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# *The Laws of Occupation and Commercial Law Reform in Occupied Territories: Clarifying a Widespread Misunderstanding*

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## Abstract

*Since the publication of the widely quoted book by Eyal Benvenisti on* The International Law of Occupation, *there seems to be a generally accepted premise that Article 64 of the IV Geneva Convention is applicable to all types of laws (including commercial laws) and that, therefore, its legal regime replaced Article 43 of the 1907 Hague Regulations. With all due respect, this article argues that such approach is wrongfully grounded. Furthermore, almost no author seems to give any relevance to the formal obligation imposed by the IV Geneva Convention to publish (in the language of the inhabitants) the commercial law norms enacted by the occupying power.*

## 1 Obligation to Respect the Commercial Laws in Force (Article 43 of the 1907 Hague Regulations)

During the historical codification process of the discussed legislative authority of the occupying powers in the administered territories, the main change has been in the

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emphasis from an initial 'right' of the occupant to change the municipal laws to a 'duty' not to do so unless absolutely necessary.[1]

In fact, at the 1899 Hague Conference an elaborate discussion took place originated by the representatives of small (potentially occupied) states, who did not want the Convention to give 'rights', in advance, to the occupying power.[2] As a consequence, the predominant idea in the 1899 Hague Regulations (and the later 1907 Hague Regulations) is that the Regulations do not stipulate what the occupying power is authorized to do ('right'), but what he ought to be prohibited or limited from doing ('duty/obligation').[3] Article 43 of the 1899 Hague Regulations (later Article 43 of the 1907 Hague Regulations) was a compromise to retain Articles II[4] and III[5] of the failed 1874 Brussels Declaration incorporated into a single Article but putting the stress on the duty character of the Article. This is summarized in the report of Captain Crozier to the US Commission to the International Conference at the Hague in the following words: 'the provisions were retained upon the theory that, while not acknowledging the right, the possible fact had to be admitted and that wise provision required that proper measures . . . of restrictions upon the occupying force should be taken in advance'.[6]

Similarly, the Report by Rolin to the Plenary Meeting of the Second Commission concluded that 'it has been formally said that none of the articles of the draft can be considered as entailing on the part of the adhering states the recognition of any right

[1] For a historical overview of the changing doctrinal positions see D.A. Graber, *The Development of the Law of Belligerent Occupation 1863–1914: A Historical Survey* (1949), at 110. For the documents, proceedings, and discussions of the relevant international codifications see: (i) Art. II of the 1874 Russian proposal for the Brussels Conference, in British Parliamentary Papers, Correspondence Respecting the Proposed Conference at Brussels on the Rules of Military Warfare (Miscellaneous No. 1), 1874, c. 1010; (ii) Arts II and III of the 1874 Brussels Declaration (though the declaration was adopted by the Conference, it was not ratified by the states) in British Parliamentary Papers, Further Correspondence Respecting the Proposed Conference at Brussels on the Rules of Military Warfare (Miscellaneous No. 3), 1875, c. 1128, 1129 and 1136; (iii) Arts 43 and 44 of the 1880 Oxford Manual issued by the International Law Association, in J.B. Scott (ed.), *Resolutions of the Institute of International Law Dealing with the Law of Nations, with an Historical Introduction and Explanatory Notes* (1916), at 26–42; (iv) Art. 43 of the 1899 Hague Regulations annexed to the 1899 Hague Convention II and Art. 43 of the 1907 Hague Regulations annexed to the 1907 Hague Convention IV, in J.B. Scott (ed.), *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts*: *The Conference of 1899* (1920) – during the 1907 Hague Conference there was no discussion on Art. 43 of the 1899 Hague Regulations, which was adopted unaltered; (v) Art. 64 of the 1949 Geneva Convention IV, in *Final Record of the Diplomatic Conference of Geneva of 1949* (1950).

[2] See considerations expressed by Beernaert, the representative of Belgium, in the Sixth Meeting (6 June 1899). The discussion took place during the Seventh (8 June 1899) and Eighth Meetings (10 June 1899). See Proceedings in Scott, *The Proceedings*, *supra* note 1, at 503–504 and 512–521.

[3] See comments of Beernaert, the representative of Belgium (in Scott, *The Proceedings*, *supra* note 1, at 504); den Beer Portugael, the representative of the Netherlands (in Scott, *The Proceedings*, *supra* note 1, at 512); Odier, the representative of Switzerland (in Scott, *The Proceedings*, *supra* note 1, at 513–514); Rolin, the representative of Siam (in Scott, *The Proceedings*, *supra* note 1, at 515); Lammasch, the representative of Austria-Hungary (in *ibid.*).

[4] '*L'autorité du pouvoir légal étant suspendue et ayant passée de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publique.*'

[5] '*A cet effet, il maintiendra les lois qui étaient en vigueur dans le pays en temps de paix, et ne les modifiera, ne les suspendra ou ne les remplacera que s'il a nécessité.*'

[6] 31 July 1899, reprinted in J.B. Scott (ed.), *The Hague Peace Conferences of 1899 and 1907: A Series of Lectures Delivered before the Johns Hopkins University in the Year 1908* (1909), ii-Documents, at 50.

whatever in derogation of the sovereign rights of each of them, and that adhesion to the regulations will simply imply for each state the acceptance of a set of legal rules restricting the exercise of power that it may through the fortune of war wield over foreign territory or subjects'.[7]

As a result, one Article (Article 43 of the 1899/1907 Hague Regulations) contained two different duties and no right (just the recognition of a restricted *de facto* power) of the occupying power.

According to Article 43 of the 1907 Hague Regulations, when power passes to the occupying power, the latter must 'take all measures in his power to restore and ensure as far as possible public order and [civil life][8] while respecting, unless absolutely prevented, the laws in force in the country'.[9] This provision thus contains two different obligations imposed on the occupying power. This double structure was clearly exemplified in the 1958 British Military Manual, where paragraph 515 refers to the 'duty of occupant to ensure public order', while paragraph 511 expressly sets out the 'duty' of the occupant not to upset the domestic laws of the occupied territory.[10]

The latter obligation (which is the one of interest for the purposes of the present work) means (as spelt out in Article III the Project-Brussels Declaration) that the occupying power cannot modify, suspend, or replace the laws (including also decrees, regulations, ordinances. . .)[11] in force in the occupied territory at the time of the commencement of the occupation. The duty refers to the entire field of legislation and is not restricted just to measures designed to restore public order and civil life.[12]

There is, however, an allowed deviation or exception to such duty in the event that it is 'absolutely prevented'. Indeed, although the stress was put on the 'duty' not to change the law in force in the occupied territory, it was admitted as 'fact'[13] (not as

[7] Report annexed to the minutes of the Fourth Meeting, 5 July 1899, in Scott, *The Proceedings*, *supra* note 1, at 418.

[8] H. Wheaton (*Elements of International Law* (1929), at 783) considers that the term 'safety' (used in the first English translation of Art. 43 of the 1899 Hague Regulations) does not reflect the original French version '*la vie public*'. Therefore, he suggests using the expression 'civil life' (which refers to the entire social and commercial life of the community). His suggested translation was adopted, among others, by Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations', 54 *Yale LJ* (1944–1945) 393, at 393; E. Benvenisti, *The International Law of Occupation* (2004), at 7; and Y. Dinstein, *The International Law of Belligerent Occupation* (2009), at 90.

[9] The foreword to the US Army 1956 Field Manual expressly recognizes that, in case of dispute, the French text of the 1907 Hague Regulations is authoritative and prevails over the English version. The official French version reads: '*[l]'autorité du pouvoir légal ayant passée de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays*.'

