

# **The *Occupatio Bellica* (Military occupation): Recent Trends**

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## **Introduction**

The essential aim of the law of occupation is to meet the immediate needs of the civilian population as well as property and assets in the hands of a foreign army.

Military occupation is governed by a rule and an exception:

a) The rule is that of the continuity of *status quo ante* (legislations, tribunals ... etc.)

b) Modification being an exception. Consequently, transformative occupation should not be considered as a rule. Transformative occupation should be governed by those three exceptions set forth by art. 43 Regulations (1907) and art. 64 (G IV).

Undoubtedly, the rules on occupation set forth in the IVth Geneva Convention remain fully applicable in all situations of partial or total occupation, whether or not the occupation meets with armed resistance.

A territory is considered occupied when it is effectively placed

*manu militari* under the authority of the hostile army<sup>(1)</sup>.

This means that the *de jure* authority of the legitimate power passes *de facto* into the hands of the occupant.

Accordingly, if because of hostile acts against occupying forces, the *de facto* authority of the occupying power cannot be established or exercised, the territory cannot be considered as occupied<sup>(2)</sup>. In such a case, the territory will be considered as an invaded one, or even a battlefield.

In principle, military occupation does not terminate statehood: for example Germany's occupation of the European states during world war II.

## Section I

### Rules applicable to military occupation

The following rules govern military occupation:

a- The occupation of a territory does not: «affect the legal status of the territory in question»<sup>(3)</sup>. Thus, the occupied territory

(1) In the advisory opinion concerning the "wall", the ICJ maintained that the construction of the later on the Palestinian occupied territory "create a fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be "tantamount to *de facto* annexation". ICJ. Rep. 2004, para. 121.

(2) Art. XLII of the regulations respecting the laws and customs of war on land (Hague IV, 1907) provides that: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised". The essence of occupation is that it will be of limited duration. Accordingly, types of occupation of unlimited duration are not admissible under IL, because they constitute breaches of a continuous character of the later. Additionally, article 14 GIV states that the convention is supplementary to sections II and III of the Hague regulations.

Moreover, art. 41 of the 1880 Oxford manual on the laws of war on land, provides that: "Territory is regarded as occupied when, as the consequence of invasion by hostile forces, the state to which it belongs has ceased, in fact, to exercise its ordinary authority therein, and the invading state is alone in a position to maintain order there."

Finally, art. 88 of the 1913 Oxford manual of naval war, provides that occupation of maritime territory exists only when there is at the same time an occupation of continental territory, by either a naval or a military force.

(3) Art. 4 of the 1977 Additional protocol No. 1

See as well: Roberts: Prolonged military occupation -the Israeli occupied territory since 1967, AJIL, 1990, p. 44-103; K. Wisse: Oil resources and the law of belligerent occupation, R. Egyp. DI. 1987, p. I-31; S Vité: L'applicabilité du droit international de l'occupation militaire aux activités des organisations internationales, IRRC, 2004, p 9-36. "Symposium: Foreign occupation and international law", EJIL, vol 16, 2005, pp 661-768; A. Roberts: The end of occupation: Iraq 2004, ICLQ, 2005, pp 27-48; "ICJ advisory opinion on construction of a wall in the occupied Palestinian territory" AJIL. 2005. pp. 1-141; A. Roberts: =

remains the legal possession of the ousted sovereign.

b- Military occupation is provisional in character. Hence an occupied territory must be, as soon as possible, restored to the legitimate state. Accordingly, occupation does not entail any transfer of sovereignty to the occupying power (e.g. through annexation), or by encouraging independence of the occupied territory.

c- The fact that a new state occupies illegally a territory appertaining to another state does not mean that rules of succession of states apply<sup>(1)</sup>.

d- Immovable monuments as well as movable property which form the cultural heritage and treasure of peoples must be respected and protected in time of war, and particularly in case of occupation of a territory<sup>(2)</sup>.

e- Any hospital ship in a port which falls into the hands of the enemy shall be authorized to leave the said port (art. 29 of the Geneva convention II of 1949).

f- Rules of international humanitarian law and human rights law apply also to all cases of partial or total occupation of a territory, even if the said occupation meets with no armed resistance. They cannot be separated during an armed conflict or in territories under occupation. In fact they complement (and even converge with) each other in certain matters: notably issues of deprivation of liberty and judicial guarantees, the prohibition of torture... etc...

