

Use of force during occupation: law enforcement and conduct of hostilities

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Abstract

This article explores the law governing the maintenance of public order and safety during belligerent occupation. Given the potential for widespread violence associated with international armed conflict, such as occurred in 2003–2004 in Iraq, it is inevitable that military and police forces will be engaged in activities that interface and overlap. Human-rights-based norms governing law enforcement, such as the right to life, are found in humanitarian law, permitting an application of both law enforcement and conduct of hostilities norms under that body of law. This results in the simultaneous application of these norms through both humanitarian and human rights law, which ultimately enhances the protection of inhabitants of the occupied territory.

Keywords: occupation, use of force, law enforcement, conduct of hostilities, security situation Iraq, insurgency and counter-insurgency, policing and maintenance of order, human rights and international humanitarian law.



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Notwithstanding the significant body of treaty and customary international law dealing with occupation, there remain a number of unresolved issues concerning how law and order is maintained in an occupied territory. The debate often centres on whether the use of force by an occupier is governed by international humanitarian law (IHL) or human rights law. This article will review that issue by looking at belligerent occupation where violent resistance is occurring; outline the legal norms governing the use of force by an occupier in maintaining law and order; and assess how the law applies in these complex security situations.

The article is divided into six parts. The first part outlines the law governing occupation; it includes a discussion of the sources of normative obligations requiring an occupier to maintain order, and when those obligations begin. In the second part, the nature of the security threats – ranging from organized armed groups participating in an ongoing international armed conflict to ordinary criminal activity – will be discussed to provide a better understanding of the complex security situation within which order often has to be maintained. This analysis will refer to occupation during World War II and use the 2003–2004 Iraq War as an example of ‘violent’ occupation. Particular emphasis will be placed on the Iraq conflict, in order to provide a contemporary example of the complexity of the security situation during such occupation. The third part will address the similarities between maintaining order in occupation and conducting a counter-insurgency campaign in non-international armed conflict. In particular, the important role of policing during such a campaign will be outlined. This will highlight the unique environment in which security forces must operate when conducting operations among the population of an occupied territory.

Having established the nature of the security threats, the fourth part outlines the limitations prescribed by humanitarian and human rights norms regarding the use of force. It also looks at the requirements of accountability under IHL and human rights law. This will establish the normative limits on the use of force and set the scene for a discussion of the options available to the Occupying Power to maintain security. The fifth part discusses the principle of *lex specialis derogate lex generali* (*‘lex specialis’*) in order to assess the interface between human rights law and its humanitarian law counterpart. Particular emphasis is placed on looking at the long-standing integration of human rights norms into humanitarian law. In this respect, a distinction is made between norms or standards, such as the right to life, and the legal regimes (human rights and humanitarian law) within which they are situated. This integration supports an interpretation that there is no ‘conflict of norms’ in respect of law enforcement within occupied territory. In this respect, the human-rights-based law enforcement norms operate within both the international human rights and the humanitarian law frameworks. Finally, the article looks at the practical application of the use of force during belligerent occupation. This analysis will highlight that the use of human-rights-based law enforcement or conduct of hostilities norms (i.e. targeting, and precautions in the attack)

to govern the use of force will be dependent upon the nature of the threat being faced.

Occupation and the rule of law

Establishment of occupation

There are a number of challenging issues associated with the concept of occupation. They include categorizing occupations in general; establishing what constitutes 'occupation' for the purposes of IHL; determining when occupation begins; and establishing how legal rights, such as the right to life, are extended to inhabitants of occupied territory. The term 'occupation' has been used to describe a wide range of activity that fundamentally involves territory being put under the control of a foreign state, international organization, or entity that has no sovereign title. Adam Roberts has identified seventeen types of occupation, ranging from wartime and post-war to peacetime. Other possible categories include control of all or part of a territory by forces acting under the authority of the United Nations¹ and occupation by a non-state entity.² There is a school of thought that supports a broad application of the law of occupation,³ although classic 'belligerent occupation' remains the iconic standard against which the law of occupation is normally assessed.⁴

Yoram Dinstein notes that belligerent occupation, which only arises in the context of an international armed conflict between states, is often shrouded in the myth that it is an anomaly or even an aberration of international law.⁵ However, it is a common and integral part of armed conflict since '[o]nce combat stabilizes along fixed lines, not coinciding with the original international frontiers, the cross-border areas seized and effectively controlled by a Belligerent Party are deemed to be subject to belligerent occupation'.⁶ The challenge often appears to be one of getting a state to admit that it is an occupier.⁷ Eyal Benvenisti has observed that modern occupiers prefer, for a variety of reasons, not to establish direct forms of administration. In his view, an acknowledgment of 'the status of occupant is

1 Adam Roberts, 'What is a military occupation?', in *British Year Book of International Law*, Vol. 55, No. 1, 1984, p. 261. See also Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, 1993, p. 4, and Gregory H. Fox, *Humanitarian Occupation*, Cambridge University Press, Cambridge, 2008, p. 4, where he suggests there is a form of humanitarian occupation which is defined as 'the assumption of governing authority over a state or a portion thereof, by an international actor for the express purpose of creating a liberal, democratic order'.

2 A. Roberts, above note 1, pp. 292–293.

3 *Ibid.*, p. 250; E. Benvenisti, above note 1, p. 4.

4 A. Roberts, above note 1, pp. 261–262. He notes that *occupation bellica* is more or less synonymous with the term 'occupation of enemy territory', having the characteristics of being carried out by a belligerent state on the territory of an enemy state, during the course of an armed conflict and before a general armistice agreement is concluded. See also Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, pp. 31–32.

5 Y. Dinstein, above note 4, p. 1.

6 *Ibid.*

7 See Hans-Peter Gasser, 'Protection of the civilian population', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd edition, Oxford University Press, Oxford, 2008, p. 276.

the first and the most important indication that the occupant will respect the law of occupation'.⁸ Therefore, a key issue is the determination of when occupation is established at law.

Article 42 of the 1907 Hague Land Warfare Regulations sets out the legal test for occupation: '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.'⁹ An aspect of this definition impacting directly on the question of the responsibility of the Occupying Power for law enforcement is what establishing and exercising authority actually mean. Assistance in that regard is available by referring to Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention.¹⁰ The occupier is required by Article 43 of the Hague Regulations to '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'.¹¹ This obligation is also reflected in Article 64 of the Fourth Geneva Convention, which states: '[t]he Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations . . . to maintain the orderly government of the Territory . . .'.¹² That Convention also requires that 'protected persons' are protected against all acts or threats of violence, and establishes rules governing the maintenance of laws, courts, internment, and so forth.¹³

It has been noted that, in a technical sense, 'the precise moment when an invasion turns into an occupation is not always easy to determine'.¹⁴ Two interpretations have traditionally been suggested. The first approach applies a restrictive meaning to occupation as is reflected in the Hague Regulations (the 'narrow interpretation'). The second, found in the commentary to the Fourth Geneva Convention by Jean Pictet,¹⁵ interprets 'occupation' in that Convention

8 E. Benvenisti, above note 1, p. 5.

9 Regulations Respecting the Laws and Customs of War on Land, annex to Hague Convention Respecting the Laws and Customs of War on Land (hereafter Hague Regulations), 18 October 1907, Art. 42.

10 The four Conventions are: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135 (hereafter the Third Geneva Convention or GC III); and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. (hereafter the Fourth Geneva Convention or GC IV).

11 Hague Regulations, Art. 43. Y. Dinstein, above note 4, p. 89. Dinstein notes that the official French text of Article 43 refers to 'l'ordre et la vie publics' (public order and life) and, as a result, the interpretation of the word 'safety' in the English text must be viewed in that context. See also E. Benvenisti, above note 1, p. 7, n. 1; and Marco Sassòli, 'Legislation and maintenance of public order and civil life by Occupying Powers', in *European Journal of International Law*, Vol. 16, No. 4, 2005, p. 663.

12 GC IV, Art. 64, para. 3.

13 *Ibid.*, Arts. 27 and 47 *et seq.*

14 A. Roberts, above note 1, p. 256.

15 Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (hereafter Geneva Convention IV Commentary), ICRC, Geneva, 1958, Art. 6, p. 60.

more broadly (the 'broad interpretation'). Regarding the first approach, Leslie Green indicates that '[t]erritory is occupied only when it is actually under the control and administration of an occupant and extends only to those areas in which he is actually able to exercise such control'.¹⁶ This interpretation reflects the view that there must be no authority exercised other than that imposed or allowed by the occupier, that local forces are no longer effective in the area, that the population is disarmed, and that the Occupying Power is 'effectively maintaining law and order with the troops available or easily secured to assist in the task if needed'.¹⁷ In this respect, 'while invasion represents mere penetration of hostile territory, occupation implies the existence of definite control over the area involved'.¹⁸ The 1948 *Hostage* case (*United States of America v. Willem List, et al.*)¹⁹ distinguished between invasion and occupation as follows:

The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied.²⁰

The requirement for a significant level of control is consistent with the International Court of Justice's decision in the 2005 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, which held that physically stationing troops at an airport did not 'allow the Court to characterize the presence of Ugandan troops stationed at Kisangani Airport as occupation in the sense of Article 42 of the Hague Regulations of 1907'.²¹ Instead it must be shown that troops 'were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government'.²² Neither this case, nor the 2004 *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* opinion,²³ addressed the question of a broader interpretation of 'occupation' under the Fourth Geneva

16 Leslie C. Green, *The Contemporary Law of Armed Conflict*, 3rd edition, Manchester University Press, Manchester, 2008, p. 285; Y. Dinstein, above note 4, pp. 38–42. Lassa Oppenheim, *International Law: A Treatise*, ed. Hersch Lauterpacht, Longmans, Green and Co., London, 1952, p. 434, wrote: 'Now it is certain that mere invasion is not occupation. . . . Occupation is invasion plus taking possession of enemy country. . . . an occupant sets up some kind of administration, whereas the mere invader does not'.

17 L. C. Green, above note 16, p. 258.

18 Gerhard von Glahn, *The Occupation of Enemy Territory*, Lund Press, Inc., Minneapolis, 1957, p. 28.

19 *United States of America v. Willem List, et al.*, Case No. 7, 19 February 1948, Trials of War Criminals Before the Nuremberg Military Tribunals, Vol. 11, Government Printing Office, Washington, 1950 (hereafter *Hostage* case).

20 *Ibid.*, p. 1243.

21 International Court of Justice (ICJ), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005, p. 231, para. 177, available at: <http://www.icj-cij.org/docket/files/116/10455.pdf> (last visited 26 September 2011) (hereafter *Congo* case).

22 *Ibid.*, p. 230, para. 173.

23 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, p. 136, available at: <http://www.icj-cij.org/docket/files/131/1671.pdf> (last visited 18 October 2011) (hereafter *Wall* case).

Convention.²⁴ Under such an interpretation, the occupier must be in a position to carry out governance over the occupied territory even though it does not exercise sovereignty.²⁵ However, where an occupation is established at law, the failure to set up an administration does not relieve the occupier of its obligations under IHL.²⁶

The broader, Pictet, interpretation maximizes the protection provided to civilians. The *Geneva Convention IV Commentary* suggests that the application of the Convention to individuals ‘does not depend upon the existence of a state of occupation within the meaning of Article 42’ and that the provisions of the Convention would extend to the invasion phase before the establishment of a stable regime of occupation.²⁷ This would include situations when a patrol ‘penetrates into enemy territory without any intention of staying there’.²⁸ A broader interpretation of occupation has been applied by the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v. Naletilic*²⁹ and has been recognized in academic literature.³⁰ However, it has also been the subject of criticism.³¹ The present approach of the International Committee of the Red Cross (ICRC) is to look to Article 42 of the Hague Regulations as providing the legal benchmark for determining the existence of an occupation, while at the same time recognizing that the theory put forward by Jean Pictet lowers the threshold application of certain Fourth Geneva Convention norms so that their application during an invasion phase can result in greater humanitarian protection for protected persons found in invaded territory that is not yet occupied as a matter of law.³²

Although driven by humanitarian concerns, the extension of the Fourth Geneva Convention obligations as a matter of treaty law to invasions, patrols, and raids is challenging from a practical perspective. Any military force attempting to apply the interpretation would be forced to identify a more limited set of Fourth Geneva Convention provisions that can be practically applied in a situation where control of the territory is limited in both a substantive and a temporal sense.³³

24 Marten Zwanenburg, ‘Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation’, in *International Review of the Red Cross*, Vol. 86, No. 856, December 2004, p. 749.

25 Yoram Dinstein, ‘International law of belligerent occupation and human rights’, in *Israel Year Book of Human Rights*, Vol. 8, 1978, pp. 105–106; E. Benvenisti, above note 1, pp. 5–6.

26 E. Benvenisti, above note 1, p. 5.

27 *Geneva Convention IV Commentary*, above note 15, Art. 6, p. 60.

28 *Ibid.*

29 ICTY, *Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Judgment, Case No. IT-98-34-T, 31 March 2003, pp. 74–75, paras. 219–223. However, the court applied the ‘narrow interpretation’ to its analysis of Article 42 regarding the determination of the status of occupation and a ‘broad interpretation’ to its assessment of Article 43 of the Hague Regulations in respect of ‘individuals’.

30 See A. Roberts, above note 1, p. 256.

31 Y. Dinstein, above note 4, pp. 38–42. See also M. Zwanenburg, above note 24, p. 749, where, in respect of the *Prosecutor v. Naletilic* decision, he suggests that the Trial Chamber’s interpretation of Geneva Convention IV ‘is questionable’.

32 See Tristan Ferraro, in this edition.

33 However, see H.-P. Gasser, above note 7, pp. 276–277, Rule 528, para. 3. It is suggested there that a list of provisions found in Part II of GC IV (Articles 13–26) would apply in contested areas regarding the general protection of the population.

Meeting the Hague Regulations and Fourth Geneva Convention obligations to restore and ensure order would prove particularly challenging, if not impossible, where control is not effective. As will be discussed, effective law enforcement requires a level of control that cannot easily be attained in the transitory and rapidly evolving situation inherent in the early stages of invasion, or while conducting a patrol.

In any event, when dealing with the civilian population, the military commander must comply with well-established general principles of humanitarian law that protect the civilian population even when the territory is not occupied. As is reflected in the ICRC *Customary International Humanitarian Law* study,³⁴ custom can provide a source for such rules. In that context, principles found in the Fourth Geneva Convention may inform those customary rules. For those seeking a treaty-based authority regarding the treatment of civilians during such transitory situations, Article 75 of Additional Protocol I³⁵ applies where persons under the power of a party to the conflict do not benefit from more favourable treatment under the Conventions or the Additional Protocol.³⁶ Similarly, Article 75 may inform the customary rules applicable in these situations.³⁷

Rule of law

The maintenance of order within an occupied territory requires a clear commitment to the rule of law.³⁸ This is linked to the issue of rights for the inhabitants of the territory. In respect of humanitarian law, Article 43 of the Hague Regulations has been described as a ‘mini-constitution for the occupation administration’,³⁹ while the Fourth Geneva Convention is referred to as a ‘bill of rights for the occupied population, a set of internationally approved guidelines for the lawful administration of the occupied territories’.⁴⁰ Human rights norms, including the right to

34 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, Cambridge University Press, Cambridge, 2005 (hereafter *ICRC Customary Law Study*).

35 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature December 12, 1977 1125 UNTS 3 (hereafter Additional Protocol I or AP I).

36 Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, para. 3015 (hereafter *Additional Protocol I Commentary*), which states: ‘[t]he protections which follow from Article 75 apply above all to those who cannot lay claim to application of the Conventions or to their application in full . . .’.

37 Marko Milanovic, ‘Article 75 AP I and US opinio juris’, in *European Journal of International Law: Talk!*, 9 March 2011, available at: <http://www.ejiltalk.org/article-75-ap-i-and-us-opinio-juris/> (last visited February 2012), for a discussion of the customary law status of AP I, Art. 75.

38 See Ian Brownlie, *The Rule of Law in International Affairs*, Martinus Nijhoff Publishers, The Hague, 1998, pp. 213–214. The elements of the rule of law are indicated to be that the exercise of power by officials must be based on authority conferred by law; law must conform to standards of substantial and procedural justice; the executive, the legislature, and the judicial functions must be separated; the judiciary should not be controlled by the executive; and all legal persons are subject to the law.

