INTERNATIONAL HUMANITARIAN LAW RESEARCH INITIATIVE

ARTICLE 43 OF THE HAGUE REGULATIONS AND PEACE OPERATIONS IN THE TWENTY-FIRST CENTURY

By

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Summary

Under Article 43 of the Hague Regulations, an occupying power must restore and maintain public order and civil life, including public welfare, in an occupied territory. This is not a result it has to achieve, but an aim it has to pursue with all available proportionate means not prohibited by International Humanitarian Law (IHL) and compatible with International Human Rights law. It may suspend the derogable provisions of the latter — but is not obliged to do so - if necessary for that purpose. Local legislation and institutions based upon such legislation must be respected by an occupying power and by any local authorities acting under the global control of the occupying power. New legislation or derogations from existing legislation are however admissible, for the period of the occupation, if essential for

(1) the security of the occupying power and of its forces,
(2) the implementation of IHL and of International Human Rights Law (as far as the local legislation is contrary to such international law),
(3) the purpose of restoring and maintaining public order and civil life in the territory,
(4) the purpose of enhancing civil life during long-lasting occupations,
(5) or where explicitly so authorized under UN Security Council Resolutions.

These obligations and limitations also apply to post-conflict reconstruction efforts, including constitutional reforms, economic and social policies.

Article 43 also applies to peace operations when they are at all subject to IHL, i.e., UN authorized or mandated operations resulting from an armed conflict or consisting of military occupations meeting no armed resistance, independently of whether the conflict or operation is authorized by the Security Council and of the aim of the operation. IHL is however not applicable if and as long as the operation meets the consent of the state on the territory on which it is deployed. The applicability of IHL to UN run operations, including UN international civil administrations, is more controversial, even when they result from an armed conflict. When Article 43 is not applicable to such a peace operation, the latter is nevertheless confronted with problems similar to those of an occupying power, which deserve solutions similar to those adopted in State practice under Article 43. Limits to such application of Article 43 by analogy are the purpose of the peace operation defined by the UN Security Council, specific instructions by the Security Council and the fact that UN Human Rights standards, even if laid down in soft law instruments, are binding upon UN operations.

Both occupying powers and those involved in peace operations must take into account, when engaged in the restoration or maintenance of public order and civil life according to Article 43 or in legislation permitted under that article, that they are not the sovereign. They should therefore introduce only as many changes as absolutely necessary under Article 43 as understood above and stay as close as possible to similar local standards and the local cultural, legal and economic traditions.

Article 43 of the Hague Regulations of 1907 reads in the most widely adopted English translation[1] of the authentic French[2] text:

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

The International Military Tribunal at Nuremberg has recognized that this provision corresponds to customary international law.[3] However, its precise meaning is unclear. In practice, occupying powers have sometimes invoked its vagueness to justify broad legislative powers, and, at other times, have relied on the obligation to respect local laws "unless absolutely prevented" in order to escape their responsibility to ensure the welfare and normal life of the local population.[4]

Prior to any discussion as to whether and how this rule applies or should apply to peace operations, it is imperative to clarify what the rule implies for the situations for which it was made, i.e., belligerent occupation, including by examining how it has been developed by the Fourth Geneva Convention of 1949 (hereinafter Convention IV).

The three issues — application to peace operations, maintenance of public order and safety, and legislative action by an occupying power — are closely interrelated.

The concept of "peace operations" increasingly covers operations with peace enforcement elements.[5] It is used for both UN run and UN authorized operations.[6] The applicability of International Humanitarian Law (IHL) (including its rules on belligerent occupation) to UN run operations is subject to controversy. Beyond that, because of the fundamental separation between *jus ad bellum* (the rules on the legitimacy of the use of force) and *jus in bello* (the rules

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[1] James B. Scott (ed.), *The Hague Peace Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York: Oxford Univ. Press, 1918).

[2] Indeed, only the French text is authentic: Dietrich Schindler and Jiri Toman, *The Laws of armed conflicts*, 3rd ed. (Dordrecht/Geneva: Nijhoff/Henry Dunant Institute, 1988) at 64.

[3] *Trial of the Major War Criminals,* International Military Tribunal in Nuremberg, published in (1947) 41 AJIL 172, in particular at 248-249. See Eyal Benvenisti, *The International Law of Occupation* (New Jersey: Princeton Univ. Press, 1993) at 8. Article 43 reaffirms rules already contained in the 1874 Brussels Declaration (*cf. infra*, note 9). See also Gerhard Von Glahn, *The Occupation of Enemy Territory – A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis: Univ. of Minnesota Press, 1957) at 95; David Kretzmer, *The Occupation of Justice – The Supreme Court of Israel and the Occupied Territories* (Albany NY: State Univ. of New York Press, 2002) at 57.

[4] Benvenisti, supra note 3 at 11.

[5] Trevor Findlay, in *The Use of Force in UN Peace Operations* (Oxford: Oxford University Press, 2003) indicates that there is a growing consensus that some type of peace enforcement in UN peace operations is possible and desirable. This concept remains controversial, however. While not dealing explicitly with the term "peace enforcement," the *Report of the Panel on United Nations Peace Operations* supports a robust mandate. See *Brahimi Report* 21 August 2000 (A/55/305, S/2000/809) at para. 49.

[6] Adam Roberts and Robert Guelff, eds. *Documents on the Laws of War*, 3rd ed. (Oxford: Oxford University Press, 2002) at 26, indicate that the term applies to UN run and UN authorised peace operations. They refer to "peacekeeping operations, whether conducted under UN *or other* auspices…" (emphasis added). The *Brahimi Report* considers the "NATO-led operations" in Kosovo, which facilitate the functioning of UNMIK in the context of peace operations (supra note 5 at para. 104).

on how force may be used, which comprise IHL)[7], IHL, including Article 43, certainly applies to any other case of belligerent occupation, whether the occupying power acts upon UN authorization, in self-defence, or in violation of *jus ad bellum*.

Article 43 may therefore *de jure* apply to some peace operations. An occupying power willing to withdraw as soon as a stable government is established may anyway be tempted to consider its presence on a territory resulting from an armed conflict as a kind of peace operation. Even beyond that, every occupying power is confronted, when restoring and maintaining public order, with problems more typical for peace-keeping operations (*e.g.* maintaining law and order) than for traditional inter-state warfare.

There is also a close relationship between the maintenance of public order and legislative action. Human rights and the rule of law (indispensable elements in any peace-building effort) demand that the maintenance of public order be based on law. Both an occupying power and an international civil administration restoring and maintaining public order face the question on what legal basis they may arrest, detain and punish persons threatening or breaking public order and to what extent they may change local legislation for that purpose. Similarly, concern for civil life and welfare is not only an important aspect of both peace-building and the maintenance of public order, but perforce involves legislative action.

While all these issues are interrelated, I shall first discuss legal aspects of the occupying power's task of maintaining public order and civil life. Second and more importantly, I shall analyze how far the legislative powers of an occupying power go under IHL, including for the purpose of restoring and maintaining public order and civil life. The results of those two enquiries perforce also apply to peace operations leading to a military occupation to which IHL formally applies. However, I will also inquire whether these results are useful for peace operations to which IHL of belligerent occupation does not apply. The delimitation between those peace operations subject to IHL and those which are not goes beyond my task and I will therefore only summarize my understanding of that debate.

Legal aspects of the obligation to restore and ensure public order and civil life

Field of application: not only security, but also welfare

Article 43 as quoted at the beginning of this paper refers to "public order and safety". This translation of the authentic French words "*l'ordre et la vie publics*" has been criticized. The meaning of "*la vie publique*" is indeed much broader. The legislative history provides good reasons to consider that it encompasses "*des fonctions sociales, des transactions ordinaires, qui constituent la vie de tous les jours*" ("social functions, ordinary transactions which constitute daily life").[8] Many scholars and the Israeli Supreme Court have endorsed this critique. They

[7] See Protocol I at preambular para. 5; the U.S. Military Tribunal at Nuremberg in the case of *Wilhelm List et al.* 8 July 1947 – 19 February 1948, Law Reports of Trials of War Criminals, vol. VIII (The United Nations War Crimes Commission) at 34-76 (see for this and other references Marco Sassòli and Antoine Bouvier, *How Does Law Protect in War?* (Geneva: ICRC, 1999) at 83-87, 665, 681, 682.); Christopher Greenwood, "The Relationship Between *jus ad bellum* and *jus in bello*" (1983) 9 *Review International Studies* 221; François Bugnion, "Guerre juste, guerre d'agression et droit international humanitaire" (2002) 847 *International Review of the Red Cross* 523; Henri Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre* (Paris: Pedone, 1970).

[8] This explanation has been proposed by Baron Lambermont, the Belgian representative at the negotiations for the Brussels Convention of 1874, which never entered into force, but is known as the "Brussels Declaration",

suggest translating "*la vie publique*" as "civil life".[9] This would be in line with the basic premise of IHL, confirmed in the introductory sentence of Article 43, that, if necessary, all functions of government must be provisionally assumed by the occupying power in order to guarantee normal life for the civilian population.