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= Transformative military occupation, *Applying the laws of war and human rights*, AJIL, 2006, pp. 580-622; "Aspects contemporains de l'occupation et de l'administration en droit international", RBDI 2006, pp 245-384; Ahmed Abou-el-wafa: A commentary on the advisory opinion concerning the wall, R. Egyp. DI, 2006, pp. 176-197 (in Arabic). In its resolution 47/70 (1992) the GA affirmed that the Israeli military occupation of Arab territories: "is of a temporary nature, thus giving no right whatsoever to the occupying power over the territorial integrity of the occupied territories". In Res. 56/31 (2001), the GA of the UN deplored: "the transfer by some state of their diplomatic missions to Jerusalem in violation of security council resolution 478 (1980)."

(1) The ILC maintained that:

« The military occupation of a territory does not constitute a succession of states. While it may have an impact on the operation of the law of treaties, it has no impact on the operation of the law of succession of states "Cf, UN conf. on succession of states in respect of treaties, off. doc., vol. III. p. 96.

(2) Art. 5 of the 1954 convention for the protection of cultural property in the event of armed conflict states that the occupant shall as far as possible support and take all necessary measures for safeguarding and preserving cultural property in the occupied territory.

In its advisory opinion (2004), the ICJ says: «some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.»<sup>(1)</sup>

The court adds:

« Israel is bound by the provisions of the international covenant on economic, social and cultural rights. Furthermore, it is under an obligation not to raise **any obstacle** to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.»<sup>(2)</sup>

This may be explained by the fact that the territory is under the authority and control of the occupying state or the person is «within the power and effective control of the state concerned.»<sup>(3)</sup>

The above-mentioned advisory opinion affirmed as well the applicability of economic, social and cultural (ESC) rights in the occupied territories.<sup>(4)</sup>

With regard to those economic, social and cultural (ESC) rights, I think a distinction should be made between two categories, namely:

1) Indispensable ESC rights such as food, education and health. Here the obligation of the occupying authority is of a mandatory and urgent nature. In this regard, art. 55 G IV provides that the occupying power has the obligation to ensure, to the fullest extent of the means available to it, the food and medical supplies of the population.

2) Other ESC rights, such as employment and social security, which may be progressively achieved.

Evidently, they cease to apply on the termination of the occupation<sup>(5)</sup>.

(1) ICJ, adv. op., 2004 (wall), para. 106.

(2) *Ibid.*, par. 112.

(3) Adv. op. 2004, paras. 107-112; HR committee: Israel, 18 august 1998.

(4) *Idem.*, paras. 107-112. The HR committee as well in 2001: Israel in 31/8/2001.

(5) Cf. art. 3/b of the 1977 Protocol I; art 2 common to the four Geneva conventions of 1949.

In its resolution A/Res./43/21(1988); the GA stated that:

« The Fourth Geneva Convention relative to the protection of civilian persons in time of war.. is applicable to all the Palestinian and other Arab territories occupied by Israel since 1967, including Jerusalem ».

Para. 4 of the same resolution demanded that Israel ought to "desist forthwith from its policies and practices that are in violation of the provisions of the convention".

g- Annexation of the whole or part of the occupied territory is usually made by the use or threat of use of force. It constitutes an act of aggression and, as such, is forbidden by IL.

h- There are some obligations incumbent on the occupying power, related to persons and things on the occupied territories, the most important of which are the following<sup>(1)</sup>:

1- inviolability of rights of persons in the occupied territory.

2- forcible transfers, deportations or evacuations of persons from occupied territory to the territory of the occupying power or to that of any other state are prohibited, unless the security of the population or imperative military reasons so demand.

3- the care and education of children must be satisfied.

4- any destruction of property by the occupying power is prohibited, unless rendered absolutely necessary by military operations.