39 E. Benvenisti, above note 1, p. 9.

40 *Ibid.*, p. 105. See also Yoram Dinstein, ‘The international law of inter-state wars and human rights’, in *Israel Yearbook of Human Rights*, Vol. 7, 1977, p. 149, where he states: ‘The human rights of civilians in

life, are specifically protected in the Hague Regulations,⁴¹ the Fourth Geneva Convention,⁴² and Article 75 of Additional Protocol I.⁴³ This is also reflected in the *Geneva Convention IV Commentary*, which states: ‘[i]t must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests’.⁴⁴

Human rights law also protects the rights of persons in occupied territory. In the 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,⁴⁵ the International Court of Justice held that the two sets of legal regimes apply together, in the sense that human rights law applies in times of war and humanitarian law acts as a form of *lex specialis* for determining what constitutes an arbitrary deprivation of the right to life under human rights law during hostilities. Further, as the Court stated in the 2004 *Wall* case,⁴⁶ ‘there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law’.⁴⁷

Human rights law is applicable in occupied territory either as a matter of treaty law or as customary international law. While certain states, such as the United States, take the position that human rights treaty law does not have extra-territorial application,⁴⁸ customary international human rights law is not territorially limited.⁴⁹ As David Kretzmer has noted, to suggest that a state does not have obligations towards a person affected by its actions ‘would be incompatible with the

time of war – mainly in occupied territories – are incorporated in the Hague Regulations and in the [F]ourth Geneva Convention’.

- 41 See Hague Regulations, 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’.
- 42 See GC IV, Art. 27, para. 1 and Arts. 48 *et seq.* Art. 27, para. 1 states: ‘Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity’. As the *Geneva Convention IV Commentary*, above note 15, Art. 27, p. 201, notes in respect of the right to life: ‘[u]nlike Article 46 of the Hague Regulations the present Article does not mention it specifically. It is nevertheless obvious that this right is implied, for without it there would be no reason for the other rights mentioned’.
- 43 For example, as AP I, Art. 75 states, in part: ‘75. 2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: (a) violence to the life, health, or physical or mental wellbeing of persons, in particular: (i) murder; (ii) torture of all kinds, whether physical or mental; (iii) corporal punishment; and (iv) mutilation.’
- 44 *Geneva Convention IV Commentary*, above note 15, Art. 2, p. 21.
- 45 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226, p. 240, para. 25, available at: <http://www.icj-cij.org/docket/files/95/7495.pdf> (last visited February 2012) (hereafter *Nuclear Weapons* case).
- 46 *Wall* case, above note 23, pp. 45–46, para. 105.
- 47 *Ibid.*, at p. 178, para. 106.
- 48 Noam Lubell, *Extraterritorial Use of Force Against Non-state Actors*, Oxford University Press, Oxford, 2010, pp. 197–198, discussing the United States position; Michael J. Dennis, ‘Application of human rights treaties extraterritorially in times of armed conflict and military occupation’, in *American Journal of International Law*, Vol. 99, No. 1, 2005, p. 119.
- 49 Major Sean Condon (ed.), *Operational Law Handbook*, Judge Advocate General’s Legal Center and School, Charlottesville, VA, 2011, p. 45, available at: http://www.loc.gov/tr/frd/Military_Law/pdf/operational-law-handbook_2011.pdf (last visited February 2012), which notes that ‘[t]he Restatement makes no qualification as to where the violation might occur, or against whom it may be directed.

very notion of the universality of human rights'.⁵⁰ The scope of such customary law is reflected in the *Restatement of the Law: The Foreign Relations Law of the United States*, which indicates that it includes protection from murder, torture, or other cruel, inhuman, or degrading treatment or punishment or prolonged arbitrary detention.⁵¹ Of particular note in respect of law enforcement, the *Restatement of Foreign Relations Law* specifically links human rights norms to policing. It is indicated that, while murder is stated to be a violation of international law, this would not be the case where it is necessary to take life in exigent circumstances, 'for example by police officials in line of duty in defense of themselves or of other innocent persons, or to prevent serious crime'.⁵² Therefore, the inhabitant's rights to life, and other rights, are protected under both IHL and human rights law.

It is in the context of maintaining public order and safety that the issue often arises of how the two governing frameworks of humanitarian and human rights law interact with each other. Since the occupation of territory does not end the armed conflict, it is inevitable, as Richard Baxter noted in 1950, 'that inhabitants of an occupied area will chafe under enemy rule . . . and that they will in numerous instances, acting singly or in concert, commit acts inconsistent with the security of the occupying forces'.⁵³ This reality is reflected in the reference to 'organized resistance movements' in the Third Geneva Convention.⁵⁴ It is also relevant to the

Therefore, it is the CIL [customary international law] status of certain human rights that renders respect for them a legal obligation on the part of U.S. forces conducting operations outside the United States, and not the fact that they may be reflected in treaties ratified by the United States. Practitioners must nevertheless look to specific treaties, and to any subsequent executing legislation, to determine if this general rule is inapplicable in a certain circumstance'. See also N. Lubell, above note 48, p. 235; Noam Lubell, 'Challenges in applying human rights law to armed conflict', in *International Review of Red Cross*, Vol. 87, No. 860, December 2005, p. 741; Y. Dinstein, above note 4, p. 71. As Dinstein notes, while the Covenant and the European Convention are limited in their application to Contracting parties, '[c]ustomary human rights are conferred on human beings wherever they are'. See also *Nuhanovic v. The State of the Netherlands*, Court of Appeal in The Hague, case number 200.020.174/01, 5 July 2011, p. 17, para. 6.3, available at: <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5388> (last visited 4 November 2011), in which the Court stated '[a]dditionally, the Court will test the alleged conduct against the legal principles contained in articles 2 and 3 ECHR and articles 6 and 7 ICCPR (the right to life and the prohibition of inhuman treatment respectively), because these principles, which belong to the most fundamental legal principles of civilized nations, need to be considered as rules of customary international law that have universal validity and by which the State is bound'; *Mustafic-Mujic et al. v. The State of the Netherlands*, Court of Appeal in The Hague, case number 200.020.173/01, 5 July 2011, p. 18, para. 6.3, available at: <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5386> (last visited February 2012).

- 50 David Kretzmer, 'Targeted killing of suspected terrorists: extra-judicial executions or legitimate means of self-defence?', in *European Journal of International Law*, Vol. 16, No. 2, 2005, p. 184.
- 51 *Restatement of the Law: The Foreign Relations Law of the United States*, Vol. 2, American Law Institute Publishers, St. Paul, MN, 1987, pp. 161–175 (hereafter *Restatement of Foreign Relations Law*).
- 52 *Ibid.*, pp. 163–164, para. f.
- 53 Richard R. Baxter, 'The duty of obedience to the belligerent occupant', in *British Year Book of International Law*, Vol. 27, 1950, p. 235.
- 54 GC III, Art. 4(A)(2). Resistance during occupation is distinguished from participation in fighting an invading force. Hague Regulations, Art. 2 and GC III, Art. 4(A)(6) provide lawful belligerent status to what has been termed the *levée en masse* and with it the right to be treated as a prisoner of war upon capture. The *levée en masse* is described as inhabitants of a non-occupied territory who, upon the approach of an enemy, spontaneously take up arms to resist invasion without having had time to form themselves into regular armed units. They must carry arms openly and respect the laws and customs of war. What is unclear is the degree of organization that the inhabitants must have in order to be considered lawful participants in armed conflict, although historically it was considered not to include individual

concept of ‘armed combatants’ in Article 44(3) of Additional Protocol I, where there are special rules regarding the retention of combatant status ‘in situations of armed conflict where, *owing to the nature of hostilities*, an armed combatant cannot so distinguish himself.⁵⁵ A number of states have limited the claim for combatant status in those circumstances to occupied territory and armed conflicts involving national liberation.⁵⁶ Further, the Fourth Geneva Convention provides for the administrative detention of civilians in internment and assigned residence⁵⁷ and for taking penal action against persons who commit offences intended to harm the Occupying Power.⁵⁸

At the same time the maintenance of public order requires that, as in any society, the population be policed.⁵⁹ Unfortunately, neither the Hague Regulations, nor the Geneva Conventions, nor Additional Protocol I refer directly to policing, although such activity is an inherent part of the detention, internment, and prosecution of criminals or security detainees authorized by humanitarian law.⁶⁰ Furthermore, the treaty law does not specifically outline how policing interacts with the conduct of hostilities against those participating in the ongoing armed conflict. However, prior to looking at how policing and military operations interact it is first necessary to gain an appreciation of the complex security challenge that can be presented during occupation. It is to that issue that the analysis will now turn.

The complex security situation in occupied territory

The complexity of the security challenge occurring during occupation will first be addressed by discussing the concept of ‘violent’ as opposed to ‘calm’ occupation. Historical examples of violent occupations from World War II, and particularly the more recent 2003–2004 occupation of Iraq, will be used to highlight the nature, scope, and intensity of hostilities that can occur during such occupations. This will

participation. See James Molony Spaight, *War Rights on Land*, MacMillan, London, 1911, pp. 51–56. Inhabitants who rose to fight in territory that was occupied originally had no right to do so; however, provision was made in 1949 in Art. [Art.] 4(A)(2) of GC III to provide prisoner-of-war status to members of organized resistance movements belonging to a party to a conflict. Those members have to meet specific conditions of being under responsible command, wearing a fixed distinctive sign recognizable at a distance, carrying arms openly, and conducting their operations lawfully. However, these conditions for legitimate status for members of organized resistance movements are largely seen as being unrealistic in practice. See Howard Levie, ‘Prisoners of war in international armed conflict’, in *International Law Studies*, Vol. 59, 1977, p. 42.

55 AP I, Art. 44(3) (emphasis added). In those circumstances, the combatant must carry arms openly during each military engagement and during such time that he or she is visible to an adversary while engaged in a military deployment preceding the launching of an attack.

56 For example, see the Reservations made by Canada, the United Kingdom, France, and Germany, available at: <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P> (last visited February 2012.).

57 GC IV, Art. 78.

58 *Ibid.*, Art. 68.

59 John Keegan, *A History of Warfare*, Vintage Books, New York, 1993, p. 57: ‘[t]he civilized societies in which we best like to live are governed by law, which means that they are policed’.

60 GC IV, Arts. 64–78.

serve to better situate the following legal discussion of the frameworks governing the maintenance of order in occupied territory. Owing to the diverse types of occupations and the unique relationship between the Occupying Power and the inhabitants of an occupied territory, there is sometimes a tendency to view the law of occupation as a body of law distinct from the humanitarian law that generally governs hostilities. It has been suggested that military occupation 'lies midway between war and peace'⁶¹ and that 'there are no major military operations in the occupied zone'.⁶² Similarly, when restoring public order, every Occupying Power is confronted 'with problems more typical of peacekeeping operations than of traditional inter-state war'.⁶³ The nature of the security situation in the territory can be such that there is no regular violence occurring. In that case, it is described as a 'calm' occupation, or when violence does occur it is viewed as an 'outbreak' or 'resumption' of hostilities.⁶⁴

There is no doubt that there are situations of occupation of relative calm, where no hostilities are being conducted or have been conducted for a period of time. However, the use of such terms is problematic to the extent that they may be interpreted as suggesting that peaceful coexistence is the norm and the conduct of hostilities is the exception during a belligerent occupation, or that occupation law is not an integral part of international humanitarian law. Belligerent occupation is fundamentally a product of war⁶⁵ and the history of warfare establishes that an occupying force can be confronted with a wide range of security challenges. Rather than being 'calm', there can be situations of elevated, widespread, and protracted violence.

These more violent situations are reflected in the occupations of World War II and more recently in Iraq. The World War II examples are relevant since the 1949 Fourth Geneva Convention was drafted with the scope, scale, and violence of that conflict in mind. These rules governing the protection of the civilian population and the treatment of those threatening the security of the Occupying Power are designed to be applied universally, regardless of the identity of that Power or the organized resistance. An overview of the nature and organization of resistance to

61 Danio Campanelli, 'The law of military occupation put to the test of human rights', in *International Review of the Red Cross*, Vol. 90, No. 871, September 2008, p. 654.

62 *Ibid.*, p. 659.

63 M. Sassòli, above note 11, p. 662. See also Joshua S. Goldstein, *Winning the War on War: The Decline of Armed Conflict Worldwide*, Dutton, New York, 2011, p. 130. Although referring to a non-occupation situation, he notes: '[p]eace operations and counterinsurgency operations have grown closer in nature, as seen in Afghanistan today where civil/political and military elements of counterinsurgency mix fluidly with humanitarian assistance, intertribal conflict resolution, and civil society capacity building, all under a UN mandate, but with a large heavily armed NATO force carrying it out'.

64 University Centre for International Humanitarian Law, *Expert Meeting on the Right to Life in Armed Conflict and Situations of Occupation*, held at Geneva, 1–2 September 2005, pp. 22–23, available at: http://www.geneva-academy.ch/docs/expert-meetings/2005/3rapport_droit_vie.pdf (last visited February 2012) (hereafter UCIHL Meeting Report). See also Louise Doswald-Beck, 'The right to life in armed conflict: does international humanitarian law provide all the answers?', in *International Review of the Red Cross*, Vol. 88, No. 864, December 2006, pp. 892–894.

65 Y. Dinstein, above note 4, p. 1.

occupation will illustrate the complexity of the security situation that can arise during ‘violent’ occupation.

Resistance groups during World War II

World War II provides perhaps the most diverse examples of groups resisting occupation. Owing to the global scale of the conflict, such operations ‘world-wide varied considerably in size, composition, motivation, mission, and effectiveness’ and ‘one resistance action often bore only generic resemblance to another’.⁶⁶ It has been noted that, in light of the initial swift German victories in Europe ‘and the general absence of pre-war planning, it is surprising how quickly national resistance movements sprang up across Europe’.⁶⁷ During most of World War II the resistance in Poland, Czechoslovakia, Norway, Denmark, Holland, Belgium, France, and Italy, applied a more subtle type of guerrilla warfare than that practised in the Soviet Union or Yugoslavia, owing to a lack of suitable terrain for sanctuary, inadequate communications, conflicting temperaments, and political attitudes. Generally, the resistance operated as individuals or small groups carrying out tasks of ‘terror, subversion or sabotage’, intelligence-gathering, and activities such as helping downed Allied airmen, while attempting to build secret guerrilla armies.⁶⁸

In contrast, partisan units in central and northern Russia often operated in operational brigades of guerrillas controlling large areas, with between 12,000 and 20,000 personnel.⁶⁹ Their activities ranged from small-unit ambush and sabotage to co-ordinated operations with the Red Army.⁷⁰ In the complex political environment of Yugoslavia there were two main resistance groups. The nationalist Chetniks and Tito’s Communist Partisans began the resistance together, although an irreparable rift developed between them.⁷¹ Tito worked to develop a regular military organization,⁷² but also employed what the German occupiers called ‘Home Partisans’. At the same time as killing soldiers and conducting sabotage, they operated as a shadow government.⁷³

It has been noted that two strategies developed for resistance groups: ‘one conservative and the other revolutionary’.⁷⁴ Russia provides an example of the conservative strategy, where operations were conducted to restore the former regime, while Tito’s partisans, who were fighting to take power from the exiled

66 Robert B. Asprey, *War in the Shadows*, Vol. I, Doubleday & Co. Inc., Garden City, NY, 1975, p. 409.

67 John Shy and Thomas W. Collier, ‘Revolutionary war’, in Peter Paret (ed.), *Makers of Modern Strategy from Machiavelli to the Nuclear Age*, Princeton University Press, Princeton, 1986, p. 833.

68 R. B. Asprey, above note 66, pp. 417–418.

69 *Ibid.*, p. 460.

70 *Ibid.*, p. 461.

71 *Ibid.*, p. 472.

72 See John Ellis, *From the Barrel of a Gun: A History of Guerrilla, Revolutionary and Counter-insurgency Warfare, from the Romans to the Present*, Greenhill Books, London, 1995, pp. 165–166, for a discussion of the development of units organized into brigades, divisions, and corps capable of conducting operations ‘half way between guerrilla operations proper and full-scale positional warfare’.

73 R. B. Asprey, above note 66, p. 481.

74 J. Shy and T. W. Collier, above note 67, p. 833.

regime, represented the 'revolutionary' strategy.⁷⁵ This indicates that resistance movements can be motivated not only by a desire to end the occupation but also by political objectives of their own that affect the conduct of hostilities.