[10] Similarly, para. 11.19 of the 2004 UK *Manual of the Law of Armed Conflict*, JSP 383 (which replaced the 1958 Military Manual) speaks of a 'responsibility' for administering the occupied territory, while para. 11.25 regulates an 'obligation' to respect the laws in force in the occupied territory.

[11] See Schwenk, *supra* note 8, at 397; Benvenisti, *supra* note 8, at 17; Dinstein, *supra* note 8, at 108.

[12] See Schwenk, *supra* note 8, at 397; E. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (1942), at 89.

[13] See the Report of Captain Crozier (*supra* note 6), Report of Rolin (*supra* note 7), and the comments of Beernaert, who originated the discussion on Art. 43 during the proceedings of the 1899 Hague Conference (in Scott, *The Proceedings*, *supra* note 1, at 504).

a 'right')[14] that, in exceptional cases, it could be 'absolutely necessary' to modify the existing law. The term 'absolutely prevented' has been commonly interpreted, not literally,[15] but as an equivalent of 'absolute necessity'.[16]

This exception cannot be equated to a circumstance precluding wrongfulness in the sense of the Articles on State Responsibility (hereinafter, ASR)[17] or the Draft Articles on Responsibility of International Organizations (hereinafter, DARIO)[18]. In particular, it cannot be mistaken for the concept of 'necessity' as used in ASR Article 25 and DARIO Draft Article 24 (though 'considerations akin to those underlying article 25 may have a role' in the interpretation of primary obligations).[19] In fact, the exception of 'necessity' is a constituent element of the obligation contained in Article 43 of the 1907 Hague Regulations. If 'necessity' as a circumstance precluding wrongfulness in the sense of ASR or DARIO is successfully alleged, the breach of an international obligation will not be considered an international wrongful act.[20] However, if 'necessity' as an exception to the obligation contained in Article 43 of the Hague Regulation is successfully alleged, there will not be a breach of the international obligation. In the first case, the international actor would be in breach of an international obligation, but would not incur international responsibility, whereas in the second case, the international actor would have acted in conformity with the international obligation and there would be no breach at all.

Before explaining in greater detail the exception to Article 43 of the 1907 Hague Regulations, it is deemed necessary to de-construct the erroneous premise (fostered by Eyal Benvenisti[21]) that seems to support the conclusion that Article 64 of the IV Geneva Convention is applicable to all types of laws. It has been suggested by Benvenisti

[14] E.g., para. 523 of the 1958 British Manual of Military Law (The War Office, *The Law of War on Land* (1958)) used the term 'power' (as it differs from legal 'right'), when explaining this exception; para. 11.9 of the 2004 British Manual, *supra* note 10, emphasizes that it tries to regulate the exercise of the occupant's powers. Similarly, para. 358 of the 1956 US Army Field Manual No. 27-10 explains that occupation empowers the occupant to use only some of the rights of the occupied state but does not transfer those rights onto the occupying power.

[15] Feilchenfeld, *supra* note 12, at 89.

[16] The term '*necessité*' was used in the original French version of Art. III of the 1874 Brussels Declaration. It was also the term used during the discussions and in the drafts proposed by Odier, Rolin (who used the expression 'necessities of war'), and Bildt: see Scott, *The Proceedings*, *supra* note 1, at 519 and 520; Dinstein, *supra* note 8, at 109; Benvenisti, *supra* note 8, at 14–15; Schwenk, *supra* note 8, at 400.

[17] ILC's Report of its 56th session, 2001, UN Doc A/56/10.

[18] The text of DARIO, together with commentaries thereto, provisionally adopted by the ILC on first reading is reproduced in the ILC report on the work of its 61st session, 2009, UN Doc A/64/10.

[19] ILC Commentaries to ASR Art. 25, UN Doc A/56/10, *supra* note 17, at 84. See, however, the written statement of Saudi Arabia submitted to the ICJ on the *Wall* case ([2004] ICJ Rep 136, at para. 30) according to which the rule on 'necessity' contained in ASR Art. 25 'is fully applicable in humanitarian law where "military necessity" is provided for'.

[20] Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses', 10 *EJIL* (1999) 405, at 405–411) suggested that (as a matter of policy and taking into account a wider community interest engaged in the violation of some international obligations) it would have been preferable to regard such conduct as 'wrongful but excused'.

[21] Sassòli ('Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', 16 *EJIL* (2005) 661, at 669–670, especially at n. 49) defends similar arguments to those advanced by Benvenisti.

that Article 64 of the IV Geneva Convention should be read as demanding respect for the existing penal laws (first paragraph of Article 64), but permitting modification in all types of laws (second paragraph of Article 64).[22] As a consequence, he contends that Article 43 of the Hague Regulations was replaced, 'at least with respect to the prescriptive powers of the occupant', by Article 64 of the IV Geneva Convention.[23] With all due respect, it is submitted here that his approach is wrongly grounded.

First, Benevenisti contends that the first paragraph of Article 64 of the IV Geneva Convention expressly requires respect for existing 'penal' laws, while the second paragraph consciously omits the adjective 'penal' (and, therefore, allows the occupying power to adopt any type of measure, not just provisions of a penal character). He argues that since there was no unanimity, the drafting committee submitted two versions to vote on: one with the adjective 'penal', the other (which was supported by the majority) without such qualification.[24] This is misleading for various reasons:

- The distinction between the two voted versions was not in the adjective 'penal' (which, even in the version supported by the minority, existed between brackets). The main discussion was on whether to retain the original Stockholm version (the position adopted by the minority[25]) or the new version with the exceptional situations introduced by the drafting committee (the position adopted by the majority, which is the current Article 64).
- Before voting, Haksar (the representative of India and Rapporteur of Committee III) explained the difference between the two versions, stating that 'the wording adopted by the Drafting Committee (see Annex No. 296) differed, therefore from the Stockholm text in the sense that . . . it envisaged cases where the Occupying Power could change the penal laws of the occupied territory . . . The changes introduced were those which would be necessary in order to maintain order in the occupied territory, to ensure the security of the Occupying Power and to ensure that the provisions of the Convention were applied.'[26] Therefore, the difference lay in the introduced exceptional situations where the occupying power could change the penal laws of the occupied territory.
- Ginnane, the representative of the US, emphasized that 'if his Delegation's amendment (Annex 294) to the first paragraph was accepted, the second paragraph would become redundant and could be omitted'.[27] The US delegation wanted to substitute the entire Article 64 (then Draft Article 55) of the IV Geneva

[22] Benvenisti, *supra* note 1, at 102.

[23] *Ibid.*, at 103.

[24] *Ibid.*, at 102–103 with reference to the Final Record, *supra* note 1, iii, at 139–140.

[25] See Final Record, *supra* note 1, iii, at 139: '[t]he penal laws of the occupied Power shall remain in force and its courts shall continue to act in respect of all offences covered by the said laws, except in cases where this constitutes a menace to the security of the Occupying Power. The Occupying Power may, however, subject the population of the occupied territory to *[penal]* provisions intended to assure the security of the members and property of the forces or administration of the Occupying Power, and likewise of the establishments used by the said forces and administration' (emphasis added by the author).

[26] *Ibid.*, iiA, at 771.

[27] *Ibid.*, iiA, at 670.

