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# Occupation in Iraq: Issues on the Periphery and for the Future: A Rubik's Cube Problem?

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**P**rior articles address occupation issues in 2003–9 coalition operations in Iraq from an international law perspective and legal and practical issues confronting coalition forces and their lawyers.

This article comments on legal issues at the periphery of the occupation, and problems that may arise in future occupations, whether governed by the UN Charter, special agreement or the law of armed conflict (LOAC). These include Charter-based law, *jus cogens* norms and other law (e.g., human rights law), international governmental organization (IGO) standards, the law of treaties and private law (e.g., admiralty law, torts, contracts) that may apply during occupations. These problems in single-State occupations, and even more so in multi-State occupations, can be vexing and complicated, like the solving of a Rubik's Cube puzzle.<sup>1</sup>

### *Geneva and Hague Law*

The Fourth Convention,<sup>2</sup> one of the 1949 Geneva Conventions,<sup>3</sup> bears upon the LOAC governing occupations. Nearly all States are parties to them,<sup>4</sup> some with

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reservations or declarations.<sup>5</sup> Commentators and States say that some or all of the Fourth Convention recites customary law.<sup>6</sup> This has been so for 1907 Hague Convention IV<sup>7</sup> since the Nuremberg Judgment,<sup>8</sup> although one commentator says Hague IV has lost its normative value in the wake of post–World War II occupations.<sup>9</sup> However, unlike the other 1949 Conventions, the Fourth Convention declares that its rules supplement Hague IV and 1899 Hague Convention II for States not Hague IV parties<sup>10</sup> for hostilities (Section II) and military authority over hostile State territory (Section III).<sup>11</sup>

The first paragraph of Hague IV's Regulations, Article 23(h), part of Section II of that Convention, provides: "In addition to the prohibitions provided by special Conventions, it is especially forbidden . . . [t]o declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party" during hostilities.<sup>12</sup> Thus even during armed conflict enemy nationals have rights guaranteed in court proceedings. The Regulations also protect courthouses and similar facilities that are public buildings.<sup>13</sup> Hague IV, Regulations, Article 43, in a commonly used English translation, is also pertinent to the analysis:

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.<sup>14</sup>

Hague II, Regulations, Article 43, in an English translation, is similar:

The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.<sup>15</sup>

There is an apparent mistranslation from the authentic French text<sup>16</sup> of "l'ordre et la vie publics" in Hague IV, Regulations, Article 43, which should translate as "public order and life," implying "also the entire social and commercial life of the community,"<sup>17</sup> "public law and civil life,"<sup>18</sup> or "the entire social and economic life of the occupied region."<sup>19</sup> Since Hague II, Regulations, Article 43 uses the same phrase, "public order and safety," in an English version, comments on Hague IV should also apply to Hague II.<sup>20</sup>

The meaning of "laws in force" is also critical.<sup>21</sup> Can this phrase limit an occupier State to preserving the status quo, or has recent practice given it a more dynamic meaning?<sup>22</sup>

There are other differences. Hague IV's translation "in fact," compared with "actually" in Hague II, seems a minor distinction; "restore" in Hague IV seems to mean the same as "re-establish" in Hague II.<sup>23</sup> Whatever the correct translations, Article 43, seen by Benvenisti "as a sort of miniconstitution for the occupation administration," is important. Brussels Declaration Articles 2 and 3 were the origins of Article 43, but since 1874, and certainly since 1899 and 1907, central government's societal role has changed.<sup>24</sup>

Whether both treaties have the same language and practice under them is more than an academic issue. For example, among the States not party to Hague IV, fourteen are NATO Treaty<sup>25</sup> members and twelve are Rio Pact<sup>26</sup> members.<sup>27</sup> Those numbers are reduced to ten NATO members and three Rio Pact members who are not party to Hague II.<sup>28</sup> The result is that some of the members of the two alliances are, like the United States, party to both Hague II and Hague IV, others are party to one or the other, and still others are party to neither. All of the NATO States were or might be involved in collective self-defense responses in Afghanistan<sup>29</sup> and all members of both treaties could have participated in Iraqi coalition operations.

A message for future occupations is that participating States must consult their indexes of treaties in force,<sup>30</sup> particularly in multilateral operations, but even if one State is bound by Hague IV and the other by Hague II to compare differences in language, interpretation and application in practice. To be sure, Hague IV's Regulations are customary law,<sup>31</sup> and Hague II's and Hague IV's language is the same for this analysis,<sup>32</sup> but textual differences between the treaties or interpretation of them invite issues between occupier and occupied States or among occupier States, or if more than one State has been occupied.<sup>33</sup> This underscores customary law's importance but suggests diplomacy to persuade States to ratify Hague IV and eliminate the issue.<sup>34</sup> Moreover, if a State would emphasize treaty-based rules over custom-based norms, there is the possibility of a conflict on this score.

The narrow questions for this article are the meaning of "laws in force"<sup>35</sup> in an occupied State and how the exemption "unless absolutely prevented" fits into international law in the Charter era. May an occupier apply a "progressive development" principle,<sup>36</sup> including introducing, e.g., international human rights standards<sup>37</sup> not previously in force in an occupied State, or must it maintain existing law as an occupier found it? If an occupier State can introduce new measures,<sup>38</sup> how far can it go? After the 2003 invasion the Coalition Provisional Authority promulgated measures designed to reform domestic governance in Iraq.<sup>39</sup> Were these permitted under Article 43? When is an occupier "absolutely prevented" from applying an occupied State's law or using the exception clause to introduce new measures?<sup>40</sup> If human rights law would apply, whose perception of it counts, the occupier or occupied State's?<sup>41</sup> Dinstein proposes a "litmus test": if an occupier

State wishes to enact new legislation for the occupied State, “the decisive factor should be the existence of a parallel statute back home[,]” citing an example of requiring car seat belts where none had been required before occupation.<sup>42</sup> It is a useful test, but is it always appropriate? Take, e.g., another hypothetical from traffic laws. In the United States, an occupier State in Iraq, cars must be driven on the right side of a road. In the United Kingdom, the other major occupier, the opposite is true. In a desert country, does it make sense to require either if the previous rule had been no rule? Which rule should be an “improvement” if one must go into force? Should neighboring States’ laws be taken into account?

Other commentators seem to take a different view, advocating abrogating occupied State laws incompatible with human rights law and promulgating progressive standards reflecting established human rights law norms and the like.<sup>43</sup> One military manual declares certain “human rights”: “Respect for human rights—Family honour and rights, the lives of persons, and private property, as well as religious convictions and practices, must be respected.”<sup>44</sup> For countries with similar military manual provisions labeling Hague-girded guarantees like this as human rights, an issue is whether the guarantee may be fleshed out through applying the current law of human rights. A more far-reaching issue is whether other human rights norms that do not fit under the Hague rubric may or must also be enforced.<sup>45</sup>

Commentators have raised the issue of self-determination, however it is defined.<sup>46</sup> Is it an occupier State’s business to promote self-determination or the opposite during an occupation? Iraq is an amalgam of three former Ottoman Empire provinces: one that governed Kurds, a distinct ethnic group; another, with a Shiite Muslim population; and the third, a Sunni Muslim population. What positions should the occupiers have taken if claims for separate States for these three groups had arisen? By contrast, the UN governance of Kosovo before its independence concerned Kosovar self-determination. The UN interregnum had (and independent Kosovo today has) a Serb minority problem within Kosovo. Should Kosovo be a paradigm for future occupations? Is it an occupier’s duty today, particularly in lengthy occupations, to promote self-determination?

An issue related to applying human rights law is the place of Martens clause principles, “usages . . . among civilized peoples, . . . the laws of humanity and the dictates of the public conscience.”<sup>47</sup> What are these principles, which under the Fourth Convention and Protocol I, for States party to it,<sup>48</sup> may be further exceptions to applying an occupied State’s laws? Are the clauses a statement of a general principle of international humanitarian law?<sup>49</sup> Are they a gate for applying human rights law, or is this another *lex specialis* situation demanding different norms, perhaps the same as human rights principles, but maybe different standards?

Might there be differing views of these issues between an occupier and an occupied State, which during an occupation would have little voice in the matter, but which might revert to earlier law after an occupier departs? Presumably the coalition reached consensus before initiating changes, but might there be issues within a coalition on what changes are appropriate?<sup>50</sup> If States leave or join a coalition during an occupation, how should consensus be maintained or achieved? If several States are under control of one or more occupier States, or if an occupied State is divided into administrative zones among occupier States, should the changes be the same throughout the occupied States, e.g., like Germany and Austria after World War II?<sup>51</sup> How would countries that are not occupier States view these matters, particularly if the occupier(s) proceed(s) as the coalition did during 2003–4 with wholesale changes,<sup>52</sup> but without benefit of UN law or similar support as was then<sup>53</sup> the case? There is also an issue of post-occupation law. If an occupier can impose beneficial changes, might an occupied State revert to its old ways after occupation ends by legislative changes, judicial construction or applying civil law principles on denial of precedent for prior cases<sup>54</sup> with resulting confusion (or worse) for the population? These are questions that should be asked and resolved in occupation situations.

### *The United Nations Charter*

Before the 1949 Conventions went into force, States had begun ratifying the UN Charter. Its Article 103 declares that it trumps all treaties. Mandatory actions under the Charter have priority over treaty-based rules. Articles 25, 48 and 94 are sources<sup>55</sup> for Charter lawmaking; if the UN Security Council issues a “decision,” it binds UN members.<sup>56</sup>

Article 51, preserving States’ “inherent right” to exercise individual and collective self-defense until the Council acts on a situation threatening international peace and security, is another important rule.<sup>57</sup> An occupier must defend an occupied State from aggression as a Charter-based obligation under Articles 2(4) and 51 to preserve that State’s territorial integrity and projected political independence in the future. A correlative to this is to assure, under a reasonableness standard, that an occupier does not compromise an occupied State’s future by actions that leave it defenseless with insufficient security forces to protect it once it is no longer occupied. An occupied State’s future territorial integrity and political independence must be assured. Occupiers should also be sure that municipal law changes do not have the same effect—e.g., transforming a formerly financially self-sufficient country into a weak State that cannot meet economic obligations, a circumstance that

might reduce its armed forces to a level where self-defense would be impossible through inability to fund sufficient defense forces from taxes and other sources.

Other issues related to self-defense include applicable standards if personal or small-unit self-defense situations arise. An easy case is a response by occupier State units or individuals in circumstances like *State v. State* confrontations; international standards apply.<sup>58</sup> An example might be an occupier State soldier(s) confronted with State-sponsored border raiders from other countries invading an occupied State. Other relatively easy cases would be trying occupier State service members under its national military law,<sup>59</sup> trying an occupier State's citizen for offenses against occupier State security law<sup>60</sup> or trying an occupier State citizen tried in that State's courts;<sup>61</sup> in the first and third cases the accused's national law would apply if that State's legislation so provides.<sup>62</sup> Problems of perceptions of procedural justice might arise if the two States' self-defense standards are different, however.<sup>63</sup> More troublesome issues might come in "mixed" situations, e.g., a mob attack on occupier State forces where some mob members are occupied State citizens, some of whom participate in the mob action and others are human shields—i.e., unwilling mob members—and still others are, e.g., terrorists perhaps subject to international standards because they are outside-State-sponsored or operatives of organizations like al Qaeda.<sup>64</sup> If occupied State citizens are tried in occupied State courts, their national standards would seem to apply;<sup>65</sup> terrorists, if State-sponsored, would be subject to international law standards.<sup>66</sup> If the terrorists are, e.g., al Qaeda members, occupier State national standards like the US Military Commissions Act of 2006<sup>67</sup> might apply. The problem of perceptions (equal justice for a defense to the same alleged offense) here might be the greatest, particularly if one group mounts a successful self-defense claim and another does not. Yet another issue could arise if the confronted forces are members of different States' military services.<sup>68</sup> If a State or States operate(s) under UN auspices, issues of Charter-based rules may arise.<sup>69</sup> Finally, there is an issue of compliance with international human rights law standards, even for cases involving occupier nationals such as members of the occupier's armed forces, if human rights standards are more protective of personal rights.<sup>70</sup> What has been said about self-defense is, of course, a paradigm for other issues of law to be applied during occupations.

Other actions under Charter law may also articulate standards for occupation situations, i.e., "calls" for action by Council resolutions or General Assembly resolutions.<sup>71</sup> Whether these result in binding rules has been debated, most saying that the resolutions themselves do not bind members.<sup>72</sup> However, if many States accept a resolution as practice required by law, it can evolve into a customary norm, e.g., the Uniting for Peace Resolution.<sup>73</sup> To the extent that these resolutions' content recites general principles of law,<sup>74</sup> e.g., of humanity in Martens clauses,<sup>75</sup>

they may strengthen these norms, particularly if a resolution cites a Geneva convention. How custom with genesis in *ipso facto* non-binding UN resolutions must be considered alongside mandatory Charter law is an open question.<sup>76</sup> The same is so for customary rules with a parallel, binding Charter rule, e.g., a customary right of self-defense alongside Article 51,<sup>77</sup> although in the latter case the logic is that such a customary rule can develop and might be different from the Article 51-supported norm.

After the 2003 invasion the Security Council approved Resolutions 1483<sup>78</sup> and 1546,<sup>79</sup> decisions<sup>80</sup> binding members. Resolution 1483, *inter alia*, declared that the US-led coalition (i.e., United Kingdom, United States) was the occupying power; Resolution 1546 welcomed the end of the occupation by June 30, 2004; then the LOAC applying to occupation ended, and governance of Iraq under the Interim Government began.<sup>81</sup> In the future, in other invasion and occupation situations, might there be non-binding resolutions, particularly as occupiers prepare to leave an occupied country? Since these non-binding resolutions can generate custom or restate general principles of law, do they as a sort of “super custom” thereby trump Fourth Convention treaty terms? If it is different from the letter of or practice under Hague Regulations, Article 43, does Charter-based law trump the practice? Probably so, but answers to these questions are far from clear.

### *Law of Other International Organizations*

Another issue that can arise in the future is the impact of binding or non-binding agreements, resolutions or regulations of other IGOs, notably UN specialized agencies, and these documents’ relationship with the LOAC governing occupations. The place of the work of IGOs is a related issue.

For example, the World Health Organization (WHO) Health Assembly, analogous to the UN General Assembly in that it has voting members from all States parties, has authority to adopt conventions or agreements within WHO’s competence by a two-thirds vote. These conventions or agreements come into force for a member when accepted by the member in accordance with its constitutional processes. The Assembly can also adopt regulations for, e.g., sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease. These regulations are in force for WHO members after the Assembly gives due notice,<sup>82</sup> except those notifying the WHO Director-General of their rejection of or reservation to the regulation within the time stated in the notice.<sup>83</sup>

If these WHO conventions, agreements or regulations are in force for an occupier State but not for an occupied country, or the other way around, how should they be applied in occupation situations under Article 43? Put more broadly, if an

occupier is a member of other IGOs, but an occupied State is not, or the other way around, what law governs under Article 43? Health issues are likely to arise during armed conflict and an ensuing occupation. Other IGOs may have similar procedures for declaring binding rules. A further issue is whether these IGO regulations bind States not party to them, i.e., that they represent customary norms or perhaps general principles,<sup>84</sup> or by law of treaties principles binding third States.<sup>85</sup> And if not, should an occupier State introduce them as progressive development<sup>86</sup> under Article 43, so that an occupied State will be more forward-leaning in its international obligations and rights and national law when occupation ends? Or are these soft law<sup>87</sup> until an occupied State or an occupier chooses to accept the norms?

There is, of course, a possibility that otherwise-binding IGO-sponsored conventions, agreements or regulations may vary from UN law, e.g., self-defense under Charter Article 51 or the parallel customary right of self-defense,<sup>88</sup> or other binding UN law, e.g., Security Council decisions,<sup>89</sup> during an occupation. Here IGO rules must give way.<sup>90</sup>

A related issue is applying rules or principles from IGOs, i.e., soft law,<sup>91</sup> particularly if an occupied State and an occupier would differ on their application during occupation. To the extent that an IGO publishes rules purporting to restate custom or general principles acceptable under both States' laws, they should continue in force during occupation.<sup>92</sup> If they are not consistent, these standards may enter as secondary sources, i.e., research of scholars, in a source matrix.<sup>93</sup> If Charter law issues are at stake and these rules differ from IGO standards, analysis similar to that for IGO-based standards should apply.<sup>94</sup>

### *The Spectral Issue of Jus Cogens*

*Jus cogens*, i.e., fundamental norms trumping treaty and customary law norms, and perhaps contrary general principles, has been a spectral source of law since World War II. Authorities differ on *jus cogens*' scope, ranging from a view that *jus cogens* does not exist to a Soviet author's position that the whole UN Charter restates *jus cogens*.<sup>95</sup> Be that divergence as it may, the International Court of Justice (ICJ) has twice said that Charter Article 2(4), which declares States entitled to their territorial and political integrity, "approaches" *jus cogens* status;<sup>96</sup> some argue that the right of self-defense also has *jus cogens* status.<sup>97</sup> The Vienna Convention on the Law of Treaties (Vienna Convention) declares rules for *jus cogens* in the law of treaties.<sup>98</sup> Perhaps not an issue related generally to occupation law today, *jus cogens* could create problems in the future, especially if an occupied State or other countries would claim a *jus cogens* violation and an occupier would not, or vice

versa, or if a claimant argues that *jus cogens* supports its action when another claimant asserts a right under a treaty, customary law or general principles.

### *Law of Treaties Issues*

Other law of treaties issues besides the law of *jus cogens* may apply in occupation situations.

