The Protection of (Foreign) Investment during Belligerent Occupation – Considerations on International Humanitarian Law and International Investment Law

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A. Introduction

An outbreak of hostilities disrupts day-to-day life in the affected State or region, posing a considerable challenge to both legal and contractual relations of the involved States. While complex situations of conflict generally endanger the rule of law and hamper the allocation of rights and duties as well as their practical implementation, it is the disruption and takeover of control by another sovereign State that poses an even more serious legal obstacle to the maintenance of regular State functions, including the protection of investment. The state of occupation requires a thorough analysis of the continuity or renunciation of legal relations between the occupied State, the occupying State and (foreign) private investors.

During conflict, investments are often the target of hostile action or collateral damage, resulting in the destruction, seizure or, broadly phrased, loss of value of the investment in question.[1] IHL aims at regulating the conduct of hostilities and restricts or reduces damages to civilians and civilian objects by prohibiting direct attack or destruction. Its regulation of the protection of investment in general and the protection of investment during occupation, however, is far from undisputed; moreover, situations of occupation in recent years have illustrated the need for legal certainty on the interpretation and application of IHL. In particular, the powers of the occupying State to control or change the economic landscape in the

1 Ofilio Mayorga, 'Occupants, Beware of BITs: Applicability of Investment Treaties to Occupied Territories' (2017) 19 Palestine Yearbook of International Law 1, 2 (hereafter Mayorga, 'Occupants, Beware of BITs').

occupied territory must be further examined, as, so far, no coherent practice on the economic legislative powers of an occupying State has emerged.[2]

IHL governs conduct during occupation; yet, it is investment law, most commonly in the form of BITs, which contains more specialised regulations for the matter at hand. International investment law has quickly evolved over the last decades and provides mechanisms aimed at the protection of investment and means of remedy both in times of conflict and violence. Therefore, with the help of factual examples, this contribution firstly analyses the protection of (foreign) investment in situations of occupation under IHL; secondly, it takes a closer look at the specific regime of BITs, their applicability during conflict and their interaction with the laws of occupation.

B. The Laws of Belligerent Occupation and the Protection of (Foreign) Investment

The laws of belligerent occupation cover a wide array of specific aspects occurring during occupation, of which the protection of (foreign) investment is only a minor, yet heavily debated one. Recent occurrences of situations of occupation, (un)lawful interventions and potential annexations highlight the need for providing legal clarity on both the means of protection and means of remedy. Occupation itself is not considered a permanent transfer of sovereignty in a territory; however, the recognition of a state of occupation is often a highly politicised matter. Therefore, as a first step, this paper highlights how the legal regime is applied in situations of occupation.

I. The Recognition of a State of Occupation and the Application of its Specialised Regime

When examining a state of occupation, one must be aware that, prior to the codification of modern IHL, a diametrical understanding of occupation was promoted. This entailed that, when the occupant took over powers as a

2 Robert Tadlock, 'Occupation Law and Foreign Investment in Iraq: How an Outdated Doctrine Has become an Obstacle to Occupied Populations' (2004) 39 The University of San Francisco Law Review 227, 245 (hereafter Tadlock, 'Occupation Law and Foreign Investment in Iraq').

conqueror, he emerged as the new rightful owner of the territory and, therewith, as the new sovereign. Yet, the prominent codification processes which took place at the turn of the century changed this perception: 'As the nineteenth century drew to a close, the distinction between conquest and military occupation had been firmly established,'[3] the latter being regarded merely as a phase of temporary change of *de facto*, but not *de jure* powers within a State territory. In this understanding, State sovereignty basically remained untouched despite the occurring transfer of control. Thus, occupation is not to be understood as the acquisition of a legal title over an occupied territory, but as the military ruling and exercise of administration in and over a, or parts of a, foreign State without consent of its sovereign. This conflict between two or more sovereign entities – one holding *de facto* powers, one holding *de jure* powers and none holding both – elucidates its integration into the laws of international armed conflict. Art. 1 (4) AP I reflects this understanding as it encompasses:

> situations … includ[ing] armed conflicts in which people are fighting against colonial domination and *alien occupation* and against racist regimes in the exercise of their right of self-determination …

In temporal terms, the point of time in which an occupation began is decisive in identifying the application of the corresponding legal regime. The main treaties of reference in this matter are the Convention Respecting the Laws and Customs of War on Land of 17 October 1907, the Geneva Convention relating to the Protection of Civilian Persons in Times of War of 12 August 1949 and AP I.[4] In Art. 3, AP I explicitly holds that the protocol is applicable:

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3 Romulus A. Picciotti, 'Legal Problems of Occupied Nations after the Termination of Occupation' (1966) 33 Military Law Review 25, 29.

4 Beyond the application of treaty law, customary IHL must also be referenced and analysed in order to establish differences between the two. The corpus of the GC IV has been transformed into customary IHL as broadly, and among others, acknowledged in the prominent ICTY's *Tadic* Judgment: 'The extensive codification of humanitarian law and the extent of the accession to the resultant treaties … have provided the international community with a corpus of treaty rules the great majority of which had already become customary …', *Prosecutor v Tadic* (Judgment) [1997] IT-94-1-T, para 577. See also Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, para 79. 'Under customary international law, this duty begins once a stable regime of occupation has been established, but under the Geneva Conventions, the duty attaches as soon as the occupying force has any relation with the civilians of that territory, that is, at the soonest possible

> … (a) from the beginning of any situation referred to in the aforementioned Article 1 and (b) shall cease, in the territory of parties to the conflict, on the general close of military operation and, in the case of occupied territories, on the termination of the occupation except, in either circumstances, for those persons whose final release, repatriation or re-establishment takes place thereafter …

The change of control over the respective territory is the key question by virtue of Art. 42 Hague Regulations, which states that the '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'.

