

## **“DURATION OF BELLIGERENT OCCUPATION AND EXTENT OF RIGHTS”**

- OM PRAKASH GAUTAM<sup>1</sup>&SAURABH<sup>2</sup>

### ***Abstract***

International lawyers explain occupation of territory during armed conflict with the help of “Effective Control” test laid down by Article 42, Hague Regulations, 1907. The occupant’s status is conceived to be that of trustee. Article 42, Hague Regulation explains the components of the “Effective Control” as (a) unconsented presence of foreign forces, (b) foreign forces ability to exercise authority in the occupied territory, and (c) Inability of the government in occupied territory to exercise its authority. All the criteria of the test must be met to determine beginning and end of occupation. If one of the criteria is not met, the occupation ends. Article 43 of the 1907 Hague Regulations, provides that, the occupying power must ‘take all measures in his power to restore and ensure as far as possible public order and [civil life] while respecting, unless absolutely prevented, the laws in force in the country’. Public order and civil life are maintained through laws, regulations, court decisions, administrative guidelines, and even customs. The passage of time weakens the grip of the ousted sovereign over the territory and renders its pre-occupation laws less and less suitable to meet evolving needs and challenges in the occupied area. Article 64 of the Geneva Convention lays down the authority of occupying power to legislate in order to maintain the orderly government of the territory, and to ensure the security of the Occupying Power. Human rights law, as *lex generalis*, is applicable at all times, both in peacetime and in armed conflict. The law of armed conflicts, as *lex specialis*, contains rules which take precedence over applicable human rights norms.

***Keywords:*** Humanitarian Law, Beginning of Belligerent Occupation, Invasion, Duties of Occupying Power, Human Rights in Occupation.

#### A. Background:

On 26 February 2014 the President of Russia, Vladimir Putin, ordered soldiers to be ready for war games near Ukraine.<sup>3</sup> Two days later, the armed men seized the military airport near

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<sup>1</sup> Assistant Professor (Law), National Law University Jodhpur. [opgautam.rmlnlu@gmail.com](mailto:opgautam.rmlnlu@gmail.com)

<sup>2</sup> Research Scholar, International Humanitarian Law, Faculty of Legal Studies, South Asian University, New Delhi..

<sup>3</sup> Aleksandar Vasovic & Maria Kiselyova, *New Ukraine ministers proposed, Russian troops on alert*, Thomson Reuters News Services, Simferopol, Ukraine/Kiev, Feb 26, 2014, Available at <http://uk.reuters.com/article/2014/02/26/uk-ukraine-idUKBREA1H0EM20140226> (Last Accessed on 1 November 2015).

Sevastopol and the civilian international airport in Simferopol.<sup>4</sup> On 6 March, Crimea's Parliament voted to join Russia and its Moscow-backed government set a referendum on the decision in 10 days' time.<sup>5</sup> The results of the referendum in Crimea held on March 16 showed that 97 percent of voters supported leaving Ukraine to join Russia.<sup>6</sup> The President of Russia, Vladimir Putin<sup>7</sup>, made a statement on 18 March 2014: "A referendum was held in Crimea on March 16 in full compliance with democratic procedures and international norms. More than 82 percent of the electorate took part in the vote. Over 96 percent of them spoke out in favour of reuniting with Russia. These numbers speak for themselves... In people's hearts and minds, Crimea has always been an inseparable part of Russia... Crimea is our common historical legacy and a very important factor in regional stability. And this strategic territory should be part of a strong and stable sovereignty, which today can only be Russian...today, in accordance with the people's will, I submit to the Federal Assembly a request to consider a Constitutional Law on the creation of two new constituent entities within the Russian Federation: the Republic of Crimea and the city of Sevastopol, and to ratify the treaty on admitting to the Russian Federation Crimea and Sevastopol, which is already ready for signing."

On 18 March, Press Secretary Jay Carney, (Office of the Press Secretary, the White House, The President of United States of America) made a statement that: "We condemn Russia's moves to formally annex the Crimean region of Ukraine. Such action is a threat to international peace and security, and it is against international law. We would not recognize this attempted annexation....The actions that Russia has taken, in clear violation of international law, in clear disregard for Ukraine's constitution, Ukraine's territorial integrity and Ukraine's sovereignty, have not been and will not be recognized by the international community."<sup>8</sup> On 19 March, Russian troops seized a Ukrainian naval base in the Black Sea port of Sevastopol and raised the Russian flag.<sup>9</sup> The next day, Russian forces took control of another Ukrainian naval base (naval transportation facility in

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<sup>4</sup> Aleksandar Vasovic & Maria Kiselyova, *Armed men seize two airports in Ukraine's Crimea - Yanukovich reappears*, Thomson Reuters News Services, Simferopol, Ukraine, Feb 28, 2014, Available at <http://uk.reuters.com/article/2014/02/28/uk-ukraine-idUKBREA1H0EM20140228> (Last Accessed on 1 November 2015).