Treaty succession principles have again become important as new States have emerged, sometimes after centuries (e.g., Belarus and Ukraine with the USSR's 1991 collapse) from the sovereignty of other countries. In other cases, new States have declared independence, e.g., some States emerging from the USSR's collapse. States have divided (e.g., Czechoslovakia) or merged (e.g., Germany).<sup>99</sup> Sometimes States' declarations recite what treaties of a former sovereign apply and, perhaps by inference, those that do not.<sup>100</sup> This can be relevant for occupation situations, e.g., involving applying Hague II or Hague IV or Protocol I.<sup>101</sup>

Vienna Convention Article 60(5) excludes application of its Convention material breach provisions to treaties providing for LOAC standards. Commentators argue over applying Article 60(5) to human rights treaties; most say it does not apply.<sup>102</sup> However, during occupations treaty breach issues for agreements other than those concerned with the LOAC may arise;<sup>103</sup> these could range from human rights treaties to those governing trade and the like. Recent ICJ decisions would say, however, that human rights law applies during armed conflict,<sup>104</sup> thus blunting the effect of Article 60(5) if construed to limit its application to LOAC treaties. There are advantages and disadvantages for applying the LOAC, customary or treaty-based, or human rights law.<sup>105</sup>

Impossibility of performance and fundamental change of circumstances are narrow exceptions for treaty non-performance.<sup>106</sup> This is particularly so in view of Vienna Convention Article 26's recitation of *pacta sunt servanda*, which restates a fundamental rule of the law of treaties.<sup>107</sup> Nevertheless, these claims may arise in contexts of compliance with treaties governing occupations, as well as other agreements binding occupier and/or occupied States. Are the exceptions in Hague II and Hague IV Regulations, Article 43, "unless absolutely prevented," or Hague IV, Regulations, Article 23(h)'s "especially forbidden" non-compliance statement, *lex specialis* rules to be used in place of general standards for impossibility and fundamental change of circumstances? Do rules on successive treaties apply?<sup>108</sup> Or are Vienna Convention standards the same as Geneva and Hague law? A common-sense answer is that they should be the same, or that *lex specialis* principles for applying Geneva/Hague law should govern, but the issue remains.

A similar issue is the relationship between rules for impossibility and fundamental change under the law of treaties and human rights treaties' derogation clauses.<sup>109</sup> War, or armed conflict, is the prototype of a public emergency threatening the life of a State, but that State may choose not to assert the derogation.<sup>110</sup> (There are certain non-derogable rights.<sup>111</sup>) Are these derogation clauses *lex specialis*, prevailing over general law of treaties rules for impossibility and fundamental change of circumstances? Like the LOAC exception clauses, it would seem that the answer should be yes. But do rules on successive treaties on the same subject apply, such that later in time standards govern?<sup>112</sup> Human rights treaties have a history contemporaneous with the Vienna Convention; sometimes one precedes the other to bind a particular country, and sometimes States may not have ratified the Convention. Some human rights treaties lack derogation clauses;<sup>113</sup> the customary law of treaties—i.e., States' rights to suspend or terminate treaties during armed conflict—applies to them unless these agreements apply during peace and war.<sup>114</sup> Or does it? For custom-based human rights law (e.g., if no treaty is in force), the analysis is problematic. By analogy to other customary norms now stated in treaties, e.g., the law of the sea,<sup>115</sup> the LOAC as a custom and treaty-based *lex specialis* should apply if human rights law and the LOAC squarely conflict.<sup>116</sup>

Suppose, during an occupation, armed conflict (e.g., invasion of an occupied State by a third State) between an occupied State and another country, or between an occupier State and a third State, erupts.<sup>117</sup> Do rules for suspending or ending treaties under customary law<sup>118</sup> or treaty provision<sup>119</sup> enter an occupier's decision matrix? Geneva and Hague law and the LOAC in general apply to States in armed conflict,<sup>120</sup> but the fate of other treaties (e.g., trade agreements or human rights treaties lacking derogation clauses) may be suspension or termination. In armed conflict situations, does the conflict provide another ground for suspending those human rights treaties with derogation clauses?<sup>121</sup> Other bases for suspending or terminating treaty obligations during conflict might be impossibility of performance or fundamental change of circumstances.<sup>122</sup> The answers to these questions are not clear, but an argument for suspending or terminating agreements without derogation clauses is that negotiators could have inserted them and for whatever reason chose not to include them, in view of similar agreements that have them or have clauses applying their terms in peace and war.<sup>123</sup> A rebuttal is that these agreements at least in part represent *jus cogens* and thus some rights under them are non-suspendable.<sup>124</sup>

*Other Derogations from Applicable International Law*

There are other derogations from applicable international law, sometimes treaty-based and sometimes grounded in custom, sometimes in both: state of necessity; reprisals; retorsions; reservations or understandings, interpretive statements and declarations under the law of treaties; treaty desuetude or obsolescence; and the persistent objector principle.

The International Law Commission's Draft Articles on State Responsibility, adopted in General Assembly Resolution 56/83 (2002),<sup>125</sup> restates the state of necessity doctrine in Article 25:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
  - (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
  - (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
  - (a) the international obligation in question excludes the possibility of invoking necessity; or
  - (b) the State has contributed to the situation of necessity.

Article 25 commentary emphasizes the principle's narrow scope; it attempts to restate the rules of reprisal and declares that anticipatory self-defense is another example of justifiable rule-breaking under extraordinary circumstances.<sup>126</sup> Might necessity, under the extraordinary circumstances of the doctrine, justify breach of occupation law—customary or treaty-based—if an emergency (“grave and imminent peril”) arises? Is “grave and imminent peril” the same as the Hague Article 43 “unless absolutely prevented” exception?<sup>127</sup> The same construction should apply to it as the language in Draft Article 25.<sup>128</sup> But what about the relationship between derogation clauses<sup>129</sup> and the necessity doctrine?

Reprisal rules say that prior notice of a breach of international law must be given an accused lawbreaker State with opportunity for it to bring its conduct into line with the law. If there is non-compliance, an aggrieved State may take measures, proportional to the circumstances but not necessarily in kind (e.g., economic measures to force human rights compliance), to bring a lawbreaker into line with the

law.<sup>130</sup> Although reprisal situations could occur between a third State and an occupier or an occupied State, issues could arise between an occupier and the occupied State. Besides a problem of whose view of the law counts, there is a question of whether an occupier can act in its behalf or on behalf of an occupied State. The response to both questions is yes. Occupation law limits reprisals in some respects, e.g., forbidding reprisals against protected persons and their property.<sup>131</sup> A further question is whether reprisals not prohibited by the Fourth Convention can be imposed in light of human rights law.

Retorsions, an aggrieved State's unfriendly but proportional lawful acts to compel law compliance, may be invoked under general law<sup>132</sup> and the Fourth Convention.<sup>133</sup> What is proportional among States involved (occupier, occupied or third States) may arise, however.

Treaty reservations rules<sup>134</sup> must be consulted; States have reserved to the Geneva Conventions, for example.<sup>135</sup> Some treaties forbid reservations, e.g., the 1982 United Nations Convention on the Law of the Sea,<sup>136</sup> and there is a current debate on whether reservations to human rights treaties may be interposed, although they do not have no-reservations clauses.<sup>137</sup> Future legal battles over agreements forbidding reservations, or considered by their nature to bar them, may be over interpretive statements.<sup>138</sup>

Occupier and occupied States may have different views on desuetude or obsolescence, i.e., that a treaty is no longer in force because of longstanding non-observance of its terms.<sup>139</sup>

A correlative to treaty reservations rules is the persistent objector principle for customary law. Reports of its demise are premature; some, perhaps all, countries are active persistent objectors.<sup>140</sup> This principle may affect occupation law if an occupier State has views on custom different from those of an occupied State, or if occupier States have different views on custom.

***Different International Law Standards for the Same General Body of Law, e.g., the Law of Armed Conflict among Occupier States***

Prior analysis mostly considered LOAC occupation law issues in the context of a single occupier State, following the Fourth Convention format of addressing issues in the singular. If more than one State is an occupier for a country,<sup>141</sup> analysis can be more complex. If occupiers are part of a coalition or an alliance,<sup>142</sup> or a combination of alliance and coalition partners,<sup>143</sup> there is a further complexity. The reverse situation—if a State occupies more than one State, or a group of States (coalition or alliance) occupies more than one State after a conflict—presents more complications. Peoples within occupied territory may travel, perhaps subject to checkpoints,

from one occupation zone to another. Even if they do not, local law,<sup>144</sup> public<sup>145</sup> and private,<sup>146</sup> of a subdivision (province or state as in the United States and other federal republics) of an occupied State may differ significantly.

Although the 1949 Geneva Conventions apply to nearly all States, and most of their principles are considered customary law, the same may or may not be true for the 1977 Protocols I and II<sup>147</sup> to them. The United States and other countries are not parties to one or both<sup>148</sup> and do not recognize all Protocol I and II provisions as customary law.<sup>149</sup> Protocol I supplements the Fourth Convention<sup>150</sup> and sometimes supersedes it.<sup>151</sup> The same issues may arise if Fourth Convention States interpret the Convention or custom differently.

Lack of universality is also true for other treaties, e.g., the Torture Convention,<sup>152</sup> although its rules prohibiting torture are considered at least customary law, if not *jus cogens*.<sup>153</sup>

If Charter law is involved, a problem may be interpreting or applying Article 51; some States involved in an occupation (typically occupier States) may adhere to a restrictive view of the valid scope of self-defense (i.e., reactive self-defense) and others may say anticipatory self-defense is lawful under the Charter and general international law. There may be differing views of what is lawful under either view, or what is valid when unit or individual self-defense is involved.<sup>154</sup> If the occupier(s) or occupied State(s) operate(s) under Security Council decisions or other UN and other IGO resolutions,<sup>155</sup> the same kind of definition and scope issues can arise.

### ***Possible Solutions for These Problems***

Today military forces operate under peacetime and war rules of engagement (ROE).<sup>156</sup> They have acted under ROE in the Iraq and Afghanistan occupations.<sup>157</sup> UN and other coalition and alliance operations have joint ROE and have used them in occupations.<sup>158</sup> ROE are used in law enforcement situations,<sup>159</sup> a major aspect of occupation law. ROE are not law but are options given commanders in conflict, potential conflict situations or similar circumstances like law enforcement, with a paramount right of self-defense. ROE are a confluence of diplomacy, policy and law.<sup>160</sup> ROE analysis suggests an analogous method to be considered for resolving questions raised for multiple levels of law, multiple sources of law within the same level of law and multi-State occupations.<sup>161</sup>

This author has suggested a factorial analysis, based on the *Restatement of the Law, Third, Foreign Relations Law of the United States*<sup>162</sup> (*Restatement (Third)*) and *Restatement (Second) of Conflict of Laws*<sup>163</sup> (*Restatement (Second)*) for these kinds of situations.<sup>164</sup> This analysis is based on choice of law or conflict of laws (private international law, as non-US commentators entitle it)<sup>165</sup> theories, although options

are within a public international law context.<sup>166</sup> This is the kind of problem—choice of law and conflict of laws—albeit more complicated, in occupation law today, what with a hierarchy of sources atop traditional sources<sup>167</sup> and a possibility of many State actors, whether acting under the LOAC, UN law or general international law.

The author's *Restatement*-based analysis has not escaped criticism,<sup>168</sup> any more than the *Restatements'* use in US courts has met with universal approval and acceptance.<sup>169</sup> It is not useful for all occupation choice of law issues, notably ad hoc or fast-moving situations like self-defense<sup>170</sup> or operationally immediate decisions after occupation criteria have been satisfied.<sup>171</sup> Like planning for major military operations, it is time-intensive and can be cumbersome to use. But might a *Restatement*-style analysis be considered for "law planning" at an operational planning stage, perhaps with "law" options emerging, i.e., those for action below mandatory rules, e.g., self-defense, Security Council decisions where standards may be spelled out and the like?<sup>172</sup>

Even if it does not apply for public law issues, factorial analysis for conflict of laws questions may be an issue if courts consider private law issues,<sup>173</sup> e.g., maritime law claims arising from shipping to and from Iraqi docks on the Shatt al-Arab,<sup>174</sup> or medical supply contract issues involving WHO regulations for Afghanistan or Iraq if States concerned had adopted different WHO agreements or regulations.<sup>175</sup> Private law issues will arise in occupied State courts,<sup>176</sup> which may have conflict of laws questions before them.<sup>177</sup> If an occupier State can modify existing occupied State law on public law and private law<sup>178</sup> issues, can it or should it modify occupied State conflicts principles, perhaps through legislation, as has been the recent method for other countries, including those with common-law traditions?<sup>179</sup>

### *How the Restatement Analysis Works (Very Briefly)*

After a decade of analysis in the American Law Institute,<sup>180</sup> *Restatement (Second)* appeared in 1971 and was partly revised in 1988. The *Restatement (Third)* appeared in 1987 after a similar process. The first step is to inquire whether there is a conflict of laws problem, i.e., is the law the same in both jurisdictions? If so, there is no conflict and the common standard applies.<sup>181</sup> This might be the circumstance where, e.g., human rights law and LOAC/occupation law standards are the same. If that is so, there is no need to analyze further; apply the common standard.

Each issue must be scrutinized (i.e., *dépeçage*) for possible conflicts, however.<sup>182</sup> The *Restatement (Second)* recites a major exclusion; if a jurisdiction has a statute governing conflict of laws, it must be used. If there is no legislation on point, a multifactor general analysis is interfaced with factors specific to an area of law, e.g.,

torts or contracts, or perhaps particular forms of torts or contracts.<sup>183</sup> There is little consideration of the international, or transnational, aspects of situations. Nevertheless, the *Restatement (Second)*'s explicit recognition of a higher rule, under construction principles in US law, is analogous to the command of the UN Charter on treaty law or a *jus cogens* mandate that may apply to an international situation.<sup>184</sup>

The *Restatement (Third)* does not list Charter law among its sources for public international law, but its comments note Charter supremacy in Chapter 1. Possible use of *jus cogens* is also mentioned.<sup>185</sup> The *Restatement* recites non-exclusive factors for applying particular law in Chapter 4, similar to the *Restatement (Second)* methodology.<sup>186</sup>

Besides US courts,<sup>187</sup> other institutions and countries have adopted similar factorial analyses for transnational conflict of laws. The European Union recognizes these principles, as do other States, among them US allies.<sup>188</sup> The US National Environmental Policy Act imposes factorial analysis for environmental impact statements.<sup>189</sup> The US Navy and other armed forces have used multifactor operational planning analysis.<sup>190</sup> What this author advocates is multifactor operational law planning analysis.

Is factorial analysis always necessary or useful? The answer is no; it will not work in rapid-response situations, like self-defense, although it might be used to plan for self-defense. It is not necessary in situations if competing laws are the same—the first requirement; if there is no conflict among competing laws, it is not necessary to go through the analysis.<sup>191</sup> Factorial analysis will not work for some law issues, e.g., treaty reservations or persistent objector situations;<sup>192</sup> the reservation or objection applies or it does not. It might help, e.g., with necessity, reprisal or retorsion situations<sup>193</sup> to promote thought on whether invoking necessity is appropriate, or the utility, kind and severity of action under necessity, reprisal or retorsion situations.

As experience through planning and execution proceeds, rules derived from repeated, similar situations that began with factorial analysis may be appropriate.<sup>194</sup> Applying this kind of analysis can lead to problems with a need to clarify the law with new rules,<sup>195</sup> but for military planning, might it be useful to think through conflicts problems before issuing black-letter recommendations for the command and an occupied State's citizens and institutions?

***Conclusion: Analyzing Occupation Issues Thoroughly through  
“Operational Law Planning”***

The relatively recent addition of operational law-trained attorneys to battle staffs and other commands has helped keep military operations within international and national law. As others have written, “lawfare”<sup>196</sup> is very much a part of those

operations, particularly given the communications and media revolutions involving the Internet, television including 24-hour battlespace newscasting, radio broadcasting, e-mail, texting, facsimile, etc.<sup>197</sup> If John Paul Jones were alive today, he would say that international law is part of a commander's "tolerable Education."<sup>198</sup> But he might add: Consult your lawyer in planning or acting if it is feasible to do so under the circumstances. Put more prosaically, look before you leap. Perceptions of law compliance are part of today's battle problem.

A further problem, particularly for operations involving multilateral forces that may be involved in occupations of or involvement with more than one country, is a need to perceive conflict of laws issues that may arise. These may be "vertical" conflicts, e.g., between the LOAC and Charter-based law,<sup>199</sup> or "horizontal" law issues, e.g., among States involved in an occupation or, more subtly, a conflict between the law of the occupied State(s) as it stood when occupation began and the progress—or lack of it—of the law as occupiers and others believe it ought to be, or, at another level, the everyday rules of private orderings (torts, contracts, etc.).<sup>200</sup> For these issues, developing a factorial decision matrix, perhaps a general checklist for the "shelf" long before need arises or a campaign-specific one for particular military operations, perhaps based on conflict of laws (private international law) concepts<sup>201</sup> will help. If military staffs<sup>202</sup> plan for and solve complex occupation problems, whether in one-on-one situations or those with a number of States on either or both sides, operational law attorneys serving commanders can solve the complex, multilateral, multilayer legal problems involved. Using conflict of laws analysis may point toward clearer thinking about concrete solutions if multiple sets or layers of laws are or can be involved.<sup>203</sup> The proposed analytical method will not produce a black-letter "answer" or rule, but it should point toward more comprehensive, well-thought-out rules.

Like Rubik's Cube, the law puzzle for occupations is capable of solution, perhaps through factorial analysis in other than urgent situations (e.g., self-defense), for sometimes multilayer, multidimensional choice of law issues under Hague IV, Regulations, Article 43.<sup>204</sup>

### *Notes*

1. Rubik's Cube is a three-dimensional puzzle Erno Rubik invented; a cube's six faces are covered by six colors (white, red, blue, orange, green, yellow) with nine smaller squares on the cube's sides. The challenge is to manipulate the cube pivot mechanism until all nine squares are the same color on each of the cube's six faces.

2. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in* THE LAWS OF ARMED CONFLICTS 575 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004) [hereinafter Fourth Convention].

3. The others are Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Convention]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Convention]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Convention]; all *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 459, 485, 507, respectively.

4. International Committee of the Red Cross, State Parties to the Following International Humanitarian Law and Other Related Treaties as of 14-Oct-2009, [http://www.icrc.org/IHL.nsf/\(SPF\)/party\\_main\\_treaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) [hereinafter State Parties], lists 194 parties to the 1949 Conventions.

5. See *id.*, *supra* note 4; for a printed source, see THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 635–88.

6. YUTAKA ARAI-TAKAHASHI, THE LAW OF OCCUPATION 59–64 (2009) (progression of Fourth Convention, *supra* note 2, from aspirational standards to mostly customary law); YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 6–7 (2009) (possibility that some States may not see the 1949 Geneva Conventions as customary law or may not apply them as municipal law). International custom is general State practice accepted as law. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031, T.S. No. 993 [hereinafter ICJ Statute]; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6–12 (7th ed. 2009); DINSTEIN, *supra* at 4; OPPENHEIM'S INTERNATIONAL LAW §§ 9–10 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 102, 103(2)(d) & cmt. c (1987) [hereinafter RESTATEMENT].

7. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 55 [hereinafter Hague IV].

8. Judgment, 1 Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946, at 253–54 (1947). The International Military Tribunal for the Far East, Judgment, 15 I.L.R. 356, 346–66 (1948) [hereinafter Tokyo trials] made the same holding. Two months after the Nuremberg trials ended, Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95, 1 U.N. GAOR, 1st Sess., U.N. Doc. A/64/Add.1, at 188 (Dec. 11, 1946) [hereinafter Resolution 95], unanimously reaffirmed Nuremberg and Tokyo trials principles. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 256 (July 8) [hereinafter Nuclear Weapons]; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 19, 70 (Dec. 19) [hereinafter 2005 Congo Case]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 172 (July 9) [hereinafter Wall Case] adopted Nuremberg principles; see also ARAI-TAKAHASHI, *supra* note 6, at 55, 57; DINSTEIN, *supra* note 6, at 5; ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 5.4.2 (A.R. Thomas & James C. Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies) [hereinafter NWP 1-14M ANNOTATED] (Hague general principles reflect customary law); UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 1.25 (2005) [hereinafter UK MANUAL]; Christopher Greenwood, *Historical Development and Legal Basis*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 1, 24 (Dieter Fleck ed., 1999) (Hague IV Regulations remain of “utmost importance”). These cases and the resolution, although secondary sources and not binding themselves, restate customary law. See ICJ Statute, *supra* note 6, arts. 38(1)(d), 59; BROWNLIE, *supra* note 6, at 15, 19–22; OPPENHEIM'S INTERNATIONAL LAW, *supra*

note 6, §§ 13, 16; RESTATEMENT, *supra* note 6, §§ 102, 103(2)(d) & cmt. c. Although the list of Hague IV parties is small compared with UN membership today, see THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 85, and the treaty has an *inter se* clause, Hague IV, *supra* note 7, art. 2, treaty succession rules may apply Hague IV to other States. See generally Committee on Aspects of the Law of State Succession, Final Report, in International Law Association, Report of the Seventy-Third Conference Held in Rio de Janeiro, Brazil, August 17–21, 2008, at 250, 360–62 (2008) [hereinafter Final Report] (UN succession conventions' general acceptance; recent practice); OPPENHEIM'S INTERNATIONAL LAW, *supra* note 6, § 62, at 211–13; Symposium, *State Succession in the Former Soviet Union and in Eastern Europe*, 33 VIRGINIA JOURNAL OF INTERNATIONAL LAW 253 (1993); George K. Walker, *Integration and Disintegration in Europe: Reordering the Treaty Map of the Continent*, 6 THE TRANSNATIONAL LAWYER 1 (1993).

9. EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 96–98, 190 (2d prtg. 2004). This claim must be evaluated in the light of Fourth Convention drafters' and negotiators' decisions to insert language in Article 154 that supplements Hague Convention (II) with Respect to Laws & Customs of War on Land, July 29, 1899, 32 Stat. 1803, *reprinted* in THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 55 [hereinafter Hague II], and Hague IV, *supra* note 7, unlike language in analogous First, Second and Third Convention provisions. Another interpretation is that the Fourth Convention affirms Hague law. See *infra* notes 10–11 and accompanying text.

10. Hague II, *supra* note 9. Many States parties to Hague II are also Hague IV parties; eighteen are not. THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 55. Compare *Convention of 1907*, *id.* at 85, with *Convention of 1899: Signatures, Ratifications and Accessions*, *id.* at 83. For States parties to both, Hague IV, Articles 2 and 4 declare that it is substituted for Hague II, if all belligerents are parties. Treaty succession rules may bind many countries achieving independence since 1899. See Final Report, *supra* note 8; Symposium, *supra* note 8; Walker, *supra* note 8. Since the 1899 and 1907 Conventions recite the same terms at issue in this analysis in nearly identical language, Hague IV's status as custom, see *supra* notes 7–9 and accompanying text, applies to Hague II parties except persistent objectors. See *infra* note 140 and accompanying text. Hague II was not the first statement of occupation law. U.S. department of War, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 arts. 1–47, Apr. 24, 1863, *reprinted* in THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 3, 4–9 [hereinafter Lieber Code]; Project of an International Declaration Concerning the Laws and Customs of War arts. 1–11, 36–42, Aug. 24, 1874, *reprinted* in *id.* at 21, 23–24, 27 [hereinafter Brussels Declaration]; INSTITUTE OF INTERNATIONAL LAW, THE LAWS OF WAR ON LAND arts. 41–60 (1880), *reprinted* in *id.* at 29, 35–37 [hereinafter OXFORD MANUAL], were its precursors. DINSTEIN, *supra* note 6, at 8–9.

11. The others say they supersede or are “complementary to” parts of prior treaties. Compare Fourth Convention, *supra* note 2, art. 154 with First Convention, *supra* note 3, art. 59 (replacing Convention for Amelioration of the Condition of Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, *reprinted* in THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 365; Convention for Amelioration of the Condition of Wounded and Sick in Armies in the Field, July 6, 1906, 35 Stat. 1885; Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, *reprinted* in *id.* at 421 [hereinafter 1929 PW Convention]); Second Convention, *supra* note 3, art. 58, replacing Hague Convention No. X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention [of 1906], Oct. 18, 1907, 36 Stat. 2371, *reprinted* in *id.* at 397; Third Convention, *supra* note 3, arts. 134–35 (replacing 1929 PW Convention, *supra*, complementary to Hague II, *supra* note 9, Regulations; Hague IV, *supra* note 7, Regulations for *id.* ch. II [spies]); see also ARAI-TAKAHASHI, *supra* note 6, at 115–16; DINSTEIN, *supra* note 6, at 6–7; 1 JEAN S. PICTET, I CONVENTION COMMENTARY 407–8 (1952); 2 JEAN S. PICTET, II CONVENTION

COMMENTARY 277–78 (1960); 3 JEAN S. PICTET, III CONVENTION COMMENTARY 636–40 (1960); 4 JEAN S. PICTET, IV CONVENTION COMMENTARY (1958).

12. Hague IV, *supra* note 7, Regulations, art. 23(h), for which there is no comparable Hague II, *supra* note 9, provision. The *id.*, Regulations, art. 44 prohibition appears in the first paragraph of Hague IV, *supra* note 7, Regulations, art. 23(h) and is not relevant to this analysis. See United States, Department of the Army, FM 27-10: The Law of Land Warfare ¶ 372 (July 1956, Change No. 1, 1975) [hereinafter FM 27-10]; DINSTEIN, *supra* note 6, at 53, 195–96; see also *infra* notes 40, 108, 176 and accompanying text.

13. In today's world, presumably protection would extend to offices, e.g., of prosecutors, public defenders and poverty assistance attorneys in courthouses or similar buildings, as well as data centers, clerks' offices, etc. Hague II, *supra* note 9, Regulations, art. 56; Hague IV, *supra* note 7, Regulations, arts. 55, 56; see also Brussels Declaration, *supra* note 10, art. 7; FM 27-10, *supra* note 12, ¶ 400; OXFORD MANUAL, *supra* note 10, ¶ C(a) & art. 52; ARAI-TAKAHASHI, *supra* note 6, at 196–98, 206; DINSTEIN, *supra* note 6, at 213, 220. Hague II, *supra* note 9, Regulations, art. 55, does not refer to municipal property, unless its "communes" exception would apply, the French version of "municipalities," in Hague IV, *supra* note 7, Regulations, art. 55, which would treat such assets as private property; see also Brussels Declaration, *supra*, art. 8, referring to municipal assets as private property. See also DINSTEIN, *supra* note 6, at 220 n.1188. On the other hand, OXFORD MANUAL, *supra* note 10, art. 53, declares that municipal property cannot be seized. Lieber Code, *supra* note 10, art. 31, declared that title to occupied State-owned real property remained in that State; revenues from such property would go to the occupier; *id.* said nothing about public buildings, e.g., courthouses. *Id.* art. 39 would continue judges' salaries, to be paid from occupied state funds. Privately owned law offices and other law-related facilities or property, e.g., a privately operated poverty law center, are covered under Hague II, *supra* note 9, Regulations, arts. 52, 56; Hague IV, *supra* note 7, Regulations, arts. 52, 56 and may be requisitioned, but owners must be compensated; see also FM 27-10, *supra* note 12, ¶ 406; OXFORD MANUAL, *supra*, arts. 54, 56, 60; Lieber Code, *supra*, arts. 37–38; DINSTEIN, *supra* at 224–32. Some property of neutral-country nationals (ships, other means of transport) may be subject to angary, although Hague II, *supra* note 9, Regulations, art. 53; Hague IV, *supra* note 7, Regulations, art. 53 protect most property of neutrals' nationals, e.g., lawyers' property caught in an occupation situation. DINSTEIN, *supra* note 6, at 236–37. If a courthouse is, or is in, a historic building or a structure of cultural significance like some US courthouses, it would be protected during occupation as cultural property. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 53, June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 711 [hereinafter Protocol I]; Convention for Protection of Cultural Property in the Event of Armed Conflict arts. 1(a), 4–5, May 14, 1954, 249 U.N.T.S. 240, *reprinted in id.* at 999 [hereinafter Cultural Property Convention]; Treaty on Protection of Artistic & Scientific Institutions & Historic Monuments, art. 1, Apr. 15, 1935, 49 Stat. 3267, 67 L.N.T.S. 290, *reprinted in id.* at 991; Hague IV, *supra* note 7, Regulations, arts. 27, 56; Hague II, *supra* note 9, Regulations, art. 56; OXFORD MANUAL, *supra*, art. 53; Brussels Declaration, *supra*, art. 8; FM 27-10, *supra* note 12, ¶¶ 45–46, 57, 405; UK MANUAL, *supra* note 8, ¶ 11.87.1; Lieber Code, *supra*, art. 34; see generally ARAI-TAKAHASHI, *supra* note 6, ch. 10; Hans-Peter Gasser, *Protection of the Civilian Population*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 8, at 209, 262–63; JIRI TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT (1996); Karl Josef Partsch, *Protection of Cultural Property*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 8, at 377–97.

14. Hague IV, *supra* note 7, Regulations, art. 43.

15. Hague II, *supra* note 9, Regulations, art. 43. Earlier international authorities were similar in tone; promulgating new laws was forbidden unless “necessary.” OXFORD MANUAL, *supra* note 10, art. 44; Brussels Declaration, *supra* note 10, art. 3. Lieber Code, *supra* note 10, art. 32, allowed occupiers to “suspend, change, or abolish, as far as the martial power extends . . .” an occupied State’s laws, without the “necessity” limitation.

16. Authentic Text, in THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 56 [hereinafter Authentic Text]. The final paragraph of Hague IV, *supra* note 7 (“Done in The Hague . . .”), says a single copy of the authentic text is filed with the Netherlands government.

17. DINSTEIN, *supra* note 6, at 89.

18. BENVENISTI, *supra* note 9, at 7; *see also* ARAI-TAKAHASHI, *supra* note 6, at 91 n.2, 96.

19. MYRES S. MCDUGAL & FLORENTINO FELICIANO, LAW AND MINIMUM PUBLIC ORDER 746 (1961).

20. DINSTEIN, *supra* note 6, analyzes Hague IV, *supra* note 7, and cites Hague II, *supra* note 9, occasionally, DINSTEIN, *supra* at 4–6, 9, 53, 90, 231, 233, 287, but does not comment on this aspect of Hague II, *supra* note 9, Regulations, art. 43. ARAI-TAKAHASHI, *supra* note 6, and BENVENISTI, *supra* note 9, concentrate on Hague IV, *supra* note 7, as does FM 27-10, *supra* note 12. Like Hague IV, *supra* note 7, the authentic language of Hague II, *supra* note 9, is French, *see* Authentic Text, *supra* note 16, at 56; the final paragraph of Hague II, *supra* note 9 (“Done at The Hague . . .”), says a single copy of the authentic text is in Netherlands archives. Schindler & Toman, THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 56, rely on THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, at 100-32 (James Brown Scott ed., 3d ed. 1918), that reproduced the US Department of State Convention translations in 22 Stat. 1803 and 36 Stat. 2227. The International Committee of the Red Cross website has had the erroneous version, as do ARAI-TAKAHASHI, *supra* note 6, at 91 and the long-influential 2 LASSA OPPENHEIM, INTERNATIONAL LAW § 169 n.4 (Hersch Lauterpacht ed., 1952). FM 27-10, *supra* note 12, *Foreword* recognizes that French is the Hague treaties’ official language. *Id.* ¶ 363 recites the erroneous English-language Hague IV, *supra* note 7, Regulations, art. 43 version. UK MANUAL, *supra* note 8, ¶ 11.25 seems to rely on the erroneous translation.

US courts apply treaties’ authentic language. *Eastern Airlines v. Floyd*, 499 U.S. 530, 534–37 (1991). The Executive and the Congress interpret treaties; courts may interpret them differently from either. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 625–33 (2006) (Third Convention, *supra* note 3, arts. 2, 3); *see also* RESTATEMENT, *supra* note 6, § 326. It is the Supreme Court’s interpretation of the laws that counts. *United States v. Nixon*, 418 U.S. 683, 703–5 (1974) (executive action review); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (US statute review). International court decisions, e.g., of the International Court of Justice (ICJ), are entitled to great respect, but they do not bind US courts. *Medellin v. Texas*, 128 S.Ct. 1346, 1358–60 (2008).

21. *See* ARAI-TAKAHASHI, *supra* note 6, at 97–98; BENVENISTI, *supra* note 9, at 12–18; DINSTEIN, *supra* note 6, at 108–9.

22. *See generally* ARAI-TAKAHASHI, *supra* note 6, at 98–113.

23. The French version is the same in both treaties; *compare* Hague II, *supra* note 9, Regulations, art. 43, 22 Stat. 1821, *with* Hague IV, *supra* note 7, Regulations, art. 43, 36 Stat. 2227. Since French is the authentic language of both treaties, it is not clear which is the more accurate English translation, or if a third and more precise English wording should be used. *See supra* notes 14–22 and accompanying text. I am not sufficiently fluent in French to offer comment.

24. ARAI-TAKAHASHI, *supra* note 6, at 93–96; BENVENISTI, *supra* note 9, at 9, 26–29, 182–83 (advocating change in the law if an occupied State’s public at large supports it), 209–10. *See also id.* 9–14 for the Brussels Declaration and Hague IV, *supra* notes 7, 10, negotiations. Change in the

law based on public support can raise an issue of differences among groups within a State, e.g., different ethnic or religious groups that do not command a majority but are a vocal minority.

25. North Atlantic Treaty, Apr. 4, 1949, 61 Stat. 2241, 34 U.N.T.S. 243 [hereinafter NATO Treaty].

26. Inter-American Treaty of Reciprocal Assistance (Rio Treaty), Sept. 2, 1947, 62 Stat. 1681, 21 U.N.T.S. 77 [hereinafter Rio Pact].

27. Albania, Bulgaria, Croatia, Czech Republic, Estonia, Greece, Iceland, Italy, Latvia, Lithuania, Slovakia, Slovenia, Spain and Turkey are the NATO non-party States. Argentina, Bahamas, Chile, Colombia, Costa Rica, Ecuador, Honduras, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela are the Rio Pact non-party States. United States Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States of America on January 1, 2009*, at 410, 343–44, 438–40 (2009) [hereinafter TIF].

28. *Id.* at 438–40 (NATO: Albania, Croatia, Czech Republic, Estonia, Iceland, Latvia, Lithuania, Poland, Slovakia and Slovenia; Rio Pact: Bahamas, Costa Rica, and Trinidad and Tobago).

29. George K. Walker, *The Lawfulness of Operation Enduring Freedom's Self-Defense Responses*, 37 VALPARAISO LAW REVIEW 489, 498–500 (2003).

30. For the United States, TIF, *supra* note 27, printed annually but also on the Department of State website.

31. See *supra* notes 7–9 and accompanying text.

32. See *supra* notes 7–9, 14–15 and accompanying text.

33. The last scenario could have arisen in World War II; Bulgaria and Italy were Hague II, *supra* note 9, parties and not Hague IV, *supra* note 7, parties and were subject to occupation law for a while. When the Allies invaded and occupied Sicily and southern Italy, Italy was German's ally; when the Benito Mussolini government fell in Italy and a new Italian government declared war on Germany, the rest of northern Italy controlled by Germany became subject to occupation law under Germany and, as the Allies moved north into Italy, Allied occupation law under various sovereigns applied. BENVENISTI, *supra* note 9, at 84–91; DINSTEIN, *supra* note 6, at 37. As the Allies moved into Europe from the east (USSR forces) and the west (primarily UK, US forces), parts of other States allied with them—parts of Belgium, Denmark (Greenland), France until establishment of the Charles de Gaulle government, Greece, Iceland (first as a Denmark possession and later after its declaration of independence during World War II), Luxembourg, Netherlands, Poland, etc.—were subject to occupation by consent of governments in exile; belligerent occupation rules did not apply. The same applied to colonial areas Japan conquered that the Allies liberated in the Pacific theater; after annexing Manchuria, Japan established puppet governments for its conquests. The Allies restored colonies to their European sovereigns. BENVENISTI, *supra* note 9, at 60–66; DINSTEIN, *supra* note 6, at 37, 46–47. Italy's colonies and conquests were subjected to occupation. BENVENISTI, *supra* note 9, at 72–81.

34. Another issue is the scope of custom the Nuremberg and Tokyo judgments stated. Nuremberg was decided under Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; parties were France, Great Britain, the USSR and the United States. The International Tribunal tried high-ranking Nazi officials; other accuseds went before military commissions. For Japan, accuseds went before military commissions in Tokyo and elsewhere in Asia and territories Japan occupied during World War II. The US Navy conducted some. George E. Erickson, Jr., *United States Navy War Crimes Trials*, 5 WASHBURN LAW JOURNAL 89 (1965). Although it might be argued that only those States and their nationals involved in the trials were thereafter governed by customary rules the trials declared, Resolution 95, *supra* note 8, unanimously reaffirmed the Nuremberg and Tokyo principles. The *Nuclear*

*Weapons*, 2005 *Congo* and *Wall* Cases, *supra* note 8, shut the door on claims of lack of a customary norm or a variant on Nuremberg standards but do not erase issues of divergence, if any, between custom and Hague II and Hague IV and later interpretations of them. The three ICJ cases closed the gap, if it ever existed.

