The European Journal of International Law Vol. 23 no. 1 © EJIL 2012; all rights reserved

The Laws of Occupation and Commercial Law Reform in Occupied Territories: A Reply to Jose Alejandro Carballo Leyda

Eyal Benvenisti*

Abstract

The essay 'The Laws of Occupation and Commercial Law Reform in Occupied Territories: Clarifying a Widespread Misunderstanding' accuses my 1993 book of fostering the 'misleading' contention that Article 64 of the Fourth Geneva Convention of 1949 recognizes the authority of occupants to modify all types of laws (and not only penal laws), beyond the limited scope of legislative authority recognized under Article 43 of the 1907 Hague Regulations. The criticism is unconvincing for several reasons. I limit my response to the claim that my interpretation of Geneva 64 is a misunderstanding, spelling out in more detail the discussion in the book. Addressing this claim offers an opportunity to gain insight not only into the specific meaning of Geneva 64 but also into the more general question of how to read and assess travaux préparatoires *of complex multilateral treaties.*

The essay 'The Laws of Occupation and Commercial Law Reform in Occupied Territories: Clarifying a Widespread Misunderstanding'[1] (hereinafter: 'the critique'), accuses my 1993 book *The International Law of Occupation* (hereinafter: 'the book') of fostering the 'misleading' contention that Article 64 of the Fourth Geneva Convention of 1949 (hereinafter 'Geneva 64' and 'the Civilian Convention' respectively)[2] recognizes the authority of occupants to modify all types of laws (and not only penal laws), beyond the limited scope of legislative authority recognized under Article 43 of the 1907 Hague Regulations ('Hague 43').[3] In contrast, the critique proposes an alternative view, according to which Geneva 64 is relevant only to penal legislation, while

* Anny and Paul Yanowicz Professor of Human Rights, Faculty of Law, Tel Aviv University. I thank Georg Nolte for his most helpful comments on a previous draft. Errors are mine. Email: ebenve@post.tau.ac.il.

1 23 *EJIL* (2012) 179.

2 IV Geneva Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 Aug. 1949.

3 Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex, 18 Oct. 1907, Art. 43.

non-penal legislation is governed solely by Hague 43, which allows for a very narrow scope of lawmaking. This alternative view is unconvincing for several reasons, not all of which I can address in this limited space. I will limit my response to the claim that my interpretation of Geneva 64 is a misunderstanding, spelling out in more detail the discussion in the book. Addressing this claim offers an opportunity to gain insight not only into the specific meaning of Geneva 64 but also into the more general question of how to read and assess *travaux préparatoires* of complex multilateral treaties.

First, a small but important correction: the point I made in my book with respect to Geneva 64 was not simply that it increased the scope of the occupant's legislative authority beyond Hague 43. Rather, I pointed out, in what is ultimately a conservative view, that despite the intention of the drafters of Geneva 64, the predominance of Hague 43 has been maintained in both subsequent scholarship and judicial practice. I explained why, despite the innovative elements introduced by Geneva 64, 'Article 43 of the Hague Regulations continued to provide the framework for discussing the occupant's prescriptive powers'.[4] The unqualified proposition that Geneva 64 effectively produced a 'modest modification of Article 43 of the Hague Regulations, allowing a little more scope for changes in the existing local laws' was proposed by Adam Roberts.[5] Marco Sassoli's view is also more permissive, suggesting that 'there are good reasons to consider [Geneva 64] more precise, *albeit less restrictive* [than Hague 43]'.[6] Rüdiger Wolfrum has offered a different basis for an expansive reading of the lawmaking powers of the occupant following the Civilian Convention, suggesting that Hague 43 is supplemented by Article 27 of the Civilian Convention, which obliges the occupant to ensure humane treatment.[7] Yutaka Arai-Takahashi explains the broader lawmaking authority under the Civilian Convention also as facilitating the occupant's 'role of regulator of socio-economic issues and of provider of services' to the local population.[8]

My argument that Geneva 64 went beyond Hague 43 was based on the text of Geneva 64 (the authorization to issue 'provisions' when these 'are essential to enable the Occupying Power to fulfil its obligations under the present Convention'), the humanitarian goals that are the object and purpose of the Civilian Convention, and the drafting process as reflected in the *travaux préparatoires.* In this reply I will elaborate my position in greater detail in order to explain why alternative interpretations, although theoretically possible, are ultimately unconvincing.