Many aspects of what constitutes "civil life" and the measures an occupying power must, may or may not take to restore or maintain it are governed in detail by specific provisions of the Hague Regulations themselves,[10] of Convention IV[11] or of Protocol I.[12] Those provisions are *lex specialis* in respect to the general rule of Article 43 of the Hague Regulations.

An obligation of means and not of result

As the qualifications "all measures in his power" and "as far as possible" confirm, public order and civil life are not results an occupying power has to guarantee, but only aims it must pursue with all available, lawful and proportionate means. One may argue that the required standard of action is below that with which human rights instruments expect states to comply in fulfilling human rights, in particular social, economic and cultural rights,[13] since, as discussed below, the occupying power is not sovereign and its legislative powers are limited. In addition, the means an occupying power may use are limited by the numerous prohibitions laid down in Convention IV (e.g., of collective punishments, house demolitions, deportations, coercion, torture, taking of hostages[14]). The most traditional way of restoring public order is criminal prosecution of those who breach it, but such prosecutions have to comply with the judicial guarantees set out in Convention IV.[15] The latter offers an occupying power the additional option to subject persons, under various procedural safeguards, to assigned residence or internment "for imperative reasons of security".[16] In my view, this security is not only that of the occupying forces, but, due to the obligation to restore and maintain public order, also that of the inhabitants of the territory.

An obligation subject to the limitations Human Rights Law sets for any state action

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considered to codify many old rules of IHL. Article 43 of the Hague Regulations combines Articles 2 and 3 of the Brussels Declaration. See Ministère des Affaires Etrangères de Belgique, *Actes de la Conférence de Bruxelles de 1874*, p. 23, reproduced in Edmund Schwenk, "Legislative Power of the Military Occupant Under Article 43, Hague Regulations" (1944-1945) 54 *Yale Law Journal* at 393.

[9] *Cf.* Schwenk, ibid., at 393, note 1; Benvenisti, supra note 3 at 9; Myres McDougal and Florentino Feliciano, *Law and Minimum World Public Order* (New Haven and London: Yale Univ. Press, 1961) at 746; Keith A. Berriedale, *Wheaton's Elements of International Law,* 6th ed., (London: Stevens, 1929) at 783. Kretzmer, supra note 3 at 58. Supreme Court of Israel, *Christian Society for Holy Places* v. *Minister of Defense* (1971), summarized in [1972] *Israel Yearbook of Human Rights* at 354.

[10] See, *e.g.* Convention IV, Article 46 on family rights, property and religious practice, Articles 48-52 on taxation, contributions, and requisitions, and Articles 53, 55 and 56 on public property.

[11] Thus, Article 56 is concerned with hygiene and public health, Article 55 with medical and food supplies, Articles 59-62 with relief, Article 57 with hospitals, Article 58 with spiritual assistance, Articles 51 and 52 with labor, working conditions and labor market measures and Article 50 (3) with some aspects of education (Convention IV).

[12] See, *e.g.* Convention IV, Article 69 on relief and Article 63 and 64 (3) on civil defense.

[13] The distinction between an obligation to respect, to protect and to fulfill Human Rights was originally suggested Asbjørn Eide, *Right to adequate food as a human right* (Studies Series No. 1) (New York: United Nations, 1989) at paras. 66-71.

[14] Prohibited by Articles 33, 53, 49, 31, 32 and 34, respectively, of Convention IV.

[15] See Articles 66-74 of Convention IV.

[16] Article 78 of Convention IV.

Public order is restored through police operations, which are governed by domestic law and International Human Rights Law, and not through military operations governed by IHL on the conduct of hostilities. Police operations are not directed at combatants (or civilians directly participating in hostilities) but against civilians (suspected of crimes or threatening public order). While military operations are aimed at weakening the military potential of the enemy, police operations aim to enforce the law and maintain public order. Police operations are subject to many more restrictions than hostilities. To mention but one example, force may be used against civilians only as a last resort after non-violent means have proved unsuccessful in maintaining law and order. As for the use of firearms, it is an extreme measure in police operations,[17] while it is normal against combatants in hostilities.

Human Rights Law on the conduct of police operations, in particular on the use of firearms, may not be suspended even in a situation threatening the life of the nation, as far as it protects the right to life, a non-derogable right.[18] Other human rights that do not belong to "the hard core" may be derogated from in times of emergency, to the extent required by the exigencies of the situation and as long as this derogation is consistent with other international obligations.[19] In my view, under the aforementioned conditions, an occupying power may derogate from certain human rights obligations if necessary to restore and maintain public order in an occupied territory. Even a serious disruption of civil life in an occupied territory could sometimes be considered as "threatening the life of the [occupied] nation". While an occupying power may thus derogate from certain provisions of International Human Rights Law, it is under no obligation to take measures contrary to its full guarantees.

The principle concerning legislation: occupying powers must leave local legislation in force

The text of Article 43 of the Hague Regulations seems to deal with the respect of local legislation by the occupying power only when it restores or ensures public order and civil life, but in fact, the Article constitutes a general rule about the legislative powers of an occupying power.[20] Article 43 does not confer on the occupying power any sovereignty over the occupied territory.[21] The occupant may therefore not extend its own legislation over the occupied territory nor act as a sovereign legislator. It must, as a matter of principle, respect the laws in force in the occupied territory at the beginning of the occupation. Article 43 is an exception clause, the goal of which is not to create privileges for occupants, but rather to

[17] See the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the 9th UN Congress on the Prevention of Crime and Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990).
[18] See ibid., Article 8.
[19] *Cf.* Article 4 (1) of the 1966 *UN Human Rights Covenant on Civil and Political Rights*, Article 15 (1) of the *European Convention on Human Rights*, and Article 27 (1) of the *American Convention on Human* Rights.
[20] Schwenk, supra note 8 at 397. In the Brussels Declaration (see supra note 9) the obligation to restore and ensure public order and civil life and the obligation to respect local laws, unless in case of necessity, were contained in two distinct articles (articles 2 and 3), which became a single article in the Hague Regulations. This means that the obligation to respect local laws (and its exception) must be seen as a general principle.
[21] See Benvenisti, supra note 3 at 8; Von Glahn, supra note 3 at 31; Michael Bothe, "Occupation, Belligerent", in Rudolf Bernhardt (dir.), *Encyclopedia of Public International Law*, *vol. 3*, (Amsterdam: Elsevier, 1997) at 765.

impose restraints on them.[22] This is one aspect of the conservative approach of IHL towards belligerent occupation, criticized by some for its rigidity.[23] We shall see, however, that it allows a considerable amount of flexibility.

The meaning of the term "legislation"

The expression "laws in force in the country" in Article 43 refers not only to laws in the strict sense of the word, but also to the constitution,[24] decrees, ordinances,[25] court precedents (especially in territories of common law tradition),[26] as well as administrative regulations and executive orders, [27] provided that the "norms" in question are general and abstract. While the rule refers to the entire legal system, exceptions apply only to the individual provisions covered by the exceptions that allow an occupying power to legislate (discussed below).

The relationship between Article 43 and Article 64 of Convention IV

Article 64 of Convention IV states:

> The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. […]
>
> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

This provision belongs to the section of the Convention devoted to penal legislation.[28] While the first paragraph explicitly refers to "penal laws", the "provisions" referred to in the second paragraph are not so qualified. Many nevertheless apply the second paragraph exclusively to penal legislation.[29] Apart from the context of the section, they may rely on the fact that Article 66 refers to "penal provisions promulgated […] by virtue of the second

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[22] Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals, vol. II – The Law of Armed Conflict* (London: Stevens and Sons, Ltd., 1968) at 182-183, referring to the case *Milaire* v. *Germany* decided by the Belgian-German Mixed Arbitral Tribunal in 1923.

[23] Robert Kolb, *Ius in bello, Le droit international humanitaire des conflits armés* (Bâle/Bruxelles: Helbing and Lichtenhahn/Bruylant, 2002) at 186-187.

[24] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford Univ. Press, 2004) [Draft as of 11 March 2004] at para 11.11.

[25] Schwenk, supra note 8 at 397.

[26] Benvenisti, supra note 3 at 16.

[27] Von Glahn, supra note 3 at 97 and 99; Ernst H. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Buffalo: William S. Hein & Co. Inc., 2000) (reprint of the original 1942 edition) at 89.

[28] According to the ICRC Commentary, the drafters of the Fourth Geneva Convention were so concerned about penal laws because Article 43 was not sufficiently observed in past conflicts mainly in this respect. See Jean Pictet, *The Geneva Conventions of 12 August 1949: Commentary* (Geneva: ICRC, 1952) at 335.