5- the occupying power must not alter the status of public officials or judges in the occupied territory.

6- the occupying power must ensure food and medical supplies, hygiene and public health, spiritual assistance and relief of the population in the occupied territory.

7- laws and regulations of the occupied territory shall remain in force<sup>(2)</sup>; however, they may be repealed or suspended in cases where they constitute a threat to the security of the occupying power, or do not meet generally admitted standards.

8- the occupying power is regarded only as administrator and usufructuary of public buildings, real estate, forests and agricultural estates situated in the occupied territory<sup>(3)</sup>.

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(1) See as well articles 47-48 of the fourth Geneva convention 1949; articles 42-56 Regulations annexed to the 1907 Fourth Hague convention 1907.

(2) For that reason, the GA declared that the Israeli decision to impose its laws, jurisdiction and administration on the occupied Syrian Golan "is null and void and has no validity whatsoever" Cf, Res. 54/38 (1999).

The draft code of offences against the peace and security of mankind considered: "The annexation by the authorities of a state of territory belonging to another state, by means of acts contrary to international law" as an offence against "the peace and security of mankind" Cf, The work of the international law commission, UN, New York, 1996,p.169.

Moreover, in its resolution 49/87 (1994),the GA said that:

"the decision of Israel to impose its laws, jurisdiction and administration on the Holy city of Jerusalem is illegal and therefore null and void and has no validity whatsoever".

(3) See also:

Wallach: The use of crude oil by an occupying power as a munition de guerre, ICLQ, 1992, p. 287-310.

9- the authority of the legitimate state, having passed into the hands of the occupying power, the later must take all measures necessary to restore and ensure public order and safety in the occupied territory.

10- demobilized members of armed forces of the occupied territory may be interned. They shall be treated as prisoners of war (art. 4 of the third Geneva convention 1949).

11- the occupying power may not compel inhabitants of the occupied territory to serve in its armed or auxiliary forces<sup>(1)</sup>.

12- The occupying power should take all necessary measures to ensure security and safety in the occupied territory<sup>(2)</sup>.

i- Illegal occupation of a territory necessarily entails the international responsibility of the occupying power.

The ICJ says:

«the provisions of the Hague Regulations have become part of customary law.»<sup>(3)</sup>

The court adds that South Africa «also remains accountable for any violations of its international obligations, or the rights of the people of Namibia».<sup>(4)</sup>

j- One of the recent or, at least, renewable aspects of military occupation is that of the withdrawal of military forces on the land territory, while continuing control and occupation of the airspace as well as besieging the borders of the later through blocking crossings to and from the occupying state e.g., case of Gaza (Palestine) now and since more than two years. This “partial” occupation is as well an “occupation” and rules of military occupation, particularly those related to IHL or human rights (for instance ensuring supplies to the civil population) are to be respected (see art. 2 common to the Four Geneva Conventions 1949).

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(1) See as well: “Human right under Israeli occupation”, New York Univ. I.L.J. and politics, vol. 21, 1989, p. 439-574.

(2) RSA, Vol. II. P. 1123.

(3) CIJ, 2004, Mur, par. 89.

(4) ICJ, Rep., 1971, p. 54, par. 118.

see as well ICJ, Rec., 1994, par. 25; pars. 172-180, 208, 245, 250.

## Section II

### International Organizations (e.g. UN) and military occupation

It is well known that UN charter prohibits the use or threat of force against the territorial integrity or political independence of a state. This means that military occupation *stricto sensu* is inconceivable for the UN. The later may, on the contrary, administer a territory.

As an administering power, the UN must observe some international legal rules. In this context, one can distinguish between two categories of rules, namely:

On the one hand, some rules of the G IV (Part III: Sections I and III) concerning respect of the honour, family rights, deportations may be applied to operations led by IOS, including UN.

On the other hands some other rules (e.g., Part III, section II of the G IV) concerning aliens within the territory of a party to the conflict are not applicable to IOS, for they have no territories, of their own, no population.

That being so, the study of the law of occupation in the context of UN leads us to refer to powers of the Security Council (SC) and the differences between an occupier and the UN as an administering power.

