101] These reports and general comments offer essential guidelines for elaborate details of ESC rights in an occupied territory, which go beyond the IHL treaty provisions.[102] This is the case, despite the fact that much of those detailed guidelines remains *lex ferenda*, and that the normative status and significance of these documents are disputed. Third, in relation to the three-tiered approach proposed by the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*,[103] it can be argued that while IHL rules deal with "respect" and "protect" aspects of rights, the "fulfil" aspect is not articulated.[104] For instance, there lack clear rules on the extent to which elaborate health measures need to be adopted in an occupied territory,[105] especially where the occupation is likely to be prolonged. Indeed, some human rights treaty provisions guarantee rights not included under IHL, such as the right to social security and the right to maternity leave with pay. Again *de lege ferenda*, these rights may become of pertinence in case of prolonged occupation.[106]

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[99] In this regard, see, for instance, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, adopted by the 127th Session of the FAO Council, November 2004; and Annex 1 to FAO, Report of the 30th Session of the Committee on World Food Security (CFS), Rome 20–23 September 2004, Guideline 16.2 and 16.3 (reaffirmation of the application of the relevant provisions of GCIV and API in the context of occupation).

[100] M. Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", (2005) 16 *EJIL* 661, at 676; and Lubell, *supra* n. 98.

[101] See, for instance, Committee on Economic, Social and Cultural Rights, General Comment 14, The Right to the Highest Attainable Standard of Health, 11 August 2000, UN Doc. E/C.12/2000/4 (2000).

[102] Lubell, *supra* n. 98, at 751.

[103] *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, 22–26 January 1997, para. 6.

[104] Lubell, *supra* n. 98, at 752–753. As he notes, while the right of aliens in the territory of a party to the conflict to claim the same standard of health care as afforded to the state's own nationals is safeguarded under Article 48, GCIV does not include an equivalent right for protected persons in occupied territory, save for Article 56 covering health measures: *ibid*.

[105] *Ibid*.

[106] For the thesis that a "stalemated situation" of occupation, or a prolonged period of occupation, reinforces the application of human rights standards, see E. Cohen, *Human Rights in the Israeli-Occupied Territories 1967–1982*, at 29 (1985) (proposing the application of economic, social and cultural rights in the occupied territories, *ibid*., at 224–250); and A. Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories 1967–1988", (1990) 84 *AJIL* 44, at 71.

8. *Derogation from Economic, Social and Cultural Rights*

The applicability of treaty-based rules of ESC nature in occupied territories is closely intertwined with the question whether or not the rights guaranteed under the ICESCR are derogable in extraordinary circumstances such as the situation of occupation. This question is compounded by the non-existence of a general derogation clause under the ICESCR, such as the provision that corresponds to Article 4 of the ICCPR.

There has been controversy over whether the absence of a derogation clause under ICESCR can be understood as excluding any possibility of suspending economic, social and cultural rights in time of national emergency. At first glance, Article 4 of ICESCR corresponds to the general derogation clause under Article 4 of ICCPR. Nevertheless, the former is designed as a general *limitation* clause on the basis of the tripartite criteria. Namely, any restrictions must be (i) determined by law; (ii) compatible with the nature of the rights recognised in ICESCR; and (iii) pursuant to the purpose of promoting the general welfare in a democratic society. It may be argued that the lack of the derogation clause under ICESCR suggests continuing applicability of the ESC rights in time of war and occupation, which can be subject only to the general limitation clause under Article 4 ICESCR. Derogation is considered intrinsically different from limitations in terms of their scope of application *ratione materiae, ratione personae, ratione loci* and *ratione temporis*. While limitations generally indicate measures of one-off restrictions, derogation means measures of total suspension or exclusion of the operation of certain rights.[107]

The *travaux préparatoires* are not clear as to why the ICESCR lacks the general derogation clause. The draft Article 32 (the current, general limitation clause under Article 4 ICESCR) was examined at the seventh session of the Commission on Human Rights in 1952, but it attracted little discussion among the delegates.[108] Indeed, it seemed that the decision not to include the derogation clause in the ICESCR draft text was never questioned. Instead, the focus of the debates was placed on whether it was appropriate to insert a *general* clause

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[107] Lubell emphatically argues that "some creative interpretation is required in order to view this article [Article 4 of the ICESCR] as allowing for restrictions during armed conflict (though this would still not be equal to the formal procedure of derogation as it appears in the Covenant on Civil and Political rights)": *ibid.*, 752.

[108] *UN, Commission on Human Rights, Report of the Eighth Session (14 April to 14 June 1952), ECOSOC, Final Records: Fourteenth Session, Supplement No. 4*, E/2256, at 24–25, paras. 155–160. See also the proposal of Lebanon (Article 4(2)(b)): UN ECOSOC, Commission on Human Rights, 7th Session, Working Group on Economic, Social and Cultural Rights, Compilation of Proposals relating to Economic, Social and Cultural Rights, E/CN.4/AC.14/2/Add.5, 28 April 1951.

of limitation rather than limitation clauses for specific rights.[109] At the 308th meeting (8th session) of the Commission on Human Rights (1952), the Commission, at the request of the USSR representative, cast a vote as to the suitability of including a general limitations clause. By a very close, roll-call vote (9 to 8, with 1 abstention), the Commission decided to insert such a general limitations clause.[110] At the same meeting, draft Article 32 (current Article 4) as a whole was adopted in a roll-call vote by 10 votes to 6, with 2 abstentions.[111]

According to Craven, the drafters considered that the general implementation clause under Article 2(1) based on the notion of progressive realisation was sufficiently flexible to dispense with the need to insert a derogative clause.[112] Still, some provisions of the ICESCR, such as Article 8 concerning the right to form and join trade unions, need to be implemented in an immediate manner.[113] Green argues that the lack of a derogation clause may be explained simply on the basis that states are far more likely to invoke such a clause in time of emergency in the area of political and civilian rights than they are in that of economic, social and cultural rights.[114] Kiss, when comparing Article 4 ICESCR and the derogation clause under Article 4 ICCPR, comments that a general limitation clause was suitable for economic, social and cultural rights, which are difficult to define with precision.[115] Higgins notes that the absence of a derogation clause under the ICESCR confirms the understanding that such a clause is needed only where there are strong implementation provisions.[116]

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[109] *UN, Commission on Human Rights, Report of the Eighth Session (14 April to 14 June 1952), ECOSOC, Final Records: Fourteenth Session, Supplement No. 4*, E/2256, at 24–25, paras. 155–160.

[110] *Ibid*., at 24, para. 159. The countries that voted in favour are: Australia, Belgium, China, France, Greece, India, Sweden, United Kingdom, United States of America; *Contra*: Chile, Egypt, Lebanon, Pakistan, Poland, Ukrainian Soviet Socialist Republic, USSR, and Yugoslavia; abstention: Uruguay.

[111] *Ibid*., at 25, para. 160 (with Australia, Belgium, China, France, Greece, India, Sweden, UK, US and Uruguay, which voted in favour, pitted against Chile, Lebanon, Poland, Ukrainian SSR, USSR, and Yugoslavia; Egypt and Pakistan abstaining).

[112] M. Craven, *The International Covenant on Economic, Social and Cultural Rights*, (1995), at 27. Yet, he recognises that the absence of a derogation clause can result in inconsistencies. He refers to an example of a state, which may lawfully derogate from its obligation to ensure the right to join and form trade unions under Article 22 ICCPR on the basis of Article 4 ICCPR, but may be prevented from doing so under the ICESCR: *ibid*.

[113] *Ibid*., at 284.

[114] L.C. Green, "Derogation of Human Rights in Emergency Situations", (1978) 16 *Can. YbkIL* 92, at 103.

[115] A.C. Kiss, "Permissible Limitations on Rights", in: L. Henkin (ed), *The International Bill of Rights – The Covenant on Civil and Political Rights*, (1981), 290–310, at 291. He nevertheless recognises that the right to form or join trade unions and the right of trade unions to function freely, both of which are guaranteed under Article 8, constitute exceptions: *ibid*.

[116] R. Higgins, "Derogations under Human Rights Treaties", (1976–77) 48 *BYIL* 281, at 286.

The general limitation clause under Article 4 of the ICESCR can be construed as one of the general principles governing the entire corpus of the ESC rights guaranteed in this treaty.[117] In non-emergency circumstances, the rights under ICESCR are susceptible of a wide range of restrictions.[118] These may suggest that Article 4 of the ICESCR *ipso facto* covers the possibility of suspending rights in emergency circumstances.[119] The Committee on ESCR has observed in its general comments that states parties must undertake a "core obligation to ensure the satisfaction of, at the very least, minimum essential levels" of the rights to food, water, housing, and health. It has added that the core obligations of these rights are "non-derogable".[120] It can be inferred from this that the states parties are allowed to derogate from non-core obligations in time of emergencies.[121]

The ICJ has confirmed the continued applicability of ESC rights during armed conflict and occupation.[122] Nevertheless, as compared with civil and political rights, no detailed examinations are provided by the ICJ as regards the extent to which economic, social and cultural rights can be considered applicable during armed conflict.

9. *Conclusion*

The foregoing examinations demonstrate that while IHL treaty-based rules furnish elaborate details in the sphere of ESC rights, many of these rules cater specifically to needs of humanitarian relief and other operational activities. On the other hand, the catalogue of ESC rights embodied in human rights treaties can acquire greater importance, especially in the case of protracted occupation. Given their detailed substance clarified in documents of monitoring bodies, those ESC rights are better equipped than IHL-based rules to deal with individual persons' concerns of diverse and complex nature.

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[117] P. Alston and G. Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights", (1987) 9 *HRQ* 156, at 193 (discussing that as compared with limitation clauses attached to specific human rights provisions, Article 4 is a clause of general applicability to all the rights in Part III of ICESCR).

[118] Green, *supra* n. 114, at 103.

[119] See, for instance, M. Dennis, "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", (2005) 99 *AJIL* 119, at 140.

[120] Committee on ESCR, General Comment No. 15, UN Doc. E/C.12/2002/11, paras. 37 and 40; and General Comment No. 14, 11 August 2000, UN Doc. E/C.12/2000/4, paras. 43 and 47.

[121] Dennis, *supra* n. 119, at 140.

[122] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 136, at 180, para. 112. See also the *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel*, 31/08/2001, E/C.12/1/Add.69, paras. 15 and 31.

Once ESC rights are understood as applicable in occupied territory, then the next question would be their justiciability and susceptibility to individual communications. At this moment, the so-called "violations approach" in the universal context of ESC rights is limited only to the mechanism set up under the Optional Protocol to the Women's Rights Convention.[123] Yet, it is not excluded that in the future, an individual complaint system may be established under the ICESCR.[124] The individual communications would provide the most meaningful venue for individual persons who are handicapped by the enduring inefficacy of the administrative or judicial practice of an occupation power.

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[123] The 1999 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Article 2. Under this provision, complaints can be lodged not only by individual victims, but also by individuals or groups of individuals acting on their behalf. If such *actio popularis* is relied on, the latter must obtain consent from the former, save in exceptional circumstances.

[124] Note that justiciability of economic, social and cultural rights has been under constant debates: *The Limburg Principles on the Implementation of the ICESCR*, UN Doc. E/CN.4/1987/17, Annex; and (1987) 9 *HRQ* 122; ECOSOC, Commission on Human Rights, *Economic, Social and Cultural Rights, Status of the International Covenants on Human Rights, Report of the Independent Expert on the Question of a Draft Protocol to the International Covenant on Economic, Social and Cultural Rights*, E/CN.4/2002/57, 12 February 2002. For analysis, see: E. Robertson, "Measuring State Compliance with the Obligations to Devote the 'Maximum Available Resources' to Realize Economic, Social, and Cultural Rights", (1994) 16 *HRQ* 693; A.R. Chapman, 'A "Violation Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights", (1996) 18 *HRQ* 23; and M.J. Dennis and D.P. Stewart, "Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?", (2004) 98 *AJIL* 462.

Chapter 15

IHL-Based Rights of Women and Children in Occupied Territories

1. *Introduction*

It ought to be noted at the outset that the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the UN Convention on the Rights of the Child are considered continuously applicable in occupied territories. The absence of derogation clauses under these human rights treaties corroborates this assumption. Thorough appraisal of the rights of women and children, which are derived from these treaties and corresponding customary international human rights law, goes beyond the parameters of this monograph. Instead, this chapter focuses on the rights of women and children in occupied territories, which are specifically derived from IHL treaty-based rules. The bulk of their rights relate to economic, social and cultural rights (ESC rights) and hence entail specific positive duties incumbent on occupying powers. While some of their rights deal with conduct of hostilities, they remain of marked significance in occupied territories.

2. *IHL Treaty-Based Rights of Women in Occupied Territory*

2.1. *Overview*

The first section briefly appraises the rights of women under IHL, which have evolved from a paternalistic concept of family honour to rights based on the individual dignity of women. It starts with a preliminary discussion on the current gendered rubrics of IHL to highlight the inadequacy of the existing legal framework to meet the special needs of women in occupied territories.

Historically, the contexts of armed conflict and occupation have provided ample evidence of women's victimisation. Their rights and interests remained fragile and invisible from the very limited scope of protection under traditional

international humanitarian law.[1] Against the sombre background of the history of armed conflict, riddled with mass rapes, sex slavery, forced prostitution or other sexual violence against women, the evolution of international human rights concepts since 1945 and the growing consciousness of women's rights since 1960s have helped shed greater light on the gender dimension of armed conflict and occupation.

2.2. *General Safeguards of the Rights of Women under IHL*

Article 46 of the Hague Regulations requires the occupying power to respect "family honour and rights". This clause has been criticised for surrendering women's rights of protection against sexual violence during armed conflict to the paternalistic concept of "family honour".[2] This term has an implied assumption of modesty and chastity imposed only on women, but not on men.

One of the three core principles embodied in Article 27 GCIV is that women must be protected against "any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault". This is the reaffirmation of the obvious, namely the duty to protect women from attacks against their physical and mental dignity. The rights of women embodied under Article 27 GCIV are fully recognised as having acquired customary and non-derogable nature. It is safe to argue that the corresponding customary rules are applicable to any situations affected by hostilities, (in international or non-international armed conflict, or in occupied territory or in a combat zone).

During the Holocaust and the Second World War, gender violence was numerous, rampant and systematised, as this was carried out pursuant to, or in close

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[1] For a general assessment of sexual offences in armed conflict, see K.D. Askin, *War Crimes against Women – Prosecution in International War Crimes Tribunal*, (1997); J.G. Gardam and M.J. Jarvis, *Women, Armed Conflict and International Law*, (2001); N.N.R. Quénivet, *Sexual Offenses in Armed Conflict and International Law*, (2005). No doubt, modern armed conflicts have intensified the vulnerability of women as direct and most vulnerable victims: Askin, *ibid*., at 251. This can be borne out by the greater share of civilian casualties in armed conflicts. The proportion of civilians killed during war were estimated at 5 percent during World War I, 50 percent during World War II, 60 percent in the Korean War, and 70 percent during the Vietnam War: A. Cassese, "A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict", in: A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict* (1979), 461–501, at 478, citing the figures from the statement made by the Swedish representative on 7 March 1974 in the general debate of the Diplomatic Conference.

[2] See, for instance, Gardam and Jarvis, *ibid*., at 97 and Chapter 3. Even the *ICRC's Commentary* is no exception to this conceptual framework. With respect to the words "women shall be treated with all consideration due to their sex" under Article 12 of the First Geneva Convention, the *Commentary* notes that the "special consideration" that must be given to women refers to "the consideration which is accorded in every civilized country to beings who are weaker than oneself and whose honour and modesty call for respect": *ICRC's Commentary to GCI*, at 140.

connection to, Nazi's ideological basis. Surprisingly, however, these issues did not even appear in the draft records of the Diplomatic Conference of Geneva in 1949.[3] The "time-honoured" reference to sexual violence couched in terms of the "honour" of women is reinstated in Article 27 GCIV. It is not until the adoption of API in 1977, when the conceptual misunderstanding of the foundational basis of the rights of women is partially remedied. Article 76(1) API provides that women who have fallen into the hands of states parties, whether in occupied territories or *anywhere* during international armed conflict, must be protected against rape, forced prostitution and any other form of indecent assault.[4]

Unlike the rights of children, which are elaborated under Part III Section III in relation to an occupied territory, the rights of women are not given detailed elaborations under Section III, which includes only a limited set of guarantees for women in detention and internment.[5] In an occupied territory, there is ample evidence for the increase in the forms of violence against women, such as sex slavery, forced prostitution, trafficking in women and sexual assault or indecent attack against women. The Committee for the Elimination of Discrimination against Women calls for "specific protective and punitive measures" to tackle such violence against women during wars, armed conflicts *and the occupation of territories*.[6]

2.3. *The Rights of Women Derived from the Obligations to Respect and Protect*

Apart from Article 27 GCIV, note should be taken of the time-honoured "obligations to respect and protect" embodied under certain provisions under Part II of GCIV, which offer guarantees for special categories of women. These provisions primarily deal with conduct of hostilities. They are nonetheless of special importance to women in occupied territories. These provisions have an advantage of broader personal scope of application than the rules laid down in Part III. The beneficiaries of the provisions under Part II are not confined to women described as "protected persons" within the meaning of Article 4 GCIV but extended to cover all women, including female unprivileged belligerents.

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[3] Reference to violence against women was very limited. For the discussions concerning thousands of women compelled to serve at brothels and contaminated with venereal diseases, see *Commission of Government Experts for the Study of the Convention for the Protection of War Victims (Geneva, April 14–26, 1947). Preliminary Documents*, Vol. III, at 47; as cited in *ICRC's Commentary on GCIV*, at 205.

[4] API, Article 76(1).

[5] GCIV, Articles 76(4), 85(4), 97(4), and 124(3).

[6] The Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence against Women, (Eleventh session, 1992), U.N. Doc. A/47/38, at 1 (1993), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6, at 243 (2003), emphasis added.

The state parties to GCIV, including those which have become occupying powers, must respect and protect personnel at civilian hospitals, especially those persons searching, removing, transporting and caring for women in maternity cases.[7] They must also respect and protect convoys of vehicles or hospital trains on land (or specially provided vessels on sea), which convey women in maternity cases.[8] A similar duty applies to an aircraft "exclusively" employed for the removal of maternity cases, together with the wounded, and sick civilians, and the infirm.[9] The duty of all state parties to GCIV to recognise the free passage of relief consignments, as provided in Article 59(3) and (4), is reinforced by Article 23 GCIV, which applies to any area affected by international armed conflict. The latter provision requires state parties to GCIV to grant free passage of essential foodstuffs, clothing and tonics destined for expectant mothers and maternity cases (and children under fifteen).[10]

2.4. *The Right of Women Deprived of Liberty to be Held in Quarters Separate from Men*

Both Article 76(4) and 124(3) GCIV recognise the right of women deprived of their liberty in occupied territory to be held in quarters separate from those of men. Similarly, Article 75(5) API recognises this right and the right to be supervised by women. Exceptions to these rights can be recognised when families are accommodated together as units. Just as the rights derived from the provisions on conduct of hostilities laid down in Part II of GCIV, this provision is applicable to any female detainees, including unprivileged belligerents. The *ICRC's Customary IHL Study* characterises this right as part of customary IHL.[11]

Women and mothers having dependent infants may be arrested, detained or interned in occupied territory for reasons relating to armed conflict, whether for purely security reasons without any criminal charge, or for their offences against penal/security laws enacted by the occupying power, or for their war crimes. In

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[7] GCIV, Article 20(1).

[8] GCIV, Article 21.

[9] GCIV, Article 22.

[10] GCIV, Article 23(1). A state party can nonetheless subject the free passage to the condition that it finds "no serious reasons" for fearing: (i) the diversion of consignments; (ii) ineffectiveness of the control; or (iii) the possibility of giving "a definite military advantage" to the military efforts or economy of the adversary through the substitution of the consignments for goods that would otherwise be provided or produced by the adversary, or through the release of such material, services or facilities as would otherwise be required for the production of such goods: GCIV, Article 23(2).

[11] The *Study* refers to the *Sweden's IHL Manual*, which describes this rule as part of customary IHL: J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (2005), at 432.

such cases, Article 76(2) API recognises that those women and mothers having dependent infants must be given the right to have their cases reviewed "with the utmost priority".[12] As recognised by the *travaux préparatoires*,[13] the notion of dependent infants needs to be examined in the light of different cultural backgrounds. The occupying power or any detaining power must ensure, "[t]o the maximum extent feasible", that capital punishment will not be inflicted on pregnant women and mothers having dependent infants.[14]

2.5. *The Responsibility of the Japanese Imperial Army for Sex Slavery (so-called "Comfort Women") before and during World War II*

Before and during World War II, the Japanese Imperial Army systematically organised notorious "comfort stations" and forced at least thousands (or possibly tens of thousands) of young women (some only in their early teens) to serve sex to soldiers,[15] including those in a dangerous front. The victims of this heinous sex slavery system were forcibly taken away, or deceived and coercively recruited, directly at the hand of the Japanese Imperial Army, or by middlemen that collaborated with the Imperial Army, and transported to dangerous combat zones while their dignity was denied.[16] These women were drawn mostly from the then Japanese colonies (Korea and Taiwan) but also from occupied territories (China,

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[12] API, Article 76(2).

[13] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*, Vol. XV, at 464, CDDH/407/Rev. 1, para. 56 (concerning draft Article 67).

[14] API, Article 76(3).

[15] See K. Iida, "Human Rights and Sexual Abuse: The Impact of International Human Rights Law on Japan", (2004) 26 *HRQ* 428, at 442–452; and Y. Yoshimi, *Comfort Women – Sexual Slavery in the Japanese Military During World War II*, (2000). See also R. Coomaraswamy, "Sexual Violence during Wartime", in: H. Durham and T. Gurd (eds), *Listening to the Silences: Women and War*, (2005) 53, at 56; J.S. Goldstein, *War and Gender – How Gender Shapes the War System and Vice Versa* (2001), 345–346; G. Hicks, *The Comfort Women: Japan's Brutal Regime of Enforced Prostitution in the Second World War* (1995); and J. Ruff-O'Herne, "Fifty Years of Silence: Cry of the Raped", in: Durham and T. Gurd (eds), *ibid.*, at 3–8.

[16] In early 2007, Shinzo Abe, the short-lived, right-wing Prime Minister of Japan, made a highly spurious and morally indefensible suggestion. He stated that a distinction should be drawn between the concept of forcibleness or coercion in the narrow sense and that in the broad sense. He argues that while the former relates to the taking away of women from their homes, the latter concept concerns the circumstances in which women "were placed in such a circumstance as to provide sex with soldiers though they were unwilling to do so". Highly controversially, he added that up to then no "official" document has been demonstrated to reveal the former case. This comment patently contradicts the testimony made by former victims of sex slavery. Further, the notion of forcibleness or coercion in his second sense in most cases falls within the notion of forcibleness as interpreted by an international human rights supervisory body. Subsequently, Abe formally apologised to the former victims of sex slavery for his statement. See "Kyouseisei' "

British colony of Malaysia, Dutch-Indonesia, US-controlled Philippines etc) in East Asia and Japan (Japan's "semi-colony" of Okinawa etc.). Further, when besieging and then occupying Nanjing in 1937, the Japanese Imperial Army raped *at least* thousands of Chinese women. Such atrocity took place in this historic city while the Army was massacring tens of thousands of civilians, prisoners of war, and unprivileged belligerents. No doubt, the surviving victims of the system of sexual slavery and the mass rape endured unspeakable suffering and horror, which impaired their physical and mental integrity, sometimes in a permanent manner. The infringement of their dignity has been aggravated by the fact that back in their traditional patriarchal Asian societies, chastity was considered a sacrosanct virtue. They have been stigmatised and often ostracised from their societies, and even from their governments whose very protection they needed.

With specific regard to the "comfort women", it is only since 1993 that the Japanese government has acknowledged its role in this abhorrent practice. Belatedly, it has made unequivocal words of apology several times. However, this needs to be qualified in two respects. First, despite the official line of apology, many leading politicians belonging to the right-wing factions of the ruling, conservative party (the Liberal Democratic Party), including the former nationalist Prime Minister Abe, have repeatedly denied the involvement of the Imperial Army for a thinly disguised motive downplaying and even whitewashing this atrocity. Indeed, they have urged private authors and publishers of the school textbooks to delete references to the issue of "comfort women" through a highly contested system of periodic inspection by the Government. Second, the Japanese government has so far failed to provide individual compensation for the surviving victims.[17] Its reasoning relating to the Korean victims was that under the Japan-Republic of Korea Agreement on the Resolution of Matters Regarding Property and Claims and Regarding Economic Cooperation (1965) all claims concerning Japan's colonial (1910–1945) and war time responsibility were settled by way of state-to-state reparations.[18] Article 2(1) of this Agreement provides that "both

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Kaishaku-no Zure Hamon", *Asahi Shimbun*, 4 March 2007, Sogo, at 2; and "Abe Shusho-no Ianfu Kanren Hatsugen – Kankoku-ga 'Tsuyoi-Ikan'", *Nikkei*, 4 March 2007, Sogo, at 2.

[17] Note, however, that the Japanese Government paid war reparations to the Asian countries that suffered from Japan's brutal aggression and occupation during World War II, and provided colonial and war-time reparations to the Government of the Republic of Korea (South Korea), which was the colony of Japan for over thirty years. With respect to China and Taiwan, while the Chinese Nationalist Government officially renounced the war time reparations from Tokyo (the position succeeded by the communist government), Japan has provided more than 25 billion dollars to China up until 2007, partly as *de facto* form of war-time reparations.

[18] The Japanese government set up the Asian Women's Fund on a public-private initiative, arguing that the relevant peace treaties settled all individual claims. This must, however, be criticised for skirting the state responsibility for individual reparations. While a few hundred women in the Netherlands and East Asian countries decided to accept it, the great majority of the surviving

Parties confirm that . . . the matters of the property, rights and interests of both Parties and of their nationals, including juridical persons, as well as the matter regarding claims between both Parties and their nationals, have been fully and finally resolved". As discussed above, along this line of reasoning, the Japanese courts, with a notable exception,[19] have all dismissed the claims for individual complaints for victims of sexual slavery.[20] Instead, the Japanese government set up the joint funds ("Asia Josei Kikin", or "Asian Women Funds") with private companies and individual donors in Japan to provide "reparations" for the former victims of sex slavery. This is akin to the German Foundation "Remembrance, Responsibility and the Future", which the German centre-left coalition government created in 2000, albeit without recognising legal responsibility.[21]

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victims from Korea, Taiwan and China refused to accept the funding, on the ground that this would amount to recognising the evasion of the responsibility of the Japanese government.

[19] Japan, Shimonoseki Branch, Yamaguchi District Court, *Korean "comfort women" v. Japan*, Judgment of 27 April 1998, (1998) 1642 *Hanrei Jiho* 24. There the Court expressly recognised that the "comfort women" system violated the 1921 International Convention for the Suppression of the Traffic in Women and Children and the 1930 Convention Concerning Forced Labour (ILO Convention No. 29) and constituted an "extremely inhuman and abominable practice". It ruled that the legislature' failure to enact appropriate laws to enable individual reparations was unlawful under the State Compensation Law. However, this was overturned by: Hiroshima High Court, *Korean "comfort women" v. Japan*, 29 March 2001, (2001) 1759 *Hanrei Jiho* 42; and (2002) 1081 *Hanrei Taimuzu* 91. See Shin Hae Bong, "Compensation for Victims of Wartime Atrocities – Recent Developments in Japan's Case Law", (2005) 3 *JICJ* 187, at 194.

[20] See, for instance, Tokyo District Court, *Philippine "comfort women" v. Japan*, 9 October 1998, (1999) 1683 *Hanrei Jiho* 57; and (2000) 1029 *Hanrei Taimuzu* 96. However, as Shin notes, while rejecting the claims for individual compensation, again, on the basis that international law did not confer upon individuals the right to claim compensation directly, the judgment of the Tokyo District Court of 24 April 2003 found the facts of the plaintiff to be undisputed while expressly recognising the violation of Article 46 of the Hague Regulations: *Chinese Victims of Sexual Violence v. Japan*, (2003) 1823 *Hanrei Jiho* (2003) 61–82; and (2003) 1127 *Hanrei Taimuzu* 281–303. See Shin, *ibid*., at 200–201.

For details on the litigations concerning victims of Japanese wartime atrocities (especially, in relation to cases of ex-Allied prisoners of war who suffered tremendous atrocities in the forced labour camps at the hands of the Japanese Imperial Army), see H. Fujita, I. Suzuki and K. Nagano (eds), *Senso to Kojin-no Kenri (War and the Rights of Individuals – Renaissance of Individual Compensation)*, (1999).

[21] Half of this fund was paid by the German companies that extensively exploited slave labour during the Second World War. Contrary to the common understanding, the German Government has failed to provide compensations for individual victims of serious violations of IHL, including war crimes and crimes against humanity, which were committed against millions of Eastern Europeans and Russians. Surely, the German Government supplied Jewish victims residing in Israel, the United States and Western Europe with compensation on the basis of treaties. Nevertheless, it has refused to recognise the legal responsibility for compensation for the victims in the Eastern front, bar the Jewish people who were victims of genocide: A. Gattini,

Clearly, the rule embodied in the Japan-Korean bilateral treaty cannot override and abrogate the rights that have always accrued to individual victims of the sex slavery system, the victims of the crimes against humanity.[22] Further, the negotiations between the Japanese Government and the Korean Government did not contain issues relating to this egregious form of gender crimes in their negotiations. The same can be said of the 1951 San Francisco Peace Treaty between the Allies and Japan, which was relevant to the Filipinos or other East Asian women, who were victims of Japan's military sexual slavery system and the citizens of the colonies of the western Allies. It is essential that rather than evading the responsibility behind the legalistic façade, the Japanese Diet must enact a specific law that enables individual compensation to be paid to all victims of crimes against humanity committed by the Japanese Imperial Army during its colonial-empire building and brutal occupation between 1931–1945. While acknowledgement of past atrocities and shortcomings is a step in the right direction,[23] this must be accompanied by concrete action. At the instigation of a Japanese NGO, Violence against Women in War Network Japan, and to its late, charismatic leader, Yayoi Matsui, the so-called Women's International War

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"War Victims and State Immunity in the *Ferrini* Decision", (2005) 3 *JICJ* 224, at 227. For assessment of the German slave labour practice see H. Herbert, *Hitler's Foreign Workers: Enforced Foreign Labor in Germany under the Third Reich*, (1997). For examinations of the civil action against the German multinational companies in US courts, see D. Vagts, "Litigating the Nazi Labor Claims: the Path Not Taken", (2002) 43 *Harvard ILJ* 503.

[22] Indeed, the liability of a state for crimes against humanity cannot be waived by the treaty concluded by another state that ought to exercise diplomatic protection on behalf of its own citizens, who were victims of the former state's crimes against humanity: Iida, *supra* n. 15, at 452. See also C.M. Chinkin, "Women's International Tribunal on Japanese Military Sexual Slavery", (2001) 95 *AJIL* 335.

An argument may be made that the continuing failure to compensate for victims of crimes against humanity constitutes a blatant contravention of *jus cogens* in the normative hierarchy of international law (even if the notion of peremptory norms has arguably evolved in the period after the Second World War). Askin argues that "sexual violence has now reached the level of a *jus cogens* norm" which mandates universal jurisdiction "even if such acts do not violate municipal law in the state in which they were committed, and even when the prosecuting state lacks a traditional nexus with the crime, offender, or victim": K. Askin, "Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles", (2003) 21 *Berkeley Journal of International Law* 288, at 293–294. *Contra*, P. Viseur Sellers, "Sexual Violence and Peremptory Norms: The Legal Value of Rape", (2002) 34 *Case Western Reserve Journal of International Law* 302, at 303 (arguing that rape has yet to achieve the status of a peremptory norm within the meaning of Article 53 of the Vienna Convention on the Law of Treaties). See also the critique of the equation between a violation of *jus cogens* and universal criminal jurisdiction or universal civil jurisdiction (to claim remedies), see Gattini, *supra* n. 21, at 236–239.

[23] Gardam and Jarvis, *supra* n. 1, at 263.

Crimes Tribunal was convened in Tokyo in 2000 to address the glaring issues of the systematic sex slavery orchestrated by the Japanese Imperial Army before and during the Second World War.[24] Apart from documentary reasons, the utilisation of this "people's tribunal" was essential for giving victims the valuable opportunity to vent their suppressed emotions and to provide detailed accounts of their personal experience so painful to share even with their families, while raising public awareness and the sense of solidarity with the victims.

2.6. *Fragility and Ineffectiveness of the Gendered Rubrics of IHL*

IHL's perceived gender-free framework has been the subject of criticism among many feminist scholars.[25] Charlesworth, Chinkin and Wright highlight that the "structure of international legal order [is] virtually impervious to the voices of women".[26] This observation is most conspicuously applicable in the context of laws of war. Gardham and Jarvis argue that "[t]o a considerable extent the image of women that we see in IHL can be traced to chivalric ideals that . . . [are] perpetuated by the stereotypes of masculinity and femininity that are integral to the culture of the military. Moreover, this construct of women contributes to the pervasive invisibility of other aspects of women's lives from the coverage of IHL".[27] Askin argues that "[t]he international provisions intended to protect

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[24] Yayoi Matsui, a former journalist of the progressive and second biggest national daily, *Asahi Shimbun*, was also the founder of the Asian Women's Association (AWA). Tragically, she died of cancer. For analysis of this NGO's people's war crimes tribunal, see Chinkin, *supra* n. 22.

[25] MacKinnon's observation is of special importance and relevance. She argues that:

> Courts intervene only in properly "factualized" disputes . . . cognizing social conflicts as if collecting empirical data; right conduct becomes rule-following. . . . But these demarcations between morals and politics, science and politics, the personality of the judge and the judicial role, bare coercion and the rule of law, tend to merge in women's experience. . . . Relatively seamlessly they promoted the dominance of men as a social group through privileging the form of power – the perspective on social life – which feminist consciousness reveals as socially male. The separation of form from substance, process from policy, adjudication from legislation, judicial role from theory or practice, echoes and reechoes at each level of the [legal] regime its basic norm: objectivity.

C. MacKinnon, *Towards a Feminist Theory of the State* (1989), 162. See also A.C. Scales, "The Emergence of Feminist Jurisprudence: An Essay", (1986) 95 *Yale LJ* 1373.

[26] H. Charlesworth, C. Chinkin and S. Wright, "Feminist Approaches to International Law", (1991) 85 *AJIL* 613, at 621. Note that with respect to women in the "Third World", they argue that while feminist movements in the Third World are faced with the problems of loyalty and priorities in view of their anti-colonial struggle combined with severe political repression against feminist causes in their traditional societies, "[i]ssues raised by Third World feminists . . . require a reorientation of feminism to deal with the problems of the most oppressed women, rather than those of the most privileged": *ibid*.

[27] Gardam and Jarvis, *supra* n. 1, at 95. In another context, Gardham succinctly reiterates this contention, arguing that:

women during wartime have uniformly been equivocal, restrained, and devoid of any reference to the possible sexual nature of the crime, ultimately providing neither protection nor redress".[28] Indeed, even with respect to the Geneva Conventions, which were drafted at the Diplomatic Conference of 1949 in the shadow of the massive civilian (mostly women) casualties during the Holocaust and World War II, very few women and indeed a very small number of non-western states were represented. While "racial", ethnic or inter-civilisational elements of under-representation were greatly improved at the Geneva Diplomatic Conference of 1973–1977, the issue of "gender invisibility" hardly progressed. Regrettably, up until the late twentieth century, issues of a gendered dimension, except for a limited number of cases relating to rape, hardly played more than a secondary role in the process of drafting, interpreting or applying international humanitarian law treaties.[29]

3. *Rights of Children in Occupied Territory*

3.1. *Overview*

Just as in relation to IHL-based rights of women in occupied territories, not all the rights of children that are derived from IHL are related to economic, social and cultural rights. Even so, their rights are inseparable from specific positive duties that are incumbent on occupying powers.

Controversy surrounding the age of maturity among nationals has resulted in the absence of stipulations on the age limit of children under IHL. Article 77(2) API sets the age of fifteen as the absolute minimum while Article 1 of

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> Humanitarian law, in common with all law, is gendered. Its rules purport to be neutral, abstract, objective and value free. But is this the reality? Much of the feminist project in law has been to demonstrate the fallacy of the objectivity of the law, to reveal its underlying assumptions and value judgments as made by, and in the interests of, men.

J.G. Gardham, "A Feminist Analysis of Certain Aspects of International Humanitarian Law", (1992) 12 *Austl.YbkIL* 265, at 267–268.

[28] See Askin (1997), *supra* n. 1, at 17.

[29] For a critique of the sheer absence of gender perspectives in the decision-making process of international humanitarian law, see, *inter alia*, H. Charlesworth and C. Chinkin, *Boundaries of International Law – a Feminist Analysis* (2000), at 250–257; and Quénivet, *supra* n. 1, in particular, at 11–18. In a modern Asian context, there are two glaring examples: (i) the absence, at the International Military Tribunal for the Far East (Tokyo Tribunal), of prosecution against responsible authorities of the Japanese Imperial Army, who organised sexual enslavement of thousands of East Asian women during World War II; and (ii) the failure by the Bangladesh Government to demand apology and compensation for approximately 200,000 Bengali women who were raped at the hands of the Pakistani Army during the War of Independence of Bangladesh in 1971.

the Convention on the Rights of the Child pushes the threshold up to eighteen years old, "unless under the law applicable to the child, majority is attained earlier".

In view of their most vulnerable status in time of occupation, rights of children[30] are given special elaborations under IHL. Under the GCIV, the occupying power must ensure that the institutions entrusted with the care and education of children are properly functioning.[31] It must facilitate the identification of children, with the registration of their parentage, whilst it is prohibited to change their personal status.[32] An official Information Bureau.[33] must take "all necessary steps" to identify children and to record particulars of their parents or other near relatives.[34]

In view of the experience of Nazi occupation practice, occupying powers are strictly prohibited from enlisting children in formations or organisations subordinate to them.[35] This rule reinforces the protection of child civilians in occupied territory, who must be safeguarded against compulsory enlistment.[36]

3.2. *Children's Right to Education in Occupied Territory*

Occupying powers must make necessary arrangements for the maintenance and education of children, who are orphaned or separated from their parents as a consequence of war. Their education should be facilitated through persons of their own nationality, language and religion.[37] They must not block the application of the preferential treatment for children under fifteen years (and for pregnant women, and mothers of children under seven years), which may have been in operation before the commencement of the occupation.[38] Although this proviso is formulated in a negative fashion ("The Occupying Power shall not hinder the application of any preferential treatment…"), it must be interpreted as requiring the occupying powers to take such positive measures whenever its resources and security allow. On the other hand, as Greenspan notes,[39] the occupying powers

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[30] For this matter, see J. Kuper, *International Law concerning Child Civilians in Armed Conflict*, (1997).

[31] GCIV, Article 50(1).

[32] GCIV, Article 50(2).

[33] This is set up under Article 136 of GCIV.

[34] GCIV, Article 50(4).

[35] GCIV, Article 50(2), second sentence.

[36] GCIV, Article 51(2).

[37] GCIV, Article 50(3).

[38] GCIV, Article 50(5).

[39] Greenspan observes that:

> In these days of ideological warfare, the supervision of education is an important function of the occupant. (…) Totalitarian states have used schools extensively to spread their

may supervise teachers and inspect textbooks to prevent political incitement or distribution of hostile materials. Such supervision or inspection is needed to eradicate brainwashing of children through fanatic ideologies such as Nazism, fascism and militarism. However, to what extent, such supervision or inspection is allowed in relation to genuinely patriotic zeal expressed by teachers and teaching materials may be controversial.

Sight must not be lost of the provisions under Part II of GCIV, which provide special guarantees for children mainly in combat zones, but which can be applied to any areas of belligerents' territories (occupied or not).[40] The Contracting Parties are bound to take necessary measures to ensure that children under fifteen, who are orphaned or separated from their families as a consequence of war, are not left to their own resources. They must make sure that their maintenance, exercise of their religion and education are facilitated "in all circumstances".[41] The Parties must facilitate the reception of such children in a neutral country during the conflict with the consent of the Protecting Power. Further, they are obliged to "endeavour" to provide all children under twelve years with means of identification (through the wearing of identity discs, or by other means).[42]

3.3. *The Right of Children Who are Deprived of Their Liberty to be Held in Quarters Separate from Adults*

Just as the corresponding right of female detainees, Article 77 API stipulates that children have the right to be detained in quarters separate from those of adults. Both Article 82(2) GCIV and Article 77(4) API provide that the exceptions to this rule can be recognised where families are lodged together as units.[43] Similarly,

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doctrines. The occupant may revise textbooks, check curricula, and investigate the records of the instructors in order to prevent subversive or harmful instruction. (…) This applies as much to private schools and institutions as to public schools.

M. Greenspan, *The Modern Law of Land Warfare* 234 (1959).

[40] In 1938, the XVIth International Red Cross Conference in London, in its Resolution No. XIII, requested the ICRC to pursue the study of providing protection for children in collaboration with the International Union for Child Welfare. After the Second World War in 1946, a Draft Convention for the Protection of Children in the Event of International Conflict or Civil War was submitted by the Bolivian Red Cross to the Preliminary Conference of National Red Cross Societies to study the amendment and the new drafting of the Geneva Conventions. The Conference recommended that the relevant provisions should be incorporated in the new Geneva Civilians Convention, rather than that a separate treaty be drafted: *ICRC's Commentary to GCIV*, at 185–186.

[41] GCIV, Article 24.

[42] GCIV, Article 24(3).

[43] See also the *UN Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law*, UN Doc. ST/SGB/1999/13 (1999), reprinted in (1999) 38 *ILM*

this provision allows the separation of a temporary nature when this is required for reasons of employment or health, or for the purpose of enforcing penal or disciplinary sanctions.[44] This right is also expressly recognised in the Convention on the Rights of the Child[45] and in the ICCPR.[46] The *ICRC's Customary IHL Study* recognises it as fully established in customary IHL.[47]

3.4. *The Prohibition on Recruiting Children in Occupied Territory*

The rights of children during armed conflict (and occupation) are supplemented by the elaborate safeguards under Article 77 of API. The parties to the conflict must ensure that children under the age of fifteen years do not take a direct part in hostilities. It is forbidden to recruit children less than fifteen years old into armed forces. The obligation to safeguard children against the prospect of direct participation in hostilities is reaffirmed in Article 38 of the Convention on the Rights of the Child (CRC). Article 38(4) CRC requires the parties to take "all feasible measures to ensure protection and care of children, who are affected by an armed conflict".[48] Again, while this rule is related more to conduct of hostilities, it remains of special significance in occupied territories.

In terms of drafting form, both Article 77(2) API and Article 38 CRC speak of duties of states, rather than articulating rights of individuals (namely, children).[49] However, as discussed above, this does not prevent the argument that

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1656, Section 8(f); and General Assembly Resolution 45/113, A/RES/45/113, 68th Plenary, 14 December 1990, The United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 29.

[44] GCIV, Article 82(2). See also API, Article 77(4); the UN Convention on the Rights of the Child, Article 37(c); ICCPR, Article 10.

[45] The Convention on the Rights of the Child, Article 37(c). However, an exception can be made for "the best interests of the child".

[46] ICCPR, Article 10.

[47] Henckaerts and Doswald-Beck, *supra* n. 11, at 433–435, Rule 120.

[48] It must be noted that issues of child soldiers are the subject of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (2000): G.A. Res. 54/263, Annex I, U.N. Doc. A/RES/54/263 (May 25, 2000). Departing from Article 38(2) of the Convention of the Rights of the Child and Article 77(2) of API, this Optional Protocol requires states parties to take "all feasible measures" to ensure that members of their armed forces who are less than eighteen years old do not take part in hostilities (Article 1). Further, the states parties to this Protocol are required to raise the age of voluntary recruitment to an age above the former international standard of fifteen years set out in Article 38(3) of the Convention of the Rights of the Child (Article 3(1)). For assessment of this Protocol, see M.J. Dennis, "Newly Adopted Protocols to the Convention on the Rights of the Child", (2000) 94 *AJIL* 789.

[49] M. Happold, *Child Soldiers in International Law*, (2005), at 125.

the rights are actually conferred upon individual persons.[50] The rule forbidding the recruitment of children under the age of fifteen years old straddles both international human rights law and IHL. It is possible to argue that a customary rule has crystallised,[51] and that this is binding on states that are not parties either to the API or to the CRC (namely, the United States and Somalia).

Whether in an occupied territory or in combat zones, children who are under the age of 15 years must be protected against any indecent assault, and given necessary care and aid.[52] Obviously, captured children must never be classified as "battlefield unprivileged belligerents" for their failure to meet the conditions for prisoners of war status.[53]

For state parties to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (2000), the age limit for protected children is raised to the age of eighteen years. Armed groups in an occupied territory of a State party to this Protocol must not recruit or use in hostilities children under the age of 18 years.[54] However, as discussed above, for the purpose of identifying individual criminal responsibility for a war crime under Article 8(2)(b)(xxvi) and Article 8(2)(e)(xii) of the Rome Statute, the boundary of age limit remains fifteen years old. Indeed, at the Rome Conference, a proposal to raise the minimum age for recruitment from 15 to 18 was rejected as being inconsistent with existing customary international law.[55]

Article 4(2) of the Optional Protocol (2000) provides that the state Parties are bound to take "all feasible measures" to prevent recruitment or use of child soldiers by armed groups. The state parties, including those which have become occupying powers, must adopt appropriate measures to prohibit and criminalise this practice.[56] They must demobilise, or release from service, any soldiers under

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[50] The textual style of Article 38 of the Convention of the Rights of the Child suggests that it is derived from the rule in an IHL treaty-based rule: Happold, *ibid.*, at 125.

[51] Happold contends that the prohibition on recruiting children at least below fifteen years of age is now considered part of customary IHL. This was the view shared by most states at the Rome Conference drafting the ICC Statute: *ibid.*, at 127–128.

[52] API, Article 77(1).

[53] API, Article 77(3).

[54] Optional Protocol on Rights of Children in Armed Conflicts (2000), Article 4(1).

[55] H. von Hebel and D. Robinson, "Crimes within the Jurisdiction of the Court", in: R.S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, (1999) 79–126, at 117–118. See also Happold, *supra* n. 49, at 128.

[56] Optional Protocol on Rights of Children in Armed Conflicts (2000), Article 4(2). This duty is supplemented by the duty of states parties to take "all necessary legal, administrative and other measures" to ensure the effective implementation and enforcement of this Protocol "within its jurisdiction". This means that the occupying powers which are parties to the Optional Protocol and which exercise effective control and authority over a foreign territory, must assume responsibility of protections under this Optional Protocol.

the age of eighteen years old recruited or used by armed opposition groups in occupied territory. Once emancipated from this egregious practice, such children must be given necessary assistance to facilitate their physical and psychological recovery, and social reintegration.[57]

Two additional comments can be made on the implications of the prohibition on recruiting children. First, the paramount interest of children means that the nationality of recruited children is totally irrelevant. Children, irrespective of whether they are nationals of the occupied state and hence qualified for "protected persons" status under Article 4 GCIV, or nationals of the occupying power, must be absolutely shielded from the inhuman practice of recruitment into armed forces. Second, as is generally the case with most rules of IHL, addressees of obligations under Article 77(2) API are not only state parties (such as the occupying powers embroiled in conflict in an occupied territory) but also any armed opposition group (rebels or insurrections) operating in an occupied territory.[58]

3.5. *Recruitment of Children as a War Crime*

To conscript or enlist children under the age of fifteen years into national armed forces, or using them to "participate actively in hostilities" constitutes a war crime,[59] subject to the requisite *mens rea*.[60] As noted in the *Elements of Crimes*, it is required that the perpetrators knew or should have known that the persons recruited were under fifteen years of age, and that s/he was aware of the relevant factual circumstances of an armed conflict.[61] This has been confirmed by the interlocutory decision of the Appeals Chamber of the Special Court for Sierra Leone in *Prosecutor v. Samuel Hinga Norman.* In that case, the defendant disputed the existence of the war crime based on recruitment of child soldiers, invoking a violation of the *nullum crimen sine lege.* However, the majority rejected this argument, holding that:

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[57] Optional Protocol on Rights of Children in Armed Conflicts (2000), Article 6(3).

[58] API, Article 77(2). According to this provision, the occupying power is also forbidden from recruiting children under the age of fifteen years into their armed forces (stationed in occupied territory or elsewhere).

[59] ICC Statute, Article 8 (2)(b)(xxvi) (concerning international armed conflict). See also Article 8(2)(e)(vii) for non-international armed conflict.

[60] *The Elements of Crimes* recognise that this category of war crimes may be established by perpetrators' negligence ("should have known") of the age of children. As Bothe notes, this seems to be inconsistent with the general rule on *mens rea* set out in Article 30 ICC Statute: M. Bothe, "War Crimes", A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court – A Commentary*, (2002), Ch. 11.3, 379, at 416.

[61] *Elements of Crimes*, Article 8(2)(b)(xxvi), paras. 3 and 5. For the general requirement of *mens rea*, see Article 30(1) ICC Statute.

> Child recruitment was criminalized before it was explicitly set out as a criminal prohibition in treaty law and certainly by November 1996, the starting point of the time frame relevant to the indictments. (…) the principle of legality and the principle of specificity are both upheld.[62]

The significance of this war crime is highlighted by the fact that the first ever trial that will be conducted by the ICC concerns allegations of war crimes, among others, of enlisting and conscripting child soldiers in the Democratic Republic of Congo.[63]

Article 77(2) API and Article 38 CRC refer to the concept of "a direct part in hostilities" while Article 8(2)(b)(xxvi), 8(2)(e)(vii) and the Elements of Crimes speak of "participate actively in hostilities". The latter concept is apparently derived from common Article 3 GCs. As seen above, the Trial Chamber of the ICTR in the *Akayesu* case has construed the notions "direct participation" and "active participation" as synonyms.[64] Nevertheless, Happold points out that the prevailing understanding at the Rome Conference was to interpret "active participation" as indicating all participation.[65]

Unlike the war crime of using children below the age of fifteen years old to participate actively in hostilities,[66] which apply both to national armed forces and to armies of armed opposition groups (and private military companies), the war crime of recruitment of children below the age of fifteen years old arises only in relation to their recruitment into national armed forces. The ICC Statute does not criminalise the enlistment (namely, voluntary induction into military service) or conscription (that is, compulsory involvement into military service) of such children into guerrillas, resistance groups, or any other "private armies".[67]

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[62] Special Court for Sierra Leone (Appeals Chamber), *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-04–14–AR72E, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, para. 53 (Justices Ayoola, Gelaga King and Winter). See, however, the dissenting opinion of Justice Robertson, para. 33 (while recognising that the customary IHL prohibited the enlisting of children under the age of fifteen, he ruled that on the basis of the principle of *nullum crimen sine lege* there was not evolved the customary rule that attributed individual criminal responsibility for such an offence of the IHL rule).

[63] See, ICC, Decision on the Issuance of an Arrest Warrant in the *Lubanga* case, para. 91; and *Prosecutor v. Germain Katanga*, Decision on the evidence and information provided by the prosecution for the issuance of a warrant of arrest for Germain Katanga, ICC-01/04–01/07, 5 November 2007, paras. 12, 43, 49, 50 and *fine*.

[64] ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96–4–T, Judgment of Trial Chamber, 2 September 1998, para. 629.

[65] Happold, *supra* n. 49, at 134.

[66] ICC Statute, Article 8(2)(b)(xxvi) and Article 8(2)(c)(vii).

[67] Happold, *supra* n. 49, at 134–135.

4. *Conclusion*

With regard to sexual offences against women in occupied territory, the fact that many instruments of war crimes tribunals have now incorporated a number of sexual offences is a salutary development. Yet, what matters most is the willingness of these tribunals to refine their specific elements and apply them in a manner geared towards more effective enhancement of their rights.[68] Further, even in circumstances where reparations are provided, if the recipient government is not democratically elected or more interested in dispensing such reparations for "white elephant" developmental projects in lieu of duly distributing them among individual victims, violations of women's dignity remain unresolved.[69]

Special note should be taken of a provocative observation made by David Kennedy, who argues that: "[e]ven very broad social movements of emancipation – for women, for minorities, for the poor – have their vision blinkered by the promise of recognition in the vocabulary and institutional apparatus of human rights".[70] This observation can be aptly applied to the blinding effect of the mere recognition of the vocabulary of gender violence in the relevant instruments of international criminal law. The implementation of IHL must overcome past ambivalent attitudes to gender related issues. The IHL's primary role in *preventing* atrocities being committed against women needs to be revisited and further consolidated.[71]

In relation to rights of children, progress remains unsatisfactory with regard to the war crimes of using children to take active part in hostilities. *De lege ferenda*, their age limit ought to be raised from fifteen to eighteen in line with the definition of children to prevent recruitment or enlistment of children of high school age in occupied territories and their deployment in a dangerous battlefield. Further, war crimes of recruitment (enlistment and conscription) ought to be applied equally to armed opposition groups, whose operation may be discerned in occupied territories.

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[68] Quénivet, *supra* 1, at 176.

[69] See, for instance, the case of the Japanese Government's colonial and war-time reparations paid to the Park Government of the Republic of Korea on the basis of the 1965 Treaty on Basic Relations between Japan and the Republic of Korea. With respect to China, as mentioned in footnote 17 above, the Japanese Government paid 25 billion dollars of state aids as a form of the *de facto* war-time reparations. These did not, however, reach those individual Chinese citizens, who were victims of Japanese Imperial Army's brutalities during its invasion and occupation of Manchuria (1931–1945) and the Second Sino-Japanese War (1937–1945).

[70] D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*, (2004), at 12.

[71] Another ethical question that is specifically pertinent to an occupying power faced with eruptions of hostilities is whether lives of women having dependant infants, and children, including babies, can ever be included in the utilitarian calculation of the concept of military necessity.

Chapter 16

Other Specific IHL-Based Rights of Individual Persons in Occupied Territory

1. *Introduction*

In this chapter, examinations will focus upon two specific rights which fall outside the classification adopted in this monograph. These are: (i) the right to freedom of religion; and (ii) the right to communicate with protecting powers, Red Cross or other humanitarian organisations.

2. *Respect for the Convictions and Religious Practices of Civilians*

The ICRC's Customary IHL Study describes it as a customary rule that the occupying power must respect the religious convictions and practices of all classes of persons in an occupied territory (and anywhere else).[1] This fundamental rule, which traces back to the corresponding rule relating to an occupied territory in the Lieber Code,[2] is recognised in the Hague Regulations of 1907.[3] Under the GCIV, the general right to respect for convictions and religious practices is guaranteed for protected persons who are found either in an occupied territory[4] or in an enemy territory.[5] At the same time, GCIV provides more detailed elaborations on this right in occupied territory.[6] Specific positive duties are imposed

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[1] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Law* (2005), Vol. I, at 375–376.

[2] Lieber Code, Article 37. See also Brussels Declaration, Article 38 and *Oxford Manual*, Article 49.

[3] Hague Regulations, Article 46(1).

[4] For protected persons in occupied territory, this right is recognised in GCIV, Article 58.

[5] GCIV, Article 38(3).

[6] Reference should be made to Article 50(3) (religious education of orphaned children or children separated from their parents as a result of war), Article 76(3) (spiritual assistance for protected persons accused or convicted of offences in occupied territory), Article 86 (religious

on the occupying power in relation to the religious education of children,[7] the spiritual assistance for protected persons accused or convicted of offences in an occupied territory,[8] the protection of religious practice and service[9] or religious activities of internees,[10] and rights of the deceased.[11]

The *ICRC's Customary IHL Study* notes that the GCIV has extended this obligation to cover all protected persons.[12] Article 75(1) API reaffirms the obligation of all the parties to respect convictions and religious practices of all persons. As discussed before, the scope of protection of this provision covers unprivileged belligerents who come outside the definition of prisoners of war under GCIII and that of protected persons under GCIV. In view of the fundamental importance of religious freedom, an infringement of this freedom may fall within the definition of the war crime of "outrages upon personal dignity". The *Elements of Crimes* for the ICC states that the assessment of this category of war crimes requires specific account to be taken of cultural background of victims.[13] To compel persons to act against their religious beliefs in an occupied territory (or elsewhere) amounts to a war crime.[14]

With respect to the practice of religion among the civilian population in an occupied territory, the occupying power must not hinder ministers of religion

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services for interned persons), Article 93 (religious activities of interned persons) and Article 130(1) (honourable burial of deceased internees according to the rites of their religion and respect for their graves) and second paragraph (cremation of deceased internees on account of their religion).

[7] GCIV, Article 50(3) (religious education of orphaned children or children separated from their parents as a result of war).

[8] GCIV, Article 76(3).

[9] GCIV, Article 86.

[10] GCIV, Article 93.

[11] Article 130 first paragraph (honourable burial of deceased internees according to the rites of their religion and respect for their graves) and second paragraph (cremation of deceased internees on account of their religion).

[12] Henckaerts and Doswald-Beck, *supra* n. 1, Vol. I, at 376. Yet, this assertion may again raise the question whether Article 27 GCIV is applicable to protected persons held other than in occupied territory or in enemy territory. Be that as it may, it is clear that the right embodied in this provision is a customary rule applicable to any persons.

[13] The Elements of Crimes for the ICC, Definition of outrages upon personal dignity as war crimes, ICC Statute, footnote 49 concerning Article 8(2)(b)(xxi) and footnote 57 concerning Article 8(2)(c)(ii). According to Dörmann, this was introduced to encompass, as a war crime, the act of forcing persons to act against their religious beliefs: K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, (2003), Commentary on Article 8(2)(b)(xxii) of the ICC Statute, at 315.

[14] On this matter, see Australia, Military Court at Rabaul, *Tanaka Chuichi* case, Judgment, 12 July 1946, (1949) 11 *LRTWC* 62, at 62–63; 13 *AD* 289 (cutting off hair and beard and forcing a Sikh prisoner of war of the Sikh religion to smoke a cigarette).

from providing spiritual assistance to members of their religious communities.[15] It must accept consignments of books and articles for religious needs and facilitate their distribution in an occupied territory.[16] The protection of these rights is a logical corollary of the general safeguard for the "religious convictions and practices" of all protected persons as recognised in Article 27(1).[17]

3. *The Right to Apply to Protecting Powers and to the Red Cross or to Other Humanitarian Organisations*

Article 30 of GCIV recognises the right of protected persons to communicate with the Protecting Powers,[18] the ICRC, the National Red Cross (Red Crescent, Red Lion and Sun, Star of David) Society, as well as to any other humanitarian organisation.[19] This provision must be read in conjunction with its counterpart in one of the execution provisions of GCIV, namely, Article 142, which establishes the status of relief organisations and other bodies.[20] The *Final Record* explains that the rationale for introducing this right is to afford means to give effect to both the rights granted to protected persons under draft Article 25 (now 27), and to the obligations imposed on the state parties under draft Article 28 (now 29).[21] This right is especially beneficial for protected persons deprived of liberty or compelled to work in an occupied territory. The communication may take the form of an application, suggestion, complaint, protest, a request for assistance or any other form. The absence of formal procedural requirements for exercising this right is a practical advantage for protected persons, who often find themselves unable to undergo cumbersome procedural rules while under conditions of distress.[22] It is a significant improvement, given that prior to 1949, civilians wishing to contact relief organisations or the protecting power, had simply to

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[15] GCIV, Article 58(1).

[16] GCIV, Article 58(2).

[17] For protected persons in enemy territory, reference can be made to Article 38(3) GCIV.

[18] The general legal basis for the action of the Protecting Power is provided under Article 9 GCIV. Obviously, unlike the ICRC which, due to its neutrality, impartiality and independence, serves as an intermediary for any types of protected persons, protecting powers can receive applications only from protected persons who owe allegiance to the belligerent States: *ICRC's Commentary to GCIV*, at 215.

[19] GCIV, Article 30.

[20] *ICRC Commentary to GCIV*, at 213–214.

[21] *Final Record*, Vol. II-A, *Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva*, 812–849, at 822 (draft Article 28).

[22] *ICRC's Commentary to GCIV*, at 214. Indeed, according to the *Commentary*, it is even unnecessary for a violation of GCIV to take place: *ibid*., at 214.

rely on the goodwill of the power under whose authority they were compelled to work or divested of their liberty.[23]

The *ICRC's Commentary* describes as "an absolute right" the right of communications with the ICRC, or other humanitarian relief organisations, or the protecting power. The reference to "absolute" nature of the right is a bit misleading. The *Commentary* itself admits of the possibility of allowing the suspension of this right in relation to protected persons held in the territories of a party to the conflict on the basis of Article 5 GCIV.[24] It ought to be recalled that under Article 5(2), rights of communications are the only derogable rights in relation to protected persons in occupied territories.

To buttress protected persons' right of applications, the occupying power must furnish humanitarian organisations and the Protecting Power with all facilities necessary for their humanitarian tasks (not only the dispatch of correspondence, but also means of transport and facilities necessary for distributing relief). Indeed, the GCIV stipulates the obligation incumbent on any belligerent party, including the occupying power, to allow visitation of the delegates of the Protecting Powers and of the ICRC to the places where protected persons are interned, detained or working.[25] The prerogative of visitation must be expanded to include "any other organisation" providing spiritual aid or material relief to protected persons.[26] It is part of the positive duties imposed on the occupying power to facilitate and promote the task of the Protecting Power or of humanitarian organisations through "rapid and effective" action.[27]

As contemplated by Article 30(2) GCIV, only military or security considerations can justify exceptions to the occupant's obligation to facilitate humanitarian work as requested by protected persons.[28] The amorphous concepts of "military or security considerations" should be interpreted akin to the concept of necessity expressly incorporated into some provisions of GCIV.[29]

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[23] *Ibid.*, at 214–215. The *Commentary* describes this right as "an absolute right".

[24] *Ibid.*, at 214.

[25] GCIV, Article 143.

[26] GCIV, Article 30(3). See also *ibid.*, at 219.

[27] *ICRC's Commentary to GCIV*, at 218.

[28] GCIV, Article 30(2). The *ICRC's Commentary* stresses that it is essential for the occupant to restrain itself in invoking this necessity ground: *ibid.*, at 218.

[29] The necessity test based on security grounds, which is applicable *generally* to all activities of the protecting power, appears in Article 9(3) GCIV. The necessity test under Article 142 (1) relates to activities of religious organisations, relief societies or any other organisations that assist protected persons deprived of liberty. It envisages a much broader scope of restrictions, which are based not only on security grounds but also on "any other reasonable need".

4. *Conclusion*

With respect to the obligation to respect religious convictions and practices, there remains a question what is meant by "respect". The "respect" aspect of this obligation entails specific positive duties, such as those relating to religious education of children. The relatively detailed body of positive duties relating to the freedom of religion for detainees appears impressive, given that in the context of international human rights law, exterior aspects of this freedom (such as the right to manifest or exercise religious faith or rituals) are susceptible to limitations and derogation.

In relation to the right of communications with Protecting Powers, the Red Cross (Crescent etc) or to other humanitarian organisations, it is crucial that as far as possible this right must not be withheld, notwithstanding the wording under Article 5 GCIV. This is the sole procedural means to ensure that persons deprived of liberty do not become incommunicado. The special significance of this right becomes clearer when analysed in conjunction with procedural safeguards for persons deprived of liberty, which will be the subject of extensive discussions in a separate chapter.

Part III

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

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

Chapter 17

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

1. *The Applicability of Human Rights during Armed Conflict*

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

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

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

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[1] E. Fraenkel, *Military Occupation and the Rule of Law*, (1944), at 205–206.

[2] Y. Dinstein, "The International Law of Inter-State Wars and Human Rights", (1977) 7 *Israel YbkHR* 139, at 148; *idem*, "Human Rights in Armed Conflict: International Humanitarian Law", in T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (1984) 345, at 350–52; H. Meyrovitz, "Le droit de la guerre et les droits de l'homme", (1972) 88 *Revue de droit*

some states before the ICJ in the *Nuclear Weapons* Advisory Opinion with special regard to unlawful loss of life in hostilities.[3] As late as 2003, the United States argued against the danger of conflating IHRL and IHL, which must be treated as "distinct".[4] It initially rejected the request for an invitation by the Working

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public et de la science politique 1059, at 1104–1105 (noting that "le droit des conflits armés et la notion des droits de l'homme . . . sont irréductibles l'un à l'autre" and describing this relationship as "antinomie intrinsèque"); W.K. Suter, "An Enquiry into the Meaning of the Phrase 'Human Rights in Armed Conflicts' ", (1976) 15 *Revue de droit pénal militaire et droit de la guerre* 394, at 422 (arguing that "[d]uring an armed conflict, the [1966 UN] Covenants curtain largely disappears and the law of armed conflicts descends to protect the individual. During periods when there is a public emergency threatening the life of the nation, the individual is initially protected by the Covenants but as the violence gradually increases, so the law of armed conflicts curtain gradually descends"). Note that even Pictet, the editor of the *ICRC's Commentary to GCs*, partially recognises this, contending that:

> . . . the two legal systems [the law of armed conflicts and human rights] are fundamentally different, for humanitarian law is valid only in the case of an armed conflict while human rights are essentially applicable in peacetime, and contain derogation clauses in case of conflict. Moreover, human rights govern relations between the State and its own nationals, the law of war those between the State and enemy nationals. There are also profound differences in the degree of maturity of the instruments and in the procedure for their implementation. . . . Thus the two systems are complementary . . . but they must remain distinct, if only for the sake of expediency.

J. Pictet, *Humanitarian Law and the Protection of War Victims*, (1975), at 15.

[3] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Rep. 1996, 226, at 239, para. 24. It seems, however, that only the United States and Israel, among democracies, adhere to the view that the application of IHL and IHRL is mutually exclusive, so that the application of one precludes the application of the other. It may be asked whether these two states can invoke the persistent objector doctrine to claim, at least insofar as their interests are concerned, that the application of IHL displaces that of IHRL. Hampson and Salama reject the application of this doctrine, referring to three grounds: (i) difficulty of determining the applicability or not of this doctrine in the field of IHRL, given the recognition of its special character (cf. Vienna Convention on the Law of the Treaties, Article 60 (5) on material breaches); (ii) doubt, at factual level, as to whether the US and Israel have persistently objected to the claim that these two bodies of international law can be concurrently applied; and (iii) the inapplicability of the persistent objector doctrine to those provisions of human rights treaties, which have acquired the status of *jus cogens*: F. Hampson and I. Salama, "Working paper on the relationship between human rights law and international humanitarian law", UN Sub-Commission on the Promotion and Protection of Human Rights, Fifty-seventh session, E/CN.4/Sub.2/2005/14, 21 June 2005, at 17, paras. 69–70. However, it is questionable whether the persistent objector rule can be considered relevant in this context. This doctrine precludes the formation of a new customary rule. What is at issue in this chapter consists rather of two aspects: (i) the conceptual shift in understanding the relationship between IHL and IHRL; and (ii) the extension of the scope of application *ratione materiae* of IHRL (expansion into situations of armed conflict and occupation).

[4] *Civil and Political Rights, Including the Questions of Torture and Detention, Report of the Working Group on Arbitrary Detention*, E/CN.4/2004/3, 15 December 2003, at 9 and 14, paras. 18 and 35.

Group on Arbitrary Detention, on the basis that the Working Group did not have mandate to address what it regarded as IHL issues, not IHRL matters.[5]

However, the rapid growth of international human rights law in the UN standard-setting efforts has completely overhauled this dichotomised understanding in the doctrinal discourse. As noted by Benvenisti,[6] since 1970s, the continued validity of human rights during armed conflict and occupation has been widely recognised by the UN General Assembly,[7] the UN HR Committee[8] and other UN human rights monitoring bodies.[9] The supervisory bodies

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[5] *Ibid.*, at 14, para. 35. Subsequently, on 27 October 2005, the US Government changed the policy and decided to invite the Working Group's Chairperson-Rapporteur, and the Special Rapporteurs on the question of torture and on freedom of religion or belief, to visit the detention facilities at Guantanamo Bay on condition that this was limited to one day, and that private interviews or visits with detainees were explicitly excluded. By letter dated 15 November 2005, the mandate-holders, including the Working Group, decided that due to the impossibility of holding interviews with detainees, they would not visit Guantanamo Bay: *Civil and Political Rights, Including the Questions of Torture and Detention, Report of the Working Group on Arbitrary Detention*, E/CN.4/2006/7, 12 December 2005, at 13, para. 27.

[6] E. Benvenisti, "The Applicability of Human Rights Conventions to Israel and to the Occupied Territories", (1992) 26 *Israel L.Rev.* 24; and E. Benvenisti, "The Security Council and The Law on Occupation: Resolution 1483 on Iraq in Historical Perspective", (2003) 1 *Israel Defense Forces Law Review* 19, at 31.

[7] *Basic Principles for the Protection of Civilian Population in Armed Conflicts*, GA Resolution 2675 (XXV) of 9 December 1970; and *Declaration on the Protection of Women and Children in Emergency and Armed Conflict*, GA Resolution 3318(XXIX) of 14 December 1974, operative paras. 3 and 6. The first principle of Resolution 2675 states that "[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict".

[8] For instance, in its Concluding Observations on the Israeli report, the Human Rights Committee states as follows:

> The Committee is deeply concerned that Israel continues to deny its responsibility to fully apply the Covenant in the occupied territories. In this regard, the Committee points to the long-standing presence of Israel in these territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein. In response to the arguments presented by the delegation, the Committee emphasizes that the applicability of rules of humanitarian law does not by itself impede the application of the Covenant or the accountability of the State under article 2, paragraph 1, for the actions of its authorities. The Committee is therefore of the view that, under the circumstances, the Covenant must be held applicable to the occupied territories and those areas of southern Lebanon and West Bekaa where Israel exercises effective control.

U.N. Doc. CCPR/C/79/Add.93 (1998), para. 10.

[9] See General Recommendation 19, Violence against Women of the Committee on the Elimination of Discrimination against Women, (Eleventh session, 1992). This states that "[w]ars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures": U.N. Doc. A/47/38, at 1 (1993), reprinted in Compilation of General Comments and General

of regional human rights treaties have followed the same approach and stressed the requirement of states to safeguard prominent categories of human rights.[10] This view is upheld by the *ICRC's Customary IHL Study*[11] and by overwhelming majority of publicists.[12] The growing recognition of the continued applicability of human rights during armed conflicts (and *ipso facto* in occupied territory) is such that scholars who keep fighting against the applicability of human rights during armed conflict may be likened to endangered species![13] Indeed, in the *Kupreskic* case, the Trial Chamber of the ICTY stressed that "[i]t is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred".[14] In this vein, the focus of scholarly arguments has been shifted to the question how to apply human rights in practical terms when faced with serious practical challenges.[15] Such challenges or difficulties can relate to *procedural* questions of jurisdiction and competence,

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Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6, at 243 (2003).

[10] See the submission of the Inter-American Commission of Human Rights in *Las Palmeras*, Preliminary Objections, Judgment of 4 February 2000, Series C, No. 67, para. 29. For the case-law of the European Court of Human Rights, see, for instance, *Loizidou v. Turkey*, Judgment of 18 December 1996, A310; and *Cyprus v. Turkey*, Judgment of 10 May 2001.

[11] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, (2005), Vol. I, at 299–305 and the ample sources cited therein.

[12] See, among others, Benvenisti (1992), *supra* n. 6; and *idem* (2003), *supra* n. 6, at 31; E.R. Cohen, *Human Rights in the Israeli-Occupied Territories 1967–1982*, (1985); L. Doswald-Beck and R. Kolb, *Judicial Process and Human Rights: United Nations, European, American and African systems*, (2004); E.-C. Gillard, "International Humanitarian Law and Extraterritorial State Conduct", in: F. Coomans and M.T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties*, (2004) 25–39, at 35; M. Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", (2005) 16 *EJIL* 661, at 666; and *idem*, "Le droit international humanitaire, une lex specialis par rapport aux droits humains?", in: A. Auer, A. Flückiger and M. Hottelier (eds), *Les droits de l'homme et la constitution, Etudes en l'honneur du Professeur Giorgio Malinverni*, (2007), at 375–395.

Contra, see the statement of Ambassador Paul Bremer who stated, in his letter addressed to Amnesty International on 27 June 2003, that the only relevant standard applicable to the Coalition's detention practices is the Fourth Geneva Convention of 1949: Amnesty International, *Iraq: Memorandum on Concerns Related to Legislation Introduced by the Coalition Provisional Authority*, 4 December 2003, (MDE 14/176/2003), Section 3.0., available at http://www.amnesty.org/en/alfresco_asset/2b849cb7–a5ca-11dc-bc7d-3fb9ac69fcbb/mde141762003en.pdf (last visited on 30 June 2008).

[13] For the same decisive judgment, see N. Lubell, "Challenges in Applying Human Rights Law to Armed Conflict", (2005) 87 *IRRC* 737, at 738.

[14] ICTY, *The Prosecutor v. Zoran Kupreskic and Others*, Judgment of Trial Chamber, 14 January 2000, IT-95-16-T, para. 529.

[15] Lubell (2005), *supra* n. 13, at 738–739. For detailed analysis, see Hampson and Salama, *supra* n. 3, paras. 78–92.

such as the extraterritorial applicability of human rights,[16] and the competence of human rights monitoring bodies to apply IHL. A *substantive* dimension of challenges includes the issues of the scope of application *ratione materiae* of human rights, such as the extent of applicability of positive obligations of human rights during armed conflict (and in occupied territory on the basis of extra-territorial effects),[17] and economic, social and cultural rights during armed conflict and occupation.[18] Further, uncertainty as to applicable standards may be rooted in specific contexts, such as non-international armed conflicts and the territory under post-conflict administration.[19]

It is submitted that the application of principles of human rights law in occupied territories helps elucidate those elements of IHL rules, which remain

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[16] This is the subject of extensive focus in the literature. See, for instance, Coomans and Kamminga (eds), *supra* n. 12.

[17] For exploration of this subject, see H. Krieger "A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study", (2006) 11 *JCSL* 265, at 282–284. She argues that all dimensions of human rights, including positive duties, must be considered applicable during armed conflict. Yet, she refers to two limitations on this approach: first, a broad margin of appreciation left to the states in dealing with the duty to protect individual persons against harmful actions by private persons; and second, the prohibition on altering the status of public officials or judges in occupied territory, as provided in Article 54 GCIV, which may inhibit the effectiveness of the occupying power in guaranteeing the duty to protect: *ibid*., at 284.

The procedural duty to investigate even during an armed conflict situation is consistently upheld by the ECtHR. For the summary of the case-law, see also the High Court of Justice (England and Wales), *Al-Skeini v. The Secretary of State for Defence*, 2004 EWHR 2911 (Admin), 14 December 2004, paras. 318–324. In the *Al-Skeini* case, the High Court found that the reference under Article 1 ECHR to the obligations to secure to everyone within "their jurisdiction" the rights and freedoms of the ECHR is essentially territorial, and that exceptions can be recognised only in relation to outposts of the state's authority abroad, such as embassies and consulates, or a prison operated by a state party in the territory of another state with the consent of the latter. It concluded that other than in such highly exceptional circumstances, the ECHR is precluded from applying to the territory of another state, which is not a party to the ECHR: *ibid*., paras. 248, 258, 269, 270, 277, and 287.

[18] For insightful exploration of this issue, see Lubell, *supra* n. 13.

[19] Applicability or not of human rights to UN post-conflict administered territory is the focus of detailed examinations. See, for instance, N. White and D. Klaasen (eds), *The UN, Human Rights and Post-conflict Situations*, (2005). For the examinations of acts of UN Interim Administration Mission in Kosovo (UNMIK) and KFOR forces in the light of human rights, see G. Nolte, "Human Rights Protection against International Institutions in Kosovo: The Proposals of the Venice Commission of the Council of Europe and their Implementation", in: P.-M. Dupuy, B. Fassbender, M.N. Shaw and K.-P. Sommermann. (eds), *Völkerrecht als Wertordnung – Festschrift für Christian Tomuschat (Common Values in International Law – Essays in Honour of Christian Tomuschat)*, (2006), 245–258. For the application of human rights to non-occupied post-conflict society, see the jurisprudence of the Human Rights Chamber for Bosnia-Herzegovina.

ambiguous and regulated in different provisions.[20] For instance, in case of "calm" occupation, standards of human rights can generally supplant the rules on the law of occupation. As examined below, if human rights standards such as the proportionality test in the narrow sense and the less restrictive alternative test are considered applicable to conduct of warfare, then this can reinforce the weight of the right to life of victims of incidental killing in proportionality appraisal. It can also provide useful guidelines for reparations for individual victims of violations of IHL.[21] With specific regard to detainees at Guantanamo, the Working Group on Arbitrary Detention did not clearly endorse the view that the ICCPR standards can be applied to interpret the requirement of a competent tribunal within the meaning of Article 5 GCIII. Apart from the minimum guarantees required under Articles 9 and 14 ICCPR, their approach is approximated to that of applying either IHL or IHRL in an alternative manner. It stressed that the status of the detainees must be determined by a competent tribunal under Article 5 GCIII and not by means of an executive order. It added, however, that in case a detainee was not found to benefit from a prisoner of war status, then given the failure of the US government to comply with the notification requirement under Article 4 ICCPR, he would be protected by Articles 9 and 14 ICCPR.[22]

The continued applicability of IHRL during armed conflict and in the situation of occupation poses the question of how to characterise and systematically comprehend the interplay between IHL and IHRL. After all, the two bodies of international law pursue the same humanity-based objective. The treaties of

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[20] Doswald-Beck argues that *prima facie*, the rules concerning the prohibition of "uncompensated or abusive forced labour", the prohibition of arbitrary deprivation of liberty, and the respect for family life, seem "innovative" under IHL. Yet, she contends that they are already guaranteed under IHL and required to be grouped together as general rules: L. Doswald-Beck, "Developments in Customary International Humanitarian Law", (2005) 15 *Schweitzerische Zeitung für internationales und europäisches Recht* 471, at 498.

[21] Hampson and Salama, *supra* n. 3, at 7, para. 18.

[22] *Civil and Political Rights, Including the Question of Torture and Detention, Report of the Working Group on Arbitrary Detention*, E/CN.4/2003/8, 16 December 2002, at 19–21, paras. 61–64. In the subsequent opinion, the Working Group found a violation of Article 9 of the Universal Declaration of Human Rights and Article 9 of the ICCPR in relation to four detainees, *Civil and Political Rights, Including the Question of Torture and Detention, Opinions adopted by the Working Group on Arbitrary Detention*, E/CN.4/2004/3/Add.1, 26 November 2003, pp. 33–35, Opinion No./2003 (United States of America). See also *Civil and Political Rights, Including the Questions of Torture and Detention, Report of the Working Group on Arbitrary Detention*, E/CN.4/2004/3, 15 December 2003, at 8–9, 14 and 20 paras. 16–20, 35 and 69; Civil and Political Rights, Including the Question of Torture and Detention, Report of the Working Group on Arbitrary Detention, E/CN.4/2005/6, 1 December 2004, at 10 and 13, paras. 21–22 and 32; and *Civil and Political Rights, Including the Questions of Torture and Detention, Report of the Working Group on Arbitrary Detention*, E/CN.4/2006/7, 12 December 2005, at 13, paras. 26–27.

IHRL and IHL share the law-making character, as opposed to the character of contracting treaties. Their intrinsic objective is to recognise and enhance rights and benefits on behalf of individual persons rather than creating reciprocal rights and obligations based on the inter-state relationship.[23] Since the central focus and objective of this chapter is to investigate the extent of applicability of human rights in the scenario of occupation, the examinations of the question relating to the interlocking relationship between IHL and IHRL are summarised and dealt with to the extent necessary for accomplishing the primary objective.

2. *Fundamental Differences between International Human Rights Law and IHL*

Some fundamental differences remain between IHRL and IHL. First, IHRL is essentially premised on the vertical relationship (individuals versus states) and designed to identify responsibility of states. On the other hand, while operating mainly on the edifice of an inter-state relationship, IHL is applicable to both states and armed opposition groups.[24] The horizontal effects of IHL[25] is clearly borne out by the general principle stated in common Article 1 of GCs. According to this provision, states must not only respect, but also "ensure" respect for, the obligations laid down in the GCs.[26] Second, in contrast to IHL treaty-based rules which are equipped only with under-utilised procedures of inquiry[27] or of an International Fact-Finding Commission[28] as a means to address its violations, IHRL is endowed with highly refined supervisory mechanisms.

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[23] This fundamental trait is recognised by Article 60(5) of the Vienna Convention on the Law of Treaties, which provides that the rules allowing the termination or suspension of a treaty in case of a material breach "do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties".

[24] Gillard, *supra* n. 12, at 36.

[25] See L. Condorelli, "The Imputability to States of Acts of International Terrorism", (1989) 19 *Israel YbkHR* 233, at 242–244. In the specific context of occupied territory, he argues that:

> The occupying power is under the international obligation of taking appropriate measures in order to protect the population against criminal activities of other individuals (and not only against abuses perpetrated by its organs). In this sense, terrorist acts of private origin can "catalyze" the responsibility of the concerned State that failed to meet its obligations.

Ibid., at 243.

[26] Article 1 common to Geneva Conventions of 1949. This general principle is reiterated in Article 1 of API.

[27] See GCI, Article 52; GCII, Article 53; GCIII, Article 132; and GCIV, Article 149.

[28] API, Article 90.

Such mechanisms are generally comprised of three-tiered modalities: state reports; inter-state complaints; and individual complaints. The outcomes of these supervisory modalities may lead to a finding of reparations for individual victims.

Further, the highly sophisticated "*acquis*" distilled from the jurisprudence of human rights supervisory mechanisms have shaped elaborate and dynamic doctrines and principles. These encompass the jurisdiction-related principles (such as the extra-territorial applicability of human rights[29] and anticipatory ill-treatment), the substantive doctrines designed to expand the dimension of human rights (such as positive obligations and *Drittwirkung*), and the interpretive principles designed to enhance the effectiveness in guaranteeing specific rights (such as the tripartite component elements of the notion of proportionality). In the context of IHL, however, the absence of an effective monitoring mechanism has debarred the development of the case-law redolent of refined principles. Instead, the normative development in this context tends to be incremental. It largely depends on the orthodox and conservative approach, namely the identification of the sufficient state practice and *opinio juris* of states to support the formation of new customary international law.

Once applicability of IHRL to occupied territory (even to a limited extent) is recognised, then the gap-filling role of IHRL can be saliently seen in relation to special categories of persons who fall outside the scope of protection *ratione personae* of relevant IHL treaties. This is obviously the case for treatment of unprivileged belligerents held by an occupying power.

3. *The Complementary Relationship between IHL and International Human Rights Law*

Many scholars have described the relationship between the two bodies of international law as complementary.[30] Meron notes that a strict separation between

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[29] See, for instance, Coomanns and Kamminga (eds), *supra* n. 12.

[30] H.-P. Gasser, "International Humanitarian Law and Human Rights Law in Non-International Armed Conflict: Joint Venture or Mutual Exclusion", (2002) 45 *German YbkIL* 149–162, at 162; and J. Pejic, "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence", (2005) 87 *IRRC* 375, at 378. Rosemarie Abi-Saab argues that:

> If humanitarian law and human rights law have as a common and identical objective the protection of the individual from all possible attempts on his personal integrity, in armed conflicts or in peacetime, it is no surprise that these two branches of international law should find complementarity. (…) Interdependence is, however, not limited to human rights in humanitarian law. It is a two-way process, where a humanitarian law approach can complement or substitute for a human rights approach to protect individuals in situations where the protection of human rights is seriously restricted or totally suspended.

the two branches of international law is "artificial and hinders efforts to maximize the effective protection of the human person".[31] The recognition of the complementary interaction of the two bodies of international law has gradually figured in key soft-law documents of the UN.[32] The importance of complying with requirements of IHL and IHRL in enforcement measures adopted by the UN Security Council has become widely recognised.[33] In his Report entitled *In larger freedom: towards development, security and human rights for all*, Kofi Annan, the former UN Secretary General, underscores the need to ensure effective guarantees of human rights in implementing Security Council resolutions on peace and security.[34]

Indeed, the complementary character of this relationship can be corroborated by Article 72 API, which provides that "[t]he provisions of this Section ["Treatment of Persons in the Power of a Party to the Conflict"] are additional to the rules concerning humanitarian protection of civilian and civilian objects in the

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> (…) Beyond this obvious interpenetration between human rights and humanitarian law in the formulation and content of the rules and in their practical implementation, the interrelationship of the two can be useful in the context of implementation. Resort to human rights as norms of general international law applicable in all situations, above and beyond treaty obligations, will help indentify general obligations and their eventual violations, thus opening the way for the condemnation of these violations.

