The International Law of Occupation

Second Edition

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OXFORD
UNIVERSITY PRESS

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The Law on the Administration of Occupied Territories

4.1 Background: Three Different Approaches to Regulate an Inherent Conflict of Interests

4.1.1 Article 43: "A seeming legal paradise"

Once a territory is occupied, Article 43 of the 1907 Hague Regulations ("Hague Regulations") kicks in with the obligation to discharge the functions of government:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and [civil life], while respecting, unless absolutely prevented, the laws in force in the country.[1]

This concise statement is the gist of the traditional law of occupation. Very few words are used to describe both the nature of the occupation regime and the scope of the occupant's legitimate powers. As detailed in Chapter 2, these words represent the culmination of prescriptive efforts made throughout the nineteenth century by judges, scholars, diplomats, and army generals. Article 43 combines two issues dealt with separately as Articles 2 and 3 in the Brussels Declaration of 1874.[2] Accordingly, the text of Article 43 was accepted by scholars as mere

[1] The official French version reads: "L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les measures qui dependent 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 vigeur dans le pays." An identical version appeared in Article 43 of the Hague Regulations of 1899. As noted by Edmund H. Schwenk, *Legislative Power of the Military Occupant under Article 43, Hague Regulations*, 54 YALE L. J. 393 (1945), the first English translation of Art. 43, which used the phrase "public order and *safety*" in lieu of "l'ordre et la *vie publics*," was incorrect. Schwenk suggested the use of the more comprehensive phrase used here, namely "public order and *civil life*." *See also infra* text accompanying notes 11–16.

[2] Article 2 of the Brussels Declaration of 1874 provides as follows: "The authority of the legitimate power being suspended and having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety." Art. 3: "With this object he shall maintain the laws which were in force in the country in time of peace and shall not modify, suspend or replace them unless necessary."

reiteration of older law,[3] and subsequently the Article was generally recognized as reflecting customary international law.[4] For reasons elaborated *infra*, Article 43 survived the major overhaul in the law of occupation introduced by the Fourth Geneva Convention (GCIV) in 1949, and is still the starting point for delineating the regime of the occupation. Dealing with the general powers and duties of the occupant, Article 43 is a sort of mini-constitution for the occupation administration; its general guidelines permeate any prescriptive measure or other acts taken by the occupant.[5]

The law that regulates the administration of occupied territories must confront the inherent conflict of interests that exists between occupant and occupied. The occupation administration must attend to at least three sets of interests: its own security interests, the interests of the ousted government, and those of the local population, which may be different from the interest of their legitimate government.[6] In cases of internal ethnic conflict, there may be divergent interests within the occupied population, even inter-ethnic strife that the occupant might have to deal with (e.g., Iraq), and which the occupant might be tempted to exploit.[7] How to balance these often conflicting interests is one of the major challenges of the law. As will be suggested *infra*, it is possible to argue that the Hague Regulations betray a preference that the occupant attend to the interests of the ousted government and prefer them when those are in conflict with the interests of the local population. The occupant is expected to fill the temporary vacuum created by the ousting of the local government and maintain its bases of power until the conditions for the latter's return are mutually agreed upon.[8] In contrast, the underlying effort of the GCIV is to focus predominantly on the effort to ensure the interests of the

[3] *See* DORIS APPEL GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION, 1863–1914 143 (1949) ("Nothing distinguishes the writing of the period following the 1899 Hague code from the writing prior to that code").

[4] This view was expressed by the International Military Tribunal in Nuremberg. *See The Trial of the Major War Criminals* 253–4 (1947), also published in 41 AJIL 172, 248–9 (1947). *See also*, eg, GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY 10–12 (1957). National courts have also regarded the Hague Regulations as codified customary international law: Felice Morgenstern, *Validity of Acts of the Belligerent Occupant*, 28 BYIL 291, 292 (1951).

[5] Other Articles deal with specific issues, such as collection of taxes (Art. 48), requisitions (Art. 52), and the use of various assets (Arts 46, 52–6). These specific grants of authority are in turn subject to the overriding delimiting principle of Art. 43. *See*, eg, HC 69/81 *Abu-Alta et al. v Commander of Judea and Samaria et al.*, 37(2) PD 197, 260 (1983), *translated in* 7 Selected Judgments of the Supreme Court of Israel 1, 54 (1983–87), available at http://elyon1.court.gov.il/files_eng/81/690/000/Z01/81000690.z01.pdf (the powers and delimitations regarding taxation, as set by Art. 48, are subject to those of Art. 43).

[6] *See*, eg, Robert Y. Jennings, *Government in Commission*, 23 BYIL 112, 135 (1946) (the administration of the occupied territory is required to protect two sets of interests: first, to preserve the sovereign rights of the ousted government, and second, to protect the local population from exploitation of both their persons and their property by the occupant).

[7] *See* the internal tensions in Belgium, manipulated by the Germans during World War I, Chapter 5 *infra*.

[8] Similarly the occupant was granted the power to possess and administer property belonging to the occupied state, subject to the duty to "safeguard the capital of these properties, and administer them in accordance with the rules of usufruct" (Art. 55 of the Hague Regulation). As much as this Article prevents the occupant from destroying or depleting national resources, it tries to keep other indigenous aspirants from making use of them.

inhabitants. This latter emphasis is underscored by the complementary application of human rights law that focuses entirely on individuals.

As we saw in Chapter 2, the delegates to the Brussels and Hague Conferences conceived occupation as a transient situation, for the short period between hostilities and the imminent peace treaty, which would translate wartime victories into territorial concessions by the defeated party. The 1870–71 Franco-Prussian War provided a prototype for the drafters of the Hague Regulations of the envisaged occupation: military victories led to the occupation of French territory, part of which was conceded to the Prussians in the subsequent peace treaty of 1871. This conception was part of a more general theory of war in the nineteenth century, in which war was seen as a legitimate means to achieve national goals,[9] a match between governments and their armies, which left out the civilians who were to be kept unharmed as much as possible, both physically and economically. This entrenched conception of war was combined with the political and economic philosophy of that period: laissez-faire was the prevailing economic and even moral theory, shared by all the powers. This theory implied minimal intervention of the government in economic life. There were minimal regulatory mechanisms of transactions and other uses of private rights, and the initial entitlements were the ultimate factor in social and economic activity, inspiring a deep reverence, especially by the state, for vested rights. The minimalist conception of war and the war effort made possible a conception of a laissez-faire type of government even in wartime. The assumption was that the separation of governments from civilians, of public from private interests, would also hold true in times of war. There was not supposed to be any unmanageable conflict between the French citizens and the Prussian king.

It was this conception that made the solution of Article 43 seemingly possible: the peaceful cohabitation of the local population with the enemy's army, with the minimal necessary interaction between them, and with the continuous immunization of the former's private interests from intervention by the latter.[10] The almost complete separation between governmental and private activity could produce an arrangement that satisfied both stronger states and those weaker ones whose citizens were likely to experience temporary foreign rule. The separation of interests provided room for a simple balancing principle of disengagement: the occupant had no interest in the laws of the area under its control except for the security of its troops and the maintenance of order; the ousted sovereign was ready to concede this much in order to ensure maintenance of its bases of power in the territory against competing internal forces and in order to guarantee the humane treatment of its citizens. This solution was supported by the practice of the nineteenth-century occupations. These occupations were of relatively short duration, during which occupants, by and large, retained existing legislation as much as possible.[11]

[9] *See* Jörg M. Mossner, *The Hague Peace Conferences of 1899 and 1907*, 3 EPIL 204, 205 (1982).

[10] A vestige of this approach is the separate treatment of the occupant's power to collect taxes (Art. 48 of the Hague Regulations) and the immunity of private property from confiscation (Art. 46).

[11] Graber, *supra* note 3, at 268–70. The author mentions the pledge made by the Prussians during their occupation of France to re-establish the prewar order and not to modify existing legislation unless military necessity required otherwise. The author also cites both German and French textbooks that affirm that the Prussians abided by their pledge. *Id.*, n. 37.

In this sense, Article 43 was a pact between state elites, promising reciprocal guarantees of political continuity, and thus, at least to a certain extent, rendering the decision to resort to arms less profound.

Even by the time of the first Hague Conference of 1899, the principles underlying the law of occupation had already been on the decline. Toward the end of the nineteenth century the national governments of some European countries began to show more involvement in their countries' economic and social life. These were the first signs of what would be later termed the welfare state. The armies at the turn of the century had also expanded beyond mid-nineteenth-century proportions: their maintenance demanded vast human and material resources, and the civilian population was called upon to provide those resources. Thus, the distinction between soldier and citizen, between private activity and wartime effort, was gradually eroded.[12] These developments were intensified by World War I, the first "total war," by the rise of competing national ideologies concerning the proper functions of the national government in both internal and international affairs, and last, but not at all least, by the advent of the claim for self-determination of peoples and the complementary idea that sovereignty lies in the people and not in its government. Moreover, as it became more difficult to reach accord on the transfer of sovereignty as a result of war, the periods of occupation became longer than before.

As a result of these factors, the balancing mechanism of Article 43 was put under tremendous strain. These factors did not erase the fundamental difference between occupant and sovereign, but the theoretical peaceful coexistence between the former and the local population could not be realistically expected any longer. More and more issues gradually became the objects of unbridgeable conflicts of interest, as the occupant sought to intervene in the affairs of the territory under its control, and at the same time its acts had the potential of causing profound effects in both the public and the private sectors. It was no longer possible to expect the occupant to perform the function of the impartial trustee of the ousted sovereign or the local population; it was no longer feasible to demand that the occupant pay no heed to its own country's interests. As soon as most societies recognized the necessity of some regulation of social and economic activities, policies and goals had to be decided upon and implemented by the central institutions. Thus the mandate of Article 43 to "restore and ensure public order and civil life" has become at best an incomplete instruction to the occupant. Even the simplest function of restoring public order, at a minimal level of intervention, became a profound policy decision, potentially resulting in stagnation of the local economy. Almost every occupation involved a conflict of interests between the occupant and the ousted sovereign, a conflict over policies and goals. Moreover, in some occupations the conflict of interests was further complicated by the appearance of a conflict

[12] *See* Ernst H. Feilchenfeld, The International Economic Law of Belligerent Occupation 6, 17–21 (1942); Julius Stone, Legal Controls of International Conflicts 727–32 (1954).

between the ousted elite and the indigenous community: Article 43's bias in favor of the former was challenged by the emerging principles of self-determination, self-rule, and human rights.

In the scholarly debate that ensued concerning the legality of occupation measures from World War I until the present, Article 43 was invariably invoked by the advocates of occupants and occupied alike, by partial and impartial tribunals and jurists, by institutions of the occupied entities, and by some—although not the majority—of the occupants.[13] Although, as Ernst Feilchenfeld rightly observed in 1942, the Hague Regulations reflected "a seeming legal paradise,"[14] there was simply no better mechanism to regulate occupations that states were able to endorse.

4.1.2 Article 64 GCIV: Focusing on human welfare

These challenges to the Article 43 regime informed the efforts to redefine the law on occupations as part of the negotiations over the GCIV. As will be discussed *infra*, the debates during the negotiations and the drafting of the Convention in the wake of World War II exposed disagreements between post-war occupants of Axis territories who were interested in having as much latitude as possible, and the smaller countries, many of them with fresh memories of the predicament of occupation, who adamantly opposed an expansive view of occupants' powers. The Geneva law differs from the Hague law in three important aspects, derived from the experiences of the preceding war and growing respect for the human dimension. The first fundamental difference is the changing emphasis from the political interests of the ousted regime to the protection of the population in the enemy's hands. This is the general approach of the GCIV, apparent in its title and its provisions, which de-emphasize the importance of the mode of governance in the occupied area.[15] As discussed in Chapter 1, the Hague Regulations assumed that upon gaining control over territory, the occupant would establish its authority over the occupied population, and introduce a system of direct administration. But by World War II it became clear that the framework of the law of occupation, with the obligations it imposed on the occupying armies, was a liability many occupants sought to avoid. Occupants would purport to annex or establish puppet states or governments, rely on "invitations" from indigenous governments, use non-state actors as proxies to control parts of a

[13] Feilchenfeld and Stone represent a significant minority of scholars who admonished about the precariousness of the status of the Hague law: *supra* note 12. For a similar concern *see* Davis P. Goodman, *The Need for a Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573 (1985). MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 746 (1961), have also injected a more realistic view into the study of this issue.

[14] *Supra* note 12, at 24. His concerns were not shared by many others. Only Stone, writing in 1954, reiterated Feilchenfeld's views, adding that the GCIV had not provided the necessary reform. *Supra* note 12, at 727.

