

The George Washington University Law School

Planning the Peace

Legal Aspects of the Military's Role in Fighting Corruption and Organized
Criminality in Post-Conflict States

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INTRODUCTION

The problem of corruption and organized crime has greatly challenged efforts to stabilize and reconstruct Iraq and Afghanistan in the wake of coalition invasions. Yet, while such problems are typical of conflict and post-conflict economies, the coalition forces seemed unprepared to effectively fight crime and corruption in the early stages of stabilization.¹ Evidence suggests, however, that ignoring basic law enforcement functions in the period between the initial invasion and the eventual UN Charter of a sovereign government in a post-conflict country may leave the country crippled for future progress. There is a gap, then, of proper authority and law enforcement during this transition, in which criminal organizations capture nascent, host state institutes, and stunt the growth of the state. This article argues that an accurate reading of international law recognizes affirmative obligations for occupying forces to investigate organized crime and corruption. Such a reading combines well-developed human rights obligations with an updated understanding of humanitarian law that such advanced human rights concepts compels. In short, it argues that occupying forces have an obligation to ensure and

¹ Such criminal activities ranged from basic looting (see “Looters Ransack Baghdad museum”, *BBC News* (April 12, 2003). Available at: http://news.bbc.co.uk/2/hi/middle_east/2942449.stm) to the types of sophisticated criminal works discussed in the remainder of this article.

respect the rights to life, privacy, property, and bodily integrity, and that they must investigate and prosecute corruption and organized crime which violate such rights.

Military commanders may rightly contend that they have too many challenges to deal with, and policing operations would divert resources from other vital functions. This article does not dispute those priorities or resourcing decisions, but merely claims that future planning should recognize the full scope of legal obligations, discussed below, and properly plan to include a substantial policing component in stabilization operations.

Indeed, it argues that while international legal norms applicable to conflict and occupation are unclear on many issues, they do create an obligation for the occupying authority to properly police occupied territory, and that obligation contemplates fighting the more sophisticated corruption and organized criminal activities that directly result in human rights abuses.

This essay will first give an overview of the political economy of conflict, describing the problems that arise in post-conflict settings, and the transition gap that occurs when occupying forces do not properly police occupied territory. It will then review the bevy of potentially applicable legal norms affecting occupation operations. It will finally conclude that an updated, comprehensive reading of these international legal

norms compels occupying armies to police occupied territory and fight crime and corruption.

DISCUSSION

POLITICAL ECONOMY OF CIVIL CONFLICT

Violent conflict often leads to the breakdown of state institutions. As opposing armies battle within a certain territory, governing institutions may be unable to provide services in the midst of violence, or may be totally destroyed.² Some legal scholars have referred to this as a “title” vacuum, to capture the inherently legal nature of a government’s sovereignty over its territory.³ Yet, at its most basic level, there is a power vacuum wherein the population may have no institutions to which it can look to help organize its life and maintain order. In such an environment, alternative institutions often arise and fill the void of service provision and order maintenance. During the Lebanese civil war, for example, a militia called the *Lebanese Forces* provided basic services such as picking up trash, while also fighting with rival militias.⁴ This void also creates

² Brock Dahl, *The Business of War: How Criminal Organizations Perpetuate Conflict and What To Do About It*, COLLOQUIUM 2, No. 1, March 2009, at 3, available at <https://coin.harmonieweb.org/Knowledge%20Center/Colloquium/Dahl.pdf>

³ Melissa Patterson, Note, *Who’s Got the Title? or, The Remnants of Debellatio in Post-Invasion Iraq*, 47 HARV. INT’L L.J. 467, 481-82 (2006).

⁴ Interview with anonymous militia member. (Sep. 26, 2005).

opportunities for the malevolent to develop sophisticated networks with which they can pursue illicit activity. The next section describes such illicit activity in greater detail, and points out the problems this activity causes for rebuilding destabilized states.

Corruption and Organized Crime

While some actors may be operating simply to provide for the fundamental needs of society, others pursue profit through a number of illicit endeavors that the conflict and policing vacuum enable.⁵ As early as April 2003, one month after the U.S. invaded Iraq, for example, reports showed that criminal organizations began to develop around the main population centers of Basra, Baghdad, and Mosul.⁶ By July, many of these organizations had already developed sophisticated means for arms and drug smuggling in and out of the country.⁷ In the wake of the U.S.-backed defeat of the Taliban by the Northern Alliance, various Alliance warlords also took control of portions of the country and economy.⁸ It is also critical to note that these organizations develop ties with local governing institutions, allowing them protection as those institutions attempt to develop,

⁵ Brock Dahl, *The Quiet Enemy: Defeating Corruption and Organized Crime*, MILITARY REVIEW, March-April 2010, 78.

⁶ Phil Williams, *Organized Crime and Corruption in Iraq*, 16 INTERNATIONAL PEACEKEEPING 1, 119 (2009).

⁷ Mark Fritz, *Arms and Drug Smuggling Rise as Crime Gets Organized in the New Iraq*, Associated Press, July 5, 2003, at 1; in Robert E. Looney, *Reconstruction and Peacebuilding Under Extreme Adversity: The Problem of Pervasive Corruption in Iraq*, 15 INTERNATIONAL PEACEKEEPING 3, n. 31 (2008).

⁸ Kimberly Marten. "Warlordism in Comparative Perspective." *International Security (Winter 2006/2007)*.

and access to resources and additional opportunities for illicit profit.⁹ Such trends are not unique to Iraq.

Indeed, the evidence for the commonality of the criminalization of conflict economies is overwhelming, putting to sleep claims that such corruption and criminality is unique to the cultures of Afghanistan and Iraq where U.S. forces are now deeply engaged. One Bosnia expert described how the smuggling networks that were critical to various war-time activities transitioned seamlessly into profit centers during the piece, pursuing a number of illicit functions.¹⁰ Similar evidence abounds of conflict inequities throughout Asia and Africa.¹¹ As this paper uses the recent U.S. and coalition experiences in Iraq and Afghanistan as its touchstone, however, it is necessary to briefly examine in greater detail the types illicit behavior commonly found in both.¹²

Kidnapping and hostage rings provide one lucrative avenue for business. As the U.S. settled into the Green Zone, political groups across Baghdad and the countryside

⁹ Peter Andreas, *The Clandestine Political Economy of War and Peace in Bosnia*, INTERNATIONAL STUDIES QUARTERLY 48, 44 (2004).

¹⁰ *Id.*, 44.

¹¹ Susan Rose-Ackerman, *Corruption in the Wake of Domestic National Conflict*, in Robert I. Rotberg (ed.), *Corruption, Global Security, and World Order* (Brookings Institution Press 2009), 66-95.