How should one approach the interpretation of the Civilian Convention? As a starting point, one must heed Georg Schwarzenberger's warning: in this 'work of codification'

[4] E. Benvenisti, *The International Law of Occupation* (1993), at 106 (a second edition is forthcoming with OUP in 2012; the references here are to the 1993 edition).

[5] Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', 100 *AJIL* (2006) 580, at 587.

[6] Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', 16 *EJIL* (2005) 661, at 670–671.

[7] Wolfrum, 'Iraq – from Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference', 9 *Max Planck Yrbk UN L*(2005) 1, at 8 n. 15. The critique, *supra* note 1 ignores this view as well.

[8] Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law and its Interaction with International Human Rights Law* (2009), at 116.

he warned, when referring to the Civilian Convention, 'a tendency is noticeable to hide deep-seated divisions behind a façade of superficially impressive bulk'.[9] This warning is particularly apt when interpreting Geneva 64, which deals with a matter that has proven to be highly divisive ever since the first failed efforts to draft a treaty in 1874.[10] The inherent conflict between powerful states, that saw themselves in the potential role of occupants, and smaller, weaker countries that had no difficulty envisaging themselves as being occupied also plagued the first Hague Peace Conference.[11] This division resurfaced during the drafting of the Civilian Convention, only now with a new twist to the old debate, added by the Soviet Union. The Soviets never recognized the applicability of the law of occupation to their direct or indirect rule beyond their territorial boundaries.[12] But it was probably useful for them to insist on imposing limits to occupants, anticipating that Western armies would as future occupants invoke the Civilian Convention as a basis for their rule. In short, it is impossible to read the drafting history of the Civilian Convention without paying close attention to the diverse concerns of the different state representatives.

Geneva 64 consists of two paragraphs the relationship between which is not immediately apparent. The first deals with 'penal legislation' (although nowhere in the Civilian Convention is the term 'penal' defined). It provides that:

> The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

It is the second paragraph which is the focus of the discussion. It creates an exception to the preceding paragraph (using the qualifier 'however') and discusses the occupant's authority to issue 'provisions' for a variety of purposes:

> 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.

The combination of these two paragraphs raises important questions: is Geneva 64 intended to apply only to 'penal' legislation or to all types of lawmaking? If the latter, how is non-penal legislation regulated under Geneva 64? Does Geneva 64 prohibit non-penal legislation? Does it condone unlimited changes to it? Does it impose specific

[9] G. Schwarzenberger, *International Law as applied by International Courts and Tribunals* (1968), ii, at 350.

[10] Benvenisti, *supra* note 4, at 10–14; Benvenisti, 'The Origins of the Concept of Belligerent Occupation', 26 *L & History Rev* (2008) 621.

[11] *Ibid.*

[12] Benvenisti, *supra* note 4, at 67–68 (quoting a suggestion raised in 1950 at the Soviet Academy of Social Sciences, that 'the task of Soviet lawyers consists of giving a learned justification of the legality of partisan wars on territories occupied by the imperialist aggressors, having in mind the Leninist-Stalinist teachings on just and unjust wars').

limits on it? Answering these questions requires a complex analysis. However, once such an analysis is undertaken, the outcome is clear and unequivocal.

There are four possible interpretations of Geneva 64. The first is that the absence of any explicit mention of non-penal legislation requires that Geneva 64 should be read as prohibiting all non-penal legislation by the occupant. However, given the factual and legal background against which the Article was drafted, such an interpretation is inconceivable. This, after all, was the era of post-World War II occupations. The allied powers had by now gained experience in the administration of occupied territories. At first hesitant and somewhat reluctant, they eventually had come to govern the occupied lands and populations under their control in a proactive manner, almost as if by right.[13] There was little opposition to such extensive legislation even by courts of the returning sovereigns.[14] As Joyce Gutteridge, who participated in the drafting process, observed in 1949, the Civilian Convention 'was drawn up against the background of two World Wars and it is therefore far removed from the conceptions of the circumstances of war which dominated those who framed the Hague Regulations'.[15] The ongoing occupations of Germany and Japan were explicitly mentioned by the drafters: The US delegate noted that '[e]xperience had shown that an Occupying Power did, in fact, exercise the majority of the governmental functions in occupied territory'.[16] In fact, the Civilian Convention was drafted with the aim of imposing on occupants a 'heavy burden'[17] of care towards the civilian population even *beyond* the duties envisaged by the Hague Regulations.[18] It therefore cannot be the case that the drafters of Geneva 64 sought to minimize the occupant's authority under Hague 43 and prohibit any non-penal legislation, and to accomplish this by negative inference.

