
Legislation and Maintenance of Public Order and Civil Life by Occupying Powers

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Abstract

Article 43 of the 1907 Hague Regulations is a key provision of the law of belligerent occupation. This essay examines how it has been understood by states and scholars, how it was developed by the Fourth Geneva Convention of 1949 and whether and how it was respected by the US and the UK during their recent occupation of Iraq. Under Article 43, an occupying power must *restore* and maintain public order and civil life, including public welfare, in *an occupied* territory. Local legislation and institutions based upon such legislation must be respected by *an* occupying power and by any local authorities acting under the global control of the occupying power. This general prohibition to change the local legislation *also* applies to post-conflict reconstruction efforts, including constitutional reforms, and changes of *economic* and *social* policies. The author examines the exceptions to the prohibition and assesses whether the widespread legislative activities by the occupying powers in Iraq fall under these exceptions. He then analyses the question of whether the law of military occupation ceased to apply in Iraq on 30 June 2004. It is *also* suggested that Article 43 applies to some peace operations and provides a *useful* framework even for those peace operations to which it does not formally apply.

1 Some Legal Questions Raised by Recent Events in Iraq

The US-led military occupation of Iraq which started in 2003 has raised renewed interest in the law of military occupation, a branch of international humanitarian law (IHL) that applies, as part of the *jus in bello*, independently of whether under *jus ad*

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bellum the war against Iraq was justified under UN Security Council resolutions or a new understanding of self-defence. Of particular relevance were the questions of the extent of the obligation of an occupying power to restore and maintain public order and civil life in an occupied territory and the extent to which an occupying power may change local legislation and institutions in a post-conflict reconstruction effort. Both questions are governed by the nearly 100-year-old Article 43 of the Regulations annexed to the 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land (hereinafter Hague Regulations).¹ The present contribution aims at understanding the meaning of that article in its contemporary context. It will show whether the claim that existing IHL of military occupation, and in particular Article 43, is 'ill suited' to situations of 'transformational occupation' such as Iraq, is correct.² Today, the UN Security Council³ and the US-led coalition consider that the occupation ended on 30 June 2004, although coalition forces remain in Iraq. In terms of IHL of military occupation, this raises the question of when that law ceases to apply in the event of a handover of the functions of government to a new national government instituted by the (former) occupying powers.

Since 1 July 2004, at the latest, coalition forces may consider their military presence in Iraq to be a sort of peace operation. Beyond the case of Iraq, other occupying powers willing to withdraw as soon as a stable government is established may also be tempted to consider their presence on a territory resulting from an armed conflict as a kind of peace operation. Every occupying power is confronted, when restoring and maintaining public order, with problems more typical of peacekeeping operations than of traditional inter-state warfare. Conversely, the question also arises of whether and when traditional peace operations are subject to Article 43 of the Hague Regulations. This question will therefore be equally considered in this article.

2 Article 43 of the Hague Regulations

Article 43 of the Hague Regulations of 1907 reads in the most widely adopted English translation⁴ of the original authentic French⁵ text:

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.

The International Military Tribunal at Nuremberg and the International Court of Justice have recognized that this provision corresponds to customary international

law.⁶ However, its precise meaning is unclear. In practice, occupying powers have sometimes invoked its vagueness to justify broad legislative powers, and, at other times, have relied on the obligation to respect local laws 'unless absolutely prevented' in order to ignore their responsibility to ensure the welfare and normal life of the local population.⁷

The text of Article 43 seems to deal with the respect of local legislation by the occupying power only when the latter restores or ensures public order and civil life, but legislative history and current practice show that the article constitutes a general rule about the legislative powers of an occupying power.⁸

The two issues – maintenance of public order and safety, and legislative action by an occupying power – are closely interrelated. Human rights and the rule of law (indispensable elements in any peace-building effort) demand that the maintenance of public order be based on law. Both an occupying power and an international civil administration restoring and maintaining public order face the question of what legal basis they may rely on to arrest, detain and punish persons threatening or breaching public order and to what extent they may change local legislation for that purpose. Similarly, concern for civil life and welfare is not only an important aspect of both peace-building and the maintenance of public order, but perforce involves legislative action.

3 Legal Aspects of the Obligation to Restore and Ensure Public Order and Civil Life

A Field of Application: Not Only Security, But Also Welfare

Article 43 as quoted above refers to 'public order and safety'. This translation of the authentic French words 'l'ordre et la vie publiques' has been criticized. The meaning of 'la vie publique' is indeed much broader. The legislative history provides good reasons to consider that it encompasses 'des fonctions sociales, des transactions ordinaires, qui constituent la vie de tous les jours' ('social functions, ordinary transactions which constitute

¹ Hague Convention (IV) Respecting the Laws and Customs of War on Land and Annex, 18 Oct. 1907, 1 Bevans 631–653 [Hague Regulations].

² See forcefully Scheffer, 'Beyond Occupation Law', 97 *AJIL* (2003) 842, at 847–853.

³ SC Res. 1546 (2004), para. 2.

⁴ J. B. Scott (ed.), *The Hague Peace Conventions and Declarations of 1899 and 1907* (3rd edn, 1918).

⁵ Indeed, only the French text is authentic: D. Schindler and J. Toman, *The Laws of Armed Conflict* (4th edn, 2004), at 56.

⁶ *Trial of the Major War Criminals. International Military Tribunal in Nuremberg, published in 41 AJIL (1947) 172, in particular at 248–249; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory Opinion, 9 July 2004, International Court of Justice, available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>, at paras. 89 and 124. See E. Benvenisti, *The International Law of Occupation* (1993), at 8. Art. 43 reaffirms rules already contained in the 1874 Brussels Declaration (cf. *infra* notes 8 and 9). See also G. Von Glahn, *The Occupation of Enemy Territory – A Commentary on the Law and Practice of Belligerent Occupation* (1957), at 95; D. Kretzmer, *The Occupation of Justice – The Supreme Court of Israel and the Occupied Territories* (2002), at 57.*

⁷ Benvenisti, *supra* note 6, at 11.

⁸ Schwenk, 'Legislative Power of the Military Occupant Under Article 43, Hague Regulations', 54 *Yale LJ* (1944–1945) 397. In the Brussels Declaration (see *infra* note 9) the obligation to restore and ensure public order and civil life and the obligation to respect local laws, unless in case of necessity, were contained in two distinct Articles (Arts. 2 and 3), which became a single Article in the Hague Regulations. This means that the obligation to respect local laws (and its exception) must be seen as a general principle.

daily life’).⁹ Many scholars and the Israeli Supreme Court have endorsed this critique. They suggest translating ‘*la viepublique*’ as ‘civil life’.” This would be in line with the basic premise of IHL, confirmed in the introductory sentence of Article 43, that, if necessary, all functions of government must be provisionally assumed by the occupying power in order to guarantee normal life for the civilian population.

B An Obligation of Means and Not of Result

Many aspects of what constitutes ‘civil life’ and the measures an occupying power must, may or may not take to restore or maintain it are governed in detail by specific provisions of the Hague Regulations themselves,¹¹ of the Fourth Geneva Convention of 1949 (hereinafter Convention IV)¹² or of the 1977 Protocol Additional I to the Geneva Conventions (hereinafter Protocol I).¹³ These provisions are *lex specialis* with respect to the general rule of Article 43 of the Hague Regulations. Under the general rule, as its qualifications ‘all measures in his power’ and ‘as far as possible’ confirm, public order and civil life are not results that must be guaranteed by an occupying power, but only aims it must pursue with all available, lawful and proportionate means. One may argue that the required standard of action is below that with which human rights instruments expect states to comply in fulfilling human rights, in particular social, economic and cultural rights,¹⁴ since, as discussed below, the occupying power is not sovereign and its legislative powers are limited. In addition, the means an occupying power may use are limited by the numerous prohibitions laid down in Convention IV (e.g. of collective punishments, house demolitions, deportations, coercion, torture, taking of hostages¹⁵). The most traditional way of restoring public order is criminal prosecution of those who breach it, but such prosecutions

have to comply with the judicial guarantees set out in Convention IV.¹⁶ The latter offers an occupying power the additional option of subjecting persons, under various procedural safeguards, to assigned residence or internment ‘for imperative reasons of security’.” In my view, this security is not only that of the occupying forces, but, due to the obligation to restore and maintain public order, also that of the inhabitants of the territory. From materials available today it seems that the occupying powers in Iraq created only belatedly a legal basis for administrative detention according to Convention IV, although they had recourse to widespread detention of civilians without trial from the start of the occupation.” This 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’.¹⁹

C An Obligation Subject to the Limitations Set by Human Rights Law for Any State Action

Public order is restored through police operations, which are governed by domestic law and international human rights law, and not through military operations governed by IHL on the conduct of hostilities. Police operations are not directed at combatants (or civilians directly participating in hostilities) but against civilians (suspected of crimes or threatening public order). While military operations are aimed at weakening the military potential of the enemy, police operations aim to enforce the law and maintain public order. Police operations are subject to many more restrictions than hostilities. To mention but one example, force may be used against civilians only as a last resort after non-violent means have proved unsuccessful in maintaining law and order. As for the use of firearms,² it is an extreme measure in police operations²⁰ while it is normal against combatants in hostilities.

When lawful or unlawful²¹ organized armed resistance continues in an occupied territory, as was the case in Iraq, the distinction between the conduct of hostilities against those directly participating in such resistance on the one hand, and police operations destined to maintain law and order and directed at civilians involved in criminal activity on the other, is more difficult to establish. The response by US forces

⁹ This explanation has been proposed by Baron Lambermont, the Belgian representative at the negotiations for the Brussels Convention of 1874, which never entered into force, but is known as the ‘Brussels Declaration’. considered to codify many old rules of IHL. Art. 43 of the Hague Regulations combines Arts. 2 and 3 of the Brussels Declaration. See Ministère des Affaires Étrangères de Belgique. *Actes de la Conférence de Bruxelles de 1874*, at 23, reproduced in Schwenk, *supra* note 8, at 393.

¹⁰ Cf. *ibid.*, at 393, note 1; Benvenisti, *supra* note 6, at 9; M. S. McDougal and F. P. Feliciano. *Law and Minimum World Public Order* (1961), at 746; K. A. Berriedale, *Wheaton’s Elements of International Law* (6th edn. 1929), at 783. Kretzmer, *supra* note 6, at 58. Supreme Court of Israel. *Christian Society for Holy Places v Minister of Defence* (1971), summarized at [1972] *Israel YB Hum Rights* 354.

¹¹ See, e.g., Hague Regulations, *supra* note 1, Art. 46 on family rights, property and religious practice, Arts. 48–52 on taxation, contributions and requisitions, and Arts. 53, 55, and 56 on public property.

¹² Thus the Geneva Convention relative to the Protection of Civilian Persons in Time of War. 12 Aug. 1949. 75 UNTS 287 (hereinafter Convention IV), Art. 56 deals with hygiene and public health, Art. 55 with medical and food supplies. Arts. 59–62 with relief, Art. 57 with hospitals. Art. 58 with spiritual assistance, Arts. 51 and 52 with labour, working conditions, and labour market measures and Art. 50(3) with some aspects of education.

¹³ See also Protocol (No. I) Additional to the Geneva Conventions of 12 Aug. 1949 relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (hereinafter Protocol I), Art. 69 on relief and Arts. 63 and 64(3) on civil defence.

¹⁴ The distinction between an obligation to respect, to protect, and to fulfil Human Rights was first suggested by A. Eide, *Right to Adequate Food as a Human Right* (Studies Series No. 1) (1989), at paras. 66–71.

¹⁵ Prohibited by Arts. 33, 53, 49, 31, 32, and 34, respectively, of Convention IV. *supra* note 12.

¹⁶ See Arts. 66–74 of *ibid.*

¹⁷ Art. 78 of *ibid.*

¹⁸ See Coalition Provisional Authority, Memorandum No. 3 (Revised): Criminal Procedures, 27 June 2004, CPA/MEM/27 June 2004/03, which ‘implements’ CPA Order No. 7: Penal Code, 9 June 2003, CPA/ORD/9 June 2003/07. This and all the Coalition Provisional Authority documents referred to below are available at <http://www.cpa-iraq.org> until 30 June 2005.

¹⁹ Art. 78 of Convention IV, *supra* note 12 (emphasis added).