[15] There is no implied recognition of the legality of such changes. The Red Cross's commentary asserts that "the reference to annexation in this Article cannot be considered as implying recognition of this manner of acquiring sovereignty:" GENEVA CONVENTIONS OF AUGUST 12, 1949 COMMENTARY: THE FOURTH GENEVA CONVENTION, 276 (Jean S. Pictet ed., 1958). This conclusion is enhanced by the continued applicability of the Hague Regulations, as provided by Art. 154.

foreign state, or simply refrain from establishing any form of administration. In these cases, the occupants would tend not to acknowledge the applicability of the law of occupation to their own or their surrogates' activities, and when using surrogate institutions, would deny any international responsibility for the latter's actions. Therefore, instead of explicitly asserting a duty to establish an occupation regime, a move for which there was probably little support,[16] the GCIV opted for an indirect approach. Article 47 of the GCIV provides that

> the benefits under the Convention shall not be affected by any change introduced, as a result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.[17]

In other words, the formal status granted to the administration of an occupied territory by the foreign army that is in charge carries no legal significance from the perspective of the law of occupation. The failure to set up military administration would not relieve the occupant of its duties under the law of occupation: after all, the definition of occupation does not depend on the establishment of an occupation administration. As the Commentary of the International Committee of the Red Cross explains, "[t]he main point, according to the Convention, is that changes made in the internal organization of the State must not lead to protected persons being deprived of the rights and safeguards provided for them."[18] Thus, the practices that loomed large during World War II would not affect the applicability of the Convention.

The second major difference is the shift of attention from the interests of the political elites to the population, and the delineation of a bill of rights for (more accurately a bill of obligations towards) the occupied population, together with a set of internationally approved guidelines for the lawful administration of occupied territories. The claim of ousted kings and governments 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 is not directly addressed; it is simply left outside the focus of the Convention. As we will later see, by eschewing the restrictive approach of Article 43, the Geneva formula recognizes the power and indeed the duty of the occupant to modify the existing law "to fulfil its obligations under the present Convention," which go beyond the other two grants of prescriptive

[16] On the underlying political tensions during the drafting of GCIV *see infra* notes 132–5 and accompanying text.

[17] Or as the British Military Manual of 1958, The War Office, The Law of War on Land, para. 518(2) (1958) states: "The duties and constraints laid upon an Occupant cannot be circumvented by carrying out illegal acts through the instrumentality of a 'puppet government' set up in the occupied territory, or by a system of orders through local government officials operating in occupied territory."

[18] "[T]he text in question is of an essentially humanitarian character; its object is to safeguard human beings and not to protect the political institutions and government machinery of the state as such." COMMENTARY: THE FOURTH GENEVA CONVENTION Pictet, *supra* note 15, at 274.

powers, namely the maintenance of orderly government and the security of the occupant's forces.

The third difference between the Hague and the Geneva approaches, and which derives from the second one, relates to the structure of the occupant's duties and powers. The occupant must be a proactive regulator, no longer the disinterested watch guard envisioned in the Hague Regulations. Thus, there is a reason to infer that the 1949 text reflected the interests of the occupants of that time to ensure wide discretion in rebuilding the postwar economies in the occupied areas. The occupant is regarded as an involved regulator of activities and provider of services. It is required to ensure the humane treatment of protected persons, without discriminating among them, and to respect, among other things, the protected persons' honor, family rights, religious convictions and practices, and manners and customs (Article 27), to facilitate the proper working of all institutions devoted to the care and education of children (Article 51), provide specific labor conditions (Article 52), ensure food and medical supplies of the population (Article 55), maintain medical services (Article 56), and agree to relief schemes and to facilitate them by all means at its disposal (Article 59).

Interestingly enough, the provisions of the GCIV regarding occupation have not been regarded as innovative at the time of their adoption. Rather, it has been generally held that the Geneva rules were in essence little more than a repetition of the Hague Regulations.[19] National courts that adjudicated matters concerning occupied territories continued to refer only or primarily to the Hague Regulations.[20] Probably because of the poor formulation of Article 64, as will be elaborated *infra*, its relevance was lost on international scholars, and Article 43 of the Hague Regulations continued to provide the framework for discussing the occupant's prescriptive powers.[21]

4.1.3 The human rights dimension

A strong influence on the occupation regime comes from human rights law, be it international human rights law, regional human rights treaties, or national laws of human rights if applicable. The major strength of human rights law may derive less from the text of the human rights instruments (the text of the GCIV already contains strong language protecting individual rights) but from the rich body of human rights jurisprudence that developed with peaceful democracies in mind and are now applied to exceptional, even extreme, conditions. The pull of

[19] *See*, eg, Pictet, *supra* note 15, at 335, 614, 617; Morris Greenspan, The Modern Law of Land Warfare 226 (1959); Allan Gerson, Israel, the West Bank and International Law 7 (1977).

[20] *See*, eg, *Aboitz and Co. v Price*, 99 F. Supp. 602 (D. Utah 1951). Similar disregard of Art. 64 was shown by scholars who elaborated on the jurisprudence of the courts in these issues. *See*, eg, Morgenstern, *supra* note 4. Lord Arnold D. McNair & Arthur D. Watts, The Legal Effects of War at 369 n. 6 (4th ed., 1966), give only scant attention to Art. 64.

[21] Some scholars refer to Art. 64 as defining the limits of only penal legislation. *See*, eg, Greenspan, *supra* note 19, at 226. Others fail to mention the Article entirely. Von Glahn's chapter on laws under military occupation (*supra* note 4), refers to the Article only in a footnote, without elaborating on it.

this jurisprudence imposes high standards for occupants to meet, and for courts to approve deviations therefrom. This, together with the institutional support of specialized human rights courts and committees, contributed to the significant impact that human rights law has had on occupation law, despite the late arrival of human rights to this legal scene.

The parallel applicability of human rights law along with the law of occupation raises the question of the relationship between the two. Human rights documents may complement the law of occupation in specific issues that are treated in more detail in the former.[22] But the real issue, where human rights law seems to differ most dramatically from the law of occupation, lies in the area of civil and political rights and liberties. Civil and political rights receive extensive treatment in human rights instruments, yet are ignored by the GCIV and the Additional Protocol I (API) of 1977. Realistically, one cannot expect occupants to endanger the security of their forces for the purpose of allowing local residents to enjoy liberties and rights that are usually granted in democracies in peacetime. If the political process is lawfully halted for the duration of the occupation, the suspension of political rights seems to be a sensible consequence. Political rights are often among the first to be suspended by occupants, and this propensity has not been criticized as unlawful in principle.[23] In the interplay between the conflicting interests, the law of occupation concedes that certain civil and political rights will from time to time be subjected to other concerns. Ultimately, as in other cases, the occupant is required to balance its interests against those of the occupied community and the ousted government, while guiding itself "by the knowledge that the object and purpose of the [human rights] Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective."[24] Thus, as hostilities subside, and security interests permit, the occupant is expected to restore civil and political rights. Under such circumstances, the human rights documents should serve as guidance for re-establishing civil and political rights in the occupied territory. Under certain circumstances, the occupant's human rights obligations toward the local population may require it to modify the local laws in ways that promote their rights. Moreover, the occupant's authority to rule as well as to modify the law is now subjected to human rights obligations, which arguably mandate the obligation to maintain basic demands of a system based on the rule of law.[25]

The strict restrictions against administrative detention are another potential area of serious conflict between human rights law and occupation law.[26] Other rights, such as the rights of minority groups to maintain their culture and their

[22] *See* Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories since 1967*, 84 AJIL 44, 72–3 (1990). On the applicability of human rights law in occupations *see* Chapter 1 at Section 1.3.2.

[23] *See supra* Chapter 2, text accompanying note 38.

[24] The European Court for Human Rights (ECtHR), *Al-Skeini and Others v United Kingdom*, App. no. 55721/07 (Grand Chamber, July 7, 2011), 162.

[25] On this obligation *see infra* notes 161–5 and accompanying text.

[26] On the tension in the context of the detentions during the occupation of Iraq *see* the judgment of the ECtHR in *Al-Jedda v United Kingdom*, App. no. 27021/08 (Grand Chamber, July 7, 2011).

traditional ways of life also become relevant considerations which must shape the policies that the occupant pursues.

Although certain human rights may be derogated "[i]n time of public emergency which threatens the life of the nation,"[27] not all occupations would qualify as such. Indeed, as the House of Lords noted in the context of the occupation of Iraq, "[i]t is hard to think that these conditions could ever be met when a state had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw."[28]

As noted in Chapter 1, the application of human rights law might don the occupation administration with a sense of normalcy, and human rights law might be invoked by the occupant to expand its authority and lawmaking power. But this is not necessarily the case, and as will be explored further *infra* (Section 4.3.3), the same body of human rights law may impose strict demands on the occupant such as the protection of expectations and the obligation to involve the population in decision-making processes that affect their interests.

4.2 The Scope of the Occupation Administration

4.2.1 Generally

The law of occupation, both Hague and Geneva, addresses two distinct but related issues. The first outlines the obligations of the administrating regime, authorizing and requiring it to "take all the measures in his power to restore and ensure, as far as possible, public order and [civil life];"[29] the second refers to the obligation to do so "while respecting, unless absolutely prevented, the laws in force in the country."[30] These are obviously not obligations of result but rather of conduct. They require due diligence. The adequacy of their realization depends on the specific circumstances, including the nature and the duration of the occupation, the resources available to the occupant, the needs of the local population, and the security of the occupant.

During the short-term occupations envisioned by the drafters of the Hague Regulations, these obligations would entail restoring the order that existed prior to the occupation and maintaining it as far as possible, for the brief period anticipated. Upon occupation, the occupant becomes responsible for maintaining public order, and therefore will be held responsible for its omissions in that respect. The occupant is expected to fill the vacuum created by the ousting of the local government, and to maintain its bases of power until the latter's return. Similarly the occupant is granted the power to possess and administer property belonging to the occupied state, subject to the duty to "safeguard the capital of these properties

[27] Article 4(1), 1966 International Covenant on Civil and Political Rights (ICCPR)

[28] *R (on the application of Al-Jedda) (FC) v Secretary of State for Defence* [2007] UKHL 58 (December 12, 2007), at 38 (Lord Bingham).

[29] *See supra* note 1.

[30] In the Brussels Declaration these were two distinct Articles (2 and 3).

and administer them in accordance with the rules of usufruct."[31] As much as this Article prevents the occupant from destroying or depleting national resources, it tries to keep other indigenous aspirants from making use of them. The prevailing doctrine on *debellatio*[32] vividly illustrates the fact that the only relevant political interests (as opposed to economic and social interests) in the Article 43 regime were those of the state elites, not of its citizens. In this sense, the law on occupation promised reciprocal guarantees of political continuity, and thus, at least to a certain extent, rendered the decision to resort to arms less profound.

The phrases in Article 43, "public order" and what should be translated as "civil life," delimit the scope of the occupant's administration. They offer, however, only a vague and intuitive course. Moreover, these phrases are susceptible to changing conceptions regarding the role of the central government in society. Between 1874, when these terms were first coined, and the early twenty-first century, the conceptions regarding the issues involved have changed dramatically. Indeed, they have become the focal point of deep ideological differences between nations. To nineteenth-century politicians and scholars, there was nothing problematic about recognizing the occupant's power to prescribe measures for the purpose of restoring and ensuring public order and civil life. Based on the then-prevailing notions of the proper role of central governments and assumptions as to the short duration and nature of war, giving this power to the occupant did not seem to raise any grave concerns on the part of societies susceptible to occupations. In fact, these terms, which would later be used by occupants as justification for increased intervention in local affairs, were originally elaborated by the delegates of the weaker countries, those most susceptible to being occupied. They wanted to impress this duty upon occupants, who otherwise, they thought, might choose not to get involved in matters concerning the civilian population of an occupied territory.

In the debate over the Brussels Declaration of 1874, it was the Belgian delegate who suggested that "*l'ordre publique*" meant "*la securité ou la sureté generale*," while "*la vie publique*" stood for "*des fonctions sociales, des transactions ordinaires, qui constituent la vie de tous les jours.*"[33] It seems safe to assume that the weaker parties to the Declaration, more than the major powers, wanted to *enlarge* the scope of the occupant's duties toward the local inhabitants, thereby ensuring their ability to return as quickly and as much as possible to their regular daily life. It was not expected at that time that the occupant would have any self-interest in regulating those social functions. Consequently, no one raised the possibility of the occupant's intervention in these areas to further its own policies. International scholars still viewed the likely motives of the occupant to be short-term military concerns, not impinging upon the local civil and criminal orders. Indeed, the occupant was not expected to introduce legal changes in the civil and criminal laws. Military

[31] Article 55.

[32] Chapter 1 at note 39, Chapter 3 at notes 76–8 and accompanying text; Chapter 6 at notes 18–20, 141–51.

[33] *See* protocol session 12 August at p. 23.

necessity, a recognized justification for legislation by the occupant, did not seem to be linked with those areas.[34]

With the advent of the twentieth century and the ever-increasing regulation of the markets and other social activities by central governments, especially during and after hostilities, the duty imposed on the occupant turned into a grant of authority to prescribe and create changes in a wide spectrum of affairs. With the modern conceptions of the state, both in the Western world and in socialist countries, it became "difficult to point with much confidence to any of the usual subjects of governmental action as being *a-priori* excluded from the sphere of administrative authority conferred upon the occupant."[35] Indeed, the term "*l'ordre et la vie publics*," in an interesting historical twist, was soon invoked by the occupants to justify their extensive use of prescriptive powers.[36] The duty was transformed into a legal tool extensively invoked by occupants in those areas in which they wished to intervene. Article 43 proved an extremely convenient tool for the occupant: if it wished, it could intervene in practically all aspects of life;[37] if it was in its interest to refrain from action, it could invoke the "limits" imposed on its powers.[38]

The dual managerial obligation under Article 43, to "restore and ensure," is composed of two distinct goals. The need to "restore" public order and civil life arises in the wake of hostilities that disrupt the previous order. The restoration process includes immediate acts needed to bring daily life as far as possible back to the previous state of affairs. The occupant's discretion in this process is limited. It is the other term, the command "to ensure," that poses some difficulties. At issue is the extent to which the occupant must adhere to the *status quo ante bellum*. This question becomes more pressing when the occupation is protracted. A strict reading of "ensure," as the preservation of the status quo,[39] could well mean the freezing of the economic infrastructure and stagnation in the occupied territory. Starting with the cessation of actual hostilities, a new era begins, which could continue for many years before the occupation is ended. During this period, "human existence requires organic growth, and it is impossible for a state to mark time indefinitely.