<sup>5</sup> Alissa De Carbonnel And Luke Baker, *Crimea votes to join Russia, Accelerating Ukraine Crisis*, Thomson Reuters News Services, Simferopol, Ukraine/Brussels, Mar 7, 2014, <http://in.reuters.com/article/2014/03/06/ukraine-crisis-crimea-vote-idINDEEA2507O20140306> (Last Accessed on 1 November 2015)

<sup>6</sup> *Crimea Referendum: Final Results Show 97 Percent of Voters in Crimea Support Joining Russia*, The World Post, March 17, 2014, Available at [http://www.huffingtonpost.com/2014/03/17/crimea-referendum-final-results\\_n\\_4977250.html](http://www.huffingtonpost.com/2014/03/17/crimea-referendum-final-results_n_4977250.html) (Last Accessed on 1 November 2015).

<sup>7</sup> *Address by President of the Russian Federation, The Kremlin*, Moscow, March 18, 2014, Available at <http://eng.kremlin.ru/news/6889> (Last Accessed on 1 November 2015).

<sup>8</sup> James S. Brady, *Press Briefing by Press Secretary Jay Carney*, March 18, 2014, Available at <http://www.whitehouse.gov/the-press-office/2014/03/18/press-briefing-press-secretary-jay-carney-3182014> (Last Accessed on 1 November 2015).

<sup>9</sup> David Mdzinarishvili, *Russian troops take over another Ukrainian naval base in Crimea*, Thomson Reuters News Services, Ukraine (Simferopol), Thursday, Mar 20, 2014, Available at <http://in.reuters.com/article/2014/03/19/ukraine-crisis-simferopol-idINDEEA2I0DT20140319> (Last Accessed on 1 November 2015).

Bakhchisaray, about 30 km (19 miles) southwest of the regional capital Simferopol) in Crimea.<sup>10</sup> On 21 March Putin had put his signature on the bill on ratification of the interstate treaty “On the admission of the Republic of Crimea into the Russian Federation and creation of new sub-federal entities.”<sup>11</sup> On 22 March, Russian troops used armored vehicles, automatic gunfire and stun grenades to seize *Belbek* and *Novofedorovka* airbase in Crimea.<sup>12</sup> On 24 March, Ukraine’s (Kiev) pulled Ukrainian forces to spare them and their families, as Kiev effectively acknowledged defeat by Russian forces who stormed one of the last of their remaining bases on the peninsula.<sup>13</sup>

On 27 March, the UN General Assembly adopted a Resolution<sup>14</sup>, that: “Noting that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014 was not authorized by Ukraine, ... 2. Calls upon all States to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine’s borders through the threat or use of force or other unlawful means; ... 5. Underscores that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol;” On 11 April, President Putin signed laws on reunification of the Republic of Crimea and the city of Sevastopol with the Russian Federation. Two new federal constituent entities, Russian Republic of Crimea and the Russian federal city of Sevastopol, were included in the list in Article 65 of Chapter 3 of the Russian Constitution stipulating federal system of government in the country.<sup>15</sup>

The issue of “Belligerent Occupation” has been a concern for the international community, for a very long time. Some of the recent instances of Belligerent Occupation being: *Territories of Kashmir: the States of Gilgit - Baltistan (formerly “Northern Areas” till 2009), Azad Jammu And Kashmir (AJK), and Shaksgam valley (Part of the State of Jammu & Kashmir, India)*

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<sup>10</sup> *Russian troops take over another Ukrainian naval base in Crimea*, Thomson Reuters News Services, Ukraine (Simferopol), Thursday, Mar 20, 2014, Available at <http://in.reuters.com/article/2014/03/19/ukraine-crisis-simferopol-idINDEEA2I0DT20140319> (Last Accessed on 1 November 2015).

<sup>11</sup> Mikhail Klimentyev, *Putin signs laws on reunification of Republic of Crimea and Sevastopol with Russia*, ITAR-TASS News Agency, Moscow, March 21, 2014, Available at <http://en.itar-tass.com/russia/724785> (Last Accessed on 1 November 2015).

<sup>12</sup> *Russian troops seize Crimea airbase as Moscow consolidates control*, Thomson Reuters News Services, Belbek Airbase, Crimea, March 22, 2014, Available at <http://www.reuters.com/article/2014/03/22/us-ukraine-crisis-idUSBREA2K0MC20140322> (Last Accessed on 1 November 2015).

<sup>13</sup> Aleksandar Vasovic & Gabriela Baczynska, *Acknowledging defeat, Ukraine pulls troops from Crimea*, Thomson Reuters News Services, Feodosia /Simferopol, Ukraine, Mar 24, 2014, Available at <http://www.reuters.com/article/2014/03/24/us-ukraine-crisis-crimea-base-idusbrea2n09j20140324> (Last Accessed on 1 November 2015).

<sup>14</sup> General Assembly Resolution GA/RES/68/262/2013, *Resolution adopted by the General Assembly on 27 March 2014*, Available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/68/262](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/262) (Last Accessed on 1 November 2015).

<sup>15</sup> *Crimea, Sevastopol included in list of Russian constituent entities in Constitution*, ITAR-TASS News Agency, Moscow, April 11, 2014, Available at <http://en.itar-tass.com/russia/727385> (Last Accessed on 1 November 2015).