The second possible interpretation (and the one that the critique supports) is that Geneva 64 simply does not apply to non-penal lawmaking by the occupant, a matter which continues to be governed by Hague 43. While theoretically conceivable, this interpretation must be ruled out when examined in light of the text, context, purpose,

[13] At the time of drafting the Civilian Convention, Allied occupants were exercising lawmaking powers that went far beyond abolishing the local racial laws. One example that I present in the book is of the occupation by the Allied Military Government of the Venezia Giulia region of Italy which was 'a rare opportunity to examine how a modern military occupant used its prescriptive powers under the Hague Regulations with respect to a relatively highly developed area': Benvenisti, *supra* note 4, at 89. See also note 22 *infra*. This expansive interpretation of Hague 43 was endorsed by contemporary scholars (*see infra* notes 38–44).

[14] See, e.g., the Italian Court of Cassation in *Du Ban and Icoredit v. Public Works Administration*, 40 ILR (1960) 467, concerning legislation referred to in *supra* note 13.

[15] Gutteridge, 'The Geneva Conventions of 1949', 26 *British Yrbk Int'l L* (1949) 294, at 319.

[16] Final Record of the Diplomatic Conference of Geneva of 1949 ('Final Record'), iiA, at 623 (referring to the Allied occupation of Germany and Japan to show the responsibility of the Occupying Powers for the welfare of the local populations).

[17] Report of Committee III to the Plenary Assembly, Final Record, *supra* note 16, at 816.

[18] This is the reason Art. 6 of the Civilian Convention sought to limit some of those positive obligations to 'one year after the general close of military operations', which the US representative suggested was the time when 'the institutions of the occupied territory were unable to provide for the needs of the inhabitants': Final Record, *supra* note 16, at 623. Note that an American proposal that would have clarified that occupants were not obliged to set in the occupied area 'higher standards of living than those prevailing before the occupation began' was defeated: *ibid.*, at 774, 827.

and object of the treaty.[19] The drafting history of the Civilian Convention sheds light on this potential interpretation, and allows us to reject it.

In reviewing the drafting process of the Civilian Convention, close attention should be paid to the views voiced by the representatives of smaller nations, such as The Netherlands and Belgium which, based on historical experience, could not help but regard themselves as potentially occupied countries. In fact, the *travaux préparatoires* of the Civilian Convention, like those of the Hague Peace Conferences, demonstrate a general point concerning the interpretation of protocols of meetings and other documents. The drafting process invites the weaker state representatives to express their concerns, not unlike in administrative hearing procedures. They voice their sincere reactions and worries, which are invaluable to our understanding of what transpired during drafting processes of treaties that pit weak against strong.[20] The terse and dry protocols of the Civilian Convention reveal the frustration and distress of those representatives so clearly that they evoke the reader's compassion.

The original intention of the drafters of the Civilian Convention was to do away with the Hague Regulations on all matters to be covered by the Civilian Convention.[21] If Draft Article 55 (which later became Geneva 64) was silent on non-penal legislation (the second possible interpretation), it would implicitly have left the regime of Hague 43 concerning non-penal lawmaking intact. This outcome was the one preferred by the delegates of the smaller states, who, fearing the worst, had found comfort in the textually rigid framework of Hague 43.[22] But when the British representative[23]

[19] As mentioned above, the primary objective and overriding purpose of the Civilian Convention is the protection of civilians – not the preservation, intact and unchanged, of the institutions, bases of power, and laws of the ousted sovereign. The Civilian Convention imposes a duty on the occupant to modify laws that are incompatible with the convention: Y. Dinstein, *The International Law of Belligerent Occupation* (2009), at 113–115; Wolfrum, *supra* note 7, at 8.

[20] The same is true for understanding the intentions of the drafters of the Hague Regulations: see discussions in *supra* note 10.

[21] As the draft report of Committee III recalled, '[t]he Stockholm Draft laid down that our Convention was to replace, in respect of the matters treated therein, the Convention of the Hague': extract from the draft report of Committee III to Plen. Assembly (on Draft Article 135), Final Record, iii, at 164.

[22] Under Hague 43, the occupant is required to respect the laws in force in the country 'unless absolutely prevented [from doing so]' in all measures taken to restore and ensure public order and civil life. The term 'unless absolutely prevented' was inserted to replace the term 'unless necessary' at the insistence of the potentially occupied states, to emphasize the occupant's obligation to preserve the status quo also in the legal sphere: see Benvenisti, 'Occupation, Belligerent', *Max Planck Encyclopedia of Public International Law* (2008), at para. 26.