[34] *See* the description of the opinion of the numerous commentators of that period in Graber, *supra* note 3, at 123–5, 132–4, 143–5.

[35] McDougal & Feliciano, *supra* note 13.

[36] *See*, eg, *Grahame v Director of Prosecution* [1947] AD Case no. 103, at 228, 232 (Germany, British Zone of Control, Control Commission Court of Criminal Appeal) ("'l'ordre et la vie publics' [is] a phrase which refers to the whole social, commercial and economic life of the community"). The Israeli High Court of Justice has also subscribed to this view. *See*, eg, *Abu-Alta*, *supra* note 5 (concerning the introduction of a new value-added tax). For other decisions of Israeli courts in this direction, *see infra* Chapter 8.

[37] McDougal & Feliciano, *supra* note 13, at 747 ("Occupants did in fact intervene in and subject to regulation practically every aspect of life in a modern state which legitimate sovereigns themselves are generally wont to regulate"); ODILE DEBBASCH, L'OCCUPATION MILITAIRE 172 (1962) ("L'occupant ...a souvent tenté d'accroître exagérément sa compétence réglementaire et de prendre des mesures que seul le souverain aurait du normalement decider").

[38] This was the position of the British occupation government in post-World War II Tripolitania, where the former denied desperate requests by the local inhabitants to ameliorate their conditions. For a discussion of that occupation, *see* Chapter 6 at Section 6.2.1.7.

[39] This interpretation was suggested in the early period of the Israeli occupation by Justice H. Cohn, in a minority opinion in *The Christian Society for the Sacred Places v Minister of Defence et al.*, 26(1) PD 574 (1972).

Political decisions must be taken, policies have to be formulated and carried out."[40] Could all these decisions be regarded as "ensuring" public order and civil life?

Many occupants have answered this question affirmatively. In implementing the duty "to ensure," they often created a whole cycle of events: new policies brought about new outcomes, which in their turn necessitated multiple other social decisions, and so forth. Since "ensuring" is linked to the wide spectrum of social activity –the "public order and civil life"—it does not take too long after the occupation administration is established for the command "to ensure" to connote not much less than full discretionary powers, amounting to those of a sovereign government.[41] This latitude that Article 43 entrusts to occupants is not a simple matter. The survey of occupations that this book offers shows—and this should not be surprising—that social decisions taken and implemented in occupied territories were never incompatible with outcomes sought by occupants. Often these outcomes proved detrimental to the occupied country.

The emergence of the administrative state, especially during the volatile occupation period as witnessed in the post-World War II occupations, not only led to the recognition of positive obligations of the occupant toward the occupied population, but also to an encompassing view of the occupant's areas of legitimate regulation that go beyond those matters affecting its military interests. The welfare of the population was deemed a worthy goal for the occupant to pursue.[42] With the inclusion of human welfare and the protection of human rights as additional considerations for the occupant to promote, its scope for discretion becomes wide indeed.

The widening scope of policy making by the occupation administration raises worries about a seeming state of normalcy within which an unaccountable occupant operates without a critical review of its measures. Given the inherent conflict of interests that exists in the administration of occupied territories, the multiple tasks facing the occupant, and the fluidity of the law that seeks to restrict the occupant's discretion, this law does not provide a satisfactory normative guideline for occupants and their critics. A way out of this conundrum might be an emphasis on the process, with demands for improved transparency and participation. In particular, occupants should be encouraged to involve the local population in its decision-making processes. The more occupation policies are shaped and implemented with the effective input of the local population, the more credibility will be given to the occupant's assertions of pursuing legitimate goals. Therefore, the law of occupation should reflect the emerging expectation that states offer effective opportunities for participation of individuals in shaping public policies. Such a general obligation is arguably part of general international law which should inform the interpretation

[40] Greenspan, *supra* note 19.

[41] Jörg M. Mossner, *Military Government*, 3 EPIL 269, 273 (1982) (after more than a decade of Israeli occupation, "it is questionable as to whether [the Hague Regulations] prohibit any changes in economic, legal, and cultural affairs whatsoever"); FRANZ VON LISZT, DAS VÖLKERRECHT 491 (12th ed., 1925) ("The longer the occupation lasts, the more comprehensive will be the interference with the administration and legislation of the occupied country for its own sake" (*translated in* Schwenk, *supra* note 1, at 399 n. 25)). On long-term occupations and international law, *see infra* Chapter 8.

[42] McNair & Watts, *supra* note 20, at 30; Debbasch, *supra* note 37, at 172.

of Article 43.[43] Occupants that open up their decision-making processes to public participation would not, by doing so, run foul of the strictures of Article 43. To the contrary, the more there are effective monitoring and review mechanisms over the occupant's discretion, the greater is the likelihood that its policies will reflect a genuine balancing of interests and be accepted as a legitimate implementation of the law.[44]

Finally a word about Article 6(3) of the GCIV which stipulates that the application of the Convention in occupied territory "shall cease one year after the general close of military operations," except that to the extent that the occupant continues to exercise the functions of government in that territory, it would continue to be bound by several of the provisions of the Convention (Articles 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143). With the post-World War II occupations in mind,[45] the expectation was that with time, the need to regulate the relationships between the indigenous population and the occupant would diminish. Moreover, a rigid cut-off date was deemed necessary to time the period when the occupant was expected, and required, to contribute from its own resources to the welfare of the occupied population. As the US delegate pointed out, "the Occupying Power should be bound by the obligations of the Convention only during such time as the institutions of the occupied territory were unable to provide for the needs of the inhabitants." He specifically referred to the Allied occupation of Germany and Japan as demonstrating that "the responsibility of the Occupying Powers for the welfare of the local populations was far less [in 1949] than during the period immediately following hostilities."[46] But occupants rarely invest their own resources in occupied territories, and the necessity to regulate the inherent conflict of interests between occupant and occupied continues throughout the occupation. This provision was not invoked by occupants, and Additional Protocol I reversed it.[47] However, while scholars expressed the opinion that this provision has lost its legal significance,[48] the International Court of Justice (ICJ), in an unexplained "bewildering"[49] statement, refers to this time limit,

[43] On this point *see also* Emma Playfair, *Playing on Principle? Israel's Justification for its Administrative Acts in the Occupied West Bank*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 205, 223 (Emma Playfair ed., 1992), and Chapter 8 at Section 8.5.5 (on changes in the occupant's powers during long-term occupations).

[44] *See* Chapter 12 on external monitoring and enforcement of occupation law.

[45] Some go as far as to suggest that this limit is "a special ad hoc provision" MICHAEL BOTHE, KARL JOSEF PARTSCH, & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 59 (1982).

[46] Final Record of the Diplomatic Conference of Geneva of 1949 ("Final Record"), Vol. IIA, at p. 623.

[47] API, Art. 3(b) ("the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation").

[48] Roberts, *supra* note 22; Ardi Imesis, *Critical Reflections on the International Humanitarian Aspects of the ICJ Wall Advisory Opinion*, 99 AJIL 102, 106 (2005).

[49] YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 283 (2009).

finding that only those Articles referred to in Article 6(3) remain applicable in the West Bank.[50]

4.2.2 The management of natural resources

The Hague Regulations pay particular attention to the occupant's rights and obligations with respect to local property.[51] The occupant may use some of those resources but must also protect them. Most crucially, the occupant is authorized, and in fact is required, to assume control over natural resources in the area, protect them against over-use and pollution, and allocate them equitably and reasonably among the various domestic users. As the ICJ ruled in the *Armed Activities* case, the occupant must "take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory."[52] This authorization, of little significance in nineteenth-century Europe, is of central importance in the current conditions of dwindling supplies of natural resources and increasing demands.

The occupant may use some of the local natural resources for specific purposes. The law of occupation offers two kinds of restrictions on the occupant's use of local resources. One type relates to the identity of the owners of the resource, the other relates to the purpose of the contemplated use. The restrictions related to the type of resource distinguish between private and public property. Private property is protected by several provisions that prohibit confiscation (Hague Regulations, Article 46), pillage (Article 47), and collective punishment (Article 50). Specific private property that can be used for military purposes (such as means of communications and of transportations) may be taken "but must be restored and compensation fixed when peace is made" (Article 53(2)). The occupant is authorized to requisition goods and services in proportion to the resources of an occupied region to accommodate the needs of the army of occupation, but it is obligated to pay for such in cash as far as it is possible (Article 52). The occupant is also authorized to collect contributions (Article 51). It is also authorized to collect taxes "as far as is possible, in accordance with the rules of assessment and incidence in force... to defray the expenses of the administration of the occupied territory" (Article 48).[53]

On the other hand, public property—certain movable property[54] and most immovable property—may be used by the occupant. Two guiding principles limit

[50] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep. 136.

[51] The GCIV also refers to the protection of private (but not public) property (Arts 33, 46, 53).

[52] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment [2005] ICJ Rep. 168, at 244–8.

[53] A question arose during the Israeli occupation of the West bank and Gaza as to whether an occupant was entitled to introduce new types of taxes (ie, a value-added tax), to which the Israeli court of justice gave a positive answer (*Abu-Aita*, *supra* note 5).

[54] Hague Regulations, Art. 53(1): "An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations."

this use.[55] The first limiting principle relates to the extent of the use. Article 55 stipulates that the occupant must administer the immovable property "in accordance with the rules of usufruct,"[56] which "forbid[] wasteful or negligent destruction of the capital value, whether by excessive cutting or mining or other abusive exploitation, contrary to the rules of good husbandry."[57] According to the ICJ in the *Armed Activities* judgment, the excessive exploitation of a foreign country's natural resources could also be regarded as "pillage" and therefore prohibited under Article 47.[58]

The second limiting principle concerns the purpose of the use. The occupant may use the property to meet its security needs, "to the extent necessary for the current administration of the territory and to meet the essential needs of the population."[59] It is generally accepted that the occupant may not use them for its own domestic purposes. The authority and right to use public immovable property for the benefit of the local population also extends to the utilization of natural resources situated in the occupied territory. Despite some controversy in the past, this has been the position of the US in relation to Israel's use of Egyptian oil during the occupation of the Sinai Peninsula.[60] This restriction was acknowledged by the occupants of Iraq in 2003, who informed the President of the UN Security Council that they would "act to ensure that Iraq's oil is protected and used for the benefit of the Iraqi people."[61] There is little doubt today that the condition is binding on all uses of immovable public property.[62] Water resources, like other natural resources, are public immovable property.[63]

[55] Feilchenfeld, *supra* note 12.

[56] "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."

[57] Feilchenfeld *supra* note 12, at 714.

[58] *Supra* note 52, at para. 245.

[59] The Institut de droit international's Bruges Declaration on the Use of Force, 2003, at p. 4 (available at http://www.idi-iil.org/idiE/declarationsE/2003_bru_en.pdf).

[60] *See* US Department of State, *Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez*, 16 ILM 733, 743 (1977) ("property can be taken only for the purposes of the occupation itself"). *See also* Brice M. Clagett & O. Thomas Johnson Jr., *May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?*, 72 AJIL 558, 580–1 (1978); Edward R. Cummings, *Oil Resources in Occupied Arab Territories Under the Law of Belligerent Occupation*, 9 J. Int'l L. & Econ. 533 (1974). On the use of water resources *see* Harold Dichter, *The Legal Status Of Israel's Water Policies In The Occupied Territories*, 35 Harv. Int'l L.J. 565, 592–3 (1994).

[61] Letter from the Permanent Representatives of the UK and the US to the UN addressed to the President of the Security Council of May 8, 2003 (S/2003/538). The Security Council Resolution on Iraq (Res. 1483 of May 22, 2003) reiterated this goal with its decision that all proceeds from export sales of petroleum, petroleum products, and natural gas from Iraq "shall be deposited into the Development Fund for Iraq until such time as an internationally recognized, representative government of Iraq is properly constituted" (Art. 20). On this *see* Chapter 9 at notes 100–104 and accompanying text.

[62] Antonio Cassese, *Powers and Duties of an Occupant in Relation to Land and Natural Resources*, *in* International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip 419, 422 (Emma Playfair ed., 1992).

[63] This was also the position with respect to the water in the West Bank and Gaza: *see* Cassesse, *id.* at 62; Dichter, *supra* note 60, at 565, 592–3. On the right to manage and use maritime resources situated along the occupied territory *see* Chapter 3 at Section 3.1.4.