¹² Admittedly, while this paper discusses on the “transition gap”, some of the criminal activities described herein may post-date that period. However, it is essential to understand the foundation laid during the transition gap for such activities, and the opportunities to institutionalize illicit behavior during the early stages of the occupation.

began “outsourcing” kidnappings with various profit and political motives.¹³ A “hostage economy” developed, mostly targeting local Iraqis and frequently involving the complicity of local police forces.¹⁴ In Afghanistan, lucrative kidnapping rings are currently run by groups with high-level connections that enable perpetrators, when caught, to gain a quick release.¹⁵

Land swindling schemes also seem to be a favorite opportunity for powerful illicit actors. The Afghan urban development minister, for example, claimed in 2007 that power players were stealing up to one square mile per day of land and selling it for a profit.¹⁶ In the wake of the expulsion of Sunnis from their homes in Baghdad (following anti-Sunni violence), Shiite militias took control of vacated properties and rent or sold them.¹⁷

Public officials can also use their positions to support various public contracting abuses and the outright theft of public goods in staggering amounts. Reports have implicated frequent bribes and other inequities in the construction industry in

¹³ Anne Barnard, *Lethal Alliance Fuels Kidnappings Iraq's Militants, Criminals Team Up*, THE BOSTON GLOBE, Sep. 25, 2004, A1.

¹⁴ Barnard, A1. Williams, 127.

¹⁵ Author interviews with Afghan experts. Kabul, Afghanistan (May, 2010).

¹⁶ Stephanie Irvine, *Powerful 'Grab Afghanistan Land*, BBC NEWS, September 6, 2007, available at http://news.bbc.co.uk/2/hi/south_asia/6981035.stm.

¹⁷ Williams, 122.

Afghanistan.¹⁸ Afghan warlords also use the vast wealth acquired from foreign logistics and private security contracts to commit a host of crimes against the population.¹⁹ The Mahdi Army, in Iraq, had purportedly utilized its control of the Health Ministry to allow the diversion and sale of substantial pharmaceuticals.²⁰ At one point in 2008, senior Iraqi Defense Ministry officials were under investigation regarding the disappearance of over \$1 billion in military equipment.²¹ Finally, an “oil mafia” quickly developed in Iraq that controlled the allocation of administrative posts in parts of the Iraqi oil industry.²² In 2004 alone, the border police in Iraq seized 2,200 tons of oil and fuel products, and 23 tons of minerals.²³ Thus, even as coalition forces were occupying the country, criminalization became institutionalized.

These improprieties, and the many others that there is no space to review, throw into sharp relief the undermining of the basic security of the local population despite the presence of coalition forces. Indeed, the Coalition seems largely to have resisted functions that could have greatly constrained the growth of the criminal economy.

¹⁸ Kevin Savage, Lorenzo Delesgues, Ellen Martin and Gul Pacha Ulfat, *Corruption perceptions and risks in humanitarian assistance: an Afghanistan case study* 12-13 (HPG Working Paper, July 2007), available at <http://www.odi.org.uk/resources/download/3180.pdf>.

¹⁹ Author interviews with Afghan experts. Kabul, Afghanistan (May, 2010).

²⁰ Williams, 121.

²¹ Looney, 427.

²² Williams, 121. The Iraq oil industry was largely state run.

²³ Edward Wong, *Boats, Cows, Tasty Lamb: Iraq Battles Smuggling*, N.Y. TIMES, Mar. 27, 2005, 1.

The Enforcement Vacuum

Despite the presence of an Iraqi Governing Council, the Coalition, through the CPA, had control and authority over Iraqi territory. The CPA had veto power over the the Iraqi Governing Council,²⁴ and the CPA enacted 100 orders with the full force and effect of law.²⁵ Finally, the UN Security Council declared in Resolution 1546 that by 30 June 2004 the occupation would end, the CPA would cease to exist, and Iraq would “reassert full sovereignty.”²⁶ Even at the time, though it may have seemed unclear to outsiders what the legal status of the Coalition was, CPA officials were operating under the assumption that they were an occupying authority subject to international humanitarian law (IHL) discussed below.²⁷

Despite its authority and control, however, the CPA and coalition forces seemed unconcerned with any comprehensive policing strategy, and would eventually simply see crime as an Iraqi responsibility.²⁸ Indeed, a US Central Command official proclaimed in 2003 that the military would not “be a police force,” and a British commander responded to questions about looting around the same time by asking, “Do I look like a

²⁴ Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT’L L. 195, 205-06 (2005).

²⁵ Brett H. McGurk, *A Lawyer in Baghdad*, 8 GREEN BAG 2d 51, 54 (2004).

²⁶ Fox, 227. S.C. Res. 1546, ¶ 1, U.N. Doc. S/RES/1546 (June 8, 2004).

²⁷ McGurk, 52.

²⁸ Williams, 116.

policeman?”²⁹ Indeed, rather than going in with any plan to fill the policing vacuum, the US approach in 2003 was contingent upon a “temporary reconstitution” of the then existing Iraqi police force.³⁰ The exploding criminality that followed the invasion demonstrates the ineffectiveness from which that plan would suffer over time. Moreover, the much-heralded³¹ U.S. strategy in Afghanistan that was contingent upon limited U.S. presence and support for local militias has created a disastrous division of power within the country that now threatens to completely undermine the counterinsurgency strategy.³²

Moreover, while the CPA created a basis for detaining individuals just after the invasion, it did not promulgate any legal provisions until nearly a year later.³³ Indeed, the U.S. military did not explicitly acknowledge the problem posed by organized crime until 2007, when General Petraeus took command.³⁴ To date, it has still not sufficiently acknowledged the problem in Afghanistan, and instead has developed logistics and security contracting relationships, even if inadvertently, with some of the worst

²⁹ R. Jeffrey Smith, *Law and Order: The Military Doesn't Do Police Work. Who Will?*, WASH. POST, April 13, 2003, B01.

³⁰ Smith, B01.

³¹ See Richard B. Andres, et al, “Winning with Allies; The Strategic Value of the Afghan Model.” *International Security (Winter 2005/2006)*.

³² See generally, Marten, *supra* n. 8.

³³ Marco Sassoli, Legislation and Maintenance of Public Order and Civil Life by Occupying Powers, *Eur. J. Int'l L.*, 665 (2005).

³⁴ Williams, 115-16.

offenders.³⁵ The focus of this paper is the early phase of reconstruction, before UN Charter of the host government, at which point soldiers seemingly had “no orders to intervene” in criminal activities.³⁶ To be certain, some battalions formulated basic policing operations in their areas.³⁷ However, the type of illicit behavior addressed herein requires a systematic strategy to effectively combat crime. Given the evident criminality in the country, such a response seemed altogether lacking.

The Transition Gap

Deducing from facts on the ground, the Coalition must have felt it had no obligation to act in a policing capacity, and that reconstituting local police would be sufficient to meet whatever needs, both practical and legal, that might exist.³⁸ That it could have reached any such conclusions may not be its own fault, given the proliferation of international legal norms, and the difficulty in assessing which apply, in environments such as Iraq and Afghanistan.

³⁵ Prakhar Sharma, “Local Contours of Security in Afghanistan,” *The Stimson Center* (May, 2010), 7-9.

³⁶ Sassoli, 667-68.

³⁷ *Id.*, 667-68.

³⁸ *Cf.* Smith, B01.

Within these legal and practical ambiguities, unfortunately, an authority gap is created that allows for criminal organizations to capture state institutions, and completely alter the future path of a post-conflict country. It is a path that operates to the detriment of the host population, and substantially reduces the prospects that the occupying power can reach a point where it feels it has left the country in even a *status quo ante* as it withdraws, let alone leaving it better off than when it came.³⁹ This gap, which occurs with the attempted transition from occupying authority to host government authority, can consequently prove fatal to the country's prospects for achieving legitimate institutions capable of independently running a nation in conformity with the sundry basic State duties towards its population acknowledged in international law. Yet, counterinsurgency doctrine is beginning to acknowledge that the building of strong local institutions is fundamental to COIN success.⁴⁰ In short, within the transition gap that yields a criminalization of the economy lays the greatest threat for the occupation endeavor and the host population's future.