35. See DINSTEIN, *supra* note 6, at 90, 108–9, commenting on Hague IV, *supra* note 7, Regulations, art. 43. Since the Hague II, *supra* note 9, Regulations, art. 43 phrase is the same, the same construction should apply.

36. Progressive development is a term in the law of treaties; see, e.g., IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 17–18 (2d ed. 1984) (comment on Vienna Convention on the Law of Treaties arts. 53, 64, 71, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] status of standards for applying *jus cogens*). Progressive development, perhaps termed “innovative,” can also be seen in secondary sources. See, e.g., SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶ 136(g) & cmt. 136.1 (Louise Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL]. *De lege ferenda*, sometimes styled *lex ferenda*, relates to the law as it should be; its antonym is *lex lata*, law as it presently is. Vienna Convention, *supra*, is in force for 109 States. Vienna Convention on the Law of Treaties Between States & International Organizations or Between International Organizations arts. 53, 64, 71, 73, 85, Mar. 21, 1986, 25 INTERNATIONAL LAW MATERIALS 543, is not in force but recites similar rules on this point and is subject to the Vienna Convention, *supra*. UN-related IGOs have ratified it, suggesting that it too must be considered if dealing with one of these IGOs. United Nations, Multilateral Treaties Deposited with the Secretary-General: Status of Treaties XXXIII-1, 3, <http://treaties.un.org/Pages/Treaties.aspx?id=23&subid=A&lang=en> (last visited Sept. 20, 2009) [hereinafter Multilateral Treaties].

37. Through Hague II and Hague IV, *supra* notes 7, 9, Regulations, art. 43’s “laws” rules; see *supra* notes 14–21 and accompanying text. A debate, now maybe settled by ICJ judgments, continues on whether and under what circumstances human rights law applies during armed conflict, or whether the LOAC is *lex specialis*; i.e., in LOAC-governed situations, human rights law does not apply. See *infra* notes 104, 116 and accompanying text.

38. DINSTEIN, *supra* note 6, at 108–9 says that an occupied State’s government can continue to legislate for occupied territory even after occupation begins. An occupier can concur with an occupied State’s views, but the occupier has a full right to legislate for the territory.

39. BENVENISTI, *supra* note 9, at ix–x; DINSTEIN, *supra* note 6, at 12.

40. DINSTEIN, *supra* note 6, at 90–91, 110–16, advocates reading Fourth Convention, *supra* note 2, art. 64, to allow amending existing law, criminal or civil, if occupier security interests are at stake, occupied State law is inconsistent with Fourth Convention obligations, civilian population needs must be met (“Article 64’s orderly government”), or maybe other changes under the Hague IV, *supra* note 7, Regulations, art. 43 “unless absolutely prevented” exception. FM 27-10, *supra* note 12, ¶¶ 369–70 recite Article 64 and say that “[i]n restoring public order and safety, the occupant will continue the ordinary civil and penal (criminal) laws of the occupied territory except to the extent it may be authorized by [Fourth Convention, *supra*, art. 64; Hague IV, *supra* note 7, Regulations, art. 43] . . . to alter, suspend, or repeal such laws,” referring also to Hague IV, *supra* note 7, Regulations, art. 23(h). FM 27-10, *supra* note 12, ¶ 371 declares an occupier may

alter, repeal, or suspend laws of the following types:

- a. Legislation constituting a threat to its security, such as laws relating to recruitment and the bearing of arms.
- b. Legislation dealing with political process, such as laws regarding the suffrage and of assembly.

- c. Legislation the enforcement of which would be inconsistent with the duties of the occupant, such as laws establishing racial discrimination.

This seems to go further than DinsteIn's interpretation and seems consistent with a view that occupiers may, by suppressing such laws, in effect promote human rights standards. *See, e.g.*, ARAI-TAKAHASHI, *supra* note 6, at 116–36; BENVENISTI, *supra* note 9, at 187–89, 210–11; MCDUGAL & FELICIANO, *supra* note 19, at 767–71; 2 OPPENHEIM, *supra* note 20, §§ 172–72b. UK MANUAL, *supra* note 8, ¶¶ 11.19, 11.25.1 and 11.60, read together, seem to conclude similarly. Gasser, *supra* note 13, at 254–56, also citing Fourth Convention, *supra*, art. 64, says occupiers must keep national laws in force but that laws serving the purpose of warfare in the occupied territory or that are a threat to security or an obstacle to applying humanitarian law may be repealed or suspended, noting differing views. Gasser's view seems contradicted at Gasser, *supra* note 13, at 247–48 when he declares, following Protocol I, Article 75, that discrimination against civilians for reasons of race, nationality, language, religious convictions and practices, political opinion, social origin or position or similar considerations is unlawful. An occupier violates this rule if it keeps national laws of an occupied State in force that would inflict these kinds of discrimination.

41. *See* DINSTEIN, *supra* note 6, at 80–81.

42. *Id.* at 121.

43. BENVENISTI, *supra* note 9, at 14–15, 187–89, 210–11 (human rights standards may be guide for occupation law); *see also supra* note 40 (others seem to allow more progressive approach).

44. FM 27-10, *supra* note 12, ¶ 380, quoting Hague IV, *supra* note 7, Regulations, art. 46; compare Hague II, *supra* note 9, Regulations, art. 46; *see also* FM 27-10, *supra* note 12, ¶ 406. It must be noted, however, that citing Hague IV, *supra* note 7, and Fourth Convention, *supra* note 2, provisions in FM 27-10, *supra* note 12, ¶¶ 381–87 suggests that the drafters had a more restrictive view in 1956, i.e., what they meant was humanitarian law and not today's human rights law.

45. *E.g.*, FM 27-10, *supra* note 12, ¶ 377, declares an occupier's broad right to impose media censorship, without citing authority. International Covenant on Civil & Political Rights art. 19, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], declares a right to expression of opinion in writing or in print, subject to "certain restrictions . . . provided by law and [which] are necessary." *Id.*, art. 4 allows derogations from this right "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed . . . to the extent strictly required by the exigencies of the situation . . .," a derogation provision in human rights treaties. *See infra* notes 109–21 and accompanying text. How should an occupier apply censorship in the light of human rights law? Are the rules the same under occupation law and human rights law? A further problem, upon which authorities divide, is whether human rights law applies extraterritorially, such that occupier State personnel carry with them human rights obligations of their country into an occupied State. Compare ARAI-TAKAHASHI, *supra* note 6, ch. 21 (they do); DINSTEIN, *supra* note 6, at 70 (they do not).

46. ARAI-TAKAHASHI, *supra* note 6, at 65–67; BENVENISTI, *supra* note 9, at 184–87; DINSTEIN, *supra* note 6, at 51–52; *see also* U.N. Charter arts. 1(2), 55–56; LELAND F. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS 29–34, 371–82 (3d rev. ed. 1969); Rudiger Wolfrum, *Self-Determination*, in THE CHARTER OF THE UNITED NATIONS 47–63 (Bruno Simma ed., 2d ed. 2002).

47. Fourth Convention, *supra* note 2, art. 158; *see also* First Convention, *supra* note 3, art. 63; Second Convention, *supra* note 3, art. 62; Third Convention, *supra* note 3, art. 142. As 1 PICTET, *supra* note 11, at 413; 2 PICTET, *supra* note 11, at 283; 3 PICTET, *supra* note 11, at 47, 648 and 4 PICTET, *supra* note 11, at 625, explain, Martens clauses bind Convention parties, even though they denounce the Convention(s), by the principles in them insofar as they express inalienable

and universal international law rules. See also Hague II, *supra* note 9, pmb.; Hague IV, *supra* note 7, pmb.; SAN REMO MANUAL, *supra* note 36, ¶ 2; INSTITUTE OF INTERNATIONAL LAW, THE APPLICATION OF INTERNATIONAL HUMANITARIAN LAW AND FUNDAMENTAL HUMAN RIGHTS IN ARMED CONFLICTS IN WHICH NON-STATE ENTITIES ARE PARTIES ¶ 4 (Aug. 25, 1999), reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 1205, 1207; INSTITUTE FOR HUMAN RIGHTS, DECLARATION OF MINIMUM HUMANITARIAN STANDARDS pmb. (Nov. 30–Dec. 2, 1990), reprinted in *id.* at 1199, 1200; ARAI-TAKAHASHI, *supra* note 6, at 68–71 (ICJ cases support view that clauses restate customary international law); MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICT 44 (1982); LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 17–18, 34, 349 (2d ed. 2000); Greenwood, *supra* note 8, § 129(2) (clauses' impact difficult to assess). A preamble is not part of a treaty's binding language but may explicate its object and purpose. Vienna Convention, *supra* note 36, art. 31(2); see also ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 235–38 (2d ed. 2007); SINCLAIR, *supra* note 36, at 127–28, 130.

48. Protocol I, *supra* note 13, art. 1(2) (customary law, Martens clause protection). State Parties, *supra* note 4, lists 168 States as Protocol I parties compared with 194 for the 1949 Conventions; many are or were US alliance or coalition partners in Afghanistan or Iraq. See also DINSTEIN, *supra* note 6, at 7 (“determined minority” of non-ratifying States for Protocol I); *supra* notes 25–28 and accompanying text.

49. ARAI-TAKAHASHI, *supra* note 6, at 71, 657–60 thinks so.

50. Cf. UK MANUAL, *supra* note 8, ¶ 11.3.3. The coalition had joint responsibility for areas under its effective control in Iraq during 2003–4. DINSTEIN, *supra* note 6, at 48.

51. If each occupying power has a separate zone to administer, as in Germany and Austria after World War II, each power is responsible under occupation law for its zone. *Id.* at 48–49. This does not respond to the issue of different interpretations and applications of the laws, including new legal regimes to replace what may have been laws like those in force in Nazi Germany. In zonal occupations, as in coalition occupations, the occupying powers should reach consensus on new legal regimes, looking to when an occupied State regains full sovereignty.

52. See *supra* note 39 and accompanying text.

53. See *infra* notes 69, 78–81 and accompanying text.

54. Although precedent (*stare decisis*) is an entrenched common law principle, States, including NATO and Rio Pact, *supra* notes 25, 26, countries, may adhere to a civil law standard like ICJ Statute, *supra* note 6, art. 59, declaring that a judgment only binds States before the Court and only for the particular case.

55. There are others, e.g., U.N. Charter art. 17(1) (General Assembly must approve UN budget); see also GOODRICH ET AL., *supra* note 46, at 148–67; THE CHARTER OF THE UNITED NATIONS, *supra* note 46, at 334–36.

56. U.N. Charter arts. 25, 48, 94(2), 103; see also DINSTEIN, *supra* note 6, at 273; GOODRICH ET AL., *supra* note 46, at 207–11, 334–37, 555–59, 614–17; SAN REMO MANUAL, *supra* note 36, ¶¶ 7–9; THE CHARTER OF THE UNITED NATIONS, *supra* note 46, at 454–62, 776–80, 1174–79, 1292–1302; W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 83, 87 (1993) (principles from Council decisions under arts. 25, 48, 103 are treaty law binding UN members, overriding other treaty obligations).

57. U.N. Charter arts. 51, 103; see also GOODRICH ET AL., *supra* note 46, at 342–53; THE CHARTER OF THE UNITED NATIONS, *supra* note 46, at 778–806. U.N. Charter art. 2(1) recognizes the principle of State sovereignty, traditionally interpreted to mean that in the absence of governing law, States may act in their interest. See also GOODRICH ET AL., *supra* note 46, at 36–40; THE CHARTER OF THE UNITED NATIONS, *supra* note 46, at 68–91. In the case of self-defense, it

is more than self-interest; it is an inherent right the Charter enshrines under Articles 51 and 103. Debate continues on whether the right of self-defense includes a right of anticipatory self-defense and, more recently, claims of a right to take preemptive action. See generally George K. Walker, *Filling Some of the Gaps: The International Law Association (American Branch) Law of the Sea Definitions Project*, 32 *FORDHAM INTERNATIONAL LAW JOURNAL* 1336, 1355–56 nn.102–3 (2009).

National sovereignty, sometimes diminished or eroded, has been a fundamental principle since the Peace of Westphalia. Treaty of Peace of Münster, Fr.-Holy Rom. Empire, art. 64, Oct. 24, 1648, 1 *Consol. T.S.* 198, 319; Treaty of Peace of Osnabrück, Swed.-Holy Rom. Empire, art. 9, Oct. 24, 1648, *id.* at 119, 198; see also CHRISTIAN L. WIKTOR, *MULTILATERAL TREATY CALENDAR 1648–1995*, at 3 (1998). The Peace of Westphalia began the modern State system. Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 20 (1948). Treaties besides the U.N. Charter art. 2(1) (“sovereign equality” of UN members) and decisions invoking the sovereignty principle include the UN Convention on the Law of the Sea art. 157(3), Dec. 10, 1982, 1833 *U.N.T.S.* 3 [hereinafter LOS Convention]; Vienna Convention, *supra* note 36, pmbl.; S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A), No. 10, at 4, 18; S.S. *Wimbledon* (U.K. v. Ger.), 1923 *id.*, No. 1, at 15, 25; see also Declaration on Principles of International Law Concerning Friendly Relations & Co-Operation Among States in Accordance with the Charter of the United Nations, Principle 6, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970); Declaration on Inadmissibility of Intervention in Domestic Affairs of States & Protection of Their Independence & Sovereignty, G.A. Res. 2131, U.N. GAOR, 20th Sess., U.N. Doc. A/RES/2131 (1965); the Secretary-General, *A More Secure World: Our Shared Responsibility: Report of the Secretary-General’s High-Level Panel on Threats, Challenges and Change*, ¶ 29, U.N. Doc. A/59/565 (2004) (States accepting UN Charter benefit of “privileges of sovereignty . . . [must] also accept its responsibilities”); the Secretary-General, *An Agenda for Peace: Report of the Secretary-General on the Work of the Organization*, U.N. Doc. A/49/277, S/24111 (1992); MICHAEL AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 21–23 (Brian Chapman ed., 3d ed. 1977); JAMES L. BRIERLY, *THE LAW OF NATIONS* 45–49 (Humphrey Waldock ed., 6th ed. 1963); BROWNIE, *supra* note 6, at 287–89; GOODRICH ET AL., *supra* note 46, at 36–40; OPPENHEIM’S *INTERNATIONAL LAW*, *supra* note 6, §§ 37, 107; LORD MCNAIR, *THE LAW OF TREATIES* 754–66 (1961); RESTATEMENT, *supra* note 6, Part I, ch. 1, *Introductory Note*, 16 & 17; THE CHARTER OF THE UNITED NATIONS, *supra* at 70–91; R.P. Anand, *Sovereign Equality of States in International Law*, 197 *RECUEIL DES COURS D’ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.]* 9, 22–51 (1986); Boutros Boutros-Ghali, *Empowering the United Nations*, *FOREIGN AFFAIRS*, Winter 1992, at 89, 98–99; Jonathan I. Charney, *Universal International Law*, 87 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 529, 539 (1993); Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 *RECUEIL DES COURS D’ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.]* 1, 49–50 (1957); Louis Henkin, *International Law: Politics, Values and Functions*, 216, *id.* at 9, 46, 130 (1989); Oscar Schachter, *International Law in Theory and Practice*, 178, *id.* at 9, 32 (1982); C.H.M. Waldock, *General Course on Public International Law*, 106, *id.* at 1, 156–72 (1962). Sovereignty is a debatable issue today. HENRY KISSINGER, *DOES AMERICA NEED A FOREIGN POLICY? TOWARD A DIPLOMACY FOR THE 21ST CENTURY* 21–22, 235–37 (2001) declared that the sovereignty concept was in trouble; Henkin, *supra*, had earlier recognized sovereignty’s force, but in LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 8–10 (1995) denounced it.

58. There are differences among countries on the law of self-defense. See *supra* note 57 and accompanying text. Even this “easy” case might raise perceptions of equal justice. There are also

possibilities of renewed hostilities, or outbreak of new hostilities, where the LOAC, and not necessarily self-defense, is involved. See generally ARAI-TAKAHASHI, *supra* note 6, ch. 12.

59. Cf. Fourth Convention, *supra* note 2, arts. 64, 66; Hague II, *supra* note 9, Regulations, art. 43; Hague IV, *supra* note 7, Regulations, art. 43; FM 27-10, *supra* note 12, ¶ 374; ARAI-TAKAHASHI, *supra* note 6, at 157–62; DINSTEIN, *supra* note 6, at 137; 4 PICTET, *supra* note 11, at 334–37, 339–41; Gasser, *supra* note 13, at 273–77. For US forces and others subject to it, it is the Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2009) [hereinafter UCMJ].

60. Fourth Convention, *supra* note 2, arts. 64, 66; Hague II, *supra* note 9, Regulations, art. 43; Hague IV, *supra* note 7, Regulations, art. 43; ARAI-TAKAHASHI, *supra* note 6, at 162–84; DINSTEIN, *supra* note 6, at 136–37; 4 PICTET, *supra* note 11, at 334–37, 339–41.

61. Cf. Fourth Convention, *supra* note 2, art. 64; Hague II, *supra* note 9, Regulations, art. 43; Hague IV, *supra* note 7, Regulations, art. 43; DINSTEIN, *supra* note 6, at 132–34; 4 PICTET, *supra* note 11, at 337; Gasser, *supra* note 13, at 271–72.

62. E.g., UCMJ, *supra* note 59, art. 2, § 802, is premised on the nationality jurisdiction principle, i.e., a State's criminal laws follow those the Code covers wherever they go. BROWNLIE, *supra* note 6, at 300–304; OPPENHEIM'S INTERNATIONAL LAW, *supra* note 6, §§ 137–38; RESTATEMENT, *supra* note 6, §§ 402(1), 402(2).

63. To be sure, the differences can be erased in terms of law on the books if an occupier State promulgates changes to local law in conformity with its standards, but a perception might persist among an occupied State's legal community and its constituents, particularly if the differences are great. Local law refers to a jurisdiction's law exclusive of its conflict of laws, or private international law, principles. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 4(1) (1971, 1988 rev.) [hereinafter RESTATEMENT (SECOND)]; EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 2.1 (4th ed. 2004). Lieber Code, *supra* note 10, art. 43, declared prize money would be paid according to "local law," presumably the captor's law. See also *infra* note 144 and accompanying text.