*separated by Line of Control - LOC were occupied by Pakistan in Indo-Pak War, 1947; Aksai Chin Region (Part of State of Jammu & Kashmir, India) separated by Line of Actual Control (LAC) was occupied by China in Sino-India War, 1962; Occupation of Palestinian Territories (West Bank, Gaza Strip and Syrian Golan) by Israel since 1967; Invasion of Kuwait by Iraq (1990); and the recent seizure of Crimea by Russia.*

The current article addresses two integral issues with regard to belligerent occupation. First, the article focuses on the period of occupation, which includes the duration and end of the occupation, which in effect depends on the definition of “effective control”. It argues that International Humanitarian Law does not provide clear and standard norms or rules to determine the start, duration and end of an occupation. In order to appreciate the complicated territory of foreign occupation and its relation to International Law, the article relies on various scholarly opinions and provides a detailed analysis of the nature of foreign consensual or non-consensual occupation.

Secondly, the article focuses on the rights and duties of an occupier during its occupation and the obligations created under International standard. The occupants are under a duty to legislate only under military, legal and material necessity, in order to restore public and civil order. Additionally, it is analysed that in the event the occupants stay for a prolonged period, certain international rights can be invoked against the said occupants. The essential minimum standards mentioned under the ICESCR, such as right to food, right to education, or right to adequate standard of living has to be maintained by the occupant. Lastly, the article concludes by providing a detailed understanding of “effective control” and argues that the integration of Human Rights Law in Humanitarian law may help to fill the vacuum under the current International standard.

#### B. DETERMINATION OF BEGINNING AND END OF OCCUPATION:

Article 42 of the Hague Regulations 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.’ Majority of the jurists explain occupation as effective control of the power (be it one or more states or coalitions of states or International Organisations), over a territory to which the occupying power has no sovereign title, without the volition of the sovereign of that territory. The occupant’s status is conceived to be that of trustee. Tristan Ferraro<sup>16</sup> relied on Article 42, Hague Regulation as the only criteria for determining occupation and explains the various components of the “Effective Control” as (a) unconsented

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<sup>16</sup> Tristan Ferraro, *Determining the beginning and end of an occupation under international humanitarian law*, International Review of the Red Cross, Volume 94 Number 885 Spring 2012, Pg. 133, Available at <https://www.icrc.org/eng/assets/files/review/2012/irrc-885-ferraro.pdf> (Last Accessed on 1 November 2015).

presence of foreign forces, (b) foreign forces ability to exercise authority in the occupied territory, and (c) Inability of the power in occupied territory to exercise its authority. The presence of foreign forces is necessary a vertical sharing of power i.e., the occupying power having command and authority over local authorities, and with the absence of the consent (genuine, valid, and explicit) for the occupation. All the criteria of the test must be met to determine beginning and end of occupation. If one of the criteria is not met, the occupation ends. In the case of indirect effective control through agents and states, the test is inapplicable. However the test can be applied to the multinational coalition through “functional approach”. The occupation law is applicable in certain territories to the foreign forces to the functions exercised by the foreign forces. Marko Milanovic<sup>17</sup> explains the end of occupation as: unilateral withdrawal; defeat of the occupying forces by the displaced sovereign or other outside intervention; or loss of control due to an insurgency in the occupied territory (subject to the extent of the loss and capacity of the occupying power to take back the control) or with consent (subject to Article 52, Vienna Convention on law of Treaties) of the occupant.

Chandralekha Ghosh<sup>18</sup> discussed the determination of 'occupation' as referred in Article 42 of the Hague Regulations affirmed by ICJ in Case concerning Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda) – “the said authority was in fact established and exercised by the intervening State in the areas in question”. Judge Koojimans in his separate opinion in the case argued for a more liberal approach to the understanding of occupation where the actual authority should be measured by the degree it prevents other governments from exercising control. Kristen Boon<sup>19</sup> suggests two element of Effective Control for determination of occupation: for a state of occupation to exist (without consent), and the ousted government must be incapable of exercising its authority. Effective control is *sine qua non* for occupation and is a question of fact. It exists not only during actual control but also in the control of authority through proxy or indirect effective control.

Konstantinos Mastorodimos<sup>20</sup> explains the elements of “occupation” as: (a) an army should be present (continuing presence, capacity to recapture even through air/naval forces); (b) actually placing the territory under its authority (*de facto*); (c) the army is hostile /foreign (determined through Nationality criterion). The occupation ends when the above mentioned essentials cease to exist for e.g., Withdrawal of the army and loss of effective control; Loss of authority over the

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<sup>17</sup> Marko Milanovic, *End of Application of International Humanitarian Law* (August 25, 2014). International Review of the Red Cross (Forthcoming). Available at SSRN: <http://ssrn.com/abstract=2486435> (Last Accessed on 1 November 2015).

<sup>18</sup> Chandralekha Ghosh, *Case concerning Armed Activities on the territory of the Congo* (Democratic Republic of the Congo v. Uganda): Reviewing the Concept of Occupation in International Humanitarian Law, 19 Student B. Rev 108 2007.

<sup>19</sup> Kristen Boon, *The Future of the Law of Occupation*, 46 Can. Y.B. Int'l L. 107 2008.

