

## VII

---

### Is There a “New” Law of Intervention and Occupation?

---

Leslie C. Green\*

**A**t least since the seventeenth century international law has accepted as a fundamental principle that all States are equal, none enjoying sovereignty over any other. This principle has found expression in Vattel’s famous aphorism:

Since men are by nature equal, and their individual rights and obligations the same, as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. Strength or weakness in this case, count for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.<sup>1</sup>

As a consequence it has come to be accepted that a State is free to treat its nationals as it pleases without interference from others, a principle which finds expression in the domestic jurisdiction clause of the Charter of the United Nations:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures

---

\* University Professor Emeritus, Honorary Professor of Law, University of Alberta, Canada.

### *Is There a “New” Law of Intervention and Occupation?*

---

under Chapter VII [relating to acts of aggression and threats to or breaches of the peace].<sup>2</sup>

Nevertheless, both doctrinal writings and States, especially the more powerful, have asserted a right of intervention and even occupation in “exceptional” circumstances.

International law recognizes two forms of occupation of the whole or part of the territory of one State by the forces or governmental representatives of another. *Occupatio pacifica* is the basis of acquiring title to territory.<sup>3</sup> For the purpose of this paper, the term is used for the situation that takes place when the occupied entity has agreed to the occupation or it has been imposed without the use of force by an occupier or as a result of a multilateral treaty, although the threat to resort to force may be the deciding factor that induces the occupied entity to agree to the occupation. *Occupatio bellica* ensues during or at the end of an armed conflict and, generally speaking, is contrary to the wishes of the State occupied or is acquiesced in since there is no other option available to that State.

Examples of occupation pursuant to agreement may be seen in the treaties relating to the independence of the successor principalities of the Ottoman Empire—Bulgaria, Montenegro, Roumania and Serbia—initiated by the 1878 Treaty of Berlin. In the case of Bulgaria, a provisional administration was established which:

[S]hall be under the direction of an Imperial Russian Commissary until the completion of the Organic Law. An Imperial Turkish Commissary, as well as the Consuls delegated *ad hoc* by the other Powers, signatory of the present Treaty, shall be called to assist him so as to control the working of the provisional *regime*. In case of disagreement amongst the Consular Delegates, the vote of the majority shall be accepted, and in case of a divergence between the majority and the Imperial Russian Commissary or the Imperial Turkish Commissary, the Representatives of the Signatory Powers at Constantinople, assembled in Conference, shall give their decision.<sup>4</sup>

Article VII, in turn, provides that:

The provisional *regime* shall not be prolonged beyond a period of nine months from the exchange of the ratifications of the present Treaty. When the Organic Law is completed the election of the Prince of Bulgaria shall be proceeded with immediately. As soon as the Prince shall have been installed, the new organization shall be put into force, and the Principality shall enter into the full enjoyment of the autonomy.

To some extent this procedure seems to foretell the type of arrangement that followed the operations against Afghanistan and Iraq at the beginning of this

century.<sup>5</sup> The succession clauses in the Treaty of Berlin guaranteed protection to religious and other minorities in each of the States concerned, but they did not provide for any form of direct sanction in the event of non-observance. In this, they differed from the view expressed by some of the “fathers” of international law, who envisaged the possibility of intervention by force, even resulting in occupation allegedly on humanitarian grounds in favor of an oppressed people. Thus, Grotius was of the opinion that:

The fact must also be recognized that kings, and those who possess rights equal to those of kings, have the right of demanding punishments not only on account of injuries against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever. . . . Truly, it is more honourable to avenge the wrongs of others rather than one’s own, in the degree that in the case of one’s own wrongs it is more to be feared that through a sense of personal suffering one may exceed the proper limit or at least prejudice his mind. . . . [K]ings, in addition to the particular care of their own state, are also burdened with a general responsibility for human society. . . . The final and most wide-reaching cause for undertaking wars on behalf of others is the mutual tie of kinship among men, which of itself affords sufficient ground for rendering assistance. . . . If, further, it should be granted that even in extreme need subjects cannot justifiably take up arms [against their sovereign] . . . , nevertheless it will not follow that others may not take up arms on their behalf.<sup>6</sup>

Not all the “fathers” of international law would agree with Grotius in his view concerning the right of a State to punish another for committing crimes against natural law. Among these was Vattel who asked:

Did not Grotius perceive that . . . his view opens the door to all the passions of zealots and fanatics, and gives to ambitious men pretexts without numbers?<sup>7</sup> . . . [However, i]f there should be found a restless and unprincipled Nation, ever ready to do harm to others, to thwart their purposes, and to stir up civil strife among their citizens, there is no doubt that all the others would have the right to unite together to subdue such a Nation, to discipline it, and even to disable it from doing further harm. . . . [But n]o foreign State may inquire into the manner in which a sovereign rules, nor set itself up as judge of his conduct. . . . If he . . . treats his subjects with severity it is for the Nation to take action; no foreign State is called on to amend his conduct and to force him to follow a wiser and juster course. . . . But if a prince, by violating the fundamental laws, gives his subjects a lawful cause for resisting him; if, by his insupportable tyranny, he brings on a national revolt against him, any foreign power may rightfully give assistance to an oppressed people who ask for its aid. . . . To give help to a brave people who are defending their liberties against an oppressor by force of arms is only the part of justice and generosity. . . . But this principle should not be made use of so as to authorize criminal designs against the peace of Nations. . . . As for those monsters who

### *Is There a “New” Law of Intervention and Occupation?*

---

under the name of sovereigns, act as a scourge and plague of the human race, they are nothing more than wild beasts, of whom every man may purge the earth.<sup>8</sup>

This last comment calls to mind President Bush’s reference to certain States as constituting an “axis of evil.”<sup>9</sup>

Pufendorf would not go as far as Grotius in granting a third State the right to intervene on behalf of foreign nationals, he nevertheless granted that right if the subjects themselves had good cause to revolt,<sup>10</sup> and, while he was critical of those:

[W]ho say, that, when the king has degenerated into a tyrant, he can be stripped of his command and punished by the people . . . [but] no one should believe, however, that we grant a boundless licence to princes, and deliver over to them their subjects, from whom we have taken away every faculty of fighting back, like cattle to their pleasure, we are altogether of the opinion that, if, indeed, even an absolute prince should assume a mind utterly hostile towards his subjects, and openly seek their destruction without the appearance of justice, his subjects can rightly employ against him also the means customarily used against an enemy for the sake of defending their own safety. . . . [A]ssuredly, absolute princes can be punished neither for not running the state to suit the people, nor for private misdeeds. . . . But after they have assumed the person of enemies [by their actions against their people], the evils which, perchance are inflicted upon them by the right of war do not have the character of a punishment properly so called. . . .<sup>11</sup> [T]he safest principle to go on is, that we cannot lawfully undertake the defence of another’s subjects, for any other reason than they themselves can rightfully advance, for taking up arms to protect themselves against the barbarous savagery of their superiors. . . .<sup>12</sup> [F]inally, when there is no other reason, common descent alone may be a sufficient ground for our going to the defence of one who is unjustly oppressed, and implores our aid, if we can conveniently do so.<sup>13</sup>

To a great extent the military operations undertaken by the United States and the United Kingdom against Iraq in 2003 were based on this type of reasoning, although the plea for intervention came not from oppressed inhabitants, but from political exiles. However, the subsequent occupation received general support, at least in the early days.

By the nineteenth century respect for sovereignty was so highly regarded that writers generally were only willing to concede a right of intervention and possible occupation in the most exceptional of circumstances. Phillimore pointed out that:

Intervention by one Christian State on behalf of Religion has . . . been practised and cannot be said, in the abstract, to be a violation of International Law. But what kind of Intervention? By remonstrance, by stipulation, by a condition in a Treaty concluding a war waged on other grounds. It may, perhaps, be justly contended that the principle might be pushed further; and that in the event of *persecution* of large bodies of men, on account of their religious belief, an armed intervention on their behalf might be as

warrantable in International Law, as an armed intervention to prevent the shedding of blood and protracted internal hostilities. . . . [N]o writer of authority upon International Law sanctions such an intervention, except upon the case of a positive *persecution* inflicted avowedly upon the ground of religious belief.<sup>14</sup>

Hall too was equally restrictive of the right:

International law professes to be concerned only with the relations of states to each other. Tyrannical conduct of a government towards its subjects, massacres and brutality in a civil war, or religious persecution are acts which have nothing to do directly or indirectly with such relations. On what ground then can international law take cognizance of them? Apparently on one only, if it be competent to take cognizance of them at all. It may be supposed to declare that acts of the kind mentioned are so inconsistent with the character of a moral being as to constitute a public *scandal, which the body of states, or one or more states as representative of it, are competent to suppress*. . . . [I]ntervention for the purpose of checking gross tyranny or of helping the efforts of a people to free itself is very commonly regarded without disfavour. Again, religious persecution, short of a cruelty which would rank as tyranny, has ceased to be recognised as an independent ground of intervention, but is still used as between Europe and the East as an accessory motive, which seems to be thought by many persons as sufficiently praiseworthy to excuse the commission of acts in other respects grossly immoral. . . . [S]entiment has been allowed to influence the more deliberately formed opinion of jurists . . . [who] have imparted an aspect of legality to a species of intervention, which makes a deep inroad into one of the cardinal doctrines of international law [that of sovereign independence] . . . and which by the readiness to which it lends itself to the uses of selfish ambition becomes as dangerous in practice as plausible in appearance. It is unfortunate that publicists have not laid down broadly and unanimously that no intervention is legal, except for the purpose of self-preservation, unless a breach of the law as between states has taken place, or *unless the whole body of civilised states has concurred in authorising it*. Intervention, whether armed or diplomatic, undertaken either for the reason or upon the pretext of cruelty, or oppression, or the horrors of a civil war, or whatever the reason put forward, supported in reality by the justification which such facts offer to the popular mind, would have had to *justify themselves, when not authorised by the whole body of civilised states unless accustomed to act together for common purposes, as measures which, being confessedly illegal in themselves, could only be excused in rare and extreme cases in consideration of the unquestionably extraordinary character of the facts causing them, and of the evident purity and motives of the intervening state*.<sup>15</sup>