[29] See for instance Yoram Dinstein, "The International Law of Belligerent Occupation and Human Rights" [1978] I.Y.H.R. at 114; Kretzmer, supra note 3 at 125 and 151; Schwarzenberger, supra note 22 at 194-195.

paragraph of Article 64", which seems to underline that these "provisions" are "penal". However, this reasoning is not compelling. The second paragraph could also have a broader sense and allow an occupying power to subject the local population to any (penal, civil, administrative etc.) laws essential for the purposes it exhaustively enumerates.[30] For the ICRC *Commentary*, the second paragraph expresses "in a more precise and detailed form" the terms "unless absolutely prevented" of Article 43.[31] The preparatory work of Article 64 shows that "it is not a mere coincidence that the adjective 'penal' is missing in the second paragraph".[32]

The text of the second paragraph of Article 64 seems to permit the introduction of new legislation for a purpose — namely, "to maintain the orderly government of the territory" — for which the first paragraph does not permit the repeal or suspension of existing penal legislation. However, according to the maxim "*lex posterior derogat legi anteriori*" any new legislation repeals previous contradictory legislation. The admissibility of penal legislation for the purpose of maintaining orderly government would therefore depend on whether by chance no legislation existed on the very same point prior to the occupation.[33] This absurd result can be avoided if we consider that legislation permissible under the second paragraph may necessarily derogate from previous legislation. Also, legislation contrary to the needs of orderly government may be considered an obstacle to the application of the Convention (one of the justifications for derogations under the first paragraph), given that Article 154 also refers to Article 43 of the Hague Regulations which, of course, obliges an occupying power to maintain such orderly government.

Article 64 (2) therefore permits, in the cases it specifies, changes to all existing local laws. It appears to impose less restrictions on legislative powers than the negative formulation of Article 43 of the Hague Regulations ("unless absolutely prevented"). The ICRC *Commentary* even qualifies the legislative powers of an occupying power as "very extensive and complex".[34] Nevertheless, as only changes "essential"[35] for the admissible purposes are permitted, Article 64 may be seen as interpreting the expression "unless absolutely prevented" contained in the Hague Regulations. Compared with the latter, the newest

[30] Benvenisti, supra note 3 at 101.
[31] Pictet, supra note 28 at 335. Schwarzenberger, supra note 22 at 193.
[32] Benvenisti, supra note 3 at 101-103. Drafting Committee No. 2 of Committee III (in charge of the draft convention on the protection of civilian persons in time of war) at the 1949 Diplomatic Conference had a long debate about future Article 64 and in particular precisely about whether the adjective "penal" should be added to the term "provisions" in the second paragraph (cf. *Final Record of the Diplomatic Conference of Geneva of 1949* (Berne, 1950) vol. III at 139). The draft submitted by the ICRC stated: "The *penal* laws of the Occupied Power shall remain in force […]" (Ibid., vol. I at 122 [emphasis added]). The UK, whose suggested amendment was closest to the finally adopted text, formulated it without specific reference to *penal* laws (Ibid., vol. III at 139). The USSR wanted to limit the provision to penal norms (Ibid., vol. IIA at 670). The Netherlands, a State having been often subject to occupation, insisted, as a way of compromise, on the insertion of an article clarifying the complementary character of the Hague Regulations and the Geneva Conventions (Ibid., vol. IIA at 672). The Drafting Committee finally let Committee III choose between two versions, one referring to "penal provisions", another one more generally to "provisions." The latter was adopted by 20 votes to 8 (Ibid., vol. III at 139). In addition, Article 154 stating that the Convention was "supplementary" to the Hague Regulations was added as part and parcel of the compromise reached about Article 64.
[33] Thus, an occupying power could introduce criminal liability of public officials in an occupied territory for unlawful official acts if no such legislation existed, but not if the previous legislation specifically excluded such liability.
[34] Pictet, supra note 28 at 337.
[35] The French term "indispensable" is even more restrictive and closer to the Hague Regulations.

element in Article 64 is the recognition of the power of the occupant to modify the existing laws in order to "fulfill its obligations under the […] Convention". This may be seen as a simple confirmation of "*lex specialis derogat legi generali*". However, it implies that the terms "unless absolutely prevented" refer not only to cases of material but also of legal necessity.

In conclusion, Article 64 certainly provides a *lex specialis* regarding when an occupying power is absolutely prevented from respecting penal law. In addition, there are good reasons to consider it a more precise, albeit less restrictive formulation of when an occupying power is "absolutely prevented" from applying existing local legislation.

Change of legislation and changes to institutions

Most writers deal with possible changes to the institutions of the occupied country separately, as if they were regulated by a specific norm. It is submitted that "the occupant's competence to establish and operate processes of governmental administration in the territory occupied does not extend to the reconstruction of the fundamental institutions of the occupied area".[36] In my opinion, except for the *lex specialis* on changes affecting courts, judges and public officials,[37] the legal parameter is always Article 43 because local institutions of the occupied country are established by and operate under the law. Institutions and the constitutional order are only one aspect of "the laws in force in the country". The exception "unless absolutely prevented" applies here too. The "active transformation and remodeling of the power and other value processes of the occupied country"[38] admittedly goes much further than simple legislation. An occupying power will only very exceptionally be "absolutely prevented" from *not* undertaking it. It may not, for example, transform "a democratic republic into an absolute monarchy", or "change the regional or racial organizations of an occupied country", or even transform a liberal into a communist economy. [39]

An exception to this so-called Fauchille doctrine, prohibiting changes to the institutions of the occupied territory,[40] is recognized "where a political system constitutes a permanent threat to the maintenance and safety of the military forces of the occupant so that there is 'absolute necessity' to abolish it" (which is clearly a mere application of the general exception "unless absolutely prevented").[41] This would distinguish the denazification carried out by the American Military Government at the end of the Second World War[42] from the German attempts to change the regional organization of Belgium during the First World War,[43] which were unanimously considered to be illegal.[44]

In my view, the cases of post World War II Germany and Japan should anyway not be seen as precedents for admissible changes in institutions.

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[36] McDougal/Feliciano, supra note 9 at 767.
[37] See Articles 64, 66 and 54, respectively, of Convention IV.
[38] McDougal/Feliciano, supra note 9 at 768.
[39] Feilchenfeld, supra note 27 at 89-90.
[40] Paul Fauchille, *Traité de droit international public* (Paris: Rousseau, 1921) at 228 ("Comme la situation est éminemment provisoire, il ne doit pas bouleverser les *institutions* du pays").
[41] Schwenk, supra note 8 at 403.
[42] Ibid., at 407 and McDougal/Feliciano, supra note 9 at 770.
[43] Germany, in particular, adopted a series of legislative measures in view of separating the French-speaking and the Dutch-speaking population of Belgium (*cf.* Von Glahn, supra note 3 at 97).
[44] Feilchenfeld, supra note 27 at 89.

First, although every country may normally choose its political, economic and social system[45] and the right to self-determination of peoples bars an occupying power from making such choices, those two countries had particularly odious regimes that had committed the most serious violations of international law. Second, after World War II, *debellatio* or unconditional surrender were still considered to end the applicability of the law of belligerent occupation,[46] which is clearly no longer the case today because Article 6 (3) and (4) of Convention IV extends the applicability of that Convention beyond the general close of military operations.[47] Third, Article 47 of Convention IV was only adopted in 1949.

Article 47 refers to institutional changes introduced by an occupying power. It states that protected persons "shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the […] territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory." This provision is sometimes misunderstood as prohibiting such changes. Such prohibition is, however, an issue of *jus ad bellum*. *Jus in bello* simply continues to apply despite such changes and such changes do not justify violations of its provisions – including those on the admissibility of legislative changes. The ICRC *Commentary* stresses that "[c]ertain changes might conceivably be necessary and even an improvement […].[t]he text in question is of an essentially humanitarian character; its object is to safeguard human beings and not to protect the political institutions and government machinery of the State as such."[48]

Applicability of Article 43 to legislation made by local authorities under the global control of an occupying power?

Another consequence of Article 47 of Convention IV, understood in conformity with the general rules on State responsibility for conduct directed or controlled by a state,[49] is that a government instituted by the occupying power may not subject the local population to changes going beyond those which could be introduced by the occupying power itself. This

[45] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, [1986] I.C.J. Rep. 14 at para. 258.

[46] Adam Roberts, "What is Military Occupation?" (1984) 55 BYIL 249 at 268-69; Odile Debbasch, *L'occupation militaire – Pouvoirs reconnus aux forces armées hors de leur territoire national* (Paris: LGDJ, 1962) at 250; Allan Gerson, "War, conquered territory, and military occupation in the contemporary international legal system" (1977) 18 *Harvard International Law Journal* 525 at 530-32; Robert Y. Jennings, "Government in Commission" (1946) 23 BYIL 112; The US Military Tribunal at Nuremberg confirmed in the case *Altstötter and others (Justice Trial)*, War Crimes Reports, vol. 6, 1948, p. 1 that the law of military occupation did not apply to the Allied military presence in Germany.

[47] Article 3 (b) of Protocol I goes even further.

[48] Pictet, supra note 28 at 274.