<sup>20</sup> Konstantinos Mastorodimos, *How and When Do Military Occupations End*, 21 Sri Lanka J. Int'l L. 109 (2009).

occupied territory when: the occupied territory becomes a combat zone and the Occupying Power cannot exercise effective control, and the conclusion of a peace treaty (or other agreement) ends the occupation as long as effective control is transferred away from the Occupying Power; Based on the Security Council Resolution; and when the (foreign) army ceases to be hostile because of the consent by the sovereign (Article 52 Vienna Convention on Law of Treaties). Michael Siegrist<sup>21</sup> argues for the lack of clarity in the definition of “occupation” in order to determine the beginning; however he supported the functional beginning of the occupation as suggested by ICRC commentary to Fourth Geneva Convention (formulated by Jean S. Pictet in the ICRC’s Commentary on the Geneva Conventions) through interpretation of the fourth Geneva Convention. According to Article 4 of the Fourth Geneva Convention, 1949, in the occupied territories protection is accorded to all persons who are not of the nationality of the occupying State. According to this approach, the occupation law becomes operational from the occupation phase. Marten Zwanenburg<sup>22</sup> rejects the “Pictet theory” and concludes that the test laid down under Article 42 of Hague regulations is the only test to determine when an invasion turns into an occupation although Pictet theory results in more protection. Michael Bothe<sup>23</sup> while rejecting the ‘Pictet theory’, argued that a possible intermediate situation between invasion and occupation, if there is any at all, would be very short and that, once an invader has gained control over a part of an invaded territory, the law of occupation applies. Marco Sassòli<sup>24</sup> defending the ‘Pictet theory’, argues that, in order to avoid legal vacuums, there is no distinction between an invasion phase and an occupation phase for applying the rules of the Fourth Geneva Convention.

### C. RIGHT AND DUTIES OF THE OCCUPYING POWER:

#### *i. Powers of the Occupying Power:*

Article 43 of the 1907 Hague Regulations, provides when power passes to the occupying power, the latter must ‘take all measures in his power to restore and ensure as far as possible public order and [civil life] while respecting, unless absolutely prevented, the laws in force in the country’.

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<sup>21</sup>Michael Siegrist, *The Functional Beginning of Belligerent Occupation*, The Graduate Institute Publications, 2011, Available at <http://books.openedition.org/iheid/75> (Last Accessed on 1 November 2015).

<sup>22</sup> Marten Zwanenburg, Michael Bothe and Marco Sassòli, *Debate: Is the law of occupation applicable to the invasion phase?*, International Review of the Red Cross, Volume 94 Number 885 Spring 2012, Pg. 29, Available at <https://www.icrc.org/eng/assets/files/review/2012/irrc-885-zwanenburg-bothe-sassoli.pdf> (Last Accessed on 1 November 2015).

<sup>23</sup> Marten Zwanenburg, Michael Bothe and Marco Sassòli, *Debate: Is the law of occupation applicable to the invasion phase?*, International Review of the Red Cross, Volume 94 Number 885 Spring 2012, Pg. 29, Available at <https://www.icrc.org/eng/assets/files/review/2012/irrc-885-zwanenburg-bothe-sassoli.pdf> (Last Accessed on 1 November 2015).

<sup>24</sup> Marco Sassòli, Antoine A. Bouvier, and Anne Quintin, *How does law protect in war?*, ICRC, Third Edition, 2011, Available at <https://www.icrc.org/eng/resources/documents/publication/p0739.htm> (Last Accessed on 1 November 2015).

EyalBenvenisti<sup>25</sup> argues that, the occupation does not confer upon the occupant sovereignty over the occupied territory. Restoration and maintenance of "Public order" and "civil life" under Article 43 Hague Regulations delimit the occupants rights and duties. Public order and civil life are maintained through laws, regulations, court decisions, administrative guidelines, and even customs. Various scholarly efforts to explore the limits of the occupant's power and duty to modify the legal landscape of the occupied territory can provide no more than general guidelines. No apriori formulation can furnish concrete rules for the specific circumstances of every occupation.

Jose Leyda<sup>26</sup> explains occupation as temporal or limited administration, not normal governance of the territory, and the occupying power is not vested with any sovereignty rights over the occupied territory. This customary rule reflected in Article 43 of the 1907 Hague Regulations strictly limits the authority of the occupying power to cases of absolute necessity to ensure public order or civil life, and no other criteria or substantive standard can be used. If a legislative reform becomes indispensable to facing economic changes in long occupations, the occupying power will be allowed to adopt it only as far as (i) there is an absolute military necessity or it is absolutely necessary to ensure public order and civil life, and (ii) it does not involve far-reaching and long-term effects likely to endure beyond the end of the occupation. Article 43 of the 1907 Hague Regulations 'imposes obligations of a general nature on the Occupying Power', while Article 64 of the IV Geneva Convention contains a specific exception for penal legislation. Therefore, Article 43 HR still remains the applicable norm regarding commercial law reform in occupied territories. David Kretzmer<sup>27</sup> explains Article 43 of the Hague Regulations as the 'mini-constitution' of an occupation regime because it prescribes the fundamental obligations of an Occupying Power. It deals with two issues: first, the obligation of the Occupying Power to restore and ensure public order and safety; and second, its obligation to respect the laws in force in the country 'unless absolutely prevented'. Harpaz<sup>28</sup>

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<sup>25</sup> EyalBenvenisti, *The International Law of Occupation*, Available at [https://web.law.columbia.edu/sites/default/files/microsites/gender\\_sexuality/Benvenisti.pdf](https://web.law.columbia.edu/sites/default/files/microsites/gender_sexuality/Benvenisti.pdf) (Last Accessed on 1 November 2015); EyalBenvenisti, *The Laws of Occupation and Commercial Law Reform in Occupied Territories: A Reply to Jose Alejandro Carballo Leyda*, *The European Journal of International Law*, EJIL (2012), Vol. 23 No. 1, 199–210, Available at <http://ejil.oxfordjournals.org/content/23/1/199.full.pdf> (Last Accessed on 1 November 2015).