#### § I – Powers of the SC in the context of military occupation

A tendency amongst western authors adopts the premise «that the UN Security Council may derogate from international law when it is acting under chapter VII of the UN Charter».<sup>(1)</sup>

This view is inadmissible:

1) In fact, art. 24 UN Charter provides that in discharging his primary responsibility for the maintenance of international peace and security, the SC “shall act in accordance with the purposes and principles of the United Nations”. Or, purposes and principles of

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(1) See: M. Zwanenburg: Existentialism in Iraq: Security Council resolution 1483 and the law of occupation, *IRRC*, vol. 86, 2004, p. 745 and 759-767; G. Oosthuizen: *Playing the devil's advocate: The United Nations Security Council is unbound by law*, *Leiden JIL*, vol. 12, 1999, p. 549.

UN (articles 1-2) do not contain the possibility to derogate from rules of international law.

2) Moreover, article 25 UN Charter provides that members “agree to accept and carry out the decisions of the security council *in accordance with the charter*” (emphasis added).

3) Additionally, to say that the SC may derogate from international law means that any decision taken under chapter VII is executable, even if it is a decision related to the occupation of a state or a territory, this is unacceptable!. Limits of such power are unknown and unexpected.

In this connexion, the ICJ states:

« The precise determination of acts permitted or allowed.... Is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the charter ». <sup>(1)</sup>

The court adds that the only limitations on powers of the SC for the maintenance of peace and security « are the fundamental principles and purposes found in chapter I of the charter ». <sup>(2)</sup>

4) It is the necessity to keep peace, not to change the legal world order, that the SC was set up.

5) Finally, powers of the SC must not exceed those of states with regard to military occupation. In reality, what is individually applicable to states is collectively valid against them when they act within the framework of an international organ, even if the later is the SC. In other words, the SC is not a « Super-state ».

#### **§ II – Differences between an occupier and the UN as an administering power of a territory:**

It is established « qu’une OI peut assumer l’administration d’un territoire non-autonome. Or, lorsqu’une OI assume une telle responsabilité, elle a, juridiquement parlant, les mêmes droits (et obligations) que ceux (ou celles) dont dispose n’importe quelle autorité administrante ». <sup>(3)</sup>

(1) ICJ, Rep., 1971, pp. 54-55 per. 120.

(2) Ibid, p. 52, par. 110.

(3) Ahmed Abou-el-wafâ: Recherches sur les traités conclus par les organisations internationales *inter se* ou avec des Etats, thèse, Lyon, 1981, p. 45.



Or, the occupation of a territory is one thing, the administration by an IO of a territory is quite another. Accordingly, it is unacceptable to make linkage between those two systems, even if this linkage is a remote one or by analogy.<sup>(1)</sup>

The main differences between them are the following:

1- An occupying power is that which, having invaded a territory belonging to an adverse party, exercises control there.

This means that occupation is a *de facto* institution characterized essentially by the fact that a territory and its population are under the authority of an adverse army (see, e.g., art. 2 G IV and art. 3 P.I).

2- The relationship between an occupier and the occupied territory is that of a conflict of interests, a contradiction of positions and attitudes. Whereas that of an IO is of cooperation with the population of the occupied territory.

3- An occupier breaches the essential rules of IL concerning the prohibition of military occupation. Where as an IO is built on the respect of international law and should act accordingly

4- The regulation of 1999 made by the S.G. of UN does not mention the application of rules of military occupation.

5- Rules of military occupation are based on the respect of territorial, legislative and judicial *status quo ante*, whereas administrations of a territory by an IO aim, *inter alia*, at introducing some institutional changes in that territory.

### General Conclusion

Military occupation dates back to as early as the existence of man on the earth. From time immemorial some groups, tribes and states proceeded to the occupation of territories appertaining to others. This is inadmissible under contemporary IL. In fact, it is now prohibited to acquire *manu militari* a territory of a state<sup>(2)</sup>.