Westlake, almost foretelling modern views based on respect for human rights and popular indignation, commented that:

Intervention in the internal affairs of another state is justifiable . . . when a country has fallen into such a condition of anarchy or misrule as unavoidably to disturb the peace,

### *Is There a “New” Law of Intervention and Occupation?*

---

external or internal of its neighbours,<sup>16</sup> whatever the conduct or policy of its government may be in that respect. . . . In considering anarchy and misrule as a ground for intervention the view must not be confined to the physical consequences which they may have beyond the limits of the territory in which they rage. These are often serious enough. . . . The moral effect on the neighbouring population is to be taken into account. Where these include considerable numbers allied by religion, language or race to the population suffering from misrule, to restrain the former from giving support to the latter in violation of the legal rights of the misruled state may be a task beyond the power of their government, or requiring it to resort to modes of restraint irksome to its subjects, and not necessary for good order if they were not excited by the spectacle of miseries which they must feel acutely. It is idle to argue in such a case that the duty of the neighbouring peoples is to look on quietly. Laws are made for men and not for creatures of the imagination, and they must not create or tolerate for them situations which are beyond the endurance, which we will not say of average human nature, since laws may fairly expect to raise the standard by their operation, but of the best human nature at the time and place they can hope to meet with.<sup>17</sup>

Today it is increasingly the case that popular feeling at large, and not merely in neighboring States, may be so outraged that a demand for intervention either by the United Nations or some other international organization is made, as has been the case in, for example, the Sudan with regard to the treatment of Darfur.<sup>18</sup>

It has not only been writers who, before the outbreak of World War I and the establishment of the League of Nations, were prepared to condemn the actions of particular States and even to advocate intervention or occupation. In his 1904 annual message, for example, President Theodore Roosevelt stated:

[T]here are occasional crimes committed on so vast a scale and of such peculiar horror as to make us doubt whether it is not *our manifest duty* to endeavour at least to show our disapproval of the deed and our sympathy with those who have suffered by it. The cases must be extreme in which such a course is justifiable . . . [and] *in extreme cases action may be justifiable and proper*. What form the action shall take must depend upon the circumstances of the case; that is, upon the degree of the atrocity and upon our power to remedy it. *The cases in which we would interfere by force of arms . . . are necessarily very few*. Yet it is not to be expected that a people like ours . . . which shows by its consistent practice its belief in the principles of civil and religious liberty and of orderly freedom . . . it is inevitable that such a nation should desire eagerly to give expression to its horror on an occasion like that of the massacre of the Jews in Kishenev,<sup>19</sup> or when it witnesses such systematic and long-extended cruelty and oppression of which the Armenians<sup>20</sup> have been the victims, and which have won for them the indignant pity of the civilised world.<sup>21</sup>

The commitment of the United States to the principle of humanitarianism has led the American writer Stowell, perhaps the most authoritative writer on intervention, to comment:

Humanitarian intervention may be defined as the *justifiable use of force* for the purpose of protecting the inhabitants of another state from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice. . . . [However, t]he right of the sovereign state to act without interference within its own territory, even though it be no more than a presumption, is of such importance to the well-being of international society, that the states in their wisdom, as evidenced in their practice, have been jealous of admitting the pleas of humanity as a justification for action against a sister state; and we find that intervention on this ground has been rather rigidly limited to specific cases, and conditioned in each of them upon the existence of a certain state of facts. It is true that the appreciation of the facts and the *determination as to the existence of the justifying situation* still remains to a certain degree a matter *entrusted to the conscientious discretion of the intervening state*; nevertheless, the general and *salutary attitude of suspicion with which every intervention upon the ground of humanity is regarded serves as a rough check upon its abuse*. The counterpoise which serves as the sanction to prevent aggression and subsequent conquest under the guise of humanitarian intervention is perhaps to be found in the general readiness of states to act in defense of the balance of power and in order to preserve the society of independent states.<sup>22</sup>

In the light of these comments the reader might be justified in assuming that a right of intervention leading to possible occupation is, in certain circumstances, recognized in customary international law. However, whether this is the case or not, such action is, as Stowell asserted, a matter of discretion, and by 1938, despite the evidence of atrocities in Nazi Germany, reaction was largely “platonic”<sup>23</sup> leading Professor H. A. Smith of London University to complain:

[I]n practice we no longer insist that States shall conform to any common standards of justice, religious toleration and internal government. Whatever atrocities may be committed in foreign countries, we now say that they are no concern of ours. Conduct which in the nineteenth century would have placed a government outside the pale of civilised society is now deemed to be no obstacle to diplomatic friendship. This means, in fact, that we have now abandoned the old distinction between civilised and uncivilised states.<sup>24</sup>

In so far as *occupatio pacifica* as a result of treaty is concerned, reference might be made to Article III of the 1903 Agreement between the United States and Cuba for the lease to the former of an area of Guantanamo “for the time required for the purpose of coaling and naval stations” and “during the period of occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas. . . .”<sup>25</sup> In a 1933 decision the Cuban Supreme Court held that “the territory of that Naval Station is for all legal effects regarded as foreign.”<sup>26</sup>

### *Is There a “New” Law of Intervention and Occupation?*

---

Nevertheless, problems arose when the United States armed forces sent numbers of individuals captured in Afghanistan for detention at the Guantanamo naval base, labeling them, since there was no “war” declared, even though supporters of the Taliban as distinct from members of al-Qaeda, carried their arms on behalf of a de facto governing authority, as “enemy combatants” rather than “prisoners of war.” The United States, maintained that as such, regardless of the terms of the Geneva Convention relating to the treatment of prisoners of war,<sup>27</sup> they could be detained indefinitely, denied access to counsel, and permitted no means of challenging their confinement or clarifying their status or alleging mistaken identity.<sup>28</sup> However, this situation was challenged at the end of 2003 by a detainee by way of *habeas corpus* proceedings, and in *Gherebi v. George W. Bush and Donald H. Rumsfeld* the government claim was rejected by the majority of the Court of Appeals for the Ninth Circuit:

[W]e simply cannot accept the government’s position that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel regardless of the length or manner of their confinement. . . . In our view, the government’s position is inconsistent with fundamental tenets of American jurisprudence and raises most serious concerns under international law.<sup>29</sup>

The Court cited, by way of explanation, Article 5 of the Prisoners of War Convention, 1949,<sup>30</sup> as well as Article 9 of the International Covenant on Civil and Political Rights to which the United States<sup>31</sup> is a party: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that a court may decide without delay on the lawfulness of his detention. . . .”

The United States argued to the court that while it exercised “complete jurisdiction and control” over Guantanamo naval base, it continued to recognize the “continuance and ultimate sovereignty in Cuba,” distinguishing the rights pertaining to “territorial jurisdiction” from those pertaining to “sovereignty”<sup>32</sup> leading the court to point out that the “United States has exercised ‘complete jurisdiction and control’ over the Base for more than a century now, with the right to acquire . . . any land or other property therein by purchase or by exercise of eminent domain with full compensation to owners thereof.”<sup>33</sup>

The court further noted that the United States has “also treated Guantanamo Bay as if it were subject to American sovereignty: we have acted as if we intend to retain the Base permanently, and have exercised the exclusive right to use it as we wish, regardless of any restrictions contained in the lease or continuing Treaty.”<sup>34</sup> The court determined that:



[B]y virtue of the United States' exercise of territorial jurisdiction over Guantanamo, habeas jurisdiction lies in the present case. . . . [W]e conclude that, at least for habeas purposes, Guantanamo is part of the sovereign territory of the United States. Both the language of the Lease and continuing Treaty and the practical reality of U.S. authority and control over the Base support that answer. . . . [T]he United States exercises total dominion and sovereignty, while Cuba retains simply a contingent reversionary interest that will become effective only if and when the United States decides to relinquish its exclusive jurisdiction and control, i.e. sovereign domain over the territory. . . . [T]he United States possesses and exercises all the attributes of sovereignty, while Cuba retains only a residual or reversionary interest, contingent on a possible future United States' decision to surrender its complete jurisdiction and control. . . . [W]e conclude that Lease and continuing Treaty must be construed as providing that Cuba possesses no substantive sovereignty over Guantanamo during the period of the U.S. reign. All such sovereignty during that indefinite and potentially permanent period is vested in the United States. . . . Sovereignty may be gained by a demonstration of intent to exercise sovereign control on the part of a country that is in possession of the territory in question and has the power to enforce its will.<sup>35</sup>

These statements by the court are fully in accord with the traditional view under customary international law of the effect of occupation and there is nothing new or innovative about them. And the State which exercises sovereignty is entitled to all the rights accompanying sovereignty, as well as being burdened with all the obligations.<sup>36</sup>