²⁰ See the 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. UN Doc. A/CONF.144/28/Rev.1 at 112 (1990) (Basic Principles).

²¹ In Iraq, resistance groups certainly did not comply with the requirements that Art. 4(A)(2) of Convention III relative to the Treatment of Prisoners of War. 12 Aug. 1949, 75 UNTS 135, sets up for members of organized armed resistance groups to benefit from combatant status (in particular the conditions of having a fixed distinctive sign recognizable at a distance, of carrying arms openly, and of complying with the laws and customs of war).

to an RPG attack upon one of their convoys in the midst of Baghdad may, for instance, be considered to be covered by the law on the conduct of hostilities, while their firing upon a car failing to stop at a checkpoint is covered by human rights law applicable to police operations.²² In the first instance, the deliberate killing of an attacker was lawful and the death of innocent bystanders could be lawful, if such civilian losses were not excessive and all feasible precautionary measures had been taken to avoid or minimize them.²³ In the second instance, international human rights law prescribes that the law enforcement officials must try to arrest the offenders without using firearms, and minimize damage and injury, and respect and preserve human life not only (as *mutatis mutandis* in the conduct of hostilities) of bystanders but also concerning the person to be arrested.²⁴

However, the application of international human rights law to police operations in occupied territories raises the question whether that branch applies at all to occupied territories. International human rights law also applies in armed conflicts,²⁵ but since armed conflicts are situations threatening the life of the nation, most of its guarantees may be suspended under certain conditions.²⁶ Although both the US and Israel deny it,²⁷ UN practice and judicial decisions clearly indicate that international human rights law binds an occupying power with respect to the population of an occupied territory.²⁸

Human rights law on the conduct of police operations, in particular on the use of firearms, may not be suspended even in a situation threatening the life of the nation,

²² See for such incidents, e.g., Human Rights Watch, *Hearts and Minds: Post-war Civilian Deaths in Baghdad Caused by US Forces* (2003), available at <http://www.hrw.org/reports/2003/iraq1003/iraq1003.pdf>, at 38–39 (for the RPG attack) and 34–38 (for the killing of persons at a checkpoint).

²³ See Arts. 51(5)(b) and 57 of Protocol I, *supra* note 13, and the largely corresponding customary law. (See for the latter M. Sassòli, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht, mit besonderer Betrachtung der Regeln zum Schutz der Zivilbevölkerung vor den Auswirkungen von Feindseligkeiten* (1990), at 412–19 and 453–489).

²⁴ See Basic Principles, *supra* note 20, Arts. 4 and 5.

²⁵ See the UN Human Rights Committee's General Comments No. 29 (CCPR/C/21/Rev.1/Add.11, of 31 Aug. 2001), at para. 3, and No. 31 (CCPR/C/74/CRP.4/Rev.6, of 21 Apr. 2004), at para. 11; *Legal Consequences of the Construction of a Wall*, *supra* note 6, at paras. 102–106; *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, at para. 25.

²⁶ See *infra* note 30 and accompanying text.

²⁷ See for Israel *Legal Consequences of the Construction of a Wall*, *supra* note 6, at paras. 102 and 110; Roberts, 'Prolonged Military Occupations: the Israeli-Occupied Territories since 1967', 84 *AJIL* (1990) 44, at 71–72 (hereinafter 'Prolonged Military Occupations'). The Coalition Provisional Authority's Administrator in Iraq, Ambassador Paul Bremer, is reported to have stated in a letter to Amnesty International that 'the only relevant standard applicable to the Coalition's detention practices is the Fourth Geneva Convention of 1949': see Amnesty International, *Iraq: Memorandum on Concerns Related to Legislation Introduced by the Coalition Provisional Authority*, 4 Dec. 2003, (MDE 14/176/2003), available at <http://web.amnesty.org/library/Index/ENGMDE141762003?open&of=ENG-IRQ>.

²⁸ *Legal Consequences of the Construction of a Wall*, *supra* note 6, at paras. 107–112; See also references in W. Kalin, *Report on the Situation of Human Rights in Kuwait under Iraqi Occupation*, UN Doc. E/CN.4/1992/26, 16 Jan. 1992, at paras 5C–59; *Concluding Observations of the Human Rights Committee: Israel*, 18/08/98, UN Doc. CCPR/C/79/Add.93, at para. 10; *Loizidou v Turkey*, and *Cyprus v Turkey*, *infra* note 131; General Comment No. 31 of the UN Human Rights Committee (see *supra* note 25), at para. 10 UK, Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), at para. 11.19 (hereinafter UK Manual).

as far as it protects the right to life, a non-derogable right.²⁹ Other human rights that do not belong to 'the hard core' may be derogated from in times of emergency, to the extent required by the exigencies of the situation and as long as this derogation is consistent with other international obligations.³⁰ In my view, under the aforementioned conditions, an occupying power may derogate from certain human rights obligations if necessary to restore and maintain public order in an occupied territory. Even a serious disruption of civil life in an occupied territory could sometimes be considered as 'threatening the life of the [occupied] nation'. While an occupying power may thus derogate from certain provisions of international human rights law, it has no obligation to do so.

D Evaluation of Coalition Practice in Iraq

In the early days of the occupation, looting, and not an insurgency, represented the greatest threat to public order and the welfare of the local population. Universities, hospitals and government buildings were dismantled piece by piece and carried off. Water and electricity facilities were looted and personal property was stolen. At the time there were even reports that museums were emptied, which fortunately later proved to be exaggerated. Reports indicate that the Coalition had insufficient forces to provide constant security for all possible targets of looting.³¹ In addition, some may have taken the attitude that looting should be permitted as 'a venting of anti-Saddam anger'.³² In some instances, Coalition forces reportedly refused to assist when, for example, ambulances were stolen, replying that 'they had no orders to intervene'.³³ In my view, allowing a population to vent its anger following a conflict tends to cause more long-term problems of reconciliation and reconstruction than it resolves through catharsis. If indeed it was an intentional practice, it violated Article 43 of the Hague Regulations. However, reports also note that Coalition forces in some areas made considerable efforts to re-establish police stations, courts and prison and detention facilities within a short period of time.³⁴ Documents from the Coalition Provisional Authority highlight the accomplishments of the occupier in assisting 'the Iraqi government in constructing the means to assume responsibility for internal and

²⁹ See Basic Principles, *supra* note 20, Art. 8.

³⁰ Cf. Art. 4(1) of the 1966 International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 UNTS 171, Art. 15(1) of the European Convention on Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 UNTS 221, and Art. 27(1) of the American Convention on Human Rights, 22 Nov. 1969, 1144 UNTS 143, and *Legal Consequences of the Construction of a Wall*, *supra* note 6, at para. 127.

³¹ Amnesty International, *Iraq: The Need for Security* (2003) (MDE 14/143/2003), available at <http://web.amnesty.org/library/Index/ENGMDE141432003?open&of=ENG-IRQ>; BBC News, 12 Apr. 2002, British 'breaching Geneva Convention', available at http://news.bbc.co.uk/go/pr/fr/-/2/hi/uk_news/2940739.stm.

³² Amnesty International, *Iraq: Looting, Lawlessness and Humanitarian Consequences* (2003) (MDE 14/083/2003), available at <http://web.amnesty.org/library/Index/ENGMDE140832003?open&of=ENG-IRQ> (quoting an unidentified UK military official).

³³ *Ibid.*, quoting Agence France Presse.

³⁴ See Amnesty International, *Iraq: The Need for Security*, *supra* note 31. These were open and operational by mid-June 2003 in Basra, for example.

external security'.³⁵ Taking into account that the obligation to preserve civil life and public welfare is one of means and not of result, the efforts made by the Coalition to create secure conditions once the occupation was established should not be discounted. It would seem, however, that such means and effort were lacking at the outset, although the problem was foreseeable.³⁶

The obligation to distinguish between military and police operations and use appropriate force was addressed above. Yet reports of civilian deaths and the use of excessive force against civilians in Iraq abound, including prior to the widespread insurgency.³⁷ It is not difficult to understand that a soldier, aware that much of the population is armed, may react in ill-considered haste when confronted by an unstable environment. Nonetheless, IHL demands disciplined and professional responses to hard situations. To switch from combat to law enforcement mode,³⁸ the occupying powers should have deployed other troops more familiar with law enforcement. Such troops are, however, rare in Anglo-Saxon countries where the military and police are traditionally separated, while Latin countries such as France, Italy and Spain have them more readily available with their *gendarmes*, *carabinieri* and *guardia civil*. The other possibility would have been to train combat troops already in peacetime to switch into the law enforcement mode. It must be hoped that the US and the UK learn those lessons from their experience at the beginning of the occupation.

4 The Principle Concerning Legislation: Occupying Powers Must Leave Local Legislation in Force

Article 43 bars an occupying power from extending its own legislation over the occupied territory or from acting as a sovereign legislator. It must, as a matter of principle, respect the laws in force in the occupied territory at the beginning of the occupation. This is one aspect of the conservative approach of IHL towards belligerent occupation, criticized by some for its rigidity.³⁹ We shall see, however, that it allows a considerable amount of flexibility.

A The Meaning of the Term 'Legislation'

The expression 'laws in force in the country' in Article 43 refers not only to laws in the strict sense of the word, but also to the constitution,⁴⁰ decrees, ordinances,⁴¹ court precedents (especially in territories of common law tradition),⁴² as well as administrative

regulations and executive orders,⁴³ provided that the 'norms' in question are general and abstract. While the rule refers to the entire legal system, exceptions apply only to the individual provisions covered by the exceptions that allow an occupying power to legislate, as discussed below.

B The Relationship between Article 43 and Article 64 of Convention IV

Article 64 of Convention IV states:

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. . .

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

This provision belongs to the section of the Convention devoted to penal legislation.⁴⁴ While the first paragraph explicitly refers to 'penal laws', the 'provisions' referred to in the second paragraph are not *so* qualified. Many nevertheless apply the second paragraph exclusively to penal legislation.⁴⁵ Apart from the context of the section, they may rely on the fact that Article 66 refers to 'penal provisions promulgated . . . by virtue of the second paragraph of Article 64', which seems to underline that these 'provisions' are 'penal'. However, this reasoning is not compelling. The second paragraph could also have a broader sense and allow an occupying power to subject the local population to any (penal, civil, administrative, etc.) laws essential for the purposes it exhaustively enumerates.⁴⁶ For the ICRC Commentary, the second paragraph expresses 'in a more precise and detailed form' the terms 'unless absolutely prevented of Article 43'.⁴⁷ The preparatory work of Article 64 shows that 'it is not a mere coincidence that the adjective "penal" is missing in the second paragraph'.⁴⁸

⁴³ Von Glahn, supra note 6, at 97 and 99; E. H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (2000) (reprint of the original 1942 edition), at 89.

⁴⁴ According to the ICRC Commentary, the drafters of Convention IV were so concerned about penal laws because Art. 43 was not sufficiently observed in past conflicts on this particular issue. See J. Pictet, *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention relative to the Protection of Civilians in Time of War* (1958), at 335.

⁴⁵ See for instance Dinstein, 'The International Law of Belligerent Occupation and Human Rights' [1978] *Israel Yb Hum Rights* 114; Kretzmer, supra note 6, at 125 and 151; G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, vol. ii – *The Law of Armed Conflict* (1968), at 194–195.

⁴⁶ Benvenisti, supra note 5, at 101.

⁴⁷ Pictet, supra note 44, at 335. Schwarzenberger, supra note 45, at 193.

⁴⁸ Benvenisti, supra note 6, at 101–103. Drafting Committee No. 2 of Committee III (in charge of the draft convention on the protection of civilian persons in time of war) at the 1949 Diplomatic Conference had a long debate about the future Art. 64 and in particular precisely about whether the adjective 'penal' should be added to the term 'provisions' in the second para. (cf. *Final Record of the Diplomatic Conference of*

³⁵ Coalition Provisional Authority, *An Historical Review of CPA Accomplishments* (2004), available at <http://www.cpa-iraq.org>.

³⁶ Roberts, 'The End of Occupation in Iraq (2004)', International Humanitarian Law Research Initiative, Monitoring IHL in Iraq, available at <http://www.ihlresearch.org/iraq/feature.php?#=51>, at 1–2; Scheffler, supra note 2, at 853–855.