(1) In a report of the ICRC (2003), entitled « International humanitarian law and the challenges of contemporary armed conflicts », it is stated (under the heading concept of occupation): «An entirely separate issue is the rules applicable to multilateral forces present in a territory pursuant to a United Nations mandate. While the fourth Geneva convention will not, generally, be applicable to peacekeeping forces, practice has shown that multinational forces do apply some of the relevant rules of occupation by analogy » IRRC, 2004, p. 228. See as well 30<sup>th</sup> international conference of the red cross and red crescent, 30 IC/07/8.4, Geneva, 2007, p. 30.

(2) «In fact, L'occupation est un état de fait»; O. Debbach: L'occupation militaire, LGDJ, Paris, 1962, p. 304.

Since it is advisable that international organizations should apply and abide by humanitarian rules (i.e., rules of IHL as well as those of human rights law) when they administer a territory, the preparation of such rules:

1- must be under another heading than that which refers to military occupation, even if there are some similarities concerning applicable rules. For that reason we do not accept the expression «relevance of occupation law to UN administration of territory». Rather, we accept the expression «Rules applicable to international organizations when they administer a territory».

2- should not be drawn up in an international treaty, but in a document adopted and approved by the IOS concerned. The two Vienna Conventions on the representation of states in their relations with IOS (1982) and of treaties concluded by IOS (1986), which have not yet entered into force, are good examples for our view that preparing a draft convention, concerning the topic under consideration, is not to be welcomed.

## Annex



ICRC

### Expert Meeting

#### The delimitations of the rights and duties of an occupying power/ The relevance of occupation law for United Nations administration of territory

#### Agenda and guiding questions

15 and 16 December 2008 – Hotel Ramada - Geneva

#### The issue:

The recent years have been characterized by a multiplication of foreign military interventions. Moving away from classic occupation, these military operations have given rise to new forms of foreign military presence in the territory of a state sometimes consensual but very often. Beside the persistence of more classic forms of occupation, these interventions have - to a certain extent - revived occupation law from its slumber and have raised new legal questions.

Of a particular relevance were the questions linked to the nature and the scope of the rights and duties incumbent upon an occupying power. Such issues are mainly governed by provisions contained in The Hague Regulations of 1907 as well as in the Fourth Geneva Convention of 1949. In this respect, some have argued that

such instruments were "antiquated" and ill-suited for the polymorphic features of the more recent situations of occupation. The reluctance to accept the application or relevance of occupation law have been often justified on the basis that those situations differ considerably from the traditional concept of belligerent occupation and would therefore deserve a more specific body of rules than the law of occupation. It has been notably argued that the static nature of occupation law places an undue emphasis on preserving the socio-political *continuum* of the occupied territory and does not pay sufficient attention to the general acceptance within the international community of certain universal standards of human rights and good governance.

Aside from the various challenges posed by contemporary occupations, another set of questions arises in relation to the applicability of IHL to UN administration of territory. Indeed, the similarities between traditional military occupation and UN-run administrations have become more apparent. Practice has shown that it is of utmost importance to define clearly the legal framework regulating the international administration of a territory. In this respect, the rules governing occupation appear increasingly relevant when international authorities administering a territory are vested with extensive executive and legislative powers. Indeed, IHL offers a normative framework adequate for the tasks carried out in internationally administered territories and may enable both the administration and the administered to draw upon the experience that occupation law has accumulated over the years and to inform their policies and expectations. But nonetheless the applicability of IHL, be it *de jure* or *de facto*, to internationally administered territories, needs to be delineated and carefully examined especially in light of the specific nature and aim of these operations.

The meeting will seek to address such issues in the different working sessions and propose practical answers *de lege lata* or *de lege ferenda*.

### **Day one:**

#### **I. The delimitation of the rights and duties of an occupying power:**

#### **9.00 – 10.30: Working session 1: Articles 43 of The Hague Regulations of 1907 (THR) and 64 of the Fourth Geneva Convention (GCIV) as key provisions for assessing the scope of the occupier's rights and duties.**

- What is the exact scope of the occupier's authority under Article 43 of THR and article 64 of the GCIV? Are those articles permissive or restrictive by nature?
- What is the meaning and scope of the obligation to ensure public order and safety incumbent upon the occupying power?
- To what extent can the occupying power legislate in occupied territory? What is the meaning of the expression "unless absolutely prevented" contained in Article 43) of THR? How does Article 43 of THR interact with Article 64§2 of the GCIV?