<sup>26</sup> Jose Alejandro Carballo Leyda, *The Laws of Occupation and Commercial Law Reform in Occupied Territories: Clarifying a Widespread Misunderstanding*, *The European Journal of International Law*, EJIL (2012), Vol. 23 No. 1, 179–197, Available at <http://ejil.oxfordjournals.org/content/23/1/179.full.pdf> (Last Accessed on 1 November 2015); Jose Alejandro Carballo Leyda, *The Laws of Occupation and Commercial Law Reform in Occupied Territories: A Rejoinder to EyalBenvenisti*, *The European Journal of International Law*, EJIL (2012), Vol. 23 No. 1, 211–214, Available at <http://ejil.oxfordjournals.org/content/23/1/211.full.pdf> (Last Accessed on 1 November 2015).

<sup>27</sup> D. Kretzmer, *The law of belligerent occupation in the Supreme Court of Israel*, *International Review of the Red Cross*, Volume 94 Number 885 Spring 2012 Pg. 207, Available at <https://www.icrc.org/eng/assets/files/review/2012/irrc-885-kretzmer.pdf> (Last Accessed on 1 November 2015).

<sup>28</sup> Guy Harpaz & Yuval Shany, *The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law*, *Israel Law Review*, Vol. 43, 2010, at Pg. 514, Available at <http://law.huji.ac.il/upload/Harpaz.pdf> (Last Accessed on 1 November 2015).

contends that the laws of belligerent occupation, display a strong preference for preservation of the status quo ante in the occupied territory. Such a preference is also predicated on the assumption that not only are belligerent occupations temporary in nature, they are also relatively short in duration, and that this constrained time frame limits the ability or will of the occupant to introduce significant changes in the area in question. If the status quo is the rule under Regulation 43 and change is the exception, the passage of time weakens the grip of the ousted sovereign over the territory and renders its pre-occupation laws less and less suitable to meet evolving needs and challenges in the occupied area. Furthermore, since the scope of the legal obligations of the occupant under Regulation 43 correlates to the longevity of the occupation, long-term occupations generate increased expectations as to the positive measures that the occupant should undertake in order to restore and ensure public order and safety/life.

EyalBenvenisti<sup>29</sup> argues that, Article 64 of the Geneva Convention has ‘introduce[d] innovative elements into the law of occupation, and thus represent[ed] a departure from Article 43 of the Hague Regulations, rather than a more precise and detailed expression of it’. Article 64 of Geneva Convention addressed the occupant’s authority to legislate in both penal and non-penal matters. Kristen Boon<sup>30</sup> explains that the legislative power of the occupant is to meet public order and safety unless absolutely prevented, the laws in force in the country under Article 43, Hague Regulations. Public order and legislative action are closely linked and sometimes required as a matter of human rights law, a permissive interpretation of "orderly government" would grant an occupier great scope to reform the laws. Under Article 64 Geneva Convention the occupying power has authority to legislate in order to maintain the orderly government of the territory, and to ensure the security of the Occupying Power. Article 43 of the Hague Regulations and Article 64 of the Geneva Conventions are subject to expansive and changing interpretations.

*ii. Application of Human Rights Law during occupation:*

Fiona Nairn<sup>31</sup> contends, humanitarian law and human rights law have very different origins and contain certain fundamental differences, but they are capable of parallel application. This parallel application can enhance the scope of protection offered to individuals as one body of law can influence the application of the other to fill in gaps that may arise. A number of methods can be used to ensure their mutual application including: creative interpretation of both the systems in such a way so as to allow mutual application for example: freedom from arbitrary deprivation of life and freedom

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<sup>29</sup>EyalBenvenisti, *The Laws of Occupation and Commercial Law Reform in Occupied Territories: A Reply to Jose Alejandro Carballo Leyda*, *The European Journal of International Law*, EJIL (2012), Vol. 23 No. 1, 199–210, Available at <http://ejil.oxfordjournals.org/content/23/1/199.full.pdf> (Last Accessed on 1 November 2015).

<sup>30</sup> Kristen Boon, *The Future of the Law of Occupation*, 46 *Can. Y.B. Int'l L.* 107 2008.

<sup>31</sup> Fiona Nairn, *The Relationship between International Humanitarian Law and International Human Rights Law: Parallel Application or Norm Conflict?* (March 14, 2012). Available at SSRN: <http://ssrn.com/abstract=2021839> (Last Accessed on 1 November 2015).

from torture; the *lexspecialis* principle wherein humanitarian principles (IHL) will prevail over Human Rights obligations (IHRL); and the norm (IHL or IHRL) which best protects the individual. N. Lubell<sup>32</sup> supported the application of Human Rights Law during occupation through extraterritoriality principle. The essence of the extraterritoriality of the obligations to occupied territory is based on the analogy to national territory, in that occupied territory is in effect under the authority and control of the occupying State. Keren Greenblatt<sup>33</sup> argues in favour of human rights law approach in the prolonged duration of the Israeli occupation of the Palestinian territories, combined with the intensifying non-violent resistance, rather than an IHL approach, in the administration of the Palestinian population and lands.