Convention for a proposed version that referred only to penal law: '[u]ntil changed by the Occupying Power the penal laws of the occupied territory shall remain in force and the tribunals thereof shall continue to function in respect of all offences covered by the said laws'.[28]

– Morosov, the representative of the USSR, explained that the second paragraph of Article 64 of the IV Geneva Convention referred to 'penal laws'. He also contended that the amendment submitted by the US delegation would give the occupying power 'an absolute right to modify the penal legislation of the occupied territory'.[29]
– The Report of Committee III to the Plenary Assembly of the Diplomatic Conference further makes it clear that 'in the second paragraph the Committee have provided that in addition to promulgating penal provisions necessary to ensure its security, an Occupying Power may subject the population to provisions which are essential to enable it to fulfil its obligations under the Convention. . . and to maintain an orderly government'.[30] The generic noun 'provision' is clearly qualified as 'penal' in relation to the three exceptional situations contained in the second paragraph of Article 64. It does not appear to be logical that only the exception of ensuring its security would limit the occupying power to promulgating just 'penal' provisions, while the other two exceptions contained in the same paragraph would allow it to adopt 'any' type of provisions: the three exceptions are treated equally in the second paragraph of Article 64. Furthermore, when the Report uses the expression 'in addition', it cannot be understood as in addition to the exception contained in the first paragraph, since the Report does not speak of 'repealing and suspending' the laws in force but of 'promulgating' new laws (and only the second paragraph deals with the issue of promulgating new laws).

Secondly, Benvenisti contends that his interpretation 'is the only one possible' if Article 64 is considered in the context of other issues dealt with in the IV Geneva Convention. In support of this drastic conclusion, he recalls the 'occupant's prescriptive powers' (in relation to labour law) found in Article 51 of the IV Geneva Convention and acknowledged by Pictet's commentary to such Article 51.[31] However, his conclusion is wrong since Pictet's commentary is not correct. In fact, Pictet mentions that 'the Diplomatic Conference recognized, on the contrary, that labor laws would probably be modified from time to time during the occupation, and that wages in particular be liable to vary if prices increased'.[32] This is not accurate:

– It is true that de Rueda (the Mexican representative) pointed out that the wages 'might be changed under the law of a given country during the occupation' for adapting them to the fluctuating economic conditions.[33] However, the Rapporteur

[28] *Ibid.*, iii, at 139.
[29] *Ibid.*, iiA, at 670.
[30] *Ibid.*, iiA, at 832.
[31] Benvenisti, *supra* note 8, at 102.
[32] J. Pictet, *Commentaire: IV La Convention de Genéve relative a la protection des personnes civiles en temps de guerre* (1956), at 298.
[33] Final Record, *supra* note 1, iiA, at 776 and iiB, at 416.

(du Pasquier, the representative of Switzerland) made it clear that according to Draft Article 47 (now Article 51 of the IV Geneva Convention) what 'shall continue' without modification was the legislation, not the hourly rates. The Rapporteur further explained that while wages could vary, the labour law of the occupied territory should continue without modification by the occupying power and would (i) indicate what authorities were responsible for fixing wages or (ii) contain a framework for agreements between employers and employees.[34]

– Maresca (the Italian representative) expressly commented that 'no doubt the Hague Convention provided for the maintenance of existing legislation in the occupied territory; but on that particular point it was desirable to stipulate that the labour legislation in force in the occupied territory remained applicable to all persons compelled to do work under Article 47'.[35] Hence, it was intended to maintain the labour laws of the occupied territory. While admitting the validity of Article 43 of the 1907 Hague Regulations as a general rule (not Article 64 of the IV Geneva Convention), Article 51 acts as *lex specialis* in the case of labour law.
– Of course, the duty to maintain the labour legislation is not absolute and there is an allowed deviation or exception. But that exception is regulated by Article 43 of the 1907 Hague Regulations, not by Article 64 of the IV Geneva Convention. The memorandum presented to the Conference by the International Labour Organization further clarifies Maresca's comment and makes it clear that 'Article 43 of the Regulations . . . provides as follows . . . It follows that the legislation applicable to labour problems in occupied territory is the legislation of that territory, except in so far as such legislation has been legally modified by the Occupying Authorities acting within the limits of their powers. It would seem useful to add a detailed provision on this point to the text approved at Stockholm. This might be done by adding to Article 47 the following paragraph: "The labour legislation of the occupied territory shall continue to apply to work exacted in virtue of this Article except in so far as such legislation has been modified by the Occupying Power within the limits of the rights conferred on the aforesaid Power by Article 43 of the Regulations annexed to the Hague Convention of 1907 the laws and customs of war on land"'.[36]

Finally, Benvenisti points to Article 154 of the IV Geneva Convention. He argues that since the IV Geneva Convention 'comprehensively discusses the issues concerning the prescriptive powers of the occupant, it replaces the relevant Hague rules' (namely, Article 43 of the 1907 Hague Regulations).[37] In support of his thesis, he quotes part of Pictet's commentary to Article 154 of the IV Geneva Convention. However, although it is true that Pictet considered that 'the new provisions have entirely replaced

[34] *Ibid.*, iiA, at 777.
[35] *Ibid.*, iiA, at 665.
[36] Annex 274, reproduced in *ibid.*, iii, at 133.
[37] Benvenisti, *supra* note 8, at 103.

the 1907 Regulations', he stated that there were some exceptions.[38] Among those exceptions he included Article 43 of the 1907 Hague Regulations. Pictet clarifies that Article 43 of the 1907 Hague Regulations 'imposes obligations of a general nature on the Occupying Power', while the IV Geneva Convention contains 'specific provisions concerning penal legislation (Article 64 et seqq.) and labour legislation (Article 51)'.[39] Pictet concludes that except for those exceptions (regarding penal and labour law), Article 43 of the 1907 Hague Regulations remains valid. Also the ICJ in its recent *Wall* Advisory Opinion of 2004 concluded that Article 43 of the 1907 Hague Regulations was fully applicable in the occupied Palestinian territory.[40] Therefore, according to Article 154 of the IV Geneva Convention, Article 43 of the 1907 Hague Regulations contains the general rule dealing with the laws in force in the occupied territory, while Articles 64 and 55 of the IV Geneva Convention 'supplement' that general rule with some *lex specialis* provisions in relation to penal and labour law. Pictet explains that emphasis was put on penal legislation due to concerns about insufficient observance of penal legislation in previous conflicts.[41]

This explains Benvenisti's perplexity[42] about the 1958 British Military Manual (which expressly stated that the IV Geneva Convention 'supplements' the 1907 Hague Regulations).[43] In fact, paragraph 523 of the 1958 British Military Manual[44] referred to Article 43 of the 1907 Hague Regulations as the general rule dealing with the laws in force in the occupied territory, while paragraph 564[45] expressly considers the second paragraph of Article 64 of the IV Geneva Convention as the specific rule dealing with the penal laws in the occupied territory[46]. More recently, the UK Attorney-General's (Lord Goldsmith) leaked Confidential Note of 26 March 2003 expressly confirmed that 'apart from rules on the collection of taxes (which must as far as possible be in accordance with existing local law), there are no specific provisions in Geneva Convention IV or the Hague Regulations dealing with the economy of the occupied territory'.[47] Therefore, he considers that the general principle outlined in Article 43

[38] Pictet, *supra* note 32, at 614 (commentary to Art. 154 of the IV Geneva Convention). According to the customary norm contained in Art. 31.3.c of the 1969 Vienna Convention on the Law of Treaties (*Gabčíkovo-Nagymaros* case [1997] ICJ Rep 7, at para. 46; the Advisory Opinion of 8 July 1996 *on the legality of the use by a state of nuclear weapons in armed conflict* [1996] ICJ Rep 66, at para. 19), a treaty should be interpreted taking into account any relevant rules of international law applicable in the relations between the parties. Art. 154 of the IV Geneva Convention already provided for a solution since it required the provisions of the IV Geneva Convention to be supplementary to Sections II and III (including Art. 43) of the Regulations annexed to the 1907 Hague Convention.

