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The Laws of Occupation and Commercial Law Reform in Occupied Territories: A Rejoinder to Eyal Benvenisti

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I thank Professor Benvenisti for his response to my article and hope that this discussion will be helpful and fruitful. Nevertheless, I concur with Pictet that Article 43 of the 1907 Hague Regulations¹ ‘imposes obligations of a general nature on the Occupying Power’, while Article 64 of the IV Geneva Convention² contains a specific exception for penal legislation.³ Therefore, Article 43 HR still remains the applicable norm regarding commercial law reform in occupied territories.

Space constraints restrict my rejoinder to the following comments:

1. The interpretation given by the UK Attorney-General in his leaked Confidential Note of March 2003 was also confirmed by the then Legal Adviser to the Foreign and Commonwealth Office (FCO), Michael Wood.⁴ Wood’s statement (applying Article 43 HR to ‘commercial’ reforms and Article 64 GCIV to ‘penal laws’) was in similar terms to (i) a Memorandum sent in April 2003 by the FCO to the Committee on Foreign Affairs of the House of Commons,⁵ and (ii) a note sent by Wood in February 2003 to the then Foreign Secretary, Jack Straw, who stated in January 2011 that ‘his understanding of the UK’s responsibilities, as an occupying power’ was based on such a note.⁶ In fact, British Military Manual of 2004, section 11.57, almost literally transcribes paragraph (2) of Article 64 GCIV only in relation to ‘criminal law’, while it still keeps applying Article 43 HR to the modification of existing law or promulgation of new law (section 11.25, in particular, footnotes 51 and 53).

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¹ Hereinafter, Art. 43 HR.

² Hereinafter, Art. 64 GCIV.

³ Pictet, *Commentaire: IV La Convention de Genève relative a la protection des personnes civiles en temps de guerre* (1956), at 617.

⁴ Second Statement, 28 Jan. 2010, at para. 9.

⁵ <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfaif/405/3042902.htm>.

⁶ Statement by Jack Straw, at 24.

Similarly, the Spanish Manual of the Law of Armed Conflicts,⁷ when commenting on the legislative powers of occupants, distinguishes between Section 2.7.b (1), regarding local laws in general (to which Article 43 HR applies), and 2.7.b(2), regarding criminal law in particular (which refers only to Article 64 of the GCIV). The ICRC's manual for training armed forces makes the same clear separation.⁸

Regarding the Canadian and US military manuals, neither of them expressly asserts that Article 64 GCIV applies to non-penal law. They just contain a joint reference to both Articles 43 HR and 64 GCIV in relation to changing local laws (penal and non-penal). Were Article 64 GCIV to be applicable to any change of local laws (including non-penal laws), the reference to Article 43 HR would not have been necessary.

2. Benvenisti further suggests that my article 'misunderstands the description by Haksar' and that 'there is not a mention of penal law in sight' in Haksar's presentation. However, Haksar refers to cases 'where the Occupying Power could change the penal laws'. He uses the terms 'change' (not merely 'suspension' or 'repeal' as in paragraph (1) of Article 64 GCIV) and 'penal'.

3. Finally, Benvenisti emphasizes that, contrary to the 1907 Hague Regulations, the IV Geneva Convention seeks to protect civilians and not to preserve the institutions and laws of the ousted sovereign. While such premise is correct, it must be stressed that the protection of the '*status quo*' of the commercial legislation in the occupied territory (enshrined in Article 43 HR), also seeks to protect important rights of the occupied population (and not merely the ousted government): the internal right of self-determination of the occupied population, that is, the right of the occupied population freely to choose its own economic system and policy without external pressure or interference.

The 'internal' facet of the right to self-determination (the application of which extends beyond colonialism⁹) was codified in Article 1 of the 1966 International Covenants on Civil and Political Rights (ICCPR) and Economic, Social, and Cultural Rights (ICESCR);¹⁰ the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation (unanimously adopted by the UN General Assembly);¹¹ Article 1 of the Charter of Economic Rights and Duties of States (adopted by the UN General Assembly by a vote of 120 in favour, 10 abstentions, and 6 against);¹² Principle VIII of the Helsinki Declaration (contained in the Final Act of the Conference on Security and Cooperation in Europe, which was signed by 34 European states and the US); Article 20.1 of the African Charter on Human and Peoples' Rights¹³ (ratified by 53 African states).

Furthermore, in 1986, the ICJ highlighted in the *Nicaragua* case that 'every State possesses a fundamental right to choose and implement its own political, economic

⁷ 1st Vol., 2nd edn, in force since 2 Nov. 2007.

⁸ ICRC, *The Law of Armed Forces: Teaching File* (2002), ch. 9 (Belligerent Occupation), at 6–7.

⁹ Separate Opinion of Judge Higgins in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 214, at para. 29; ILC Report on the work of its 40 session, 1988, UN Doc A/43/10, at para. 266.

¹⁰ 993 UNTS 171 and 993 UNTS 3, respectively. Both International Covenants were adopted by UN GA Res 2200 (XXI).

¹¹ Res 2625 (XXV).

¹² Res 3281 (XXIX).