[23] The British military authorities had an expansive vision of the occupant's legislative powers. Upon occupying the Dodecanese Islands, the British Military Administration issued Proclamation 1, which stipulated that '[e]xisting laws, customs, rights and properties in the said territories will be fully respected in accordance with International Law; *insofar as the necessities of war permit*' (Art. 2, my emphasis), but that '[n]o right or privilege of the Fascist Party will be recognised, and no legal provision against race or religion will be enforced' (Art. 6). See Chrysanthopoulos, 'The British and Greek Military Occupations of the Dodecanese 1945–1948', 2 *Revue Hellenique de Droit International* (1949) 227, at 227–228. Chrysanthopoulos approvingly reports on additional measures taken by this occupant which were 'not foreseen in the Hague Regulations, but [which were] no doubt . . . within their spirit' (at 229), including the requisition of houses for civilian use, the dismantling of the local police force, and the institution of new civil courts. See also note 40 *infra*.

introduced the version (which, with minor modifications, ultimately prevailed) which includes reference to 'provisions' (rather than 'penal laws'[24]), the representatives of the smaller states were alarmed. General Schepers (The Netherlands), obviously realizing that the new formula would also authorize non-penal lawmaking by the occupant, thus terminating the (qualified) protection granted by Hague 43, expressed his worry as follows:

> If Article 55 was adopted, what would remain of Article 43 of the Hague Regulations – since Article 135 of the Draft Convention laid down that that Convention would replace the Hague Convention in regard to the matters with which the former dealt. [25]

He further warned that '[any] possible misinterpretation must be avoided, for it was certain that the Occupying Power would be only too much inclined to adopt the interpretation most favourable to itself'.[26] However, there was little that could be done in the short time left for the conclusion of the work of the Drafting Committee: 'it would be impossible to submit within forty-eight hours all the amendments that would be necessary to bring the text of the present Draft into line with the Hague Regulations'.[27]

A resolution to the problem was proposed by the Belgian delegate, Mr. Mineur, who suggested that, instead of the stipulation in Draft Article 135 that 'the present Convention shall replace, in respect of the matters treated therein, the Hague convention', a new formulation would state that the Hague Convention 'shall remain applicable save in so far as it is expressly abrogated by the present Convention'.[28] The ultimate wording was offered by the Norwegian delegation, and it provided that the Civilian Convention 'shall be supplementary to Sections II and III of the Hague Regulations'.[29]

Unfortunately for General Schepers and the other small states' representatives, despite their best efforts, the report of Committee III could not avoid acknowledging that Geneva 64 enjoyed at least some precedence over Hague 43: 'should any contradiction arise between the effect of the Hague text and that of our Convention, the interpretation should settle the difficulty in accordance with accepted legal principles, in particular in accordance with the rule that in law, the latter supersedes the earlier'.[30]

This last minute scrambling to reformulate Draft Article 135 would have been superfluous had it been clear that Geneva 64 was simply silent on non-penal legislation.

[24] Note that even the version that was originally fielded and which was replaced by the British text left the possibility that the adjective 'penal' would be reiterated in the second para. '[t]he 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': Final Record, *supra* note 21, at 140. If it was clear that 'provisions' meant 'penal provision, why add 'penal' in parentheses to the proposed text?

[25] Final Record, *supra* note 16, at 672.

[26] *Ibid.*

[27] *Ibid.*, at 675.

[28] *Ibid.*, at 676.

[29] Committee III reports that '[t]his wording is cautious in that it does not attempt to indicate any limitation between the Civilian Convention and the Hague Convention, neither does it seek to establish a hierarchy; any such attempt, in a field as complex as this, would be singularly dangerous undertaking': *ibid.*, at 846.

[30] Final Record, *supra* note 21, at 164, see also Final Record, *supra* note 16, at 787.