64. DINSTEIN, *supra* note 6, at 99–107 (civilians can be Fourth Convention, *supra* note 2, art. 73, protected persons but become combatants subject to the LOAC if they participate as part of an attacking force, then revert to protected status as civilians).

65. This is subject to Fourth Convention authority to try them in special military courts and under lawful changes an occupier State might make in occupied State law. See *supra* note 60 and accompanying text.

66. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001); United Nations Global Counter-Terrorism Strategy, G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (Sept. 20, 2006); Protocol I, *supra* note 13, art. 51(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts arts. 4(2)(d), 13(2), June 8, 1977, 1125 U.N.T.S. 609, reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 775 [hereinafter Protocol II]; INSTITUTE FOR HUMAN RIGHTS, *supra* note 47, art. 6; Commission of Jurists, Hague Rules Concerning Air Warfare art. 22, Feb. 17, 1923, reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 315, 317; International Institute of Humanitarian Law, Declaration on the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-International Armed Conflicts art. A2, Apr. 7, 1990, *in id.* at 1195, 1196; see also BOTHE ET AL., *supra* note 47, at 300–301, 677–78; BROWNLIE, *supra* note 6, at 745; OPPENHEIM'S INTERNATIONAL LAW, *supra* note 6, § 122, at 401–3; NWP 1-14M ANNOTATED, *supra* note 8, ¶¶ 8.5.1.2, 11.3; RESTATEMENT, *supra* note 6, § 404 (State-sponsored terrorism may be a universal crime); COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 1977, at 618, 1375, 1453 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., 1987). A caveat is

that terrorists' trials might be in special military courts or local courts in an occupied State under occupier or occupied State law, which might differ from international standards. *See supra* notes 60, 65, *infra* note 67 and accompanying text.

67. Pub. L. No. 109-366, 120 Stat. 2600, *inter alia* codified as 10 U.S.C. §§ 948a–950w (2009).

68. The problem can be largely eliminated in coalition or alliance operations if coalition or allied forces operate in defined areas, e.g., the UK and US sectors in Iraq and zones in occupied Germany and Austria after World War II, or if one country is the occupier State, as was the situation in Japan after World War II. There are no reported issues of this nature involving other States that sent forces to Iraq as part of the coalition. Agreements among occupier States, like status of forces agreements with rules on primary jurisdiction, might resolve issues among States, but a problem of occupied State and international perceptions might remain.

69. For the 2003 Iraq coalition, UN Security Council Resolutions 1483, S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003); 1511, S.C. Res. 1511, U.N. Doc. S/RES/1511 (Oct. 16, 2003); and 1546, S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004), were the chartering documents, recognizing the Coalition Provisional Authority and the occupation's end. For commentary on Iraq after occupation ended, *see generally* Andrea Carcano, *End of the Occupation in 2004? The Status of the Multinational Force in Iraq After the Transfer of Sovereignty to the Interim Iraqi Government*, 11 JOURNAL OF CONFLICT & SECURITY LAW 41 (2006), then (in 2005) arguing that the Interim Government did not meet sovereignty standards and that the coalition continued as occupiers. *See also infra* notes 78–81 and accompanying text.

70. *Cf.* BENVENISTI, *supra* note 9, at 20–21. An example is a criminal trial penalty phase where occupier State law allows the death penalty, perhaps under the LOAC, human rights law and occupied State law would not, following conviction for violating the law of war. *Cf.* FM 27-10, *supra* note 12, ¶ 508 (death penalty possible for grave breaches); *but see also* Fourth Convention, *supra* note 2, art. 75; Protocol I, *supra* note 13, art. 75(4); FM 27-10, *supra* note 12, ¶ 445; 4 PICTET, *supra* note 11, at 361–63; Gasser, *supra* note 13, at 274. A similar issue is if occupier State law allows capital punishment, human rights law does not, and occupier State law prescribes an execution method different from occupier State law. A common execution method under US law is lethal injection; other States might use methods not compatible with, e.g., U.S. CONST. amend. VIII.

71. U.N. Charter arts. 10–11, 13–14 (provisions for Assembly recommendations), 33, 36–37 (Chapter VI provisions for possible Council action), 39–51 (Chapter VII provisions for situations involving breaches of the peace or threats to international peace and security and the inherent right of individual and collective self-defense and possible Council action).

72. SYDNEY D. BAILEY & SAM DAWS, THE PROCEDURE OF THE UN SECURITY COUNCIL 18–21, 236–37 (3d ed. 1998); BROWNLIE, *supra* note 6, at 14; JORGE CASTENADA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 78–79 (Alba Amoia trans., 1969); GOODRICH ET AL., *supra* note 46, at 111–29, 133–44, 257–65, 277–87, 290–314; OPPENHEIM'S INTERNATIONAL LAW, *supra* note 6, § 16; RESTATEMENT, *supra* note 6, § 103(2)(d) & r.n.2; THE CHARTER OF THE UNITED NATIONS, *supra* note 46, at 257–87, 298–326, 583–94, 616–43, 717–49.

73. *See* W. Michael Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 57, 72–73 (2007–2008), citing *Uniting for Peace Resolution*, G.A. Res. 377, ¶ 1, U.N. Doc. A.1775 (Nov. 3, 1950), employed during the Korean War to continue UN operations; *Wall Case*, *supra* note 8, 2004 I.C.J. at 148–51 (adv. op.); *Certain Expenses of the United Nations*, 1952 I.C.J. 151, 163–71 (adv. op.); *compare* Joseph Isanga, *Counter-Terrorism and Human Rights: The Emergence of a Rule of Customary International Law from U.N. Resolutions*, 32 DENVER JOURNAL OF INTERNATIONAL LAW & POLICY 233, 238–49 (2009), *also citing* 2005 Congo Case, *supra* note 8, 2005 I.C.J. at 53–54;

Nuclear Weapons, *supra* note 8, 1996 I.C.J. at 254–55; Military & Paramilitary Activities in & Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 99–108 (June 27) [hereinafter Nicaragua Case]. See also GEORGE K. WALKER, THE TANKER WAR, 1980–88: LAW AND POLICY 175–77 (2000) (Vol. 74, US Naval War College International Law Studies). Otherwise-non-binding Council resolutions, e.g., calls for action under Chapter VII, *supra* notes 55–57 and accompanying text, could evolve into a customary norm. Isanga, *supra* at 240, citing 2005 Congo Case, *supra* note 8, at 53–54; Wall Case, *supra* at 171.

The Supreme Court of the United States has held differently on another important General Assembly resolution, the Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948). *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 n.12 (2004), declined to accept the Declaration as part of US customary international law because the US UN Permanent Representative, Eleanor Roosevelt, had declared the Declaration was not a binding standard. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980), reached a different conclusion on State-sponsored torture. DINSTEIN, *supra* note 6, at 68 and Committee on the Enforcement of Human Rights Law, International Law Association, *Final Report on the Status of the Universal Declaration of Human Rights in National and International Law*, Report of the 66th Conference 523, 544 (1994) say many Declaration provisions reflect customary international law. This illustrates dilemmas for US and other national decisionmakers; choices made in conformity with national law standards may not be the same as public international law norms or as the law as perceived by allied States. A related issue has been the growth of “soft law,” i.e., standards, perhaps coming from an IGO, a non-binding agreement or a non-governmental organization (NGO), that deserve consideration, even if they may not have source of law status. AUST, *supra* note 47, at 52–53.

74. General principles of law are another primary international law source. ICJ Statute, *supra* note 6, art. 38(1)(c); BROWNLIE, *supra* note 6, at 19, 15–27; OPPENHEIM’S INTERNATIONAL LAW, *supra* note 6, § 12; but see RESTATEMENT, *supra* note 6, §§ 102(1)(c), 102(4) & cmt. 1 (general principles a subsidiary source).

75. See *supra* notes 47–49 and accompanying text.

76. Vienna Convention, *supra* note 36, art. 31(3)(b) may give an answer. It provides that subsequent practice under a treaty, and presumably an *ipso facto* binding UN resolution emanating from the Charter (which is a treaty), establishes the parties’ agreement on application of the treaty. A longstanding view has been, however, that treaties and custom are coequal in status; see ICJ Statute, *supra* note 6, art. 38(1); RESTATEMENT, *supra* note 6, § 102. A custom coming later in time might trump an earlier, inconsistent treaty, particularly if it is in desuetude. AUST, *supra* note 47, at 14; BROWNLIE, *supra* note 6, at 5; RESTATEMENT, *supra* note 6, § 102 r.n.4. Whether these construction principles apply to Charter law situations is not clear. A reconciliation is that there may be a clear difference between the newer custom and the older treaty, such that Article 31(3)(b) does not apply.

77. Cf. Nicaragua Case, *supra* note 73, 1986 I.C.J. at 94.

78. S.C. Res. 1483, *supra* note 69.

79. S.C. Res. 1546, *supra* note 69; for questions related to self-defense issues possibly arising during an occupation, see *supra* notes 57–70 and accompanying text.

80. U.N. Charter arts. 25, 48, 103; see also *supra* notes 55–57 and accompanying text.

81. DINSTEIN, *supra* note 6, at 273. What began in 2004 was another kind of occupation—occupation by consent of the government of Iraq and not belligerent occupation under the LOAC, subject to Security Council Resolution 1546, *supra* note 69, standards. DINSTEIN, *supra* note 6, at 36 (citing pre-Charter examples), 273. The Fourth Convention/Hague IV, *supra* notes 2, 7, regime ended June 30, 2004. There can be UN forces occupation with host country consent

or in a kind of trusteeship; these are not belligerent occupations unless there is UN enforcement action, as distinguished from peacekeeping operations. DINSTEIN, *supra* note 6, at 38; Michael Bothe, *Peace-Keeping*, in THE CHARTER OF THE UNITED NATIONS, *supra* note 46, at 648, 683. These operations, often governed by Council decision but perhaps other UN resolutions, *see supra* notes 55–57 and accompanying text, may draw from the LOAC of belligerent occupation for their governance standards.

82. For analysis of “due notice” in the law of the sea (LOS) context, *see* LAW OF THE SEA COMMITTEE, *Report*, in PROCEEDINGS OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION 2007–2008, at 217–20 (2008) [hereinafter LOS Committee Report].

83. The Executive Board is WHO’s executive arm, very roughly analogous to the UN Security Council. Constitution of the World Health Organization arts. 10, 19, 21–22, 24–37, 59–60, July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185. E.g., Iraq, the United Kingdom and the United States are WHO members, but there may not be a common matrix of conventions, agreements or regulations among these countries. TIF, *supra* note 27, at 370–72.

84. *Cf.* BROWNLIE, *supra* note 6, at 691–92; OPPENHEIM’S INTERNATIONAL LAW, *supra* note 6, § 16; RESTATEMENT, *supra* note 6, §§ 102, 103(2)(c), cmt. c & r.n. 1; *supra* notes 73–74 and accompanying text.

85. Vienna Convention, *supra* note 36, arts. 34–38; AUST, *supra* note 47, ch. 14; BROWNLIE, *supra* note 6, at 627–29; OPPENHEIM’S INTERNATIONAL LAW, *supra* note 6, §§ 626–27; MCNAIR, *supra* note 57, ch. 16; RESTATEMENT, *supra* note 6, § 323.

86. *See supra* note 36 and accompanying text.

87. *See supra* note 73.

88. U.N. Charter arts. 51, 103; *see also supra* notes 55–57 and accompanying text. This is not as far-fetched as it might seem. In 1805 as part of Third Coalition actions against Napoleon Bonaparte, the commander of Austrian forces in the Italian peninsula established a cordon, “ostensibly” to protect against spread of yellow fever behind his defense lines. FREDERICK W. KAGAN, THE END OF THE OLD ORDER 501 (2006). Although this was a mask for Austrian troop buildup to await enemy attack if it came, suppose an occupier uses forces in self-defense in ways that have an incidental effect of violating health regulations but are reasonable under the circumstances. The right of self-defense would trump WHO rules. However, an occupier might use a factorial approach like that suggested *infra* notes 156–95 and accompanying text to implement self-defense to give partial or total effect to WHO rules.

89. *See supra* notes 55–57 and accompanying text.

90. U.N. Charter art. 103; *see also supra* notes 55–57, 71–73 and accompanying text.

91. *See supra* note 73.

92. An example from the law of naval warfare is the difference, sometimes subtle, between the SAN REMO MANUAL and NWP 1-14M ANNOTATED, *supra* notes 8, 36. Although both deal with LOAC rules for conflicts at sea, which had some resonance in the 2003–4 Iraq situation, another occupation might raise more of these issues.

93. ICJ Statute, *supra* note 6, art. 38(1)(d) (writings of scholars); BROWNLIE, *supra* note 6, at 691–92; OPPENHEIM’S INTERNATIONAL LAW, *supra* note 6, § 16; RESTATEMENT, *supra* note 6, §§ 102, 103(2)(c), cmt. c & r.n. 1,2.

94. *See supra* notes 88–90 and accompanying text.

95. *See generally* BROWNLIE, *supra* note 6, at 510–12 (*jus cogens*’ content uncertain); T.O. ELIAS, THE MODERN LAW OF TREATIES 177–87 (1974) (same); OPPENHEIM’S INTERNATIONAL LAW, *supra* note 6, §§ 2, 642, 653 (same); MCNAIR, *supra* note 57, at 214–15 (same); RESTATEMENT, *supra* note 6, §§ 102 r.n. 6, 323 cmt. b, 331(2), 338(2) (same); SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945–1986, at 281–88 (1989); THE CHARTER OF THE

UNITED NATIONS, *supra* note 46, at 62 (dispute over self-determination as *jus cogens*); GRIGORII I. TUNKIN, *THEORY OF INTERNATIONAL LAW* 98 (William E. Butler trans., 1974) (all of the Charter is *jus cogens*); Levan Alexidze, *Legal Nature of Jus Cogens in Contemporary Law*, 172 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 219, 262–63 (1981); John N. Hazard, *Soviet Tactics in International Lawmaking*, 7 DENVER JOURNAL OF INTERNATIONAL LAW & POLICY 9, 25–29 (1977); Jimenez de Arechaga, *International Law in the Last Third of a Century*, 159 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 9, 64–67 (1978); Georg Schwarzenberger, *International Jus Cogens?*, 43 TEXAS LAW REVIEW 455 (1978) (*jus cogens* non-existent for self-defense, any other purpose); Dinah Shelton, *Normative Hierarchy in International Law*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 291 (2006) (current analysis); Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICHIGAN JOURNAL OF INTERNATIONAL LAW 1 (1995) (criticizing the concept). An International Law Commission (ILC) study acknowledged primacy of UN Charter Article 103–based law and *jus cogens* but declined to list *jus cogens* norms. International Law Commission, Report on Its Fifty-Seventh Session (May 2–June 3 and July 11–August 5, 2005), U.N. GAOR, 60th Sess., Supp. No. 10, at 221–25, U.N. Doc. A/60/10 (2005) (2005 ILC Rep.); see also Michael J. Matheson, *The Fifty-Seventh Session of the International Law Commission*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 416, 422 (2006).

96. Nuclear Weapons, *supra* note 8, 1996 I.C.J. at 245; Nicaragua Case, *supra* note 73, 1986 I.C.J. at 100–101; see also Report of the International Law Commission on the Work of its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, art. 50 and Commentary ¶¶ 1–5 at 247–49, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles on Responsibility of States for Internationally Wrongful Acts], reprinted in JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY* 288–89 (2002) (“fundamental substantive obligations”); OPPENHEIM’S INTERNATIONAL LAW, *supra* note 6, § 2 (Art. 2(4) a fundamental norm); RESTATEMENT, *supra* note 6, §§ 102, cmts. h, k; 905(2) & cmt. g (same). The Court is bound by its sources rules, ICJ Statute, *supra* note 6, arts. 38, 59; maybe that is why it did not adopt *jus cogens* for the issue. Armed Activities on the Territory of the Congo (Dem. Rep. of Congo v. Rwanda), 2006 I.C.J. 3, 29–30, 49–50 (Feb. 3) (jurisdiction, admissibility of application) [hereinafter 2006 Congo Case] held a *jus cogens* violation allegation was not enough to deprive the Court of jurisdiction, preliminarily stating that Convention on Prevention & Punishment of Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention] represented *erga omnes* obligations; see also Application of Convention on Prevention & Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 191, ¶ 161 (Feb. 26) [hereinafter Genocide Case], citing 2006 Congo Case, *supra*. Vienna Convention, *supra* note 36, art. 53 (declaring *jus cogens* standards), was among other treaties 2006 Congo Case, *supra*, cited. While also citing *Nicaragua* and *Nuclear Weapons* cases, *supra* notes 8, 73, Shelton, *supra* note 95, at 305–306 says the 2006 Congo Case is the first ICJ case to recognize *jus cogens*, but its holding seems not quite the same as ruling on an issue and applying *jus cogens*. The case compromise included the Vienna Convention, *supra* note 36, which raises *jus cogens* issues that the Court could have decided under that law as well as traditional sources. ICJ Statute, *supra* note 6, arts. 36, 38, 59. Thus the issue technically remains whether the Court will apply *jus cogens* as a separate trumping norm, or whether it will apply *jus cogens* as stronger custom among competing primary sources—treaties, custom, general principles—under *id.*, art. 38(1). If the Court is true to its treaty-based rules, it should opt for the latter analysis. However, it is clear that a case will find the issue before the Court and it is reasonably clear that an appropriate case will find the Court declaring for *jus cogens*, perhaps as trumping custom under *id.*

97. Carin Kahgan, *Jus Cogens and the Inherent Right to Self-Defense*, 3 ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 767, 823–27 (1997) (U.N. Charter art. 51 represents *jus cogens* norm); *but see* Schwarzenberger, *supra* note 95. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 96, art. 21 & Commentary, at 177–80, *reprinted in* CRAWFORD, *supra* note 96, at 166, resolves conflict between UN Charter Articles 2(4) and 51, saying that no Article 2(4) issues arise if there is a lawful self-defense claim, appearing to give Article 51 the same status as Article 2(4). If Article 2(4) has *jus cogens* status, and Article 51 does not, the result would be that a self-defense response, otherwise lawful under Charter or customary law, would violate a *jus cogens* norm in *id.* art. 2(4).