F. J. Hampson<sup>34</sup> makes reference to the pronouncements of ICJ on the relationship between IHL and IHRL and asserts three possibilities of interpretation: First, human rights law remains applicable even during armed conflict. Second, it is applicable in situations of conflict, subject only to derogation. Third, when both IHL and human rights law are applicable, IHL is the *lexspecialis*. As regards *lexspecialis derogat legi generali*, it is not clear whether this means only that the special prevails over the general, or whether it means that the former actually displaces the latter. Whilst the ICJ may not have used the most appropriate formulation, it is clear in general terms what the Court meant. It appears to have meant, first, that where both IHL and human rights law are applicable, priority should be given to IHL. Second, given the ICJ's view that human rights law remains applicable at all times, by necessary implication the ICJ also meant that the human rights body should make a finding based on IHL and expressed in the language of human rights law. This sounds straightforward, but it does not in fact explain how the *lexspecialis* doctrine should work in practice. There are various possibilities. It could be that once IHL is applicable, it is the sole legal basis on which a human rights body can base its decision. Does this mean that when IHL is applicable, there can be no violation of the human rights standards provided there is no violation of the IHL rules? Whether IHL prevails where it contains an express provision which addresses a similar field to that of a human rights norm? Or a possible third solution is that the *lexspecialis* would depend upon the precise issue at stake.

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<sup>32</sup> N. Lubell, *Human rights obligations in military occupation*, International Review of the Red Cross, Volume 94 Number 885 Spring 2012 Pg. 317, Available at <https://www.icrc.org/eng/assets/files/review/2012/irrc-885-lubell.pdf> (Last Accessed on 1 November 2015).

<sup>33</sup> Keren Greenblatt, "*Gate of the Sun*": *Applying Human Rights Law in the Occupied Palestinian Territories in Light of Non-Violent Resistance and Normalization*, Northwestern Journal of International Human Rights, Volume 12, Issue 2 Article 2, Spring 2014, 12 Nw. J. Int'l Hum. Rts. 152 (2014), Available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1171&context=njihr> (Last Accessed on 1 November 2015).

<sup>34</sup> F. J. Hampson, *The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body*, International Review of the Red Cross, Volume 90 Number 871 September 2008 Pg. 549, Available at <https://www.icrc.org/eng/assets/files/other/irrc-871-hampson.pdf> (Last Accessed on 1 November 2015).

V. Koutroulis<sup>35</sup> denies the applicability of the *Lex Specialis* of IHL in relation to IHRL on the three points: first, it applies to relations between two concrete rules rather than between two normative orders in abstracto, especially since these two orders are different in their purposes, areas of applicability, and principles; second, it has been applied, even by the ICJ itself, not as a rule for the resolution of conflict norms (dictating which of these norms should prevail over the others) but rather as an interpretative aid in order to avoid norm conflicts; and, third, even if it can be applied in relation to some rules, it is overly simplistic to do justice to the complexity of the relations between the two sets of legal rules. A complementary application of IHL and IHRL, which suggests, in principle, a parallel application of the two sets of legal rules in situations of armed conflict and prolonged occupation, can imply a great deal of interaction between them. It is interesting to note here that several fields have been identified where IHL rules are usefully complemented by IHRL. For example, economic, social, and cultural rights of the occupied population, such as the right to adequate food, the right to health, or the right to education.

Cordula Droege<sup>36</sup> suggests that, a complete merging of the two bodies of law is impossible. Human rights and humanitarian law are not mutually exclusive, but complementary and mutually reinforcing. The concept of complementarity in its legal understanding is in conformity with the Vienna Convention on the Law of Treaties, and the concept of *lexspecialis*. Complementarity means that human rights law and humanitarian law do not contradict each other but, being based on the same principles and values, can influence and reinforce each other mutually. In this sense, complementarity reflects a method of interpretation enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which stipulates that, in interpreting a norm, “any relevant rules of international law applicable in the relations between the parties” shall be taken into account. The principle of *lexspecialis* stems from a Roman principle of interpretation according to which, in situations especially regulated by a specific rule, this rule would displace the more general rule (*lexspecialis derogat legi generali*). There are two aspects of the *lexspecialis* principle. One is its meaning as a principle of interpretation whereby a more general rule is interpreted in the light of a more specific rule. When there is a genuine conflict of norms, one of the norms must prevail. In such

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<sup>35</sup> V. Koutroulis, *The application of international humanitarian law and international human rights law in situations of prolonged occupation: only a matter of time?*, International Review of the Red Cross, Volume 94 Number 885 Spring 2012 Pg. 165, Available at <https://www.icrc.org/eng/assets/files/review/2012/irrc-885-koutroulis.pdf> (Last Accessed on 1 November 2015).