[39] Pictet, *supra* note 32, at 617.

[40] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, supra* note 17, at para. 124.

[41] Pictet, *supra* note 32, at 337.

[42] Benvenisti, *supra* note 8, at 102.

[43] See n. 2 to para. 499 of Part III of the 1958 British Manual of Military Law, *supra* note 10.

[44] Similarly, at paras 11.9 and 11.25 of the 2004 British Manual, *supra* note 10.

[45] Similarly, *ibid.*, at para. 11.57.

[46] Similarly, para. 370 (Laws in Force) of the 1956 US FM 27-10, *supra* note 9, refers to both Art. 43 of the 1907 Hague Regulations and Art. 64 of the IV Geneva Convention.

[47] See the declassified document, available at: www.iraqinquiry.org.uk/media/46487/Goldsmith-advice-re-occupying-powers-26March2003.pdf.

of the 1907 Hague Regulations (not Article 64 of the IV Geneva Convention) 'applies equally to economic reform, so that the imposition of major structural economic reforms would not be authorized by international law'.

Does this mean that an occupying power party to the IV Geneva Convention but not to the 1907 Hague Regulations is allowed freely to change the commercial law in the occupied territory? No, since Article 43 of the 1907 Hague Regulations is to be considered as reflecting a rule of customary law. Indeed, the ICJ in its *Wall* Advisory Opinion[48] (with special mention of Article 43 of the 1907 Hague Regulations),[49] the *Nuclear Weapons* case,[50] and the *Armed Activities on the Territory of Congo, Democratic Republic of Congo v. Uganda,* case[51] reiterated that international humanitarian norms (including Article 43 of the 1907 Hague Regulations) have become part of customary law.[52] This is the main reason why Pictet mentioned that 'when a State is party to the Fourth Geneva Convention of 1949, it is almost superfluous to enquire whether it is also bound by the Fourth Hague Convention of 1907 or the Second of 1899.'[53] The 1907 Hague Rules will always apply as customary rules.

The present work also disagrees with the approach adopted by Dinstein, who considers that 'logic dictates that Article 64 should be construed as applicable, if only by analogy, to every type of law (including civil or administrative legislation)'.[54] Again, a wrong premise leads to an erroneous conclusion. In fact, the use of a legal rule by analogy is valid only if, and as far as, a lacuna exists.[55] Therefore, Article 64 of the IV Geneva Convention cannot be applied by analogy to the modification of non-penal legislation, since such situation is already covered by another conventional rule of international law (namely, the customary rule reflected in Article 43 of the 1907 Hague Regulations).

[48] The *Wall* case, *supra* note 17, at paras 89 and 124.

[49] According to the ICJ, even if Israel is not a party to the 1907 Hague Convention IV, Art. 43 of the annexed 1907 Hague Regulations is considered applicable in the occupied Palestinian territory (*ibid.*, at para. 124). Therefore, the general assertion that the rules contained in the 1907 Hague Regulations are customary (*ibid.*, at para. 89) expressly applies to Art. 43 of the 1907 Hague Regulations.

[50] *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, at para. 79.

[51] *Armed Activities on the Territory of Congo (DRC v. Uganda)* [2005] ICJ Rep 168, at para. 217.

[52] Regarding the 1907 Hague Regulations see *Trial of the Major War Criminals*, International Military Tribunal in Nuremberg, 41 *AJIL* (1947), at 248–249; written statement of France in the *Wall* case, *supra* note 40, at para. 21. Regarding the 1949 Geneva Conventions see written statements of Namibia and Egypt (at 32) in the *Wall* case; para. 2 of the Final Document of the UN Conference on measures to enforce the IV Geneva Convention in the Occupied Palestinian Territory, 14–15 June 1999 (annexed to a letter from the Permanent Representative of Senegal to the UN Secretary General, UN Doc A/ES-10/34); Meron, 'The Geneva Conventions as Customary Law', 81 *AJIL* (1987) 348. Regarding both the 1907 Hague Regulations and the IV Geneva Convention see written statements in the *Wall* case, *supra* note 40, South Africa (at para. 45), Morocco (at 9–10), Jordan (at para. 5.69), the League of Arab States (at para. 9.1), and the Islamic Conference (at para. 31); EU Guidelines on Promoting and Compliance with International Humanitarian Law, 2005/C327/04, OJ (2005) C327, at para. 8; paras 1.25 and 1.30.2 of the 2004 UK Manual, *supra* note 10.

[53] Pictet, *supra* note 32, at 614.

[54] Dinstein, *supra* note 8, at 111.

[55] E.g., Vöneky, 'Analogy in International Law', in *Max Planck Encyclopedia of Public International Law* (2008) and bibliography quoted.

Consequently, the only rule establishing the exceptions to the occupying power's duty not to modify, suspend, or replace the commercial laws in force in the occupied territory is the customary rule reflected in Article 43 of the 1907 Hague Regulations. The exceptions allowed by the second paragraph of Article 64 of the IV Geneva Convention are applicable only in relation to penal laws. While Article 43 stresses the obligation not to change the laws in force, Article 64 puts the emphasis on the power of the occupant to introduce new measures.

But, how should one interpret the 'absolute necessity' exception contained in Article 43 of the 1907 Hague Regulations? Initially, 'absolute necessity' (for the purposes of the exception to Article 43 of the 1907 Hague Regulations) was restricted to mere 'military necessity'.[56] However, during and after World War II, legal writing and state practice interpreted it in a broader way.[57] The maintenance of public order and the welfare of the inhabitants were recognized as additional grounds of necessity.[58] These two grounds reflect the other duty contained in Article 43 of the 1907 Hague Regulations. Hence, although the 'absolute necessity' in the particular case has to be determined by reference to the facts of the case, it is nevertheless linked to military necessity (which relates only to the security of the forces of occupation),[59] as well as to the duty of restoring and ensuring as far as possible public order (understood as 'security and general safety') and civil life (understood as 'social functions, ordinary transactions which constitute daily life') in the occupied territory.[60]

Minimal disruption to civil society (and, thus, the maintenance of public order and civil life) is promoted by non-interference with local laws, so the occupant usually will not introduce changes in the private laws in force in the occupied territory.[61] According to paragraphs 520 and 521 of the 1958 British Military Manual, while the political laws and constitutional safeguards of the occupied territories are generally suspended, civil laws 'continue as a rule to be valid'. Paragraph 523 further stated that 'in occupied territories possessing adequate legal system in conformity with generally recognized principles of law important changes should be avoided as far as possible'.[62] This

[56] Paras 286 and 288 of the 1940 version of the US Army Field Manual, *supra* note 9, refer to 'military necessity'. Similarly, para. 366 of the 1912 British Guidance for military officers (J.E Edmonds and L. Oppenheim, *Land Warfare: An Exposition of the Laws and Usages of War on Land for the Guidance of Officers of His Majesty's Army* (1912), at 80) refers to 'the exigencies of war'. See generally Schwenk, *supra* note 8, at 400 and the authors quoted by him.

[57] Benvenisti, *supra* note 8, at 14–15 (and the authors quoted by him); G. Schwarzenberger, *International Law as Applied by International Court and Tribunals* (1968), at 193.