R. Abi-Saab, "Human Rights and Humanitarian Law in Internal Armed Conflicts, in: D. Warner (ed.), *Human Rights and Humanitarian Law*, (1997), 107–123, at 122–123.

[31] T. Meron, *Human Rights in Internal Strife: Their International Protection*, (1987), at 28. See also D. Forsythe, "1949 and 1999: Making the Geneva Conventions Relevant after the Cold War", (1999) 81 *IRRC* 265, at 271; F. Hampson, "Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts", (1992) 31 *RDMDG* 118; H.-J. Heintze, "On the Relationship between Human Rights Law Protection and International Humanitarian Law", (2004) 86 *IRRC* 789, at 794.

[32] See, for instance, Human Rights in Armed Conflicts, Resolution XXIII adopted by the International Conference on Human Rights, Teheran, 12 May 1968.

[33] See, for instance, Security Council Resolution 1592, 30 March 2005, S/RES/1592 (2005) (adopted under Chapter VII of the UN Charter), operative paras. 11 and 12 (concerning acts of sexual exploitation and abuse committed by UN personnel of the MONUC (UN Mission in the Democratic Republic of Congo) against the local population).

[34] Annan states that:

> The increasing frequency of the Security Council's invitations to the High Commissioner to brief it on specific situations shows that there is now a greater awareness of the need to take human rights into account in resolutions on peace and security. The High Commissioner [UN High Commissioner for Human Rights] must play a more active role in the deliberations of the Security Council and of the proposed Peacebuilding Commission, with emphasis on the implementation of relevant provisions in Security Council resolutions.

In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, 21 March 2005, A/59/2005, at 37u, para. 144.

power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to protection of fundamental human rights during international armed conflict". In its *General Comment No. 29* concerning Article 4 ICCPR, the Human Rights Committee has taken the view that:

> During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers. 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.[35]

This statement suggests the complementary nature of the interplay between IHL and IHRL, with IHL providing more specific forms to the obligations of state parties in time of armed conflict. This line of thinking is borne out by the Human Rights Committee's *General Comment No. 31* (2004) concerning the nature of general obligations under Article 2 ICCPR. The Human Rights Committee states that "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*."[36] Indeed, it can be suggested that the gap-filling role of the Martens Clause inverses the traditional hypothesis of international law as affirmed in the *Lotus* case,[37] according to which international law can be construed as giving states ample latitudes of discretion and minimal constraints on their conduct.[38] This means that with regard to IHL and IHRL, acts or omissions which are not expressly prohibited by law are not necessarily allowed in practice.[39] In the *Legality of the Threat or Use of Nuclear Weapons* case, the ICJ confirms the complementary character of the two branches of international law, holding that: "the protection of the

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[35] HRC, *General Comment 29, States of Emergency (article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 3.

[36] HRC, *General Comment No. 31 (Nature of the General Legal Obligation Imposed on States Parties to the Covenant)*, 29 March 2004, CCPR/C/21/Rev.1/Add.13, para. 11, emphasis added.

[37] PCIJ, *Lotus (France v. Turkey)*, Judgment, 7 September 1927, [1927] PCIJ Rep. Series A, No. 10, at 18–19.

[38] Y. Shany, "Toward a General Margin of Appreciation Doctrine in International Law?", (2005) 16 *EJIL* 907, at 912 and 917.

[39] L. Doswald-Beck, "Le droit international humanitaire et l'avis consultatif de la Cour internationale de Justice sur la licéité de la menace ou de l'emploi d'armes nucléaires", (1997) 79 *IRRC*, No. 823, 37–59, at 52.

International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency".[40]

4. *The Threshold of Derogation Clauses under International Human Rights Law and the Applicability of Common Article 3*

The complementary relationship between IHL and IHRL raises the question whether the threshold of applicability of common Article 3 of the GCs should be comparable to that of derogation in non-international armed conflict. If the threshold is set at the comparable level, then it may be further questioned whether the state invoking a derogation clause would be estopped from denying the application of common Article 3 GCs (and even APII, if ratified).[41] Indeed, if the state taking advantage of derogation can avoid obligations under IHL by claiming the existence merely of a riot or an internal disturbance short of the threshold of common Article 3 GCs, then the applicable rules would be limited to a small number of non-derogable rights under IHRL.[42] Viewed in that way, it is desirable that the threshold of applicability of common Article 3 GCs, which is lowered according to the humanitarian objective, should be approximated to the threshold of application of derogation.

5. *Advantage of Relying on IHL Rules in Assessing International Human Rights Law*

It can be argued that if the monitoring bodies of international human rights law recognise their competence to draw on IHL rules, these rules can serve as crucial guidelines for appraising requirements of IHRL. According to this argument, the more specific and elaborately detailed IHL rules governing extraordinary situations of armed conflict and occupation[43] can facilitate the monitoring

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[40] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Rep. 1996, 226, at 240, para. 25.

[41] Hampson (1992) *supra* n. 31, at 125–126.

[42] This normative status is commonly referred to as the "Meron gap". For analysis of this gap, see T. Meron, "Towards a Humanitarian Declaration on Internal Strife", (1984) 78 *AJIL* 859, at 861. See also J. Cerone, "Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo", (2001) 12 *EJIL* 469, at 471, n. 5.

[43] L. Doswald-Beck and S. Vité, "International Humanitarian Law and Human Rights Law", (1993) 75 *IRRC* 94, at 101.

mechanisms of human rights to establish violations of specific human rights in such extraordinary situations. Indeed, many rights recognised in IHL treaties are formulated in such a manner that specifically addresses issues of armed conflict (and occupation).[44] It ought to be, however, noted that the elaborately detailed regulation of IHL alone does not necessarily provide a persuasive justification for giving IHL priority in every case of conflict between IHL and IHRL.[45]

Kleffner and Zegveld contend that the range of rights that can come to rescue individual persons under IHL is broader than the narrow range of non-derogable rights under human rights treaties. Similarly, Adam Roberts notes that "over a wide range of issues, the laws of war rules regarding military occupations, as laid down in the Hague Regulations and the Geneva Conventions, may offer more extensive, detailed and relevant guidance than the general human rights conventions".[46] It is suggested that the IHL's gap-filling role in the hostilities scenario can be discerned especially with respect to three areas: (i) the right to life; (ii) the rights of economic and social nature,[47] in particular, the right to health and the right to food; and (iii) the right of aliens. Kleffner and Zegveld[48] argue that the IHL rules relating to the freedom of movement and the right of foreigners not to be arbitrarily expelled are more elaborate and effective in time of hostilities.[49] The treatment of aliens in enemy territory is the subject of

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[44] Sassòli and Bouvier claim that in contrast to four specific areas (due process rights; use of firearms by law enforcement officials; medical ethics; and definition of torture), the specific rules detailed in the following areas are more adapted to armed conflict situations under IHL: (i) right to life; (ii) prohibition of inhumane and degrading treatment; (iii) right to health; (iv) right to food; and (v) freedom of movement: M. Sassòli and A.A. Bouvier, *How Does Law Protect in War? – Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, 2nd ed., (2006), Vol. I, at 347.

[45] A.E. Cassimatis, "International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law", (2007) 56 *ICLQ* 623, at 631.

[46] Adam Roberts, "Transformative Military Occupation: Applying the Laws of War and Human Rights", (2006) 100 *AJIL* 580, at 600.

[47] For example, the right to food and adequate standard of living under Article 11 ICESCR can be given much more specific meaning in the context of armed conflict and occupation by reference to the provisions on humanitarian relief. For protected persons in occupied territory, see, in particular, GCIV, Articles 55, 59–62, 108–111 and API, Articles 69 and 71. For examinations of the right to food in armed conflict, see J. Pejic, "The Right to Food in Situations of Armed Conflict: The Legal Framework", (2001) 83 *IRRC*, No. 844, 1097.

[48] J.K. Kleffner and L. Zegveld, "Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law", (2000) 3 *YbkIHL* 384, at 387, n. 17.

[49] State parties to the ICCPR can derogate from Article 13, which reads that "[a]n alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority".

detailed regulations under GCIV Part III, Section I.[50] In occupied territory, as has been appraised in Part II, both individual and mass expulsions may amount to forcible transfers or deportations of protected persons, which are absolutely prohibited under Article 49(1) GCIV.[51]

With respect to the right to life guaranteed under Article 6 ICCPR, the ICJ in the *Nuclear Weapon*s case held that "whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself".[52] Apart from the conduct of warfare scenario, as noted by Kleffner and Zegveld,[53] IHL rules relating to the death penalty provide more stringent conditions *ratione personae*[54] and *ratione materiae*.[55] In contrast, the persons immune from lawful sanction of capital punishment under Article 6(5) ICCPR are limited only to persons below the age of eighteen and pregnant women.

Further, the concurrent application of IHL rules by the supervisory organs of IHRL has two specific advantages. In the first place, the IHL contains detailed rules concerning economic, social and cultural rights specifically tailored to occupation. The parties to an armed conflict must implement such rules *immediately*, rather than *progressively* as in relation to the rights embodied in the ICESCR.[56] The obligation of immediate implementation is of special importance in occupied

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[50] Kleffner and Zegveld, *supra* n. 48, at 387, n. 17.

[51] This point is of special relevance to *Loizidou v. Turkey*, where the applicant was forced to leave the Turkish occupied territory contrary to Article 49(1) GCIV, but the European Court of Human Rights refused to examine IHL. The applicant's displacement did not amount to evacuation within the meaning of Article 49(2) either, which might have been justified on the ground of security of the population or of imperative military necessity: *Loizidou v Turkey*, Judgment of 18 December 1996, A 310. For the concurrent view, see Heintze, *supra* n. 31, at 808.

[52] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Rep. 1996, 226, at 240, para. 25.

[53] Kleffner and Zegveld, *supra* n. 48, at 387, n. 18.

[54] GCIV, Article 68 (4) and API, Article 77(5) (the prohibition on pronouncing and executing death penalty on a protected person who was under 18 years of age at the time of the offence); and API, Article 76(3) (the prohibition, "[t]o the maximum extent feasible", on avoiding the pronouncement of capital punishment on pregnant women or mothers having dependent infants, and the absolute ban on executing such women).

[55] For instance, in occupied territory, the applicability of death penalty in relation to protected persons is restricted to three circumstances: espionage; "serious acts of sabotage"; and murder: Article 68(2) GCIV. See also other conditions: GCIV, Article 68(3) and Article 75.

[56] The principle of "progressive realization" is embodied in Article 2(1) of the ICESCR, which provides that "[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of

territory. Three categories of rules relating to ESC rights can be highlighted: (i) the rules purported to prevent inadequacy in standard of living (food, shelter and clothing); (ii) the rules on humanitarian assistance and relief supplies to civilians; and (iii) the rules intended specifically to protect vulnerable categories of persons (such as women and children).[57] In the second place, many IHL rules regarding ESC rights in occupied territory are in essence non-derogable. Their special feature can be partly explained by the objective of IHL "to deal with the inherently exceptional situation of armed conflict".[58] Even if some rules may be subject to the concept of military necessity, the parameters within which this concept can be invoked is relatively narrow. This ought to be contrasted to the general limitation clause embodied in Article 4 ICESCR, which even in non-emergency circumstances contemplates a wide-range of restrictions on ESC rights.

6. *IHL as* Lex Specialis

6.1. *Overview*

As discussed above, in *Legality of the Threat or Use of Nuclear Weapons*, the ICJ has enunciated that in case of conflict between rules of IHRL and those of IHL, the latter, as being *lex specialis*, prevail over rules of the former.[59] Indeed, as will be examined below, long before the ICJ's Advisory Opinion, the European Commission of Human Rights in *Cyprus v. Turkey* (1976) implicitly recognised the relationship between IHL and human rights as *lex specialis* and *lex generalis*.

Without embarking on an in-depth assessment of *lex specialis* in general, this section will appraise the meaning and component elements of the *lex specialis* rule. This preliminary appraisal is conducted for the purpose of obtaining insight into the interplay between IHL and human rights. Special regard will be had to the question whether, and if so to what extent, the *lex specialis* rule needs to be adjusted to this "special relationship".

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the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

[57] Pejic, (2001) *supra* n. 47, at 1097–1098.

[58] *Ibid*., at 1097.

[59] See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Rep. 1996, 226, at 240, para. 25; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 136, at 177–178, paras. 104–106.

6.2. *Brief Examinations of the* Lex Specialis *Rule*

The legal maxim *lex specialis derogat lex generalis* has its origin in Roman law,[60] and it is fully anchored in the writings of classic scholars of international law. Grotius notes that "[a]mong agreements which are equal in respect to the qualities mentioned, that should be given preference which is most specific and approaches most nearly to the subject in hand; for special provisions are ordinarily more effective than those that are general".[61] Akehurst notes that the maxim "*lex specialis derogat generali* is no more than a rule of interpretation. (…) there is a presumption that the authority laying down a general rule intended to leave room for the application of more specific rules which already existed or which might be created in the future, even though the specific rules might be derived from an inferior source; but this is only a presumption, which can be rebutted by proof of contrary intention".[62]

The *lex specialis* rule is based on the functional and practical rationale that a specific rule is more effective than a general rule in affording a clear and definite guideline in a specific context. The Report of the ILC's study group on the fragmentation of international law, finalised by Martti Koskenniemi, highlights the role of the *lex specialis* maxim in the context of conflict ascertainment and conflict resolution, which "are part of *legal reasoning*, that is, of the pragmatic process through which lawyers go about interpreting and applying formal law".[63] Indeed, he explains that the rationale of the *lex specialis* principles lies in the fact that:

> …such special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law. Its application may also often create a more equitable result and it may often better reflect the intent of the legal subjects.[64]

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[60] A. Lindroos, "Addressing Norm Conflicts in Fragmented Legal System: The Doctrines of *Lex Specialis*", (2005) 74 *Nordic JIL* 27, at 35.

[61] H. Grotius, *De Jure belli ac pacis, Libri Tres*, Vol. II (1625), translation by F.W. Kelsey, (1964), Ch. XVI, Sect. XXIX, at 428.

[62] M. Akehurst, "The Hierarchy of the Sources of International Law", (1974–1975) 47 *BYIL* 273.

[63] ILC, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", *The Report of the ILC's study group on the fragmentation of international law*, finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006, para. 27. See also Lindroos, *supra* n. 60, at 36.

[64] ILC, *Conclusion of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2006), adopted by the ILC at its Fifty-eighty session in 2006, and submitted to the General Assembly as a part of the Commission's report, A/61/10, para. 251; *YbkILC*, 2006, Vol. II, Part Two.

The *lex specialis* rule does not assume the normative hierarchy. As Jenks notes,[65] no "absolute validity" can be ascribed to this rule, or to any other variety of rules of interpretation and maxims such as *lex prior, lex posteior, a contrario, ejusdem generis*". These other rules of interpretation may override *lex specialis*, or they may be applied concurrently.[66]

6.3. *Two Requirements of the* Lex Specialis *Rule*

The scholarly work suggests two requirements for the application of *lex specialis*: (i) that two rules of international law must deal with the same subject matter; and that there must exist inconsistency or conflict between the two rules.[67] Similarly, the ILC's Commentary on Article 55 of the Draft Articles on State Responsibility concerning *lex specialis* explains that:

> For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.[68]

With respect to the definition of conflict of norms, the scholarly literature focuses on a "pragmatic" approach. Indeed, the requirement of conflict cannot be assessed separately from the requirement that the two rules must relate to the "same subject matter".[69] A conflict is recognised whenever two valid norms cannot be applied simultaneously to the same set of factual circumstances, without violating one of them[70] or without leading to irreconcilable results.[71] The two rules must have a certain relationship based on the shared normative objectives and interests.

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[65] W. Jenks, "The Conflict of Law-Making Treaties", (1953) 30 *BYIL* 401, at 407.

[66] Lindroos, *supra* n. 60, at 41.

[67] G. Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points", (1957) 33 *BYIL* 203, at 236; and Lindroos, *ibid*., at 44.

[68] ILC, *Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Official Records of the General Assembly* (2001), UN Doc. A/56/10, Supplement 10, at 358. This is reprinted in: J. Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (2002), at 307, para. (4).

[69] B. Vierdag, "The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions", (1988) 59 *BYIL* 75, at 100.

[70] Lindroos, *supra* n. 60, at 45. See also J. Mus, "Conflicts between Treaties in International Law", (1998) 45 *NILR* 208, at 209–211.

[71] Vierdag, *supra* n. 69, at 100.

6.4. *Two Contexts in Which the Application of the* Lex Specialis *Rule is Contemplated*

Koskenniemi and Lindroos classify the two contexts in which the operation of the *lex specialis* rule is conceived in international legal theory and practice.[72] In the first instance, a special norm is considered an application of the general law in specific circumstances. In this context, both the specific and the general rules share the normative environment, and this allows or requires the specific rule to be construed in the light of the related but more general rule.[73] No conflict in the sense of normative objectives and interests can be recognised. Second, a special rule can be seen as an exception to the general rule. In this context, the former is allowed to modify, overrule or set aside the latter.[74] In this context, the *lex specialis* rule is a "structural necessity"[75] to preserve the coherence and systematicity in positing the two separate set of rules in a single unitary legal order.

Lindroos describes *lex specialis* as a "contextual principle"[76] stressing "contextual sensitivity" in using this principle. She argues that this principle is simply not capable of "an abstract determination of an entire area of law as being more specific towards another area of law".[77] Viewed in that way, she contends that the applicability and the utility of this maxim to certain types of conflicts of laws, such as the conflicts emanating from the fragmentation of international law, is limited.[78] On the international legal plane, this rule has been invoked to

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[72] ILC (Koskenniemi), *supra* n. 63, at 49–59; Lindroos, *supra* n. 60, at 46–47. See also Krieger (2006), *supra* n. 17, at 269–270. Compare this with Bianchi, who distinguishes *lex specialis ratione personae* (namely, rules applicable to a limited number of states such as bilateral treaty rules, as opposed to general international law), and *lex specialis ratione materiae*, which is based on the formula of more detailed (versus more specific) rules regulating the same subject matter: A. Bianchi, "Dismantling the Wall: The ICJ's Advisory Opinion and its Likely Impact on International Law", (2004) 47 *German YbkIL* 343, at 371–372.

[73] ILC (Koskenniemi), *ibid.*, at 49; Lindroos, *supra* n. 60, at 46–47. Krieger argues that the prohibition of inhumane treatment and the prohibition of arbitrary detention, which are framed in vague terms under IHL, can obtain more concrete meaning through assessment of the jurisprudence of human rights law: Krieger (2006), *supra* n. 17, at 270, 275–276.

[74] ILC (Koskenniemi), *ibid.*, at 49, para. 88. According to Koskenniemi, this scenario involves the application of "a genuine lex specialis", and the World Trade Organisation's Dispute Settlement Body follows this line of reasoning, according to which the absence or impossibility of "harmonious interpretation" justifies the overruling of a general standard by a conflicting special one: *ibid.*; and Lindroos, *supra* n. 60, at 46–47.

[75] D. Pulkowski, "Narratives of Fragmentation: International Law between Unity and Multiplicity", ESIL Agora Paper 3, at 12, section 5.

[76] Lindroos, *supra* n. 60, at 42. See also Krieger (2006), *supra* n. 17, at 269.

[77] Lindroos, *ibid.*, at 44.

[78] *Ibid.*, at 44 and 47. She also points out that the doctrinal discourse has failed to present guidelines for determining which rules are more special and more general: *ibid.*, at 48.

regulate the conflict of two specific norms rather than to offer a *general* guideline for the relations between two specialised regimes.[79]

Simma and Pulkowski argue that the *lex specialis* rule operates in the idea of "a particular fiction of unified state conduct" (or "the universalistic school") that presume states to act with "a unified legislative will" when concluding treaties or installing customary rules.[80] Akin to the systematic normative pyramid envisaged by Kelsen, the conceptual framework contemplated by the universalists presupposes the coherent and unitary legal order on which both specific and more general legal sub-systems can fall back in quest for legitimation and validation. Such conceptualisation is a pattern of international lawyers' endeavour to allocate and systematise "the proper balance between legitimacy and effectiveness" in a specific case.[81] *The Conclusion of the Work of the Study Group on the Fragmentation of International Law* (2006) does recognise international law as a "legal system" based on the meaningful relationship among different norms, rather than a random collection of different norms.[82]

6.5. *Limit of the* Lex Specialis *Rule*

It is possible to contemplate two *intrinsic* limits of the *lex specialis* rule.[83] In the first place, its lack of substantive content may prevent this rule serving to determine what is general or special, making such determination susceptible to a value-laden, policy choice.[84] The determination of general or special rules can be considered to fall within the dimension of "fit" in Dworkin's account. Yet, it ought to be recalled that ascertaining the threshold of fit is not mechanical but dependent on an interpreter's political convictions about fit.[85] Second, as a "contextual principle", *lex specialis* may be incapable of resolving the conflict

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[79] *Ibid.*, at 43 *et seq*; and Krieger (2006), *supra* n. 60, at 269.

[80] B. Simma and D. Pulkowski, "Of Planets and the Universe: Self-Contained Regimes in International Law", (2006) 17 *EJIL* 483, at 489. See also Pulkowski, *supra* n. 75, at 8, section 3A.

[81] Pulkowski, *ibid.*, at 12, section 4B.

[82] ILC, *The Conclusion of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (2006)*, para. 1. Indeed, Koskenniemi, the chairperson of this Study Group, considers that despite the claim for particular orientations of legal thought based on different historical and cultural traditions, there is a strong presumption among international lawyers that the law as such should be read in a universal manner: *Official Records of the General Assembly*, 60th session, Supplement 10 (2005), 204–224, at 208, paras. 452–453.

[83] Lindroos, *supra* n. 60, at 42. As an example of the exception to the applicability of *lex specialis*, she also refers to the scenario in which two norms are both considered special in a particular context. However, she notes that in such a case, the incapacity of the *lex specialis* rule to provide a solution to the conflict of two rules or normative orders is not derived from this rule itself: *ibid.*

[84] *Ibid.*, at 42.

[85] R. Dworkin, *Law's Empire* (1986), at 257.

between two normative orders *in abstracto*, much less providing "a mechanic juristic logic" that justifies "prioritis[ing] an area of law over another".[86] Such limit, according to Lindroos, compelled the ICJ in the *Nuclear Weapons* Case to reduce *lex specialis* to a "technical tool" in a specific context.[87]

6.6. *The* Lex Specialis *Rule and the Interplay between IHL and International Human Rights Law*

The approach followed by the ICJ in its Advisory Opinion in the *Nuclear Weapons* case was to focus on the question of the specific case of the right to life. In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ has held that:

> As regards the relationship between international humanitarian law and human rights law, there are… three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[88]

As Bianchi notes, when literally interpreted, the last statement would suggest a problematic consequence that during armed conflict, whenever there are rights provided both in human rights law and IHL, the standards of IHL *en bloc* would "systematically and invariably" override those of human rights.[89] Such a far-reaching implication is highly problematic.[90] First, this repercussion flies in the face of the crucial role of human rights during armed conflict in complementing areas which are governed by IHL but hardly given specificity. These areas include fair trial guarantees of captives in non-international armed conflict, the notion of inhumane treatment, and freedom from arbitrary detention.[91] Second, such conceptualisation would ignore the specific "contextual character" of the *lex specialis* rule. It would be oblivious of the need to determine the interface between IHL and human rights *in casu*.[92]

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[86] Lindroos, *supra* n. 60, at 42.

[87] *Ibid.*, at 42.

[88] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 136, at 178, para. 106. See also ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, available at www.icj-cij.org/ (last visited on 30 April 2008), para. 216.

[89] Bianchi, *supra* n. 72, at 370–371.

[90] See also CUDIH, *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation*, Geneva, 1–2 September 2005, at 19.

[91] Bianchi, supra n. 72, at 371.

[92] Lindroos, *supra* n. 60 at 49; and Krieger (2006), *supra* n. 17, at 271.

The same disturbing implication of the *lex specialis* rule may also be drawn from the approach followed by the European Commission of Human Rights in *Cyprus v. Turkey*. In that case, as seen above, the now defunct Commission implicitly invoked the *lex specialis* rule to explain the relationship between IHL and human rights. The absence of the declaration of a state of emergency by Turkey led the majority of the Commissioners to hold that all relevant rules of the ECHR were fully applicable to the occupied area.[93] With respect to issues of internment and detention, the following observation was made:

> The Commission has taken account of the fact that both Cyprus and Turkey are parties to the (Third) Geneva Convention of 12th August 1949, relative to the treatment of prisoners-of-war, and that, in connection with the events in the summer of 1974, Turkey in particular assured the International Committee of the Red Cross (ICRC) of its intention to apply the Geneva Convention and its willingness to grant all necessary facilities for humanitarian action (…).
> …
> Having regard to the above, the Commission has not found it necessary to examine the question of a breach of Article 5 of the European Convention on Human Rights with regard to persons accorded the status of prisoners of war.[94]

As Frowein notes,[95] the Commission *implicitly* recognised and applied the *lex specialis* rule with respect to the relationship between IHL and human rights. It assumed that GCIII would prevail over the requirements under Article 5 ECHR in relation to the assessment of detention of prisoners of war and their judicial proceedings.[96] The Commission refused to examine the compatibility of detention measures with relevant rules of IHL (namely, those under GCIII). This evasive and restrained approach is highly problematic. Whenever relevant IHL rules are found to be *prima facie* complied with, it would become unnecessary to undertake an inquiry into whether the requirements of Article 5 ECHR are fulfilled *in a specific detention at issue*.

In their dissenting opinion, two Commissioners, Messr Sperduti and Trechsel, went further in evaluating the relationship between IHL and human rights in

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[93] ECmHR, *Cyprus v. Turkey, No 6780/74 and 6950/75*, Report of 10 July 1976, paras. 525–528 (declassified pursuant to Committee of Ministers Resolution DH (79) of 21 January 1979); reported in: (1982) 4 *EHRR* 482, at 556.

[94] *Ibid*., para 313, (1982) 4 *EHRR* 482, at 532–533. See also 2 *DR* 125 (admissibility decision).

[95] J.Abr. Frowein, "The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation", (1998) 28 *Israel YbkHR* 1, at 9–11.

[96] While not referring to the *lex specialis* rule, Frowein suggests that this rule was applied. He notes that "the Commission recognized the special status of prisoners of war and the fact that the Prisoners-of-War Convention, the Third Geneva Convention, takes precedence in that respect over the ECHR": *ibid*., at 10. For the same view, see also Adam Roberts (2006) *supra* n. 46, at 597.

time of occupation. They argued that "respect for these same rules [the rules on occupation embodied in the 1907 Hague Regulations and GCIV] by a High Contracting Party during the military occupation of the territory of another state, will *in principle* assure that that High Contracting Party will not go beyond the limits of the right of derogation conferred on it by Article 15 of the Convention".[97] This view suggests that compliance with IHL rules relating to occupation serves as a guideline for assessing the lawfulness of a derogating measure under a specific human rights treaty.

It may be criticised that the interpretation given by the two Commissioners would reduce the role of IHL rules to a *supplementary* guideline for human rights. Viewed in that way, this interpretation would ignore that in some areas (such as medical experimentation), the threshold and the material scope of rights for individual persons may be more effectively guaranteed under IHL than under international human rights law.[98] However, the two Commissioners did not explicitly mention the supplementary nature of IHL. Nor did they indicate in any manner that the threshold of protection under IHL would be lower than that under human rights law. Instead, their view indicates a *complementary* role of IHL in providing criteria for lawfulness under the relevant human rights rule. The fact that they have added the words "in principle" suggests that they have not totally excluded the possibility that compliance with the obligations under IHL may not suffice to prove that relevant human rights standards are met.

The foregoing appraisals lead to the conclusion that IHL constitutes *lex specialis complementa* (complementary) rather than *lex specialis derogata* (derogatory) of IHRL.[99] The potential application of one body does not necessarily exclude or displace the other. Rather, as affirmed by the Inter-American Commission on Human Rights in the *Coard* case, it is of special importance to reaffirm "an integral linkage" between the two bodies of international law based on their "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity".[100] It is essential effectively to capitalise on the synergy between the two bodies of international law.

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[97] *Cyprus v. Turkey*, *Nos. 6780/74 and 6950/75*, Commission's Report of 10 July 1976, Diss. Opinion, Sperduti and Trechsel, at 564, para. 6, emphasis added, (1982) 4 EHRR 482, at 561–565, in particular 564.

[98] See, for instance, Dinstein (1984), *supra* n. 2, at 350–354; R. Provost, *International Human Rights and Humanitarian Law*, (2002), at 334 (discussing the prohibition against medical experiments as an example of the greater protection afforded by IHL, and the prohibition of preventive detention as an example for the better guarantees under human rights law).

[99] CUDIH, *Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict*, Geneva, 24–25 July 2004, at 45.

[100] IACmHR, *Coard et al. v. US*, Case 10.951, Report No. 109/99, 29 September 1999; reprinted in (2001) 8 *IHRR* 68, para. 39.

6.7. *Circumstances in Which the* Lex Specialis *Rule Should be Excluded to Allow the Application of International Human Rights Law*

It is possible to contemplate three circumstances in which the *lex specialis* rule should be set aside to invoke the concurrent application of both IHL and IHRL: (i) circumstances where the underlying rationale of the *lex specialis* rule is absent, as in the areas where relevant IHL rules lack requisite specificity and precision; (ii) circumstances where the application of both IHRL and IHL is based on analogy, as in the case of international administration of foreign territories, and where specific *contextual* nature of *lex specialis* must be taken into account;[101] and (iii) circumstances where a doctrine based on the distinctive nature and objectives of human rights law expressly allow such an exception to the *lex specialis* rule.

First, it is suggested that in areas where relevant IHL rules remain rudimentary and lacking in specificity, as in the instance of internal armed conflict,[102] the application of the *lex specialis* rule should be excluded to call into play the full application of human rights law.[103] Support for this argument can be found in the preambular paragraph 2 of APII, which specifically stresses the linkage between the Protocol and human rights. Its statement that "international instruments relating to human rights offer a basic protection to the human person" reinforces the concurrent applicability of human rights.[104] The *ICRC's Commentary on APII* refers to the ICCPR, the UN Convention against Torture, the Racial Discrimination Convention, and regional human rights treaties.[105] It is suggested that common Article 3 of GCs[106] does not deal with the conduct of warfare whilst guarantees

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[101] Krieger (2006), *supra* n. 17, at 273–275.

[102] The rules concerning internal armed conflict remain relatively less developed and articulated. This is especially the case for methods and means of warfare. See D. Turns, "At the 'Vanishing Point' of International Humanitarian Law: Methods and Means of Warfare in Non-International Armed Conflict", (2002) 45 *German YbkIL* 115.

[103] Krieger (2006), *supra* n. 17, at 273–275. She observes that "[i]nternal armed conflicts can be much closer to the regular sphere of application of human rights law, because they also concern the relation of the individual vis-à-vis his or her state": *ibid.*, at 275. However, two aspects ought to be noted: first, non-international armed conflicts can be even more intense and brutal than international armed conflicts; and second, violations of human rights committed by armed opposition groups are not capable of adjudication before a human rights monitoring body.

[104] See also Pejic (2005), *supra* n. 30, at 378–379.

[105] *ICRC's Commentary to APII*, at 1339–1340, paras. 4427–4430.

[106] Kolb observes that while the rights guaranteed under common Article 3 can be approximated to the irreducible core of non-derogable nature, a large number of human rights treaties, which provide equivalent guarantees of non-derogable nature, has diminished the utility of this provision: R. Kolb, *Ius in Bello: Le droit international des conflits armés* (2003), at 79–80, para. 157.

for civilians under APII are couched only in general terms under Articles 13–18. In contrast, rules of IHRL are much more specific and elaborate.[107]

One may argue that customary rules can fill a gap[108] in non-international armed conflict,[109] and that customary rules can take concrete and specific forms, as "crystallised" in the authoritative *ICRC's Customary IHL Study*.[110] However, customary rules are intrinsically ambiguous, lacking in specificity and articulation sufficient to provide effective guarantees for individual persons.[111] It is questionable whether in internal armed conflict these customary rules are better equipped than the principles developed in the doctrinal discourse or the jurisprudence of IHRL to deal with means and methods of warfare.[112]

Second, it is suggested that where IHL is applied by way of analogy, as in the case of international administration of territory, the underlying rationale for almost exclusive reliance on IHL is lessened.[113] This is an area where the contextual nature of the *lex specialis* rule provides an exception to its application. The deployment of national troops as peace-keeping forces in accordance with a Security Council resolution pursues objectives totally different from the obligations imposed on the occupying power. The UN peacekeeping forces assume a wide range of functions akin to a government, implementing law-enforcement, penitentiary and judicial measures. These functional differences, it may be suggested, weaken the assumption that IHL should be given prevalence over human rights law.[114]

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[107] Bianchi, *supra* n. 72, at 371; and Krieger (2006), *supra* n. 17, at 274.

[108] See E. David, *Principes de droit des conflits armés*, 3rd ed., (2002), at 57, para. 27. A salient example of a gap-filling role of customary IHL can be seen in the approach followed by the Eritrea-Ethiopia Claims Commission. There, customary humanitarian norms served as the most important sources of law, as Eritrea was not a party to the 1949 Geneva Conventions until after the occurrence of the contested events: *Partial Award of Eritrea's Civilian Claims*, 44 *ILM* 601, paras. 28, 30 (2005).

[109] See David, *ibid*., at 62, para. 33.

[110] Surely, the argument that these rules have crystallised by way of the ICRC's authoritative and highly helpful *Study* in itself may be contested.

[111] R. Kolb, G. Porretto and S. Vité, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationals – Forces de paix et administrations civiles transitoires*, (2005), at 135; and Krieger (2006), *supra* n. 17, at 274.

[112] Parts I–IV of the *Study* (Henckaerts and Doswald-Beck, *supra* n. 11) in-depthly elaborates specific rules, which principally regulate the conduct of hostilities. These rules can serve as a highly attractive source of guidance for the supervisory bodies of human rights.

[113] Krieger (2006), *supra* n. 17, at 273; and *idem*, "Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslandseinsatz", (2002) 62 *ZaöRV* 669, at 695–696.

[114] Krieger suggests that the functions of the peacekeeping forces in international administration are understood in terms of the classical concept of freedom from interference by the state than in terms of military or humanitarian aspects of the laws of war: Krieger (2006), *ibid*., at 274. This suggestion must, however, be qualified in two respects. First, since the legal framework

Third, the law-making character of human rights treaties has given rise to what Sadat-Akhavi terms as the "more favourable principle".[115] According to this principle, among the relevant rules of human rights, the rule affording the most effective and enhanced guarantees to an individual person must prevail. This principle finds its legal basis under Article 5(2) ICCPR[116] and its equivalent provisions under regional human rights treaties. Human rights treaties contemplate this principle to serve as an exception to the *lex specialis* rule within human rights law.[117] In view of the shared normative environment and objectives, it is justifiable to apply this principle to the interplay between IHL and human rights. This approach would favour a rule more protective of individual victims, be it derived from IHL or from human rights law,[118] insofar as a specific context

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of international administration of territory assumes a wide range of governmental functions, inhabitants under that administration should be entitled not only to rights of classical "first-generation" rights, but also to so-called "second-generation" rights. Second, the modern law of occupation, as vastly supplemented by GCIV, requires the occupying power to assume positive obligations akin to the concept of welfare state. Indeed, she recognises this point in another context, observing that:

> Vielmehr legt die Spruchpraxis der Strassburger Organe nur nahe, dass das humanitäre Völkerrecht in bewaffneten Konflikten grundsätzlich als *lex specialis* mögliche menschenrechtsverletzungen rechtfertigen kann. Eine solche Interpretation verringert den Menschenrechtsschutz nicht, da die Genfer Abkommen zumeist mindestens gleiche, *oft aber weiterreichende und der Situation des bewaffneten Konflikts besser entsprechende Rechte enthalten*, und zwar selbst dann, wenn die Derogationsmöglichkeit nicht genutzt wurde.
>
> Rather the judicial practice of the Strasbourg organs only suggests that international humanitarian law in armed conflicts principally as *lex specialis* may justify possible violations of human rights. Such an interpretation does not reduce the human rights protection, as at least the Geneva Protocols mostly resemble [human rights], *but often contain rights which are more extensive and better corresponding to armed conflict situations*, and indeed this is so even where the possibility of derogation were not used [English translation by the present writer].

Krieger (2002), *ibid*., at 695, emphasis added.

[115] According to him, the application of this principle is limited only in the specific case of conflict between provisions affording the same right for the same person: S.A. Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties*, (2003), at 219. For the examination of this principle, see *ibid*., at 213–232.

[116] Article 5(2) of ICCPR reads that "[t]here shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent".

[117] Sadat-Akhavi, *supra* n. 115, at 219.

[118] Indeed, their "relationship" or "connection" is distinguishable from that between two dissimilar normative orders, such as environmental norms and trade norms: Lindroos, *supra* n. 60, at 41–42 and 44–45.

of the case is duly taken into account. Indeed, the "cross-border" application of the more favourable principle is explicitly recognised in Article 75(8) API, which states that "[n]o provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1". It is patently clear that such applicable rules of international law include both treaty and customary human rights law.[119]

7. *The Methodology of Applying IHL Rules by Human Rights Treaty Bodies*

7.1. *Overview*

The above examinations have led to the conclusion that the relationship between IHL and IHRL is not governed by the literal application of *lex specialis*, which would set aside human rights *en bloc* by IHL. They have rather highlighted the importance of determining an applicable standard on the basis of specific contextual analysis. The focus of examinations now turns to the methodology to seek applicability of IHL by human rights monitoring bodies. The direct application of IHL would facilitate victims of violations of IHL to raise responsibility of a state through highly refined supervisory mechanisms. This methodology has been "pioneered" by the supervisory organs of the American Convention on Human Rights (ACHR). The assumption of this methodology is that rules of human rights law are insufficient to deal specifically with extraordinary situations of armed conflict and occupation. One crucial advantage of this methodology is that by tapping human rights monitoring mechanisms, it can remedy the absence of *procedural* rules for addressing violations of IHL.

7.2. *Direct Application of IHL by Human Rights Treaty Bodies*

A proposal to achieve the effective convergence between IHL and IHRL is to implement the former body of law through the supervisory procedures of the latter. A concern has been expressed that only serious violations of IHL lead to individual criminal responsibility under the ICC Statute. Further, even in such cases, the establishment of the collective side of responsibility, whether by states or armed opposition groups, is often neglected.[120] It is suggested that the effective use of human rights monitoring mechanisms equipped with independent

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[119] See also Pejic (2005) *supra* n. 30, at 378.

[120] Kleffner and Zegveld, *supra* n. 48, at 384–385; and L. Zegveld, *Armed Opposition Groups in International Law: the Quest for Accountability*, (2002), at 276–277.

judicial or quasi-judicial organs, which are lacking in IHL, may partially remedy such problems. The application of IHL by the supervisory bodies of human rights treaties, both in their reporting procedures and in inter-state or individual complaints procedures, would facilitate the establishment of state responsibility for violations of IHL,[121] closing the gap left by the latter body of international law.

As compared with the supervisory bodies of UN human rights treaties[122] and the European counterparts (the European Court and Commission of Human Rights),[123] the Inter-American Commission on Human Rights has played a leading role in synthesising IHL into the adjudications on human rights.[124] This approach is based on the functional rationale that the *direct* application of IHL,

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[121] Indeed, this was the approach advocated by Messrs. Sperduti and Trechsel of the erstwhile European Commission of Human Rights in their dissenting opinion in *Cyprus v. Turkey*. They argue that:

> It is to be noted that the rules of international law concerning the treatment of the population in occupied territories (contained notably in the Hague Regulations of 1907 and the Fourth Geneva Convention of 12 August 1949) are undeniably capable of assisting the resolution of the question whether measures taken by the occupying power in derogation from the obligations which it should in principle observe – by virtue of the European Convention [on Human Rights] – where it exercises (*de jure* or *de facto*) its jurisdiction, are or are not justified according to the criterion that only measures of derogation strictly required by the circumstances are authorised.... It follows that respect for these same rules by a High Contracting Party during the military occupation of the territory of another state, will in principle assure that that High Contracting Party will not go beyond the limits of the right of derogation conferred on it by Art. 15 of the Convention....

Cyprus v. Turkey, 6780/74 and 6950/75, Report of 10 July 1976, declassified pursuant to Committee of Ministers Resolution DH (79) of 21 January 1979; reported in (1982) 4 *EHRR* 482, at 564, para. 6. See also C. Greenwood, "International Humanitarian Law", in: F. Kalshoven (ed), *The Centennial of the First International Peace Conference*, (2000) 161, at 240–241, 251–252; and M. Zwanenburg, *Accountability of Peace Support Operations* (2005), at 284.

[122] D. O'Donnell, "Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms", (1998) 80 *IRRC*, No. 324, 481.

[123] See A. Reidy, "The Approach of the European Commission and Court of Human Rights in International Humanitarian Law", (1998) 80 *IRRC*, No. 324, 513.

[124] For analysis of the application of IHL by the Inter-American Court of Human Rights, see F. Martin, "Application du droit international humanitaire par la Cour interaméricaine des droits de l'homme", (2001) 83 *IRRC*, No. 844, 1037; L. Zegveld, "The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case", in: (1998) 80 *IRRC*, No. 324, 505.

As regards the application of IHL by regional human rights supervisory bodies in general, see C.M. Cerna, "Human Rights in Armed Conflict: Implementation of International Humanitarian Law Norms by Regional Intergovernmental Human Rights Bodies", in: F. Kalshoven and Y. Sandoz (eds), *Implementation of International Humanitarian Law*, (1989), at 31–67. For the application of IHL by UN bodies, see H.-P. Gasser, "Ensuring Respect for the Geneva

rather than reliance on this body of law as guidance in interpreting the ACHR,[125] is vital to the identification of specific rules safeguarding individual persons in armed conflict. The Inter-American Commission has been confronted with cases akin to those susceptible to the application of IHL rules on conduct of hostilities. It has noted in particular that such rules, including those concerning means and methods of warfare, are essential to fill a gap left by a human rights treaty such as the ACHR. In the *Tablada* case,[126] the Commission elaborated the reasoning for broadening its mandate to apply IHL:

> [B]oth Common article 3 [of the Geneva Conventions] and article 4 of the American Convention protect the right to life and thus, prohibit, *inter alia*, summary executions in all circumstances. Claims alleging arbitrary deprivations of the right to life attributable to state agents are clearly within the Commission's jurisdiction. But the Commission's ability to resolve claimed violations of this non-derogable right arising out of an armed conflict may not be possible in many cases by reference to article 4 of the American Convention alone. This is because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations. Therefore, the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations.[127]

A teleological and victim-oriented rationale underpins the approach followed by the Inter-American Commission on Human Rights. This can be explicitly seen in its statement that not to apply relevant IHL rules would be tantamount to the refusal to exercise its jurisdiction even in cases involving indiscriminate attacks that precipitate many civilian casualties. According to the Commission, such an outcome "would be manifestly absurd in light of the underlying object and purposes of both the American Convention and humanitarian law treaties".[128] It is clear that in this case, the Commission assertively relied on IHL rules when

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Conventions and Protocols: the Role of Third States and the United Nations", in: H. Fox and M.A. Meyer, *Effecting Compliance*, (1993), at 15–49.

[125] See Kleffner and Zegveld, *supra* n. 48, at 386; and

[126] For detailed assessment of this case, see Zegveld (1998), *supra* n. 124, at 505–511. See also IACmHR, *Coard et al. v. US*, Case 10.951, Report No. 109/99, 29 September 1999; reprinted in (2001) 8 *IHRR* 68 (interpretation of IHL standards together with, and in the framework of, the provisions of the American Declaration of the Rights and Duties of Man).

[127] IACmHR, *Juan Carlos Abella* (*Tablada* case), Case No. 11.137, 18 November 1997, *Annual Report of the IACmHR 1997* (OEA/Ser.L/V/II.95 Doc. 7 rev) 271, para. 161.

[128] *Ibid.*

addressing issues such as the execution of persons *hors de combat*, the principle of distinction and the prohibition against indiscriminate attacks.[129]

In the subsequent *Las Palmeras* case concerning Colombia, the Inter-American Commission followed this teleological and "pro-active interpretation", recognising its mandate directly to apply IHL on the basis of the "recognised interrelation and complementarity" between IHL and human rights. Observing that the right to life embodied in Article 4 ACHR must be interpreted in a manner "coextensive" with the norm of general international law codified in common Article 3 GCs,[130] the Commission found a concurrent violation of both provisions.[131] However, before the Inter-American Court of Human Rights, preliminary objections were raised by the Colombian Government, which challenged the competence of the Commission and the Court to apply common Article 3 GCs. The Court upheld these objections in its judgment.[132] It ruled that it lacked the competence directly to apply the Geneva Conventions, though it was able to interpret them to assist its interpretation of the ACHR.[133] Kleffner and Zegveld conclude that after the *Las Palmeras* judgment, it is "highly unlikely" that other human rights bodies such as the Human Rights Committee or the European Court of Human Rights will *directly* apply IHL in the future.[134]

In the subsequent *Bamaca-Velasquez* case, which involved torture and murder of a guerrilla leader at the hands of the Guatemalan military, the Inter-American Court has obtained guidance from common Article 3 GCs in interpreting the prohibition of inhumane treatment in internal armed conflict. The Court ruled that while it lacked competence to find violations of treaties that do not grant to it such competence, "it can observe that certain acts or omissions that violated human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3".[135] This statement can be interpreted as attenuating the repercussion of *Las Palmeras*. It evinces its understanding that while lacking competence officially to find a

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[129] CUDIH (2005), *supra* n. 90, at 14.

[130] The Commission emphasised that three important elements of common Article 3 GCs, which justify its direct application are: specificity; relevance; and context: *Las Palmeras*, Preliminary Objections, Judgment of 4 February 2000, Series C, No. 67, para. 31.

[131] *Las Palmeras*, Preliminary Objections, Judgment of 4 February 2000, Series C, No. 67, para. 31.

[132] *Ibid.*, para. 43.

[133] *Ibid.*, paras 32–33. See, however, IACtHR, *Bámaca Velásquez v. Guatemala*, Judgment of 25 November 2000, Series C, No. 70, paras. 208–209. Bianchi considers that the Court took IHL standards as a reference when interpreting ACHR: Bianchi, *supra* n. 72, at 373.

[134] Kleffner and Zegveld, *supra* n. 48, at 389.

[135] IACtHR, *Bámaca Velásquez v. Guatemala*, Judgment of 25 November 2000, Series C, No. 70, para. 208.

violation of IHL rules, these rules can be used as *more than a general guidance* for finding a violation of relevant provisions of the ACHR.[136]

7.3. *Indirect Application of IHL by Human Rights Treaty Bodies*

The fallout of *Las Palmas* is that the only possible way of applying IHL by the monitoring bodies of the ACHR would be the indirect application of IHL, namely, its use as "a source of authoritative guidance"[137] in applying and interpreting human rights in armed conflict and occupation. This methodology requires the interpretation of human rights requirements in the light of the normative objective envisaged by relevant IHL rules.[138] This model provides a practically viable pattern of converging IHL and human rights standards. Nevertheless, the method of indirect application is criticised for lacking in the procedure allowing identification of violations committed by non-state actors, namely, armed opposition groups. It may be contended that there is a "corrosive effect" of stressing violations committed only by states.[139] It is suggested that denying the procedure whereby individual victims can charge armed opposition groups with violations of IHL risks undermining its horizontal effects of this body of law.[140] In view of such deficiencies, Kelffner and Zegveld propose that there should be established a "humanitarian law committee" invested with a competence to accept the "violations" approach.[141]

8. *The Methodology of Expanding the Scope of Application of International Human Rights Law in Situations of Occupation and Armed Conflict*

Next, search for a practically viable model that can realise assertive convergence between IHL and IHRL turns to the methodology of extending the scope of

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[136] On the basis of this judgment, Heintze concludes that the *direct* applicability of IHL by the IACtHR is ascertained: Heintze, *supra* n. 31, at 805. This is, however, a misreading of the judgment. See *Bámaca Velásquez v. Guatemala, ibid.*, paras. 207–214.

[137] Kleffner and Zegveld, *supra* n. 48, at 389.

[138] This understanding can find support in Greenwood's suggestion that "the monitoring mechanisms of human rights conventions could be used in an indirect way to assist in ensuring compliance with the law applicable in internal conflicts": Greenwood, *supra* n. 121, at 240–241 and 251–252.

[139] Kleffner and Zegveld, *supra* n. 48, at 389–390.

[140] *Ibid.*

[141] *Ibid.*, at 390–400.

application of the latter body of international law to cover situations of occupation and conduct of hostilities. Indeed, the assumption of this methodology is opposite to that of the approach of relying on IHL rules by human rights treaty bodies. It starts with the understanding that substantive rules of IHL are inadequate as compared with more elevated and effective standards of IHRL, and that such deficiencies can be remedied by the expansive application of the latter body of law. The main question is how to push the boundaries of IHRL and to allow the inroad of this body of international law into "hard cases",[142] such as full-blown battle situations, which may erupt in occupied territories.

Two approaches can be suggested. The first approach is the one suggested by Kretzmer. According to him, a key to determining the application of IHRL is the capacity of an occupying power to implement law enforcement operations. He proposes that such capacity should be determined by existence of sufficient control over a territorial area. The second approach is to propose that detailed subtests developed in assessing the notion of proportionality in the context of human rights law should be transposed to the appraisal of a balance between military necessity and collateral civilian loss (injuries and damage) taking place during hostilities. The second approach of integrating the principle of proportionality developed in the jurisprudence of human rights treaty bodies into the examinations of conduct of hostilities will be explored in the next chapter dealing with so-called targeted killing and the principle of proportionality, insofar as this is pertinent in occupied territories.

9. *Kretzmer's Mixed Model*

Kretzmer suggests that whenever a state exerts sufficient control over a part of the territory, it is the ordinary measures of law enforcement (capture, arrest and detention of a terrorist suspect for a trial), subject to human rights requirements, which must at first be resorted to. This model is of special importance in the context of the fight against terrorism[143] and in non-international armed conflict (NIAC), where the boundary between IHL and IHRL is not clear.

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[142] Compare Koskenniemi's observation that "*Legality of Nuclear Weapons* was a 'hard case' to the extent that a choice had to be made by the Court between different sets of rules none of which could fully extinguish the others": ILC (Koskenniemi), *supra* n. 63, para. 104.

[143] D. Kretzmer, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?", (2005) 16 *EJIL* 171, at 201–204.

The special feature of this model is to link the application of law-enforcement and human rights standards with the "effective territorial control" test, or with the willingness or capacity of the *de facto* force in control of the relevant territory to hand over a terrorist suspect or to take effective steps to debar terrorist activities.[144] This model clarifies the conditions under which rigorous standards of human rights should be applied. It has an advantage of introducing such human rights standards and principles as the principle of less restrictive alternatives based on "a high probability" test,[145] the test of proportionality in the narrow sense,[146] the duty of "a thorough and credible legal investigation" into killings,[147] and the shift of onus of proof to a state. It offers a viable and coherent methodology to strengthen the convergent theory.[148]

Nevertheless, some critical comments can be made on the assumption underlying this model. First, there is concern that over-emphasis on *territorial* control would ignore the danger that states may favour an *aerial* targeted killing (including resort to a targeted killing by a drone) so as to obtain immunity from the obligations under law-enforcement/human rights rules.[149] Kretzmer stresses the

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[144] *Ibid.*, at 203.

[145] *Ibid.*, at 203. Kretzmer argues that the necessity principle can be imported from the corresponding principle in self-defence. However, more elaborate and viable elements of the sub-test of necessity can be obtained by analogy from the case-law of the European Court of Justice in the context of EU law. See N. Emiliou, *The Principle of Proportionality in European Law – a Comparative Study*, (1995).

[146] In the context of "targeted killing" directed at a terrorist, Kretzmer suggests that three factors be weighed in assessment of proportionality: (i) the danger to life posed by the continued activities of terrorists; (ii) the possibility of the danger to human life being realised if activities of the suspect is not neutralised immediately; and (iii) the danger of incidental loss of civilian lives or wounding of civilians in the attack on the suspected terrorist: Kretzmer, *supra* n. 143, at 203.

[147] *Ibid.*, at 201–204 (in particular, at 203–204). Contrast this with House of Lords, Appellate Committee, *Al-Skeini and Others v. Secretary of State for Defence*; and *Al-Skeini and Others v. Secretary of State for Defence* (Consolidated Appeals), 13 June 2007, [2007] UKHL 26, para. 83. Lord Rodger of Earlsferry held that "…the United Kingdom did not even have the kind of control of Basra and the surrounding area which would have allowed it to discharge the obligations, including the positive obligations, of a contracting state under article 2 [of the ECHR], as described, for instance, in *Osman v. United Kingdom*…paras 115–116".

[148] Kretzmer suggests the importance for such adjustments in specific context, noting that in relation to the question of application of human rights standards to non-international armed conflict, "the special features" of such conflict must be taken into account: Kretzmer, *supra* n. 143, at 202.

[149] Indeed, states may justify resort to an aerial targeted killing, on the basis of military necessity (the necessity of minimising the incidental loss of civilians' lives and the loss of its own soldiers, which may arise if it chooses a ground invasion to effectuate occupation to capture a suspect involved in terrorism or insurgency).

"situational control" over individual persons.[150] Indeed, the focus on territoriality risks unnecessarily highlighting an artificial line between aerial space and territory controlled by a state, the distinction adduced by the European Court of Human Rights in the *Bankovic* case to justify the dismissal of the complaint as inadmissible.[151] At the *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation*, organised by the CUDIH at University of Geneva in 2005, one expert suggested that the focus of appraisal should be shifted to the question whether a state exercises effective control over the means of violating human rights, such as the airspace, the pilot, the plane, and the weapon.[152] As will be examined in Chapter 21 that deals with extraterritorial application of human rights, the HRC adheres to the approach enunciated in its *General Comment No. 31*. Accordingly, the responsibility for violations of the rights under the ICCPR can be engaged whenever a person falls within the power or effective control of a state party.[153]

Kretzmer's model does not contemplate the application of human rights standards to battlefield or any pocket of the land in occupied territory, where an occupying power has become unable to secure situational control. In such areas, according to his model, it is only the body of IHL that should be applied.[154] Even so, it must be noted that the state of occupation is determined on a specific factual basis. Once a portion of a states' territory falls under effective control of an adverse party to the conflict, then the state of occupation can be fully established. The applicable law will be the law of occupation and human rights law. Both laws focus on law enforcement measures such as arrest, detention and

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[150] Chatham House, *The Law of Armed Conflict: Problems and Prospects*, 18–19 April 2005, at 55 (presentation by Kretzmer).

[151] *Banković and Others v. Belgium and Others, No. 52207/99*, Decision of 12 December 2001. Scheinin calls into question "a distinction between the presence of ground troops, which according to the Concluding Observations [of the HRC] on Israel constitutes effective control, and high altitude air strikes". He criticises that "the choice of method of warfare could result in an advantage for a state resorting to military force as to the non-applicability of human rights law": M. Scheinin, "Extraterritorial Effect of the International Covenant on Civil and Political Rights", in: Coomans and Kamminga (eds), *supra* n. 12, 73–81, at 77. Likewise, Lubell observes that "[t]here is a risk that basing the notion of control on the existence of ground troops while excluding the possibility of violations through use of air power would mean that States can choose the latter in order to avoid censure for human rights violations": Lubell, *supra* n. 13, at 741, n. 20. For a criticism of this judgment as an example of "restrictive interpretation", see A. Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights" (2003) 14 *EJIL* 529, at 538–551.

[152] CUDIH (2005), *supra* n. 90, Section E. 3, at 32–33.

[153] HRC, *General Comment No. 31, Nature of General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (2004), para. 10.

[154] Chatham House, *supra* n. 150, at 52 and 55 (presentation by Kretzmer).

trial, rather than accord an automatic licence for instant killing of a suspect. The standards of human rights and occupation law must prevail, insofar as there is no eruption of fighting of such intensity as to deprive the occupying power of control over a specific area. In the context of the law of occupation, the main difficulty lies precisely in the factual evaluation of the threshold of effectiveness in control. The boundaries between an area of occupation and a combat zone may be blurred. This is especially the case because Kretzmer's model is purported to expand the applicability of IHRL, setting a threshold lower than that of effective control for humanitarian reasons.

10. *Fundamental Differences in the Underlying Rationales of IHL and International Human Rights Law Revisited*

At a policy level, striking a reasonable balance between the laws of war and IHRL provides credible legitimacy to "transformative occupation".[155] That said, there remain fundamental differences both in the conceptual framework and the underlying rationales of the two bodies of law, which may overshadow the efforts by human rights supervisory organs to extend human rights standards to conflict situations. In the first place, the differences in the conceptual framework can be manifested at the preliminary stage of factual determinations.

Such differences can be highlighted in two issues: (i) how to characterise a specific operation as part of a law-enforcement operation governed by human rights law, or a military operation which triggers the application of IHL; and (ii) how to classify the status of a person against whom lethal force is directed (whether s/he is regarded as a civilian or as a person who has taken a direct part in hostilities). Determining specific fighting against a member of a terrorist or insurgent group as a law-enforcement measure or as a military operation is a key to ascertaining the rules relating to lawful military objectives. As illustrated in examinations of Kretzmer's model, difficulties in such factual determinations can be saliently seen in non-international armed conflicts and in occupied territory riddled with sporadic fighting. The trend to set the threshold of applicability of common Article 3 GCs at a level lower than that of APII is no doubt salutary for humanitarian reasons. Yet, its spin-off is to blur the dividing line between an armed conflict and a law-enforcement operation that takes place within national borders.[156]

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[155] S. Ratner, "Foreign Occupation and International Territorial Administration: The Challenges of Convergence", (2005) 16 *EJIL* 695; and Adam Roberts, *supra* n. 46, at 619.

[156] Lubell, *supra* n. 13, at 749–750. As he notes, the proposal to apply human rights law standards to the use of force during domestic operations of low intensity (in the context of a

At the Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation, Geneva (2005),[157] the experts agreed that the applicability or not of the IHL rules governing the conduct of warfare depends on whether new hostilities have broken out or old hostilities (which gave rise to the state of occupation) have resumed.[158] In case of "calm" occupation where arrest is possible either through its own control or by a request of handover by a local authority exerting control over an area of the occupied territory, the law enforcement rules, including in particular the proportionality requirement concerning the right to life, should be the norms.[159] It would be unlawful to direct lethal force against a member of a resistance movement or even a member of an unprivileged belligerent group (such as a terrorist organisation) on the basis of the rules on conduct of warfare.[160]

Second, differences in rationale underpinnings affect the interpretation and application of human rights principles. This casts serious doubt on the strategy of mechanically transplanting such principles in armed conflict without overhauling them. With respect to the concept of inhumane treatment, international human rights jurisprudence has developed tripartite standards of ill-treatment (torture, cruel or inhuman treatment/punishment, and degrading treatment or punishment). The liberal construction of supervisory organs has contributed to lowering the threshold of degrading treatment to cover unsatisfactory conditions of detention,[161] which cannot be justified by economic and social circumstances. Can such liberal standards of degrading treatment admitting of no derogation be applied to conditions of internment of civilians or prisoners of war in occupation scenarios? Further, as illustrated in the approach of the European Court of Human Rights in the *Ergi* case, the requirement of effective investigation into causes of death or ill-treatment is a logical corollary of the rigorous standard of proportionality. However, this requirement finds no equivalent counterpart in treaty provisions of IHL. As examined above, to stretch the parameters of this requirement to cover inquiries into the death of unprivileged belligerents in an active combat zone is hardly practicable.

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non-international armed conflict), and to call into play IHL rules once the conflict reaches a higher threshold as envisaged by APII, contradicts the efforts to allow for a lower threshold of application of IHL both to states and to non-state parties as early as possible: *ibid*.

[157] CUDIH (2005), *supra* n. 90.

[158] *Ibid*., at 22.

[159] *Ibid*., at 23–24.

[160] *Ibid*., Sections D3 and E, at 22–35.

[161] See, for instance, ECtHR, *Kalashnikov v. Russia*, in which the ECtHR assailed overcrowded, unsanitary and unhygienic conditions of detention, allowing no justifications based on the general or common feature of such unsatisfactory conditions in a respondent State: Judgment of 15 July 2002.

The most fundamental difference in the underlying logic and methodology can be illustrated in the effort to re-calibrate and converge the standard of proportionality developed in the context of human rights law to a scenario of armed conflict that erupts in an occupied territory. The proportionality principle developed in the jurisprudence of the right to life is designed to minimise the use and effect of lethal force in favour of the right of an individual person. The elaborate jurisprudence on such "absolute necessity" test has resulted in the strong emphasis on minimising any loss of life. It has also tightly demarcated the parameters within which recourse to lethal force is allowed. In contrast, the principle of proportionality under IHL operates in extraordinary circumstances of armed conflict. When applied to an attack during a military operation, it requires the balance to be struck between the incidental loss of civilians and the amorphous concept of military advantage.[162]

11. *Conclusion*

The *ICRC's Customary IHL Study* seems to rely on effective convergence of IHL and IHRL and generally follows the approach based on *lex specialis* in specific context.[163] Nevertheless, it adopts a distinct methodology. When identifying customary rules of fundamental guarantees for individuals in armed conflict (international, non-international) and occupation, its focus firstly turns to rules of IHL. In case any relevant rules are not found, less clearly articulated or less developed under IHL than under IHRL, the *Study* turns to the latter to distil norms that are deemed both customary *and* applicable to the context of armed conflict and occupation. The *Study* notes that "…references to human rights law instruments, documents and case-law have been included…not for the purpose of providing an assessment of customary human rights law, but in order to support, strengthen and clarify analogous principles of humanitarian law". This cautious stance may be understood as defence against a possible criticism that ample references to human rights case-law suggest the extrapolation of customary IHL rules from empirical data on IHRL.[164] Even so, in essence, what the *Study* has done is to fill lacunae left by IHL in respect of fundamental guarantees, undertaking "normative translation"[165] of the essence of customary

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[162] For detailed examinations, see CUDIH (2005), *supra* n. 90.

[163] Krieger (2006), *supra* n. 17, at 268.

[164] Indeed, in some areas, the *Study* has been audacious in deducing from the jurisprudence of the ECHR, a regional human rights mechanism, the rules of general and universal applicability to armed conflict and occupation: *ibid.*, at 289.

[165] This word is used by K. Dörmann in his discussion on the materialisation of customary IHL rules applicable to NIAC, Chatham House, *supra* n. 150, at 25.

IHRL as those of customary IHL. One way of providing a coherent explanation for such normative transposition is to rely on the concept of "general principles of law". This concept, which can be invoked for the purpose of interpreting IHL treaties,[166] is understood as encompassing the relevant rules of customary human rights obligations.[167]

In contrast, in its analysis of the principles relating to the precautions in attack, persons deprived of liberty, and displaced persons, the *Study* relies exclusively or primarily on state practice and *opinio juris* relating to IHL rules.[168] It may be argued that underlying the *Study's* methodology is an "ought"-driven policy rationale. This serves to approximate the standards of the two bodies of international law by extending to victims in combat situations more favourable and effective standards of human rights, even though some standards may remain *lex ferenda* (reasonable normative projections). Such an assertive pattern of "effective convergence" can be saliently seen in its emphasis on the requirement of effective investigation[169] developed in the case-law on the right to life, which cannot find its equivalent counterpart in treaty provisions of IHL.[170]

The examinations reveal difficulties in determining combatants or civilians, and the threshold of effective control of territory. As will be analysed in the subsequent chapter, it is also intractable to integrate the principles fleshed out in the human rights context (the principle of proportionality concerning the right to life, the concept of inhumane treatment, effective investigations etc.) into conduct of hostilities. Such difficulties highlight a fundamental difference

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[166] See the Vienna Convention on the Law of Treaties, Article 31(3)(c).

[167] R. Provost, "Reciprocity in Human Rights and Humanitarian Law", (1994) 65 *BYIL* 383, at 423–7 (discussions of the interaction between the Martens Clause and international human rights law, especially in relation to belligerent reprisals); Cassimatis, *supra* n. 45, at 634. For the advocacy of relying on general principles of law as basis for inferring human rights obligations, see Judge Tanaka's dissent in *South West Africa*, Second Phase, ICJ Rep. 1966, 4, at 298; B. Simma and P. Alston, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles", (1988–9) 12 *Austl. YbkIL* 82, 105–6. For the assessment of the interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties, see C. McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention", (2005) 54 *ICLQ* 279.

[168] Henckaerts and Doswald-Beck, *supra* n. 11, Vol. I, Chs. 5, 37–38, respectively.

[169] This requirement is not expressly provided in the relevant provisions of the ECHR but developed in the case-law relating to two non-derogable rights: the right to life protected under Article 2; and freedom from torture, inhuman or degrading treatment or punishment guaranteed under Article 3. For the case-law on effective inquiries obligations relating to circumstances of death in occupied territories, see, in particular, UK, House of Lords, *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, para. 83 (*per* Lord Rodger of Earlsferry).

[170] Henckaerts and Doswald-Beck, *supra* n. 11, Vol. I, at 314.

in the underlying premises and rationales of IHL and IHRL.[171] As Aeyal Gross notes, the situation of occupation lacks the foundation of IHRL. In the absence of democratic accountability of those who are governing for the population who are governed, it is of "inherently undemocratic rights-denying nature".[172]

Such fundamental difference reinforces the importance of specific contextual assessment in order to determine the most protective standards and principles derived from assertive convergence of human rights and IHL.[173] Koskenniemi contends that "[h]owever desirable it might be to discard the difference between peace and armed conflict, the exception that war continues to be to the normality of peace could not be simply overlooked when determining what standards should be used to judge behaviour in those (exceptional) circumstances".[174] Lindroos emphasises the contextual appraisal in determining a specific rule governing the deprivation of life under IHL and human rights, noting that both bodies of international law concern the protection of individual persons, but "in different circumstances".[175] From a critical legal studies' standpoint, David Kennedy argues that:

> . . . to maintain the claim to universality and neutrality, the human rights movement pays little attention to background social and political conditions which will determine the meaning a right has in particular contexts, rendering the even-handed pursuit of "rights" vulnerable to all sorts of distorted outcomes.[176]

In some cases, merging IHRL into IHL rules on occupation without taking into account specific context and the complex nature of occupation life may result in weakening the rights of inhabitants in occupied territory. Aeyal Gross points out that transplanting the language of human rights onto the IHL framework applicable to occupied territory, with its purported claim for universal application to all individuals, would blend a horizontal balancing between the rights of different individuals (indigenous inhabitants and settlers in occupied territory) with the vertical balancing of human rights violations (the balance between security and the right of the local population). It is suggested that this would enable the rights of settlers to operate on a par with those of inhabitants. According to Gross, this may bring about the consequence that without full attention given to structural inequality between settlers and indigenous inhabitants, the

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[171] For the concurrent view, see Krieger (2006), *supra* n. 17, at 290–291.

[172] A.M. Gross, "Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?", (2007) 18 *EJIL* 1, at 33.

[173] Lindroos, *supra* n. 60, at 48 and 62.

[174] ILC, (Koskenniemi), *supra* n. 63, at 57, para. 104.

[175] Lindroos, *supra* n. 60, at 42, and 44. See also ILC (Koskenniemi), *supra* n. 63, at 53, paras. 96–97.

[176] D. Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (2004), at 12.

human rights of the former such as their right to freedom of religion can be read in the broader concept of military necessity under Article 43 of the Hague Regulations.[177] As he notes, special heed must be taken of two implications: (i) the blurring of the intrinsically undemocratic and right-denying nature of occupation; and (ii) the conferring upon the occupant the perceived legitimacy of an accountable regime.[178]

[177] Gross, *supra* n. 172, at 16–17, 19, 25 and 31.
[178] *Ibid.*, at 33.

Chapter 18

The Effective Convergence between IHL and International Human Rights Law in Guaranteeing the Right to Life in Situations of "Volatile Occupation"

1. *Introduction*

One of the most intractable questions for the parallel application of international human rights law (IHRL) and IHL in occupied territories is the extent to which the standards fleshed out in the jurisprudence of the monitoring bodies of human rights treaties concerning the right to life can be applied to conduct of hostilities that break out in occupied territories. This has been the subject of much of academic debate in relation to so-called targeted killing. Targeted killing is a commonly used concept that often refers to lethal force used against an individual person. The experts who gathered to discuss a multitude of implications of this issue at the University Centre of International Humanitarian Law (UCIHL), Geneva, in 2005 provided the following cogent definition:

> A targeted killing is a lethal attack on a person that is not undertaken on the basis that the person concerned is a "combatant", but rather where a state considers a particular individual to pose a serious threat as a result of his or her activities and decides to kill that person, even at a time when the individual is not engaging in hostile activities.[1]

This pattern is often relied upon against an alleged, suspected, or actual terrorist, or against any other unprivileged belligerent in occupied territories. The modality of targeted killing often takes the form of aerial killing (at times by

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[1] Definition employed by the Centre Universitaire de Droit International Humanitaire (CUDIH), *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation*, at Geneva on 1–2 September 2005, Section E; L. Doswald-Beck, "The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?", (2006) 86 *IRRC* 881, at 894.

way of drones). If this form of deploying lethal force is considered outside the framework of the rules of conduct of warfare under international humanitarian law (IHL), this amounts to an extra-judicial killing, which is clearly unlawful. The issue of aerial targeted killing is so intimately connected to issues of volatile occupied territories riddled with eruptions of fighting caused by resistance or other armed opposition groups, or by unprivileged belligerents such as terrorists. The intertwined nature of the regime of occupation and aerial killing is such that the combined syndrome provides a crucial touchstone for assessing the parallel application of international humanitarian law (IHL) and international human rights law (IHRL) with respect to the right to life.

Before undertaking detailed examinations, the fundamental assumptions of this chapter need to be highlighted. It is proposed that in occupied territories, the human rights standards applicable in respect of law enforcement operations should be the default rules, unless and to the extent that these are modified by the IHL rules on conduct of hostilities.[2] The International Court of Justice,[3] the European Court of Human Rights[4] and many monitoring bodies[5] of IHRL have recognised the parallel application of IHL and IHRL in military occupations. Even in case occupying powers are confronted with demonstrators or riots in occupied territories, it is the measure of arrest and trial that should be preferred.[6] Indeed, the existence of Article 68 GCIV suggests that the process of arrest, capture, prosecution and punishment pursuant to the law enforcement model should be chosen to deal with issues of maintenance of public order and security within the meaning of Article 43 of the 1907 Hague Regulations and Article 64 GCIV.[7] On the other hand, where the armed forces of the occupied State or members of independent groups fulfilling the conditions for prisoners of war under Article 4A(2) GCIII are conducting combat operations in the occupied territory, it is generally the IHL rules on conduct of hostilities rather than the IHRL rules on law enforcement that govern the occupying power's response.[8] However, a fundamental problem is that the IHL treaties that deal

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[2] See CUDIH, *ibid.*, at 19, 22–23.

[3] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 136, at 177–181, paras. 102–114; *Armed Activities on the Territory of the Congo*, Judgment of 19 December 2005, available at www.icj-cij.org/ (last visited on 30 April 2008), para. 216.

[4] ECtHR, *Loizidou v. Turkey*, Preliminary Objections, Judgment of 23 March 1995, paras. 63–64.

[5] HRC, *General Comment 31*, para. 10; and its *Concluding Observations on the Second Periodic Report on Israel*, 21 August 2003, para. 11.

[6] CUDIH, *supra* n. 1, at 26 (all experts agreed on this issue); and Doswald-Beck (2006) *supra* n. 1, at 890.

[7] CUDIH, *ibid.*, at 22–23.

[8] *Ibid.*, at 24.

with occupation, such as the 1907 Hague Regulations and the 1949 Geneva Civilians Convention, do not provide clear guidelines on when resort to lethal force may be allowed, leaving much leeway to occupying powers.[9]

Bearing in mind these basic underlying assumptions, the appraisal firstly turns to the criteria that have been developed in law-enforcement context to assess lawful recourse to lethal force. Next, the examinations focus on the extent to which the standard of proportionality and its subtests fleshed out in IHRL context can be transposed to the assessment of specific attacks involving lethal force in situations which are generally considered subject to IHL rules on conduct of hostilities.

2. *Guidelines Derived from the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*

For the purpose of assessing the efficacy of the proportionality test in law enforcement context, note must be taken of the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*. Principle 9 of the *Basic Principles* elaborates on the subtests of proportionality, confining the use of force to what is strictly necessary:

> Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of 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, and only when less extreme means are insufficient to achieve these objectives. In any event, international lethal use of firearms may only be made when strictly unavoidable in order to protect life.[10]

This suggests that the Principle 9 provides only four legitimate aims pursuant to which firearms can be used by law enforcement officials: (i) self-defence or defence of others against the imminent threat of death or serious injury; (ii) prevention of the perpetration of a particularly serious crime involving grave threat to life; (iii) arrest of a person who presents such a danger and resists their authority; and (iv) prevention of his or her escape. Military personnel may fall within the term

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[9] Doswald-Beck (2006), *supra* n. 1, at 892.

[10] *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 to 7 September 1990, and adopted by Genera Assembly in Res. 45/166, 69th Plenary Meeting, 18 December 1999, para. 4 ("Welcomes . . . the Basic Principles on the use of Force and Firearms by Law Enforcement Officials . . . and invites Governments to respect them and take them into account within the framework of their national legislation and practice").

"law enforcement officials" laid down in Article 1(b) of the *Code of Conduct for Law Enforcement Officials*,[11] to which the *Basic Principles* refers.[12]

The essence of the lawful use of force is strictly premised on the tests of necessity, proportionality and precaution. First, the reference to inadequacy of "less extreme means" clearly indicates the doctrine of less restrictive alternative. Second, the requirement that firearms should be used only "when strictly unavoidable" suggests the principle of proportionality in a narrow sense. Third, law enforcement officials must abide by the precautionary principle. Principle 10 of the *Basic Principles* provides that "[i]n the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed". Further, Principle 10 recognises the escape clause only in two circumstances where to do so: (i) "would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons"; and (ii) "would be clearly inappropriate or pointless in the circumstances of the incident". The insertion of the adjectives "unduly" in the first escape clause and "clearly" in the second suggests that the threshold for allowing the exceptions is set very high.

3. *Criteria for Assessing the Legality of Targeted Killing in Occupied Territory*

As noted above, in "calm" occupied zones, the rules on law-and-order operations guided by the standards on the right to life should be the default normative regime that regulates the occupying power's response to security threats posed by dangerous terrorists and saboteurs etc. In such zones, recourse to lethal force without exhausting law enforcement measures or examining their efficacy should be considered absolutely forbidden. Where an occupying power exercises sufficient degree of control and authority over the territory to effectuate an arrest of suspects, there lacks the element of immediacy or urgency that may justify resort to what is described as extrajudicial killing in peacetime.

Surely, once the severity of hostilities has reached such a violent stage that the occupying power loses the capacity to respond based on the law enforcement model, the IHL rules on conduct of hostilities may come into play. The persons who would otherwise have to be arrested may risk becoming lawful military targets.[13]

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[11] *UN Code of Conduct for Law Enforcement Officials*, General Assembly Resolution 34/169 of 17 December 1979.

[12] See also CUDIH, *supra* n. 1, at 32.

[13] *Ibid*., at 30.

Absent the sufficient level of hostilities to allow the application of the IHL rules on conduct of warfare, the scope of lawful targeted killing must be strictly limited to the circumstances where: (i) insurgents or autonomous entities exert an effective control over the area in which an individual taking direct part in hostilities is found; *and* (ii) they continue to show inability or unwillingness, even after repeated requests, to arrest and transfer him/her to the occupying power for the purpose of trial.

4. *Proportionality Assessment of the Right to Life in Situations of Hostilities*

4.1. *Modalities of Proportionality in Assessing the Right to Life in the Context of International Human Rights Law*

Intractable questions arise in relation to the application of the right to life in situations of conduct of hostilities, where an incidental loss of civilians may be justified under the IHL-based concept of proportionality. Any clash between the requirement of the right to life under IHRL, which is non-derogable, and the considerations of IHL can be resolved by arguing that the requirements of IHRL are not breached insofar as collateral killing of innocent bystanders is considered to remain within the limit of such proportionality concept.[14]

As examined in the preceding chapter, the interaction between IHRL and IHL can be most saliently observed in the jurisprudence of the American Convention on Human Rights (ACHR). With respect to lethal measures in hostilities, where responses by state authorities are manifestly egregious, the supervisory bodies of the ACHR have shown a readiness to find the proportionality test to be unfulfilled.[15] In the *Neira Alegria et al.* case, the IACtHR found a violation of Article 4(1) ACHR (the right to life) in relation to the demolition of a prison (a correctional facility called *El Frontón*) during riots, which was undertaken even when prisoners were inside. The Court considered it very serious that the authorities showed little interest in rescuing the surviving rioters after the demolition, and that they failed to identify the bodies with "required diligence".[16] Similarly, in the *Armando Alejandre Jr. and Others* case, the IACmHR found a violation of Article I of the American Declaration of the Rights and Duties of Man in relation to the shooting down by a Cuban MiG29 fighter plane of a small civilian aircraft, which was alleged to have violated Cuban airspace. The Commission found sufficient evidence to conclude that agents of the Cuban

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[14] R. Provost, "Reciprocity in Human Rights and Humanitarian Law", (1994) 65 *BYIL* 383, at 426.

[15] CUDIH, *supra* n. 1, at 14.

[16] IACtHR, *Neira Alegria et al., v. Peru (El Frontón Case)*, Judgment of 19 January 1996, Series C No. 21, paras. 69–72.

State orchestrated arbitrary and extrajudicial execution, referring to such factors as "the disproportionate and indiscriminate use of lethal force applied to the civilian aircraft" and "the intensity of that force".[17]

4.2. *The Approach of the European Court of Human Rights: the Precautionary Principle as Part of Proportionality*

In *Ergi v. Turkey*, when assessing under Article 2 ECHR (right to life) the accidental killing of a woman allegedly caught in cross-fire between Turkish security forces and PKK (Kurdistan Workers' Party) terrorists, the European Court of Human Rights found that Turkey breached the principle of proportionality because of its failure "to take all feasible precaution in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding or, at least, minimising the incidental loss of civilian life".[18] The Court arrived at this finding even without conclusive evidence as to the exact source of the bullet which killed the applicant's sister. In its view, it was reasonable to draw an inference that "insufficient precautions" were taken to discharge the positive obligations of protecting and ensuring the right to life of an innocent civilian.[19]

The elevated standard of proportionality applied by the Court has contributed to the strengthening of positive duties of protection and prevention in respect of the right to life, which must be fulfilled by the member states. According to the Commission, (and the Court which has endorsed the opinion of the Commission), even if the state security forces were taking "due care" of civilians in its response to terrorist firings, this was not sufficient. The Court asserted that the duty of precaution and care required to minimise incidental loss of civilians must take into account the possibility that terrorist organisations will not respond with such restraint and precautions in their attack as state agents are required to do.[20]

It may be argued that the stringent standard of proportionality applied by the Court in the *Ergi* case is not practically feasible in active combat situations. This would require the armed forces to take precautionary measures to prevent civilians caught in a cross-fire or in an active hostility zone from falling into the victim of the fire shot even by an insurgent or enemy forces who harbour little mercy for them. It may be contended that the application of both a heightened

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[17] IACmHR, *Armando Alejandre Jr. and Others. v. Cuba*, Case No. 11.589, Report No. 86/99, 29 September 1999, (OEA/Ser.L/V/II.106 Doc. 3 rev.) 586 (1999), paras. 37 and 45.

[18] ECtHR, *Ergi v. Turkey*, Judgment of 28 July 1998, para. 79.

[19] *Ibid.*, para. 81. For a similar reasoning based on the finding that the police used excessive firing, see ECtHR, *Güleç v. Turkey*, Judgment of 27 July 1998, paras. 69–73.

[20] ECtHR, *Ergi v. Turkey*, Judgment of 28 July 1998, at 80.

standard of proportionality and the expanded scope of positive obligations enunciated in human rights jurisprudence to a scenario of conduct of warfare risk being divorced from the theatre of military operations that the IHL-based notion of proportionality governs.

In the *Ergi* case, the Court did not explicitly invoke any IHL rule. Yet, this dictum was enunciated in the passage peppered with key terminology of IHL such as "means and methods of a security operation", "civilian life" and "incidental loss".[21] This evinces an insightful methodology of reading and tacitly integrating IHL rules into the process of proportionality appraisal in human rights context.

In *Isayeva, Yusupova and Bazayeva v. Russia*, the European Court of Human Rights was confronted with a scenario much closer to an active combat. It was asked to examine whether missile attacks against a convoy of trucks that transported internally displaced persons in Chechnya were carried out in harmony with Article 2 ECHR. After giving a benefit of doubt to the respondent government with respect to the legitimacy of the aim of the attack under Article 2(2)(a) (defence of a person from unlawful violence emanating from an insurgent group), the Court meticulously examined whether the attacks complied with the "absolute necessity" requirement under Article 2. Its proportionality appraisal took into account factors, which are generally the subject of scrutiny by a local commander in armed conflict. Such relevant factors included specific elements of the operation (the impact assessment of the specific missile attacks, the timing and the frequency of the attacks, absence of adequate precaution, the number of direct, accidental civilian casualties, and the responsible authority's knowledge of both civilian presence and attacks against it), the systemic failures (inadequacy in planning and control in the overall operation), and the question of evidence (discrepancy of testimonies).[22] Despite the third party submission by the NGOs, which referred specifically to common Article 3 GCs and the ICC Statute,[23] the Court did not explicitly invoke IHL rules.[24]

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[21] *Ibid*., paras. 79–81.

[22] ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Judgment of 24 February 2005, paras. 168–200.

[23] *Ibid*., at paras. 163–164.

[24] See also N. Lubell, "Challenges in Applying Human Rights Law to Armed Conflict", (2005) 87 *IRRC* 737, at 744.

5. *The Methodology of Incorporating Subtests of Proportionality Developed in the Context of International Human Rights Law into the Appraisal of Conduct of Hostilities*

5.1. *Overview*

In the *Targeted Killings* judgment,[25] the Israeli Supreme Court applied the component elements of proportionality developed in IHRL context to assess proportionality of lethal measures. In essence, President (emeritus) Barak stressed the three-pronged test of proportionality: (i) the rational link test, which requires the means chosen to be rationally capable of attaining the desired military objective; (ii) the less restrictive alternative (LRA) doctrine, according to which the means selected should cause the least foreseeable incidental harm (injury or death) to innocent civilians who are bystanders or passers-by; and (iii) the proportionality *stricto sensu*, namely, the requirement that unfortunate harm caused by the selected measure ought to strike a reasonable balance to its anticipated military gains.[26] These correspond to the tripartite test of proportionality (suitability; necessity or LRA; and proportionality in a narrow sense) developed in the jurisprudence of EU law and German public law.

5.2. *The Less Restrictive Alternative (LRA) Doctrine*

According to the Israeli Supreme Court in the *Targeted Killings* case, the government must satisfy itself that there are no other effective means available which would be less injurious to the targeted civilians.[27] The onerous duty of establishing whether the LRA subtest has been met rests on the attacking army.[28] The Court conceded that the evaluation of the efficacy of the LRA test may be qualified by two relative factors. First, such alternatives may not actually be available in an occupied territory. Second, the application of the proportionality test in a narrow sense may override the appraisal based on the LRA test. This can occur when

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[25] HC *2056/04, Beit Sourik Village Council v. The Government of Israel and Commander of the IDF Forces in the West Bank*, Judgment of 30 June 2004, 58(5) *Piskei Din* 807; reproduced in: (2004) 43 *ILM* 1099.

[26] This tripartite formula of proportionality appraisal has been recognised (not exclusively but prominently) in the *Beit Sourik* case: *ibid*., (2004) 43 *ILM* 1099, at 1114–1115, paras. 40–43. In that case, the Court found a segment of the route of the barrier to be disproportionate in breach of the less restrictive alternative doctrine, recognising the existence of an alternative route.

[27] HC *769/02, Public Committee Against Torture in Israel v. The Government of Israel*, Judgment of 11 December 2005, available at: http://www.court/gov.il (last visited on 30 June 2008), para. 40.