[49] See Article 8 of the *Draft Articles on Responsibility of States for internationally wrongful acts*, United Nations, International Law Commission, *Report on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001)*, UN GAOR, 55th Sess., Supp. No. 10 UN Doc. A/56/10, www.un.org/law/ilc/reports/2001/2001report.htm at 29-365. The ICRC Commentary to Art. 29 of Convention IV considers that when a violation has been committed by local authorities, "what is important is to know where the decision leading to the unlawful act was made, where the intention was formed and the order given." (Pictet, supra note 28, at 212.). In the *Tadic* case, the International Criminal Tribunal for the Former Yugoslavia held however that overall control is the appropriate standard, and not effective control over the conduct to be attributed (*Prosecutor v. Tadic*, (1999), Case No. IT-94-1 (ICTY, Appeals Chamber) at paras. 116-144).

raises the question of when the devolution of governmental authority to a national government is effective enough to end the applicability of IHL on belligerent occupation altogether.[50] Many would make that end depend on the (democratic) legitimacy of a new national government,[51] given that, taking into account the right of the local people to self-determination, a democratic election cannot be considered as a change introduced by the occupying power, even if it was held under the latter's initiative and supervision. That democratically elected government could then end the occupation, even though troops of the former occupying power remain present on the territory of the state, by freely agreeing to their presence.[52]

The main problem with this line of argument is that the legitimacy of the new government is often controversial (as is the question of whether the new government's consent to the continued presence of foreign troops is freely given). International Human Rights Law provides only insufficient indications of such legitimacy, through the right to self-determination, political rights and the rights of minorities.[53] International recognition of such legitimacy, in particular by the UN Security Council, may offer a clearer indication. However, it is precarious to make the (end of) application of IHL dependant on criteria of legitimacy, as this blurs the distinction between *jus ad bellum* and *jus in bello*.

Exceptions to the prohibition to legislate

The words "restore and ensure […] public order and civil life" in Article 43 could be understood as implying that the occupying power is allowed to take only legislative measures with that purpose, *i.e.* concerning the "common interest or the interest of the population".[54] However, as confirmed by Article 64 of Convention IV and the drafting history of the Hague Regulations and prior international instruments on the same topic, an occupying power may also legislate to promote its own military interests.[55] When Article 64 refers to the security of the occupant's forces, it does no more than confirm, though in more permissive terms, what was already admissible under Article 43.[56]

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[50] Article 6 (3) of Convention IV prescribes that the Convention ceases to apply "[i]n the case of occupied territory […] one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions [of the most important articles for our discussion, such as Arts. 47 and 64]." The decisive factor is, therefore, who effectively exercises governmental authority. Art. 3 (b) of Protocol I goes further in prescribing that IHL applies until the termination of the occupation, but such termination must also depend upon who exercises effectively governmental authority.

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

[52] See however the precedent of Northern Cyprus. The European Court of Human Rights considers it to be occupied by Turkey in the cases *Loizidou* v. *Turkey, Merits, E.C.H.R. Reports*, 1996-VI 2216 at 2235-2236, para. 56, and *Cyprus* v. *Turkey*, 10 May 2001, at paras. 69-77, http://hudoc.echr.coe.int.

[53] See Articles 1, 25 and 27 of the UN Covenant on Civil and Political Rights.

[54] Schwenk, supra note 8 at 395, citing Meurer, *Die Volkerrechtliche Stellung der vom Feind besetzten Gebiete* (Tübingen, 1915) at 23.

[55] See Schwenk, supra note 8 at 395-397.

[56] Benvenisti, supra note 3 at 104. See also Schwarzenberger, supra note 22 at 194.

The occupying power may only legislate for the time of the occupation

The task of restoring or ensuring public order and civil life is limited *ratione temporis* to the period of occupation.[57] In accordance with the aim of Article 43 to maintain the existing legislation as far as possible and to limit changes by an occupying power, and because the occupation does not transfer any title of sovereignty, every legislative change made by the occupying power should be commensurate with the transitional and temporary nature of the occupation.

The occupying power may legislate for purposes other than military necessity

The meaning of the exception "unless absolutely prevented" ("*sauf empêchement absolu*") is controversial. Some suggest that it refers to "military necessity".[58] The words "unless absolutely prevented" were however a mere reformulation of the term "necessity" contained in Article 3 of the Brussels Declaration, which, according to its preparatory works, was not meant as a synonym for "military necessity".[59] At the other extreme, some authors simply require sufficient justification to deviate from local legislation.[60] Others consider that "absolute prevention means necessity" and that the adverb "absolutely" is therefore of small consequence.[61] More generally, it is regretted that Article 43 does not offer a fixed criterion to determine which changes are lawful.[62] After the two world wars, courts have indeed accepted a great variety of legislation by occupying powers (including by those that were finally vanquished) as valid.[63] The practice of Israeli courts concerning legislation in the Israeli occupied territories is also very permissive.[64]

Most authors have an intermediate position and mention that, as confirmed by Article 64 of Convention IV, not only the interests of the army of occupation, but also those of the local civil population may prevent an occupying power from applying local legislation.[65] This

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[57] Oppenheim, *International Law – A Treatise, 7th edition edited by Hersch Lauterpacht,* Vol. II, Disputes, War and Neutrality, (London: Longman, 1952) at 436 and 437.

[58] Schwenk, supra note 8 at 393; Morris Greenspan, *The Modern Law of Land Warfare* (Berkley: Univ. of California Press, 1959) at 224; Bothe, supra note 21.

[59] Schwenk, supra note 8 at 401.

[60] Feilchenfeld, supra note 27 at 89.

[61] Dinstein, supra note 29 at 112 citing Schwarzenberger, supra note 22 at 193. Dinstein adds that "[t]he necessity [...] may be derived either from the legitimate interests of the occupant or from concern for the civilian population".

[62] Sylvain Vité, "L'applicabilité du droit international de l'occupation militaire aux activités des organisations internationales" 853 (2004) *International Review of the Red Cross* 17. This article is based upon a larger study by Robert Kolb, Gabriele Porretto and Sylvain Vité, *L'Articulation des règles de droit international humanitaire et de droits de l'homme applicables aux forces internationale et aux administrations civiles internationales transitoires* (Geneva: University Center for International Humanitarian Law, 2003) (mimeotyped version, to be translated and published in English).

[63] For examples see reference to various court cases in Eric David, *Principes de droit des conflits armés*, third edition (Bruxelles: Bruylant, 2002) at 511.

[64] For the practice of the Israeli Supreme Court see Kretzmer, supra note 3 at 61-72.

[65] Schwenk, supra note 8 at 400; Pictet as quoted supra note 48; Debbasch, supra note 46 at 172; Von Glahn, supra note 3 at 97. Arnold D. McNair and Arthur D. Watts, *The Legal Effects of War* (Cambridge: Cambridge Univ. Press, 1966) at 369 mention three grounds for being "absolutely prevented" to respect local laws, namely the maintenance of order, the safety of the occupant and the realization of the legitimate purpose of the occupation.

broader interpretation also corresponds to the practice of allied occupying powers *during* World War II. Nonetheless, the risk of abuse of a broader interpretation should not be neglected, as it is the occupying power that decides whether a legislative act is necessary, and its interpretation is not subject to revision during the occupation.[66]

The occupying power may legislate to ensure its security

Under both Article 43 of the Hague Regulations and Article 64 (2) of Convention IV, the most uncontroversial case of legislation an occupying power may introduce is that *essential*[67] to ensure its security. Such legislation may not, however, prescribe any measure specifically prohibited by IHL (such as collective punishment, house demolitions or deportations).[68] Traditional examples for laws that may be suspended are those concerning conscription, rights of public assembly, and bearing arms.[69]

The occupying power may adopt legislation essential for the implementation of IHL

The reference in Article 64 to legislation essential for (or an obstacle to) the respect of the "Convention [IV]" must be extended to all applicable IHL, since IHL cannot possibly require specific conduct from an occupying power and also prohibit it to legislate for that purpose. To fulfil its various duties under IHL in a non arbitrary way compatible with the principles of the rule of law, and to respect the principle "*nullum crimen sine lege*" in the field of penal law, an occupying power must legislate, including by abrogating provisions of the local legislation contrary to IHL. Examples given in the preparatory works for the necessity to legislate are provisions in the fields of child welfare, labor, food, hygiene and public health.[70] The ICRC *Commentary* mentions "provisions which adversely affect racial or religious minorities" as examples of laws which may be abrogated. As any state Party to Convention IV, an occupying power must also legislate to try persons having committed grave breaches, if such legislation does not yet exist in the occupied territory.[71]

May the occupying power legislate to implement International Human Rights Law?

International Human Rights Law applies also in armed conflicts,[72] but since armed conflicts are situations threatening the life of the nation, most of its guarantees may be suspended under certain conditions.[73] In particular in an occupied territory, the specific provisions of IHL provide for a *lex specialis* on the issues they regulate. However, many issues such as freedom of the press, freedom of opinion, the right to form trade unions or the right to social security are not dealt with by IHL.[74] On other issues, such as the moment from when

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[66] Von Glahn, supra note 3 at 100.

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

[68] *Cf.* Articles 33 (1), 49 (1) and 53 of Convention IV.

[69] *UK Manual*, supra note 24 at para. 11.25.

[70] See *Final Record*, supra note 32, vol. II-A at 672 and 833.