As a further instance of *occupatio pacifica* by way of agreement the situation created by the arrangements made in 1960 at the time of the grant of independence to Cyprus, whereby Britain retained full sovereignty over two areas of the island as military bases may be cited.<sup>37</sup>

It may happen that part of a State's territory is occupied by a victor in accordance with a peace treaty after a war. In such a case, the borderline between *occupatio pacifica* and *occupatio bellica* may be somewhat blurred. However, when such an occupation takes place, the wartime rights and obligations of the occupant are not normally relevant. Under the 1919 Treaty of Versailles for example, Article 426 provides:

As a guarantee for the execution of the present Treaty by Germany, the German territory situated west of the Rhine [the Rhineland and the Ruhr], together with the bridgeheads, will be occupied by Allied and Associated troops for a period of fifteen years from the coming into force of the present Treaty.<sup>38</sup>

Provision was also made, depending on compliance by Germany with the terms of the Treaty, for the gradual withdrawal of the occupying forces.<sup>39</sup>

### *Is There a “New” Law of Intervention and Occupation?*

---

A somewhat different policy was adopted after World War II because of the unconditional surrender of both Germany<sup>40</sup> and Japan.<sup>41</sup> In so far as Germany was concerned, the victorious Allies—France, the Union of Soviet Socialist Republics, the United Kingdom and the United States—divided the country into four separate zones governed by military officers, with Berlin divided into four sectors each allocated to one of the four powers. To all intents and purposes Germany, as a State, had ceased to exist by virtue of *debellatio*<sup>42</sup> and the zones, both separately and severally, were under the full sovereignty and administration of the occupying powers, which only formally ended with the establishment and recognition of the Federal and People’s Republics, respectively. In so far as Japan was concerned, the situation was somewhat different. There was no suggestion that the State had ceased to exist and the Emperor remained as titular Head of State, although the actual government was in the hands of General Douglas MacArthur as Supreme Commander for the Allied Powers. He ruled with virtually absolute power. Although ostensibly acting on behalf of the Allied Powers, MacArthur remained subject to the authority of the President of the United States. This situation prevailed until the adoption of the Peace Treaty with Japan in 1951.<sup>43</sup> Article 6(a) of the Treaty provides, in part, that all “occupation forces of the Allied Powers shall be withdrawn from Japan as soon as possible after the coming into force of the present Treaty, and in any case not later than 90 days thereafter. . . .”

Although by Article 1 of the Peace Treaty “the Allied Powers recognize the full sovereignty of the Japanese people over Japan and its territorial waters,” the Constitution of Japan,<sup>44</sup> drawn up in 1947 under the auspices of MacArthur’s occupation, remained in force. Article 9 of the Constitution provided:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

The occupation of Japan was similar to that of the occupation of the Rhineland in that both followed the unconditional surrender of the defeated State and the assumption of absolute power by the victors. There was no suggestion that the occupier was in any way limited by the rights granted to an occupier in accordance with the law of war.

Reference might also be made to the position of Austria following World War II. Austria had been annexed by Germany in 1938 and was regarded as part of

Germany.<sup>45</sup> Recognition of the annexation was withdrawn by virtue of the Moscow Declaration.<sup>46</sup> Nevertheless, Austria was not treated in the same fashion as other States unlawfully occupied by Germany. In 1946, an agreement was concluded between the four major Allied Powers (United States, United Kingdom, Soviet Union and France) and Austria<sup>47</sup> that established a four-power Commission with competence for the whole of Austria, but with each of these powers a virtual sovereign occupant in its own zone. By Article 1 of that accord, the Austrian Government and all subordinate Austrian authorities were bound to carry out all instructions received from the Allied Commission, so much so that “the Austrian authority . . . is no more than an executive arm of the occupying Power.”<sup>48</sup> Although the *anschluss* had ceased to be recognized, in 1955 a peace treaty was agreed to with Austria,<sup>49</sup> Article 20 of which stipulated that the 1946 Agreement was terminated and that the Agreement on Zones of Occupation was to terminate on the withdrawal of all Allied forces by the end of that year.

*Occupatio bellica* involves occupation during the actual conduct of hostilities or, after these have ceased prior to any arrangement being made for the future of the territory in question. In such cases, reference must be made to the laws and customs of war. Already in ancient India:

Customs, laws and family usages which obtain in a country should be preserved when the country has been acquired. . . . Having conquered his foe, let him not abolish or disregard the laws of that country. . . . A king should never do such injury to his foe as would rattle in the latter’s heart.<sup>50</sup>

More important from our point of view, particularly since it became the model for much of Europe, is the Lieber Code<sup>51</sup> prepared by Professor Lieber of Columbia University and propounded by President Lincoln during the American Civil War. Here, we find a number of regulations affecting the rights of enemy civilians of which we need cite just a few:

Art. 23. Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.

Art. 25. In modern regular wars of the Europeans, and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exception.

Art. 33. It is no longer considered lawful – on the contrary, it is held to be a serious breach of the law of war – to force the subjects of the enemy into the service of the

### *Is There a “New” Law of Intervention and Occupation?*

---

victorious government, except the latter should proclaim, after a fair and complete conquest of the hostile country or district, that it is resolved to keep the country, district, or place permanently as its own and make it a portion of its own country.

Art. 35. Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.<sup>52</sup>

Art. 36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace. In no case shall they be sold or be given away by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.

Art. 37. The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women: and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished. . . .

Art. 39. The salaries of civil officers of the hostile government who remain in the invaded territory, and continue the work of their offices, and can continue it according to the circumstances arising out of the war – such as judges, administrative or public officers, officers of city or communal governments – are paid from the public revenue of the invaded territory, until the military government has reason wholly or partially to discontinue it. . . .

Art. 44. All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense. . . .

Art. 47. Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severe punishment shall be preferred. . . .

There is no need here to examine the Brussels Declaration of 1874<sup>53</sup> or the Oxford Manual of 1880<sup>54</sup> since the former was never ratified, while the latter was drawn up by members of the Institute of International Law and had no official standing. Moreover, their contents were fully taken into consideration at the Hague

Conference of 1899, which produced Hague Convention II<sup>55</sup> with respect to the Laws and Customs of War on Land, which was itself replaced at the 1907 Conference by Convention IV.<sup>56</sup> It is the latter Convention which governed the law on occupation until its application was extended in 1949 by the Fourth Geneva Convention,<sup>57</sup> as possibly supplemented by the various principles now accepted as part of the international law concerning the protection of human rights, in particular the 1948 Universal Declaration of Human Rights<sup>58</sup> and the 1966 International Covenant on Civil and Political Rights.<sup>59</sup> Since the Geneva Conventions apply “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them,”<sup>60</sup> it may be said as a general statement that:

[T]he law of belligerent occupation is applicable whenever one State occupies, in the course of an armed conflict, territory which was previously under the control of a hostile party to that conflict, irrespective of whether the displaced power was the lawful sovereign of that territory.<sup>61</sup>

But, this is only true of conflicting States which are parties to the Conventions, although the principles embodied in 1907 have been held to be part of customary law<sup>62</sup> and would, therefore, be applicable in any armed conflict. Moreover, the Martens Clause, set forth in the Preamble of Hague Convention IV of 1907, provides, in pertinent part, that:

[I]n cases not included in the Regulations [annexed to the Convention] . . . , the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

In its advisory opinion on nuclear weapons, the International Court of Justice made clear that the Martens Clause is relevant even today, and “the fundamental rules [laid down in the Hague and Geneva Conventions] are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.”<sup>63</sup>

Since it is now established that the principles embodied in the Hague Regulations and the Geneva Conventions, at least to the extent that they are in accordance with accepted customary law, are of general application binding on all, it is necessary to draw attention to some of the basic principles relating to occupation. The underlying principle in Hague Convention IV is to be found in Article 43:

### *Is There a “New” Law of Intervention and Occupation?*

---

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all 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 that country.

The effect of this provision may be seen from the statement by the United States Military Tribunal in the *Hostages Case*:

The status of an occupant of the territory having been achieved, international law places the responsibility upon the commanding general of preserving order, punishing crime and protecting lives and property within the occupied territory. His power of accomplishing these ends is as great as his responsibility. But he is definitely limited by recognized rules of international law.<sup>64</sup>

This does not mean, of course, that the occupying power must maintain in force legal provisions that run counter to morality or basic principles underlying its own way of life, so that the Powers occupying Germany after its unconditional surrender were fully entitled to abrogate such German legislation as the Nazi “racial” laws, or, as has happened more recently, the cancellation of discriminatory legislation directed at women.

Other relevant provisions of Hague Convention IV include Article 45 (“It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power”), Article 46 (“Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected . . .”), Article 50 (“No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible”), and Article 55 (“The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct”).

The law with regard to *occupatio bellica* was greatly expanded with the adoption of the 1949 Geneva Convention IV. This did not replace the provisions of the 1907 Convention, expressly stating that it is “supplementary” thereto.<sup>65</sup> This Convention is primarily directed to protecting the rights of civilians in occupied territory, limiting the rights of the occupant in so far as such civilians are concerned. Article 4 provides that “Persons protected by the convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of . . . a[n] occupation, in the hands of a[n] Occupying Power of which they are not nationals.” It has been said of this Convention that:

The emphasis is . . . upon the preservation of minimum humanitarian standards, through the prohibition of reprisals and collective punishments against the civilian population of the occupied territory, hostage-taking, torture, inhuman and degrading treatment, deportation, slave labour, wholesale seizure of property, and compulsion to perform work of military value. Both the Hague Regulations and the Fourth Geneva Convention also forbid the exploitation of the economy of the occupied territory for the benefit of the occupant's own economy. In exercising its power to determine such matters as exchange rates, the amount of money in circulation in the occupied territory, and the terms and conditions of trade, the occupying power must seek to provide for the good economic government of the occupied territory and not merely feather its own nest.<sup>66</sup>

As important as these humanitarian provisions are, perhaps even more significant is the provision in Article 1 that the Convention is to apply "in all circumstances," while by Article 2, which is common to all four of the 1949 Geneva Conventions, Convention IV is to apply:

[T]o all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. [It] shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party even if the occupation meets with no armed resistance.