Mao Tse Tung's book *On Guerrilla Warfare*⁷⁶ is often associated with revolutionary warfare in the wake of World War II. However, it was published in 1937 in the context of the war against Japanese invaders occupying China. In describing such warfare, Mao points out that guerrilla units may be organized from a variety of entities: the masses of the people, regular army units, local militia, the police, the ranks of the enemy, and even bandit groups.⁷⁷ Operationally, their 'primary field of activity is in the enemy's rear area', reinforcing the fact that armed conflict often continues once territory is occupied.⁷⁸ Guerrilla forces were assessed as being 'particularly effective in the Far East where Chinese Communist Guerrillas helped KMT [Kuomintang] regular divisions tie down some 25 Japanese Divisions for most of the war'.⁷⁹

While it might be tempting to view the violent activities of the World War II resistance movements as a relic of a bygone era, the more recent example of Iraq suggests otherwise. Some sixty years after World War II a diversity of resistance groups, methods of operation, motivations, and levels of violence was evident. Further, in respect of maintaining law and order, the occupation of Iraq highlights the challenges of containing criminal activity while addressing the significant security threats posed by insurgent activity. A more detailed overview of the complexity of the security situation in the aftermath of the 2003 invasion of Iraq is particularly helpful in understanding the nature of a 'violent' occupation.

The complex security situation in Iraq

The swift and largely conventional Coalition military operation against Iraq that commenced on 20 March 2003 came to a close on 1 May 2003 with the declaration by President Bush that: '[m]ajor combat operations have ended'.⁸⁰ While the exact time period of the occupation of Iraq has been the subject of debate,⁸¹ it is widely considered to have begun on 1 May 2003 and ended on 28 June 2004.⁸² Even before

75 *Ibid.*

76 Mao Tse-Tung, *On Guerrilla Warfare*, trans. Samuel B. Griffith, University of Illinois Press, Champaign, IL, 2000.

77 *Ibid.*, pp. 71–76.

78 *Ibid.*, pp. 52–53.

79 J. Ellis, above note 72, p. 200.

80 Thomas E. Ricks, *Fiasco: The American Military Adventure in Iraq*, Penguin Press, New York, 2006, p. 145. See also European Court of Human Rights (ECtHR), *Case of Al-Skeini and Others v. The United Kingdom*, application no. 55721/07, 7 July 2011, para. 10, available at: <http://www.unhcr.org/refworld/pdfid/4e2545502.pdf> (last visited February 2012) (hereafter *Al Skeini* case).

81 See Robert Kolb, 'Occupation in Iraq since 2003 and the powers of the UN Security Council', in *International Review of the Red Cross*, Vol. 90, No. 869, 2008, p. 29; M. Zwanenburg, above note 24, p. 745; Adam Roberts, 'The end of occupation in Iraq (2004)', in *International and Comparative Law Quarterly*, Vol. 54, January 2005, p. 27; and Adam Roberts, 'Transformative military occupation: applying the laws of war and human rights', in *American Journal of International Law*, Vol. 100, No. 3, 2006, pp. 608–613.

82 See *Al Skeini* case, above note 80, para. 143: 'This aim was achieved by 1 May 2003, when major combat operations were declared to be complete and the United States and the United Kingdom became

the *de jure* commencement of occupation, looting and civil disorder began as the United States military reached the centre of Baghdad on 9 April 2003. The Iraqi police and government authority disappeared, and invading military forces largely stood by and watched. It has been noted that: '[o]nce it became clear that US soldiers were not going to intervene, public exuberance, joy at liberation, and economic opportunism quickly darkened into a systemic effort to strip the capital's stores and public institutions of everything of value'.⁸³ The disappearance of central authority, as well as Saddam Hussein's release of 38,000 inmates from prison in 2002, resulted in criminal elements embarking on a wave of violence including murders, kidnappings, rapes, and home invasions.⁸⁴ It has been remarked that: '[b]y conservative estimates, 10,000 Iraqi civilians were killed in the year following the US intervention'.⁸⁵

Military planners had not adequately prepared for the breakdown in public order. The mass disintegration of what had been a police force of questionable quality was exacerbated by a subsequent decision on 23 May 2003, Coalition Provisional Authority Order Number 2 to disband Iraqi Entities. As Thomas Ricks has written, '[t]his included not only the army, but also police and domestic security forces of the Ministry of the Interior'.⁸⁶ While significant efforts were made to reconstitute an Iraqi police force, there remained a significant gap in the Coalition's ability to police the occupied territory. The looting in Baghdad made restarting the electrical grid more difficult, which 'further undermined a burgeoning security problem' and encouraged crime.⁸⁷ While British forces in Basra moved quickly to adopt a 'hearts and minds' approach towards the population at the end of the initial combat phase,⁸⁸ they also struggled to maintain law and order.⁸⁹ The gap in law enforcement capability might have been filled by Coalition or even international police forces; however, it had wrongly been anticipated that Iraqi security personnel would stay in place.⁹⁰ Further, there appeared to be little support within the United States Government for that approach in the early months of the occupation.⁹¹

The threat to public order was not limited to ordinary crime and lawlessness. The growing insurgency also manifested itself in attacks against

Occupying Powers within the meaning of Article 42 of the Hague Regulations', and *ibid.*, para. 148: 'the occupation came to an end on 28 June 2004, when full authority for governing Iraq passed to the Interim Iraqi Government from the Coalition Provisional Authority, which then ceased to exist'.

83 David H. Bayley and Robert M. Perito, *The Police in War: Fighting Insurgency, Terrorism, and Violent Crime*, Lynne Rienner Publishers, Boulder, CO, 2010, p. 6.

84 *Ibid.*, p. 7. See also John Keegan, *The Iraq War*, Key Porter Books, Toronto, 2004, pp. 206–207.

85 D. H. Bayley and R. M. Perito, above note 83, p. 7.

86 T. E. Ricks, above note 80, p. 162. See also *Coalition Provisional Authority Order Number 2: Dissolution of Entities*, 23 May 2003, available at: http://www.iraqcoalition.org/regulations/20030823_CPAORD_2_Dissolution_of_Entities_with_Annex_A.pdf (last visited February 2012).

87 Michael R. Gordon and General Bernard E. Trainor, *Cobra II: The Inside Story of the Invasion and Occupation of Iraq*, Pantheon Books, New York, 2006, p. 468.

88 J. Keegan, above note 84, p. 182.

89 *Al-Skeini* case, above note 80, para. 22, quoting from the 2008 Aitken Report.

90 D. H. Bayley and R. M. Perito, above note 83, p. 6.

91 *Ibid.*, p. 11.

Coalition forces with improvised explosive devices (IEDs).⁹² In what has been termed the ‘war of the roadside bomb’, the ‘insurgents usually used 155 millimeter artillery shells and a variety of mortar rounds, and occasionally TNT or plastic explosive’.⁹³ It is estimated that the average number of daily bomb, mortar, and grenade attacks on US troops rose from twenty-five a day in January 2004 to double that number by June of the same year.⁹⁴ There were also battles for the control of whole cities and areas of Iraq.⁹⁵ In the *Al-Skeini* case it is stated that, as of 30 June 2004, in the Multinational Division (South East) area of operations, the violence had included 1,050 violent attacks involving 5 anti-aircraft attacks, 12 grenade attacks, 101 attacks and 52 attempted attacks involving IEDs, 145 mortar attacks, 147 rocket propelled grenade attacks, and 535 shootings.⁹⁶

Ultimately, a broad spectrum of attacks in Iraq occurred, not only against US and Coalition military forces, but also against senior Iraqi political figures, foreign companies, Iraqi security officers and services, Iraqis collaborating with occupation authorities, critical infrastructure (such as power stations, liquid natural-gas plants, and oil installations), and symbolic targets such as the Jordanian Embassy and the UN Headquarters.⁹⁷ The ICRC headquarters in central Baghdad was also attacked with a vehicle-borne IED, resulting in twelve deaths.⁹⁸ These are not the weapons, tactics, or level of violence that law enforcement authorities are ordinarily equipped or trained to confront, although they do deal with isolated acts of terrorism.

A further indication of the warlike violence is evident in the fighting that took place in Baghdad and other cities such as Fallujah and Najaf. In Sadr City, an area of Baghdad, armed fighters from Moqtadr al-Sadr’s ‘Mahdi army’ took over all eight police stations and engaged in a firefight with US forces, resulting in the deaths of a reported eight US soldiers (with fifty-one wounded) and an estimated several hundred Iraqi fighters.⁹⁹ The conflict spread to cities in southern Iraq under the

92 See also J. Keegan, above note 84, p. 207, where he states in respect of the insurgents: ‘[t]heir methods, familiar to Israeli troops fighting the intifada but also to British with experience in Northern Ireland, were those of terrorism – attacks on patrols by gunmen who disappeared into side streets, roadside bombs – intensified by the self-sacrifice of suicide bombers’.

93 T. E. Ricks, above note 80, p. 217. Sergio Catignani, ‘The Israel Defense Forces and the Al-Aqsa Intifada: when tactical virtuosity meets strategic disappointment’, in Daniel Marston and Carter Malkasian (eds), *Counterinsurgency in Modern Warfare*, Osprey Publishing, Oxford, 2010, p. 235, notes that such weapons have also been used by groups resisting other occupation forces, as seen in the 2000–2005 Al-Aqsa Intifada against Israeli occupation, where ‘the placement of improvised explosive devices (IEDs) on roads leading to settlements was an especially lethal tactic that accounted for numerous military and civilian casualties’.

94 T. E. Ricks, above note 80, p. 329. See also *ibid.*, p. 337. The violence against occupation forces in early 2004 rose from ‘about 280 incidents in the last week of March, then about 370 in the first week of April, then 600 in the second week’.

95 *Ibid.*, p. 345.

96 *Al Skeini* case, above note 80, p. 10, para. 23.

97 Ahmed S. Hashim, *Insurgency and Counter-insurgency in Iraq*, Cornell University Press, Ithaca, NY, 2006, pp. 188–200.

98 BBC News, ‘Baghdad terror blasts kills dozens’, 27 October 2003, available at: <http://news.bbc.co.uk/2/hi/3216539.stm> (last visited February 2012).

99 T. E. Ricks, above note 80, p. 338. See also A. S. Hashim, above note 97, pp. 256–264, for a discussion of Moqtada al-Sadr and the revolt of 2003–2004; Patrick Cockburn, *Muqtada Al-Sadr and the Shia Insurgency in Iraq*, 2008, Faber and Faber, London, pp. 172–186, discussing the siege of Najaf; and Bing

control of Italian, Spanish, Polish, Ukrainian, and Salvadorian troops.¹⁰⁰ The US effort to take control of Sunni-dominated Fallujah started during the occupation (April 2004) and ran until November 2004. Although unconfirmed, it was reported that the number of dead ‘exceeded 600, including insurgents and civilians, and other accounts said more than 1,000 had been wounded.’¹⁰¹ An attack on the city in April 2004 against an estimated 500 insurgents¹⁰² involved 150 air strikes and destroyed between 75 and 100 buildings.¹⁰³ Although carried out after the official end of occupation, the subsequent November 2004 operation, which was, in effect, a successful completion of the previous attempts to seize Fallujah, involved attacks against 1,000 ‘hard core and two thousand part-timers’,¹⁰⁴ incorporating 500 air strikes, 14,000 artillery and shells, and 2,500 tank main gun rounds and significantly more destruction.¹⁰⁵ The twenty-one-month struggle resulted in 151 American troops killed and more than 1,000 wounded.¹⁰⁶ The scope of combat highlights the high levels of violence that can occur when fighting organized armed groups. The battles in Iraqi cities such as Fallujah and Najaf reflected a shift away from the traditional guerrilla operations in rural areas to ones carried out in urban terrain.¹⁰⁷

Although primarily, but not exclusively, a Sunni-based insurgency,¹⁰⁸ the organized groups engaged in combat with Coalition forces were diverse. One clash between American forces and locals in Fallujah, described as ‘more of a tribal war than a resistance force’, resulted from what was perceived to be poor treatment of the tribes by the military forces.¹⁰⁹ In his assessment of the Iraqi insurgency, Ahmed Hashim has identified what he describes as a remarkable number of insurgent organizations varying ‘widely in levels of skill, functional specialization, professionalism, number of personnel, modus operandi, targeting and longevity’.¹¹⁰ Insurgent groups included combat cells ranging from large and well-developed organizations,

West, *No True Glory: A Frontline Account of the Battle for Fallujah*, Bantam Dell, New York, 2005, pp. 61–62.

100 P. Cockburn, above note 99, pp. 181–182; T. E. Ricks, above note 80, pp. 337–338.

101 John F. Burns, ‘The struggle for Iraq: the occupation; troops hold fire for negotiations at 3 Iraqi cities’, in *New York Times*, 12 April 2004, available at: <http://www.nytimes.com/2004/04/12/world/struggle-for-iraq-occupation-troops-hold-fire-for-negotiations-3-iraqi-cities.html?pagewanted=print> (last visited February 2012).

102 B. West, above note 99, p. 256. However, see Thom Shanker and John Kifner, ‘The struggle for Iraq: troops; suited to guerrillas, a dusty town poses tricky perils’, in *New York Times*, 25 April 2004, available at: <http://www.nytimes.com/2004/04/25/world/struggle-for-iraq-troops-suited-guerrillas-dusty-town-poses-tricky-perils.html?pagewanted=all&src=pm> (last visited February 2012), where it is indicated that United States intelligence believed there were ‘2,000 hard-core insurgents, including 200 foreign fighters’.

103 B. West, above note 99, p. 315.

104 *Ibid.*, p. 256.

105 *Ibid.*, pp. 315–316. It is estimated that 18,000 of Fallujah’s 39,000 buildings were damaged or destroyed.

106 *Ibid.*

107 Richard H. Shultz Jr. and Andrea J. Dew, *Insurgents, Terrorists and Militias: The Warriors of Contemporary Combat*, Columbia University Press, New York, 2006, pp. 253–254.

108 A. S. Hashim, above note 97, p. 60.

109 Zaki Chehab, *Inside the Resistance: The Iraqi Insurgency and the Future of the Middle East*, Nation Books, New York, 2005, p. 18.

110 A. S. Hashim, above note 97, p. 170.

referred to as squadrons, battalions, or brigades, to part-time participants.¹¹¹ Support for the insurgency came from Arab nationalists, disgruntled Muslims, foreign fighters, and Sunni extremists. The significance of the relatively small number of foreign terrorists and religious extremists was as a force multiplier, owing to their willingness to participate in operations such as suicide attacks and massive car bombs.¹¹² The insurgency was also supported by financial facilitators and through the proceeds of crime.¹¹³ By the summer of 2004 it became evident that the Coalition forces were fighting a significant insurgency. With the official end of the occupation, the conflict became non-international in character, although the nature of the attacks against the governing authorities did not change. Accordingly, the Coalition developed a campaign plan that ‘called for containing the insurgent violence, building up Iraqi security forces, rebuilding economically and reaching out to the Sunni community’.¹¹⁴

This recognition of the resistance as an insurgency introduces a framework within which the interface between policing and conduct of hostilities can be assessed. This includes looking at the primary role performed by the police in counter-insurgency and the complementary activities of military forces. However, the law enforcement role must also be assessed in terms of the practical limits that arise when employing police forces in high-threat situations. It is to those issues that the analysis will now turn.

Occupation, counter-insurgency, and policing

Insurgency and counter-insurgency

The connection between insurgency and occupation can be found in *The U.S. Army, Marine Corps Counterinsurgency Field Manual*,¹¹⁵ which was developed in response to the security situation confronting US military forces in Iraq and Afghanistan. An insurgency is described as ‘an organized, protracted politico-military struggle designed to weaken the control and legitimacy of an established government, *occupying power*, or other political authority while increasing insurgent control’.¹¹⁶

111 *Ibid.*, pp. 158–160. See also Z. Chehab, above note 109, pp. 6–8. He describes a June 2003 meeting with a five-person Sunni group armed with hand grenades, AK-47 machine guns, RPG-7s, and a 62 mm mortar which started out as an independent nationalist group, but which at that point had growing ties to groups with Islamic backgrounds, ex-Ba’athists, and members of the Fedayeen Saddam.

112 A. S. Hashim, above note 97, pp. 138–139.

113 R. H. Shultz and A. J. Drew, above note 107, pp. 240–242; A. S. Hashim, above note 97, p. 169.

114 T. E. Ricks, above note 80, pp. 392–393.

115 *The U.S. Army, Marine Corps Counterinsurgency Field Manual*, U.S. Army Field Manual No. 3-24, Marine Corps Warfighting Publication No. 3-33.5, University of Chicago Press, Chicago, 2006 (hereafter *Counterinsurgency Manual*).