[71] *UK Manual*, supra note 24 at para. 11.26, note 54.

[72] See the UN Human Rights Committee's General Comments No. 29 (CCPR/C/21/Rev.1/Add.11, of 31 August 2001), para. 3, and No. 31 (CCPR/C/74/CRP.4/Rev.6., of 21 April 2004), para.11, as well as *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, [1996] I.C.J. Rep. 226 at para. 25.

[73] See supra note 19 and accompanying text.

[74] Adam Roberts, "Prolonged Military Occupations: the Israeli-Occupied Territories since 1967" (1990) 84 AJIL 44 at 73, also mentions that discrimination in employment, discrimination in education and the import of

an accused must have access to defence counsel, human rights as interpreted by treaty and UN Charter-based mechanisms are more specific. In both cases, human rights standards therefore apply, but in the former case they may be subject to derogations.

Although some current occupying powers seem to deny it,[75] UN practice and judicial decisions clearly indicate that International Human Rights Law binds an occupying power with respect to the population of an occupied territory.[76] The occupying power therefore has an obligation to abolish legislation and institutions, which contravene international human rights standards. While it may derogate from certain provisions due to a situation of emergency, it is certainly not obliged to do so and may therefore change any legislation contrary to the full guarantees of International Human Rights Law.

That IHL does not mention this additional exception to the continuing applicability of local legislation can be easily explained by the fact that when the Hague Regulations were adopted in 1907, International Human Rights Law did not yet exist, and in 1949, when Convention IV was drafted, it was just born.[77] Today, an occupying power has a strong argument that it is "absolutely prevented" from applying local legislation contrary to international law.

Human rights, e.g., the right to a fair trial, women's rights, and in particular social and economic rights often require the state to take positive (including legislative) action. Thus, one may even go so far as to allow the occupying power to adopt new, additional laws that are genuinely necessary to protect International Human Rights Law. However, that body of law often provides only a framework and leaves the State great latitude on how to implement it. As long as local legislation falls within this latitude, an occupying power may certainly not replace it. As the ICRC *Commentary* emphasizes, occupying authorities may not change local legislation "merely to make it accord with their own legal conceptions,"[78] including where those conceptions are also perfectly compatible with international human rights standards.

A difficult question arises when local legislation is clearly contrary to (or insufficient under) human rights standards. May an occupying power then be authorized to exercise (provisionally) the latitude granted to states on how they implement International Human Rights Law? In my view, while such exercise of discretion is contrary to the right to self-determination and to the principle that legislation must be based upon the will of the

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educational materials […] are addressed in considerable detail in certain human rights agreements, and are not so addressed in the law on occupations. In respect of such issues, the application of international human rights standards is highly desirable".

[75] See for Israel Roberts, ibid, at 71-72. The Coalition Provisional Authority Administrator in Iraq, Ambassador Paul Bremer is reported to have stated in a letter to Amnesty International that "the only relevant standard applicable to the Coalition's detention practices is the Fourth Geneva Convention of 1949", see Amnesty International, *Iraq: Memorandum on concerns related to legislation introduced by the Coalition Provisional Authority*, 4 December 2003, (MDE 14/176/2003), http://web.amnesty.org/library/Index/ENGMDE141762003?open&of=ENG-IRQ.

[76] See references in Walter Kälin, *Report on the situation of human rights in Kuwait under Iraqi Occupation*, UN Doc. E/CN.4/1992/26, 16 January 1992, paras 50-59; *Concluding Observations of the Human Rights Committee: Israel. 18/08/98*, UN Doc. CCPR/C/79/Add.93, para. 10; *Loizidou* v. *Turkey,* and *Cyprus* v. *Turkey,* supra note 52; General Comment No. 31 of the UN Human Rights Committee (*cf.* supra note 72), para. 10; *UK Manual*, supra note 24 at para. 11.19.

[77] In 1949, a proposal by the Mexican Delegation to the effect that local legislation could only be modified by the occupier if it violated the "Universal Declaration of the Rights of Man" was rejected (see *Final Record*, supra note 32, vol. IIA at 671).

[78] Pictet, supra note 28 at 336.

people,[79] it is inherent in the situation of occupation and must therefore be accepted until the local people can exercise their right to self-determination. An occupying power must however take into account, while exercising such discretion, that it is not the sovereign, may introduce only as many changes as absolutely necessary under its human rights obligations and must stay as close as possible to similar local standards and the local cultural, legal and economic traditions.

Consequently, in my view, the proper test cannot be whether a similar law exists in the occupier's own country.[80] If, for example, an Anglo-Saxon power occupies a country of Roman-German penal law tradition, the legislation of which would not offer the necessary guarantees of a fair trial, the former could not introduce an adversarial criminal procedure, but only those changes which make an inquisitorial trial compatible with the right to a fair trial. Similarly, an occupying power with a free labor market could not change the local labor legislation to allow free hiring and firing in order to implement the right to work.

A special problem arises in relation to the right to self-determination of peoples. First, while this is a human right, it applies only to peoples. Not every population of an occupied territory is a people. If part of an existing country is occupied where part of a people lives, it would clearly be incompatible with international law if an occupying power encouraged the "self-determination" of the population of that territory. May an occupying power however take legislative action to further the exercise of the right to self-determination of a genuine people living in an occupied territory? In my view, this right cannot be implemented by an occupying power. It is too closely linked to the wishes of the people as it consists of the people's right to make choices, and the ways in which this right can be satisfied are too manifold.

Some would add that the very fact of occupation is incompatible with the right to self-determination. The best way to respect it for an occupying power is not to legislate, but to withdraw. This is however an issue of *jus ad bellum* and this argument cannot be used to deny an occupying power the right to legislate under *jus in bello*. An occupying power confronted with a people in an occupied territory may therefore be considered to be allowed to legislate to create conditions necessary to the exercise by that people of its right to self-determination and abrogate legislation making such an exercise impossible.

The occupying power may legislate where necessary to maintain public order

Beyond the protection of its own security, the protection of the security of the local population is a legitimate aim for legislation by an occupying power. Re-establishing and maintaining order in occupied territories is as much in the interest of the occupying power as in that of the local population. As it must restore and maintain public order, it may also legislate where absolutely necessary for that purpose.

May the occupying power legislate to maintain civil life in an occupied territory?

The most important contribution of an occupying power to civil life in an occupied territory is to maintain the orderly government of the territory. Article 64 (2) of Convention IV

[79] *Cf.* Article 21 (3) of the Universal Declaration of Human Rights.
[80] As suggested by Dinstein, supra note 29 at 113.

explicitly allows it to legislate for that purpose. Beyond that, it must also ensure civil life among the inhabitants of the territory and may legislate for that purpose if the existing legislation or its absence absolutely prevents it from reaching that aim. This includes regulations fixing prices or securing the equitable distribution of food and other commodities, calling up, if necessary, the inhabitants for police duty to assist the regular police in the maintenance of public order, for help with fire fighting or to perform other duties that may be required of citizens for the public good.[81] In practice, aside from the case of legislation contrary to human rights standards already mentioned, legislative action by the occupying power to ensure civil life will mainly be necessary where a failed State is occupied. Here again it must stay as close as possible to similar local standards and the local cultural, legal and economic traditions.

May an occupying power legislate to enhance civil life in an occupied territory?

Sooner or later, a prolonged military occupation faces the need to adopt legislative measures in order to let the occupied country evolve.[82] The legislative function being a continuous, necessary function of every State on which the evolution of civil life depends, a legislative vacuum created by the disruption of the legitimate sovereign must at a certain point in time be filled by the occupying power.[83] It has been suggested that the exception of Article 43 must be interpreted more extensively the longer an occupation lasts.[84] This is particularly evident for the rules on taxation. Article 48 of the Hague Regulations does not seem to exclude tax increases, especially if "such changes […] have been made desirable […], in the case of an extended occupation, [through] general changes in economic conditions. […] If the occupation lasts through several years the lawful sovereign would, in the normal course of events, have found it necessary to modify tax legislation. A complete disregard of these realities may well interfere with the welfare of the country and ultimately with 'public order and safety' as understood in Article 43".[85]

On the other hand, here, too, the risk of abuse exists. Article 43 was adopted originally under the influence of weaker countries that were more susceptible to occupation and thus wished to oblige likely occupants to take care of the civilian population. However, the tendency of the twentieth century state to become more active in regulating economic and social relations and the practice of occupants during the two World Wars have led to the concern that occupying powers invoke their obligation to restore civil life to justify a broad use of legislative powers, thus reversing the original aim of this norm.[86]

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[81] *UK Manual*, supra note 24 at paras 11.16 and 11.25.1. For other examples see reference to various court cases in David, supra note 63 at 507.

[82] Lerquin, "The German Occupation in Belgium and Article 43 of The Hague Convention of the 18th October 1907" (1916) 1 International Law Notes at 55.

[83] Ludwig von Kohler, *The Administration of the Occupied Territories, Vol. I – Belgium*, (Washington DC: Carnegie Foundation for International Peace, 1942) at 6, cited in McDougal/Feliciano, supra note 9 at 746, writes that "the life of the occupied country is not to cease or stand still, but is to find continued fulfillment even under the changed conditions resulting from occupation".