4.2.3 The external relations of the occupied territory

Nowadays there are few areas of national regulation that are not governed, or at least heavily influenced, by formal or informal international agreements, institutions, or other means of inter-governmental coordination. National policy making routinely involves communication with foreign governments and international bureaucracies. The management of transboundary natural resources might be governed by treaties and subject to regional regimes. The occupant may be faced with several treaties by which the ousted government is bound. Is the occupant bound to comply on behalf of the occupied area with international obligations assumed by the legitimate government prior to the occupation? Is it authorized to undertake new international obligations for the duration of the occupation? Could such negotiations yield agreements that would be binding after the expiration of the occupation period? And similar questions arise for third countries and treaty bodies: must they accept the occupant as representing the state party? May they negotiate with the occupant?

From the perspective of the law of occupation, it would seem that to the extent that public order and civil life depend on complying with formal international obligations and informal "soft law" commitments that the ousted government had assumed prior to the occupation, the occupant should regard itself as bound by those obligations.[64] For example, during the occupation of Iraq the occupation authorities justified their redrafting of the Iraqi labor code by recalling that, as a state party to the International Labour Organization (ILO) Conventions 138 and 182, Iraq was obliged to take affirmative steps towards eliminating child labor.[65] Similarly, new undertakings on behalf of the local populations necessary to "restore and ensure" public order and civil life should also be regarded within the ambit of the occupant's authority to pursue. The law does not restrict the occupant's choice of the legal means it has to realize its duties, and these may include, as we shall later see, changing the law. The occupant may and indeed must, "take *all the measures in his power* to restore, and ensure, as far as possible, public order and safety" (Article 43). The law is mainly interested in the occupant's goals, not in the means it uses to further these goals. As put by Schwarzenberger, "[I]n short, the *ratio* of the rule [of Article 43] is to forestall temptations on the part of the Occupying Power to abuse its discretionary and legislative powers."[66] The same logic would apply with equal force to the authority to coordinate its activities with neighboring states. This

[64] Eyal Benvenisti, *Water Conflicts during the Occupation of Iraq, forthcoming in Agora Future Implications of the Iraq Conflict*, 97 AJIL 860 (2003); Adam Roberts, *Transformative Military Occupation: Applying The Laws Of War And Human Rights*, 100 AJIL 580, 589 (2006): "Traditionally, the laws of war have been seen as the main—even the only—branch of international law applicable to occupations. However, there is no a priori reason why multilateral conventions on other matters should not be applicable to occupied territories."

[65] Coalition Provisional Authority, Order No. 89, Amendments to the Labor Code—Law No. 71 of 1987, CPA/ORD/05 May 2004/89. *See also* Sylvian Vité, *The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights: the Examples of Food, Health and Property*, 90 Int'l Rev. Red Cross 629, 633 (2008).

[66] Georg Schwarzenberger, International Law as applied by International Courts and Tribunals, Vol. II at 201 (1968).

perspective suggests that there should be no a priori restriction on the occupant's authority to negotiate or renegotiate agreements for the duration of the occupation with other states, especially the immediate neighbors.[67]

The same conclusion can be gleaned from other areas of international law that seek to ensure that human activity in a certain territory is not harmful to global welfare. To the extent that compliance with existing international undertakings or committing one to new obligations promotes global interests such as the reduction of pollution, the optimal utilization of transboundary water resources, or the fight against pandemics, such new commitments taken by the occupant should be encouraged rather than rebuked. For this reason, it made ample sense for the Venice Commission to declare in 2009 its expectation that Russia comply with the 1951 Geneva Convention on the Status of Refugees, to which Georgia was a party, in the areas of Georgia under Russian occupation.[68]

In the same vein, the occupant should be encouraged to participate, on behalf of the area it occupies, in regional institutions aimed, for example, at "attaining optimal and sustainable utilization [of the shared watercourses] and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse"[69] because "[t]he management of ecosystems consists of a constant, almost daily balancing of a myriad of demands on a relatively fragile and scarce shared resource."[70] The protection of the interests of all riparian states and peoples dependent on it requires that occupants would be entitled to represent the interests of the occupied territory and its inhabitants in the shared watercourse vis-à-vis neighboring countries, and at the same time assume responsibility vis-à-vis those states for any harm it causes to them by its own management decisions.[71]

Three caveats are called for. A question of conflict of interests may arise when the occupant is itself a riparian of the same transboundary resource. The Israeli occupation of the West Bank, for example, has put Israeli occupation administration in control of water resources shared by Israel and the West Bank (the Mountain Aquifer) or by Israel, the West Bank, and Jordan (the Jordan River).[72] In such cases

[67] On this matter *see infra*, text accompany notes 69–73.

[68] Opinion on the Law on Occupied Territories of Georgia, adopted by the Venice Commission At its 78th Plenary Session (Venice, March 13–14, 2009), Opinion no. 516/2009 CDL-AD(2009)015, available at http://www.venice.coe.int/docs/2009/CDL-AD%282009%29015-e.asp, at para. 17.

[69] Convention on the Law of the Non-navigational Uses of International Watercourses (1997), 36 ILM 700 (1997); GA Res. 51/229, UN GAOR, 51st Session, 99th meeting, UN Doc. A/RES/51/229 (1997), Art. 5(1).

[70] Eyal Benvenisti, Sharing Transboundary Resources 101 (2003).

[71] The more complicated question relates to the responsibility of the occupant to the acts or omissions of individuals in the occupied territory who are not members of its forces or its own nationals. The logic of the law of occupation as allocating responsibilities among states requires that the occupant be held responsible as if it were the lawful government. This responsibility is in itself a reason for assigning the authority to utilize these resources in the first place.

[72] Sharif S. Elmusa, *Dividing Common Water Resources According to International Water Law: The Case of the Palestinian-Israeli Waters*, 35 Nat. Res. J. 223, 225 (1995); Eyal Benvenisti & Haim Gvirtzman, *Harnessing International Law to Determine Israeli-Palestinian Water Rights: The Mountain Aquifer*, 33 Nat. Res. J. 543 (1993); Jamal L. El-Hindi, *The West Bank Aquifer and Conventions Regarding the Laws of Belligerent Occupation*, 11 Mich. J. Int'l L. 1400 (1990).

the concentration of representation of both Israeli and West Bank interests by one authority is an unsatisfactory solution.[73] The second caveat relates to cases of partial occupation of a territory, when the sovereign government controls part of the natural resource, be it a watercourse or an oil field, and conflicts arise between it and the occupant, or between the two and third parties. Awareness to such problematic situations should lead to ad hoc approaches to ensure equitable and sustainable management of the resources in question.

The third and most important caveat relates to occupants who deny the applicability of the occupation regime and instead illegally annex the territory or act through puppet regimes. The UN Security Council often reminds states of their obligation to regard such acts as legally invalid. States must therefore, for example, refrain from signing new treaties with such regimes. But this caveat contains its own caveat: the illegality of the occupant's measures should not adversely affect the population subject to its rule. States must therefore confine their reactions to the illegality to their direct relations with the occupant, while at the same time continue to maintain existing treaty-based relations that benefit the local population. This is emphasized by the ICJ in its *Namibia Advisory Opinion*.[74] The Court makes several distinctions between different types of treaties:

> member States are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia. With respect to existing bilateral treaties, member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation. ***With respect to multilateral treaties, however, the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia.*** It will be for the competent international organs to take specific measures in this respect.

The Court also added that "[i]n general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation."[75] the same rationale applies to bilateral and regional treaties such as free trade areas which ensure the livelihoods of the occupied inhabitants. For example, one might question the appropriateness of the judgment of the European Court of Justice which decided that farmers in northern Cyprus, under Turkish rule through a "Turkish Republic of Northern Cyprus,"[76] could not benefit from the Association Agreement which had been signed between the European Community and Cyprus before the occupation, and thereby imposed an effective economic blockade on that part of the island, with consequent severe economic hardships inflicted

[73] On the management of the water resources of the West Bank *see* Chapter 8 at notes 69–71 and accompanying text.

[74] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] ICJ Rep. 16, at 55, paras 122, 125.

[75] *Id.*, para 125.

[76] On this occupation *see* Chapter 7, at Section 7.4.4.

on the population.[77] As we will see in Chapter 12, there are good reasons, based on human rights concerns, not to apply the prohibition on the non-recognition of unlawful regimes too rigidly on individuals.

The question remains as to the nature and durability of any agreements concluded between the occupant and other states with respect to the management of the occupied territories in those spheres, such as environment protection that are regarded under the occupant's jurisdiction. Because the occupant's authority is essentially limited in time—only as long as it exercises effective control—it cannot create rights and obligations among vis-à-vis other state parties that will last beyond the period of occupation. To draw again from Feilchenfeld,

> though [Article 55] permits the Occupant to let or utilize public land and buildings, sell crops on public land, cut or sell timber, and work mines, *such contract or lease must not extend beyond the termination of the war.* (Emphasis added.)[78]

Agreements between the occupant, as the administrator of the occupied country's natural resources, and neighboring countries—whether or not formally qualified as treaties under the Vienna law on treaties[79]—will be therefore valid for the duration of the occupation, and expire automatically when occupation ends and a new regime comes to power. Such a termination, however, does not suggest that such agreements will not be able to create long-term impact. Any renegotiation of the agreement will have to take into consideration the changed circumstances as a result of the war and occupation, and vested interests that have been crystallized in the meantime. Such uses would, for example, constitute part of the "factors relevant to equitable and reasonable utilization" specified in Article 6 of the Watercourses Convention.[80]

4.2.4 The occupant's forward-looking and post-occupation obligations

The law on occupation is designed to apply while occupation lasts. So far the doctrine has not dealt with the question of the obligation of the occupant in the period leading up to and during the period of the unilateral termination of the occupation. This is mainly due to the fact that most occupations ended either involuntary or by agreement to which the law deferred.[81] In recent years, however, with occupations becoming more a liability than an asset, occupants have chosen to unilaterally withdraw their forces and terminate their effective control, leaving the local population to face up to the challenge of re-establishing public order. Situations

[77] European Court of Justice, C-432/92 *R v Minister of Agriculture, ex parte Anastasiou* [1994] ECR I-3087. For a critical review of this litigation *see* Stefan Talmon, *The Cyprus Question before the European Court of Justice*, 12 EJIL 727 (2001). and *see* Chapter 12 at note 75 and accompanying text.

[78] At 714.

[79] The Vienna law on treaties regards as treaties agreements signed between states, but in this case it will be the occupant, which is distinct from the state, which will be the party to the agreement. On the other hand, Art. 3 does not rule out other types of agreements subject to this law.

[80] Convention on the International Watercourses, *supra* note 69.

[81] Adam Roberts, *Occupation, Military, Termination of, in* Max Planck Encyclopedia of Public International Law (2011). On the long-term effects of occupation measures *see* Chapter 11.

like the termination of the occupation by Israel of Southern Lebanon in 2000, or the so-called "disengagement" from the Gaza Strip in 2005, therefore raise new questions with regard to the transition to the post-occupation era. The first question involves the present-tense obligations of the occupant: do these also entail the taking into account, while occupying a country, the long-term needs of the population also in the post-occupation era? The second question relates to the voluntary decision of an occupant to withdraw from a territory it controls. To what extent must it take into account the needs of the occupied population and ensure them during and immediately following the withdrawal?

My argument here is that the present-tense obligations of the occupant toward the occupied population should be interpreted as also entailing obligations to ensure as much as the occupant possibly can the continuation of "public order and civil life" during and immediately after the termination of the occupation and the transition to indigenous rule.[82] The scope of this obligation deepens and widens in direct relation to the length of the occupation. This obligation is more pronounced in occupations where the occupant becomes actively involved in managing daily life and controls the institutions that run local public institutions, and the local population thus becomes reliant on them. As dependency on the occupant widens and deepens, so grows the responsibility of the occupant to ensure a smooth transition to indigenous control and to facilitate building of the necessary infrastructure. This is especially the case in so-called humanitarian occupations[83] or transformative occupations[84] that were prompted by the urge to protect the local population from internal persecution. These considerations imply that already during occupation the occupant must take into account the post-occupation period and make the necessary provisions in anticipation of the termination of its control.

The same goes for the obligations of the occupant at the moment of ending the occupation. It is possible, and indeed it is morally necessary, to argue that the unilateral decision to terminate an occupation is not free from legal constraints. Obviously, occupants may often be driven out by force and under conditions that do not leave them time or resources to consider the well-being of the local population they leave behind in their retreat. But when their withdrawal is a matter of choice, circumstances permitting a process of deliberation of a variety of options, the interests of the local population seem to merit attention. This does not mean that occupation should not be terminated, or should become a pretext for prolonging the occupation. What it means is that the plans for the termination should include ensuring public order in civil life for the duration of the termination process

[82] The Hague Regulations, Art. 43 "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety [l'ordre et la vie publics], while respecting, unless absolutely prevented, the laws in force in the country." These obligations extend for the duration of the occupation (as determined by Art. 42) but the text does not preclude the proposition that *during* the occupation the occupant would make provisions for the period immediately after its planned withdrawal.

[83] For a comprehensive treatment of this type of occupations *see* Gregory H. Fox, Humanitarian Occupation (2008). *See also* Chapter 7, the occupations discussed under Section 7.4.