³⁷ See, e.g., Human Rights Watch, supra note 22; Amnesty International, supra note 32.

³⁸ 'From warrior to police': Human Rights Watch, supra note 22, at 4 and 5.

³⁹ R. Kolb, *Ius in bello, Le droit international humanitaire des conflits armés* (2002), at 186–187.

⁴⁰ UK Manual, supra note 28, at para 11.11.

⁴¹ Schwenk, supra note 8, at 397.

⁴² Benvenisti, supra note 6, at 16.

The text of the second paragraph of Article 64 seems to permit the introduction of new legislation for a purpose – namely, ‘to maintain the orderly government of the territory’ – for which the first paragraph does not permit the repeal or suspension of existing penal legislation. However, according to the maxim *lex posterior derogat legi anteriori* any new legislation repeals previous contradictory legislation. The admissibility of penal legislation for the purpose of maintaining orderly government would therefore depend on whether, by chance, any legislation existed on the very same point prior to the occupation.⁴⁹ This absurd result can be avoided if we consider that legislation permissible under the second paragraph may necessarily derogate from previous legislation. Also, legislation contrary to the needs of orderly government may be considered an obstacle to the application of the Convention (one of the justifications for derogations under the first paragraph), given that Article 154 also refers to Article 43 of the Hague Regulations, which, of course, obliges an occupying power to maintain such orderly government.

Article 64(2) therefore permits, in the cases it specifies, changes to all existing local laws. It appears to impose fewer restrictions on legislative powers than the negative formulation of Article 43 of the Hague Regulations (‘unless absolutely prevented’). The ICRC *Commentary* even qualifies the legislative powers of an occupying power as ‘very extensive and complex’.⁵⁰ Nevertheless, as only those changes that are ‘essential’⁵¹ for the admissible purposes are permitted, Article 64 may be seen as interpreting the expression ‘unless absolutely prevented’ contained in the Hague Regulations. Compared with the latter, the newest element in Article 64 is the recognition of the power of the occupant to modify the existing laws in order to ‘fulfil its obligations under the ... Convention’. This may be seen as a simple confirmation of *lex specialis derogat legi generali*. However, it implies that the term ‘unless absolutely prevented’ refers not only to cases of material but also of legal necessity.

In conclusion, Article 64 certainly provides a *lex specialis* regarding the situations in which an occupying power is absolutely prevented from respecting penal law. In addition, there are good reasons to consider it a more precise, albeit less restrictive,

formulation of when an occupying power is ‘absolutely prevented’ from applying existing local legislation.

C Change of Legislation and Changes to Institutions

Most writers deal with possible changes to the institutions of the occupied country separately, as if they were regulated by a specific norm. It is submitted that ‘the occupant’s competence to establish and operate processes of governmental administration in the territory occupied does not extend to the reconstruction of the fundamental institutions of the occupied area.’⁵² In my opinion, except for the *lex specialis* on changes affecting courts, judges and public officials,⁵³ the legal parameter is always Article 43 because local institutions of the occupied country are established by and operate under the law. Institutions and the constitutional order are only one aspect of ‘the laws in force in the country’. The exception ‘unless absolutely prevented’ applies here too. The ‘active transformation and remodelling of the power and other value processes of the occupied country’⁵⁴ admittedly goes much further than simple legislation. An occupying power will only very exceptionally be ‘absolutely prevented’ from *not* undertaking it. It may not, for example, transform ‘a democratic republic into an absolute monarchy’, or ‘change the regional or racial organizations of an occupied country’, or even transform a liberal into a communist economy.⁵⁵

An exception to this so-called Fauchille doctrine, prohibiting changes to the institutions of the occupied territory,⁵⁶ is recognized ‘where a political system constitutes a permanent threat to the maintenance and safety of the military forces of the occupant so that there is “absolute necessity” to abolish it’ (which is clearly a mere application of the general exception ‘unless absolutely prevented’).⁵⁷ This would distinguish the denazification carried out by the American Military Government at the end of the Second World War⁵⁸ from the German attempts to change the regional organization of Belgium during the First World War,⁵⁹ which were unanimously considered to be illegal.⁶⁰ In my view, the cases of post-World War II Germany and Japan should in any case not be seen as precedents for admissible changes in institutions. First, although every country may normally choose its political, economic and social system⁶¹ and the right to self-determination of peoples bars an occupying power from

Geneva of 1949 (1950). U. at 139). The draft submitted by the ICRC stated: ‘[t]he penal laws of the Occupied Power shall remain in force ...’: *ibid.*, i, at 122 (emphasis added). The UK, whose suggested amendment was closest to the finally adopted text, formulated it without specific reference to penal laws: *ibid.*, U. at 139). The USSR wanted to limit the provision to penal norms: *ibid.*, iia, at 670). The Netherlands, a state having been subjected to occupation, insisted, by way of compromise, on the insertion of an Article clarifying the complementary character of the Hague Regulations and the Geneva Conventions: *ibid.*, iia, at 672). The Drafting Committee finally let Committee III choose between two versions, one referring to ‘penal provisions’, another one more generally to ‘provisions’. The latter was adopted by 20 votes to 8: *ibid.*, iii, at 139). In addition, Art. 154 stating that the Convention was ‘supplementary’ to the Hague Regulations was added as part and parcel of the compromise reached about Art. 64.

⁴⁹ Thus, an occupying power could introduce criminal liability of public officials in an occupied territory for unlawful official acts if no such legislation existed, but not if the previous legislation specifically excluded such liability.

⁵⁰ Pictet, *supra* note 44, at 337.

⁵¹ The French term ‘*indispensable*’ is even more restrictive and closer to the Hague Regulations.

⁵² McDougal and Feliciano, *supra* note 10, at 767.

⁵³ See Arts. 64, 66, and 54, respectively, of Convention IV, *supra* note 12.

⁵⁴ McDougal and Feliciano, *supra* note 10, at 768.

⁵⁵ Feilchenfeld, *supra* note 43, at 89–90.

⁵⁶ P. Fauchille, *Traité de droit international public* (1921), at 228 (‘Comme la situation est éminemment provisoire, il ne doit pas bouleverser les institutions du pays’).

⁵⁷ Schwenk, *supra* note 8, at 403.

⁵⁸ *ibid.*, at 407 and McDougal and Feliciano, *supra* note 10, at 770.

⁵⁹ Germany adopted a series of legislative measures with a view to separating the French-speaking and the Dutch-speaking populations of Belgium (cf. von Glahn, *supra* note 6, at 97).

⁶⁰ Feilchenfeld, *supra* note 43, at 89.

⁶¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits [1986] ICJ Rep 14, at para. 258.

making such choices, those two countries had particularly odious regimes that had committed the most serious violations of international law. Second, after World War II, *debellatio* or unconditional surrender were still considered to end the applicability of the law of belligerent occupation,⁶² which is clearly no longer the case today because Article 6(3) and (4) of Convention IV extends the applicability of that convention beyond the general close of military operations.⁶³ Third, Article 47 of Convention IV was only adopted in 1949.

Article 47 refers to institutional changes introduced by an occupying power. It states that protected persons ‘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 ... 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 provision is sometimes misunderstood as prohibiting such changes as, for instance, annexations. Such prohibition is, however, an issue of *jus ad bellum*. *Jus in bello* simply continues to apply despite such changes and such changes do not justify violations of its provisions – including those on the admissibility of legislative changes. The ICRC *Commentary* stresses that ‘[c]ertain changes might conceivably be necessary and even an improvement... [T]he text in question is of an essentially humanitarian character; its object is to safeguard human beings and not to protect the political institutions and government machinery of the State as such.’⁶⁴ That the Coalition established an Interim Governing Council in Iraq,⁶⁵ laid ground for a federalist constitutional system,⁶⁶ abolished the Ba’ath Party and its system of government⁶⁷ and tried to introduce a free-market economy,⁶⁸ was

therefore not as such a violation of IHL, but every individual measure must be checked hereafter against the exceptions admissible under IHL to the prohibition for occupying powers to change local legislation.

5 Exceptions to the Prohibition to Legislate

The words ‘restore and ensure ... public order and civil life’ in Article 43 could be understood as implying that the occupying power is allowed to take only legislative measures for that purpose, i.e. concerning the ‘common interest or the interest of the population’.⁶⁹ However, as confirmed by Article 64 of Convention IV and the drafting history of the Hague Regulations and prior international instruments on the same topic, an occupying power may also legislate to promote its own military interests.⁷⁰ When Article 64 refers to the security of the occupant’s forces, it does no more than confirm, though in more permissive terms, what was already admissible under Article 43.⁷¹

A The Occupying Power May Only Legislate for the *Time* of the Occupation

The task of restoring or ensuring public order and civil life is limited *ratione temporis* to the period of occupation.⁷² In accordance with the aim of Article 43 to maintain the existing legislation as far as possible and to limit changes by an occupying power, and because the occupation does not transfer any title of sovereignty, every legislative change made by the occupying power should be commensurate with the transitional and temporary nature of the occupation.

B The Occupying Power May Legislate for Reasons Other than Military Necessity

The meaning of the exception ‘unless absolutely prevented (*‘sauf empêchement absolu’*) is controversial. Some suggest that it refers to ‘military necessity’.⁷³ The words ‘unless absolutely prevented’ were, however, a mere reformulation of the term ‘necessity’ contained in Article 3 of the Brussels Declaration, which, according to its preparatory works, was not meant as a synonym for ‘military necessity’.⁷⁴ At the other extreme, some authors simply require sufficient justification to deviate from local legislation.⁷⁵ Others consider that ‘absolute prevention means necessity’ and

⁶² Roberts, ‘What is Military Occupation?’, 55 *BYIL* (1984) 249, at 268–269; O. Debbasch, *L’occupation militaire – Pouvoirs reconnus aux forces armées hors de leur territoire national* (1962), at 250; Gerson, ‘War, Conquered Territory, and Military Occupation in the Contemporary International Legal System’, 18 *Hurv Int’l LJ* (1977) 525, at 530–532; Jennings, ‘Government in Commission’, 23 *BYIL* (1946) 112; the US Military Tribunal at Nuremberg confirmed in *Altstötter and others (Justice Trial)*, 6 War Crimes Reports (1948) 1 that the law of military occupation did not apply to the Allied military presence in Germany.

⁶³ Art. 3(b) of Protocol I, supra note 13, goes even further.

⁶⁴ Pictet, supra note 44, at 274.

⁶⁵ Coalition Provisional Authority, Regulation No. 6: Governing Council of Iraq, 13 July 2003 CPA/REG/13 July 2003/06.

⁶⁶ Coalition Provisional Authority, Law of Administration for the State of Iraq for the Transitional Period, 8 Mar. 2004, Art. 4 (Transitional Administration Law).

⁶⁷ Coalition Provisional Authority, Order No. 1: De-Ba’athification of Iraqi Society, 16 May 2003 CPA/ORD/16 May 2003/01; Coalition Provisional Authority, Memorandum No. 1: Implementation of De-Ba’athification Order No. 1, 3 June 2003 CPA/MEM/3 June 2003/01; Coalition Provisional Authority, Order No. 2: Dissolution of Entities (And Annex), 23 May 2003 CPA/ORD/23 May 2003/02.

⁶⁸ See especially, Coalition Provisional Authority, Order No. 54: Trade Liberalization Policy 2004 with Annex A, 24 Feb. 2004 CPA/ORD/24 February 2004/54; Coalition Provisional Authority, Order No. 56: Central Bank Law and Annex A, 6 Mar. 2004 CPA/ORD/6 Mar. 2004/56; Coalition Provisional Authority, Order No. 87: Public Contracts, 14 May 2004 CPA/ORD/14 May 2004/87; Coalition Provisional Authority, Order No. 39: Foreign Investment (Amended by Order No. 46), 20 Dec. 2003, CPA/ORD/20 Dec. 2003/39; Coalition Provisional Authority, Order No. 64: Amendment to the Company Law No. 21 of 1997, 29 Feb. 2004, CPA/ORD/29 Feb. 2004/64.

⁶⁹ Schwenk, supra note 8, at 395, citing Meurer, *Die Völkerrechtliche Stellung der vom Feind besetzten Gebiete* (1915), at 23.