[58] Para. 11.25 of the 2004 British Military Manual, *supra* note 10 (like para. 523 of the 1958 version), refers to 'the exigencies of war, the maintenance of order, or the welfare of the population'.

[59] Pellet, 'The Destruction of Troy will not Take Place', in E. Playfair (ed.), *International Law and the Administration of Occupied Territories* (1992), at 198.

[60] At the session of 12 Aug. 1874 of the Brussels Conference, Baron Lambermont, the Belgian representative, defined '*ordre*' as '*la sécurité ou la sûreté générale*' and '*vie publique*' as '*des functions sociales, des transactions ordinaries, qui constituent la vie de tous les jours*'. It was accepted by the Commission. See British Parliamentary Papers (c. 1128, 1129 and 1136), 1875, *supra* note 1, at 66.

[61] The Judge Advocate General's School Text No. 11, *Law of Belligerent Occupation* (1944), at 39 and 55 (with authors quoted).

[62] Similarly, para. 11.25.1 of the 2004 UK Manual, *supra* note 10.

reflects the discussions of the 1874 Brussels Declaration[63] and the academic writings of the period following the 1899 Hague Conference,[64] which general view considered that civil and commercial laws would usually remain unchanged. At the present time, however, there exists increasing tension between those scholars who support the approach that a market-oriented economic reform facilitates the stabilization of a post-conflict society,[65] and those who contend precisely the contrary; namely, that a situation of stability is required in order to develop a capitalist-oriented economy[66] and that the links between international free trade, market economy, and conflict are not so straightforward.[67] The present work argues that the case of Iraq (where the results of the economic reform were not as good as expected due to important security problems and legal uncertainty about the future adoption of the CPA's reform by the Iraqi government[68]) evidences that a fast economic transformation of the occupied territory is not the panacea for security problems leading to stability.

The minimal regulatory changes allowed as an exception are to be construed very narrowly:

- The changes introduced cannot amount to a drastic transformation of the economy: 'an occupant has no right to transform a liberal into a communist or fascist economy',[69] and *vice versa:* an occupant has no right to transform the social economic system of the administered territory into a deregulated free market economy;
- The occupying power cannot adopt any irreversible (legislative) reform that could not be undone by future legitimate governments of the occupied state; and
- The laws in force in the occupied territory cannot be changed by the occupying powers 'simply to bring them into accord with its own juridical conceptions'.[70] However difficult it sometimes may be, an important distinction must be drawn

[63] Baron Lambermont (the delegate of Belgium), Colonel Comte Lana (the Italian representative), Baron Jomini (President and the Russian delegate), and General De Voigts-Rhetz (the delegate of Germany). See Protocol No. 10 of the Committee, 12 Aug. 1874, in British Parliamentary Papers (c. 1128, 1129 and 1136), 1875, *supra* note 1, at 66.

[64] See the authors quoted by Graber (*supra* note 1, at 143–145 and 153–154); A.S. Bustamante, *Derecho Internacional Público* (1937), at 336; Schwenk, *supra* note 8, at 406.

[65] Barnes, 'The Contribution of Democracy to Rebuilding Postconflict Societies', 95 *AJIL* (2001) 92; Hope and Griffin, 'The New Iraq: Revising Iraq's Commercial Law is a Necessity for Foreign Direct Investment and the Reconstruction of Iraq's Decimated Economy', 11 *Cardozo J Int'l & Comp L* (2003–2004) 886; Willet, 'Trading with Security: Trade Liberalisation and Conflict', in M. Pough, N. Cooper, and M. Turner (eds.), *Whose Peace? Critical Perspectives on the Political Economy of Peacebuilding* (2008), at 67; Gartzke and Li, 'War, Peace and the Invisible Hand: Positive Political Externalities of Economic Globalization', 47 *Int'l Studies Q* (2003) 561, at 561–586; B.M. Russett and J.R. Oneal, *Triangulating Peace: Democracy, Interdependence and International Organizations* (2001).

[66] Gerson, 'Peace Building: The Private Sector's Role', 95 *AJIL* (2001) 105.

[67] K. Barbieri, *The Liberal Illusion: Does Trade Promote Peace?* (2002); Winters, 'Trade, Trade Policy and Poverty: What are the Links?', Discussion Paper No. 2382, Centre for Economic Policy Research, 2000; R. Paris, *At War's End* (2004).

[68] Crocker, 'Reconstructing Iraq's Economy', 27 *Washington Q* (2004) 73, at 73, 79, and 84.

[69] Feilchenfeld, *supra* note 12, at 89–90; Bustamante, *supra* note 64, at 324.

[70] Pictet, *supra* note 32, at 360.

between mere 'desirability' of the economic reforms and their 'absolute necessity'; only the latter is a matter within the discretion of the occupying power, while the former belongs to the occupied people.

Here lies the Gordian knot of the customary rule reflected in Article 43 of the 1907 Hague Regulations: it is necessary to determine whether the motivation of the occupying power responds (a) to its own interests, (b) to the alleged benefit of the occupied population or (c) to an actual, absolute need to restore or ensure (meaning to 'maintain', not to 'enhance') the social and economic life of the occupied territory. Only in the latter case does the customary rule reflected in Article 43 of the 1907 Hague Regulations allow enactment by the occupying power.

Thus, the present work cannot agree on the 'benevolent occupant' approach[71] adopted by Judge Sussman (writing for the majority) in the *Christian Society* case[72] (and latter followed by the Israeli Supreme Court[73] as the yardstick for the application of Article 43 of the 1907 Hague Regulations except for cases of military necessity):[74] if the measure is good for the occupied population, it is necessary to ensure civil life. This approach (the 'bear's hug of the occupant'[75]) allows the occupant to adopt far-reaching enactments disguised as measures taken for the benefit of the occupied territories. Furthermore, as Judge Cohen remarked in his dissenting opinion to the *Christian Society* case, the occupying power should not try to 'set the world aright and establish an ideal order and life in the territories, or even a form of public order and civil life which appears to him to be the most desirable'. An occupying power cannot enact new legislation based on the ground that he considers it to be beneficial or desirable for the occupied population.

[71] D. Kretzmer, *The Occupation of Justice* (2002), at 57 ff.

[72] Supreme Court of Israel, HC337/71, *The Christian Society for the Holy Places v. Minister of Defense et al*. The Judgment is excerpted in English at 2 *Israel Yrbk on Human Rts* (1972) 354.

[73] The decisions of the Israeli Supreme Court cited here were delivered while it was sitting as the High Court of Justice. Some of them can be found in English on the official website of the court: http://elyon1.court.gov.il/verdictssearch/englishverdictssearch.aspx.

[74] E.g., in HC351/80, *Jerusalem District Electricity Co. Ltd v. Minister of Energy and Infrastructure et al*. (excerpted in English at 11 *Israel Yrbk on Human Rts* (1981) 354) the Supreme Court of Israel considered that the military commander was not allowed to adopt measures that have far-reaching and long-term influence in the occupied region, unless they are for the benefit of the occupied population. Regarding military necessity, the Supreme Court of Israel held in 1972 (HC302/72, *Sheikh Suleiman Hussein Odeh Abu Hilu et al. v. The Government of Israel et al.*, excerpted in English at 5 *Israel Yrbk on Human Rts* (1975), at 384) that: 'the court is not the proper place to decide whether a military-security operation. . . – if grounded in law and undertaken for reasons of security – was indeed warranted by the security situation or whether the security problem could have been resolved by different means'. According to the Israeli Supreme Court (HC369/79, *Ben Zion v. Military Commander of the Judea and Samaria Region et al*, excerpted in English in 10 *Israel Yrbk on Human Rts* (1980) 342), the military commander knows better than anyone else what steps are required to ensure that security, and the Supreme Court intervenes only if it is convinced that the discretion enjoyed by the military commander was not exercised in good faith or was exercised in an arbitrary way.