[84] Roberts, *supra* note 64, at 580 (referring to occupation "whose stated purpose (whether or not actually achieved) is to change states that have failed, or have been under tyrannical rule").

and immediately in its aftermath. At times this attention would be minimal—some food, water, and medical supplies—for the duration until the incoming power establishes control. When the withdrawal is planned and executed in an orderly manner, it should include the orderly transfer of control over public buildings and installations, police headquarters and prisons,[85] private buildings such as banks and shopping centers that could become targets of looting, to responsible representatives of the local population, if such can be found. And if circumstances require, and time and resources allow, the occupant may be called upon to build the capacity of the indigenous community before it retreats. The obligation to "ensure, as far as possible, public order and safety" persists till the very end of the occupation.

Similar questions arise with respect to obligations under human rights treaties because they too impose obligations on parties to such treaties that exercise effective control over territory during and after international armed conflicts.[86] The state party which is occupying a foreign land and is considering withdrawing from it may have certain responsibilities toward the population it contemplates leaving behind, in the hands of a power which may not be bound by the same human rights obligations, or which may not be able or willing to ensure them. At least in one case, formally not one of occupation, the matter was raised. The occasion was the transfer of authority over Hong Kong from the United Kingdom (which was a party to the 1966 International Covenant on Civil and Political Rights (ICCPR)) to China (which was not). The Concluding Observations of the Human Rights Committee stated that before and in preparation for the transfer of authority, the transferring state must "take all necessary steps to ensure effective and continued application of the provisions of the Covenant."[87] In principle, a similar statement may also be appropriate in the context of preparations for the transfer of authority from the occupant to indigenous rule.

The withdrawing power may also have a specific obligation in situations where there are substantial grounds for believing that particular individuals or groups are under a real risk of irreparable harm as a consequence of falling into the hands of the

[85] The GCIV specifically mentions the obligation to hand over protected persons who have been accused of offences or convicted by the courts in occupied territory together with the relevant records (Art. 77).

[86] *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion of July 9, 2004, available at http://www.icj-cij.org/docket/files/131/1671.pdf; the *Armed Activities* Judgment, *supra* note 52. For a critical appraisal *see* Aeyal M. Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?*, 18 EJIL 1 (2007).

[87] Concluding Observations of the Human Rights Committee (Hong Kong): United Kingdom of Great Britain and Northern Ireland, November 18, 1996 (CCPR/C/79/Add.69). *See also* Akbar Rasulov, *Revisiting State Succession to Humanitarian Treaties: Is There as Case for Automaticity?*, 14 EJIL 141 (2003); Rein Mullerson, *Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia*, 42 ICLQ 473, 492 (1993); Rhoda Mushkat, *Hong Kong and Succession of Treaties*, 46 ICLQ 181, 191 (1997). Judge Weeramantry's Separate Opinion in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Preliminary Objections [1996] ICJ Rep. (available at http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=f4&case=91&code=bhy&p3=4) upheld that doctrine, stating that human rights and humanitarian treaties can be regarded as an exception to the general "clean slate" approach in state succession because inter alia they "involve no loss of sovereignty or autonomy of the new State, but are merely in line with general principles of protection that flow from the inherent dignity of every human being which is the very foundation of the United Nations Charter" (at 645).

incoming power.[88] A well-established principle of human rights law requires parties not to remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as by torture, in the country to which removal is to be effected or in any country to which the person may subsequently be removed. A higher level of abstraction will stipulate that parties may not hand over persons to the incoming authority by leaving such persons behind.[89] Such persons will definitely include individuals who acted as collaborators or informers to the occupying army and there is reason to believe that the incoming power would subject them to torture. Arguably the same case can be made for people expected to be persecuted by the incoming power, such as gays and lesbians, political dissidents, or members of ethnic minorities.[90] When Israel unilaterally withdrew from South Lebanon (2000) it also opened its borders to the fleeing members of the Israeli-backed militia called the South Lebanon Army. When it withdrew from Gaza in 2005 its Gazan collaborators were resettled within Israel.

Finally, the occupant might also have post-occupation obligations, especially after withdrawing from an area that was held for many years and whose economy and society have become dependent on the occupant. Such a rationale was endorsed by the the Israeli Supreme Court, which regarded the disengagement from Gaza in 2005 as ending the occupation. The court, however, went on to rule that while Israel no longer had effective control over Gaza, it was nevertheless required to ensure the welfare of the inhabitants of Gaza, based on obligations "derived from the state of warfare that currently ensues between Israel and the Hamas organization which controls the Gaza Strip; ... and also from the situation that was created between the State of Israel and the territory of the Gaza Strip after years of Israeli military control in the area, following which the Gaza Strip is now almost totally dependent on Israel for its supply of electricity."[91]

4.3 Stability versus Change: The Level of Respect for the Legal Status Quo

4.3.1 Article 43 Hague Regulations

The second part of Article 43 continues the effort to strike a balance between stability and change, between the interests of the occupant and those of the occupied

[88] Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v The Prime Minister of Israel*, 42 ISRAEL L.R. 101 (2009).

[89] Eyal Benvenisti, *The Law on the Unilateral Termination of Occupation*, in VERÖFFENTLICHUNGEN DES WALTHER-SCHÜCKING-INSTITUTS FÜR INTERNATIONALES RECHT AN DER UNIVERSITÄT KIEL 371 (Andreas Zimmermann & Thomas Giegerich eds, 2009). For the use of the same rationale in an even wider sense *see* Shany, *supra* note 88, at 114–15. *See also* Benjamin Rubin, *Disengagement from the Gaza Strip and Post-Occupation Duties*, 42 ISR. L. REV. 528, 555–60 (2010).

[90] Those are likely to qualify also as refugees under the 1951 Geneva Convention relating to the Status of Refugees (Art. 35 on the prohibition of *refoulement*).

[91] HCJ 9132/07 *Jaber Al-Bassiouni Ahmed v Prime Minister et al.*, trans. available at http://elyon1.court.gov.il/files_eng/07/320/091/n25/07091320.n25.pdf.

population. Implicit in the duty to respect "unless absolutely prevented, the laws in force in the country" is the recognition of the occupant's power to prescribe laws or otherwise act in ways not in conformity with the legal system that was laid down by the sovereign government. This implicit recognition was the only issue regarding Article 43 that was contested during the 1899 Hague Peace Conference.[92] Beernaert, the delegate of Belgium, and den Beer Portugael, of the Netherlands, opposed the inclusion of Article 3 of the Brussels Declaration (which used the more permissive term "unless necessary") in the proposed Hague Regulations. Beernaert explained that he did not want officially to sanction such a power: "The country invaded submits to the law of the invader; that is a fact; that is might; but we should not legalize the exercise of this power in advance, and admit that might makes right."[93] Several formulations were put forward, trying to satisfy strong and weak countries alike.[94] The compromise that was finally agreed upon, suggested by the French delegate Bilhourd, probably seemed more acceptable to the representatives of the weaker states, because "respecting" and "unless absolutely prevented" seemed more restrictive than the phrases "maintaining" and "unless necessary" in the Brussels Declaration.[95] In retrospect, this change of tone proved of little value. From the point of view of the occupants, the meaning of "unless absolutely prevented" remained conveniently vague. The Belgians, on the other hand, did not consider themselves hindered by this Article from claiming that the German occupant of their land during World War I (or any other occupant, for that matter) had no power to enact binding laws.[96]

The requirement to "respect" the existing laws "unless absolutely prevented" has no meaning of its own, since the occupant is almost never absolutely prevented, in the technical sense, from respecting them.[97] This phrase becomes meaningful only when it is linked to the considerations that the occupants are entitled or required to weigh while contemplating the desirability of change vis-à-vis the interest in stability and respect for the status quo. But delineating the legitimate concerns of the occupant is not enough. One must also determine the proper balances: the desired balance between stability and change in general, and the balance between the conflicting considerations that the occupant faces in a particular matter. Thus, if general emphasis should be laid on maintaining the status quo, then no conflicting acts would be permitted unless (for example) the public order had deteriorated significantly. More particularly, if the occupant's security interests merit no more deference than does the welfare of the population, then not all changes that may promote its army's needs would be deemed lawful. On the other hand, if the general emphasis is on change and not on stability, then the vague phrase "unless absolutely prevented" would merely create a weak presumption in favor of the pre-occupation law, and the question of whether to enact new laws will not be very different from the same question posed to any sovereign government contemplating new policies.

[92] *See*, eg, William I. Hull, *The Two Hague Conferences and Their Contributions to International Law* 243–5 (1908). [93] Reprinted in *id.* at 244.

[94] A succinct description of the suggestions exists in Graber, *supra* note 3, at 141–3, and Schwenk, *supra* note 1, at 396–7.

[95] The linkage between the duty concerning legislation (to respect local laws unless absolutely prevented) and the duty to restore and ensure public order and civil life, which existed in the Brussels Declaration is retained in Art. 43. It is, nevertheless, widely accepted that the duty to respect local laws is a general principle, which is not limited to issues related to public order and civil life. There is no freedom to disregard local law in other matters, Schwenk, *supra* note 1, at 397.

[96] This was essentially a reiteration of the argument of their delegate to the 1899 Hague Peace Conference. On the later Belgian claims with respect to the 1914–18 occupation, *see supra* note 96, and Chapter 12, text accompanying notes 3–20.

[97] Feilchenfeld, *supra* note 12; Schwenk, *supra* note 1, at 400.

The common view of the drafters of this phrase regarded military necessity as the sole relevant consideration that could "absolutely prevent" an occupant from maintaining the old order.[98] As was mentioned earlier, under the prevailing laissez-faire view at the time, the occupant was not expected, during the anticipated short period of occupation, to have pressing interests in changing the law to regulate the activities of the population, except for what was necessary for the safety of its forces. The only relevant question under this restrictive view would therefore be whether the occupant could—in the technical sense—accommodate its security interests with the existing laws. However, as early as World War I, this test proved to be insufficient as it could not properly conform to the occupant's duty to protect the interests of the local population, interests that at times could be best met by amending the local laws. For example, upon occupying Palestine in 1917, the British military administration promulgated norms concerning food prices, public health and sanitation, cruelty to animals, the cutting down of trees, and rent control. It modified the judicial system by replacing the adversary procedure for the French procedure which was "not calculated to secure expeditious justice," abolished minimum penalties, and increased the discretion of judges "to make punishments more humane."[99]

Scholars in the post-World War II period already conceded other legitimate subjects for the occupant's lawmaking. Von Glahn contended that the occupant might lawfully enact laws for nonmilitary goals. In his view, "the secondary aim of any lawful military occupation is the safeguarding of the welfare of the native population, and this secondary and lawful aim would seem to supply the necessary basis for such new laws that are passed by the occupant for the benefit of the population and are not dictated by his own military necessity and requirements."[100] McNair and Watts drew three grounds for legitimate lawmaking: "the maintenance of order, the safety of [the occupant's] forces and the realization of the legitimate pur-

[98] *See* the many citations in Schwenk, *supra* note 1. *See also* Greenspan, *supra* note 19, at 224 ("if demanded by the exigencies of war"), but Greenspan adds that "[t]hose exigencies may, in fact demand a great deal," and gives as an example the elimination of undemocratic and inhumane institutions. Michael Bothe, *Occupation after Armistice*, 4 EPIL 63 and *Belligerent Occupation*, 4 EPIL 65, 66 (1982) is a post-World War II voice advocating a strict interpretation.

[99] Norman Bentwich, *The Legal Administration of Palestine under the British Military Occupations*, 1 BYBIL 139, 144–6 (1920–21).

[100] According to von Glahn, the view confining lawmaking to military necessity "fails to take cognizance of the fact that there are certain categories of laws which may be necessary during the course of belligerent occupation but which nevertheless have nothing to do with military necessity in the strict sense of the term." Von Glahn, *supra* note 4, at 97. But still, in von Glahn's view, military necessity remains the primary grant of prescription, well before the "public order:" the welfare of the local population is "a secondary aim" of the lawful occupation. *Id.*

pose of his occupation."[101] Debbasch mentioned "la sécurité de l'armée et l'ordre public local" as the two lawful grounds for changing the law.[102]

In addition, especially in light of the oppressive laws that the occupants found in Nazi Germany, some scholars have argued that at times moral arguments, and not only technical difficulties, could be considered as preventing an occupant from respecting local laws and, in fact, requiring change.[103] With the enlargement of the legitimate subjects for changes came a more positive view regarding change in principle. Scholars in that postwar period, all writing from a Western perspective, were less averse to changes to be introduced by the occupant. Thus, some interpreted "absolutely prevented" as meaning "absolute necessity,"[104] or just "necessity."[105] Ernst Feilchenfeld suggested the test of "sufficient justification" to change the law.[106] Still another approach was to use the "reasonableness" test.[107] Reflecting this "moral turn" of the reading of Article 43, the US Army Field Manual included, as a ground for altering or repealing local laws, "[l]Legislation the enforcement of which would be inconsistent with the duties of the occupant, such as laws establishing racial discrimination."[108]

This recognition of broader powers for changing the legal landscape of the occupied territory—and indeed an obligation not to enforce local norms that are incompatible with the obligation to protect the human rights of the occupied population—implied more discretion for the occupant, and less formal constraints on its measures. Realizing that occupants could invoke the needs of the civilian population as grounds for legislation under Article 43, while the law offers "no objective criterion in practice for drawing a distinction between sincere and insincere concern for the civilian population." Yoram Dinstein suggested a "litmus test" for such "sincerity:" the occupants' "show of similar concern for the welfare of its own population."[109] Thus the existence of a law in the occupant's own country will generally serve as evidence of the occupant's lawfulness in introducing a similar law in the occupied territory. This is a practical test, and as such could serve as a useful compass in evaluating occupation measures. But, as Dinstein adds, this could be only a prima facie test, which would have to be subjected to further examination: the social and economic conditions in the two areas could be different, and

[101] McNair & Watts, *supra* note 20. [102] Debbasch, *supra* note 37, at 172.