³⁹ The Laws of Occupation require the occupying powers to maintain a status quo ante in occupied territory. Conor McCarthy, *The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq*, 10 J. CONFLICT & SECURITY L. 43, 63 (2005).

⁴⁰ Thom Shanker, *Afghan Push Went Beyond Traditional Military Goals*, N.Y. TIMES, February 19, 2010, available at <http://www.nytimes.com/2010/02/20/world/20military.html>.

The task that remains, then, is to outline the legal obligations that can fill this void and guide an occupying authority in its administration of a post-conflict territory prior to a UN Charter for an independent, sovereign government. The path to understanding such obligations leads through a wilderness of potential sources of governing law that have traditionally been analyzed as completely separate bodies of law, but now seem to have more in common than is usually accepted.

POTENTIAL SOURCES OF LAW GOVERNING MILITARY ACTIVITIES

There are a host of potential sources of applicable legal norms in occupation situations. Those sources include *debellatio*, UN Security Council Resolutions, international humanitarian law (IHL, or Law of Occupation), and international human rights law (HRL). These sources will be reviewed in this section. This section will also conclude that the infrequency of fully recognized occupations has hampered the development of a clear set of laws guiding occupation, leaving a maze of norms from which occupiers can draw to guide their actions. However, it will also lay the groundwork for the argument in the second half of the article that IHL and HRL are entirely consistent and interdependent when it comes to fighting corruption and crime,

and that they must be read together to impose an obligation on occupying powers to combat illicit behavior.

Debellatio

The oldest source of law potentially impacting one state's military conflict with and occupation of another is called *deballatio*. This concept, the legal analogue to absolute war, essentially sees the defeated government as totally annihilated, and allows for an occupying authority to make sweeping changes to host institutions.⁴¹ Patterson describes the tripartite definition of *deballatio* as: (i) the invaded state ceases to exist by virtue of the disintegration of its national institutions; (ii) the occupying victor acquires title to the territory formerly controlled by the toppled state; and, (iii) the new title-holder has plenary powers over the territory where the state previously existed.⁴²

While Patterson does make a strong argument that a modernized version of such a concept would be most applicable to the situation in Iraq,⁴³ it is arguable that modern concepts of Statehood and international relations make *deballatio* obsolete. Modern

⁴¹ McGurk, FN1. Though *deballatio* would not even countenance the terms of occupier, occupation, and the like, they are used here to maintain consistency in describing the presence of foreign forces in a given territory not under the authority of those forces' sovereign at the onset of military operations.

⁴² Patterson, 480-81.

⁴³ *Id.*, 468.

notions of sovereignty and self-determination⁴⁴ would directly conflict with a concept that essentially provides *carte blanche* authority to an occupying power. Moreover, the customary notion of the continued existence of the State in international law seems to directly rebut the aged concept of total annihilation. Finally, the CPA never claimed the applicability of *debellatio* in Iraq.⁴⁵ While the CPA's own conclusions about legal obligations are not dispositive for the purposes of determining actual legal status, it is helpful to initially address the problem from the very terms which the occupants thought most applicable. Therefore, it is to Security Council Authority, IHL (embodied in the Hague Regulations of 1907 and the Geneva Convention of 1949), and HRL that we now turn.⁴⁶

UNSC Resolutions

The Coalition was also compelled to act under United Nations Security Council Resolutions (UNSCR) 1483 and 1511.⁴⁷ UNSCR 1483 calls upon the CPA,

⁴⁴ Benvenisti discusses, in detail, the applicability of such notions to modern occupations. See Eyal Benvenisti, *The International Law of Occupation* 3-31, (Princeton Univ. Press 2004).

⁴⁵ McGurk, FN1.

⁴⁶ McGurk openly acknowledges the coalition as occupiers, and the consequent applicability of occupation law. *Id.*, 51-55.

⁴⁷ S.C. Res. 1483, U.N. DOC. S/RES/1483 (May 22, 2003) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/368/53/PDF/N0336853.pdf?OpenElement>. S.C. Res. 1511, U.N. DOC. S/RES/1511 (October 16, 2003) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/563/91/PDF/N0356391.pdf?OpenElement>.

“to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future.”⁴⁸

The CPA argued that through the UNSCRs the United Nations commanded the CPA to play an “active and vigorous role in the administration and reconstruction of Iraqi society.”⁴⁹ Some within the CPA also felt, however, that this role could conflict with the “conservative principle” (though they might not use that term) of Geneva IV, Article 43.⁵⁰

Resolution 1511 emphasizes “the importance of establishing effective *Iraqi* police and security forces in maintaining law, order, and security,”⁵¹ Paragraph 13 of the same, “. . . *authorizes* a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq . . .”⁵²

⁴⁸ S.C. Res. 1483, *supra* note 41, ¶4, Chapter 7 provisions.

⁴⁹ McGurk, 53-54.

⁵⁰ McGurk, 55.

⁵¹ S.C. Res. 1511, *supra* note 41, ¶16.

⁵² *Id.* (original emphasis)

It seems, then, that whatever else the UNSC Resolutions may have implied, there was clearly an emphasis placed on restoring policing and providing security as an imperative function of the CPA. The obligations under IHL are not so clear.

Law of Occupation

This paper assumes a traditional understanding of the Law of Occupation, sometimes referred to as International Humanitarian Law (IHL), which is primarily based upon the 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.⁵³ Much modern scholarship has carelessly conflated separate bodies of human rights law, such as the International Covenant on Civil and Political Rights (ICCPR), under the heading of IHL.⁵⁴ Unlike the Law of Occupation, however, international human rights norms were not expressly written with conflict situations in mind. They will, therefore, be dealt with separately in a subsequent section. The consanguinity of these two bodies of law as they pertain to military occupations, however, will be established in the next half of this paper.

⁵³ 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., art. 43, Oct. 18, 1907, 2 U.S.T. 2269 [hereinafter Hague IV].

⁵⁴ International Covenant on Civil and Political Rights [hereinafter ICCPR], art. 2, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171.

i. Hague Article 43

The fulcrum of IHL is Hague Regulation article 43, which reads,

“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”⁵⁵

It is necessary to mention from the outset that the English translation of the original, authoritative French regulation has been criticized and corrected in scholarship.⁵⁶ The French ‘l’ordre et la vie publics,’ was translated into English as ‘public order and safety,’ though ‘public order and *civil life*’ seem a more accurate translation.⁵⁷ The concept of civil life, according to the legislative history of the document, can be described as ‘social functions, ordinary transactions which constitute daily life.’⁵⁸ Thus, the international mandate would encompass wider needs than basic security alone.

One of the most authoritative experts on occupation law, Yoram Dinstein, read Hague Article 43 to create “two distinct obligations”: (i) to restore and ensure as far as

⁵⁵ Hague IV, art. 43.

⁵⁶ See, for example, Sassoli, 663-664; Benvenisti, 7; and Yoram Dinstein, *The International Law of Belligerent Occupation* 90 (Cambridge Univ. Press 2009).