[84] Kolb, supra note 23 at 186.

[85] Feilchenfeld, supra note 27 at 49. See also Roberts, "Prolonged Military Occupations" supra note 74 at 44.

[86] Benvenisti, supra note 3 at 9-11. See also McDougal/Feliciano, supra note 9 at 747, Debbasch, supra note 46 at 172 and Schwarzenberger, supra note 22 at 200-201.

The occupying power may legislate where explicitly authorized to do so by a UN Security Council resolution

Even apart from a peace operation, the UN Security Council may mandate or authorize an occupying power to take certain steps to create conditions in which the population of the occupied territory can freely determine its future, live under the rule of law and enjoy the respect of human rights. It may consider that this necessitates the establishment of new local and national institutions and legal, judicial and economic reform. According to the principles of the rule of law — which are essential to any peace-building effort — all this implies the need to adopt legislation which may go further than what can be justified under the exceptions to the principle of Article 43 discussed up to this point.[87] Only Security Council resolutions can justify such fundamental changes and the devolution of wide legislative powers to local authorities remaining under the global control of the (former) occupying power. Some authors go even one step further and claim that the Security Council may end the occupation altogether, not by changing the facts on the ground, but by re-qualifying a belligerent occupation as an international transitional administration.[88]

Assuming that the International Court of Justice was correct when it held that Article 103 of the UN Charter makes not only the UN Charter, but also binding UN Security Council resolutions prevail over any other international obligation,[89] such resolutions authorizing legislative changes in an occupied territory prevail over the restrictions of Article 43 of the Hague Regulations and Article 64 of Convention IV. Many consider that even Security Council resolutions may not derogate from *jus cogens*.[90] IHL obligations fall under *jus cogens*.[91] However, it is unclear who could determine that a given Security Council resolution violates *jus cogens*.

In my view, any derogation from IHL by the UN Security Council must be explicit. Its resolutions must be interpreted whenever possible in a manner compatible with IHL. First, as mentioned, even the Security Council must comply with *jus cogens*. Second, the mandate of the Security Council to maintain international peace and security consists of enforcing *jus ad bellum*. Just as a state implementing *jus ad bellum* by using force in self-defence or under UN Security Council authorization has to comply with IHL, it follows that any measure

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[87] First, the very constitution of new local authorities necessitates changes, which go beyond the simple implementation of political rights under International Human Rights Law. Second, as long as the occupation lasts (on when an occupation ends see supra, notes 50-53 and accompanying text) the conduct of local authorities, even if freely elected (the European Court of Human Rights considered Northern Cyprus to be occupied by Turkey, supra, note 52), will be attributed to the occupying power (see supra note 52) and is therefore subject, under Article 47 of Convention IV, to the same restraints under IHL than conduct of the occupying power. Newly national authorities will however never comply with the limitations of legislative powers discussed up to now.

[88] Vité, supra note 62 at 28.

[89] Order of 14 April 1992 in the Case *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *US)*, [1992] I.C.J. Rep. at 126.

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

[91] *Report of the ILC,* supra note 49, para. 5 to Article 40, referring to *Nuclear Weapons*, supra note 72 at para. 79. See also *Report of the International Law Commission on the work of its thirty-second session* in *Yearbook of the International Law Commission* 1980, vol. II, Part Two at 46, para. 28, and *The Prosecutor* v. *Zoran Kupreskic and others*, (2000) Case No. IT-95-16-T (ICTY, Trial Chamber, Judgment) at para. 520.

authorized by the Council must be implemented in a manner that respects IHL.[92] A simple encouragement of international efforts to promote legal and judicial reform by an occupying power is certainly too vague to justify an occupying power to legislate beyond what IHL permits.[93]

Application of Article 43 to peace operations

Applicability of IHL of military occupation to peace operations

No clear-cut definition of peace operations exists. As the term is not only used for UN run operations, i.e., not only those established by the UN and under its command and control, one might fear that its use depends more on the (claim of) legitimacy and international support for the operation, than on objective criteria. Most often, peace operations are run by international organizations. The latter, and certainly, the United Nations are not party to the treaties, which set out IHL. As for customary IHL, the denial by the UN that it is *de jure* subject to IHL raises some doubts whether the IHL rules that are customary between States are also customary in armed conflicts involving international organizations. Certainly, in practice, all peace operations are carried out by national contingents that are bound by IHL by virtue of the engagement of their sending States. Is that sufficient to make IHL applicable, even if the organization has command and control? Sending states have at least the general international law obligation not to contribute, through their contingents, to violations of IHL and in particular the obligation "to ensure respect for" IHL under Article 1 common to the Geneva Conventions.[94]

The UN has repeatedly recognized that it is bound by the "principles and spirit" of IHL. While this ostensibly vague commitment may imply a lack of will to be bound to the letter of the law, it may also be interpreted as an expedient way of getting around the fact that some provisions of IHL cannot be applied to the UN since it lacks, e.g., a territory, a penal system, or a population.[95] Finally, where there are gaps in IHL treaties, we may have recourse to the Martens Clause. As Michael Hoffman states, "surely, the dictates of public conscience would

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[92] See Theodor Meron, "Prisoners of War, Civilians and Diplomats in the Gulf Crisis" (1991) 85 AJIL 104 at 106.

[93] The *UK Manual*, supra note 24 at para. 11.11, footnote 15, claims that such encouragement in UN Security Council Resolution 1483 (2003) concerning occupied Iraq justifies US and UK legislation in this field. In fact para, 8 (i) of that resolution simply "requests the Secretary-General to appoint a Special Representative […] whose independent responsibilities shall involve […], in coordination with the [occupying powers], assisting the people of Iraq through: […] encouraging international efforts to promote legal and judicial reform." Such wording is certainly not sufficient as a Security Council mandate releasing the occupying powers from the restraints mentioned in this paper.

[94] See on the whole debate whether IHL applies to UN operations Christopher Greenwood, "International Humanitarian Law and United Nations Military Operations" (1998) 1 *Yearbook of International Humanitarian Law* 3; Claude Emanuelli, *Les actions militaires de l'ONU et le droit international humanitaire* (Montréal: Wilson & Lafleur Ltée, 1995); Claude Emanuelli (ed.), *Les casques bleus: policiers ou combattants?* (Montréal: Wilson & Lafleur Ltée, 1997); Daphna Shraga, "The United Nations as an actor bound by international humanitarian law" in Luigi Condorelli, Anne-Marie La Rosa et Sylvie Scherrer (eds), *Les Nations Unies et le droit international humanitaire, Actes du Colloque international à l'occasion du cinquantième anniversaire des Nations Unies, Genève, 19, 20 et 21 octobre 1995* (Paris: Pedone, 1996) at 317.

[95] David, supra note 63 at 203-204.

require the fullest possible application of IHL where UN-sponsored forces (or those sponsored by a regional organisation) are engaged in combat or military occupation."[96]

As for the applicability of IHL of military occupation to peace forces, some object to the very possibility that at least UN peace forces could be subject to the obligations of an occupying power. It is significant in this respect that the UN Secretary-General's Bulletin on Observance by United Nations Forces of IHL, which refers to many rules of IHL to be respected by UN forces when engaged as combatants in armed conflicts, does not mention one single rule of IHL of belligerent occupation.[97] Opponents to the applicability of IHL argue that the rights and obligations accruing to occupying powers under IHL flow from the conflict inherent in the relationship between traditional occupying powers and occupied territories and are therefore not relevant to the altruistic nature of a peace operation which is deployed in conformity with the general interest.[98] Furthermore, they argue, as a protective force, peace keepers are accepted — if not welcomed — by the local population, and thus do not require the strictures of IHL. This rather rosy view of relationships between peace keepers and local populations is not always borne out by experience. Moreover, if the local population accepts the peace-keepers, it will only facilitate compliance with the obligations of humanitarian law. Finally, the level of altruism or good intentions of an invader may be difficult to measure and will change according to one's perspective; thus, altruism is not a sound basis for determining whether IHL applies to a given conflict.

Can we draw a bright line between UN peace operations and those carried out by other States or regional organizations claiming their motives are purely altruistic?

Another line of argument simply holds that IHL of belligerent occupation cannot apply to transitional international civil administrations because such administrations proceed, under their Security Council mandate and subsequent practice, to make changes in local legislation and institutions which would not be admissible under IHL of military occupation.[99] This argument however begs the question.