[103] *See*, eg, McDougal & Feliciano, *supra* note 13, at 770 (the Allied occupants of Germany "may fairly be said to have been 'absolutely prevented' by their own security interests from respecting, for instance, the German laws with respect to the Nazi Party and other Nazi organizations and the 'Nuremberg' racial laws"); similarly, Greenspan, *supra* note 19, at 225 ("If, in those circumstances [of complete German surrender], the victors are not 'absolutely prevented'...from respecting those institutions, then those words have no sensible meaning"). *See also* the British Military Manual of 1958, *supra* note 17, at para. 510 n.l.

[104] *See*, eg, Schwenk, *supra* note 1, at 401 ("It is therefore submitted that the term 'empêchement absolu' means nothing but 'absolute necessity' ").

[105] Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 IYHR 104, 112 (1978) ("absolute prevention means necessity").

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

[107] McDougal & Feliciano, *supra* note 13, at 767; Debbasch, *supra* note 37, at 317; Greenspan, *supra* note 19, at 224 ("International law allows a reasonable latitude in such circumstances").

[108] *The Law of Land Warfare* (US Army Field Manual, FM 27–10, 1956), Art. 371.

[109] Dinstein *supra* note 49, at 121.

communal needs may vary. For example, the imposition of the same labor laws or social security coverage may be deemed beneficial for employees although the real motivation would be the desire to deprive the local market force of its competitive advantage which is cheap labor.[110] It is also necessary to bear in mind that the occupant country's norms might not fit the needs of the occupied peoples, or could facilitate economic union that would hamper the vitality of an independent economy in the occupied area.[111] It is also quite likely that the wholesale duplication of legislation into the occupied territory and the assimilation of the legal landscape of the two regions would effectively amount to a de facto annexation of the occupied territory.[112] For similar reasons the possibility of expanding this "litmus test" by justifying the adoption of new laws or standards as being compatible with international treaties to which the legitimate government is party, while intuitively sensible and often useful, must also not be followed without careful scrutiny. The various scholarly efforts to explore the limits of the occupant's power and duty to modify the legal landscape of the occupied territory can provide no more than general guidelines. No a priori, general formula could substitute the process of analyzing each and every act, taking note of all the relevant interests at stake and the available alternatives.

Having said all that, there is one consideration that merits closer attention. The occupation regime is by its nature transient. The occupant must not seek to effect long-term changes that would complicate the re-establishment of authority by the legitimate government. For this reason, for example, institutional changes that modify the indigenous political institutions must in principle be avoided.[113] Such a concern may have lesser weight in unique situations where the ousted government has been dissolved and the indigenous political institutions are redesigned with the active involvement of the legitimate representatives of the indigenous people engaged in exercising its right to self-determination in the newly emerging state. These are situations of "humanitarian" or "transformative" occupations which will be discussed in Chapters 9 and 10, dealing respectively with the occupations in Iraq and Kosovo.

Having said that, it should be added that certain specific issues have been addressed in greater detail by scholars, and some specific rules have gained wide acceptance. One of these is the rule that occupants may suspend the operation of laws concerning conscription to military service and granting licenses to carry weapons, as well as laws relating to political activity in the territory, such as laws concerning elections to national institutions. Another generally expected act, often required by military necessity, is the suspension of certain civil liberties, such as freedom of speech and freedom of movement.[114] Considerable agreement exists

[110] This was exactly the aim of the German occupant in Belgium during World War I: Larry Zuckerman, The Rape of Belgium 80 (2004).

[111] Katharina Parameswaran, Besatzungsrecht im Wandel 177 (2008).

[112] For a similar critique of this test, *see* Theodore Meron, *Applicability of Multilateral Conventions to Occupied Territories*, 72 AJIL 542, 550 (1978); Roberts, *supra* note 22, at 44, 94.

[113] Dinstein, *supra* note 49, at 124.

[114] *See*, eg, von Glahn, *supra* note 4, at 98–9; Schwenk, *supra* note 1, at 403–4.

among scholars with respect to the occupant's power to regulate the local currency and determine exchange rates.[115] Scholars also generally agree that the indigenous court system should be left intact if it is operative.[116] Other specific issues have received special attention, but no consensus has been formed, for example, regarding the occupant's powers to introduce changes in fiscal laws (including custom duties).[117]

Besides the discussion concerning the scope of the authorized legislation by the occupant, two issues exist with respect to the relevant portions of the local legal system that the occupant should respect: does the duty to respect "*the laws* in force" extend not only to primary legislation but also to secondary legislation and maybe even court precedents? And what weight should be given to the term "the laws *in force in the country*"? Do these laws include new laws introduced by the sovereign government subsequent to the commencement of the occupation, and enforced in the unoccupied part of the country?

Only a very narrow and technical reading of Article 43 can support a claim that the occupant has no duty to respect prescriptions that are not embedded in primary legislation. Public order and civil life are maintained through laws, regulations, court decisions, administrative guidelines, and even customs, all of which form an intricate and balanced system. Even in democratic societies, which differentiate between the legislative powers of the elected parliament and the delegation of authority to other lawmaking bodies, it is accepted that all the prescriptive functions are equally important.[118] Schwenk argued that the legislature, by delegating its legislative authority to other branches, has a priori implicitly consented to any changes made by the occupant and therefore such changes do not have to pass the muster of international law.[119] But this opinion overlooks the fact that by delegating its authority, the legislature did not waive its power to intervene and correct abuses made by the agency to which it delegated power. That opportunity

[115] *See* Feilchenfeld, *supra* note 12, at 70–83; Krzysztof Skubiszewski, Pieniądz na Terytorium Okupowanym [Money in Occupied Territories] (1960) (in Polish, summary in English at 360–83); Arthur Nussbaum, Money in the Law 495 (1950); Francis A. Mann, The Legal Aspect of Money 485–91 (4th ed., 1982); Stone, *supra* note 12, at 718.

[116] Ernst Wolff, *Municipal Courts in Enemy-Occupied Territory*, 29 TGS 99 (1944); Stone, *supra* note 12, at 701; von Glahn, *supra* note 4, at 106.

[117] The specific Article dealing with such laws is Art. 48 of the Hague Convention. On taxation, *see*, eg, Feilchenfeld, *supra* note 12, at 49; Stone, *supra* note 12, at 712–13; Greenspan, *supra* note 19, at 229; McNair & Watts, *supra* note 20, at 386. On custom duties *see*, eg, Feilchenfeld, *supra* note 12, at 83; Stone *supra* note 12, at 712 n. 118; Greenspan, *supra* note 19, at 228; Schwenk, *supra* note 1, at 404; Erik Castrén, The Present Law of War and Neutrality 224 (1954). Of special interest would be the decision of the Israeli Supreme Court in the case of *Abu-Aita*, *supra* note 5, which sanctioned the introduction of value-added tax into the Israeli-occupied territories, and also approved the free passage of goods across the borders between Israel and the territories. *See also infra* Chapter 8, text accompanying notes 138–44.

[118] A glaring example for the different interpretation of the local law by the occupant is the interpretation by the Israeli administration of the definition of "state lands" under local land law. The new interpretation offered the formal legal basis for redefining the immovable property regime in the West Bank: *see* Chapter 8, text accompanying notes 180–1. But cf von Glahn, *supra* note 4, at 99, arguing that "administrative regulations and executive orders are quite sharply distinct from the constitutional and statute law of a country and... they do not constitute as important or as vital a part of the latter's legal structure."

[119] Schwenk, *supra* note 1, at 408.

to react to abuses or misuses of authority is, of course, lacking under occupation. Hence, the occupant's duty to respect the laws under Article 43 should be construed as including the duty to respect nonstatutory prescriptions,[120] and even the local administration's interpretation of the local statutes and other instruments. Any deviation from such an interpretation should not be justified as a "fresh reading" of the interpreted instrument, but rather by the necessity to deviate from the former operative interpretation, necessity that must be justified under Article 43.

The second question, concerning the effect of new laws introduced by the ousted government after the commencement of the occupation, relates not only to the occupant's discretion but also to the obligations of the ousted government. It is therefore addressed separately in Section 4.4 *infra*.

4.3.2 Article 64 GCIV

This conclusion that the scope and intensity of the occupant's authorities and responsibilities are relatively wide and large under Article 43 is further bolstered by Article 64 of the GCIV, which replaced the negative test of "unless absolutely prevented," with an implied positive authorization for the occupant who

> may subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power...

Furthermore, Article 47 of the GCIV which envisions, without condoning, "change[s] introduced, as the result of the occupation of a territory, into the institutions of government" of the occupied territory, can be possibly read as focusing less on the structure of government and legal framework and more on the specific obligations toward the protected persons who "shall not be deprived... of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government...".

At least until the publication of the first edition of this book, Article 43 of the Hague Regulations continued to provide the framework for discussing the occupant's prescriptive powers.[121] Subsequent scholarship accepted the view that Article 64 effectively produced, in Adam Roberts's view, a "modest modification of Article 43 of the Hague Regulations, allowing a little more scope for changes in the existing local laws."[122] Marco Sassòli proposed that "there are good reasons to consider [Article 64] more precise, *albeit less restrictive* [than Article 43]."[123] Hans-Peter Gasser opined that "[a]lthough Article 64 mentions only criminal law

[120] *See*, eg, Charles de Visscher, *L'occupation de guerre d'après la jurisprudence de la Cour de cassation de Belgique*, 34 LQR 72, 80 (1918); Karl Strupp, Das Internationale Landkriegsrecht 99 n. 2 (1914).

[121] Eyal Benevenisti, *Interpreting Article 64 of the Fourth Geneva Convention: A Reply*, EJIL (*forthcoming*, 2012).

[122] Adam Roberts, *supra* note 64, at 580, 587. *See also* Dinstein *supra* note 49, at 110–12.

[123] Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 EJIL 661, 670–1 (2005). For a similar reading *see* Parameswaran, *supra* note 111, at 173–5.

which remains in force, the entire legal system of the occupied territories is actually meant by this rule."[124] Robert Kolb and Sylvain Vité agree that the scope of application of Geneva 64 is identical to that of Article 43,[125] while Rüdiger Wolfrum offered a different basis for an expansive reading of the lawmaking powers of the occupant following the GCIV (suggesting that Article 43 is supplemented by Article 27 of the GCIV which obliges the occupant to ensure humane treatment).[126] Yutaka Arai-Takahashi explains the broader lawmaking authority under the GCIV also as facilitating the occupant's "role of regulator of socio-economic issues and of provider of services" to the local population.[127]

The argument that Article 64 GCIV went beyond Article 43 is based on the text of Article 64, the humanitarian goals that are the object and purpose of the GCIV, and the drafting process as reflected in the *travaux préparatoires*. Article 64 consists of two paragraphs, the relationship between which is not immediately apparent. The first deals with "penal legislation" (although nowhere in the GCIV 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 Article 64 intended to apply only to "penal" legislation or to all types of lawmaking? If the latter, how is non-penal legislation regulated under the GCIV? The answer to these questions requires a complex analysis. However, once such an analysis is undertaken, the outcome is clear and unequivocal.

[124] Hans-Peter Gasser, *Protection of the Civilian Population*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 237, 286 (Dieter Fleck ed., 2008).

[125] ROBERT KOLB & SYLVAIN VITÉ, LE DROIT DE L'OCCUPATION MILITAIRE: PERSPECTIVES HISTORIQUES ET ENJEUX JURIDIQUES ACTUELS 192–4 (2009).

[126] Rüdiger Wolfrum, *Iraq—from Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference*, 9 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 1, 8 n. 15 (2005).

[127] YUTAKA ARAI-TAKAHASHI, THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW 116 (2009).

There are four possible interprerations of Article 64. The first is that the absence of any explicit mention of non-penal legislation requires that Article 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 almost as if by right.[128] There was little opposition to such extensive legislation even by courts of the returning sovereigns.[129] As Joyce Gutteridge, who participated in the drafting process, observed in 1949, the GCIV "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."[130] 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."[131] In fact, the GCIV was drafted with the aim of imposing on occupants a "heavy burden"[132] *beyond* their duties under the Hague Regulations.[133] It therefore cannot be the case that the drafters of Article 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 is that Article 64 simply does not apply to non-penal lawmaking by the occupant, a matter which continues to be governed by Article 43 of the Hague Regulations. While theoretically conceivable, this interpretation must be ruled out when examined in light of the text, context, purpose, and object of the treaty.[134] The drafting history of the GCIV sheds light on this potential interpretation, and allows us to reject it. When examining the protocols that consist of the Convention's *travaux préparatoires* it is neces-

[128] At the time of drafting the GCIV, Allied occupants were exercising lawmaking powers that went far beyond abolishing the local racial laws. *See* Chapter 6 at notes 95–7, 112, 146 and accompanying text.