[75] Dinstein, 'The International Law of Belligerent Occupation and Human Rights', 8 *Israel Yrbk on Human Rts* (1978) 113.

As Anghie has remarked,[76] Western benevolent attempts to advance 'good governance' (including not only the promotion of democracy, but also the introduction of neo-liberal deregulatory free market economic policies, the 'Washington Consensus'[77]) seek to reproduce a set of economic principles and institutions which are considered to be ultimately perfected by western states and which every country should adopt in order to prosper and progress. This form of economic imperialism (which Jessup considered inconsistent with the modern concepts on which the UN is built[78]) merely reproduces the old 'civilizing mission';[79] the idea of paternally imposing, for the alleged 'benefit'[80] of the administered population but without their consent,[81] so-called 'universal' economic standards and policies developed by western countries. The alleged distinction between the 'able' and the 'unable', the 'knowing' and the 'unknowing' is to some extent equivalent to the old distinction between the 'civilized' and the 'uncivilized'.[82] It is one thing to promote those economic standards and policies if they are considered to be beneficial for the administered territory; it is another thing for the foreign territorial administrator to impose them without the consent of the administered population. The main goal of those reforms is to foster and protect the economic interest of the occupying powers (opening the market of the administered territory and establishing a 'familiar' legal environment for the international investments), and that is not allowed by the customary rule reflected in Article 43 of the 1907 Hague Regulations.

Furthermore, this article cannot agree with Dinstein's proposed test, which consists of checking whether or not the measure introduced in the occupied territory is similar (not necessarily identical) to a law in force in the territory of the occupying power.[83] As pointed out by Benvenisti, though practical, this test cannot be considered as 'the

[76] A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2007), at 249.

[77] The term first coined by J. Williamson (*Latin American Readjustment: How Much has Happened* (1989)) to describe a set of 10 economic policy prescriptions (such as privatization, liberalization of foreign direct investment inflows, and trade liberalization) which Washington thought would be good for Latin American crisis-racked countries, gradually transformed into a broader concept, a synonym for (free) market fundamentalism.

[78] P. Jessup, *A Modern Law of Nations* (1948), at 117.

[79] According to the Judge Advocate General's School Text No. 11 (*supra* note 61, at 56), 'civil or commercial laws which violate *civilized* concepts may be annulled' (emphasis added by the author).

[80] The concept of (free) market fundamentalism (the idea that only deregulatory free market philosophy can provide development and prosperity) has been criticized, among others, by Nobel Laureate, former Senior Vice President and Chief Economist of the World Bank, J. Stiglitz (*Globalization and its Discontents* (2002); and 'What I Learned at the World Economic Crisis', *The New Republic*, Apr. 2000). In May 2003, the IMF partially confirmed the complaints about its liberalization policies (Prasad *et al.*, 'Effects of Financial Globalization on Developing Countries: Some Empirical Evidence', IMF, 17 Mar. 2003, available at: /www.imf.org/external/np/res/docs/2003/031703.pdf). See also A. Chua, *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability* (2003). According to the UNCTAD (UNCTAD XI Conference, Development Strategies, Brazil, 13–18 June 2004, available at: www.unctadxi.org/templates/Page____108.aspx), '*trade liberalization has been unsuccessful in many developing countries*'.

[81] 'Everything for the people, nothing by the people': Joseph II, Holy Roman Emperor.

[82] Matz, 'Civilization and the Mandate System under the League of Nations as Origin of Trusteeship', 9 *Max Planck Yrbk UN L* (2005) 69. Similarly, Anghie, *supra* note 76; Fidler, 'The Return of the Standard of Civilization', 2 *Chicago J Int'l L* (2001) 137, at 137–157.

[83] Dinstein, *supra* note 75, at 113.

ultimate test for lawfulness'.[84] First, the social and economic conditions in the occupied territory could differ greatly from those in the territory of the occupying power and, secondly, Dinstein's test could be abused as an excuse to duplicate the legal system of the occupying power in the territory under occupation.[85] This is all the more evident when the economic systems of the occupying power and the occupied territory are completely different. According to Meron, the test can be conclusive 'only in the negative sense'[86] (i.e., when the measure enacted in the occupied territory has no parallel statute in the occupant's legislation, it should be considered invalid). In fact, as Dinstein himself recognizes, occupied territories 'are not a laboratory for experiments in law reform'.[87] Similarly, a test which consists of checking whether or not the measure introduced is similar to a lowest common denominator gleaned from the laws in force in the states neighbour to the occupied state must be rejected.[88] The premise that the occupied state would have passed similar laws to its neighbours is completely unsound, since the socio-economic environment can be completely different and also their ideology (e.g., China, Russia, and Japan, though neighbours, do not share similar economic systems and policies).

It is not a matter of balancing pros and cons, benefits and costs; it is not a test of 'reasonableness' or 'proportionality'.[89] Occupation means temporal and limited administration, not normal governance of the territory,[90] since the occupying power is not vested with any sovereignty rights over the occupied territory.[91] During the period of occupation there is a *de facto*, temporal suspension of the exercise of sovereignty by the occupied population,[92] while the occupying powers assume only transitional authority as *de facto* administrator of the territory.[93] As Oppenheim highlighted,

[84] Benvenisti, *supra* note 8, at 15.

[85] *Ibid.*, at 147; Pellet, *supra* note 59, at 201. See discussion contained in Dinstein, *supra* note 8, paras 283–284.

[86] Meron, 'Applicability of Multilateral Conventions to Occupied Territories', 72 *AJIL* (1978) 542, at 549–550.

[87] Dinstein, *supra* note 8, at para. 284.

[88] Tadlock, 'Occupation Law and Foreign Investment in Iraq: How an Outdated Doctrine has Become an Obstacle to Occupied Populations', 39 *U San Francisco L Rev* (2004–2005), at 254 ff

[89] Koskenniemi, 'Occupied Zone – A Zone of Reasonableness?', 41 *Israel L Rev* (2008) 13, at 40.

[90] *Ibid.*, at 36.

[91] For a historical overview of the changing doctrinal positions see Graber, *supra* note 1, at 37–69; also Benvenisti, 'The Origins of the Concept of Belligerent Occupation', 26 *L and History Rev* (2008), available at: www.historycooperative.org/journals/lhr/26.3/benvenisti.html. *Affaire de la Dette publique ottomane* (Bulgarie, Irak, Palestine, Transjordanie, Grèce, Italie et Turquie) [*Ottoman Debt Arbitration*], 18 April 1925, UNRIAA, i, at 555. Against the increasing conceptualization of occupation as *de facto* or 'functional' sovereignty (e.g. Harris, 'The Era of Multilateral Occupation', 24 *Berkeley J Int'l L* (2006) 13), see Koskenniemi, 'Occupation and Sovereignty –Still a Useful Distinction?', in O. Engdahl and P. Wrange, *Law at War: The Law as it was and the Law as it Should be* (2008), at 174.

[92] Yannis, 'The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics', 13 *EJIL* (2002) 1037; Report of the International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect', Dec. 2001, available at: www.iciss.ca/pdf/Commission-Report.pdf, at para. 5.26; Rodrigo Hernández, 'Soberanía y Administración de Territorios', XX *Anuario Derecho Internacional* (2004), at 279.