It is this takeover of factual control, irrespective of the lawfulness of the original deployment of armed forces or motives behind the engagement in hostilities, which triggers the application of the laws of belligerent occupation.[5]

The ICRC asserts that

> [t]here is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets.[6]

While the focus on the factual change of control over territory aims at ensuring the application of the pertinent laws irrespective of the official position of actors involved, the fluid and highly politicised nature of situations of occupation *per se* nonetheless hampers the smooth transition to the occupation regime. For this reason, it is essential that IHL underlines the general and broad renunciation of official declarations in favour of the factual situation.[7] Positions brought forward by the State Parties, including any denial of a situation of occupation, are irrelevant for the legal finding

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moment, a principle that finds reflection in U.S. military policy.'; Human Rights Watch, 'International Humanitarian Law Issues In A Potential War In Iraq' (*Human Rights Watch Briefing Paper*, 20 February 2003) <http://www.hrw.org/backgrounder/arms/iraq0202003.htm> accessed 08 October 2017.

5 Frederic Kirgis 'Security Council Resolution 1483 on the Rebuilding of Iraq' (*ASIL Insight*, 2003) <https://www.asil.org/insights/volume/8/issue/13/security-council-resolution-1483-rebuilding-iraq> accessed 11 March 2004.

6 Jean S. Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary*, vol. IV (Geneva 1958) 60 (hereafter Pictet, *Commentary*).

7 Art. 2 AP I: '... the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.'

and, thus, do not relinquish any arising obligations – at least in theory. The dispute over Ukraine in recent years and, more specifically, the status of Crimea between annexation, occupation and secession has illustrated the difficulties in both, ascertaining a certain legal status and demanding a subsequent application of law.[8]

Art. 1 (4) AP I furthermore emphasises that the occupation itself need not be armed; however, it is triggered when resistance against the occupation arises which could lead to active hostilities. Moreover, Art. 2 (2) GC IV applies 'to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance'. This clarification allows it to encompass various situations, whether the control over territory stems from foreign military superiority or from foreign control through a puppet regime.[9] This broad scope of application is required to trigger the resulting obligations for the occupant while exerting its *de facto* control over the foreign territory.

II. The Protection of Private Property during Occupation

The international law of belligerent occupation contains general obligations concerning the security and basic necessities – such as food, medical supplies, or the provision of electricity – of the civilian population in the occupied territory. As such, it also aims at reconciling the disputed interests of the occupant, the occupied State and the population residing in the territory in question.[10] Art. 47 GC IV lays down the general obligation that

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

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8 Hans-Joachim Heintze, 'Völkerrecht und Sezession – Ist die Annexion der Krim eine zulässige Wiedergutmachung sowjetischen Unrechts?' (2014) 27 J. Int'l L. of Peace & Armed Conflict 129.

9 Eyal Benvenisti, *The International Law of Occupation* (2nd edn, OUP 2012) 4 (hereafter Benvenisti, *Law of Occupation*).

10 Christopher Greenwood, 'Book Review and Note: The International Law of Occupation by Eyal Benvenisti' (1996) 90 AJIL 712.

The 1907 Hague Regulations, while not directly referring to investment, codifies the general respect for private property and the prohibition of confiscation in Art. 46: 'Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated'. Furthermore, Art. 47 Hague Regulations generally prohibits pillage, and Art. 33 (2) GC IV[11] states that, 'Pillage is prohibited. (3) Reprisals against protected persons and their property are prohibited'.

Examples of the protection of private property during occupation can already be found in early investment disputes, such as the *Lighthouse Concession* Arbitration of 1956. The case concerned a lighthouse operated by a French company for which it held concessions granted by the Ottoman Empire in 1860. The lighthouse was located on territory that was later occupied by Greece. The tribunal set up decided that the occupying power, Greece, had to respect existing commercial rights in light of Art. 46 Hague Regulations, which were established by the concession contract of the occupied State prior to the occupation. Therewith, Greece was obliged to pay dues for its ships to the French company.[12]

The fundamental prohibition of IHL to directly attack civilians and civilian objects, in conjunction with the prohibition of disproportionality in targeting operations, offers a general protection mechanism for investments, both national and foreign, covering factories, offices, vehicles and any other form of assets.[13] One can generally presume that staff is

11 Generally, the GC IV in this regard operates with a limited scope of application to individuals, linking its provisions to protected persons as defined by Art. 4: 'those, who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.' The commentary elaborates on this provision as referring to the whole population of the territory, which also includes foreign investors. See, Mayorga, 'Occupants, Beware of BITs' (n 1) 44 et seq. Arai argues that, if the home State of the investor maintains regular relations with the occupying power, then these cannot be considered 'protected persons', Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Martinus Nijhoff Publishers 2009) 306 (hereafter Arai-Takahashi, *The Law of Occupation*).