[129] *See*, eg, the Italian Court of Cassation in *Du Ban and Icoredit v Public Works Administration* [1960] 40 ILR 467, concerning legislation referred to *supra* note 128.

[130] Joyce A. C. Gutteridge, *The Geneva Conventions of 1949*, 26 BYBIL 294, 324 (1949), at 319.

[131] Final Record, *supra* note 46, Vol. IIA, p. 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).

[132] Report of Committee III to the Plenary Assembly, Final Record, *supra* note 46, Vol. IIA, at p. 816.

[133] This is the reason why Art. 6 of the GCIV 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 period when "the institutions of the occupied territory were unable to provide for the needs of the inhabitants." (Final Record, *supra* note 46, Vol. IIA, p. 623). Note that a US 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 (Final Record, *supra* note 46, Vol. IIA, p. 774, 827).

[134] As mentioned *supra*, the primary objective and overriding purpose of the GCIV is the protection of civilians—not the preservation, intact and unchanged, of the institutions, bases of power, and laws of the ousted sovereign. The GCIV imposes a duty on the occupant to modify laws that are incompatible with the Convention: Dinstein, *supra* note 49, at 113–15.

sary to heed Georg Schwarzenberger's observation that in this Convention there is "a tendency... to hide deep-seated divisions behind a façade of superficially impressive bulk."[135] This warning is particularly apt when interpreting Article 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.[136] The inherent conflict between powerful states, that saw themselves in the potential role of occupants, and smaller, weaker countries that had no difficulty envisioning themselves as being occupied that has plagued the first Hague Peace Conference resurfaced during the drafting of the GCIV, 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.[137] But it was probably useful for them to insist on imposing limits to occupants, anticipating that Western armies would as future occupants invoke the GCIV as a basis for their rule. In short, it is impossible to read the drafting history of the GCIV without paying close attention to the diverse concerns of the different state representatives.

In reviewing the drafting process of the GCIV, close attention should be paid to the views voiced by the representatives of smaller nations, such as the Netherlands and Belgium that, based on historical experience, could not help but regard themselves as future potentially occupied countries. In fact, the *travaux préparatoires* of the GCIV 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 hearing procedures, and 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.[138] The terse and dry protocols of the GCIV 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 GCIV was to do away with the Hague Regulations on all matters to be covered by the GCIV.[139] Therefore, if Draft Article 55 (which later became Article 64) was silent on non-penal legislation (the second possible interpretation mentioned above), it would implicitly have left the regime of Article 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 Article 43.[140]

[135] Schwarzenberger, *supra* note 66, at 350. [136] Chapter 3, text accompanying notes 5–14.

[137] Chapter 6, text accompanying note 31.

[138] The same is true for understanding the intentions of the drafters of the Hague Regulations, as they discussed the scope of legislative authority under Art. 43 of the Hague Regulations, *supra* notes 92–5, and *supra* note 134.

[139] As the draft report of Committee III recalled, "The 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 the Plenary Assembly (on Draft Article 135), Final Record, *supra* note 46, Vol. III, p. 164.

[140] On the interpretation of Art. 43, *see supra* Section 4.3.1.

But when the British representative[141] introduced the version (which, with minor modifications, ultimately prevailed) which referred to "provisions" (rather than "penal laws"[142]), 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 whatever protection was granted by Article 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.[143]

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."[144] 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."[145]

As has become a tradition in the drafting of the law of occupation, the resolution to the problem was proposed by a 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."[146] The ultimate wording was offered by the Norwegian delegation, and it provided that the GCIV "shall be supplementary to Sections II and III of the Hague Regulations."[147] Unfortunately for General Schepers and the other small states

[141] 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 "Existing 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, emphasis added), but that "No right or privilege of the Fascist Party will be recognized, and no legal provision against race or religion will be enforced" (Art. 6). *See* Themistocles L. Chrysanthopoulos, *The British and Greek Military Occupations of the Dodecanese 1945–1948*, 2 REVUE HELLENIQUE DE DROIT INTERNATIONALE 227, 227–8 (1949). 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, dismantling the local police force, and the institution of new civil courts.

[142] 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 paragraph ("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..." (Final Record, *supra* note 46, Vol. III, p. 140). If it was clear that "provisions" meant "penal provision", why add "penal" in parentheses to the proposed text?

[143] Final Record, *supra* note 46, Vol. IIA, at p. 672. [144] *Id.* [145] *Id.* at 675.

[146] *Id.* at 676.

[147] Committee III reports that "[t]his wording is cautious in that it does not attempt to indicate any limitation between the GCIV 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." *Id.* at 846

representatives, despite their best efforts, the report of Committee III could not avoid acknowledging that Article 64 enjoyed at least some precedence over Article 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."[148] This last minute scrambling to reformulate Draft Article 135 would have been superfluous had it been clear that Article 64 was simply silent on non-penal legislation.

The third possible interpretation of Article 64's silence with respect to non-penal lawmaking is that the Article 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 US proposal sought to achieve. Under it, all restrictions on any type of lawmaking by occupants would have been indirectly removed.[149] Second, such a reading is fully compatible with Article 47 of the GCIV, which envisions 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 GCIV obligations).[150] Third, 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.[151] But this third (and radical) interpretation cannot be reconciled with the elaborate discussion of the conditions for lawmaking under the second paragraph of Article 64, and indirectly by the attempts to resuscitate Article 43 by the new version of Draft Article 135 (Article 154 in the final document). That Article 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 Article 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."[152] Limits on non-penal lawmaking were explicitly discussed while dealing with the occupant's obligation to ensure proper labor conditions for protected persons, which resulted in a modification

[148] Final Record, *supra* note 46, Vol III, p. 164, *see also* Final Record, Vol. IIA, p. 787.

[149] The proposal read: "*Until changed by the Occupying Power*, the penal laws of the occupied territory shall remain in force and the tribunals thereof shall continue to function in respect of all offenses covered by the said laws" (Final Record, *supra* note 46, Vol. III, at p. 139 (emphasis added)). In addition, the US proposed to delete para. two of Draft Art. 55 (*id.*).

[150] *See also* Dinstein, *supra* note 49, at 123–5 and Robert Kolb, *Etude sur l'occupation et sur l'article 47 de la IVeme convention de geneve du 12 aout 1949 relative a la protection des personnes civiles en temps de guerre: le degre d'intangibilite des droits en territoire occupe*, 10 African YB Int'l L. 267 (2002).

[151] *See also* Kolb, *supra* note 150, at 271 (noting the role of GCIV as providing a bill of rights for the individuals: "L'optique est individuelle").

[152] Final Record, *supra* note 46, Vol. IIA, at p. 672.

of the French text of Article 51 (to prevent the occupant from invoking its lack of lawmaking authority as a pretext to keep wages low).[153]

Therefore, the only remaining interpretation of Article 64, the one that "logic dictates,"[154] is that Article 64 does address—and indeed delineates—the occupant's authority to legislate both penal and non-penal legislation. As the Pictet Commentary concludes, the GCIV "has taken from [Article 43] those parts essential for the protection of civilian persons."[155] While the first paragraph of Article 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 Article 43.

Following the adoption of the GCIV, the great majority of contemporary commentators generally agreed that Article 64 addressed the occupant's authority to legislate in both penal and non-penal matters. For unarticulated reasons, this prevailing view preferred to read Article 64 as simply a reiteration, "in a more precise and detailed form," of the formula of Article 43.[156] This view indirectly supported an expansive reading of the lawmaking authority under Article 43, a reading that was shared by at least some of the drafters of the GCIV.[157] Morris Greenspan, for example, viewed Article 64 as supporting the proposition that Article 43 allows the occupant to introduce fundamental changes in the institutions of the occu-

[153] 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 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, *supra* note 46, Vol. IIB, p. 416). Paragraph 2 of Art. 51 of the GCIV stipulates in the French text: "La 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 discussion mentioned *supra* confirms that modifications are possible. *See also* Pictet, *supra* note 15, at 298.

[154] Dinstein, *supra* note 49, at 111.

[155] Pictet, *supra* note 15, at 617.

[156] Gutteridge, *supra* note 130, at 324 (1949) (Geneva 64 is "an amplification and clarification" of Hague 43); Pictet, *supra* note 15, at 335: "Article 64 expresses, in a more precise and detailed form, the terms of Article 43"; McNair & Watts, *supra* note 20 (presenting Geneva 64 as authorizing the occupant to make changes in "the law" (ie not only penal law)). Schwarzenberger, *supra* note 66, at 194 ("Beyond [penal legislation], the purposes for which the Occupying Power was entitled to enact its own legislation were specifically enumerated [citing Geneva 64 second para.]. 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 von Glahn, *supra* note 4, ch. 7 (referring solely to Hague 43).

[157] 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, *supra* note 46, Vol. IIA, at p. 624 (emphasis added). This view was not challenged.

pied country.[158] Myres McDougal and Fiorentino 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,"[159] and regarded Article 64 as conferring "just as explicit" lawmaking authority as Article 43.[160] The same conclusion is to be found in the 1956 US Army Field Manual,[161] as well as in the Canadian military manual of 2001.[162] Even the British military manual of 2004, which was finalized while the Iraqi occupation was still ongoing, while retaining the distinction between Article 43 and Article 64, contains quite an expansive reading of Article 43 which is influenced by the GCIV. 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 GCIV]."[163]

Was Article 64 a new development or was it just a confirmation of an expansive lawmaking authority that had already been recognized by Article 43? In my view, it is impossible to deny that Article 64 introduced innovative elements into the law of occupation to enable the occupant to achieve the aims of the GCIV, and thus represents a departure from Article 43, rather than a more precise and detailed expression of it. At the same time, due to the fact that most contemporaneous writers and courts regarded Article 64 as a reiteration of Article 43, the latter continued to provide the framework for discussing the occupant's prescriptive powers.

4.3.3 Human rights

On the one hand, the influence of human rights law may strengthen the lawmaking function of occupants. Several authors have pointed out that the occupant not

[158] Greenspan, *supra* note 19, at 226, *see also* 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." *Id.* at 224.

[159] McDougal & Feliciano, *supra* note 13, at 746 (McDougal and Feliciano held an expansive view on the occupant's lawmaking power under Hague 43: *see id.* at 757–70).

[160] *Id.* 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* 757.

[161] Article 369, *supra* note 108, 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"): "In 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, GCIV, and Article 43, Hague Regulations, to alter, suspend, or repeal such laws. These laws will be administered by the local officials as far as practicable."

[162] Canada. The Law of Armed Conflict at the Operational and Tactical Level B-GJ-005-104/FP-021 (2001), Section 1209, entitled "Law Applicable in Occupied Territory" provides, in para. 2: "If 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).

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

only can suspend local legislation which clearly contravenes international human rights law, but in fact, it must do so, and it must also make new law to introduce "as many changes as is absolutely necessary under its human rights obligations."[164] During the occupation of Iraq, Amnesty International prodded the US and the UK "to suspend the application of Iraqi laws or decrees which contravene international law, while respecting their restrictions regarding other legislative changes as required by the Fourth Geneva Convention," and "to suspend the operations of special Iraqi tribunals which have been operating in violation of international human rights law and standards."[165] In an obiter dictum, Lord Brown of the UK House of Lords suggested that the occupants' obligation to respect Article 43 might be in conflict with its obligation under the European Convention on Human Rights (ECHR), giving the example of Sharia law where "Convention rights would clearly be incompatible with the laws of the territory occupied."[166]

On the other hand, complying with human rights obligations also imposes a rather rigorous legislative discipline on the occupant. Compliance with human rights obligations stipulates adherence to the rule of law. Hence, the occupant's ability to issue retroactive changes in the domestic law is considerably diminished, as well as its ability to operate outside the law, arbitrarily, or for improper goals. Respect for the rule of law, as mandated by human rights treaties, includes, in the words of Lord Bingham, the obligation to govern "by clear and publicly accessible rules" without "any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred."[167] Because limitations on human rights require that they be "in accordance with the law" the European Court of Human Rights (ECtHR) has developed "well established case-law [to the effect that] the words 'in accordance with the law' require the impugned measure both to have some basis in domestic law and to be compatible with the rule of law."[168] This means that "legal discretion granted to the executive [cannot] be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise."[169] In particular, it would be illegal to impose criminal responsibility by retroactive legislation. To limit arbitrariness, the rule of law requirements would entail also an obligation to open up the lawmaking function to allow public participation. Moreover, the exceptional nature of

[164] Sassòli, *supra* note 123, 676–7.

[165] Amnesty International, "Iraq: Responsibilities of the Occupying Powers" (MDE 14/089/2003) at 11 (2003). *See also* Amnesty International, "Iraq: Memorandum on Concerns Related to Legislation Introduced by the Coalition Provisional Authority" (MDE 14/176/2003) at 3, 13–14 (2003).

[166] *Al Skeini and Others v Secretary of State for Defence* [2007] UKHL 26 (Q.B.), at para 129.

[167] "The lawfulness requirement in the [ECHR] addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided." *R (on the application of Gillan (FC) and another (FC)) v Commissioner of Police for the Metropolis and another* [2006] UKHL 12, at para. 34.

[168] *Gillan and Quinton v United Kingdom*, App. no. 4158/05, Judgment (January 12, 2010), 76.