[93] Pictet, *supra* note 31, at 273 and 275.

'there is not an atom of sovereignty in the authority of the occupant'[94] (which is not an obstacle for the potential international liability of the occupying power, *de facto* in control of the territory, for acts affecting other states[95]). Both paragraph 11.9 of the 2004 British Manual of the Law of the Armed Conflict and paragraph 358 of the 1956 US FM 27-10 state that 'during occupation, the sovereignty of the occupied state does not pass to the occupying power'.

The customary rule reflected in Article 43 of the 1907 Hague Regulations strictly limits the authority of the occupying power to cases of absolute necessity, and no other criteria or substantive standard can be used.[96] Only if the occupying power does not exceed the scope of the exceptional deviation allowed by the customary rule reflected in Article 43 of the 1907 Hague Regulations will its measures (and, thus, the rights acquired there under) be recognized and upheld.[97]

Furthermore, from the wording of the obligation the existence of a rebuttable presumption against the necessity to change the existing commercial legislation can be deduced. The commercial laws in force shall remain unless absolutely prevented. This presumption shifts the burden of proof from the party alleging the international responsibility of the occupying power to the latter. In fact, the applicability of the general principle that requires the party alleging a fact to bear the burden of proof (*actori incumbit probatio*[98]) is not absolute.[99] The occupying power will be charged with the burden of rebutting the presumption contained in the customary rule reflected in Article 43 of the 1907 Hague Regulations.

It has been held that the preservation of the *status quo* does not preclude the adoption of incremental and gradual measures to develop the economy of the administered

[94] Oppenheim, 'The Legal Relations between an Occupying Power and the Inhabitants', 33 *LQR* (1917) 364.

[95] As the ICJ stated in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 118, 'physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States'.

[96] Yoo ('Iraqi Reconstruction and the Law of Occupation', 11 *UC Davis J Int'l L & Policy* (2004) 16), who served as a Deputy Assistant Attorney General in the Office of Legal Counsel in the US Department of Justice at the time of the Iraqi occupation, wrongly considered that Art. 43 of the 1907 Hague Regulations does not establish any substantive standard.

[97] Morgenstern, 'Validity of the Acts of the Belligerent Occupant', 28 *British Yrbk Int'l L* (1951) 291; C.C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (1945), iii, at 1885 (with case law and authors quoted by him); A.D. McNair, *Legal Effects of War* (1944), at 337; Benvenisti (*supra* note 8, at 24–25) considers that national courts in liberated territories were 'simply indifferent' to the question of international lawfulness and did use the test of Art. 43 of the 1907 Hague Regulations as an instrumental policy to ensure market stability, namely to validate fair transactions. Nevertheless, measures that create legitimate expectations and on the faith of which transactions have been established may be given effect to despite their initial illegality; at least, until the returning government abrogates them (see Morgenstern, *supra* note 97, at 308–309).

[98] C.F. Amerasinghe, *Evidence in International Litigation* (2005), at 61 ff; S. Rosenne, *The Law and Practice of the International Court of Justice: 1920–2005* (2006), at 1040.

[99] Wolfrum, 'Taking and Assessing Evidence in International Adjudication', in R. Wolfrum and T.M. Ndiaye (eds), *Law of the Sea, Environmental Law and Settlement of Disputes* (2007), at 345.

territory in the event of a prolonged occupation.[100] However, international law does not allow an occupying power to disregard, or apply in a loose manner, the provisions of the 1907 Hague Regulations merely because the occupation extends for a long period of time.[101] Therefore, if a legislative reform becomes indispensable to facing economic changes in long occupations, the occupying power will be allowed to adopt it only as far as (i) there is an absolute military necessity or it is absolutely necessary (not merely desirable) to ensure (meaning to 'maintain', not to 'enhance') public order and civil life (not just because the benevolent occupant considers it beneficial for the occupied population or for its own interests), and (ii) it does not involve far-reaching and long-term effects likely to endure beyond the end of the occupation (in which case only the legitimate local authorities – not a *quisling* government installed by the occupying power[102] – would be entitled to adopt those changes).

## 2 Obligation to Give Effective Publicity of the Enacted Provisions (Article 65 of the IV Geneva Convention)

It must be noted that Article 65 of the IV Geneva Convention clearly requires that adopted measures 'shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language'.[103] Since the convention does not stipulate the form of publication, the occupying power is free to use the local press, an 'Official Gazette' specially issued for the purpose, or notices posted in places specially set aside and known to the public.[104]

The Article literally refers only to 'penal laws', and nowhere in the proceedings appears to justify its application to non-penal laws. Nevertheless, it could be argued that (i) since there is no express provision to this effect in the 1907 Hague Regulations and (ii) according to Article 154 of the IV Geneva Convention the latter supplements the Hague Regulations, there is no reason to infer *a contrario* that this obligation (to publish) cannot be applied by analogy to civil and commercial laws enacted by the occupation authorities.[105] Any exception to the general rule of the customary rule reflected in Article 43 of the 1907 Hague Regulations (no modification of civil and

[100] According to the Israeli Supreme Court (the *Christian Society* case, *supra* note 67) the occupying power must take account of (and revise local laws consonant with) the changing social needs: Sassòli, *supra* note 21, at 679; Dinstein, *supra* note 8, at 116–120; Roberts ('Prolonged Military Occupation: The Israeli-Occupied Territories since 1967', 84 *AJIL* (1990) 44) while admitting that the basic rules of the occupation law continue to apply 'for as long as the occupation lasts' (*ibid.*, at 54 and 96), considers that they leave room for some flexibility (*ibid.*, at 57–58 and 97) in order to empower the occupant to make drastic and permanent changes in the economy in case of prolonged occupation (*ibid*, at 53).

[101] Greenwood, 'The Administration of Occupied Territory in International Law', in *Playfair, supra* note 59, at 263; Von Glahn, 'Taxation Under Belligerent Occupation', in *Playfair, supra* note 59, at 349; Benvenisti, *supra* note 8, at 147–148.

[102] Art. 47 of the IV Geneva Convention.

[103] This provision has no precedent in the 1907/1899 Hague Regulations, the 1880 Oxford Manual, or the 1874 Brussels Declaration.

[104] Pictet, *supra* note 32, at 338.

[105] This seems to be also the opinion of Dinstein, *supra* note 8, at 129.

commercial laws) should be made clear and public. This is not only beneficial for the occupied population, but is also in the interest of the occupying power in having its legislative acts understood and implemented. According to one CPA official responsible for drafting commercial laws, 'we gave them a lot of laws, but it would have been smarter to do fewer laws and work more on implementation. Our office was writing away, but in the end we didn't ensure that the Iraqi government and people understood the new laws or how to implement them.'[106]

This seems to be in conformity with state practice:

(1) By virtue of an Ordinance of 23 December 1914 of the German Governor-General in Belgium all notices, which according to Belgian laws required to be published in the *Moniteur Belge*, were to be published in the *Gesetz-und Verordnungsblatt für die okkupierten Gebiete Belgiens* (where the laws, ordinances, proclamations, and notifications of the occupying power were published, in German with official translations into French and Flemish, since the first proclamation on 5 September 1914);[107]

(2) Similarly, an announcement of 10 May 1940 proclaimed that the German Military Commander of Paris was publishing all rules and general orders ('which shall have the force of laws') in the official German gazette of occupation;[108]

(3) During the Allied occupation of Germany after the Second World War, the Allied Control Council legislation appeared periodically (in English, French, and Russian with an informative translation into German) in the Official Gazette of the Control Council for Germany[109] (after the breakdown of the Allied Control Council, the legislation issued by the Allied High Commission in West Germany and West Berlin was published in the Official Gazette of the Allied High Commission for Germany[110]), while the legislation issued by each (UK, French, US, and Russian) Military Government was published in their own official gazettes;[111]

(4) According to Paragraph 29 of the 1947 US Army and Navy Field Manual of Civil Affairs Military Government 27-5/OPNAV P22-1115[112] it is advisable to publish all regulations and orders (in English and in the language of the

[106] Henderson, 'The Coalition Provisional Authority's Experience with Economic Reconstruction in Iraq', 138 *US Institute of Peace Special Report* (2005), at 13.