[28] *Ibid*. See also D. Kretzmer, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?", (2005) 16 *EJIL* 171, at 203.

the danger to which soldiers may be exposed is considered to outweigh benefits of resorting to non-lethal measures, such as arrest, investigation and trial.[29]

5.3. *The Applicability or not of the LRA Subtest to the Assessment of Conduct of Hostilities*

One of the crucial implications of the Israeli Supreme Court's judgment in the *Targeted Killings* case[30] is that on the basis of the LRA subtest, lethal force would be deemed disproportionate whenever non-lethal alternative course of action is available. On this matter, the Court relied on the judgment of the ECtHR in the *McCann* case in which the Strasbourg Court ruled that:

> . . . in determining whether the force used was compatible with Article 2 (art. 2), the Court must carefully scrutinise, as noted above, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.[31]

In that case, the ECtHR found that the reflex action of the soldiers in shooting to kill the suspects lacked the degree of caution in using firearms, as required by law enforcement personnel in democracy, even when dealing with dangerous terrorist suspects. It hence concluded that there was a violation of Article 2(2)(a) ECHR.[32]

In the *Targeted Killings* case, President Barak, when relying on the *McCann* formula on proportionality enunciated in the law enforcement context, drew an analogy between law enforcement operations and security measures applied in an occupied territory, without, however, differentiating between "calm" occupation zones and trouble-ridden spots. It seems that he assumed the relevance and practical utility of the LRA subtest in an occupied territory *in general*.[33] He asserted that a non-lethal measure, such as arrest, investigation and trial, "is a possibility which should always be considered".[34] Indeed, the same line of

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[29] *Public Committee Against Torture in Israel v. The Government of Israel, ibid*. However, it is not clear how the alternative course of action, such as use of non-lethal measures, may result in "its harm to nearby innocent civilians . . . [being] greater than that caused by refraining from it": *ibid*.

[30] *Ibid.*

[31] ECtHR, *McCann v. UK*, Judgment of 27 September 1995, A324, paras. 194 and 201.

[32] *Ibid*., paras. 211–214.

[33] This can be inferred from this eminent Judge's proposition that the LRA test "might actually be particularly practical under conditions of belligerent occupation": HC *769/02*, *Public Committee Against Torture in Israel v. The Government of Israel*, Judgment of 11 December 2005, available at: http://www.court/gov.il (last visited on 30 June 2008), para. 40.

[34] *Ibid*.

reasoning was adopted by the HRC in its *Concluding Observations on Report from Israel*. The HRC has stated that "[a]ll measures to arrest a person suspected of being in the course of committing acts of terror must be exhausted in order to avoid resorting to the use of deadly force".[35]

One crucial or far-reaching implication of the above dictum is that the application of the LRA subtest even in combat zones may not be entirely excluded. More specifically, the LRA subtest may be invoked to determine the lawfulness of means and methods causing non-lethal or less injurious consequences on a targeted person (civilians taking a direct part in hostilities) in the midst of heated battle. Yet, there has yet to materialise *lex lata* requiring that this subtest be met whenever lethal force is levelled at civilians taking direct part in hostilities outside the border of occupied territories.[36]

Cohen and Shany criticise that the transposition of the LRA subtest developed in law enforcement operations to situations of armed conflict would be misplaced.[37] They argue that[38] within the framework of IHL on both IAC and NIAC, a state is not (always) obliged to favour non-lethal measures over lethal ones to neutralise fighting capacity of enemy combatants.[39] The effect of LRA appraisal on modalities of attack against a combatant may be limited only to certain means (weapons, such as blinding laser weapons etc.) and methods (for instance, killing by treacherous or perfidious methods). Cohen and Shany even suggest that by categorising members of terrorist organisations as civilians (albeit subject to the test of direct participation in hostilities), and importing the subtests of proportionality developed in IHRL context into conduct of hostilities, the Israeli Supreme Court, perhaps inadvertently, gave "more protection" to such "unlawful combatants" than to lawful combatants.[40]

5.4. *Proportionality* Strict Sensu

The troubling aspect of the concept of proportionality in a narrow sense in the IHL context can be summarised in a two-fold manner. First, in assessing relative weight and value assigned to competing interests, innocent civilians who are anticipated to suffer injuries or lose their lives are abstracted and subsumed into

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[35] HRC, Concluding Observations: Israel, CCPR/CO/78/ISR, 5 August 2003, para. 15.

[36] A. Cohen and Y. Shany, "A Development of Modest Proportions – The Application of the Principle of Proportionality in the Targeted Killings Case", (2007) 5 *JICJ* 310, at 315

[37] *Ibid.*, at 314.

[38] *Ibid.*

[39] This can be implicit in the understanding that combatants obtain immunity from attacks only if they manifest their intent to surrender: Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, (2004), at 145.

[40] Cohen and Shany, *supra* n. 36, at 314.

a sterile and impersonalised notion of collateral loss or injuries. Second, such incidental loss or injuries is placed on a utilitarian scale to be weighed against the amorphous notion of military advantage. At what rate the cost of individual persons' lives can be considered "acceptable" in specific *ex ante* risk assessment is an innately difficult question that causes a moral dilemma to military planners and soldiers alike.[41] In contrast, the test of proportionality under IHRL starts with the assumption that balancing the right to life on a scale in itself ought to be disfavoured, or at least avoided to the maximum extent. This difference in underlying rationales may explain the more lax standard contemplated in the notion of proportionality in IHL.

Further, an acceptable threshold may be deemed lower in *ex post* evaluation of factual circumstances, which can be undertaken with the benefit of hindsight well beyond the heat of battleground. Yet, this should not result in imposing practically insurmountable decisions on soldiers in a front. All that is required of military planners and soldiers is to carry out "meticulous examination of every case".[42] The outcomes of these examinations suggest that speculative and ultimately subjective elements cannot be entirely dissociated from the exercise of *ex ante* risk assessment.[43]

Surely, when analysing the parameters of military advantages, President Barak in the *Targeted Killings* case carefully fleshed out the requirement that such anticipatory advantage must be "concrete and direct" as provided in Article 57(2)(a)(iii) API.[44] This judgment may be taken as indicating an emerging proclivity of judicial bodies, national and international, to weave the rigorous standards of proportionality *strict sensu* developed in IHRL (and EU law) context into the analysis of cost-benefit impacts of attacks in armed conflict situations. Nevertheless, the assessment of the subtest of proportionality in the narrow sense ultimately hinges on a case-by-case approach.[45] This is illustrated in the *Final Report to the ICTY Prosecutor concerning the NATO's campaign against Yugoslavia*. The *Report* states that "[i]t is much easier to formulate the principle

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[41] Cohen and Shany, *ibid.*, at 316. See also E. Benvenisti, "Human Dignity in Combat: The Duty to Spare Enemy Civilians", (2006) 39 *Israel L. Rev.* 81, at 92–93 (proposing "a duty to reduce harm to enemy civilians that does not entail an obligation to assume personal life-threatening risks").

[42] HC *769/02*, *Public Committee Against Torture in Israel v. The Government of Israel*, Judgment of 11 December 2005, available at: http://www.court/gov.il (last visited on 30 June 2008), para. 46.

[43] Cohen and Shany, *supra* n. 36, at 316.

[44] HC *769/02*, *Public Committee Against Torture in Israel v. The Government of Israel*, Judgment of 11 December 2005, available at: http://www.court/gov.il (last visited on 30 June 2008), para. 46.

[45] *Ibid.*

of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective."[46]

6. *Procedural Requirements for Targeted Killings*

6.1. *Overview*

Prior to recourse to lethal force, policy leaders and military planners must undertake scrupulous examinations of the planning and targeting processes. Once the action is carried out, the focus of examinations must turn to the evidence collected afterwards. It can be proposed that such *ex post* appraisal should include damage and impact assessments, if possible, through witnesses and video.[47] With respect to both *ex ante* and *ex post* examinations, the principle of proportionality serves as the most important benchmark.

6.2. Ex ante *Procedural Requirements*

In relation to the planning procedure, first, it is crucial to ascertain the necessity grounds. This requires an occupying power to verify that persons to be targeted are those who have committed serious life-threatening hostile acts, and that there is clear evidence that they will continue to do so. In this respect, it can be underscored that persons must not be selected for lethal targeting, simply on the basis of their incitement. The prior investigations of the necessity grounds may be likened to *trial in absentia* of persons who would otherwise have to be arrested and prosecuted while equipped with due process guarantees.[48] Second, the occupying power must examine whether the principle of proportionality in a narrow sense can be complied with. It must ensure that the means and the methods chosen do not cause excessive loss of the lives and limbs of persons living in the vicinity of the targeted persons. Third, the LRA subtest ought to be taken into account not only in relation to determinations of the choice of specific modalities of lethal force (means and methods) under IHL rules on conduct of hostilities. It should also be of marked significance to the overarching question on the choice of the applicable legal framework (namely, the option between IHL rules on conduct of hostilities, IHL rules concerning occupation

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[46] ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, (2000) 39 *ILM* 1257, para. 48.

[47] See CUDIH, *supra* n. 1, at 34.

[48] Cohen and Shany, *supra* n. 36, at 317.

and rules of IHRL). The occupying power must ascertain whether the application of a law-enforcement measure still remains feasible, even though hostilities have resumed or broken out. Fourth, it may be suggested that the occupying power should take precautionary measures prior to the attack.[49] This element of precaution is of special import to the assessment of the *mens rea* for war crimes based on intentionally directing attacks against individual civilians not taking direct part in hostilities.[50] Dörmann argues that the requisite mental element relating to the wilfulness of the conduct may be inferred from the failure to take necessary precautions (as understood within the meaning of Article 57 API in relation to the use of available intelligence to identify the target) before and during an attack.[51]

6.3. Post Factum *Procedural Requirements*

The "institutional aspects" deriving from the principle of proportionality encompass three specific obligations: (i) the duty to carry out effective and independent investigations into circumstances of killing subsequent to the attack; (ii) payment of compensation to victims of mistaken and incidental killings or injuries;[52] and (iii) the duty to investigate alleged war crimes and, if necessary, to prosecute and mete out appropriate punishment to offenders. The ECtHR has fleshed out and refined these institution-based requirements since 1990s as part of its creative policy of broadening the ambit of positive obligations under the right to life.[53] Brief comments will be made on the point (ii), whilst more detailed evaluations will focus on aspects under (i) and (iii).

In respect of the compensation requirement, as examined in Chapter 11, the obligation to pay reparations for individual victims of breaches of IHL rules, as set out in Article 3 of the 1907 Hague Convention IV and Article 91 API, can be considered to have acquired the status of customary international law.[54] This was confirmed in the *Targeted Killings* case, where the Israeli Supreme Court stressed the need for compensation for victims.[55] It ought to be recalled

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[49] *Ibid.*, at 317–318. However, it is not clear whether the principle of precautionary measure should be considered to include the duty to give prior warning to a suspect to be targeted.

[50] ICC Statute, Article 8(2)(b)(i).

[51] K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court – Sources and Commentary*, (2003), at 132 and 147.

[52] Cohen and Shany, *supra* n. 36, at 317–318.

[53] See, for instance, ECtHR, *Gül v. Turkey*, Judgment of 14 December 2000, paras. 84–95; and *Nachova v. Bulgaria*, Judgment of 26 February 2004.

[54] A. Cassese, *International Law*, 2nd ed., (2005), at 419 and 423; and *idem*, "On Some Merits of the Israeli Judgment on Targeted Killings" (2007) 5 JICJ 339, at 345.

[55] HC *769/02*, *Public Committee Against Torture in Israel v. The Government of Israel*, Judgment of 11 December 2005, available at: http://www.court/gov.il (last visited on 30 June 2008), para. 40.

in this regard that the idea that innocent bystanders may risk being deprived of their lives as "collateral damage" poses an intrinsic moral dilemma. Indeed, the rationale underpinning the system of IHRL accords fundamental protections to individual persons *qua* individuals, even though their community membership is not irrelevant in the discourse of IHRL.[56]

6.4. *The Duty of Effective Inquiries into Circumstances of Killing*

The duty of effective investigation into circumstances of killing is fully established in the case-law of ECHR.[57] Yet, opinions may be divided as to the extent to which such duties of effective inquiries are imposed on an occupying power in occupied territories.[58] In the *Targeted Killing* case, the Israeli Supreme Court decisively stressed the need to perform "independent" and "thorough", *post factum* inquiries into the precision in identifying the target and the circumstances of the attack. In this regard, reference can be made to the relevant case-law of the ECHR,[59] and academic writings.[60] In contrast, for an international or national tribunal to carry out effective inquiries into the circumstances of death would be fraught with forensic problems.[61]

To assuage the concern that requiring retroactive review of factual circumstances of all doubtful lethal incidents in a combat zone might unduly compromise the tactical and operational capacity of armed forces, two qualifications can be noted. First, it may be argued that this duty is limited only to attacks with

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[56] Provost, *supra* n. 14, at 427.

[57] See C. Dröge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention*, (2003); and A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004).

[58] See also CUDIH, *supra* n. 1, at 34.

[59] ECtHR, *McKerr v. UK*, Judgment of 4 May 2001, paras. 122–161, in particular, paras. 157–161.

[60] H. Duffy, *The "War on Terror" and the Framework of International Law* (2005), at 310; and Cassese (2005), *supra* n. 54, at 419.

[61] Warbrick observes that:

> Whether the inquiry at the international level focuses on the planner or the operative, there is a formidable forensic problem for the applicant in obtaining and for the Court [European Court of Human Rights] in evaluating the evidence. The more fraught the circumstances, for example fire-fights between the security forces and terrorist groups, the more the fact-finding capacity of the Court is tested. . . .

C. Warbrick, "The Principle of the European Convention on Human Rights and the Responses of State to Terrorism", (2002) 3 *EHRLRev* 287, at 293. Indeed, as he notes, the Strasbourg Court has proven unable to establish beyond a reasonable doubt that the State agents were responsible for the death in violation of the State's responsibility under Article 2(2). See also ECtHR, *Kaya v. Turkey*, Judgment of 19 February 1998.

lethal force that have been suspected of being unlawful (in respect of a wrong target or disproportionate attack etc.). Second, this duty should be understood as being extended only so far as to the situation in which an occupying power can exercise effective or overall control over a portion of the territory, be it international or non-international armed conflict.

6.5. *The Duty to Prosecute and Punish Responsible Soldiers and Their Superiors*

Some comments can be made on the requirement to prosecute and punish responsible soldiers or their superiors in case the disproportionate impact of targeted killings is judged to reach the threshold of war crimes.[62] There are two possible rules which can cause war crimes in case of targeted killing: (i) war crimes based on "[i]ntentionally directing attacks . . . against individual civilians not taking direct part in hostilities" within the meaning of Article 8(2)(b)(i) ICC Statute; and (ii) war crimes based on "[i]ntentionally launching 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". As regards the first type of war crimes, the fact that a state has undertaken rigorous *ex ante* appraisal can generally rule out the possibility that attacks could be described as *deliberately* directed against a civilian and tantamount to war crimes.

On the other, inquiries are needed into the second type of war crimes, the identification of which may be more plausible. On this matter, it ought to be recalled that innocent bystanders become victims of collateral killing, posing a serious dilemma from the standpoint of the convergence between IHRL and the Martens Clause.[63] It may be argued that the drafters of the ICC Statute deliberately set a higher threshold for determining individual criminal responsibility for war crimes in relation to excessive collateral damage of attacks under Article 8(2)(b)(iv) ICC Statute. This may be borne out by the addition of the words "clearly" and "overall" to the treaty-based rule provided in Article 51(5)(b) API. First, the drafters of Article 8(2)(b)(iv) ICC Statute added the adverb "clearly" before an adjective "excessive" in relation to war crimes based on attack causing disproportionate damage, which corresponds to Article 51(5)(b) API.[64] Second, they also diluted

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[62] For detailed discussion on this matter, see O. Ben-Naftali, "A Judgment in the Shadow of International Criminal Law", (2007) 5 JICJ 322.

[63] Provost, *supra* n. 14, at 427.

[64] Cohen and Shany, *supra* n. 36, at 319. See also Dörmann, *supra* n. 51, at 166 and 169.

the element of collateral damage or injury by adding the word "overall" to a military advantage.[65] Indeed, many western military powers have expressed their understanding that the military advantage anticipated from the attack indicates the advantage considered as a whole and not from isolated or specific parts of the attack.[66] However, it may be countered that the words "clearly" and "overall" introduced in Article 8(2)(b)(iv) ICC Statute does not change existing law.[67] The ICRC representative at the Rome Conference in 1998 stated that:

> The word "overall" could give the impression that an extra unspecified element has been added to a formulation that was carefully negotiated during the 1974–1977 Diplomatic Conference that led to Additional Protocol I to the 1949 Geneva Conventions and this formulation is generally recognized as reflecting customary law. The intention of this additional word appears to be to indicate that a particular target can have an important military advantage that can be felt over a lengthy period of time and affect military action in areas other than the vicinity of the target itself. As this meaning is included in the existing wording of Additional Protocol I, the inclusion of the word "overall" is redundant.[68]

The question whether or not the word "overall" is superfluous or capable of elevating the threshold of determining a war crime under Article 8(a)(b)(iv) needs to be clarified by the practice of the ICC.

Aside from an individual soldier carrying out an attack, a commander may incur war crimes liability based on the negligence-based threshold of *mens rea*,[69] unless s/he is at pains to undertake a "robust" and "effective" *ex ante* review" of a measure of liquidating a targeted person.[70] Departing from Article 86 API, Article 28 ICC Statute draws distinction between military commanders and civilian superiors, subjecting the latter to a more rigorous standard of *mens rea* based on conscious disregard of information on the occurrence of core crimes. The *ICRC's Customary IHL Study* endorses this distinction as reflective of custom-

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[65] Dörmann, *ibid.*, at 166 and 169.

[66] See the statements made by Australia, Belgium, Canada, Germany, Italy, Netherlands, New Zealand, Spain, and UK: as cited in: Dörmann, *ibid.*, at 170–171.

[67] *Ibid.*, at 169–170.

[68] UN Doc. A/CONF.183/INF/10 of 13 July 1998, available at ICC preparatory works; as cited in: *ibid.*, at 169–170.

[69] This doctrine may be considered a special form of accomplice liability: W.J. Fenrick, "Article 28 – Responsibility of Commanders and Other Superiors", O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, (1999), at 515–522, at 517.

[70] Cohen and Shany, *supra* n. 36, at 320.

ary IHL.[71] Despite these, it is submitted that non-military (civilian) superiors should live up to the same standard of negligence to account for war crimes committed under their subordinates.[72]

7. *Conclusion*

The foregoing examinations lead to the conclusion that so-called targeted killing conducted in occupied territories must be regarded as *prima facie* unlawful. The scope of lawful recourse to such practice by the occupying power (or any other state) must be limited to the circumstances in which it complies with the following stringent conditions as highlighted in the CUDIH's Expert Meeting in 2005:[73]

(i) this is undertaken in an area where the occupying power does not exercise effective control that would allow it to take reasonable measures of arresting and detaining the individual;
(ii) the occupying power has already requested the transfer of the individual from an authority that exercises control over the relevant area, but the relevant authority is either unwilling or unable genuinely to cooperate to take necessary action;
(iii) the individual has engaged in serious, life-threatening, hostile acts either against the occupying authorities (both military and administrative personnel) in occupied territories, or against civilians in the territory of the

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[71] On this matter, the ICRC's *Customary IHL Study* follows the dichotomised approach of the ICC Statute, Article 28: J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (2005), Vol. I, at 561–562. The standard "conscious disregard", which is applicable to non-military superiors, is akin to the notion of gross negligence. This has been confirmed by the ICTR, *Kayishema and Ruzindana*, Judgment of Trial Chamber, 21 May 1999, ICTR-95-1-T, para. 228.

[72] The origin of the doctrine of command responsibility can be traced back long before the Second World War in national military laws. It was firmly enunciated in post-WWII war crimes trials: US Military Commission, Manila, *Trial of General Tomoyuki Yamashita*, 8 October–7 December 1945; and the US Supreme Court, Judgment of 4 February 1946, (1948) 4 *LRTWC* 1; British Military Court, Wuppertal, *Trial of Major Karl Rauer and Six Others*, (1948) 4 *LRTWC* 113, Case No. 23; US Military Tribunal, Nuremberg, *Trial of Wilhelm Von Leeb and Thirteen Others (The High Command Trial)*, 30 December 1947–28 October 1948, (1949) 12 *LRTWC* 1, Case No. 72; (1948) 15 *AD* 376; and US Military Tribunal, Nuremberg, *Trial of Wilhelm List and Others (Hostages Trial)*, 8 July 1947–19 February 1948, (1949) 8 *LRTWC* 34, Case No. 47; and 15 *AD* 632. This doctrine is incorporated in Articles 86(2) and 87 of API.

[73] See CUDIH, *supra* n. 1, at 32.

occupying power, and the occupying power is given reliable intelligence indicating his/her intention to commit such hostile acts; and

(iv) the inadequacy of less extreme measures to counter the threat.

With respect to the test of proportionality, the *Targeted Killing* judgment of the Israeli Supreme Court has understood the harmonisation of the modality of the proportionality appraisal under IHL and IHRL in respect of the right to life.[74] The LRA subtest has been fully endorsed as one of the essential components of the standard of proportionality applicable even to the appraisal of conduct of warfare. This audacious step has been taken, notwithstanding that in the jurisprudence of IHRL, the LRA subtest so far remains crude and of limited use in the case-law.

Notwithstanding such a liberal methodology enunciated in the *Targeted Killing* judgment, one ought to recall a more brute and dour reality that the concept of military necessity remains an underlying rationale even in relation to the regime of the law of occupation. Especially in a volatile state of occupation where a small-scale (international or non-international) armed conflict may erupt, the approach of relying on the principle of proportionality to obtain greater scope of protection for victims of lethal attacks in occupied territory is severely tested, and its effectiveness may find limit. Gowlland-Debbas argues that the [international humanitarian] "law regulating the conduct of hostilities" entails "a grim 'balancing' or 'equation' between military necessity and human suffering, shrouded in euphemisms such as collateral damage".[75] Similarly, publicists of human rights law voice a concern over the role of military commanders in undertaking the appraisal of proportionality with respect to "incidental loss" of civilian lives in case of (often aerial) attacks,[76] as stipulated under Article 51 (5)(b) API. As discussed above, the drafters of the ICC Statute inserted a qualifying adverb "clearly" before the term "excessive" in assessing such incidental loss of civilian lives under the war crimes provision of the Statute of the International Criminal Court (Article 8(2)(b)(iv)) – the curious move that "does not fulfill its ostensible purpose,

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[74] Cohen and Shany, *supra* n. 36, at 313. They point out that "[t]his merger of proportionality tests under national law and IHL may be linked to the growing influence on IHL of human rights law (which, in turn, influences domestic constitutional and administrative law)": *ibid.*, at 313. See also O. Ben-Naftali and Y. Shany, "Living in Denial: The Application of Human Rights in the Occupied Territories", (2003–2004) 37 *Israel L. Rev.* 17.

[75] V. Gowlland-Debbas, "The Right to Life and Genocide: The Court and an International Public Policy", in: L. Boisson de Chazournes and P. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons*, (1999), 315, at 335.

[76] L. Doswald-Beck and S. Vité, "International Humanitarian Law and Human Rights law", (1993) 293 *IRRC* 94, at 109; and A.E. Cassimatis, "International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law", (2007) 56 *ICLQ* 623, at 629.

which was to clarify the crime, but simply raises the threshold and introduces greater uncertainty into the law in this area."[77] The fallout of this is to enable the military powers, big or small, to engage in intentionally launching an attack against military objectives, without harbouring moral qualms or anxiety over a possible war crime prosecution before the International Criminal Court.

[77] R. Cryer, "Of Custom, Treaties, Scholars and the Gavel: the Influence of the International Criminal Tribunals on the ICRC Customary Law Study", (2006) 11 *JCSL* 239, at 259–260. See also J.C. Lawrence and K.J. Heller, "The First Ecocentric Environmental War Crime: the Limits of Article 8(2)(B)(IV) of the Rome Statute", 20 *Geo. Int'l Envtl. L. Rev.* 61, at 77.

Chapter 19

The Expanding Catalogue of Human Rights of Non-Derogable Nature

1. *Introduction*

In this chapter, inquiries will be made into the catalogue of human rights that the monitoring bodies of human rights treaties have classified as non-derogable in its documents or in their case-law. As rights that are *ipso facto* incapable of suspension, these rights must be respected in occupied territories.

In the context of IHRL, states "may" invoke the derogation clause of the appropriate human rights treaty (such as Article 4 of the ICCPR) to suspend a large category of rights on the basis of security reasons. It must, however, be noted that during international armed conflict, including the period of occupation, even derogable rights do not automatically cease to apply. Instead, as the word "may" suggest, states are only given the discretion to rely on the derogation clause.[1] In that sense, unless states duly invoke the derogation clause in a manner that meets the conditions for lawful derogation, all human rights norms embodied in the relevant treaty must be considered fully applicable. This is the view consistently held by the Human Rights Committee (HRC).[2] It can be suggested that the failure to satisfy even one of those conditions should

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[1] See CUDIH, *Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict*, Geneva, 24–25 July 2004, at 25–27.

[2] See, for instance, HRC, *General Comment No. 31, Nature of the General Legal Obligations on States Parties to the Covenant* (2004), para. 10 (applicability of the Covenant in situations where an international peace-keeping or peace-enforcement operation takes place). See also HRC, Concluding Observations on Israel's second periodic report, CCPR/CO/78/ISR, 21 August 2003, para. 11, with reference to paragraph 10 of its concluding observations on Israel's initial report (CCPR/C/79/Add.93 of 18 August 1998). In that observation, the Human Rights Committee stated that "the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including article 4 which covers situations of public emergency which threaten the life of the nation".

render derogation invalid *ab initio*, so that the list of human rights that would otherwise be lawfully derogated from remains applicable. Queries must turn to conditions for such lawful derogation as formulated in the practice of international human rights treaties.

2. *Article 4 of the ICCPR*

2.1. *Overview*

Under Article 4 of the ICCPR, the requirements for lawful derogation can be divided into procedural and substantial conditions. The procedural requirement consists of: (i) the proclamation of a state of emergency; and (ii) the notification to other state parties. The substantial requirements in turn encompass: (i) the existence of a state of emergency; (ii) proportionality; (iii) the prohibition on suspending non-derogable rights; (iv) consistency with other obligations of international law; and (v) non-discrimination.[3]

The obligations on state parties embodied in Article 4, akin to the obligations under Articles 2, 3 and 5, are of supplementary character. Article 4 can be applied only in the interplay with any of the substantive rights recognised under Articles 6–27. This does not, however, mean that Article 4 is not amenable to individual communications. The HRC has not recoiled from a finding that the requirements of Article 4 are not satisfied, when holding that a substantive right has been violated.[4] As discussed below, the doctrinal discourse suggests that many non-derogable rights explicitly mentioned in Article 4(2) should be regarded as impervious to a reservation,[5] and that they can be considered candidates for peremptory norms.

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[3] ICCPR, Article 4 ICCPR; and ACHR, Article 27. ECHR Article 15 does not contain the requirement of non-discrimination. For discussions on this subject see J. Oraá, *Human Rights in States of Emergency in International Law*, (1992), at 177–182.

[4] See, for instance, HRC, *Landinelli Silva et al. v. Uruguay*, *No. 34/1978*, View of 8 April 1981, paras. 6–8.4 (non-compliance with the proportionality requirement). See also HRC, *Consuelo Salgar de Montejo v. Colombia*, *No. 64/1979*, View of 24 March 1982, paras. 10.2–10.3; *Orlando Fals Borda et al. represented by Pedro Pablo Camargo v. Colombia*, *No. R.11/46*, Decision of 27 July 1981, para. 13.2; and *Tae Hoon Park v. Republic of Korea*, *No. 628/1995*, View of 3 November 1998, paras. 8.2. and 10.4.

[5] So far, only one state (Trinidad and Tobago) formed a reservation to this clause, and this provoked the objection by the governments of Germany and the Netherlands that this reservation was incompatible with the object and purpose of the ICCPR, within the meaning of Article 19(c) of the Vienna Convention on the Law of Treaties: M. Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary*, 2nd revised edition, (2005), at 109–110, para. 46. McGoldrick criticises the French reservation attached to Article 4(1) ICCPR, observing that:

2.2. *The Requirement of a Proclamation of a State of Emergency*

Given that the suspension of the rights guaranteed under international human rights treaties is an exceptional measure, rather than an automatic entitlement of state parties, states invoking a derogation clause must make an official proclamation that a state of emergency has arisen. The proclamation of an emergency is a precondition for invoking the saving clause under Article 4 ICCPR. As the *Siracusa Principles* state,[6] it is desirable that the procedures under national law for the proclamation of a state of emergency be prescribed in advance. The HRC has emphasised that this requirement is indispensable for maintaining the principle of legality and the rule of law.[7]

2.3. *The Requirement of Immediate Notification*

Article 4(3) of the ICCPR requires that when invoking the derogation clause under Article 4(1), the state must notify the other state parties "immediately", through the UN Secretary-General, of the two elements: (i) the provisions that it has derogated from; and (ii) reasons for such derogation. In case it terminates the derogation measures, it must inform, through the same intermediary, of the date on which it terminates the derogation measures.[8] The requirement of immediate notification is instrumental in enabling the HRC and the other state parties to examine compliance or not of derogation measures with the three other requirements (non-discrimination; proportionality; and non-derogability from certain rights).[9] In its *General Comment No. 29*, the HRC, criticising the summary character of the notification given by state parties,[10] stressed the need

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"It is difficult to reconcile a considerable broadening of the scope of emergency powers with the object and purpose of the ICCPR. (…) the HRC should consider the validity of reservations made by States within the context of the article 40 reporting procedure": D. McGoldrick, *The Human Rights Committee – Its Role in the Development of the International Covenant on Civil and Political Rights*, (1994), at 305. For criticisms of the corresponding French reservation to Article 15 ECHR, see R. Higgins, "Derogations under Human Rights Treaties", (1978) 48 BYIL 281, at 317 n. 5.

[6] *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, para. 43, reprinted in (1985) 7 *HRQ* 3, at 8.

[7] HRC, *General Comment No. 29, States of Emergency (Article 4)*, (2001), para. 2.

[8] After the September 11 attacks, the UK duly submitted a detailed notice of derogation on 18 December 2001. Notices of derogation submitted by state parties can be found in the UN treaties databases: http://www.untreaty.un.org, and in the homepage of the UN High Commissioner for Human Rights.

[9] HRC, *General Comment No. 29, States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), 31 August 2001 (adopted on 24 July 2001), para. 17.

[10] Indeed, the Committee criticised that in many cases state parties have failed to comply with the requirement of notification. The recalcitrant behaviour of states ranges from the sheer absence of such notification of the initial invocation of emergency powers, through the presentation

to provide "full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their view".[11] In contrast to the official proclamation of emergency, notification is not considered a prerequisite for the right of state parties to invoke Article 4, but it constitutes an additional procedural duty.[12]

2.4. *Existence of a State of Emergency*

The operation of a saving clause depends on the existence of a state of emergency that "threatens the life of the nation". The fact that an armed conflict is taking place or that the relevant territory is occupied does not necessarily satisfy this requirement. Indeed, the conditions are more stringent as shown by the words "only if and to the extent that the situation constitutes a threat to the life of the nation". The *Siracusa Principles* helpfully elucidate the specific elements of this requirement. According to them, such a threat "is one that: (a) affects the whole of the population and either the whole or part of the territory of the State, and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant".[13]

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of only a summary notification which fails to specify the provisions to be derogated from, to the omission to inform any territorial or other changes in exercising emergency powers: HRC, *General Comment No. 29, States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), 31 August 2001 (adopted on 24 July 2001), para. 17.

[11] *Ibid*.

[12] HRC, *Landinelli Silva v. Uruguary*, *No. 34/1978*, View of 8 April 1981, para. 8.3 (stating that "[a]lthough the substantive right to take derogatory measures may not depend on a formal notification being made pursuant to article 4(3) of the Covenant…"). See also Nowak, *supra* n. 5, at 107, para. 43; and S. Joseph, J. Schultz and M. Castain, *The International Covenant on Civil and Political Rights, – Cases, Materials and Commentary*, 2nd ed., (2004), at 835.

[13] *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, para. 39, reprinted in (1985) 7 *HRQ* 3, at 7–8. Kälin argues that these elements are usually considered absent when a state is engaged in military operations in foreign lands, either as an aggressor and occupier or as a participant in a peace enforcing or peace-keeping mission. They may also be lacking in circumstances where an eruption of armed conflict is miniscule in effect and scope as compared with the geographical landmass of the country concerned (for instance, in a border dispute far away from the strategically important localities), or where the armed forces of that country find it relatively easy to suppress aggressors, insurgents or rebels: CUDIH, *Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict*, Geneva, 24–25 July 2004 (presentation by W. Kälin), at 27.

2.5. *Consistency with Other Obligations under International Law*

Often neglected in the discourse on the applicability of human rights in emergency circumstances is the requirement that states invoking derogation measures must ensure that such measures are consonant with their "other obligations" under international law. This requirement is incorporated into the saving clauses of the three international human rights treaties.[14] Indeed, this is corroborated by the rule of interpretation of treaties, according to which "any relevant rules of international law applicable in the relationships between the parties" must be taken into account.[15] In *Brannigan and McBridge v. UK*, when assessing compliance of the relevant United Kingdom legislation in Northern Ireland with the obligations under the Geneva Conventions, the European Court of Human Rights specifically referred to this requirement. It has stressed that even though the requirement of an official proclamation of a state of emergency is not specifically embodied in the saving clause under Article 15 ECHR, the United Kingdom must abide by this requirement derived from Article 4 of the ICCPR to which it is a Party.[16]

In practice, this requirement entails two crucial implications on the discourse on the relationship between IHL and international human rights law. First, it can be argued that states invoking the derogation clause under Article 4 ICCPR are estopped from derogating from the rights already recognised in rules of conventional or customary IHL. It must be recalled that the list of fundamental rights expressly safeguarded in the rules of conventional or customary IHL is much more extensive than the catalogue of non-derogable rights under IHRL treaties.[17] Second, as Hampson argues, the requirement of consistency with other obligations of international law enables or even requires the monitoring bodies of human rights to use IHL standards as a yardstick for establishing violations of

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[14] ICCPR, Article 4(1); ECHR, Article 15(1); and ACHR, Article 27(1).

[15] Vienna Convention on the Law of Treaties, Article 31(3)(c). This point was implicitly recognised by Judge Pettiti in his dissenting opinion in ECtHR, *Loizidou v. Turkey*, Judgment of 18 December 1996, A 310, individual dissenting opinion of Judge Pettiti, at 43. He observes that "[a]n overall assessment of the situation, beginning with the concepts of sovereignty and jurisdiction, would make it possible to review the criteria ('occupation', 'annexation', territorial application of the Geneva Conventions in northern Cyprus, 'conduct of international relations') on the basis of which the UN has analysed both the problem whether or not to recognize northern Cyprus as a State and the problem of the application of the UN Charter. . . ."

[16] ECtHR *Brannigan and McBridge v. UK*, Judgment of 26 May 1993, A 258–B, paras. 67–73.

[17] As discussed below, this is especially the case with respect to due process guarantees safeguarded in Article 75(3) and (4) API. See also CUDIH, *Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict*, Geneva, 24–25 July 2004 (presentation by W. Kälin), at 28.

specific human rights in situations of armed conflict and occupation. These rights include the right to life and the prohibition of torture which become of special importance to killings and injuries triggered off in emergency circumstances.[18]

2.6. *The Prohibition of Discrimination*

Article 4(1) ICCPR attaches to the derogation measures invoked by state parties a requirement that such measures do "not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". Two remarks need to be made.[19] First, the prohibition of discrimination, while incorporated into Article 27(1) of the ACHR, is not contained in the corresponding provision of the ECHR (Article 15). In that way, it may be argued that states invoking derogating measures under the ECHR are, unless challenged on the basis that an evolving customary international law prohibits it, not precluded from taking a derogating measure of discriminatory nature, which would otherwise contravene Article 14 ECHR (and its 2002 Protocol No. 12). Second, the list of prohibited ground of discrimination under Article 4 ICCPR is exhaustive, being limited to six grounds: race, colour, sex, language, religion or social origin. The discriminatory "badges" are also exhaustive under Article 27 of the ACHR, which reiterates the same badges. The problem is that states parties to the ICCPR (and to the ACHR) might then suspend rights of persons in a discriminate manner on the basis of their nationality, disability (physical or mental) or sexual orientation. The omission of the discriminatory ground of nationality, the ground which features in almost all the provisions concerning non-discrimination under international human rights treaties, can be explained by the traditional understanding that during armed conflict, nationals of enemy states or their allies may have to endure a greater extent of derogations. However, in contemporary international law, there is an increasing trend to de-emphasise the notion of nationality.

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[18] F.J. Hampson, "Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts", (1992) 31 *RDMDG* 118, at 126.

[19] The prohibition of discrimination is stated as one of the general principles in Article 2(1), but as discussed in the main text, the list of discriminatory grounds under Article 4(1) is narrower than that general principle. Apart from Article 2(1), gender equality is set forth as another general principle under Article 3. Further, Article 26 provides a substantive and *independent* right to equality (or freedom from discrimination). The comprehensive and open-ended list of proscribed discriminatory grounds under this provision corresponds to that under Article 2(1). The main difference is that unlike the general principles embodied in Articles 2(1) and 3, the right to equality under Article 26 can be invoked as an independent right, without need for an applicant to raise an alleged violation of another substantive right. This differs from Article 14 ECHR (except for the state parties to the 12th Protocol).

2.7. *The Principle of Proportionality*

The principle of proportionality under the saving clause can be further divided into different elements. First, it can be argued that derogation measures must be considered effective means to achieve a legitimate goal of putting an end to emergency situations that have provided the basis for derogation (the principle of suitability).[20] Second, it suggests that there must be attained a reasonable or proportionate balance between exigencies and derogation measures in relation to their temporary, territorial and material scope and effect (the principle of proportionality in a narrow sense). Third, in case there is an alternative measure less restrictive of individual persons' rights, then such a less onerous alternative must be relied upon (the principle of necessity).[21] Merely invoking emergency is not sufficient to justify derogation in a blanket manner. No doubt, the nature of rights affected by derogation is crucial for the assessment of proportionality. The proportionality scrutiny should become more stringent in relation to censorship of the press than with respect to requisitions of individual persons' means of transport in occupied territory.[22]

With respect to the scope of application *ratione temporis*, in its *General Comment No. 5*, the HRC took the view that "measures taken under article 4 are of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened".[23] With specific regard to an occupied territory, this temporal element means that once hostilities subside, the occupant is required to restore those civil and political rights, the suspension of which it deems no longer useful to deal with exigencies.[24]

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[20] See CUDIH, *Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict*, Geneva, 24–25 July 2004, at 27 (presentation by W. Kälin).

[21] The three-fold standards of proportionality have been developed in national public law (Germany etc.) and in EU law. See N. Emiliou, *The Principle of Proportionality in European Law – a Comparative Study*, (1996).

[22] While censorship concerns freedom of expression, which is a foundational right for democracy, requisitions of means of transport relate to the right to property (and indirectly, the right to free movement), the rights conceptually and in practice accorded less weight than freedom of expression both in the discourse and in the jurisprudence of international human rights law. The *UK Manual* refers to the possibility of censorship on the press and mass media, and of requisitioning means of transport: UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, (2004), at 286. See also *US Field Manual 27–10*, which contemplates general restrictions on civil liberties in four specific aspects: limitations on freedom of movement, commercial restrictions, censorship, and seizure and control over means of transport (including the private ones): *US Field Manual 27–10*, paras. 375–378.

[23] HRC, *General Comment No. 5, Article 4* (Thirteenth Session, 1981), para. 3.

[24] See also E. Benvenisti, "The Security Council and The Law on Occupation: Resolution 1483 on Iraq in Historical Perspective", (2003) 1 *Israel Defense Forces Law Review* 23, at 32.

2.8. *The List of Non-Derogable Rights Expressly Provided under Article 4 of the ICCPR*

The list of non-derogable rights *explicitly* mentioned in Article 4(2) ICCPR encompasses seven rights: the right to life (Article 6); the prohibition of torture, cruel, inhuman or degrading treatment or punishment (Article 7); the prohibition of slavery, slave trade and servitude (Article (1) and (2)); freedom from imprisonment merely on the ground of inability to fulfil a contractual obligation (Article 11); the prohibition of retroactive application of criminal law (Article 15); the right to recognition as a person before the law (Article 16); the right to freedom of thought, conscience and religion (Article 18). The catalogue is more elaborated than that contained in Article 15(2) ECHR, which confines the non-derogable rights to four, but less comprehensive than the lengthy catalogue provided in Article 27(2) ACHR.[25] Inquiries must now be made into the expanded scope of non-derogable rights, as set out in HRC's *General Comment No. 29*.

3. General Comment No. 29 *of the Human Rights Committee*

3.1. *Overview*

The HRC was criticised for its failure to articulate the definition and criteria for public emergency under Article 4 ICCPR during its some twenty years of practice.[26] As a partial response to this, the HRC adopted its *General Comment No. 29* (2001).[27] In this *General Comment*, it has emphasised that this list "is

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[25] Under Article 27(2) ACHR, the following, eleven rights are specifically designated as non-derogable: the right to juridical personality (Article 3); right to life (Article 4); right to humane treatment (Article 5); freedom from slavery (Article 6); freedom from *ex post facto* laws (Article 9); freedom of conscience and religion (Article 12); rights of the family (Article 17); right to a name (Article 18); rights of the child (Article 19); right to nationality (Article 20); and right to participate in government (Article 23), as well as "judicial guarantees essential for the protection of such rights". The due process guarantees are embodied in Articles 7 (right to personal liberty) and 8 (right to a fair trial).

[26] A.-L. Svensson-McCarthy, *The International Law of Human Rights and States of Exception*, (1998), at 238. See also Nowak, *supra* n. 5, at 88–89, paras. 9–11.

[27] HRC, *General Comment No. 29, States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), 31 August 2001 (adopted on 24 July 2001). For assessment of this *General Comment*, see S. Joseph, "Human Rights Committee: General Comment 29", (2002) 2 *HRLRev* 81. See also *The Administration of Justice and the Human Rights of Detainees: Questions of Human Rights and States of Emergency – 10th annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency*, presented by L. Despouy, Special Rapporteur appointed pursuant to ECOSOC Resolution 1985/37, E/CN.4/Sub.2/199719, 23 June 1997; *the Turku (Åbo) Declaration of Minimum Humanitarian Standards of 1990* (E/CN.4/1995/116); *the Siracusa Principles on the Limitation and Derogation Provisions in the*

related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law".[28] The HRC provides two explanations as to why certain rights of the ICCPR are expressly classified as non-derogable.[29] In the first place, some rights are intrinsically of such fundamental nature as to be characterised as peremptory norms (*jus cogens*). Obvious examples for this category of rights include the rights guaranteed in Articles 6 (the right to life) and 7 (the prohibition of torture, cruel, inhuman or degrading treatment or punishment). In the second place, according to the HRC, derogation from certain rights is considered simply unnecessary, even in time of exigencies. The HRC refers to the rights embodied in Articles 11 (the prohibition of imprisonment on the ground of inability to fulfil a contractual obligation) and 18 (the right to freedom of thought, conscience and religion) as examples for such category of rights.[30]

3.2. *The Legal Basis for the Human Rights Committee to Issue* General Comment No. 29

The express legal basis for the HRC to provide general comments can be found in Article 40(4) ICCPR. Under this provision, the HRC is authorised to transmit general comments ("*observations générales*") as it may see fit to the states parties and, together with copies of state reports, to ECOSOC. General comments are designed to elucidate the nature of obligations on states parties, elaborate the scope of protection of rights, and supply suggestions concerning cooperation between states parties in applying the ICCPR provisions.[31]

International Covenant on Civil and Political Rights (E/CN.4/1985/4); (1985) 7 HRQ 3; the *Paris Minimum Standards of Human Rights Norms in a State of Emergency*, adopted in 1984 by the International Law Association (reproduced in: (1985) 79 AJIL 1072): Nowak, *supra* n. 5, at 87–88, paras. 7–8. For assessment of the *Siracusa Principles*, see J.F. Hartman, "Working Paper for the Committee of Experts on the Article 4 Derogation Provision", (1985) 7 HRQ 89; and D. O'Donnell, "Commentary by the Rapporteur on Derogation", (1985) 7 HRQ 23.

[28] HRC, *General Comment No. 29, States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), 31 August 2001 (adopted on 24 July 2001), para. 11.

[29] *Ibid*.

[30] With respect to the right to freedom of thought, conscience and religion in the second category, an individual person's (inner core of the) mental state of mind and conscience, including thought and religion, is called the *forum internum*. In the context of the ECHR, though freedom of religion is not set out as in Article 15, the right within the *forum internum* is generally considered non-derogable. Compare Article 18 of the UN International Covenant on Civil and Political Right, which designates the freedom of thought, conscience and religion guaranteed under Article 4(2) as one of non-derogable rights.

[31] Nowak, *supra* n. 5, at 748, para. 64.

3.3. *Normative Status of* General Comment No. 29

Two strands of argument can be put forward with respect to the normative significance of general comments. First, they can be considered "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties. It is possible to argue that the state parties to the ICCPR have agreed to "delegate" to the monitoring body (HRC) the power of clarifying the meaning of this treaty.[32] Nowak describes general comments as evidentiary of "the most authoritative interpretation" of the ICCPR's provisions.[33] Second, it is possible to contend that general comments being the fruits of elaborate doctrinal discourse of the leading experts on international human rights law, their status and weight as a material source of international law are comparable to, but more authoritative than, the writings of leading publicists within the meaning of Article 38(1)(d) of the Statute of the International Court of Justice (ICJ).

4. *The Expanded Catalogue of Non-Derogable Rights under* General Comment No. 29

4.1. *General Remarks*

Of marked importance to the application of human rights in an occupied territory is the HRC's observation made in *General Comment No. 29* that the list of non-derogable rights goes beyond that expressly set out in Article 4(2) ICCPR.[34] According to the HRC, the expanded normative framework on non-derogable rights covers such fundamental rights as the freedom from arbitrary deprivation of liberty and the right to fair trial (which includes the presumption of innocence), as well as the principles closely intertwined with corresponding IHL rules, such as the prohibition on taking hostages and the interdiction of collective punishments.[35] It must be noted that the HRC's reference to these rights is formulated

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[32] Orakhelashvili argues that "[w]here treaties provide for a supervisory body entrusted with the function of interpretation and application of the treaty, it follows naturally that it is not only the practice and attitudes of the contracting states that matter, but also the attitudes expressed by the supervisory body itself". Nevertheless, as he notes, subsequent practice is relevant only to the extent that it facilitates the effective operation or enforcement of a human rights treaty, and it cannot restrict, in scope or effect, the substantive rights guaranteed in that treaty: A. Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights", (2003) 14 *EJIL* 529, at 535–536.

[33] Nowak, *supra* n. 5, at Introduction, XXII, para. 6.

[34] HRC, *General Comment No. 29, States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), 31 August 2001 (adopted on 24 July 2001), para. 6.

[35] *Ibid.*, paras. 11 and 13.

even in an exemplary and open-ended manner.[36] Whether any further additional rights of non-derogable character can be inferred from this open-ended list will be closely examined in the next chapter dealing with procedural safeguards for persons deprived of liberty in occupied territory.

The HRC has identified the additional list of non-derogable rights on the basis of three approaches. In the first instance, the HRC examines the possibility of linking the fundamental nature of specific rights with their distinct normative effects. It claims that certain rights are not only constitutive of customary rules but also metamorphosed into peremptory norms forming the normative edifices of international pubic order. Accordingly, violations of such norms, if committed against civilians in a widespread or systematic manner, may amount to crimes against humanity. Second, as discussed above, the HRC identifies a set of rights whose suspension is simply unnecessary even in time of emergency.[37] That these rights can be described as non-derogable has little to do with their intrinsic nature. Third, the HRC applies a functional rationale, attributing non-derogable character to the procedural safeguards that can be invoked in association with violations of non-derogable rights. Article 27(2) ACHR supports the third approach, providing that the "judicial guarantees essential for the protection of such [non-derogable] rights" cannot be suspended even in time of war or other public exigencies.

Of special importance to doctrinal discourse is the first approach based on the conceptual linkage between human rights violations and crimes against humanity as a guideline for discerning expanding parameters of non-derogable rights.[38] This approach can be corroborated by the fundamental principle of the concurrence of individual criminal responsibility and state responsibility in respect of serious violations of fundamental rules of IHL, as recognised by Article 29 GCIV. This approach can also be defended on the basis that only certain categories of human rights, whose violations can cause "appreciable injury",[39] should be categorised as deserving of special normative effect of non-derogability.

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[36] This is evidenced by the use of the phrase "for instance".

[37] Hartman criticises that the inclusion, in the catalogue of non-derogation rights, of the rights whose suspension is relatively unnecessary to deal with states of emergency would trivialise Article 4 ICCPR: Hartman, *supra* n. 27, at 113–114.

[38] The Human Rights Committee notes that "[i]f action conducted under the authority of a State constitutes a basis for individual criminal responsibility for a crime against humanity by the persons involved in that action, article 4 of the Covenant cannot be used as justification that a state of emergency exempted the State in question from its responsibility in relation to the same conduct": HRC, *General Comment No. 29, States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 12.

[39] The term "appreciable injury" has been used to define rules of IHL whose violations give rise to war crimes: B.V.A. Rölling, "The Law of War and the National Jurisdiction since 1945", (1960) 100 *RdC* 333, at 340. See also H. Lauterpacht, "The Law of Nations and the Punishment of War Criminals", (1944) 21 *BYIL* 58, at 78–79.

The HRC made reference only to specific acts (or omissions) constituting crimes against humanity under Article 7 of the ICC Statute. Agreeing with the generally held view on this matter, it stated that instead of providing definition of such crimes, this provision only spells out the material scope of crimes against humanity that fall within the jurisdiction of the ICC. It would be helpful if the HRC had articulated the customary law nature of the categories of human rights *other than* those described in that provision, serious violations of which may be tantamount to crimes against humanity.

On the basis of the linkage with crimes against humanity, the HRC[40] considers the following five rights and principles to be of non-derogable character:

(i) the right of all persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person, as guaranteed under Article 10 ICCPR;
(ii) the prohibitions against taking of hostages, abductions or unacknowledged detention;
(iii) the rights of persons belonging to minorities, as recognized in Article 27 ICCPR;
(iv) the prohibition of deportation or forcible transfer of population without grounds allowed under international law; and
(v) the prohibition of the propaganda for war, and the ban on advocating national, racial or religious hatred.

The emphasis that *General Comment No. 29* places on linkage to crimes against humanity implicitly suggests that the infringement of these fundamental rights would always be out of proportion to the exigency.[41]

Apart from these five rights, the HRC attributes non-derogable nature to the right to an effective remedy under Article 2(3)(a) ICCPR and to specific elements of due process guarantees. As will be appraised below, the Committee justifies such expansive framework of non-derogable rights to give practical effectiveness to the guarantees of the substantive rights of non-derogable nature.[42]

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[40] HRC, *General Comment No. 29, States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 13.

[41] Joseph (2002) *supra* n. 27, at 91. The only possible exception would be the prohibition of propaganda for war, which remains elusive.

[42] Joseph considers that the list of non-derogable, procedural safeguards, which can be inferred on the basis of the functional approach is less controversial than the list of substantive rights, most of which are deduced from the connection to crimes against humanity: *ibid.*, at 94. This observation is probably reflective of common-law approaches with emphasis on practice. The deductive approach, often used in doctrinal and philosophical approaches in civil law countries,

4.2. *The Right to Humane Treatment*

General Comment No. 29 considers that the right of detainees to be treated with humanity and with respect for the inherent dignity of the human person,[43] as guaranteed under Article 10 ICCPR, is fully anchored in the bedrock of general international law that admits of no derogation. It refers to the express recognition of the inherent dignity of the human person in the preamble to the ICCPR and to "the close connection between articles 7 [which prohibits torture or other forms of ill-treatment] and 10".

Obviously, the requirement of humane treatment of captured soldiers and civilians has been the foundational and most prominent theme of IHL. The customary IHL nature of the right to be treated humanely has been distilled from IHL treaty-based rules,[44] not least from common Article 3 GCs and Article 75(1) API. As the *ICRC's Customary IHL Study* recognises,[45] the requirement of humane treatment is "an overarching concept", which finds detailed elaborations in specific IHL rules, such as the provisions forbidding torture or other forms of ill-treatment.[46] In the *Aleksovski* case, the Trial Chamber of the ICTY aptly explains the manner in which the generalised concept of humane treatment is safeguarded under GCIV:

> A reading of paragraph (1) of common Article 3 [of the 1949 Geneva Conventions] reveals that its purpose is to uphold and protect the inherent human dignity of the individual. (…) Instead of defining the humane treatment which is guaranteed, the States parties chose to proscribe particularly odious forms of

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stresses the approach of highlighting the intrinsically fundamental nature of particular rights as a ground for attributing a special (or elevated) status to them.

[43] Reference to the term "dignity" is used to explain the concept of humane treatment in the following treaties and instruments: ICCPR, Article 10(1); ACHR, Article 5; American Declaration on the Rights and Duties of Man, Article XXV; AfCHPR, Article 5; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 1; Basic Principles for the Treatment of Prisoners, para. 1; UN Secretary-General's Bulletin, Section 8; HRC, *General Comment No. 21* (on Article 10 ICCPR); and *General Comment No. 29* (on Article 4 ICCPR).

[44] The Hague Regulations of 1907, Article 4(2); GCs, common Article 3(1); GCI, Article 12(1); GCII, Article 12(1); GCIII, Article 13; and GCIV, Articles 5(3) and 27(1).

See also Lieber Code, Article 76; Brussels Declaration, Article 23(2); and Oxford Manual, Article 63.

[45] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (2005), Vol. I, at 307–308.

[46] The specific reference to the concept of "ill-treatment" can be found in the IMT Charter (Nuremberg Charter), Article 6. In contrast, the ICRC's *Customary IHL Study* does not refer, in this regard, to anti-torture provisions of relevant human rights treaties, which prohibits not only torture but also other forms of ill-treatment, such as cruel, inhumane, or degrading treatment or punishment.

> mistreatment that are without question incompatible with humane treatment.... Hence, while there are four sub-paragraphs which specify the absolutely prohibited forms of inhuman treatment from which there can be no derogation, the general guarantee of humane treatment is not elaborated, except for the guiding principle underlying the Convention, that its object is the humanitarian one of protecting the individual *qua* human being and, therefore, it must safeguard the entitlements which flow therefrom.[47]

Several comments can be made on the scope of application of this right in IHL context. This right is equipped with a broad scope of application *ratione materiae* and *ratione personae*. First, it is applicable in both non-international and international armed conflicts.[48] Second, it must be guaranteed without any discrimination.[49] Article 5(3) GCIV specifically classifies this right as one of the two non-derogable rights that cannot be withdrawn from "protected persons" in an occupied territory under Article 5(3) GCIV. Indeed, this customary norm is designated as one of the minimum safeguards applicable to any persons that do not fall within the definition of prisoners of war or civilians and that remain of doubtful status, such as unprivileged belligerents held in a combat zone (battlefield unprivileged belligerents).

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[47] ICTY, *Prosecutor v. Zlatko Aleksovski*, Judgment of Trial Chamber, 25 June 1999, IT-95-14/1-T, para. 49.

[48] The *ICRC's Customary IHL Study* describes the right of both civilians and persons *hors de combat* to be treated humanely as a norm of customary international law applicable both in international armed conflicts and in armed conflicts of non-international character: See elaborate discussions made in Henckaerts and Doswald-Beck, *supra* n. 45, Vol. I, at 308–311, Rule 88. For this fundamental principle under non-international armed conflict, see Article 4(1), APII, which is adopted by consensus.

[49] The exemplary nature of the discriminatory grounds is clear from the text of both common Article 3 GCs and Article 75 API. The relevant part of Article 3(1) common to the GCs reads that "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria". Similarly, the relevant part of Article 75(1) API reads that "[i]n so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria".

4.3. *The Prohibition on Taking Hostages, Abductions or Unacknowledged Detention*

4.3.1. *Overview*

General Comment No. 29 explains that this right can be encompassed within the category of non-derogable and "absolute" rights on the basis that it has attained the status of customary international humanitarian law.[50] This conclusion is hardly unassailable as it is considered a specific form of the requirement of humane treatment.

With respect to the prohibition on taking hostages, this is fully anchored in customary IHL applicable both in international and non-international armed conflict. This fundamental rule has already been discussed in detail in the context of specifically prohibited acts of inhumane treatment. Suffice to mention that serious violations of this rule will engender individual criminal responsibility for war crimes within the ICC's jurisdiction.

As regards the notion of unacknowledged detention, *General Comment No. 29* does not provide any comments on it. Nor is there any guideline on the distinction between this notion and the act of taking hostages or of abductions. Clearly, any unacknowledged detention, whether done in the context of hostage-taking or abductions, constitutes an arbitrary deprivation of liberty in clear violation of the right to liberty and security recognised under Article 9 ICCPR. In contrast to aspects of hostage-taking and unacknowledged detention, more elaborate examinations are needed with respect to the prohibition of abduction.

4.3.2. *Abduction*

Some comments can be made on abductions carried out by non-state actors. In case a state accepts or endorses such conduct of non-state actors, it is clear that the responsibility of that state can be engaged, as provided in the ILC's *Articles on State Responsibility*.[51] On the other, the ambit of state responsibility has been further broadened by the development of the doctrine of positive obligations in relation to the right to life and the freedom from ill-treatment in the jurisprudence of the monitoring bodies of international human rights law. State responsibility for such human rights violations can be identified where a state has failed to take necessary preventive or protective action even though it

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[50] HRC, *General Comment No. 29*, para. 13(b).

[51] Article 11 of the ILC's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* provides that "[c]onduct which is not attributable to a State . . . shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own": *ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts*, ILC, 53rd. Session (2001).

has known or ought to have known danger to life or to limb of victims. When applied to cases of abductions, this doctrine serves to set the same level of *mens rea* for determining the responsibility of a state.

The non-derogable nature of the rule forbidding abductions can be borne out in international criminal law. Whether in time of peace, or in situations of armed conflict or occupation, abductions of civilians committed in a widespread or systematic manner may constitute crimes against humanity based on enforced disappearance of persons under Article 7(1)(i) of the ICC Statute. Individual criminal responsibility for crimes of forced disappearance of persons is recognised in the Inter-American Convention on Forced Disappearance of Persons (1994).[52] This crucial step at the regional level is emulated by the International Convention for the Protection of All Persons from Enforced Disappearance (2006).[53] The Convention provides the possibility of identifying crimes against humanity, accessory crimes,[54] and the responsibility of a civilian superior, which can be established by the *mens rea* corresponding to that stipulated in Article 28 ICC Statute.[55]

4.4. *The Rights of Persons Belonging to Minorities*

The HRC's recognition of non-derogable status of rights of persons appertaining to the minorities is circumlocutory. *General Comment No. 29* states that

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[52] The non-derogable nature of this rule can be recognised in several aspects. First, akin to the UN Convention against Torture, there is recognition of quasi-universal jurisdiction, based on *aut judicare aut dedere* principle: The Inter-American Convention on Forced Disappearance of Persons, Article IV(2). Second, it is expressly stipulated that emergency circumstances cannot be invoked as a ground for justifying the commission of such offences: Article X(1). Third, this Convention incorporates general principles pertinent to core crimes, including the general exclusion of statutes of limitations: Article VII(2); denial of superior orders as a ground precluding individual criminal responsibility of the perpetrators: Article VIII(1); and no immunity or privilege: Article IX(3).

[53] Article 5 of the International Convention for the Protection of All Persons from Enforced Disappearance reaffirms that the widespread or systematic practice of enforced disappearances constitutes a crime against humanity.

[54] The International Convention for the Protection of All Persons from Enforced Disappearance, Article 6(1)(a). This largely corresponds to Article 25(3)(b) of the ICC Statute (order, soliciting, and inducement).

[55] The International Convention for the Protection of All Persons from Enforced Disappearance, Article 6(1)(b). The responsibility of military commanders may be engaged by a lower threshold of *mens rea*, given that Article 6(1)(b) "is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander": Article 6(1)(c). The phrase "relevant international law" obviously refers to Article 28 of the ICC Statute and Article 87(1) API (which, as discussed elsewhere, sets the same standard of responsibility both for military commanders and for civilian superiors, and which is considered to conform to customary international law, notwithstanding Article 28 ICC Statute).

"the international protection of the rights of persons belonging to minorities *includes elements* that must be respected in all circumstances".[56] The rights of persons pertaining to minorities (based on ethnicity, religion or language) are guaranteed under Article 27 ICCPR. The laconic style of the HRC's observation leave many questions unanswered. It has failed to articulate which specific elements of the rights of persons appertaining to minority status are considered non-derogable, and applicable even in extraordinary circumstances, such as the situation of occupation.

The HRC invokes three grounds for justifying the non-derogable character of these rights: (i) the prohibition of genocide; (ii) a non-discrimination clause under Article 4(1) ICCPR; and (iii) the non-derogable nature of the right embodied under Article 18 ICCPR.[57] Several comments can be made on these matters. Invoking the prohibition of genocide, which is the least controversial norm for its peremptory status, may be helpful in clarifying the meaning of minorities and identifying the criteria for minority status. Yet, the protected groups under the Genocide Convention and Article 6 ICC Statute are limited only to only four groups: national, racial, ethnic and religious groups. With respect to the HRC's reference to the principle of non-discrimination embodied under Article 4(1), this may be criticised for misinterpreting or over-extensively interpreting this clause. The duty of non-discrimination under this clause serves as a guiding principle only in relation to the application of derogation measures in line with Article 4(1) ICCPR. It would be more persuasive if the HRC adverted to the principle of non-discrimination, which is set forth under Article 2(1), as one of the general guiding principles of the ICCPR.

Further, it ought to be noted that Article 18 ICCPR is relevant only to individual persons belonging to religious minorities. Determining the status of minorities solely on the basis of the three grounds (ethnicity, religion and language) under Article 27 ICCPR is too restrictive. It would overlook the rights of individual persons claiming minority status based on other grounds of identity or differentiation, such as gender, sexual orientation, disability or socio-economic group. As a comparison, the Framework Convention on Minorities, adopted under the auspices of the Council of Europe, includes as grounds of identity the criterion of culture in addition to these three grounds.[58]

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[56] HRC, *General Comment No. 29, States of Emergency (article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 13(c), emphasis added.

[57] *Ibid*.

[58] The Council of Europe, the Framework Convention for the Protection of National Minorities, (1995), Article 6(1). See also Article 5(1), which regards "the essential elements of their ['national minorities'] identity, namely their religion, language, tradition, and cultural heritage".

4.5. *The Prohibition of Deportation or Forcible Transfer of Populations*

The detailed examination of this issue has already been made above in Chapter 13 concerning specifically prohibited acts of inhumane treatment. Here, it suffices to highlight salient features of this fundamental rule. The peremptory nature of the prohibition of deportation or forcible transfer can be confirmed by its incorporation into core crimes under international criminal law. Both GCIV and API classify deportation or forcible transfer within the meaning of Article 49(1) GCIV as a grave breach.[59] If committed in a systematic or widespread manner against civilians, this may amount to crimes against humanity under the ICC Statute.[60] The HRC does not confine the prohibition of deportation or forcible transfer of population in the context of cross-border displacement of civilians (from an occupied territory to the territory of the occupying power or to that of any other country). This is fully consistent with the broader approach contemplated under Article 7(1)(d) of the ICC Statute. Under the latter provision, forcible transfer, which takes place *within* the occupied territory, whether or not this may generate internally displaced persons, may also amount to crimes against humanity. The HRC regards such an offence as absolutely forbidden.

4.6. *The Prohibition of Propaganda for War and of Advocacy of National, Racial, or Religious Hatred That Would Constitute Incitement to Discrimination, Hostility or Violence*

The fifth category of an additional non-derogable rule identified by the HRC in its *General Comment No. 29* is the rule embodied in Article 20 ICCPR. This provision forbids both the propaganda for war and any advocacy for national, racial or religious hatred that would amount to incitement to discrimination, hostility or violence.[61] The absence of any qualifying clause attached to Article 20 may bolster this interpretation. While the addressees of these rules are both states and individual persons (including a group of individuals), the HRC contemplates that only the prohibition addressed to the states is of non-derogable nature.[62]

With respect to the notion of propaganda for war, the HRC largely leaves unresolved its meaning and scope of application. The controversy over the

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[59] GCIV, Article 147; and API, Article 85(4)(a).

[60] ICC Statute, Article 7(1)(d) and (2)(d).

[61] HRC, *General Comment No. 29, States of Emergency (article 4)*, U.N. Doc. CCPR/C/21Rev.1/Add.11 (2001), para. 13.

[62] It states that "[n]o declaration of a state of emergency made pursuant to article 4, paragraph 1, may be invoked as justification *for a State party to engage itself*, contrary to article 20, in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence": *ibid.*, para. 13(e), emphasis added.

elements of such a prohibited act is closely intertwined with the continued polemics over the definition of aggression. This point is illustrated in the HRC's *General Comment No. 11* on Article 20, in which the HRC recognised that the first paragraph of this provision does "not prohibit advocacy of the sovereign right of self-defence".[63] Still, this does not resolve the problem at all, not least because the conditions under which this *jus ad bellum* right can be exercised are highly controversial.

Similar criticism of ambiguity can be directed against the act of advocating national, racial or religious hatred that amounts to incitement to discrimination, hostility or violence. The HRC fails to provide any elaborate criteria for identifying those acts. Nor does its *Comment* demarcate the boundaries between the permissible exercise of freedom of expression and the expression that gives rise to such advocacy. With respect to the concepts of propaganda for war and the advocacy of hatred, it may be criticised that their ambiguous nature and broad ambit pose a serious risk of undermining the exercise of freedom of expression, one of the most cardinal human rights that serve as the fulcrum of democracy.[64]

Article 20 ICCPR contemplates only the three limited categories of protected groups (namely, national, racial or religious groups). Some comments can be made on other groups that should be safeguarded against hatred that would amount to incitement to discrimination, hostility or violence. First, the notion of ethnicity should be included in the rule prohibiting such virulent form of hate speech. It ought to be recalled that ethnicity is classified as one of the four protected groups set forth in the Genocide Convention, and that direct and public incitement to genocide is designated as a punishable offence under the ICC Statute.[65] Second, if the linkage to the elements of crimes against humanity can be considered a key to determining additional rules of non-derogable character, then the obvious missing groups are gender, cultural and social-economic groups,[66] as well as homosexuals and the disabled. Apart from the difficulty of drawing a line between permissible and impermissible speech, there seems to be no intrinsic reason why these groups should not be shielded against hatred-driven incitement to discrimination, hostility or violence in an occupied territory.

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[63] HRC, *General Comment No. 11*, reprinted in: (1994) 1–2 *IHRR* 10, para. 2.

[64] As Joseph notes, this is one of the reasons that many states, including the US, has formed a reservation to Article 20, expressing their doubt on the customary law nature of this rule: Joseph (2002) *supra* n. 27, at 93. See also Observations by the United States on *General Comment No. 24*, reprinted in: (1996) 3 *IHRR* 265, at 267, Section 3.

[65] ICC Statute, Article 25(3)(e).

[66] One need not remind oneself of the magnitude of crimes against humanity committed by the Nazi, Stalin, Mao, Pol Pot and Kim Jong-Il against political opponents and "class enemies".

5. *Other Non-Derogable Rights Identified by the Human Rights Committee*

5.1. *The Right to an Effective Remedy under Article 2(3)(a) of the ICCPR*

Apart from the five rules examined above, *General Comment No. 29* states that the obligation on a state to provide an effective remedy as provided in Article 2(3)(a) ICCPR is non-derogable.[67] This obligation is a general principle of the ICCPR, which governs the whole substantive provisions dealing with the rights of individual persons. The Committee stresses that even if a state party, when invoking the derogation clause under Article 4, can make "adjustments to its procedures of judicial or other remedies, the obligation to afford an effective remedy remains the minimum core that must not be transgressed".[68]

The general principle embodied in Article 2(3) provides a basis for an individual person to claim his/her right to an effective remedy before a national tribunal. This right is supplementary or "accessory" in nature,[69] in the sense that it can be invoked only in conjunction with an *alleged violation* of a substantive right.[70] Joseph argues that "an Article 2(3) remedy can only arise in conjunction with a *finding of violation* of a substantive Covenant right".[71] This interpretation, however, misses the point that Article 2(3)(a) ICCPR can be raised in conjunction whenever an applicant advances "an arguable claim" of an infringement of a substantive right, and that a breach of Article 2(3)(a) can be identified without

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[67] HRC, *General Comment No. 29, States of Emergency (article 4)*, U.N. Doc. CCPR/C/21Rev.1/Add.11 (2001), para. 14.

[68] *Ibid*.

[69] Nowak, *supra* n. 5, at 34–37, paras. 13–17. As Nowak notes, the provisions of Articles 2–5 ICCPR are intended to be general provisions, which can be invoked only in tandem with individual rights guaranteed under Articles 6–27.

[70] For the jurisprudence of Article 13 ECHR as a comparative appraisal, see Y. Arai, "Right to an Effective Remedy before a National Authority", in: P. Van Dijk, F. Van Hoof, A. Van Rijn and L. Zwaak (eds), *Theory and Practice of the European Convention on Human Rights*, 4th ed., (2006) 997, at 1000. On this matter, Frowein and Peukert nevertheless criticise the narrow interpretation given by the Court for practically approximating the "arguable claim" test to the finding of a violation of a substantive right ("Freilich hat der GH [Europäischer Gerichtshof für Menschenrechte] die Voraussetzungen des 'arguable claim' teilweise sehr eng verstanden, so daß die Gefahr besteht, Art. 13 praktisch nur bei einer Verletzung der materiellen Bestimmung zur Anwendung zu bringen") ("However, the ECtHR has understood the requirements of 'arguable claim' partly in a very narrow manner, so that there is a danger that Article 13 may come into play practically only in case of a violation of a material provision"): J.Abr. Frowein and W. Peukert *Europäische Menschenrechtskonvention EMRK-Kommentar*, 2nd ed., (1996), at 427–428 (English translation by the present author).

[71] Joseph, *supra* n. 27, at 93 (emphasis added).

the finding of a violation of the latter.[72] In this regard comparison can be made with the jurisprudence of Article 13 of the ECHR.[73]

The application of Article 2(3)(a) in conjunction with a substantive provision may be contemplated in four scenarios:

(i) the finding of a violation of a substantive right which the Committee classifies as non-derogable in its extended catalogue of non-derogable rights;
(ii) the finding that no violation of such a substantive, non-derogable right has occurred;
(iii) the finding of a violation of a substantive right which does *not* pertain to one of the non-derogable rights in this expanded catalogue; or
(iv) the finding that no violation of such a derogable, substantive right has taken place.

The logic dictates that in the first scenario, an effective judicial remedy must be provided in any circumstances, enabling this supplementary right in itself to be of non-derogable character. With respect to the second, the non-derogable character of the right to an effective remedy under Article 2(3)(a) ought to be recognised every time an arguable claim is made that an infringement of a substantive right has occurred. It is submitted that even in the third and fourth scenarios, there is no intrinsic reason to derogate from the right under Article 2(3).[74]

5.2. *Judicial Guarantees in Relation to Non-Derogable Rights*

The HRC has emphasised that procedural guarantees, including judicial guarantees, must never be suspended in relation to measures that encroach on the protection of non-derogable rights. As examined above with respect to the right to an effective remedy, a claim that a non-derogable right is violated must be considered sufficient to prohibit the suspension of judicial guarantees. The HRC suggests that the saving clause must never be invoked in such a manner as to undermine the substance of the non-derogable rights. It refers to the need to abide by the requirements of due process guarantees embodied under Articles

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[72] For the same view, see Nowak, *supra* n. 5, at 36–37, para. 17.

[73] See, Arai (2006), *supra* n. 70, at 997–1026.

[74] Given that Article 4 does not fall within the meaning of "any of the rights set forth in the Covenant" under Article 1 of the First Optional Protocol, the HRC is not competent to examine an alleged violation of Article 4 *alone*. Nonetheless, in case the rights suspended by a derogating state do not fall within the expanded catalogue of non-derogable rights, potential victims, when denied the right to an effective remedy, would in practice be unable to contest the disproportionate or discriminate nature of derogating measures.

14 and 15 ICCPR in case of any trial involving the imposition of death penalty.[75] The effective interpretation suggests that unless the fair trial guarantees are immune from derogation, a proceeding against alleged violations of non-derogable rights before domestic courts would be futile.

5.3. *Core Elements of Fair Trial Guarantees*

General Comment No. 29 considers core elements of fair trial guarantees as immune from derogation. This can be justified on the basis that "certain elements of the right to a fair trial" are explicitly guaranteed under IHL.[76] This is precisely the reasoning followed by the *Siracusa Principles*, which recognise a minimum of due process rights set out in IHL.[77] The HRC contends that "the principles of legality and the rule of law", which underpin the safeguards relating to derogation under Article 4, require that even during armed conflict and in time of occupation, "fundamental requirements of fair trial" must be guaranteed.[78] Nevertheless, its reference to core elements of fair trial guarantees is confined only to three specific procedural safeguards: (i) access to a court in case of criminal proceedings; (ii) the presumption of innocence; and (iii) the right to habeas corpus or *amparo*, namely, the right to take proceedings before a court to have the lawfulness of detention determined without delay.[79] In subsequent

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[75] HRC, *General Comment No. 29, States of Emergency (article 4)*, U.N. Doc. CCPR/C/21Rev.1/Add.11 (2001), para. 15.

[76] *Ibid.*, para. 16.

[77] See, for instance, the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1985/4, paras. 60, 64, 66, 67, and 70; reproduced in: (1985) 7 HRQ 3. Buergenthal proposes that the right to a fair trial should be encompassed within the catalogue of non-derogable rights: T. Buergenthal, "To Respect and to Ensure: State Obligations and Permissible Derogations", in: L. Henkin (ed.), *The International Bill of Rights – The Covenant on Civil and Political Rights*, (1981) 72, at 83.

[78] HRC, *General Comment No. 29, States of Emergency (article 4)*, U.N. Doc. CCPR/C/21Rev.1/Add.11 (2001), para. 16.

[79] *Ibid.*, para. 16. See the Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 46th Session, *The Administration of Justice and the Human Rights of Detainees*, U.N. Doc. E/CN.4/Sub.2/1994/24 (1994), para. 166 (proposing that "the right to habeas corpus or similar procedure should be made non-derogable and thus should be applicable even during periods of public emergency"). See also the HRC, *Concluding Observations on Israel*, CCPR/C/79/Add.93, 18 August 1998, para. 21:

> The Committee considers the present application of administrative detention to be incompatible with articles 7 and 16 of the Covenant, neither of which allows for derogation in times of public emergency. The Committee takes due note that Israel has derogated from article 9 of the Covenant. The Committee stresses, however, that a State party may not depart from the requirement of effective judicial review of detention. The Committee recommends that the application of detention be brought within the strict requirements of the Covenant and that effective judicial review be made mandatory.

Chapter 20, it will be explored whether it is possible to identify an additional catalogue of fair trial guarantees that must never be abridged in occupied territories (or in any other circumstances affected by armed conflict).

6. *Conclusion*

The broadened inventory of non-derogable rights is of special importance to individual persons finding themselves in non-international armed conflict or any other emergency circumstances short of armed conflict. In the context of occupation, despite the relatively ample list of rights guaranteed under GCIV and Article 75 API, the possibility of directly relying on international human rights norms of non-derogable nature remains of crucial significance. The elaborate details of such non-derogable human rights, as fleshed out in the documents and case-law of the monitoring bodies, can be applied in conjunction to give greater effect to the rights secured under IHL.

No doubt, the intrinsic moral values articulated by specific human rights norms are crucial to determining their non-derogable status.[80] This suggests that there can be a close correlation between the list of non-derogable rights, the notion of *jus cogens*, the obligations *erga omnes* and a grave breach form of war crimes resulting from the violation of such rights.[81] All these notions are indicative of an emerging hierarchy or verticalisation of international norms. The idea of international law cannot be segregated from the dialectical and dynamic process of international society re-conceiving itself through accommodating and integrating consciousness emanating from diverse and competing value-systems.[82] It is against the backdrop of such a value-laden process of the modern international society that the notion of non-derogability has been yielded to rationalise a hierarchy of international rules.[83]

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[80] K. Teraya, "Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights", (2001) 12 *EJIL* 917, at 921–922.

[81] The *ICRC's Customary IHL Study* wisely avoids categorising any of those rights as peremptory norms.

[82] P. Allott, *Eunomia: New Order for a New World* (1990), at 110.

[83] Teraya, *supra* n. 81, at 937.

Chapter 20

Procedural Safeguards and Fair Trial Guarantees in Occupied Territory

1. *Introduction*

The provisions under GCIV Section III (Articles 64–78), which deal with penal and security laws, furnish the most important basis for assessing the relationship between IHL and human rights law in occupied territory. These provisions relate to the requirements for occupation courts, procedural safeguards for protected persons interned or administratively detained for security reasons, and to the fair trial guarantees for protected persons who are held in pre-trial detention for criminal charges and those who are convicted. The fact that such procedural safeguards and due process guarantees find more elaborate counterparts under international human rights treaties requires careful assessment of the relationship between IHL and international human rights law. This chapter firstly seeks to articulate procedural safeguards that must be accorded to all individual persons interned or administratively detained in occupied territory. The focus of appraisal will then turn to the expanded scope of fair trial guarantees that must be given to all accused persons in occupied territory.

2. *Assigned Residence and Internment/Administrative Detention*

2.1. *The Legal Basis for Depriving Persons of Liberty in Occupied Territory*

Both in occupied territories and in the territories of the parties to the conflict, protected persons may be subjected to "such measures of control and security . . . as may be necessary as a result of the war" within the meaning of Article 27(4) GCIV.[1] The most that the occupying power can use as such measures of control

[1] GCIV, Article 27(4).

and security will be either assigned residence or the severe measure of internment (administrative detention). However, Article 78(1) GCIV stresses that such deprivation of liberty is of exceptional nature that can be adopted only if there are "imperative reasons of security".[2]

Assigned residence consists of moving individual persons from their domicile and forcing them to live in a locality where supervision is more easily carried out.[3] The occupying power is obligated to take measures of internment in case individual persons volunteer, through the representatives of the protecting power, to be interned and where their situation "renders this step necessary".[4] Measures of internment or administrative detention may cause severe financial predicament on the protected persons under control. In such cases, those affected persons are entitled to the standards of welfare corresponding to the detailed requirements embodied in the section on internment of protected persons (Part III, Section IV) GCIV.[5]

Internment or administrative detention is defined as the deprivation of liberty that has been ordered by the executive branch (and not by the judiciary) without criminal charges brought against the internee/administrative detainee.[6] In that sense, internment/administrative detention must be strictly distinguished from the circumstances where protected persons are deprived of their liberty while held in pre-trial detention on criminal charges, or where they are serving penalties involving loss of their liberty.[7] Further, this type of internment or administrative detention is a regime distinct from the internment of prisoners of war in international armed conflicts.[8]

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[2] GCIV, Article 78(1).

[3] *ICRC Commentary to GC IV*, at 256. See also UK Ministry of Defence, *The Manual of the Law of Armed Conflict* [hereinafter *UK Manual]* (2004), at 230, para. 9.32.

[4] GCIV, Article 42(2).

[5] GCIV, Article 41(2) and Article 39(2).

[6] J. Pejic, "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence", (2005) 87 *IRRC* 375, at 375–376; and *idem*, "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence", in: L. Maybee and B. Chakka (eds), *Custom as a Source of International Humanitarian Law*, (2006) 197, at 197–198. See also *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 [hereinafter, ICRC's Commentary to APs]*, (1987), "Commentary on Protocol I relative to international armed conflicts", Article 75(3), para. 3063.

[7] Pejic aptly describes the danger of confusing the two regimes, stating that "[u]nless internment/administrative detention and penal repression are organized as strictly separate regimes there is a danger that internment might be used as a substandard system of penal repression in the hands of the executive power, bypassing the one sanctioned by a country's legislature and courts": Pejic (2005), *ibid.*, at 381.

[8] On this matter, it may be questioned whether prisoners of war who are benefiting from the system provided by IHL (such as access and visit by Protecting Powers and ICRC) must be

As discussed above, the highly exceptional nature of administrative detention regime in occupied territory means that its application must be confined only where "imperative" security reasons are demonstrated. Administrative detention may be invoked for the purpose of preventing the suspects (re-)committing an offence, but not as a penalty for offences committed in the past.[9] There is no justification whatsoever for interning or administratively detaining protected persons for the sole purpose of intelligence gathering, unless these persons, *judged individually*, pose security threat to the occupying power.[10] Dinstein recognises the application of administrative detention to persons suspected of having committed offences in the past, where sensitive intelligence sources prevent the disclosure of sufficient evidence to convict them. Yet, even in such circumstances, justifications for administrative detention should lie in the prevention of future offences, rather than in the punishment of offences committed.[11]

2.2. *The Legal Basis for Procedural Safeguards of Persons Deprived of Liberty in Occupied Territory*

Article 78 GCIV and Article 75(3) API furnish procedural safeguards for protected persons deprived of their liberty outside the criminal context. The procedural safeguards expressly provided in IHL treaties are sparse. Even so, fair trial guarantees for protected persons accused of offences against penal/security laws in occupied territory are given relatively detailed elaborations under Articles 65–77 GCIV, and Article 75(4) API. In view of such general paucity of procedural safeguards under IHL, inquiries ought to turn to the practice and the doctrine of international human rights law. It must be examined whether it is possible to "recruit" or "supplant" additional and more specifically elaborate elements of

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given the right of periodic review similar to that applicable to civilian internees/administrative detainees. More specifically, it may be questioned whether prisoners of war, who are not suspected of any offences or crimes (ordinary crimes or war crimes), should be accorded less protections than civilian internees who are suspected criminals. See CUDIH, *Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict*, Geneva, 24–25 July 2004, at 9 (Background Paper by L. Doswald-Beck). With regard to the right of periodic review, it may be proposed that such prisoners of war should be able to rely on "cumulative" application of Article 75(3) API and Article 9 ICCPR: *ibid.*, at 32 (presentation by W. Kälin). Yet, if the occupying power duly derogates from Article 9 ICCPR, then there is a question whether it is unlawful to deny such periodic judicial review to prisoners of war. The problem is that Article 75(3) API does not make any reference to the requirement of periodic review. The most that might be argued is that the requirement of release with the minimum delay, expressed in this provision, implies the existence of procedural safeguards against abuse to secure early release.

[9] Y. Dinstein, "The International Law of Belligerent Occupation and Human Rights", (1978) 8 *Israel YbkHR* 104, at 125.

[10] Pejic (2005), *supra* n. 6, at 380.

[11] Dinstein (1978), *supra* n. 9, at 126.

procedural safeguards. In this regard, special regard must be had to the expansive scope of non-derogable rights examined by the Human Rights Committee (HRC) and to the relevant soft-law instruments of human rights that set out detailed procedural rights for interned or administratively detained persons.

Article 75 API embodies "fundamental guarantees" for persons deprived of their liberty, who do not benefit from more favourable treatment under the GCs or under API. It is a "legal safety net" safeguarding a "minimum standard of human rights" for all persons that do not benefit from protections on other grounds.[12] These minimum guarantees are codificatory of basic human rights law.[13] They are applicable even to a Party's treatment of its own nationals.[14]

Interning or administratively detaining protected persons in occupied territory without meeting the procedural requirements under GCIV is "unlawful confinement" of civilians that constitutes a grave breach of GCIV[15] and a war crime under the Statute of the International Criminal Court (ICC).[16] As confirmed by the Elements of Crimes for the ICC,[17] "unlawful confinement" is a broad concept that encompasses not only civilians but also all persons protected under the GCs, such as the wounded, sick or shipwrecked combatants detained in occupied territory.

2.3. *The Limited Scope of the Procedural Safeguards for Internees/Administrative Detainees*

As Pejic notes,[18] despite frequent practice of applying this type of deprivation of liberty in occupied territory (*and* indeed in the territories affected by both international and non-international armed conflicts), the extent to which protected persons interned or administratively detained in occupied territory (or in the territories of parties to the conflict) can claim due process guarantees is not fully elaborated. The uncertainty of their procedural safeguards is all the more

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[12] H.-P. Gasser, "Protection of the Civilian Population", in: D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, (1995), Ch. 5 209–292, at 281.

[13] *Ibid.*, at 233.