<sup>36</sup> Cordula Droege, *Elective affinities ? Human rights and humanitarian law*, International Review of the Red Cross, Volume 90 Number 871 September 2008 Pg. 501, Available at <https://www.icrc.org/eng/assets/files/other/irrc-871-droege1.pdf> (Last Accessed on 1 November 2015); Cordula Droege, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*. Israel Law Review, Vol. 40, No. 2, pp. 310-355, 2007; Hebrew University International Law Research Paper No. 14-07. Available at SSRN: <http://ssrn.com/abstract=1032149> (Last Accessed on 1 November 2015).

situations the *lexspecialis* principle, in the sense of a conflict-solving rule, gives precedence to the rule that is most adapted and tailored to the specific situation.

Alexander Orakhelashvili<sup>37</sup> argues, if humanitarian law is *lexspecialis*, it is so for limited purposes and in a way complements – not curtails – the level of protection under human rights law. The relationship between the norms from the two fields must be verified by reference to the interaction between individual norms. Sylvain Vite<sup>38</sup> asserts that the economic, social and cultural rights complement the law of occupation, which remains general, when it comes to defining a long-term normative framework. The right to food and health show that the occupier's obligations are not limited to the minimum defined by international humanitarian law, they must be viewed from a perspective which encompasses the complementary contribution made by human rights. With regard to property, the relation between the two legal regimes is very different. International humanitarian law proves to be more complete and more detailed than the law of human rights. There is no complementarity, as the latter is superseded by the former by virtue of the principle of speciality. Irrespective of whether it applies to the short term or to the long term, the prevailing legal regime is the law of occupation.

D. Campanelli<sup>39</sup> also support the applicability of human rights law (*lexgeneralis* nature) at all times both in peacetime and in time of war and argues that the law of armed conflicts, as *lexspecialis*, contains rules which take precedence over some protective human rights norms. Any conflict of between the two is generally resolved in favour of the law of armed conflicts. The special nature of the law of armed conflicts therefore allows it to derogate from general rules, such as those of human rights law. Nevertheless, while it is true that the law of armed conflicts takes priority during conflicts because of its *lexspecialis* nature, it is also true that the rules protecting human rights – *lexgeneralis* – can continue to be applied during a conflict, on certain conditions: first, their application must be possible through creative interpretation and, if treaty-based rules are involved, then based on the applicability to a particular situation ; second, they must not conflict with a special rule of the law of armed conflicts ; and, third, they must not be derogated in case of war, public emergency or a similar scenario that would limit or preclude their applicability during an armed conflict. The human rights law provides an important tool for filling gaps in occupation law, particularly where civil and political rights are concerned

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<sup>37</sup> Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, The European Journal of International Law, EJIL (2008), Vol. 19 No. 1, 161–182, Available at <http://www.ejil.org/pdfs/19/1/178.pdf> (Last Accessed on 1 November 2015).

<sup>38</sup> Sylvain Vite, *The interrelation of the law of occupation and economic, social and cultural rights*, International Review of the Red Cross, Volume 90 Number 871 September 2008 Pg. 629, Available at <https://www.icrc.org/eng/assets/files/other/irrc-871-vite.pdf> (Last Accessed on 1 November 2015).

<sup>39</sup> D. Campanelli, *The law of military occupation put to the test of human rights law*, International Review of the Red Cross, Volume 90 Number 871 September 2008 Pg. 653, Available at <https://www.icrc.org/eng/assets/files/other/irrc-871-campenalli.pdf> (Last Accessed on 1 November 2015).

Aeyal M. Gross<sup>40</sup> makes a reference to the ICJ's Wall and Armed Activities decisions, where it expanded the determination to human rights conventions in general, and developed the rule on the application of human rights norms in times of war to the context of belligerent occupation. These decisions reinforce the convergence of these two bodies of law. The current direction of international law is to apply human rights norms to situations of armed conflict in general and to situations of belligerent occupation in particular, as evident in the interpretation of human rights treaties, in the decisions of treaty bodies, and in the rulings of the courts that interpreted them, including the European Court of Human Rights (ECtHR). The author argues that IHRL can be used to actually undermine the protection of rights and legitimize their violation. 'Righting' the law of occupation in general and invoking IHRL in particular may serve to limit the rights and entitlements of people under occupation, the currently prevalent human rights justifies limiting rights in the name of security as long as the limits are proportional. It also allows limiting rights in the name of the rights of others. Individual rights can be limited both for 'public interest' or the rights of others and for military necessity. The concept of military necessity, however, may sometimes allow restrictions on rights beyond the public interest. Naomi Burke<sup>41</sup> asserts that the main purpose of increasing the occupants' power to make legislative change under Article 64 Geneva Conventions was to permit the introduction of measures to fulfil the obligations of the occupant towards the local population under the Convention, which include ensuring the availability of food, maintaining hospitals, and other basic duties that the occupied government would perform. The ICJ Advisory Opinion on the Consequences of the Construction of a Wall held that Israel's obligations under the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Political rights (ICESCR) and the Convention on the Rights of the Child (CRC) extended to their policies in occupied Palestinian territory. In the context of the Vienna Convention, it can be argued that these characteristics indicate an intention of the parties that human rights conventions would apply to occupied territory.