⁷⁰ See Schwenk, supra note 8, at 395–397.

⁷¹ Benvenisti, supra note 6, at 104. See also Schwarzenberger, supra note 45, at 194.

⁷² Oppenheim, *International Law – A Treatise* (7th edn. by H. Lauterpacht, 1952), ii. Disputes, War and Neutrality, at 436 and 437.

⁷³ Schwenk, supra note 8, at 393; M. Greenspan, *The Modern Law of Land Warfare* (1959), at 224; Bothe, ‘Occupation, Belligerent’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1997), iii, at 765.

⁷⁴ Schwenk, supra note 8, at 401.

⁷⁵ Feilchenfeld, supra note 43, at 89.

that the adverb ‘absolutely’ is therefore of small consequence.⁷⁶ More generally, it is regretted that Article 43 does not offer a fixed criterion to determine which changes are lawful.⁷⁷ After the two world wars, courts have indeed accepted a great variety of legislation by occupying powers (including by those that were finally vanquished) as valid.⁷⁸ The practice of Israeli courts concerning legislation in the Israeli occupied territories is also very permissive.⁷⁹ Most authors have an intermediate position and mention that, as confirmed by Article 64 of Convention IV, not only the interests of the army of occupation, but also those of the local civilian population may prevent an occupying power from applying local legislation.⁸⁰ This broader interpretation also corresponds to the practice of allied occupying powers during World War II. Nonetheless, the risk of abuse of a broader interpretation should not be neglected, as it is the occupying power that decides whether a legislative act is necessary, and its interpretation is not subject to revision during the occupation.⁸¹

C The Occupying Power May Legislate to Ensure Its Security

Under both Article 43 of the Hague Regulations and Article 64(2) of Convention IV, the most uncontroversial case of legislation an occupying power may introduce is that which is essential⁸² to ensure its security. Such legislation may not, however, prescribe any measure specifically prohibited by IHL (such as collective punishment, house demolitions or deportations).⁸³ Traditional examples of laws that may be suspended are those concerning conscription, rights of public assembly, and bearing arms.⁸⁴ In Iraq, the occupying powers introduced, for example, a prohibition on the bearing of arms during assemblies permitted by the Coalition Provisional Authority.⁸⁵

⁷⁶ Dinstein, *supra* note 45, at 112, citing Schwarzenberger, *supra* note 44, at 193. Dinstein adds that ‘[t]he necessity . . . may be derived either from the legitimate interests of the occupant or from concern for the civilian population’.

⁷⁷ Vité, ‘L’application du droit international de l’occupation militaire aux activités des organisations internationales’, 853 *Int’l Rev Red Cross* (2004) 17. This article is based upon a larger study by R. Kolb, G. Porretto, and S. Vité, *L’Articulation des règles de droit international humanitaire et de droits de l’homme applicables aux forces internationales et aux administrations civiles internationales transitoires* (2003) (mimeo-typed version, to be translated and published in English).

⁷⁸ For examples see reference to various court cases in E. David, *Principes de droit des conflits armés* (3rd edn., 2002), at 511.

⁷⁹ For the practice of the Israeli Supreme Court see Kretzmer, *supra* note 6, at 61–72.

⁸⁰ Schwenk, *supra* note 8, at 400; Pictet, quoted *supra* note 64; Debbasch, *supra* note 62, at 172; Von Glahn, *supra* note 6, at 97. A. D. McNair and A. D. Watts, *The Legal Effects of War* (1966), at 369 mention three grounds for being ‘absolutely prevented’ from respecting local laws, namely the maintenance of order, the safety of the occupier, and the realization of the legitimate purpose of the occupation.

⁸¹ Von Glahn, *supra* note 6, at 100. Exceptionally, the ICJ was able in *Legal Consequences of the Construction of a Wall*, *supra* note 6, at para. 137, to give an opinion on whether certain measures taken by an occupying power were necessary.

⁸² While it is not sufficient that legislation furthers its security, an occupying power has broad discretion in deciding what is essential to its security.

⁸³ Cf. Arts. 33(1), 49(1), and 53 of Convention IV, *supra* note 12.

⁸⁴ UK Manual, *supra* note 28, at para. 11.25.

⁸⁵ Coalition Provisional Authority, Order No. 19: Freedom of Assembly, 9 July 2003 CPA/ORD/9 July 2003/19, ss. 2 and 6.

D The Occupying Power May Adopt Legislation Essential for the Implementation of IHL

The reference in Article 64 to legislation essential for (or an obstacle to) the respect of ‘Convention [IV]’ must be extended to all applicable IHL, since IHL cannot possibly require specific conduct from an occupying power and also prohibit it to legislate for that purpose. To fulfil its various duties under IHL in a non-arbitrary way compatible with the principles of the rule of law, and to respect the principle *nullum crimen sine lege* in the field of penal law, an occupying power must legislate, including by abrogating provisions of the local legislation contrary to IHL. Examples given in the preparatory works for the necessity to legislate are provisions in the fields of child welfare, labour, food, hygiene and public health.⁸⁶ The ICRC *Commentary* mentions ‘provisions which adversely affect racial or religious minorities’ as examples of laws which may be abrogated. Examples of such changes in Iraq were Orders ensuring fundamental standards for persons detained.⁸⁷

Like any state party to Convention IV, an occupying power must also legislate to try persons having committed grave breaches, if such legislation does not yet exist in the occupied territory.⁸⁸ The Coalition Provisional Authority in Iraq, however, went one step further. It not only adopted (through the Governing Council for which it is responsible under Article 47 of Convention IV) legislation criminalizing international crimes committed by the former regime.⁸⁹ This was certainly lawful. It could then have brought such crimes either before its own (military) courts,⁹⁰ or before existing Iraqi courts, which it must ‘let continue to function’.⁹¹ It chose neither of those two options, but preferred to create a new Iraqi court for that purpose,⁹² an option which is not offered by Convention IV and is certainly not necessary in order to respect IHL, as the other two kinds of tribunals could have done the job. Therefore, in my view, the Iraqi Special Tribunal established on 10 December 2003 by the Interim Governing Council under an explicit delegation of authority by the occupying powers,⁹³ violated IHL and, as it was not lawfully constituted, it could not today try Iraqis accused of international crimes unless the new Interim Government of Iraq were to establish it again. The conduct of the Council could in any case be attributed to the occupying powers even without the delegation of authority.⁹⁴

⁸⁶ See *Final Record*, *supra* note 48, iia. at 672 and 833.

⁸⁷ See Coalitional Provisional Authority, Order No. 10: Management of Detention and Prison Facilities, 5 June 2003 CPA/ORD/5 June 2003/10 and Coalition Provisional Authority, Memorandum No. 2: Management of Detention and Prison Facilities, 8 June 2003 CPA/MEM/8 June 2003/02.

⁸⁸ UK Manual, *supra* note 28, at para. 11.26, note 54.

⁸⁹ See Governing Council, The Statute of the Iraqi Special Tribunal, 10 Dec. 2003, ‘Annex’ to CPA Order No. 48, *infra* note 92. See especially Section Three: Jurisdiction and Crimes.

⁹⁰ See Art. 66 of Convention IV, *supra* note 12.

⁹¹ See *ibid.*, Art. 64(1)

⁹² See Coalition Provisional Authority, Order No. 48: Delegation of Authority Regarding an Iraqi Special Tribunal, 10 Dec. 2003 CPA/ORD/9 Dec. 2003/48.

⁹³ See *supra* notes 89 and 92.

⁹⁴ See *infra*, section 6.A.

E May the Occupying Power Legislate to Zmplement Znternational Human Rights Law?

It was explained above that international human rights law also binds occupying powers in respect of the treatment of the local population.⁹⁵ The specific provisions of IHL provide for a *lex specialis* on the issues they regulate.⁹⁶ However, many issues such as freedom of the press, freedom of opinion, the right to form trade unions or the right to social security are not dealt with by IHL.⁹⁷ On other issues, such as the moment from which an accused must have access to defence counsel, human rights as interpreted by treaty and UN Charter-based mechanisms are more specific. In both cases, human rights standards therefore apply, but in the former case they may be subject to derogations.

The occupying power therefore has an obligation to abolish legislation and institutions which contravene international human rights standards. While it may derogate from certain provisions due to a situation of emergency, it is certainly not obliged to do so and may therefore change any legislation contrary to the full guarantees of international human rights law.

That IHL does not mention this additional exception to the continuing applicability of local legislation can be easily explained by the fact that when the Hague Regulations were adopted in 1907, international human rights law did not yet exist, and in 1949, when Convention IV was drafted, it had just come into being.⁹⁸ Today, an occupying power has a strong argument that it is ‘absolutely prevented’ from applying local legislation contrary to international law.

Human rights, e.g. the right to a fair trial, women’s rights, and in particular social and economic rights often require the state to take positive (including legislative) action. Thus, one may even go so far as to allow the occupying power to adopt new, additional laws that are genuinely necessary to protect international human rights law. In Iraq, the Coalition prohibited, for example, child labour.⁹⁹ The property reconciliation and claims institutions it established may also come under this category.¹⁰⁰

⁹⁵ See *supra* notes 25–28.

⁹⁶ See *Legai Consequences of the Construction of a Wall*, *supra* note 6, at para. 106.

⁹⁷ Roberts, *supra* note 27, at 73, also mentions that ‘discrimination in employment, discrimination in education and the import of educational materials . . . are addressed in considerable detail in certain human rights agreements, and are not so addressed in the law on occupations. In respect of such issues, the application of international human rights standards is highly desirable.’

⁹⁸ In 1949, a proposal by the Mexican Delegation to the effect that local legislation could be modified by the occupier only if it violated the ‘Universal Declaration of the Rights of Man’ was rejected (see *Final Record*, *supra* note 48, *ii*, at 671).

⁹⁹ See Coalition Provisional Authority, Order No. 89: Amendments to the Labor Code – Law No. 71 of 1987, 5 May 2004, CPA/ORD/05 May 2004/89.

¹⁰⁰ See, e.g., Coalition Provisional Authority, Regulation No. 4: Establishment of the Iraqi Property Reconciliation Facility, 14 Jan. 2004 CPA/REG/14 Jan. 2004/04, Regulation No. 8: Delegation of Authority Regarding Establishment of a Property Claims Commission (Amended by Reg. 12), 14 Jan. 2004, CPA/REG/14 Jan. 2004/08, and Regulation No. 12: Establishment of the Iraq Property Claims Commission (As Amended and Restated) with Annex A, 24 June 2004, CPA/REG/24 June 2004/12, which recognizes ‘that large numbers of people from different ethnic and religious backgrounds in Iraq have been uprooted and forced to move from their properties . . .’ and attempts to set up a mechanism to resolve property disputes primarily related to the Kurdistan Regional Government area.

However, international human rights law often provides only a framework and leaves the state great latitude on how to implement it. As long as local legislation falls within this latitude, an occupying power may certainly not replace it. As the ICRC *Commentary* emphasizes, occupying authorities may not change local legislation ‘merely to make it accord with their own legal conceptions’,¹⁰¹ including where those conceptions are also perfectly compatible with international human rights standards.

A difficult question arises when local legislation is clearly contrary to (or insufficient under) human rights standards. May an occupying power then exercise (provisionally) the latitude granted to states on how they implement international human rights law? In my view, while such exercise of discretion is contrary to the right to self-determination and to the principle that legislation must be based upon the will of the people,¹⁰² it is inherent in the situation of occupation and must therefore be accepted until the local people can exercise their right to self-determination. An occupying power must, however, take into account, while exercising such discretion, that it is not the sovereign – it may introduce only as many changes as is absolutely necessary under its human rights obligations and must stay as close as possible to similar local standards and the local cultural, legal and economic traditions. Consequently, in my view, the proper test cannot be whether a similar law exists in the occupier’s own country.¹⁰³ If, for instance, an Anglo-Saxon power occupies a country of Roman-German penal law tradition, the legislation of which would not offer the necessary guarantees of a fair trial, the former could not introduce an adversarial criminal procedure, but only those changes which make an inquisitorial trial compatible with the right to a fair trial. Similarly, an occupying power with a free labour market could not change the local labour legislation to allow free hiring and firing in order to implement the right to work.