[14] This point is of special relevance to Al Qaeda members of the nationals of US and its allies. It also served as important safeguards for both Eritrean civilians who were denationalised by the government of Ethiopia and expelled to Eritrea, and their family members who were expelled together. Such harsh measures were implemented despite their non-possession of Eritrean nationality: Eritrea Ethiopia Claims Commission, *Civilians Claims Eritrea's Claims 15, 16, 23 and 27–32*, Partial Award, 17 December 2004, (2005) 44 *ILM* 601, at 608 (para. 30) and 617 (para. 97).

[15] GCIV, Article 147.

[16] ICC Statute, Article 8(2)(a)(vii); ICTY Statute, Article 2(g); and UNTAET Regulation 2000/15, Section 6(1)(a)(vii).

[17] Elements of Crimes for the ICC, Definition of unlawful confinement as a war crime, ICC Statute, Article 8(2)(a)(vii).

[18] Pejic (2005), *supra* n. 6, at 376.

apparent when compared with a relatively detailed list of fair trial guarantees for protected persons accused of offences against security laws or penal laws in occupied territory.

Under Article 78 GCIV, the "regular procedure" that must be safeguarded consists only of two rights: (i) the right of appeal to be decided "with the least possible delay"; and (ii) the right to periodic review (if possible every six months) by a "competent body" set up by the occupying powers.[19] The decisions on the appeal must be made "with the least possible delay". In case the appeal is upheld, protected persons must be given the right of periodic review, if possible every six months, by "a competent body" established by the occupying power.[20]

Article 75(3) API, which has an advantage of being applicable to *all* individual persons arrested, detained or interned as a consequence of international armed conflict, expressly mentions only two rights: (i) the right to be informed promptly, in a language they understand, of the reasons for such deprivation of liberty; and (ii) the right to be released with the minimum delay possible, except in criminal process, or as soon as the grounds justifying the deprivation of liberty disappear.[21] More elaborate list of rights that must be guaranteed to individual persons interned or administratively detained in occupied territory can be derived from specific rights recognised as non-derogable in the practice of international human rights law.

2.4. *Procedural Safeguards for Persons Other Than Protected Persons in Occupied Territory*

By way of analogy, the procedural safeguards concerning internment or administrative detention should be firstly applied to persons who are qualified as "protected persons" within the meaning of Article 4 GCIV but who are stripped of much of the rights laid down in Part III of GCIV. These are namely members of the battlefield unprivileged belligerents (members of independent militia or volunteer corps, who fail to meet the conditions for prisoners of war under Article 4A(2) GCIII; and civilians who have taken up arms and taken direct part in hostilities in a combat zone). These procedural safeguards help minimise the risk that they may be continuously detained in occupied territory without criminal charge, even after the grounds for their detention cease to exist.

The procedural safeguards should also be applied by analogy to those individual persons who fail to meet the criteria for protected persons within the meaning of Article 4 GCIV. These are comprised of nationals of the Detaining Power,

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[19] GCIV, Article 78(2).
[20] GCIV, Article 78(2).
[21] API, Article 75(3).

non-nationals, and nationals of co-belligerents in occupied territory who cannot rely on the system of diplomatic protection.

2.5. *The Analogous Application of Procedural Safeguards to Persons Captured in the UN-Administered Territory*

Apart from these two categories of persons discussed above, the present author proposes that as policy decision, the corpus of the rules concerning procedural safeguards should be applied to persons held by the military or law enforcement officers working under the auspices of the UN administration. One of the main advantages of applying IHL by analogy to international territorial administration in peace operations is that the law of occupation provides a broad range of rules designed to maintain and ensure public order and civil life. IHL furnishes an express legal basis for arrest, detention and punishment of persons threatening public order. The most salient example is the case of administrative detention or internment which can be authorised on an exceptional basis without criminal charge. Some authors argue that such preventive detention may be preferable to the conviction by biased judges bent on vengeance and the subsequent acquittal after long years of imprisonment.[22]

Nevertheless, the advantage of relying on the law of occupation is not fully tapped into in the practice. For instance, the *United Nations, Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law* did not incorporate any rules on treatment of civilian detainees in occupied territory (or indeed any rules on the law of occupation).[23] In Kosovo,

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[22] M. Sassòli, "Droit international pénal et droit pénal interne: le cas des territoires se trouvant sous administration internationale" in M. Henzelin and R. Roth, *Le Droit Pénal à l'épreuve de l'internationalisation* (2002) 119, at 146; *idem*, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", (2005) 16 *EJIL* 661, at 692.

[23] In contrast, the *Bulletin* incorporates rules on treatment of detainees as derived from GCIII. Section 8 of the *United Nations, Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law* provides that:

> The United Nations force shall treat with humanity and respect for their dignity detained members of the armed forces and other persons who no longer take part in military operations by reason of detention. Without prejudice to their legal status, they shall be treated in accordance with the relevant provisions of the Third Geneva Convention of 1949, as may be applicable to them *mutatis mutandis*. In particular:
> (a) Their capture and detention shall be notified without delay to the party on which they depend and to the Central Tracing Agency of the International Committee of the Red Cross (ICRC), in particular in order to inform their families;
> (b) They shall be held in secure and safe premises which provide all possible safeguards of hygiene and health, and shall not be detained in areas exposed to the dangers of the combat zone;
> (c) They shall be entitled to receive food and clothing, hygiene and medical attention;
> (d) They shall under no circumstances be subjected to any form of torture or ill-treatment;

Security Council Resolution 1244 decides that the main responsibilities of the international civil presence consist of protecting and promoting human rights.[24] Yet, there is no indication that the security operation must be bound by international human rights law.[25]

3. *General Principles Governing Internment/Administrative Detention of Individual Persons in Occupied Territory*

3.1. *The Principle That Internment or Administrative Detention Must be Carried out in Accordance with the Principle of Legality*

In case of internment or administrative detention for security reasons, the principle of legality means that individual persons may be deprived of their liberty only based on substantive grounds (substantive aspect of legality) and in conformity with due procedures (procedural aspect of legality).[26] In the *Delalic* case, the Trial Chamber of the ICTY confirms this, stating that "an initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in article 43 GCIV".[27]

Article 27(4) is a general clause that furnishes a basis for depriving protected persons (in occupied territory and in the territory of a party to the conflict) of liberty while a specific clause under Article 78 supplies an additional basis for holding protected persons in occupied territory.[28] Articles 27(4) and 78 GCIV proffer the legal basis for initial and continuing deprivation of liberty of

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(e) Women whose liberty has been restricted shall be held in quarters separate from men's quarters, and shall be under the immediate supervision of women;

(f) In cases where children who have not attained the age of sixteen years take a direct part in hostilities and are arrested, detained or interned by the United Nations force, they shall continue to benefit from special protection. In particular, they shall be held in quarters separate from the quarters of adults, except when accommodated with their families;

(g) ICRC's right to visit prisoners and detained persons shall be respected and guaranteed.

United Nations, Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law, ST/SGB/1999/13, 6 August 1999.

[24] UN Security Council Resolution 1244 (adopted under Chapter VII of the Charter), S/RES/1244 (1999), 10 June 1999, operative para. 11(j).

[25] See CUDIH, *Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict, Geneva*, 24–25 July 2004, at 18.

[26] Pejic (2005), *supra* n. 6, at 383.

[27] ICTY, *Prosecutor v. Delalic and Others* (*Celebici Camp* case), Judgment of Trial Chamber, 16 November 1998, IT-96–21–T, para. 583; and Appeals Chamber, Judgment, *Prosecutor v. Delalic and Others*, IT-96–21–A, Judgment of 20 February 2001, para. 322.

[28] For protected persons in the territory of a party to the conflict, such specific clauses are set forth in Articles 41 and 42 GCIV.

individual persons in occupied territory. With respect to the substantive aspect of legality in occupied territory, the security reasons adduced by the occupying power must reach the threshold of "imperative reasons of security" within the meaning of Article 78 GCIV.[29] As regards procedural requirements, as examined below, internees/administrative detainees must be entitled to the procedural safeguards embodied in Part III, Section III of GCIV, which are supplemented by those derived from international human rights law.

In order to implement internment or administrative detention in harmony with Article 78 GCIV, the occupying power must adopt a specific implementing law upon which measures of security detention can be based. With respect to occupied Iraq, the Coalition Provisional Authority (CPA) failed to take a necessary legislative measure until a few days before its dissolution. It was only by virtue of CPA Memorandum No. 3 (revised) of 27 June 2004 that the express legal basis was furnished for detaining individual persons on security grounds ("security internees"),[30] or on grounds that they were suspected of having committed criminal offences ("criminal detainees").[31]

The CPA carried out a drastic reform of Iraq's prison system. It issued Order No. 10[32] and Memorandum No. 2[33] to improve the management of the penitentiary system and to adjust its standards to the requirement contemplated by the UN standards rules for prisons. The drawbacks of these laws, however, became patently clear when the scandal surrounding the brutalities against the detainees at Abu Ghraib was revealed.[34] In response, the CPA adopted Memorandum No. 3 on 27 June 2004. Section 6(4) of this law specifically refers to Section IV (of Part III) of GCIV as the guidelines for the operation, condition and standards of all internment facilities established by the Multinational Force.[35]

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[29] In the territory of parties to the conflict, internment or administrative detention can be ordered only where the "absolute necessity" test is met: Article 42 GCIV.

[30] CPA, memorandum Number 3 (revised), Criminal Procedures, Section 6, which is entitled "MNF [Multinational Force] Security Internee Process".

[31] *Ibid.*, Section 5, which is entitled "Criminal Detentions".

[32] CPA, Order No. 10, CPA/ORD/8 June 2003/10.

[33] CPA, Order Memorandum No. 2: Detention and Prison Facilities, CPA/MEM/8 June 2003/02.

[34] The reporting of the shocking image of Abu Ghraib was firstly reported by S.M. Hersh, "Torture at Abu Ghraib – American Soldiers Brutalized Iraqis: How Far Does the Responsibility Go?", *The New Yorker*, 10 May 2004. See also ICRC's Report of February 2004: *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation*. See also the Human Rights Watch's report of June 2004, *The Road to Abu Ghraib*.

[35] CPA, Memorandum No. 3, CPA/MEM/27 June 2004/03, Section 6(4).

3.2. *The Principle That Internment or Administrative Detention is an Exceptional Measure*

As discussed above, the GCIV expressly stresses that internment or administrative detention is the severest measure of control that an occupying power can take with respect to protected persons who are not charged.[36] In the *Delalic* case, the Trial Chamber of the ICTY affirmed that: "the fundamental consideration must be that no civilian should be kept in assigned residence or in an internment camp for a longer time than the security of the detaining party absolutely demands".[37] The exceptional nature of internment or administrative detention[38] is corroborated by the enunciation made by the HRC that Article 4 ICCPR cannot be invoked to justify arbitrary deprivation of liberty "in violation of humanitarian law".[39] The underlying assumption is that personal liberty is the general rule even in occupied territory.

As a corollary of the exceptional nature of deprivation of liberty, the onus of justifying the confinement of protected persons in occupied territory rests on the occupying power. In the *Delalic* case, the Appeals Chamber of the ICTY held that such burden lies "upon the detaining power to establish that the particular civilian does pose such a risk to its security that he must be detained, and the obligation lies on it to release the civilian if there is inadequate foundation of such a view".[40] The more prolonged the confinement of civilians becomes, the greater the onus on the occupying power to justify it.

The *ICRC's Commentary on GCIV* recognises the discretion of the occupying power (or the detaining power in a territory of the party to the conflict) to appraise circumstances prejudicial to the security of the occupying authorities (armed forces and administration) and of the inhabitants in specific circumstances of the case.[41] Nevertheless, the exercise of such discretion must be rigorously scrutinised. Less serious grounds such as the necessity for intelligence gathering, or dubious grounds such as the political decisions to use internees as "bargaining chips", can never serve as valid reasons.[42] When interpreting the term "imperative reasons of security" under Article 78 GCIV, a fragile peace susceptible to eruptions of hostilities in occupied territory does not always justify the laxer

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[36] See also Pejic (2005), *supra* n. 6, at 380.

[37] ICTY, *Prosecutor v. Delalic and Others*, Judgment of Trial Chamber, 16 November 1998, IT-96-21-T, para. 581.

[38] Pejic (2005), *supra* n. 6, at 380.

[39] HRC, *General Comment No. 29*, para. 11. Regrettably, the HRC has not elaborated on this aspect in its extended framework of non-derogable rights.

[40] ICTY, *Prosecutor v. Delalic and Others*, Judgment of Appeals Chamber, 20 February 2001, IT-96–21–A, paras. 328–329.

[41] *ICRC's Commentary to GCIV*, at 368. See also *ibid.*, at 257.

[42] Pejic (2005), *supra* n. 6, at 380.

standards of necessity than the standard applicable in the territory of a party to the conflict.

In occupied territory, the absence of the imperative reasons of security requires the occupying power to rely on less stringent measures, which are short of the deprivation of liberty, than internment or administrative detention. Such measures include curfew and blackout, the prohibition on printing and publishing political material without permit, ban on agitation, limitations on political activities, the censure on the press,[43] restrictions on traffic, and exchange control.[44] The legal basis for these measures must be explicitly found in existing penal and security laws in occupied territory, as has been amended by the occupying power.

3.3. *The Principle That Internment or Administrative Detention Must Not be an Alternative to Criminal Proceedings*

As a corollary of its exceptional nature, the measure of internment/administrative detention must not be applied as an alternative to criminal proceedings. Persons interned or administratively detained have not been the subject of criminal proceedings. As Pejic notes, unless internment/administrative detention and penal repression are organised and implemented as strictly separate regimes, there is a serious risk that the former would become a handy vehicle for the occupying power to bypass stringent judicial guarantees required for criminal proceedings under IHL and international human rights law.[45]

Pejic's caution resonates in the aftermath of the public disclosure of images of torture or other abuses committed at the Abu Ghraib detention centre in Iraq in 2004.[46] Several thousands of individual persons who were detained at Abu Ghraib were loosely classified into three different categories: (i) common criminals; (ii) security detainees who were suspected of having committed "crimes against the coalition"; and (iii) a small number of suspected "high-value"

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[43] See, for instance, the judgment of the Military Court of Bethlehem in BL/1114/72, *Military Prosecutor v. Sheinboim et al.*, (1974) 3 *Selected Judgments of Military* Courts 346, at 354–355; as excerpted in (1977) 7 *Israel YbkHR* 253, at 256–7.

[44] *UK Manual* (2004), *supra* n. 3, at 297, para. 11.68.1. Dinstein argues that the laws prohibiting acts of sabotage, possession of arms, hostile organisation, contacts with the enemy, and the like, determine the ambit of these acts, which are classified as "war treason": Dinstein (1978), *supra* n. 9, at 112.

[45] Pejic (2005), *supra* n. 6, at 381.

[46] Hersh, *supra* n. 34: *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation*. See also the Human Rights Watch's report of June 204, *The Road to Abu Ghraib*.

leaders of insurgency.[47] It is clear that the first category of persons must have been strictly separated from the second and the third categories of detainees.[48] As discussed above, it was not until the adoption of the CPA Memorandum No. 3 on 27 June 2004 that the legal basis for distinguishing between security internees/administrative detainees on one hand and criminals on the other was provided. It was the responsibility of the US and the UK as the Detaining Powers to ensure that all persons deprived of liberty under their control were humanely treated.[49]

Until Memorandum No. 3 was enacted, in operational terms of the Coalition forces, the denomination "high valued detainees" or "HVD" was employed to refer to both thirteen "enemy prisoners of war" and a number of "security internees", who were distinguished from ordinary criminals in occupied Iraq.[50] With respect to those HVD who were "enemy prisoners of war", the US, as the Detaining Power, was responsible for their treatment until they were released at the end of active hostilities or under a parole agreement.[51] Under Article 12 GCIII, such detainees could be transferred only to another Detaining Power that is a party to the Convention. The Iraqi Governing Council did not meet this condition, and it was to the Iraqi provisional government that the lawful transfer of such prisoners of war could be made.[52] Those "enemy prisoners of war" accused of war crimes or crimes against humanity were to be brought before the Iraqi Special Tribunal while entitled to due process guarantees under GCIII.[53]

According to the CPA Memorandum No. 3, "criminal detainees" are "persons who are suspected of having committed criminal acts and are not considered security internees".[54] They are not strictly speaking "criminal" unless or until they

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[47] Hersh, *ibid*.

[48] Even persons accused must be, save in exceptional circumstances, separated from convicted persons: ICCPR, Article 10(2).

[49] For Iraqi prisoners of war, see GCIII, Article 12; and the provisions on humane treatment, such as Article 13. For civilian internees ("security internees", and "criminal detainees" who have yet to be charged), see GCIV, Article 29, and the provisions on humane treatment embodied in Part III, Section I (in particular, Article 27). As Kelly notes, it is not the CPA but the US as the actual Detaining Power that was held responsible for conditions and treatment of detainees at Abu Ghraib. CPA did not exercise both physical and financial control over military detention facilities such as Camp Buca (near Basra), Camps Ganci and Vigilant (in Baghdad): M.J. Kelly, "Iraq and the Law of Occupation: New Tests for an Old Law", (2003) 6 *YbkIHL* 127, at 153–154.

[50] Kelly, *ibid*., at 152. Kelly's article was apparently completed some time before the Memorandum No. 3 (which included the official distinction between "security internees" and "criminal detainees") was adopted.

[51] *Ibid*., at 152.

[52] *Ibid*.

[53] GCIII, Articles 84–88, and 99–108.

[54] CPA, Memorandum No. 3, Section 5(1).

are convicted. In that sense, they are administrative detainees whose liberty can be removed only based on security grounds under Article 78 (or Article 27(4)) GCIV. The approach of the Memorandum No 3 could not blunt Sassòli's criticism. He observes that "widespread detention of civilians without trial from the start of the occupation . . . would have been a clear violation of IHL, as the latter requires an individual decision 'according to a regular procedure *to be prescribed* by the Occupying Power'" as mentioned in Article 78 GCIV.[55]

4. *Procedural Safeguards That are Expressly Recognised in IHL Treaties*

4.1. *Overview*

With respect to the procedural safeguards for individual persons deprived of liberty, which are embodied in IHL treaties, they can be classified into two genres: (i) the procedural safeguards that are largely influenced by international human rights law; and (ii) the procedural safeguards that are considered distinct in the context of IHL. Examinations turn to specific rights appertaining to those two genres of procedural safeguards.

4.2. *The Procedural Safeguards That are Largely Influenced by International Human Rights Law*

4.2.1. *The Right of Interned or Administratively Detained Persons to be Informed Promptly, in a Language They Understand, of the Reasons for such Deprivation of Liberty*

The right of individual persons deprived of liberty to be informed "promptly", in a language they understand, of the reasons for such deprivation of liberty is recognised under Article 75(3) API. This is a logical corollary of the substantive aspect of the general principle of legality.

There must be an explicit basis for deprivation of liberty either under the law in force in occupied territory (penal/security laws of the occupied state as amended by the occupying power) or under international law. As discussed above, in occupied territory, Article 78 GCIV requires the occupying power to establish "imperative reasons of security" to justify internment or administrative detention.

The right to be informed of the reasons for arrest is recognised under Article 9(2) ICCPR and other regional human rights treaties[56] and in soft law instru-

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[55] Sassòli (2005), *supra* n. 22, at 665, emphasis in original.

[56] See also ECHR, Article 5(2); ACHR, Article 7(4). While the African Charter of Human and Peoples' Rights does not expressly provide this right, the African Commission on Human and

ments.[57] While constituting an intrinsic element of "the principles of legality and the rule of law", the HRC does not include it in its expanded scope of non-derogable rights.[58] Nevertheless, in its *Report on Terrorism and Human Rights*, the Inter-American Commission on Human Rights (IACmHR)[59] states that "the right to be informed promptly and intelligibly of any criminal charge" must not be dispensed with altogether. On that basis, the *ICRC's Customary IHL Study* assumes that this right has acquired the status not only of customary but also non-derogable nature applicable to detained persons in non-international armed conflict.[60]

4.2.2. *The Right to Contest Measures of Internment or Administrative Detention*
Protected persons who are subjected to measures of assigned residence or internment are entitled to challenge the lawfulness of the decisions on such measures. Article 78 GCIV requires that such decisions must be made "according to a regular procedure… [that] shall include the right of appeal". In effect, this recognises the right similar to a writ of *habeas corpus*. To give effect to this right, the reviewing authority must not be the same body that made initial decisions on

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Peoples' Rights has stated that this right constitutes a parcel of the right to fair trial: AfCmHPR, Resolution on the Right to Recourse and Fair Trial, para. 2b. see also AfCmHPR, Res. 61 (XXXII)02: Resolution on Guidelines and Measures for the Prohibition of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (2002), paras. 25–26.

[57] See, for instance, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 10. See also HRC, *General Comment No. 8 (Article 9)*, 30 July 1982, para. 4 (stating that "if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e.… information of the reasons must be given").

[58] HRC, *General Comment 29, States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add. 11 (2001), 31 August 2001 (adopted on 24 July 2001). Note, however, the core elements of fair trial guarantees described as non-derogable: *ibid*., para. 16.

[59] The relevant part of the *Report on Terrorism and Human Rights* reads that:

> Where an emergency situation is involved that threatens the independence or security of a state, the fundamental components of the right to due process and to a fair trial must nevertheless be respected… The basic components include, in particular, the right to fair trial by a competent, independent and impartial court for persons charged with criminal offenses, the presumption of innocence, the right to be informed promptly and intelligibly of any criminal charge, the right to adequate time and facilities to prepare a defense, the right to legal assistance of one's choice for free legal counsel where the interests of justice require, the right not to testify against oneself and protection against coerced confessions, the right to attendance of witnesses, the right of appeal, as well as respect for the principle of non-retroactive application of penal laws.

IACmHR, *Report on Terrorism and Human Rights*, Doc. OEA/Ser.L/V/II.116Doc.5rev.1corr., 22 October 2002, paras. 245 and 247.

[60] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law (2005)*, Vol. I, at 349–350.

deprivation of liberty.[61] Such authority must also be equipped with "the necessary power to decide finally on the release of prisoners whose detention could not be considered justified for any serious reason".[62] Obviously, the continued availability of this right in occupied territory is indispensable for preventing any risk of ill-treatment and examining allegation of ill-treatment of persons in custody.[63]

The review of internment/administrative detention of civilians must be subject to the minimum time requirement. With respect to administrative detention/internment in enemy territory under Article 43 GCIV, the Appeals Chamber of the ICTY held that:

> The Appeals Chamber recalls that Article 43 of Geneva Convention IV provides that the decision to take measures of detention against civilians must be "reconsidered as soon as possible by an appropriate court or administrative board". Read in this light, the reasonable time which is to be afforded to a detaining power to ascertain whether detained civilians pose a security risk must be the minimum time necessary to make enquiries to determine whether a view that they pose a security risk has any objective foundation such that it would found a "definite suspicion" of the nature referred to in Article 5 of Geneva Convention IV.[64]

Similar reasoning must be applied to the confinement of civilians in occupied territory as provided in Article 78 GCIV.[65] This is made clear by the requirement that appeals against decisions on assigned residence or internment must be made "with the least possible delay".

The weakness of the IHL treaty-based rules in relation to procedural safeguards can be saliently seen in several respects. First, Article 78 GCIV does not indicate that the court or the administrative board dealing with initial review, appeal and regular procedure in occupied territory is required to be independent and impartial.[66] In particular, it is not clear whether such a body must be independent of the official that decides on the detention.[67] Second, there is no indication that such body must be a tribunal able to make binding decisions.

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[61] Pejic (2005), *supra* n. 6, at 386.

[62] ICTY, *Prosecutor v. Delalic, Mucic, Delic and Landzo* (*the Celebici* Camp case), Judgment of Appeals Chamber, 20 February 2001, IT-96-21-A, paras 328–329.

[63] HRC, *General Comment No. 29*, para. 15.

[64] ICTY, *Prosecutor v. Delalic, Mucic, Delic and Landzo* (*the Celebici* Camp case), Judgment of Appeals Chamber, 20 February 2001, IT-96-21-A, para. 328.

[65] CUDIH, *Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict*, Geneva, 24–25 July 2004, at 14 (Presentation by K. Dörmann).

[66] The same applies to decisions on confinement of enemy civilians under Article 43 GCIV, even though that provision specifically refers to "a court or administrative board".

[67] CUDIH, *Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict*, Geneva, 24–25 July 2004, at 17.

Third, the six month period within which periodic review must be undertaken[68] may be considered inadequate.[69] Fourth, it is not clear whether a civilian who is administratively detained or interned is entitled to assistance of a lawyer in challenging the lawfulness or need for continued detention.[70] Further, in view of its rare use, the Protecting Power regime envisaged in GCIV cannot be deemed a viable alternative.[71]

In the context of international human rights law, the right of all persons deprived of liberty to take proceedings to challenge the lawfulness and need of such deprivation of liberty is fully anchored. In its *General Comment No. 29*, the HRC has recognised that the right to habeas corpus before a court (and not before an administrative board) under Article 9(4) of the ICCPR[72] is part of its expanded framework of non-derogable rights. It states that "in order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant".[73] The Inter-American Court of Human Rights has confirmed the non-derogable nature of this right on the basis that it is "essential" with a view to protecting the rights explicitly categorised as non-derogable under the AHRC.[74] Similarly,

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[68] Note that in contrast to confinement of civilians in occupied territory as governed by Article 78 GCIV, which must be reviewed "if possible every six months", Article 43 GCIV requires the periodic review of enemy civilians who are interned or administratively detained to take place "at least twice yearly". Literally construed, the latter provision may allow an interval of more than 6 months, so long as binary review is carried out.

[69] CUDIH, *Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict*, Geneva, 24–25 July 2004, at 17.

[70] *Ibid*., at 3 (Background Paper by L. Doswald-Beck), 14 (presentation by K. Dörmann), and 17 (Discussion).

[71] See CUDIH, *Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict*, Geneva, 24–25 July 2004, at 3 (Background Paper by L. Doswald-Beck).

[72] See also ECHR, Article 5(4); ACHR, Article 7(6); Body of Principles of for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 32; and American Declaration on the Rights and Duties of Man, Article; XXV.

[73] HRC, *General Comment No. 29*, para. 16. See also *ibid*., para. 11; and *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 32*, UN GA Resolution 43/173 of 9 December 1988.

[74] Inter-American Court of Human Rights (IACtHR), *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87, 30 January 1987, Ser. A, No. 8, para. 42 ("…writs of habeas corpus and of 'amparo' are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) and that serve, moreover, to preserve legality in a democratic society"; *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, 6 October 1987, Ser. A, No. 9, para. 41(1) ("…the 'essential' judicial guarantees which are not subject to derogation, according to Article 27(2) of the Convention, include habeas corpus (Art. 7(6)), *amparo*, and any other effective remedy before judges or competent tribunals (Art. 25(1)), which is designed to guarantee the respect of the rights and

the African Commission on Human and Peoples' Rights has affirmed that in emergency type situations where administrative detention is practiced, persons challenging the lawfulness of their detention must be brought before a court that is independent of the executive authority that ordered the detention.[75]

It may be questioned whether habeas corpus review should apply even when the mechanism provided by IHL, such as the appointment of Protecting Powers and the visit by the ICRC, properly functions. As in the case of prisoners of war, upon internment/administrative detention, this information must be communicated, as soon as possible, to the Protecting Powers, the national Information Bureau, the Central Tracing Agency and the Power on which the persons depend or in whose territory they resided.[76]

In occupied Iraq, following the widespread publicity of the Abu Ghraib scandal, the CPA belatedly issued Memorandum No. 3 that sets out detailed rules on the security internee process. According to this, the Military Intelligence Tactical Questioners were given 72 hours to interview detainees before the due process guarantees, including access to defence counsel, became applicable. If s/he was held more than 72 hours, s/he was accorded the right to demand that the initial decision to intern him/her be reviewed.[77] This initial detention review had to take place "with the least possible delay" and in all cases had to be held no later than seven days after the date of induction into an internment facility.[78]

4.2.3. *The Right to Periodic Review*

According to Article 78(2) GCIV, protected persons interned or administratively detained in occupied territory are entitled to have their continued detention

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freedoms whose suspension is not authorized by the Convention"); and *Neira Alegría et al.* Case, Ser. C, No. 21, Judgment of 19 January 1995, paras. 82–84 and 91(2).

[75] AfCmHPR, *Amnesty International and Others v. Sudan*, *Nos. 48/90, 50/91, 52/91 and 89/93*, Decision, 26th session, Kigali, 1–15 November 1999, paras. 59–60 (an appeal challenging the legality of arrest, which was made to the Revolutionary Command Council whose president ordered the arrest in a state of emergency); *Nos. 143/95 and 150/96, Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, 26th Session, Kigali, 1–15 November 1999, paras. 31–34 (denial of a writ of habeas corpus on the basis of the State Security Decree, which contemplated a state of emergency). See also ECtHR, *Lawless* case (Merits), Judgment of 1 July 1961, Series A 2, para. 14; *Ireland v. UK*, (Merits and just satisfaction), Judgment of 18 January 1978, Series A. 25, paras. 199–200. Note that the *ICRC's Customary IHL Study* describes the right of habeas corpus guarantee as non-derogable, and hence that this right can come to rescue persons detained for reasons related to a non-international armed conflict as well: Henckaerts and Doswald-Beck, *supra* n. 60, at 352.

[76] CUDIH, *Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict*, Geneva, 24–25 July 2004, at 14 (presentation by K. Dörmann).

[77] CPA Memorandum No. 3, Section 6(1).

[78] *Ibid.*, Section 6(2).

reviewed on a periodic basis ("if possible every six months") by "a competent body" set up by the occupying power. Once a ground for the continuing internment or the detention of individual persons no longer exists, a competent body must order their release.

There is no specific elaboration on the nature of such a "competent body". Nevertheless, all the procedural safeguards germane to the initial review must apply to the process of periodic review as well. Apart from the requirements of independence and impartiality of such a competent body, the review must be practically effective.[79] The *ICRC's Commentary on GCIV* recognises the analogous interpretation, stating that the occupying power "must observe the stipulations in Article 43, which contains a precise and detailed statement of the procedure to be followed".[80] With respect to the body entrusted with periodic review of protected persons interned or administratively detained in the territories of parties to the conflict, Article 43 GCIV allows the detaining power to choose either "an appropriate court or administrative board". Hence, the "competent body" within the meaning of Article 78 can be either a judicial body or an administrative board.[81]

Clearly, judicial review is the preferred mechanism.[82] If an administrative venue is chosen, the decision must not be made by one administrative official but by the board offering the procedural requirements of impartiality and independence.[83] Such a board must be equipped with the final authority to render decisions on internment or release, which cannot be reversed or reviewed by another organ or person in the administrative hierarchy of the occupying authorities.

With respect to the frequency of review, reference to the expression "if possible every six months" under Article 78 suggests that the failure to carry out binary review does not necessarily violate this rule.[84] This must be contrasted to the periodic review of protected persons interned or administratively detained in

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[79] Pejic (2005), *supra* n. 6, at 388.

[80] *ICRC's Commentary to GCIV*, at 368–369.

[81] In contrast, Pejic argues that in the context of non-international armed conflict and other violence, the jurisprudence of human rights law has demanded that the reviewing body must be a court: Pejic (2005), *supra* n. 6, at 387.

[82] See the same conclusion reached in CUDIH, *Expert Meetings on the Supervision of the Lawfulness of Detention During Armed Conflict*, Geneva, 24–25 July 2004, at 42. Compare, however, ECtHR, *Lawless v. Ireland* (No. 1), Judgment of 1 July 1961, Series A 3 (recognising that the reviewing body, which was not a court, was independent from the executive).

[83] *ICRC's Commentary to GCIV*, at 260.

[84] With respect to persons interned or administratively detained for reasons related to non-international armed conflict, Pejic argues that the interval of periodicity in review must not exceed six months. She does not provide any reason for this, but this conclusion can be reached by analogy with Article 43 GCIV. Nonetheless, she does not refer to the applicability of *minimum* six-month rule to situations of occupied territory: Pejic (2005), *supra* n. 6, at 389.

the territories of parties to the conflict, which is required "at least twice yearly" according to Article 43. It may be suggested that "[t]he difference of approach is reflective of the administrative and practical security realities in occupied territory compared with the home territory of a party to the conflict".[85] This is reflected in the *travaux préparatoires*.[86] In the 47th Meeting of Committee III, Mr. Haksar, Rapporteur, explained that the Drafting Committee found "it . . . not possible to push the analogy between the situation of internees on the territory of a belligerent and that of internees in occupied territory any further. The two situations were so entirely different that no argument by analogy was possible".[87]

Turning to international human rights, Article 9 ICCPR does not specifically embody the right to periodic review of detention. This provision is, however, complemented by a key soft-law instrument. Article 11 of the Turku Declaration (1990) stipulates that "[i]f it is considered necessary for imperative reasons of security to subject any person to assigned residence, internment or administrative detention, such decisions shall be subject to a regular procedure prescribed by law affording all the judicial guarantees which are recognized as indispensable by the international community, including the right of appeal or to a periodical review."[88]

In occupied Iraq, Memorandum No. 3 required regular review of any security internee who continued to be detained. A review was mandatory in any case not later than six months from the date of induction into an internment facility.[89] The interval of such periodic review is not specified, but this does not breach Article 78 GCIV. The problem is more to do with the fact that as mentioned above, the Memorandum No. 3 was issued only a few days before the dissolution of the CPA. Clearly, the legal basis for periodic review should have been established at the time of the commencement of occupation in March-April 2003 to avoid the like of abuses at Abu Ghraib.

4.2.4. *The Application of Judicial Review in Occupied Territory*

The *ICRC's Customary IHL Study* takes a view that in case of international armed conflict, persons interned or administratively detained in occupied territory can

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[85] Kelly (2003), *supra* n. 49, at 141.

[86] *Final Record of the Diplomatic Conference of Geneva of 1949* (hereinafter, *Final Record*), Vol., II-A, at 659 (statement of Mr. Wershof of Canada regarding the paucity or absence of internment measures taken against Germans during World War II – clearly oblivious of the internment of Japanese Canadians (despite their Canadian citizenship) on a racial or ethnic ground), 772–773 (statements of Mr. Mineur of Belgium, Mr. Abut of Turkey and General Slavin of USSR), 790 (relation to draft Articles 40 and 68 of the Geneva Civilians Convention).

[87] Statement of Mr. Haksar (India), Committee II, 47th Meeting (on draft Article 68), *ibid.*, at 790.

[88] Declaration of Turku, 2 December 1990, Article 11.

[89] CPA, Memorandum No. 3, Section 6 (3).

claim both the habeas corpus review of the initial decision on their detention, and the periodic review of their continued detention before an administrative board, but not necessarily *before a court*. On the other hand, the *Study* considers that in the context of civil war, persons interned or administratively detained on pretext of "preventive detention" must be allowed to have the legality of such detention contested *before a court*.[90]

The *Study's* dichotomised approach can be explained on two grounds. First, controversy over extra-territorial jurisdiction may cast doubt on the capacity of the judicial organs of the occupying power's home country to undertake judicial review of acts done in occupied territories. Second, in the harsh reality of occupation, the prospect that local courts in occupied territory during the period of occupation may scrutinise the occupying power's decisions on internment or administrative detention is discouragingly slim. Even if such review takes place, practical difficulty remains as to the implementation and enforcement of such review decisions. Even so, there is no intrinsic reason to apply the lower standard of the non-derogable rights to persons held in occupied territory as compared with persons divested of liberty in civil strife. What matters most is that both have fallen within the hands of a state.[91]

4.2.5. *The Right to Release with the Minimum Delay Possible*

Internment or administrative detention must be terminated as soon as the grounds justifying such an exceptional measure cease to exist. Article 75(3) API explicitly recognises the right of *any* individual persons deprived of liberty in any manner (arrest, detention, internment etc.) for actions relating to armed conflicts to be released "with the minimum delay possible", except in criminal process, or "as soon as" the grounds justifying the deprivation of liberty disappear.[92] With specific regard to protected persons divested of liberty in occupied territory (and in the territory of a party to the conflict), Article 132(1) GCIV recognises that they must be released as soon as reasons for internment cease to exist.[93]

With respect to occupied Iraq, Section 6(5) of Memorandum No. 3 of 27 June 2004 provides that in case security internees are placed in internment after 30 June 2004 (namely after the handover of governmental control from CPA to

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[90] Henckaerts and Doswald-Beck, *supra* n. 60, at 345–346, and 350–352. Pejic, one of the legal advisers at the ICRC (at the time of writing of this monograph), takes the same line: Pejic (2005), *supra* n. 6, at 387.

[91] Despite frequent international criticisms against its judgments, whether legal or politically motivated, at least the fact that the Israeli Supreme Court is the only judicial organ that has exercised jurisdiction over acts in occupied territories and examined difficult petitions challenging the acts done by the commanders in chief ought to be commended.

[92] API, Article 75(3).

[93] See also ICCPR, Article 9(3); ECHR, Article 5(3); ACHR, Article 7(5). Article 6 of the AfCHPR does not expressly refer to this right.

the provisional Iraqi government), only the imperative reasons of security can justify detention of such internees. It adds that such internees must at any event be released from internment or transferred to the Iraqi criminal jurisdiction not later than eighteen months from the date of induction into an MNF (Multinational force) internment facility. Nevertheless, the underlying assumption of this rule is questionable in two respects: (i) whether the CPA had the competence to legislate matters that would arise after its dissolution;[94] and (ii) whether the legal state of occupation came to an end after 30 June 2004. Indeed, it ought to be recalled that upon the termination of the legal state of occupation, the continued detention of security internees became unlawful unless they were criminally charged.

Further, Section 5 of Memorandum No. 3 provides for "special" treatment of juvenile security internees. The third sentence of this Section reads that "[a]ny person under the age of 18 interned at any time shall in all cases be released not later than 12 months after the initial date of internment". Despite this, Section 5 should be considered incompatible with Article 37(b) of the Convention on the Rights of the Child. This provision describes the internment of children (any persons under the age of 18 years old) as a highly exceptional measure and contemplates the shortest possible period of internment even if applied.[95]

4.2.6. *The Prohibition on Administrative Detention of Indefinite Nature*

Indefinite and prolonged deprivation of liberty, which lasts "beyond the period for which the State can provide appropriate justification" is absolutely forbidden.[96] The *ICRC's Customary IHL Study* describes the prohibition on indefinite detention as part of customary norms.[97] Indeed, the practice of the monitoring

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[94] Nevertheless, the legality of this measure can be provided by the retroactive endorsement by the provisional Government of Iraq.

[95] Article 37(b) of the Convention on the Rights of the Child reads that:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used *only as a measure of last resort and for the shortest appropriate period of time* (emphasis added).

There is no doubt that the rule embodied in this provision is part of customary international human rights law binding also on the United States (which is, together with Somalia, yet to become a party to this most widely participated treaty).

[96] HRC, *A v. Australia, No. 560/93*, View of 30 April 1997, para. 9.4. The HRC has construed the notion of "arbitrariness" within the meaning of Article 9(1) ICCPR more broadly than the notion "against the law", so as to cover such elements as inappropriateness and injustice: *ibid.*, para. 9.2. See also *Concluding Observations of the Human Rights Committee: Columbia*, 26 May 2004, CCPR/CO/80/COL, para. 9 (administrative detention without a prior judicial order).

[97] Henckaerts and Doswald-Beck, *supra* n. 60, Vol. I, at 451–453 and 454–456, Rule 128. See also Pejic (2005), *supra* n. 6, at 381–382.

bodies of international human rights treaties has fully established the prohibition on indefinite incommunicado detention.[98] The HRC has even enunciated that prolonged *incommunicado* detention may reach the level of cruel and inhuman treatment, and in some circumstances even that of torture, the severest form of ill-treatment prohibited under Article 7 ICCPR.[99] The jurisprudence has developed the tripartite hierarchy of ill-treatment (torture, cruel or inhuman treatment or punishment, and degrading treatment or punishment). Not only the condition of detention but also the length of time *alone* is considered a relevant factor in assessing these forms of ill-treatment.[100]

In occupied Iraq, Section 6 of Memorandum No. 3 allowed the period of internment/administrative detention of security internees over the age of eighteen to be exceptionally prolonged for more than eighteen months. The multinational forces responsible for detention facilities were able to apply to the Joint Detention Committee (JDC) to obtain approval for an additional period of continued internment.[101]

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[98] See also the Turku Declaration (2 December 1990). Article 4 of the Declaration reads that:

1. All persons deprived of their liberty shall be held in recognized places of detention. Accurate information on their detention and whereabouts, including transfers, shall be made promptly available to their family members and counsel or other persons having a legitimate interest in the information.

2. All persons deprived of their liberty shall be allowed to communicate with the outside world including counsel in accordance with reasonable regulations promulgated by the competent authority.

3. The right to an effective remedy, including habeas corpus, shall be guaranteed as a means to determine the whereabouts or the state of health of persons deprived of their liberty and for identifying the authority ordering or carrying out the deprivation of liberty. Everyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of the detention shall be decided speedily by a court and his or her release ordered if the detention is not lawful.

4. All persons deprived of their liberty shall be treated humanely, provided with adequate food and drinking water, decent accommodation and clothing, and be afforded safeguards as regards health, hygiene, and working and social conditions.

[99] HRC, *El-Megreisi v. Libyan Arab Jamahiriya Communication No. 440/1990*, View of 24 March 1994, UN Doc. CCPR/C/50/D/440/1990 (1994), para. 5.4. See also CUDIH, *Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict*, Geneva, 24–25 July 2004, at 38.

[100] In relation to Article 3 of ECHR, See Y. Arai-Takahashi, "'Uneven, But in the Direction of Enhanced Effectiveness' – A Critical Analysis of 'Anticipatory Ill-Treatment' under Article 3 ECHR", (2002) 20 *NQHR* 5, at 21–22.

[101] CPA Memorandum No. 3, Section 6. In examining the application, the members of the JDC were to present recommendations to the co-chairs, who must jointly agree on the need to prolong the internment, and specify the additional period of internment. The application must be finalised not later than 2 months from the expiration of the initial eighteen month internment period: *ibid*.

4.3. *The Procedural Safeguards That are Specific to IHL*

4.3.1. *Immunity from Arrest, Prosecution and Conviction for Acts Committed, or for Opinions Expressed, before the Occupation*

Any protected persons must not be subject to arrest, prosecution or conviction for acts committed, or for opinions expressed, prior to the occupation, or during a temporary interruption thereof. Obviously, breaches of the laws and customs of war constitute exceptions to this rule.[102] No doubt, these rules are declaratory of customary international law.[103]

In view of the experience of Jewish refugees in Nazi occupied territories in Europe during World War II, refugees who are nationals of an occupying state and are received in the territory of the occupied State are entitled to immunity from arrest, prosecution, conviction or deportation from the occupied territory. Exceptions to this right are allowed only in respect of two offences: offences committed after the outbreak of hostilities; and offences under common law committed before the outbreak of hostilities, which the law of the occupied State would have designated as extraditable in time of peace.[104]

4.3.2. *The Requirement That Persons Interned or Administratively Detained Must be Registered and Held in a Recognised Place of Internment or Administrative Detention*

Any persons interned or administratively detained must be registered and held in a recognised place to avoid the danger of abuse, detention incommunicado and disappearance.[105] Any information on whereabouts of interned or administratively detained persons and on their transfer to other places of detention (such as a hospital in case of sickness) must be available to their family, and to the Information Bureau and Central Tracing Agency as rapidly as possible.[106] The *ICRC's Customary IHL Study* characterises the requirement to record personal details of internees/administrative detainees as part of customary international law.[107]

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[102] GCIV, Article 70(1).

[103] G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Vol. II: The Law of Armed Conflict*, (1968), at 177.

[104] GCIV, Article 70(2).

[105] Pejic (2005), *supra* n. 6, at 384.

[106] This right can be derived from GCIV, Articles 105, 106 and 132, and 136–137. During international armed conflict, the Information Bureau of a detaining state is required to receive information on civilian internees, and this information must be transmitted to the belligerent states and to the Central Tracing Agency. For prisoners of war, the comparable requirement is provided in Article 122 GCIII. With respect to the time element, Pejic takes a more lax stance, referring to the notification to the family "within a reasonable time": Pejic (2005), *supra* n. 6, at 384.

[107] Henckaerts and Doswald-Beck, *supra* n. 60, Vol. I, at 439–441, Rule 123. It must be noted that the requirement of notification and registration of detained persons during international

The Protecting Powers must be facilitated to visit places of detention[108] and to transmit information about interned or detained persons to their next of kin.[109] Similarly, the ICRC's role in supervising the overall operation of the detention regime of protected persons is instrumental in avoiding the risk of unacknowledged detention.[110]

5. *Procedural Safeguards That Need to be Supplemented by the Practice of International Human Rights Law*

5.1. *The Right to Legal Assistance*

Both the soft-law instrument[111] and the practice of international human rights law[112] stress that to give effectiveness to the right of habeas corpus, the right of access to a lawyer should be treated as akin to non-derogable rights. The *ICRC's Customary IHL Study* notes that there exists "extensive practice" that helps confirm both customary law status and non-derogable character of this right. Even so, *ratione materiae*, the *Study* observes that its non-derogable status is applicable to detention in *non-international armed conflict*.[113] Further, the "extensive practice" that the *Study* refers to is limited to documents of supervisory bodies of international human rights treaties (the HRC's Concluding Observations on the report of Senegal; and the Report of the UN Committee against Torture on the Situation in Turkey), and one European case-law (*Aksoy v. Turkey*).

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armed conflicts is related only to the detaining states, the states on which the captives depend, and the Central Tracing Agency of the ICRC. There is no linkage to the UN or any monitoring bodies of the UN human rights treaties. During the Iraqi conflict (2003) and its aftermath, the United States failed to provide the UN with lists of persons who were detained, leaving their number and location uncertain. While this was unsatisfactory, strictly speaking, this was not unlawful: CUDIH, *Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict*, Geneva, 24–25 July 2004, at 19.

[108] GCIV, Article 143.

[109] GCIV, Articles 106, 107, 137 and 138.

[110] Pejic (2005), *supra* n. 6, at 385. The *ICRC's Customary IHL Study* recognises as a customary rule the requirement that in international armed conflict, which includes situations of occupation, the ICRC must be granted regular access to all internees/administrative detainees to verify the conditions of their detention and to restore contacts between them and their families: Henckaerts and Doslwald-Beck, *supra* n. 60, Vol. I, at 442–443, Rule 124.

[111] *The Body of Principles for the Protection of All persons under Any Form of Detention or Imprisonment*, Principle 17.

[112] HRC, *Concluding Observations on the report of Senegal;* UN Committee against Torture, Report of the Committee against Torture on the Situation in Turkey, UN Doc., A/48/44/Add.1, 15 November 1993, para. 38; ECtHR, *Aksoy v. Turkey*, Judgment, 18 December 1996, Reports of Judgements and Decisions 1996–VI, para. 83.

[113] Henckaerts and Doswald-Beck, *supra* n. 60, at 352.

Relying on soft law standards[114] and the effective interpretation of Article 43 GCV (whose requirements are applicable to Article 78 GCIV by analogy),[115] one can contend that the right to legal assistance should not be dispensed with not only in non-international armed conflict but also in international armed conflicts (including occupied territory).[116]

5.2. *The Right to Attend at the Process of Review*

As a logical corollary of the right to legal assistance (including access to a lawyer), it may be suggested that an internee/administrative detainee and his/her legal representative should be given the right to attend both at the process of initially reviewing the lawfulness of internment, and the process of periodic review. Akin to the general prohibition on trial in absentia of accused persons, the presence of detainees or their legal representatives is essential in drawing adequate attention to their cases in hearings.[117] This right is neither *explicitly* mentioned in IHL or human rights treaties, nor established in state practice and *opinio juris*. Yet, as *lex feranda*, the occupying power should furnish guarantees for this right in occupied territories.

6. *Fair Trial Guarantees of Accused Persons in Occupied Territory – the Interplay between IHL and International Human Rights Law Disaggregated*

6.1. *Overview*

This section analyses the emerging normative framework of fair trial guarantees for accused persons in occupied territory, which can be discerned through the effective interaction and convergence between IHL and international human rights law. The focus of this paper is to explore the rights of the accused in criminal proceedings before a military tribunal set up by the occupying power (so-called occupation courts). It examines the extent to which and the ways in which the catalogue of due process rights developed in the practice of international human rights law and international criminal law can be applied to such courts, while note needs to be taken of the specific context of occupation.

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[114] Pejic explicitly invokes the *Body of Principles*, Principles 17 and 18; and Pejic (2005), *supra* n. 6, at 388.

[115] Pejic recognises that her view relating to this right is based on value-laden, "policy" point of view: *ibid.*, at 375 and 388.

[116] *Ibid.*, at 388.

[117] *Ibid.*, at 389.

6.2. *The Legal Basis for Fair Trial Guarantees under IHL and International Human Rights Law*

Individual persons who are accused or convicted in occupied territory can benefit from the list of fair trial guarantees embodied in GCIV and Article 75(4) API. Articles 65–77 GCIV recognise fair trial guarantees for "protected persons" (within the meaning of Article 4), who are accused of offences against penal/security laws in occupied territory. Common Article 3 GCs contains a general clause of fair trial guarantees, which is applicable to all individual persons and in the context of both non-international and international armed conflict. The chapeau of Article 75(4) API furnishes the rights of the accused or the convicted to "an impartial and regularly constituted court respecting the generally recognised principles of regular judicial procedure". This is given specific elaborations in ten sub-paragraphs, which constitute the catalogue of minimum fair trial guarantees.[118] Article 75 API embodies "fundamental guarantees" for any persons who do not benefit from more favourable treatment under the GCs or under API.

Article 75 API is a "legal safety net" that safeguards a "minimum standard of human rights" for all persons.[119] The minimum guarantees contained in this provision are declaratory of customary international law.[120] Both Article 75(4) API and common Article 3 GCs, which are reflective of basic human rights law,[121] have advantage of the broad scope of application *ratione personae*. Contrary to the view expressed in the *travaux préparatoires*,[122] the scope of application *ratione*

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[118] Compare Article 67 ICC Statute.

[119] Gasser, *supra* n. 12, at 281.

[120] IACmHR, *Report on Terrorism and Human Rights*, *supra* n. 59, paras. 64 and 257. The US government has considered Art. 75 part of the customary rules embodied in Protocol I: *US Army, Operational Law Handbook* (2002), Ch. 2, at 5; and M.J. Matheson, "The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions", M.D. Dupuis, J. Q. Heywood and M.Y.F. Sarko, "The Sixth American Red Cross – Washington College of Law Conference on International Humanitarian Law: a Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions", (1987) 2 *American University Journal of International Law and Politics* 419, at 427–428 and 432. See also C.J. Greenwood, 'Customary Law Status of the 1977 Geneva Protocols', in A.J.M. Delissen and G.J. Tanja, eds., *Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honor of Frits Kalshoven*, (1991) 93, at 103.

[121] Gasser, *supra* n. 12, at 233.

[122] See *O.R.* Vol. XV, (1978), at 460–461, CDDH/407Rev. 1, paras. 41–42 (Report of Committee III). With respect to the personal scope of application of Article 75 API, the Committee III explains that:

> Paragraph 1 of Article 65 [now Article 75] was the last paragraph resolved because it raises a delicate question of whether the protections of the article were to be extended to a Party's own nationals. At an early stage it was decided that the scope of the article should be

personae of Article 75(4) API is not limited to persons deprived of liberty.[123] These treaty-based rules and their customary concomitants are applicable to *all* persons,[124] irrespective of their status of "protected persons" under Article 4 GCIV. They can come to rescue a Party's own nationals[125] and even all types of unprivileged belligerents, including battlefield unprivileged belligerents held in occupied territory (namely unprivileged belligerents who have been captured in a combat zone but are transferred to an occupied area and found accused therein).[126]

In relation to due process guarantees, the treaty-based rules of IHL contain more progressive elements than the treaty provisions of international human rights law. The rights of the accused persons are expressly recognised in the relevant provisions of GCIV and Article 75(4) API, as well as in their customary counterparts. In contrast, no element of fair trial guarantees is expressly classified as non-derogable under Article 4 of the ICCPR, even though the latter was adopted seventeen years after the Diplomatic Conference of Geneva (1949). The drafters of the Additional Protocols (APs) enumerated ten specific rights of due process guarantees under Article 75(4) API. They did so for the purpose of precluding state parties invoking the derogation clause under Article 4 of the ICCPR, which came into force a year before the adoption of APs.[127] Indeed, at

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restricted to persons affected by the armed conflict and further restricted to the extent that the actions by a Party in whose power they are so affect them. This is the purpose of the introductory clause of the paragraph. Moreover, paragraphs 3 to 7 inclusive are further limited by their own terms to persons affected in specific ways, e.g., persons "arrested, detained, or interned for actions related to the armed conflict" (paragraph 3).

Ibid., at 460, CDDH/407/Rev. 1, para. 41. This restrictive scope of application *ratione personae* was proposed by Australia and the United States, CDDH/III/314, reported in *O.R.* Vol. III, at 292; and *O.R.* Vol. XV, at 40, CDDR/III/SR.43, para. 80 (statement by Mr. de Stoop of Australia). In contrast, for a broader personal scope of application of Article 75, see *ibid.*, Vol. XV, CDDH/III/SR. 43, para. 74 (statement by Mr. Condorelli of Italy).

[123] M. Bothe, K.J. Partsch and W.A. Solf, *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, (1982), at 463.

[124] Along this line, *ICRC's Customary IHL Study* claims that the customary IHL rights, which correspond to those guaranteed under Article 75 API, apply to all individual persons: Henckaerts and Doswald-Beck, *supra* n. 60, Vol. I, at 352–374, Rules 100–102.

[125] See Eritrea Ethiopia Claims Commission, *Civilians Claims Eritrea's Claims 15, 16, 23 and 27–32*, Partial Award, 17 December 2004, (2005) 44 *ILM* 601, at 608 (para. 30) and 617 (para. 97).

[126] Dörmann and Colassis aver that even battlefield unprivileged belligerents, namely unprivileged belligerents captured in a combat zone, can be covered by the protections of GCIV. Their rationale is that the combat zone can be transformed into an occupied territory, or that the captured persons are transferred to occupied part of the territory: K. Dörmann and L. Colassis, "International Humanitarian Law in the Iraq Conflict", (2004) 47 *German YbkIL* 292, at 322–327.

[127] Bothe *et al., supra* n. 123, at 464.

the final phase of the Diplomatic Conference in Geneva (1974–1977), the Dutch Delegate, specifically referring to Article 4 ICCPR, made clear that draft Article 65 (now Article 75) was intended to make many of the due process guarantees recognised in the ICCPR remain in force even in time of war.[128]

Notwithstanding the above, the combined effectiveness of the rights guaranteed under GCIV and Article 75(4) API is insufficient. Many of the rights guaranteed under IHL treaty provisions remain unelaborated. Further, despite the generally detailed elaborations of the rights contained under Article 75(4) API, *specific* elements of the rights concerning the means of defence are expressly recognised only in Articles 71–73 GCIV, whose personal scope of application is confined to protected persons in occupied territories.[129] In view of such uncertainties surrounding the treaty-based rules, it is of crucial importance to identify customary IHL rights that are equipped with the broader ambit of protection *ratione materiae* and *ratione personae*.

All the fair trial guarantees embodied under treaty-based rules of IHL find parallel guarantees in international human rights treaties.[130] For the purpose of ascertaining customary humanitarian rules, to what extent and under what specific conditions can the case-law and doctrinal discourse relating to the corresponding rights under international human rights law be invoked to fill gaps left by treaty-based rules of IHL? Problems arise with respect to those rights that have yet to be recognised as non-derogable in the context of international human rights law. In what ways can specific elements and principles fleshed out in relation to *derogable* rights in non-emergency circumstances be considered to constitute customary IHL rules applicable in occupied territory? In particular, whether these specific elements can be transposed to the context of occupation (and international armed conflict in general) must be ascertained.[131]

It is of special significance to highlight three interrelated objectives that can be fulfilled by the complementary role played by the practice and doctrine of

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[128] *O.R.*, Vol. XV, Summary Record of the Forty-Third Meeting, 30 April 1976, at 28, CDDH/III/SR.43, paras. 16–17, the Statement of Mr Schutte (Netherlands).

[129] Along the same line, Olivier argues that IHL "is, by its very nature, discriminatory" in that only those pertaining to the protected groups are covered by this body of law: C. Olivier, "Revising General Comment No. 29 of the United Nations Human Rights Committee: About Fair Trial Rights and Derogations in Times of Public Emergency", (2004) 17 *Leiden JIL* 405, at 408.

[130] Note that in relation to individual persons deprived of liberty, IHL treaty-based rules include distinctive, procedural rights, such as those relating to the Protecting Power regime.

[131] In relation to the right to liberty and security, see H. Krieger, "The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study", (2006) 11 *JCSL* 265, at 285–286. In this respect, the *Study's* reliance, in its Vol. II (and not in Vol. I), on the non-emergency case decided by the European Court of Human Rights (*Van Leer v. the Netherlands*, Judgment of 21 February 1990) should be understood more as a reference point only: Henckaerts and Doswald-Beck (eds), *supra* n. 60, Vol. II, Part 2, at 2351, para. 2715; and Vol. I, Rule 99, at 350 (the right of a person arrested to be informed of the reasons for arrest).

international human rights law: (i) the clarification of the meaning of fair trial guarantees that remain unarticulated under IHL; (ii) the elaborations on specific elements of fair trial guarantees; and (iii) the supplementing of additional prerequisites for fair trial guarantees. Clearly, it is justifiable to use guidelines derived from international human rights law to obtain clarity and elaboration in relation to the elements already embodied in GCs and Article 75(4) API. In contrast, to integrate as part of *customary IHL rules* entirely new elements of fair trial guarantees, which are developed in the doctrine and the case-law of international human rights law *in non-emergency circumstances*, requires special caution in not overstepping the scope of application *ratione materiae* of *lex lata* by incorporating elements of *lex ferenda*. One must duly weigh the normative status, relevance and weight, as well as the scope of application, of principles enunciated by the monitoring bodies of international human rights treaties to extraordinary situations faced by occupation courts.

7. *The Normative Status, and the Weight of Evidence, of the Documents and Case-Law of International Human Rights Law in Ascertaining Customary Norms concerning Fair Trial Guarantees*

7.1. *The Structure of Analysis*

The methodology of harnessing effective convergence between IHL and international human rights law to deduce customary IHL rules on rights of accused can be disaggregated into three processes: (i) the identification of customary law status of the rules contained in treaty provisions of IHL, which embody fair trial guarantees; (ii) the ascertainment of whether corresponding rules under international human rights treaties are equipped with the special normative force of non-derogability so as to be applicable in any circumstances, including the situation of occupation; and (iii) the evaluation of whether, and if so in what ways and to what extent, the elements and principles elaborated in detail by the monitoring bodies of the human rights treaties in their documents and case-law can be "recruited" into the realm of IHL. While the final chapter will undertake theoretical appraisal of such a process, the analysis of this chapter will focus on specific elements of procedural safeguards for individual persons in occupied territories.

7.2. *The First Step: the Identification of the Customary Law Status of Fair Trial Guarantees Contained in IHL Treaty Provisions*

7.2.1. *Overview*

All the fair trial guarantees that the *ICRC's Customary International Humanitarian Law Study* (hereinafter *Study*) describes as customary IHL are, except for the right

of appeal, embodied in Articles 65–77 GCIV and Article 75, API. In relation to the due process rights safeguarded in GCIV, their customary law status is beyond any doubt. Indeed, Meron argues that most of the rules embodied in GCs are the prime examples of treaty rules accepted as reflecting customary principles without even need to examine concordant practice.[132] The question is more to do with whether the scope of application *ratione personae* of the customary law rights of fair trial is broadened to encompass all accused persons. With respect to Article 75(4) API, it remains unclarified to what extent the customary law status can be attributed to rights implicitly derived from the general phrase "the generally recognized principles of regular judicial procedure" used in the chapeau of this provision. For the purpose of analysing customary law, the distinction must be drawn between the ten specific requirements expressly embodied in this provision and additional elements that are implied rights.

7.2.2. *The Customary Law Status of the Elements of the Rights of the Accused That Are Safeguarded in Article 75(4) API*

It may be contended that the declaratory nature of the judicial guarantees expressly recognised in Article 75(4) API dispenses with inquiries into the interaction between treaty-based rules and customary norms, without much further ado. With respect to the ten specific due process guarantees laid down in Article 75(4) API, it is safe to observe that by the time of the adoption of API in 1977, namely, one year after the entry into force of ICCPR, all of them were established as customary law applicable in *non-emergency* circumstances. However, the applicability of most of these rights embodied under the ICCPR to extraordinary situations of international armed conflict and occupation was yet to be fully recognised. As discussed above, the ten specific elements of the rights of the accused were enumerated with a view to fending off the possibility that some state parties to API might call into play the derogation clause under Article 4 ICCPR. This shows that far from being declaratory or crystallisation, many of these elements were perceived as innovations. Nevertheless, there is no doubt that at least two rules, the prohibition of collective punishment and the principle of *nullum crimen nulla poena sine lege* which are contained in sub-paragraphs (b) and (c) respectively, were deemed codificatory at the Diplomatic Conference on Humanitarian Law in 1973–1977. Apart from these, uncertainty remains as to the extent of codificatory elements.[133]

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[132] T. Meron, *The Humanization of International Law*, (2006), at 381.

[133] As Zappalà notes, even the right to be presumed innocent or any equivalent guarantee, which the Human Rights Committee has described as non-derogable rights in its *General Comment No. 29*, was not given to the accused in the Nuremberg and the Tokyo Military Tribunals: S. Zappalà, "The Rights of the Accused", A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (2002), Ch. 31.3., 1319, at 1341.

Clearly, most of the procedural elements set forth in Article 75(4) API have hardened into customary law after the adoption of this treaty. The fluid and haphazard manner in which customary rules evolve makes it impossible to pinpoint the precise juncture at which such customary rules have been shaped and consolidated. The crux of the matter is that at present all the ten specific requirements of due process guarantees enumerated in Article 75(4) API can be safely deemed declaratory of customary IHL.

7.2.3. *Additional Elements of the Rights of the Accused, Which Can be Derived from Article 75(4) API, and the Ascertainment of Corresponding Customary Rules*
It can be proposed that the ten specific elements of fair trial guarantees contained in Article 75(4) API be construed as merely exemplary, so that this open-ended list be supplemented by more detailed elements recognised as inalienable in the context of international human rights law. The general phrase "the generally recognized principles of regular judicial procedure" mentioned in the chapeau of Article 75(4) API is accompanied by the wording "which include the following". Similarly, common Article 3 GCs stresses the minimum requirement of "affording all the judicial guarantees which are recognized as indispensable by civilized peoples". These provisions are couched in general, undefined and open terms without stringent conditions for their application.

Even so, there remains a problem of *how* to identify additional elements that can be "grafted" onto the treaty provision of Article 75(4) API without overstepping the bounds of teleological interpretation. Some authors argue that "[i]t is legitimate to have recourse to the corresponding provisions of the Covenant [ICCPR] in order to define which principles of regular judicial procedure are generally recognized".[134] Yet, when advocating the "borrowing" of specific fair trial requirements from Article 14, they fail to delve into the relationship between IHL and international human rights law.

This monograph proposes that the general phrase "the generally recognized principles of regular judicial procedure" under the chapeau of Article 75(4) API be interpreted in the light of corresponding customary rules. Within this analytical framework, this general phrase provides a vehicle through which customary international law can be called into play to cement the relationship between IHL and international human rights law. The next step is to examine the extent to which the course of development relating to the rights of fair trial in the human

[134] Bothe *et al, supra* n. 123, at 464. See also CUDIH, *Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict*, Geneva, 24–25 July 2004, at 31 (presentation by W. Kälin).

rights context has impacted upon customary IHL rules. It is assumed that the proposed interpretation remains within the ambit of the conventional norm, and that it is not intended to modify a declaratory treaty rule by new customary international law. There is no conflict between a component element of the conventional rule and a new element of the customary rule.[135] Still, it should be remarked that there is no clear-cut demarcation line between interpretation and modification. Villiger provides a cogent argument on this matter:

> . . . parties may, in their interpretation, gradually wander from the original text towards a different content and thereby modify the rule (. . .). Modificatory practice *via* adaptation may eventually constitute a new customary rule.[136]

Nevertheless, this methodology cannot evade the need for raw empirical data. State practice and *opinio juris* must indicate that additional rights of the accused persons in occupied territory are no longer in *statu nascendi* but clearly embedded in the premises of customary rules, and that the material scope of such customary rules has been amplified to cover extraordinary situations such as occupation. To argue that the general phrase used in Article 75(4) API in itself is declaratory of customary law so as to obliterate *individuated* inquiries into customary law status of each of the new elements is unpersuasive. In undertaking empirical survey, there may be an obstacle to identifying sufficient degree of state practice and *opinio juris* relating to fair trial guarantees that are apposite in the specific context of occupation. In response, it can be argued that in contrast to other areas of international law, the standard of evidence applied by international tribunals for ascertaining the material and psychological elements may not be stringent in the realm of IHL, the body of international law purported to create rights and interests of individual persons.[137]

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[135] For detailed analysis of this issue, see M.E. Villiger, *Customary International Law and Treaties – A Manual on the Theory and Practice of the International Sources*, fully revised 2nd ed. (1997), at 193–223.

[136] *Ibid.*, at 213.

[137] T. Meron, *Human Rights and Humanitarian Law as Customary Law* (1989), at 44–45; *idem* (2006), *supra* n. 132, at 380–381. Kirgis argues that "[t]he more destabilizing or morally distasteful the activity – for example . . . the deprivation of fundamental human rights – the more readily international decision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable": F. Kirgis, "Custom on a Sliding Scale", (1987) 81 *AJIL* 146, at 149. IHL norms may be classified as part of "moral customs" based on normative appeal rather than on descriptive accuracy of empirical data: Anthea E. Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation", (2001) 95 *AJIL* 757, at 764–766, 772–774, 778–779 and 790.

7.3. *The Second Step: Ascertaining the Non-Derogability of Corresponding Rules Embodied under Human Rights Treaties*

Apart from Article 27(2) ACHR which only generally states that the list of inalienable rights covers "the judicial guarantees essential for the protection of" non-derogable rights, none of the fair trial guarantees embodied in IHL treaty-based rules, which are reflective of customary norms, is classified as non-derogable in human rights treaty provisions. This does not, however, critically handicap the methodology of integrating detailed elements fleshed out in the case-law and the doctrinal discourse of human rights treaties. As a preliminary observation, it must be noted that as discussed in Chapter 19, the derogable rights are not automatically to be suspended in time of occupation or other public emergencies. Their continued applicability is not affected unless and until an occupying power duly invokes the derogation clause and satisfies the necessary conditions, including the notification requirement. Assuming that the occupant meets such conditions and derogates from much of the rights guaranteed under specific human rights treaties, two further issues need to be explored.

First, it may be asked whether the customary law equivalents of fair trial guarantees embodied in Articles 71–73 GCIV and Article 75(4) API have their scope of application *ratione materiae* (and *ratione personae*) extended to cover all accused persons in any circumstances relating to occupation (and international armed conflict in general). With respect to the customary law concomitant of Article 75(4) API, is it plausible to claim that its material scope goes beyond the situations defined in Article 1 API (namely, international armed conflict and three instances of non-international armed conflict classified as "international" in Article 1(4) API) to encompass non-international armed conflict, including non-international armed conflicts taking place in occupied territory? Indeed, the fact that the list of the corresponding fair trial guarantees under Article 6 APII[138] is truncated in half has not debarred the *ICRC's Customary IHL Study* from asserting such a conclusion.

As far as the rights of the accused contained in Articles 71–73 GCIV are concerned, two lines of argument can be furnished. Meron claims that "the core of the due process guarantees" embodied in GCIV amounts to "general principles of law" within the meaning of Article 38(1)(c) of the Statute of the ICJ, and hence that it is opposable to all states.[139] In a different strand of argument, it

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[138] Note that at the Diplomatic Conference at Geneva (1974–1977), Committee III adopted draft Article 65 (now Article 75) API by incorporating into it the elements of Articles 6 and 10 of draft APII: *O.R.* Vol. XV, at 460, para. 40.

[139] Meron (1989), *supra* n. 137, at 49–50. He refers specifically to three rules: the *nullum crimen, nulla poena sine lege* principle (Article 65); the requirement that courts apply only such provisions as "are in accordance with general principles of law, in particular the principle that

can be contended that the customary law equivalent of these treaty-based rules has their scope of application *ratione materiae* expanded to cover the situation of non-international armed conflict, so that it can apply to non-international armed conflicts occurring in occupied territory. It may be asked whether this argument might be borne out in the implication flowing from the *Tadic* decision.[140] As is well-known, in that case the ICTY Appeals Chamber suggested that the notion of "violations of law or customs of war" can embrace all violations of IHL rules based not only on the Hague but also on the Geneva rules (unless violations fall under the headings of the grave breaches of GCs, genocide and crimes against humanity).[141] Is it plausible to argue that as a ramification of this dictum, despite the derogable nature of the rights of fair trial safeguarded in Article 14 ICCPR, the customary equivalents of Articles 71–73 GCIV are non-derogable even in non-international armed conflict? The incorporation of the minimum fair trial guarantees embodied in common Article 3 GCs into the war crimes provision under Article 8(2)(c)(iv) ICC Statute lends succour to this argument. This is so, even though there remains a need to specify the meaning of the term "a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable". It is possible to discern the conceptual linkage between non-derogability of fair trial guarantees and war crimes resulting from denial of such guarantees.

Second, support for the non-derogable nature of many fair trial guarantees can be explicitly found in the case-law and the documents provided by the monitoring bodies of human rights treaties. For the purpose of identifying fair trial guarantees under customary IHL, the *ICRC's Customary IHL Study* heavily relies upon the HRC's *General Comment No. 29* and the IACmHR's *Report on Terrorism and Human Rights*, both of which have articulated supplementary catalogues of non-derogable rights. Similarly, useful insight is obtained from the AfCHPR's soft-law documents specifically dealing with fair trial guarantees.[142]

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the penalty shall be proportionate to the offence" (Article 67); and the requirement that "[n]o sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial" (Article 71).

[140] ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, Case No. IT-94-1-AR72, reprinted in (1996) 35 *ILM* 32, at pp. 49–50, 71, paras. 87–88, 137.

[141] Many commentators criticise the implication of this judgment for being overambitious: G.H. Aldrich, 'Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia', (1996) 90 *AJIL* 64, at 67–68; and T. Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', (1996) 90 *AJIL* 238. See also L. Moir, *The Law of Internal Armed Conflict* (2002), at 188–189.

[142] See, for instance, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted at the 33rd Ordinary Session, Niamey, Niger, 15–29 May 2003.

In line with the *Syracuse Principles*,[143] the HRC's *General Comment No. 29* stresses that "certain elements of the right to a fair trial" are explicitly guaranteed under IHL.[144] It contends that "the principles of legality and the rule of law" underpin the safeguards relating to derogation under Article 4, and that even during armed conflict and in time of occupation, "fundamental requirements of fair trial" must be guaranteed.[145] Nevertheless, a word of caution needs to be noted. The Committee's reference to core elements of due process guarantees is confined only to three specific procedural safeguards: (i) access to a court in case of criminal proceedings; (ii) the presumption of innocence; and (iii) the right to habeas corpus or *amparo*, namely, the right to take proceedings before a court to have the lawfulness of detention determined without delay.[146] As an alternative, reliance can be made on the *Report on Terrorism and Human Rights*. This *Report* applies the most liberal approach to ascertaining the scope of non-derogable rights.

7.4. *The Third Step: The Methodology of Recruiting Specific Elements and Principles from Documents and the Case-Law of the Monitoring Bodies of Human Rights Treaties*

7.4.1. *Overview*

As discussed above, the *ICRC's Customary IHL Study* draws considerably, among others, on documents and case-law (binding decisions, and non-binding opinions/views) of the monitoring bodies of human rights treaties to identify manifold elements that proffer building blocks for constructing its customary IHL framework. Its approach to fair trial guarantees may be considered wanting in two respects. First, it fails to determine the normative status and weight of such sources.[147] Second, it has not addressed the questions whether, and if so, to what extent, it is methodologically defensible to transfer the elements and principles developed in relation to those fair trial guarantees which are yet to be declared non-derogable even in the documents or the case-law of the human rights monitoring bodies.

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[143] The *Syracuse Principles* emphasise the need to maintain a minimum of due process rights on the basis of the fair trial guarantees under IHL. See, for instance, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1985/4, paras. 60, 64, 66, 67, and 70; reprinted in: (1985) 7 *HRQ* 3.

[144] HRC, *General Comment No. 29, States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add. 11 (2001), 31 August 2001 (adopted on 24 July 2001), para. 16.

[145] *Ibid*.

[146] *Ibid*.

[147] For the same criticism in the context of international criminal law, see R. Cryer, "Of Custom, Treaties, Scholars and the Gavel: the Influence of the International Criminal Tribunals on the ICRC Customary Law Study", (2006) 11 *JCSL* 239, at 252.

7.4.2. *The Normative Significance of the Case-Law of the Monitoring Bodies of Human Rights Treaties in Ascertaining Customary International Law*

It is necessary to diagnose the normative status and weight of the case-law (binding or non-binding) for the purpose of identifying customary international law. For this purpose, inquiries are firstly made into the decisions of international tribunals as a "quasi-formal source" or "formally material source" of international law in the sense described by Fitzmaurice.[148]

Judicial decisions are described as a subsidiary means of identifying international law under Article 38(1)(d) of the ICJ Statute. Even though there is no common-law doctrine of binding precedent or *stare decisis*, the decisions of international tribunals serve as an authoritative source of developing international law.[149] They play a highly influential role in identifying (if not generating) customary international law.[150] Hersch Lauterpacht endorses the use of decisions of international tribunals to ascertain customary law. After discussing that the Court's decisions have helped formulate or clarify "varying degrees of crystallisation" of rules of international law, and established "a kind of fixed 'jurisprudence'", he argues that "this general recognition of the persuasive force of judicial precedent" indicates "the method and the spirit in which the Court may

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[148] Sir Gerald Fitzmaurice, "Some Problems regarding the Formal Sources of International Law", in: *Simbolae Verzijl*, The Hague (1958) 153, at 173 and 176.

[149] It is commented that:

> …judicial decision has become a most important factor in the development of international law, and the authority and persuasive power of judicial decisions may sometimes give them greater significance than they enjoy formally. (…) they [decisions of international tribunals] exercise considerable influence as an impartial and well-considered statement of the law by jurists of authority made in the light of actual problems which arise before them. (…) It is probable that in view of the difficulties surrounding the codification of international law, international tribunals will in the future fulfil, inconspicuously but efficiently a large part of the task of developing international law.

R.Y. Jennings and A. Watts (eds), *Oppenheim's International Law: Vol. I: Peace*, (9th ed, 1992), 41, para. 13 (footnotes omitted).

[150] Shahabuddeen notes that absent the element of repetitiveness, the decision of the International Court of Justice cannot create a new customary law. In his view, the Court can only recognise the emergence of such a new customary rule, which is at the final stage of crystallisation: M. Shahabuddeen, *Precedent in the World Court* (1996), at 72. However, Jennings notes that:

> …judges, whether national or international, are not empowered to make new laws. Of course we all know that interpretation does, and indeed should, have a creative element in adapting rules to new situations and needs, and therefore also in developing it even to an extent that might be regarded as changing it. Nevertheless, the principle that judges are not empowered to make new law is a basic principle of the process of adjudication. Any modification and development must be seen to be within the parameters of permissible interpretation.

R.Y. Jennings, "The Judiciary, International and National, and the Development of International Law" (1996) 45 *ICLQ* 1, at 3.

be counted upon to approach similar cases".[151] Schwarzenberger claims that the subjective impartiality of judges, "an international outlook which represents the world's main legal systems and high technical standards" are the three hallmarks that accord the ICJ the prominent place in "the hierarchy of the elements of law-determining agencies". Even so, his support for regional or *ad hoc* courts in such a hierarchy is more mitigated.[152] Rousseau furnishes a crucial insight into the ascertainment of customary law through decisions of judicial bodies. He argues that "…les règles qui se dégagent des décisions judiciaries ne s'imposant pas en tant que décisions jurisprudentielles, mais uniquement comme éléments de la coutume lorsqu'elles sont suffisamment constants pour paraître refléter l'assentiment générale des Etats…".[153] Nguyen Quoc Dinh recognises that in view of their elements of coherence, continuity and legitimate expectation (sécurité juridique) the decisions of international tribunals can be given more authoritative weight than academic opinions.[154] Nevertheless, he considers that this is not sufficient to make the jurisprudence in general as a veritable source of international law with general effects.[155]

To return to the case-law of the HRC, its role as the supervisory body of the universal human rights treaty in providing cogent evidence of customary law rights cannot be underrated. Indeed, several features clearly militate in favour of approximating its views to judicial decisions. First, the HRC members serve on an individual capacity. Second, the individual complaints (and inter-state complaints that have never been utilised) must be screened through the rigorous process of admissibility decisions based on established procedural grounds. Third, in examining the merits of petitions, the HRC supplies coherently reasoned opinions, which are attended by separate and dissenting opinions of Committee members. These features bear striking resemblance to judicial decisions. The HRC almost certainly benefits from the above three hallmarks suggested by Schwarzenberger. The case-law of HRC can be regarded as highly important repositories of practice that helps determine the process of a certain human rights norm hardening into a customary rule. Similar observations can be made about the normative weight of opinions provided by the African Commission of Human and Peoples' Rights (AfCmHPR) and the IACmHR. Despite their limited scope of jurisdiction *ratione loci*, their intrinsic quality, which owes to the integrity of Commissioners, the established admissibility criteria, and to the coherently reasoned opinions, ought not to be overlooked.

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[151] H. Lauterpacht, *The Development of International Law by the International Court* (1958), at 18.

[152] See also Schwarzenberger, *supra* n. 103, Vol. I, 3rd ed., (1957), at 30.

[153] C. Rousseau, *Droit International Public, Tome I (Introduction et Sources)*, (1970), at 368–369.

[154] This is supported by Fitzmaurice (1958), *supra* n. 148, at 174–175.

[155] P. Daillier and A. Pellet, *Nguyen Quoc Dinh – Droit International Public*, 5th ed., (1994), at 389–390, para. 265.

7.4.3. *The Normative Significance of Documents of the Monitoring Bodies of Human Rights Treaties in Ascertaining Customary International Law*

As a preliminary reflection, the ascertainment of customary law status of human rights norms, which are in-depthly elaborated by the HRC in its *General Comments*, requires the assessment whether this can be considered equivalent to state practice. Or is it rather the absence of objection by states parties to the ICCPR that constitutes "state" practice required for the formation of customary law?[156]

Equally, authoritative weight can be ascribed to the outpourings of the supervisory organs of human rights treaties, including, not least the HRC's *General Comments* ("*observations générales*"). In Chapter 19, we have already analysed the legal basis for the HRC to provide general comments and the normative significance ascribed to them. It is recalled that the power of the HRC as the monitoring body of ICCPR to issue general comments are expressly provided in Article 40(4) ICCPR. Further, we have considered two strands of arguments that can be put forward to explain the normative significance of *General Comments:* (i) the *General Comments* as the "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties; and (ii) the *General Comments* as a material source of international law comparable to, albeit more authoritative than, the writings of leading publicists.

Similar observations can be made about the IACmHR's *Report on Terrorism and Human Rights*.[157] In accordance with Article 41 ACHR, the mandate of the IACmHR includes the preparation of reports as it considers advisable in performing its duties and the submission of an annual report to the General Assembly of the Organisation of American States (OAS). However, the *Report* is the product of a regional human rights body. Clearly, where it is invoked to support customary law status of specific elements or their non-derogable nature, care must be taken not to read its evidential value in universal context without separate evidence traceable outside the OAS mechanism.

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[156] See F. Hampson, "Other Areas of Customary Law in Relation to the Study", in: E. Wilmshurst and S. Breau (eds), *Perspectives on the Study on Customary International Humanitarian Law*, (2007), Ch. 3 50–73.

[157] See also *The Cleveland Principles of International Law on the Detention and Treatment of Persons in Connection with the "Global War on Terror"*, drafted by experts on 7 November 2005 at Case Western Reserve Univ. School of Law.

7.4.4. *Is it Possible to Read Additional Non-Derogable Elements of Fair Trial Guarantees in the Human Rights Committee's* General Comment No 29?

In view of the paucity of non-derogable elements expressly articulated in *General Comment No. 29*, it may be proposed that the three components expressly mentioned in *General Comment No. 29* be of exemplary nature in the expanding catalogue of inalienable rights. According to this methodology, additional rights can be deduced from the general catalogue of "fundamental requirements of fair trial", which the HRC considers not to be suspended in any circumstances.[158] In conjunction with its detailed empirical survey of the state practice and *opinio juris* in IHL, the *ICRC's Customary IHL Study* tacitly relies on this methodology.[159]

While agreeing with the proposal to expand the scope of non-derogable rights as *lex ferenda*, the present writer nonetheless notes that a caveat is necessary in deducing additional elements from the open-ended list in the document prepared by the monitoring bodies of human rights treaties. This would be tantamount to inferring implied rights as *lex lata* from the document, whose nature as "subsequent practice" of state parties or as a source of international law remains ambivalent. The focus of appraisal will inevitably be reverted to the existence *vel non* of sufficient amount of state practice and *opinio juris* to suggest the non-derogability of additional rights of customary nature, which can be relied upon in the situations of international armed conflict (including occupation).

Having analysed the methodology of recruiting specific elements of due process guarantees from the practice of the international human rights law into the realm of IHL, the examinations now turn to such specific elements that are concurrently identifiable in both IHL and human rights contexts through the medium of customary international law. As explained above, the analysis divides those elements that are expressly articulated in sub-paragraphs of Article 75(4) API and those that are implicitly derived from the general terms used in the chapeau of this provision.

8. *The Elements of the Rights of the Accused, Which are Expressly Contained in Article 75(4) API*

8.1. *Fundamental Principles of Criminal Law*

Any individual persons who are accused in occupied territory are beneficiaries of the fundamental principles of criminal law, starting with the principle of *nullum crimen nulla poena sine lege*.[160] As a corollary of this principle, penal

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[158] HRC, *General Comment No. 29*, paras. 11 and 16.

[159] Henckaerts and Doswald-Beck (eds), *supra* n. 60, Vol. I, at 359.

[160] API, Article 75(4)(c). For protected persons accused in occupied territory, see the second sentence of Article 65, and the first sentence of Article 67 GCIV. The prohibition of retroac-

provisions promulgated by occupying powers must not come into effect until they are published and brought to the knowledge of the inhabitants in their own language.[161] Second, the penalty must be proportionate to the offence.[162] Third, it is forbidden to apply collective punishment.[163] These fundamental principles are expressly recognised as non-derogable in the HRC's *General Comment No. 29*,[164] and the IACmHR's elaborate *Report on Terrorism and Human Rights.*[165]

8.2. *The Right to be Presumed Innocent*

Protected persons who are charged with offences against penal/security laws in occupied territory have the right to be presumed innocent until proved guilty.[166] The right to be presumed innocent is closely connected with the freedom from compulsory self-incrimination which, as will be analysed below, is fully established in both customary and treaty-based rules of IHL.[167] While this right is not specifically designated as non-derogable in international human rights treaties,[168] both the HRC and the IACmHR have already recognised its inalienable nature in their doctrinal contributions.[169] It is widely recognised that this right has hardened into part of customary international law relating to the administration of criminal justice both at the domestic and international level.[170]

Some specific elements of this right are manifestly identifiable even without recourse to the relevant case-law of international human rights treaties. All officials involved in the case must refrain from prejudging the outcome of a trial.[171]

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tive application of criminal law is designated as non-derogable in ICCPR (Article 4), ACHR (Article 27) and ECHR (Articles 7 and 15).

[161] GCIV, Article 65.

[162] GCIV, Article 67.

[163] API, Article 75(4)(b). See also Hague Regulations, Article 50 and GCIV Article 33 (1).

[164] HRC, *General Comment No. 29, supra* n. 43, paras. 11 and 13 (prohibition of collective punishment).

[165] IACmHR, *Report on Terrorism and Human Rights, supra* n. 59, para. 261 (a) (concerning all those general principles of criminal law discussed here).

[166] API, Article 75(4)(d).

[167] See API Article 75(4)(f).

[168] ICCPR, Article 14(2); Convention on the Rights of the Child, Article 40(2)(b)(i); ECHR, Article 6(2); ACHR, Article 8(2); and AfCHPR, Article 7(1).