116 *Ibid.*, p. 2, para. 1–2 (emphasis added). The potential link between insurgency and occupation was recognized in Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (III) Geneva Convention Relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, Art. 4, p. 58, where, in order to counter a perspective that providing prisoner-of-war status to members of organized resistance movements was legitimizing insurgency, it is stated: ‘In our view, the stipulation that organized resistance

Classic counter-insurgency doctrine focuses on good governance, with a primary role for policing in countering the insurgent threat. It is as applicable in a situation of occupation as it is in an internal armed conflict. This is reflected in the fact that the nature of the security threat facing state authorities (either Coalition or Iraqi) did not change when the occupation legally ended but the struggle to control the violence continued.¹¹⁷

As Sir Robert Thompson stated in 1966: '[a]n insurgent movement is a war for the people. It stands to reason that government measures must be directed towards restoring government authority and law and order throughout the country so that control over the population can be regained and its support won'.¹¹⁸ The link between governance, the maintenance of law and order, and counter-insurgency operations is reflected in contemporary military doctrine.¹¹⁹ The conduct of a counter-insurgency campaign places a premium on the employment and, if necessary, development of police and internal intelligence services. Police play a particularly important role in gathering intelligence on insurgent activities.¹²⁰

The maintenance of law and order requires respect for the rule of law. The indicia of a functional legal system include the police, a law code, judicial courts, and a penal system.¹²¹ This is generally reflected in humanitarian law, which provides for the continuance in force of the laws of the occupied territory,¹²² the continued functioning of tribunals¹²³ and the maintenance of the status of public officials and judges.¹²⁴ As James Spaight noted in 1911, seeing that justice is done and 'malefactors are brought to book, is an essential condition of good government and promotes the submission of the inhabitants to the rule of the stranger'.¹²⁵ However, '[n]o conventional rules govern the special problem of indigenous law-enforcement

movements and members of other militias and members of other volunteer corps which are independent of the regular armed forces must belong to a Party to the conflict, refutes the contention of certain authors who have commented on the Convention that this provision amounts to a "ius insurrectionis" for the inhabitants of an occupied territory'.

117 A. Roberts, 'Transformative military occupation', above note 81, p. 617, who notes that 'even if the occupation was theoretically over, the likelihood remained that uses of force, perhaps even exercises of administrative authority, that closely resembled a situation of occupation would occur'.

118 Robert Thompson, *Defeating Communist Insurgency*, Hailer Publishing, St. Petersburg, 1966, p. 51. See also David Galula, *Counterinsurgency Warfare: Theory and Practice*, Frederick A. Praeger, New York, 1964, pp. 89–90; and Frank Kitson, *Low Intensity Operations: Subversion Insurgency and Peacekeeping*, Faber & Faber, London, 1971, p. 49. For an overview of the history of counter-insurgency theory, see Daniel Marston and Carter Malkasian, 'Introduction', in D. Marston and C. Malkasian, above note 93, pp. 13–19.

119 *Counterinsurgency Manual*, above note 115, pp. 360–361, paras. D-38–D-39.

120 R. Thompson, above note 118, pp. 104–106; *Counterinsurgency Manual*, above note 115, pp. 229–230, paras. 6–90–6–91; D. H. Bayley and R. M. Perito, above note 83, p. 78.

121 *Counterinsurgency Manual*, above note 115, pp. 360–361, paras. D-38–D-39; D. H. Bayley and R. M. Perito, above note 83, p. 79.

122 Hague Regulations, Art. 43. This article indicates respect for existing laws is required 'unless absolutely prevented'. See also GC IV, Art. 64, where provision is made for the repeal or suspension of penal laws 'by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention'.

123 GC IV, Art. 64.

124 *Ibid.*, Art. 54.

125 J. M. Spaight, above note 54, p. 358.

agencies in occupied territories'.¹²⁶ The practice of Occupying Powers has been varied. Historically, it has included substituting their own armed forces for existing police agencies; retaining existing police forces after vetting; and even infiltrating sympathizers from the occupied territory into positions of control over existing forces.¹²⁷

Policing and the maintenance of order

In the immediate aftermath of the 2003 Iraq invasion, the Iraqi police apparently disappeared even before the occupation was legally established, in what has been described as a situation that probably could not be averted.¹²⁸ This situation was not helped by the disbandment of Iraqi security forces. Halting the looting, lawlessness, and crime therefore became the responsibility of the invading Coalition. It has been noted that '[t]he occupant must maintain law and order, and he is not at liberty to tolerate a situation of lawlessness and disorder in the occupied territory'.¹²⁹ Although some Iraqi police returned to duty, and programmes to train new Iraqi police forces were eventually established,¹³⁰ it was military forces that had to fill the security void. As is evident in the Iraq occupation, and in other counter-insurgencies of the twenty-first century, such as that in Afghanistan, military forces will sometimes be required to perform police-like functions such as 'protecting key installations, controlling access to relatively secure areas, manning checkpoints, or detaining spoilers'.¹³¹ However, this is far from ideal since they are not necessarily trained for those duties and '[f]oreign stability forces must serve as role models with respect to the separation of military and police forces'.¹³² This reality also necessitates military forces employed on law enforcement duties being trained and equipped with appropriate weapons (including less lethal weapons such as riot-control agents). They must further be required to use appropriate levels of force applicable to the performance of such duties.

The challenges of maintaining law and order in situations of occupation

At the same time, there are limits to how police forces can and should be employed. This is important in assessing the applicability of a law enforcement normative framework. As demonstrated by the Iraq occupation, and the occupations of World War II before it, international armed conflict can continue throughout the period of occupation. Even during the long occupation of the West Bank and Gaza, the Second Intifada that started in 2000 demonstrated that hostilities at the armed

126 G. von Glahn, above note 18, p. 136.

127 *Ibid.*

128 J. Keegan, above note 84, p. 206.

129 Y. Dinstein, above note 25, pp. 105–106. This also extends to the actions of the occupying forces. See Y. Dinstein, above note 4, p. 208; *Congo* case, above note 21, para. 323, in which the Court indicates that every belligerent party has a duty of vigilance to ensure that its forces do not engage in pillage.

130 D. H. Bayley and R. M. Perito, above note 83, pp. 8–17.

131 *Ibid.*, pp. 77 and 80.

132 *Ibid.*, p. 81.

conflict end of the spectrum could re-ignite after periods of relative calm or low levels of violence.¹³³

The level of violence may not be consistent in intensity or scale across the territory. In what has been referred to as a ‘mosaic’ war, it is often difficult to confine the insurgent activity of a resistance movement to one area or period of time. For instance, insurgents may use ‘guerrilla tactics in one province while executing terrorist attacks and an urban approach in another’.¹³⁴ The resistance may be organized in a similar manner to a conventional force and may seek to control territory or a city. However, attacks are often made by a guerrilla force that seeks to hide among the population, resulting in what has been called a ‘war amongst the people’.¹³⁵ The scale of the violence is often far beyond that associated with normal criminal activity. Attacks and defensive operations conducted by organized armed groups armed with mortars, suicide bombs, car bombs, IEDs, anti-tank rockets, and automatic weapons are not readily amenable to being dealt with by a police force.

The security continuum can include war, insurgency, subversion (i.e. terrorism or sabotage), disorder (i.e. strikes, demonstrations, mass rallies), and normal crime, all of which can occur concurrently,¹³⁶ which makes ‘determining the police role very difficult’.¹³⁷ The police are not necessarily the best trained or equipped to address this full spectrum of security threats. Generally, police functions can be divided into six categories: uniformed general duties police, non-uniformed criminal investigators, covert intelligence, border police, and stability police units for controlling strikes and demonstrations as well as protecting installations and personnel.¹³⁸ The first two categories are viewed as ‘core police’ duties that are fundamental for demonstrating that the ‘government can provide security and justice in response to the needs of individuals’.¹³⁹ The core police, along with emergency medical personnel, fire-fighters, and humanitarian workers, are often most at risk from insurgent attack.¹⁴⁰ The result is that there must be co-ordination between the military forces performing the counter-insurgency role and police forces focused on protecting the population. However, it has been suggested that ‘[i]f proactive force is required, it should be done by the military as a means to support core policing, and not as a substitute for it’.¹⁴¹

Furthermore there is the issue of the degree to which the civilian population is willing to co-operate. Notwithstanding the fact that the occupier is dealing

133 S. Catignani, above note 93, p. 235, who notes that the violence ‘took on a decidedly different character from the First Intifada’, extending to gunfire being directed at Israeli vehicles, ambushes, and the placement of improvised explosive devices.

134 *Counterinsurgency Manual*, above note 115, p. 14, para. 1–37.

135 General Rupert Smith, *The Utility of Force: The Art of War in the Modern World*, Penguin Books, London, 2007, pp. 3–4.

136 D. H. Bayley and R. M. Perito, above note 83, pp. 71–72.

137 *Ibid.*

138 *Ibid.*, p. 73. See also *Counterinsurgency Manual*, above note 115, p. 230, para. 6–92. The *Manual* identifies four major categories of police: criminal and traffic police, border police, transport police, and ‘[s]pecialized paramilitary strike forces’.

139 D. H. Bayley and R. M. Perito, above note 83, pp. 73–74.

140 *Ibid.*, p. 75.

141 *Ibid.*, p. 77.

with enemy civilians, the nature of a counter-insurgency is such that ‘in a guerrilla struggle one must seek their sympathy and support’.¹⁴² As was evident in the Iraq occupation, the failure to maintain law and order can create animosity towards the Occupying Power and contribute to a broader insurgency,¹⁴³ although it is recognized that the motives for the Iraq insurgency were multi-faceted.¹⁴⁴ Even if reliance on a narrow interpretation of the law discussed above means that the legal obligation to maintain law and order does not commence until occupation is established, there remains a strong moral and operational advantage in limiting criminal activity where feasible. In any event, an occupation of territory will not always be unpopular in the eyes of the inhabitants. This security situation may be even more complex where the occupation ends up being a transformative one, with various factions within the territory vying for political control.¹⁴⁵

The legitimacy of belligerent acts and the implication of the local police

Another factor that can complicate the role of the Occupying Power in maintaining law and order is the issue of the interaction between foreign security forces and those of the occupied territory. Article 51 of the Fourth Geneva Convention bans the forced participation of protected persons in the armed or auxiliary services of the Occupying Power or their being compelled to ‘undertake any work which would involve them in the obligation of taking part in military operations’.¹⁴⁶ However, the Convention does not specifically make reference to indigenous police forces and their interface with the ongoing hostilities in the context of law enforcement. In addressing the complex security situation created by armed resistance, the *Geneva Convention IV Commentary* does seek to provide some guidance. That commentary indicates that police personnel of the occupied territory ‘cannot under any circumstances *be required* to participate in measures aimed at opposing *legitimate* belligerent acts, whether commenced by armed forces hostile to the Occupying Power, by corps of volunteers or by organized resistance movements’.¹⁴⁷ Presumably, those personnel could agree to do so voluntarily. The *Commentary* also notes that, owing to the criminal nature of acts occurring outside those contemplated by Article 4 of the Third Geneva Convention, it appears that ‘the

142 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Basic Books, New York, 1977, pp. 186–187.

143 T. E. Ricks, above note 80, pp. 135–138; D. H. Bayley and R. M. Perito, above note 83, p. 10; A. S. Hashim, above note 97, pp. 19–20.

144 A. S. Hashim, above note 97, pp. 59–124, where the origins and motives of the insurgency are identified as including the protection of Sunni identity; dissolution of the Iraqi security forces; nationalism, honour, revenge, and pride; tribal motives; religion; and political goals including ejecting the foreign occupation.

145 A. Roberts, ‘Transformative military occupation’, above note 81, pp. 615–616.

146 GC IV, Art. 51.

147 *Geneva Convention IV Commentary*, above note 15, Art. 54, p. 307 (emphasis added). See Kenneth Watkin, ‘Maintaining law and order during occupation: breaking the normative chains’, in *Israel Law Review*, Vol. 41, 2008, pp. 182–184, for a more detailed discussion of the issue of employing local police forces.

Occupying Power is entitled to require the local police to take part in tracing and punishing hostile acts',¹⁴⁸ whatever the motivation of the actors.

A key factor for deciding to involve the local police therefore appears to be the lawfulness of the activities carried out by insurgents who cannot claim legitimate belligerent status. While terms such as 'combatant' or 'fighter' are sometimes used in a generic sense¹⁴⁹ when referring to 'unprivileged belligerents',¹⁵⁰ the use of such terminology does not change the result that direct participation in hostilities without the benefit of lawful combatant status can lead to prosecution.¹⁵¹ In respect of the law governing occupation, the recognition that an Occupying Power may enact penal provisions and take measures 'to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication' reflects the unlawful nature of most resistance activities.¹⁵²

This linking of the legitimacy of participants in hostilities and the enforcement of the law means that police forces of the occupied territory can lawfully be employed against insurgents in all but the most exceptional of circumstances, since the likelihood of a resistance movement meeting the requirements of Geneva Convention III has long been viewed as very remote.¹⁵³

148 *Geneva Convention IV Commentary*, above note 15, Art. 54, p. 307.

149 *ICRC Customary Law Study*, above note 34, p. 3, where it is stated that '[t]he term "combatant" . . . is used in its generic meaning, indicating persons who do not enjoy the protection of attack accorded to civilians, but does not imply a right to combatant status or prisoner of war status'. See Michael N. Schmitt, Charles H. B. Garraway, and Yoram Dinstein, *The Manual of the Law of Non-international Armed Conflict With Commentary*, International Institute of Humanitarian Law, Sanremo, 2006, p. 4: 'fighters include both members of the regular armed forces fighting on behalf of the government and members of armed groups fighting against the government. The term "fighters" has been employed in lieu of "combatants" in order to avoid any confusion with the meaning of the latter term in the context of the international law of armed conflict'. See also 'Third Meeting of Experts: The Use of Force in Occupied Territory, 29–30 October 2009, Geneva', in ICRC, *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory*, report prepared and edited by Tristan Ferraro, ICRC, March 2012 (hereafter 'Use of Force in Occupied Territory'), where the term 'fighter' is used to describe those fighting occupation forces. (in this edition)

150 Richard R. Baxter, 'So-called "unprivileged belligerency": spies, guerrillas, and saboteurs', in *British Year Book of International Law*, Vol. 28, 1951, p. 323, where the term 'unprivileged belligerent' is defined as 'persons who are not entitled to treatment as either peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949'. However, see Knut Dörmann, 'The legal situation of "unlawful/unprivileged" combatants', in *International Review of the Red Cross*, Vol. 85, No. 849, March 2003, pp. 45–74, who notes that the terms unlawful/unprivileged combatant/belligerent are not found in international humanitarian treaty law, and who provides an outline of the protections available to persons termed as such.

151 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd edition, Cambridge University Press, Cambridge, 2010, pp. 36–37. In referring to such participants as 'unlawful combatants', he notes 'in contradistinction to a lawful combatant, an unlawful combatant fails to reap benefits of the status of a prisoner of war. Hence, although he cannot be executed without trial, he is susceptible to being prosecuted and punished by military tribunal'. See also L. C. Green, above note 16, p. 137, where he notes that those who fail to comply with the requirements of AP I, Art. 44(3) to carry arms openly during an attack or while deploying prior to an attack 'may find themselves treated as unlawful combatants'.

152 GC IV, Art. 64(2); see also Arts. 65–68.

153 G. von Glahn, above note 18, pp. 51–52. See also Colonel G. I. A. D. Draper, 'The legal classification of belligerent individuals', in Michael A. Meyer and Hilaire McCoubrey (eds), *Reflections on Law and Armed*

In this respect, requirements such as carrying arms openly, or 'having a fixed distinctive sign recognizable at a distance', can be particularly difficult to meet for organized groups operating within occupied territory, thereby potentially criminalizing their activity. Even where parts of uniforms and other symbols have been worn, that, in itself, has not necessarily proved sufficient to have the members of a resistance group viewed as lawful belligerents.¹⁵⁴ Such participation in hostilities has long been viewed as 'criminal' in nature, leading to it being subjected to police attention as well as military activity. The reliance on local police forces to maintain order during occupation can be controversial, particularly as it can put them in opposition to groups and others who are their fellow nationals. As the *Geneva Convention IV Commentary* notes, internal laws and regulations should be issued to define those duties, so that the police can operate 'with complete loyalty without having to fear the consequences, should the terms of the Convention be liable to be interpreted later in a manner prejudicial to them'.¹⁵⁵

'Belonging to a Party to the Conflict'

Another way in which the status of the members of an organized resistance movement as lawful belligerents may become an issue concerns whether the armed group 'belongs' to a Party to the Conflict.¹⁵⁶ It has been suggested that hostilities between an Occupying Power and organized armed groups that do not 'belong' to a Party to the Conflict could be considered non-international in character. Under that approach, the threshold for engaging such groups would depend upon active hostilities reaching a certain level associated with the *Tadić* criterion for conflicts not of an international character (involving organized armed groups and a certain intensity of conflict).¹⁵⁷ However, the threshold for non-international armed

Conflict: The Selected Works on the Laws of War by the Late Professor Colonel G.I.A.D. Draper, OBE, Kluwer Law International, London, 1998, p. 201; H. Levie, above note 54, pp. 39–40.