The third possibility is that Geneva 64's silence with respect to non-penal lawmaking indirectly granted the occupant unfettered discretion to introduce any changes it deemed fit (as long as its enumerated obligations toward Protected Persons under that Convention were kept). There are reasons to believe that this was indeed the intention of at least some of the drafters. First, this is exactly the outcome that an earlier, disingenuous American proposal sought to achieve. Under it, all restrictions on any type of lawmaking by occupants would have been indirectly removed.[31] Secondly, such a reading is fully compatible with Article 47 of the Civilian Convention, which envisages not only extensive lawmaking by the occupant but also outright annexation (and in such scenarios, confines itself to demanding that the occupant remain committed in the annexed area to its Civilian Convention obligations).[32] Thirdly, this interpretation is compatible with the purpose of the Convention, which focuses primarily on protecting civilians, rather than on maintaining the integrity of the institutions and power bases of the ousted sovereign.[33]

But this third (and radical) interpretation cannot be reconciled with the elaborate discussion of the conditions for lawmaking under the second paragraph of Geneva 64, and indirectly by the attempts to resuscitate Hague 43 by the new version of Draft Article 135 (Article 154 in the final document). That Geneva 64 did not mean to grant the occupants unfettered legislative powers in non-penal matters can also be learned from the view of the British representative, who introduced the formula that later became Geneva 64. Referring to the second paragraph he stated that, 'The second paragraph should then say that the Occupying Power had the right to take such legislative measures as might be necessary to secure the application of the Convention and the proper administration of the territory'.[34] Limits on non-penal lawmaking were explicitly discussed while dealing with the occupant's obligation to ensure proper labour conditions for Protected Persons, which resulted in a modification of the French text of Article 51 (to prevent the occupant from invoking its lack of lawmaking authority as a pretext for keeping wages low).[35]

[31] The proposal read: '*[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 offenses covered by the said laws': Final Record, *supra* note 21, at 139 (my emphasis). In addition, the US proposed to delete para. (2) of Draft Art. 55: *ibid.*

[32] See also Dinstein, *supra* note 19, at 123–125; see also Kolb, 'Etude sur l'occupation et sur l'article 47 de la IVème convention de geneve du 12 août 1949 relative à la protection des personnes civiles en temps de guerre: le degré d'intangibilité des droits en territoire occupé', 10 *African Yrbk Int'l L* (2002) 267.

[33] Because the Geneva law emphasized the occupant's obligations towards the population and 'diminish[ed] the claim of ousted elites to return to areas that they had controlled before the occupation but in which they did not continue to enjoy the support of the indigenous population' (Benvenisti, *supra* note 4, at 106) there was less pressure to conform to the laws that the ousted government had enacted. See also Kolb, *supra* note 32, at 271 (noting the role of Civilian Convention as providing a bill of rights for the individuals: '[l]'optique est individuelle').

[34] Final Record, *supra* note 16, at 672.

[35] Benvenisti, *supra* note 4, at 102. The concern that the occupant would keep wages low by arguing that international law prevented it from modifying the law was raised during the drafting. This led to a change in the French text. As explained by Mr. Mineur (Belgium): 'the Mexican Delegate . . . feared that the words "shall continue" might prevent the Power concerned from adapting wage rates in conformity

The only remaining interpretation of Geneva 64,[36] the one that 'logic dictates',[37] is that Geneva 64 does address – and indeed delineates – the occupant's authority to legislate both penal and non-penal legislation. As the Pictet Commentary concludes, the Civilian Convention 'has taken from [Hague 43] those parts essential for the protection of civilian persons'.[38] While the first paragraph of Geneva 64 refers to modifying or suspending penal laws, the second paragraph, which opens up a large exception to the previous paragraph with the qualifier 'however', is not confined to penal laws; it refers to 'provisions' in general and both lowers the threshold for resorting to lawmaking and also expands the scope of legislation way beyond the rather rigid 'unless absolutely necessary' formula of Hague 43.

Following the adoption of the Civilian Convention, the great majority of contemporary commentators generally agreed that Geneva 64 addressed the occupant's authority to legislate in both penal and non-penal matters. For unarticulated reasons, this prevailing view preferred to read Geneva 64 as simply a reiteration, 'in a more precise and detailed form', of the formula of Hague 43.[39] This view indirectly supported an expansive reading of the lawmaking authority under Hague 43, a reading that was shared by at least some of the drafters of the Civilian Convention.[40] Morris Greenspan, for example, viewed Geneva 64 as supporting the proposition that Hague 43 allows the occupant to introduce fundamental changes in the institutions of the

---

with the fluctuating economic conditions of the country. The cost of everything normally rises, in wartime; wages should normally rise in proportion and the Mexican Delegate wondered whether the words "shall continue" [in the French text] might not have the effect of preventing the necessary advance of wage rates. That was the reason why we suggested the use of the word "sera". I admit that this is not the ideal wording, and that it could be improved, but I think it is definitely better than the term "continuera"': Final Record, iiB, at 416. Para. (2) of Art. 51 of the Civilian Convention stipulates in the French text: '[l]a législation en vigueur dans le pays occupé concernant les conditions de travail . . . sera applicable aux personnes protégées soumises aux travaux dont il est question au présent article' (the English version reads: '[t]he legislation in force in the occupied country concerning working conditions, . . . , shall be applicable to the protected persons assigned to the work referred to in this Article'). There is no obligation in this text to keep the law frozen, and the abovementioned discussion confirms that modifications are possible. See also the Geneva Conventions of 12 August 1949 Commentary: Volume IV: Relative to the Protection of Civilian Persons in Time of War (Jean S. Pictet, General Editor, 1959), at 298.