¹³ 1520 UNTS 217.

and social systems'.¹⁴ And, more recently, in July 2009, the UN General Assembly endorsed the outcome of the Conference on the World Financial and Economic Crisis and its Impact on Development,¹⁵ which recognized the continued importance of 'national ownership of policies and strategies'.¹⁶ Nowadays, it could even be argued that the core of the internal right to self-determination (that the will of the administered population is the only valid legal authority to establish the economic system and policy of a territory), is considered a *jus cogens* norm.¹⁷

This right is duly complemented by the corresponding obligation imposed on the occupying power to respect such internal decision.¹⁸ In fact, the body in charge of monitoring the implementation of the ICESCR expressly highlighted in its General Comment No. 8 that 'when an external party takes upon itself even partial responsibility for the situation within a country (whether under Chapter VII of the Charter or otherwise), it also unavoidably assumes a responsibility to do all within its power to protect the economic, social and cultural rights of the affected population'.¹⁹

The right to internal self-determination is not vested in the nominal government but in the administered population, which is the holder and not the mere beneficiary of the right. Therefore, even if the ousted government collapsed, the people of the occupied territory would still be entitled to the right of internal self-determination, which is

¹⁴ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA)* [1986] ICJ Rep 14, at para. 258.

¹⁵ UN Doc A/RES/63/303, July 2009.

¹⁶ *Ibid.*, at 6, paras 18 and 19.

¹⁷ Separate opinion of Judge Ammoun, *Barcelona Traction* case ([1970] ICJ Rep 72); H. Gros Espiell, Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Human Rights Commission, UN Doc E/CN.4/Sub.2/405/rev.1, at 12; ILC Commentaries to ASR Art. 40, UN Doc A/56/10, at 113; ILC Report on 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', UN Doc A/CN.4/L.682, at 185, para. 367; pronouncements of various states in the UN GA regarding the Draft Arts on the Law of Treaties [Official Records, First Session, A/CONF.39/11 (statements of the USSR, Sierra Leone, Ghana, Cyprus, Romania and Czechoslovakia), and Second Session, A/CONF.39/11.Add.1 (statements of Poland, Byelorussia, Ecuador, Cuba and Ukraine)] and in 1970 regarding the Declaration on Friendly Relations (GAOR, 25th session, Sixth Committee, UN Doc A/C.6/SR.1180, statements of Iraq, Ethiopia, and Trinidad and Tobago and UN Doc A/C.6/SR.1181, statement of Greece); statement of Prof. G. Sperduti, acting in his capacity as Italian delegate to the UN Human Rights Committee, UN Doc E/CN.4/SR.1300, at 91; in its memorial in the Case Concerning the *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Guinea-Bissau contended that not only the right to self-determination but also its 'accompanied corollaries' had the character of belonging to *jus cogens* (83 ILR (1990) 24); written statements in the *Wall* case: Jordan (51, at paras 5.37 and 5.46–5.50), the League of Arab States (at 62, para. 8.2), South Africa (at 11, para. 25), and Saudi Arabia (at 3, para. 4.vi); written statement of The Netherlands, 17 Apr. 2009, in the ICJ case concerning *Accordance with International Law of the Unilateral Declaration of Independence*, at 7, para. 3.2, available at: www.icj-cij.org/docket/files/141/15987.pdf.

¹⁸ M. Diezzz de Velassco, *Instituciones de Derecho Internacional Público* (2007), at 182. According to Cassese (*Self-Determination of Peoples: A Legal Reappraisal* (1995), at 55), it follows that Art. 1 of the 1966 International Covenants prohibits contracting states from occupying the territory of another contracting state in such a manner as to deprive the occupied population of its internal right of self-determination. Similarly, see Cohen, 'The Role of International Law in Post-Conflict Constitution-Making: Toward a Jus Post Bellum for Interim Occupations', 51 *NY Law School L Rev* (2006–2007) 497, at 525–526.

¹⁹ UN ICESCR, General Comment No. 8, 'The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights', UN Doc E/C.12/1997/8, at para. 13.

considered to be a ‘permanent’ or continuing right.²⁰ Only the occupied population is legally entitled to decide and legislate on its own economic transition process and economic policy, which cannot be imposed by outsiders (even if it is for the alleged benefit of the administered population). People own the right to take an active role in their ‘self-transformation’²¹ or ‘self-imagining’.²²

Therefore, the strict preservation (pursued by Article 43 HR) of the *status quo* of commercial legislation in the occupied territory is consonant with the protection of the right to internal self-determination of the occupied population. In fact, the latter could be considered an evolution of the former.

²⁰ Comment made by Urquia, Chairman of the Drafting Committee on Art. 1, UN Doc A/C.3/SR.668, at para. 3.

²¹ Stiglitz, ‘Whither Reform? Ten Years of the Transition’ (1999), available at: <http://siteresources.worldbank.org/INTABCDEWASHINGTON1999/Resources/stiglitz.pdf>.

²² Koskenniemi, ‘Occupation and Sovereignty – Still a Useful Distinction?’, in O. Ehdahl and P. Wrangé, *Law at War: The Law as it Was and the Law as it Should Be* (2008), at 174.