[169] HRC, *General Comment No. 29*, paras. 11 and 16. See also IACmHR, *Report on Terrorism and Human Rights*, supra n. 3, paras. 245 and 247.

[170] Henckaerts and Doswald-Beck (eds), *supra* n. 60, Vol. I, at 357–358; and Zappalà, *supra* n. 133, at 1341. For the case-law, see Australia, Military Court, Rabaul, *Ohashi and Six Others* case, Judgment, 20–23 March 1946, (1948) 5 *LRTWC* 25–31. See also ICC Statute, Article 66; ICTY Statute, Article 21(3); ICTR Statute, Article 20(3); and Statute of the Special Court for Sierra Leone, Article 17(3).

[171] HRC, *General Comment No. 13*, para. 7; *Gridin v. Russia*, *No. 770/1997*, U.N. Doc. CCPR/C/69/D/770/1997 (2000), View of 20 July 2000, para. 8.3; and ECtHR, *Allenet de Ribemont v. France*, Judgment of 10 February 1995, A 308, para. 41.

The presumption of innocence must be guaranteed throughout all the stages of investigation,[172] from the period in which an individual person has yet to be accused or formally charged to the time of his/her conviction. As a corollary of this right, even in the absence of the specific rule on this matter,[173] the *onus probandi* must be placed on the prosecutor[174] with the requisite standard of proof.[175] From this right can be inferred another due process right, the right to remain silent,[176] whose normative status in IHL will be analysed separately.

8.3. *The Right to be Informed of the Nature and the Cause of Accusation*

Article 75(4)(a) API stipulates that all individual persons accused of offences relating to the armed conflict defined in Article 1 API have the right to be informed of the nature and the cause of accusation. In occupied territory, Article 71(2) GCIV specifically guarantees this right for any "accused persons" who are under criminal proceedings by the occupying power. In case of disciplinary punishment that may be pronounced by the commandant of the place of internment in occupied territory (and in the territories of the parties to the conflict), Article 123(2) GCIV stipulates that the accused internee must be given "precise information" on the offences of which s/he is accused. This right is supplemented by the requirement that the information on the nature and cause of accusation must be given to the accused "without delay" or "promptly",[177] and in a language that the accused understands.[178]

While this right is not explicitly classified as non-derogable in human rights treaties,[179] inquiries need to be made into the doctrinal discourse of the relevant

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[172] Zappalà, *supra* n. 133, at 1341.

[173] *Ibid.*, at 1344. Note that while Article 66(2) ICC expressly imposes burden of proof on the prosecutor, such express provision is lacking in the Statutes of ICTY and ICTR.

[174] In its *General Comment No. 13*, the HRC has elaborated the principle as follows:

> By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.

HRC, *General Comment No. 13, Article 14* (Twenty-first session, 12 April 1984), U.N.Doc. HRI/GEN/1/Rev.1, at 14 (1994), para. 7.

[175] The common law standard "proof beyond reasonable doubt" takes an upper hand in international criminal justice over the civil law standard "*intime conviction du juge*". The former is incorporated into the Rules of Procedure and Evidence adopted by the ICTY and ICTR (Rule 87(A) RPEs.), and into Article 66(33) ICC Statute.

[176] Zappalà, *supra* n. 133, at 1343.

[177] GCIV, Article 71(2).

[178] GCIV, Article 71(2); and API, Article 75(4)(a).

[179] ICCPR, Article 14(3)(a); Convention on the Rights of the Child, Article 40(2)(b)(ii); ECHR, Article 6(3)(a); ACHR, Article 8(2)(b). The right to be informed of the nature and the cause

monitoring bodies. The peremptory nature of this right is recognised only in the *Report on Terrorism and Human Rights* adopted by the IACmHR.[180] In its *General Comment No. 29*, the HRC has not explicitly referred to this right.[181] As discussed above, it appears that the *ICRC's Customary IHL Study* tacitly relies on the general phrase "fundamental principles of fair trial" under *General Comment No. 29* to deduce the non-derogable nature of this right and its customary law status in IHL context.[182]

8.4. *The Right to Trial by an Independent, Impartial and Regularly Constituted Court*

8.4.1. *Overview*

Individual persons accused of offences against penal/security laws in occupied territory have a right to be tried by an independent, impartial and regularly constituted court.[183] The *ICRC's Customary IHL Study* describes the right to trial by an independent, impartial and regularly constituted court as part of customary IHL,[184] which is applicable not only to civilian detainees but also to prisoners of war.[185] Even so, the specific meanings of the notions of independence and impartiality need to be clarified.[186]

With specific regard to protected persons accused in occupied territory, Article 66 GCIV requires occupation courts to be "properly constituted, non-political military courts".[187] Reference to "military courts" under Article 66 GCIV does not debar civilians serving on such courts. The only condition is that they must be subordinate to direct military control and authority.[188] At the Diplomatic

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of accusation is anchored in the practice of the post-WWII war crimes tribunals. For post-WWII trials, see US Military Tribunal, Nuremberg, *Josef Altstötter and Others*, (*The Justice Trial*), 17 February–4 December 1947, (1948) 6 *LRTWC* 1–110, Case No. 35; (1947) 14 *AD* 278 (No. 126).

[180] IACmHR, *Report on Terrorism and Human Rights*, supra n. 59, paras. 245 and 247.

[181] HRC, *General Comment No. 29*, paras. 11 and 16.

[182] Henckaerts and Doswald-Beck (eds), *supra* n. 60, Vol. I, at 359.

[183] API, Article 75(4) chapeau; common Article 3 GCs; and Article 66 GCIV. See also US Supreme Court, *Hamdan v. Rumsfeld*, Judgment of 29 June 2006, 126 S.Ct. 2749.

[184] Henckaerts and Doswald-Beck (eds), *supra* n. 60, Vol. I, at 354–356.

[185] For prisoners of war, see Article 84(2) GCIII.

[186] For the proposal to rely on Article 14 ICCPR to seek guidance on this matter, see, for instance, CUDIH, *Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict*, Geneva, 24–25 July 2004, at 31 (presentation by W. Kälin).

[187] At the Diplomatic Conference of Geneva in 1949, the expression "properly constituted" was substituted for the original word "regular", which was considered insufficient to denote the requirement of adequate safeguard: *Final Record, supra* n. 86, Vol. II-A, at 833.

[188] G. Von Glahn, *The Occupation of Enemy Territory – A Commentary on the Law and Practice of Belligerent Occupation*, (1957), at 116.

Conference of Geneva in 1949, the reference to "civil courts" in the Stockholm draft text of Article 66 GCIV (draft Article 57) was deleted on two grounds. First, the Committee III, which was responsible for drafting the Civilians Convention, felt that this expression would implicitly allow the occupying power to extend part of its civil legislation to occupied territory. Second, civil courts were considered more susceptible to politics than military courts.[189]

The second sentence of Article 66 GCIV states that "[c]ourts of appeal shall preferably sit in the occupied territory". This does not obligate the occupying power to set up a system of appeal from trial courts. As discussed in relation to the right of appeal, the second sentence of Article 73(2) GCIV clarifies this matter. According to this provision, in the absence of appeal procedures, the convicted persons are entitled to petition against the finding and sentence to the "competent authority" of the occupant. The theatre commander of the occupant (or a military governor) can act as such "competent authority".[190]

8.4.2. *Non-Derogability under the Practice of International Human Rights Law*

The practice and doctrine developed under international human rights law elucidate the meaning of independence and impartiality, while providing additional prerequisites for a "regularly constituted court". Many human rights treaties guarantee the right to a "competent" tribunal,[191] or a tribunal "established by law" while specifically requiring elements of independence and impartiality.[192] Yet, this right is not expressly designated as non-derogable under the derogation clauses. The peremptory character of this right is, however, recognised in a special report adopted by the IACmHR and the case-law of the AfCmHPR. The IACmHR's *Report on Terrorism and Human Rights* specifically affirms that the elements of independence and impartiality of courts must be guaranteed in all circumstances.[193] In the *Civil Liberties Organisation and Others v. Nigeria*, the AfCmHPR has enunciated that Article 7 of the African Charter, which guarantees, *inter alia*, "the right to be tried . . . by an impartial court or tribunal", embodies a non-derogable right.[194] On the other hand, in the more universal context of ICCPR, the HRC has stopped short of specifying elements of independence and impartiality in its enlarged parameters of inalienable rights, invoking

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[189] *Final Record, supra* n. 86, Vol. II-A, at 765 and 833.

[190] Von Glahn (1957), *supra* n. 188, at 117.

[191] ICCPR, Article 14(1); ACHR, Article 8(1); Convention on the Rights of the Child, Article 40(2)(b)(iii).

[192] ICCPR, Article 14(1); ECHR, Article 6(1); ACHR, Article 8(1); AfCHPR, Article 7(1)(d) and Article 26; and Convention on the Rights of the Child, Article 40(2)(b)(iii).

[193] IACmHR, *Report on Terrorism and Human Rights*, *supra* n. 59, paras. 245 and 247.

[194] AfCmHPR, *Civil Liberties Organization and Others v. Nigeria*, 218/98, Decision, 23 April–7 May 2001, para. 27.

only the general phrase "fundamental principles of fair trial" or "fundamental requirements of fair trial".[195]

8.4.3. *The Role of International Human Rights Law in Complementing Procedural Guarantees of Occupation Courts*

The complementary role of international human rights law is instrumental in elucidating details of procedural guarantees that must be recognised by occupation courts. The words "properly constituted . . . courts" under Article 66 GCIV or the term "regularly constituted court" under common Article 3 GCs and Article 75(4) API are left unarticulated. By drawing on the practice of international human rights law, the *ICRC's Customary IHL Study* stresses that the wording "regularly or property constituted" should be interpreted as requiring the courts to be established in accordance with the laws and procedures already in force in the country concerned.[196]

With specific regard to the element of independence, the practice of human rights monitoring bodies suggests that a judicial organ must be able to make decisions free from any influence whatsoever from the executive.[197] As regards the element of impartiality, the *subjective* impartiality requires judges to be free from any preconceptions on the case *sub judice* (especially, the guilt of the accused or any other prejudice or bias against him/her) and to act in a manner that does not promote the interests of one of the parties.[198] In addition, objective impartiality demands that the tribunals or judges must offer sufficient guarantees to remove any legitimate doubt about their impartiality.[199]

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[195] HRC, *General Comment No. 29*, paras. 11 and 16.

[196] Henckaerts and Doswald-Beck (eds), *supra* n. 60, Vol. I, at 355.

[197] HRC, 468/1991, CCPR/C/49/D/468/1991, *Bahamonde v. Equatorial Guinea*, View of 20 October 1993, para. 9.4. For the jurisprudence of AfCmHPR, see *Centre for Free Speech v. Nigeria, 206/97*, Decision of 15 November 1999, paras. 15–16. For the case-law of the ECHR, see ECtHR, *Belilos v. Switzerland*, Judgment of 29 April 1988, A 132, para. 64; *Findlay v. UK*, Judgment of 25 February 1997, para. 73. See also IACmHR, *Javier v. Honduras,* Case 10.793, Report No. 8/93, Report of 12 March 1993, IACmHR, OEA/Ser.L/V/II.83 Doc. 14, at 93 (1993), para. 20; and IACmHR, *Garcia v. Peru*, Case 11.006, Report No. 1/95, 17 February 1995,OEA/Ser.L/V/II.88 rev.1, Doc. 9, at 71 (1995), Section VI(2)(a).

[198] Reference can be made to Australia, Military Court, Rabaul, *Trial of Sergeant-Major Shigeru Ohashi and Six Others* case, Statement by the Judge Advocate, (1948) 5 *LRTWC* 25–31; and HRC, *Karttunen v. Finland, No. 387/1989*, View of 23 October 1992, UN Doc. CCPR/C/46/D/387/1989; (1994) 1 *IHRR* 79, at 83, para. 7.2.

[199] AfCHPR, *Constitutional Rights Project v. Nigeria, No. 60/91*, Decision, 13–22 March 1995, para. 14; *Malawi African Association and Others v. Mauritania, No. 54/91*, Decision of 11 May 2000, (2001) 8 *IHRR* 268, at 282–283, para. 98. For the case-law of the ECHR, see ECtHR, *Piersack v. Belgium*, Judgment of 1 October 1982, A 53, paras. 28–33; *De Cubber v. Belgium*, Judgment of 26 October 1984, A 86, paras. 24–26; and *Findlay v. UK*, Judgment of 25 February 1997, para. 73. For the jurisprudence of ACHR, see IACmHR, *Raquel Martí*

8.4.4. *The Trial of Civilians by Military Courts*

The requirements of independence and impartiality fleshed out in the context of international human rights law call into question the lawfulness of trying civilians by a military court. The general principle emerging from the analysis of the practice of human rights is that military tribunals are required to apply the same extent of procedural requirements of independence and impartiality as those applicable to civilian courts.

On this matter, progressive development is discernible in the regional human rights context. In the *Civil Liberties Organisation and Others v. Nigeria*, the AfCmHPR held that military tribunals and special security courts *per se* are found to be not incompatible with the requirements of independence and impartiality.[200] However, it quickly added that for such tribunals to be lawful, they must meet the same requirements of independence and impartiality as civilian tribunals.[201] The similar line of judicial reasoning has been demonstrated in the jurisprudence of the supervisory bodies of the ACHR and ECHR.[202] In the *Ergin* case, the ECtHR held that the fair trial guarantees under Article 6 ECHR cannot be definitively interpreted as excluding the jurisdiction of military courts to try cases where civilians are implicated. Nevertheless, it stressed that the use of such jurisdiction must be considered "very exceptional" and subordinated to "particularly careful scrutiny", with onus on a state to adduce a particularly high standard of proof.[203]

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v. Peru, Case 10.970, Report No. 5/96, 1 March 1996, OEA/Ser.L/V/II.91 Doc.7 at 157, Section V(B)(3)(c).

[200] AfCmHPR, *Civil Liberties Organization and Others v. Nigeria, 218/98*, Decision, 23 April–7 May 2001, para. 44.

[201] *Ibid.* The African Commission specifically stresses the requirements of fairness, openness, and justice, independence, and due process. See also AfCHPR, *Constitutional Rights Project v. Nigeria, No. 60/91*, Decision, 13–22 March 1995, para. 14; *Civil Liberties Organization and Others v. Nigeria, No. 218/98*, Decision, 23 April–7 May 2001, paras. 25–27 and 43–44. For the case-law on the ECHR, see ECtHR, *Findlay v. UK*, Judgment of 25 February 1997, paras. 73–77; *Ciraklar v. Turkey*, Judgment of 28 October 1998, para. 38; and *Sahiner v. Turkey*, Judgment of 25 September 2001, paras. 45–47. For the jurisprudence of ACHR, see IACmHR, *Salinas v. Peru*, Case 11.084, Report No.27/94, 30 November 1994, OEA/Ser.L/V/II.88rev.1Doc.9, at 113 (1995), Section V.3.

[202] See, for instance, ECtHR, *Finlay v. UK*, Judgment of 25 February 1997, paras. 73–77; *Ciraklar v. Turkey*, Judgment of 28 October 1998, para. 38; and *Sahiner v. Turkey*, Judgment of 25 September 2001, paras. 45–47; and IACmHR, *Salinas v. Peru*, Case 11.084, Report, 30 November 1994, OEA/Ser.L/V/II.88rev.1Doc.9, at 113 (1995), Section V(3).

[203] First, there must exist "compelling reasons" warranting the extension of military criminal justice to civilians. Second, this extension must be premised "on a clear and foreseeable legal basis": ECtHR, *Ergin v. Turkey*, Judgment of 5 May 2006, para. 47; and *Martin v. UK*, Judgment of 24 October 2006, para. 44.

Indeed, the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*,[204] the soft law document adopted by the Organisation of African Unity (OAU) (the present-day African Union or AU), goes further, emphasising that trials of civilians by military courts violate the right to be tried by an independent and impartial tribunal. As far as AU member states are concerned, this document, albeit of hortatory nature in legal effects, casts doubt on the lawfulness of using military courts to try protected persons in occupied territory. This implication goes beyond the requirement under Article 66 GCIV, which expressly allows protected persons who have offended penal/security laws in occupied territory to be handed over to, and tried by, the military tribunals (so-called occupation courts).

8.4.5. *The Trial of Unprivileged Belligerents in Occupied Territory*

The question of the legality of trying civilians by military courts is of special relevance to the trial of unprivileged belligerents in occupied territory. In the first place, captured soldiers must have their prisoners of war (PoW) status determined by a "competent tribunal" set up under Article 5 GCIII. At this stage, Article 5 GCIII does not indicate whether it is necessary for such a tribunal to be an independent, impartial and regularly constituted court. Clearly, there is insufficient degree of procedural safeguards. There is no indication that captured soldiers are entitled to access to and assistance of a lawyer.[205] Further, unless that Power is a party to API (or unless Article 45 API is considered part of customary law),[206] the very need to set up the Article 5 review procedure is made dependent on the discretion of the captors. If the detaining Power claims that there is no doubt as to non-PoW status of those captives, then they would be barred from an Article 5 review process.[207]

If the PoW status of captured soldiers has been negated in the Article 5 review process, the next question is whether they are entitled to the status of

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[204] See, for instance, AfCHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, DOC/OS (XXX) 247, adopted at the 33rd Ordinary Session, Niamey, Niger, 15–29 May 2003; reprinted in (2005) 12 *IHRR* 1180. Paragraph (c) of the right of civilians not to be tried by military courts reads that "[m]ilitary courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences which fall within the jurisdiction of regular courts".

[205] Given the absence of any specification, it is not considered obligatory for such a tribunal to be a judicial body. In practice, many states contemplate this to consist of military officers, an extension of the military and hence executive power. Nor is there any express recognition of the right to assistance of a lawyer for captives before the Article 5 tribunal. See CUDIH, *Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict*, Geneva, 24–25 July 2004, at 16.

[206] *Ibid.*

[207] *Ibid.*

civilians or protected persons within the meaning of Article 4 GCIV, and if so, to what extent they can claim rights and privileges accruing to protected persons under GCIV (subject to derogation under Article 5, GCIV). It can be assumed that the AU's *Principles and Guidelines* is considered one of the most authoritative interpretations of the African Charter on Human and Peoples' Rights ("subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties).[208] If such unprivileged belligerents are classified (or treated) as protected persons under GCIV, is it unlawful for a state party to the African Charter to try them before an occupation court? On this matter, it may be argued that since the AU's *Principles and Guidelines* only prohibit the trial of *civilians*, the power of the occupation court to try and punish unprivileged belligerents is totally unaffected. It may be added that even if qualified as "protected persons" under Article 4 GCIV, unprivileged belligerents held in occupied territory have forfeited the status of civilians within the meaning of Articles 51(3) API because of their direct participation in hostilities at the time of (or immediately prior to) capture.[209] This line of argument assumes that categories of persons affected by occupation and international armed conflict are not dichotomised but tripartite, so that between "peaceful civilians" and combatants that can benefit from PoW status lies the third category of unprivileged belligerents.

In contrast, albeit highly unlikely, there may be circumstances where such unprivileged belligerents are determined by the occupying power as prisoners of war despite the considerable doubt over their compliance with the four cumulative conditions laid down under Article 4A(2) GCIII. If so, they would have to be tried by a military court in line with Article 84(1) GCIII.[210]

In its *Report on Terrorism and Human Rights*, the IACmHR has recognised that military courts may try both "privileged and unprivileged combatants",

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[208] Vienna Convention on the Law of Treaties, Article 31.

[209] The *Study* describes as well-established in customary IHL the rule that civilians enjoy immunity from direct attack so long as they do not take a direct part in hostilities: Henckaerts and Doswald-Beck (eds), *supra* n. 60, Vol. I, Rule 6, at 19–24.

[210] It would be very improbable that the "competent tribunal" set up in accordance with Article 5 GCIII deliberately opts to categorise captives of doubtful status as prisoners of war for the purpose of allowing them to be tried by the occupation court in respect of their offences. In contrast, cases may arise where captives do not wish to be regarded as prisoners of war, as in the case of Iraqi reservists in the UK during the 1990–1991 Gulf War: F. Hampson, "The Geneva Conventions and the Detention of Civilians and Alleged Prisoners of War", *Public Law*, Winter 1991, 507, at 514–516. Indeed, she criticises the decision of the UK authorities in 1990–1991 to classify Iraqi detainees who were lawful residents of the UK as prisoners of war. She argues that those Iraqi citizens that were detained in military camps resembled rather enemy aliens governed by GCIV, and that the *prima facie* evidence that they could at best be described as reservists is weakened by the fact that they had not been called up: *ibid*.

subject to the condition that "the minimum requirements of due process" are safeguarded. It nevertheless adds a caveat that "human rights violations or other crimes unrelated to military functions" must be excluded from the jurisdiction of military tribunals.[211] Are offences and delicts against penal/security laws in occupied territory, which are of very minor nature, to be categorised as "other crimes unrelated to military functions"? The test used by the IACmHR does not depend on the gravity of offences. Arguably, any offences committed in occupied territory may be considered detrimental to the overall military function (which includes even tasks essentially of civilian nature, such as the delivery of mail or catering for the occupying administrative personnel). The complex nature of modern occupation situations is compounded by the involvement of private military contractors (PMCs) in direct support of military operations.[212] This makes it difficult for the function test alone to serve as a viable yardstick for ascertaining offences that must not be tried by an occupation court but by civilian courts.

8.5. *The Right of the Accused to be Present at the Trial*

Article 75(4)(e) API specifically recognises the right of the persons charged with an offence to be tried in his/her presence. This right is fully recognised in instruments of both international human rights law[213] and international criminal law,[214] and in national military manuals.[215] Nevertheless, the case-law and

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[211] IACmHR, *Report on Terrorism and Human Rights*, supra n. 3, para. 261(b). See also *ibid.*, para. 232.

[212] Whether or not PMCs can be regarded as civilians authorised to accompany armed forces must be evaluated by disaggregating the role and function of the PMCs. The US Uniform Code of Military Justice (UCMJ) allows such "civilians" who accompany an armed force in the field to be tried by court-martials in time of declared war: UCMJ, Section 820, Article 2, (a)(10). For assessment of PMCs, see N. Boldt, "Outsourcing War – Private Military Companies and International Humanitarian Law", (2004) 47 *German YbkIL* 502.

[213] ICCPR, Article 14(3)(d). While Article 6(3)(c) ECHR and Article 8(2)(d) ACHR do not expressly provide the right to be tried in his/her presence, this right can be inferred from the reference to the right to defend oneself: Henckaerts and Doswald-Beck (eds), *supra* n. 60, Vol. I, at 366, n. 436.

[214] ICC Statute, Article 63(1), Article 67(1)(d); ICTY Statute, Article 21(4)(d); ICTR Statute, Article 20(4)(d); and Statute of the Special Court for Sierra Leone, Article 17(4)(d).

[215] The *Study* notes that this right is set forth in "several military manuals and is part of most, if not all, national legal systems": Henckaerts and Doswald-Beck (eds), *supra* n. 60, Vol. I, at 366. However, among the national military manuals cited in *ibid.*, Vol II, only those of Argentina, New Zealand and Sweden are applicable to persons other than prisoners of war who are accused in occupied territory: *ibid.*, Vol. II, Part 2, at 2464, paras. 3455–3458. As regards the national legislation cited therein, only the laws of three states (Bangladesh, Ireland, and Norway) are indisputably applicable to any accused persons in occupied territory. Further, Vol. II leaves unanswered the derogability or not of national constitutional provisions, or of

documents provided by the monitoring bodies of human rights treaties have yet to recognise its non-derogable status.

The controversy remains over the legality of trial *in absentia*. At the time of drafting the Additional Protocols, an opinion was expressed that exceptionally, defendants could be banished from the courtroom in case of their persistent misconduct.[216] Such possibility, applicable in many civil law countries, may be the primary reason why this right is yet to be recognised as inalienable even in the IACmHR's *Report on Terrorism and Human Rights*. Indeed, some states attached reservations or declarations of interpretation to the effect that Article 75(4)(e) is subordinated to the power of a judge to exclude the accused from the courtroom in special circumstances.[217] While the case-law of human rights treaty bodies confirms the possibility of trial *in absentia* in exceptional circumstances,[218] the tide in the practice of international criminal law[219] is clearly shifted toward the prohibition of such practice.

8.6. *The Right to Examine Witnesses or the Right to Have Witnesses Examined*

Article 75(4)(g) API recognises the right of the accused in occupied territory to examine witnesses and to have them examined. With respect to protected persons accused in occupied territory, this right finds express recognition in Article 72(1) GCIV.

In the context of international human rights law,[220] as discussed above, the HRC's *General Comment No. 29* stops short of specifying this right within its expanded list of non-derogable rights.[221] In contrast, the IACmHR's *Report on Terrorism and Human Rights* clearly tends towards recognising its non-derogable nature. It stresses that this right is well-established in treaty-based rules of IHL,

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the provisions of national codes of criminal procedure: *ibid.*, Vol. II, part 2, at 2464–2465, paras. 3459–3462.

[216] CDDH/407/Rev. 1, para. 48; *O.R.*, Vol. XV, at 462.

[217] See the statements made by the delegations of France, Germany and Norway: France, *O.R.*, Vol. VI, at 267, CDDH/SR. 43; Federal Republic of Germany, *ibid.*, at 269; and *ibid.*, Vol. XV, at 205, CDDH/III/58, para. 10; Norway, *ibid.*, Vol. VI, CDDH/III/SR. 58, paras. 7–8.

[218] ECtHR has recognised the possibility of a hearing *in absentia* in case the state has provided effective notice of the hearing but the accused chooses not to appear: ECtHR, *Ekbatani v. Sweden*, Judgment of 26 May 1988, A134, para. 31; and *Kremzow v. Austria*, Judgment of 21 September 1993, A268–B, paras. 59 and 67.

[219] ICC Statute, Article 63(21) and Article 67(1)(d); ICTY Statute, Article 21(4)(d); ICTR Statute, Article 20(4)(d); and Statute of the Special Court for Sierra Leone, Article 17(4)(d).

[220] ICCPR, Article 14(3)(e); ECHR, Article 6(3)(d); and ACHR, Article 8(2)(f). The AfCmHPR has recognized this right as part of the right to fair trial: AfCHPR, 11th Session, Tunis, 2–9 March 1992, *Resolution on the Right to Recourse and Fair Trial*, para. 2(e)(iii).

[221] HRC, *General Comment No. 29*, paras. 11 and 16.

and that it cannot be subject to suspension.[222] Nevertheless, a word of caution ought to be added. In contrast to Article 75(4)(g) API, which does not contain any escape clause, the *Report* notes that the right to examine witnesses *present* in courts can be derogated from where there is no alternative to secure witnesses' anonymity and lives.[223]

8.7. *The Right of the Accused Not to be Compelled to Testify against Him/Herself and the Protection against Coerced Confessions*

While the freedom from self-incrimination is recognised for prisoners of war under Article 99(2) GCIII, this is absent in GCIV in relation to the protected persons accused in occupied territory (or in the territories of the parties to the conflict). This gap is filled by Article 75(4)(f) API, which specifically embodies the right of the accused not to be compelled to testify against him/herself or to confess guilt.[224] No doubt, this right can be described as one of the most cardinal procedural rights in the practice of international criminal law[225] and international human rights law.[226] Again, while the HRC's *General Comment No. 29* fails to articulate this right in the category of inalienable rights, the IACmHR has confirmed its non-derogable character in its *Report on Terrorism and Human Rights*.[227] Logically derived from the prohibition on compelling accused persons to testify against themselves is the axiomatic principle that evidence obtained by torture or other compulsory means and methods must not be used as evidence in any proceedings.[228]

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[222] IACmHR, *Report on Terrorism and Human Rights, supra* n. 59, paras. 261(c)(iv).

[223] *Ibid.*, para. 262(b). See also *ibid.*, paras. 247 and 251.

[224] The 2004 edition of the *UK Manual* does not refer to this right: *UK Manual* (2004), *supra* n. 3 at 295–296, para. 11.63.

[225] ICC Statute, Article 55(1)(a), Article 67(1)(g); ICTY Statute, Article 21(4)(g); ICTR Statute, Article 20(4)(g); and Statute of the Special Court for Sierra Leone, Article 17(4)(g). See also US, Supreme Court, *Ward v. State of Texas*, Judgment, 1 June 1942, 316 U.S. 547 (1942).

[226] ICCPR, Article 14(3)(g); Convention on the Rights of the Child, Article 40(2)(b)(iv); and ACHR, Article 8(2)(g). See also the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 21. Though not expressly provided in the text of the ECHR, this right is fully recognised in the case-law of ECtHR. See, *inter alia, Funke v. France*, Judgment of 25 February 1993, A256–A, para. 44; *John Murray v. UK*, Judgment of 8 February 1996, para. 47; and *Quinn v. Ireland*, Judgment of 21 December 2000, para. 47.

[227] IACmHR, *Report on Terrorism and Human Rights, supra* n. 59, paras. 247 and 261(c)(iii).

[228] The UN Convention against Torture specifically excludes the admissibility of evidence obtained by torture: UN Convention against Torture, Article 15. In the *Coëme* case, the ECtHR has enunciated the general principle that it is forbidden to use evidence obtained from the accused against his/her will, by coercion or by oppression: ECtHR, *Coëme and Others v. Belgium*, Judgment of 22 June 2000, para. 128.

8.8. *The Right of the Convicted Persons to be Informed of Available Remedies and of their Time-Limits*

The right of convicted persons to be informed of available remedies and of their time-limits is guaranteed under both GCIV (Article 73) and API (Article 75(4)(j)). Article 73(1) GCIV recognises the right to be informed of appeal or petition, and of its time-limit, and the "right of appeal provided for by the laws applied by the court". The second paragraph ensures that in the event that the laws of the occupied territory fail to recognise appeals, the convicted persons must be given the right to petition against the finding and sentence to the "competent authority" of the occupying power.[229] Article 75(4)(j) API, which very much recapitulates Article 73(1) GCIV, guarantees the right of a convicted person to "be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised". Turning to international human rights law, it is only the *Report on Terrorism and Human Rights* adopted by the IACmHR that expressly recognises non-derogability of this right.[230] Whether or not from this right can be deduced the right of appeal as such needs to be queried below.

8.9. Non bis in idem *(Freedom from Double Jeopardy)*

Article 75(4)(h) API safeguards the right not to be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure (the *non bis in idem* or *ne bis in idem* principle). This right must be recognised as a minimum guarantee for any persons convicted for offences related to the armed conflict. With special regard to protected persons in occupied territory (or in the territory of a party to the conflict), Article 117(3) GCIV recognises that they may not be punished more than once for the same act or on the same charge (count).[231] This right is fully recognised in the instruments of both international criminal law[232] and international human

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For the case-law of the ACHR, see IACmHR, Nicaragua, Case 10.198, *Reynaldo Tadeo Aguado*, Resolution No. 29/89, 29 September 1989**,** *Annual Report of the Inter-American Commission on Human Rights* (1989–90), at 73–96, Second Statement, and Conclusions, paras. 2 and 4; and US, Supreme Court, *Ward v. State of Texas*, Judgment, 1 June 1942, 316 U.S. 547 (1942).

[229] GCIV, Article 73(2).

[230] IACmHR, *Report on Terrorism and Human Rights, supra* n. 59, para. 261(c)(v).

[231] GCIV, Article 117(3).

[232] ICC Statute, Article 20(2); ICTY Statute, Article 10(1); ICTR Statute, Article 9(1); and Statute of the Special Court for Sierra Leone, Article 9(1).

rights law.[233] Its non-derogable nature is yet to be fully endorsed in the context of international human rights law, except for the IACmHR's *Report on Terrorism and Human Rights*.[234]

The *non bis in idem* principle does not prohibit either the resumption of a trial justified by exceptional circumstances,[235] or the prosecution of the same offences in different states.[236] Such revisions of conviction or sentence[237] can be exceptionally recognised on the basis of two grounds: (i) the discovery of new evidence, which was unavailable at the time of the trial; and (ii) fundamental defects in previous proceedings.[238] Further, in case occupation courts are equipped with the appeal system, prosecutorial appeals against both convictions and acquittals[239] are not considered inconsistent with this principle.[240]

The *non bis in dem* principle entails crucial implications on the jurisdictional relationship between the occupation court and the ICC. Special regard must be had to specific exceptions to this principle provided in Article 20(2) and (3) of the ICC Statute. Starting with Article 20(2), it is highly unlikely that the *res judicata* effect of the ICC vis-à-vis national courts (what Van der Wyngaert and Ongena call "downward *ne bis in idem*")[241] has serious ramifications on the occupation court. In relation to the meaning of *idem*, it must be noted that Article 75(4)(h) API mentions "offence", and not "conduct". As commented by Wyngaert and Ongena, in the vertical relationship between national courts and the ICC,[242] an individual person who has been convicted for "core crimes" by the ICC can be retried for the same acts in proceedings before the local court or the occupation court in occupied territory on the basis of "ordinary crimes". Further, it may be suggested that these courts sitting in occupied territory are

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[233] ICCPR, Article 14(7); ACHR, Article 8(4); and Protocol 7 to ECHR, Article 4. See also EU Charter of Fundamental Rights, Article 50.

[234] IACmHR, *Report on Terrorism and Human Rights*, supra n. 59, para. 261(a).

[235] HRC, *General Comment No 13*, 12 April 1984, para. 19.

[236] HRC, *A.P. v. Italy, No. 204/1986*, Admissibility Decision, 2 November 1987, U.N. Doc. Supp. No. 40 (A/43/40), at 242, para. 7.3,

[237] See ICC Statute, Article 84.

[238] C. Van den Wyngaert and T. Ongena, "*Ne bis in idem* Principle, Including the Issue of Amnesty", in: Cassese, *et al.* (eds) (2002), *supra* n. 133, Ch. 18.4. 705–729, at 722. Similarly, Article 4(2) of Protocol No. 7 to ECHR allows the reopening of the case if there is evidence of new or newly discovered facts, of if there has been a fundamental defect in the previous proceedings that could affect the outcome of the case.

[239] See ICC Statute, Article 81.

[240] While in common law countries, such appeals are deemed derogation from this principle, in civil law countries this is not considered even an exception to it: Van den Wyngaert and Ongena, *supra* n. 238, at 722.

[241] *Ibid.*, at 722–723.

[242] *Ibid.*, at 723–724.

not bound to take into account the sentence already pronounced by the ICC for the same conduct.[243]

In the scenario contemplated in Article 20(3) ICC Statute ("upward *ne bis in idem*", according to Van der Wyngaert and Ongena),[244] the *ne bis in idem* principle is inapplicable in two circumstances: (i) where this principle serves to shield a person from criminal responsibility for core crimes within the jurisdiction of the ICC, as in the case of sham trials; and (ii) where the proceedings are marred by irregularity (namely, absence of independence or impartiality) flouting due process guarantees recognised under international law *and* were conducted in a manner inconsistent with an intent to bring the person concerned to justice, as in the case of partisan justice.

Unlike the Statutes of the ICTY and ICTR,[245] the ICC Statute does not expressly recognise, as an exception to the *non bis in idem* principle, the possibility of trying a person who has been tried by a national court for an act constituting war crimes, but only with respect to ordinary crimes.[246] If a person has been tried only for offences against penal/security laws in occupied territory in relation to an act that involves war crimes, the occupying power is obligated under customary international criminal law to prosecute him/her for war crimes based on the same act.[247] Indeed, what Article 75(4)(h) API prohibits is the re-trial for an offence "under the same law".

8.10. *The Right to Public Proceedings*

Article 75(4)(i) API recognises the right of any individual persons prosecuted for an offence to have the judgment pronounced publicly. While not specifically

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[243] This is suggested by Van den Wyngaert and Ongena: *ibid.*, at 724.

[244] *Ibid.*, at 724–726.

[245] Article 10(2)(a) ICTY Statute; and Article 9(2)(a) ICTR Statute.

[246] The drafters considered this exception too ambiguous: Van der Wyngaert and Ongena, *supra* n. 238, at 725–726.

[247] A new trial may be necessary even if war crimes elements fall outside the scope of grave breaches under GCs and API, *and* the catalogue of "other serious violations of laws and customs" applicable to international armed conflict. This is because the catalogue of war crimes under customary international law does not overlap the list embodied in Article 8 ICC Statute. This assumption can be supported by the inclusion of Article 10 ICC Statute, which reads that "[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute". Paust goes even so far as to suggest that all violations of laws of war amount to war crimes over which there is universal jurisdiction: J.J. Paust, "The United States as Occupying Power over Portions of Iraq and Special Responsibilities under the Laws of War", (2003) 27 *Suffolk Transnational Law Review* 1, at 13. See also J.B. Bellinger, III and W.J. Hayes, II, "A US Government Response to the ICRC Study Customary International Humanitarian Law", (2007) 89 *IRRC* No. 867, 443, at 467 (discussing diversity of war crimes in national practice in relation to Rule 157 in the ICRC's *Customary IHL Study*).

referring to the right of the accused as such, Article 74(1) GCIV recognises the entitlement of representatives of the protecting power to attend the trial of the accused persons in occupied territory with a view to preventing arbitrary detention of protected persons.[248] The presence of the protecting power can be denied only in case of *in camera* proceedings for security reasons. In case they are excluded, the representatives must be notified of such exclusion, and the date and place of trial.[249]

Apart from the recognition of this right in several national military manuals and laws,[250] this right is fully recognised in the practice of international human rights law[251] and international criminal law.[252] Nevertheless, the case-law and the documents developed by human rights treaty bodies have yet to attribute the non-derogable nature to this right.

9. *The Elements of the Rights of the Accused, Which are Implied from the General Terms under Article 75(4) API*

9.1. *The Rights Relating to Means of Defence*

9.1.1. *Overview*

The fair trial guarantees relating to means of defence available to persons accused of offences in occupied territory are enumerated in GCIV. Article 72(1) GCIV recognises five specific rights of the accused persons, or of their advocate or counsel: (i) the right to present evidence necessary to their defence; (ii) the right

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[248] Henckaerts and Doswald-Beck (eds), *supra* n. 60, Vol. I, at 345–346.

[249] GCIV, Article 74(1).

[250] Among the military manuals cited in Vol. II of the *Study*, those of Argentina, Colombia, New Zealand and Sweden are the only ones clearly applicable to accused persons who are not prisoners of war: Henckaerts and Doswald-Beck (eds), *supra* n. 60, Vol. II, Part 2, at 2475–2476, paras. 3543–3547. Among the national laws cited therein, only the laws of Ireland and Norway recognise this right for *any* accused persons in occupied territory. Again, it is left unclarified whether the relevant provisions of the national constitutions are susceptible to derogation.

[251] ICCPR, Article 14(1); ECHR, Article 6(1), and ACHR, Article 8(5). While there is no express reference to this right in the text of the African Charter, the AfCmHPR, drawing on the experience of the Human Rights Committee, has recognised that this is a requirement of a fair trial: AfCmHPR, *Civil Liberties Organization and Others v. Nigeria, No. 218/98*, Decision of 7 May 2001, paras. 36–37; *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 15–29 May 2003, Section A, para. 3. See also UDHR, Articles 10–11; American Declaration on the Rights and Duties of Man, Article XXVI; and EU Charter of Fundamental Rights, Article 47(2).

[252] ICC Statute, Article 64(7) and Article 67(1), Article 68(2) and Article 76(4); ICTY Statute, Article 20(4) and Article 23(2); ICTR Statute, Article 19(4) and Article 22(2); and Statute of the Special Court for Sierra Leone, Article 17(2) and Article 18. See also US Military Tribunal, Nuremberg, *Josef Altstötter and Others*, (*The Justice Trial*), 17 February–4 December 1947, (1948) 6 *LRTWC* 1–110, Case No. 35; (1947) 14 *AD* 278 (No. 126).

to call witnesses; (iii) the right to be assisted by a qualified advocate or counsel of their own choice; (iv) the right of the advocate or the counsel to visit the accused freely; and (v) the right of the advocate or the counsel to enjoy the necessary facilities for preparing the defence. Article 123(2) GCIV guarantees the rights of the accused internee, which include: (i) the right to be given an opportunity to explain his/her conduct and to defend him/herself; (ii) the right to call witnesses; and (iii) the right to have recourse to the services of a qualified interpreter. In contrast to the relatively elaborate requirements embodied in Article 72(1) GCIV,[253] Article 75(4)(a) API adverts to the entitlement of the accused to "all necessary rights and means of defence" only in a general and indefinite manner. It does not provide specific elements relating to means of defence. Indeed, at the Diplomatic Conference at Geneva (1974–1977), there was a proposal to insert more specific reference to means of defence,[254] such as the right to legal assistance and the right to a service of an interpreter, but this was not accepted.

It must be explored whether the general term "all necessary rights and means of defence" under Article 75(4)(a) API can be interpreted as a basis for deducing specific rights. These include the right to defend oneself or to be assisted by a lawyer, the right to legal assistance, and the right to communicate with counsel, as well as the right to an interpreter and a translator.

Inquiries will be made into four specific rights relating to means of defence: (i) the right to defend oneself or to be assisted by a lawyer of one's own choice; (ii) the right to legal assistance; (iii) the right to sufficient time and facilities to prepare the defence; (iv) the right of the accused to communicate freely with a counsel; and (v) the right to the assistance of an interpreter or a translator.

When seeking guidance from the practice of human rights treaty bodies, one must bear in mind that none of these rights has yet to be recognised as inalienable in the treaty provisions, and in the case-law or the documents provided by these bodies. Indeed, the HRC's *General Comment No. 29* fails to single out any specific right of defence in its expanded catalogue of non-derogable rights. Again, it is by reference to the progressive twist provided by the IACmHR in its *Report on Terrorism and Human Rights* that one can confirm that rights of defence have acquired the non-derogable status.[255]

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[253] For the rights relating to means of defence for prisoners of war, see more elaborate rules embodied in GCIII, Article 105.

[254] See the proposal made by the Netherlands and Switzerland, CDDH/III/317, 29 April 1976, as reported in: *O.R.*, Vol. III, at 294. See also *O.R.* Vol. XV, at 29 and 31, Summary Record of the Forty-Third Meeting, 30 April 1976, CDDH/III/SR.43, paras. 21 and 31.

[255] IACmHR, *Report on Terrorism and Human Rights, supra* n. 59, para. 247 (the right to defend oneself or to be assisted by a lawyer of one's own choice; the right to legal assistance; the right

9.1.2. *The Right to Defend Oneself or to be Assisted by a Lawyer of One's Own Choice*

The right to defend oneself or the right to legal assistance, which has a long pedigree in international criminal law[256] and international human rights law,[257] finds its explicit basis in IHL treaties. Article 72(1) GCIV recognises that the accused persons in occupied territory have "the right to present evidence necessary to their defence . . . [and] to be assisted by a qualified advocate or counsel of their own choice".

With respect to the period in which the accused persons must be given access to a lawyer, Article 72(1) GCIV mentions only that the procedures in occupied territory must encompass the right to legal counsel both during and before the trial to realise effective defence.[258] The *acquis* of the jurisprudence of human rights treaty bodies suggests that access to lawyers must be secured both before the trial (including even at the interrogation phase) and at all crucial stages of the proceedings.[259] The IACmHR, in its *Report on Terrorism and Human Rights*,

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to sufficient time and facilities to prepare the defence; and the right to the assistance of an interpreter or translator).

[256] IMT Charter, Article 16(d); IMTFE Charter (Tokyo), Article 9(c); ICC Statute, Article 67(1); ICTY Statute, Article 21(4); and ICTR Statute, Article 20(4); and Statute of the Special Court for Sierra Leone, Article 17(4). The statutes of the modern international criminal tribunals (the latter four) entail the right to be informed of the right to defend oneself or to be assisted by a counsel of one's own choice. See also US Military Tribunal, Nuremberg, *Josef Altstötter and Others*, (*The Justice Trial*), 17 February–4 December 1947, (1948) 6 *LRTWC* 1–110, Case No. 35; (1947) 14 *AD* 278 (No. 126); US Military Commission, Shanghai, *Trial of Lieutenant-General Harukei Isayama and Seven Others*, Judgment of 1–25 July 1946, 5 *LRTWC* 60; and the US, Supreme Court, *Ward v. State of Texas,* Judgment, 1 June 1942, 316 U.S. 547 (1942).

[257] ICCPR, Article 14(3)(d); ECHR, Article 6(3)(c); ACHR, Article 8(2)(d); and AfCHPR, Article 7(1)(c). For the prohibition on compelling the accused to accept a lawyer of government's choice, see HRC, *Saldías López v. Uruguay, 52/1979*, CCPR/C/13/D/52/1979, View of 29 July 1981, para. 13; AfCHPR, *Civil Liberties Organization and Others v. Nigeria, No. 218/98*, Decision of 23 April–7 May 2001, paras. 27–31.

[258] GCIV, Article 72(1) (the right of the accused "to enjoy the necessary facilities for preparing the defence").

[259] See, *inter alia*, HRC, *Sala de Tourón v. Uruguay, No. 32/1978*, View of 31 March 1981, CCPR/C/12/D/32/1978, para. 12; *Pietraroia v. Uruguay, No. 44/1979*, View of 27 March 1981, CCPR/C/12/D/44/1979, para. 17; *Wight v. Madagascar, No. 115/1982*, CCPR/C/22/D/115/1982, View of 1 April 1985, para. 17; *Lafuente Peñarrieta and Others v. Bolivia, No. 176/1984*, View of 2 November 1987, CCPR/C/31/D/176/1984, para. 16; *Little v. Jamaica, No. 283/1988*, View of 1 November 1991, U.N.Doc.CCPR/C/43/D/283/1989, paras. 8.3–8.4. For the case-law of the AfCHPR, see *Avocats Sans Frontières v. Burundi, No. 231/99*, Decision, 23 October–6 November 2000, para. 30. For the case-law of the ECHR, see ECtHR, *Imbrioscia v. Switzerland*, Judgment of 24 November 1993, A 275, para. 33; and *Averill v. UK*, Judgment of 6 June 2000, paras. 57–61. For the jurisprudence of ACHR, see IACmHR,

has highlighted the special importance of this right especially in cases where the accused persons are: (i) in detention; (ii) giving a statement; or (iii) undergoing interrogation.[260]

9.1.3. *The Right to Free Legal Assistance*

Article 72(2) GCIV lays down that in case the accused persons fail to choose an advocate, the protecting power may appoint one for them. If the accused faces a serious charge but the protecting power is not functioning, then the occupying power must provide an advocate or counsel, with the consent of the accused. While not being classified as non-derogable, the right to *free* legal assistance when the interests of justice so requires is fully anchored in international human rights law[261] and international criminal law.[262]

The *ICRC's Customary IHL Study*, by drawing heavily on the case-law and the documents of human rights treaty bodies, concludes that the right to legal assistance must entail the availability of legal services *free* of charge. The *Study's* prevailing reliance on the practice of international human rights law (rather than on that of national military laws) in this respect[263] may cast some doubt on the conclusion that the right to legal services *free* of charge is already ingrained in the solid ground of customary IHL. The *Study* notes that the case-law of human rights law[264] has provided essential guidelines for the circumstances in which free

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Resolution No. 29/89, Case 10.198, Nicaragua, 29 September 1989, OEA/Ser.L/V/II.77 rev.1, doc. 7, *Annual Report of the Inter-American Commission on Human Rights*, (1989–1990), third statement and Conclusions, para. 2.

[260] IACmHR, *Report on Terrorism and Human Rights, supra* n. 59, para. 237.

[261] ICCPR, Article 14(3)(d); ECHR, Article 6(3)(c); and ACHR, Article 8(2)(e) (while this right is subject to the conditions of domestic law, the IACtHR has held that the free services must be recognised for the accused who are indigent and when the fairness of the hearing so demands: IACtHR, *Exceptions to the Exhaustion of Domestic Remedies* case, Advisory Opinion, OC-11/90, 10 August 1990, paras. 25–27.

[262] ICC Statute, Article 67(1)(d); ICTY Statute, Article 21(4)(d); ICTR Statute, Article 20(4)(d); and Statute of the Special Court for Sierra Leone, Article 17(4)(d).

[263] Henckaerts and Doswald-Beck (eds), *supra* n. 60, Vol. I, at 361–362. Most of the empirical data on national military laws cited in the *Study* concern the prisoners of war who are accused of offences, and not protected persons or civilians. Further, the national military manuals cited in the *Study* do not specifically recognise the right to *free* legal services if the interests of justice so require: *ibid.*, Vol. II, Part 2, at 2435–2439. Free legal services are recognised only in limited numbers of national laws: *ibid.*, at 2438, para. 3263, n. 2985. See also *UK Manual* (2004), *supra* n. 3, at 295–296, para. 11.63 (no reference to the right to free legal services as such).

[264] See, *inter alia*, HRC, *Currie v. Jamaica, No. 377/1989*, View of 29 March 1994, CCPR/C/50/D/377/1989, paras. 13.2–13.4; *Marriott v. Jamaica, 519/1992*, Admissibility Decision, 30 June 1994, CCPR/C/55/D/519/1992, para. 6.2; AfCmHPR, *Avocats Sans Frontières v. Burundi*, 231/99, Decision, 23 October–6 November 2000, para. 30; ECtHR, *Pakelli v. Germany*, Judgment of 25 April 1983, A 64, paras. 30–40; and *Quaranta v. Switzerland*, Judgment, 24 May 1991, A205, paras. 27 and 32–34. The IACmHR notes that the factors determining the

services of a lawyer are required, taking into account such factors as the complexity of the case, the seriousness of the offence and the severity of the case.[265]

9.1.4. *The Right to Sufficient Time and Facilities to Prepare the Defence*

Article 72(1) GCIV specifically recognises the right of the accused in occupied territory to "necessary facilities" for preparing the defence, without, however, adverting to "sufficient time". The practice of national military laws mostly follows the wording of this provision, so that the recognition of the material scope of this right is limited only to facilities (to the exclusion of temporal element).[266] In contrast, both human rights treaties[267] and the statutes of international criminal law[268] fully endorse the right to both physical and temporal elements (facilities and time).

The present writer proposes that the requirement of necessary facilities for the defence as embodied in Article 72 GCIV be taken as embracing the temporal element. This interpretation can be attended by the argument that the corresponding customary norm equipped with the same material elements has already been shaped and grafted onto the relevant treaty norm under IHL (namely, the norm embodied under Article 72 GCIV). The cogency of such argument can be reinforced by the express recognition of this right in the instruments of international human rights law and international criminal law. Still, whether Article 72 GCIV may be deemed a provision of "norm-creating character" in the sense articulated by the ICJ in the *North Sea Continental Shelf Cases*[269] remains ambivalent, in view of the limited scope of application *ratione materiae* (occupied territory) and *ratione personae* (protected persons).

In its *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, the African Commission on Human and People's Rights has delineated factors determinative of the adequacy of time for preparation of a defence. According to the *Principles and Guidelines*, the factors include: (i) the complexity of the case; (ii) the defendant's access to evidence; (iii) the length of time laid down by rules of procedure prior to particular proceedings; and (iv) prejudice to the defence.[270]

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need for free legal representation are: (i) the significance of a legal proceeding; (ii) its legal character; and (iii) its context in a particular legal system: IACmHR, *Report on Terrorism and Human Rights, supra* n. 3, para. 236.

[265] Henckaerts and Doswald-Beck (eds), *supra* n. 60, Vol. I, at 362.

[266] *Ibid.*, Vol. II, part 2, at 2435–2439.

[267] ICCPR, Article 14(3)(b); ECHR, Article 6(3)(b); and ACHR, Article 8(2)(c). See also the *Body of Principles of All Persons under Any Form of Detention or Imprisonment*, Principle 18(2).

[268] ICC Statute, Article 67(1)(b); ICTY Statute, Article 21(4)(b); ICTR Statute, Article 20(4)(b); and Statute Sierra Leone, Article 17(4)(b).

[269] *North Sea Continental Shelf Cases*, Judgment of 20 February 1969, ICJ Rep. 1969, 3, at para. 72.

[270] AfCmHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*,

9.1.5. *The Right of the Accused to Communicate Freely with Counsel*

Article 72(1) GCIV guarantees the entitlement of counsel to visit the accused freely. The right of the accused to communicate freely with counsel, which is fully anchored in international human rights law[271] and international criminal law,[272] can be inferred as a logical corollary of the right to be assisted by a legal counsel or the right to legal assistance. Clearly, denying the accused communication with their counsel will defeat the very essence of the latter right. Nevertheless, this right has yet to be recognised as non-derogable in any of the case-law or document of the supervisory bodies of human rights treaties.[273]

9.1.6. *The Right to the Assistance of an Interpreter or Translator*

Article 72(3) GCIV recognises the right of the accused in occupied territory to be assisted by an interpreter, both during preliminary investigations and during the hearing in court. They are also entitled to object to the interpreter at any time and to ask for his/her replacement. With special regard to protected persons who are interned and accused of disciplinary offences in occupied territory (and in the territories of the parties to the conflict), Article 123(2) GCIV stipulates that such persons must be able to claim assistance of a qualified interpreter. The right to assistance of an interpreter is fully established in instruments of both international human rights law[274] and international criminal law.[275]

15–29 May 2003, N. *Provisions Applicable to Proceedings Relating to Criminal Charges*, para. 3(c).

[271] ACHR, Article 8(2)(d); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 18; and *Basic Principles on the Role of Lawyers*, Principle 8. See also HRC, *General Comment No. 13* (1984); AfCmHPR, *Resolution on the Right to Recourse and Fair Trial; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 15–29 May 2003, Sections G and N para. 2. For the jurisprudence, see, AfCmHPR, *inter alia, Civil Liberties Organization and Others v. Nigeria, No. 218/98*, Decision, 23 April – 7 May 2001, paras. 27–31; and ECmHR, *Can v. Austria, No. 9300/81*, Report of 12 July 1984, paras. 53 and 57.

[272] ICC Statute, Article 67(1)(b); ICTY Statute, Article21(4)(b); ICTR Statute, Article 20(4)(b); and Statute of Sierra Leone, Article 17(4)(b).

[273] See, for instance, IACmHR, *Report on Terrorism and Human Rights, supra* n. 59, paras. 247 and 261.

[274] ICCPR, Article 14(3)(f); Convention on the Rights of the Child, Article 40(2)(b)(vi); ACHR, Article 8(2)(a); and ECHR, Article 6(3)(e). Though this right is not explicitly provided in the African Charter, the AfCHPR has recognised it as part of the right to a fair trial: AfCmHPR, 11th Session, Tunis, 2–9 March 1992, *Resolution on the Right to Recourse and Fair Trial*, para. 2(e)(iv); and *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted at the 33rd Ordinary Session, Niamey, Niger, 15–29 May 2003, N. Provisions Applicable to Proceedings Relating to Criminal Charges, para. 4.

[275] ICC Statute, Article 67(1)(f); ICTY Statute, Article 21(4)(f); ICTR Statute, Article 20(4)(f); and Statue of the Special Court for Sierra Leone, Article 17(4)(f).

The question remains whether the occupying power must translate not only oral statements, but also all documents employed as evidence.[276] As a comparison, it ought to be noted that Article 67(1)(f) ICC Statute qualifies the scope of the right to language assistance, referring to "such translations as are necessary to meet the requirement of fairness". As Zappalà notes,[277] this aspect departs from the relevant provisions of the ICTY (Article 21(4)(f)) and ICTR Statutes (Article 20 (4)(f)), both of which do not provide such restrictions on this right.

9.2. *The Right to Trial without Undue Delay*

Article 71(2) GCIV specifically recognises the right of the accused to be tried "as rapidly as possible". The right to trial without undue delay is fully established in instruments of both international human rights law and international criminal law.[278] Nevertheless, this right is handicapped in two respects. First, the catalogue of procedural safeguards under Article 75(4) API does not include this right. Unless the customary law equivalent is considered broader in the scope of application, this raises the question of its applicability to persons other than protected persons. Second, the HRC's *General Comment No. 29* or documents prepared by other human rights treaty bodies fail to confirm the inalienable status of this right. Indeed, even the most liberal IACmHR, in its *Report on Terrorism and Human Rights*, concedes that the right to a hearing within a reasonable time can be derogated from in case of emergency.[279] However, the *Report* emphasises that a delay exceptionally longer than would otherwise be acceptable in non-emergency situations can be recognised only pursuant to two specific conditions: (i) the delay must be subordinated "at all times" to judicial review; and (ii) it must not be prolonged or indefinite.[280]

The first condition suggested by the IACmHR requires two comments germane to occupation courts. In the first instance, the *Report* fails to specify the frequency of review in case the trial becomes lengthy, if not protracted. Second, clearly, the requirement that accused persons who are detained pending trial must be given the right to seek *judicial* review needs to be distinguished from

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[276] On this matter, see ECtHR, *Luedicke, Belkacem and Koç*, Judgment of 28 November 1978, A 29, para, 48; and *Kamasinski v. Austria*, Judgment, 19 December 1989, A 168, para. 74.

[277] Zappalà, *supra* n. 133, at 1351.

[278] ICCPR, Article 9(3)("within a reasonable time") and Article 14(3)(c) ("without undue delay"); Convention on the Rights of the Child, Article 40(2)(b)(iii) ("without delay"); ECHR, Article 5(3) and Article 6(1) ("within a reasonable time"); ACHR, Article 8(1) ("within a reasonable time"); and AfCHPR, Article 7(1)(d) ("within a reasonable time"). See also *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 38; EU Charter of Fundamental Rights, Article 47.

[279] IACmHR, *Report on Terrorism and Human Rights, supra* n. 59, paras. 253 and 262(c).

[280] *Ibid.*, para. 262(c).

the requirement provided in Article 78(2) GCIV. As noted above, according to this provision, periodic review of protected persons who are interned or administratively detained without criminal charge in occupied territory can be undertaken by an administrative board.[281]

In assessing the customary law status of this right based on national military manuals or relevant national laws, the *ICRC's Customary IHL Study's* methodological rigour may be questionable. The actual empirical examples cross-referenced by Vol. I and cited in Vol. II of the *Study* are not thoroughly consistent with the *Study's* assertion that the right to trial without delay is set forth in "several" military manuals and included in "most, if not all, national legal systems".[282] To be fair to the *Study*, these data may be seen as referring only to the most exemplary ones. In respect of national laws, apart from the Kenyan constitutional provision whose non-derogable status remains unexplained, the data cited in Vol. II relate to the laws of three countries which criminalise violations of the provisions of GCIV. Yet, these national laws contemplate the personal scope of application equivalent to that of Article 71 GCIV.[283]

Notwithstanding such qualifications, it must be submitted that the customary law status of GCIV, including even those provisions which were considered progressive development of law in 1949, is fully established. It would only be a small incremental step from the claim that the right which corresponds to the right contained in Article 71 GCIV has evolved into customary IHL to the argument that its personal scope of application is broad enough to cover *any* individual persons who are accused of offences relating to international armed conflict.

Assuming this conclusion, a valuable insight can be obtained from the jurisprudence of the monitoring bodies of human rights treaties. The reasonableness in the length of time must be calculated from the time of the charge to the final judgment, including the appeal.[284] According to the case-law of the ECHR and the ACHR, the relevant factors include: (i) the complexity of the case; (ii) the behaviour of the accused; and (iii) the diligence of the authorities.[285] The

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[281] Article 78(2) GCIV refers to "a competent body" for the purpose of review.

[282] Henckaerts and Doswald-Beck (eds), *supra* n. 60, Vol. II, Part 2, at 2447, paras. 3316–3324. Indeed, the express embodiment of this right for persons other than prisoners of war, who are accused in occupied territory, are confined only to the military manuals of Argentina, Australia, Canada, Columbia, New Zealand, Spain, and US: *ibid.*, at 2447, paras. 3316–3321 and 3323. See also *UK Manual* (2004), *supra* n. 3, at 295–296, para. 11.63 (no mention of this right).

[283] Henckaerts and Doswald-Beck (eds), *supra* n. 60, Vol. II, Part II, at 2447–2448, paras. 3324–3327.

[284] HRC, *General Comment No. 13* (1984).

[285] See *inter alia*, ECtHR, *Wemhoff v. Germany*, Judgment of 27 June 1968, A7, para. 12; *König v. Germany*, Judgment of 28 June 1978, A 27, paras. 101–111; *Letellier v. France*, Judgment of 26 June 1991, A207, para. 35; and *Tomasi v. France*, Judgment of 27 August 1992, A241–A,

evaluation of the diligence of the authorities must necessarily take into account the extraordinary situation of occupation.

9.3. *The Right to Remain Silent*

There is growing recognition of the right to remain silent under international human rights law.[286] This right, together with the correlative principle that no adverse inference can be drawn from silence, can be deduced from both the right not to incriminate oneself and the right to be presumed innocent. Even so, its non-derogable status in the context of international human rights law is highly debatable. In the context of IHL, it remains inconclusive whether the right to remain silent and the prohibition on drawing adverse inference from silence have acquired customary law status.[287] In occupied Iraq, the CPA's Memorandum No. 3, which was adopted long after the public outcry over the abuses at Abu Grab, amended the Iraqi Criminal Procedure Code. It recognised both the right of the accused to remain silent and the prohibition on drawing adverse inference from silence.[288] This salutary step contributed to state practice in the direction of the customary law status of this right.

9.4. *The Right of Convicted Persons to Appeal*

While recognising the right of the convicted persons to be informed of available remedies and of their time-limits, both Article 73 GCIV and Article 75(4)(j) API stop short of expressly recognising the right of appeal. The qualifying phrase "provided for by the laws applied by the court" suggests that Article 73(1) does not require the occupying power to guarantee the right of appeal against sentence in all circumstances.[289] Along this line, the *ICRC's Commentary on API*

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para. 102; IACtHR, *Genie Lacayo* Case, Judgment of 29 January 1997, Series C No. 30, para. 77; and IAmCmHR, see *Jorge A. Giménez v. Argentina*, Case 11.245, Report No. 12/96, 1 March 1996, para. 111; *Report on Terrorism and Human* Rights, *supra* n. 59, para. 234.

[286] For instance, the HRC, in its *Concluding Observations on the UK*, stated that:

> The Committee notes with concern that the provisions of the Criminal Justice and Public Order Act of 1994, which extended the legislation originally applicable in Northern Ireland, whereby inferences may be drawn from the silence of persons accused of crimes, violates various provisions in article 14 of the Covenant, despite the range of safeguards built into the legislation and the rules enacted thereunder.

UN Doc. CCPR/C/79/Add.55, 27 July 1995. See also ECtHR, *Funke v. France*, Judgment of 25 February 1993, A256–A, para. 44.

[287] *ICRC's Customary IHL Study* is silent on this: Henckaerts and Doswald-Beck (eds), *supra* n. 60, Vol. I, at 357–358; and 367–368.

[288] CPA Memorandum No. 3, CPA/MEM/18 June 2003/03, Section 3.

[289] New Zealand's Military Manual (1992), §1330(3); and *UK Manual* (2004), *supra* n. 3, at 297, para. 11.70.

states that convicted persons must be fully advised of available judicial (appeal or petition) or other remedies (such as pardon or reprieve),[290] and of the time limits for such remedies, without, however, expressly referring to the right of appeal as such. The failure fully to embrace the right of appeal can be explained by the fact that when APs were adopted, the majority of the states had yet to recognise the right of appeal in their laws.[291]

On the basis of its detailed survey of the relevant human rights case-law, the *ICRC's Customary IHL Study* concludes that "the influence of human rights on this issue is such that it can be argued that the right of appeal proper – and not only the right to be informed whether appeal is available – has become a basic component of fair trial rights in the context of armed conflict".[292] Nevertheless, the *Study's* assertion is not backed by the empirical evidence in a rigorous manner that otherwise characterises its meticulous survey in many respects.

The *Study* refers to national constitutional provisions,[293] which do not, however, mention their non-derogable status. The *Study* also cites the pertinent provisions of human rights treaties,[294] but all of them, except for the African Charter, are expressly stated as being susceptible to suspension in time of emergencies. Among the work of the supervisory organs of international human rights treaties, again, only the IACmHR's *Report on Terrorism and Human Rights* has confirmed its non-derogability.[295] The national military manuals cited by the *Study* are in tune with the wording of Article 73 GCIV, as they tend to reproduce the wording of this stipulation. They stop short of expressly recognising the right of convicted persons to appeal as such. *Some* national military manuals referred to in the *Study* relate only to the right to appeals of convicted *prisoners of war*,[296] and not of civilians, much less unprivileged belligerents, who are held and convicted in occupied territory. These appraisals suggest that to assert the right of appeal for *all* convicted persons as fully established in customary IHL may be far-fetched within the framework of positive law. Surely, this observation does not negate the possibility that this right may be entering the domain of customary IHL.

If the appeal procedure is instituted for occupation courts, Article 73(2) GCIV requires the occupying power to comply with the penal procedural rules

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[290] *ICRC's Commentary to API*, at 885, para. 3121.

[291] *Ibid.*

[292] Henckaerts and Doswald-Beck (eds), *supra* n. 60, Vol. I, at 369–370.

[293] *Ibid.*, Vol. II, Part II, at 2484–2485, paras. 3604–3605.

[294] ICCPR, Article 14(5); Convention on the Rights of the Child, Article 40(2)(b)(v); Protocol 7 to the ECHR, Article 2(1); ACHR, Article 8(2)(h); and AfCHPR, Article 7(1)(a).

[295] The *Report* considers the non-derogability of the right to appeal as a possibility: IACmHR, *Report on Terrorism and Human Rights, supra* n. 59, para. 261(c)(v).

[296] Henckaerts and Doswald-Beck (eds), *supra* n. 60, Vol. II, Part 2, at 2483–2484 (Argentina and Hungary).

embodied in Part III, Section III, including elaborate fair trial guarantees for the accused persons under Articles 71–73 GCIV.[297] Any time-limit for appeals in case of death penalty or imprisonment of two years or more must not run until the protecting power receives the notification of the judgement.[298]

10. *Conclusion*

The foregoing appraisal has explored how the assertive convergence between IHL and international human rights law has helped shape an emerging framework of due process guarantees in occupied territory. It has deployed the concept of non-derogability of human rights norms as a key to the identification of detailed principles relating to the rights of the accused in the context of IHL. This monograph's underlying assumption is that all the fair trial guarantees of non-derogable nature are *ipso facto* customary norms. It is argued that within the interactive relationship between treaty-based rules and corresponding customary norms, the latter can assist elaborate elements to be read into the general terms employed in the former, such as the chapeau of Article 75(4) API.

Many argue that the intrinsic moral values articulated by specific human rights norms are crucial to determining their non-derogable status.[299] Surely, the very foundation of democracy and the rule of law may be jeopardised by an infringement or suspension of many elements of fair trial guarantees.[300] As examined above, it is very plausible that the conclusion reached by the *ICRC's Customary IHL Study* relating to non-derogability of some judicial guarantees has been swayed by deductive reasoning.[301] This issue is closely intertwined with the method of identifying customary international law, another concept that has played a pivotal role in the assessment of this chapter. As will be analysed in Part V, the ascertainment of customary international law is traditionally

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[297] GCIV, Article 73(2).

[298] GCIV, Article 74(2), 4th sentence.

[299] K. Teraya, "Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights", (2001) 12 *EJIL* 917, at 921–922.

[300] Olivier, *supra* n. 129, at 415. She does not, however, consider it necessary to spell out specific elements of fair trial guarantees which are non-suspendable: *ibid.*, at 417. Indeed, in its Advisory Opinion on *Judicial Guarantees in States of Emergency*, the IACtHR stated that "[i]t is neither possible nor advisable to list all the possible 'essential' judicial guarantees that cannot be suspended under Art. 27(2)": IACtHR, *Judicial Guarantees in States of Emergency (Arts 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87, 6 October 1987, IACtHR, (Ser.A) No. 9 (1987), para. 40.

[301] The IACmHR's *Report on Terrorism and Human Rights*, which the *Study* has heavily relied on in this regard, fails in itself to provide guidelines for ascertaining non-derogability of rights of the accused.

premised on inductive reasoning, which focuses on empirical data to extrapolate a general norm.[302]

There is a salient correlation between judicial guarantees of non-derogable nature and the grave breach form of war crimes based on denial of such guarantees. Wilfully depriving protected persons of "the rights of fair and regular trial" couched only in general terms would amount to a grave breach under Article 147 GCIV and Article 85(4)(e) API, and to war crimes under Article 8(2)(a)(vi) ICC Statute. After thoroughly analysing the Allied post-World War II war crimes trials,[303] Dörmann suggests that the denial of any of the following elements would constitute war crimes: (i) the right to counsel; (ii) the right to prepare a defence (which covers the right to present witnesses and evidence); (iii) the right to be informed of the charges against the accused; (iv) the right to have a judgment rendered by an independent and impartial court; (v) the right to an interpreter; and (vi) the relevance of the length of the trial to the evaluation of the fairness of the proceedings.

Nevertheless, the list of war crimes elements diagnosed by this ICRC legal expert is shorter than the inventory of the rights of the accused which the *ICRC's Customary IHL Study* has found to be customary norms.[304] The customary law status of fair trial rights must be considered to be in flux. It must be questioned whether the evolution of customary law since the end of the Second World War has sufficiently broadened the list of fair trial guarantees backed by the sanction of war crimes prosecution to cover all the elements that are classified by the *Study* as customary IHL. This issue can be clarified through the appraisal of the future practice of the fledgling International Criminal Court. Such an appraisal will help build an enriched theoretical account that can elucidate the conceptual linkage between the rights of fair trial of non-derogable nature on one hand, and the notion of *jus cogens* and the obligations *erga omnes* on the other.[305] It ought to be noted that the identification of war crimes requires mental elements and the absence of grounds precluding criminal responsibility, and hence proves much more restrictive than ascertainment of a violation of non-derogable human rights.[306]

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[302] B. Simma and P. Alston, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles", (1988–89) *Austl. YbkIL* 82, at 88–89.

[303] K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court – Sources and Commentary*, (2003), at 104–105.

[304] It ought to be noted that the two projects were completed almost at the same time, and that Knut Dörmann is one of the contributors to the *Study*.

[305] The ICRC's *Customary IHL Study* avoids categorising any of those rights as peremptory norms.

[306] For the same line of thought in the context of comparison between crimes against humanity and non-derogable human rights, see Olivier, *supra* n. 129, at 410.

This chapter has sought to establish a solid methodology that can provide greater effectiveness in guaranteeing procedural safeguards of detained persons and fair trial guarantees of all accused persons in occupied territory. Through its disaggregated analysis, it has responded to some of the methodological questions left unanswered by the *ICRC's Customary IHL Study* in determining the customary law rights of accused persons while generally endorsing and reinforcing the *Study*'s outcomes.

Part IV

Evolving Issues of the Law of Occupation

In this Part, inquiries are made into two emerging issues relating to occupied territories: (i) extraterritorial application of international human rights law in occupied territories; and (ii) applicability or otherwise of IHL, more specifically, the laws of occupation, to UN peacekeeping forces and the UN post-conflict administration. The appraisal is intended to obtain a general insight into these issues of contemporary concern, which require detailed evaluation of the interaction between IHL and international human rights law.

Chapter 21

The Extraterritorial Application of International Human Rights Law in Occupied Territory

1. *Introduction: Extraterritorial Applicability of International Human Rights Law in Occupied Territory*

It is simply beyond the scope of this monograph to undertake detailed examinations of extraterritorial application of international human rights law. The analysis of this issue will be carried out to the extent that it can shed crucial insight into the scope of application of international human rights law in occupied territories. Some preliminary observations can be made before turning to substantive discussions.

First, as examined below, the Human Rights Committee (HRC), in its *General Comment No. 31*, has stressed that the scope of jurisdiction within the meaning of Article 2 of the International Covenant on Civil and Political Rights (ICCPR) can encompass acts or omissions of agents or troops of a member state outside its territory. It has thus fully recognised the applicability of the ICCPR to occupied territories. It may be criticised that in specific regard to occupied territories, the HRC has left unexplained the question whether the basis of its view is that individuals fall within the jurisdiction of the occupying power, or that human rights protection comes within the responsibility of the occupying power under the rubric of the law of state responsibility.[1]

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[1] F. Hampson and I. Salama, "Working paper on the relationship between human rights law and international humanitarian law", UN Sub-Commission on the Promotion and Protection of Human Rights, Fifty-seventh session, E/CN.4/Sub.2/2005/14, 21 June 2005, para. 83. See, however, the HRC's *Concluding Observations on the third and fourth periodic reports of Israel*. In the third report, the HRC referred to "the long-standing presence of Israel in these territories, Israel's ambiguous attitude towards their future status, as well as the exercise of *effective jurisdiction* by Israeli security forces therein": *Concluding Observations of the Human Rights Committee: Israel*, 18 August 1998, CCPR/C/79/Add.93, para. 10, emphasis added. In the fourth report,

Nevertheless, as McGoldrick notes,[2] the extraterritorial application of international human rights treaties is not a question of state responsibility as crystallised by the International Law Commission,[3] with the distinction to be drawn between primary and secondary rules.[4]

Second, although the question of jurisdiction and the content of human rights are quite separate matters, the linkage between them can be tangibly felt in relation to certain elements of human rights. This is especially the case for institutional aspects of positive duties, such as the obligation to carry out effective and independent investigations into circumstances of killing or torture. In case killing or torture is committed by one member state against individuals (of whatever nationality) in the territory of another member state, the duty to carry out inquiries may not be undertaken with efficacy unless the recalcitrant state can exert effective control over victims.[5]

Third, when assessing the extraterritorial application of international human rights law, the scope of application *ratione materiae* ought to be understood as covering not only civil and political rights, but also economic, social and cultural rights.[6] Indeed, with respect to the occupied Palestinian territories, the Committee on Economic, Social and Cultural Rights, in its *Concluding Observations on Israel*, has stated that "the State party's obligations under the Covenant apply to all territories and populations under its effective control". It has added that "even in a situation of armed conflict, fundamental human rights must be respected and that basic economic, social and cultural rights, as part of the minimum standards of human rights, are guaranteed under customary international law

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the HRC's basis seems shifted to the concept of state responsibility. It stated that "…the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within *the ambit of State responsibility of Israel under the principles of public international law*": Concluding Observations of the Human Rights Committee: Israel, 21 August 2003, CCPR/CO/78/ISR, para. 11, emphasis added.

[2] D. McGoldrick, "Extraterritorial Application of the International Covenant on Civil and Political Rights", in: F. Coomans and M.T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties*, (2004), 41–72, at 42.

[3] See J. Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries*, (2002), at 14–16.

[4] Compare ECtHR, *Loizidou v. Turkey* (Merits and Just Satisfaction), 18 December 1996, A 310, para. 52; and *Banković and Others v. Belgium and Others, No. 52207/99*, Decision of 12 December 2001, para. 57.

[5] McGoldrick, *supra* n. 2, at 46.

[6] For detailed assessment on this issue, see F. Coomans, "Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights", Coomans and Kamminga (eds), *supra* n. 2, 183–199; and R. Künnemann, "Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights", Coomans and Kamminga (eds), *supra* n. 2, 201–231.

and are also prescribed by international humanitarian law".[7] The applicability of ICESCR and the Convention on the Rights of the Child[8] in the occupied territories has been fully confirmed by the ICJ in its Advisory Opinion in the *Wall* case.[9] With respect to the ICESCR, it held that "it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction".[10] The construction of the impugned security wall was found to undermine the safeguards of the right to work, to health, to education and to an adequate standard of living as vested in the ICESCR and in the Convention on the Rights of the Child.[11] According to the Court, the impediments to those rights could not be justified, as being contrary to the requirement of implementing restrictions "solely for the purpose of promoting the general welfare in a democratic society".[12]

2. *The Meaning of the Term "within its territory and subject to its jurisdiction" under Article 2(1) ICCPR*

2.1. Travaux Préparatoires *of Article 2(1) ICCPR*

According to Article 32 Vienna Convention on the Law of Treaties (VCLOT), in case the interpretation pursuant to Article 31 VCLOT either (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd, recourse can be had to the preparatory work as a supplementary means of interpretation. Inquiries need to be made into the *travaux préparatoires* of the ICCPR.[13] When the UN Human Rights Commission completed its work on the draft Covenants in 1954, the Secretary-General's Annotations on the text

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[7] Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, E/C.12/1Add.90, 23 May 2003, para. 31.

[8] Article 2 of the Convention on the Rights of the Child (1989) provides that "States Parties shall respect and ensure the rights set forth in the…Convention to each child *within their jurisdiction*…", emphasis added.

[9] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 136, at 180–181, 189, and 191–192, paras. 112, 130 and 134.

[10] *Ibid*., at 180–181, para. 112. The Court referred to Article 14 ICESCR, which deals with transitional measures in the case of a state which "at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge": *ibid*.

[11] *Ibid*., para. 134.

[12] *Ibid*., para. 136.

[13] For detailed discussions, see M.J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987).

of the draft Covenants on Human Rights attaches the following comment on draft Article 2:

> There was some discussion on the desirability of retaining the words "within its territory". It was thought that a state should not be relieved of its obligations under the covenant to persons who remained within its jurisdiction merely because they were not within its territory. For example, states parties would have to recognize the right of their nationals to join associations within their territories even while they were abroad. There might also be a contradiction between the obligation laid down in paragraph 1 and that laid down in some of the other articles, particularly article 12, paragraph 2(b), which provided that anyone should be free to enter his own territory. On the other hand, it was contended that it was not possible for a state to protect the rights of persons subject to its jurisdiction when they were outside of its territory; in such cases, action would be possible only through diplomatic channels.[14]

In 1963, the Third Committee of the General Assembly carried out continued examinations of whether or not to retain the words "within its territory" under Article 2(1) of the draft ICCPR.[15] Several delegates expressed the concern that these words were restrictive. Many of them proposed the deletion of these words, contending that the words "subject to its jurisdiction" would be preceded by the words "national and territorial" to clarify the national and the territorial jurisdictions of a State Party.[16] In the end, the vote was taken with regard to a specific question of the words "within its territory". The vote was cast by 55

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[14] UN Doc. A/2929, 1 July 1955, 10th Session, *Draft international Covenants on Human Rights, Annotation Prepared by the Secretary-General*, Chapter V, para. 4.

[15] *Official Records of the General Assembly, 18th Session, Third Committee, Social and Humanitarian and Cultural Questions, Summary Records of Meetings 17 September–11 December 1963, United Nations*, UN Doc.A/C3/SR.1211–1287, at 1257–1259 (1257th to 1259th sessions), 1257th session (8 November 1963, 10:45am), paras. 1 (the statement of Mrs Mantzoulinos, Greece); 10 (the statement of Mr Capotorti, Italy); 19 (the statement of Mrs Kume, Japan); 21 (the statement of Mr. Combal, France); and 1258th session (8 November 1963, 3:20pm), paras. 2 (the statement of Mr Ionascu, Romania), 29 (the statement of Mr Cha, China), 32 (the proposal of a vote by the Chairman); 33 (the statement of Mrs Mantzoulino, Greece); 39 (the statement of Mr. Belaunde, Peru); and 1259th session (11 November 1963), para. 30 (the vote cast by 55 votes to 10, with 19 abstentions, in favour of the retention of the words "within its territory" in paragraph 1).

[16] *Ibid*., 1257th session (8 November 1963, 10:45am), paras. 1 (the statement of Mrs Mantzoulinos, Greece); 10 (the statement of Mr Capotorti, Italy); 19 (the statement of Mrs Kume, Japan); 21 (the statement of Mr. Combal, France); 1258th session (8 November 1963, 3:20pm), paras. 29 (the statement of Mr Cha, China), 32 (the proposal of a vote by the Chairman, Mr Diaz Casanueva, Chile); and 33 (the statement of Mrs Mantzoulino, Greece); See also, *ibid*., 1258th session, para. 39 (the statement of Mr. Belaunde, Peru).

votes to 10 (and with 19 abstentions) in favour of the retention of the words "within its territory" in paragraph 1.[17]

McGoldrick concludes from this drafting record that reference to territoriality was retained only with a view to underscoring that there could be some circumstances where a state is unable to protect the rights of persons subject to its jurisdiction when they were outside of its territory.[18] Accordingly, he suggests that the drafting record supports the disjunctive reading of the expression "within its territory and subject to its jurisdiction".[19] In the drafting process, the Peruvian delegation specifically mentioned the inability of states to act outside the limits of its territory to protect individual persons.[20] However, the tenor of the arguments revealed from the much closer evaluations of the drafting records does not support the disjunctive interpretation.

Indeed, the *travaux préparatoires* suggest that the majority of the delegates succumbed to the US amendment.[21] In the Sixth Session of the Commission on Human Rights (on 15 May 1950), the US submitted an amendment to the effect that the words "within its territory" should be added to the phrase "within its jurisdiction". Eleanor Roosevelt, the US representative and the then chairperson of the Commission on Human Rights, voiced a concern that the US would be held responsible for acts of its armed forces in occupied territories of Germany, Austria and Japan, on the basis that "persons living in those territories were in certain respects subject to the jurisdiction of the occupying Powers but were in

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[17] *Ibid*., 1259th session (11 November 1963), para. 30. At the same time, paragraph 1 was adopted by 87 votes to none, with 2 abstentions: *ibid*.

[18] McGoldrick, *supra* n. 2, at 66.

[19] *Ibid*.

[20] *Official Records of the General Assembly, 18th Session, Third Committee, Social and Humanitarian and Cultural Questions, Summary Records of Meetings 17 September – 11 December 1963, United Nations*, UN Doc. A/C3/SR.1211–1287, 1258th session (8 November 1963, 3:20pm), para. 39 (the statement of Mr. Belaunde, Peru).

[21] For the same conclusion drawn from the survey of the *travaux préparatoires*, see M. Dennis, "Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation", (2005) 99 *AJIL* 119, at 123–124. See also E. Schwelb, "Civil and Political Rights – The International Measures of Implementation", (1968) 62 AJIL 827 [Schwelb(1968)a]; *idem*, "Some Aspects of the International Covenants on Human Rights of December 1966", in: A. Eide and A. Schou (eds), *International Protection of Human Rights – Proceedings of the Seventh Nobel Symposium, Oslo, September 25–27, 1967*, (1968) 103, at 109; and Chatham House, *The Law of Armed Conflict: Problems and Prospects, 18–19 April 2005* (presentation by Professor David Kretzmer), at 53. See also *Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba*, March 10, 2006, at 27–30, available at http://www.asil.org/pdfs/ilib0603212.pdf (last visited on 30 June 2008).

fact outside the legislative sphere of those Powers".[22] On the following day, she re-emphasised the importance of adopting the US amendment to paragraph 1 of Article 2, stating that "the insertion of the words 'territory and subject to its' immediately prior to the word 'jurisdiction' . . . would limit the application of the covenant only to persons within its territory and subject to its jurisdiction. By this amendment, the United States Government would not, by ratifying the covenant, be assuming an obligation to ensure the rights recognized in it to the citizens of countries under United States occupation".[23] At the 8th session of the Commission in 1952, the French Delegate proposed that the phrase "within its territory" (or "*se trouvant sur leur territoire*") should be deleted.[24] The US delegation (Mrs Roosevelt) reiterated the US opposition to such an amendment, stating that "[t]he Commission had considered that expression ["within their territory"] necessary so as to make it clear that a State was not bound to enact legislation in respect of its nationals outside its territory".[25] In response, the French Delegate provided the following explanations:

> The French amendment to paragraph 1 [of draft Article 1, or current Article 2] was designed to ensure that all individuals under a country's jurisdiction enjoyed equal rights, whether or not they were within the national territory of that country. The current text of paragraph 1 did not commit States in regard to their nationals abroad.
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> . . .
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> The deletion of the words "within its territory and" would oblige States to ensure equal rights to all their nationals; for example, they would have to recognize the rights of their nationals to join associations within their territory, even while abroad, and to observe, in regard to them, the principle of non-retroactivity of penal law in cases of judgment by default.[26]

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[22] Summary Record of the Hundred and Ninety-Third Meeting, U.N. ESCOR, Human Rights Commission, 6th session, 193rd meeting, UN Doc. E/CN.4/SR.193, at 13, para. 53. (1950) (statements of Eleanor Roosevelt).

[23] UN Doc. E/CN.4/SR.194, at 5, para. 14, (1950). See also *ibid*., at 9, para. 32 (statements of Eleanor Roosevelt).

[24] UN Doc. E/CN.4/L.161, 19 May 1952, Commission on Human Rights, 8th Session, (French amendment to article 1, paragraph 1).

[25] UN Doc. E/CN.4/SR.329, 27 June 1952, Commission on Human Rights, 8th Session, *Summary Record of the Three Hundred and Twenty-Ninth Meeting, Held at Headquarters, New York, on Tuesday, 10 June 1952, at 10.30 a.m.*, at 10.