A special problem arises in relation to the right to self-determination of peoples. First, while this is a human right, it applies only to peoples. Not every population of an occupied territory is a people. If part of an existing country is occupied where a part of a people lives, it would clearly be incompatible with international law for an occupying power to encourage the ‘self-determination’ of the population of that territory. May an occupying power, however, take legislative action to further the exercise of the right to self-determination of a genuine people living in an occupied territory? In my view, this right cannot be implemented by an occupying power. It is too closely linked to the wishes of the people and the ways in which this right can be satisfied are too manifold. Some would add that the very fact of occupation is incompatible with the right to self-determination. The best way to respect it for an occupying power is not to legislate, but to withdraw. This is, however, an issue of *jus ad bellum* and this argument cannot be used to deny an occupying power the right to legislate under *jus in bello*. An occupying power confronted with a people in an occupied territory may

¹⁰¹ Pictet, *supra* note 44, at 336.

¹⁰² Cf. Art. 21(3) of the Universal Declaration of Human Rights, GA Res. 217(III), UN GAOR, 3d Sess. Supp. No. 13, UN Doc. A/810 (1948), 71.

¹⁰³ As suggested by Dinstein, *supra* note 45, at 113.

therefore be considered to be allowed to legislate in order to create conditions necessary to the exercise by that people of its right to self-determination and to abrogate legislation making such an exercise impossible.

F *The Occupying Power May Legislate Where Necessary to Maintain Public Order*

Beyond the protection of its own security, under the explicit wording of Article 43, the protection of the security of the local population is a legitimate aim for legislation by an occupying power. As it must restore and maintain public order, it may also legislate where absolutely necessary for that purpose. In Iraq, it might be that the imposition of longer prison sentences for acts of looting or sabotage of infrastructure was justified under this exception.¹⁰⁴ The simultaneous denial of pre-trial bail in such cases¹⁰⁵ was, however, probably not compatible with human rights standards, which do not include the seriousness of the suspected crime amongst the valid reasons for denial of bail.¹⁰⁶

G *May the Occupying Power Legislate to Maintain Civil Life in an Occupied Territory?*

The most important contribution of an occupying power to civil life in an occupied territory is to maintain the orderly government of the territory. Article 64(2) of Convention IV explicitly allows it to legislate for that purpose. Beyond that, it must also ensure civil life among the inhabitants of the territory and may legislate for that purpose if the existing legislation or its absence absolutely prevents it from accomplishing that aim. This includes regulations fixing prices or securing the equitable distribution of food and other commodities, calling up, if necessary, the inhabitants for police duty to assist the regular police in the maintenance of public order, for help with fire fighting or to perform other duties that may be required of citizens for the public good.¹⁰⁷ In practice, aside from the case of legislation contrary to human rights standards already mentioned, legislative action by the occupying power to ensure civil life will mainly be necessary where a failed state is occupied. Here again it must stay as close as possible to similar local standards and the local cultural, legal and economic traditions.

¹⁰⁴ See Coalition Provisional Authority, Order No. 31: Modifications of Penal Code and Criminal Proceedings Law, 10 Sept. 2003, CPA/ORD/10 September 2003/31.

¹⁰⁵ See *ibid.*, s. 6.

¹⁰⁶ According to Art. 9(3) of the International Covenant on Civil and Political Rights, 'it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement'. In its *General Comment No. 08: Right to liberty and security of persons (Art. 9) 30/06/82*, the Human Rights Committee stated that 'pre-trial detention should be an exception and as short as possible'. In *Communication No 526/1993: Spain, 23/06/97*, it emphasized that 'bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party'. In my view, denial of pre-trial bail because of the seriousness of the suspected crime violates the right to be presumed innocent.

¹⁰⁷ UK Manual, *supra* note 28, at paras. 11.16 and 11.25.1. For other examples see reference to various court cases in David, *supra* note 78, at 507.

in Iraq, the occupying powers addressed, for example, the problem of a number of different series of Iraqi Dinar notes circulating in order to help stabilize the economy and to instil public confidence.¹⁰⁸ They also adopted changes to the traffic code.¹⁰⁹ The first change could have been considered necessary to maintain economic life. Other measures went clearly beyond what is necessary for that purpose and therefore in my view violated IHL. The occupying powers simplified, for example, the procedure of concluding public contracts and liberalized trade and foreign investment.¹¹⁰ On the latter, they allowed foreign investors to completely own Iraqi companies with no requirements for reinvesting profits back into the country – something that had previously been restricted by the Iraqi Constitution to the citizens of Arab countries.¹¹¹ Neither human rights nor economic life made such a change, affecting the right of the Iraqi people to freely dispose of its wealth and resources, necessary.¹¹²

H *May an Occupying Power Legislate to Enhance Civil Life in an Occupied Territory?*

Sooner or later, a prolonged military occupation faces the need to adopt legislative measures in order to let the occupied country evolve.¹¹³ As the legislative function is a continuous, necessary function of every state on which the evolution of civil life depends, a legislative vacuum created by the disruption of the legitimate sovereign must at a certain point in time be filled by the occupying power.¹¹⁴ It has been suggested that the exception of Article 43 must be interpreted more extensively the longer an occupation lasts.¹¹⁵ This is particularly evident for the rules on taxation. Article 48 of the Hague Regulations does not seem to exclude tax increases, especially if

such changes... have been made desirable... in the case of an extended occupation, [through] general changes in economic conditions... 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 43.¹¹⁶

¹⁰⁸ Coalition Provisional Authority, Order No. 43: New Iraqi Dinar Banknotes, 14 Oct. 2003, CPA/ORD/14 October 2003/43.

¹⁰⁹ Coalition Provisional Authority, Order No. 86: Traffic Code with Annex A, 20 May 2004, CPA/ORD/20 May 2004/86.

¹¹⁰ See *supra* note 68.

¹¹¹ See Order 39, *supra* note 68, ss. 7(2)(d), 11.

¹¹² Equally critical are Roberts, *supra* note 36, at 7, and Catan, 'Iraq Business Deals May be Invalid. Law Experts Warn', *Financial Times*, 2 Nov. 2003; Eviatar, 'Free-Market Iraq? Not So Fast', *NY Times*, 10 Jan. 2004, B9.

¹¹³ Lerquin, 'The German Occupation in Belgium and Article 43 of The Hague Convention of the 18th October 1907', 1 *International Law Notes* (1916) 55.

¹¹⁴ L. von Kohler, *The Administration of the Occupied Territories, Vol. I – Belgium* (1942), at 6, cited in McDougal and Feliciano, *supra* note 10, at 746, writes that 'the life of the occupied country is not to cease or stand still, but is to find continued fulfilment even under the changed conditions resulting from occupation'.

¹¹⁵ Kolb, *supra* note 39, at 186.

¹¹⁶ Feilchenfeld, *supra* note 43, at 49. See also Roberts, *supra* note 27, at 44.

In Iraq, although the occupation did not last for a very long period, the occupying powers legislated to introduce ‘an efficient and modern income tax system’.¹¹⁷

Here too the risk of abuse exists. Article 43 was originally adopted under the influence of weaker countries that were more susceptible to occupation and thus wished to oblige likely occupants to take care of the civilian population. However, the tendency of the 20th-century state to become more active in regulating economic and social relations and the practice of occupants during the two World Wars have led to the concern that occupying powers invoke their obligation to restore civil life to justify a broad use of legislative powers, thus reversing the original aim of this norm.¹¹⁸

I The Occupying Power May Legislate Where Explicitly Authorized to do so by a UN Security Council Resolution

Even apart from the case of a peace operation dealt with below, the UN Security Council may mandate or authorize an occupying power to take certain steps to create conditions in which the population of the occupied territory can freely determine its future life under the rule of law and enjoy the respect of human rights. It may consider that this necessitates the establishment of new local and national institutions and legal, judicial and economic reform. According to the principles of the rule of law – which are essential to any peace-building effort – all this implies the need to adopt legislation which may go further than what can be justified under the exceptions to the principle of Article 43 discussed up to this point.¹¹⁹ Only Security Council resolutions can justify such fundamental changes and the devolution of wide legislative powers to local authorities remaining under the global control of the (former) occupying power. Some authors go even one step further and claim that the Security Council may end the occupation altogether, not by changing the facts on the ground, but by requalifying a belligerent occupation as an international transitional administration.¹²⁰

Assuming that the International Court of Justice was correct when it held that Article 103 of the UN Charter makes not only the UN Charter but also binding UN Security Council resolutions prevail over any other international obligation,¹²¹ such

¹¹⁷ Preamble to Coalition Provisional Authority, Order No. 49: Tax Strategy of 2004 with Explanatory Note and Annex, 20 Feb. 2004, CPA/ORD/20 Feb. 2004/49. See also Coalition Provisional Authority, Order No. 37: Tax Strategy for 2003, 19 Sept. 2003, CPA/ORD/19 Sept. 2003/37.

¹¹⁸ Benvenisti, *supra* note 6, at 9–11. See also McDougal and Feliciano, *supra* note 10, at 747, Debbasch, *supra* note 62, at 172, and Schwarzenberger, *supra* note 45, at 200–201.

¹¹⁹ First, the very constitution of new local authorities necessitates changes which go beyond the simple implementation of political rights under international human rights law. Secondly, as long as the occupation lasts, local authorities, even if freely elected (see *infra* note 131) are subject to the same restraints under IHL as the occupying power (see *infra*, at 6. A.). Newly established national authorities will, however, never comply with the limitations of legislative powers discussed hitherto.

¹²⁰ Vité, *supra* note 77, at 28. See also Ottolenghi, ‘The Stars and Stripes in Al-Fardos Square: The Implications for the International Law of Belligerent Occupation’, 77 *Fordham L Rev* (2004) 2177.

¹²¹ Order of 14 April 1992 in *Question of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v US)* [1992] ICJ Rep 126.

resolutions authorizing legislative changes in an occupied territory prevail over the restrictions of Articles 43 of the Hague Regulations and 64 of Convention IV. IHL obligations, however, fall under *jus cogens*.¹²² Many consider that even Security Council resolutions may not derogate from *jus cogens*.¹²³ The International Court of Justice has, on the contrary, called upon the Security Council to take action to bring violations of IHL to an end.¹²⁴ However, the question of whom could determine that a given Security Council resolution violates *jus cogens* is unclear.

In my view, any derogation from IHL by the UN Security Council must be explicit. Its resolutions must be interpreted whenever possible in a manner compatible with IHL. First, as mentioned, even the Security Council must comply with *jus cogens*. Second, the mandate of the Security Council to maintain international peace and security consists of enforcing *jus ad bellum*. Just as a state implementing *jus ad bellum* by using force in self-defence or under UN Security Council authorization has to comply with IHL, it follows that any measure authorized by the Council must be implemented in a manner that respects IHL.¹²⁵ 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. I would therefore reject the claim of the new UK Military Manual that UN Security Council Resolution 1483 (2003) justifies US and UK legislation in this field when it simply ‘requests the Secretary-General to appoint a Special Representative . . . whose independent responsibilities shall involve . . . in coordination with the [occupying powers], assisting the people of Iraq through: . . . encouraging international efforts to promote legal and judicial reform’.¹²⁶ Such involvement may only have been justified under the exception for legislation necessary under international human rights law. I would similarly reject the claim by the UK Secretary of State for Foreign and Commonwealth Affairs that ‘Security Council Resolution 1483 provides a sound legal basis for the policy goals of the CPA Foreign Investment Order’ discussed above.¹²⁷ Here too, the resolution

¹²² Draft Articles on Responsibility of States for Internationally Wrongful Acts, United Nations International Law Commission, Report on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001), UN GAOR, 55th Sess., Supp. No. 10, UN Doc. A/56/10, available at <http://www.un.org/law/ilc/reports/2001/2001report.htm>, at 29–365, para. 5 to Art. 40, referring to Nuclear Weapons, *supra* note 25, at para. 79. See also Report of the International Law Commission on the work of its thirty-second session in *Yearbook of the International Law Commission* (1980).ii, Part Two, at 46, para. 28, and *Prosecutor v Kupreskic*, Case No. IT-95–16-T, Judgment, para. 520 (ICTY Trial Chamber I, 14 Jan. 2000). Scheffer, *supra* note 2, at 852, considers 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 peremptory norms of international law’. The ICJ disagrees, because it applied rules on state responsibility for serious breaches of peremptory norms of international law to violations of IHL of military occupation (see *Legal Consequences of the Construction of a Wall*, *supra* note 6, at para. 159).