The provisions in Geneva Convention IV are applicable from the opening of the conflict or of the occupation and:

[I]n the case of occupied territory [its] applications . . . shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory by the provisions of [certain specified Articles relating to the status and treatment of civilians]. Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.<sup>67</sup>

By Article 27, the rights guaranteed by Convention IV are to be enjoyed by all "without any adverse distinction based . . . on race, religion or political opinion," and women are to be protected against "any attack on their honour." To ensure that protected persons enjoy their rights under the Convention, Article 29 provides that the "Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred . . ." Article 31, in turn, states that "no physical or moral coercion shall be exercised against protected persons, particularly to

### *Is There a “New” Law of Intervention and Occupation?*

---

obtain information from them or from third parties.” Moreover, Article 32 provides that it is prohibited to take:

[A]ny measure of such a character as to cause the physical suffering or extermination of protected persons in [the] hands [of any High Contracting Party]. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality, whether applied by civilian or military agents.

It is important to note that, in accordance with Article 8, protected persons may not agree to give up their rights under the Convention either “in part or entirety.” Similarly, Article 47 declares that:

[P]rotected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by the annexation by the latter of the whole or part of the occupied territory.

This raises nice questions regarding, for example, the Israeli actions with regard to territories under the control of the Palestine Administration Authority; although Israel contends that since it has never ratified the Fourth Convention it is not bound thereby. Moreover, it has argued that since the territories in question were never under the authority of any recognized sovereign they are merely “administered,” rather than “occupied”—whatever that distinction might be. However, Prime Minister Sharon has acknowledged, in connection with his undertaking to withdraw from parts of the territory in question, that they are in fact “occupied.” In this connection it might be of interest to draw attention to the following comment in the British Manual of the Law of Armed Conflict: “Whether the administration imposed by the occupying power is called a military government or civil government is not important. The legality of its acts will be determined in accordance with the law of armed conflict.”<sup>68</sup> The United States Army manual, *The Law of Land Warfare*, is to the same effect:

It is immaterial whether the government over an enemy’s territory consists in a military or civil or mixed administration. Its character is the same and the source of its authority is the same. It is a government imposed by force, and the legality of its acts is determined by the law of war.<sup>69</sup>



In the light of these statements, it would appear that the inclusion in the administration of civilian nationals of the occupied territory would not alter the situation. It might be questioned, therefore, whether the administrations that, under the supervision of occupying authorities, have been established in the Kosovo region of Yugoslavia, Afghanistan and Iraq are truly in line with the requirements of the Convention, for they purport to govern regardless of the provisions of the Convention or the customary law concerning occupation. In each of these instances, regardless of the installation of “local” administrations, the occupation, even though government might be conducted through local surrogates however described, has continued and appears likely to do so for some time, despite the holding of local elections. A comment by Professor Greenwood is relevant:

Although it is obviously difficult to apply the law of belligerent occupation in a prolonged occupation, that law is not thereby rendered inapplicable. Prolonged occupation raises many questions to which the Hague Regulations and the Fourth Geneva Convention provide no express answers. In particular, there is a need for change on a far greater scale during a prolonged occupation simply because of the way in which circumstances change over time. Nevertheless, there is no indication that international law permits an occupying power to disregard provisions of the Regulations or the Convention merely because it has been in occupation for a long period, not least because there is no body of law which might plausibly take their place and no indication that the international community is willing to trust the occupant with *carte blanche*. Any changes, it is suggested, must take place within the framework of the Hague Regulations and the Fourth Geneva Convention, the principles of which are flexible enough to accommodate at least some of the needs of a prolonged occupation. . . . The longer the occupation lasts, the greater the degree of change which is likely to be required but changes should still be made only in accordance with the broad principles [to be found in the Regulations and Convention].<sup>70</sup>

It must be borne in mind, when considering the Israeli situation, which was Professor Greenwood’s particular concern when making this comment, that Israel has refused to ratify Geneva IV and is only bound by those provisions of the Convention which give expression to customary law.

In so far as the Israeli situation is concerned, while the tendency has been until recently to describe the contested Palestinian lands—the West Bank region, also described as Judea and Samaria—held by Israel as “administered territories”<sup>71</sup> to which the Fourth Convention does not apply, Israeli courts, when called upon to consider the legality of actions by military authorities in those territories, have not always taken such a narrow approach, pointing out as early as 1968 that the Military Commander’s legislative powers derive from the actual occupation and not the Convention, but the judge stated:

### *Is There a “New” Law of Intervention and Occupation?*

---

[T]he State of Israel observes the provisions of the convention in practice. And since it is guided by the convention, inasmuch as the latter embodies humanitarian principles of civilized nations, I shall assume that I must have recourse to the convention as being of binding force. . . . Any Order made by the Commander is presumed to be valid, and its validity can only be impugned if the Order is on the face of it so unreasonable and exceptional and contrary to the most basic principles of natural justice and international morality accepted by civilized nations, that it stands to be rejected and the Military Court [set up under security Provisions Order issued by the Military Commander of the Region] by virtue of its inherent authority must disregard it as being enacted out of malice and arbitrariness rather than the achievement of any lawful purpose. . . .<sup>72</sup>

The “Military Court” referred to in this opinion was established under security Provisions Order issued by the Military Commander of the Region. Establishment of such military courts is consistent with Geneva Convention IV.<sup>73</sup>

As to the 1907 Hague Regulations, the Israeli judicial position is very clear. As was pointed out by the Supreme Court in 1982:

The rights of a resident in the area under military government vis-à-vis the military commander – rights subject to judicial review in a court of law of the occupying state – stem from the rules governing belligerent occupation in customary international law and contractual international law, insofar as they have been assimilated into the internal law of the occupying state by a valid internal act of legislation. In respect of Israel’s belligerent occupation, and in the absence of legislation which internalizes the principle [sic] norms of the laws of war relating to belligerent occupation, (the rules in force) are those included in the Hague Regulations. . . . Even though the Hague Regulations serve as an authority in this respect, the accepted attitude – which has also been accepted by this Court – is that the Hague Regulations are declarative in nature and reflect customary international law, applicable in Israel without an act of Israeli legislation.<sup>74</sup>

The Fourth Geneva Convention, not having been ratified by Israel, has never been the subject of Israeli legislation. However, as has just been noted, the courts will apply those parts of the Convention which it considers to be purely humanitarian in character and part of international customary law. It is for this reason that Israel applies the Hague Regulations appended to Convention IV of 1907, even though it contends there is no war since there is no State enemy, merely groups of “terrorists,” like the Popular Front for the Liberation of Palestine, who are not entitled to be treated as prisoners of war and are, therefore, not protected by the Third Geneva Convention.<sup>75</sup>

Among the activities of the Israel military administration claimed to be contrary to both the Hague Regulations and Geneva Convention IV is the destruction of the

homes of civilians who are related to an alleged terrorist. In the 1985 case of *Degalis v. Military Commander of the Judea and Samaria Region*, Judge Ben-Dror pointed out that the goal of the 1945 Defence (Emergency) Regulations permitting such demolition:

[W]as a deterrent effect, and this effect should apply not only to the terrorist alone, but also to the family living with him. A demolition of a terrorist's house cannot be considered a 'collective punishment' because the house about to be demolished is connected to the terrorist, and not to people unconnected with the matter. In cases such as this the High Court usually instructs the respondent [the Military Commander] to consider other deterrent measures, such as merely sealing off the terrorists' houses. However, the final decision on the nature of the measure to be adopted lies within the respondent's competence according to Regulation 119, and due to the gravity of the acts performed by the petitioners' relatives, the sanction of demolition of their houses seems quite a reasonable one.<sup>76</sup>

The conclusion to be drawn from these Israeli judicial decisions is that it matters little whether the occupying power regards the territory under administration as "enemy" or "terrorist" or by some other nomenclature. For Israel, at least, the law to be applied is made up of the occupation provisions of the Hague Regulations, together with those provisions of the Fourth Geneva Convention which are humanitarian in their purpose and as such are to be observed regardless of legislation ratifying the Convention.

The difference between the Israeli occupation and those that have occurred later lies in the fact that the former is the result of conflict following Israel's creation and has been conducted between Israel and forces that, for the main part, do not owe allegiance to any other State. The later occupations have all involved States, all of which are members of the United Nations, and have followed an intervention not of the normal conflict type, but have been based on some other ground, often in disregard of the terms of the Charter of the United Nations. It is necessary, therefore, to pay some attention to the basis for the intervention and the consequent occupation.