[26] *Ibid*., at 13. See the statement of the Yugoslav delegation (Mr. Jevremovic) in favour of the French amendment. He stated that "the words 'within its territory and' 'subject to its jurisdiction' were not reconcilable; account must be taken, as regards jurisdiction, of the difference between the geographical and the legal territory": *ibid*. With respect to the view that some of the ICCPR rights should be exercisable by persons not physically present in the territory of the State Party, at the much later 1257th session of the Third Committee of the General Assembly in 1963, the Italian Delegate specifically referred to the right of free access to the

However, the French amendment was defeated at the 8th session of the Commission in 1952.[27] As discussed above, when this issue was revisited in the 1963 session of the General Assembly, again, the proposal to delete the phrase in question was rejected.[28]

2.2. *The Approach of the Human Rights Committee*

In its *Concluding Observations* relating to several countries[29] the HRC has stressed the applicability of the ICCPR outside the territories of the state parties, such as occupied territories and territories where its troops take part in peace missions. In its *General Comment No. 31*, when interpreting the meaning of the scope of application of ICCPR under Article 2(1), which corresponds to Article 1 of the European Convention on Human Rights (ECHR), the HRC states that "…the enjoyment of Covenant rights…applies to those within the power *or* effective control of the forces of a State Party acting outside its territory, *regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation*".[30] The crucial implication of this statement is that even in the absence of effective degree of territorial control, the applicability of a human rights treaty in an extraterritorial context can be determined once a person falls into the power of a state party to that treaty. Abandoning the essentially territorial criterion for the application of human rights

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courts and the right to be free from arbitrary interference with one's family: *Official Records of the General Assembly, 18th Session, Third Committee, Social and Humanitarian and Cultural Questions, Summary Records of Meetings 17 September–11 December 1963, United Nations*, UN Doc. A/C3/SR.1211–1287, at 1257–1259 (1257th to 1259th sessions), 1257th session (8 November 1963, 10:45am), para. 10 (the statement of Mr Capotorti, Italy).

[27] UN Doc. E/CN.4/SR.329, 27 June 1952, Commission on Human Rights, 8th Session, *Summary Record of the Three Hundred and Twenty-Ninth Meeting, Held at Headquarters, New York, on Tuesday, 10 June 1952, at 10.30 a.m.*, at 14, by 10 votes to 4, with 4 abstentions.

[28] *Official Records of the General Assembly, 18th Session, Third Committee, Social and Humanitarian and Cultural Questions, Summary Records of Meetings 17 September–11 December 1963, United Nations*, UN Doc.A/C3/SR.1211–1287, UN Doc. A/C.3/SR.1259th session (11 November 1963), para. 30 (1963). See also the extracts found in Bossuyt, *supra* n. 13, at 53–55.

[29] See, for instance, *Concluding Observations of Human Rights Committee: Germany*, 4 May 2004, CCPR/CO/80/DEU, para. 11; *Concluding Observations of the Human Rights Committee: Israel*, 18 August 1998, CCPR/C/79/Add.93, para. 10; *Concluding Observations of the Human Rights Committee: Israel*, 21 August 2003, CCPR//CO/78/ISR, para. 11; *Concluding Observations: Morocco*, 1 November 1999, CCPR/C/79/Add.113, para. 9; *Concluding Observations: Morocco*, 1 December 2004, CCPR/CO/82/MAR, paras. 8 and 18 (Western Sahara); *Concluding Observations: Syrian Arab Republic,* 24 April 2001, CCPR/CO/71/SYR, para. 10; and *Concluding Observations: Syrian Arab Republic*, para. 8 (acts of Syrian forces in Lebanon).

[30] HRC, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10, emphasis added.

treaties, the HRC broadens the scope of application to cover even a scenario in which a person falls into the hands of peacekeeping forces which do not exert any territorial control.

The HRC's rationale for the application of ICCPR outside the territorial jurisdiction, be it in or outside the military context,[31] lies in reading the obligation of a state party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction" ("à respecter et à garantir à tous les individus se trouvant sur leur territoire et relevant de leur compétence") under Article 2(1) ICCPR in a disjunctive manner.[32] Read in this way, the scope of application is extended to cover not only individual persons within its territory *but also* those who are subject to its jurisdiction.[33]

As discussed above, in its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ recognised the applicability of the ICCPR, the ICESCR and the Convention on the Rights of the Child to occupied territory.[34] In relation to ICCPR, the Court nevertheless appears to have narrowed the standard employed by the HRC, stressing a circular standard,[35] "acts done by a State in the exercise of its jurisdiction outside its own territory".

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[31] Outside the military context, the HRC has long established the principle that Article 2(1) of the Covenant requires a State party to "be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it": HRC, *López Burgos v. Uruguay, Communication No. 52/79*, CCPR/C/13/D/52/1979, View of 29 July 1981, para. 12.3; and *Lilian Celiberti de Casariego v. Uruguay, Communication No. 56/79*, CCPR/C/13/D/56/1979, View of 29 July 1981, para. 10.3 (abduction of Uruguayan citizens in Argentina and Brazil).

[32] For analysis of this practice, see CUDIH, *Expert Meeting on the Supervision of the Lawfulness of Detention During Armed Conflict*, Geneva, 24–25 July 2004, at 33 (presentation by W. Kälin). In the aftermath of the Iraqi invasion of Kuwait, the UN General Assembly adopted Resolutions 45/170, *The situation of human rights in occupied Kuwait,* 18 December 1990; and 46/135, *Situation of human rights in Kuwait under Iraqi occupation*, 17 December 1991), stressing that Iraq was bound by the Covenant in Kuwait, even though the latter was not part of its territory.

[33] See HRC, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10. See also *Concluding Observations of the Human Rights Committee: Israel,* 18 August 1998, CCPR/C/79/Add.93, para. 10 (reference to "effective jurisdiction" exercised by the Israeli security forces in occupied territories).

[34] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 136, at 177–181, paras. 102–113.

[35] J. Cerone, "The Application of Regional Human Rights Law Beyond Regional Frontiers: The Inter-American Commission on Human Rights and US Activities in Iraq", *ASIL Insight*, October 25, 2005.

2.3. *The Human Rights Committee and the "Subsequent Practice" of States Parties*

The disjunctive interpretation of Article 2(1) ICCPR can be justified by systematic interpretation of the phrase "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties. On one hand, the orthodox view is to understand this phrase as referring to the practice of state parties. On the other hand, as analysed in Chapter 19, it can be argued that by agreeing to set up the HRC as the monitoring body of the ICCPR, the states parties have "delegated" to the HRC the competence to provide authoritative interpretation of the ICCPR provisions.[36]

3. *The Meaning of the Term "within their jurisdiction" under Article 1 ECHR*

3.1. Travaux Préparatoires *of the ECHR*

Turning to the ECHR, the *Travaux Préparatoires*[37] suggest that the ECHR was drafted with the specific intention to limit its applicability only to persons within the territorial jurisdiction of member states.[38] The first draft of what is now Article 1 ECHR was Article 2 of the draft found in the *Recommendation No. 38 to the Committee of Ministers*, which was adopted by the Council of Europe's Consultative Assembly (as it was then called) at its First Session on 8 September 1949. This draft article read that: "[i]n this Convention, the Member States shall undertake to ensure to all persons residing within their territories. . . ."[39] Subsequently, the phrase "residing in" was replaced with "living in". In the Governmental Sub-Committee, a second proposal was submitted to the effect that:

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[36] A. Orakhelashvili, "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights", (2003) 14 *EJIL* 529, at 535–536. McGoldrick seems to agree with Orakehelashvili's line of reasoning. This can be seen from his reference to the words: "subsequent practice of states parties *and* of the Human Rights Committee": McGoldrick, *supra* n. 2, at 49, emphasis added.

[37] *Collected Edition of the "Travaux Travaux Préparatoires" – Preparatory Commission of the Council of Europe, Committee of Ministers, Consultative Assembly 11 May–8 September 1949 [hereinafter the Travaux Préparatoires of the European Convention on Human Rights)*, Vol. III, (1975), at 260.

[38] This was confirmed in ECtHR, *Banković and Others v. Belgium and Others, No. 52207/99*, Decision of 12 December 2001, para. 63.

[39] *Travaux Préparatoires of the European Convention on Human Rights, supra* n. 37, Vol. II, at 276 (Recommendation No. 38 to the Committee of Ministers adopted 8th September 1949 on the conclusion of the debates, 18th Sitting held on 8 September 1949).

> Since the aim of [the first] amendment is to widen as far as possible the categories of persons who are to benefit by the guarantees contained in the Convention, and since the words 'living in' might give rise to a certain ambiguity, the Sub-Committee proposes that the Committee should adopt the text contained in the draft Covenant of the United Nations Commission: that is, to replace the words "residing within" by 'within its jurisdiction'….".[40]

Eventually, the Committee of Experts who met in early 1950 adopted the same line of reasoning:

> It seemed to the Committee that the term "residing" might be considered too restrictive. It was felt that there were good grounds for extending the benefits of the Convention to all persons in the territories of the signatory States, even those who could not be considered as residing there in the legal sense of the word. This word, moreover, has not the same meaning in all national law. The Committee therefore replaced the term "residing" by the words "within their jurisdiction", which are also contained in Article 2 of the draft Covenant of the United Nations Commission.[41]

3.2. *The Approach of the European Court of Human Rights in Relation to the Meaning of Jurisdiction under Article 1 ECHR*

The line of reasoning discerned in the ECHR context is much more nuanced than that provided by the HRC. In the *Bankovic and Others*,[42] the European Court of Human Rights (ECtHR) has held that the words "within their jurisdiction" in Article 1 of the ECHR refer to a state's jurisdictional competence which is "primarily" territorial.[43] Nevertheless, it has recognised that the notion of "jurisdiction" within the meaning of Article 1 ECHR is not necessarily limited to the national territory of the member states.[44] The thrust of the argument is that despite the preponderance of the territorial principle in the application of the ECHR, the acts of the member states performed even outside their terri-

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[40] *Ibid.*, Vol. III, 5 February 1950, at 200.

[41] *Ibid.*, Vol. III, 15 February 1950, at 260. See also *ibid.*, at 236 (Preliminary Draft Convention for the Maintenance and Further Realization of Human Rights and Fundamental Freedoms, Doc. A833 dated 1 February 1950).

[42] ECtHR, *Banković and Others v. Belgium and Others, No. 52207/99*, Decision of 12 December 2001, para. 59.

[43] See also ECtHR, *Ilaşcu and Others v. Moldova and Russia*, Judgment of 8 July 2004, para. 312.

[44] ECtHR, *Banković and Others v. Belgium and Others, No. 52207/99*, Decision of 12 December 2001, paras. 68 and 80. Reference is made to the *Loizidou* case which involved the Turkish occupation of Northern Cyprus: *Loizidou v. Turkey* (Merits), Judgment of 18 December 1996, para. 52. See also and *Ilaşcu and Others v. Moldova and Russia*, Judgment of 8 July 2004, para. 314.

tory can be considered an exercise of their jurisdiction within the meaning of Article 1 ECHR.

The rationale adopted by the ECtHR in the *Loizidou* case is that in accordance with the relevant principles of international law, the responsibility of a state can be engaged where it exercises "effective control" of an area outside its national territory, whether or not this is lawful or unlawful.[45] Such control can be exercised directly through its armed forces, or through a subordinate local administration.[46] According to the ECtHR, the requisite degree of control may not be so stringent as to demand detailed control over policies and actions of entities in the controlled area. Instead, the "overall control" of an area is considered sufficient.[47] Indeed, the ECtHR has confirmed the earlier case-law of the old European Commission of Human Rights (ECmHR)[48] and the liberal

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[45] ECtHR, *Loizidou v. Turkey* (Merits), Judgment of 18 December 1996, para. 52. See, however, Prof. Brownlie's criticism of the test developed by the erstwhile European Commission of Human Rights. In the proceedings before the European Court of Human Rights, he criticised the test for confusing the concept of state responsibility with the notion of jurisdiction: *Loizidou v. Turkey (Preliminary Objections)*, Judgment of 23 March 1995, para. 57. See also M. O'Boyle, "The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life After Bankovic'", in: Coomans and Kamminga (eds), *supra* n. 2, 125–139, at 129. He notes that "[i]n the Convention system the concept of jurisdiction and state responsibility are not interchangeable. They are separate concepts though the former is necessarily the pathway to establishing the latter": *ibid*., at 131.

[46] ECtHR, *Loizidou v. Turkey* (Merits), Judgment of 18 December 1996, para. 52. See also *Ilaşcu and Others v. Moldova and Russia*, Judgment of 8 July 2004, para. 314; and *Issa and Others v. Turkey*, Judgment of 16 November 2004, para. 69.

[47] ECtHR, *Loizidou v. Turkey* (Merits), Judgment of 18 December 1996, para. 56; *Ilaşcu and Others v. Moldova and Russia*, Judgment of 8 July 2004, para. 315; and *Issa and Others v. Turkey*, Judgment of 16 November 2004, para. 70. See also *Cyprus v. Turkey*, Judgment of 10 May 2001 (Grand Chamber), para. 77.

[48] See, *inter alia*, ECmHR, *W.M. v. Denmark, No. 17392/90*, Decision of 14 October 1992, 73 DR 193; and *Illich Sanchez Ramirez v. France, No. 28780/95*, Decision of 24 June 1996, 86–A DR 155. In *W.M. v. Denmark*, the ECmHR was confronted with the complaints relating to the removal of nationals of the former German Democratic Republic (DDR) from the Danish Embassy by the DDR police at the request of the ambassador. The Commission stated that:

> It is clear, in this respect, from the constant jurisprudence of the Commission that authorized agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged.… Therefore, in the present case the Commission is satisfied that the acts of the Danish ambassador complained of affected persons within the jurisdiction of the Danish authorities within the meaning of Article 1 of the Convention.

Ibid., at 196 (citing *X v. United Kingdom, No. 7547/76*, Decision of 15 December 1977, 12 *DR* 73). In the *Illich Sanchez Ramirez* case, which concerned the removal of a person from

methodology devised by the HRC[49] and the Inter-American Commission on Human Rights (IACmHR)[50] in interpreting the notion of jurisdiction. It has identified the responsibility of a member state in relation to its agents' operations in the territory of another state.[51]

4. *Doctrinal Discourse on the Meaning of the Words "within its territory and subject to its jurisdiction"*

The ordinary and literal reading of Article 2(1) ICCPR would be to require individuals to be "within the territory"; and (ii) "within its jurisdiction". Some writers adhere to this narrow construction.[52] Nevertheless, as McGoldrick notes,[53] this conjunctive understanding of the two elements may yield a result which is inconsistent with the object and purpose of the ICCPR in the sense of Article 31 of the Vienna Convention on the Law of Treaties (VCLOT), or manifestly absurd within the meaning of Article 32 VCLOT. Some of the ICCPR rights, such as the right to enter one's own country under Article 12(4) presume presence (and not necessarily, residence) of individuals outside the territorial jurisdiction of states.[54] Further, to confine the applicability of ICCPR rights only

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Sudan to France (the fact similar to the *Oçalan v. Turkey*), the Commission provided the following dictum:

> Selon le requérant, il aurait été pris en charge par des agents de la force publique française et privé de liberté dans un avion militaire français (which took him from Khartoum in Sudan to France). Si tel a été le cas, le requérant, à partir du moment de la remise, relevait effectivement de l'autorité de la France et donc de la jurisdiction de ce pays, même si cette autorité s'est exercée en l'occurrence à l'etranger. . . .

Illich Sanchez Ramirez v. France, ibid., at 161–162.

[49] HRC, *Lopez Burgos v. Uruguay*, No. *52/1979*, View of 29 July 1981, CCPR/C/13/D/52/1979, para. 12.3; and *Lilian Celiberti de Casariego v. Uruguay, Communication No. 56/79*, View of 29 July 1981, CCPR/C/13/D/56/1979, para. 10.3.

[50] IACmHR, *Coard et al. v. US*, Case 10.951, Report No. 109/99, 29 September 1999; reprinted in (2001) 8 *IHRR*, at 68, paras. 37, 39, 41 and 43.

[51] ECtHR, *Loizidou v. Turkey* (Merits), Judgment of 18 December 1996, para. 56; and *Issa and Others v. Turkey*, Judgment of 16 November 2004, para. 71.

[52] Dennis (2005), *supra* n. 21, at 125; and M. Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary, 2nd revised ed.*, (2005), at 43, para. 28, n. 78.

[53] McGoldrick, *supra* n. 2, at 47–49.

[54] *Ibid.*, at 48. See also E. Mose and T. Opsahl, "The Optional Protocol to the International Covenant on Civil and Political Rights", (1981) 21 *Santa Clara Law Review* 271, at 297–298 (discussing both the seizure of a citizen's publications and the annulment of his/her passport whiles/he is abroad). In *Lichtensztejn v. Uruguay*, a Uruguayan citizen resident in Mexico, complained of a denial by the Uruguayan authorities to issue his new passport. The respondent State argued that the applicant failed to meet the requirement of Article 1 of the First Optional

to spatial locus of territorial jurisdiction would overlook the circumstances in which individuals are within the territory of a state party but not subject to its jurisdiction. Such circumstances may arise due to the territorial control exerted by an armed opposition group or by an occupying power, or even by an international organisation pursuant to peace support operations.[55]

Many writers follow the disjunctive reading of the two key elements under Article 2(1) ICCPR.[56] Buergenthal provides cogent explanations:

> In fact, however, that reading of Article 2(1) [the conjunctive reading of these two elements so as to require that an individual must be within a state's territory and subject to its jurisdiction] is specious and would produce results that were clearly not intended. It would compel the conclusion, for example, that a person who is temporarily outside his country no longer enjoys the right proclaimed in Article 12(4) not to be "deprived of the right to enter his own country", although that provision is plainly designed to protect only individuals who happen to be outside their country. It would be equally absurd to assume that one who avails himself of the right to leave his country, established in Article 12(2), gives up all the other rights that the Covenant ensures, including, *inter alia*, the right to reenter his country. Similarly Article 14(3)(d) provides for "the right to be tried in his presence" and outlaws *in absentia* criminal trials. Interpreting the Covenant as providing that a criminal defendant is entitled to protection against *in absentia* trials only when he is in the territory of the state, but not when he is outside, is patently absurd.[57]

The disjunctive reading of Article 2(1) suggests that the ICCPR applies to all individuals within its jurisdiction, regardless of whether they are within its ter-

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Protocol in relation to the wording "subject to its [the state party's] jurisdiction", on the ground that when he submitted his petition, he was outside the jurisdiction of the Uruguayan State. The HRC rejected this argument, observing that "…from the very nature of that right [contained in Article 12(2) ICCPR]…in the case of a citizen resident abroad, article 12(2) imposed obligations both on the State of residence and on the State of nationality and [that]…article 2(1) of the Covenant could not be interpreted as limiting the obligations of Uruguay under article 12(2) to citizens within its own territory": HRC, *Lichtensztejn v. Uruguay, No. 77/1980*, 31 March 1983, UN Doc. A.38/40, 166, paras. 4.1. and 6.1. Compare HRC, *Daniel Monguya Mbenge v. Zaire, No. 16/1977*, View of 25 March 1983, UN Doc. A/38/40, at 134 (the trial in absentia involving the pronouncement of the death penalty, which took place after the applicant left the territory of Zaire).

[55] McGoldrick, *supra* n. 2, at 49.

[56] T. Buergenthal, "To Respect and to Ensure: State Obligations and Permissible Derogations", in: L. Henkin (ed), *The International Bill of Rights – The Covenant on Civil and Political Rights* (1981) 72–91, at 74; McGoldrick, *supra* n. 2, at 47–49; T. Meron, "Extraterritoriality of Human Rights Treaties", (1995) 89 *AJIL* 78, at 79; and M. Scheinin, "Extraterritorial Effect of the International Covenant on Civil and Political Rights", in: Coomans and Kamminga (eds), *supra* n. 2, 73–81, at 73, 75–77. See also R. Provost, *International Human Rights and Humanitarian Law*, (2002), at 19, and 21–23.

[57] Buergenthal, *ibid*.

ritory. It ought to be noted that Article 1 of the First Optional Protocol to the ICCPR refers only to the jurisdictional element but not to the intra-territorial requirement.[58]

These examinations suggest that in contrast to the notion of jurisdiction under the ECHR, the corresponding notion under the ICCPR, despite the *travaux préparatoires*, may go beyond a territorial locus. Having understood this, inquiries must now turn to the circumstances in which extraterritorial application of the ICCPR can be recognised.

5. *The Circumstances in Which the Extraterritorial Application of International Human Rights Law Can be Envisaged*

5.1. *Overview*

Hampson and Salama, in their *Working paper on the relationship between human rights law and international humanitarian law* for the Sub-Commission on the Promotion and Protection of Human Rights, have elaborated the notion "within

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[58] Article 1 of the First Optional Protocol includes the phrase "subject to its [the contracting party's] jurisdiction (*relevant de sa jurisdiction*). On this matter, it has been questioned whether or not individual persons who were within the jurisdiction of a state when a violation took place have to be within the jurisdiction of that state at the time of submitting an individual communication under Article 1 of the First Optional Protocol. The HRC has consistently taken a broad view, stating that "Article 1 of the Optional Protocol was clearly intended to apply to individuals subject to the jurisdiction of the State party concerned at the time of the alleged violation of the Covenant, irrespective of their nationality": HRC, *Estrella v. Uruguay, No. 74/1980*, View of 29 March 1983, UN Doc. Supp No. 40 (A/38/40), at 150 (1983), para. 4.1. See also HRC, *Carmen Amendola Masslotti and Graciela Baritussio v. Uruguay, No. R.6/25*, View of 26 July 1982,UN Doc. Supp. No. 40 (A/37/40), at 187 (1982), para. 7.2. See also McGoldrick (2004), *supra* n. 2, at 57. The view of the HRC and of McGoldrick should be contrasted to a narrower view sustained by Schwelb:

> . . . a State Party undertakes, under Article 2(1) of the Covenant, to respect and to ensure the rights recognized in the Covenant to all individuals *within its territory* and subject to its jurisdiction. The words "within its territory", which do not appear in either the European Convention [on Human Rights] or the Racial Discrimination Convention, amount to a limitation of the substantive scope of the Covenant. Misgivings about this limitation were felt both in the Commission on Human Rights and in the Third Committee of the General Assembly. The words "within its territory" were, however, retained in a separate vote. . . . The conclusion seems inescapable that the scope of the procedural protection afforded by the Protocol cannot be wider than that of the substantive protection provided by the Covenant.

Schwelb (1968)a, *supra* n. 21, at 863, emphasis in original. See also D. Schindler, "Human Rights and Humanitarian Law", (1982) 31 *AULR* 935, at 939.

the jurisdiction".[59] They analyse three circumstances in which the extraterritorial application of the ICCPR, whether in or outside a military context, can be recognised: (i) where a state exercises control over a territory of another state; (ii) where a state exercises control over the person in question; and (iii) where a state exercises control over the infliction of the alleged violation.[60] Examinations turn to these three circumstances.

5.2. *Cases Where a State Exercises Control over a Territory of Another State*

Firstly, it is suggested that territorial control can take the form of military occupation, control without occupation or even temporary control.[61] With respect to occupied territories, the HRC has recognised the responsibility of the occupying power for safeguarding human rights in such territories. In its *Concluding Observations* on States Reports submitted by Israel, the HRC stated that:

> The Committee is deeply concerned that Israel continues to deny its responsibility to fully apply the Covenant in the occupied territories. In this regard, the Committee points to the long-standing presence of Israel in these territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein . . . . the Committee emphasizes that the applicability of rules of humanitarian law does not by itself impede the application of the Covenant or the accountability of the State under article 2, paragraph 1, for the actions of its authorities. The Committee is therefore of the view that, under the circumstances, the Covenant must be held applicable to the occupied territories and those areas of southern Lebanon, and West Bekaa where Israel exercises effective control.[62]

In the leading case of *Cyprus v. Turkey*, the European Court of Human Rights has recognised the continued applicability of the ECHR in occupied territories.[63] In the case of *Ilascu and Others*, it found human rights violations that occurred in areas which might not be seen as occupied territory as understood in IHL. In

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[59] Note that the UN Convention against Torture envisages its applicability to "any territory under its jurisdiction": UN Convention against Torture, Articles 2(1) and 16(1).

[60] Hampson and Salama, *supra* n. 1, paras. 82–92.

[61] *Ibid*., para. 83.

[62] *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Israel*, CCPR/C/79/Add.93, 18 August 1998, at 3, para. 10. See also *Concluding Observations of the Human Rights Committee*: Israel. 21/08/2003, CCPR/CO/78ISR, para. 11; Syrian Arab Republic, 24 April 2001, CCPR/CO/71—/SYR, para. 10 (disappearances of Syrian nationals and Lebanese nationals, who were arrested in Lebanon by Syrian forces, and then transferred to Syria); and Morocco, 1 November 1999, CCPR/C/79/Add. 113, para. 9. CCPR/CO/82/MAR, 1 December 2004, paras. 8 and 18 (implementation of human rights in Western Sahara).

[63] ECtHR, *Loizidou v. Turkey*, Judgment of 18 December 1996, A 310; *Cyprus v. Turkey*, Judgment of 10 May 2001.

that case, the Court held Russia to be responsible for acts of its armed forces which were stationed in Transdniestria.[64] The unlawful acts committed by the Transdniestrian separatists were considered imputable to the responsibility of the Russian Federation. In view of Russia's continuing military, political and economic support to the separatists, including the participation of its military personnel in the fighting, the separatists' authorities were found to be "under the effective authority, or at the very least, under the decisive influence" of Russia.[65]

The *Issa* case provides a possibly more liberal attempt to broaden the jurisdictional boundaries of the ECHR.[66] In that case, it may be argued that the standard of effective overall control was set sufficiently low to cover an area where control is effectuated only for a very short period of time. Differentiating this case from *Loizidou*, the Court found that the jurisdictional basis under Article 1 ECHR was lacking. Nevertheless, it can be argued that its reasoning does not exclude the possibility that temporary (but effective overall) control of territory outside the border of the member states of the ECHR may be encompassed within the meaning of jurisdiction under Article 1 ECHR.[67] The gist of the Court's reasoning is two-fold. First, in contrast to Northern Cyprus where Turkish forces were stationed throughout the whole of the territory for a much longer time, the Turkish forces did not exercise the "effective and overall control" of "the entire area" of northern Iraq. The Court found that the military operations had been conducted without comparable degree of patrol and check points.[68] Second, it considered that the applicants did not satisfy the standard of proof "beyond reasonable doubt" in relation to the allegation that at the relevant time the Turkish troops carried out military operations in the area where the killings of the shepherds occurred.[69]

If one takes the view that in the second *Issa* case, reasoning relating to factual evidence was the most decisive for the Court's conclusion, then there may be room for finding the jurisdiction even outside the territory of the member states of the ECHR, insofar as a member state exercises the effective overall control over a territory in question. Indeed, the Court articulated that:

> The Court does not exclude the possibility that, as a consequence of this military action [Turkey's military operations in northern Iraq], the respondent State could be considered to have exercised, *temporarily, effective overall control of a particular portion of the territory of northern Iraq*. Accordingly, if there is a sufficient factual

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[64] ECtHR, *Ilaşcu and Others v. Moldova and the Russian Federation*, with Romania intervening, Judgment of 8 July 2004.

[65] *Ibid.*, paras. 382 and 392.

[66] ECtHR, *Issa and Others v. Turkey*, Judgment of 16 November 2004.

[67] *Ibid.*, para. 74. See also *Issa and Others v. Turkey*, Admissibility Decision of 30 May 2000.

[68] ECtHR, *Issa and Others v. Turkey*, Judgment of 16 November 2004, para. 75.

[69] *Ibid.*, paras. 76–81.

> basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey (and not that of Iraq, which is not a Contracting State and clearly does not fall within the legal space (*espace juridique*) of the Contracting States. . . .[70]

The ECtHR's liberal approach in broadly construing the notion of territorial control within the meaning of Article 1 ECHR was severely tested in the *Behrami* case.[71] There the main question was whether a member state's responsibility could arise from acts or omission of its troops forming part of a peace support operation. The ECtHR was confronted with the claim that the member states of the ECHR, which contributed troops to KFOR, were accountable for the death and serious injury of civilians through cluster bomb units (CBUs) in Kosovo. The complaints related, among others, to the alleged failure of these troops to mark and/or defuse the un-detonated CBUs which they knew to be present on the relevant site, and to extra-judicial detention by KFOR. The Grand Chamber declared the complaints incompatible *ratione personae* with the ECHR's provisions and shunned the possibility of its judicial review. In terms of factual determination, it found the impugned actions and inactions of the KFOR and UNMIK, both of which owe their legal foundations to Chapter VII-based Security Council Resolution 1244 of 10 June 1999, imputable to the UN. In essence, it did not consider its scope of judicial review broad enough to include acts and omissions of member states occurring prior to or in the course of missions undertaken pursuant to the mandatory Security Council Resolution. According to the Court, to do so would undermine effectiveness of the UN's key missions in maintaining peace and security, for instance, by leading to the imposition of conditions not provided for in a relevant resolution.[72]

It can be argued that the ECtHR refrained from judicial review not on the basis that it lacked inherent competence to do so. Instead, the decision was taken more on the expedient ground, or based on the policy choice, to avoid challenging the authority of the Security Council. In that sense, it can be understood that absent a possible clash with the primary responsibility of the Security Council and its mandatory decisions, the judgment does not intrinsically exclude its right to undertake review of acts or omissions of the troops sent by member states insofar as the overall and effective control test is fulfilled. In this context, it may be questioned whether the outcome of the Grand Chamber's decision would be different if troops contributing nations acted pursuant to non-binding resolutions

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[70] ECtHR, *Issa and Others v. Turkey*, Judgment of 16 November 2004, para. 74, emphasis added. See also *Issa and Others v. Turkey*, Admissibility Decision of 30 May 2000.

[71] ECtHR, *Agim Behrami and Bekir Behrami v. France, and Saramati v. France, Germany and Norway*, Judgment of 31 May 2007.

[72] *Ibid*., paras. 149–152.

adopted by the Security Council (namely, those based on Chapter VI or so-called Chapter VI 1/2 of the UN Charter) to perform peacekeeping missions.

Returning to the specific context of occupied Iraq, the main implication of *Issa* is that it is not excluded that the UK troops which exercised "effective overall control" over the southern part of Iraq could fall within the jurisdiction of the ECHR.[73] This methodology is analogous to the approach designed to assess the liability of actions of a state taking place outside its territory. Similar juridical thinking was demonstrated in the *Namibia* Advisory Opinion in 1971, in which the ICJ held that South Africa:

> . . . remains accountable for any violations . . . of the rights of the people of Namibia. The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.[74]

Nevertheless, one ought to be cautious about the extent to which this judicial policy can be advanced to remedy a legal vacuum in safeguarding human rights outside the territorial boundaries of the member states of the human rights treaty in question. In the *Bankovic* case, which will be closely analysed below, the Grand Chamber provided two qualifications. First, it has emphasised the "exceptional" nature of the recognition of extraterritorial jurisdiction of the Convention rights. Second, it has silently introduced a new requirement based on the exercise of "normal public powers".[75] It is not clear how far the notion of public powers can go, beyond the capacity to exercise law enforcement powers of arrest and detention. This question is of special importance to the assessment of alleged arbitrary killings that take place at an early stage of occupation when an occupying power has yet to exert administrative or judicial powers.[76]

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[73] R. Wilde, "Legal 'Black Hole'? Extraterritorial State Action and International Treaty Law on Civil and Political Rights", (2005) 26 *Mich. JIL* 739, at 801. He argues that the concept of jurisdiction understood as a spatial qualification can encompass effective overall control exercised over a portion of the territory of a state *not* a party to a given human rights treaty: *ibid.*, at 798–802.

[74] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Rep. 1971, 16, at 54, para. 118.

[75] R. Lawson, "Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights", in: Coomans and Kamminga (eds), *supra* n. 2, 83–123, at 110–111.

[76] *Ibid.*, at 111.

5.3. Bankovic *and the* Espace Juridique *Doctrine*

The case of *Bankovic* deserves close scrutiny in view of the implication of the *espace juridique* doctrine that it has enunciated. The case related to the bombing of a building belonging to Radio Televizije Srbije (RTS) in Belgrade by a NATO aircraft during the campaign against the then Federal Republic of Yugoslavia (FRY). The fundamental question was whether the Court entertained jurisdiction over alleged human rights violations committed outside the territory of a member state (the FRY was not a party to the ECHR at that time). After surveying its case-law, the Grand Chamber of the ECtHR has emphasised the exceptional nature of its recognition of the extraterritorial application of ECHR:

> In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.[77]

The Grand Chamber distinguished the present case from *Cyprus v. Turkey* by reference to the "*espace juridique*" doctrine:

> It is true that, in its above-cited *Cyprus v. Turkey* judgment . . . the Court was conscious of the need to avoid "a regrettable vacuum in the system of human-rights protection" in northern Cyprus. However . . . that comment related to an entirely different situation to the present: the inhabitants of northern Cyprus would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed, by Turkey's "effective control" of the territory and by the accompanying inability of the Cypriot Government, as a Contracting State, to fulfil the obligations it had undertaken under the Convention.
>
> In short, the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention . . . in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.[78]

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[77] ECtHR, *Banković and Others v. Belgium and Others, No. 52207/99*, Decision of 12 December 2001, para. 71 (Grand Chamber).

[78] *Ibid.*, para. 80.

Extraterritorial action of a member state generates normative "vacuums" in safeguarding the rights and freedoms embodied in human rights treaties. However, in essence, by applying the *espace juridique* doctrine, the ECtHR has confined the type of the vacuums, which can be remedied by the application of the ECHR, only to the cases where actions of a member state occur in the territory of another party to the ECHR, and where the latter is prevented from fulfilling obligations.[79] Put differently, the effect of this doctrine would be to limit the right holders under the ECHR to individual persons, whatever nationality may be, who are found only within the territory of the member states, namely, within the "legal space" of the ECHR.[80]

Several comments can be made on the implication of this doctrine. It is possible to discern some elements suggesting that the Court has nonetheless not altogether negated the possibility of applying the ECHR to actions or omissions of a member state occurring outside the boundaries of the Council of Europe.[81] First, as Lawson[82] and Wilde[83] note, the Grand Chamber qualified the territorial implication of the *espace juridique* doctrine, adding the word "notably" or "essentially". These two elements suggest that the Grand Chamber does not necessarily rule out the applicability of the ECHR outside the territorial areas of the Council of Europe. Second, Wilde suggests that with respect to the Court's emphasis on the operation of the ECHR "essentially in a regional context", the term "context" may be understood as indicating a wider meaning associated with the sphere of influence that can emanate from the Council of Europe as a regional body. This means that the term should be comprehended as turning not necessarily on geographical loci or territorial areas of the member states.[84] Yet, a caveat ought to be heeded. The Court's express statement that "the Convention was not designed to be applied throughout the world" dampens broader implications of the dictum.[85]

In the *Bankovic* case, the stress on territorial control prompted the applicants to adduce a different strand of argument based on the so-called "speculative violation" of the Convention rights. They contended that the NATO air strikes

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[79] Wilde, *supra* n. 73, at 793.

[80] *Ibid.*, at 794. Wilde considers that the vacuum in legal protection caused by states' extraterritorial action outside the *espace juridique* of a given human rights treaty amounts to a "legal black hole". He adds that this doctrine has been "exploited" by the UK government in its attempt to skirt the ECHR obligations relative to actions of its armed forces in Basra, Iraq: *ibid.*

[81] *Ibid.*, at 796.

[82] Lawson, *supra* n. 75, at 114.

[83] Wilde, *supra* n. 73, at 794–795.

[84] With respect to the word "context", Wilde argues that this "is hardly a clear reference to a territorial area (it could equally refer to a regional grouping of States, irrespective of where they act)": *ibid.*, at 794.

[85] *Ibid.*, at 794–795.

against a radio and television building were the result of the prior decisions taken in the territories of the member states of the ECHR, and that the anticipatory effects of these decisions later materialised outside the legal space of the ECHR.[86] This line of reasoning was consonant and co-terminus with the cases where speculative violations were contested in respect of extradition, expulsion or deportation of individuals to a third country where violations of the anti-torture provision (Article 3 ECHR) would be consummated. In those cases, the ECtHR has consistently recognised anticipatory violations if given the proof of a real risk of ill-treatment, which is set somewhere between possibility and probability.[87] However, in the *Bankovic* case, the ECtHR rejected this argument precisely on the basis of the *espace juridique* doctrine.

As McGoldrick comments,[88] the ECtHR in the *Bankovic* case focused on the fact that the real connection between the applicants and the respondent states was the contested act which, wherever decided, was carried out and had effects outside the member states' territory.[89] According to this *espace juridique* doctrine, had the air strikes or bombardments taken place within the territorial jurisdiction of the member states, the result would have been different. Cerna provides another angle of explanation. She argues that the Court's approach in the *Bankovic* case could be understood as suggesting that the respondent states did not exercise sufficient degree of control over persons in another state to be tantamount to "jurisdiction" over those persons. She questions "how much bombing would be required to wrest jurisdiction from the territorial state".[90]

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[86] ECtHR, *Banković and Others v. Belgium and Others, No. 52207/99*, Decision of 12 December 2001, para. 53. The applicants specifically referred to *Soering v. UK*, Judgment of 7 July 1989, A 161.

[87] For analysis under the ECHR context, see Y. Arai-Takahashi, "'Ueven, But in the Direction of Enhanced Effectiveness' – A Critical Analysis of 'Anticipatory Ill-Treatment' under Article 3 ECHR", (2002) 20 *NQHR* 5. For the relevant case-law under ICCPR, see, for instance, *Ng. V. Canada, No. 469/1991*, View of 5 November 1993, U.N. Doc. CCPR/C/49/D/469/1991, para. 16.4. For the case-law under ACHR, see, for instance, IACmHR, *Haitian Centre for Human Rights et al. v. the United States, Case No. 10.675*, Report No. 51/96, Decision of 13 March 1997, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev., at 550 (1997), para. 167.

[88] McGoldrick, *supra* n. 2, at 55.

[89] ECtHR, *Banković and Others v. Belgium and Others, No. 52207/99*, Decision of 12 December 2001, paras. 51 and 53.

[90] C.M. Cerna, "Extraterritorial Application of the Human Rights Instruments of the Inter-American System", in: Coomans and Kamminga (eds), *supra* n. 2, 141–173, at 159. She adds that:

> Given the nature of modern warfare to rely on firebombing, saturation bombing and the like, would the European Court recognize the transfer of jurisdiction to the bombing state, as in the case of the fire-bombing of Tokyo or Dresden, when the victim's State and/or Government has been obliterated?

Ibid.

Be that as it may, in the subsequent *Ocalan* case that will be analysed below, the Court exceptionally recognised the establishment of its jurisdiction over acts that took place outside the *espace juridique* of the Council of Europe, apparently (and implicitly) on the ground of extension of control over persons. The remaining question would be to ascertain guidelines for such exceptional recognition of extraterritorial application of the ECHR.[91]

5.4. *Cases Where a State Exercises Control, Power or Authority over Individual Persons*

It is suggested that the extraterritorial jurisdiction of a human rights treaty can be recognised on the basis of the control, power or authority exercised by a member state over an individual person outside the territory of that state, even if the pertinent territory falls outside the boundaries of the member states of that treaty.[92] Lawson contends that "the extent to which contracting parties must secure the rights and freedoms of individuals outside their borders is proportionate to the extent of their control over these individuals".[93] The control over persons may even be incidental in an ad hoc fashion.[94] Yet, the extraterritorial application of human rights treaties on the basis of control over persons has been limited to detention cases.[95]

The approach based on control over persons is endorsed by the HRC's *General Comment No. 31* relating to Article 2 ICCPR. The HRC observes that the jurisdictional standard under Article 2(1) "means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party".[96] As discussed above, the disjunctive reading of "jurisdiction" (either based on "spatial target" or "personal target"[97] in an alternative manner) enables the trajectory of extraterritorial application of the ICCPR to go beyond the *espace juridique* of the member states.

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[91] An even less clear-cut approach to this issue is to examine whether there is any cogent reason against the extraterritorial applicability of the ECHR. See, for instance, ECmHR, *Ilse Hess v. UK, No. 6231/73*, Decision of 28 May 1975, 2 *DR* 72, at 73 (1975). This approach may be described as a "default position": Wilde, *supra* n. 73, at 797.

[92] Hampson and Salama, *supra* n. 1, para. 88; and Wilde, *ibid.*, at 802–804.

[93] Lawson, *supra* n. 75, at 120.

[94] *Ibid.*, at 103.

[95] Hampson and Salama, *supra* n. 1, para. 88.

[96] HRC, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10.

[97] Wilde, *supra* n. 73, at 798–804.

In the *López Burgos* case,[98] the HRC has applied a liberal construction to the wording "within its territory and subject to its jurisdiction" under Article 2(1) ICCPR. It recognised that the applicant's husband was within the jurisdiction of Uruguay when he was tortured, initially in Argentina and then in Uruguay, by Uruguayan security forces. In that case, the HRC referred to Article 5(1) ICCPR, which provides that "[n]othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant". The HRC found that "…it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory".[99] According to Hampson and Salama,[100] in *Lopez* and *Burgos*, the HRC found the basis of jurisdiction not on the fact of detention but on control over persons. This can be demonstrated by the HRC's following observations:

> The reference in article 1 of the Optional Protocol to "individuals subject to its jurisdiction" does not affect the above conclusion [the conclusion that the HRC was not barred under Article 1 of the Optional Protocol or under Article 2(1) of the Covenant from examining the allegations concerning arrest, detention and mistreatment on foreign territory, so long as these were perpetrated by the Uruguayan agents acting on foreign soil] because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State *in relation to a violation* of any of the rights set forth in the Covenant, wherever they occurred.[101]

Along the same line, in his individual opinion, Tomuschat observes that:

> To construe the words "within its territory" pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would, however, lead to utterly absurd results. (…) a State party is normally unable to ensure the effective enjoyment of the rights under the Covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with

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[98] HRC, *López Burgos v. Uruguay*, No. 52/1979, View of 29 July 1981, UN Doc. CCPR/C/13/D/52/1979, 29 July 1981.

[99] *Ibid*., para. 12.3. See also *Lilian Celiberti de Casariego v. Uruguay, No. 56/79*, View of 29 July 1981, CCPR/C/13/D/56/1979, U.N. Doc. Supp. No. 40 (A/36/40), at 185, para. 10.3. To accept the argument that activities are legally prohibited when committed within their own soil but not legally prohibited if committed extraterritorially would provide a state with a convenient subterfuge for eschewing legal responsibility simply by shifting or outsourcing its activities overseas: Wilde, *supra* n. 73, at 791.

[100] Hampson and Salama, *supra* n. 1, para. 87.

[101] HRC, *López Burgos v. Uruguay, No. 52/1979*, View of 29 July 1981, UN Doc. CCPR/C/13/D/52/1979, 29 July 1981, para. 12.2, emphasis added.

> their limited potential. Instances of occupation of foreign territory offer another example of situations which the drafters of the Covenant had in mind when they confined the obligation of States parties to their own territory. (…) Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad.[102]

Tomuschat's proposition is confined to the extra-territorial violations committed against a state's own national. Yet, it can be argued that the tenor of his opinion is sufficient to suggest that even if the victim had been a non-Uruguayan national, this would not have made any difference. Arrest and abduction of whatever nationals can be considered to bring them within the jurisdiction of the recalcitrant state party.[103]

It must be noted that even where an individual is apprehended and detained outside the territorial bounds of a state, s/he is considered to fall within the authority and control of that state, and hence to benefit from the relevant human rights treaties. The expanding scope of positive duties[104] suggests that states must protect captured individuals from danger posed to their lives or limbs by other individuals or armed opposition groups. These duties can be recognised in a manner commensurate with the degree of control and authority over the individuals held. Violations of the duties can be ascertained by the standard of negligence "ought to have known".[105]

A more clear-cut enunciation of the "personal target" approach has been exhibited in the approach of the IACmHR.[106] In the *Coard and Others* case,[107]

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[102] HRC, *López Burgos v. Uruguay, No. 52/1979*, View of 29 July 1981, UN Doc. CCPR/C/13/D/52/1979, 29 July 1981, Individual opinion of Mr. Tomuschat.

[103] For the same view, see J. Cerone, "Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo", (2001) 12 *EJIL* 469, at 476; Lawson, *supra* n 75, at 94; and McGoldrick, *supra* n. 2, at 62.

[104] In the ECHR context, see, for instance, *Osman v. UK*, Judgment of 28 October 1998, para. 116. See also *Mastromatteo v. Italy, Judgment* of 24 October 2002, para. 67.

[105] In the *Osman* case, the ECtHR held that: "[f]or a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk": *ibid*., para. 116.

[106] Apart from the cases examined here, see also *Haitian Center for Human Rights et al. v. United States*, Case 10.675, Decision of 14 March 1997, Report No. 51/96, IACmHR, OEA/Ser. L/V/II.95 Doc. 7 Rev., at 550 (1997). For detailed analysis of the extraterritorial application of ACHR and American Declaration on the Rights and Duties of Man, see Cerna, *supra* n. 90, 141–174.

[107] IAmCmHR *Coard et al. v. US*, Case 10.951, Report No. 109/99, 29 September 1999. This petition was brought before the IACmHR in relation to the US military action in Grenada

the IACmHR has recognised the applicability of the American Declaration of the Rights and Duties of Man to the US military action in Grenada during the invasion. Indeed, while the US did not challenge the extraterritorial application of the American Declaration, the IACmHR decided to examine this question *proprio motu*. It has stated that:

> . . . under certain circumstances, the exercise of its [IACmHR's] jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination – "without distinction as to race, nationality, creed or sex". . . . Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. . . . In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control. . . .[108]

Similar rationale underscores the decision by the IACmHR to indicate precautionary measures in relation to detainees at Guantanamo Bay:

> Accordingly where persons find themselves within the authority and control of a state and where a circumstance of armed conflict may be involved, their fundamental rights may be determined in part by reference to international humanitarian law as well as international human rights law. Where it may be considered that the protections of international humanitarian law do not apply, however, such persons remain the beneficiaries at least of the non-derogable protections under international human rights law. In short, no person, under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights.[109]

The IACmHR' has focused on the fact that persons are subject to the authority and control of another state rather than on their physical presence on the soil of a member state.

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which took place in October 1983. See also IACmHR, *Richmond Hill v. United States (Disabled Peoples' International et al. v. United States), Case No. 9213*, Admissibility Decision of 22 September 1987; and the friendly settlement, Report No. 3/96, 1 March 1996, OEA/Ser. L/V/II.91 Doc. 7, at 201 (1996).

[108] IAmCmHR *Coard et al. v. US*, Case 10.951, Report No. 109/99, 29 September 1999; reprinted in (2001) 8 *IHRR*, at 68, para. 37.

[109] IACmHR, Request for Precautionary Measures Concerning the Detainees at Guantanamo Bay, Cuba, 12 March 2002, (2002) 421 *ILM* 532, at 533 (sixth paragraph).

The audacious methodology pursued by the IACmHR in "pushing the envelope of its jurisdiction"[110] can be compared with the more reticent stance of the supervisory bodies of the ECHR. It appears that express recognition of the control over persons is limited to cases involving diplomatic or consular premises of member states or prison/detention facilities abroad. For instance, in *M v. Denmark*, the former ECmHR opined that:

> It is clear . . . from the constant jurisprudence of the Commission that authorised agents of a State . . . bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged.[111]

The ECmHR's assertion that "persons" were brought within the jurisdiction of a member state can be understood as suggesting an approach based on "a personal target for the relationship of authority".[112]

However, in the *Öcalan* case, it seems that the ECtHR came much closer to accepting the standard based on control over persons. In that case, the jurisdictional issue under Article 1 ECHR arose from the fact that the PKK leader was handed over by Kenya officials to the Turkish security forces in Nairobi. He was then arrested inside an aircraft registered in Turkey in the international zone of Nairobi Airport in Kenya.[113] Endorsing the line of reasoning adopted by the Chamber,[114] the Grand Chamber took the view that:

> It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. It is true that the applicant was physically forced to return to Turkey

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[110] Cerna, *supra* n. 90, at 168.

[111] *W. M. v. Denmark, No. 17392/90*, Decision of 14 October 1992, 73 *DR* 193, at 196, The Law, para. 1. Reference was made to *X v. UK, No. 7547/76*, Decision of 15 December 1977, 12 *DR* 73.

[112] Wilde, *supra* n. 73, at 803.

[113] ECtHR, *Öcalan v. Turkey*, Judgment of 12 March 2003 (Chamber), paras. 78 and 93; and Judgment of 12 May 2005 (Grand Chamber), para. 91 (see also para. 74).

[114] Previously, the Chamber applied the same line of reasoning, holding that:

> [T]he applicant was arrested by members of the Turkish security forces inside an aircraft in the international zone of Nairobi Airport. Directly after he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.

Öcalan v. Turkey (Merits), Judgment of 12 March 2003 (Chamber), para. 93.

> by Turkish officials and was under their authority and control following his arrest and return to Turkey. . . .[115]

Some comments can be made as to this dictum. As explained above, the supervisory organs of the ECHR have been constrained by the territorial notion of jurisdiction. A way to loosen such jurisdictional bridle is to establish linkage to the territorial jurisdiction of a member state. In the *Oçalan* case, special importance can be attached to the fact that the leader of the PKK was handed over to Turkish officials in an international zone and taken to Turkey's national flag carrier. The reasoning of the Grand Chamber suggests that the linkage to a territorial locus could be established in view of the extension of the Turkish jurisdiction over persons in an international zone. In doing so, however, it may be considered that the Grand Chamber has obscured the question whether the identification of "effective Turkish authority" could be explained by control over the applicant or control over the locality (that is, the space inside an aircraft registered in Turkey).[116] On this score, it can be suggested that the Grand Chamber specifically mentioned the behaviour of Turkish officials towards the applicant, such as an act of physically forcing him back to Turkey without, however, noting whether the aircraft or the "international zone" was controlled by Turkey.[117] It can be argued that the Grand Chamber's reasoning in *Oçalan* was based more on the control exercised over the person rather than on the control over the territory.

The standard based on control over persons has been recognised by the English High Court (and the House of Lords) in the *Al-Skeini* case. In occupied Iraq in the period between March–April 2003 and June 2004, the Coalition States did not recognise the applicability of the ICCPR.[118] The case concerned six

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[115] ECtHR, *Oçalan v. Turkey*, Grand Chamber, Judgment of 12 May 2005, para. 91. In this regard, compare *Freda v. Italy*, which concerned the circumstances similar to *Oçalan*. The applicant was arrested in Costa Rica by the local police and then handed over to the Italian police, who obliged him to go on board of an Italian Air Force airplane to reach Italy. The Commission opined that:

> . . . it is established that the applicant was taken into custody by officers of the Italian police and deprived of his liberty in an Italian Air Force aeroplane. The applicant was accordingly from the time of being handed over in fact under the authority of the Italian State and thus within the "jurisdiction" of that country, even if this authority was in the circumstances exercised abroad. . . .

Freda v. Italy, No. 8916/80, Decision of 7 October 1980, 21 *DR* 254, at 256, The Law, para. 3.

[116] Further, it must be noted that the Grand Chamber seems to have interchangeably used the words "authority" and "control", even though the latter connotes a power to exert a degree of restrictions on an individual person.

[117] Wilde, *supra* n. 73, at 803–804.

[118] See M.J. Kelly, "Iraq and the Law of Occupation: New Tests for an Old Law", (2003) 6 *YbkIHL* 127, at 136–137.

Iraqi claimants seeking compensation before the English courts for the death of their relatives in Iraq, which occurred in the latter part of 2003 (August and November). On the basis of the personal control standard, the High Court distinguished the first five applicants, who were killed by shooting incidents, from the sixth applicant, who was subjected to brutal and fatal maltreatment while detained in a British military base in Basra. The Court held that the sixth applicant fell within the "the control and authority" of the British armed forces, and that as such, his claim fell within the scope of the ECHR (and hence the Human Rights Act).[119]

In contrast, the High Court narrowly interpreted the meaning of Article 1 ECHR, asserting that the reference to the obligations to secure rights and freedoms of ECHR within "their jurisdiction" under this provision relates to territoriality. According to the High Court, with the rare exceptions of outposts of the states authority exercised abroad, such as embassies and consulates or a prison operated with the consent of the territorial state, the ECHR is precluded from applying to the territory of a state not a party to it, irrespective of whether the portion of that territory is under effective control of a member state.[120] Indeed, the House of Lords, which upheld the claims relating to the sixth applicant, including his claim for compensation, closely followed the reasoning of the *espace juridique* doctrine enunciated by the ECtHR in *Bankovic*.[121]

In the subsequent *Al-Jedda* case, which concerned a British-Iraqi citizen who was held in Iraq by British forces for three years since October 2004 on suspicion of terrorism, the House of Lords provided different reasoning, which focused more on the conflict between the obligations under the ECHR and the mandatory obligations under the Security Council's Resolution under Chapter VII of the UN Charter. The Law Lords took the view that by virtue of Articles 25 and 103 of the UN Charter, the obligations of the UK as an occupying power under IHL to detain suspects of posing threat to security, which was buttressed

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[119] UK, the House of Lords, Appellate Committee, *Al-Skeini and Others v. Secretary of State for Defence; and Al-Skeini and Others v. Secretary of State for Defence* (Consolidated Appeals), 13 June 2007, [2007] UKHL26, paras. 72 (*per* Lord Rodger of Earlsferry), 107 and 128 (*per* Lord Brown of Eaton-under-Heywood).

[120] The High Court of Justice (England and Wales), *Al Skeini v. The Secretary of State for Defence*, 2004 EWHR 2911 (Admin), 14 December 2004, paras. 248 (referring to *Loizidou v. Turkey, Cyprus v. Turkey, Ilascu v. Moldova and Russia*), 258 (analysis of *Bankovic; Yonghong v. Portugal; Al-Adsani v. UK* etc.), 269–270, 277 (*Issa* case, the *espace juridique* doctrine) and 287–288. See also *ibid.*, paras. 318–324.

[121] UK, House of Lords, Appellate Committee, *Al-Skeini and Others v. Secretary of State for Defence; and Al-Skeini and Others v. Secretary of State for Defence* (Consolidated Appeals), 13 June 2007, [2007] UKHL26, in particular, paras. 68–84 (emphasis on the jurisdictional link between the victims and the respondent state, based on sufficient control exercised by the latter over the deceased) (*per* Lord Rodger of Earlsferry).

by Security Council Resolution 1546, would prevail over the obligations of the UK under Article 5(1) of the ECHR.[122] Their views in turn assume the applicability of the ECHR in the area in question.[123]

5.5. *Cases Where a State Exercises Control over the Infliction of the Alleged Violation*

It may be suggested that the extraterritorial application of human rights treaties should be exceptionally recognised in situations where a member state is considered to control the infliction of the alleged violation and where it is foreseeable that the applicant would be a victim of that violation.[124] It is proposed that instead of indicating the standard of effective control, which is closely related to a spatial concept (territory or space), the notion of jurisdiction should be understood as referring to control over means of human rights violations, such as airplanes, fighter jets, drones and weapons.[125] By dint of the similar reasoning, Scheinin contends that insofar as a state exerts control over whatever modality (means or methods) of lethal force employed against a targeted individual, the focus on territorial locus would be essentially artificial, and that the victim can be considered to fall within "effective control" of a targeting state.[126] The crux of these arguments is to shift the focus of analysis to the question whether a victim in a given circumstance of an attack is captured within the reach of lethal means.

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[122] See *R (on the application of Al-Jedda) v. Secretary of State for Defence, UK House of Lords*, Appellate Committee, 12 December 2007, [2007] UKHL 58, paras. 38–39 (*per* Lord Bingham of Cornhill), 111 and 118 (*per* Lord Rodger of Earlsferry), 125–129 (*per* Baroness Hale of Richmond, describing the detention of the appellant as having occurred in "post conflict, post occupation" situations, clearly marking a contrast to the present writer's view that even after the supposed transition on 29 June 2004, the occupation can be considered continuing), 135–136 (*per* Lord Carswell), 151 (*per* Lord Brown of Eaton-under-Heywood).

[123] As Baroness Hale put it, the right under Article 5 ECHR was "qualified but not displaced": *ibid*., para. 126.

[124] Hampson and Salama, *supra* n. 1, at 22, paras. 89–91.

[125] See the proposal made by one expert at CUDIH's *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation*, at Geneva on 1–2 September 2005, at 32–33.

[126] Scheinin provides a cogent argument based on concrete examples, noting that "[u]ltimately, I believe that the assassination of a targeted individual with a cruise missile, an anthrax letter sent from the neighboring country, a sniper's bullet in the head from the distance of 300 meters, or a poisoned umbrella tip on a crowded street all constitute "effective control" in respect of the targeted individual and his or her enjoyment of human rights when undertaken by agents of a foreign state": Scheinin, *supra* n. 56, at 77–78. He also notes that in the context of Iran's report under the ICCPR, when examining the *fatwa* pronounced by the Iranian authorities on Salman Rushdie, the HRC must have assumed that ordering such an assassination or inciting non-state actors to perform it would constitute "effective control" over the deprivation of an individual's life: *ibid*., at 80.

The main advantage of this methodology is to recognise the notion "within the jurisdiction" even where a member state cannot be considered to exert control over persons. This is discernible in the IACmHR's case-law, including *Disabled Peoples' International et al. v. US* concerning the alleged US bombardment of a mental hospital in Grenada,[127] and *Salas and Others v. US* in relation to deaths, injuries and the property loss arising from allegedly indiscriminate firing during the US invasion in Panama.[128] Hampson and Salama[129] argue that the cases concerning the application of the ECHR to acts of diplomatic personnel outside the member states of the Council of Europe[130] can be better grasped as falling within the category of cases where a state exercises control over means of inflicting alleged violations.[131] Likewise, they contend that the original admissibility decision in *Issa* may be better understood as the application of the standard of "control over the infliction of alleged violations".[132]

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[127] IACmHR, *Richmond Hill v. United States (Disabled Peoples' International et al. v. United States)*, *Case No. 9213*, Admissibility Decision of 22 September 1987; and the friendly settlement, *Report No. 3/96*, 1 March 1996, OEA/Ser.L/V/II.91 Doc. 7, at 201 (1996).

[128] IACmHR, *Salas and Others v. the United States*, Case No. 10.573, *Report No. 31/93*, 14 October 1993, *Annual Report of the Inter-American Commission on Human Right* (1993) 312, Analysis, para. 6.

[129] Hampson and Salama, *supra* n. 1, at 22, para. 90.

[130] In this context, they refer to ECmHR, *X. v. Federal Republic of Germany, No. 1611/62*, Decision of 25 September 1965, 8 *YbkECHR* 158, at 168 ("…in certain respects, the nationals of a Contracting State are within its 'jurisdiction' even when domiciled or resident abroad; …in particular, the diplomatic and consular representatives of their country of origin perform certain duties with regard to them which may, in certain circumstances, make that country liable in respect of the Convention"). It is recalled that in *W.M. Denmark*, the ECmHR took the view that in case authorised agents of a State, such as diplomatic or consular agents, bring other persons and affect such persons by their acts or omissions within the jurisdiction of that State, then the responsibility of the State can arise: *W.M. v. Denmark, No. 17392/90*, Decision of 14 October 1992, 73 *DR* 193; The law, para. 1. Reference was made to *X v UK, No. 7547/76*, Decision of 15 December 1977, 12 *DR* 73.

[131] They stress that these cases did not concern the responsibility of a state for acts taking place in diplomatic premises: Hampson and Salama, *supra* n. 1, at 22, para. 90.

[132] *Ibid*., at 22, para. 90. In contrast, they add that in the *Varnava and Others* case concerning missing Greek Cypriots, it is not clear whether the rationale was based on detention or on other grounds: ECmHR, *Varnava and Others v. Turkey, No. 16064/90 and Others*, Decision of 14 April 1998.

6. *Conclusion*

Wilde suggests that the monitoring bodies of the ICCPR, ECHR and American Convention on Human Rights (ACHR) share the strong judicial (or quasi-judicial) policy of applying the human rights treaties in three scenarios: (i) "a double standard of legality operating as between the territorial and extraterritorial locus"; (ii) "disparity in human rights protection operating on grounds of nationality; and (iii) "a vacuum in rights protection being created through the act of preventing the existing sovereign from safeguarding rights".[133]

Among the methodologies examined above to grasp jurisdictional basis for the extraterritorial application of specific human rights treaties, the approach based on effective control over a portion of the territory, even outside the *espace juridique* of the treaties in question, appears most reasonable in occupied territories. However, this approach may not be sufficient to allow the identification of human rights violations committed by the occupying power in circumstances where intense fighting, be it international or non-international armed conflict, erupts in a certain area of the occupied territory, over which the occupying power loses effective control. The same can be said of the area of the occupied territory, where a great deal of autonomy, including the full law-enforcement power, is granted to a political entity of the inhabitants to such a degree as to exclude effective control by the occupant. Measures going beyond those allowed under law enforcement operations, such as air strikes, may be launched against a rebel or a terrorist found in such an area, (in case of the second scenario, only after the political entity enjoying the autonomy refuses to hand over the suspect, despite the repeated request by the occupying power to do so). Where aerial bombardment and strikes are chosen, the appraisal turns to whether or not the degree of aerial control exerted by the occupant over the specific area in question is sufficient to meet the jurisdictional requirement on the basis of the third approach suggested by Hampson and Salama, namely the control over means of inflicting violations of IHL. A similar line of reasoning can be advanced to ascertain whether the areas in which the occupying forces withdraw their forces but retain control of the air can still be considered an occupied territory susceptible of laws of occupation.[134]

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[133] Wilde, *supra* n. 73, at 796–797.

[134] Wills refers to the "no fly zones" imposed by the western coalition forces (US, UK and France) on the north and south of Iraq in 1991 onwards. The forces left the territory in question, but it retained control of the skies. In such circumstances, whether the coalition forces may be considered to remain the occupying power "would depend on whether their control of the air was sufficient to render them in effective control of the territory". The similar reasoning applies to some areas of the Israeli occupied territories under the 1995 Israeli-Palestinian Interim

The issue of detrimental consequences of aerial bombardment examined in the *Disabled Peoples' International et al. v. US* marks a striking contrast to the *Bankovic* case. It ought to be recalled that too much stress on a spatial control test would lead to an unreasonable result based on artificiality of the distinction between victims situated inside the border of territorial control and those found outside.[135] Lubell cogently points out that "[t]here is a risk that basing the notion of control on the existence of ground troops while excluding the possibility of violations through use of air power would mean that States can choose the latter in order to avoid censure for human rights violations".[136] We shall see how the future jurisprudence of international and national human rights law will develop in the light of the growing assertiveness shown by monitoring bodies or national courts to assume their responsibility for assessing human rights violations in an extraterritorial context.

Agreement on the West Bank and Gaza Strip (Oslo II): S. Wills, "Occupation Law and Multinational Operations: Problems and Perspectives", in: (2006) 77 *BYIL* 256, at 289.

[135] This has been pointed out by several authors: Hampson and Salama, *supra* n. 1, at 37–38, n. 94. See also ECmHR, *Isiyok v. Turkey, No. 22309/93*, Decision of 3 April 1995 (the attack by a helicopter and a jet aircraft on the village of the applicants who were of Turkish or Kurdish origin); the Commission's Report of 31 October 1997 (friendly settlement).

[136] N. Lubell, "Challenges in Applying Human Rights Law to Armed Conflict", (2005) 87 *IRRC* 737, at 741, n. 20.

Chapter 22

The Applicability of the Law of Occupation to UN Peace Support Operations and UN Post-Conflict Administration

1. *Introduction*

The growing reliance on the UN peacekeeping forces and operations in conflict-ridden areas in the latter half of the twentieth century has raised the question whether IHL, and in particular, the law of occupation, can be applied by analogy to the territory where such forces are deployed. One may contend that national contingents of the UN forces are at any event bound by the obligations of the troop-contributing states to respect the relevant IHL treaties. Still, the fact that apart from the four Geneva Conventions, the IHL treaties in general do not muster near universal ratification suggests that there are problems of discrepancy in the applicable rules and standards among troop contributing states. Among the troops deployed as part of the same UN forces in the same region, contingents of some countries are required to live up to higher obligations, for instance, under the AP I and APII, the UN Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention), the 1999 Hague Protocol to the Cultural Property Convention, or the Protocols to the Conventional Weapons Convention. On the other hand, contingents of other states may only give effect to the obligations under the Geneva Conventions or the 1954 Hague Cultural Property Convention.

Such an unequal application of the standards of IHL was seen in the operation of the Unified Task Force (UNITAF) in Somalia, the Chapter VII-based peace-enforcement operation which was based on Security Council Resolution 794 of 3 December 1992. The legal advisor to the Australian forces in UNITAF decided that the laws of occupation should be applied *de jure* to its UN operation in Somalia, on the ground that UNITAF was the only organised entity capable

of exercising authority in the area where the forces were deployed.[1] In contrast to the US occupied areas, the areas under the control of Australian forces were subject to the law of occupation.[2]

Since 1990s, the UN has played an assertive role in establishing civil administrations in many post-conflict societies. Such UN administered territories again bear many hallmarks that characterise occupied territories susceptible to the law of occupation. The advantage of capitalising on the law of occupation in these scenarios is that this body of law contains elaborate rules governing issues that the UN peacekeeping forces or the UN administration must address: relief supplies, treatment of civilians, and penal and disciplinary measures, including detention of offenders.

For the purpose of assessing UN peace support operations, distinction should be drawn between the UN-authorised missions and UN-commanded missions.[3] The first type can be discerned where the forces of a member states undertake a peace support operation or form a security presence pursuant to the Security Council's mandate but remain under national and not UN command. In other words, national contingents are "contracted out" but acting within the normative framework set by mandatory Security Council resolutions.[4] Examples of this type include the Operation Desert Storm in 1991, Operation Restore Hope in Somalia, UNITAF in Somalia,[5] NATO forces protecting UNPROFOR in the former Yugoslavia in the early 1990s, and the multinational forces in Haiti and Timor-Leste. The Security Council's authorisation for use of force is accorded not to the state-led forces as a collective entity but to each UN Member State.[6] On the other hand, the UN-commanded type can be contemplated where forces are assigned to UN command in accordance with an agreement between the UN and a member state. In that case, the commander is placed under the direct authority of the UN Secretary-General or his/her Special Representative.[7] Examples of this "blue helmet" operation include the UNTAC in Cambodia, United Nations Operation in Somalia (UNOSOM), United Nations Interim Force in Lebanon (UNIFIL), and United Nations Protection Force in the Former Yugoslavia (UNPROFOR). Apart from the UN peacekeeping forces based on

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[1] M.J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (1999), at 17.

[2] S. Wills, "Occupation Law and Multi-national Operations: Problems and Perspectives", (2006) 77 *BYIL* 256, at 280.

[3] Kelly (1999), *supra* n. 1, at 167–181.

[4] *Ibid.*, 167–168.

[5] For detailed assessment of the UNITAF, see *ibid.*, Ch. 1, at 3–31.

[6] K.Okimoto, "Violations of International Humanitarian Law by United Nations Forces and Their Legal Consequences", (2003) 6 *YbkIHL* 199, at 204.

[7] *Ibid.*

Chapter VI (or so-called Chapter VI 1/2) of the UN Charter,[8] some of these UN forces have been authorised expressly under Chapter VII of the UN Charter.[9] The appraisal of this chapter, however, focuses only on the applicability of the law of occupation to the second type (namely, UN-commanded) peacekeeping operations.[10]

Before analysing the applicability or not of the law of occupation to the presence of UN peace operations, examinations turn to the question whether the UN can become a party to IHL treaties. The chapter then briefly explores potential advantages of applying the normative framework of the law of occupation to post-conflict international administration.

2. *The Applicability of Customary IHL to the UN Peacekeeping Forces*

The question whether the UN entertains international legal personality has been settled since the *Reparations* case. There the ICJ held that the UN is "a subject of international law and capable of possessing international rights and duties".[11] It added that "its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence to enable those functions to be effectively discharged".[12] An international organisation with international legal personality is subject to general international law

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[8] Peacekeeping operations deployed without the consent of all parties involved may be deemed "a twilight zone between Chapter VI and Chapter VII": D.-E. Khan and M. Zöckler, "Germans to the Front? Or Le malade imaginaire", (1992) 3 *EJIL* 163, at 165, n. 19. For summary analysis of the evolution of the UN peacekeeping operations, see M. Katayanagi, *Human Rights Functions of United Nations Peacekeeping Operations*, (2002), Ch. 2, at 37–66.

[9] The authorisation under Chapter VII of the Charter was given, for instance, to the following UN forces: United Nations Mission in Sierra Leone (UNAMSIL, SC Res. 1270, 1289, 1389); Mission des Nations Unies en République Démocratique du Congo (MONUC, SC Res. 1291, 1493, 1533); United Nations Mission in Support in East Timor (UNMISET, SC Res. 1410); United Nations Operation in Côte d'Ivoire (UNOCI, SC Res. 1528); Opération des Nations Unies au Burundi (ONUB, SC Res. 1545); United Nations Mission in Liberia (UNMIL, SC Res. 1509) and Mission des Nations Unies pour la stabilisation en Haiti (MINUSTAH, SC Res. 1529); as cited in: Okimoto, *supra* n. 6, at 203, n. 31.

[10] While the legal basis for UN peacekeeping forces is not expressly provided in the UN Charter, the ICJ, in its Advisory Opinion in the *Expenses* case declared the UN competent to create such forces, with the expenses for such forces considered to constitute "expenses of the Organization" within the meaning of Article 17(2) of the UN Charter: ICJ, *Certain Expenses of the United Nations,* Advisory Opinion of 20 July 1962, ICJ Rep. 1962, 151, at 179–180.

[11] ICJ, Advisory Opinions on *Reparations for Injuries Suffered in the Service of the United Nations,* Advisory Opinion of 11 April 1949, ICJ Rep. 1949, 174, at 179.

[12] *Ibid*. See also ICJ Advisory Opinion, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Rep. 1980, 73, at 88–89, para. 37 (holding that "[i]nternational organizations

(namely, customary international law and general principles of law),[13] because it owes its personality to this legal system.[14] In that way, as Seyersted notes,[15] the UN is bound by customary IHL, insofar as it engages in activities of the kind governed by IHL.[16] Bowett observes that:

> . . . customary law . . . would prohibit to the Forces of the United Nations, regardless of the justification for the use of armed force, the use of treachery to wound or kill, the refusal to accept surrender or give quarter, and the inflicting of unnecessary suffering. These and the similar rules of customary law prohibiting individual or collective excesses in combat are applicable in all circumstances of international armed conflict, representing as they do the minimum standards of (in the words of both the 1907 Hague and the 1949 Geneva Conventions) "the usages estab-

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are subjects of international law and as such, are bound by any obligations incumbent upon them under general rules of international law").

[13] See, *inter alia*, I. Brownlie, *Principles of Public International Law*, 7th ed. (2008), at 688 (commenting that "[i]n principle the relations of the organization with other persons of international law will be governed by international law, including general principles of law, with the norms of constituent treaty predominating when relations with member states of the organizations are concerned"). For detailed assessment of this question, see A. Bleckmann, "Zur Verbindlichkeit des Algemeinen Völkerrechts für Internationale Organisationen", (1977) 37 *ZaöRV* 107.

[14] M. Zwanenburg, *Accountability of Peace Support Operations*, (2005), at 151.

[15] F. Seyersted, *United Nations Forces in the Law of Peace and War*, (1966), at 187 (applicability of customary laws of war to the United Nations Forces during the Korean War), 201–202 ("... the general laws of war ... must be applicable, directly or by analogy, to a United Nations enforcement action ... to the extent that no special considerations arising out of the differences between such actions and 'war' require deviations from these laws. ..."), 314 (application of treaty-based international humanitarian rules) and 395–396 (reference to the XXth International Red Cross Conference in Vienna in 1965, which adopted a resolution proposing that appropriate arrangements be made to ensure that armed forces placed at the disposal of the United Nations observe the obligations under the Geneva Conventions).

[16] C. Greenwood, "International Humanitarian Law and United Nations Military Operations", (1998) 1 *YbkIHL* 3, at 16; T.H. Irmscher, "The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights, and the Law of Occupation", (2001) 44 *German YbkIL* 353, at 376; D. Schindler, "United Nations Forces and International Humanitarian Law" in: C. Swinarski (Ed.), *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet*, (1984) 521, at 526; D. Shraga and R. Zacklin, "The Applicability of International Humanitarian Law to United Nations Peace-keeping Operations: Conceptual, Legal and Practical Issues, in: U. Palwankar (ed), *Symposium on Humanitarian Action and Peace-Keeping Operations – Report,* (1994) 39, at 47; and Wills, *supra* n. 2, at 277. Compare M. Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", (2005) 16 *EJIL* 661, at 687 (suggesting that due to the UN's denial of the *de jure* application of IHL to UN forces, there are "some doubts as to whether the IHL rules that are customary between States, are also customary in armed conflicts involving international organizations").

> lished among civilised people, the laws of humanity and the dictates of the public conscience."[17]

Viewed in that way, the customary laws of occupation are not barred from being applied to the UN troops when they find themselves in control of foreign territory.[18]

3. *Can the UN Become Parties to IHL Treaties?*

In contrast to the UN's obligations under customary IHL, whether the UN is bound by conventional IHL remains controversial.[19] A significant body of opinion rejects the possibility of accession to IHL treaties by the UN and other international organisations conducting peace support operations.[20]

The legal experts of the UN have long taken the view that the Geneva Conventions are not open to participation by international organisations such as the UN. They have referred to several grounds.[21] First, the UN peace-keeping forces were considered to act on behalf of the international community as a whole, and hence cannot be regarded as a "Party" to the conflict, nor a "Power" within the meaning of the Geneva Conventions. Second, it is argued that the UN, *qua* an international organisation, is not competent to become a party to the 1949 Geneva Conventions and to assume duties and responsibilities under them. In particular, the UN is not regarded as equipped with necessary juridical and administrative powers to discharge many of the obligations set forth in the Geneva Conventions. Third, it is contended that the Geneva Conventions shun the possibility of the UN becoming a party to them, as their final clauses do not leave room for international organisations.[22]

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[17] D.W. Bowett, *United Nations Forces – A Legal Study of United Nations Practice*, (1964), at 506.

[18] *Ibid.*, at 490–1; Irmscher, *supra* n. 16, at 376; Adam Roberts, "What is Military Occupation", (1984) 55 *BYIL* 249, at 290.

[19] In a separate development, the HRC has recognised that the ICCPR could be applied to UNOSOM II in that it exercised *de facto* control over Somalia: Concluding Observations of the Human Rights Committee : Belgium, 19/11/98.CCPR/C/79/Add.99, 19 November 1998, para. 14. Yet, as Wills notes, there was no indication that the laws of occupation were applicable to the UN forces: Wills, *supra* n. 2, at 284.

[20] See, *inter alia,* (1994) 88 *ASIL Proc.* 349 (comment by Mr. Szasz); Greenwood, *supra* n. 16, at 16 (noting that the UN, while being subject to customary IHL, cannot become parties to IHL treaties). See also B.D. Tittemore, "Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations", (1997) 33 *Stan. JIL* 61, at 95.

[21] Shraga and Zacklin, *supra* n. 16, at 43.

[22] *Ibid.*

In contrast, some authors suggest the text of the GCs, which refers to "Powers", "Parties to the conflict", and to "Contracting Parties", and not to "states", allows room for participation by international organisations such as the UN.[23] As Zwanenburg notes,[24] this view is, however, not supported by the *travaux préparatoires* of the GCs and API. During the First Session (1971) of the Conference of Government Experts, the ICRC raised the question of the applicability of GCs to UN peacekeeping forces. A proposal was made that this question should be included in the agenda of the IVth Commission of the Conference.[25] In reply, the Representative of the UN Secretary-General rejected the proposal mainly on two grounds: (i) each regulation issued by the Secretary-General for peacekeeping forces implied not only respect for the letter of international conventions applicable to the conduct of military staff but also "the most scrupulous respect" of the very spirit of such treaties; (ii) the question of the training and discipline of the military personnel belonging to the UN peacekeeping forces had hitherto been regarded as the responsibility of the troop contributing states and not that of the UN.[26] In the subsequent Second Session, with respect to draft Article 78 of API on accession, the Representative of the UN Secretary-General commented that:

> Accession to the Conventions of Geneva and the Protocol was, however, a course which the United Nations could not take. Such accession would obviously pose problems as to the competence in general of the Organization to become a Party to a multilateral treaty, as well as with respect to the ratification procedure. But the main obstacle was the impossibility for the Organization to fulfil many of the obligations laid down in the Conventions of Geneva. . . . As for United Nations peacekeeping forces, the representative of the Secretary-General . . . emphasized that so far the questions of training and discipline of the military forming part of those forces had been considered as appertaining to the several national contingents, and not to the Organization. The United Nations, which had neither territorial authority nor criminal or disciplinary jurisdiction, was for the time being incapable of implementing the Conventions of Geneva. The accession which had been suggested

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[23] D. Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", (1979–II) 163 *RdC* 116, at 130; *idem* (1984), *supra* n. 16, at 529; Seyersted, *supra* n. 15, at 348–350, and 352–353; M. Bothe, *Le Droit de la Guerre et les Nations Unies – À propos de incidents armés au Congo* (1967), at 198 *et seq*; P. De Visscher, "Les Conditions d'application des lois de la guerre aux opérations militaires des Nations Unies", (1971) 54(1) *Annuaire de l'Institut de Droit International,* Session de Zagreb 43 (proposing for the application, by analogy, of the IHL conventions such as the Geneva Conventions to international organisations).

[24] Zwanenburg (2005), *supra* n. 14, at 136–137.

[25] ICRC, *Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts,* Geneva (1971), first session, Geneva, 24 May–12 June 1971, at 52, paras. 309–310 (Report of Commission II).

[26] *Ibid.*, para. 311.

> would therefore only raise false hopes, and in consequence, give rise to unjustified criticism of the United Nations.[27]

Indeed, as discussed above, the suggestion that IHL treaties apply to UN peacekeeping forces is not upheld by the practice of the UN, which has considered the term "Powers" to exclude international organisations. In the same year as the Second Session of the Conference of Government Experts was held (1972), the UN secretariat provided the following observation as to the possibility of accession to IHL treaties:

> We have always maintained, however that the United Nations is not substantively in a position to become a party to the 1949 Conventions, which contain many obligations that can only be discharged by the exercise of the juridical and administrative powers which the Organization does not possess, such as the authority to exercise criminal jurisdiction over members of the Forces, or administrative competence relating to territorial sovereignty. Thus the United Nations is unable to fulfil obligations which for their execution require the exercise of powers not granted to the Organization, and therefore cannot accede to the Conventions.[28]

Absent the capacity to become a party to IHL treaties, the UN has instead encouraged its peacekeepers to observe the "principles and spirit" of IHL while denying that they were bound by such rules.[29] Nevertheless, the notion of "principles and spirit" of IHL rules remains ostensibly ambiguous.[30]

4. *The Practice of the United Nations and the* UN Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law

The need for a sweeping overhaul of this traditional thinking has been felt by the reality that not only UN forces under the enforcement action, but even peacekeepers have become frequently embroiled in hostile situations that require

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[27] *Ibid.*, Second Session, 3 May–3 June 1972, Vol. I, Geneva, 1972, at 193–194, para. 4.166. This comment was supported by many experts: *ibid.*, at 194, para. 4.168. *Contra*, Proposal submitted by the experts of the Arab Republic of Egypt in relation to draft Article 78 on accession, according to which:

> The United Nations Organization, the international specialized agencies and regional intergovernmental organizations may accede to the Conventions and the present Protocol.

Ibid., Vol. II (Annexes), at 108.

[28] Question of the Possible Accession of Intergovernmental Organizations to the Geneva Conventions for the Protection of War Victims, 15 June 1972, (1972) *UNJY* 153–154, at 153.

[29] C. Stahn, "The Ambiguity of Security Council Resolution 1422", (2003) 14 *EJIL* 85, at 95, n. 36.

[30] Sassòli, *supra* n. 16, at 687.

use of force. This has prompted the ICRC to advocate the application of IHL to UN peacekeepers when they use force, and to call for the identification of specific and concrete rules.[31] As a result, the UN has incorporated the obligations to abide by "the principles and spirit" of the relevant IHL treaties in its status of forces agreements (SOFA), which it has concluded with a territorial state.[32] Subsequently, the UN Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peacekeeping Operations, adopted by the General Assembly in 1991, more unequivocally confirmed the applicability of the conventional rules of IHL with explicit reference to specific treaties. It provides that:

> [The United Nations peace-keeping operation] shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel. The international conventions referred to above include the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of armed conflict.[33]

The commitment to respect the "principles and rules of the laws of war" is now inserted into Status of Forces Agreements, which are concluded between the UN and states in which peacekeeping forces are to be deployed.[34] Nevertheless, the primary concern of both the Model Agreement and the SOFA is conduct of

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[31] See, for instance, U. Palwankar, "Applicability of International Humanitarian Law to United Nations Peace-keeping Forces", (1993) *IRRC*. No. 294, 227; T. Pfanner, "Application of International Humanitarian Law and Military Operations Undertaken under the United Nations Charter", in: Palwankar (ed), *supra* n. 16, 49, at 57.

[32] See, *inter alia,* Agreement on the United Nations Forces and Operations in Croatia, 1864 UNTS 287, para. 7(a) (relating to UNPROFOR, and United Nations Confidence Restoration Operation ((UNCRO); Exchange of Letters Constituting an Agreement on the Status of the United Nations Protection Force in the Former Yugoslav Republic of Macedonia (concerning UNPROFOR), 1788 UNTS 257, para. 7(a); Agreement on the Status of the United Nations Assistance Mission for Rwanda (UNAMIR), 1748 UNTS 1, para. 7(a); Agreement on the Status of the United Nations Peace-keeping Operation in Angola (dealing with the United Nations Angola Verification Mission III: UNAVEM III), 1864 UNTS 193, para. 6(a); Agreement on the Status of the United Nations Interim Force in Lebanon (relating to UNIFIL), 1901 UNTS 397, para. 7(a); Agreement Concerning the Status of the United Nations Mission in the Central African Republic (concerning Mission des Nations Unies en République Centrafricaine ((MINURCA)), 2015 UNTS 727, para. 6(a).

[33] Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations, A/46/185, 23 May 1991, para. 28, reproduced in: D. Fleck (ed.), *The Handbook of the Law of Visiting Forces,* (2001), 615–620, at 619.

[34] Wills, *supra* n. 2, at 275. The term "spirit" in the obligation to respect the "principles and spirit" of the laws of armed conflict is now replaced by "rules": P.C. Szasz, "UN Forces and International Humanitarian Law", in: M.N. Schmitt (ed.), *International Law Across the Spectrum*

troops, with these agreements disclosing little guidance on the UN engagement in complying with the laws of occupation.

In 1999 the Secretary-General Kofi Annan promulgated guidelines for IHL rules applicable to UN forces. This is the UN Secretary-General's *Bulletin on Observance by United Nations Forces of International Humanitarian Law* (1999).[35] The *Bulletin* recognises the need for United Nations forces conducting operations under UN command and control to comply with "fundamental principles and rules of international humanitarian law".[36] It states that these principles and rules are applicable in enforcement actions, or in peacekeeping operations when the use of force is allowed in self-defence. In respect of its juridical nature, the *Bulletin*, as a Secretary-General's Bulletin, is an internal UN document issued as an administrative instrument aiming to elaborate the Staff Rules.[37] The preamble to the *Bulletin* notes that it is crafted "for the purpose of setting out fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control".

Section 1.1 of the *Bulletin* clearly recognises the combatant status of UN peace forces insofar as they take part in hostilities. The application of IHL to members of UN forces is recognised "when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement". This is the case not only for UN forces operating under enforcement actions, but also for those involved in peacekeeping operations "when the use of force is permitted in self-defence".[38]

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of Conflict: Essays in Honour of Professor L.C. Green On the Occasion of His Eightieth Birthday, (2000) 507, at 516.

[35] *UN Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law,* ST/SGB/1999/13, 6 August 1999, UN Doc. ST/SGB/1999/13, 6 Aug. 1999; reproduced in: 38 *ILM* 1656; (1999) *IRRC* No. 836, at 812–817. For assessment, see A. Ryniker, "Respect du Droit International Humanitaire par les Forces des Nations Unies", (1999) 81 *IRRC* 795; and M. Zwanenburg, "The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: A Pyrrhic Victory?", (2000) 39 *RDMDG* 14. Zwanenburg criticises that the *Bulletin* avoids the question whether a UN force can be considered an occupying power, suggesting that the laws of occupation provide a useful framework in failed states: *ibid*., at 29.