⁵⁷ Sassoli, 663-64; Benvenisti, 7; Dinstein, 90.

⁵⁸ Sassoli, 663-64.

possible, public order and life in the occupied territory; and, (ii) to respect the laws in force in the occupied territory unless an absolute impediment exists.⁵⁹ Another commentator refers to the latter obligation to respect the laws in force in the occupied territory as the “conservationist principle”.⁶⁰ According to this principle, the occupier enjoys no sweeping authority to make permanent changes to “legal and political structures” in the territory. One former CPA attorney acknowledges that Article 43 constitutes a general prohibition against “transformative” change.⁶¹ More importantly, another scholar extends the conservations claim even further by arguing that there is no obligation to create institutions that monitor rights compliance, investigate allegations of wrongdoing, and prosecute violators.⁶² The analysis below will directly refute this latter contention as inconsistent with a holistic reading of IHL and HRL.

Another set of scholars take a broader view of Article 43. As opposed to the prohibitive nature of the conservative principle, they contend that Article 43 creates an affirmative obligation to “protect the civil population from a meaningful decline in orderly life.”⁶³ In this broader view, the distinction between “life” and “safety” is

⁵⁹ Dinstein, 90.

⁶⁰ Fox, 199.

⁶¹ McGurk, 52.

⁶² Fox, 271.

⁶³ Dinstein, 90.

essential, because an occupying power may frequently “. . .show callous indifference to any hardships (unrelated to safety and security) that befall [the population].”⁶⁴

Arguably, moreover, this is an obligation of means and not results.⁶⁵ According to some analysts, the affirmative obligations imposed by Article 43 may not be as intensive as what would be required to fulfill human rights obligations.⁶⁶ Again, however, a modernized reading of both IHL and HRL make such a distinction between the two bodies difficult to defend.⁶⁷ Even within the more narrow, exclusivist readings of the different bodies of law, however, one thing is clear: criminal prosecution constitutes “[t]he most traditional way” of restoring public order,⁶⁸ and such activity would thus arguably be required by Article 43.

Benvenisti, however, sees a much more limited relevance for Article 43 in modern occupation law.⁶⁹ He feels that the phrase is vulnerable to changing conceptions regarding the proper role of a government, and notes that when the Hague Regulations were written, *laissez-faire* governance was the dominant ideal of the day.⁷⁰ Yet, while,

⁶⁴ *Id.*

⁶⁵ Sassoli, 664-5.

⁶⁶ *Id.*

⁶⁷ See Analysis section below.

⁶⁸ Sassoli, 664-65.

⁶⁹ Benvenisti 30-31.

⁷⁰ *Id.*, 9, 209-10.

Benvenisti is probably right in saying Article 43 has “at best become an incomplete instruction to the occupant,”⁷¹ even *laissez-faire* governments would have acknowledge law enforcement functions such as policing and prosecution to be ineluctable elements of governance. Moreover, despite Benvenisti’s incredulity as to the efficacy of the Regulation, traditional IHL was invoked by the UNSC when it asked occupying powers to observe their obligations under IHL.⁷²

Ultimately, the precise applicability of IHL is left open for debate, a dangerous precedent when people’s lives and well-being are on the line. As will be discussed below, HRL provides added flesh to the skeletal structure the IHL conventions established, and which narrow readers of Article 43 overlook.⁷³

Human Rights Law

Questions about the potential applicability of HRL⁷⁴ to occupation settings have given rise to much academic speculation.⁷⁵ There is a growing trend, not without its

⁷¹ *Id.*, 30.

⁷² See S.C. 1483, *supra* note 41, ¶5.

⁷³ See Analysis section below.

⁷⁴ HRL as referred to here includes a range of various treaties and covenants signed by States in mutual recognition of the rights of humanity.

⁷⁵ See, for example, John Cerone, *Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations*. 39 VAND. J. TRANSNAT’L L. 1447 (2006); see also Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 451 (1990).

critics, to incorporate human rights laws into the obligations assumed to inhere in occupying authorities.⁷⁶

i. Applicability of Human Rights Law During Occupation

John Cerone cites the International Court of Justice's (ICJ) "Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons," and the agreement of the Inter-American Commission on Human Rights (IACHR) and the United Nations Human Rights Committee (UNHRC) to the effect that the International Covenant of Civil and Political Rights (ICCPR), one of the leading human rights accords, is applicable in times of war.⁷⁷

Some disagree. Arguing for the predominance of the conservationist principle, Fox points out that the principle would cease to exist where applicable human rights law imposed obligations to legislate outside of "conservationist" boundaries.⁷⁸ Yet, this claim does not prove that the basic security functions of effective governance must be ignored. Indeed, the potential applicability of human rights laws would arguably create an affirmative obligation for the occupying authority to take certain measures to "ensure"

⁷⁶ Cerone, 1453-1454.

⁷⁷ Cerone, 1453-54.

⁷⁸ Fox, 274-75.

the rights of the population in ways that would not necessarily break the conservationist principles regarding local legislation.

ii. Affirmative Obligation Through Human Rights

The *Velasquez-Rodriguez* case, a watershed in modern human rights law, provides a window on the connectivity of IHL and HRL.⁷⁹ In *Velasquez*, the Inter-American Court of Human Rights (IACHR) read the term “ensure” in the pre-ambular paragraph of the American Convention on Human Rights to create affirmative obligations on the state to “organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that [state parties] are capable of juridically ensuring the free and full enjoyment of human rights.”⁸⁰ Moreover, according to the IACHR, the State must prevent, *investigate and punish* any violation of the rights recognized by the Convention.⁸¹ Additionally, even a private act could lead to state responsibility if there was a “. . .lack of due diligence to prevent the violation or to respond to it as required by

⁷⁹ *Velasquez-Rodriguez*, 1988 Inter-Am. Ct.H.R., (ser. C), No. 4 (July 29, 1988), available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf.

⁸⁰ *Velasquez*, ¶ 166.

⁸¹ *Id.*

the Convention.”⁸² Finally, the State’s duty is, specifically, “. . . to take reasonable steps to prevent human rights violations. . . .”⁸³

The same obligation, to “take *whatever measures are necessary* to enable individuals to enjoy or exercise the rights guaranteed by the Covenant” also arguably exists in the ICCPR, which is valid in Iraq and Afghanistan.⁸⁴ The presence of such obligations in the ICCPR is evident through both the decisions and general comments of the UN Human Rights Committee (UNHRC). In *Atachahua v. Peru*, for example, the UNHRC held that Peru had violated multiple provisions of the ICCPR by failing to prevent and punish rights violations including arbitrary detention and murder by state agents.⁸⁵ In General Comment No. 6, the UNHRC noted that “State parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces.”⁸⁶ The UNHRC has also commanded that the State must take all legislative and “other measures” necessary to protect citizens from cruel treatment and punishment, whether such punishment occurred

⁸² *Id.*, ¶ 172.

⁸³ *Id.*, ¶ 174.

⁸⁴ Thomas Buergenthal, *To Respect and Ensure: State Obligations and Permissible Derogations*, in Louis Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*, 77 (Columbia Univ. Press 1981). (emphasis added)

⁸⁵ *Atachahua v. Peru*, CCPR/C/56/D/540/1993, UN Human Rights Comm. (UNHRC) (April 16, 1996).