12 Administration of Lighthouses Arbitration (*France v Greece*) (Award) [1956] RIAA 155, para 201 et seq.

13 Art. 48 AP I, Art. 13 AP II, Art. 51 (4) and (5) AP I, Art. 51 (5) (b) and Art. 57 (2) (a) (iii) AP I.

considered civilian and is therefore protected; moreover, factories, offices and equipment such as vehicles are classified as civilian objectives unless they change their nature during hostilities.[14] This change in classification has more than often resulted in arbitration and compensation claims following an attack.[15] The GC IV in Art. 53 ascertains that

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

Moreover, Art. 52 Hague Regulations equally holds that no interference should be made unless it is of use for military purposes of the occupying military, as stated in the following:

> Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

The limitation of the protection granted is the test of military necessity.[16] This rationale stems from the attempt to separate the sphere of hostilities between the conflict Parties from the daily life and its procedures in the affected territory.[17] In the 1921 *Cessation of Vessels and Tugs for Navigation on the Danube* case, Arbitrator Hines proclaimed that '[t]he purpose of the immunity of private property from confiscation is to avoid throwing the burdens of war upon private individuals, and is, instead, to place those burdens upon the States which are the belligerents.'[18]

The protection of single or individual property, both national and foreign, is only one aspect of the broader issue of the protection of investment during occupation; there have been numerous incidents and disputes over economic intervention during occupation in past years. These illustrate not

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14 Horace Robertson, The Principle of Military Objective in the Law of Armed Conflict (1997) 8 Journal of Legal Studies 35.

15 Ofilio Mayorga, *Arbitrating War: Military necessity as a defense to the breach of investment treaty obligations* (Program on Humanitarian Policy and Conflict Research, Harvard University 2013).

16 For the debate on the interpretation of military necessity, see Katja Schöberl and Linus Mührel, 'Sunken Vessel or Blooming Flower? Lotus, Permissions and Restrictions within International Humanitarian Law' in this volume 59, 73 et seqq (hereafter Schöberl and Mührel, 'Sunken Vessel or Blooming Flower?').

17 Arai-Takahashi, *The Law of Occupation* (n 11) 238.

18 *Cessation of Vessels and Tugs for Navigation on the Danube River* (Award) [1921] 1 RIAA 97, para 107 et seq.

only the importance of the protection of property as such, but rather the importance of more generally clarifying the status of law during occupation and the status of existing contractual relations.

III. Occupation, Law and Foreign Investment

The focus of this contribution does not solely lie on the protection of investment, but is concerned more specifically with foreign investments in occupied territory. Therefore, the status of existing laws in occupied territory as well as the power of the occupant to engage in substantive legislative changes is addressed in the following.

1. The status of law and the legislative powers of the occupant

Early during the negotiation and drafting processes at the Hague Peace Conference, the newly envisaged role of the occupant for modern IHL was debated. The later codified position of the *de facto* powers in occupied territories originated from a small group of States that strongly elaborated on their interests at the 1899 Conference – a group of States fearing potential future occupation.[19] Their goal was to introduce obligatory language to the developing occupation regime rather than to acknowledge or even strengthen any rights of occupying States.[20] The *travaux préparatoires* emphasised that

> … it has been formally said that none of the articles of the draft can be considered as entailing on the part of the adhering States the recognition of any right whatever in derogation of the sovereign tights of each of them, and that adhesion to the regulations will simply imply for each State the acceptance of a set of legal rules restricting the exercise of power that it may through the fortune of war wield over foreign territory or subjects.[21]

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19 See the delegates debating at the Sixth, Seventh and Eighth Meeting, James Brown Scott, *The Proceedings of the Hague Peace Conferences: Translations of the Official Texts: The Conference of 1899* (OUP 1920) 503 (hereafter Scott, *The Proceedings of the Hague Peace Conferences*).

20 See also Schöberl and Mührel, 'Sunken Vessel or Blooming Flower? (n 16) 71 et seq.

21 Report annexed to the minutes of the Fourth Meeting, 5 July 1899 in Scott, *The Proceedings of the Hague Peace Conferences* (n 19) 418.

Art. 43 Hague Regulations is the main result of this successful attempt and contains the regulation on the distribution of power and entailing rights during occupation:

> 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.[22]

Generally, the obligation is considered as one of means rather than of result due to the special situation of occupation as well as the limited resources and powers of the occupying State.[23] The Article reflects the basic understanding that the state of occupation should disrupt the regular life in the occupied territory as little as possible. It represents a call for continuity – one that was already recognised as customary in nature at the International Military Tribunal in Nuremburg.[24]

While the more prominent way to ensure public order and safety is through criminal prosecution[25] and law enforcement operations, for the matter at hand, the occupying power's rights and obligations concerning 'the law in force' in the economic context is of greater relevance. As such, Art. 43 Hague Regulations acts as a means to restrain the occupying power.[26] The term 'laws in force in the country' is commonly perceived as a broad term, which does not solely cover legislation but, with minor exceptions, also the whole legal system.[27] This understanding is reflected in the longstanding (academic) debate over the scope of the Articles in question.

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22 See Benvenisti, *Law of Occupation* (n 9) 8.

23 Marco Sassòli, *Article 43 of the Hague Regulations and Peace Operations in the Twenty-First Century* (Background Paper prepared for the Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Cambridge, 25-27 June 2004) 4 (hereafter Sassòli, *Article 43 of the Hague Regulations*).

24 'Trial of the Major War Criminals, International Military Tribunal in Nuremberg' reprinted in (1947) 41 AJIL 172, 248 et seq.

25 The limiting factors for the power of the occupying party were subsequently codified in GC IV, most prominently in Articles 66-74 on Penal Legislation and Procedure.

26 Sassòli, *Article 43 of the Hague Regulations* (n 23) 4 et seq.

27 Ibid, 6, with reference to Benvenisti, *Law of Occupation* (n 9) 16. See further Ernst Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Carnegie Endowment for International Peace 1942) (hereafter Feilchenfeld, *International Economic Law*).