*iii. Occupants power to Legislate or modify existing legislation:*

Marco Sassòli<sup>42</sup> explains the power of the occupant to legislate and holds that, an occupying power, must restore and maintain public order and civil life, including public welfare, in an occupied territory. Local legislation and institutions based upon such legislation must be respected by an occupying power. Article 43 bars an occupying power from extending its own legislation over the

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<sup>40</sup> Aeyal M. Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?*, The European Journal of International Law, EJIL (2007), Vol. 18 No. 1, 1–35, Available at <http://www.ejil.org/pdfs/18/1/212.pdf> (Last Accessed on 1 November 2015).

<sup>41</sup> Naomi Burke, *A change in Perspective: Looking at Occupation through the lens of the Law of Treaties*, 41 N.Y.U. J. Int'l L. & Pol. 103 2008-2009.

<sup>42</sup> Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, European Journal of International Law, EJIL (2005), Vol. 16 No. 4, 661–694, Available at <http://www.ejil.org/pdfs/16/4/313.pdf> (Last Accessed on 1 November 2015).

occupied territory or from acting as a sovereign legislator. The words ‘restore and ensure . . . public order and civil life’ in Article 43 could be understood as implying that the occupying power is allowed to take only legislative measures for that purpose (only for the time of the occupation), i.e. concerning the ‘common interest or the interest of the population’ (for implementation of IHL and Human Rights Law) and to promote its own military interests. It may also legislate authorization from Security Council Resolution. An occupying power may, while exercising the discretion that human rights instruments (or the Security Council mandate) leave to states setting up (their) institutions and economic and social policies, introduce only as many changes as absolutely necessary under human rights obligations (or the Security Council mandate) and must stay as close as possible to similar local standards and the local cultural, legal and economic traditions. YoramDinstein<sup>43</sup> asserted that the Hague Article 43 imposed two diverse obligations on the Occupying Power: (a) to restore and ensure, as far as possible, public order and life in the occupied territory; (b) to respect the laws in force in the occupied territory unless an “empêchementabsolu” (absolute necessity) exists. The occupant has power to suspend or modify the pre-existing legislation, under necessity. Article 64 Fourth Geneva Convention explains the necessity in three dimensions (a) Occupying Power to remove any direct threat to its security; (b) duty of the Occupying Power to discharge its duties under the Geneva Convention, (c) necessity to ensure the “orderly government” of the occupied territory.

#### D. CONCLUSION:

International law lays down a basic principle: threat or use of force against the territorial integrity or political independence of any State is prohibited and constitutes a violation of international law. Any acquisition of territory through threat or use of force constitutes an act of aggression which is prohibited (is illegal) and must be returned. The occupation of territory through use of force is of temporary nature. Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907; and Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, are applicable to the territories occupied through use of force.

International law also imposes the responsibilities over the occupying power and other states. The occupying power has responsibility to: (a) respect the basic human rights, of the inhabitants of the occupied territory; (b) not to impose its citizenship over the inhabitants of the occupied territory; (c) not to deport or transfer the civilian population to or from the occupied territory; (d) not to alter or change the character or legal status of the occupied territory; (e) not to destroy the property or carry

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<sup>43</sup> YoramDinstein, *Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding*, Occasional Paper Series, Fall 2004, Number 1, Program on Humanitarian Policy and Conflict Research, Harvard University, Available at <http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper1.pdf> (Last Accessed on 1 November 2015).

out construction activities in the occupied territory; and (f) not to destroy, deplete the natural resources of the occupied territory.

“Effective Control” test as laid down in Article 42, Hague Regulations, 1907 has following three criteria (most convincing and practical being the view of Tristan Ferrero<sup>44</sup>): (a) unconsented presence of foreign forces;(b) foreign forces ability to exercise authority in the occupied territory; and (c) Inability of the power in occupied territory to exercise its authority.Occupation depends on the fulfilment of the three criteria and it ends if one is not met. Moreover, in the case of multinational operations, occupation law is applicable to the foreign forces for the functions exercised by them.Occupation law must apply during invasion phase, as argued by Pictet theory, as the foreign forces gain control of the territory.

Although Article 43, Hague Regulations, 1907 and Article 64 Fourth Geneva Convention, 1949 limit the changes that can be brought in the occupying territory with a notion, that occupation is only temporary. The occupying power can bring changes only in the cases restore and ensure public order and safety along with respect to the applicable laws in force. But in the cases of prolonged occupation, such as occupation of Palestinian territories by Israel since 1967, warrant reforms to ensure public order. Several fields have been identified where IHL rules are usefully complemented by IHRL.For example, economic, social, and cultural rights of the occupied population, such as the right to adequate food, the right to health, or the right to education, appear to be of particular relevance in situations of prolonged occupation. The occupying power, after a very long duration of occupation, as the case of Israel,gathers de-facto legitimacy to make changes in the domestic laws and policies applicable to the occupied territory. Human Rights norms may be applied during occupation either through constructive interpretation of both the norms and Extra-territoriality principle. Human Rights law may help in filling the vacuum with Humanitarian Law.

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<sup>44</sup> Tristan Ferraro, *Determining the beginning and end of an occupation under international humanitarian law*, International Review of the Red Cross, Volume 94 Number 885 Spring 2012, Pg. 133, Available at <https://www.icrc.org/eng/assets/files/review/2012/irrc-885-ferraro.pdf> (Last Accessed on 1 November 2015).