154 *Hostage* case, above note 19, p. 1244, which notes, in respect of the organized resistance in Yugoslavia, 'The evidence shows that the bands were sometimes designated as units common to military organization. They, however, had no common uniform. They generally wore civilian clothes although parts of German, Italian, and Serbian uniforms were used to the extent they could be obtained. The Soviet star was generally worn as insignia. The evidence will not sustain a finding that it was such that it could be seen at a distance. Neither did they carry their arms openly except when it was to their advantage to do so.'

155 *Geneva Convention IV Commentary*, above note 15, Art. 54, p. 307 and n. 7, where reference is made to a draft 'Declaration applying to Police Officers the Geneva Convention of August 12th, 1949, concerning the protection of civilians in wartime', which provides that '[d]uring or after occupation, Police officers may in no case be subjected to penalty or compulsion by reason of the execution by them of an order of any authority which could in good faith be regarded as competent especially if the execution of this order was a normal part of their duty'.

156 GC III, Art. 4 A (2).

157 'Use of Force in Occupied Territory', above note 149, pp. 18–21; Jelena Pejić, 'The protective scope of Common Article 3: more than meets the eye', in *International Review of the Red Cross*, Vol. 93, No. 881, March 2001, pp. 191–193. See also ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-A, Decision of 2 October 1995, para. 70; ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgment (Trial Chamber), 7 May 1997, paras. 562–568; ICTY, *Prosecutor v. Ljube Boskoski*, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, paras. 175 *et seq.*

conflict is open to interpretation. For example, in *Juan Carlos Abella v. Argentina*¹⁵⁸ the Inter-American Commission on Human Rights applied humanitarian law norms in assessing hostilities involving forty-two armed individuals attacking government forces over a thirty-hour period.¹⁵⁹ This suggests either different criteria than that contemplated by the jurisprudence of the ICTY, or the application of a relatively low threshold when considering the necessary intensity and duration of violence.¹⁶⁰ In this respect, to the extent that criteria for assessing the organization of an armed group – such as the existence of a command structure, disciplinary rules and mechanism within the armed group, the existence of a headquarters, logistics, the planning and conduct of operations, and so forth – are relied on,¹⁶¹ those criteria need to be applied contextually. This is particularly evident in situations of occupation, where organized armed groups conducting network-centric guerrilla warfare normally operate in a less hierarchical and more decentralized fashion than conventional forces that have a traditional headquarters, formal command structure, and the like.¹⁶² One of the challenges in assessing thresholds for internal conflict is the reality that '[d]istinguishing between international and non-international conflicts is particularly difficult in contemporary conflict situations, which often present aspects of both'.¹⁶³ As a result, there is 'no agreed-upon mechanism for definitively characterizing situations of violence'.¹⁶⁴

158 Inter-American Commission on Human Rights, *Juan Carlos Abella v. Argentina*, Case 11.137, in *Inter-American Yearbook on Human Rights*, Vol. 13, 1997, 602 (Commission report) (hereinafter the *Abella Report*).

159 Lindsay Moir, 'Law and the Inter-American Human Rights System', in *Human Rights Quarterly*, Vol. 25, pp. 189–190. For a discussion of the *Abella Report* regarding its reliance on humanitarian law norms.

160 See Susan Breau, Marie Aronsson, and Rachel Joyce, 'Discussion paper 2: drone attacks, international law, and the recording of civilian casualties of armed conflict', Oxford Research Group, June 2011, available at: <http://www.google.com/search?q=Discussion+Paper+2%3A+Drone+Attacks%2C+International+Law%2C+and+the+Recording+of+Civilian+Casualties+of+Armed+Conflict%E2%80%9D%2C&sourceid=ie7&rls=com.microsoft:en-us:IE-SearchBox&ie=&oe=> (last visited February 2012), for reference to the *Abella* case in the context of applying the intensity and duration criterion for assessing the threshold for a non-international armed conflict.

161 See J. Pejic, above note 157, p. 192, for an outline of the organization 'criterion' in the ICTY jurisprudence.

162 Stanley A. McCrystal, 'It takes a network: the new frontline of modern warfare', in *Foreign Policy*, March/April 2011, available at: http://www.foreignpolicy.com/articles/2011/02/22/it_takes_a_network?print=yes&hidecomments=yes&page=full (last visited February 2012). As General McCrystal noted, there was an initial attempt to assess Al Qaeda in Iraq in terms of a traditional military structure: 'But the closer we looked, the more the model didn't hold. Al Qaeda in Iraq's lieutenants did not wait for memos from their superiors, much less orders from bin Laden. Decisions were not centralized, but were made quickly and communicated laterally across the organization. Zarqawi's fighters were adapted to the areas they haunted, like Fallujah and Qaim in Iraq's western Anbar province, and yet through modern technology were closely linked to the rest of the province and country. Money, propaganda, and information flowed at alarming rates, allowing for powerful, nimble coordination. We would watch their tactics change (from rocket attacks to suicide bombings, for example) nearly simultaneously in disparate cities. It was a deadly choreography achieved with a constantly changing, often unrecognizable structure'.

163 Theodor Meron, 'The humanization of humanitarian law', in *American Journal of International Law*, Vol. 94, No. 2, 2000, p. 261.

164 *Ibid.* See also S. Breau *et al.*, above note 160, p. 5, who note that 'what level [of organization] this is has not been agreed upon, but it appears to be the consensus that an insurgent group must be organised enough to fulfil the obligations imposed upon them by Article 3 in order to be a "party" to an armed conflict'.

While the theory of applying non-international armed conflict thresholds may offer some attraction as a means to limit the violence during occupation when there are sporadic or renewed hostilities, it would have limited relevance to the violent occupations of World War II or Iraq, given the scope, level, and intensity of those conflicts.¹⁶⁵ In addition, there remains the question of whether a non-international armed conflict threshold would apply as a matter of law, or simply provide a practical means of identifying renewed hostilities as a matter of policy. The least controversial position is that the threshold can be of use from a practical perspective. In any event, with respect to the employment of police forces for dealing with the insurgents, applying the law of non-international armed conflict would actually highlight the ‘criminal’ nature of the insurgent activities. This is because the legitimate status of the members of the organized armed group would no longer be an issue: the category of prisoner of war is not available in non-international armed conflict.¹⁶⁶

Furthermore, viewing hostilities between resistance movements and an Occupying Power as a non-international armed conflict raises a number of additional practical and legal complexities. It introduces a body of law: that governing non-international armed conflict, which is not as clearly proscribed in treaty law as the law applicable to international armed conflict. And, as will be discussed, suggesting that the hostilities between the Occupying Power and certain organized armed groups could be viewed as a non-international armed conflict is also inconsistent with traditional and long-standing interpretations of the law.

Hostilities conducted by an Occupying Power are carried out in the context of an international armed conflict. A state of occupation only exists during such conflict. The occupier is not the ‘sovereign’ of the territory, but rather is carrying out obligations imposed on it by the law governing international armed conflict. The resistance may include a variety of organized armed groups, as well as individuals who are taking a direct part in hostilities, or otherwise acting against the security interests of the occupier. In this respect, resistance during violent occupation often

165 UCIHL Meeting Report, above note 64, p. 29, which suggests ‘that the threshold for determining the existence of a Common Article 3 NIAC [non-international armed conflict], i.e., armed violence of a certain intensity and duration, provided a useful threshold for determining whether there has been a “resumption” or “outbreak” of hostilities in the relevant part of the occupied territory where the hostilities stem from resistance activity’.

166 Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, Oxford University Press, Oxford, 2010, p. 78, where it is noted that there is no equivalent status to prisoner of war in non-international armed conflict and ‘[w]hile the law of non-international armed conflict does not expressly prohibit or criminalize participation . . . international law does not immunize such participation from the operation of domestic law’. See also Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, p. 60: ‘[o]nce rebels are captured, or otherwise rendered unable to continue fighting . . . they become *hors de combat* and are entitled to the same level of treatment as civilians. Their legal status nevertheless remains unchanged, exposing them to the full force of the State’s criminal law’; and Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p. 36 : ‘armed opposition groups cannot, on the basis of Common Article 3, claim immunity from prosecution and punishment when captured by the territorial state for their acts contrary to the laws of the territorial state’.

involves a complex interrelationship between numerous armed groups, suggesting co-operation and co-belligerency rather than operating under one command or even for the political power whose authority over the territory has been displaced by the occupation. While not all organized armed groups resisting occupation are linked to a state, particularly in the strict formal sense established under the Third Geneva Convention for the narrow purpose of determining prisoner-of-war status, this does not make the hostilities in fact or in law any less international in character. Relying on prisoner-of-war status criteria to categorize the conflict appears to introduce an unnecessary element of formalism and to overreach the scope of the Third Convention. Members of some resistance groups fighting during occupation may get prisoner-of-war status because they belong to a Party to the Conflict, but that is the extent of the effect of those provisions of the Convention. The provisions do not speak to either the nature or categorization of the conflict itself. Further, in practical terms there may be no difference in organization or tactics of the variously backed organized armed groups engaged in the conflict, regardless of their affiliation. These groups, often acting as co-belligerents, fight the same Occupying Power, which attained that status at law as a result of the ongoing international armed conflict. It is difficult to see what advantage is gained in seeking to subdivide this conflict into different categories in what is an integrated operational and security environment involving protection of the same population.

As was demonstrated in World War II, armed resistance groups can serve diverse ranges of competing political interests, but at the same time, for a variety of reasons, act together against a common enemy.¹⁶⁷ This was seen again during the 2003–2004 Iraq Occupation.¹⁶⁸ However, this does not change the overarching law governing the activities of the Occupying Power, including the conduct of hostilities. As was indicated in the 1948 *Hostage* case, in respect of countering diverse organized resistance movements in Yugoslavia and Greece, the actions of the Occupying Power in ‘preserving order, punishing crime, and protecting lives and property within the occupied territory’ are ‘definitely limited by recognized rules of international law,

167 R. B. Asprey, above note 66, pp. 434–435, where it is indicated that in February 1943 the organized resistance in France consisted of five distinct groups. One of the most effective organizations was not linked to the occupied state: the Communist ‘Front National’, which provided nearly a third of the Maquis in a group called the ‘Franc Tireurs et Partisans’, did not give up control of their units but did co-operate with the Allied Powers and other groups in seeking to establish a secret army ‘more by need for recognition, arms, and money than by patriotism’. Similarly, the resistance in Yugoslavia presented another complicated situation. Tito’s Partisans were seeking to oust the exiled regime and by ‘November 1941, the communists and monarchists were at each other’s throats’. See Matthew Bennett, ‘The German Experience’, in Ian F. W. Beckett (ed.), *The Roots of Counterinsurgency: Armies and Guerrilla Warfare 1900–1945*, Blandford Press, London, 1988, p. 74. Notwithstanding this inter-group conflict, operations by and against the German occupier occurred in the context of an international armed conflict and not an internal one.

168 A. S. Hashim, above note 97, pp. 170–176, who notes that in Iraq there were nearly twenty different armed groups engaged in the resistance. While a linkage between most of these groups and the previous regime of Saddam Hussein would have been unlikely, that did not make the conduct of hostilities by or against the occupying Coalition forces any less international in character.

particularly the Hague Regulations of 1907'.¹⁶⁹ Although the conflict in Iraq was also subject to the provisions of the later 1949 Geneva Conventions, those Conventions did not change the basic premise of the *Hostage* case judgment.¹⁷⁰

It should be of particular concern that claiming that the law governing internal conflicts readily applies to occupation may call into question the broader applicability of the Fourth Geneva Convention. This may particularly arise in situations where a majority or all of the resistance forces have little or no connection to the displaced regime. It also introduces additional levels of complexity, with the Occupying Power being asked to attempt a simultaneous application of the law governing international armed conflict with its internal counterpart. Such situations can occur; however, from the viewpoint of a practical and consistent application of the law they should be avoided whenever possible. There is also the potential for multiple separate non-international armed conflicts occurring where there are numerous different armed groups engaged in hostilities. Moreover, in focusing on the legitimacy of organized armed groups the theory fails to address the situation where individual civilians take a direct part in hostilities. It is not clear whether they would be considered to be participants in an international or a non-international armed conflict.

While it is the international law of armed conflict that applies to the occupier, this does not mean that non-international armed conflicts can never occur in occupied territory. As the *Tadić* decision contemplates, an armed conflict may occur when two organized armed groups fight one another. In the context of an occupation, such fighting between these groups could be seen as a conflict not of an international character. However, this is the exception rather than the rule. In any event, as has been noted, suggesting that a conflict is non-international in character reinforces the argument that police forces have a role to play in dealing with such illegal activity. While not necessarily encompassing traditional crimes such as theft or drug trafficking, participation by non-state actors in internal conflicts has long been viewed by states in particular as 'criminal' in nature. Acts that are carried out contrary to the security interests of the state in such conflicts may be treated as crimes. This inevitably points towards involvement of the criminal justice system, of which policing is such an integral part.

In the final analysis, hostilities conducted against the Occupying Power, including those carried out by a diverse range of organized armed groups, fit comfortably within the law governing international armed conflicts, including occupation law. It is difficult to see how any limited benefits gained from introducing the law governing non-international armed conflict outweigh the application of the better-developed and articulated law applicable to international conflicts. Overall this self-imposed interpretive complexity is neither necessary nor desirable from the broader perspective of protecting the inhabitants of the occupied territory.

169 *Hostage* case, above note 19, pp. 1243–1244.

170 GC III, Art. 135 and GC IV, Art. 154. The 1949 Geneva Conventions are supplementary to the 1907 Hague Regulations.

The primacy of the police function

In respect of the performance of a policing function ‘occupation authorities, being responsible for maintaining law and order, are within their rights in claiming cooperation of the police’ regarding the suppression of criminal activity.¹⁷¹ While it is open for public officials such as police to abstain from filling their functions for reasons of conscience,¹⁷² the *Geneva Convention IV Commentary* recognizes that it is the moral duty for such officials ‘to remain at their posts in the interests of their fellow citizens’.¹⁷³ Ultimately, their employability may depend on the degree to which they are willing, able, and capable of engaging in police duties that could involve using force against insurgents. However, as occurred in Iraq, the establishment of a new governing authority – and with it security forces – increases the likelihood that the police forces become engaged in the counter-insurgency campaign.

It is clear that policing remains of fundamental importance during occupation, both in terms of general law enforcement and as part of a security campaign designed to counter the illegal activities of insurgent groups. However, separating the law enforcement role from the conduct of hostilities aspect of an insurgency is neither factually nor legally simple. As discussed above, factors, such as the intensity of the hostilities and the organization of the parties to the conflict might provide useful practical indicators of insurgent activity.¹⁷⁴

If an ‘organized resistance movement’ meeting the criteria of Article 4 of the Third Geneva Convention was threatening the Occupying Power, then identification of the threat could be significantly easier.¹⁷⁵ However, as happened in Iraq, it is more likely that organized groups that do not meet the requirements of lawful belligerency and civilians taking a direct part in hostilities will carry out insurgent activities.¹⁷⁶ Further, police will often find themselves on the frontlines of the conflict owing to their integration into local communities, and, through the assignment of roles such as defending property and personnel, subject to attack.

To be consistent with traditional counter-insurgency doctrine, operational planning should rely on the ‘police primacy principle’.¹⁷⁷ That principle recognizes that a key objective is to reduce military involvement and increase local police

171 *Geneva Convention IV Commentary*, above note 15, Art. 54, p. 307. See M. Sassòli, above note 11, p. 665, who takes the view that ‘[p]olice operations are not directed at combatants (or civilians directly participating in hostilities) but against civilians (suspected of crimes threatening public order)’.

172 GC IV, Art. 54.

173 *Geneva Convention IV Commentary*, above note 15, Art. 54, p. 306.

174 ICTY, *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, above note 157, para. 70.

175 *Hostage* case, above note 19, p. 1244. In limited circumstances some groups may operate as lawful combatants. The court noted ‘[t]here is convincing evidence in the record that certain band units in both Yugoslavia and Greece complied with the requirements of international law. . . . But the greater proportion of the partisan bands failed to comply with the rules of war entitling them to be accorded the rights of a lawful belligerent’.