[36] *UN Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law, ibid*. See also *Implementation of the Recommendations of the Special Committee on Peacekeeping Operations and the Panel on United Nations Peace Operations – Report of the Secretary-General*, A/55/977, 1 June 2001 (so-called *Brahimi Report)*, at 59.

[37] Zwanenburg (2000), *supra* n. 35, at 18; *idem* (2005), *supra* n. 14, at 174. See also C.F. Amerasinghe, *The Law of the International Civil Service: As Applied by International Administrative Tribunals*, Vol. I, 2nd revised ed., at 146 (1994).

[38] *UN Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law, supra* n. 36, Section 1.1.

With respect to IHL rules that must be respected by UN forces, the *Bulletin* refers only to general principles. These include the protection of the civilian population; the means and methods of combat; the treatment of civilians and persons hors de combat, including in particular women and children; the treatment of detained persons; and the protection of the wounded, the sick, and medical and relief personnel.

Several criticisms can be directed at the contents of the *Bulletin*. First, the *Bulletin* fails to specify a legal basis for the applicability of IHL to UN peace support operations. Second, there is no indication as to which of the rules it sets forth are of customary law character. It is suggested that some rules are not declaratory of customary international law.[39] Shraga observes that "[i]n concretizing the 'principles and spirit' of the Geneva Conventions and their Additional Protocols, the Secretary-General did not consider himself necessarily constrained by the customary international law provisions of the Conventions and Protocols as the lowest common denominator by which all national contingents would otherwise be bound".[40] Several conventional rules contained in the *Bulletin* may be considered constitutive and progressive development in nature. As examples of such rules, Shraga refers to prohibitions on using methods of warfare intended to cause widespread, long-term and severe damage to the natural environment, rendering useless objects indispensable to the survival of the civilian population, and causing the release of dangerous forces with consequent severe losses among the civilian population.[41]

Third, *ratione materiae*, the *Bulletin* can be criticised for being patently insufficient. Even with respect to rules concerning conduct of warfare, it does not include such important rules as the prohibition on using blinding laser weapons.[42] Further, the *Bulletin*, like the Model Agreement, makes no reference to the laws of occupation, restricting the applicable rules of IHL only to those concerning conduct of hostilities.[43] The absence of reference to rules on occupation may be explained by the fact that UN lacks a territory, a penal system or a population, which provides the assumptions of many IHL rules.[44] Indeed, the UN-authorised humanitarian interventions or peace-enforcement operations, which were carried out in the former Yugoslavia, Somalia, Haiti, Mozambique, Angola, Western

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[39] Zwanenburg (2005), *supra* n. 14, at 173.

[40] D. Shraga, "UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage", (2000) 94 *AJIL* 406, at 408.

[41] *Ibid*., at 408.

[42] R. Kolb, G. Porretto and S. Vité, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationals – Forces de paix et administrations civiles transitoires,* (2005), at 140.

[43] Wills, *supra* n. 2, at 276–7.

[44] E. David, *Principes de droit des conflits armés*, 3rd ed., (2002), at 203–204, para. 1.177.

Sahara, and East Timor in the 1990s, did not recognise the application of the law of occupation, despite the focus of these missions on the restoration and maintenance of public order and civil life.[45] For the purpose of providing a normative framework on IHL rules in occupation-like situation, one must turn to the obligation of the troop contributing states to ensure compliance with IHL within the meaning of common Article 1 GCs.[46]

5. *Other Indices for the Applicability of IHL Rules to UN Forces*

The possibility that an international organisation, even without being a party to a specific treaty, can assume rights and obligations of that treaty, is recognised by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).[47] Articles 35 and 36 of that treaty allow an international organisation to assume rights and obligations of a treaty without being a party to that treaty, on conditions that the parties to that treaty intend to provide such rights and obligations, and that the international organisation accepts those rights and obligations. This suggests that the UN, while not being a party to GCs and APs, may become holders of right and bearers of duties under these IHL treaties.[48]

It ought to be recalled that the principal argument against the application of IHL rules to UN forces is that UN peacekeeping forces are not considered parties to a conflict. Nevertheless, the Rome Statute of the International Criminal Court (ICC Statute) provides two indices suggesting a departure from this traditional understanding. First, there is no provision giving members involved in UN peace support operations immunities from individual criminal responsibility for core crimes. On the contrary, the approach of the ICC Statute is plainly to make

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[45] E. Benvenisti, "The Security Council and The Law on Occupation: Resolution 1483 on Iraq in Historical Perspective", (2003) 1 *Israel Defense Forces Law Review* 23, at 34–35. For assessment of applicability of the law of occupation to UN-based peace-enforcement operations, see Kelly (1999), *supra* n. 1; Kolb *et al., supra* n. 42; Zwanenburg (2005), *supra* n. 14, in particular Chs. 3–5 (at 131–285).

[46] Sassòli, *supra* n. 16, at 687. For examinations of the applicability or not of IHL to UN operations, see Greenwood, *supra* n. 16; C. Emanuelli, *Les actions militaires de l'ONU et le droit international humanitaire* (1995); *idem* (ed), *Les casques bleus: policiers ou combattants?* (1997); D. Shraga, "The United Nations as an Actor Bound by International Humanitarian Law", in: L. Condorelli, A.-M. La Rosa, and S. Scherrer (eds), *Les Nations Unies et le droit international humanitaire, Actes du Colloque international à l'occasion du cinquantième anniversaire des Nations Unies, Genève, 19 20 et 21 octobre 1995* (1996), at 317–338.

[47] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, reproduced in (1986) 25 *ILM* 543.

[48] Okimoto, *supra* n. 6, at 207.

official position of persons irrelevant under Article 27. In view of these, the use of force by UN peacekeepers, which goes beyond law enforcement circumstances, may trigger the application of IHL. Persons engaged in UN peace support operations are clearly covered by the scope of these provisions.[49] In this regard, the US, preoccupied with "politicised" prosecution, secured Security Council Resolution 1422 of 12 July 2002. This highly controversial Resolution allowed deferral of potential prosecutions of peacekeepers from non-state parties to the ICC Statute for a twelve-month period, purportedly in accordance with Article 16 of the ICC Statute.[50] This very fact demonstrates the US view that the UN peacekeeping personnel are bound by IHL and susceptible to the risk of committing war crimes.[51] Second, Article 8(2)(b)(iii) of the ICC Statute expressly stipulates that it is a war crime "[i]ntentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict".

6. *The Distinction between Enforcement Action and Non-Enforcement Action in Assessing the Applicability of IHL*

The UN-commanded operations that involve the deployment of military forces can be divided into two types: peace-making operations which form part of the enforcement action pursuant to Chapter VII of the UN Charter; and peacekeeping operations established under Chapter VI (or so-called Chapter VI 1/2) of the Charter. It must be examined whether this distinction is considered to be of special importance to the assessment of applicability of IHL. At least *de lege ferenda*, the application of the law of occupation to UN peace support operations (not just to enforcement action but also to peacekeeping forces) provokes less controversy.[52] In this respect, it ought to be recalled that the drafters of GCIV

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[49] Stahn (2003), *supra* n. 29, at 94–95. See also S. Wirth, "Immunities, Related Problems, and Article 98 of the Rome Statute", (2001) 12 *CLF* 429, at 450 (not recognising immunities of foreign forces abroad).

[50] For criticism of the compatibility of the Resolution with the systematic interpretation of Article 16 of the ICC Statute, see Stahn, *ibid.*, at 88–91.

[51] Zwanenburg (2005), *supra* n. 14, at 176.

[52] G.J. Cartledge, "Legal Constraints on Military Personnel Deployed on Peacekeeping Operations", in: H. Durman and T. McCormack (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (1999), 121, at 128. See also Zwanenburg (2005), *ibid.*, at 208. The question of applicability of GCIV to a partial or total occupation of the territory of a state party to the GCIV by forces that are not parties to an international armed conflict has

specifically contemplated its broader scope of application *ratione materiae* to cover issues of occupation, irrespective of the existence of armed conflict.[53]

Inquiries need to be made into two aspects. In the first place, the UN troops pursuant to enforcement action operate under the explicit mandate of Security Council resolutions which are binding on all states. This suggests that the Council can abrogate rules on the law of occupation when furnishing a normative framework for the operation of enforcement forces. The scope of the mandate may be broadened to encompass the establishment of the international civil presence assigned for post-conflict administration.[54] Surely, as the *Brahimi Report* acknowledges,[55] the mandates given by Security Council resolutions may turn out to be short and notoriously vague.[56] They may not proffer specific details on applicable rules concerning the treatment of detainees, the procedure and standards for the employment of local officials, as well as the relationship between the force and the population (which covers policing powers, detention of civilians, investigations of crimes and the management of penitentiary systems).[57] In the absence of express mandates concerning such areas under a specific Security Council resolution, the UN peace support forces must comply with the relevant norms of IHL and international human rights law that are applicable to occupied territories.[58]

In the second place, the enforcement action under Chapter VII does not need consent of a territorial (host) state.[59] On a factual level, this brings about a situ-

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been extensively explored by M. Kelly, *Peace Operations: Tackling the Military, Legal and Policy Challenges* (1997), in particular, Chs 4–5.

[53] ICRC, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, (Geneva, April 14–26, 1947)*, (1947), at 8.

[54] Compare M.H. Hoffman, "Peace-enforcement Actions and Humanitarian Law: Emerging Rules for 'Interventional Armed Conflict'", (2000) 82 *IRRC* 193, at 198 (arguing that the UN Charter does not accord the UN any authority to administer the territory of a sovereign state, and such juridical authority can be found solely in the body of IHL relating to occupation).

[55] *Report of the Panel on United Nations Peace Operations (Brahimi Report)*, attached to the *Identical letters dated 21 August 2000 from the Secretary-General to the President of the General Assembly and the President of the Security Council*, 21 August 2000, UN Doc. A/55/305 and S/2000/809, para. 56.

[56] See also Irmscher, *supra* n. 16, at 383.

[57] J. Cerone, "Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo", (2001) 12 *EJIL* 469 at 485; Kelly (1999), *supra* n. 1, at 70; and Zwanenburg (2005), *supra* n. 14, at 195–196.

[58] Cerone, *ibid.*, at 485.

[59] It must be noted that the question of applicability of the law of occupation is separate from that of identifying armed conflict in respect of peace enforcement which does not rely on consent of a host state or the parties to the conflict. For instance, van Hegelsom uses the existence of consent to distinguish peacekeeping forces from peace enforcement and rejects application of IHL to the former: G.-J.F. van Hegelsom, "The Law of Armed Conflict and UN Peace-Keeping

ation analogous to that of occupation where there is conflict of interests (if not animosity or even open hostilities) between the inhabitants and the occupying power. Enforcement action results in the UN forces wielding temporary administrative authorities and finding themselves occupying a territory of a sovereign state, a situation amenable to the application of IHL rules.[60]

On the other, the deployment of peacekeeping forces in accordance with Security Council resolutions adopted under Chapter VI or Chapter VI 1/2 depends on the consent of a territorial state.[61] The status of force agreements regulate their powers in a relatively detailed manner.[62] It may be suggested that in view of the consent given by the government of the territorial state in whose territory peacekeeping forces are deployed, the protective mission of a UN peace operation based on the cooperation between the force and the local population is fundamentally different from the occupant-occupied relationship

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and Peace-Enforcing Operations", (1993) 6 *Hague Yearbook of International Law* 45, at 57. On this matter, Zwanenburg criticises the use of a subjective standard (existence or not of consent) for the purpose of identifying armed conflict, stressing objective standards: Zwanenburg (2005), *supra* n. 14, at 191.

[60] Adam Roberts (1984), *supra* n. 18, at 290. See also Bowett, *supra* n. 17, at 490; and Seyersted, *supra* n. 15, at 281–3. See also Hoffman, *supra* n. 54, at 203 and 204 B. Levrat, "Le droit international humanitaire au Timor oriental: entre théorie et pratique", (2001) 83 *IRRC*, No. 841, 77–100, at 95–98; Cerone, *supra* n. 57, at 483–485; Adam Roberts (1984), *supra* n. 18, at 291; and Sassòli, *supra* n. 16, at 688.

This conclusion cannot be diminished even in situations where peacekeeping forces or UN civil administrations do not meet any armed resistance. This is simply irrelevant, as provided in Article 2(2) GCs. Referring to the practice in Congo in the early 1960s, Cambodia in 1991, Somalia in 1993 and in Bosnia in 1995, Kelly argues that:

> The application of both the convention regime and the customary law of non-belligerent occupation are not dependent on whether forces are party to a conflict or engaged in combat. It is dependent on the fact of the presence of a force on foreign territory where they are the sole or primary effective authority.

Kelly (1999), *supra* n. 1, at 178.

[61] Nevertheless, ONUC in Congo and UNOSOM II in Somalia were two outstanding cases in which the UN could not obtain consent of host states: Okimoto, *supra* n. 6, at 217. In relation to UNOSOM II, the UN Department of Peacekeeping Operations observed that "…in an environment of state collapse, the Fourth Geneva Convention could supply adequate guidelines for regulating relations between peacekeeping troops and the local populations": UN Department of Peacekeeping Operations, *The Comprehensive Report on Lessons Learned from the United Nations Operation in Somalia (UNOSOM) April 1992–March 1995,* (1995), available at www.un.org/Depts/dpko/lessons/ (last visited on 30 June 2008) para. 57. Note that the US, which contributed the largest contingent to UNOSOM II, recognised the *de facto* applicability of GCIV: US Department of the Army, *FM 100–23 Peace Operations* (1994), available at www.dtic.mil/doctrine/jel/service_pubs/fm100_23.pdf (last visited on 30 June 2008), at 48–49.

[62] Irmscher, *supra* n. 16, at 383.

based on conflicts of interests.[63] Nevertheless, as will be discussed immediately below, this fact alone does not *ipso facto* exclude the applicability of the law of occupation in that context.

7. *Consent as a Determining Factor?*

The foregoing discussions on the distinction between enforcement and non-enforcement action turn on the consent of the territorial state. It must be explored whether the application of IHL to peacekeeping forces is suspended if and so long as the host or sovereign government has consented to the deployment of troops in the territory.[64] Even if this is answered in the positive, the applicability of IHL as such may not be considered excluded. For instance, once the consent is withdrawn or the whole basis of consent becomes questionable, this will "resuscitate" the applicability of IHL rules to the relevant territory.[65] Vité argues that the absence of consent by the territorial sovereign to the deployment of foreign troops constitutes a key to determining the application of the law of occupation. He contends that in case of peace-making operations founded under Chapter VII of the UN Charter, their coercive nature meets this criterion.[66]

Nevertheless, several arguments can be adduced to counter the suggestion that the absence of consent of a territorial state should serve as a determining factor for assessing the application of IHL. First, even in case of deployment of troops based on consent, the relationship between the population in an area and the peacekeeping forces may become so deteriorated as to result in open hostility. Cottier argues that "widened peacekeeping" missions, as in the case of Opération des Nations Unies au Congo (ONUC) in Katanga province,[67] may create a grey area in which active use of force reaches a degree sufficient to be described as an offensive force and to justify divesting peacekeepers of the entitlement to civilian

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[63] Shraga (1996), *supra* n. 46 at 327–328; and S. Vité, "L'applicabilité du droit international de l'occupation militaire aux activités des organisations internationals", (2004) 86 *IRRC* 9, at 19–20.

[64] Sassòli, *supra* n. 16, at 689.

[65] For the same argument, see Adam Roberts (1984), *supra* n. 18 at 291; and Vité (2004), *ibid.*, at 21. *Contra*, Sassòli, *ibid.*, at 689.

[66] S. Vité, "L'applicabilité du droit de l'occupation militaire aux opérations des organisations internationales, *Collegium, Proceedings of the Bruges Colloquium, Current Challenges to the Law of Occupation, 20–21 October 2005,* No. 34 (2006), Special Edition, 93, at 96.

[67] The International Court of Justice, in its advisory opinion on *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, found that ONUC was not an enforcement action under Chapter VII of the UN Charter: Advisory Opinion of 20 July 1962, ICJ, Rep. 1962, 151, at 166.

protection.[68] Indeed, there is a possibility that the mandate for a peacekeeping mission may be transformed into a full-blown enforcement operation under Chapter VII of the UN Charter.[69] Further, hostilities may ensue even in the case of the genuine attempt by the UN peacekeeping forces to stop fighting between two or more factions in the relevant territory. Second, the government that has accorded consent may not exert effective control over the relevant part of its territory, where insurgents are operating and in which peacekeeping forces are deployed.[70] Third, the consent of general nature given by a host state may not be sufficiently specific and concrete to allow effective peacekeeping operations. This is especially true for peacekeepers embroiled in situations of disorder or turmoil of a highly complex nature.[71] Indeed, in some circumstances, as in the case of UNOSOM II, there may be no functioning government that exercises effective control over a territory.[72] Fourth, as Zwanenburg notes,[73] consent may be obtained by duress which takes the form of threat or use of force in violation

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[68] M. Cottier, "Attacks on Humanitarian Assistance or Peacekeeping Missions", in: O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999) 187, at 195. Okimoto's examination reveals that notwithstanding the juridical nature of the ONUC, this UN force was engaged in heavy combat with irregular forces in the Katanga province, which included even several air strikes by ONUC air forces: Okimoto, *supra* n. 6 at 201 and the UN sources cited in n. 10. Surely, as Cottier notes, where peacekeepers cross the boundary between "quiet" peacekeeping missions to a more volatile mission, there arises a hard question of determining whether the whole peacekeeping operation may still be perceived as neutral or lose entitlement to protection equivalent to that given to civilians: Cottier, *ibid.*, at 195.

[69] Cottier, *ibid.*

[70] This is precisely the case with respect to the ONUC forces in Katanga, Congo in 1961: Cottier, *ibid.,* at 195; and Okimoto, *supra* n. 6, at 201.

[71] This point is recognised by the *Brahimi Report*, which states that:

> Experience shows, however, that in the context of modern peace operations dealing with intra-State/transnational conflicts, consent may be manipulated in many ways by the local parties. A party may give its consent to United Nations presence merely to gain time to retool its fighting forces and withdraw consent when the peacekeeping operation no longer serves its interests. A party may seek to limit an operation's freedom of movement, adopt a policy of persistent non-compliance with the provisions of an agreement or withdraw its consent altogether. Moreover, regardless of faction leaders' commitment to the peace, fighting forces may simply be under much looser control than the conventional armies with which traditional peacekeepers work, and such forces may split into factions whose existence and implications were not contemplated in the peace agreement under the colour of which the United Nations mission operates.

Report of the Panel on United Nations Peace Operations of 21 August 2000, UN Doc. S/2000/809, para. 48, available at <http://www.un.org/peace/reports/peace_operations/docs/full_report.htm> (last visited on 30 June 2008).

[72] Zwanenburg (2005), *supra* n. 14, at 196–197.

[73] *Ibid.*, at 197.

of international law.[74] This was the case of the consent given by erstwhile Federal Republic of Yugoslavia to the Military-Technical Agreement[75] that brought an end to armed conflict between the parties.[76]

These analyses make it clear that the procedural question whether a peace support operations are based on Chapter VI (or Chapter VI 1/2) or on Chapter VII is not of material importance. Even a peacekeeping force under Chapter VI (or Chapter VI 1/2) may be considered to exercise a type of "occupation by consent", which is susceptible to the application of the law of occupation.[77] Indeed, as early as 1964, Bowett already suggested that the laws of occupation can be applied not only to enforcement action based on Chapter VII, but also to peacekeeping operations pursuant to a recommendation of the Security Council under Article 39 of the Charter, or the General Assembly under the Uniting for Peace Resolution.[78]

8. *The Convention on the Safety of the United Nations and Associated Personnel*

The 1994 UN Convention on the Safety of the United Nations and Associated Personnel appears to distinguish between enforcement action on one hand, and what it defines as a "United Nations operation" in that Convention on the other. Article 1 of the Convention defines a "United Nations operation" as "an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control". Further, Article 2 of that Convention makes clear that it does not

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[74] According to Article 52 of the Vienna Convention on the Law of Treaties, a treaty is void if its conclusion has been obtained by the threat or use of force in violation of the principles of international law.

[75] The Military-Technical Agreement, concluded on 9 June 1999 by NATO military authorities and the Federal Republic of Yugoslavia.

[76] See I. Brownlie, "Kosovo Inquiry: Memorandum on the International Law Aspects", (2000) 49 *ICLQ* 878, at 897, paras. 88–89 (concerning the Rambouillet Agreement). As Zwanenburg notes, the same argument based on duress can apply to the Military Technical Agreement: Zwanenburg (2005), *supra* n. 14, at 197, n. 199. On this matter, Cerone argues that "formal consent would probably be insufficient to overcome the presumption of occupation that arises from the circumstances leading up to the signing of the MTA [Military-Technical Agreement]": Cerone, *supra* n. 57, at 484. In any event, KFOR's presence has been rendered legal by Security Council Resolution 1244 of 10 June 1999 (which was adopted under Chapter VII of the UN Charter). Even so, as he notes, this does not directly affect the application of the Geneva Conventions: *ibid*.

[77] Adam Roberts (1984), *supra* n. 18, at 291.

[78] Bowett, *supra* n. 17, at 490.

apply to "a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies". Article 2 provides an implication *a contrario* that conduct of UN peacekeeping forces based upon Chapter VI or Chapter VI 1/2 of the Charter is not bound by IHL (including the law of occupation). This can be explained by the understanding of the drafters of the Convention that the Convention and the regime of IHL are mutually exclusive.[79] It was felt that if UN military personnel were covered by IHL, they could become a legitimate target for attacks. In contrast, this Convention prohibits attacks against UN and associated personnel.[80]

The picture is, however, more complicated because of the insertion of the saving clause under Article 20. Article 20(a) reads that nothing in the Convention shall affect "the applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards". This provision brings us back to the question whether the UN operations are entitled to the protection of the Convention or are regarded as a party to the conflict, which can benefit from the application of IHL rules.[81]

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[79] It was also considered that if both were applicable concurrently, UN forces would be better protected than the adversary, providing the latter with a disincentive to abide by IHL rules: Okimoto, *supra* n. 6, at 214. Non-application of IHL in such context would degenerate into a state of lawlessness that must be absolutely avoided: Hersch Lauterpacht provides a cogent argument:

> . . . any application to the actual conduct of war of the principle *ex injuria jus non oritur* would transform the contest into a struggle which may be subject to no regulation at all. The result would be the abandonment of most rules of warfare, including those which are of a humanitarian character. These rules . . . have served to a considerable extent the purpose of preventing or diminishing human suffering, and that they would in fact cease to operate if their operation were made dependent upon the legality of the war on the part of one belligerent or group of belligerents.

H. Lauterpacht, "The Limits of the Operation of the Law of War", (1953) 30 *BYIL* 206, at 212.

[80] C. Emanuelli, "The Protection Afforded to Humanitarian Assistance Personnel under the Convention on the Safety of United Nations and Associated Personnel", (1996) 9 *Humanitäres Völkerrecht Informationsschriften* 4, at 6.

[81] See also the corresponding provision under Article 4(b) of the Statute of the Special Court for Sierra Leone. On this matter, McDonald comments that this provision "could prove especially interesting if it provokes a debate on whether UN and ECOMOG peacekeepers were entitled to the protection of the 1994 UN Convention on the Safety of United Nations and Associated Personnel or could be considered as combatants bound by international humanitarian law": A. McDonald, "Sierra Leone's Shoestring Special Court", (2002) 84 *IRRC* 121, at 130.

As Zwanenburg notes,[82] two strands of interpretation can be put forward. First, it may be argued that this saving clause does not add anything new to Article 2(2) of the Convention. According to this line of interpretation, Article 20(a) merely reiterates that UN military personnel must respect IHL in circumstances where the Convention is not applicable under Article 2(2). Second, it may be suggested that notwithstanding Article 2(2), the saving clause allows the concurrent application of IHL and the Convention.[83] The second view implies an asymmetrical consequence. The UN personnel can become parties to the conflict as lawful combatants while enjoying privileges unavailable to opponents, whose attack against the UN personnel incurs responsibility for war crimes.[84] According to Bouvier, the negotiations leading up to the adoption of Article 20(a) (draft Article 6) and the textual tenor of the Convention[85] clearly suggest the simultaneous application of the Convention and IHL.[86] The scope of application *ratione materiae* of the Convention[87] is hence quite distinct. It covers: (i) the situations in which the Convention and IHL apply; and (ii) those in which only IHL is applicable, namely circumstances envisaged by the exclusion clause under Article 2(2).[88]

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[82] Zwanenburg (2005), *supra* n. 14, at 171.

[83] The inapplicability of the Convention to enforcement operations in which any of the UN personnel are engaged as combatants and to which IHL applies does not mean that IHL is irrelevant to the subject matter dealt with by the Convention. Indeed, the Convention does not undermine the application of IHL to protect UN operations, and the UN and associated personnel: C. Bourloyannis-Vrailas, "The Convention on the Safety of United Nations and Associated Personnel", (1995) 44 *ICLQ* 561, at 583–584; and A. Bouvier, "Convention on the Safety of United Nations and Associated Personnel: Presentation and Analysis", (1995) 35 *IRRC* 638, at 663.

[84] Rome Statute of the International Criminal Court, Article 8(2)(b)(iii).

[85] See, for instance, Article 8 of the Convention, which stresses the duty to treat UN or associated personnel who are captured or detained "in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949".

[86] Bouvier, *supra* n. 83, at 663.

[87] The material scope of application of the Convention is expanded by the Optional Protocol to the 2006 Convention on the Safety of United Nations and Associated Personnel. Article II(a) of the Protocol requires state parties to it to "apply the Convention in respect of all other United Nations operations established by a competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control for the purposes of: (a) Delivering humanitarian, political or development assistance in peacebuilding, or (b) Delivering emergency humanitarian assistance".

[88] Bouvier, *supra* n. 83, at 663.

9. *The Threshold for Determining Whether the UN Forces Have Become Parties to an Armed Conflict*

In view of the great reluctance to characterise UNOSOM or the United States forces in Somalia as parties to armed conflict, it may be argued that the threshold for determining whether UN peacekeeping forces have become parties to an armed conflict is set higher than in other cases.[89] Similarly, the minimum level for ascertaining the existence of an armed conflict may be elevated. Greenwood observes that:

> It appears . . . that a United Nations force and national units operating in association with it but under national command will be regarded as parties to an armed conflict only when they have engaged in hostilities on a scale comparable to those of a force established for the purpose of enforcement action. That scale will be considerably higher than that which is used to define an armed conflict of other purposes.[90]

This line of reasoning may be buttressed by the practice. Still, in theory, it is preferable to envisage the same threshold to be applied to the assessment of the outbreak of an armed conflict.

10. *The UN Post-Conflict Administration and the Law of Occupation*

10.1. *The UN Practice Relating to Post-Conflict Administration*

The legal regime of international administration can be discerned from Danzig in the inter-war period through the failed attempt at the Free Territory of Trieste in 1945 and Jerusalem in 1948, to its fully revitalised operation in post-conflict societies such as Cambodia, Eastern Slavonia in Croatia, Namibia, East Timor and Kosovo, which have taken place since 1990s.[91] It can be suggested that the law of occupation should be generally applied to the situation of post-conflict UN governance, unless this was precluded by the obligations arising from Chapter VII-based resolutions of the Security Council. Clearly, the fact that an international administration is set up subsequent to a UN enforcement opera-

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[89] Greenwood explicitly recognises "a tendency to treat the threshold for determining whether a force has become party to an armed conflict as being somewhat higher in the case of United Nations and associated forces engaged in a mission which has a primarily peace-keeping or humanitarian character than in the normal case of conflicts between states": Greenwood, *supra* n. 16, at 24.

[90] *Ibid.*, at 25.

[91] See S. Chesterman, "Occupation as Liberation: International Humanitarian Law and Regime Change", (2004) 18 *Ethics and International Affairs* 51, at 56–58.

tion does not detract from the applicability in itself of IHL to such a regime.[92] As briefly mentioned above, Bowett already contemplates the application of the laws of war, in particular, the laws of occupation, to such situations:

> The question of the law concerning the behaviour of United Nations Forces towards the government, inhabitants and property while occupying the territory of a State opposing it does become relevant in instances of "enforcement action" under Chapter VII, or possibly to similar action pursuant to a *recommendation* of the Security Council under Article 39 or the General Assembly under the Uniting for Peace Resolution.
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> In any of these latter three situations, a United Nations Force may be in actual "belligerent occupation" of territory, or may exercise a civil affairs administration subsequent to hostilities but before the relevant organ has determined that international peace and security is no longer threatened. Under these conditions, the customary and conventional laws of war (Articles 42–56 of the Hague Regulations and the General Convention of 1949 relating to the Protection of Civilian Persons in Time of War being two of the principal sources) are relevant to United Nations Forces.[93]

In both Kosovo and East Timor, the relevant Security Council resolutions adopted under Chapter VII of the UN Charter vested the UN with a comprehensive mandate to set up international civil and security presences authorised to wield all legislative[94] and executive authority and to take charge of the administration of justice. In Kosovo, Security Council Resolution 1244 (1999) authorised the establishment of an international presence: KFOR (largely consisting of NATO forces)[95] for security presence and the United Nations Interim Administration in Kosovo (UNMIK) for civil presence. It remains, however, unclear to what extent the KFOR, which is not commanded and controlled by the UN and not subordinated to the Secretary-General or his Special Representative, is bound by UNMIK regulations.[96] In East Timor, the Security Council Resolution 1272

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[92] This is obvious, as the legal basis under *jus ad bellum* does not affect the applicability of IHL rules concerning occupation. This holds true, even though the state of occupation may be subsequently recognised by the Security Council, as in the case of occupied Iraq (2003–2004): Sassòli, *supra* n. 16, at 689.

[93] Bowett (1964), *supra* n. 17, at 490, emphasis in original.

[94] Irmscher doubts that Resolution 1244 dealing with Kosovo supplied an explicit authorisation to legislation: Irmscher, *supra* n. 16, at 391.

[95] Security Council Resolution 1244 envisaged the establishment of an international presence in Kosovo. Within this framework, KFOR was designated as a security branch of the international presence while an international civilian presence, contemplated in this Resolution, later became United Nations Interim Administration Mission in Kosovo (UNMIK); Security Council Resolution 1244, S/RES/1244 (1999), 10 June 1999 (adopted under Chapter VII of the UN Charter), paras. 7, 8 and 10. Irmscher, *ibid.*, at 355. See also Cerone, *supra* n. 57, at 484.

[96] Wills, *supra* n. 2, at 313. Regulation 2000/47, "On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo", provides that KFOR shall respect applicable law and regulations to the extent that they do not run counter to the fulfillment of their

(1999)[97] set up the United Nations Transitional Administration in East Timor (UNTAET), following the successful restoration of peace and security by the International Force for East Timor (INTERFET).[98] Indeed, the mandates of the UN civil presence were so broad and comprehensive as to cover a range of nation-building tasks. These included: the reconstruction and operation of public utilities and infrastructure, the establishment and operation of civil service, the operation of social services relating to employment, health care and education, and the creation of necessary conditions for economic development, such as the establishment of a banking system and the formulation of financial policies.[99]

The UN has recognised the application of international human rights law to its post-conflict administration. Yet, it has yet to recognise the application of IHL, in particular, the law of occupation. The wording of Section 1 of the CPA Regulation No. 1 of 16 May 2003, which provided the outline of the legal authority and goals of the CPA,[100] is strikingly similar to the relevant parts of Regulation No. 1 of UNMIK[101] and Regulation No. 1 of UNTAET.[102] There is, however, a crucial difference in the language of the relevant legal documents.[103] On one hand, in case of Kosovo and E. Timor, as applicable laws, reference is made to "internationally recognized human rights standards". On the other, with respect to occupied Iraq, it is "the laws and usages of war" rather than human rights law that are expressly mentioned in case of CPA's Regulation No. 1.

10.2. *The Appraisal of the Applicability of the Law of Occupation to the UN Administration*

There are fundamental differences between the legal regimes of occupation and the territory administered by UN peace-keeping forces. First, one can revert to the argument discussed above, namely, the argument that in theory, there is no hostile relationship between the civilian population and the UN peacekeeping

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mandate under Resolution 1244. Yet, it is not certain how broadly or narrowly this is to be construed. Further, KFOR is exempted from the ombudsman's jurisdiction, and KFOR soldiers' reported human rights violations are not subject to a local agency's oversight: *ibid*.

[97] UN Security Council Resolution 1272 of 25 October 1999.

[98] INTERFET was created by Security Council Resolution 1264 of 15 September 1999.

[99] H. Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor", (2001) 95 *AJIL* 46, at 46–47.

[100] CPA Regulation No. 1, §1, para. 1, 16 May 2003.

[101] UNMIK Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo, UNMIK/Reg/1999/1, Section 1, para. 1.1, 25 July 1999.

[102] Regulation No. 1999/1 on the Authority of the Transitional Administration in East Timor, UNTAET/Reg/1999/1, Section 1, para. 1.1, 27 November 1999.

[103] Adam Roberts, "Transformative Military Occupation: Applying the Laws of War and Human Rights", (2006) 100 *AJIL* 580, at 612.

forces. Both the population and the forces generally pursue the shared objective of re-establishing peace and order between the territorial state and the state deploying troops.[104] It may be argued that the possibility that the Chapter VII-based deployment of peace-keeping forces may encounter hostile reactions of the local population does not diminish this common objective. Second, transitional international civil administrations are authorised under the Security Council's Chapter VII-based mandate to exercise a wide purview of power. Such power includes the capacity to introduce reforms in legislation and institutions, which would go beyond the parameters of changes that are allowed under Article 43 of the 1907 Hague Regulations and Article 64 of GCIV.[105]

Dinstein argues that the Hague rules on belligerent occupation are not, formally, applicable to UN peace-building situations. Yet, he recognises the possibility of their application "by analogy".[106] Sassòli proposes that the application of the law of occupation should be confined only to the situation where an international territorial administration "is run or *de facto* controlled by military forces", rather than by international civilian presence. He argues that the scope of application of the law of occupation can be stretched only to cover "belligerent, i.e. military presences not meeting armed resistance" within the meaning of common Article 2(2) GCs.[107] Be that as it may, it cannot be denied that as demonstrated in the practice of the INTERFET in East Timor, the law of occupation, especially GCIV, can serve as a source of inspiration for rules concerning the system of detention and administration of justice.[108]

11. *Conclusion*

The foregoing appraisal demonstrates that detailed rules embodied in both conventional and customary rules of IHL concerning occupation can help address

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[104] See also David, *supra* n. 44, at 500–501.

[105] Vité (2004), *supra* n. 63, at 24–25.

[106] Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, (2004), at 2. Shraga excludes the applicability of the law of occupation to the UN peacekeeping forces, with special reference to the powers of requisition and of detention. She argues that such powers can be conferred only by a binding, Security Council resolution: D. Shraga's remark in: Condorelli *et al.* (eds) (1996), *supra* n. 46 at 433. Zwanenburg, however, stresses that in such context, it is necessary for the Council to provide clear guidance for resolving issues of administration of territory: M. Zwanenburg, "Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation", (2004) *IRRC*, No. 856, 745, at 763.

[107] Sassòli, *supra* n. 16, at 688–689.

[108] David, *supra* n. 44, at 501, para. 2.354. For detailed discussions on this subject, see B.M. Oswald, "The INTERFET Detainee Management Unit in East Timor", (2000) 3 *YbkIHL* 347, at 350–361.

diverse issues faced by UN peacekeeping forces, such as disorder, crimes, property, economy and public life in general. In particular, the main advantage of applying IHL to international territorial administration pursuant to peace operations can be seen in the task of maintaining and ensuring public order and civil life. IHL provides an express legal basis for arrest, detention and punishment of persons threatening public order. As examined above, this advantage is not, however, fully tapped into by the *United Nations, Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law*. The *Bulletin* does not incorporate any rules on treatment of civilian detainees in occupied territory (or indeed any rules on the law of occupation).[109]

Given that the UN is not considered capable of becoming a party to IHL treaties, it is essential that the relevant Security Council resolutions adopted under Chapter VII of the UN Charter should provide a clear mandate for IHL rules germane to both civilian and military international presences. In particular, it is of vital importance for the Council resolutions to recognise the application of the law of occupation (as well as appropriate human rights law) by analogy. This will give much needed substance to the cursory description of the IHL rules set forth in the *Bulletin*. Further, specifying a detailed set of rules in resolutions is

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[109] In contrast, the *Bulletin* incorporates rules on treatment of detainees as derived from GCIII. Section 8 of the *United Nations, Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law* provides that:

> The United Nations force shall treat with humanity and respect for their dignity detained members of the armed forces and other persons who no longer take part in military operations by reason of detention. Without prejudice to their legal status, they shall be treated in accordance with the relevant provisions of the Third Geneva Convention of 1949, as may be applicable to them *mutatis mutandis*. In particular:
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> (a) Their capture and detention shall be notified without delay to the party on which they depend and to the Central Tracing Agency of the International Committee of the Red Cross (ICRC), in particular in order to inform their families;
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> (b) They shall be held in secure and safe premises which provide all possible safeguards of hygiene and health, and shall not be detained in areas exposed to the dangers of the combat zone;
>
> (c) They shall be entitled to receive food and clothing, hygiene and medical attention;
>
> (d) They shall under no circumstances be subjected to any form of torture or ill-treatment;
>
> (e) Women whose liberty has been restricted shall be held in quarters separate from men's quarters, and shall be under the immediate supervision of women;
>
> (f) In cases where children who have not attained the age of sixteen years take a direct part in hostilities and are arrested, detained or interned by the United Nations force, they shall continue to benefit from special protection. In particular, they shall be held in quarters separate from the quarters of adults, except when accommodated with their families;
>
> (g) ICRC's right to visit prisoners and detained persons shall be respected and guaranteed.

United Nations, Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law, ST/SGB/1999/13, 6 August 1999.

all the more important for the purpose of avoiding ambiguity in the scope of the mandate, which leaves too broad and general an ambit of discretion to the international presence.

Admittedly, the application of the law of occupation in itself is not a panacea for normative gaps created by the deployment of UN peacekeeping forces or the establishment of UN administrations. In particular, problems may arise where peacekeepers undertake administrative detention or internment, which can be authorised on an exceptional basis without criminal charge under the law of occupation. As examined in Chapter 20, the law of occupation lacks detailed procedural safeguards for those persons who are interned or administratively detained.Such deficiencies must be addressed through the creative interpretation of the appropriate treaty-based rules of IHL on the basis of customary norms, which are in turn shaped and influenced by the development of international human rights law.[110] Indeed, as with many other issues of occupation, it is through the synergy of the two bodies of international law that one can construct a coherent and effective legal framework of UN administered territory.

[110] The relevant standards of international human rights law include the UN soft law instruments, such as the Code of Conduct for Law Enforcement Officials (GA Res. 34/169, annex, 34 UN GAOR Supp. No. 46 at 186, UN Doc. A/34/46) and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (available at the website of the Office of the UN High Commissioner for Human Rights).

Part V

Theoretical Appraisal

Part I of this book has examined general principles of the laws of occupation. It has ascertained how the law of occupation, which was codified in 1899, has withstood and survived the turbulent history of the twentieth century all the way up to the Anglo-American occupation of Iraq in 2003. Part II has underlined a number of specific principles derived from IHL treaty-based rules and customary IHL, which are related to fundamental rights of individual persons in occupied territories. Part III has set its principal purposes to explore the extent to which the influence of international human rights law has modified principles of occupation laws. Part IV has in turn dealt with emerging issues relating to the extraterritorial application of international human rights law (IHRL) in occupied territories, and the applicability of IHRL and IHL in territories occupied by UN forces. The final Part will undertake theoretical inquiries into customary IHL rules applicable in occupied territories, with specific regard to their distinct nature, criteria for their formation, and the dynamic process of their interaction with customary IHRL.

The first chapter of this Part analyses the formation process of customary international law (CIL) in general, and the relationship between treaty-based norms and customary law. The appraisal will then turn to the scholarly discussions on the distinction between modern and traditional customary international law. It is in this context that distinct features and special rationale underpinnings of customary IHL will be probed and highlighted. Brief inquiries will also be made into the methodology of the *ICRC's Customary IHL Study* in obtaining customary rules. The chapter's focus will then be shifted to a more theoretical appraisal. For the purpose of providing a solid basis for, and sound process of, ascertaining customary IHL rules concerning fundamental guarantees of persons in occupied territories, the analysis turns to proposed theoretical approaches designed to overcome Koskenniemi's charge that ascertaining rules of international law is inevitably vulnerable either to apology to power politics or to utopianism indicative of natural law.

It is recalled that the primary purpose of this monograph is to build a normative framework within which rights of individual persons in occupied territories can be effectively guaranteed on the basis of the dynamic interaction between IHL and IHRL. Bearing this in mind, the final chapter will investigate the *process* of identifying such a normative framework. Theoretical investigations aim to provide sound rationales to defend the methodology of accommodating emerging standards of customary IHRL in the realm of customary IHL.

Chapter 23

The Nature of Customary International Humanitarian Law Revisited

1. *Introduction*

In this chapter, the examinations firstly deal with the process of identifying customary international law in general.[1] Analysis will then turn to the overarching methodology (inductive or deductive) of ascertaining customary international law. Next, investigations will focus upon the relationship between treaty-based rules and customary international law. In the substantive section, the appraisal will map out the discourse on modern customs and traditional customs. In the last section, brief inquiries will be made into Koskenniemi's critique of the legal

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[1] For different schools of thought, see, *inter alia*, M. Akehurst, "Custom as a Source of International Law", (1974–75) 46 *BYIL* 1; J.A. Beckett, "Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL", (2005) 16 *EJIL* 213; M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law*, (1999); M. Chinen, "Game Theory and Customary International Law: a Response to Professors Goldsmith and Posner", (2001) 23 *Mich. JIL* 143; A.A. D'Amato, *The Concept of Custom in International Law* (1971); D. Fidler, "Challenging the Classical Concept of Custom", (1996) 39 *German YbkIL* 198; J. Goldsmith and E. Posner, "A Theory of Customary International Law", (1999) 66 *Univ. of Chicago Law Rev.* 1113; J. Kammerhofer, "The Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems", (2004) 15 *EJIL* 523; J. Kelly, "The Twilight of Customary International Law", (2000) 40 *VaJIL* 449; Anthea E. Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation", (2001) 95 *AJIL* 757; H.W.A. Thirlway, *International Customary Law and Codification – An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (1972); D. Vagts, "International Relations Looks at Customary International Law: A Traditionalist's Defence", (2004) 15 *EJIL* 1031; M.E. Villiger, *Customary International Law and Treaties – A Manual on the Theory and Practice of the International Sources*, fully revised 2nd ed. (1997); R.M. Walden, "Customary International Law: A Jurisprudential Analysis", (1978) 13 *Israel L. Rev.* 86; and K. Wolfke, *Custom in Present International Law*, 2nd ed., (1993).

argumentative structure based on the fluctuation between apology and utopia. Analyses then turn to theoretical answers to his critique.

2. *Inquiries into the Formation of Customary International Law in General*

2.1. *Two Constituent Elements: State Practice and* Opinio Juris

Despite pleas for the abandonment of the element of *opinio juris* by some prominent scholars,[2] the following appraisal assumes that in order for customs to be identified and ascertained, it is necessary to have two components: state practice and *opinio juris.* Opinions are divided as to the nature and function of each component, especially in relation to *opinio juris*, the centrepiece of disputes. Even with respect to the element of state practice, there remains controversy over whether all aspects of state action, including verbal statements, can constitute state practice. Can state practice be identified in relation to omission, abstention[3] or non-action? Further, how frequent, consistent, long,[4] and uninterrupted does such state practice need to be to trigger the formation of a custom? These questions are inextricably linked to the vexed relationship between state practice and *opinio juris*, probably the most controversial issue for the purpose of identifying the nature of customary IHL.

Beckett argues that the relationship between the two component elements of customs (state practice and *opinio juris*) can be classified in two ways: aggregate or synthesis.[5] The aggregate approach is to posit that the two radically different elements of state practice and *opinio juris* remain discrete and "atomistic", whilst the approach based on synthesis assumes that the two elements become inexorably bound and inseparable.[6] He proposes that the relationship between state practice and *opinio juris* should be understood in a synthesized manner. The two elements are not purported to trade off each other. Rather, both are essential ingredients for creating the normative product of customs.[7]

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[2] A. D'Amato (1971), *ibid.*, at 73–87, especially, at 73–74.

[3] Kelsen recognises that the physical element required for custom can encompass "un acte négatif, soit une abstention", describing it as "une coutume passive" that can mark a contrast to "une coutume active": H. Kelsen, "Théorie du droit international coutumier", (1939) 1 (Nouvelle Série (N.S.)) *Revue internationale de la théorie du droit* 253, at 262.

[4] For instance, the concept of so-called "instant custom" has been introduced by Bin Cheng's oft-cited article: B. Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?", (1965) 5 *Indian Journal of International Law* 23.

[5] Beckett, *supra* n. 1, at 220.

[6] *Ibid.*

[7] *Ibid.*, at 231–232.

Positivist theorists disagree over the nature or definition of *opinio juris.* There has been controversy over whether this means consent by states or their belief that certain conduct is required by law. Does this refer to consent of states to legality (legally binding or obligatory nature and effect) or a belief in legality?[8] With respect to belief, there is a further question whether it is required to have a belief that specific conduct *is* required by law (or something *is* law), or a belief that something *ought to be* law.

2.2. *Some Problems Relating to State Practice*

With regard to the question which conduct of states can be counted as state practice, traditional positivists argue that it is *opinio* that differentiates practice from mere conduct.[9] In contrast, natural lawyers suggest that state action must be congruent with overarching ethical principles. Tesón contends that:

> If we are equipped with a moral theory, which, on reflection, seems to us correct, our process of selecting those precedents that shape a customary rule shall be naturally guided by such theory. I suggest that in this important sense, moral philosophy (loosely understood as including assessments of fairness, efficiency, and so forth) is part of what we think of, rather loosely, as international law. (…) the legal principles and rules that deal with human rights and the use of military force… are supposed to embody fundamental moral perceptions. On one hand, the legal norms in question are inextricably linked with our notions about the justice or injustice of war. On the other hand, our interpretation of those norms reflects the place we are willing to accord to basic human rights in international relations.[10]

The requisite elements relating to state practice, such as duration, frequency and consistency, are inherently uncertain and opaque.[11] Further, among numerous and varying phenomenal forms of state conduct, which form can be counted as state practice remains a fundamental question.

2.3. *Can Verbal Acts Constitute Practice Free of a Specific Normative Belief?*

There has been controversy over whether state practice can include statements as a form of verbal act, apart from "physical" acts. Kammerhofer points out that there is an intrinsic distinction between the argument that deems practice the exercise of the right claimed on one hand, and the argument that sees practice as a claim itself. The latter approach results in blurring the line between state

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[8] *Ibid.*, at 232–234.

[9] See ICJ, *North Sea Continental Shelf Cases*, Judgment of 20 February 1969, ICJ Rep. 1969, 3, at 43, para. 74. See also Beckett, *ibid.*, at 220.

[10] F.R. Tesón, *Humanitarian Intervention – An Inquiry into Law and Morality*, 3rd ed., (2005), at 13–14.

[11] D'Amato (1971), *supra* n. 1, at 56–66; and Byers, *supra* n. 1, at 156–62.

practice as a physical element and *opinio juris* as a psychological element.[12] On one hand, D'Amato argues that "a claim is not an act… [and that] claims themselves, although they may *articulate* a legal norm, cannot constitute the material component of custom". He stresses that "until it [a state] takes enforcement action, the claim has little value as a prediction of what the state will actually do".[13] According to him, state practice can nonetheless encompass decisions not to act, or restraint from action, in circumstances where a state could have acted.[14] On the other hand, Akehurst argues that statements can be considered part of state practice, on the basis that it would be "artificial to distinguish between what a State does and what it says".[15]

Wolfke notes that "[t]he origin of misunderstanding caused by considering verbal acts as *custom-reacting* practice lies in confounding such practice with its evidence or with the evidence of acceptance of the practice as law".[16] Similarly, Thirlway argues that "[t]he very real distinction which must be emphasised… is that between the practice of States, which constitutes the material element of custom, and evidence of the practice of States which is not itself practice". He admits that this distinction is "extremely difficult" to draw, in relation to a specific set of facts adduced to support a claim that a certain customary rule exists.[17] Wolfke suggests that "[t]he unquestionably possible role of verbal acts in the formation of international custom is the source of additional confusion in doctrine, because it mixes up the basic practice – the material element of custom – with various practices consisting, *inter alia* also of verbal acts, which, depending on their content and other circumstances, can constitute direct or indirect evidence of the subjective element of custom, that is, the acceptance of the basic practice as law".[18]

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[12] Kammerhofer, *supra* n. 1, at 525.

[13] D'Amato (1971) *supra* n. 1, at 88, emphasis in original.

[14] *Ibid*., at 88–89. Thirlway observes that:

> The mere assertion *in abstracto* of the existence of a legal right or legal rule is not an act of State practice; but it may be adduced as evidence of the acceptance by the State against which it is sought to set up a claim, of the customary rule which is alleged to exist, assuming that that State asserts that it is not bound by the alleged rule.… More important, such assertions can be relied on as *supplementary* evidence both of State practice and of the existence of the *opinio juris*; but only as supplementary evidence, and not as one element to be included in the summing up of State practice for the purpose of assessing its generality.

Thirlway, *supra* n. 1, at 58, (emphasis in original).

[15] Akehurst, *supra* n. 1, at 3.

[16] Wolfke, *supra* n. 1, at 42, emphasis added.

[17] Thirlway, *supra* n. 1, at 57.

[18] Wolfke, *supra* n. 1, at 43.

2.4. *Some Problems Relating to* Opinio Juris

The element of *opinio juris* is articulated by the ICJ in the *North Sea Continental Shelf* Cases:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.* The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough.[19]

Obviously, not all states, especially newly created states, have participated in the formation of customary international law. The theory of tacit consent, according to which consent is inferred or implied as a form of acquiescence, is introduced precisely to provide coherence to the theory of consent as a basis for *opinio juris*,[20] and to the voluntarist foundation of customary international law. Mendelson notes that only the "specially affected states" that "knew, or might have been expected to know", of the practice can be considered capable of tacitly acquiescing in it.[21]

At first glance, a change in an existing customary norm by a new customary norm seems difficult to conceive, if the creation of a new norm is considered to violate the existing norm.[22] Further, it can be argued that if there needs to be a belief that specific conduct is pursuant to a particular norm, such a belief would be in relation to an existing norm, so that for a new customary norm to

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[19] ICJ, *North Sea Continental Shelf* Cases, Judgment of 20 February 1969, ICJ Rep. 1969, 3, at 44, para. 77.

[20] Kammerhofer, *supra* n. 1, at 533. See also R. Walden, "The Subjective Element in the Formation of Customary International Law", (1977) 12 *Israel L. Rev.* 344, at 355. Walden refers to Tunkin's argument that newly created states are presumed to have generally recognised a customary rule, with the *onus probandi* on the state denying that it is bound: G. Tunkin, *Theory of International Law*, English ed., (1974), at 355.

[21] M. Mendelson, "The Subjective Element in Customary International Law", (1995) 66 *BYIL* 177, at 186, with reference to the *Fisheries* case (*UK v. Norway*), Judgment of 18 December 1951, ICJ Rep. 1951, 116, at 138–139.

[22] This question is again dependent on the ways in which the relationship between state practice and *opinio juris* should be understood. Kammerhofer cogently argues that one must not confuse the act/process of customary law creation, which is governed by the "meta-norm" governing the *Tatbestand* (required elements) for custom-creation on one hand, and the act of application of a customary norm as such (the simple act of applying a substantive norm): Kammerhofer, *supra* n. 1, at 531.

be created, the belief that a new norm is being shaped must be an erroneous belief.[23] Kelsen explains that:

> La théorie du droit romain [qui s']appelle <<opinio juris sive necessitatis>>... veut dire la conviction des individus qu'ils ne sont pas libres mais qu'ils sont obligés ou autorisés à accomplir les actes qui constituent la coutume créatrice du droit; (...) si les sujets, qui accomplissent ces actes, pensent qu'en les faisant ils exécutent déjà du droit positif, ils se trompent; car ce droit ne se trouve encore que in statu nascendi. Le sens subjectif avec lequel l'acte se présente ne répond pas, pas encore, à un sense objectif.

Kammerhofer extends Kelsen's argument further, arguing that:

> First the nature of the subjective element is that it contains an act of will. It is precisely an act of will that makes law positive rather than hypothetical.... Second, because the subjective element does not have to correspond to some pre-existing legal "reality", i.e. the claims made do not have to be "truthful", it is the fact of the making of the claim, not of the "value" of the claim that is relevant. A constitutive view of *opinio juris* requires that the veracity of the beliefs be secondary to the *existence* of the belief.[24]

Mendelson provides two different strands of theory to explain the rationale for psychological element:

> Some identify the subjective element in custom as the State's will (or several or all States' will) that the practice become a rule of law: in other words, with consent to the (would-be) rule. Proponents of this, voluntarist, approach tend to equate the creation of custom with tacit agreement: just as treaties are the written, formal expression of States' will, so custom is its informal manifestation. Others reject the voluntarist thesis, preferring to regard the subjective element as a *belief* – a belief in

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[23] See the discussion provided in: Kelsen (1939), *supra* n. 3, at 263. Kelsen observes that:

> Cette théorie selon laquelle les actes constituant la coutume doivent être executés dans l'intention d'accomplir une obligation juridique ou d'exercer un droit... c.-à-d. d'exécuter une règle de droit déjà en vigueur, cette théorie est évidemment fausse. Car une telle interprétation de l'élément psychique dit <<opinio juris sive necessitatis>> a pour conséquence que le droit coutumier ne peut prendre naissance que par *une erreur* des sujets constituant la coutume. C'est pourquoi quelques auteurs admettent que la prétention subjective avec laquelle les actes qui forment la coutume se présentent, doit simplement être: qu'ils réalisent des normes qui doivent *devenir* du droit, des commandements de la morale ou de la justice (qui ne sont cependant pas encore du droit positif, mais ne sont pas non plus de simples normes d'une <<courtoisie internationale>>). (...) Les sujets constituant la coutume seraient liés par une norme juridique préexistante, par la norme précisément que subjectivement ils croient appliquer. C'est une erreur qui se rattache évidemment à la conception... selon laquelle la coutume ne serait pas la création d'une norme déjà existante dans la conscience sociale.

Ibid., at 263, emphasis in original.

[24] *Ibid.*, at 536, emphasis in original.

> the legally permissible or obligatory character (as the case may be) of the conduct in question: *opinio juris sive necessitatis*, or *opinio juris* as it is known for short".[25]

Mendelson nonetheless cautions against placing too much emphasis on the distinction between the consent theory and the theory based on belief. He suggests that the relative weight of both schools depends on a specific context.[26]

The distinction between will and belief provides another analytical angle. Even so, Kammerhofer questions whether it is possible to draw a sharp line between these subjective elements, arguing that:

> . . . the lines between "will" and "belief" become unclear: can one say that a belief, especially if formulated as "belief that the practice *becomes* or *ought to be* law", is not an act of will? On the other hand, is the "belief that something *is* law" really an act of will?
>
> . . . it is impossible to distinguish between what the law is and what it ought to be. One would have to know what the law is in order to distinguish between the *lex lata* and *lex ferenda*: The object of ascertaining the *opinio juris* is to find out what the law is and that is what has to be proven.[27]

Thirlway suggests that the concept of *opinio juris* should be broadened to encompass both the belief, rightly or wrongly, that the practice *is* required by law (*opinio juris*) and the belief that practice *ought to be* law (*opinio necessitatis*).[28] By the same token, Walden contends that with respect to the customary law formation, "what is involved may be, not a belief that the practice is already legally binding, but a claim that it ought to be legally binding. In other words, those who follow the practice, and treat it as a legal standard of behaviour, may be doing so with deliberate legislative intention".[29] Thirlway argues that if a state considers, mistakenly or not, either that there exists a rule of law (*lex lata*) which requires specific action, or that a certain action remains *de lege ferenda* but is "socially desirable", then this is sufficient to distinguish the nascent legal rule from the usage, or potential usage, which results from simple courtesy or convenience.[30]

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[25] Mendelson (1995), *supra* n. 21, at 180–181 (1995), emphasis in original.
[26] *Ibid.*, at 183.
[27] Kammerhofer, *supra* n. 1, at 535–536, emphasis in original.
[28] Thirlway, *supra* n. 1, at 55–56.
[29] Walden (1978), *supra* n. 1, at 97.
[30] Thirlway, *supra* n. 1, at 55.

2.5. *Subjective Elements of State Practice, Which are Indicative of* Opinio Juris

Müllerson agrees that state practice embrace both objective and subjective elements.[31] Yet, he adds that not all acts of states contain *opinio juris*.[32] Indeed, Mendelson cogently notes that a subjective element discovered in state practice may be "*opinio non juris*".[33] States may make it clear that albeit they act in a certain manner, they consider neither that they do so out of legal obligation (as in the case of comity of sending condolences on the death of a head of State), nor that they intend their behaviour to contribute to the formation of a rule as a precedent (as in the case of the exemption from customs duties of goods imported for the personal use of diplomats).[34] Viewed in that way, only those subjective elements discovered in the practice of a state, which relate to "the possibility or desirability of formation of customary rules" as a result of its acts, as opposed to those subjective attitudes of a state towards its acts in international relations generally, can qualify as *opinio juris*.[35] From Müllerson's approach, it is clear that subjective elements of states can be implicitly obtained from the physical act of state behaviour.[36] Along the line of argument suggested by Müllerson, Kammerhofer contends that state practice can be differentiated between the action that in essence demonstrates a behavioural regularity, and the action based on the psychological element. According to him, it does not matter whether this psychological element indicates the *will* that behaviour should contribute to the law-creation, or the *belief* that behaviour should be in conformity to law.[37]

It is to be recalled that according to Kelsen's *Pure Theory of Law*,[38] the special feature of customary law lies in the will of the subjects of law that they "*ought to observe* the behavioural regularity; i.e. the recognition that the practice is a norm".[39] Kelsen observes that:

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[31] R. Müllerson, "The Interplay of Objective and Subjective Elements in Customary Law", in: K. Wellens (ed), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (1998) 161, at 164.

[32] *Ibid.*, at 165.

[33] Mendelson (1995) *supra* n. 21, at 197–198.

[34] Müllerson, *supra* n. 31, at 164–165.

[35] *Ibid.*, at 164.

[36] Kammerhofer, *supra* n. 1, at 527.

[37] *Ibid.*, at 528. Wolfke seems to follow this line of reasoning, when he asserts that:

> As far as the element of practice is concerned, treaties, being strictly speaking only a promise of certain conduct, are by no means the practice described *in their content*. In fact, they constitute true custom-forming precedents only in the customary law of treaties. In other cases, treaties, on condition of their implementation, may be at most evidence of practice, more precisely, of the practice of their implementation and not that promised *in their content*.

Wolfke, *supra* n. 1, at 70, emphasis added.

[38] H. Kelsen, *Reine Rechtslehre,* 2nd ed., (1960), at 9, emphasis in original.

[39] Kammerhofer, *supra* n. 1, at 546–547, emphasis in original.

> Normen, durch die ein Verhalten als gesollt bestimmt wird, können auch durch Akte gesetzt werden, die den Tatbestand der Gewohnheit konstituieren. (…) Der subjektive Sinn der Akte, die den Tatbestand der Gewohnheit konstituieren, ist zunächst nicht ein Sollen. Erst wenn diese Akte durch eine gewisse Zeit erfolgt sind, entsteht in dem einzelnen Individuum die Vorstellung, daß es sich so verhalten soll, wie sich die Gemeinschaftsmitglieder zu verhalten pflegen, und der Wille, daß sich auch die anderen Gemeinschaftsmitglieder so verhalten sollen. (…) So wird der Tatbestand der Gewohnheit zu einem kollektiven Willen, dessen subjektiver Sinn ein Sollen ist. Als objektiv gültige Norm kann aber der subjektive Sinn der die Gewohnheit konstituierenden Akte nur gedeutet werden, wenn die Gewohnheit durch eine höhere Norm als normerzeugender Tatbestand eingesetzt wird. Da der Tatbestand der Gewohnheit durch Akte menschlichen Verhaltens konstituiert wird, sind auch die durch Gewohnheit erzeugten Normen durch Akte menschlichen Verhaltens gesetzt, und sohin, wie die Normen, die der subjektive Sinn von Gesetzgebungsakten sind, *gesetzte*, das heißt *positive* Normen. Durch Gewohnheit können Moralnormen sowie Rechtsnormen erzeugt werden. Rechtsnormen sind durch Gewohnheit erzeugte Normen, wenn die Verfassung der Gemeinschaft die Gewohnheit, und zwar eine bestimmt qualifizierte Gewohnheit, als rechtserzeugenden Tatbestand einsetzt.[40]

The English translation of this passage reads that:

> Norms according to which men ought to behave in a certain way can also be created by custom. (…) At first the subjective meaning of the acts that constitute the custom is not an *ought*. But later, when these acts have existed for some time, the idea arises in the individual member that he ought to behave in the manner in which the other members customarily behave, and at the same time the will arises that the other members ought to behave in that same way. (…) In this way the custom becomes the expression of a collective will whose subjective meaning is an *ought*. However, the subjective meaning of the acts that constitute the custom can be interpreted as an objectively valid norm only if the custom has been instituted by a higher norm as a norm-creating fact. Since custom is constituted by human acts, even norms created by custom are created by acts of human behaviour, and are therefore – like the norms which are the subjective meaning of legislative acts – "posited" or "positive" norms. Custom may create moral or legal norms. Legal norms are created by custom, if the constitution of the social group institutes custom – a specially defined custom – as norm-creating fact.[41]

The understanding that state action is inclusive of *opinio juris* is most saliently illustrated in Mendelson's writing:

> Verbal acts, then, can constitute a form of practice. But their *content* can be an expression of the subjective element – will or belief. (…) Whether we classify a particular verbal act as an instance of the subjective or of the objective element may depend on circumstances, but it probably does not matter much which category we put it into. What must, however, be avoided is counting the same act

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[40] Kelsen (1960), *supra* n. 38, at 9.

[41] H. Kelsen, *Pure Theory of Law*, translation from the second (revised and enlarged) German edition by M. Knight, (first published in 1967; reprinted in 1970), at 9, emphasis in original.

> as an instance of *both* the subjective and the objective element. If one adheres to the "mainstream" view that it is necessary for both elements to be present, and in particular for the subjective element to be accompanied by "real" practice, this must necessarily preclude treating a statement as both an act and a manifestation of belief (or will).[42]

According to Mendelson, verbal conduct such as statements, which are considered state practice as such, implies the subjective element.[43] This may result in dispensing with the separate proof of *opinio juris*.[44]

3. *Methodology of Ascertaining Customary IHL*

3.1. *Inductive Approach*

Ascertainment of customary international law is traditionally premised on inductive reasoning, which focuses on empirical data to extrapolate a general norm.[45] Kammerhofer aptly sums up the essence of the inductive method, noting that:

> The criterion of the inductive method is the correspondence of the thesis developed by an author with the "facts" of international life. Authors who espouse that method will try to induce the law on customary law-making from instances where customary law has been created in the past, a sort of state practice concerned not with rules of customary law, but with the way in which these rules come about.[46]

One of the specific advantages of the inductive method is that results of the induction are consistent with empirically verifiable facts.[47] Yet, this method entails the risk of muddling facts (descriptions of reality) and law (the normative projection of future behaviour).[48] Further, it tends to prioritise the empirical and descriptive accuracy at the expense of rational coherency and integrity.

Positivist theories are anchored in the inductive approach. Hart considered the system of international law insufficiently developed to have secondary rules of recognition to give legal validity to norms as international law.[49] He took the view that "there is no basic rule providing general criteria of validity for

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[42] M. H. Mendelson, "The Formation of Customary International Law", (1999) 272 *RdC* 155, at 206–207, emphasis in original.

[43] *Ibid.*, at 283–293.

[44] Kammerhofer, *supra* n. 1, at 526.

[45] B.B. Simma and P. Alston, "The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles, (1988–89) *Austl.YbkIL* 82, at 88–89.

[46] Kammerhofer, *supra* n. 1, at 537.

[47] *Ibid.*, at 537.

[48] *Ibid.*, at 537.

[49] H.L.A. Hart, *The Concept of Law*, 2nd ed., (1994), at 229–230.

the rules of international law", and that "the rules which are in fact operative constitute not a system but a set of rules, among which are the rules providing for the binding force of treaties".[50] According to him, international law is "in a stage of transition" towards recognising "[a] basic rule of recognition . . . which would represent an actual feature of the system and would be more than an empty restatement of the fact that a set of rules are in fact observed by states".[51] It can be argued that Hart draw too much on the analogy of municipal law. In contrast, Van Hoof suggests that the rule of recognition can be identified in international law. According to him, it is the consent of States that can be considered the "constitutive element" (*Tatbestand*) of rules of international law.[52] Van Hoof's proposed approach is nonetheless criticised for mixing *lex lata* based on "is" and *lex ferenda* based on "ought".[53]

3.2. *Deductive Approach*

As evidenced by the ICJ in the *Nicaragua* case,[54] in relation to norms invested with intrinsically fundamental values and authority such as the non-use of force and many catalogues of human rights, there has been a tendency to bend pre-requisites of the traditional methodology by shifting emphasis on the "elusive and rather ephemeral" notion of *opinio juris* rather than on tangible concept of state conduct.[55] This tendency is bolstered by the deductive approach that places special importance on the normative (rather than descriptive) part of *opinio juris.* The deductive method is to extrapolate rules from the more general and abstract propositions, which are often found in the superstructure of natural law or morals.[56] This method has an advantage of retaining internal logical consistency. It also has a benefit of keeping normative ideals separate and autonomous from empirical reality.[57] The deductive approach is certainly not free from controversy.[58] Its inference from an abstract proposition entails the epistemological problem of non-verifiability.[59] Kelsen criticises that "the norms of the Law of Reason present themselves as the meaning of acts of thought: they

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[50] *Ibid.*, at 236.
[51] *Ibid.*, at 236.
[52] G.J.H. Van Hoof, *Rethinking the Sources of International Law* (1983), at 76–81.
[53] Kammerhofer, *supra* n. 1, at 544.
[54] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Merits, ICJ Rep. 1986, 14, at 99–104, paras. 188–195.
[55] See, for instance, F.L. Kirgis, Jr., "Custom on a Sliding Scale", (1987) 81 *AJIL* 146, at 149.
[56] Kammerhofer, *supra* n. 1, at 537.
[57] *Ibid.*, at 542, with his reference to A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926), at 31.
[58] Anthea E. Roberts, *supra* n. 1, at 763–764.
[59] See Kammerhofer, *supra* n. 1, at 537.

are not willed norms but *thought* norms".[60] Another charge against a deductive method is that deduction is susceptible to subjective reasoning.[61] This in turn suggests the vulnerability of inferential process to the "preponderant" influence of a few powerful states.[62]

4. *The Relationship between a Treaty-based Norm and Customary Law*

4.1. *The Implications of the* North Sea Continental Shelf *Cases Revisited*

In this section, examinations turn to the question of the "entangled strands of treaty and custom".[63] In the *North Sea Continental Shelf* Cases, no doubt the *locus classicus* for the assessment of this matter, the ICJ recognised the possibility of a treaty norm generating a customary rule. It stated that "[t]here is no doubt that this process [the process of a treaty provision generating new customary law] is a perfectly possible one and does from time to time occur".[64] Whether a particular IHL treaty provision can be described as a "norm-creating provision" ought to be evaluated against benchmarks suggested by the ICJ in that case.[65] According to the ICJ's wording, the relevant treaty provision "should, at all events potentially, be of a fundamentally norm-creating character such as could

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[60] H. Kelsen, *Allgemeine Theorie der Normen* (1979), at 5–6; and *idem, General Theory of Norms*, translated by M. Hartney, (1991), at 6, emphasis in original.

[61] Meron notes that "the characterisation of some rights as fundamental results largely from our own subjective perceptions of their importance": T. Meron, "On a Hierarchy of International Human Rights", 80 *AJIL* (1986) 1, at 8.

[62] T. Meron, *The Humanization of International Law*, (2006), at 377. See also Simma and Alston, *supra* n. 45, at 88, 94 and 96. They propose that search for universal human rights should focus on the notion of general principles along a strictly consensualist line: *ibid.*, at 102–108. See also M. Koskenniemi, "The Pull of the Mainstream", (1990) 88 *Mich.L.Rev.* 1946, at 1951.

[63] O. Schachter, "Entangled Treaty and Custom", in: Y. Dinstein (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, (1989), at 717–738, at 718.

[64] *North Sea Continental Shelf Cases*, ICJ Rep. 1969, 3, at 41, para. 71.

[65] There, in respect of the contention submitted by Denmark and the Netherlands that Article 6 of the 1958 Geneva Convention on the Continental Shelf, which contains the equidistance principle for the delimitation of continental shelves, had produced new customary law, and as such had binding effects on the Federal Republic of Germany, the Court observed that:

> In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect . . . it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention.

Ibid., para. 71.

be regarded as forming the basis of a general rule of law".[66] Still, the Court added a caveat that the process of a treaty rule yielding customary law "is not lightly to be regarded as having been attained".[67] The "fundamentally norm-creating character" requirement in essence excludes from becoming customs any rules that give indispensable role to treaty-based bodies, or to a normative regime which is inextricably linked to a particular treaty.[68]

In *Prosecutor v. Tadic*, when discussing customary IHL rules applicable to non-international armed conflicts, the Appeals Chamber of the ICTY recognised the capacity of a treaty-based rule to produce a concurrent customary norm. It held that:

> The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallized, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions…but also applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and…to the core of Additional Protocol II of 1977.[69]

Villiger argues that the two yardsticks, "fundamentally norm-generating character" and "general rule of law", are the key to understanding the mechanism of a treaty provision developing into a customary norm.[70] These two inter-related yardsticks call for the capacity of a norm to regulate *pro futuro*.[71] For instance, the rules embodied in sub-paragraphs of Article 75(4) API, one of the axiomatic provisions of the "law-making" treaty (*traité lois*), can be considered to meet these two requirements. When discussing the possibility of ascribing customary law status to a treaty rule, Schachter distinguishes between codification treaties and "treaty rules resulting from widely politicized debates and bloc voting". He

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[66] *Ibid.*, para. 72.

[67] *North Sea Continental Shelf Cases*, Judgment of 20 February 1969, ICJ Rep. 1969, 3, at 41, para. 71.

[68] In this light, one prominent example would be the regime of enhanced protection provided in the Second Protocol to the 1954 Hague Convention. This regime is indispensably connected to the International List of Cultural Property under Enhanced Protection, as decided by the Committee for the Protection of Cultural Property in the Event of Armed Conflict. See R. O'Keefe, *The Protection of Cultural Property in Armed Conflict*, (2006), at 322–323 and 326. In the context of *jus ad bellum*, the obligation to report to the Security Council, which is required of the state invoking the right of self-defence under Article 51 of the UN Charter, is a similar example.

[69] ICTY, *Prosecutor v. Tadic*, Decision on the Defence of Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, Case No. IT-94–1–AR72, para. 98.

[70] Villiger, *supra* n. 1, at 177–178.

[71] *Ibid.*, at 177–179.

suggests that the application of the criteria of State practice and *opinio juris* varies, depending on the three factors: (i) the nature of the convention; (ii) the relationship of the convention to "basic values"; (iii) the process by which the convention came into existence.[72] With respect to the third factor, it ought to be noted that many API provisions relating to fundamental rights are adopted by consensus. Schachter's view is echoed by Mendelson, who argues that there is an exception to the general rule that a resolution passed by an international conference is not binding on states. He adds that "[i]f an international humanitarian conference were to adopt a unanimous (or perhaps a nearly unanimous) resolution, and it was clear from the content and context that those voting for it did not regard this as the mere expression of a pious hope, but a formal expression of their position as to the customary law in question, there is no reason of principle or theory why that should not count".[73]

4.2. *The Requirement of "a very widespread and representative participation in the convention"*

Apart from the "fundamentally norm-creating character", the other criterion suggested by the Court in the *North Sea Continental Shelf Cases* is the requirement of "a very widespread and representative participation in the convention", which "include[s] that of States whose interests were specially affected".[74] In the subsequent *Case Concerning the Continental Shelf (Libya v. Malta)*, the ICJ reiterated this approach, ruling that:

> [I]t cannot be denied that the 1982 Convention [the 1982 UN Convention on the Law of the Sea] is of major importance, having been adopted by an overwhelming majority of States; hence it is clearly the duty of the Court, even independently of the references made to the Convention by the Parties, to consider to what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law.[75]

This condition evinces that if many "[s]tates with priority in contributing to the creating of customary international law . . . object to the formation of a custom, no custom can emerge".[76] More to the fundamental point, the assumption of

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[72] O. Schachter, "Remarks in Disentangling Treaty and Customary Law", (1987) 81 *ASIL Proc.* 158, at 159.

[73] Chatham House, *The Law of Armed Conflict: Problems and Prospects, 18–19 April 2005, Transcripts and summaries of presentations and discussions* (presentation by M. Mendelson).

[74] *North Sea Continental Shelf Cases*, Judgment of 20 February 1969, ICJ Rep. 1969, 3, at 42, para. 73.

[75] *Case Concerning the Continental Shelf (Libya Arab Jamahiriya/Malta)* (Merits), Judgment of 3 June 1985, ICJ Rep. 1985, 13, at 30, para. 27.

[76] Y. Dinstein, "The ICRC Customary International Humanitarian Law Study", (2006) 36 *Israel YbkHR* 1, at 13.

the requirement of "a very widespread and representative participation" may in itself be called into question. Indeed, as O'Keefe notes, even very widespread participation in a specific treaty is not necessarily indicative of the customary character of a rule. Becoming parties to a treaty and assuming its obligations are not necessarily grounded on a normative belief as to the duty to chime with custom.[77] While this requirement *might* pose a potential problem for the customary law formation of some provisions of API,[78] it is clearly satisfied in relation to Article 75 API, the product of consensus. With respect to the GCs, the methodology of confirming their customary law status through their highly widespread acceptance among states is supported by many leading publicists.[79]

4.3. *Critical Appraisal of the Relationship between Treaty-Based Norms and Customary Law*

Koskenniemi's dialectic of apology and utopia,[80] which will be examined in section 6 of this Chapter, can prove of great utility in understanding the nature of three patterns of the relationship between treaties and customs: codification; crystallisation; and progressive development of law. According to David Kennedy, these patterns can be analysed from the two opposing standpoints. Codification of (pre-)existing customs may be considered to reflect historic wisdom. On the other hand, identifying customary law through the vehicle of multilateral treaties may be regarded as prone to manipulation by the political majority of the contemporary international community.[81] However, the reverse is more

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[77] See, for instance, O'Keefe (2006), *supra* n. 68, at 317, n. 54. He goes even so far as to argue that the high degree of participation in a given treaty "often" indicates the belief in the opposite direction, namely that a state opts to become a party to a treaty on the assumption or on the ground that a rule it embodies is yet to be considered representative of custom: *ibid*.

[78] Dinstein criticises the conclusion reached by the *ICRC's Customary IHL Study* in respect of the customary law status of the rules embodied, *inter alia*, in Articles 43 and 44 API (the abolition of the status of unlawful combatants other than spies and mercenaries) and Articles 35(3) and 55(1) API (the prohibition on employing methods or means of warfare expected to cause widespread, long-term and severe damage to the natural environment): Dinstein (2006), *supra* n. 76, at 9, and 13–14. However, he gives special weight to the objection raised by a small number of western states (the US, UK and France) as *opinio juris* of the states "whose interests are specially affected".

[79] See, for instance, I. Brownlie, *Principles of Public International Law*, (7th ed., 2008), at 13; T. Meron, "The Geneva Conventions as Customary Law", (1987) 81 *AJIL* 348, at 366; and Adam Roberts, "Prolonged Military Occupation: The Israeli-Occupied Territories 1967–1988", in: E. Playfair (ed), *International Law and the Administration of Occupied Territories – Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, (1992) 25, at 35–36.

[80] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989) reissued (2005).

[81] David Kennedy, "When Renewal Repeats: Thinking against the Box", (2000) 32*N.Y.U.J. Int'l L. & Pol.* 335, at 355. He nevertheless recognises that "[p]erhaps the reverse – custom might be

likely. Traditionally, custom has been perceived as more reflective of the power of dominant political forces (such as western states)[82] while treaties provide the venue for democratic and representative nature of the post-colonial international community. This is more saliently seen in the context of the laws of war than in any other fields, given that the bulk of the customary (and even conventional) rules concerning conduct of hostilities and occupation are derived from customary rules developed in the exclusive club of the "civilised" nations, which were European and North American. Turning to progressive development of law (and crystallisation of an about-to-become custom), this process, if occurring through the medium of multilateral treaties or forums, can be deemed more representative of the modern international community.

Baxter recognises that the "centripetal force" underlies the methodology of using multilateral treaty rules as a vehicle for finding evidence of customary law (whether the treaty rules were initially declaratory or constitutive). He explains that a multilateral treaty, whether it was initially considered declaratory or constitutive of the customary law, can become the reference point because of the clarity of the treaty-based rules.[83] One of the specific results of this convergence is that a state is precluded from denunciating that treaty, and hence from being absolved from its obligations to observe corresponding customary rules.[84]

With respect to the interplay between customs and treaty-based rules in IHL, the most crucial question remains the verification of evidence of evolv-

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the place for recognizing the power of political forces while treaty law preserves the autonomy and distinctiveness of international law": *ibid*.

[82] Schachter observes that:

> Customary law . . . tends to appeal to the conservative. Its case-by-case gradualism reflects particular needs in concrete situations. It avoids grand formulas and abstract ideals. The law that evolves is more malleable and more responsive to each State's individual interest. Not least in the minds of some of its supporters is that custom gives weight to effective power and responsibility whereas multilateral treaty-making unrealistically and unwisely, in their view, treats all States as equally capable.

Schachter (1989), *supra* n. 63, at 721. Developing states and socialist states have often rejected customs, arguing that they have been created to serve the interests of wealthy European and imperialist overlords: Anthea Roberts (2001), *supra* n. 1, at 768. See also L. Henkin, *How Nations Behave – Law and Foreign Policy* 121–121 (1979) (arguing that "[t]heoreticians have questioned the intellectual foundations of the traditional norm", in view of the "wide rejection of the conceptual underpinning" by newly created Asian and African states); and Fidler, *supra* n. 1, at 213–14 and 218.

[83] R.R. Baxter, "Multilateral Treaties as Evidence of Customary International Law", (1965–1966) 41 *BYIL* 275, at 300. On this matter, he refers to the four elements of statehood embodied in Article 1 of the Montevideo Convention on the Rights and Duties of States of 1933.

[84] *Ibid*., at 300.

ing customary norms in relation to states *not* parties to API.[85] This holds true, even though some treaty-based rules, such as Article 75(4) API, can serve as a vehicle for a "customary law generator". Indeed, in the *North Sea Continental Shelf Cases*, the ICJ emphasised the need to leave aside as a relevant guide the practice of contracting parties (and of states that would shortly become parties) *inter se*, since these states "were . . . acting actually or potentially in the application of the Convention [the Geneva Convention on the Continental Shelf]. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law . . .".[86] Here lies the methodological hurdle, which is often described as "Baxter's paradox".[87] In view of the large number of states parties to API, it becomes highly intractable to evaluate the existence of the practice and *opinio juris* of states *dehors* the framework of this convention, with focus on conduct and legal views of non-parties *inter se* (as well as on those of state parties vis-à-vis third parties).[88] In a similar line of reasoning, Jennings, in his dissenting opinion in the *Nicaragua* case, argued that "there are obvious difficulties about extracting even a scintilla of relevant 'practice' . . . from the behaviour of those few States which are not parties to the Charter; and [that] the behaviour of all the rest, and the *opinio juris* which it might otherwise evidence, is surely explained by their being bound by the Charter itself. . . ."[89] He referred to the difficulty of ascertaining the practice of a state party to a treaty in relation to a customary rule supposed to exist in parallel, because all the relevant practice is in accordance with a treaty norm.[90] Indeed, one of the most solid criticisms of such a methodology is that it overlooks and helps erode the consensualist paradigm of international law. Further, while the process by which a treaty can inspire the formation of customary rules has been recognised in international law, there is no guarantee that this will happen.[91]

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[85] R. Cryer, "Of Custom, Treaties, Scholars and the Gavel: the Influence of the International Criminal Tribunals on the ICRC Customary Law Study", (2006) 11 *JCSL* 239, at 244; Dinstein (2006), *supra* n. 76, at 10; and Villiger, *supra* n. 1, at 183.

[86] ICJ, *North Sea Continental Shelf* Cases, ICJ Rep. 1969, at 43–44, para. 76.

[87] For details, see Baxter, *supra* n. 83, at 282–283.

[88] Villiger, *supra* n. 1, at 183–184. See also Chatham House, *supra* n. 73 (presentation by D. Bethlehem); and Dinstein (2006) *supra* n. 76, at 10.

[89] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Merits)*, Judgment of 27 June 1986, ICJ Rep. 1986, 14, Dissenting opinion of Judge Sir Robert Jennings, at 531.

[90] Judge Jennings noted that "[t]o indulge the treaty interpretation process, in order to determine the content of a posited customary rule, must raise a suspicion that it is in reality the treaty itself that is being applied under another name": *ibid*., at 532.

[91] Chatham House, *supra* n. 73 (presentation by M. Mendelson). He refers to the case of the abolition of privateering following the Declaration of Paris of 1856.

Baxter alludes to an exception to the paradox in case of humanitarian treaties.[92] However, he qualified the implications of this exception, noting that the identification of such humanitarian treaties that serve as material evidence for customary international law and impose obligation even on non-parties would require "true international legislation, by which the majority binds the dissenting or passive minority". The question is how to differentiate and verify which of multilateral treaties are qualified as "true international legislation".

5. *"Modern" vs. "Traditional" Understanding of the Formation of Customary International Law*

5.1. *Overview*

There has been much debate over the differentiation between so-called modern customs and so-called traditional customs. According to this dichotomised understanding, there is a marked difference in the methodology of ascertaining traditional customs, such as rules relating to diplomatic immunities etc., which are designed to facilitate the international coexistence and cooperation of states, and modern customs, which deal with issues of pre-eminent importance in international legal order, such as those touching on international human rights law and IHL. It ought to be noted that chronologically, this distinction does not always suggest that traditional customs attained customary law status earlier than modern customs. Indeed, most Hague rules have already become part of customary international law long before debates over modern customs have arisen.

Traditional customs such as rules relating to diplomatic immunities are geared towards facilitating international relations of sovereign states, without necessarily disclosing moral imperatives.[93] Anthea Roberts aptly terms them as facilitative customs.[94] They rely more on descriptive accuracy than on normative appeal, because empirical evidence of state practice is used to identify prescriptive requirements.[95] Kelsen described customs as "a law-creating fact". Facilitative customs are purported to achieve minimum world order values of co-existence and cooperation, which are rooted in the positivist-voluntarist system of international

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[92] Baxter, *supra* n. 83, at 299.

[93] Kelly, *supra* n. 1, at 479–80. Note should be taken of what he calls "structural or constitutive norms", which are intended to "define and structure international relations that are empirically verifiable". See also Simma and Alston *supra* n. 45, at 88–89 (discussion of *la coutume sage*).

[94] See Anthea Roberts, *supra* n. 1, at 764.

[95] *Ibid.*, at 764.

law.[96] In contrast, modern customs tend to place emphasis more on normative appeals rather than on descriptive accuracy, because prescriptive requirements for future action of states are ascertained through a moral lens that attempts to obtain consensus on ideal state behaviour.[97] Such customs may be referred to as "moral customs". IHL and international human rights law are considered to reflect moral values.[98] Customary rules involving moral demands find inherent normative force and rationales without necessarily relying on external considerations, such as the need to facilitate smooth transactions of sovereign states.