⁸⁶ U.N. HUMAN RIGHTS COMM. (UNHRC), General Comment 6 (Apr. 30, 1982).

at the hands of government or private actors.⁸⁷ It has made similar findings in other areas, as well.⁸⁸

Moreover, the European Court of Human Rights has also recognized such affirmative obligations of the state. Most recently, in *Silih v. Slovenia*, the European Court made clear that it is insufficient for states merely to have laws protecting human rights on the books; they must enforce those laws in practice.⁸⁹

These decisions demonstrate an emerging norm that imposes upon States some measure of responsibility for both public and private actions in their territories.⁹⁰

According to Justice Thomas Buergenthal, now a judge on the ICJ, the obligations tied to the usage of “ensure” includes an obligation to “improve the administration of criminal justice.”⁹¹ Administration would seem to be wide enough to include legislation and enforcement, and Cerone argues that the due diligence requirement involves a legislative prohibition of violative behavior as well as enforcement.⁹² Dinah Shelton adds that due

⁸⁷ U.N. HUMAN RIGHTS COMM. (UNHRC), General Comment 20 (Mar. 10, 1992).

⁸⁸ U.N. HUMAN RIGHTS COMM. (UNHRC), General Comment 16 (Apr. 8, 1988).

⁸⁹ *Silih v. Slovenia*, App. No. 71463/01, Eur. Ct. H.R. (Apr. 9, 2009).

⁹⁰ Cerone, 1466.

⁹¹ Buergenthal, 77.

⁹² Cerone, 1467.

diligence requires, “reasonable measures of prevention that a well administered government could be expected to exercise under similar circumstances.”⁹³

iii. Extraterritorial Application of Human Rights Conventions

As these Human Rights conventions purport to affect State’s behavior within their own territory, an added wrinkle to the applicability question involves whether they create obligations in an extraterritorial setting such as would exist during occupation. As is the case with respect to many other legal issues affecting occupations, opinions differ.

The United States Supreme Court, in *Sale v. Haitian Centers Council, Inc.*, found that “. . . a treaty cannot impose un contemplated extraterritorial obligations on those who ratify it through no more than general humanitarian intent . . .”⁹⁴ The growing international norm may be in conflict with the Court’s rendering, however.

Cerone points out that the UNHRC has frequently held that the ICCPR can have extraterritorial application.⁹⁵ He also notes the ICJ’s “Advisory Opinion on the Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory” to the effect that the ICCPR, the International Covenant on Economic, Social, and Cultural

⁹³ Dinah Shelton, *Private Violence, Public Wrongs, and the Responsibilities of States*, 13 FORDHAM INT’L. L. J. 1, 22-23 (1990).

⁹⁴ *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 183 (1993). See Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L. L. 78, 81-82 (1995).

⁹⁵ Cerone, 1471-72.

Rights (ICESCR), and the Convention on the Rights of the Child (CRC) applied to Israeli actions in the occupied Palestinian territories.⁹⁶ The European Commission on Human Rights has also acknowledged the extraterritorial obligations of the State.⁹⁷

Moreover, Justice Buergenthal has written, prior to his ICJ judgeship, that the state is obligated to ensure the rights of all those *within its jurisdiction*.⁹⁸ This seems to rest on factual questions about whether the occupying authority exercises powers of government on the ground.⁹⁹ The Hague Convention acknowledges the adoption of authority by occupying powers in Article 43, which reads, “The authority of the legitimate power having in fact passed into the hands of the occupant.”¹⁰⁰ The UNHCHR, moreover, has made clear that the “rights enshrined in the Covenant belong to the people living in the territory of the State party”.¹⁰¹ If, indeed, rights rest with the people, their rights should be protected regardless of the identity of the governing authority.

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⁹⁶ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, 111-113 (July 9). Cerone, 1473-74.

⁹⁷ *Cyprus v. Turkey*, App. No. 25781/94, Eur. Ct. H.R. (1994). Buergenthal, 76.

⁹⁸ Buergenthal, 74.

⁹⁹ Fox, 273.

¹⁰⁰ Hague IV, art. 43.

¹⁰¹ U.N. HUMAN RIGHTS COMM. (UNHRC), General Comment 26 (Dec. 8, 1997).

This section indicates the uncertainty surrounding the potential authorities governing occupation, as well as the proper meaning and scope of those authorities even where they are found applicable. In an age where many occupiers refuse to be so named, or subjected to the laws of occupation, there has been limited opportunity to further develop and understand occupation law.¹⁰² Therefore, each application of the occupation law helps chip away an underlying form.¹⁰³ Within already existing law and scholarship, there is a clear normative tendency towards imposing affirmative obligations on governing authorities to investigate and prosecute rights violations.

LEGAL CONFUSION

Brett McGurk, a former CPA attorney, noted in looking back on the CPA's activities that the multitude of authorities created "internal inconsistencies that were often hard to reconcile."¹⁰⁴ By his reading, it could be impossible in certain circumstances to simultaneously comply with both UNSC Resolutions and IHL.¹⁰⁵ The Coalition, he admits, voluntarily declared itself occupants, but IHL seemed difficult to apply in

¹⁰² Fox, 231.

¹⁰³ Patterson, 474.

¹⁰⁴ McGurk, 51.

¹⁰⁵ *Id.*, 55.

situations of long-term occupation where the UNSC contemplated sweeping changes to various institutions.¹⁰⁶

The legal ambiguity surrounding the degree of legislation an occupier can or must promote, identified by McGurk and debated by academics, is no block to a resolution of the more limited question about the occupier's obligations and capabilities with respect to the administration of law enforcement. As the next section will show, a proper, comprehensive reading of various legal authorities indicates that the occupying power has a duty to effectively police the territory for which it is responsible. Consequently, though traditional occupation law is ill-developed, related law and precedent indicates that occupying forces assume governing authority and the human rights obligations that such authority contains. We now turn to exploring this claim in greater detail.

ANALYSIS

Both IHL and HRL require that a governing authority “ensure” basic norms of order. Read together, the agreements amongst the international community to ensure basic levels of order (whether found in the Hague Convention, the ICCPR, or elsewhere)

¹⁰⁶ *Id.*, 52-53.

imply an affirmative obligation that a governing authority must provide at least a base level social stability function. Because of the coterminous elements of both IHL and HRL, it is clear that these affirmative obligations exist regardless of whether a state is in conflict or at peace. The analysis below demonstrates this simultaneous identity of obligations imposed by IHL and HRL. In so doing, it maintains that a reading of the law that denies an occupier's obligations to attack illicit behavior rejects the importance of the most fundamental needs of human life and society, and the most rudimentary functions that a state must serve in ensuring those needs are met.

The analysis below addresses areas where corruption and organized criminality violate the basic rights that international law has acknowledged governing authorities must protect. It discusses areas where international precedents have clearly ordained that a governing authority is obliged to act to ensure and respect the rights of its citizens, and argues that international law must be understood to create obligations during occupations of signatory states that force governing authorities to attack corruption and organized

criminal activities which violate the rights enshrined in the ICCPR and materially similar conventions.¹⁰⁷

The article concludes by asserting that occupying forces are not immune from affirmative obligations. Just like governments functioning in normal times, occupying forces have an obligation under international law to respect and ensure the rights of those in the territory which they occupy. Such an obligation requires that they limit, deter, and prosecute violations caused by corruption and organized criminality.