¹²³ See Separate Opinion of Judge Lauterpacht in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), Provisional Measures, Order of 13 September 1993 [1993] ICJ Rep 325, at 440–441, paras. 100–102.

¹²⁴ *Legal Consequences of the Construction of a Wall*, *supra* note 6, at para. 160.

¹²⁵ See Meron, ‘Prisoners of War, Civilians and Diplomats in the Gulf Crisis’, 85 *AJIL* (1991) 104, at 106.

¹²⁶ See UK Manual, *supra* note 28, at para. 11.11, n. 15, and SC Res. 1483 (2003), para. 8(i).

¹²⁷ See HC Debs., 20 Nov. 2003, vol. 413, col. 1304W and *supra* notes 110–112.

simply mentions among the responsibilities of the Special Representative the promotion, in coordination with the occupying powers, of ‘economic reconstruction and the conditions for sustainable development’.¹²⁸ The mentioned Order therefore violated international law.

6 When does International Humanitarian Law of Military Occupation Cease to Apply, particularly in Iraq?

A ZHL of Belligerent Occupation Applies to Local Authorities Acting under the Global Control of an Occupying Power

As mentioned above, Article 47 of Convention IV states that protected persons ‘shall not be deprived’ of the benefits of IHL ‘by any change introduced, as the result of the occupation of a territory, into the institutions or government of the . . . territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power’. Understood in conformity with the general rules on state responsibility for conduct directed or controlled by a state,¹²⁹ this means that a government instituted by the occupying power, such as the Interim Governing Council in Iraq before 30 June 2004, may not subject the local population to changes going beyond those which could be introduced by the occupying power itself. This raises the question of when the devolution of governmental authority to a national government is effective enough to end the applicability of IHL on belligerent occupation altogether. Article 6(3) of Convention IV prescribes that the Convention ceases to apply ‘[i]n the case of occupied territory . . . one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions [of the most important articles for our discussion, such as Articles 47 and 64].’ The decisive factor is, therefore, who effectively exercises governmental authority. Article 3(b) of Protocol I goes further in prescribing that IHL applies until the termination of the occupation, but such termination must also depend upon who exercises effectively governmental authority.

B The End of Occupation through Devolution of Governmental Authority to New National Authorities: The Case of Iraq

Many would make that end depend on the (democratic) legitimacy of a new national government,¹³⁰ given that, taking into account the right of the local people to self-determination, a democratic election cannot be considered as a change ‘introduced’ by the occupying power, even if it was held under the latter’s initiative and supervision. That democratically elected government could then end the occupation, even though troops of the former occupying power remain present on the territory of the state, by freely agreeing to their presence.¹³¹ The main problem with this line of argument is that the legitimacy of the new government is often controversial (as is the question of whether the new government’s consent to the continued presence of foreign troops is freely given). International human rights law provides only insufficient indications of such legitimacy, through the right to self-determination, political rights and the rights of minorities.¹³² International recognition of such legitimacy, in particular by the UN Security Council, may offer a clearer indication.

In the case of Iraq, Security Council Resolution 1546 (2004), ‘[l]ooking 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’, explicitly welcomes that ‘by 30 June 2004, the occupation will end’.¹³³ In my view, this cannot be seen as an application of the rules of IHL on the end of application of the law of military occupation to the facts on the ground. Under IHL, the law of military occupation would have continued to apply. The resolution was adopted when the US-led coalition itself admitted that it was still exercising effective control over Iraq and its wording does not make this determination dependent upon an effective change on the ground. As for the facts, more than 100,000 Coalition troops remain in Iraq, they are involved in daily fighting, they are not put under the direction of the Iraqi provisional government and the latter may not even ask them directly for their withdrawal from Iraq. All Resolution 1546 foresees is that the ‘mandate for the multinational force shall be reviewed at the request of the Government of Iraq’.¹³⁴ When evaluating whether the Interim Government was, in terms of Article 47 of Convention IV, a change introduced by the occupying power, one has to admit that it was not directly chosen by the occupying powers, but under the supervision of a UN representative. On the other hand, the US had an important word to say on its

¹²⁸ SC Res. 1483 (2003), para. 8(e).

¹²⁹ See Art. 8 of the Draft Articles, *supra* note 122. The ICRC Commentary to Art. 29 of Convention IV considers that when a violation has been committed by local authorities, ‘what is important is to know where the decision leading to the unlawful act was made, where the intention was formed and the order given’ (Pictet, *supra* note 44, at 212.). In the *Tadic* case, the International Criminal Tribunal for the Former Yugoslavia held, however, that overall control is the appropriate standard, and not effective control over the conduct to be attributed to a given state (Prosecutor v *Tadic*, Case No. IT-94-1, Judgment, paras. 116–144 (ICTY, Appeals Chamber 15 July 1999)).

¹³⁰ This appears to be the ICRC position, which requalified the conflict in Afghanistan into a non-international armed conflict once the Karzai government was elected by the Loya Jirga (see Roberts, ‘The Laws of War in the War on Terror’, 32 *Israel Yearbook of Human Rights* (2002) 193).

¹³¹ See, however, the precedent of Northern Cyprus. The European Court of Human Rights considers it to be occupied by Turkey and attributes the conduct of local authorities, though freely elected, to Turkey in *Loizidou v Turkey, Merits*, ECHR (1996), Series VI, 2216 at 2235–2236, para. 56, and *Cyprus v Turkey*, 10 May 2001, at paras. 69–77, available at <http://hudoc.echr.coe.int>.

¹³² See Arts. 1, 25, and 27 of the International Covenant on Civil and Political Rights, 19 Dec. 1966, 999 UNTS 171 (entered into force 23 Mar. 1976).

¹³³ SC Res. 1546, *supra* note 3, at para. 2.

¹³⁴ *ibid.*, at para. 12.

composition, the new Prime Minister has a long record of US connections,¹³⁵ before the elections held in January 2005 the Government could not yet possibly be considered as democratically legitimated, and, finally, it is very doubtful whether it has greater control over the reality in Iraq than the US and its coalition partners have.

Resolution 1546 must rather be seen as a decision overriding the rules of IHL on the subject. As seen above, such a decision is valid under Article 103 of the UN Charter. It is nevertheless regrettable and a dangerous precedent to make thus the (end of) the application of IHL dependent on criteria which are at best related to the desired legitimacy of the new government and at worst to the needs of a US administration in an election year, as both considerations blur the fundamental separation between *jus ad bellum* (the rules on the legitimacy of the use of force) and *jus in bello* (the rules on how force may be used, which comprise IHL).¹³⁶

C IHL Rules Applicable after the Official End of Occupation in Iraq

One could object to the aforementioned line of argument that in an Annex to Resolution 1546, US Secretary of State Colin Powell promises in writing 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'.¹³⁷ This astonishing promise is difficult to interpret.

First it could mean that while the occupation ends from the point of view of *jus ad bellum* (and for the consumption of the US and Iraqi public opinion), the *jus in bello* of military occupation continues to apply, as the applicability of the *jus in bello* depends on the factual situation.¹³⁸ Those espousing this interpretation stress that the occupying powers otherwise would have had to release or transfer to the Iraqi authorities all civilian prisoners on 30 June 2004, which they did not do, and would lack a legal basis for administratively detaining persons newly arrested.¹³⁹ The second possible

¹³⁵ Roberts, *supra* note 36, at 8.

¹³⁶ See Protocol I, *supra* note 13, at preambular para. 5: the US Military Tribunal at Nuremberg in the case of *Wilhelm List et al.*, 8 July 1947–19 Feb. 1948, Law Reports of Trials of War Criminals, viii (The United Nations War Crimes Commission), at 34–76 (see for this and other references M. Sassòli and A. Bouvier, *How Does Law Protect in War?* (1999), at 83–87, 665, 681, 682); Greenwood, 'The Relationship Between *jus ad bellum* and *jus in bello*', 9 *Review of Int'l Studies* (1983) 221; Bugnion, 'Guerre juste, guerre d'agression et droit international humanitaire', 847 *Int'l Review of the Red Cross* (2002) 523; H. Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre* (1970).

¹³⁷ Letter of 5 June 2004 by Secretary of State Colin Powell to the President of the Security Council, annexed to SC Res. 1546 (2004).

¹³⁸ This position is forcefully supported by Roberts, *supra* note 36, at 14–16. Amnesty International, 'Iraq, Human Rights Protection and Promotion Vital in the Transitional Period', (2004) (MDE 14/030/2004), available at <http://web.amnesty.org/library/Index/ENG.MDE140302004?open&of=ENG-IRQ>, at 2, writes that IHL of military occupation continues to apply if the multinational forces continue to exercise effective control over Iraq.

¹³⁹ Amnesty, *supra* note 138, Art. 77 of Convention IV reads: '[p]rotected persons who have been accused of offences or convicted by the courts in occupied territory, shall be handed over at the close of occupation, with the relevant records, to the authorities of the liberated territory'. In his letter (*cf.* *supra* note 137), Secretary of State Powell announces that the multinational forces will have recourse to 'internment where this is necessary for imperative reasons of security'. As occupying powers, they would have a legal basis for such internment in Art. 78 of Convention IV, *supra* note 12.

interpretation is that while the situation in Iraq is no longer governed overall by IHL of military occupation (and in particular the interplay of Article 47 of Convention IV and Article 43 of the Hague Regulations as discussed in this section no longer applies to conduct of the Iraqi Interim Government), the Coalition forces themselves will apply it to their conduct. This would be in line with the ICRC Commentary¹⁴⁰ and an ICTY decision¹⁴¹ arguing that the concept of occupation under Convention IV is broader than the same concept as defined in Article 42 of the Hague Regulations, which reads: 'Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territory where such authority is established, and in a position to assert itself.' Convention IV would apply as soon as individuals fall into the hands of the occupying power. Such a theory, however, begs the crucial question when the state into whose power those individuals fall may be classified as the 'occupying power'.¹⁴² Furthermore, the dividing line between the broader and the narrower concept cannot in my view correspond to the distinction between the Hague Regulations and Convention IV. Some of the provisions of the latter too, such as Article 50 on education and Article 64 on criminal legislation presuppose actual control.

The third possible meaning of the promise made by the Secretary of State is that it constitutes a reminder of Article 6(4) of Convention IV, which states, after enumerating in paragraphs 1–3 when the Convention ceases to apply, that 'Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention'. The many persons the US-led coalition continues to hold after 1 July 2004 remain protected by IHL of belligerent occupation. Reportedly, some Coalition officials argue that those detainees were constructively released, although they are still held by Coalition forces, because the latter detain them now under the authority of the Iraqi Government. In my opinion, this is an absurd claim, because IHL applies according to the facts and protection needs and not according to brilliant legal constructions.¹⁴³

Even correctly interpreted, Article 6(4) of Convention IV does not cover persons arrested by Coalition forces after 1 July 2004.¹⁴⁴ Such persons would only be covered by Article 3 common to the Geneva Conventions. More generally, the US and UK forces would become simple allies of the Iraqi Interim Government in a non-international

¹⁴⁰ Pictet, *supra* note 44, at 60.

¹⁴¹ Prosecutor v *Naletilić and Martinović*, Case No. IT-98–34-T, Judgment, paras. 218 ff (ICTY Trial Chamber, 31 Mar. 2003).

¹⁴² *Ibid.*, at para. 221.

¹⁴³ See US Military Tribunal at Nuremberg, *US v. Alfred Krupp*, The United Nations War Crimes Commission, Law Reports of Trials of War Criminals, x, 1949, 130, partly reproduced in Sassòli and Bouvier, *supra* note 136, at 668, and Prosecutor v. *Tadić*, *supra* note 129, at para. 166.

¹⁴⁴ Interestingly enough, IHL of international armed conflicts contains no provision similar to Art. 2(2) of Protocol [No. II] Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609, which applies to non-international armed conflicts, and reads: 'those deprived of their liberty . . . after the conflict for the same reasons [i.e. reasons related to the conflict] shall enjoy the protection [of the provisions relating to persons whose liberty has been restricted and penal prosecutions] until the end of such deprivation . . . of liberty'.

armed conflict, bound by Article 3 common to the Conventions.¹⁴⁵ The fourth possibility is therefore that Secretary Powell is simply referring to that common article.