Before doing so, however, reference must be made to some apparent occupations under the auspices of the United Nations which have nothing inherently to do with the law of armed conflict, and, consequently, not with the law concerning occupation. There have been a number of incidents in which the members of the United Nations, particularly of the Security Council, have become concerned at the manner in which conflicting racial or tribal groups within a country, frequently one that has only recently achieved its independence, have indulged in outrageous behavior, or in which it has been feared the local hostilities might eventually

### *Is There a “New” Law of Intervention and Occupation?*

---

involve some third power. In such circumstances the United Nations has authorized the raising of a “peacekeeping” force which has been stationed in the affected territory with a view to bringing an end to hostilities by acting as an interposition force between rival groups.<sup>77</sup> This has happened, for example, in Cyprus, Korea, Israel, Somalia, Rwanda,<sup>78</sup> Kampuchea, and East Timor, to name but a few. However, these forces do not operate as occupiers, and the law, whether it is that of the Hague or of Geneva, has no relevance. That these forces are there as a matter of local tolerance may be seen from the manner in which the UN force in Gaza was withdrawn at the request of Egypt, the host country, in 1967.<sup>79</sup>

The intervention by peacekeepers in Haiti tends to stand in a position of its own, for in this case it has been alleged that the United States, which provided the bulk of the peacekeeping force, virtually forced Aristide, the democratically elected president of the country, to depart and arranged for his removal (Aristide asserts that the United States forcibly removed him), which, if true, is clearly an action interfering with local government contrary to customary international law. The United States denied doing so. While there was some indication that this action may have been popular at the time, by October 2004 agitation was taking place calling for his return.

Before considering the legal status of such interventions it must be pointed out that by Article 2, paragraph 4, of the Charter all Members “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Further, as was indicated at the very beginning of this article, paragraph 7 of the same Article provides:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this Principle shall not prejudice the application of enforcement measures under Chapter VII.

Chapter VII is concerned with “Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.” *Prima facie*, this would suggest that, unless ill treatment of nationals by one State constituted a direct threat to the well-being of another, no State or the United Nations itself would have a right to intervene on behalf of those persecuted. The situation might be altered by virtue of the existence of treaty obligations concerning human rights undertaken by the persecutor, although it must be borne in mind that none of the presently existing treaties in this field confers a right of direct intervention on any other party to such treaties.

In accordance with the law of treaties, unless the treaty specifically creates such a right, by both customary and conventional law, breach of a treaty does not give private citizens any right recognized and enforceable by international law,<sup>80</sup> and the various treaties concerned with human rights have not created such a right *expressis verbis*. The only other recourse to a national would depend upon the State party to the treaty and alleged to be in breach of it having created such a right under its national law. The only right accruing to other parties to the treaty would be by way of damages, provided it could prove that its own interests had in fact been adversely affected by the conduct objected to.

The first case that calls for consideration arose out of the dissolution of the Socialist Federal People's Republic of Yugoslavia and the conflicts which began in 1991. These conflicts were both international, as for example, between Croatia and Serbia, and non-international, as for instance, between Bosnia and Bosnian Serbs seeking to join Serbia. In accordance with customary international law, an established government is entitled to take such action as it deems necessary to suppress a revolt, free from any active intervention by any other State, and it would appear from Article 2, paragraph 7 of the Charter, free from intervention by the United Nations. In addition, in this particular instance it is important to note that all of the parties concerned in the Yugoslav fighting accepted the provisions of Protocol II of 1977.<sup>81</sup>

By Article 3 of the Protocol, non-intervention by third States, whatever the circumstances, is condemned emphatically:

1. Nothing in the Protocol [including Part II concerning Humane Treatment] shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate [it does not say "reasonable"] means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
  
2. Nothing in the Protocol shall be invoked as a justification for intervening, directly or indirectly, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which the conflict occurs.

Of course, States, for example the United States, which had not become a party to the Protocol, would not be bound by this provision. It would, however, be bound by the well-established principle of non-intervention under customary law and reaffirmed in the Charter.

Apart from the conflicts between Bosnia, Croatia and Serbia, a major conflict took place in the Serb remnant, particularly as between the Serb authorities and the Albanian population that constituted a majority in Kosovo. The attempt by the

### *Is There a “New” Law of Intervention and Occupation?*

---

Serbs to reassert their authority resulted in atrocities on both sides, with widespread allegations that the authorities were carrying out extensive policies of “ethnic cleansing” involving expulsions, killings and mass rapes of the Albanians. Some would argue that “ethnic cleansing” was a sanitized term for genocide. Article II of the Genocide Convention of 1948 defines genocide as meaning:

[A]cts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>82</sup>

It can hardly be denied that slaughtering the men, and forcing women and children to flee their homes and take to the hills in winter without adequate food or clothing, would fall within this definition. While the Convention elevated genocide to a crime, it made little provision for its punishment, nor did it give any party a right to intervene to terminate acts of genocide being committed by some other party. *In any case, by failing to describe what was going on by the treaty term would suggest that no such right could be asserted.*

Nevertheless, when Serbia rejected a proposal that a force of North Atlantic Treaty Organization (NATO) personnel be admitted and that a plebiscite under NATO supervision be held on Kosovo’s future after three years of interim government, and followed this rejection with increased pressure upon the Kosovar Albanian population, NATO indicated that military action against the Serbs was inevitable and in July 1999 NATO began a bombing campaign. This is not the place to discuss the NATO intervention<sup>83</sup> either in accordance with the United Nations Charter or the North Atlantic Treaty<sup>84</sup> itself. Suffice it to say that Article 5 of the Treaty defines the geographic area of its competence, which does not include the former State of Yugoslavia, and requires an armed attack against a signatory for the obligations of the Treaty to come into effect. It is difficult to appreciate how a non-international conflict in Yugoslavia, not a member of NATO, in any way threatened the security of any NATO member. NATO, however, maintained that its intervention was not in any way politically directed with the aim of breaking up what remained of the former Yugoslavia or to recognize an independent Kosovo, but was purely humanitarian, directed at terminating the ethnic cleansing and other

atrocities committed by the Serbs against the Muslim Albanian population, and to enable the latter to return home in safety and enjoying the same rights as all other Serbian citizens in the area. Here we have an approach that is reminiscent of provisions to be found in the 1878 Treaty of Berlin. Article XXXV thereof provides:

In Serbia the difference of religious creed and confession shall not be alleged against any person as a ground for exclusion or incapacity in matters relating to the enjoyment of civil and political rights, admission to public employments, functions, and honours, or the exercise of the various professions and industries, in any locality whatever. The freedom and outward exercise of all forms of worship shall be assured to all persons belonging to Serbia, as well as to foreigners. And no hindrance shall be offered either to the hierarchical organization of the different communions, or to their relations with their spiritual heads.

While it is true that there is no established right of intervention, whether leading to occupation or not, in customary international law, one cannot ignore the fact that international law is a developing process. The Preamble to the United Nations Charter affirms “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.” This has led to the adoption of a variety of instruments reaffirming the existence of and support for human rights. With few States presuming to oppose these assertions, there is a tendency to assert that there is now, if not a *jus cogens*, at least a developing customary law in this field binding upon and enforceable by all. Given this trend, it may be contended that the NATO intervention is legally justifiable. What may be more difficult to support is the continued presence of NATO forces and a UN administrator in the territory now that “peace” has officially been restored, and purportedly free elections have been held in Serbia. However, the form of those elections and the persons permitted to run for office have all been vetted and approved by the non-local internationally imposed administrator. While there is no official occupation in existence and no suggestion that the area is under the umbrella of the Fourth Geneva Convention, the members of the “occupying” forces are immune from the local jurisdiction, and there appears to be little effort made by the sending State authorities to try their personnel in accordance with their own national law for offenses committed against local inhabitants.<sup>85</sup>

It remains to discuss the situation in both Afghanistan and Iraq, particularly as the United States has taken the lead in dealing with both these countries and continues to do so, and remains somewhat indifferent to the view of other States offering support in seeking to restore order.

On September 11, 2001, three hijacked American aircraft were used as destructive weapons against the World Trade Center in New York and the Pentagon in

### *Is There a “New” Law of Intervention and Occupation?*

---

Washington, D.C., while a fourth plane was likely prevented by its passengers from crashing into the White House itself. The immediate reaction of the United States Government was to declare a “war against terrorism,” without any indication as to the State against which this war was to be waged. There was strong evidence to indicate that the attacks had been organized by al-Qaeda, a group of Islamic fundamentalists led by Osama bin Laden, a renegade Saudi citizen, who had been responsible for a number of prior attacks against United States and other western interests. There was also evidence to indicate that bin Laden was in Afghanistan where he maintained or financed a number of terrorist training camps. Afghanistan was at that time administered by an Islamic fundamentalist administration (the Taliban) that constituted the country’s *de facto* government, although it was not internationally recognized. The Taliban authorities were called upon to arrest bin Laden and surrender him to the United States for trial. When they refused to do so, the country was attacked by US forces, supported by the United Kingdom and others.