The GC IV addresses this approach in Art. 64:

> The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention …

In contrast to the Hague Regulations, the GC, however, explicitly refers to 'penal laws' rather than relating to the laws generally in force in the territory. For this reason, a dispute over its legal scope has arisen. In contrast to the above proclaimed rationale to restrict the (legislative) powers of the occupant, the terminology of Art. 64 GC IV can be interpreted as less restrictive, even as 'extensive and complex'[28]. While some stick to the exact wording and therewith support the strict reference to 'penal law', others opt for a broader and more encompassing interpretation, one that includes administrative and civil laws in force in the occupied territory. Art. 64 (2) GC IV backs up this argument as it solely refers to 'provisions' rather than to repeat the penal law wording of the previous paragraph.[29] *Benvenisti* promotes this idea of a conscious omission of reference and emphasises the broad reading of both paragraphs as referring to all types of laws.[30] Similarly, *Dinstein* argues that 'logic dictates that Art. 64 should be construed as applicable, if only by analogy, to every type of law (including civil or administrative legislation)'[31]. Moreover, the Pictet Commentary on Art. 64 underlines that

> [t]he idea of the continuity of the legal system applies to the whole of the law (civil and penal law) in the occupied territory. The reason for the Diplomatic Conference making express reference only to respect for penal law was that it had not been sufficiently observed during past conflicts; there is no reason to infer a contrario that the occupation authorities are not also bound to respect the civil law of the country, or even its constitution.[32]

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28 Pictet, *Commentary* (n 6) 335.

29 Sassòli, *Article 43 of the Hague Regulations* (n 23) 6.

30 Benvenisti, *Law of Occupation* (n 9) 102 et seq, with reference to the Final Record of the Diplomatic Conference of Geneva of 1949 (1950), iii, at 139 et seq. For a very strong counter argumentation based on the *travaux préparatoires*, the Commentaries to the Convention and subsequent ICJ Advisory Opinions, see Jose Alejandro Carballo Leyda, 'The Laws of Occupation and Commercial Law Reform in Occupied Territories: Clarifying A Widespread Misunderstanding' (2012) 23 EJIL 179 (hereafter Leyda, 'Laws of Occupation').

31 Yoram Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) 111.

32 Pictet, *Commentary* (n 6) 335.

The Article generally enshrines the obligation to respect and uphold existing legislation and contractual obligations of the occupied State. This not only acts in favour of the affected population, but it could equally provide security for foreign investors and their contractual relations in the territory. The major downside to the debate over the laws is the following: while the above referenced attempts to expand the scope of 'the laws in force' are an endeavour to expand protection from the occupant and limit his powers, they can also act as a door-opener to empower the occupant, not only to change the 'penal laws' but also to make changes to 'every type of law'.

The Article entitles the occupant to make alterations to the law. However, this power is limited, as it allows the occupant to introduce legislation in order to maintain or even enhance civil welfare. The maintenance of an orderly government is the explicit goal incorporated in paragraph two; the longer a situation of occupation exists, the more pressing additional legal changes might become in order to avoid a failing and disruption of governance in the territory.[33]

While it is generally considered that small interventions in the inherent nature of an economy can be initiated by the occupant, the definition and identification of the 'absolutely necessary' remains highly disputed and gives leeway for arbitrariness.[34]

2. The occupant's powers and the welfare of the population in the occupied territory

The abrogation of existing laws as well as the introduction of new laws can be instruments of drastic economic and political transformation in occupied territories – changes that depend on the occupant's general understanding of economic development, or specific positions towards protectionism, market liberalisation or global economic interaction.

The occupant is 'allowed to evaluate the modality and extent of investments in occupied territories, while bearing in mind the duty to ensure the welfare of inhabitants in that territory'.[35] The regulations both in the Geneva Conventions and the Hague Regulations encompass a balancing act

33 Sassòli, *Article 43 of the Hague Regulations* (n 23) 15. For example, see tax regulations as addressed under Art. 48 Hague Regulation.
34 Leyda, 'Laws of Occupation' (n 30) 188.
35 Arai-Takahashi, *The Law of Occupation* (n 11).

between the powers of the occupant as a permissive element and the welfare of the affected population as a restrictive element. Establishing when a balanced situation is achieved and defining what constitutes the welfare of the population, however, leaves a wide margin of discretion as well as options for unilateral change and intrusion.

In principle, Art. 55 Hague Regulations seems to contradict a too permissive reading by depicting the occupant 'only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country'[36]. Nonetheless, Art. 43 Hague Regulations may provide an exception to such a 'conservationist premise'[37] as it entitles the occupying power to introduce changes for a specific purpose, for instance the improved welfare of the population. In particular, introducing new laws that affect the territory's economy – for instance through the negotiation of new foreign investments – may follow such a purpose. The pertinent regulations remain silent on the explicit issuing of new investments. Already in 1957, *von Glahn* considered that granting investments is not *per se* a breach of the law of occupation as long as it does not exceed the time of the occupation.[38]

Examples of this balancing act and the role of the occupying power in investment matters can already be found in early case law. For instance, arbitrary tribunals in Belgium decided on the economic and legislative powers of the occupant, Germany, after the First World War. In 1920, the Brussels Court of Appeal upheld a decree on the regulation of excessive pricing of produce introduced by Germany, stating that the latter had 'acted in the place of the legitimate authority which for the time being had been ousted, and in conformity with the provisions of Art. 43'[39]. In 1925, it argued that 'the circumstances of war-times, and particularly the increase of cost in raw materials and the necessity for providing the needs of the population, in fact justified the measures taken by the occupying authority'[40]. Rulings from the post-Second-World-War era addressed

36 For a detailed discussion on the scope of Art. 55, see Separate Opinion of M. Séfériadés in *Lighthouses Case between France and Greece* (*France v Greece*) [1934] PCIJ (ser. A/B) No. 62, para 205 et seq.