36 Benvenisti, *supra* note 4, at 102.

37 Dinstein, *supra* note 19, at 111.

38 Pictet, *supra* note 35 at 617.

39 Gutteridge, *supra* note 15, at 324 (Geneva 64 is 'an amplification and clarification' of Hague 43); Pictet, *supra* note 35, at 335: 'Article 64 expresses, in a more precise and detailed form, the terms of Article 43'; A. McNair and A.D. Watts, *The Legal Effects of War* (4th edn., 1966), at 369 (presenting Geneva 64 as authorizing the occupant to make changes in 'the law' (i.e., not only penal law)). Schwarzenberger, *supra* note 9, at 194: '[b]eyond [penal legislation], the purposes for which the Occupying Power was entitled to enact its own legislation were specifically enumerated [citing Geneva 64 para. (2)]. In drawing up this list, the Conference of 1949 took it for granted that it had not extended the traditional scope of occupation legislation'. *Cf.* G. von Glahn, *The Occupation of Enemy Territory* (1957), chap. 7 on 'Laws under Military Occupation' (referring solely to Hague 43 and ignoring Geneva 64).

40 Mr Sinclair (UK) said that 'Article 43 laid down that an Occupying Power should take all necessary steps for the maintenance of public order, while respecting *as far as possible* the laws in force in the country': Final Record, *pra* note 16, at 624 (my emphasis). This view was not challenged.

occupied country.[41] McDougal and Feliciano recognized that the occupant's authority to legislate 'must bear some reasonable correspondence to the comprehensiveness and complexity of the social and economic processes of a modern community',[42]and regarded Geneva 64 as conferring 'just as explicit' lawmaking authority as Hague 43.[43] The same conclusion is to be found in the 1956 US Army Field Manual,[44] as well as in the Canadian[45] military manual of 2001. Even the British military manual of 2004, which was finalized while the Iraqi occupation was still ongoing, although it retains the distinction between Hague 43 and Geneva 64, contains quite an expansive reading of Hague 43 which is influenced by the Civilian Convention. It recognizes that the occupant 'would be prevented from respecting the laws in force if they conflicted with its obligations under international law, especially [the Civilian Convention]'.[46]

Was Geneva 64 a new development or was it just a confirmation of an expansive lawmaking authority that had already been recognized by Hague 43? In my view, it was impossible to deny that Geneva 64 'introduce[d] innovative elements into the law of occupation, and thus represent[ed] a departure from Article 43 of the Hague Regulations, rather than a more precise and detailed expression of it'.[47] In a book that attempted to delineate and assess the evolution of the law of occupation (rather than simply to restate it), it was important to note this moment of change. For the same reason, it was equally important to note that, due to the fact that most contemporary writers and courts regarded Geneva 64 as a reiteration of Hague 43, the latter 'continued to provide the framework for discussing the occupant's prescriptive powers'.[48]

[41] M. Greenspan, *The Modern Law of Land Warfare* (1959), at 226; see also at 227. 'The occupant may . . . alter or suspend any of the existing laws or promulgate new ones, if demanded by the exigencies of war. These exigencies may, in fact, demand a great deal': *ibid.*, at 224.

[42] M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order* (1961), at 745, 746 (McDougal and Feliciano held an expansive view on the occupant's lawmaking power under Hague 43: see *ibid.*, at 757–770).

[43] *Ibid.*, at 745. After citing Hague 43 the authors continue, 'The complementary military purpose for which the occupant may prescribe and apply policy has been rendered just as explicit in Article 64, second paragraph, of the Geneva Civilian Convention'. See also at 757.

[44] Art. 369 of US Army Field Manual 27-10 (1956), available at: www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf, which is a verbatim copy of Geneva 64, is entitled, without qualifications, 'Local Law and New Legislation'. The absence of any distinction made between civil and penal legislation can also be seen in Art. 370 (entitled 'Laws in Force'): '[i]n restoring public order and safety, the occupant will continue in force the ordinary civil and penal (criminal) laws of the occupied territory except to the extent it may be authorized by Article 64, GC, and Article 43, HR, to alter, suspend, or repeal such laws. These laws will be administered by the local officials as far as practicable.'