176 M. Sassòli, above note 11, p. 665, n. 21. See also D. Kretzmer, above note 50, p. 207.

177 D. H. Bayley and R. M. Perito, above note 83, pp. 68–69. This principle is discussed in the context of a foreign intervention focused on the creation of a self-sustaining legitimate government. However, it has equal applicability to the maintenance of public order in a situation of occupation.

capacity. This is so that primary personnel deployed among the population to deal with the insurgency are trained to use minimum force and expected to exercise individual discretion.¹⁷⁸ However, insurgent activity can impact on what the police can do as '[i]nsecurity indicates both a need for police and an impediment to their effectiveness'.¹⁷⁹ It is also evident that the nature and scale of the threat posed by ongoing hostilities, as well as the organization, training, traditional role, and equipment of police forces, means that they are not the only security forces engaged either in law enforcement or in countering the insurgency during an occupation. Military forces of the Occupying Power will be required to participate in hostilities, fill gaps in the policing capacity, and provide support to police operations.¹⁸⁰ The issue raised above in the section 'Occupation and the rule of law' remains of how the legal frameworks governing the use of force in law enforcement and the conduct of hostilities in this complex security environment relate to one another. Having established the factual reality of 'violent' occupation and the significant challenges facing security forces, it is to that issue that the analysis will now turn.

Legal frameworks governing the use of force in hostilities and policing

One commentator has suggested that '[p]ublic order is restored through police operations, which are governed by domestic law and international human rights, and not through military operations governed by IHL on the conduct of hostilities'.¹⁸¹ However, that assessment was tempered with the acknowledgement that continuing organized armed resistance makes the distinction between the conduct of hostilities and police operations directed against criminal activity more difficult to establish.¹⁸² While a preference for a clearly bifurcated system of normative frameworks to govern police and military operations in occupied territories is understandable, the complex security situation requires a more integrated and nuanced approach. In this respect it is not clear how the maintenance of 'public order and safety' can be limited to police operations, either factually or legally. Public order is a broader concept than 'law and order',¹⁸³ which itself has been interpreted to be more than simply the enforcement of criminal law.

178 *Ibid.*, p. 69. It is noted by authors that four characteristics distinguishing the police from the military are their being lightly armed, or not at all; their deployment as individuals or small groups; the exercise of more individual discretion; and an organizational structure separate from the military.

179 *Ibid.*

180 *Ibid.*, p. 77.

181 M. Sassòli, above note 11, p. 665.

182 *Ibid.*

183 Y. Dinstein, above note 4, pp. 91–94. In relying on the original wording of the preceding 1874 *Brussels Project of an International Declaration on the Law and Customs of War* and the 1880 *Oxford Manual of the Laws of War on Land*, he adopts a broad interpretation of Article 43 of the Hague Regulations to include public order and life, and states: '[i]t is not enough for the Occupying Power to conscientiously protect life and limb. . . . The military government cannot observe with equanimity an economy under occupation in a shambles or a social breakdown causing distress to the civilian population' (*ibid.*, p. 93).

Maintaining ‘law and order’ can involve preventing and responding to crimes, controlling public demonstrations, disarming individuals or groups, and preventing serious crimes such as genocide, war crimes, and crimes against humanity.¹⁸⁴ As has been noted, unless members of an organized resistance movement have attained the status of lawful belligerents, their activities can be subject to criminal prosecution. It is therefore necessary to look at the normative frameworks of human rights and humanitarian law, which govern security operations, to determine their relative roles in maintaining security. This will be done by setting out the basic differences between the two frameworks, assessing factors impacting on their relative applicability (such as exercising control over territory), and looking at the application of the *lex specialis* rule.

The use of force under the human rights and humanitarian normative frameworks

The normative framework governing law enforcement addresses the use of force in a fundamentally different manner than the conduct of hostilities. Law enforcement, based on a human rights normative framework, seeks to limit the use of force to situations of absolute necessity.¹⁸⁵ A ‘shoot to kill’ policy is strictly avoided.¹⁸⁶ Accordingly, deadly force is only employed when it is strictly unavoidable.¹⁸⁷ There is a clear preference demonstrated for capturing rather than killing a suspect.¹⁸⁸ The use of force is governed by the principles of necessity and proportionality, with firearms

permitted in self-defense or the defense of others against the imminent threat of death or serious injury; to prevent a particularly serious crime involving grave threat to life; to arrest a person presenting such a danger and resisting their authority; or to prevent his or her escape.¹⁸⁹

See also E. Benvenisti, above note 1, pp. 9–11, for a discussion of the differing views of the scope of ‘public order’.

184 Timothy McCormack and Bruce M. Oswald, ‘The maintenance of law and order in military operations’, in Terry Gill and Dieter Fleck (eds.), *The Handbook of the International Law of Military Operations*, Oxford University Press, Oxford, 2010, p. 445, para. 1.

185 ECtHR, *McCann et al. v. United Kingdom*, Application no. 18984/91, Judgment of 27 September 1995, para. 148 (hereafter *McCann*); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August–7 September 1990, para 9, available at: <http://www2.ohchr.org/english/law/pdf/firearms.pdf> (last visited February 2012) (hereafter UN Basic Principles on Use of Force).

186 ECtHR, *McKerr v. United Kingdom*, Application no. 28883/95, Judgment of 4 May 2001, para. 100 (hereafter *McKerr*), for reference to the term ‘shoot to kill’.

187 UN Basic Principles on Use of Force, above note 185, para. 9.

188 See the Israeli High Court of Justice (HCJ), *Public Committee Against Torture in Israel v. Government of Israel*, HCJ 769/02, Judgment of 11 December 2005, para. 40, available at: <http://www.law.upenn.edu/academics/institutes/ilp/targetedkilling/papers/IsraeliTargetedKillingCase.pdf> (last visited February 2012) (hereafter *Targeted Killing* case), relying in part on the European Court of Human Rights decision in *McCann*, above note 185, p. 148, para. 235, for a discussion of human-rights-based principles regarding law enforcement and the preference for arrest, investigation, and trial.

189 The Public Commission to Examine the Maritime Incident of 31 May 2010 (Turkel Commission), Report, Part I, January 2011, p. 233; UN Basic Principles on Use of Force, above note 185, para. 9.

In terms of accountability, the case law in the European Court of Human Rights extends the requirement for an investigation beyond 'all *suspected* cases of extra-legal, arbitrary and summary executions', as set out in the United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions¹⁹⁰ to the broader requirement of having an 'effective official investigation when individuals have been killed as a result of the use of force'.¹⁹¹ The form of investigation is not limited to a criminal inquiry; however, it must be independent of state authorities and comply with universal standards. The investigation can include a review not only of the security personnel involved but also of issues such as training, planning, rules of engagement, and orders.¹⁹²

In contrast, humanitarian law recognizes that the use of deadly force is an inherent part of the conduct of hostilities. Lawful combatants receive immunity for killing carried out in accordance with the law. Members of state security forces are specifically trained, ordered, and expected to use such force, although attacks must be limited to valid military objectives (either persons or objects).¹⁹³ Lawful targets during international armed conflict, which encompasses periods of occupation, include members of the regular armed forces of states, irregular armed forces belonging to a party to the conflict, and civilians taking a direct part in hostilities.¹⁹⁴ Those using force must distinguish between lawful targets and civilians not taking an active part in hostilities and civilian property. However, under the humanitarian law concept of 'proportionality', collateral death, injury, or damage may result owing to their proximity to lawful targets.¹⁹⁵

International humanitarian law also has an accountability structure, although, since it is not focused on preventing a 'shoot to kill' policy, it does not require an investigation whenever a person is killed. Rather, investigations deal primarily with alleged breaches of international criminal and domestic law such as war crimes, crimes against humanity, or breaches of military law. For example, in the 1998 Rome Statute of the International Criminal Court, the war crime relating to collateral injury or death is established when there is the 'intentional launching of an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated'.¹⁹⁶ The initiation of a criminal or other investigation would only be required, as a matter of law, if there were a reasonable

190 United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Economic and Social Council Res. 1989/65, 24 May 1989, Annex, in Economic and Social Council Official Records, 1989, Supp. No. 1, p. 52, UN Doc. E/1989/89, para. 9 (emphasis added).

191 McKerr, above note 186, p. 599, para. 111.

192 Kenneth Watkin, 'Controlling the use of force: a role for human rights norms in contemporary armed conflict', in *American Journal of International Law*, Vol. 98, No. 1, 2004, pp. 19–20.

193 AP I, Arts. 43, 48, and 50–52.

194 ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, ICRC, Geneva, February 2009, p. 25.

195 AP I, Arts. 51(5)(b) and 57.

196 Rome Statute of the International Criminal Court, 17 July 1998, A/CONF. 183/9, Art. 8(2)(b)(iv), available at: <http://www.unhcr.org/refworld/docid/3ae6b3a84.html> (last visited February 2012) (hereafter Rome Statute).

suspicion that such excessive collateral injury, death, or destruction had occurred. Depending upon the circumstances, and the level of information available to a commander, an initial fact-finding inquiry may be directed in order to determine whether a criminal or other investigation is necessary.¹⁹⁷ Of course, this would not preclude the ordering of an investigation, as a matter of policy, whenever any injury, death, or damage occurs, as can happen in the context of certain operations such as counter-insurgencies.

In addition, administrative or operational investigations may be ordered for a variety of operational and policy reasons: for example, under circumstances where a weapons system does not perform as expected and strikes an unintended target, personnel do not follow established procedures, or a pattern of misconduct emerges that is of concern to a military commander.¹⁹⁸ Liability can be incurred for individual acts or omissions and as a result of command or superior responsibility.¹⁹⁹ While the human rights accountability structure has been traditionally viewed as better developed and utilized, there has been continued application of national humanitarian-law-based investigations and an increasing involvement of international criminal courts.²⁰⁰ The operation of this humanitarian law accountability process is often masked internationally by its reliance on domestic courts and tribunals for the prosecution of war crimes and investigations of alleged wrongdoing.²⁰¹

Occupied territory and ‘control’

The application of the normative frameworks governing the conduct of hostilities and law enforcement in respect of operations undertaken to maintain public order is affected by the degree of control that the Occupying Power exercises over the territory where the resistance is operating. The issue of control is relevant in two

197 Michael N. Schmitt, ‘Investigating violations of international law in armed conflict’, in *Harvard National Security Journal*, Vol. 2, 2011, p. 63, who notes that such an initial inquiry has been formalized by Australia in the form of a Quick Assessment (QA) ‘in which a military member appointed by the officer concerned examines the facts and circumstances of a matter within twenty-four hours. . . . The primary purpose of the QA is to determine whether further action is required’.

198 Canadian Broadcasting Corporation, ‘Afghan deaths focus of special forces probe’, 14 September 2010, available at: <http://www.cbc.ca/news/canada/story/2010/09/14/sand-trap.html> (last visited February 2012), where it is indicated that, in addition to a criminal investigation into alleged wrongdoing, ‘a military board of inquiry, which investigates major problems within the Canadian Forces, is looking into administrative and non-criminal issues surrounding the case, and is hearing 100 witnesses as it conducts its probe’.

199 Rome Statute, above note 196, Arts. 25–28.

200 Antonio Cassese, *International Criminal Law*, 2nd edition, Oxford University Press, Oxford, 2008, pp. 435–444, for a discussion of the need for international trials. See also *ibid.*, p. 6. International criminal law is unique, as it derives its origins from humanitarian law, human rights law, and national criminal law.

201 See Robert Cryer, Håkan Friman, Darryl Robinson, and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd edition, Cambridge University Press, Cambridge, 2010, p. 64. The authors indicate that international crimes are primarily intended to be prosecuted at the domestic level. Further, war crimes ‘have been regulated in domestic law the longest and have been prosecuted most often’ and are often considered to be a preferable option in political, sociological, practical, and legitimacy terms. However, see also *ibid.*, p. 580, where it is noted that international tribunals have arisen because of an absence or failure of national justice efforts, ‘but are not meant to replace them’.

ways. First, there is the question of whether the Occupying Power is exercising sufficient control over the territory to conclude that it is occupied. If it is not occupied, then the obligation to maintain public order under the Fourth Geneva Convention does not apply as a matter of treaty law, although this does not mean that such forces will not be tasked to intervene to suppress criminal acts that they observe during the conduct of operations. Second, there is the question of control over the area where operations are being conducted by security forces. In this respect, even where there is a requirement to maintain public order, the ability to conduct law enforcement operations may be considerably diminished by the prevailing security situation.

Should an organized group, or the armed forces of the other party, regain control of the territory, then operations against the group by the occupier would, in effect, be the same as a re-invasion.²⁰² In this respect an analogy has been drawn between occupation and blockade. Like a blockade, an occupation cannot merely exist on paper.²⁰³ However, temporary dispossession of territory does not necessarily mean that the occupation has ended. A key issue appears to be whether the Occupying Power can send security forces to ensure that its authority is effective. As has been noted, '[s]hould the Occupying Power manage to display resilience in the face of temporary adversity, it would not lose effective control'.²⁰⁴ Further, it appears that pockets of resistance would not render the whole territory 'unoccupied', as 'the presence of isolated areas in which that [legitimate] authority is still functioning does not affect the reality of the occupation if those areas are effectively cut off from the rest of the occupied territory'.²⁰⁵

During the Iraq conflict, the periodic control exercised by insurgent forces over cities or parts of cities, such as in Fallujah and Najaf, did not mean that the Coalition forces had been ousted as the Occupying Power in those locations.²⁰⁶ However, a sufficient loss of control appears to have occurred in some instances in Russia during World War II²⁰⁷ and perhaps in parts of Yugoslavia as well.²⁰⁸ This

202 G. von Glahn, above note 18, p. 29. See also Elbridge Colby, 'Occupation under the laws of war', in *Columbia Law Review*, Vol. 25, No. 7, 1925, p. 910 : if an occupation is '[f]ounded by force it may be overthrown by force'; *Einsatzgruppen case (United States of America v. Otto Ohlendorf, et al.)* (Case No. 9), 8–9 April 1948, *Trials of War Criminals Before the Nuremberg Military Tribunals*, Vol. IV, Government Printing Office, Washington, 1950, p. 492 (hereafter *Einsatzgruppen case*): partisans had 'wrested considerable territory from the German occupant' and '[i]n reconquering enemy territory which the occupant has lost to the enemy, he is not carrying out a police performance but a regular act of war'.

203 G. von Glahn, above note 18, p. 29.

204 Y. Dinstein, above note 4, p. 45. See also *Hostage case*, above note 19, p. 1243. The case held that, although the partisans in Greece and Yugoslavia were able to control sections of the country, it remained occupied as 'it is established that the Germans could at any time they desired assume physical control of any part of the country'.

205 L. C. Green, above note 16, p. 286.

206 B. West, above note 99; and P. Cockburn, above note 99, pp. 184–185, where it is noted that in April 2004 the Mehdi Army had taken over a vast cemetery in central Najaf and 'the street fighting was very intense with the American troops staying inside their tanks while we tried to hit them from all directions'.

207 See *Einsatzgruppen case*, above note 202, p. 492, for reference to the partisans having wrestled territory from the German occupier. Further, in reconquering the territory, the occupant 'is not carrying out a police performance but a regular act of war'.

208 See J. Ellis, above note 72, pp. 167–168. Tito's Partisans set up 'liberated areas' which were 'miniature states controlled by the administrative machinery of AVNOJ [the Partisan Anti-Fascist Council of

view that mere physical presence of an armed group does not normally oust the occupier also supports the narrower interpretation of occupation by which simply placing ‘boots on the ground’ during a patrol, raid, or invasion does not create an occupation at law.²⁰⁹ If that were the case, then organized resistance movements conducting the patrols, raids, or other operations could theoretically easily extinguish the obligations of the occupier.

Barring a complete ousting of the Occupying Power, the treaty obligation to maintain order still exists, despite a temporary loss of control over an area. However, law enforcement operations are unlikely to be a viable option for maintaining order in those areas, either on the ground or at law. That is because the conduct of law enforcement requires a very significant level of control over the security situation being addressed. Policing is effective because of the degree of control that can be exercised by state authorities, including by the use of undercover operatives, by electronic surveillance, and through the collection of human intelligence. In this respect, domestic security agencies are integrated into the lives of citizens as a result of the high levels of control that a state ordinarily enjoys.

For example, it is the ability to geographically isolate a suspect (who is normally lightly armed, if at all) and then use an overwhelming physical presence and the threat of force to effect an arrest, or otherwise resolve the situation, which makes policing so effective. In contrast, it is the inability to exercise sufficient control over an area that often makes the use of military force to remove the security threat the most realistic option for dealing with insurgents. Even when charting a unique approach to targeting law by incorporating law enforcement norms in the 2006 *Public Committee Against Torture in Israel v. Government of Israel* case, the Israeli Supreme Court identified two factors that could impact on its stated preference for arrest, investigation, and trial. Those factors were the risk to the lives of soldiers and civilians, and the issue of control.²¹⁰ While the court indicated a law enforcement response might be particularly practical during belligerent occupation, it was in respect of a situation ‘in which the army controls the area where the operation is taking place’.²¹¹ For example, a commander may be confronted with a situation where a military force potentially has to fight its way into, or away from, an objective where a capture is being considered. A force may also be under risk of ambush or attack while conducting the operation. In those situations, a commander would have to weigh the feasibility of the operation, considering both the importance of the enforcement action and the attendant risk to the security forces and uninvolved civilians. Such limits for the application of a law enforcement response during occupation are also reflective of the training, equipment, and ordinary role of police forces.