37 Arai-Takahashi, *The Law of Occupation* (n 11) 169.

38 Gerhard Von Glahn, *The Occupation of Enemy Territory – A Commentary on the Law of Belligerent Occupation* (University of Minnesota Press 1957) 209.

39 *Bochart v Committee of Supplies of Corneux* (1920) No. 327, AD 1919-1922, quoted by Feilchenfeld, *International Economic Law* (n 27) 148.

40 *City of Malines v Societe Centrale pour L'Exploitation du Gaz* (1925) No. 362, AD 1925-26, quoted by Feilchenfeld, *International Economic Law* (n 27) 148.

similar issues. For example, the *Singapore Oil Stocks* case concerned oil concessions in Sumatra granted to Dutch companies by the Netherlands East Indies Government. Following the invasion by Japanese troops in February 1942, oil was exported to Singapore to further strengthen the Japanese war effort. The UK later seized parts of the oil in question when taking control over Singapore in 1945. Based on the Defence Compensation Regulation of 1940, owners were entitled to claim compensation by the UK. The legal dispute arose over the question of who held this entitlement: the Dutch companies, or the occupying power, Japan. In a first decision, the claim of the Dutch companies was rejected. Then, however, the Court of Appeal of Singapore reversed the decision.[41] The leading argumentation was related to Art. 53 Hague Regulations, which did not cover the exploitation of the oil by the Japanese troops as it was conducted without consideration of the local economy.[42]

Thus, the considerations on the rights of the occupant do not solely affect the abrogation or introduction of a single new piece of legislation, but are even more sensitive when affecting the economy of the occupied territory or the State as such.

3. Balancing in practice: the example of occupied Iraq

The situation of occupied Iraq following the conflict in 2003 is a major example when discussing the legality of alterations made by the occupant or, in the pertinent case, the occupying coalition.[43] The questionable aspect at stake in this context was the introduction of rather neoliberal ideas by the Coalition Provisional Authority (CPA) in Iraq, which aimed at opening the State to foreign investment.[44] The scope and necessity of changes to the Iraqi economic system and the resulting evaluation of the laws of occupation and potential changes to the domestic legal regime have

41 Martins Paparinskis, 'Singapore Oil Stocks Case' in MPEPIL (online edn, OUP April 2010).

42 *N.V. de Bataafsche Petroleum Maatschappij and Others v The War Damage Commission* (1956) 23 ILR 810 para 833 (Singapore Court of Appeal).

43 See Arai-Takahashi, *The Law of Occupation* (n 11) 171.

44 See the preamble of CPA Order 39: '*Noting* that facilitating foreign investment will help to develop infrastructure, foster the growth of Iraqi business, create jobs, raise capital, result in the introduction of new technology into Iraq and promote the transfer of knowledge and skills to Iraqis'.

triggered debates on the role of an occupying power.[45] In contrast to prior situations of factual occupation such as in the Palestinian territories, in Northern Cyprus, or the Falkland Islands, the belligerent occupying armed forces acknowledged their own status as an occupying power and the Security Council also determined the occupation as such. In May 2003, the UN SC under Art. 41 UN-Charter explicitly recognised 'the specific authorities, responsibilities, and obligations under applicable international law of these States as occupying powers' and their obligation to fully comply with 'the Geneva Convention of 1949 and the Hague Regulations of 1907' in particular.[46] The SC's Resolution 1483 reaffirmed that no transfer of sovereignty would take place and emphasised the 'right of the Iraqi people freely to determine their own political future and control their own natural resources.' The application of the legal regime of occupation was consequently undisputed, but the scope of the occupant's rights and obligations became a matter of discussion.

Were the changes introduced necessary or did they go beyond Art. 43 Hague Regulations, therefore violating it? Prior to the occupation, the Iraqi economy was characterised by limitations on foreign investment, for instance with respect to immovable property for non-Arabic foreign corporations, the investments of such more generally as well as their ownership of Iraqi companies specifically.[47] The CPA, however, introduced laws that led to inherent changes in the nature of the Iraqi economy. CPA Order 39 of 2003 is the primary example of such a transformed new legislation.[48] By replacing 'all existing foreign investment', the CPA attempted to comprehensively dismantle all barriers to foreign investment.[49] Foreign investors were provided with protection 'no less favourable than those applicable to an Iraqi investor'[50] and no longer experienced

45 For a very critical view of occupation practices that are limiting the occupied territories' development for instance in the case of Iraq, see Tadlock, 'Occupation Law and Foreign Investment in Iraq' (n 2).

46 UN SC Res 1483 (22 May 2003) UN Doc S/RES/1483.

47 US Department of Commerce, Overview of Commercial Law in Pre-War Iraq (12 September 2003) 1, 6 et seq <http://www.aschq.army.mil/supporting-docs/Iraqi_Comm_Law.pdf> accessed 08 October 2017.

48 In particular, the Companies Law 21 of 1997, available under International Labour Organization, Iraq, General provision <http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=83220&p_classification=01> accessed 14 October 2017.