98. Vienna Convention, *supra* note 36, pmb., arts. 53, 64, 71; *see also* AUST, *supra* note 47, at 319–20; RESTATEMENT, *supra* note 6, §§ 331(2)(b) & cmts. e, f; 338(2) & cmt. c; SINCLAIR, *supra* note 36, at 17–18, 218–26 (Vienna Convention, *supra*, principles considered progressive development in 1984).

99. *See generally* Final Report, *supra* note 8; Symposium, *supra* note 8; Walker, *supra* note 8.

100. TIF, *supra* note 27, is valuable if the United States is a party; Multilateral Treaties, *supra* note 36, may help if the UN Secretary-General is the depository; other treaties list other sites, and still others may be found on unofficial websites, e.g., State Parties, *supra* note 4. Contacting the US Department of State Office of the Legal Adviser (for US researchers) or a State's foreign ministry may also be useful, particularly if there are ongoing negotiations on what treaties are in force.

101. *See supra* notes 12–34, 48 and accompanying text.

102. Vienna Convention, *supra* note 36, art. 60(5). *See generally* Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 96, art. 40 & Commentary ¶ 8, at 333, 336, *reprinted in* CRAWFORD, *supra* note 96, at 288, 290; AUST, *supra* note 47, at 295 (although negotiators had 1949 Conventions, *supra* notes 2, 3, in mind, Article 60[5] “would apply equally to other conventions of a humanitarian character, or to human rights treaties, since they create rights intended to protect individuals irrespective of the conduct of the parties to each other”); BROWNLIE, *supra* note 6, at 622–23; OPPENHEIM'S INTERNATIONAL LAW, *supra* note 6, § 649, at 1302; RESTATEMENT, *supra* note 6, § 335, cmt. c; SINCLAIR, *supra* note 36, at 190; Louise Doswald-Beck & Sylvain Vite, *International Humanitarian Law and Human Rights Law*, 293 INTERNATIONAL REVIEW OF THE RED CROSS 94 (1993); Crawford, *Introduction, in* CRAWFORD, *supra* note 96, at 41 (State cannot disregard human rights obligations because of another State's breach; no Vienna Convention, *supra* note 36, citation for the point); David Weissbrodt & Peggy L. Hicks, *Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict*, 293 Int'l Rev. Red Cross 120 (1993). AUST, *supra*, seems to be the only commentator applying Article 60(5) to human rights treaties; *see also* Crawford, *supra*. Preparatory works discussing other sources, *supra*, and Article 60(5)'s text (“treaties of a humanitarian character”), as distinguished from “treaties of a human rights character,” which is not the Article 60(5) language, suggest a misstating of the law if distinctions between humanitarian and human rights law remain.

103. Vienna Convention, *supra* note 36, art. 60; Gabčíkovo-Nagymoros Project (Hung. v. Slov.), 1997 I.C.J. 7, 39, 64 (Sept. 25) (Article 60 customary law) [hereinafter Project Case]; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, 47 (June 21) (Article 60(3) customary law); Article 25 of *Harvard Draft Convention on the Law of Treaties* 27, 29 AMERICAN JOURNAL OF INTERNATIONAL LAW 657, 662, 1077–96 (Supp. 1935) [hereinafter Harvard Convention]; Draft Articles on Responsibility on States for Internationally Wrongful Acts, *supra* note 96, art. 42 & Commentary, at 294–301, *reprinted in* CRAWFORD, *supra*

note 96, at 255–60; AUST, *supra* note 47, at 293–96; BROWNLIE, *supra* note 6, at 622–23; OPPENHEIM'S INTERNATIONAL LAW, *supra* note 6, § 649; MCNAIR, *supra* note 57, ch. 36; RESTATEMENT, *supra* note 6, § 335; SINCLAIR, *supra* note 36, at 188–90; Jimenez de Arechaga, *supra* note 95, at 79–85.

104. 2005 Congo Case, *supra* note 8, 2005 I.C.J. at 60 (occupied territory); Wall Case, *supra* note 8, 2004 I.C.J. at 173–77 (occupied territory) (adv. op.); Nuclear Weapons, *supra* note 8, 1996 I.C.J. at 239 (armed conflict) (adv. op.); *see also* DINSTEIN, *supra* note 6, at 69–71 (human rights apply to persons within a State's territory and subject to its authority). *Id.* 85–88 adds, however, that if the LOAC and human rights law conflict, LOAC as *lex specialis* governs. *See also* Wall Case, *supra* note 8, 2004 I.C.J. at 177–81 (human rights law also applies to areas subject to a State's jurisdiction but outside its sovereign territory, but possibility remains for applying LOAC as *lex specialis*); ARAI-TAKAHASHI, *supra* note 6, at 414–25; BENVENISTI, *supra* note 9, at 187–89. UK MANUAL, *supra* note 8, ¶ 11.8 states that the LOAC applies during occupations, but in paragraph 11.19 declares that an occupier must enforce applicable human rights law and that if an occupier is a European Convention for Protection of Human Rights & Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention], party the Convention as amended may apply in occupied territories. UK MANUAL, *supra* note 8, ¶ 11.60 adds that Universal Declaration of Human Rights, *supra* note 73, rules must also apply during Fourth Convention, *supra* note 2, Article 64–governed proceedings. The Declaration may fare differently in US courts. *See supra* note 73.

105. DINSTEIN, *supra* note 6, at 81–85.

106. Vienna Convention, *supra* note 36, arts. 61–62; *see also* Project Case, *supra* note 103, 1997 I.C.J. at 39 (Articles 61, 62 customary norms); Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 3, 18 (Feb. 2) (same for Article 62); AUST, *supra* note 47, at 296–300; BROWNLIE, *supra* note 6, at 623–25; ARIE E. DAVID, THE STRATEGY OF TREATY TERMINATION ch. 1 (1975); ELIAS, *supra* note 95, at 119–30; Harvard Convention, *supra* note 103, art. 28, at 1096–1126 (*rebus sic stantibus*); OPPENHEIM'S INTERNATIONAL LAW, *supra* note 6, §§ 650–51; RESTATEMENT, *supra* note 6, § 336; SINCLAIR, *supra* note 36, at 190–96; Report of the International Law Commission on the Work of Its Eighteenth Session, 21 U.N. GAOR, Supp. No. 9, U.N. Doc. A/6309/Rev. 1 (1966), *reprinted in* 2 (1966) YEAR BOOK OF THE INTERNATIONAL LAW COMMISSION 211, U.N. Doc. A/CN.4/Ser.A/1966/Add. 1, at 169, 255–58 [hereinafter 1966 ILC Rep.]; Gyorgy Haraszti, *Treaties and the Fundamental Change of Circumstances*, 146 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 1 (1975); Robert D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AMERICAN JOURNAL OF INTERNATIONAL LAW 535, 541–44 (1970) (Vienna Convention, *supra* note 36, drafting negotiations); Oliver J. Lissitzyn, *Treaties and Changed Circumstances*, AMERICAN JOURNAL OF INTERNATIONAL LAW 895 (1967); Walker, *supra* note 8, at 65–68 (1993). MCNAIR, *supra* note 57, at 685 does not recognize a separate impossibility rule; some of his examples are impossibility situations and might be cited as such.

107. Vienna Convention, *supra* note 36, pmb. (“... *pacta sunt servanda* rule [is] universally recognized”), art. 26; *see also* U.N. Charter pmb. (“respect for obligations arising from treaties”); Project Case, *supra* note 103, ICJ at 78–79 (“What is required in the present case by . . . *pacta sunt servanda*, as reflected in Article 26 of the [Vienna Convention, *supra*] is that the Parties find an agreed solution within the cooperative context of the Treaty.”); AUST, *supra* note 47, at 144–45, 187; BROWNLIE, *supra* note 6, at 591–92 (general principle of law); Harvard Convention, *supra* note 103, art. 20, at 977 (rule of law); 1966 ILC Rep., *supra* note 106, at 211 (*pacta sunt servanda* a rule of law); OPPENHEIM'S INTERNATIONAL LAW, *supra* note 6, §§ 12, at 38, 584 (*pacta sunt servanda* a customary rule); HANS KELSEN, PURE THEORY OF LAW 214–17 (Max Knight trans., 2d rev. ed. 1967) (*pacta sunt servanda* comes from custom); MCNAIR, *supra* note 57, at

465, 493; RESTATEMENT, *supra* note 6, § 321 & cmt. a (*pacta sunt servanda* at core of law of international agreements and is “perhaps the most important principle of international law”); THE CHARTER OF THE UNITED NATIONS, *supra* note 46, at 35–36, 92–93, 96–97; SINCLAIR, *supra* note 36, at 83–84, 119 (no suggestion *pacta sunt servanda* a fundamental norm); Kearney & Dalton, *supra* note 106, at 516–17 (Vienna Convention, *supra* art. 26 negotiations analysis).

108. Vienna Convention, *supra* note 36, art. 30; AUST, *supra* note 47, ch. 12; BROWNLIE, *supra* note 6, at 629–30; Harvard Convention, *supra* note 103, art. 22, at 661–62, 1009–29; RESTATEMENT, *supra* note 6, § 323.

109. *E.g.*, ICCPR, *supra* note 45, art. 4; *see also* Nuclear Weapons, *supra* note 8, 1996 I.C.J. at 239 (adv. op.); INSTITUTE OF INTERNATIONAL LAW, *supra* note 47, art. 4; INSTITUTE FOR HUMAN RIGHTS, *supra* note 47, art. 18; SUBATARA ROY CHOWDHURY, RULE OF LAW IN A STATE OF EMERGENCY 12–13, 22–29, 59, 121–25, 210–11 (1989), analyzing International Law Association Minimum Standards of Human Rights Norms in a State of Emergency, 1984; Joan Fitzpatrick, *Protection Against Abuse of the Concept of “Emergency,”* in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 203 (Louis Henkin & John Lawrence Hargrove eds., 1994); Louis Henkin, *International Human Rights as “Rights,”* 1 CARDOZO LAW REVIEW 446–47 (1979). Some human rights treaties apply in peace and war, *e.g.*, Convention Against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2(2), Dec. 18, 1984, 1468 U.N.T.S. 85 [hereinafter Torture Convention]; Genocide Convention, *supra* note 96, art. 1, whose terms are at least customary law. Reservations to Convention on Prevention & Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28); DINSTEIN, *supra* note 6, at 147; *supra* note 96 and accompanying text. Treaties can provide for armed conflict, *e.g.*, Convention on Rights of the Child arts. 38–39, Nov. 20, 1989, 1577 U.N.T.S. 3. Others have no derogation clauses, *e.g.*, International Covenant on Economic, Social & Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. Here law of treaties rules for armed conflict may apply. *See infra* note 118 and accompanying text.

110. DINSTEIN, *supra* note 6, at 71–74 (two regional human rights treaties, *e.g.*, European Convention, *supra* note 104, exclude application during armed conflict).

111. ICCPR, *supra* note 45, art. 4(2), listing Articles 6 (right to life, death penalty standards), 7 (prohibition against torture), 8(1) (prohibition against slavery), 8(2) (prohibition against servitude), 11 (imprisonment for contract breach barred), 15 (*ex post facto* criminal laws barred), 16 (recognition as a person before the law), 18 (freedom of thought, conscience, religion); *see also* ARAI-TAKAHASHI, *supra* note 6, ch. 19 (“expanding catalogue of human rights of non-derogable nature”); DINSTEIN, *supra* note 6, at 74–79 (other explicit, implicit limitations).

112. *See supra* note 108 and accompanying text.

113. *See supra* note 109.

114. This is so for the Genocide and Torture Conventions, *supra* notes 96, 109. There are others that lack derogation clauses. *See supra* note 109.

115. The LOS treaties except the LOAC from its rules through its “other rules” clauses. Before these treaties went into force, custom governed the LOS; alongside this custom, the LOAC in treaties, custom and general principles applied during armed conflict. *See infra* notes 118–19 and accompanying text.

116. DINSTEIN, *supra* note 6, at 85–88; *see also supra* note 104 and accompanying text. George K. Walker, *The 2006 Conflict in Lebanon, or What Are the Armed Conflict Rules When Legal Principles Collide?*, ch. 15, in ENEMY COMBATANTS, TERRORISM, AND ARMED CONFLICT LAW (David K. Linnan ed., 2008) proposes a factorial analysis for LOAC–human rights law and similar clashes based on private international law (conflict of laws) analysis; *see also* ARAI-TAKAHASHI, *supra* note 6, chs. 17–18, 24 for similar analysis; FERNANDO R. TESON, HUMANITARIAN

INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (2d ed. 1997); John Norton Moore, *Toward an Applied Theory for the Regulation of Intervention*, in MOORE, LAW AND CIVIL WAR IN THE MODERN WORLD ch. 1 (1974) and sources cited in George K. Walker, *Principles for Collective Humanitarian Intervention to Succor Other Countries' Imperiled Indigenous Nationals*, 18 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 35, 56 n.111 (2002) (Kosovo), published in part as Walker, *Application of the Law of Armed Conflict During Operation Allied Force: Maritime Interdiction and Prisoner of War Issues*, in LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN 85 (Andru E. Wall ed., 2002) (Vol. 78, US Naval War College International Law Studies) (factorial approaches for intervention).

117. Under the LOAC occupation begins when enemy territory is placed under hostile forces' authority. Hague II, *supra* note 9, Regulations, art. 42; Hague IV, *supra* note 7, Regulations, art. 42. Occupation ends a year after military operations end under Fourth Convention, *supra* note 2, art. 6. Protocol I, *supra* note 13, art. 3 declares that occupation law standards continue until occupation ends, which could be more than a year. See also ARAI-TAKAHASHI, *supra* note 6, at 16–24; Bothe, *supra* note 81, at 59; DINSTEIN, *supra* note 6, at 42–45, 270–73; 4 PICTET, *supra* note 11, at 62–63; COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 66, at 68. Although Nazi Germany disappeared as a sovereign State at World War II's end, States like Japan and Italy retained sovereignty and continued in occupation status after the war. The *debellatio* doctrine, *i.e.*, where a State disappears due to total subjugation in war, has been criticized as a principle of contemporary international law. Compare BENVENISTI, *supra* note 9, at 92–96, 183 (*debellatio* has no place in current international law) and ARAI-TAKAHASHI, *supra* at 34–40 (German sovereignty survived; argument against applying *debellatio*) with DINSTEIN, *supra* note 6, at 2, 32–33 (*debellatio* doctrine remains viable).

118. 5 GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 513, at 383–84 (1943); Harvard Convention, *supra* note 103, art. 35(a), at 664, 1183–1204; Institut de Droit International, *The Effects of Armed Conflicts on Treaties* (Resolution of the 1985 Helsinki Session) arts. 3–4, 61(2) ANNUAIRE 278, 280 (1986); Institut de Droit International, *Regulations Regarding the Effect of War on Treaties* (Approved at the 1912 Christiania Session) art. 5, reprinted in 7 AMERICAN JOURNAL OF INTERNATIONAL LAW 153, 154 (1913); AUST, *supra* note 47, at 308–11 (ILC's "ostrich-like" approach that a provision was unnecessary for Vienna Convention, *supra* note 36); BROWNLIE, *supra* note 6, at 620–21 (ongoing ILC work on the subject); OPPENHEIM'S INTERNATIONAL LAW, *supra* note 6, § 655; MCNAIR, *supra* note 57, ch. 43; RESTATEMENT, *supra* note 6, § 335, cmt. c; G.G. Fitzmaurice, *The Judicial Clauses of the Peace Treaties*, 73 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 255, 312 (1948); Cecil J.B. Hurst, *The Effect of War on Treaties*, 2 BRITISH YEARBOOK OF INTERNATIONAL LAW 37, 42 (1921); see also Vienna Convention, *supra* note 36, art. 60(5); *supra* notes 102–5 and accompanying text.

119. The LOS conventions' "other rules of international law" clauses are an example. See LOS Convention, *supra* note 57, pmb., arts. 2(3) (territorial sea); 19, 21, 31 (territorial sea innocent passage); 34(2) (straits transit passage); 52(1) (archipelagic sea lanes passage; incorporation by reference of Articles 19, 21, 31); 58(1), 58(3) (exclusive economic zone, or EEZ); 78 (continental shelf; coastal State rights do not affect superjacent waters, *i.e.*, territorial or high seas; coastal State cannot infringe or unjustifiably interfere with "navigation and other rights and freedoms of other States as provided in this Convention"); 87(1) (high seas); 138 (the Area); 293 (court or tribunal having jurisdiction for settling disputes must apply LOS Convention and "other rules of international law" not incompatible with the LOS Convention); 303(4) (archeological, historical objects found at sea, "other international agreements and rules of international law regarding the protection of objects of an archeological and historical nature"); Annex III, Article 21(1); Convention on the High Seas art. 2, Apr. 28, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 92 [hereinafter High

Seas Convention]; Convention on the Territorial Sea and Contiguous Zone arts. 1(2), 22(2), Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205 [hereinafter Territorial Sea Convention]. Although the other 1958 LOS treaties do not have other-rules clauses, they declare that waters within their competence are high seas areas; the High Seas Convention, *supra*, art. 2 “other rules” clause applies. See Convention on the Continental Shelf art. 3, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311; Convention on Fishing & Conservation of the Living Resources of the High Seas arts. 1, 2, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285. The same is true for the contiguous zone next to the territorial sea; beyond the territorial sea, the contiguous zone is a high seas area. LOS Convention, *supra*, art. 33(1); Territorial Sea Convention, *supra*, art. 24(1). See also High Seas Convention, *supra*, art. 1, defining “high seas” as all parts of the sea not included in a State’s territorial sea or internal waters. Like the territorial sea, airspace above it is part of a coastal State’s sovereign territory. Convention on International Civil Aviation arts. 1, 2, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295.

The longstanding consensus has been that these clauses mean that LOAC rules apply during armed conflict as between belligerents; neutrals’ rights may also be affected, and as to neutrals’ rights among themselves, the LOS, perhaps conditioned by the law of neutrality, prevails. There has been a minor trend toward citing the clauses for other than LOAC situations. LOS Committee Report, *supra* note 82, at 300–07.

The other-rules clauses confirm statements on applying belligerent occupation law beyond an occupied State’s lands. Since all areas subject to the LOS have an exclusion for LOAC-governed situations, and occupation law is part of the LOAC, the result is that occupation law extends seaward to an occupied State’s territorial sea and to its claims under other sea areas, e.g., its contiguous zone, continental shelf, EEZ, and fishing zones in addition to inland waters and airspace above its sovereign territory. DINSTEIN, *supra* note 6, at 47–48; INSTITUTE OF INTERNATIONAL LAW, OXFORD MANUAL OF NAVAL WAR art. 88 (1913), *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 1123, 1135; see also Fourth Convention, *supra* note 2, art. 2 (applies to total or partial occupation of Convention party’s territory); 4 PICTET, *supra* note 11, at 21.