Liberation]. In this way the Communists both created a uniform administration in all the areas they controlled and also, particularly towards the end of the war, gradually built up the framework of a future national administration’.

209 However, see G. von Glahn, above note 18, p. 29, who took the view that ‘an occupation would be terminated at the actual dispossession of the occupant, regardless of the source of such dispossession’.

210 *Targeted Killing* case, above note 188, para. 40.

211 *Ibid.*

However, even where sufficient control is exercised to effectively carry out law enforcement functions, this does not mean that hostilities will not occur in that territory. Although some countries develop units with special capabilities,²¹² and sometimes local police are trained and employed as ‘little soldiers’,²¹³ ‘[u]ltimately police contribute to counterinsurgency by winning the allegiance of the population: the military contributes . . . by eliminating threats of violence’.²¹⁴ In very practical terms, RPGs (hand-held anti-tank grenade launchers), mortars, vehicle-borne or suicide bombs, and IEDs are not the weapons of ordinary criminals controllable through a law enforcement response. It is reported that a SAM-7 ground to air missile was used by insurgents to down an attack helicopter in April 2004.²¹⁵ Similarly, the use of RPGs to shoot down helicopters in Somalia,²¹⁶ Afghanistan,²¹⁷ and Iraq²¹⁸ provided clear examples of the significant risk attendant in dealing with armed groups equipped with such weapons of war. There are limits to what police and other law enforcement authorities can do without being turned into soldiers conducting hostilities. The nature of the threat, the capabilities of the security forces, the degree of control exercised over territory, and the normative rules governing the use of force are inevitably linked.

The principle of *lex specialis*

Given the availability of two normative frameworks to govern the use of force, and the complex security situation often prevalent during an occupation, the question remains as to how they apply to controlling the use of force. Certainly, the principle of *lex specialis* provides a starting point for addressing this issue. However, there is an increasingly complex discussion developing over what *prima facie* appears to be a fairly straightforward application of the *lex specialis* principle presented by the International Court of Justice in the *Nuclear Weapons* case.²¹⁹

212 M. Sassòli, above note 11, p. 668, referring to the military forces familiar with law enforcement of France, Italy, and Spain such as the gendarmerie, carabinieri, and guardia civil. See also Grant Wardlaw, *Political Terrorism: Theory, Tactics and Counter-measures*, Cambridge University Press, Cambridge, pp. 97–100.

213 D. H. Bayley and R. M. Perito, above note 83, p. 76.

214 *Ibid.*, pp. 76–77.

215 J. F. Burns, above note 101, who notes that: ‘[t]he insurgents inflicted a new blow when they shot down an Apache attack helicopter about three miles west of the Baghdad airport, killing both crewmen’.

216 Mark Bowden, *Blackhawk Down: A Story of Modern War*, Grove Press, New York, 2010, p. 79.

217 Ray Rivera, Alissa J. Rubin, and Thom Shanker, ‘Copter downed by Taliban fire; elite U.S. unit among dead’, in *New York Times*, 6 August 2011, available at: <http://www.nytimes.com/2011/08/07/world/asia/07afghanistan.html?pagewanted=all> (last visited February 2012).

218 Rory Carroll, ‘11 killed as civilian helicopter is shot down in Iraq’, in *The Guardian*, 21 April 2005, available at: <http://www.guardian.co.uk/world/2005/apr/22/iraq.rorycarroll> (last visited February 2012).

219 *Nuclear Weapons* case, above note 45, p. 240, para. 25. For an example of an approach that blends IHL, human rights law, and general international law, see Nils Melzer, ‘Conceptual distinction and overlaps between law enforcement and the conduct of hostilities’, in T. Gill and D. Fleck, above note 184, p. 33. Melzer introduces a concept of the ‘law enforcement’ and ‘hostilities’ paradigms, both of which would include humanitarian law, human rights law, and general international law. The interaction of these two paradigms would then be governed by the *lex specialis* principle. See *ibid.*, p. 43.

In what can be termed an interpretive ‘struggle’, the *lex specialis* principle has been said to be ‘descriptively misleading, vague in meaning, and of little practical use in application’.²²⁰ One interpretation has been described as broadly exclusionary in nature, seeing ‘the speciality of IHL operating at a very general level, so that IHL would replace IHRL [international human rights law] altogether in times of armed conflict’.²²¹ Attributed to states such as the United States and Israel, this approach has been called ‘radical’.²²² It has been indicated that a more correct interpretation of *lex specialis* is one applied on a case-by-case basis to certain individual rights in situations where there is an actual conflict such that, where a norm cannot be applied without violating another, ‘the special norm of IHL should prevail’.²²³ However, it is also suggested that what can be used is the *lex specialis completat legi generali* principle, where both branches of the law are applied simultaneously, such that human rights norms ‘have to be interpreted in light of IHL norms’.²²⁴ Reflecting this interpretive uncertainty, Françoise Hampson has stated, in regard to the *lex specialis* principle, that ‘[i]t is not clear whether this means only that the special prevails over the general, or whether it means that the former actually displaces the latter’.²²⁵ Another analysis reaches the conclusion that international humanitarian and human rights treaties can ordinarily be reconciled, but that there will be instances where that will not occur, leading to a political choice as to which of the conflicting norms will be given priority.²²⁶

An approach allowing for the application of human rights law, even when IHL applies, has been to interpret *lex specialis* as a ‘rule governing conflicting norms’.²²⁷ This interpretation gives ‘precedence to the rule that is most adapted and

220 Marko Milanovic, ‘Norm conflicts, international humanitarian law and human rights law’, in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, Oxford, 2011, p. 124. See also Françoise J. Hampson, ‘The relationship between international humanitarian law and human rights from the perspective of a human rights treaty body’, in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 562, who writes that ‘[s]ome way needs to be found to develop a coherent approach to the problem’. See also L. Doswald-Beck, above note 64, pp. 898–900.

221 Andrea Gioia, ‘The role of the European Court of Human Rights in monitoring compliance with humanitarian law in armed conflict’, in O. Ben-Naftali, above note 220, p. 213.

222 *Ibid.*

223 *Ibid.*, p. 214.

224 *Ibid.*

225 F. J. Hampson, above note 220, p. 558. Hampson goes on to suggest two other possible interpretations: first, that IHL prevails where it contains an express provision that addresses a similar field to that of a human rights norm; and, second, that the *lex specialis* depends upon the issue at stake – if the right is not covered by IHL then human rights will prevail. See, generally, *ibid.*, pp. 558–562.

226 M. Milanovic, above note 220, p. 124.

227 See Cordula Droegge, ‘Elective affinities? Human rights and humanitarian law’, in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 524. The alternate interpretation of the *lex specialis* rule is based on the work of Martti Koskeniemi, ‘Study on the function and scope of the *lex specialis* rule and the question of “self contained regimes”’, UN Doc. ILC(LVI)/SG/FIL/CRD.1 and Add. 1, 2004. See also Marco Sassòli, ‘The role of human rights and international humanitarian law in new types of armed conflicts’, in O. Ben-Naftali, above note 220, pp. 34 and 71, where he suggests resolving conflicting norms by favouring the norm with the broadest application, that with the greatest precision, that having explicit application, and that with the most restrictive application; and Marco Sassòli and Laura M. Olson, ‘The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts’, in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 603–604.

tailored to the specific situation'.²²⁸ In this respect, 'the most important indicators are the precision and clarity of a rule and its adaptation to the particular circumstances of the case'.²²⁹ However, this 'conflicting norms' approach has to be reconciled with the specific wording in the *Nuclear Weapons* case, which characterized humanitarian law as a tool for interpreting human rights law. One way of dealing with the wording of that case and the *Wall* case has been to suggest that, since there is no reference to the *lex specialis* principle in the subsequent *Congo* case, 'it is not clear whether the omission was deliberate and shows a change in the approach of the Court'.²³⁰ However, it is not evident how an omission in that case, assuming that there was one, would actually constitute a reversal of the specific language found in two previous judgments by the same court, particularly given the importance of those decisions.²³¹ Perhaps the most apt explanation of the *lex specialis* principle in respect of the law of occupation is that it acts as a 'prism filtering human rights during armed conflict'.²³²

However, a more fundamental question needs to be asked regarding the humanitarian law obligation to maintain order in occupied territory as to whether the issue even needs to be looked at as a 'conflict' of human rights norms. In this respect, humanitarian and human rights law govern the same activity: the policing of territory. When a 'conflicting norms' approach is suggested, in respect of either internal armed conflicts²³³ or occupation,²³⁴ the legal paradigm applicable to law enforcement is almost invariably suggested to be human rights law. Such an interpretation is reinforced by a view that, since Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention do not provide any detail regarding the use of potentially lethal force, it is human rights law that 'would govern the use of force by the OP [Occupying Power] with respect to the OP's entitlement and obligation to restore and maintain public order and safety'.²³⁵ In effect, while the obligation is found in international humanitarian treaty law, the actual maintenance of order would have to be put into operation by the application of international human rights law.

To the extent that this argument is based on the view that humanitarian law lacks specific treaty provisions governing how order is to be maintained, it might even be argued that the principle of *lex specialis*, as set out in the International Court of Justice cases, would not have to be applied. Human rights law would then

228 C. Droege, above note 227, p. 524.

229 *Ibid.*

230 See *ibid.*, p. 522. See also M. Milanovic, above note 220, p. 100.

231 Y. Dinstein, above note 151, p. 23. Dinstein suggests that 'this lapse does not prove much'.

232 Y. Dinstein, above note 4, p. 86.

233 William Abresch, 'A human rights law of internal armed conflict: the European Court of Human Rights in Chechnya', in *European Journal of International Law*, Vol. 16, No. 4, 2005, p. 747, who states that '[t]he rationale that makes resort to humanitarian law as *lex specialis* appealing – that its rules have greater specificity – is missing in internal armed conflicts . . . the humanitarian law of internal armed conflict is quite spare and seldom specific'.

234 C. Droege, above note 227, p. 538, where it is stated: '[i]n abstract legal terms, the answer must be . . . where the occupying power has effective control, is in a law-enforcement situation and capable of making arrests, it should act in compliance with the requirements of human rights law'.

235 UCIHL Meeting Report, above note 64, p. 21.

apply as the general law, without the *lex specialis* principle even having to be considered. However, there cannot be a conflict of norms unless the *lex specialis* of humanitarian law specifically governs law enforcement activities in occupied territory. In this respect, the suggestion that there is a conflict is an acknowledgment that humanitarian law does in a substantive way govern the maintenance of order in occupied territory. The question is how and to what extent that occurs. These are fundamental issues regarding the application of the *lex specialis* principle, however that principle might be interpreted.

Any conclusion that human rights law exclusively governs policing in occupied territory would have to address the fact that the Hague Regulations, the Geneva Conventions, and Additional Protocol I incorporate substantive rights, such as the right to life, upon which the law enforcement model is fundamentally based.²³⁶ There is a parallelism of content regarding rights such as the right to life; prohibition against torture and cruel, inhuman, or degrading treatment; due process; the prohibition on discrimination; the protection of family honour and rights; and a prohibition against arbitrary detention.²³⁷ Further, it is significant that the recognition of human rights for inhabitants of occupied territories, as well as the obligation under Article 43 of the Hague Regulations to restore and ensure public order and safety, pre-dated the substantive development of treaty-based human rights law at the end of World War II.²³⁸ Such norms, including those relating to law enforcement, have been and remain part of ‘the general principles of law recognized by civilized nations’.²³⁹ In addition, those rights have continued to be recognized

236 For example, in respect of the European Court of Human Rights and its application of the European Convention on Human Rights provisions, see *McCann*, above note 185, on Art. 2(2) (the right to life); *McKerr*, above note 186, on Art. 2(2), Art. 13 (the right to an effective remedy), and Art. 14 (the prohibition against discrimination) of the European Convention on Human Rights. Similarly, in respect of the application of the European Convention of Human Rights provisions, see *Makaratzis v. Greece*, Application no. 50385/99, 20 December 2004, on Arts. 2, 3 (the prohibition against torture or inhuman or degrading treatment or punishment), and 13; *Nachova and Others v. Bulgaria*, Application nos 43577/98 and 43579/98, 6 July 2005, on Arts. 2, 13, and 14; *Kakoulli v. Turkey*, Application no. 38595/97, 22 November 2005, on Arts. 2(2), 8 (respect for private and family life), and 14; *Huohvanainen v. Finland*, Application no. 57389/00, 13 March 2007, on Art. 2; and *Giuliani and Gaggio v. Italy*, Application no. 23458/02, 25 August 2009, on Arts. 2(2), 3, 6 (the right to a fair trial), and 13.

237 For example, see Hague Regulations, Art. 46. This provision establishes the requirement to uphold family honour and rights, the lives of persons, religious convictions, and private property. This is also reflected in GC IV, Art. 27, and AP I, Art. 75. See also T. Meron, above note 163, p. 266, for a discussion on the parallelism of content between humanitarian and human rights law.

238 Reference to calling upon the population to assist in policing is found in the Great Britain War Office, *Manual of Military Law*, His Majesty's Stationary Office, London, 1914, pp. 291–292, para. 381; and the American *Rules of Land Warfare*, Government Printing Office, Washington, DC, 1914, 10/917, p. 114, para. 319. See also Leslie C. Green, ‘The relations between human rights law and international humanitarian law: a historical overview’, in Susan C. Breau and Agnieszka Jachec-Neale (eds), *Testing the Boundaries of International Humanitarian Law*, British Institute of International and Comparative Law, London, 2006, p. 49, where Green discusses the historical integration of human rights norms into IHL.

239 Statute of the ICJ, Art. 38(1). See Malcolm N. Shaw, *International Law*, 6th edition, Cambridge University Press, Cambridge, 2008, p. 98, for a discussion of this general principle of law. The long-standing nature of the norms underpinning law enforcement can be also seen in *Geneva Convention IV Commentary*, above note 15, p. 36, on Article 3, where it is noted that, in respect of a conflict not of an international character, ‘no Government can object to observing, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, even when dealing with common criminals’. See Richard B. Jackson, ‘Perfidy in non-international armed

and integrated into humanitarian treaty and customary international law since that time. As a result, the normative rules for carrying out policing or other law enforcement activity during occupation are not uniquely found in human rights law as a governing legal framework. They are based on human rights norms that are a fundamental part of both bodies of law. In this respect, it has been noted that the *Nuclear Weapons* case discussed the application of the *lex specialis* principle in the context of *norms* rather than governing *legal regimes*.²⁴⁰ Both human rights norms and the unique norms applicable to the conduct of hostilities are part of humanitarian law.

These human rights norms are also an integral part of customary international humanitarian law. As the *ICRC Customary Law Study* indicates, the prohibition against murder, the requirement for humane treatment of detained persons, the prohibition against torture and other cruel or inhuman treatment, trial affording all essential judicial guarantees, and other protections relevant to law enforcement are norms of customary humanitarian law in international armed conflict.²⁴¹ This application of customary IHL is as important as its customary human rights law counterpart in ensuring that there are no gaps in the law.

In respect of treaty law, Article 75 of Additional Protocol I was clearly influenced by human rights documents such as the 1948 Universal Declaration on Human Rights²⁴² and the 1966 International Covenant on Civil and Political Rights (ICCPR).²⁴³ For example, the *Additional Protocol I Commentary* states in respect of Article 75: '[m]ost of the guarantees listed in sub-paragraphs (a)–(j) [related to due process] are contained in the Conventions and the Covenant on Human Rights', although a difference is that, unlike the Covenant, the Additional Protocol provision is not subject to derogation.²⁴⁴ Protection is provided against discrimination; violence to life, health, or physical or mental well-being; torture and humiliating and degrading treatment; and threats to carry out such acts.²⁴⁵ And provision is made for trial before an impartial and regularly constituted court.²⁴⁶ As one commentator has indicated, the post-World War II relationship between IHL and human rights law 'is expressed in the adoption of major human rights principles in Article 75 AP I'.²⁴⁷ It has been noted that 'states did not include other specific guarantees provided

conflicts', in Kenneth Watkin and Andrew J. Norris (eds), *Non-international Armed Conflict in the Twenty-first Century*, U.S. Naval War College International Law Studies, Vol. 88, Naval War College, Newport, RI, 2012, p. 251.