49 CPA Order 39 (3) (1).

50 CPA Order 39 (4) (1).

restrictions regarding the percentage rate of full or partial ownership of Iraqi companies.[51]

With a transformation of this scope, the changes made are none that were restricted to the time of occupation, but rather shaped the economic system of the country far beyond the time of occupation. As such, they were criticised for 'completely overhaul(ing) Iraqi commercial law, in particular, its foreign investment law'[52]. Interestingly, the changes to the economic structure of Iraq constituted only one aspect of the attempt to induce an overall change in regime.[53] This undertaking, however, is exactly what IHL prohibits within its laws of occupation.[54]

C. The Role of Investment Law during Belligerent Occupation

IHL is not the only field of law that governs in times of conflict. While the law of occupation codifies regulations concerning the powers of the occupying State to enact or change existing (economic) laws, the field of investment law provides another angle on the status of foreign investment and its protection in occupied territories. The traditional instruments governing the protection of investment are BITs, the use of which has increased since the 1990s. BITs are agreements between two States regulating the terms and conditions of private investment of the respective State's nationals or companies in the other State's territory. Typically, these agreements contain treatment guarantees, protection regulations as well as recourse to an investor-State dispute settlement mechanism. During times

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51 CPA Order 39 (4) (2). Only minor limitations remained or were put in place, among other restrictions on foreign investments into the sectors of natural resources, banking and insurances, CPA Order 39 (6) (1).

52 Tadlock, 'Occupation Law and Foreign Investment in Iraq' (n 2) 242.

53 For a more detailed analysis, see Sir Adam Roberts, 'The End of Occupation in Iraq' (*IHLRI*, 2004) Section D on the transformative purpose of the occupation of Iraq <http://www.ihlresearch.org/iraq/feature.php?a=51> accessed 02 March 2017

54 Knut Dörmann and Laurent Colassis, 'International Humanitarian Law in the Iraq Conflict' (2004) 47 GYIL 293, 306 (hereafter Dörmann, 'International Humanitarian Law'). For a partially different argumentation concerning regime change and human rights violations, see Rüdiger Wolfrum, 'The Attack of September 11, 2001, the War Against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?' (2003) 7 Max Planck Yearbook of United Nations Law 1, 56.

of occupation, one can question whether and to what extent BITs are and remain applicable.

I. Bilateral Investment Treaties and their Application during Times of Conflict and Occupation

The general rule of public international law, *res inter alios acta,* emphasises that States are only bound by treaties that they have consented to.[55] This rule is codified in Art. 34 VCLT: '[a] Treaty does not create either obligations or rights for a third State without its consent'. In a situation of occupation, the occupying power itself is not a State Party to pre-existing BITs between the occupied State and third States. From the *res inter alios acto* rule, one could infer that the occupying power, since it had never consented to the treaty, is not bound by it. Does that mean that no obligations arise out of the BIT as such and is it only the occupied State, the original BIT host State – a party without effective control over the territory in which the investment is located – that must adhere to its obligations? Or does the law of occupation that renders the occupant the new administrator of the territory transfer these obligations to the occupant – without his direct consent?

The classical international law presumption concerning treaties during times of occupation stems from the traditional and clear-cut separation of the regime of law of peace and the regime of law of armed conflict.[56] Generally, one assumed a discontinuity of all existing treaties and State relations as IHL replaced all laws belonging to the law of peace.[57] This understanding of the relation of law of peace to the law of armed conflict has since changed. The Draft Articles on the Effects of Armed Conflict on

55 See Schöberl and Mührel, 'Sunken Vessel or Blooming Flower?' (n 16).

56 Arnold Pronto, 'The Effect of War on Law – What happens to their treaties when states go to war?' (2003) 2 Cambridge Journal of International and Comparative Law 227, 230.

57 Hans-Joachim Heintze, 'On the Relationship between Human Rights Law Protection and International Humanitarian Law' (2004) 86 IRRC 789, 790. The 1958 commentary of the Geneva Convention mirrors such an understanding by stating that the occupant 'is not bound by the treaties concerning the legal status of aliens which may exist', see Pictet, *Commentary* (n 6) 49.

Treaties[58] are illustrative of this development as they do not support the *ipso facto* termination support in Art. 3 treaty continuity. The general assumption of the continuity of treaties explicitly includes a situation of occupation, which they subsume under situations of armed conflict through Art. 2.[59]

In addition to this general assumption of continuity, the Draft Articles furthermore directly address treaties on finance as one type of treaty that continues to apply in the absence of any explicit and contradictory treaty clauses. This link to treaties of commerce is encompassed in the indicative list annexed to the Draft Articles and also includes contemporary BITs.[60] As a third argument on the continuity of BITs, these often contain so called 'war-clauses' to regulate protection guarantees and resulting compensation claims in situations of armed conflict. Thus, their drafters envisaged their application during armed conflict. Art. 4 Draft Articles supports this argument.

General treaty law as well as the BITs themselves anticipate their application during conflict and occupation. One can further subsume those BITs under the bulk of 'laws in force' in the country as regulated by IHL under Art. 43 Hague Regulations and 64 GC IV as referred to above. Several peace treaties signed between the defeated States and the US in the aftermath of the Second World War act as examples of State practice on continuity: The Agreement on Reparation from Germany of 1946 and the Treaty of Peace with Japan of 1951 exemplify such an approach.[61] Returning to the aforementioned primary IHL guidance on laws in force in the country, Art. 43 Hague Regulations ensures respect for the laws of the occupied State territory, including its laws on contracts, which 'prohibits the occupying power to nullify or suspend any legitimate State contracts …

58 ILC, 'Draft articles on the effects of armed conflict on treaties, with commentaries' (2011) UN Doc A/66/10 <http://legal.un.org/ilc/texts/instruments/english/commentaries/1_10_2011.pdf> accessed 14 October 2017 (Draft Articles).