[45] Canada, *The Law of Armed Conflict at the Operational and Tactical Level* B-GJ-005-104/FP-021 (2001), Sect. 1209, entitled 'Law Applicable in Occupied Territory' provides, in para. 2: '[i]f military necessity, the maintenance of order, or the welfare of the population so require, it is within the power of the occupant to alter or suspend or repeal any of the existing laws, or to promulgate new laws'. The sources for this provision are Hague 43 and Geneva 64 (3) (namely the second para. of Geneva 64).

[46] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), at 284. This reading arguably goes significantly beyond the interpretation of Lord Goldsmith as reflected in his memorandu to the UK Prime Minister on 26 Mar. 2003, available at: www.iraqinquiry.org.uk/media/46487/Goldsmith-advice-re-occupying-powers-26March2003.pdf.

[47] Benvenisti, *supra* note 4, at 101.

[48] *Ibid.*, at 106.

I was indeed happy to note that since the publication of the book, scholars have increasingly come to recognize the differences between the two provisions, some of them doing so after making their own inquiries, some offering additional arguments.[49]

But maintaining the distinction between Hague 43 and Geneva 64 would have had more than purely historical significance. Although for most occupants there would have been little practical significance whether the source of authority for lawmaking in an occupied territory was Geneva 64 or Hague 43, this would not necessarily have been true of all potential occupants. In the case of Israel, for example, the distinction between the two provisions was potentially crucial, as Israeli courts deemed themselves bound to apply only the Hague Regulations.[50] Maintaining the distinction between the more restrictive text of Hague 43 and the 'innovative elements' of Geneva 64 would have meant that the Israeli occupant would have a narrower, rather than a wider, scope for legislation.[51]

The Critique develops two arguments against the fourth interpretation. The first merely suggests that 'the generic noun "provision" is clearly qualified as "penal" in relation to the three exceptional situations contained in the second paragraph of Article 64'.[52] The above detailed discussion must suggest that this contention is anything but 'clear'.

Secondly, the critique seeks to 'deconstruct' my reliance on the *travaux préparatoires* by offering an incomplete picture of what transpired during the drafting process. From the two days of debate in the Drafting Committee 2 of Committee III, the critique chooses to bring only two voices. Oddly, the critique attributes to the US – which had been asserting wide lawmaking authority in the territories under its occupation and which expected to repeat this practice in the future – the intention to confine legislative authority to penal laws only. In fact, as noted above,[53] the Americans sought exactly the opposite outcome, namely, the unfettered discretion to modify any type of law. The critique then relies on the reaction of the USSR delegate, without taking into account that throughout the drafting process this delegate, as well as delegates of Communist satellites, sought to impose restrictions on occupants, perhaps anticipating that future occupants who would recognize themselves as such would only be Western armies. The Soviets never recognized – either at that time or later – the applicability of the law of occupation to their rule

[49] Gasser, 'Protection of the Civilian Population', in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2008), at 237, 286: '[a]lthough Article 64 mentions only criminal law which remains in force, the entire legal system of the occupied territories is actually meant by this rule'. Dinstein, *supra* note 19, at 111; Roberts, *supra* note 5, at 587; Sassoli, *supra* note 6, at 670–671; Arai-Takahashi, *supra* note 8, at 117.

[50] The Israeli Supreme Court does not regard the Civilian Convention as reflecting customary law, and therefore the Civilian Convention is not part of Israeli law: see D. Kretzmer, *The Occupation of Justice* (2002), at 43–56; Benvenisti, *supra* note 4, at 109–112 .

[51] The Israeli Supreme Court endorsed the 'conventional interpretation' which regarded Hague 43 and Geneva 64 as comparable in scope: HCJ 69/81, *Abu Aita v. Commander of Judea and Samaria*, 37(2) PD 197 (1981), at paras 12, 54 (approving the promulgation of a Value Added Tax in the West Bank).

[52] The Critique, *supra* note 1.