The fifth and final possibility, which would address the concern just mentioned, is that the Coalition forces will no longer apply IHL of military occupation, but other rules of IHL on the conduct of hostilities and detention as soon as they are involved in combat, arrests or detention. The problem with this suggestion is that Convention IV contains no section on arrest and detention other than provisions applicable on a party's own territory¹⁴⁶ and provisions applicable in occupied territory.¹⁴⁷ If Iraq is not an occupied territory, under the mere wording of Convention IV, there are no rules of IHL of international armed conflict on how US forces have to treat persons in their power, as the US will certainly not consider that it acts on its own territory and because the rules on the treatment of protected persons on a party's own territory are in any case completely inadequate for the situation in Iraq.

This may be one of the few fields in which Convention IV needs an update: the protection of civilians who are in the power of a belligerent, but are neither on a territory occupied by that belligerent nor on that belligerent's own territory. The reality elsewhere, e.g. in Afghanistan and in peace operations, contradicts the assumption of Convention IV that every civilian affected by an international armed conflict is perforce either on the territory of the belligerent in whose power he or she is or on an occupied territory. This assumption could only be maintained by adopting and pushing further, for the purposes of Convention IV, the functional and flexible concept of occupation mentioned above in connection with the second possible meaning of the letter by the Secretary of State.¹⁴⁸ 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.

7 Application of Article 43 to Peace Operations

The concept of 'peace operations' increasingly covers operations with peace enforcement elements.¹⁴⁹ It is used for both UN-run and UN-authorized operations.¹⁵⁰

¹⁴⁵ This is envisaged by Amnesty, *supra* note 138, at 2, if the occupation has in fact ended.

¹⁴⁶ See Sections II, I, and IV of Part II of Convention IV, *supra* note 12.

¹⁴⁷ See *ibid.*, Sections III, I, and IV.

¹⁴⁸ See *supra* notes 140–142.

¹⁴⁹ T. Findlay, *The Use of Force in UN Peace Operations* (2002), at 375, indicates that there is a growing consensus that some type of peace enforcement in UN peace operations is possible and desirable. This concept remains controversial, however. While not dealing explicitly with the term 'peace enforcement', the Report of the Panel on United Nations Peace Operations supports a robust mandate. See Brahimi Report, 21 Aug., 2000 (A/55/305, S/2000/809), at para. 49.

¹⁵⁰ A. Roberts and R. Guelff (eds.), *Documents on the Laws of War* (3rd ed., 2002), at 26, indicate that the term applies to UN run and UN authorized peace operations. It refers to 'peacekeeping operations, whether conducted under UN or other auspices . . .' (emphasis added). The Brahimi Report considers the 'NATO-led operations' in Kosovo which facilitate the functioning of UNMIK in the context of peace operations (*supra* note 149, at para. 104).

Indeed, no clear-cut definition of 'peace operations' exists. As the term is not only used for UN-run operations, i.e. not only those established by the UN and placed under its command and control, one might fear that its use depends more on the (claim of) legitimacy and international support for the operation, than on objective criteria.

A Controversies whether IHL Applies to UN-run Operations

Traditionally, peace operations are run by international organizations. The latter, and in particular the United Nations, are not party to the treaties which set out IHL. As for customary IHL, the denial by the UN that it is *de jure* subject to IHL raises some doubts as to whether the IHL rules that are customary between states are also customary in armed conflicts involving international organizations. The UN has repeatedly recognized that it is bound by the 'principles and spirit' of IHL. This ostensibly vague commitment does not necessarily imply a lack of will to respect IHL, but may be due to the fact that some provisions of IHL cannot be applied to the UN since it lacks, for instance, a territory, a penal system, or a population.¹⁵¹ Certainly, in practice, all peace operations are carried out by national contingents that are bound by IHL by virtue of the engagement of their sending states. Is that sufficient to make IHL applicable, even if the organization has command and control? Sending states have at least the general international law obligation not to contribute, through their contingents, to violations of IHL and in particular the obligation 'to ensure respect for' IHL under Article 1 common to the Geneva Conventions.¹⁵²

As for the applicability of IHL of military occupation to peace forces, some object to the very possibility that at least UN peace forces could be subject to the obligations of an occupying power. It is significant in this respect that the 'UN Secretary-General's Bulletin on Observance by United Nations Forces of IHL', which refers to many rules of IHL to be respected by UN forces when engaged as combatants in armed conflicts, does not mention one single rule of IHL of belligerent occupation.¹⁵³ Opponents to the applicability of IHL argue that the rights and obligations accruing to occupying powers under IHL flow from the conflict inherent in the relationship between traditional occupying powers and occupied territories and are therefore not relevant to the altruistic nature of a peace operation which is deployed in conformity with the general interest.¹⁵⁴ They argue, as a protective force, peacekeepers are accepted – if not

¹⁵¹ David, *supra* note 78, at 203–204.

¹⁵² See on the whole debate whether IHL applies to UN operations Greenwood, 'International Humanitarian Law and United Nations Military Operations', 1 *Yb Int'l Humanitarian L* (1998) 3; C. Emanuelli, *Les actions militaires de l'ONU et le droit international humanitaire* (1995); C. Emanuelli (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 22 octobre 1995* (1996), at 317.

¹⁵³ UN Doc. ST/SGB/1999/13 of 6 Aug. 1999, also reproduced in Sassòli and Bouvier, *supra* note 136, at 460.

¹⁵⁴ Shraga, *supra* note 152, at 328; Vité, *supra* note 77, at 19.

welcomed – by the local population, and thus do not require the strictures of IHL. This rather rosy view of relationships between peacekeepers and local populations is not always borne out by experience. Moreover, if the local population accepts the peacekeepers, this will only facilitate compliance with the obligations of IHL. The level of altruism or good intentions may be difficult to measure and will change according to one's perspective; thus, altruism is not a sound basis for determining whether IHL applies to a given conflict. If we adopt it, why should operations carried out by individual states or regional organizations claiming that their motives are purely altruistic be subject to IHL? In my view, to oppose the applicability of IHL of military occupation to UN peace operations based on the alleged nature of the operation disregards reality and introduces a *jus ad bellum* argument into the discussion of whether *jus in bello* applies.¹⁵⁵ Another line of argument simply holds that IHL of belligerent occupation cannot apply to transitional international civil administrations because such administrations proceed, under their Security Council mandate and subsequent practice, to make changes in local legislation and institutions which would not be admissible under IHL of military occupation.¹⁵⁶ This argument, however, begs the question.

In my view, when the UN or a regional organization enjoys 'the effective control of power ... over a territory ..., without the volition of the sovereign of that territory,' it is an occupying force.¹⁵⁷

What is even more doubtful is whether the law of military occupation applies to UN-run peace(keeping) forces, meeting no armed resistance, if the latter or a UN civil administration effectively run the territory. Common Article 2(2) of the Geneva Conventions, which provides that those Conventions 'shall also apply 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', suggests an affirmative answer. Australia considered that IHL of military occupation applied *de jure* to its UN operation in Somalia, which did not meet armed resistance by the territorial sovereign.¹⁵⁸ Most would, however, object that Article 2(2) is an exception clause applying IHL beyond armed conflicts, which must be limited to situations where the foreign military presence is that of another state and not that of the international community organized through the UN. In any case, IHL of military occupation would only apply if the international territorial administration is run or *de facto* controlled by military forces.

¹⁵⁵ Ibid., at 27, replies that the Security Council does not derogate from IHL but creates a situation to which IHL on its own terms does not apply.

¹⁵⁶ Ibid., at 24.

¹⁵⁷ See Benvenisti, supra note 6, at 3 (emphasis added); Hoffman, 'Peace-enforcement Actions and Humanitarian Law: Emerging Rules for "Interventional Armed Conflict"', 837 *Int'l Rev Red Cross* (2000) 193, at 203 and 204; Levrat, 'Le droit international humanitaire au Timor oriental: entre théorie et pratique', 841 *Int'l Rev Red Cross* (2001) 77, at 95–96; Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo', 12 *EJIL* (2001) 469, at 483–485. Roberts, supra note 62, at 291 (citing D. Bowett, *United Nations Forces: a Legal Study of United Nations Practice* (1964)) writes that most or all customary or conventional laws of war would apply.

¹⁵⁸ M. J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations* (1999), at 178.

Article 2(2) of Convention IV extending the applicability of IHL of military occupation to cases meeting no armed resistance does not cover every international *de facto* presence not meeting the consent of the sovereign, but only belligerent, i.e. military presences not meeting armed resistance, the difference being that a military occupier could have overcome armed resistance if it had existed, while a civilian presence could not have done so.

B Applicability of IHL to UN-authorized Operations

Beyond the aforementioned controversy whether IHL (including its rules on belligerent occupation) applies to UN-run operations, the fundamental separation between *jus ad bellum* and *jus in bello*¹⁵⁹ entails that IHL, including Article 43, certainly applies to any other case of belligerent occupation, whether the occupying power acts upon UN authorization, in self-defence, or in violation of *jus ad bellum*. The distinction between *jus ad bellum* and *jus in bello* dictates that the fact that the UN Security Council authorized military intervention has no impact on the applicability of IHL, as part of *jus in bello*, to the resulting occupation. In my view this must necessarily also be the case if an international administration results from a UN authorized peace-enforcement operation.¹⁶⁰ The same must a *fortiori* be true if the conflict itself was not authorized, but the resulting occupation is explicitly authorized by the UN Security Council or if the latter does so implicitly by mandating the occupying power with certain peace-building tasks (as was arguably the case in Iraq).¹⁶¹

In my view, the question turns – as for the qualification of any other foreign military presence – on the issue of whether the sovereign of the territory on which peace operations (whether civil or military) are deployed consents to that deployment or not. It is widely accepted that IHL does not apply to peacekeeping forces if and for as long as the sovereign/host government has consented to the deployment of troops on its territory.¹⁶² Consent excludes the possibility of the occupation being described as 'belligerent'. If the consent vanishes, according to some authors, IHL could subsequently become applicable.¹⁶³ I have some doubts, however, whether the simple disappearance of the legal basis for a foreign military presence makes the law of armed conflicts applicable.

According to this view, IHL is not applicable to the international territorial administrations in place in Kosovo and East Timor for the simple reason that the states concerned consented to the presence of foreign troops and administrators on the relevant territories.¹⁶⁴ Conversely, an international administration put in place without the

¹⁵⁹ See supra note 136.

¹⁶⁰ Apparently *contra* are Kolbet et al., supra note 77, at 112.

¹⁶¹ Vité, supra note 77, at 20–21, considers that IHL does not apply if an occupation has been authorized by the Security Council as pari of a peace operation.

¹⁶² Roberts, supra note 62, at 291.

¹⁶³ *ibid.*: Vité, supra note 77, at 21.

¹⁶⁴ Kelly, McCormack, Muggleton and Oswald, 'Legal Aspects of Australia's Involvement in the International Force for East Timor', 841 *Int'l Rev Red Cross* (2001) 101, at 115; 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), at 144.

consent of the sovereign or host government would trigger the application of IHL to that administration. Some protest that sovereigns of some territories occupied by UN forces in a peace operation may not consent to the operation (whereas others would), which means that we would treat differently situations which demand on their facts to be treated identically, notably from the point of view of protection of civilians.¹⁶⁵ However, in the Westphalian system, the consent of a state is a factor which carries significant legal consequences.

For the occupation of Iraq, Security Council Resolution 1483 (2003) acknowledged the status of the Coalition as occupiers and reminded them of their obligations under IHL. Some considered that this same resolution authorized the occupation of Iraq by the Coalition forces.¹⁶⁶ Indeed, it transferred some peace-building tasks, such as the creation of conditions 'in which the Iraqi people can freely determine their own political future' to the occupying powers, or at least accepted that the occupying powers perform such tasks. Even if this authorized the US-led Coalition (called 'Authority') to exercise the functions of government of Iraq, this would not have made IHL of military occupation inapplicable. The US and the UK indeed never so claimed.