IHL is applicable to a territory occupied during a conflict fought in self-defense or authorized by the UN Security Council. The distinction between *jus ad bellum* and *jus in bello* dictates that the fact that the UN Security Council authorized military intervention has no impact on the applicability of IHL to the conflict. The laws of occupation, as part of *jus in bello*, apply whether that occupation is brought about by a legal or an illegal use of force. In my view this must necessarily also be the case if an international administration results from a peace-enforcement operation.[100] The same must *a fortiori* be true if the conflict itself was not authorized, but the resulting occupation is authorized explicitly by the UN Security Council or if the latter does so implicitly by mandating the occupying power with certain peace-building tasks.[101]

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[96] Michael Hoffman, "Peace-enforcement actions and humanitarian law: Emerging rules for 'Interventional Armed Conflict'" (2000) 837 Int'l Rev. Red Cross 193 at 202.
[97] UN Doc. ST/SGB/1999/13 of 6 August 1999, also reproduced in Sassòli/Bouvier, supra note 7 at 460.
[98] Shraga, supra note 94 at 328; Vité, supra note 62 at 19.
[99] Vité, supra note 62 at 24.
[100] Apparently *contra* Kolb et al., supra note 62 at 112.
[101] In Resolution 1483 (2003), the Security Council acknowledged the status of the Coalition as occupiers and reminded them of their obligations under international humanitarian law. At the same time, this Resolution is perceived as authorizing the occupation of Iraq by the US and U.K. and other members of the Coalition and it

Some authors therefore consider that when the UN or a regional organization enjoys "the effective control of power […] over a territory to which that power has no sovereign title, *without the volition of the sovereign of that territory*," it is an occupying force.[102] Others write that when UN forces find themselves in belligerent occupation, most or all customary or conventional laws of war would apply.[103] Those who oppose the applicability of IHL of military occupation to UN peace operations do so based on the aforementioned dogmatic view of the nature of the operation, which in my view disregards reality and introduces a *jus ad bellum* argument into the discussion of whether *jus in bello* applies.[104]

In my view, in terms of peace operations and an occupation authorised by the Security Council, the question turns — as for the qualification of any other foreign military presence — on the issue of whether the sovereign of the territory on which peace operations (whether civil or military) are deployed consents to that deployment or not. The mere fact that an occupation has been authorized by the Security Council as part of a peace operation has no effect on the applicability of IHL to that occupation.[105] It is accepted widely that IHL does not apply to peace-keeping forces where the sovereign/host government has consented to the deployment of troops on its territory. Consent excludes the possibility of the occupation being described as "belligerent". IHL is not applicable if and for as long as the peace operation enjoys the consent of the State on the territory on which it is deployed.[106] If the consent vanishes, according to some authors, IHL could subsequently become applicable,[107] although one may doubt whether the simple disappearance of the legal basis for a foreign military presence makes the law of armed conflicts applicable.

Accordingly, IHL is not applicable to the international territorial administrations in place in Kosovo and East Timor for the simple reason that the States concerned consented to the presence of foreign troops and administrators on the relevant territories.[108] Nonetheless, an international administration put in place without the consent of the sovereign would trigger the application of IHL to that administration.

Some would argue that the reason IHL does not apply to the international administrations in Kosovo and East Timor is that Security Council resolutions mandating those missions

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is claimed to transfer some peace-building tasks to the occupying powers or to accept at least that the occupying powers perform such tasks.

[102] Benvenisti, supra note 3 at 3. Emphasis added. Hoffman, supra note 96 at 3 and 4; Bertrand Levrat, "Le droit international humanitaire au Timor oriental: entre théorie et pratique" (2001) 841 Int'l Rev. Red Cross at 95-96; John Cerone, "Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo" (2001) 12 EJIL 469 at 483-485.

[103] Roberts, "What is Military Occupation" supra note 46 at 291, citing Derek Bowett, *United Nations Forces: a legal study of United Nations Practice* (London: Stevens and Sons, 1964); Benvenisti supra note 3 at 3. Kolb, supra note 23 at 75, points out that this is controversial.

[104] Vité, supra note 62 at 27, replies that the Security Council does not derogate from IHL but creates a situation to which IHL on its own terms does not apply.

[105] *Contra* Vité, supra note 62 at 20-21.

[106] Roberts, "What is Military Occupation", supra note 46 at 291.

[107] Ibid.; Vité, supra note 62 at 21.

[108] Michael Kelly, Timothy McCormack, Paul Muggleton and Bruce Oswald, "Legal aspects of Australia's involvement in the International Force for East Timor" (2001) 841 Int'l Rev. Red Cross 101 at 115; Marco Sassòli, "Droit international pénal et droit pénal interne : le cas des territoires se trouvant sous administration internationale" in Marc Henzelin and Robert Roth, *Le Droit Pénal à l'épreuve de l'internationalisation* (Bruxelles: Bruylant 2002) at 144.

change the very nature of the latter, regardless of the consent of the host government to that resolution.[109] They protest that sovereigns of some territories occupied by UN forces in a peace operation may not consent to the operation (whereas others would) which means that we would treat differently situations which demand on their facts to be treated identically, notably from the point of view of protection of civilians.[110] However, in the Westphalian system, the consent of a state is a factor, which carries significant legal consequences. The expediency and/or appropriateness of treating like situations alike are no reason to depart from this general principle.

Finally, if one considers that IHL applies to peace operations according to its normal application thresholds, it should also apply to an international military presence meeting no armed resistance from the territorial sovereign (e.g., in an environment of State collapse). Australia considered that IHL of military occupation applied *de jure* to its UN operation in Somalia.[111] Common Article 2 of the Geneva Conventions provides that the Conventions "shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." Under this line of argument, there can be little doubt that IHL is applicable to a UN authorized military occupation not based on consent, even if the latter meets no armed resistance.

What is more doubtful is whether the law of military occupation also applies to UN run peace (keeping) forces, meeting no armed resistance, if the latter or a UN civil administration effectively runs the territory. While legal logic leads to an affirmative answer, most would object that Art. 2 (2) is an exception clause applying IHL beyond armed conflicts, which must be limited to situations where the foreign military presence is that of another state and not that of the international community organized through the UN to which the non-consenting sovereign has indirectly consented through its UN membership. It would be even more difficult to argue that an international civil administration not made up of — nor effectively imposed by — military forces could be *de jure* subject to IHL of military occupation. Article 2 (2) does not cover every international *de facto* presence not meeting the consent of the sovereign, but only belligerent, i.e., military presences not meeting armed resistance, the difference being that a military occupier could have overcome armed resistance if it had existed, while a civilian presence could not have done so.

Particularities in applying Article 43 to peace operations subject to IHL

Several issues arise as to the application of IHL when the UN is involved in a peace operation to which IHL applies. Particularly, as alluded to in the discussion on exceptions to the prohibition to legislate, the Security Council mandate may entail significant derogations from the general principle that local legislation should be left in force. Some authors go as far as to consider that IHL only applies "unless and until the Security Council used its Chapter VII powers to impose a different regime".[112] They can base their argument upon Article 103 of the UN Charter.[113] Unfortunately, from the point of view of IHL, this construction implies again the introduction of a criterion of *jus ad bellum* — the legitimacy

[109] As mentioned supra note 104, Vité is on this line. See also Hoffman, supra note 96 for a discussion of his theory that a new category of "interventional armed conflict" has evolved.
[110] Vité, supra note 62 at 23.
[111] Michael J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations* (The Hague: Kluwer, 1999) at 178.
[112] Greenwood, supra note 94 at 28.
[113] See supra, note 89 and accompanying text.

furnished by the Security Council — in the solution of a problem of *jus in bello*. Such a mixture is always delicate. Formally, one could not object to a Security Council resolution even ending an occupation altogether, not by changing the facts on the ground, but by re-qualifying a belligerent occupation as international transitional administration.[114] A conclusion such as this, which is contrary to the very core idea that the applicability of IHL depends on the facts and not on legal qualifications, should only be drawn if such intent is made very explicit by the Security Council.

Another suggestion would be to apply the specific rules of IHL regarding occupation only when the peace forces have effective control over territory, while the rules of IHL regarding the conduct of hostilities and detention would apply as soon as the forces are involved in combat, arrests, or detention. The problem with this suggestion is that Convention IV contains no section on arrest and detention other than provisions applicable on a party's own territory[115] and provisions applicable in occupied territory.[116]

Many issues regarding an extended derogation have been outlined above. In particular, we should recall that even if peace operation occupiers limited themselves to constituting and training local authorities and allowing those local authorities to create and adopt legislation for new institutions, they will have difficulties complying with Article 43.[117] IHL is reticent towards institutional or legislative changes introduced into the political, economic, or educational systems or into the government by an occupant. Such reluctance may be overcome by a Security Council resolution if changes going beyond those permitted by Article 43 are considered indispensable for peace-building purposes, but such authorization must be explicit in the Security Council resolution. A peace operation occupier in those conditions should interpret the mandate in a manner compatible with IHL whenever possible.[118]

Utility of applying IHL by analogy to an international territorial administration in peace operations even if IHL is not applicable

Even if IHL is not applicable formally to international civil administrations by virtue of the consent by the sovereign concerned to the mission or for other reasons outlined above, IHL of military occupation provides practical solutions to many problems confronted by a civil or military administration.[119] It offers a normative framework adequate for the maintenance of civil life and public order which has, first, the advantage of being accepted by all states independently of the legitimacy of the international presence on a territory. Second, that framework is pre-existing, which facilitates its immediate application when an international administration starts and avoids *à la carte* solutions adopted by the international presence, which are arbitrary (because not ruled by a normative framework) or at least perceived as arbitrary. Third, that framework also applies independently of the legitimacy of the presence

[114] Vité, supra note 62 at 27.
[115] See Sections II, I, and IV of Part II of Convention IV.
[116] See ibid., Sections III, I and IV.
[117] See supra notes 49-53 and accompanying text.
[118] See supra notes 92 and 93 and accompanying text.
[119] Sassòli, supra note 108, 141-149; Vité, supra note 62 at 29-33 ; Kelly/McCormack/Muggleton/Oswald, supra note 108 at 115; David, supra note 63 at 501; UN Department of Peace-Keeping Operations, Lessons-Learned Unit, *Comprehensive Report on Lessons-Learned from the United Nations Operation in Somalia*, April 1992-March 1995 (Sweden, 1995) para 57, www.un.org/Depts/dpko/lessons/UNOSOM.pdf..

of the former sovereign and of the feelings of the local population.[120] Fourth, all armed forces and their military lawyers are familiar with the framework since they must comply with it in case of armed conflict.