[107] C.H. Huberich and A. Nicol-Speyer, *German Legislation for the Occupied Territories of Belgium (official texts)* (1915), at vii–viii and 107.

[108] *Verordnungsblatt für das besetzte Gebiet der französischen Departments Seine, Seine-et-Oise und Seine-et-Marne*, No. 3, 21 June 1940, 13, reprinted in R. Lemkin, *Axis Rule in Occupied Europe* (1944), at 389.

[109] There is a digitalized version in German on the website of the Deutsche National Bibliothek (http://deposit.ddb.de/online/vdr/rechtsq.htm). For an English version see British Library, OGG.40/2, Nos. 1-19, 29 Oct. 1945–31 Aug. 1948.

[110] There is a digitalized version in German on the website of the Deutsche National Bibliothek. For an English version, British Library, OGG.40/7, Nos. 1-126, 23 Sept. 1949–5 Mar. 1955.

[111] E.g., French Zone: *Journal officiel du Commandement en chef français en Allemagne*, Gouvernement militaire de la zone française d'occupation (Website of the Deutsche National Bibliothek, *supra* note 109, and British Library, OGG.40/5, Nos. 1-305, 3 Sept. 1945–20 Sept. 1949).

[112] According to the Preface to the (1956) US Field Manual 27-10, *supra* note 9, on the Law of Land Warfare, its Chapter 6 ('Ocupation') has to be read in connection with US FM 27-5 on Civil Affairs/Military Government.

occupied area) in the same manner in which legal notices were published prior to the occupation or to create a new official publication;[113]

(5) According to paragraph 11.28 of the new 2004 British Manual of the Law of the Armed Conflict, 'the suspension, modification, or replacement of law or courts must be published to the population of the occupied territory in their own language'.[114]

Nevertheless, while in theory the occupying powers during the two World Wars committed themselves to publishing all their legislative acts, in practice, this pledge was not always observed:[115] e.g., although section 5 of the initial Decree of the Führer concerning the exercise of governmental authority in the Netherlands (18 May 1940)[116] stated that any orders of the Reich Commissioner 'shall be published' in the German gazette of occupation, Section 2(2) of the Order of 29 May 1940 of the Reich Commissioner for the Occupied Netherlands[117] declared that 'publication shall not take place if the Reich Commissioner so requests'. Similarly, there are examples after World War II where the occupying power did not feel oblige to publish all its legislative acts, e.g., while the Israeli Manual for the Military Advocate in Military Government instructed the authorities to publish every enactment in Arabic, the Military Commander of the West Bank expressly provided in paragraph 6 of the Proclamation on Law and Administration (Proclamation No. 2), of 7 June 1967, that 'Proclamation, Order or Notice issued on my behalf shall be promulgated in any manner I may deem fit'.[118] As a result, in 1980, the Secretary-General of the International Commission of Jurists wrote (in relation to the West Bank), 'There have been isolated cases, as in Chile, where one or two decrees of a military government have been treated as secret

[113] Although para. 29.a states that 'only essential ordinances should be published', the assertion must be construed in relation to its location within the structure of the para. (in the section related to 'issuance', not in the section regulating 'publication') and the following sentence, which requires that 'therefore, the fullest advantage should be taken of established laws and customs. If it becomes necessary to publish an ordinance, its provisions should be carefully analyzed to determine its probable ramifications and its effect upon the civilian population before publication'. The meaning of the assertion appears clear when compared with para. 36.a of the previous 1943 version: '[c]areful study should be made of the local laws, in order that necessary rules or ordinances, and only these, may *be prepared*, and in order that their full ramifications and effects may be understood' (emphasis added by the author). Therefore, it must be understood that the manual requires that only essential ordinances should be prepared/issued and equates issue with publishing (so all issued ordinances should be published).

[114] This para. applies generally to all types of law (including commercial laws), since the special rules regarding criminal law are dealt with in later paras 11.56 to 11.74.

[115] Pictet, *supra* note 32, at 338.

[116] *Verordnungsblatt für die besetzten Niederländischen Gebiete*, No. 1, 5 June 1940, 2 and *Reichsgesetzblatt*, 1940, I, 778, reprinted in Lemkin, *supra* note 108, at 446.

[117] *Verordnungsblatt für die besetzten Niederländischen Gebiete*, No. 1, 5 June 1940, 8, reprinted in Lemkin, *supra* note 108, at 448.

[118] Shamgar, 'Legal Concepts and Problems of the Israeli Military Government – The Initial Stage', in M. Shangar (ed.), *Military Government in the Territories Administered by Israel 1967–1980: The Legal Aspects* (1982), i, at 27–31 and 450–452. Shamgar (who was Military Advocate General of the Israel Defence Force between 1961 and 1968 and drafter of the Military Manual) notes that identical proclamations were issued for the remaining territories occupied in 1967, with the exception of the Golan Heights.

documents and not published. However, this is the first case to come to the attention of the International Commission of Jurists where the entire legislation of a territory is not published in an official gazette available to the general public'[119] (only after 1982 were Israeli Military Orders finally published in almost their totality).[120]

Although the customary character of the obligation contained in Article 65 of the IV Geneva Convention is not clear,[121] such obligation was recently recognized as a limitation to the regulatory activity of the foreign territorial administrators in Iraq (in relation to all regulations and orders, including commercial law).[122] Section 3.2 of CPA Regulation No. 1 established that CPA regulations and orders 'shall be promulgated in the relevant languages and shall be disseminated as widely as possible'. However, concerns were raised[123] about inconsistencies between the English and Arabic texts of legislation published by the CPA, as well as the usual delay in releasing the Arabic translations of CPA orders (according to Section 3.2 of CPA Regulation No.1, 'in case of divergence, the English text shall prevail'), all of which meant that the Iraqi population lacked timely awareness of – or even were given complete misinformation about – legal changes undertaken by the CPA.

[119] McDermot, 'Preface' to R. Shehadeh and J. Kuttab, *The West Bank and the Rule of Law* (1980), at 7.

[120] Shehadeh, 'The Legislative Stages of the Israeli Military Occupation', in Playfair, *supra* note 59, at 151.

[121] *Supra*, note 52.

[122] Similarly, Section 5.2 of UNMIK Reg. 1999/1 (which was not repealed by UNMIK Reg. 1999/25) required all UNMIK Regs (without excluding those of a civil or commercial nature) to be 'issued in Albanian, Serbian and English' (the English version was to prevail in case of divergence) and to be 'published in a manner that ensures their wide dissemination by public announcement and publication'.

[123] Amnesty International, 'Memorandum on concerns related to legislation introduced by the Coalition Provisional Authority', 4 Dec. 2003, available at: http://web.amnesty.org/library/Index/ENGMDE141762003?open&of=ENG-IRQ.