59 Ibid, Art. 2, para 4-9.

60 Ibid, Art. 3.

61 Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold (opened for signature 14 January 1946, entered into force 24 January 1946) 55 UNTS 69 and Treaty of Peace with Japan (opened for signature 8 September 1951, entered into force 28 April 1952) 136 UNTS 45.

by amending … laws or by issuing a legislative declaration to that effect'[62]. Art. 64 GC IV also works with the presumption of continuity by stating that

> [t]he penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.[63]

Moreover, the commentary reiterates that '[t]he idea of continuity of the legal system applies to the whole of the law (civil and penal law) in the occupied territory'[64].

Following this assumption, the occupant must uphold the interests of the ousted government, which include, as *Benvenisti* states, obligations towards foreign nationals including their investments.[65] *Meron* equally argues that the occupant is bound by the treaties that were in force prior to the occupation, albeit he emphasises that this concerns treaties addressing the maintenance of public order and civil life.[66] By analogy, *Burke* asserts that the same applies to multilateral treaties: 'A multilateral treaty that has been ratified by the occupied State is certainly a "law in force in the country"',[67] or 'there is no a priori reason why multilateral conventions on other matter should not be applicable to occupied territory'.[68] *Mayorga* phrases this new link between the occupant and the pre-existing treaty as one of indirect or derivative consent, which transfers obligations to the occupying power both regarding substantive obligations and procedures of dispute settlement.[69]

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62 Pieter Bekker, 'The Legal Status of Foreign Economic Interests in Occupied Iraq' (*Asil Insights,* 18 July 2003) <https://www.asil.org/insights/volume/8/issue/20/legal-status-foreign-economic-interests-occupied-iraq> accessed 10 October 2017.

63 Naomi Burke 'A Change in Perspective: Looking at Occupation through the Lens of the Law of Treaties' (2008) 41 New York University Journal of International Law and Politics 103, 115 (hereafter Burke, 'Change in Perspective').

64 Pictet, *Commentary* (n 6) 335 on Art. 64.

65 Benvenisti, *Law of Occupation* (n 9) 18.

66 Theodor Meron, 'Applicability of Multilateral Conventions to Occupied Territories' (1978) 72 AJIL 542, 550.

67 For a debate on the suspension of treaties, see Burke, 'Change in Perspective' (n 63) 115.

68 Adam Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 AJIL 580, 589.

69 Mayorga, 'Occupants, Beware of BITs: Applicability of Investment Treaties to Occupied Territories' (n 1) 33.

The matter of dispute settlement and compensation claims is the second matter which suffers from legal uncertainty, both regarding IHL and the application of BITs during occupation. As BITs are applicable during times of occupation, their exact scope influences the arising protection obligations and potentially resulting compensation claims. If BITs contain full protection and security clauses as well as guarantees of national treatment or most-favoured-nation treatment, this changes the standard of due diligence which the host State of the BIT must provide – a standard that must take into account the restrictions of the host State. The widest limitation on the protection of investment surely arises during the occupation and takeover of factual control over the territory in question. To successfully bring forward a compensation claim, the violation of an obligation must firstly be established. Secondly, circumstances precluding wrongfulness must be excluded. The specific situation of occupation, however, might easily offer such recourse when damages have been caused by third actors or were conducted out of military necessity.[70] Thus, one must analyse these steps in a case-by-case examination and under the respective BIT in question.

II. The Case of Ukraine as an Illustration of the Uncertain Co-Application of Laws

The territorial dispute over parts of Ukraine, most prominently the Crimean Peninsula and eastern Ukraine, as well as the protection of investment between Ukraine, Russia and private investors serves as an illustrative example of the continued dispute over the application of treaties and the interaction of different fields of law.[71] Since early 2014, the Russian grasp of parts of Ukrainian territory, including the takeover of military and political control over Crimea, as well as the partly open, partly covert incursion of Russian forces and equipment in Eastern Ukraine, have given rise to a political and legal outcry of the international community. Yet, discordant reactions by States and diverging argumentation by international lawyers have left private investors in Ukraine struggling. Ukraine possesses

70 Eric de Brabandere, 'Host State's Due Diligence Obligations in International Investment Law' (2015) 42 Syracuse Journal of International Law and Commerce 320.

71 Territorial disputes following an unlawful transfer of territory, for example in Western Sahara, the Palestinian territories or the current tensions surrounding the South China Sea, provide further examples of such disputes.

several different investment treaties with other countries, including Russia, the UK, the US or Germany, obliging the State to protect foreign investment on its territory – some of them include provisions addressing the outbreak of hostilities or insurrections and some incorporate provisions on essential security interests of Ukraine, releasing the State of certain protective duties when pursuing its own legitimate military objectives.

Since 2014, Russia has started imposing Russian laws and legislated new regulation for Crimea in various sectors, such as the financial sector, army services or pension payments.[72] These alterations need to be analysed in detail for their validity under the laws of occupation – a matter which is highly problematic, given that Russia does not acknowledge its status as an occupying force and therefore denies the applicability of the laws of occupation.

A similar question arises with regard to the BITs in force. Which BITs should be applied to settle arising disputes: those between Ukraine and the foreign investors' country or those between Russia and the foreign investors' country? The Ukrainian case is one in which these matters have been or are currently being brought to international attention with regard to compensation claims in investor State arbitrations. Moreover, these ongoing developments pose a conflict between the different legal regimes.

Since mid-2016, numerous investment arbitration claims have been raised against Russia under the UNCITRAL Arbitration Rules pursuant to the Russia-Ukraine BIT. These disputes surround the alleged Russian expropriation of investments of Ukrainian investors in Crimea.[73] Different legal issues concerning the interpretation of certain terms, most notably 'investment' and 'territory', have arisen. While 'investment' covers a broad array of subjects, the investments in question were made prior to the Russian takeover in 2014 and therewith were Ukrainian investments in *de jure* Ukrainian territory rather than Ukrainian investments in factually

72 Laura Brank, Danial Gal, Timothy Lindsay et al, 'The Imposition of Russian Law in Crimea: What Does this Mean for Foreign Banks and Companies?' (2014) 19 Westlaw Journal 1.