TO RESPECT AND ENSURE

It is difficult to imagine any other interpretation of the term “ensure” than one which imposes upon the subject an obligation to do something to achieve the object of the sentence in which “ensure” is found. Whatever the objective of the action may be, if that object is to be ensured, the subject must in some way affirmatively see to it that the object is achieved. Both IHL and HRL utilize the term “ensure” with respect to defined subjects and objects. The subject of IHL is an occupying power¹⁰⁸; of HRL, a state

¹⁰⁷ The ICCPR is chosen because its provisions provide focal points that are the most relevant to the types of violations seen in conflict economies. Other treaties, however, also describe rights which occupying forces may be obligated to protect.

¹⁰⁸ Hague IV, article 43, “The authority of the legitimate power having passed into the hands of the occupant. . .”

government.¹⁰⁹ The object of each is textually different, but should be read as imposing the same affirmative obligations on occupying powers and state governments.

As mentioned above, IHL requires that an occupant, “. . . restore, and ensure, as far as possible, public order and [civil life] . . .”¹¹⁰ Though HRL varies by covenant, the ICCPR demands that a State party, “undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant . . .”¹¹¹ Because so few opportunities to further explicate occupation law have occurred¹¹², the concept of public order and safety (or civil life, depending on the preferred translation) has not been fleshed out in the legal arena. The development of HRL constitutes the acknowledgment by a similarly broad group of states as to the basic rights that any social order must enshrine, and indirectly then, gives color to the concept of public order and civil life. The case law addressing key provisions of HRL, therefore, gives substantial detail on what the Article 43 concept of ensuring public order and civil life include.

¹⁰⁹ International Covenant on Civil and Political Rights [hereinafter ICCPR], art. 2, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171, “Each State Party to the present Covenant undertakes . . .”.

¹¹⁰ Hague IV, art. 43.

¹¹¹ ICCPR, art 2., ¶ 1. See also, American Convention on Human Rights, Ch. 1, art. 1, ¶ 1, July 18, 1978, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, “. . .to respect the rights and freedoms recognized herein and to ensure all persons subject to their jurisdiction the free and full exercise of those rights and freedoms. . .”

¹¹² Fox, 231.

Even using the more limited translation of public order and safety, Article 43 must be read to incorporate the most fundamental rights of life, privacy, property, and personal integrity that illicit behavior violates. What is order and safety if not a citizen's basic right to be alive, to have their privacy protected, to maintain their own possessions and their bodily integrity? These aspects of life are so fundamental to the well-being of the human person that without them a person could not fully participate in society, and society itself would cease to function. There would, in fact, be no order or safety. The very objectives IHL seeks to achieve, therefore, would be undermined.

Consequently, affirmative obligations of the governing authority derive directly from the "ensure" language of the conventions. In both IHL and HRL, the subject must ensure the objects of the law – which at least include life, privacy, property, and bodily integrity.

Scholars on occupation law also recognize this overlap. Fox has noted that "substantive rights and implementing responsibilities" should "inform our understanding" of IHL.¹¹³ McCarthy has argued for an even broader reading, and claimed that it is not permissible for the occupying power to allow for ". . . economic, social, political, and

¹¹³ Fox, 296.

infrastructural retardation.”¹¹⁴ Dinstein has argued that a key litmus test for judging the propriety of occupation actions should be asking whether the occupying power is protecting the rights in a similar fashion as it would in its own state.¹¹⁵

An additional argument exists, however, from the notion of the adoption of the powers of the legitimate authority by the occupying power. If, as HRL establishes, legitimate authorities have the obligation to respect and ensure life, property, privacy, and bodily integrity, then any view of occupation that contemplates an occupier adopting the full responsibilities of the legitimate authority would also necessitate the adoption of responsibilities to respect and ensure the adumbrated rights. Indeed, IHL takes such an “adoptive” view of occupation in Article 43.

Article 43 of the Hague Convention notes, “The authority of the legitimate power having in fact passed into the hands of the occupant . . .”, and then obliges the occupant to ensure public order and safety.¹¹⁶ Because the Hague Convention is addressed to and specifically describes the responsibilities and obligations of the occupier, and Article 43 itself couples authority with obligations. It is inconceivable that the Convention would

¹¹⁴ McCarthy, 62.

¹¹⁵ Dinstein, 121-122.

¹¹⁶ Hague IV, art. 43.

intend for authority to pass to the occupier without the responsibilities that authority necessitates also passing.

The fact that the international understanding of order and safety has undergone more specific articulation over the past century through HRL should be no surprise. But such latter, more specific articulations of state obligations should enhance, rather than limit, our understanding of what order and safety can now be said to include. Order and safety were clearly thought by the world community in the Hague IV convention to be the most fundamental aspects of human society. As evidenced by their universal appearance in various human rights covenants, life, privacy, property, and bodily integrity are thought by the world community today to be equally fundamental to human society. The fact that the latter fundamentals were expressed through a different legal medium should not prohibit us from recognizing their contribution to better understanding a governing authority's obligations during occupation.

The UNHRC, the body responsible for overseeing the implementation of the ICCPR, agrees. Speaking of the obligation to respect and ensure the rights listed in the ICCPR, the HRC commented, "This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the

circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.”¹¹⁷ While the UNHRC’s language may be interpreted as limited to UN peace-keeping situations given its contemplation of an assignment for such responsibilities, the principles of international law would arguably also apply to occupants who had initiated operations on their own initiative.

A comparison of the fundamental objectives underlying IHL and HRL law, thus, makes clear that the more specific obligations of the state to ensure the rights of its citizens must be read into the obligation to maintain order and safety established by IHL. The next section will describe in more detail, however, the practical actions (prevention, investigation, and punishment of violations) such obligations require. The final section will drill down to an additional level of detail in addressing specific types of violations which the occupying authority is obliged to prevent, investigate, and punish in order to fulfill its obligations under international law.

¹¹⁷ UNHRC, General Comment 31, ¶ 10.

AFFIRMATIVE OBLIGATIONS: PREVENT, INVESTIGATE AND PUNISH

The governing authority must fulfill its obligation to maintain order and safety by ensuring the fulfillment of the traditional functions of the state; such as, policing, investigations, and the prosecution of crimes. In short, it must ensure the preservation of the rights universally recognized by various human rights treaties as elements of order and safety. The overlap of objectives between IHL and HRC means that neat distinctions between basic policing and separate military occupation no longer hold true. One commentator captured the traditional boundaries in saying, “Public order is restored through police operations, which are governed by domestic law and international human rights law, and not through military operations governed by IHL on the conduct of hostilities.”¹¹⁸ This article asserts, however, that military occupants must plan for and be prepared to execute basic policing and administrative functions as part of their occupation. Developments in international law mean that the traditional distinctions drawn between IHL and HRC are no longer viable in occupation and post-stabilization environments. In short, it is not enough to plan the war; a potential occupier must also plan the peace.

¹¹⁸ Sassoli, 665.