120. See *supra* notes 102–5 and accompanying text.

121. See *supra* notes 45, 109–16 and accompanying text.

122. See *supra* notes 106–16 and accompanying text.

123. See *supra* note 110 and accompanying text.

124. Not all customary human rights norms have *jus cogens* status. RESTATEMENT, *supra* note 6, § 702, cmt. 11. The important point is that law of treaties rules do not apply to custom-based rules. THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 3–10, 114–35 (1989). Custom also has limiting doctrines, e.g., the persistent objector principle. See *infra* note 140 and accompanying text.

125. G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

126. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 96, art. 25 & Commentary, at 194–206, *reprinted in* CRAWFORD, *supra* note 96, at 178–86. State of necessity is not the same as necessity as a qualification for invoking the right of self-defense or as a qualification of standards for ordering an attack under the LOAC. States and commentators differ if anticipatory self-defense is lawful in the Charter era. See *supra* note 57; see also Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AMERICAN JOURNAL OF INTERNATIONAL LAW 715, 719–37 (2008) (noting distinction between proportionality in self-defense and LOAC situations, and four other circumstances, including reprisals). See also *supra* notes 55–57 and accompanying text.

127. See *supra* notes 14–15, 35–42, 108 and accompanying text.

128. That seems to be the drafters' intent for Article 25. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 96, Commentary ¶¶ 2, 21 & notes 398, 435–36, although these do not refer to Hague IV, *supra* note 7, Regulations, art. 43. DINSTEIN, *supra* note 6, at 109, seems to agree, although he does not cite Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 96, art. 25; he does note that Brussels Declaration, *supra* note 10, art. 3 uses “necessary.”

129. See *supra* notes 35–42 and accompanying text.

130. See generally Franck, *supra* note 126, at 719–37.

131. Fourth Convention, *supra* note 2, art. 33; see also Protocol I, *supra* note 13, art. 73 (stateless persons); compare Hague II, *supra* note 9, Regulations, arts. 44–45 (occupied territory “population”) with Hague IV, *supra* note 7, Regulations, arts. 44–45 (occupied territory “inhabitants”). See also ARAI-TAKAHASHI, *supra* note 6, at 285; BOTHE ET AL., *supra* note 47, at 446–50; DINSTEIN, *supra* note 6, at 61–63; FM 27-10, *supra* note 12, ¶¶ 272, 495(e), 497; NWP 1-14M ANNOTATED, *supra* note 8, ¶ 6.2.3.2 n.48; 4 PICTET, *supra* note 11, at 45–52, 227–29; COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 66, at 845–55; Gasser, *supra* note 13, at 219–20, 248–49. The United States did not reserve to Article 33, see THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 680–81, but the United States says it does not consider a comparable provision prohibiting reprisals against civilians in Protocol I, *supra* note 13, art. 51(6), as customary law insofar as it prohibits reprisals against civilians during armed conflict. NWP 1-14M ANNOTATED, *supra*, ¶ 6.2.3 n.36; but see ARAI-TAKAHASHI, *supra* note 6, at 285–89 (also noting the UK reservation to Protocol I, *supra* note 13, art. 51(6)); Frits Kalshoven, *Noncombatant Persons, in* THE LAW OF NAVAL OPERATIONS 300, 306 (Horace B. Robertson Jr. ed., 1991) (Vol. 64, US Naval War College International Law Studies); Stefan Oeter, *Methods and Means of Combat, in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS, *supra* note 8, at 105, 204–7. Protocol I's provision applies during armed conflict, not during occupations; it is recited in Protocol I, *supra* note 13, arts. 48–71, and not in Articles 72–79, which apply to the Fourth Convention, *supra* note 2. Article 4 of the Fourth Convention defines protected persons during armed conflict as those persons who find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or an occupier State of which they are not nationals, i.e., the Convention covers persons not parties to a conflict. Nationals of States not bound by the Convention or of a neutral State without normal diplomatic representation with a State in whose hands they are, are not regarded as protected persons. Those the First, Second and Third Conventions, *supra* note 3, cover are also considered not to be protected persons. 4 PICTET, *supra* at 45–51. The upshot is that Article 33 does not cover reprisals against civilians of an opposing belligerent during armed conflict. Cultural Property Convention, *supra* note 13, art. 4(4) prohibits reprisals against cultural property; see also ARAI-TAKAHASHI, *supra* note 6, at 253–54; TOMAN, *supra* note 13, at 71.

132. BRIERLY, *supra* note 57, at 399; FRITS KALSHOVEN, *BELLIGERENT REPRISALS* 27 (1971); 2 CHARLES CHENEY HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* § 588 (3d ed. 1945–47); 2 OPPENHEIM, *supra* note 20, § 135; RESTATEMENT, *supra* note 6, § 905 & r.n. 8; JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 288–89 (1959 rev.). Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 96, Part 3, ch. 1, at 324–54, reprinted in CRAWFORD, *supra* note 96, at 281–302, charts a course apart from traditional reprisal and retorsion law, substituting a new term, countermeasures.

133. Although Fourth Convention, *supra* note 2, art. 33, bars reprisals against protected persons or property, it does not prohibit retorsions. 4 PICTET, *supra* note 11, at 224–29; see also *supra* notes 130–31 and accompanying text.

134. Vienna Convention, *supra* note 36, arts. 19–23; see also AUST, *supra* note 47, ch. 8; BROWNIE, *supra* note 6, at 612–15; OPPENHEIM'S INTERNATIONAL LAW, *supra* note 6, §§ 614–19;

MCNAIR, *supra* note 57, ch. 9; RESTATEMENT, *supra* note 6, §§ 313–14; SINCLAIR, *supra* note 36, ch. 3.

135. See *Reservations and Declarations*, in THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 650–88. It is also true for Protocol I, *supra* note 13. *Reservations and Declarations*, in THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 792–818.

136. LOS Convention, *supra* note 57, art. 309. For possible application of this treaty, see *supra* note 119. It may also govern other occupation contexts as codified custom.

137. Compare the ILC reservations study, *Text of Draft Guidelines on Reservations to Treaties Provisionally Adopted So Far by the Commission*, in Report of the International Law Commission on the Work of its Fifty-fifth Session, 58 U.N. GAOR Supp. No. 10 at 50, U.N. Doc. A/58/10 (2003) and *Preliminary Conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties Including Human Rights Treaties*, in Report of the International Law Commission on the Work of its Forty-Ninth Session, 52 U.N. GAOR Supp. No. 10 at ¶¶ 65–157, U.N. Doc. A/52/10 (1997), available at [http://untreaty.un.org/ilc/documentation/english/A\\_52\\_10.pdf](http://untreaty.un.org/ilc/documentation/english/A_52_10.pdf) (last visited Sept. 20, 2009), which so far follows the Vienna Convention, *supra* note 36, approach, for Articles 19–23, with Human Rights Committee, General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, Addendum: Comment No. 24(52), General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 2, 1994), reprinted in 34 INTERNATIONAL LEGAL MATERIALS 839, 840, 842. This approach was criticized by United Kingdom, Observations of Franklin Berman, U.K. Foreign & Colonial Office Legal Adviser, to UN Human Rights Committee, July 20, 1995, in *United Kingdom Materials on International Law*, 66 BRITISH YEARBOOK OF INTERNATIONAL LAW 584, 655 (Gregory Marston ed., 1995); and Human Rights: 2001 Digest 305. Commentators differ on whether the Committee approach was beyond its competence. AUST, *supra* note 47, at 150–51; BROWNLIE, *supra* note 6, at 615; FRANK HORN, RESERVATIONS AND INTERPRETATIVE DECLARATIONS TO MULTILATERAL TREATIES 153–60 (1988); LIESBETH LIJNZAAD, RESERVATIONS TO UN–HUMAN RIGHTS TREATIES: RATIFY AND RUIN? ch. 3 (1995); Francesco Parisi & Catherine Sevchenko, *Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention*, 21 BERKELEY INTERNATIONAL LAW JOURNAL 1, 20–22 (2003); Edward T. Swaine, *Reserving*, 31 YALE JOURNAL OF INTERNATIONAL LAW 307, 321–22 (2006). The ILC has been at work on the law of treaties related to multilateral reservations after receiving UN General Assembly endorsement for the project. G.A. Res. 48/31, U.N. Doc. A/RES/48/31 (Jan. 24, 1994); G.A. Res. 49/51, U.N. Doc. A/RES/49/51 (Feb. 17, 1995). For a short analysis through its 2005 session, see generally Matheson, *supra* note 95, 418–19; Swaine, *supra*. For counterpoint on Swaine’s analysis, see Laurence R. Helfer, *Response: Not Fully Committed? Reservations, Risk, and Treaty Design*, 31 YALE JOURNAL OF INTERNATIONAL LAW 367 (2006). The Commission continues its work. See generally Alain Pellet, Special Rapporteur, International Law Commission, *Eleventh report on reservations to treaties*, U.N. Doc. A/CN.4/574 (Aug. 10, 2006).

Human rights law is relevant for occupations. See *supra* notes 43–49, 104–5, *infra* note 152 and accompanying text.

138. The law on these is vague. George K. Walker, *Professionals’ Definitions and States’ Interpretative Declarations (Understandings, Statements or Declarations) for the 1982 Law of the Sea Convention*, 21 EMORY INTERNATIONAL LAW REVIEW 461 (2007) offers solutions.

139. Vienna Convention, *supra* note 36, does not cover desuetude or obsolescence; its drafters considered these exceptions to performance fell under principles of parties’ conduct to abandon a treaty, *id.*, art. 54(b). OPPENHEIM’S INTERNATIONAL LAW, *supra* note 6, § 646, at 1247; see

also AUST, *supra* note 47, at 306–7; MCNAIR, *supra* note 57, at 516–18; SINCLAIR, *supra* note 36, at 163–64 (drafters' explanation not entirely satisfactory); Richard Plender, *The Role of Consent in the Termination of Treaties*, 57 BRITISH YEARBOOK OF INTERNATIONAL LAW 133, 138–45 (1986). Desuetude claimants must take into account the *pacta sunt servanda* principle. Vienna Convention, *supra* note 36, art. 26; see also *supra* note 107 and accompanying text. Some LOAC treaties may be in desuetude. See, e.g., SAN REMO MANUAL, *supra* note 36, ¶ 136 cmt. 136.2 (Convention Relating to Status of Enemy Merchant Ships at Outbreak of Hostilities, Oct. 18, 1907, 205 Consol. T.S. 305, in desuetude).

140. See Committee on Formation of Customary (General) International Law, *Final Report: Statement of Principles Applicable to the Formation of General Customary International Law*, in Final Report, *supra* note 8, at 712, 738–40; BROWNLIE, *supra* note 6, at 11; OPPENHEIM'S INTERNATIONAL LAW, *supra* note 6, § 10, at 29; NWP 1-14M ANNOTATED, *supra* note 8, ¶ 5.4.1; RESTATEMENT, *supra* note 6, § 102, cmts. b, d; Michael Akehurst, *Custom as a Source of Law*, 47 BRITISH YEARBOOK OF INTERNATIONAL LAW 1, 23–27; Waldock, *supra* note 57, at 49–52; 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xxxi–xlii (Marie Henckaerts & Louise Doswald-Beck eds., 2005) (no view on persistent objector doctrine, citing the doubts of Maurice H. Mendelson, *The Formation of Customary International Law*, 272 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 227–44 [1998]); but see also Charney, *supra* note 57, at 538–41 (persistent objector rule's existence open to serious doubt). J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS (2d ed. 1996), an exhaustive study of LOS claims protests, demonstrate that the rule is alive and well for LOS issues. Problems with studies of States' objections are that many lie buried in chancellery files because they seem to have little public research value when filed; they may be subject to national security concerns, cf. RESTATEMENT, *supra* note 6, § 312 r.n.5; there may be time delay rules barring publication until after a period of years; or States may have selective or non-publication policies like courts' unpublished opinion rules.

141. This was the situation in Austria and Germany after World War II; these countries were divided into four occupation zones. Germany had annexed Austria in 1938; the Third Reich ceased to exist as a State with surrender of German armed forces in May 1945.

142. Except perhaps Kuwait, which may have signed a bilateral self-defense agreement (up to now not published) with the United States, countries involved in the 1990–91 and 2003 Iraq conflicts were coalition partners. George K. Walker, *The Crisis Over Kuwait, August 1990–February 1991*, 1991 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 25, 30.

143. This has been the Afghanistan situation after 9/11; these have been NATO operations with separate US zones, although there has been no formal occupation. See generally Carcano, *supra* note 69, at 58; Walker, *supra* note 29, at 498–500 (participation under NATO Treaty, *supra* note 25; Rio Pact, *supra* note 26; Security Agreement (ANZUS Pact), Sept. 1, 1951, 3 U.S.T. 3420, 131 U.N.T.S. 83; bilateral agreements like Treaty of Mutual Cooperation & Security, with Agreed Minute & Exchange of Notes, Japan-U.S., Jan. 19, 1960, 11 U.S.T. 1632, 373 U.N.T.S. 179. By 2009 there was debate on whether it had become a non-international armed conflict or remained an international conflict. ARAI-TAKAHASHI, *supra* note 6, at 23–24.

144. Local law refers to a jurisdiction's law exclusive of its conflict of laws, or private international law, principles. See *supra* note 63.

145. This can range from general criminal law and different punishments for crime among these subdivisions to local government traffic laws and the like.

146. E.g., family law, contracts, torts, property.

147. Protocol I, *supra* note 13; Protocol II, *supra* note 66, governing conflicts like civil wars, for which the law of belligerent occupation does not apply unless a State fighting insurgents

recognizes their belligerency. Then the Fourth Convention, *supra* note 2, through its Common Article 3, applies. If a State is a party to Protocol I its Article 1(4) applies to self-determination conflicts. DINSTEIN, *supra* note 6, at 34; *see also* 4 PICTET, *supra* note 11, at 25–44.

148. State Parties, *supra* note 4, lists 164 States as Protocol II, *supra* note 66, parties, and 168 as Protocol I, *supra* note 13, parties; many are US alliance or coalition partners. State Parties, *supra* note 4, lists 194 States as 1949 Geneva Conventions parties.

149. *See, e.g., supra* note 48 and accompanying text.

150. Protocol I, *supra* note 13, arts. 1, 3, 49(4), 68, 72; *see also* BOTHE ET AL., *supra* note 47, at 37–52, 57–60, 291, 428–29, 441–45; COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 66, at 34–56, 66–69, 606–8, 809–10, 841–44.

151. Protocol I, *supra* note 13, arts. 3 (extending Fourth Convention, *supra* note 2, art. 6, protections from a year after general close of military operations until occupation ends); 5(4) (parties to conflict must approve Protecting Power, amending Fourth Convention, *supra* note 2, art. 11); 43–44 (altering Contracting Parties in Third Convention, *supra* note 3, art. 4(A)(2)); 45(3) (greater protections for those taking part in hostilities not entitled to prisoner of war status, unless accused of espionage, extension of Fourth Convention, *supra* note 2, art. 5); 73 (prewar refugees, amending Fourth Convention, *supra* note 2, art. 4); *see also* DINSTEIN, *supra* note 6, at 7, 64–65, 96, 182, 281; 4 PICTET, *supra* note 11, at 45–64, 99–113.

152. Torture Convention, *supra* note 109. As Multilateral Treaties, *supra* note 36, at IV-9 suggests for this treaty in listing 146 parties, all States are not parties to every human rights treaty; the issue is whether custom or general principles bind non-party States. Beneath this general treaty web lie regional human rights treaties that must be consulted if States (occupier and occupied States alike) are parties. The issue here, like general treaties, is whether a regional treaty applies under law of treaties rules for territorial application. Vienna Convention, *supra* note 36, art. 29; AUST, *supra* note 47, at 202–5, 439–40; OPPENHEIM'S INTERNATIONAL LAW, *supra* note 6, § 621; MCNAIR, *supra* note 57, at 116–17; RESTATEMENT, *supra* note 6, § 322(b); SINCLAIR, *supra* note 36, at 87–92. If territorial rules do not apply, a question is whether a treaty applies to the person of one accused of a violation, under a treaty to which his/her country is a party, customary law, general principles of law or *jus cogens* standards. *See, e.g.,* ICCPR, *supra* note 45, art. 2; DINSTEIN, *supra* note 6, at 82, 147; OPPENHEIM'S INTERNATIONAL LAW, *supra* note 6, § 622; RESTATEMENT, *supra* note 6, § 322 r.n.3. Treaty succession principles may also govern territory rules; *see* Final Report, *supra* note 8; Symposium, *supra* note 8; Walker, *supra* note 8.

153. The same is true for the Genocide Convention, *supra* note 96. RESTATEMENT, *supra* note 6, §§ 702(a), 702(d) & cmts. a–b, d, g, o, r.n.1–3, 5; *see also supra* notes 95–98 and accompanying text.

154. *See supra* note 57 and accompanying text.

155. There may be similar issues under other Charter law or the law of IGOs and perhaps soft law norms derived from them or NGOs. *See supra* notes 55–57, 71–77, 82–94 and accompanying text.

156. *Cf., e.g.,* NWP 1-14M ANNOTATED, *supra* note 8, ¶¶ 3.11.5.1, 4.3.2.2, 5.5; *see also* BRADD C. HAYES, NAVAL RULES OF ENGAGEMENT: MANAGEMENT TOOLS FOR CRISIS (1989); D.P. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER 169–80 (1975); Christopher Craig, *Fighting by the Rules*, NAVAL WAR COLLEGE REVIEW, May–June 1984, at 23 (UK Wartime ROE, 1982 Falklands/Malvinas War); James C. Duncan, *The Commander's Role in Developing Rules of Engagement*, NAVAL WAR COLLEGE REVIEW, Summer 1999, at 76; Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate's Primer*, 42 AIR FORCE LAW REVIEW 245 (1997); J. Ashley Roach, *Rules of Engagement*, NAVAL WAR COLLEGE REVIEW, Jan.–Feb. 1983, at 46, *reprinted in* 14 SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE 865 (1988);

Ivan A. Shearer, *Rules of Engagement and the Implementation of the Law of Naval Warfare*, *id.* at 767.