[169] *Id.* at 77.

the occupation regime calls for exceptional measure of review by human rights monitoring bodies and courts. For example, due to the inherent doubt in the impartiality of the occupant as administrator and legislator, the latter may not be granted the same margin of appreciation that sovereigns enjoy, and perhaps no margin at all. While all the inferences from the rule of law requirements under human rights law are yet to be fully explored, what is clear is that human rights law obligations not only enlarge the scope of lawmaking by the occupant, but they also restrain its discretion with respect to both the scope and the process of lawmaking.

4.4 The Rights and Duties of the Ousted Government

During occupation, the ousted government would often attempt to influence life in the occupied area out of concern for its nationals, to undermine the occupant's authority, or both. One way to accomplish such goals is to legislate for the occupied population. Because such legislation could undermine their authority, several occupants have declared the inapplicability of such new legislation to the territories they occupied. The German occupation government in Belgium during World War I, the Allied forces in World War II, and the Israeli administration in 1967 did not recognize such laws as applicable.[170] Some national courts,[171] and a number of scholars[172] have rejected any duty to respect legislation made by the ousted government while it is outside the occupied area. However, the majority of post-World War II scholars, also relying on the practice of various national courts, have agreed that the occupant should give effect to the sovereign's new legislation as long as it addresses those issues in which the occupant has no power to amend the local

[170] *See* Eric Stein, *Application of the Law of the Absent Sovereign in Territories under Belligerent Occupation: The Schio Massacre*, 46 MICH. L. REV. 341, 352–3 (1948); *see also* the US JUDGE ADVOCATE GENERAL'S SCHOOL, LEGAL ASPECTS OF CIVIL AFFAIRS 104 n. 10 (1960), which states that "the belligerent occupant is under no legal obligation to apply laws promulgated by the absent sovereign subsequent to the occupation." The Israeli view is pronounced in Proclamation Concerning Law and Administration (no. 2) of June 7, 1967.

[171] The US Supreme Court held this view with respect to territories occupied by US forces: *Thirty Hogsheads of Sugar v Boyle*, 13 U.S. 191, 9 Cranch 191 (1815); *United States v Rice*, 4 Wheat. 246; 17 U.S. 246, 254; 4 L.Ed. 562 (1819). But cf the opinion of the US Second Circuit with respect to legislation by the exiled Dutch government in *State of the Netherlands v Federal Reserve Bank of New York*, 201 F.2d 455 (2d Cir. 1953), 18 ILR no. 174 ("The legitimate Government should be entitled to legislate over occupied territory insofar as such enactments do not conflict with the legitimate rule of the occupying power").

[172] *See* 3 CHARLES C. HYDE, INTERNATIONAL LAW 1886 (2d ed., 1945), arguing: "The possession by the belligerent occupant of the right to control, maintain or modify the laws that are to obtain within the occupied area is an exclusive one. The territorial sovereign driven therefrom cannot compete with it on an even plane." Dinstein, *supra* note 49, at 113–14, and Stein, *supra* note 170, at 362, suggest that although the occupant has no duty to do so, it might be expedient to respect the new laws in certain circumstances. Wolff, *supra* note 116, at 109, mentions operative difficulties: "from a practical point of view such a division of the legislative power between the legitimate government and the occupant would meet with the greatest difficulties. It is hardly possible to draw the border line between measures dictated by 'absolute necessity' and other measures.... The second doubt concerns the promulgation. The legitimate government will not be able to comply with the provisions contained in its constitutional law about the promulgation of legislative measures."

law, most notably in matters of personal status.[173] Scholars also maintained that even if the occupant does not have to respect such new legislation, the legislation would be regarded as valid nevertheless by the returning sovereigns or by its courts which would apply them retroactively at the end of the occupation.[174] But this response should be qualified, especially if human rights considerations are taken into account. The legislation by the ousted government may disregard the rights and expectations of the occupied population, for reasons such as lack of representation, or indifference or even animosity toward the population in the occupied territory when the ethnic composition of the population in the occupied territory is distinct from that of the ousted government. Similarly, as will be discussed in greater detail in Chapter 11, the retroactive application of laws promulgated during the occupation might unduly harm the rights and the legitimate expectations of the occupied population, and therefore should be limited.

A case in point is the Law on Occupied Territories of Georgia promulgated by Georgia in 2008 with respect to the areas of Abkhazia and South Ossetia occupied by Russia.[175] Among other provisions, this law renders void, invalid, and illegal the acts of bodies other than those authorized by Georgia which exercise legislative, executive, or judicial functions in these areas; prohibits any economic activity which requires a permit under Georgian law but for which such permit was not granted; and prohibits the entry to the occupied territories from the Russian border. In its comment on this law,[176] the Venice Commission commended some parts of the law, in particular the demand that any transaction in real estate property be in accordance with Georgian law. This was regarded to be in line with the law of occupation and quite appropriate for facilitating the return of fugitives. But the Commission also criticized other parts of the law. In its view,

[173] *See* Feilchenfeld, *supra* note 12, at 135, asserting that "one goes too far in assuming, as has been done by various authorities, that an absent sovereign is absolutely precluded from legislating for occupied areas. The sovereignty of the absent sovereign over the region remains in existence and, from a more practical point of view, the occupant may and should have no objection to timely alterations of existing laws by the old sovereign in those fields which the occupant has not seen fit to subject to his own legislative power." For similar views, *see* McNair & Watts, *supra* note 20, at 446; von Glahn, *supra* note 4, at 34–6; Debbasch, *supra* note 37, at 229–33.

[174] "The rule [respecting the local laws] freezes the local law for the period of the belligerent occupation. The disseised sovereign cannot, and the Occupying Power may not [with the exception of the necessities of war], interfere with the *status quo ante bellum*.... In [matters that are not the legitimate legislative concern of the occupant], the legislation of the disseised sovereign is merely ineffective while the occupation lasts,... [and] retroactive application of such legislation [upon the return of the sovereign] is compatible with international law." *supra* note 66, at 201–2. "So far as the inhabitants of the occupied territory are concerned, they can invoke legislation-in-exile only in the courts of the restored sovereign after the occupation." McDougal & Feliciano, *supra* note 13, at 771–3. The Swiss Federal Tribunal has held that the enactments of an exiled government were immediately valid in the occupied territory. The court did not qualify this assertion by subjecting it to the legitimate prescriptive powers of the occupant: "Enactments by the [exiled government] are constitutionally laws of the [country] and applied *ab initio* to the territory occupied... even though they could not be effectively implemented until the liberation...." *Ammon v Royal Dutch Co.*, 21 ILR 25, 27 (1954).

[175] Available at http://www.venice.coe.int/docs/2009/CDL%282009%29004-e.asp. On the occupation *see* Chapter 7.

[176] *Opinion on the Law on Occupied Territories of Georgia*, adopted by the Venice Commission at its 78th Plenary Session (Venice, March 13–14, 2009), Opinion no. 516/2009 CDL-AD(2009)015, available at http://www.venice.coe.int/docs/2009/CDL-AD%282009%29015-e.asp.

A restriction and criminalisation of economic activities necessary for the survival of the population in occupied areas as well as a (potential) restriction and criminalisation of humanitarian aid is contrary to the rule of customary international law that the well-being of the population in occupied areas has to be a basic concern of those involved in a conflict.[177]

The Commission also noted that the prohibition on the activities of indigenous public authorities had to be qualified where as a result "basic human rights would be violated."[178]

Arguably, the same concern with aggressive legislation by the ousted government designed to harm the occupied population applies with equal force to the interpretation and implementation of the ousted sovereign's law by its national courts. For this reason, as will be discussed further in Chapter 12,[179] in partially-occupied countries, occupants tended to suspend the right to appeal from cases decided by courts in the occupied area to a higher court which was situated in the unoccupied part. For similar reasons, national courts in the unoccupied area, just like the ousted government, must heed the interests and rights of the occupied population and refrain from using the national law as a vehicle to undermine public order and civil life in the occupied area.

4.5 Nationals of the Occupying Power

An exception to the principle of limited prescriptive powers of occupants has been recognized in practice and in the literature: the occupant is not bound by the Hague Regulations in prescribing the internal legal relationships among the members of its forces and the nationals who accompany the troops insofar as this does not impinge upon indigenous interests.[180] This can justify the otherwise indefensible judgment of the Israeli Supreme Court in 1949 which regarded the Israeli law directly applicable to Israelis in parts of Jerusalem that during the war were yet to become subject to Israeli law.[181] There is no international obligation to apply the territorial law of the occupied territory (and hence Article 43) to transactions these nationals have

[177] *Id.*, at para. 35. [178] *Id.*, at para. 43.

[179] *See* Chapter 12 at notes 42–4 and accompanying text.

[180] *See*, eg, *The Law of Land Warfare* (US Army Field Manual, FM 27-10, 1956), which states in Section 374: "Military and civilian personnel of the occupying forces and occupation administration and persons accompanying them are not subject to the local law or to the jurisdiction of the local courts of the occupied territory unless expressly made subject thereto by a competent officer of the occupying forces or the occupation administration." But cf Greenspan, *supra* note 19, at 254–6 (the troops will not be subject to local law and jurisdiction, but accompanying civilians may be subject to the local law to be applied by the military tribunals). According to the UK Foreign Marriage Act 1947, a British ceremony of marriage will be administered abroad if at least one of the parties is a member of the army. The Law Commission proposed in 1985 that the same arrangement be extended to civilians who accompany the forces. *See* Geoffrey C. Cheshire, Peter M. North, & James J. Fawcett, Private International Law 565 (11th ed., P. North & J. Fawcett eds, 1987).

[181] Crim A 1/48 *Attorney General for Israel v Sylvester* 1PD 5 (1948) [1948] AD Case no. 190 (February 8, 1949). The court instead asserted that "if international law recognizes that the military commander has certain powers of legislation, *a fortiori* such power is vested in the legislature of the occupant from which the military commander derives his own authority. . . . Accordingly there is no substance in the assertion that the laws that were applied to the occupied territory are invalid because they were issued by the State of Israel and not by the military commander of the occupying forces." This runs against the principle that the occupation administration must be distinct from the state and independent of it. *See also* Chapter 8, text to note 190.

concluded among themselves, and thus national law would often be the applicable law.[182] In practice, the occupant would usually also prevent the local courts of the occupied territory from adjudicating claims regarding these nationals.[183]

With regard to nationals of the occupant who are not related to the latter's forces, the legal situation is not as clear. Some authorities support the territorial principle, according to which the state has no jurisdiction to prescribe, adjudicate, or enforce its laws over its citizens in the occupied area.[184] This was certainly not the practice in Israel, where the nationality principle was applied to regulate the behavior of Israelis in the occupied territories.[185] From the point of view of the law of occupation, it would seem that the test should be whether the application of the national law would have, directly or indirectly, adverse effects on the local public order and on short- and long-term indigenous interests. Usually the application of the nationality principle, in both civil and criminal matters, would not impinge on those concerns, and thus it is arguable that in those cases the nationality principle could replace the territorial principle. But if such measures are liable to affect the indigenous population of the occupied territory, then they ought to pass the scrutiny of international law. One such external outcome of an application of the nationality principle might be the encouragement of nationals to emigrate to the occupied territory. Such an outcome might impinge on the local "public order and civil life," and regarded as "indirect transfer" of one's own population to the occupied territory, and therefore be proscribed by international law.[186]

The discussion in this and the preceding chapters can only offer an abstract analysis of the law of occupation. A better sense of the challenges facing occupants and the ways the occupants responded to them, as well as the possibilities for improving such responses will hopefully be gained by exploring the experience with different occupations in subsequent chapters, and in particular the occupation by Israel of the West Bank and Gaza and the occupation of Iraq.

[182] Thus acts of marriage between members of Allied occupation forces in occupied Germany and Italy have been held valid by the British Probate Court, which preferred the nationality law on the otherwise applicable *lex loci celebrationis*. *See* eg, *Merker v Merker* [1963] P 283; [1962] 3 All E.R. 928; *Preston v Preston* [1963] P 411; [1963] 2 All E.R. 405 (here the husband was a member of the occupation forces while the wife, a civilian, lived in the same army camp). For an in-depth analysis *see* Rain Liivoja, 'An Axiom of Military Law: Applicability of National Criminal Law to Military Personnel and Associated Civilians Abroad', Doctoral Dissertation, submitted to the University of Helsinki, 2011.

[183] *See*, eg, Greenspan, *supra* note 19, at 255.

[184] *See Madsen v Kinsella*, 93 F. Supp. 319, 323 (S.D. W.Va. 1950), *aff'd* 188 F.2d 272 (4th Cir. 1951), *aff'd* 343 U.S. 341 (1952). The case involved a conviction under the German Criminal Code of an American for the murder of her husband. At the relevant time, both had been living in the US occupation zone in Germany, where the husband served as an army officer. Said the court of first instance: "When an American citizen (not a member of the Armed Forces) enters a foreign country, he becomes amenable to the laws of that country, and is triable by its courts. . . ." *See also In re Friess and Ronnenberger* [1947] AD Case no. 80 (decision after World War II by the French Cour de cassation applying French criminal law to acts of two civilians of German nationality who had resided in France during the occupation).

[185] On the law applied to settlers *see* Chapter 8 at text accompanying notes 187 *et seq.*

[186] On the prohibition of indirect transfer *see* Chapter 12, text accompanying notes 130–1.