The obligations articulated in *Velasquez* most succinctly describe the policing obligations for which an occupier must plan: any administrative functions that are required to prevent, investigate, and punish violations of the rights recognized by [relevant conventions].¹¹⁹ The key theme of *Velasquez*, and its progeny in the Inter-American and European human rights systems, and in the UNHRC, is that governing authorities must take the measures necessary to end the impunity of criminals, whether such criminals act in an official or private capacity.¹²⁰ It is precisely the impunity of corrupt and organized criminals which leads to wholesale violations of the rights of local inhabitants, undermines stability operations insofar as it compromises trust in governing authorities, and minimizes the chances for the establishment of strong governing institutions and sustainable peace. Therefore, through the protection, investigation, and punishment of rights violations, occupying forces not only fulfill their international legal obligations, but also achieve more effective counterinsurgency.

¹¹⁹ *Velasquez*, ¶ 166.

¹²⁰ *Paniagua-Morales v. Guatemala*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 37, ¶ 173 (Mar. 8, 1998).

EFFECTIVE MEASURES TO PRESERVE LIFE, PRIVACY, PROPERTY, AND PERSONAL
INTEGRITY

A failure to fulfill the tripartite obligation to prevent, investigate, and punish obliges the governing authority to provide effective remedies to those whose rights have been violated. The investigation and punishment of wrongs provide the most tangible remedies. Yet, such governmental functions also perform a preventive purpose insofar as they deter future wrongdoing – specifically attacking the impunity that reigns in the absence of any such deterrence. The right to an effective remedy is a fundamental aspect of HRL. Article 13 of the European Convention on Human Rights and Fundamental Freedoms establishes the right for European residents, for example. Moreover, Article 2 of the ICCPR makes it necessary “to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.”¹²¹ The UNHCHR, in addition, has reinforced the *Velasquez* obligations (prevent, investigate, punish) by making clear that, “Administrative requirements are particularly required to give effect to the general obligations to investigate allegations of violations . . .”¹²²

¹²¹ ICCPR, art. 2, ¶3(a).

¹²² UNHRC, General Comment 31, ¶ 15.

It is crucial, then, to have effective means of preventing, investigating, and prosecuting rights violations. It is insufficient to simply have laws or administrative procedures on the books that address such measures; the governing authority must actually execute the laws in order to satisfy their international obligations.¹²³ The following four sections address specific instances of areas where corruption and organized criminal activities lead to violations of fundamental rights, and where occupying authorities must take effective measures to prevent, investigate, and prosecute such activities. The four key areas (preservation of life, privacy, property, and the bodily integrity of local inhabitants) are almost universally present in various human rights conventions, and therefore present sound cornerstones for the development of a policing strategy for occupying forces.

Life

Article 6 of the ICCPR echoes the universal recognition in other human rights documents that every human being has a right to life that shall be ensured by the state. Article 2 of the European Convention on Human Rights expresses the same; and the

¹²³ *Cf. Silih*, ¶ 195 (noting that “State’s obligation . . . will not be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice . . .”).

obligation under Article 2 was recently tested in *Silih v. Slovenia*, a case that rose to the Grand Chamber in the European Court.¹²⁴

Silih involved a family whose son had died due to negligent hospital action, but whose complaints essentially went unrecognized by the local authorities.¹²⁵ The ECHR found that the state has an obligation to provide an effective, independent judicial system to adjudicate matters such as wrongful death, and that the State has an obligation to promptly and effectively respond to complaints about wrongful deaths.¹²⁶ Slovenia's failure to provide these resulted in liability to the complainants.¹²⁷ The ECHR discussed similar obligations in *Opuz v. Turkey*, where it made clear that the State must back up criminal laws with effective law enforcement machinery for the "prevention, suppression, and punishment" of violations of the criminal law.¹²⁸

Occupying authorities, though potentially numbed to the violence wrought by the phases of conflict directly preceding the termination of formal hostilities, have an obligation to similarly prevent, investigate, and punish, violent crimes that result in wrongful deaths. As discussed above, criminal organizations will often compete

¹²⁴ See *supra*, n. 81.

¹²⁵ *Silih*, ¶¶ 10-85.

¹²⁶ *Id.*, ¶¶ 192, 195.

¹²⁷ *Id.*, ¶ 211.

¹²⁸ *Opuz v. Turkey*, App no 33401/02, Eur. Ct. H.R., ¶¶ 128 (June 9, 2009).

violently for control of various areas or commodities. It is just as essential to properly investigate and penalize the deaths that result from such activities as those that result from insurgent or terrorist violence, or even negligence such as existed in *Silih*.¹²⁹

Privacy

The right to privacy is also recognized in various international human rights conventions. Article 17 of the ICCPR protects individuals from being subjected to arbitrary or unlawful interference with their privacy and family.¹³⁰ The American Convention on Human Rights similarly states, “No one may be the object of arbitrary or abusive interference with his private life, his family, his home.”¹³¹ The European nations have similarly agreed that, “Everyone has the right to respect for his private and family life, his home and his correspondence.”¹³²

One need only consider the appalling situation in Afghanistan of “loan brides” to find an obvious example of gross violations of this most sanctified sphere of family privacy. In some rural Afghan provinces, it is not uncommon to hear of farmers who are forced to give their daughters as repayment of loans given by local drug traffickers, but

¹²⁹ *Silih*, ¶¶10-85.

¹³⁰ ICCPR, art. 17.

¹³¹ ACHR, art. 11, ¶ 2.

¹³² European Convention for the Protection of Human Rights and Fundamental Freedoms [CHRFF], art 8, ¶ 1, Nov. 4, 1950, Europ. T.S. No. 5, 214 UNTS 221.

whom they are unable to repay with cash crop when their poppy harvest is destroyed by eradication efforts.¹³³ The economic pressures created by such local trafficking syndicates, and in many situations permitted or aided by local police forces, destroy human dignity and warp local family relations. Such inhuman conduct cannot be allowed to go unpunished.¹³⁴

Property

International courts have also recognized the importance of property rights as a fundamental condition of the individual in society. While some conventions have not specifically mentioned rights to property, the bodies interpreting those conventions have been willing to defend property rights as a function of prohibitions on inhuman and degrading treatment. The ECHR's decision in *Ilhan v. Turkey* exemplifies such a reading.¹³⁵

In *Ilhan*, Turkish security forces stormed the complainant's home, burning it to the ground and destroying its contents, as well as his vineyards, orchards, and oak trees.¹³⁶ The ECHR found that the destruction constituted a violation of Article 3 of the

¹³³ Sami Yousafzai and Ron Moreau, *The Opium Brides of Afghanistan*, NEWSWEEK (April 7, 2008) available at <http://www.newsweek.com/id/129577>.

¹³⁴ The complexities created by eradication efforts, while acknowledged, is beyond the scope of this paper.

¹³⁵ *Ilhan v. Turkey*, App. No. 22494/93, Eur. Ct. H.R. (2004).

¹³⁶ *Id.*, ¶¶ 12-20.