There was no declaration of war and, despite the fact that Taliban fighters were representative of their “government” and as such distinguishable from al-Qaeda, the United States refused to recognize them as legitimate combatants entitled to treatment when captured as prisoners of war. Instead they were described as “enemy combatants,” a classification not known to the law of armed conflict, which regards all captured enemy personnel belonging to an organized force as prisoners of war. If not clearly recognizable as entitled to be described as such, they are entitled to be treated as if they were prisoners of war until such time as their status has been clarified by a tribunal.<sup>86</sup> It is true that the supporters of the Taliban administration were not easily identifiable as members of a regular force, but they were certainly no less identifiable than those constituting the Northern Alliance, which purported to be the remnant of the government overthrown by the Taliban. Moreover, in view of the camouflage worn by many members of modern armed forces—as well as by many, particularly younger, civilians—it may well be difficult to identify these too, especially those members who participate in undercover missions wearing civilian or other dress, as distinct from national uniform, whether in place of or additional to their regular uniform.<sup>87</sup> Having displaced the Taliban, the United States treated as an ally the Northern Alliance as representatives of the government displaced by the Taliban, and subsequently selected personnel from among its members, together with some tribal leaders, to form a council to elect a government under the leadership of an individual acceptable to the United States. In the meantime the latter was able to persuade some third States to assist in the administration and rebuilding of Afghanistan, and, as in Kosovo, some of the military supervisory activities have been undertaken by NATO—although there has



been no attempt to explain how such an activity so far from the North Atlantic area falls within NATO's competence. At no time has it been suggested that there is an occupation or that there is any room for any of the Geneva Conventions to be applied.

Moreover, a new development in the practice of occupation has been introduced in Afghanistan. A number of armed western security personnel, often ex-servicemen, who may well be described as mercenaries and therefore illegal combatants,<sup>88</sup> have been recruited to assist the occupying authority and the Afghan administration in protecting commercial interests, usually western in character. Such personnel have no interest in or concern for restrictions imposed by the Hague or Geneva Conventions and their activities go largely unchecked by either the allied or Afghan authorities.<sup>89</sup>

Despite the existence of an acceptable Afghan administration and the participation of other States, the United States has removed captured personnel from Afghanistan to Guantanamo Bay in Cuba, where it has a naval base leased in virtual perpetuity from the Cuban government.<sup>90</sup> Among the captives are members of the Taliban, who, it may be suggested, were legitimately engaged in combat on behalf of their government against the United States "invader," and who might be regarded, *prima facie*, as entitled to Third Convention protection, instead of being denied, until recently,<sup>91</sup> any form of independent legal protection. Also among the Taliban captives are non-Afghan Muslims who volunteered to defend a Muslim administration against rebels or foreign forces seeking to overthrow that administration. It may be suggested that they were entitled to the same treatment as the French Foreign Legion, the LaFayette Squadron or any American who joined the allied forces in either World War before the United States itself became a belligerent. Even when these captives have held the nationality of one of the American allies, as have a number from Britain or Pakistan, the United States has declined to treat them as in any way protected by the law of armed conflict nor, with rare exceptions, has it been prepared to hand them over to their own government for treatment in accordance with their national law. Moreover, it would seem that where some detainees are concerned no details as to name or even place of detention are known.<sup>92</sup>

In practice, despite the existence of a nominally independent government, Afghanistan is under effective US occupation since it would appear that the "government" acts only with the consent of the United States, even though the latter contends that any actions taken by them against local "terrorists" (a term which is being used somewhat indiscriminately both in Afghanistan and Iraq even against those who might be more correctly described as "insurgents") are only undertaken at the request or with the consent of the Afghan administration. Both the United

### *Is There a “New” Law of Intervention and Occupation?*

---

States and the Afghan authorities deny that an occupation exists, and the United States has indicated that it will withdraw if requested after the Afghan election which is due to take place shortly. Until then, it is the United States that is seeking to ensure that conditions exist for such an election to be held.

At least in so far as Afghanistan is concerned, it is possible to argue that the protection offered by the Taliban to the al-Qaeda terrorist movement with the latter's threats and actions against third States was enough to regard the Taliban as an ally of Osama bin Laden's supporters and, as such, sufficient as a coconspirator to warrant action against it. Additionally, the Taliban governmental authority was extremely restrictive and in virtual denial of all human rights, particularly where women were concerned, although this argument was not originally of any major significance.

In the case of Iraq, no similar contentions could be put forward. Instead reference was made to the United Nations resolutions terminating hostilities at the end of the conflict with Iraq consequent upon its invasion of Kuwait. By Resolution 687,<sup>93</sup> which was adopted in 1991, Iraq was required to get rid of all its chemical and biological weapons as well as its weapons of mass destruction and to submit to international inspection to ensure compliance with these requirements. After 9/11, the United States contended that Iraq was not fulfilling its obligations and was not cooperating with the United Nations inspectors. When the Security Council failed to take the further action desired by the United States, the latter, supported by the United Kingdom, launched a military offensive against Iraq, while adding to its complaint the assertion that Saddam Hussein, president of Iraq, was a partisan of al-Qaeda and even claimed that Iraq was party to the September attacks on the United States, a claim for which there appears to have been no substantive evidence whatever. The United Kingdom added the complaint that Iraq was in breach of every international obligation concerning human rights and that the administration should be overthrown even on this ground alone.

As in the case of Afghanistan, there was no support from the United Nations nor was there any declaration of war.<sup>94</sup> The actual combat operations were not of great duration, the Iraqi armed forces soon surrendered, and President Bush proclaimed that the operation was successfully terminated. In that case, in accordance with the Third Geneva Convention,<sup>95</sup> all prisoners of war other than those held for potential trial as war criminals must be released, an obligation only partly complied with. Further, the United States declared that Saddam Hussein and many of his leading military, political and scientific advisers had committed war crimes during the first Gulf War following the Iraqi invasion of Kuwait, as well as crimes against humanity, particularly against dissident Iraqi nationals. There was again no suggestion that these latter were to be treated in accordance with the Geneva Conventions,

although Saddam at least was permitted to see International Committee of the Red Cross representatives. Moreover, the United States arranged for Saddam and some of the others to be handed over to the new Iraqi administration for trial, thus raising the possibility of trials by vengeance, even though it was asserted that proper precautions would be taken to ensure that they receive a fair trial.

With the overthrow of the government, the United States, without acknowledging that it was an occupant subject to the restrictions imposed by the Hague or Geneva Conventions, became the governing authority in Iraq, appointing a United States citizen as supreme governor, although he was later replaced by an American-sponsored Iraqi interim administration, with the United States making clear which local politicians it would not tolerate. The United States signed an agreement with this administration undertaking to withdraw from Iraq should the Iraqi government request it to do so. In the meantime, the United States remained the supreme authority for security purposes and agreed not to undertake offensive operations against “terrorists,” even though some of those so described might more properly be considered as insurgents. It must be kept in mind that the overthrow of Saddam Hussein and his government and the disbandment by the occupant of the Iraqi armed forces did not mean that all support for the legitimate Iraqi government had terminated, particularly as many of these forces found themselves without prospects of employment. Many of them did in fact continue operations of a warlike character against both the “invading” military forces and representatives of the Iraqi administration. Subsequently the United States began allowing members of the former Iraqi forces, after proper vetting, to rejoin the newly-created Iraqi armed or police forces.

When it became clear that Iraq had no weapons of mass destruction and had destroyed under United Nations supervision its chemical and biological weapons, a fact later confirmed by the head of the United States Iraq Survey Group in his Final Report,<sup>96</sup> the United States and its allies changed the balance of their arguments concerning the invasion and subsequent occupation. It now seemed that the most important aim of their operations was to bring democracy to Iraq, sometimes claiming that this would prove an example for other Middle East States, the governments of many of which were dictatorial in character. This claim that the spread of democratic governments everywhere the United States and its allies considered it to be desirable—even absent United Nations approval if this could not be obtained—is reminiscent of policies pursued by the Concert of Europe in the nineteenth century.

In both Afghanistan and Iraq, the United States, backed by its allies, has supported its nominee in the local administration in organizing an election under American protection. The presumption appears to be that with an election, even

### *Is There a “New” Law of Intervention and Occupation?*

---

though local conditions might not make it feasible to be held throughout the occupied area, a new era will be created with a popular government taking over, one that will fully respect human rights, will not constitute a threat to any neighbor and will not seek to acquire weapons of mass destruction or others now considered contrary to international law.

This view that the introduction of the trappings of democracy to a society that has never known it and the history of which is riven with local lustings for power, hatreds and jealousies is the answer to all problems and the way to a future peaceful existence for all is similar to the situation that existed particularly in former British colonies in Africa during the disassembling of empire. At that time the attitude seems to have been,

[Y]ou are now independent. We are giving you a building that looks like a London railway terminus which is your legislature. In addition, we are providing you with a ceremonial chair which is the ‘Speaker’s Chair’, although the man who sits in it does not speak. There will be a person dressed somewhat like Little Lord Fauntleroy known as the Speaker, who will sit in the Speaker’s Chair from which he is not allowed to speak. Then we will present you with an ornamental mace as a symbol of the Speaker’s authority, but which must not be used as you were accustomed historically to use a mace. Finally, we will give you a presentation copy of Erskine May’s *Parliamentary Procedure* and you will hold an election. After this, the world will know that you are a democracy.

Unfortunately, the years since those “heady” days have shown how artificial these hopes were. There is no reason to assume that the situation in either Afghanistan or Iraq will be any different.

While there may be good grounds for arguing that the operations against the former Yugoslavia and in Kosovo, together with the invasions of both Afghanistan and Iraq are contrary to the Charter of the United Nations and the obligations of the members, and are thus illegal, it should be noted that there has been no attempt in that organization to condemn any of them, not that there could have been any decision by the Security Council to this effect in view of the vetoes that would have been exercised by the United States and the United Kingdom.<sup>97</sup> It must, however, be noted that the governments responsible for the invasions have sought to justify their interventions on the basis of the need to protect and assert human rights. In this endeavor, they argue, they have done nothing contrary to the principles relating to humanitarian intervention discussed earlier in this paper, particularly when the international community as such has failed to take action collectively. In their case, this contention is strengthened by the generally accepted view that respect for human rights is now part of the international *jus cogens* that must be respected and protected by all.