- May the occupier legislate to enhance "civil life" in occupied territory? May the occupier legislate to implement international law in occupied territory, in particular human rights law? May the occupier undertake legislative measures aimed at altering the political and institutional orders in occupied territory? May the occupier legislate in order to further the right to self-determination in occupied territory?
- How does Article 43 of THR interact with other occupation law norms? Can it supersede those norms in certain cases?
- Do Articles 43 of THR and Article 64 of the GCIV entitle the occupier to negotiate international agreements on behalf the occupied territory with others States or international organizations? Is the occupier limited in the choice of the means aimed at administering the occupied territory?
- Is there a need to ensure reviewability/monitoring of the measures taken by the occupant under Articles 43 of THR and Article 64 of the GCIV? Who would be responsible for reviewing the occupiers' measures?

**10.30 – 11.00: Coffee break**

**11.00–12.30: Working session 2: The place and role of international human rights law in occupied territory**

- What triggers the application of human rights law in occupied territory? If a form of control is required to apply human rights law in occupied territory, does control under IHL mean a similar type and level of control as under human rights law?
- What is the nature of the relationship between IHL and human rights law in situation of occupation? What is the influence of human rights law on the law of occupation? And *vice versa*?
- Is there a right or an obligation under IHL to apply human rights law in occupied territory? Do IHL provisions, in particular Article 43 of THR, entail an obligation to respect and ensure respect for human rights law in occupied territory as suggested by the ICJ in the *DRC vs. Uganda case*<sup>1</sup>? Are human rights obligations applicable from the beginning of the occupation or do they only apply after a certain period of time?
- If human rights law applies, to what extent must it be respected, protected and fulfilled? Do all human rights obligations apply fully in situations of occupation? In particular, how can economic, social and cultural rights be implemented in occupied territory? How do human rights obligations -which may entail important legal and structural reforms - mesh with the conservationist principle intrinsic to occupation law?
- Can human rights law be derogated from in occupied territory? Can the notion of "public emergency which threatens the life of the nation" as contained in Article 4§1 of the ICCPR be invoked by the occupier? Does the occupier

<sup>(1)</sup> ICJ, 19 December 2005, Case concerning armed activities on the territory of the Congo (DRC vs. Uganda), § 178.

need to derogate from its human rights obligations in order not to apply them in occupied territory?

12.30 – 14.00: Lunch

14.00 – 16.00: Working session 3: Transformative occupation

- Does IHL permit or preclude transformative occupation? Does the obligation to administer the occupied territory encompass a power to craft structural reforms, in particular in the institutional and constitutional fields?
- Can the *status quo ante* intrinsic to occupation law always be maintained? Is there any exception to this principle? Is the conservationist principle still relevant in the case of occupation of a decaying/collapsed State? Can transformative occupation be carried out if the subsequent changes do not affect the protections afforded by IHL to the occupied population? Are the legitimacy and extent of the reforms permitted linked to whether they find justification in other fields of international law?
- What is the contemporary *rationale* for the conservationist principle, if any? Does it still demarcate a borderline between the rights of the occupier and a *de jure* sovereign?
- Can the Security Council require or justify transformative occupation? Under which circumstances? Does transformative occupation necessarily require the Security Council's approval?
- Can human rights law, in particular the right to self-determination, serve as a basis for pursuing transformative policies in occupied territory? Can the occupier replace institutions by others necessary to protect human rights?
- Is there any necessity/desirability that IHL evolve so that it accommodates transformative occupation? How should IHL accommodate this reality? Should it espouse general principles of what reforms are permitted or describe more permissible and impermissible reforms in details?