Many principles of IHL of belligerent occupation, such as the right of the local population to continue life as normally as possible[121] and the right for the international presence to protect their security, seem appropriate, as does the obligation to restore and maintain public order and civil life in the territory. As seen above, IHL offers answers to some of the main legal questions for administrators of territory under civil transitional administration who have the responsibility of restoring public order and civil life: on what legal basis may they arrest, detain and punish persons threatening public order? When may they change local legislation? IHL grants to the occupying power the right to have recourse to administrative detention. For imperative reasons of security it can intern protected persons even without accusing them of a crime, provided that certain safeguards are respected.[122]

IHL also provides a helpful separation with respect to penal law between fields covered by new legislation and applied by a new (at least provisionally international) justice system and those that are governed by local legislation enforced by the local justice system. Under IHL, foreign personnel apply the legislation they create and do not interfere with the handling of individual cases by the local justice system. In a territory under international administration, we can distinguish between criminal cases which go to the heart of the objectives of the international presence and those which relate to local law. The first could be decided by the international administration's own tribunals, which would apply the law and procedure that have been established by the administration. All other affairs would be left to the competence of local justice institutions, even if personnel must first be trained.

While awaiting the development of competent local institutions, persons suspected of serious crimes against local law could be held under administrative detention. This would be justified by imperative reasons of security, because security would be threatened by a failure to respond to such acts as well as the acts of vengeance, which flow from that failure. From a humanitarian perspective, provisional administrative detention is sometimes preferable to condemnation or acquittal by a biased tribunal in an irregular procedure.[123] This solution would also avoid having foreign judges study, interpret and apply law that they do not know, and, equally as important, would avoid having international administrators modifying laws for simple reasons of convenience. Given the ideals of judicial independence and the rule of law which must be transmitted to the local population, it is preferable that there be a separation between the areas of competence of the international administration and those of the local administration-in-training. Through the administration period, more and more areas can be successively given back to the local justice system.[124]

There may be some limits to the analogy, however. First, with regard to the purpose of the administration, the international civil administration may have been instituted precisely to

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[120] Sassòli, supra note 108 at 145. Kelly, supra note 111 at 311, and Vité, supra note 62 at 29-30, support this line of arguments.

[121] This is what Jean Pictet, *Principes du droit international humanitaire* (Geneva: ICRC, 1966) at 50, calls the principle of normality.

[122] See Article 78 of Convention IV.

[123] Sassòli, supra note 108 at 146.

[124] Ibid., at 147.

prepare the passage of the territory to the sovereignty of the local population or to another State. This can also be the objective of a military occupation. Many territories changed rulers or attained independence following a military occupation. Admittedly, however, there is a significant distinction between situations for which IHL relating to military occupation was created and those relating to territories under international administration. In the first situation, protection of the local population consists in particular of a guarantee of the greatest possible continuity from the situation prior to occupation. The law of occupation proceeds from the idea that the foreign presence is established against the will of the population or at least independently of this will. A civil international administration, on the other hand, is often instituted in conformity with the will of the local population and, more importantly, to change the prior situation. This distinction does not seem to be taken into account in the rules of IHL. However, the population of a territory placed under administration no longer needs to be protected from the previous competent authorities, but against the new authorities. Independence, autonomy, or the introduction of social, legal or economic changes cannot be achieved during the transitional period. During this period, it would not be shocking to apply, as a matter of principle and subject to the many exceptions mentioned above, prior laws not incompatible with the objectives of the transitional administration.

Some authors suggest that only the humanitarian rules of IHL apply to international civil administrations, not those fixing the attributes of the occupying power.[125] In my view protection of war victims and rights of the occupying power are two sides of the same coin. All rules of IHL are humanitarian. Occupying powers have tried to argue the same distinction between humanitarian and other rules of IHL.[126] This distinction was not accepted by other States and has resulted in abuses.

Some of the problems of applying IHL to peace operations have been addressed above in the section dealing with the authorization of the Security Council to legislate. With respect to international civil administrations, appropriate derogations from IHL become even fuzzier and harder to discern. Such derogations may be implicit in the nature of the operation, explicitly mandated by the Security Council, and/or more easily be assumed to be implicit in the Security Council mandate. Indeed, where IHL applies *de jure*, the argument was that the Security Council could not easily be considered to want to deviate from the applicable legal regime. Here, the latter is not applicable, but simply provides solutions for problems not governed by any applicable pre-existing legal regime. The Security Council may therefore much more easily be assumed to want to deviate from it. In international civil administrations to which IHL does not apply, the administrators may enjoy more latitude with respect to derogations implicit in the Security Council resolution and in the nature of the operation.

Conversely, some may wish that, when setting up an international civil administration, the Security Council determines explicitly that IHL of belligerent occupation applies subsidiarily as long as new legislation is not adopted by the administration.[127] In my view this is not very realistic and as far as Article 43 of the Hague Regulations is concerned it means that the latter would not apply, as it precisely restricts a foreign administration from legislating.

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[125] Vité, supra note 62 at 27-28 and 32.

[126] See on this distinction made by Israel concerning the territories it occupies, Roberts, supra note 74 at 62, and references in Sassòli/Bouvier, supra note 7 at 802-872.

[127] Vité, supra note 62 at 30.

The main disadvantages of the application of IHL by analogy as suggested here are that it depends on the good will of the international administration and that different contingents may have a divergent practice in this respect.[128] In the absence of such analogy, however, the practice will by definition be even less coherent and predictable.

Finally, UN soft law Human Rights standards,[129] such as the Code of Conduct for Law Enforcement Officials[130] and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials[131] may also be given greater scope in the context of an international civil administration. While soft law as such is not binding upon States, a UN run operation, whether *de jure* subject to Article 43 or not, may be considered to be legally bound since that soft law has been adopted by the UN General Assembly, the supreme organ of the United Nations.[132]

Conclusion

Most of the above is uncontroversial and corresponds to practice. In any case, practice has at least shown that occupying powers and international civil administrations which are either less active in restoring and maintaining public order and civil life or go further in terms of legislation encounter serious problems among the population concerned or the international community. The most delicate question is that highlighted in the information note for the Informal High-Level Expert Meeting, asking how far an occupying power "involved in post-conflict reconstruction efforts" may or even must go "in terms of constitutional reforms, economic and social policies". In my view, only in very exceptional circumstances can such fundamental changes be considered as absolutely necessary or even as essential to restore public order and civil life in the territory. An occupying power may be involved in such efforts, which necessarily imply changes in legislation,

(i) under a specific UN Security Council mandate; or
(ii) if it is indispensable to respect its obligations either under IHL or Human Rights Law.

As it is not the sovereign and in order to respect the right to self-determination of peoples, an occupying power may however, while exercising the discretion Human Rights instruments (or the Security Council mandate) leave to states setting up (their) institutions and economic and social policies, introduce only as many changes as absolutely necessary under its human rights obligation (or Security Council mandate) and must stay as close as possible to similar local standards and the local cultural, legal and economic traditions. To paraphrase the ICRC Commentary, occupying authorities may not change local legislation "merely to make it accord with their own [constitutional, economic or social]

[128] Ibid.
[129] For an overview of the UN standards as applicable to the maintenance of law and order by UN peace operations see United Nations Crime Prevention and Criminal Justice Branch, *UN Criminal Justice Standards for Peace-Keeping Police (The Blue Book)* (Vienna: Office of Crime Control and Drug Prevention, 1994), www.uncjin.org/Documents/BlueBook/BlueBook/index.html.
[130] G.A. res. 34/169, annex, 34 UN GAOR Supp. No. 46 at 186, UN Doc. A/34/46.
[131] Supra note 17.
[132] *Cf.* Kolb et al., supra note 62 at 166; Article 10 of the UN Charter.

conceptions."[133] It is my view, certainly opposed by many, that even a UN administration should not introduce such fundamental changes, but at the outmost suggest them to the population of the territory it administers as a solution to their problems.

[133] Pictet, supra note 28 at 336.