In these instances, however, since the enforcing powers maintained that they were present only for the good of the country affected and the welfare of the world, they, or at least the United States, tended to argue that their opponents were not entitled to the protection of the law. For the main part, however, military personnel captured in Iraq have, while in detention, been treated in accordance with the regulations concerning prisoners of war, subject to the exceptions respecting some members of both the United States and United Kingdom forces responsible for holding and interrogating Iraqi military and civilian detainees.<sup>98</sup> Given the circumstances in which the invasions took place, the existence of interim governments in both Afghanistan and Iraq and the tendency to describe all opponents as terrorists, it is perhaps not surprising that the occupying authorities have not been too concerned about the application of the Hague or Geneva Conventions. It would appear, therefore, that by and large there has been no “new” law of occupation, but an application of behavior conditioned by the circumstances of the case.

For the future, perhaps, and to avoid the controversies that these operations have given rise to, the writer may be permitted to refer to a proposal he first put forward in 1994:

When a government is unwilling or unable to protect, or persistently infringes the human rights of large segments of its population, or the government structure has so disintegrated that law and order have virtually ceased to exist, it may then well be time for the United Nations to take over the administration until such time as normal conditions have been restored. . . . However, it would perhaps be more desirable that this be done not on an *ad hoc* basis – nor by a group of States assuming such authority unto itself – but on the basis of a permanent United Nations body made up of trained personnel from a variety of countries and regions. . . . The members of such administrative or governing commission should not be drawn from nationals of the great powers among whom, despite the end of the cold war, political rivalries and manoeuvring is still likely to take place.<sup>99</sup>

At the same time, it would be necessary to establish rules, probably by way of a convention somewhat similar to Geneva Convention IV, indicating the manner in which persons in the country taken over are to be treated.

Such a proposal would be met by opposition from the great powers since it is suggested they be left out of the administration to be established, while they might well be called upon to assist in its financing and in the training of personnel over whose activities they would have no control. In addition, opposition would almost certainly be forthcoming from some of the smaller newly independent and developing countries which are jealous of their sovereignty and are aware that they are more likely to be the “victims” of such a procedure than any other State. However,

## *Is There a “New” Law of Intervention and Occupation?*

---

if such a policy were adopted, there might be less doubt as to the legal basis for the intervention and consequent occupation, and a more substantial foundation for contending that it is in accordance with the rule of law.

### *Notes*

1. EMMERICH DE Vattel, 3 THE LAW OF NATIONS 7 (Charles G. Fenwick ed., Carnegie Institute of Washington 1916) (1758).
2. U.N. Charter art. 2, para 7.
3. See, e.g., *Island of Palmas* (U.S. v. Neth.), 1928, 2 R.I.A.A. 829, 839; see also *Western Sahara* (Advisory Opinion) 1975 I.C.J. Reports 12, 39 (Oct. 16) and M.F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW (1926).
4. 1878 Treaty of Berlin (Great Britain, Austria-Hungary, France, Germany, Italy, Russia and Turkey), art. VI, July 13, 1878, 153 Consol. T. S. 172; reprinted in MAJOR PEACE TREATIES OF MODERN HISTORY, 1648–1967, at 975 (Fred L. Israel ed., 1967).
5. See *infra* pp. 190–94.
6. HUGO GROTIUS, II DE JURE BELLI AC PACIS 504–5, 508, 582, 584 (Francis W. Kelsey trans., Clarendon Press 1964) (1625).
7. See, e.g., IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 338–42 (1963); see also Imre Szabo, *Fundamental Questions Concerning the Theory and History of Citizens Rights*, in SOCIALIST CONCEPT OF HUMAN RIGHTS 267 (Jozsef Halasz ed., 1966).
8. Vattel, *supra* note 1, at 116, 130–2.
9. See, e.g., President Delivers State of the Union Address, Jan 29, 2002, available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.
10. SAMUEL VON PUFENDORF, DE JURE NATURAE ET GENTIUM (C.H. & William A. Oldfather trans., Clarendon Press 1934) (1688).
11. SAMUEL VON PUFENDORF, ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS 292–5 (William A. Oldfather trans., Clarendon Press 1931) (1672).
12. VON PUFENDORF, *supra* note 10, at 1307.
13. SAMUEL VON PUFENDORF, DE OFFICIO HOMINIS ET CIVIS 140 (Frank G. Moore trans., Oxford University Press 1927) (1682).
14. SIR ROBERT PHILLIMORE, 1 INTERNATIONAL LAW 622–3 (1879) [italics in original].
15. WILLIAM E. HALL, TREATISE ON INTERNATIONAL LAW 302–4 (A. Pearce Higgins ed., 4th ed. 1924) (1895) [emphasis added].
16. This was largely the ground on which India invaded East Pakistan during the Bangladeshi struggle for independence in 1971.
17. JOHN WESTLAKE, I INTERNATIONAL LAW 305–07 (1904).
18. John Ibbitson, *Standing on Guard for Darfur*, GLOBE AND MAIL (Toronto), Sept. 3, 2004, at A4.
19. See CYRUS ADLER & AARON M. MARGALITH, WITH FIRMNESS IN THE RIGHT: AMERICAN DIPLOMATIC ACTION AFFECTING JEWS 1840–1945, at 261 *et seq.* (1946).
20. JOHN BASSETT MOORE, 5 DIGEST OF INTERNATIONAL LAW 833 (1906).
21. JOHN BASSETT MOORE, 6 DIGEST OF INTERNATIONAL LAW 32 (1906) [emphasis added].
22. ELLERY C. STOWELL, INTERNATIONAL LAW 349, 352 (1931) [emphasis added].
23. ARNOLD J. TOYNBEE, SURVEY OF INTERNATIONAL AFFAIRS 1931, at 371 (1934).
24. H. A. Smith, *Where the League of Nations Failed*, THE LISTENER, Jan. 26, 1938, at 183.

25. Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, T.S. 418, 6 Bevans 1113 [hereinafter Agreement for the Lease].
26. *In re Guzmán and Latamble*, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES, 1933–34, Case No. 43 (Cuba 1933).
27. Convention Relative to the Treatment of Prisoners of War, art. 5, Aug. 12, 1949, 75 U.N.T.S. 135, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 244 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter Geneva Convention III], provides that:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [defining those who are prisoners of war], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.
28. *See, e.g.*, Neil A. Lewis, *U.S. Erecting a Solid Prison at Guantanamo for Long Term*, NEW YORK TIMES, Oct. 23, 2004, at A20.
29. *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003), *reprinted in* 43 INTERNATIONAL LEGAL MATERIALS 381 (2004).
30. *Id.* at 1283 n.7.
31. Done Dec. 16, 1966, 999 U.N.T.S. 171.
32. *Gherebi*, *supra* note 29, at 1286.
33. *Id.* at 1287.
34. *Id.* The 1903 Agreement for the Lease of Guantanamo Bay was extended in 1934 by agreement between the United States and Cuba. It states that the lease “shall continue in effect” “until the two contracting parties agree to the modification or abrogation of” the lease, provided that the United States does not abandon the naval station. Treaty Defining Relations with Cuba, U.S.-Cuba, art. III, May 29, 1934, 48 Stat. 1682, 1683.
35. *Gherebi*, 352 F.3d at 1289–1290. In its decision, the court cited *States v. Rice* 17 U.S. (4 Wheat) 246, at 254 (‘hostile occupation gives ‘firm possession’ and the “fullest rights of sovereignty” to the occupying power, while suspending the sovereign authority of the land whose territory is being occupied.’)
36. *See, e.g.*, award by Judge Huber in Island of Palmas Case (Neth. v. U.S.), Hague Court Reports 2d (Scott) 83 (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb. Awards 829, 831.
37. HMSO Command Paper 1093 (1960).
38. Treaty of Versailles, June 28, 1919, 225 Consol. T. S. 188, *reprinted in* II MAJOR PEACE TREATIES OF MODERN HISTORY, *supra* note 4, at 1265.
39. *Id.*, art. 429.
40. Declaration regarding the Defeat of Germany and the Assumption of Supreme Authority of the Occupying Powers, June 5, 1945, HMSO Command Paper 6658 (1953); *see also* WOLFGANG FRIEDMANN, THE ALLIED MILITARY GOVERNMENT OF GERMANY (1947).
41. *See* Instrument of Surrender, 1945; Moscow Declaration, December 1945; and Presidential document on United States Post-Surrender Policy for Japan, all *reprinted in* US State Department, Occupation of Japan: Policy and Progress 62, 69–73, 73–81 (1946); *see also* Leslie C. Green, *Law and Administration in Present-day Japan*, 1 CURRENT LEGAL PROBLEMS 188 (1948).
42. *See* LUDOVICO N. BENTIVOGLIO, LA ‘DEBELLATIO’ NEL DIRITTO INTERNAZIONALE (1948).
43. San Francisco Peace Treaty, Sep. 8, 1951, *reprinted in* IV MAJOR PEACE TREATIES OF MODERN HISTORY, *supra* note 4, at 2641; *see also* Leslie C. Green, *Making Peace with Japan*, 6 YEARBOOK OF WORLD AFFAIRS 1 (1952).
44. *See* Occupation of Japan, *supra* note 41, at 117; AMOS J. PEASLEE, 2 CONSTITUTIONS OF NATIONS 518 (1966).