5.2. *Traditional Customs*

Traditional customs are those rules which have arisen from general and consistent practice, followed by states' sense of obligations (*opinio*). Several salient features are observable in respect of such customary norms. First, for the purpose of identifying such customs, the primary focus is placed on state practice in the form of inter-state interaction and acquiescence, with the secondary role given to *opinio juris*. The finding of this subjective element has been made possible by examining recurrent patterns within the raw material of state practice and construing those patterns in such a manner as to obtain juridical considerations.[99] Second, the formation process of customary rules is gradual, and evolutionary in a cyclical manner. Third, as a corollary of the first, the method of their identification is the inductive process based on the accumulated body of state practice.[100] This can be typified in the cases of *Lotus*[101] and *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v US)*.[102] Fourth, as explained

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[96] See, for instance, P. Weil, "Towards Relative Normativity in International Law?", (1983) 77 *AJIL* 413, at 418–19; and J. Tasioulas, "In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case", (1996) 16 *OJLS* 85, at 86 and 112.

[97] Anthea Roberts, *supra* n. 1, at 764.

[98] *Ibid*.

[99] Simma and Alston, *supra* n. 45, at 88.

[100] G. Schwarzenberger, *The Inductive Approach to International Law* (1965), at 35–36; *idem*, "The Inductive Approach to International Law", (1946–1947) 60 *Harvard LR* 539, at 566–70. Schachter explains the background for the ascendancy of the inductive approach:

> . . . the powerful ideas of positive science and State sovereignty were harnessed to create a doctrine for removing subjectivism and morality from the "science" of international law. It was intended to make international law realistic and definite. It satisfied those concerned with the realities of State power and the importance of sovereignty. It also met the intellectual requirements of the analytical theorists of law who sought to place jurisprudence on scientific foundations. . . .

See O. Schachter, *International Law in Theory and Practice* (1991), at 36.

[101] *The Lotus* Case (*France v. Turkey*), Judgment of 7 September 1927, (1927) PCIJ Ser. A, No. 10.

[102] In that case, the Court held that "[a] body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for ensuring the co-existence

above, the traditional customs are more geared towards facilitating coexistence and cooperation of states in international society rather than designed to create rights and interests of individual persons.[103]

The advantage of the "traditional" customary norms is that they are "hard and solid" and predictable.[104] In this regard, it is pertinent to recall the normative paradigm postulated by Kelsen, according to which:

> . . . the basic norm [*Grundnorm*] of international law . . . must be a norm which countenances custom as a norm-creating fact, and might be formulated as follows: The states ought to behave as they have customarily behaved.[105]

The gist of this methodology is that the empirical results inductively collected can be projected as the body of law that prognostically determines state behaviour in the future.[106]

5.3. *Modern Understanding of Customs*

In contrast, the so-called modern customs arise from a deductive process. The methodology of identifying modern customary rules places special emphasis upon the inference from generalised statements, rather than from particular instances of state practice[107] The meticulous extent of inquiries into raw materials relating to state practice, such as the consistency and the duration of the practice, if remaining relevant, becomes of secondary importance. Modern customs may be described as new species of universal declaration of law. They are "authoritative statements about practice rather than observable regularities of behavour"[108] Customary rules relating to international human rights and inter-

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and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas": *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v US)*, Judgment of 12 October 1984, ICJ Rep. 1984, 246, at 299, para. 111.

[103] For the extensive analysis of the distinction between facilitative and moral customs, see Anthea Roberts, *supra* n. 1, at 764.

[104] Simma and Alston, *supra* n. 45, at 88–89.

[105] H. Kelsen, *Principles of International Law*, (1952), at 417–418 (and at 307–11); and *idem*, 2nd ed. (Revised and Edited by R.W. Tucker) (1966), at 564 (and at 440–444).

[106] Simma and Alston, *supra* n. 45, at 89. Compare Dissenting opinion of Vice-President Koretsky, *North Sea Continental Shelf Cases.* He distinguished customary international law from general principles of international law, holding that "customary international law turns its face to the past while general international law keeps abreast of the times, conveying a sense of today and the near future by absorbing the basic progressive principles of international law as soon as they are developed": ICJ Rep. 1969, 3, at 156.

[107] Simma and Alston, *ibid*.

[108] D. Bodansky, "Customary (and Not So Customary) International Environmental Law", (1995) 3 *Ind. J. Global Legal Stud.* 105, at 116–119. See also J. Charney, "Universal International Law",

national humanitarian law are considered identifiable through the methodology of modern customs.

Different comments have been voiced in relation to so-called modern customs. As Anthea Roberts notes,[109] modern customs may be criticised for creating quasi legislation through declarations and treaties. With respect to the extrapolation of customs from General Assembly resolutions, Morrison comments that this "changes General Assembly resolutions from a step in the evolution of international law to the end result of that process".[110] Indeed, as the ICJ recognised in the *Nicaragua* case,[111] rules recognised as customary become entrenched in the sense that they are not subject to reservations or denunciation.[112] Surely, one can share Weil's unease when he observes that by recognising the customary law status of certain treaty-based rules, the requirements of treaties have "not been frontally assaulted but cunningly outflanked".[113] Nevertheless, it is submitted that the ascendancy of modern customs can be understood as inextricably intertwined with the two salutary, dynamic trends: (i) the expansion of the international community to encompass a greater number of non-western states; and (ii) the recognition of the applicability of international law to individuals and groups within states.[114]

5.4. *Fidler's Three Perspectives of Evaluating Modern Customs*

Fidler discerns three perspectives of appraising and appreciating modern customs, referring to "dinosaur", "dynamo" and "dangerous perspectives" approaches.[115] Firstly, the "dinosaur" approach is characterised by the argument that in view of the sheer extent of changes in the international system, the focus on traditional custom has become an anachronism or a "legal fossil".[116] It is maintained that the traditional customs are unfit to develop laws to address the needs of the modern international society. Charney proposes that greater reliance should be

(1993) 87 *AJIL* 529, at 543 and 546–547; and H. Chodosh, "Neither Treaty nor Custom: The Emergence of Declarative International Law", 26 *Tex. Int'lLJ* 87 (1991).

[109] Anthea Roberts, *ibid.*, at 765.

[110] F.L. Morrison, "Legal Issues in the *Nicaragua* Opinion", 81 *AJIL* 160, at 162 (1987).

[111] See ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merit), Judgment of 27 June 1986, ICJ Rep. 1986, at 113–14, paras. 217–18.

[112] See T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), at 6–7 (concerning denunciation, termination or suspension of a treaty, and a reservation to a treaty) and 27; and Schachter (1989) *supra* n. 63, at 727–28.

[113] Weil, *supra* n. 96, at 438.

[114] H.C.M. Charlesworth, "Customary International Law and the Nicaragua Case", (1984–87) 11 *Austl. YbkIL* 1, at 2–3. See also Tasioulas, *supra* n. 96, at 116–17.

[115] Fidler, *supra* n. 1, at 216–231.

[116] *Ibid.*, at 216.

made on "general international law" that is shaped primarily through the work of international institutions, and on new law-making procedures within international organisations.[117] Similarly, Bodansky suggests that multilateral treaties should serve as a vehicle for accommodating diverging state parties and forming international legal rules.[118] Such needs have become more and more complex due mainly to three factors: (i) growth in the number of states; (ii) increase in diversity of states; and (iii) emerging global problems affecting the humanity as a whole.[119] Charney adds that customary international law has become outdated because of the expansion of subject matter into areas that have hitherto been the traditional preserve of states' domestic jurisdiction.[120]

The second strand of arguments on modern customs, ("dynamo approach") characterises modern customs as a highly useful source of law that can address global issues in progressive direction.[121] Contrary to the traditional understanding of custom as a conservative force, this approach regards customary international law as a "progressive and innovative force", because of the binding effect of customary international law and of the inability of a state to opt it out unless it acts as a persistent objector.[122] Indeed, even the weaknesses associated with customs, such as ambiguity and vagueness are now heralded as providing flexibility for accommodating diverging values of states and changing needs of the global community.[123] According to this strand of argument,[124] modern customs can be identified through the accumulated body of case law enunciated by international tribunals. Modern customs are related to areas that are of intrinsic importance to the shared values of international community, such as fundamental human rights, genocide, self-determination and environmental issues. Meron writes that "those rights which are most crucial to the protection of human dignity and of universally accepted values of humanity, and whose violation triggers broad condemnation by the international community, will require a lesser amount of confirmatory evidence".[125]

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[117] Charney, *supra* n. 108, at 543–544, and 550–551.

[118] Bodansky, *supra* n. 108, at 119.

[119] Fidler, *supra* n. 1, at 216–220.

[120] Charney, *supra* n. 108, at 544–45.

[121] Fidler, *supra* n. 1, at 220–224. See also Anthea Roberts, *supra* n. 1, at 759.

[122] Fidler, *ibid*., at 222.

[123] *Ibid*., at 222.

[124] As examples of this school, reference can be made to Meron (1989), *supra* n. 112, at 94; L.L. Bruun, "Beyond the 1948 Convention – Emerging Principles of Genocide in Customary International Law", (1993) 17 *Maryland J Int'l L & Trade* 193, at 216–217 (concerning the customary legal norm on genocide); and R.B. Lillich, "The Growing Importance of Customary International Human Rights Law", (1995/1996) 25 *Ga J. Int'l & Comp. L* 1.

[125] Meron (1989), *ibid*.

The sources of inspiration for modern customs are understood as encompassing even the declarations made by international fora (such as UN GA resolutions, relating to genocide, apartheid etc.), despite the non-binding nature of such resolutions. Further, more controversially, modern customs are considered ascertainable even from provisions of multilateral treaties, the position that reverts to the question that has already been addressed above. Schachter argues that:

> Whether human rights obligations have become customary law cannot readily be answered on the basis of the usual process of customary law formation. States do not usually make claims on other States or protest violations that do not affect their nationals. In that sense, one can find scant State practice accompanied by *opinio juris.* Arbitral awards and international judicial decisions are also rare except in tribunals based on treaties such as the European and Inter-American courts of human rights. The arguments advanced in support of a finding that rights are a part of customary law rely on different kinds of evidence. They include the following:
> – the incorporation of human rights provisions in many national constitutions and laws…;
> – frequent references in the United Nations resolutions and declarations to the "duty" of all States to observe faithfully the Universal Declaration of Human Rights…;
> – resolutions of the United Nations and other international bodies condemning specific human rights violations as violative of international law…;
> – statements by national officials criticizing other States for serious human rights violations…;
> – a dictum of the International Court of Justice that obligations *erga omnes* in international law include those derived "from the principles and rules concerning the basic rights of the human person" (*Barcelona Traction* Judgment, 1970)…;
> – some decisions in various national courts that refer to the Universal Declarations as a source of standards for judicial decision….

None of the foregoing items of "evidence" of custom conform to the traditional criteria.[126]

Along this line, Lillich argues that as evidence for identifying customary international human rights law, special emphasis should be placed on multilateral

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[126] O. Schachter, "International Law in Theory and Practice", (1982–V) 178 *RdC* 9, at 334–35; reproduced in: Schachter (1991), *supra* n. 100, at 336. Similarly, Bruun observes that:

> Evidence of state practice and attitudes reflects that a new principle of customary international law has emerged. *Opinio juris* declared by Israel in the *Eichmann* case and by other nations through United Nations resolutions on South Africa, Iraq, and Bosnia have demonstrated a world belief that massive violations of human rights can assume international implications. Foreign state involvement in Uganda, Pakistan, Cambodia, Iran and Iraq has also demonstrated that outside action can be an appropriate response to genocide. *Opinio juris* and state action in this area strongly imply the emergence of a new principle of customary international law.

Bruun, *supra* n. 124, at 216–217.

treaties and the UN General Assembly resolutions, including the UDHR.[127] Anthea Roberts contends that such treaties and resolutions are often expressed in mandatory language to "provide a catalyst for the development of modern custom".[128] Meron provides another analytical angle to support the methodology of discerning customary IHL through the channel of multilateral treaties. According to him, treaty-based IHL rules may reflect "a deliberate ambiguity" between actual and desired practice, because such ambiguity or abstraction is needed with a view to "stretching the consensus of the negotiating states as widely as possible".[129]

Further, as the yardstick for assessing customary rules, one can turn to the ICJ's decisions in the *Barcelona Traction*[130] and *East Timor* cases,[131] and the decisions of international war crimes tribunals such as the ICTY, the ICTR, and to those of various hybrid war crimes tribunals. The normative inspirations for distilling new customary rules can also come from national judicial decisions that have dealt with serious human rights violations, including genocide, crimes against humanity, and war crimes. Clearly of marked significance are the seminal decisions of *Eichmann*,[132] *Pinochet*,[133] *Filartiga*,[134] etc.

Turning to what Fidler regards as "the dangerous perspective approach", this approach views modern custom as a dangerous departure from the traditional approach. D'Amato cautions that the modern approach saps the theoretical edifices of custom by inverting the traditional priority of state practice over *opinio juris*.[135] Indeed, Sir Robert Jennings, the late UK judge at the ICJ even

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[127] Lillich, *supra* n. 124, at 8–10.

[128] Anthea Roberts, *supra* n. 1, at 763. See also remark by E. Jiménez de Aréchaga, in the context of "The Role of General Principles of Law and General Assembly Resolutions", in: A. Cassese and J.H.H. Weiler (eds.), *Change and Stability in International Law-Making*, (1988), at 48 (referring to some General Assembly resolutions, which have the effect of declaring or crystallising customary norms, and describing them as "a model of conduct" of states in the law-marking process).

[129] Meron (1989), *supra* n. 112, at 44. See also Schachter (1991), *supra* n. 100, at 335 and 337.

[130] ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment of 5 February 1970 (Second Phase), ICJ Rep. 1970, 3.

[131] ICJ, *East Timor Case (Portugal v. Australia)*, Judgment of 30 June 1995, ICJ Rep. 1995, 90.

[132] Israel, District Court of Jerusalem, *Eichmann*, Judgment of 12 December 1961, translated into English in 36 *ILR* 5–276; and Israel, Supreme Court, *Eichmann*, Judgment of 29 May 1962, translated into English in 36 *ILR* 277–342.

[133] UK, House of Lords, *R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, 24 March 1999, [1999] 2 *All ER* 97–192.

[134] United States Court of Appeals, Second Circuit, *Filartiga v. Pena-Irala*, 30 June 1980, 630 F.2d 876 (2d Cir. 1980).

[135] A.A. D'Amato, "Trashing Customary International Law", 81 *AJIL* 101, (1987). He specifically criticises the reasoning (or the lack of reasoning) of the International Court of Justice in *Nicaragua* in inferring the customary norm that prohibits intervention from treaties and

went so far as to mention that "… most of what we perversely persist in calling customary law is not only *not* customary law; it does not even faintly resemble a customary law".[136] The ambitious, teleological strategy of relaxing the traditional mechanisms of custom formation is considered to increase the risk of custom being relied upon expediently to serve the interests of powerful states.[137] Reisman proffers an insightful analysis of the structure of the claim concerning custom:

> Rather, the new use of the word "custom" camouflages a constitutive shift in two aspects of the *politics* of international lawmaking. What is being signalled is opposition to the *quantity* and the *style* of formal international legislation as it has developed in the last twenty years. The setting of necessary legislation is being shifted from the most inclusive and open international arenas, such as the General Assembly and universal conferences, to more limited alliance, regional and, within them, value sectoral conferences from which most of the new majority in the United Nations will be excluded.[138]

By the same token, Weisburd expresses his misgiving that the flimsy nature of custom characterises "new modes of law-making" argument.[139] This strand of argument is tantamount to a serious warning that the seemingly perfunctory use of custom may risk lending itself to a rebuke by states and, contrary to the seemingly good intention, result in stultifying the goals of providing sound explications for the rationale basis of human rights law.

5.5. *Descriptive Accuracy and Normative Appeal Revisited*

With respect to the relationship between law and practice, Anthea Roberts distinguishes three epistemological dimensions: what the practice has been; what the law is; and what the practice ought to be.[140] A law is considered primarily descriptive when its justification is backed by what the practice has been. On the other hand, a law is primarily prescriptive if it is based on what the practice ought to be.[141] She criticises the two facets of confusion among positivist

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resolutions. He forcefully argues that the Court "purports to give us a rule of customary international law without even considering the practice of states and without giving any independent, ascertainable meaning to the concept of *opinio juris*": *ibid.*, at 103.

[136] R.Y. Jennings, "The Identification of International Law", in: B. Cheng (ed), *International Law: Teaching and Practice* (1982) 3, at 5, emphasis in original.

[137] See A.A. Weisburd, "Customary International Law: The Problem of Treaties", (1988) 21 *Vand. JTL* 1.

[138] W.M. Reisman, "The Cult of Custom in the Late 20th Century", (1987) 17 *Cal. W. Int'l L.J.* 133, at 135.

[139] Weisburd, *supra* n. 137, at 38–39. He also criticises Baxter's suggestion that humanitarian treaties may constitute exceptions to the paradox: *ibid.*, at 39–41; and Baxter, *supra* n. 83, at 299.

[140] Anthea Roberts, *supra* n. 1, at 761.

[141] *Ibid.*

theorists on this matter. In the first place, descriptive and prescriptive considerations are mistakenly merged. She argues that "[b]y aligning the distinction between description and normativity with the positivist 'is/ought' dichotomy, which distinguishes between what the law is and what the law should be, they conflate the 'has/is/ought' structure with the 'is/ought' dichotomy".[142] In particular, she criticises that there is an erroneous conflation between the descriptive element (the evaluation of what the practice has been) and prescriptive elements (the evaluation of what the law is).[143] Indeed, the conceptual shift from *has been* to *is* involves a process of discovering and creating law. In this process, an abstract rule can be formulated from diverging features (consistency, ambiguities, contradictions etc) of empirical materials based on actual practice. In essence, this distilling process can be saliently seen in the codification of international law.[144] In the second place, Anthea Roberts criticises that there is confusion between prescriptive and normative features of laws. She argues that while prescriptive laws manifest a legal imperative to act, at times with the backing of the sanction of law, normative laws are grounded on moral imperatives (demand for action on the basis of moral requirements).[145] While many rules entail both prescriptive and normative aspects, some laws are purely prescriptive, and devoid of, or indifferent to, moral contents.

Law, conceived as a social institutional system, may entail moral properties, but this does not of necessity suggest that the identity of law is made dependent on specific moral conditions.[146] Anthea Roberts' idea of normativity is, however, susceptible to a criticism that it fails to distinguish two conceptions of the normativity of law, namely, what Raz describes as "justified" and "social normativity".[147] One school of thought claims that legal standards of behaviour are norms only if and insofar as they are justified, whether by some objective (or metaphysical), and universally valid reasons, or by intuitively perceived, subjective value-judgments. This is generally endorsed by natural law theorists. The other school maintains that standards of behaviour are deemed norms irrespective of their merit, because they are socially upheld as binding. Positivists tend to follow this line of thought. However, Kelsen excludes a concept of social normativity from the conceptual realm of normativity. In so doing, he draws a line between a subjective and an

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[142] *Ibid.*

[143] *Ibid.*

[144] O. Schachter, "Recent Trends in International Law Making", (1988–1989) 12 *Austl. YbKIL* 1, 2–3; and J. Stone, "On the Vocation of International Law Commission", (1957) 57 *Colum. L Rev* 16, at 18–19. See also H. Lauterpacht, "Codification and Development of International Law" (1955) 49 *AJIL* 16.

[145] Anthea Roberts, *supra* n. 1, at 761.

[146] J. Raz, *The Authority of Law – Essays on Law and Morality,* (1979), at 45.

[147] *Ibid.*, at 134.

objective "ought".[148] As Raz explains,[149] according to Kelsen, legal norms are considered objective by virtue of its intrinsic, objective "ought". On the other hand, a subjective "ought", conceived as a genre of social normativity, refers to a subjective value judgment, namely "the value that consists . . . in the relation of an object to a wish or will of an individual directed at this object". If one applies Kelsen's distinction between a subjective and an objective "ought" to the process of identifying a new customary norm, this process is even more complex than Anthea Roberts assumes. It requires a facet of ascertaining and abstracting a new customary rule entailing an intrinsically objective "ought" through the prism of a subjective "ought" manifested by a variety of states.

Descriptive accuracy of what the practice *has been* is a virtue that undergirds inductive methodology. It lends credence to the content of international law, because laws should correspond to reality.[150] In a decentralised system of international law, the fact that laws bear some relations to the reality is crucial both for the purpose of effectively regulating conduct and expecting effective compliance on the part of states.[151] Bodansky argues that "in the absence of judicial enforcement, customary norms must have a relatively high degree of specificity in order to exert a constraining influence on states" and to demand compliance pull.[152] Descriptive accuracy is also of special importance for the purpose of giving laws the power of projecting and predicting future state behaviour.[153]

Anthea Roberts argues that justifications for international law based on normative appeal can be further divided into procedural and substantive normativity.[154] On one hand, substantive normativity demands that laws should be coherent, and that their contents should be morally good or at least neutral.[155] On the other hand, procedural normativity requires that the process of formulating law

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[148] H. Kelsen, *The Pure Theory of Law*, (translation from the 2nd German ed. by M. Knight, first published in 1967; reprinted in 1970), at 7; as cited in: Raz, *ibid.*, at 135.

[149] Raz, *ibid.*, at 135–136.

[150] Cheng argues that "[a] valid explanation of the process of the formation of rules of customary international law has indeed to correspond to the realities of the situation". When asserting this, he criticises the approach of dismissing evidence in deference to "the voluntarist-positivist dogma" that rules of customary international law are tacit agreements, which he in turn charges for being based on an unproven postulate that the principle of the equality of state applies not only to the application of the law but also to its making: B. Cheng, "Custom: The Future of General State Practice in a Divided World", in: R.St.J. Macdonald and D.M. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory* (1983), 513, 539.

[151] Anthea Roberts, *supra* n. 1, at 762.

[152] Bodansky, *supra* n. 108, at 118.

[153] Simma and Alston, *supra* n. 45, at 89.

[154] Anthea Roberts, *supra* n. 1, at 762.

[155] *Ibid.*

should be transparent enough to enable states to be aware of the basis for forming customs and to regulate their behaviour accordingly.[156] Indeed, her concept of procedural normativity is very much akin to the concept of procedural legitimacy proposed by Kelly,[157] who contends that:

> Legal rules are more likely to be respected, even when the outcome is unfavourable, if they are the product of a process perceived as legitimate.... Compliance in a decentralized system is more likely if states have participated in the process, accepted norms, and they internalized them into their decision-making process.[158]

Again, in a decentralised system of international law, laws that are created from processes considered legitimate can expect greater compliance on the part of states.[159] Franck argues that "in a community organized around rules, compliance is secured – to whatever degree it *is* – at least in part by perception of a rule as legitimate by those to whom it is addressed. Their perception... becomes a crucial factor, however, in the capacity of any rule to secure compliance when, as in the international system, there are no other compliance-inducing mechanisms".[160]

As Anthea Roberts notes, the two aspects of normativity correspond to Dworkin's differentiation between the notions of fairness and justice. His idea of fairness accords with procedural normativity, whilst his idea of justice tallies with the concept of substantive normativity.[161] Any defects in either procedural or substantive normativity will reduce the capacity of the rules to claim the customary law status and to demand compliance.[162] The question of procedural normativity will be touched upon again below when analysing traditional and modern customs within Koskenniemi's theoretical framework based on the two opposing pulls of apology and utopia.

5.6. *Modern Customs Based on Deduction from Moral Substance*

As explained above, the deductive method favours normative appeals. This can be contrasted to the inductive methodology of ascertaining customs, which tends to privilege description over normativity.[163] It is to be recalled that mod-

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[156] *Ibid*. See also Cheng (1983), *supra* n. 150, at 539; and Charlesworth, *supra* n. 114, at 27.

[157] Kelly, *supra* n. 1, at 457, n. 34.

[158] *Ibid*., at 531. See also B. Kingsbury, "The Concept of Compliance as a Function of Competing Conceptions of International Law", (1997–98) 19 *Mich. JIL* 345.

[159] Anthea Roberts, *supra* n. 1, at 762.

[160] T.M. Franck, "Legitimacy in the International System", (1988) 82 *AJIL* 705, 706, emphasis in original.

[161] R. Dworkin, *Law's Empire* (1986), at 177.

[162] See also Anthea Roberts, *supra* n. 1, at 765. She argues that "inadequacies in either procedural or substantive normativity will diminish respect for asserted customs and reduce their ability to effect compliance".

[163] Koskenniemi (1989), *supra* n. 80, at 41; and *idem*, reissued (2005), *supra* n. 80, at 59–60.

ern customs are associated more with substantive normativity, because they are derived from abstract statements of *opinio juris*.[164] What compounds the analysis is that as seen above, *opinio juris* is inherently ambiguous. It ought also to be recalled that statements of states can be interpreted as either *lex lata* (descriptive characterisation of what the law is) or *lex ferenda* (normative characterisation of what the law ought to be).[165]

In determining the emergence of new, "modern" customary IHL rules, *opinio juris* plays a more decisive role than state practice. Less emphasis is placed on state conduct than on ideal standards of state behaviour.[166] Scholarly opinions and judicial bodies are less exacting in ascertaining not only state practice, but even *opinio juris*, in respect of IHL rules. Such a tendency can be partly explained by the Martens Clause.[167] Meron spells out that "[t]he 'ought' merges with the 'is', the *lex ferenda* with the *lex lata*".[168] He explains that such change in methodology of verifying custom reflects the reality that "the humanitarian conventions may have lesser prospects for actual compliance than other multilateral treaties, even though they enjoy stronger moral support."[169] This is especially the case given the special circumstances in which violations of both IHL and human rights treaty-based rules take place, including the limited access for impartial third parties. Blum and Steinhardt similarly contend that in contrast to the traditional customary approach, which emphasises confirmatory state practice, the newer mode of customary law making is characterised by the tendency to mitigate the importance of unofficial derogations and to stress the shared aspirations of states for a world order.[170] Rational explanations of the scholarly and judicial tendency to rely on the deductive approach in ascertaining customary IHL (and customary international human rights law) can be found in the moral values and aspirations that the normative content of all IHL rules is supposed to manifest.[171]

Meron analyses such proclivity of customary IHL to be shaped by ought-driven moral desires and aspirational values:

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[164] Anthea Roberts, *supra* n. 1, at 763.

[165] *Ibid.*, at 763.

[166] Schachter (1991), *supra* n. 100, at 336; and Tesón, *supra* n. 10, at 12–16.

[167] A. Cassese, "The Martens Clause: Half a Loaf or Simply Pie in the Sky?", (2000) 11 *EJIL* 187 at 214. See also ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Rep. 1996, 226, Dissenting Opinion of Judge Shahabuddeen, at 409–411 (assessment of the concept of public conscience as part of the Martens Clause).

[168] Meron (1989), *supra* n. 112, at 41–42, 44 and 246.

[169] *Ibid.*, at 44.

[170] J.M. Blum and R.G. Steinhardt, "Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after *Filartiga v. Pena-Irala*", (1981) 22 *Harvard ILJ* 53, at 72–73. See also Lillich, *supra* n. 124, at 8–10 (responses to the criticism raised by Simma and Alston)

[171] Anthea Roberts, *supra* n. 1, at 760.

> The teleological desire to solidify the humanizing content of the humanitarian norms clearly affects the [international] judicial attitudes underlying the 'legislative' character of the judicial process. Given the scarcity of actual practice, it may well be that [international] tribunals have been guided, and may continue to be guided, by the degree to which certain acts are offensive to human dignity. The more heinous the act, the more willing the tribunal will be to assume that it violates not only a moral principle of humanity but also a positive norm of customary law.[172]

Modern customs have developed since 1945 in areas of human rights[173] and IHL. Lillich contends that the practice of states, which serves to shape customary international human rights law, includes forms of conduct, which are distinct from those that constitute customary international law generally.[174] Meron refers to those human rights norms that are considered *jus cogens*, averring that they are founded on aspirational values of special importance to "public order of the international community". His observation suggests that intrinsic values represented and projected by specific human rights norms are decisive for identifying their peremptory nature.[175] A similar observation can be said of many IHL rules.

As a corollary of the greater emphasis on the deductive approach and on *opinio juris*, there is tendency to discount inconsistent practice of states.[176] This approach was taken by the ICJ in the *Nicaragua* case, where it held that:

> The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[177]

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[172] Meron (1989), *supra* n. 112, at 42.

[173] Bruun (1993), *supra* n. 124, at 216–17. See also Anthea Roberts, *supra* n. 1, at 764.

[174] Lillich, *supra* n. 124, at 8–9. On this matter, he refers to the methodology of identifying customary international human rights law as suggested by the *Restatement (Third) of the Foreign Relations Law of the United States*, § 701 n. 2.

[175] Meron (1986), *supra* n. 61, at 19–20. Discussing the conceptual expansion of the idea of human rights, which gradually started at national level before the Second World War and the Holocaust, Henkin observes that "[t]he move from state values to human values, from a liberal state system to a welfare system, is . . . undeniable, irresistible, irreversible": L. Henkin, "Human Rights and State 'Sovereignty'", (1995–96) 25 *Ga J. Int'l & Comp. L* 31, at 35.

[176] Anthea Roberts, *supra* n. 1, at 765.

[177] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US),* Merits, ICJ Rep. 1986, 14, at 98, para. 186.

Meron argues that such a tendency helps reinforce the effectiveness of customary law. He explains that:

> Given the frequency of violations, the lack of an approach acknowledging the reality of contrary practice and articulating a method of dealing with it might make it impossible to identify many norms of customary international law, for there is virtually no norm that every nation consistently obeys; in any event, to reduce customary law to a mere description of completely universal practices would be to strip it of its force as law.[178]

Even so, he recognises that contrary practice may reach such "a critical mass" that negates the customary law status of the norms in question.[179]

The emergence of "modern customs" such as those in the areas of international human rights and IHL can be explained by the erosion of the purely voluntarist and consensualist account of the traditional paradigm of international law, which has been associated with the preservation of state sovereignty. Many modern customs exhibit a special feature of discounting dissenting states and inconsistent practice of states.[180] It can be argued that the Martens clause based on "elementary considerations of humanity" suggests the departure from the traditional thinking of the voluntarist approach to customary norms. In the Advisory Opinion in the *Reservations to the Genocide Convention* case, the ICJ stated that "[t]he origins of the [Genocide] Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946)".[181]

6. *Apology and Utopia: Dealing with Koskenniemi's Critique of Legal Argumentations*

6.1. *Overview*

The dichotomy between description and normativity corresponds to what Koskenniemi calls the inherent tension between apology and utopia in the tendency of international norms:

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[178] T. Meron, "Revival of Customary Humanitarian Law", (2005) 99 *AJIL* 817, at 820.

[179] *Ibid*.

[180] Anthea Roberts, *supra* n. 1, at 766.

[181] ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Rep. 1951, 15, at 23.

> A law which would lack distance from State behaviour, will or interest would amount to a non-normative apology, a mere sociological description. A law which would base itself on principles which are unrelated to State behaviour, will or interest would seem utopian, incapable of demonstrating its own content in any reliable way.[182]

He also elaborates this argumentative structure in the tension between the demand of concreteness of a rule and that of normativity:

> The two requirements *cancel each other.* An argument about concreteness is an argument about the closeness of a particular rule, principle or doctrine to State practice. But the closer to State practice an argument is, the less normative and the more political it seems. The more it seems just another apology for existing power. An argument about normativity, on the other hand, is an argument which intends to demonstrate the rule's distance from state will and practice. The more normative a rule, the more political it seems because the less it is possible to argue it by reference to social context. It seems utopian and – like theories of natural justice – manipulable at will.[183]

On the basis of this dialect between apology and utopia, customary norms that place emphasis on conformity to raw empirical data on state practice tends to risk being an apology for power politics. Closely related to this is the (real or putative) voluntary and consensualist foundation of international law. Since public international law is premised on the consent of states, it cannot furnish an external and autonomous force of constraint on state behaviour.[184] On the other hand, customary norms that are primarily based on normative demands may be divorced from reality and become ineffective and utopian.[185] In Koskenniemi's argumentative structure, it would be simply impossible to identify customary rules which are not only autonomous and neutral, but simultaneously effective and determinate. Within the oscillation between the two spectrums, indeterminacy

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[182] Koskenniemi (1989), *supra* n. 80, at 2; and *idem*, reissue (2005), *supra* n. 80, at 17.

[183] M. Koskenniemi, "The Politics of International Law", (1990) 1 *EJIL* 4, at 8, emphasis in original.

[184] Koskenniemi argues that:

> According to the requirement of normativity, law should be applied regardless of the political preferences of legal subjects. In particular, it should be applicable even against a state which opposes its application to itself. As international lawyers have had the occasion to point out, legal rules whose content or application depends on the will of the legal subjects for whom they are valid are not proper legal rules at all but apologies for the legal subject's political interests. . . .

Koskenniemi (1990), *ibid.*, at 8. See also Beckett, *supra* n. 1, at 221 (this is not his view but his reading of Koskenniemi's argument).

[185] Byers argues that "the essence of obligation and the purpose of law would seem to be an ability to control both present *and* future behaviour" (emphasis in original). He refers to the risk of inherent instability and indeterminacy of customary norms: Byers, *supra* n. 1, at 49.

and manipulability become an "endemic and inexorable" feature of customary law.[186] Along this line, David Kennedy observes that:

> . . . the arguments for and against a more political international law are intensely familiar and easily presented as a story about progress. Either international law has been too far from politics and must move closer to become effective, or it has become dangerously intermingled with politics and must assert its autonomy to remain potent.[187]

The thrust of Koskenniemi's critique yields crucial implications on the process of generating customary law, the question to which queries now turn.

6.2. *Traditional Customs and Apology*

As analysed above, the criticism that traditional customs lack procedural normativity in relation to the process of their formation[188] can be highlighted in two respects: (i) the democratic deficit of the custom-formation process; and (ii) by way of the tacit consent doctrine, newly created Asian or African states are considered bound by existing customary laws, despite their non-participation in the process of their formation.[189]

With respect to the first question, traditional customs have often been associated with an apology for exercise of power by powerful states,[190] with a so-called "international community" consisting only of western Europe and the United States, which had long formed an "exclusive club" till the second half of the twentieth century.[191] As regards the codification of international law, Visscher observes that:

> Far from benefiting from the strong community impulse that the national concentrations of the nineteenth century brought to the codification of municipal law, the codification of international law, by its direct dependence upon the explicit agreement of States, elicits the full measure of their natural individualism. (. . .)

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[186] Beckett, *supra* n. 1, at 222.

[187] Kennedy, *supra* n. 81, at 355.

[188] Anthea Roberts, *supra* n. 1, at 767.

[189] D'Amato, *supra* n. 1, at 191–93; Akehurst, *supra* n. 1, at 27; and Anthea Roberts, *ibid.*, at 768.

[190] Koskenniemi (1989), *supra* n. 80, at 355; and *idem*, reissue (2005), *supra* n. 80, at 402.

[191] M. Bedjaoui, *Toward a New International Economic Order* (1979), at 51–53. Schachter argues that "[i]nternational law must . . . be seen as the product of historical experience in which power and the 'relation of forces' are determinants. Those States with power (i.e., the ability to control the outcomes contested by others) will have a disproportionate and often decisive influence in determining the content of rules and their application in practice. . . . Because this is the case, international law, in a broad sense, both reflects and sustains the existing political order and distribution of power": Schachter (1991), *supra* n. 100, at 6. See also Charney, *supra* n. 108, at 537; and Kelly, *supra* n. 1, at 469.

> Up to the Second World War, it was essentially in the practice of the European countries and of the United States that the rules of customary law found their expression. (…) it is… true that divergences are beginning to appear, if not in the principles, at least in their application, and that it is more urgent than it used to be to establish the world-wide scope of the recognition accorded them. In our day, prudent codification meets the need of authenticating the rules of law in this new perspective.[192]

Such a problem of selectivity suggests a "democratic deficit" of the formation of traditional customs,[193] which are considered to reflect values and interests of western powers.[194]

6.3. *Modern Customs and Utopia*

Modern customs that place increased focus on substantive normative appeals entails both advantages and disadvantages. Relying on statements to identify customs spurs their formation.[195] Anthea Roberts argues that the formation of customs through treaties and declarations, rather than state practice, "is potentially more democratic because it involves practically all states".[196] In contrast, there remains a problem of the absence of articulated criteria for ascertaining modern customs.[197] Commenting on the ICJ's ambivalent approach in ascertaining customs in *Nicaragua*, Charlesworth argues that "[t]he combination of familiar terms and categories with a redefinition of content serves to obfuscate rather than clarify an important area of law, and fails to acknowledge directly the shift in the Court's thinking".[198] Further, modern customs may be rebuked for being descriptively inaccurate, because they reflect ideal, rather than actual, behaviour of states.[199]

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[192] De Visscher, *Theory and Reality in Public International Law* 149–150 (P.E. Corbett trans. Rev. ed.,) (1968).

[193] Kelly, *supra* n. 1, at 519.

[194] Fidler, *supra* n. 1, at 213–14 and 218; and Schachter (1989), *supra* n. 63, at 721.

[195] Blum and Steinhardt argue that:

> …there is evidence that lawmaking processes have themselves been transformed, so that obligations now emerge in ways conceptually foreign to the classical system. The essence of the new modes of lawmaking is that they accelerate the process of customary law formation by relying upon the unique form of state practice which occurs in multilateral organizations like the United Nations. If viewed from a naturalistic, declaratory perspective, the new mode consists of the discovery of fundamental human rights.

Blum and R.G. Steinhardt, *supra* n. 170, at 72. See also Charney, *supra* n. 108, at 543 (reference to the tendency to rely increasingly on multilateral forums in forming and creating customary international law).

[196] Anthea Roberts, *supra* n. 1, at 768.

[197] *Ibid*. Indeed, the ICJ failed to provide guidelines on this matter in the *Nicaragua* case.

[198] Charlesworth, *supra* n. 114, at 27.

[199] Anthea Roberts, *supra* n. 1, at 769. Compare this with Bodansky, *supra* n. 108, at 110–112.

7. *Evaluations of Koskenniemi's Argumentation*

7.1. *Overview*

According to Beckett, Koskenniemi's critique assumes that the desired characteristics of consistency, impartiality and objectivity are innate and intrinsic to the law, but lacking in international law.[200] He argues that lurking behind Koskenniemi's critique are two questions: an absence of alienation of power (namely, the absence of the distance of a rule from politics); and absence of a "Sovereign" to determine the content of the law.[201] While Beckett astutely avoids reference to the term "constitution", these questions are in essence relating to the "constitution" of international law (or international constitutional law, Völkerverfassungsrecht), namely, the normative superstructure that governs the formation and operation of international law.

Precisely in this light, Kammerhofer considers that both Koskenniemi's frustration and uncertainties surrounding customary law formation can be explained by the epistemological inability to perceive the constitution of international law as the normative superstructure.[202] There lacks the hierarchically superior normative order that recognises and validates the process of forming international law, including customary international law,[203] and governs the relationship of the sources of international law.[204] It ought to be noted that epistemological difficulty of verifying such a constitution does not mean that such a normative order is inexistent.[205]

7.2. *Beckett's Proposal for a "Virtual Sovereign" and the Reflexive Process of Custom Formation*

Beckett postulates the international community as a "virtual sovereign" within a "reflexive" system of law creation.[206] According to him, the introduction of a "virtual sovereign", which can be actualised in a specific norm-creation process, will allow the conceptual framing of a necessary relationship between law and sovereignty.[207] In specific context of customary law, the gist of Koskenniemi's frustration comes from the absence of sovereignty in international law, which could legitimately and authoritatively apply the rule of recognition so as to

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[200] Beckett, *supra* n. 1, at 228.
[201] *Ibid.*, at 222.
[202] Kammerhofer, *supra* n. 1 at 547–551.
[203] This is what Kammerhofer calls "meta-meta-laws", as these laws govern the meta-law aspects of customary law formation: *ibid.*, at 549.
[204] *Ibid.*, at 549.
[205] *Ibid.*, at 550–551.
[206] Beckett, *supra* n. 1, at 235.
[207] *Ibid.*

ascertain that a new customary rule has emerged, rather than that there has been an aberration of an existing legal rule.[208] The international community can be postulated as the sovereign of international law, which "is actualised only at the points when it is required, e.g. to legislate".[209] Within this theoretical structure, *opinio juris* can be understood as "contextual endorsement" of other states in response to a specific act of a state based on opinion that is left open for emulation by all. It is within this "reflexive" process based on the interplay between the state action that is transmuted to a normative sphere and termed as state practice on one hand, and the *validating reaction* of other states on the other, that we can discern "the *purposive activation* of the rule of recognition". This reflexive process may culminate in the fruition of a customary rule.[210] The result of this process of customs formulation based on the virtual sovereignty of international community is summarised as follows:

> This means that individual states are no longer law-makers, their *individual* consent to the rules is no longer required; consequently it cannot effectively be unilaterally withdrawn: as a result, the system is not apologetic in the important sense of descriptive. Moreover, *opinio* can be fully divorced from morality, and it need not differ between classes of states. Because *opinio* is returned to the realm of factual observation the system is not utopian in either sense.[211]

Beckett's postulation of *opinio juris* as a contextual endorsement without requiring specific, individual consent, is instrumental in mapping out the argumentative framework within which customary IHL can be distilled from concordant practice of treaty-based bodies of international human rights law, the process that will be examined below. Nevertheless, his pre-supposition that Koskenniemi's frustration is largely explicable from the absence of an overarching sovereign in international law is speculative. Further, his concept of "virtual" sovereignty seems undifferentiated from the idea of constitution of international law, or from the concept of general principles of international law. It is submitted that the

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[208] *Ibid.*, at 234–235.

[209] *Ibid.,* at 237.

[210] *Ibid.,* at 236, emphasis added. This process, according to Beckett, can escape the trap of "perpetual stasis" as depicted by Thirlway, who argues that:

> The simple equation of the *opinio juris* with the intention to confirm to what is recognised, at the moment of conforming, as an existing rule of law has been exposed to the objection . . . that it necessarily implies a vicious circle in the logical analysis of the creation of custom. As a usage appears and develops, States may come to consider the practice to be required by law before this is in fact the case; but if the practice cannot become law until States follow it in the *correct* belief that it is required by law, no practice can ever become law, because this is an impossible condition.

Thirlway, *supra* n. 1, at 47.

[211] Beckett, *supra* n. 1, at 238, emphasis in original.

idea of constitution of international law better grasps the structural problems of international law.

8. *Dworkin's Interpretative Theory*

For the purpose of better understanding the nature of the dynamic tension between demand for consistency with empirical data (what Anthea Roberts calls descriptive accuracy), and normative demand of the contents of customs (or normative appeals in her work), Anthea Roberts consider it of special import to examine Dworkin's interpretive theory. Dworkin argues that "[a] successful interpretation must not only fit but also justify the practice it interprets".[212] An interpretive theory of custom is based on the combination of descriptive accuracy (fit) with normative considerations (substance).[213] An interpretation can be considered eligible only if it passes the dimension of fit, which requires the interpretation accurately to describe the raw data of practice. Determining the threshold of fit is not mechanical but dependent on an interpreter's political convictions about fit.[214] Evaluation of empirical data is inevitably "theory dependent and biased by assumption",[215] as this process must be guided by some kind of a priori theoretical convictions. As Anthea Roberts notes,[216] the problem is that the dimension of fit is reflective of "ideological nostalgia",[217] manifesting a conservative preference for a status quo. On this matter, it is pertinent to recall Bedjaoui's argument that:

> . . . the developed countries are perfectly aware that this material element [the speed necessary for the adoption of the customary rules] can only work in their favour. (. . .) Backward looking, conservative because static, iniquitous in its content, ponderous in its formation, custom as traditionally conceived cannot be of real use in the development of new rules, and could actually be an obstacle to any attempt at change.[218]

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[212] Dworkin (1986), *supra* n. 161, at 285.
[213] Anthea Roberts, *supra* n. 1, at 775.
[214] Dworkin (1986), *supra* n. 161, at 257.
[215] Anthea Roberts, *supra* n. 1, at 778–779.
[216] *Ibid.*, at 779.
[217] Presentation by R.A. Falk, in the context of "To What Extent are International Law and International Lawyers Ideologically Neutral?", in: Cassese and Weiler (eds), *supra* n. 128, at 137.
[218] Bedjaoui, *supra* n. 191, at 136–38.

Only after the dimension of "fit", which serves as the "working threshold requirement", is crossed, the dimension of substance comes into play. Dworkin's dimension of substance involves a moral and political theory of international law.[219] In this process, substantive considerations are analytically weighed against fit.[220] The problem is that moral and political ideals are deeply divisive and varying among states or along civilisational fault lines.[221]

Dworkin distinguishes three processes of interpretation: pre-interpretation process in which raw empirical data are collected; the stage of interpretation; and post-interpretation.[222] In the process of interpretation (the so-called "dimension of fit"), a sort of a threshold requirement comes into play, according to which the interpretation can be accepted as eligible only if the raw data of legal practice adequately support it.[223] In his conceptual framework, the term "fit" refers to what the law has been, while the dimension of "substance" indicates a normative moral quest for what it ought to be.[224] As Anthea Roberts notes,[225] three circumstances can be envisaged in Dworkin's interpretation stage: the absence of any eligible interpretation; "easy cases" in which there is only one appropriate interpretation; and "hard cases" in which more than one eligible interpretations exist due, for instance, to conflicting indications from the raw data.[226] The third stage of post-interpretation (so-called "dimension of substance") becomes relevant only in "hard cases". Dworkin suggests that interpretation that makes the practice appear in the best light and is evaluated in accordance with substantive aspirations of the legal system should be chosen. This process requires appraisal of "moral and political ideas", and "higher-order convictions about how these ideals should be prioritized when they conflict".[227] Dworkin aptly describes the nature of the propositions of law as follows:

> . . . propositions of law are not simply descriptive of legal history in a straightforward way, nor are they simply evaluative in some way divorced from legal history. They are interpretive of legal history, which combines elements of both description and evaluation but is different from both.[228]

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[219] Anthea Roberts, *supra* n. 1, at 778.
[220] Dworkin (1986), *supra* n. 161, at 246–47 and 255–57.
[221] K.T. Jackson, "Global Rights and Regional Jurisprudence", 12 *Law and Philosophy* 157, at 158–59 (1993).
[222] Dworkin (1986), *supra* n. 161, at 66.
[223] *Ibid.*, at 255.
[224] R. Dworkin, "Law as Interpretation", (1981–1982) 60 *Tex.L. Rev.* 527, at 528.
[225] Anthea Roberts, *supra* n. 1, at 771.
[226] Dworkin (1986), *supra* n. 161, at 255–256.
[227] *Ibid.*, at 256. See also Anthea Roberts, *supra* n. 7, at 771 and 787.
[228] Dworkin (1981–82) *supra* n. 224, at 528.

In case there are plural eligible interpretations, then inquiries into what the law *has been* (fit) must be balanced against a political and moral inquiry into what it *ought to be* (substance). This may, however, be exposed to Finnis' criticism that "in the absence of any metric which could commensurate the different criteria (the dimension of fit and inherent moral merit), the instruction to 'balance' (or, earlier, to 'weigh') can legitimately mean no more than bear in mind, conscientiously, all the relevant factors, and *choose*".[229]

Along Dworkin's line of reasoning,[230] Anthea Roberts argues that the concept of moral considerations in the dimension of substance should not be limited to the narrow focus of traditional international law based on peaceful coexistence, as enunciated by Tasioulas.[231] She proposes that this concept should be broadened to include commonly held moral objectives and values such as protection of human rights.[232] She also suggests that the dimension of substance should comprise both procedural and substantive normative considerations, with focus on the substantively moral content of customs and on a legitimate process through which the customs are shaped.[233] As she notes,[234] substantive normativity is criticised for conflating law and politics,[235] and discarding the distinction between two functions associated with law-interpretation (discovery and invention).[236]

9. *The Sliding Scale Conceptualisation of Custom*

Kirgis, in his sliding scale theory, attempts to provide a rational explanation for the trade-offs between state practice and *opinio juris*. He argues that when the elements of frequency and consistency of state practice become weakly observable, a stronger demonstration of *opinio juris* will be needed.[237] Kirgis argues that:

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[229] J. Finnis, "On Reason and Authority in *Law's Empire*", (1987) 6 *Law and Philosophy* 357, at 373–74, emphasis in original. This balancing process can cure inadequacies of fit by the relative strengths of substance (which guides the principle of interpretation): Dworkin (1986), *supra* n. 161, at 246–247 and 257.

[230] Dworkin argues that "his [a judge's] decision will reflect not only his opinions about justice and fairness but his higher-order convictions about how these ideals should be compromised when they compete": Dworkin (1986), *supra* n. 161, at 256.

[231] Tasioulas, *supra* n. 96, at 113.

[232] Anthea Roberts, *supra* n. 1, at 778, and 787–9.

[233] *Ibid.*, at 778.

[234] *Ibid.*, at 778.

[235] M. Koskenniemi, "The Police in the Temple – Order, Justice and the UN: A Dialectical View", (1995) 6 *EJIL* 325.

[236] Tasioulas, *supra* n. 96, at 114.

[237] Kirgis, *supra* n. 55.

> On the sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an *opinio juris*, so long as it is not negated by evidence of non-normative intent. As the frequency and consistency of the practice decline in any series of cases, a stronger showing of *opinio juris* is required. At the other end of the scale, a clearly demonstrated *opinio juris* establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule.[238]

According to his model, if state behaviour is not very morally objectionable, then the Court will be more exacting in requiring both state practice and *opinio juris*. In contrast, he notes that "[t]he more destabilizing or morally distasteful the activity – for example, the offensive use of force or the deprivation of fundamental human rights – the more readily international decision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable".[239]

Tasioulas[240] seeks to rationalise the sliding scale on the basis of Dworkin's interpretative theory of law,[241] whose primary concern is related to interpretation of previous case law. Tasioulas argues that the divergence in the process of ascertaining custom, and the shift in emphasis from material elements to psychological elements, can be defended by Dworkin's interpretive theory of law based on the competing demand between a descriptive account of law (identification of what the law has been on the basis of raw data) and a normative appeal (what the law ought to be on the basis of substantive moral soundness).[242] In the dimension of fit, international judicial organs or monitoring bodies seek to identify eligible interpretation on the basis of empirical data of both state practice and *opinio juris*. Inconsistencies in state practice and *opinio juris* will give rise to hard cases in which more than one eligible interpretation are ascertainable. In such cases, Tasioulas proposes that the best interpretation can be determined by balancing the dimensions of fit and substance on a sliding scale.[243] Norms involving strong substantive appeals can compensate for inadequacies at the level of fit (for instance, inconsistent or weak state practice).[244] This consideration can aptly apply to most rules in the realms of international human rights law and IHL. In contrast, in case such strong substantive appeals are lacking in the norm in question, a greater showing of both state practice and *opinio juris* will be required.[245]

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[238] *Ibid*., at 149.
[239] *Ibid*.
[240] Tasioulas, *supra* n. 96, at 113.
[241] Anthea Roberts, *supra* n. 1, at 772.
[242] Tasioulas, *supra* n. 96.
[243] *Ibid*., at 113.
[244] *Ibid*.
[245] *Ibid*. In this respect, see, for instance, ICJ, *North Sea Continental Shelf Cases*, ICJ Rep. 1969, 3; Anthea Roberts, *supra* n. 1, at 773.

Anthea Roberts argues that while Tasioulas does not expressly mention this, his model assumes the operation of two sliding scales: the first one that balances state practice and *opinio juris* at the level of fit to formulate eligible interpretations. In hard cases (namely where there are multiple eligible interpretations), he proposes that the second sliding scale be used to balance the dimensions of fit and substance. Tasioulas clearly articulates the application of Kirgis' sliding scale theory in the second stage. He notes that:

> …the crucial point…is that the two dimensions [of fit and substance] are not regulated by a rigid lexical ordering of fit over substance; instead, they must be balanced against each other in order to ascertain the best interpretation.…Indeed, to posit two discrete hurdles that competing interpretations must negotiate is an idealization of analytical value only. Such "balancing" is possible precisely because the dimension of fit, like that of substance, is responsive to and expressive of value judgements.… This means not only that questions of fit re-emerge on the substantive dimension…or that an interpretation meeting the threshold of fit may have its remaining infelicities of fit compensated for by its substantive appeal.[246]

On closer scrutiny, contrary to what Anthea Roberts notes, Tasioulas does explicitly mention the application of the sliding scale in relation to the trading-off between state practice and *opinio juris*. Yet, as she comments, he seems not to differentiate between the two sliding scales. He argues that:

> The sliding scale conception permits the adoption of an interpretation as best even though it fares poorly on the dimension of fit (e.g. because, despite considerable support in normative words (*opinio juris*), little state practice supports the putative norm and much practice conflicts with it) provided the putative norm possesses very strong appeal on the substantive dimension (i.e. it expresses an essential part of the good which the institutional of customary international law is supposed to achieve…).[247]

Anthea Roberts criticises Tasioulas' model from the standpoint of the fluctuation between apology and utopia.[248] She argues that the first sliding scale in Tasioulas' model allows deficiencies in state practice to be compensated for by strong *opinio juris* and vice versa. In that way, the claimed customs involve either the propensity for apologism for power politics, or the risk of divorce from reality and lack of effectiveness. According to her, this compensatory process is exposed to a normative criticism on the ground that the strength of one element is allowed to override inadequacies in the other.[249] This entails the possibility that customs may be identified only on the basis of state practice *alone*, or of *opinio juris*. This appraisal is, however, flawed. There is no possibility of identifying

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[246] Tasioulas, *supra* n. 96, at 113. See also Dworkin (1986), *supra* n. 161, at 257; and Finnis, *supra* n. 229, at 373–5.

[247] Tasioulas, *ibid*.

[248] Anthea Roberts, *supra* n. 1, at 773.

[249] *Ibid*.

customs in circumstances where empirical evidence on state practice (or *opinio juris*) is totally lacking.[250]

Anthea Roberts notes that the second sliding scale proposed in Tasioulas' model is designed to remedy the problems relating to oscillation between apology and utopia by balancing inadequacies in fit against the strength in the dimension of substance.[251] She provides two reasons why this proposed solution falters.[252] First, the relevance of the dimension of substance is limited only to the circumstances where multiple eligible interpretations are possible. In Dworkin's theory, this reasoning is true. However, what Anthea Roberts refers to as an example to support this reasoning is mistaken. She mentions the possibility that a custom may be ascertained solely on the basis of strong state practice without being backed by procedural or substantive normativity.[253] As discussed above, without at least even a modicum of either substantive or procedural normativity, it is not possible to contemplate customs to be shaped. Second, the sliding scale enables strong *opinio juris* to support an eligible interpretation at the dimension of fit, which is in turn balanced according to the second sliding scale for its substantive appeal. However, since *opinio juris* is often statements of *lex ferenda*, the two sliding scales would enable modern customs to be shaped by normative appeals of *lex ferenda* both at the level of fit and substance. The result would be the creation of utopian customs which are lacking in descriptive accuracy and removed from the reality.[254]

My criticism is coterminous with Anthea Roberts' second line of criticism. It is submitted that Tasioulas' method would allow the "double counting" of substantive moral elements (or "ought" elements). Since *opinio juris* often involves elements of what the law ought to be, Tasioulas' model introduces normative considerations (based on the ideal conduct of states) both on the first weighing of state practice and *opinio juris,* and on the second sliding scale that weighs deficiencies in fit against adequacies of substantive considerations. Nonetheless, it must be contended that only in circumstances in which *opinio juris* is considered to reflect *lex lata*, can we coherently defend the incorporation of the balance between state practice and *opinio juris* in the fit stage.[255] In that sense, Tasioulas' proposed model may jeopardise effectiveness in exerting "compliance pull". Even so, at least one can note that the distillation of customary norms by "double-counting" *lex ferenda* elements reflects strong underlying moral imperatives of such customary norms.

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[250] As Kirgis' sliding scale model graphically shows, the curve never touches on an X or Y axe.
[251] Anthea Roberts, *supra* n. 1, at 773.
[252] *Ibid.*
[253] *Ibid.*
[254] *Ibid.*
[255] This point is implicitly recognised by Anthea Roberts as well: *ibid.*, at 775.

Further, Anthea Roberts criticises the use of the sliding scale between fit and substance to ascertain customs, on the ground that the sliding scale is applied asymmetrically to traditional and modern customs. According to her, modern customs are more likely than traditional customs to lead to a strong dimension of substance and to a second sliding scale. While traditional customs tend to fare well on fit, with their focus on state practice, the reverse can often be true for modern customs which give greater emphasis to *opinio juris* that cloaks *lex ferenda* as *lex lata*.[256] Further, modern customs entail greater share of moral contents (as opposed to facilitative contents) than traditional customs.[257]

According to Anthea Roberts, the sliding scale is "crude" in three respects. First, it overlooks the open-textured nature of state practice that may give rise to multiple interpretations. Second, it assumes the static and fixed nature of state practice and *opinio juris*. Inconsistent or conflicting state practice may be treated as a deviation, but it should never be dismissed as irrelevant, as this may constitute a seed for a new customary rule in rudimentary form.[258] Third, she criticises that the sliding scale assumes state practice and *opinio juris* to be irreconcilable elements that ought to be traded off against each other.[259]

10. *Anthea Roberts' Proposal to Balance Fit and Substance in Rawls" "Reflective Methodology"*

Anthea Roberts argues that the most desirable interpretation among multiple eligible interpretations is the one that provides the most coherent explanation on the dimensions of both fit (description) and substance (normativity).[260] She contends that interpretations should strive to obtain coherence[261] or integrity[262] by mediating between fit and substance.[263] This approach is based on Rawls' notion of a "reflective equilibrium" that is proposed to mediate between intuition and moral principles in ethical theories.[264] Rawls suggests that instead of mak-

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[256] *Ibid.*, at 774.

[257] *Ibid.*, at 774.

[258] *Ibid.*, at 789–791.

[259] *Ibid.*, at 790.

[260] *Ibid.*, at 779.

[261] International law gives special importance to the value of coherence: T.M. Franck, *Fairness in International Law and Institutions* at 38–41 (1995); *idem*, *The Power of Legitimacy among Nations* 150 (1990); and *idem* (1988), *supra* n. 160, at 735–51.

[262] Dworkin describes coherence as "integrity": Dworkin (1986), *supra* n. 161, at 176–275.

[263] Anthea Roberts, *supra* n. 1, at 779.

[264] J. Rawls, *A Theory of Justice*, revised ed., (1999), at 17–19. The idea of "reflective equilibrium" is expressly or implicitly relied upon throughout Rawls' theoretical explorations: *ibid.*, at 42, 379, 381, 392 and 396.

ing one judgment outweigh the other, the interpretation of existing judgments and principles should continue to be revised in a two-way reconciling process until it reaches a fixed point, or an equilibrium, that yields the principles which match our considered and adjusted judgments.[265] In essence, this reflexive process of mutual adjustment of principles and considered judgments is an attempt to search for an equilibrium that can be coherently explained from both ends of the spectrum.[266] Anthea Roberts proposes that Rawlsian reflective methodology[267] should help harmonise two opposing ends of inductive and deductive methodologies.[268] According to her, the dimension of fit is inductive, whilst the dimension of substance is comparable to moral principles because of their propensity to deduce a norm from *in abstracto* statements of principles.[269]

Anthea Roberts proposes that the reflective interpretive approach should be applied to two problems inherent in customs (the tension between facilitative and modern customs; and the fluid nature of customs).[270] She argues that the asymmetrical application of fit and substance to traditional and modern customs can be explained by the dynamic along the spectrum of facilitative and moral customs. A balance between fit and substance varies along this spectrum, depending on the relative strength of the practice and principles. Strong substantive considerations may offset inadequacies and inconsistencies of fit, while less fundamental nature of substantive aims pursued by a specific norm may call for a finer weighing between fit and substance.[271]

Anthea Roberts' model of reflective equilibrium in ascertaining the existence of customs is not static, but fluid and dynamic. The best interpretation must be constantly tested and searched in accordance with change in state practice, *opinio juris* and moral demands.[272] She contends that this model constitutes a more nuanced method for reconciling the often rivalling demands of fit and substance than the sliding scale supported by Kirgis (and by Tasioulas).[273]

Anthea Roberts' reconciliatory model of reflexive equilibrium is purported to temper the demand of each with that of the other. Yet, Beckett criticises that her model still cannot escape from Koskenniemi's charge that international law will

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[265] *Ibid.*, at 18–19 (1999).
[266] Anthea Roberts, *supra* n. 1, at 780.
[267] Rawls, *supra* n. 264, at 18.
[268] Anthea Roberts, *supra* n. 1, at 780.
[269] *Ibid.* Unlike Dworkin, who is confident about the objectively determinable nature of the best interpretation, Anthea Roberts contends that subjectivity is intrinsic in interpreting empirical materials: *ibid.*, at 781.
[270] *Ibid.*
[271] *Ibid.*, at 781 and 783.
[272] *Ibid.*, at 784 and 788.
[273] *Ibid.*, at 789.

degenerate into manipulable oscillation between the two unpalatable poles of apology and utopia, rather than reconciling traditional and modern theories of customs.[274] Indeed, Anthea Roberts seems to assume that any infelicities of subjective elements can be mitigated through the harmonising and dynamic process of a reflective interpretive methodology. In that sense, her proposed approach entails the assumption that deficiency in one element is compensated for by the greater advantage of another requisite element. Further, Rawls' "reflective equilibrium", according to which considered judgments or "considered convictions of justice" can be attained after a thorough process of revising convictions and their counterparts,[275] is more a technique of reasoning than a substantive theory. Be that as it may, as will be examined in the final Chapter, her proposal to apply Rawls' reflexive equilibrium model provides a key to analysing the process of identifying customary IHL rules applicable in occupied territories.

11. *Conclusion*

The foregoing analysis has highlighted the inherent indeterminacies surrounding the structure of argumentations relating to the process of customary law formation. The complex interplay of the two component elements (state practice and *opinio juris*) make it hard to provide a coherent framework of arguments. The examination has also dealt with the convoluted relationship between customs and treaty norms, with specific regard to the methodological soundness of inferring customary norms from multilateral treaty provisions. Once the requirements for the ascertainment of customary norms and the interaction between state practice and *opinio juris* have been clarified in the general discourse on customary international law, this chapter has turned to the dichotomised debates on modern customs and traditional customs. These appraisals have assisted in elucidating distinctive features of customary IHL and obtaining rational explanations for such features. Finally, bearing in mind the implications of Koskenniemi's critique upon the identification of customary IHL applicable in occupied territories, the chapter has sought to obtain insight into the relative merit of both Tasioulas' proposal to apply Kirgis' sliding scale theory and Anthea Roberts' suggestion that Rawls' reflexive equilibrium be relied upon.

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[274] Beckett, *supra* n. 1, at 232.
[275] Rawls, *supra* n. 264, at 392.

Chapter 24

Identifying Customary IHL in Occupied Territories on the Basis of its Interplay with Customary International Human Rights Law

1. *Introduction*

The final chapter sets out a proposed structure of arguments that can explain the mechanism of identifying customary IHL rules, which are applicable in occupied territory, on the basis of corresponding standards of international human rights law (IHRL). It proposes to rely on the Martens clause as a normative vehicle for transplanting customary IHRL into the sphere of IHL. Along the theoretical line suggested by Anthea Roberts, the proposed structure assumes that the process of ascertaining customary IHL can be given cogent rationalisation by Kirgis' sliding scale theory and reflective methodology underlying Rawls' work.

2. *The Proposed Framework of Customary IHL Relating to Fundamental Guarantees in Occupied Territories*

The present writer proposes to use customary international law as building blocks for conceptualising an effective normative framework of IHL in occupied territories and to rely on the Martens Clause as a vehicle for "normative translation"[1] of many rules which are developed in the practice of international human rights law. The law of occupation is placed in a curious dilemma. The underlying assumption is that many of its rules can be approximated to law enforcement rules in peacetime, and considered porous and pervious to the growing influence of human rights law. Yet, as will be analysed below, the concept of military

[1] This word is used by K. Dörmann in his discussion on the materialisation of customary IHL rules applicable to NIAC, Chatham House, *The law of Armed Conflict: Problems and Prospects, 18–19 April 2005*, at 25.

necessity remains a potent underlying rationale that lends itself to providing a counterweight to greater demands of humanity. To what extent and how can such salutary "spill-over" effects of international human rights law in the realm of the law of occupation be given cogent explanation and legitimate recognition?

As discussed in Chapter 17, these two branches of international law constitute "special regimes"[2] which are linked to general international law and part of the international legal system.[3] The present writer proposes that the "dynamic generative role"[4] of the Martens clause[5] should be able to assist in the systemic transplantation, rather than, mechanical translation, of customary international human rights law into customary IHL. The fundamental problem is, however, that there is no hierarchically superior rule that recognises, validates and guides such process of transfer. On this matter, as discussed in the First Part, the present writer postulates the Martens clause as part of general principles of international law. It can be understood as capable of systemically guiding and validating the process of transplanting customary rules from one realm to another.

Once the Martens Clause is conceptualised as a general principle of IHL, it can be deployed to facilitate new customary rules developed in the dynamic practice of international human rights law to be transposed to the realm of customary IHL. This process can take place, without requiring *specific* consent of states to *each* of the new rules *every time* such "transplantation" takes place. It can escape the charge of utopianism. The generalised form of consent by states is already given through the Martens Clause. This means that the positivist-voluntarist pre-supposition is satisfied. Indeed, this methodology was pioneered by Judge Tanaka in his dissenting opinion in the *South West Africa* case. In his passage imbued with natural law flavour, he held that:

> (…) the guarantee of fundamental human rights and freedoms possesses a super-constitutional significance. (…) the law concerning the protection of human rights may be considered to belong to the *jus cogens*.

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[2] ILC, *Fragmentation of International Law: Difficulties Arising From the diversification and Expansion of International Law – Report of the Study Group of the International Law Commission*, Finalized by Martti Koskenniemi, UN Doc. A/CN/.4/L.682, 13 April 2006, 82.

[3] A.E. Cassimatis, "International Humanitarian law, International Human Rights Law, and Fragmentation of International Law", (2007) 56 *ICLQ* 623, at 625.

[4] I. Scobbie, "The Approach to Customary International Law in the Study", in: E. Wilmshurt and S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, (2007) 15, at 18 and 44.

[5] For assessment of the Martens Clause, see, for instance, A. Cassese, "The Martens Clause: Half a Loaf or Simply Pie in the Sky?", (2000) 11 *EJIL* 187; T. Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience", (2000) 94 *AJIL* 78; and R. Ticehurst, "The Martens Clause and the Laws of Armed Conflict", (1997) 37 *IRRC* 125, No. 316.

> As an interpretation of Article 38, paragraph 1(c), we consider that the concept of human rights and of their protection is included in the general principles mentioned in that Article.
>
> (…) in Article 38, paragraph 1(c), some natural law elements are inherent. It extends to the concept of the source of international law beyond the limit of legal positivism according to which, the States being bound only by their own will, international law is nothing but the law of the consent and auto-limitation of the State. But this viewpoint … was clearly overruled by Article 38, paragraph 1(c), by the fact that this provision *does not require the consent of States as a condition of the recognition of the general principles*. States which do not recognize this principle or even deny its validity are nevertheless subject to its rule. From this kind of source international law could have the foundation of its validity extended beyond the will of States, that is to say, into the sphere of natural law and assume an aspect of its supra-natural and supra-positive character.[6]

The states are estopped from questioning the norm-generating (or norm-transposing) function of the Martens Clause as such (because the Clause is a general principle of international law). Nevertheless, it can still (or persistently) object to the two processes: (i) the formation process of a customary rule in the realm of international human rights law; and (ii) the process of such a rule being transposed to the domain of IHL and crystallised and manifested *qua* a customary IHL rule. It must be noted that the process of ascertaining IHL rules is not purported to "super-impose" on the existing rubric of customary IHL new customary rules derived from the area of international human rights law. Instead, the concurrent identification is designed to fill the lacunae in areas where IHL rules remain unarticulated and unelaborated.

3. *The Process of Ascertaining Customary IHL in the Interaction with Customary International Human Rights Law*

The proposed structure of the present writer's argument consists of three stages: (i) the identification of customary rules in the realm of IHRL; (ii) the process of transposition through the Martens Clause; and (iii) the process of concordant identification and distillation of customary IHL. In the foregoing chapter, we have examined Kirgis' sliding scale theory and Anthea Roberts' proposal to introduce Rawls' methodology of reflective equilibrium, especially against the backdrop of Koskenniemi's critique. Here, it is important to plot how these theories can be usefully applied to rationalise this three-pronged process of translating human rights standards. As we have seen in Chapter 20 that deals

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[6] ICJ, *South West Africa* Case (Second Phase), Judgment of 18 July 1966, Dissenting Opinion of Judge Tanaka, ICJ Rep. 1966, 4, at 298, emphasis added.

with procedural safeguards for persons in occupied territories, the distillation of customary IHRL draws heavily on documents and case-law of the monitoring bodies of human rights treaties. Yet, there is no intrinsic normative obstacle to drawing on the practice of human rights law.

On the first stage, both Kirgis' sliding scale theory and Rawls' reflective equilibrium methodology help distil customary human rights rules that strengthen the protection of individual persons in occupied territories. The sliding scale theory of custom can explain the liberal tendency of some human rights monitoring bodies to broaden the list of non-derogable rights and to furnish their elaborate details. While their conclusion is morally unassailable, these supervisory organs have often done so, without offering elaborate and solid justifications based on empirical analysis of state practice. Similarly, there is a proclivity of the *ICRC's Customary IHL Study* to turn heavily on liberal practice of the supervisory organs of human rights treaties to justify its argument that the enlarged list of non-derogable rights, as ascertained by such organs, are *ipso facto* customary, and are applicable in time of occupation and armed conflict. In this respect, I have argued that non-derogability is a key to differentiating norms and identifying those norms eligible for the transposition process. Turning to Rawls' notion of reflective equilibrium, this can provide a more nuanced approach. It exhibits capacity to accommodate different factors and to allow adjustments to both the customary law status and non-derogable nature of specific IHRL norms.

On the second stage, the normative translation requires a peg on which the argument for transposing customary IHRL to the realm of IHL can solidly hang. As I have noted, the Martens Clause is deployed to serve as such a normative peg. Admittedly, the meaning of "principles of humanity" and "dictates of public conscience" may vary from time to time. Nevertheless, this variable nature has an advantage: the underlying ethos of both the Martens Clause and the teleological (or evolutive) construction operates as a safety valve that ensures no lessening of the *acquis* of customary IHL standards.

On the third stage of concordantly identifying customary IHL, the fine-tuning capacity with which the notion of reflective equilibrium is equipped may aid in addressing the question which of the customary human rights norms, which have been progressively identified by the supervisory organs of human rights treaties, are eligible for customary IHL. Even so, intractable questions remain. Fundamental differences in the underlying rationale between IHL and IHRL may surface to add complexity to the process of ascertaining customary IHL. Further, the distinct nature of occupation compounds the fundamental differences in rationale underpinnings.

4. *Distinct Variables in the Context of the Law of Occupation*

4.1. *Overview*

The process of transplanting customary IHRL into the rubric of IHL is likely to be exposed to obstacles derived from distinctive features of laws of occupation. The percolation of the elaborately detailed standards of human rights in the occupied territories may be hampered by the absence of necessary capacities and resources for ensuring effective guarantees of what would otherwise be considered *derogable* human rights norms. This in turn jeopardises the enticement of "compliance pull" of these norms by the occupying authorities, which may perceive such a methodological attempt as a subterfuge for incorporating onerous or even impractical standards. The occupying powers may even be prompted to dismiss such a methodological attempt as unfounded and illegitimate exercise. In order to avoid such an accusation and to assuage their concern, it is therefore essential to highlight some special features deriving from the extraordinary nature of occupation. These features are: (i) the underlying concept of military necessity; (ii) considerations of volatile occupation, namely, the fact that some areas under occupation may be quickly transformed into a combat zone; and (iii) implications of individual criminal responsibility for offences against customary IHL.

4.2. *The Underlying Concept of Military Necessity*

In 1952, Hersch Lauterpacht observed that: "[i]f 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".[7] His remark aptly summarises the underlying dilemma of IHL, that is, its vulnerability to sheer military needs and geopolitical power. All IHL rules are intrinsically amenable to balancing the demands of humanity and the concept of military necessity.[8] Many norms relating to conduct of hostilities expressly contain the concept of military necessity as part of these norms' definitional and constituent elements. This embedded nature of military necessity has certainly led to abuse by states. Carnahan observes that "[t]he modern denigration of military necessity goes back at least to the Nuremberg trials after World War II, where some defendants argued that military necessity justified their atrocities against civilian populations.... In an echo of Confederate criticisms of 130 years ago, military necessity is widely

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[7] H. Lauterpacht, "The Problem of Revision of the Law of War", (1952) 29 *BYIL* 360, at 382.

[8] R. Provost, "Reciprocity in Human Rights and Humanitarian Law", (1994) 65 *BYIL* 383, at 425; and A. Zahar and G. Sluiter, *International Criminal Law – a Critical Introduction*, (2008), at 430.

regarded today as an insidious doctrine invoked to justify almost any outrage".[9] This observation, while providing elements of truth, is a bit too far-reaching. Be that as it may, what is clear is that the proportionality notion is intrinsically embedded as an underlying rationale for construing IHL rules.

In Part III, the present writer has suggested that in the context of "calm" occupation, it is the law of occupation, supplemented (but not super-imposed or supplanted) by the law enforcement rules and IHRL,[10] that constitutes the applicable rules. However, even in the context of occupation, the concept of military necessity always functions as a built-in, underlying concept. This holds true, even where the concept of military necessity is not expressly mentioned in specific IHL rules.[11] Dinstein argues that "LOIAC [Law of international armed conflict] *in its entirety* is predicated on a subtle equilibrium between two diametrically opposed impulses: military necessity and humanitarian considerations. (…) In actuality, LOIAC takes a middle road, allowing belligerent States much leeway (in keeping with the demands of military necessity) and yet circumscribing their freedom of action (in the name of humanitarianism)".[12] This observation remains pertinent to the laws of occupation, so that a much more fine-tuned balancing is required between humanitarian concerns and the brute concept of military necessity. The concept of military necessity, against which the consideration of humanitarian ethos, as underpinned in the Martens Clause, ought to be weighed, may demand special adjustment to the application of the sliding scale theory and the methodology of reflective equilibrium.

4.3. *Shifting Nature of Occupied Territories: Do Areas Remain Occupied Territories Subject to Law Enforcement, or Become Subject to Rules of Conduct of Warfare?*

As examined in Part III, the nature and legal status of part of occupied territories may be susceptible to change from "calm" occupation to more volatile occupa-

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[9] B.M. Carnahan, "Lincoln, Lieber and the Laws of War: the Origins and Limits of the Principle of Military Necessity", (1998) 92 *AJIL* 213, at 230.

[10] True, all human rights law concepts, possibly except for non-derogable rights of peremptory status, are susceptible to balancing with varying public aims. Yet, the susceptibility to balancing is much stronger in relation to IHL.

[11] For those IHL rules applicable in occupied territory, which expressly mention the concept of military necessity, see, for instance, GCIV, Articles 49(2) (evacuation), 49(5) detention of protected persons in an area particularly exposed to the dangers of war, 53 (prohibition of destruction of real or personal property), 55(3) (the right of the Protecting Power to verify the state of the food and medical supplies in occupied territories), 60 (prohibition on diverging relief consignments), 62 (the right of the protected persons in occupied territories to receive the individual relief consignments sent to them).

[12] Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, (2004), at 16–17, emphasis added.

tion riddled with the outbreak of either international or non-international armed conflicts. The susceptibility to (even small-scale) hostilities can be translated into the readiness or the necessity of the occupying power to shift the applicable rules from the law of occupation (and human rights) to more "brute" IHL rules on conduct of hostilities. This change requires adjustment of the applicable rules, and careful judgments over temporal (when such hostilities, which would justify the change in the applicable IHL rules, have occurred?) and geographical scope (in what areas, the occupying power is allowed to switch the applicable rules to the IHL rules on conduct of hostilities?). These are highly complex questions. This is so, especially in a borderline scenario. Even where the application of rules on conduct of hostilities is recognised, the pull of "dimension of substance" and ethical, ought-driven policy considerations may serve to fend off the policy decision to suspend the application of the law of occupation and human rights in much of the occupied areas.[13]

4.4. *Implications of Individual Criminal Responsibility*

In ascertaining the viability of transplanting customary rules from the realm of IHRL to IHL, there is a special need to take into account the gamut of implications deriving from the possibility that serious breaches of occupation law may lead to criminal proceedings against individuals. On one hand, progressive interpretation in favour of identifying more customary rules is highly instrumental in solidifying the rights of individual persons in occupied territories and attributing liability to the occupying authorities. On the other hand, as Meron observes, the international war crimes tribunals faced with the task of indicting and prosecuting suspects of cores crimes are constrained by the principle of legality (*nullum crimen sine lege*). Such a cautious approach discernible in the decision-making policy of international criminal tribunals is also corroborated

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[13] In this connection, it is of special significance to recall Provost's observation concerning reprisals during conduct of hostilities:

> The progressive development of a principle of humanity restricting reprisals is related to the enlargement in Protocol I of the class of individuals protected from reprisals. Both phenomena are symptomatic of a slow but profound transformation of humanitarian law under the pervasive influence of human rights, a transformation that underlies the fact that belligerent reprisals and individual rights are fundamentally inconsistent legal concepts.... That is, reprisals rest on a theory of collective solidarity in the enforcement of the laws of war, in which the individual is completely subsumed into a group. (...) A theory of human rights, while not necessarily rejecting the relevance of a person's connection to a community, emphasizes the primary importance of the individual.

Provost, *supra* n. 8, at 427.

by a high evidentiary threshold of conviction, which accords with the fair trial rights of the accused.[14]

No doubt, customary IHL can serve as a valid basis for trying and convicting offenders.[15] Customary IHL prohibits acts that are already outright prohibited under national criminal laws, such as murder, rape, torture, attack on civilians, deportations, pillage etc. In the *Čelebići* case, the Appeals Chamber of the ICTY confirmed the Trial Chamber's reasoning that:

> It is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to "general principles of law" recognised by all legal systems. . . . It strains credibility to contend that the accused would not recognise the criminal nature of the acts alleged in the Indictment. The fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.[16]

However, Meron contends that custom provides a safe basis for conviction "only if genuine care is taken to determine that the legal principle was firmly established as custom at the time of the offense so that the offender could have identified the rule he was expected to obey".[17] It is to be recalled that the UN Secretary-General, in his report accompanying the Security Council Resolution 808 establishing the ICTY, stressed that "the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law".[18]

The principle of legality entails the requirements of predictability and precision.[19] Yet, the *nullum crimen* principle does not require a rigidly laborious inquiry into the customary law status or not of a specific legal principle at a particular time in relation to every crime. Rather, as confirmed by the Appeals Chamber

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[14] See, for instance, Y. Shany, "Toward a General Margin of Appreciation Doctrine in International Law?", (2005) 16 *EJIL* 907, at 930.

[15] T. Meron, "Revival of Customary Humanitarian Law", (2005) 99 *AJIL* 817, at 821.

[16] ICTY, *Prosecutor v. Delalić et al.*, Appeals Judgment, No. IT-96–21–A, para. 179, 20 February 2001, confirming the Trial Judgment, 16 November 1998, para. 313.

[17] Meron (2005), *supra* n. 15, at 821.

[18] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 34, available at http://www.un.org/icty/legaldoc-e/basic/statut/s25704.htm (last visted on 30 June 2008).

[19] Meron (2005), *supra* n. 15, at 821–822.

of the ICTY above, this principle proves of special significance only where the unlawfulness of the conduct at issue would not have been doubtful.[20]

The dynamic tendency of war crimes tribunals to apply progressive interpretation to broaden or rapidly expand customary law offences[21] needs to be carefully balanced against the countervailing interests of the fair trial rights of the accused persons.[22] The ICTY has distinguished between the interpretation and clarification of customary law, which is permissible on one hand, and the creation of new law, which would contravene the *ex post facto* prohibition on the other.[23] Meron proposes two approaches to secure the principle of legality: (i) reliance only on the firmly established, traditional methods to ascertain applicable customary norms (what he calls "methodological conservatism"); and (ii) the approach whereby any doubt concerning the customary law status of any specific legal principle would be found in favour of the defendant (*in dubio pro reo*), the approach he describes as "outcome conservatism".[24]

With specific regard to the interplay between IHRL and IHL, the war crimes tribunals must be circumspect in reading too readily customary law nature of some aspects of norms, which are given detailed elaborations by the monitoring bodies of IHRL.[25] For instance, denial of fair trial guarantees in respect of prisoners of war or other protected persons (whether in occupied territories or elsewhere) will amount to a grave breach form of war crimes under Article 8(2)(a)(vi) of the ICC Statute.[26] While this provision is open-ended with respect to details of

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[20] *Ibid*., at 822.

[21] For exploration of this issue, see M. Shahabuddeen, "Does the Principle of Legality Stand in the Way of Progressive Development of Law?", (2004) 2 *JICJ* 1007. See also ICTY, *Prosecutor v. Hadžihasanović*, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, No. IT-01-47-AR72, 16 July 2003, Partial Dissenting Opinion of Judge Shahabuddeen, and Separate and Partially Dissenting Opinion of Judge Hunt.

[22] Meron (2005), *supra* n. 15, at 818.

[23] The Appeals Chamber of the ICTY held that the principle of *nullum crimen sine lege*:

> . . . does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime.

Prosecutor v. Aleksovski, Judgment of Appeals Chamber, 24 March 2000, No IT-95-14/I-A, paras. 126–127.

[24] Meron (2005), *supra* n. 15, at 822–3.

[25] It is to be recalled that the International Criminal Court's interpretation and application of the applicable law must be consistent with the requirement of international human rights law: ICC Statute, Art. 21(3).

[26] This provision refers to "[w]ilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial". This extends the scope of grave breaches to encompass the same acts committed against the wounded, sick or the shipwrecked. Compare Article 50 of GCI and Article 51 of GCII.

"fair and regular trial", specific aspects of fair trial guarantees expressly articulated in IHL treaty-based rules are limited. Is the negation of some elements of fair trial, which are not expressly mentioned in IHL treaties but are recognised as non-derogable in the Inter-American Commission on Human Rights' document or in the Human Rights Committee's *General Comments*, sufficient to constitute a grave breach of GCs? There may be some uncertainty and risk of undermining the principle of legality, if specific details of human rights standards, as have been progressively construed by the treaty-based bodies of IHRL to expand the parameters of state responsibility, are relied on as customary IHL norms whose violation lead to the individual liability for war crimes.

5. *Conclusion*

The interaction of human rights standards and IHL through the normative channel of the Martens Clause in the context of occupied territories, as proposed in this chapter, is a dynamic process. This requires circumspection and meticulousness in extrapolating those customary human rights rules that are applicable in the extraordinary circumstances of armed conflict and occupation.

The three distinct variables identified above will require careful adjustments in "progressively" discerning customary norms in the realm of laws of war. The stress on the moral dimension may have to be supported by the strength in empirical evidence to establish customary IHL rules whose violations may result in war crimes prosecution. It is also necessary to undertake a prudent judgment on the choice of applicable laws (rules on conduct of hostilities or the law of occupation) in a specific area and at a specific time in occupied territories. With regard to the process of distilling customary IHL rules, Rawls' technique of reflective equilibrium is more adept at fine-tuning than Kirgis' sliding scale theory. Rawls' model of reasoning proves more capable of taking into account the distinct variables operative in the context of occupation.

This monograph is purported thoroughly to examine the general principles and rules of the laws of occupation, and the substantive body of IHL rules that are derived from the interlocking relationship between IHL and international human rights law. It is intended to provide a coherent normative framework within which rights of *any* individual persons in occupied territories, be they civilians or unprivileged belligerents, can be effectively recognised and solidly established. It has demonstrated that the laws of occupation have largely gravitated away from the outright distinction drawn between laws of war and laws of peace, which prevailed in the conceptual thinking of the nineteenth century, and has adapted itself to accommodating a growing body of IHRL. Further, the legal parameters of the laws of occupation have been perceived as in visible need of fine-tuning and refinement, if not comprehensive overhaul, to accommodate

the changing legal landscape of occupied territories (the extent of applicability of sophisticated standards developed in the human rights case-law; and the shifting boundaries between combat zones and a zone of occupation etc.).

The major upshot of this study is that laws of occupation are found to be resilient but simultaneously highly malleable, as they have undergone a number of turbulent historical periods. As a beneficial spin-off of this study, the monograph has highlighted the minimum normative framework within which rights of even very controversial categories of persons, such as unprivileged belligerents captured in a combat zone, must be absolutely safeguarded, an implication crucial at the time of uncertainty when the fallout of occupied Iraq resonates and overshadows debates on the future of the laws of war in the twenty-first century.

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