157. Neil Brown, *Issues Arising from Coalition Operations: An Operational Lawyer's Perspective*, in *INTERNATIONAL LAW AND MILITARY OPERATIONS* 225, 228–31, 233 (Michael D. Carsten ed., 2008) (Vol. 84, Naval War College International Law Studies); Vickie McConachie, *Coalition Operations: A Compromise or an Accommodation*, in *id.*, ch. 12; Dale G. Stephens, *Coalition Warfare: Challenges and Opportunities*, in *THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE* 245 (Anthony M. Helm ed., 2006) (Vol. 82, Naval War College International Law Studies).

158. See, e.g., Charles Dunlap, *Legal Issues in Coalition Warfare: A US Perspective*, in *THE LAW OF WAR IN THE 21ST CENTURY*, *supra* note 157, at 221, 224 (possibility of different interpretations by coalition partners); McConachie, *supra* note 157, at 242–43 (East Timor); Stephen A. Rose, *Crafting the Rules of Engagement for Haiti*, in *THE LAW OF MILITARY OPERATIONS: LIBER AMICORUM* PROFESSOR JACK GRUNAWALT 225 (Michael N. Schmitt ed., 1998) (Vol. 72, Naval War College International Law Studies). The International Institute of Humanitarian Law will publish draft multinational ROE in the near future.

159. Cf. NWP 1-14M ANNOTATED, *supra* note 8, ¶ 3.11.5.1 (US Coast Guard, Department of Defense units performing law enforcement duties).

160. Roach, *supra* note 156.

161. See *supra* notes 14–34, 50–54, 71–77, 82–98, 134–55 and accompanying text.

162. RESTATEMENT, *supra* note 6.

163. RESTATEMENT (SECOND), *supra* note 63.

164. WALKER, *supra* note 73, ch. 6 (environmental issues during armed conflict); Walker, *The 2006 Conflict in Lebanon*, *supra* note 116 (Israel-Lebanon-Hezbollah, 2006); Walker, *Principles*, *supra* note 116 (Kosovo).

165. “Conflict of laws” in US law instead of private international law or transnational law, ICJ Judge Philip C. Jessup’s phrase for transactions and situations crossing national borders, results from the scholarship of US Supreme Court Justice Joseph Story. See PHILIP C. JESSUP, *TRANSNATIONAL LAW* (1956); JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* (1834).

166. “Public international law,” as contrasted with private international law or conflict of laws, is a term used throughout much of the world; in US law the field is known as international law. Cf. the title to BROWNLIE, *supra* note 6; but see the title to OPPENHEIM’S *INTERNATIONAL LAW*, *supra* note 6, representing older UK usage. Conflict of laws issues seldom arose in English courts before the end of the last century. SCOLES ET AL., *supra* note 63, §§ 1.1, 2.1.

167. Some UN law and *jus cogens* if the latter applies. RESTATEMENT (SECOND), *supra* note 63, § 6(1) gives primacy to statutes governing conflict of laws over common-law factorial analysis, an analogy to supremacy of Charter Articles 103 and 51 (the right of self-defense) and Security Council decisions under Articles 25, 48 and 94 over treaties. See *supra* notes 55–57 and accompanying text. In US courts state statutory or common-law conflict of laws rules must satisfy the Constitution’s due process and full faith and credit provisions. *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 816–23 (1985). This is another higher law analogy for Charter law supremacy on self-defense and Council decisions in public international law.

168. E.g., Jane G. Dalton, *George K. Walker’s The Tanker War, 1980–88: Law and Policy*, 96 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 278 (2002) (book review).

169. *Laker Airways v. Sabena, Belgian World Airways*, 731 F.2d 909, 948–53 (D.C. Cir. 1984); *Boudreau v. Baughman*, 368 S.E.2d 849, 853–56 (N.C. 1988); SCOLES ET AL., *supra* note 63, §§ 2.19–2.24; WALKER, *supra* note 73, at 542. Other multifactor analyses have been criticized. See, e.g.,

John Norton Moore, *Prolegomenon to the Jurisprudence of Myres S. McDougal and Harold Lasswell*, 54 VIRGINIA LAW REVIEW 662 (1968), supporting the law-science-policy (LSP) decision-making approach Myres McDougal advocated but noting criticisms. LSP LOAC analysis, MCDUGAL & FELICIANO, *supra* note 19, is still helpful. MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980) uses the analysis.

170. No one expects commanders, or an individual sailor, airman, soldier, Marine, or civilian supervisor, to seek legal advice on what to do in anticipatory or many reactive self-defense situations; here ROE give basic rules and declare the fundamental law of self-defense, and that is enough, if commanders act or acted on facts they know, or reasonably should have known. *See, e.g., Walker, The 2006 Conflict in Lebanon, supra* note 116, at 258–59, 269.

171. Fourth Convention, *supra* note 2, arts. 2, 6; Hague II, *supra* note 9, Regulations, arts. 42–56; Hague IV, *supra* note 7, Regulations, arts. 42–56; ARAI-TAKAHASHI, *supra* note 6, at 16; BENVENISTI, *supra* note 9, ch. 2; DINSTEIN, *supra* note 6, ch. 2; FM 27-10, *supra* note 12, ¶¶ 351–61; 4 PICTET, *supra* note 11, at 17–25, 58–64; Gasser, *supra* note 13, at 240–46.

172. *See supra* notes 55–57 and accompanying text.

173. LSP analysis has been concerned with public order, i.e., public international law, issues, as titles to MCDUGAL & FELICIANO and MCDUGAL ET AL., *supra* notes 19, 169, suggest. *See also supra* note 169 and accompanying text.

174. If cargo loss claims come from voyages to or from US ports, US courts must apply US law, i.e., the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300–15 (2006), modifying International Convention for Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155 [hereinafter Brussels Convention]. Since the United States is not a party to, e.g., Protocols, Feb. 23, 1968, 1412 U.N.T.S. 121, and Dec. 21, 1979, 1412 U.N.T.S. 121, to amend the Brussels Convention or the superseding United Nations Convention on Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3, shipments to and from US ports are not governed by their terms. US courts might apply other treaty standards if litigants are nationals of States that are parties to these treaties, however.

175. *See supra* notes 82–87 and accompanying text.

176. Fourth Convention, *supra* note 2, art. 64; Hague II, *supra* note 9, Regulations, art. 43; Hague IV, *supra* note 7, Regulations, art. 43; *see also* 4 PICTET, *supra* note 11, at 335. Although the thrust of the Fourth Convention, *supra* note 2, is protecting accuseds in penal legislation—*see id.* arts. 64–78—DINSTEIN, *supra* note 6, at 128–29; 4 PICTET, *supra* at 335–69; UK MANUAL, *supra* note 8, ¶¶ 11.56–11.74 say Article 64 applies equally to private law claims. Even if Articles 64–78 would be held to apply only to criminal law, the first paragraph of Hague IV, *supra* note 7, Regulations, art. 23(h) declares that it is “especially forbidden . . . [t]o declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.” Article 23(h) applies during occupations. DINSTEIN, *supra* at 135. The Article 23(h) prohibition is a customary norm. *See supra* notes 7–9 and accompanying text. There is no comparable Hague II, *supra* note 9, provision; *see supra* notes 12–13, 40 and accompanying text.

177. Conflict of laws, or private international law, is governed by *lex fori*, the law of the forum; it is “procedural” in nature, as distinguished from the “substantive” law of, e.g., contracts or torts.

178. *See supra* note 173 and accompanying text.

179. *See infra* note 188 and accompanying text.

180. The American Law Institute (ALI) is a non-profit corporation in Philadelphia. It elects US state and federal judges, academics and lawyers as members; there are *ex officio* members, e.g., US law school deans. The Institute works with the American Bar Association and the National Conference of Commissioners on Uniform State Laws on law-improvement projects. None of

these organizations is government-affiliated or sponsored. No government or court in the United States must accept and apply any standard these organizations publish unless, of course, higher authority, e.g., legislation, declares a restatement provision is the rule to be followed.

181. Phillips, *supra* note 167, 472 U.S. at 816; SCOLES ET AL., *supra* note 63, § 3.23. An analogy for this analysis is, e.g., if US national law and an international standard are the same. This occurs if US statutes implement a treaty without modifying treaty standards, e.g., Hamdan, *supra* note 20, 548 U.S. at 627–33 (UCMJ, *supra* note 59, art. 21, 10 U.S.C. § 821 [2006] incorporates Third Convention, *supra* note 3, art. 3, rules without modification). It can also happen if courts agree that US judge-made law is the same as customary international law, e.g., The Pacquete Habana, 175 U.S. 677, 686–700 (1900), whose rules for wartime capture of inshore fishing boats are the same in international law, Convention No. XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War art. 3, Oct. 18, 1907, 36 Stat. 2396. *Habana* general customary international law and scholarly research rules also remain the same for US courts. Compare *Habana*, 175 U.S. at 700 with *Sosa*, *supra* note 73, 542 U.S. at 734.

182. See, e.g., RESTATEMENT (SECOND), *supra* note 63, §§ 6(1), 145, 187; see also SCOLES ET AL., *supra* note 63, §§ 2.14, 17.24, 18.8.

183. RESTATEMENT (SECOND), *supra* note 63, §§ 6, 145, 187–88. The *Restatement's* drafters intended that the section 6 policies would be initially applied; some courts, if no statute is involved, examine the special provisions (e.g., *id.* §§ 145, 187–88) first, with review of section 6 factors next, or not at all. SCOLES ET AL., *supra* note 63, §§ 2.14, 2.19. The *Restatements'* black-letter section and Comment materials represent the ALI's official position. Reporters' notes after sections are not the ALI position but explain and amplify sections and Comments. See also *supra* note 180 and accompanying text.

184. U.N. Charter art. 103; see also *supra* notes 55–57 and accompanying text.

185. RESTATEMENT, *supra* note 6, § 102 & cmts. g, h, k; see also *supra* notes 55–57, 71–77, 95–98 and accompanying text.

186. The RESTATEMENT, *supra* note 6, also distinguishes between jurisdiction to prescribe, i.e., authority to legislate; jurisdiction to adjudicate, i.e., authority to subject people or things to court process; and jurisdiction to enforce, or executive authority to compel or induce compliance with law. It then gives factors for asserting kinds of jurisdiction, and for universal crimes, authority to prescribe rules and adjudicate issues connected with them. Compare *id.* §§ 102 & cmts. g, h, k; 401–4, 421, 423, 431–32 with RESTATEMENT (SECOND), *supra* note 63, § 6. Similar to *id.*, RESTATEMENT, *supra* note 6, has special factorial standards for selected transnational transactions, taxation and anti-competitive (i.e., anti-trust) activities; the RESTATEMENT (SECOND), *supra* note 63, purports to cover all areas of US law. Compare RESTATEMENT, *supra* note 6, §§ 411–16 with, e.g., RESTATEMENT (SECOND), *supra* note 63, §§ 145, 187–88.

187. Many US jurisdictions apply RESTATEMENT (SECOND), *supra* note 63, methodologies. Some do analysis differently, e.g., examining a factor list (e.g., for torts), before considering RESTATEMENT (SECOND), *supra* note 63, § 6, the opposite of what the drafters intended. See generally SCOLES ET AL., *supra* note 63, § 2.19. US federal courts follow the RESTATEMENT (SECOND), *supra* note 63, if there is no statute, treaty or contrary precedent. Compare, e.g., *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1003–4 (9th Cir. 1987) (applying *Restatement [Second]* in Foreign Sovereign Immunities Act–governed case) with *Oviessi v. Islamic Repub. of Iran*, 573 F.3d 835, 841 (D.C. Cir. 2009) (applying state law in case under the Act to effectuate Congressional intent). Transnational or maritime law cases may cite RESTATEMENT, *supra* note 6, e.g., *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 163–67 (2004) (anti-trust); *Neely v. Club Med Mgt. Serv.*, 63 F.3d 166, 183–98 (3d Cir. 1995) (maritime personal injury).

188. Changes have come through legislation or treaties. *See generally* PETER HAY ET AL., CONFLICT OF LAWS 538–45 (13th ed. 2009).

189. 42 U.S.C. § 4332 (2006). U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, ANTI-TRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS 20–22 (1995), *Reprinted in* 34 INTERNATIONAL LEGAL MATERIALS 1080, 1102–4, uses similar factorial analysis.

190. *Cf.* Frank M. Snyder, *Introduction*, in US NAVAL WAR COLLEGE, SOUND MILITARY DECISION (1992).

191. *See supra* note 181 and accompanying text.

192. A State can decline to invoke a reservation, inviting a claim of later practice inimical to the reservation. If a State has previously objected but does not do so in a particular situation, that could weaken an objection's "persistence." *See supra* note 140 and accompanying text. However, might a State recite, in publicly declining to invoke a reservation or objection, that its action in a particular occupation situation is subject to its prior reservation or objection in all other cases? There seems to be little law on this, *but cf.* Vienna Convention, *supra* note 36, art. 30(2) (treaty clause that it is subject to earlier treaty); *see supra* note 108 and accompanying text.

193. *See supra* notes 125–33 and accompanying text.

194. This has been the New York state experience, where its conflict of laws rules evolved from traditional vested rights rules to a factorial approach (contacts, interest analysis) for each issue in a case, *e.g.*, *Babcock v. Jackson*, 191 N.E.2d 279, 280–85 (N.Y. 1963) (which jurisdiction's guest passenger law should apply), to rules for variants on the issue, *Neumeier v. Kuehner*, 268 N.E.2d 454, 457–59 (N.Y. 1972), to applying these rules in other cases, *e.g.*, *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277, 279–84 (N.Y. 1993) (work-related injury), which also recognized the supremacy of the US Constitution's full faith and credit and due process principles, analogous to the UN Charter's primacy for public international law issues; *see supra* notes 55–57 and accompanying text. Less-than-critical analysis can cause results that many would think wrong, *e.g.*, *Shultz v. Boy Scouts of America*, 480 N.E.2d 679 (N.Y. 1985).

195. *See generally* *Neumeier*, *supra* note 194.

196. Dunlap, *supra* note 158, at 227–28.

197. These means of swift communications apply as well to coalition planning; indeed, one issue may be too many communications. It is a far cry from the courier system of two hundred years ago. *See, e.g.*, KAGAN, *supra* note 88, at 280–81 (communications difficulties for Third Coalition facing Napoleon, 1804–5).

198. Letter from John Paul Jones to Joseph Hewes (May 19, 1778), in SAMUEL ELIOT MORISON, JOHN PAUL JONES: A SAILOR'S BIOGRAPHY 55, 56 (1959).

199. This can also occur between the LOAC and law derived from other IGOs or NGO claims. *See supra* notes 55–57, 71–77, 82–90 and accompanying text.

200. Hague IV, *supra* note 7, Regulations, art. 43; *see also supra* notes 14–34, 50–54, 82–98, 134–55 and accompanying text.

201. *See supra* notes 156–93 and accompanying text.

202. KAGAN, *supra* note 88, at 279–80, discusses problems of staffing, planning and coordinating large-scale armies during the Napoleonic Wars, and separation of overall priorities and war planning in World War II. Might a similar division of tasks be appropriate for lawyers who serve commanders, particularly in occupation situations? *E.g.*, US occupation planning spanned years before plans were put into effect after surrenders in Europe. *See generally* HARRY L. COLES & ALBERT K. WEINBERG, CIVIL AFFAIRS: SOLDIERS BECOME GOVERNORS ch. 1 (1964).

203. Having this analysis committed to records, electronic or otherwise and perhaps classified, may help justify ultimate actions commanders take, particularly if there are claims of legal liability, or if there are questions raised during later litigation, diplomacy or legislative investigations.

White House Counsel Alberto Gonzalez's unfortunate reference to the 1949 Geneva Conventions as "quaint" is a negative example of how these memoranda can hurt an author and those who supervise him or her as well as subordinates relying on them. The other side of the coin is that well-reasoned, thoughtful memoranda can be a positive support for action taken, even if the result is untoward. In self-defense and LOAC situations, and occupations as well, a commander or individual service member is bound by what he or she knew, or reasonably should have known, before acting. See *supra* note 170. Part of this reasonableness rule is advice on the law; solid analysis justifying how a choice of law was derived is critical to a record of that advice, even though results from action taken may not be seen as good in the eyes of some.

204. A peripheral issue is correctly translated treaties for clarity of interpretation and application. Some treaties have plurilingual texts, all of which are authentic, see, e.g., U.N. Charter art. 111, and for which Vienna Convention, *supra* note 36, Article 33 rules apply. Others, like Hague II and IV, *supra* notes 7, 9, have one official language. Might it be appropriate for foreign or defense ministries to review treaties, particularly those in common use, to be sure of proper translation and note the problem in, e.g., military manuals? For Hague II and IV, the difference between, e.g., the official French text of Regulations, Article 43 and unofficial translations may be significant in occupations. There seem to be other translation issues. See *supra* notes 14–34 and accompanying text. See also AUST, *supra* note 47, at 253–55 (Article 33 recites custom); MCNAIR, *supra* note 57, at 30–31, ch. 25; RESTATEMENT, *supra* note 6, § 325, cmt. f & r.n. 2, § 326; SINCLAIR, *supra* note 36, at 147–53 (Article 33 recites custom). The more difficult problem is how to correct the problem. If over one hundred years have passed, and some States still adhere to Hague II, *supra* note 9, what chance is there for general acceptance of amending protocols? Might it be argued that parallel custom, cf. ICJ Statute, *supra* note 6, art. 38(1), supersedes the treaty rule, or that practice under the treaties, see Vienna Convention, *supra* note 36, art. 31(3)(b), cures the problem? Article 31(3)(b) is today a customary rule. See generally Genocide Case, *supra* note 96, 2007 I.C.J. ¶ 160; AUST, *supra* at 241; SINCLAIR, *supra* note 36, at 135–40. Another issue is considering review of national military manuals, e.g., FM 27-10, *supra* note 12, for correct translations and applying them. It is unlikely that States will negotiate amending protocols to correct mistranslations; manuals might note the problem and declare customary rules that have developed, either as superseding law or as practice under the treaties. Third, manuals should recognize developing principles that may apply to future occupations, e.g., Charter law, IGO-developed rules, *jus cogens* norms and human rights law. The influence of NGOs and soft law cannot be discounted, either.