C Particularities in Applying Article 43 to Peace Operations Subject to IHL

Several issues arise as to the application of IHL when the UN is involved in a peace operation to which IHL applies. Particularly, as alluded to in the discussion on exceptions to the prohibition to legislate, the Security Council mandate may entail significant derogations from the general principle that local legislation should be left in force, if it considers changes going beyond those permitted by Article 43 indispensable for peace-building purposes. Such authorization must, however, be explicit in the Security Council resolution. A peace operation occupier should interpret the mandate in a manner compatible with IHL whenever possible.¹⁶⁷ Some authors consider that IHL only applies 'unless and until the Security Council use[s] its Chapter VII powers to impose a different regime'.¹⁶⁸ They can base their argument upon Article 103 of the UN Charter.¹⁶⁹ Formally, one could not object to a Security Council resolution even ending an occupation altogether, not by changing the facts on the ground, but by requalifying a belligerent occupation as international transitional administration¹⁷⁰ and deciding that IHL does not apply to that administration. A conclusion such as this, which is contrary to the very core idea that the applicability of IHL depends on the facts and not on legal qualifications, should only be drawn if such intent is made very explicit by the Security Council.

D Utility of Applying IHL by Analogy to an International Territorial Administration in Peace Operations even if IHL is not Applicable

Even if IHL is not formally applicable to international civil administrations by virtue of the consent by the sovereign or host government concerned to the mission or for other reasons outlined above, IHL of military occupation provides practical solutions to many problems confronted by a civil or military administration.¹⁷¹ It offers a normative framework adequate for the maintenance of civil life and public order which has, first, the advantage of being accepted by all states independently of the legitimacy of the international presence on a territory. Second, that framework is pre-existing, which facilitates its immediate application when an international administration starts and avoids 'à la carte' solutions adopted by the international presence, which are arbitrary (because they are not ruled by a normative framework) or at least perceived as arbitrary. Third, that framework also applies independently of the legitimacy of the presence of the former sovereign and of the feelings of the local population.¹⁷² Fourth, all armed forces and their military lawyers are familiar with the framework since they must comply with it in case of armed conflict. Accordingly, some authors would prefer that the Security Council explicitly determine, when setting up an international civil administration, that IHL of belligerent occupation applies subsidiarily as long as new legislation is not adopted by the administration.¹⁷³

Many principles of IHL of belligerent occupation, such as the right of the local population to continue life as normally as possible¹⁷⁴ and the right for the international presence to protect their security, seem appropriate, as does the obligation to restore and maintain public order and civil life in the territory. As seen above, IHL offers answers to some of the main legal questions for administrators of territory under civil transitional administration who have the responsibility of restoring public order and civil life: On what legal basis may they arrest, detain and punish persons threatening public order? When may they change local legislation? IHL grants to the occupying power the right to have recourse to administrative detention.

IHL also provides a helpful separation with respect to penal law between fields covered by new legislation and applied by a new (at least provisionally international) justice system and those which are governed by local legislation enforced by the local justice system. Under IHL, foreign personnel apply the legislation they create and do not interfere with the handling of individual cases by the local justice system. In a

¹⁶⁵ Vité, *supra* note 77, at 23.

¹⁶⁶ See, for e.g., Stahn, 'Enforcement of the Collective Will After Iraq', 97 *AJIL* (2003) 804, at 822. See also Grant, 'The Security Council and Iraq: An Incremental Practice', 97 *AJIL* (2003) 823, at 825. For a contrary view, see Falk, 'What Future for the UN Charter System of War Intervention?', 97 *AJIL* (2003) 590, at 596.

¹⁶⁷ See *supra*, at 5.1.

¹⁶⁸ Greenwood, *supra* note 152, at 28.

¹⁶⁹ See *supra* note 121, and accompanying text.

¹⁷⁰ Vité, *supra* note 77, at 27.

¹⁷¹ Sassòli, *supra* note 164, at 141–149; Vité, *supra* note 77, at 29–33; Kelly *et al.*, *supra* note 164, at 115; David, *supra* note 78, at 501; UN Department of Peace-Keeping Operations, Lessons-Learned Unit, *Comprehensive Report on Lessons-Learned from the United Nations Operation in Somalia*, Apr. 1992–Mar. 1995 (Sweden, 1995), at para 57, available at <http://www.un.org/Depts/dpko/lessons/UNOSOM.pdf>.

¹⁷² Sassòli, *supra* note 164, at 145; Kelly, *supra* note 158, at 311, and Vité, *supra* note 77, at 29–30, support this line of argument.

¹⁷³ Vité, *supra* note 77, at 30. In my view this is not very realistic and as far as Art. 43 of the Hague Regulations is concerned it means that the latter would not apply, as it precisely restricts a foreign administration from legislating.

¹⁷⁴ This is what J. Pictet, *The Principles of International Humanitarian Law* (1967) at 50, calls the principle of normality.

territory under international administration, we can distinguish between criminal cases which go to the heart of the objectives of the international presence and those which relate to local law. The first could be decided by the international administration's own tribunals, which would apply the law and procedure that have been established by the administration. All other affairs would be left to the competence of local justice institutions, even if personnel must first be trained.

While awaiting the development of competent local institutions, persons suspected of serious crimes against local law could be held under administrative detention. This would be justified by imperative reasons of security, because security would be threatened by a failure to respond to such acts as well as the acts of vengeance which flow from that failure. From a humanitarian perspective, provisional administrative detention is sometimes preferable to condemnation or acquittal by a biased tribunal in an irregular procedure.¹⁷⁵ This solution would also avoid situations like in Kosovo where foreign judges study, interpret and apply law that they do not know, and where international administrators modify laws for simple reasons of convenience.¹⁷⁶ Given the ideals of judicial independence and the rule of law which must be transmitted to the local population, it is preferable that there be a separation between the areas of competence of the international administration and those of the local administration-in-training. Through the administration period, more and more areas can be successively given back to the local justice system.¹⁷⁷

There are some limits to the analogy, however. With respect to international civil administrations, derogations from the principle that local legislation may not be altered may be explicitly mandated by the Security Council, and/or more easily be assumed to be implicit in the Security Council mandate. Indeed, where IHL applies *de jure*, the argument was that the Security Council could not easily be considered to want to deviate from the applicable legal regime. Here, the latter is not applicable, but simply provides solutions for problems not governed by any applicable pre-existing legal regime. In addition, there may be a significant difference between situations for which IHL relating to military occupation was created and territories under international administration. In the first situation, protection of the local population consists in particular of a guarantee of the greatest possible continuity from the situation prior to occupation. An international civil administration, on the other hand, is often instituted to change the prior situation. This distinction does not seem to be taken into account in the rules of IHL. However, the population of a territory placed under administration no longer needs to be protected from the previous competent authorities, but against the new authorities. Independence, autonomy, or the introduction of social, legal or economic changes cannot be achieved during the transitional period. During this period, it would not be shocking to apply, as a matter of principle and subject to the many exceptions mentioned above, prior laws not incompatible with the objectives of the transitional administration.

¹⁷⁵ Sassòli, *supra* note 164, at 146.

¹⁷⁶ *Ibid.*, at 128, 146–147.

¹⁷⁷ *Ibid.*, at 147.

Some authors suggest that only the humanitarian rules of IHL apply to international civil administrations, not those fixing the attributes of the occupying power.¹⁷⁸ In my view, protection of war victims and rights of the occupying power are two sides of the same coin. All rules of IHL are humanitarian. Israel has tried to argue that the same distinction exists between humanitarian and other rules of IHL with which it has to comply in the Occupied Palestinian Territories.¹⁷⁹ This distinction was not accepted by other states and has resulted in abuses.

The main disadvantages of the application of IHL by analogy as suggested here are that it depends on the good will of the international administration and that different contingents may have a divergent practice in this respect.¹⁸⁰ In the absence of such analogy, however, the practice will by definition be even less coherent and predictable.

Finally, UN soft law human rights standards,¹⁸¹ such as the Code of Conduct for Law Enforcement Officials¹⁸² and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials¹⁸³ may also be given greater scope in the context of an international civil administration. While soft law as such is not binding upon states, a UN-run operation, whether *de jure* subject to Article 43 or not, may be considered to be legally bound since that soft law has been adopted by the UN General Assembly, the supreme organ of the UN.¹⁸⁴

8 Conclusion

Practice, including in Iraq, has shown that occupying powers and international civil administrations, which do not comply with the regime outlined in this article and are either less active in restoring and maintaining public order and civil life or go further in terms of legislation, encounter serious problems among the population concerned or the international community. Our analysis proves that in this field as in others the existing rules of IHL are flexible enough to provide realistic solutions to problems appearing in contemporary conflicts. Such flexibility, unfortunately, stems in part from the possibility that the UN Security Council has to derogate in a given case from the normally applicable rules of IHL, a possibility which is not satisfactory from a humanitarian point of view and which also raises concerns from the point of view of the rule of international law because of the selective and short-term political

¹⁷⁸ Vité, *supra* note 77, at 27–28 and 32.

¹⁷⁹ See on this distinction made by Israel concerning the territories it occupies. Roberts, *supra* note 27, at 62: *Legal Consequences of the Construction of a Wall*, *supra* note 6, at para. 93, and references in Sassòli and Rouvier, *supra* note 136, at 802–872.

¹⁸⁰ Vité, *supra* note 77, at 32.

¹⁸¹ For an overview of the UN standards as applicable to the maintenance of law and order by UN peace operations see United Nations Crime Prevention and Criminal Justice Branch, *UN Criminal Justice Standards for Peace-Keeping Police (The Blue Book)* (Vienna: Office of Crime Control and Drug Prevention, 1994), available at <http://www.uncjin.org/Documents/BlueBook/BlueBook/index.html>.

¹⁸² G.A. Res. 34/169, annex. 34 UN GAOR Supp. No. 46 at 186. UN Doc. A/34/46.

¹⁸³ *Supra* note 20.

¹⁸⁴ Cf. Kolbet al., *supra* note 77, at 166: Art. 10 of the UN Charter.

approach of the Council. These concerns are obviously even more acute when the Council is dominated, as is the case concerning Iraq, by the actual occupying powers.

In any case, as it is not the sovereign and in order to respect the right to self-determination of peoples, an occupying power may, while exercising the discretion that human rights instruments (or the Security Council mandate) leave to states setting up (their) institutions and economic and social policies, introduce only as many changes as absolutely necessary under human rights obligations (or the Security Council mandate) and must stay as close as possible to similar local standards and the local cultural, legal and economic traditions. To paraphrase the ICRC Commentary, occupying authorities may not change local legislation 'merely to make it accord with their own [constitutional, economic or social] conceptions'.¹⁸⁵ If Cuba occupied Switzerland it may not introduce a communist economy, and if Switzerland occupied France it may not introduce federalism, although both countries are certainly convinced that their system is best for the maintenance of civil life. In this respect, the economic changes made by the US and the UK in Iraq certainly went beyond a sustainable interpretation of IHL liable to be applied in other cases to other occupying powers. Furthermore, it is my view that even a UN administration should not introduce such fundamental changes, but at the outmost suggest them to the population of the territory it administers as a solution to their problems.

Foreign Occupation and International Territorial Administration: The Challenges of Convergence

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Abstract

International organizations have increasingly joined states as occupiers of territory. Yet international law *doctrine* and policymakers have regarded occupation by states and administration by international organizations as distinct legal and political phenomena. The stigma associated with state occupation has translated into an assumption that the two operations are governed by *different* norms and their tactics for asserting control subject to *different* standards of legitimacy. This article rejects that dichotomy and the doctrinal parsing that comes with it. It emphasizes the common traits and challenges of these occupations and argues for a joint legal and political appraisal. From the legal perspective, the two sorts of missions operate under common legal frameworks; those managing both *need to find* the proper balance among international humanitarian law, international human rights law, local law, and any mandate from an international organization. As a political matter, each encounters resistance from those in the territory opposed to its presence, leading to coercive responses whose legitimacy will be questioned from within and outside the territory. The article concludes with some modest thoughts on how each sort of occupier might learn something from the other.

Occupation of foreign territory continues to have an ambiguous posture in international law. If it results from an illegal use of force, occupation is clearly unlawful;¹ yet international humanitarian law (IHL), including law developed since the United

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¹ Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (hereinafter *Friendly Relations Declaration*), principle 1, para. 10, GA Res. 2625 (XXV), 24 Oct. 1970.

¹⁸⁵ Pictet, *supra* note 44, at 336.