[53] *Supra* note 31.

over foreign territories, and instead endorsed indigenous requests to join the USSR or adopt communist rule.[54]

After curiously failing to follow the dramatic struggle prompted by the representatives of weaker states in Drafting Committee 2, the critique misunderstands the description by Haksar (the representative of India and the Rapporteur of Committee III) of the version of Draft Article 55 that was approved by the majority of representatives in Drafting Committee 2. As Haksar explained, the majority felt that the lawmaking authority of the occupant needed to be expanded in order 'to safeguard the security of the Occupying Power and prevent the recurrence of two cases which had occurred during the second world war [*sic*]', namely situations where 'the legislation in an occupied territory was contrary to generally recognized humanitarian principles' or where 'courts no longer existed . . . and the Occupying Power had, therefore, been obliged to make provision itself for the normal administration of justice'. This reasoning does not distinguish between penal and non-penal law. Humanitarian concerns and concerns with the normal administration of justice encompass not just penal laws, and there was no sense to require occupants to enforce provisions that discriminated between groups of Protected Persons (e.g., restricted admittance to women or minorities) if there was no penal sanction involved. Having explained the background to this provision, Haksar moves to describe the *first* paragraph of Draft Article 55, which dealt with situations 'where the Occupying Power could change the penal laws of the occupied territory'. He then goes on to describe the *second* paragraph of the Article, explaining 'the changes introduced' in the draft Article, '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'.[55] As one can see, not a mention of penal law in sight! Indeed, Haksar's presentation actually lends support to the fourth interpretation of Geneva 64 that I have presented above.

The critique then mentions the final report of Committee III to the Plenary. The final report does not carefully track the wording of Geneva 64 (it uses the term 'in addition' instead of 'however', a subtle change that may be of significance). But even

[54] *Supra* note 12.

[55] This is the text of the protocol: 'Mr. HAKSAR (India), Rapporteur, explained that the Drafting Committee had thought it advisable to include certain provisions in Article 55 in order to safeguard the security of the Occupying Power and prevent the recurrence of two cases which had occurred during World War II. In the first case, the Occupying Power had found the legislation in an occupied territory was contrary to generally recognized humanitarian principles. In the other case, courts no longer existed in certain territories and the Occupying Power had, therefore, been obliged to make provision itself for the normal administration of justice.

The wording adopted by the Drafting Committee *(see Annex No.* 296) differed, therefore, from the Stockholm text in the sense that, in accordance with the spirit of amendments submitted by the United Kingdom *(see Annex No.* 295) and the Soviet Delegations *(see Summary Record of the Eighteenth Meeting*), it envisaged cases where the Occupying Power could change the penal laws of the occupied territory. The cases in question concerned the security of the Occupying Power and the application of the present Convention. 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': Final Record, *supra* note 16, at 771.

if the report was right to suggest that the occupant was entitled under paragraph one to 'promulgat[e] [only] penal provisions necessary to ensure its security', there is no place for the conclusion that the *two additional grounds* for lawmaking that the final report refers to, namely 'provisions which are essential to enable it to fulfill its obligations under the Convention (e.g. in particular Articles 46, 49 and 50) and to maintain an orderly government', were limited only to penal laws. In fact, as Pictet has suggested, the opposite conclusion is more appropriate.[56]

The critique finally relies on part of the *travaux* to fault not only me but also Pictet for misrepresenting the debate in the Drafting Committee concerning legislation in labour matters. But the critique mentions only part of the debate, as if the debate ended at that point. But this was not the case, as Pictet noted; the debate continued and ultimately led to a modification of the French text, which clarified that the occupant was understood to have the authority to modify labour laws (to comply with its obligations under the Civilian Convention).[57]

Space constraints prevent me from addressing the critique's treatment of Hague 43. Suffice it to say that the contention that Hague 43 is limited to 'an actual, absolute need to restore or ensure (meaning to "maintain", not to "enhance") the social and economic life of the occupied territory'[58] is contradicted by the practice of occupants from World War I onwards and by scholarly opinion, including that cited above. The Civilian Convention in general, and Geneva 64 in particular, reflects the understanding that occupants should be encouraged – even obliged – to restore, ensure, and even promote the welfare of the occupied population as defined by the Civilian Convention, including, if this becomes necessary, by lawmaking.

[56] Pictet, who relies on this Report, states that the second para. of Geneva 64 covers 'legislative powers of the occupant' which include '(a) . . . provisions required for the application of the Convention . . . in a number of spheres: child welfare, labour, food, hygiene and public health etc; (b) . . . provisions necessary to maintain the orderly government of the territory in its capacity as the Power responsible for public law and order; (c) . . . *penal* provisions for its own protection': Pictet, *supra* note 35, at 337.

[57] See *supra* note 35, at 298.

[58] The critique, *supra* note 1, at 190.