### *Is There a “New” Law of Intervention and Occupation?*

---

45. See 1 OPPENHEIM’S INTERNATIONAL LAW 192 n.37 (9th ed. 1996); see also *In re Mangold’s Patent*, (1950) 68 R.P.C. 1.
46. Moscow Conference, Joint Four-Nation Declaration, Oct. 1943, 161 British and Foreign State Papers 288 (1954), available at <http://www.ibiblio.org/pha/policy/1943/431000a.html>.
47. Agreement on the Machinery of Control in Austria, Vienna, June 28, 1946, 138 U.N.T.S. 85.
48. Requisition of Private Property (Austria) Case, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES, 1949, Case No. 188 (Austria).
49. Treaty for the Re-establishment of an Independent and Democratic Austria, May 15, 1955, 217 U.N.T.S. 223, reprinted in IV MAJOR PEACE TREATIES OF MODERN HISTORY, *supra* note 4, at 2709.
50. See W. S. Armour, *Custom of Warfare in Ancient India*, 8 TRANSACTIONS OF THE GROTIUS SOCIETY 71, 81 (1922).
51. Instructions for the Government of Armies of the United States in the Field, General Order No. 100, Apr. 24, 1863, reprinted in THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004); see also Richard R. Baxter, *The First Modern Codification of the Law of War*, 3 INTERNATIONAL REVIEW OF THE RED CROSS, No. 25, at 171 (1963).
52. After the fall of Baghdad and its occupation by United States forces, there was much criticism at the “failure” of those forces adequately to protect Iraqi works of art, museum pieces, and the like.
53. Reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 51, at 21.
54. *Id.* at 29.
55. Convention (II) With Respect to the Laws and Customs of War on Land, July 29, 1899, 22 Stat. 1803, 1 Bevans 247, reprinted in *id.* at 63.
56. Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, reprinted in *id.* at 55.
57. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, reprinted in *id.* at 575.
58. G.A. Res. 217A (III), Dec. 10, 1948, available at <http://www.un.org/Overview/rights.html>.
59. G.A. Res. 2200 A (XXI), Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www.clea.org.uk/treaties/Iccpr.html>.
60. See Common Article 2 of each of the four Geneva Conventions of 1949, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 27, at 197, 222, 244 and 301, respectively.
61. Christopher Greenwood, *The Administration of Occupied Territory in International Law*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORY 243 (Emma Playfair ed., 1992).
62. The *Nuremberg Judgment* 1946, HMSO, Command 6964 (1946), at 65 states that:

The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law as it existed at the time of their adoption. But the Convention expressly stated that it was an attempt ‘to revise the general laws and customs of war’, which it thus recognised to be then existing, but by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war. . . .
63. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 257 (July 8).
64. *In re List* (1948) 11 Trials of War Criminal 1230, 1244–5.
65. *Supra* note 57, art. 154.
66. Greenwood, *supra* note 61, at 250.
67. *Supra* note 57, art. 6.



68. United Kingdom Ministry of Defense, *The Manual of the Law of Armed Conflict*, Sec. 11.19 (2004).
69. Department of the Army, *The Law of Land Warfare*, FM 27-10, July 1956, ¶ 368.
70. Greenwood, *supra* note 61, at 263; *see also* the opinion of Judge Barak in *A Cooperative Society Lawfully Registered in the Judea and Samaria Region v. Commander of the IDF Forces in the Judea and Samaria Region*, 37 (4) Piskei Din (Reports of Supreme Court, Israel) 1982, *reprinted in* 14 ISRAEL YEARBOOK OF HUMAN RIGHTS 301, 307, 313 (1984):

The concrete content that we shall give to Art. 43 of the Hague Regulations in regard to the occupant's duty to ensure life and order will not be that of public life and order in the nineteenth century, but that of a modern civilized State at the end of the twentieth century. . . . The transportation needs of the local population continue to increase and it is impossible to freeze the condition of the roads in the Region. Therefore the Military Administration was authorized to elaborate a roads project to respond to the present and future needs of the population. Indeed, the roads will remain after the termination of the military administration, but this fact does not matter. There is nothing in the roads project that might blur the distinction between a military administration and an ordinary government. . . .
71. *See, e.g.*, J. Singer, *The Establishment of a Civil Administration in the Areas Administered by Israel*, 12 ISRAEL YEARBOOK ON HUMAN RIGHTS 259 (1982); *see also* Mustafa Yusef v. Manager of the Judea and Samaria Central Prison, 17 ISRAEL YEARBOOK ON HUMAN RIGHTS 309 (1984).
72. *The Military Prosecutor v. Zuhadi Saleh Hussein Zohar*, 1968, *reprinted in* 1 ISRAEL YEARBOOK ON HUMAN RIGHTS 421 (1971).
73. *Supra* note 57, art. 66.
74. *A Cooperative Society Lawfully Registered in the Judea and Samaria Region v. Commander of the IDF Forces in the Judea and Samaria Region*, 1982, *cited in* Mazen Qudus, *The Application of International Law in the Occupied Territories as Reflected in the Judgments of the High Court of Justice in Israel*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORY*, *supra* note 61, at 90.
75. *Supra* note 28. *See also* *The Military Prosecutor v. Omar Mahmud Kassem et al.*, 1969, *reprinted in* 1 ISRAEL YEARBOOK ON HUMAN RIGHTS 456 (1971).
76. *Reprinted in* 17 ISRAEL YEARBOOK ON HUMAN RIGHTS 315 (1987).
77. *See, e.g.*, ROSALYN HIGGINS, *I UNITED NATIONS PEACEKEEPING 1946–1967*, at 271–3 (1969); MICHAEL J. KELLY, *PEACE OPERATIONS: TACKLING THE MILITARY, LEGAL AND POLICY CHALLENGES* (1997).
78. *See, e.g.*, ROMEO DALLAIRE, *SHAKE HANDS WITH THE DEVIL* (2003).
79. HIGGINS, *supra* note 77, at 295 *et seq.*
80. *Civilian War Claimants Association v. The King* [1932] A.C. 14. (House of Lords).
81. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 51, at 775 [hereinafter Protocol II].
82. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 27, at 180.
83. For a discussion of the NATO intervention, *see, e.g.*, LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN (Andru Wall ed., 2002) (Vol. 78, US Naval War College International Law Studies).
84. The North Atlantic Treaty, Washington, Apr. 4, 1949, 34 U.N.T.S. 243.
85. *See* A. LeBor, *NATO and UN 'Fund Prostitution in Kosovo'*, TIMES (London), May 7, 2004, at A19.

### *Is There a “New” Law of Intervention and Occupation?*

---

86. See *Public Prosecutor v. Koi* [1968] A.C. 829 (P.C. 1967), and *Osman bin Haji Mohamed Ali v. Public Prosecutor* [1969] 1 A.C. 430 (P.C. 1968).
87. See W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 493 (2003).
88. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 47, June 8, 1977, 1125 U.N.T.S. 3, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 27, at 422. See also International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, G.A. Res. 44/34, U.N. GAOR, 72nd plen. mtg., art. 1, U.N. Doc. A/RES/44/34 (Dec. 4, 1989), reprinted in 29 INTERNATIONAL LEGAL MATERIALS 89.
89. See Hamida Ghafour, *Afghans Learning the Price of Security*, GLOBE AND MAIL (Toronto), Oct. 8, 2004, at A14.
90. See *supra* text accompanying notes 25–35.
91. *Gherebi v. Bush* 352 F.3d 1278 (9th Cir. 2003); reprinted in 43 INTERNATIONAL LEGAL MATERIALS 381 (2004).
92. See, e.g., D. McGory, *Ghost Prisoners Haunt Terrorism Hunt*, TIMES (London), Sept. 11, 2004, at 19 (“President Bush says he does not know how many ‘ghost prisoners’ there are, but that interrogating them in secret has proved crucial in the war on terrorism”).
93. S.C. Res. 687, Apr. 8, 1991, reprinted in 30 INTERNATIONAL LEGAL MATERIALS 846.
94. Similarly, in the case of Iraq, on August 24, 2005, the English Court of Chancery held in *Sadiqua Ahmed Amin v. Brown* that it “was satisfied that the Government’s position was that there was not, and had not been a state of war between the United Kingdom and the Republic of Iraq.”
95. See Convention Relative to the Treatment of Prisoners of War, Geneva, Aug. 12, 1949, art. 118, 75 U.N.T.S. 135, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 27, at 243, which provides that “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.” See also Article 119 which provides, in part, that “Prisoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings. . . .”
96. See Iraq Survey Group Final Report, Sept. 30, 2004, available at <http://www.globalsecurity.org/wmd/library/report/2004/isg-final-report/>.
97. U.N. CHARTER, art. 27, para. 3.
98. See Report of the International Committee of the Red Cross on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation, Feb. 2004, available at <http://cryptome.org/icrc-report.htm#EXECUTIVE%20SUMMARY>; Article 15-6 Investigation of the 800th Military Police Brigade, Mar. 9, 2004, available at [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf). The latter is the report by Major General Antonio M. Taguba on the alleged abuse of prisoners at the Abu Ghraib prison in Baghdad. See also KAREN J. GREENBERG & JOSHUA L. DRATEL, *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 405 (2005).
99. Leslie C. Green, Proceedings, 23rd Annual Conference of the Canadian Council on International Law, 6, 26 (1994) and Proceedings, 26th Annual Conference of the Canadian Council on International Law 31, 37 (1997). See also *supra* text accompanying notes 15 and 17, respectively, for comments of Hall and Westlake.