European convention, which says, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”¹³⁷ The ECHR decided that such destruction and subsequent anguish caused to the family by the actions of the state qualified as inhuman treatment insofar as it left the family without shelter and support, and obliged them to leave their place of residence.¹³⁸

Moreover, illegally forced evictions, a substantial problem in post-conflict settings, are arguably the functional equivalent of destruction insofar as they also deprive the family of shelter and support, obliging them to leave their place of residence. Such evictions and destruction have been prominent in post-war Iraq and Afghanistan. As noted above, powerful forces formed land mafias in post-war Afghanistan, and deprived Afghan citizens of their land, evicting the residents and putting the property to use for their own purposes.¹³⁹ Similarly, in Iraq, reporting indicates thousands of forced evictions.¹⁴⁰ This reporting specifically calls on host country authorities and international

¹³⁷ *Ilhan*, ¶¶ 104-109.

¹³⁸ *Id.*, ¶ 107-109.

¹³⁹ Irvine, available at http://news.bbc.co.uk/2/hi/south_asia/6981035.stm.

¹⁴⁰ See generally, *Iraq's displacement crisis: the search for solutions*, FORCED MIGRATION REVIEW (Refugee Studies Centre, June 2007) available at <http://www.fmreview.org/FMRpdfs/Iraq/full.pdf>.

forces to “shoulder responsibilities placed on them under international law” to ensure protection, security and services for the most vulnerable of Iraqis.¹⁴¹

Much like the ECHR, the ICCPR provides that, “No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹⁴² Occupying forces, therefore, are under an obligation to prevent, investigate, and punish actions, such as the destruction and deprivation of property, that constitute inhuman and degrading treatment of host national occupants.

Personal Integrity

ICCPR’s article 9 reads, “Everyone has the right to liberty and security of person.”¹⁴³ The American convention echoes that sentiment, ensuring that “Every person has the right to security and personal liberty.”¹⁴⁴ The ECHR states substantially the same as both the ICCPR and the ACHR.¹⁴⁵ The right enunciated in each of these clauses strikes at one of the most sensitive and prevalent crimes seen in post-conflict situations: disappearances.

¹⁴¹ *Id.*, 20.

¹⁴² ICCPR, art. 7.

¹⁴³ *Id.*, art. 9, ¶ 1.

¹⁴⁴ ACHR, art 7, ¶ 1.

¹⁴⁵ ECHR, art. 5, ¶ 1

Disappearances prompted the *Velasquez* watershed which first articulated the affirmative obligations placed upon governments discussed in this essay.¹⁴⁶ The European Court, in addition, agreed in *Kurt v. Turkey* that the state must investigate disappearances, and that not doing so constitutes a violation of the right to liberty and security of person.¹⁴⁷ The UNHRC has agreed, finding in *Atachahua v. Peru* that the violent removal by state agents and subsequent failure to investigate the whereabouts of Laureano Atachahua constituted a violation of the right to liberty and security of person.¹⁴⁸

While the *Kurt* and *Atachahua* decisions both focused specifically on a disappearance involving state actors, there is no reason why the right to liberty and security of person giving rise to an investigatory obligation should be limited only to situations where state officials were involved.¹⁴⁹ *Velasquez*, poignantly, makes clear that a state's obligation to investigate applies regardless of whether the state or a private actor is the potential wrong-doer.¹⁵⁰ The UN and the ECHR agree.¹⁵¹

¹⁴⁶ See generally, *Velasquez*.

¹⁴⁷ *Kurt v. Turkey*, 1998-III Eur. Ct. H.R., ¶¶ 128-129 (May 25, 1998).

¹⁴⁸ *Atachahua*, ¶ 8.6.

¹⁴⁹ *Kurt*, ¶¶ 128-129.

¹⁵⁰ *Velasquez*, ¶ 177 (stating, "Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.")

¹⁵¹ See *supra*, n. 79. Cf. *supra* n. 81.

Thus, disappearances offer yet another example of a crime against human rights that an occupying power is obligated to prevent, investigate, and punish in accordance with international law. Inaction in the early days of occupation ultimately shrouds nascent illicit actors in a veil of impunity. In Iraq, the widespread disappearances that began in 2003 and only escalated after the transition provide an unsettling example of such a problem.¹⁵² Numerous examples of such impunity are also evident in the everyday life of Afghans.¹⁵³

U.S. OBJECTIONS

Military officials may argue that this understanding of IHL and HRL obligations expands the mission beyond reasonable bounds and places too many responsibilities on limited forces. Indeed, the responsibility lies with policymakers to recognize the full weight and obligations created by international law, and to provide sufficient resources to the military to perform the functions it must perform in order to adhere to international norms.

¹⁵² Peter Beaumont, *Frontline police of new Iraq are waging secret war of vengeance*, GUARDIAN, November 20, 2005 available at <http://www.guardian.co.uk/world/2005/nov/20/iraq.theobserver>.

¹⁵³ See *infra*, n. 46.

The U.S. military has also maintained that it is not subject to the obligations imposed by the ICCPR in extraterritorial settings.¹⁵⁴ It maintains that IHL is *lex specialis* that operates to the exclusion of HRL.¹⁵⁵ For several reasons, however, that logic hardly seems to offer sufficient response to the obligations to maintain public order and safety as outlined above. Indeed, as the foregoing discussion has made clear, Article 43 offers only a vague impression of government obligations that HRL can animate in greater detail. The U.S. Army's Operational Law Handbook, moreover, recognizes that those aspects of human rights law that rise to the level of customary international law are considered obligatory, but does not pass on what qualifies as customary international law.¹⁵⁶ Moreover, general rejection of obligations in addition to IHL during occupation is out of step with the statements and decisions of international bodies such as the UNHRC and the ICJ, which support potential extraterritorial validation.¹⁵⁷ Finally, respected experts such as Thomas Buergenthal, now an ICJ jurist, have made clear that ICCPR obligations apply to any territory within a state's jurisdiction (or authority).¹⁵⁸

¹⁵⁴ Cerone, n.209.

¹⁵⁵ Center for Law and Military Operations, Rule of Law Handbook: A Practitioner's Guide for Judge Advocates, 79-80 (2008).

¹⁵⁶ International and Operational Law Department, Operational Law Handbook, 41 (2009).

¹⁵⁷ See supra n. 87, n. 88.

¹⁵⁸ Buergenthal, 73-74.

Moreover, it is quite simply untenable to maintain that a state should recognize ICCPR rights within its own borders, but not within the borders of another state where it exercises governing authority. To do so would be to relegate the rights of other nationalities to an imagined substratum that the very *raison d'être* of an international covenant denies.

Most importantly, however, because the occupying authority inherits the authorities and obligations of the legitimate government, an occupying power such as the U.S. cannot escape its international obligations through an extraterritoriality exception argument.¹⁵⁹ Through occupation, the occupier is responsible to uphold essential rights through the updated reading of IHL espoused in this article, but also due to its inheritance of the Conventional obligations of the previous authorities of the occupied territory. In that respect, it is interesting to note that both Iraq and Afghanistan have ratified or acceded to the ICCPR; in 1971 and 1983, respectively.¹⁶⁰

¹⁵⁹ See *supra* n. 92-93.

¹⁶⁰ UN Database, Status of Treaties, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

CONCLUSION

This article has established that occupying forces have an obligation to ensure and respect the rights to life, privacy, property, and bodily integrity. This obligation must be embraced as part of a comprehensive reading of IHL and HRL. While Article 43 of the Hague Convention (IV) provides an incomplete directive to occupying forces that has been sparsely addressed in a succeeding century of war, modern notions of HRL provide the necessary complement which enable a fuller understanding of the global meaning of public order and civil life.