16.00 – 16.30: Coffee break-

16.30 – 18.00: Working session 4: Long-term occupation

- Are the implementation and interpretation of Article 43 of THR and Article 64 of the GCIV impacted by the duration of an occupation? Does long-term occupation oblige the occupier to take steps to promote the development of the occupied territory? Can those obligations be interpreted as imposing upon the occupier an obligation to administer the occupied territory "for the benefit of the occupied population"?
- How can the conservationist principle be reconciled with long-term occupation? Since the limitations of the occupier's powers are indicia of the temporary character of occupation, does protracted occupation mitigate such limitations? Can long-term occupation justify more changes operated by the occupier in occupied territory? If yes, what would be the criteria and the limits for such changes?

- Is there any relationship between the implementation of human rights in occupied territory and protracted occupation?
- How does long-term occupation interrelate with Article 6§3 of the Fourth Geneva Convention? What should be the bearing of the 2004 ICJ advisory opinion on the Wall<sup>1</sup>? Did it revive Article 6§3 of the GCIV from its slumber? Or is this Article still a legal oddity?

19.30: Dinner

Day two:

*II. The relevance of occupation law for UN administration of territory:*

**9.00 - 10.30: Working session 1: The threshold questions of *de jure* applicability of occupation law**

- Is occupation law applicable *de jure* to UN administration of territory? Can the UN ever be considered an occupier? Does either the *source of authority or purpose* of a UN administration *per se* make occupation law inapplicable *de jure* to such situations?
- Does the traditional criterion for occupation of lack of consent to the presence of the occupier apply to UN territorial administration? If so, what sort of *indicia* for consent *ab initio* render the law of occupation inapplicable *de jure*? How should such consent be determined in the context of territory with no effective government?
- Assuming such consent is achieved *ab initio*, what sort of change in circumstances on the ground would justify the application of the law of occupation *de jure* after a UN administration has already started?
- Do the general criteria for exercise of effective control of territory apply to UN administrations, especially in light of the large civilian presence? What if the UN mission has no military contingents or relies upon the military presence of other international actors? If foreign forces not part of the UN administration gained control of the territory, who would be bound by the law of occupation?

*10.30-11.00: Coffee Break*

**11.00 – 12.30: Working session 2: Reconciling the law of occupation with a Security Council mandate**

- If a UN operation meets the threshold criteria for *de jure* application of the law of occupation, can the Security Council legally override all or part of occupation law? If the latter, which parts?
- Are any parts of occupation law *jus cogens* and would the Security Council have any authority to override them?

<sup>(1)</sup> ICJ, Advisory Opinion, 9 July 2004, Legal consequences of the construction of a wall in the occupied Palestinian territory, § 125-126.

- Assuming the Security Council has the authority to override the law of occupation, how specific does the Security Council need to be in its authorizing resolution to do so? Does it need to mention the inapplicability of occupation law or can the mandate of the mission implicitly override certain occupation law norms?
- Are there any other general principles for determining the reconcilability (or compatibility) of the law of occupation with the Security Council's mandate?

*12.30 – 14.00: Lunch*

**14.00 – 15.30: Working session 3: Application of specific occupation norms by UN operations**

- Do certain norms of occupation law seem especially helpful to UN administrations even if not applicable *de jure*? Do certain classes of occupation law norms seem irrelevant?
- How specifically should such administrators adjust occupation law rules to take into account the goals of the mission or other norms of international law such as human rights law? Does the utility of occupation law change over the course of the mission?
- What are the overall costs and benefits to both the regime of IHL and to the UN's purposes of applying part but not all of occupation law as a matter of policy, or, alternatively, as a source of inspiration of policy?

*15.30 -16.00: Coffee Break*

**16.00– 17.00: Working session 4: Application of specific occupation norms by UN Operations (end)**

- Is there any need for a detailed legal regime (through treaty, UN resolution, or otherwise) on UN governance of territories that would place the UN mandate, IHL, human rights law, other international law, and local law in a framework specifying when and how each would govern a particular issue?
- Would the UN benefit from a further set of guidelines on the role of the law of occupation in UN territorial administrations?
- Would UN member States favor the creation of additional guidelines in this area?

**17.00 -17.30: Concluding session**