73 Among others, *Stabil LLC and Others v the Russian Federation* (International Investment Agreement) [2015] PCA Case No 2015-35; *LLC Lugzor and Others v the Russian Federation* (Investment Arbitration) [2015] PCA Case No 2015-29; *Privatbank and Finance Company Finilion LLC v The Russian Federation* (Investment Arbitration) [2015] PCA Case No 2015-21; *Aeroport Belbek LLC and Mr. Kolomoisky v the Russian Federation* (Investment Arbitration) [2015] PCA Case No 2015-07.

Russian-controlled territory. Thus, the tribunals must elaborate on the notion of foreign investment. Secondly, Art. 1 of the BIT interprets 'territory' to be the territory of Russia and Ukraine respectively, as defined in conformity with international law. The takeover of Crimea by Russian forces, however, is broadly considered an unlawful annexation.[74] The latter provides an additional obstacle to the recognition of any arbitral award delivered in this regard, as it might be considered a recognition of the alteration of the status of Crimea.[75] If unchallenged, it further reinforces the factual consolidation of Russia's control over the peninsula. Initial decisions delivered in February 2017 shrank back from actually discussing the lawfulness of the Russian control over Crimea and stated that Russia's obligation under the Russia-Ukraine BIT was triggered following 21 March 2014: the signing date for the decree on the inclusion of Crimea into the Russian Federation signed by President *Vladimir Putin*.[76] These decisions represent a conflict between the general *ex iniuria jus non oritur* rule and the Stimson Doctrine of non-recognition of unlawful territorial changes.[77] To not further consolidate the annexation of Ukrainian territory, compensation claims against the regular host State, Ukraine, would comprise the correct, albeit potentially ineffective channel.

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74 Sergeis Dilevka, 'Arbitration Claims by Ukrainian Investors under the Russia-Ukraine BIT: Between Crimea and a Hard Place?' (*CIS Arbitration Forum*, 17 February 2016) <http://www.cisarbitration.com/2016/02/17/arbitration-claims-by-ukrainian-investors-under-the-russia-ukraine-bit-between-crimea-and-a-hard-place/> accessed 10 October 2017; UN GA Res 68/262 (27 March 2014) UN Doc S/A/68/262, 'The General Assembly, … [c]alls upon all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum'.

75 Convention on the Recognition and Enforcement of Foreign Arbitral Award (opened for signature 10 June 1958, entered into force 7 June 1959) 330 UNTS 38, Art. V (1) (c) on the recognition and enforcement of awards.

76 'Russia is Obliged to Protect the Ukrainian Investors in Crimea after the annexation – IA Reporter' (*Ukrainian Hot News*, 10 March 2010) <https://ukrhotnews.com/2017/03/10/russia-is-obliged-to-protect-the-ukrainian-investors-in-crimea-after-the-annexation-ia-reporter/> accessed 10 October 2017.

77 Benvenisti, *Law of Occupation* (n 9) 142.

D. Concluding Remarks

The contemporary regime of a belligerent occupation establishes the occupant as the temporary administrator of a foreign State's territory. Under this premise, the occupant has to safeguard both public order and the welfare of the affected population. The primary rules concerning the protection of (foreign) property under IHL offer a first fundamental protection, while the regulations concerning the introduction or alteration of the laws in force in the occupied territory prevent the occupant from transforming the territory, including its economy:

> The idea of the law of occupation was to prevent the occupying power from modelling the governmental structure of that territory according to its own needs disregarding the cultural, religious or ethnic background of the society of the occupied territory.[78]

The example of occupied Iraq, however, has shown how discretionary arguments concerning the welfare of the population and resulting necessary changes can be. In particular, the reaction of the international community and its States are of utmost importance to control the occupant's rule in the territory. For the occupant to solely act as an administrator and not as conqueror of new territory, States must hold the State in question accountable to the law of occupation and refuse to acknowledge measures going beyond its scope.

Traditionally, damages resulting from armed conflict were integrated into negotiations for a peace treaty, which left the compensation for losses dependent on the discretion of the negotiating parties, primarily the former occupying power and the victim's home State. The evolution of international law has produced other channels to pursue compensation, such as by means of diplomatic protection via the investor's home State or potentially through regional human rights courts.[79] Investment law, however, offers a much more promising and direct way to claim compensation by the affected investor against the State. Yet, it equally triggers new debates over the interaction of IHL and investment law. The ongoing investment arbitration in Ukraine illustrates the arising dilemma: On the one hand, the arbitrations against Russia, the occupant, but not the original BIT host State, acknowledge and therewith strengthen the occupant's claim over the territory, as they are based on the idea of the

78 Dörmann, 'International Humanitarian Law' (n 54) 308.

79 Robert Kolb, *Advanced Introduction to International Humanitarian Law* (Elgar Publishing 2014) 195.

transfer of treaty obligations to the occupying State. As such, they are an instrument of recognition of transfer of territory and might impede the notion of occupation as a temporary, but not inherent change of power. On the other hand, they could be considered as a means to hold the occupant accountable for violations and therewith also enforce adherence to primary obligations. The recent cases again highlight the importance of the interaction between the different fields of international law. A narrow analysis of each single field of law without recognising its broader effects in other fields will not simplify, but rather hamper the protection of investments during occupation.