240 See M. Milanovic, above note 220, p. 99.

241 *ICRC Customary Law Study*, above note 34, pp. 299–383.

242 Universal Declaration of Human Rights, 1948, in Ian Brownlie and Guy S. Goodwin-Gill (eds), *Basic Documents on Human Rights*, 5th edition, Oxford University Press, Oxford, 2006, p. 23.

243 International Covenant on Civil and Political Rights, 1966, in I. Brownlie and G. S. Goodwin-Gill, above note 242, p. 358.

244 *Additional Protocol I Commentary*, above note 36, Art. 75, para. 3092. However, see D. Campanelli, above note 61, p. 666; and E. Benvenisti, above note 1, p. 189, where it is indicated that civil and political rights are ignored in GC IV and AP I. However, this discussion appears to centre around political rights and civil liberties such as the freedom of speech and freedom of movement (see *ibid.*, p. 16).

245 AP I, Arts. 75(1) and (2).

246 AP I, Art. 75(4).

247 See Christopher Greenwood, 'Scope of application of humanitarian law', in D. Fleck, above note 7, p. 74, Rule 254.

for in the ICCPR within either Protocol, such as the right to liberty of movement and freedom of expression and association'.²⁴⁸ However, the list of incorporated rights is lengthy, and those rights have a particular relevance to law enforcement.

As a result, the States Parties to Additional Protocol I, and those that accept that Article 75 of that Protocol reflects customary international law, are obligated to apply these *human rights norms* as an integral part of their compliance with IHL.²⁴⁹ This obligation exists in occupied territories and in other military operations such as during patrols, raids, and invasions, although, as has already been discussed, the ability to do so will still be dependent upon factors such as whether the Occupying Power exercises sufficient control over the territory to conduct law enforcement operations. In this respect it should be noted that a major non-signatory to the Protocols, the United States, indicated in March 2011 that it will, out of a sense of 'legal obligation', apply the norms of Article 75 in international armed conflict.²⁵⁰ While not a statement acknowledging these norms as customary IHL,²⁵¹ the language of obligation raises the issue of '*opinio juris*'. In addition, it had been noted by an official from a previous administration that the United States did 'regard the provisions of article 75 as an articulation of the safeguards to which all persons in the hands of the enemy are entitled'.²⁵²

The complex relationship between 'human rights law and the laws of war is not just a simple confrontation between the *lex generalis* of human rights and the *lex specialis* of the laws of war'.²⁵³ International human rights law covers areas that

248 Michael J. Dennis, 'Application of human rights treaties extraterritorially in times of armed conflict and military occupation', in *American Journal of International Law*, Vol. 99, No. 1, 2006 p. 138.

249 Federal Court of Canada, *Amnesty International Canada and British Columbia Civil Liberties Union v. Chief of Defence Staff for the Canadian Forces, et al.*, Case File No. T-324-07, Respondent's Factum, 18 January 2008, p. 26, para. 83, available at: [http://web.ncf.ca/fk624/data/Factum%20-%20Crown%20\(Charter,%20Jan%2008\).PDF](http://web.ncf.ca/fk624/data/Factum%20-%20Crown%20(Charter,%20Jan%2008).PDF) (last visited February 2012). The Canadian Government argued before the Federal Court of Canada that, during armed conflict, Common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol I apply as a matter of treaty or customary law to guarantee fundamental rights of a detained person charged with a criminal offence that are virtually identical to norms found in international human rights law. For the purposes of the litigation, the conflict in Afghanistan was considered to be a non-international armed conflict. *Ibid.*, p. 3, para. 9, note 1.

250 Hillary Rodham Clinton, 'Reaffirming America's commitment to humane treatment of detainees', Press Statement, 7 March 2011, available at: <http://www.state.gov/secretary/rm/2011/03/157827.htm> (last visited February 2012).

251 See John B. Bellinger III and Vijay M. Padmanabhan, 'Detention operations in contemporary conflicts: four challenges for the Geneva Conventions and other existing law', in *American Journal of International Law*, Vol. 105, No. 2, 2011, p. 207, where the authors note that 'the administration neither stated that Article 75 is customary international law nor agreed to apply Article 75 in non international armed conflicts, such as the conflict with Al Qaeda'. However, see also Supreme Court of the United States, *Salim Ahmed Hamdan v. Donald H. Rumsfeld et al.*, 548 U.S. 557, 2006, No. 05.184, 29 June 2006, p. 633, where a plurality of judges of the US Supreme Court held that Article 75 of Additional Protocol I applied as a matter of customary international law in respect of a non-international armed conflict with Al Qaeda.

252 William H. Taft IV, 'The law of armed conflict after 9/11: some salient features', in *Yale Journal of International Law*, Vol. 28, No. 1, 2003, p. 322. See also Michael J. Matheson, 'Session one: the United States position on the relation of customary international law to the 1977 Protocols Additional to the 1949 Geneva Conventions', in *American University Journal of International Law and Policy*, 1987, Vol. 2, p. 427; Michael J. Matheson, 'Continuity and change in the law of war: 1975 to 2005: detainees and POWs', in *George Washington International Law Review*, Vol. 38, No. 3, 2006, pp. 547-548.

253 A. Roberts, 'Transformative military occupation', above note 81, p. 594.

are not included in humanitarian law.²⁵⁴ However, there are also significant and important areas of overlap. There does not always need to be an interpretive struggle seeking to apply one body of law in preference to the other. As has been noted, the *Wall* case addressed the issue of simultaneous application when it was noted that there are rights that ‘may be matters of both these branches of international law’.²⁵⁵ For example, the right to individual self-defence, normally assessed according to human right norms, is recognized under humanitarian law as a matter of both treaty²⁵⁶ and customary international law.²⁵⁷

The same can be said about the rights of inhabitants of the occupied territory regarding their right to life, and other rights associated with law enforcement. While the right to life is interpreted differently when targeting combatants, members of organized armed groups, or persons taking a direct part in hostilities, it is not in respect of civilians not actively engaged in the conflict.²⁵⁸ Therefore, it is human rights standards that would be applied in assessing any use of force against them by security forces. In this respect, the application of these human rights norms recognized in humanitarian law substantively matches that reflected in human rights law.

Given this incorporation of these human rights norms, it can be argued that there is limited potential for a ‘conflict of norms’ between the two bodies of law.²⁵⁹ To the extent that there is a conflict, it is most likely to arise where an attempt is made to apply human-rights-based law enforcement norms to a situation of hostilities, such as targeting, or to introduce humanitarian law norms to ordinary policing. The question would have to be asked in each case why it would be necessary or legally appropriate to do so.²⁶⁰

254 *Ibid.*, p. 594; Y. Dinstein, above note 4, pp. 84–85.

255 *Wall* case, above note 23, p. 131. See also Jochen Abr. Frowein, ‘The relationship between human rights regimes and regimes of belligerent occupation’, in *Israel Yearbook on Human Rights*, Vol. 28, 1998, p. 8, who notes that ‘humanitarian law may also be referred to in order to support the application of human rights law in situations of armed conflict’.

256 See GC I, Arts. 22(1) and 22(2) regarding arming medical personnel and sentries, etc.; AP I, Arts. 65(3) and 67(1)(d) regarding arming persons for self-defence relating to civil defence. See also the Rome Statute, above note 196, Art. 31(1)(c).

257 ICTY, *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgment, 26 February 2001, para. 451.

258 Geoffrey Corn, ‘Mixing apples and hand grenades: the logical limit of applying human rights norms to armed conflict’, in *Journal of International Humanitarian Legal Studies*, Vol. 1, 2010, p. 61 : ‘Armed forces have increasingly come to terms with the reality that even during armed conflict, their authority in relation to interactions with individuals falling outside the category of operational opponents – namely civilians or former enemy combatants who are *hors de combat* – is operationally similar to the authority of police officers interacting with the public during times of peace’.

259 Yuval Shany, ‘Human rights and humanitarian law as competing legal paradigms for fighting terror’, in O. Ben-Naftali, above note 220, p. 25, where it is noted that the ‘normative gaps between “law and order” and the “armed conflict” paradigms are narrowed’ in part ‘due to numerous obligations pertaining to the respect for the rights of individuals in occupied territories, which limit the counter-terrorism options available to occupying forces’. This statement was supported by reference to GC IV, Art. 27, and ICCPR, Arts. 17 and 23. While this does not appear to go as far as stating that there is a complete congruence between the two normative frameworks, it is indicative of similar outcomes in applying law enforcement and hostilities norms in this area.

260 G. Corn, above note 258, pp. 55–56, where he notes that ‘without careful and critical assessment of when and where human rights norms are logically applicable during armed conflict and where that logic

In applying a complementary approach, if any gaps exist, they can be addressed by the application of human rights law, as a matter of either treaty or customary law.²⁶¹ Any court or tribunal interpreting the human rights norms guaranteed by IHL can look to the same ‘soft law’ instruments outlining the principles governing law enforcement that are applied under the human rights accountability regime.²⁶² In *Prosecutor v. Kunarac*, the Trial Chamber of the ICTY noted that ‘[b]ecause of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights law’.²⁶³ Further, the decisions of domestic courts and regional human rights bodies assessing law enforcement activities under human rights law can also be considered. As has been noted, one of the sources of international law is ‘the general principles of law recognized by civilized nations’, such as those appearing in municipal law.²⁶⁴ An assessment of the general principles of law enforcement applied in domestic jurisdictions, whether as a matter of common law or as one of civil law, also has the advantage of enhancing the identification of universal standards of conduct.

There are numerous distinct advantages to applying human-rights-based law enforcement norms as part of IHL rather than as a discrete application of human rights law. First, whether these norms are applied as a matter of treaty or customary international humanitarian law, the difficult debate over the extra-territorial application of human rights treaty law can be prevented. Armed conflict may occur in what has been termed the ‘area of war’, comprising the territories of the parties to the conflict as defined by national boundaries, the high seas, and the exclusive economic zone, although military operations may more narrowly occur in operational zones or theatres of war.²⁶⁵ During such conflict, some provisions of IHL may have broad application to the entire territory of the Parties to a Conflict and ‘not just to the vicinity of actual hostilities’.²⁶⁶ This would include the law of occupation with its provisions governing the maintenance of public order, which extend to the entire territory that is occupied.²⁶⁷ As a result, human rights norms

dissipates, the risk of overbroad application creates the potent[ial] to disable the efficacy of military operations’.

261 C. Droege, above note 227, pp. 512–522, for a discussion of the meaning of ‘complementarity’.

262 For example, the UN Basic Principles on Use of Force, above note 175.

263 ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T and IT-96-23/1-T, 22 February 2001, p. 160, para. 467.

264 M. N. Shaw, above note 239, pp. 98–99; and *Restatement of Foreign Relations Law*, above note 51, p. 152, para. 701(c), where it is indicated that a state is required to respect the human rights of a person subject to its jurisdiction ‘that it is required to respect under general principles of law common to the major legal systems of the world’.

265 C. Greenwood, above note 247, pp. 59–62.

266 *Tadić*, Decision on the Defence Motion, above note 157, para. 68.

267 *Geneva Convention IV Commentary*, above note 15, p. 47, where it is noted in respect of the jurisdiction of the Fourth Geneva Convention referring to persons being in the hands of a Party to the Conflict, that ‘[t]he mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or “hands” of the Occupying Power. It is possible that this power will never actually be exercised over the protected person: very likely an inhabitant of an occupied territory will never have anything to do with the Occupying Power or its organizations. In other words, the expression “in the hands of” need not necessarily be understood in the physical sense; it simply means that the person is in

incorporated under humanitarian law would have application to the occupied territory even if the Occupying Power took the position that its human rights law obligations did not have extra-territorial application to such territory.²⁶⁸

Second, it avoids the risks inherent in adopting an exclusionary approach for either body of law. Advocating the exclusive application of humanitarian law without acknowledging the norms governing the use of force in a law enforcement context potentially puts peaceful civilians at risk, since the conduct of hostilities norms (i.e. precautions in targeting²⁶⁹) are not designed for policing. Conversely, a unique application of human rights law will be challenged to deal with the elevated levels of threat inherent in the violence that can occur during occupation. Failure to address those threats put not only the security forces at risk but also the civilians whom they are obligated to protect.

Third, while there are regional human-rights-treaty-based bodies that deal with breaches of human rights committed by security forces in occupied territory, their jurisdiction is restricted to certain states.²⁷⁰ This limitation can be addressed by relying on mechanisms for the application of human rights norms through the enforcement of humanitarian law, since that law has a more universal application to countries not subject to oversight by those bodies. This broad applicability of IHL means that some states will be subject to both the jurisdiction of regional human rights bodies and the parallel frameworks of accountability under humanitarian law. This is not problematic, as both are dealing with issues of law enforcement, and it potentially significantly enhances accountability.²⁷¹

Fourth, in terms of accountability, dealing with the misapplication of force as a breach of humanitarian law means that the incident is amenable to being handled as a 'war crime'.²⁷² A violation of human rights law would probably have to

territory which is under the control of the Power in question'. See also Y. Dinstein, above note 4, pp. 47–48, who indicates that, in respect of belligerent occupation, effective control established by the Occupying Power on land even extends to 'any abutting maritime areas and to the superjacent air space'.
268 'Use of Force in Occupied Territory', above note 149, pp. 111 and 117–119, where it is noted that such a result may be an appropriate way to bridge the gap between supporters of the application of human rights and those suggesting an exclusive application of humanitarian law.

269 AP I, Art. 57(2).

270 A. Cassese, above note 200, p. 389, who notes that regional supervisory mechanisms include judicial bodies such as the European Court of Human Rights, the Inter-American Commission, and the Inter-American Court of Human Rights. There is also the African Court on Human and People's Rights, as well as the monitoring body, the African Commission on Human Rights and the Rights of Peoples.

271 *Congo* case, above note 21, p. 245, para. 220, where the Court found that Uganda was responsible for violations of both international human rights law and IHL. See also Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted on 29 March 2004 (2187th meeting), CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 11: 'As implied in General Comment 29, the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive'.

272 A. Cassese, above note 200, p. 81, where he states that '[w]ar crimes are serious violations of customary or treaty rules belonging to the corpus of the international law of armed conflicts'. See also T. Meron, above note 163, p. 266, who notes that 'the offences included in the ICC Statute under crimes against humanity and common Article 3 are virtually indistinguishable from major human rights violations. They overlap with violations of some fundamental human rights law, which thus become criminalized under an instrument of international humanitarian law'.

be dealt with as a potential crime against humanity. That offence has additional criteria for culpability relating to the act being widespread or systemic that could be limiting in its application.²⁷³

Finally, recognizing that human rights norms applicable to law enforcement in occupied territory are found within the body of IHL provides a more holistic approach towards applying the law. This allows for easier integration and socialization within the doctrine and training of military forces tasked with maintaining public order, whether it is ordinary policing or countering the threats posed by an insurgent force. Ultimately, respect for the broad range of legal rights applicable in wartime is enhanced, and greater protection is provided to the civilian population.

Resolving practical issues

It is also important to be clear what the recognition of human-rights-based law enforcement norms within humanitarian law will not do. It will not simplify the interface between law enforcement and the conduct of hostilities during belligerent occupation. These challenges remain the same whether human rights norms are applied as a matter of international humanitarian law or human rights law. The threats to the security of the occupier and the inhabitants of the territory can be organized, diverse, complex, and extremely violent, particularly because of the organization of the armed resistance groups. Those threats can extend far beyond those normally associated with law enforcement. In such situations, force used by security forces is governed by legal norms linked to the threat being posed. The maintenance of public order and safety cannot be effectively addressed by viewing the situation as being exclusively one of law enforcement or the conduct of hostilities, nor can such exclusivity exist in the application of the governing norms.

Where the threat is from organized resistance movements meeting the legal criteria for combatant status, from other involved organized armed groups, or from civilians taking a direct part in hostilities, the conduct of hostility norms governing the use of force will apply. Attacks can only be directed against lawful military objectives.²⁷⁴ Where insecurity is caused by civilians not involved in the hostilities but engaged in 'riots, isolated and sporadic acts of violence and acts of a similar nature',²⁷⁵ then human-rights-based law enforcement norms govern the activities of the security forces. In practical terms, this division of application of norms is also

273 A. Cassese, above note 200, p. 98; Cryer *et al.*, above note 201, p. 233, where it is noted that 'crimes against humanity require a context of widespread or systematic commission, whereas war crimes do not; a single isolated act can constitute a war crime'. See also Darryl Robinson, 'Defining "crimes against humanity" at the Rome Conference', in *American Journal of International Law*, Vol. 93, No. 1, 1999, p. 48, who notes that an accused can be criminally liable for a single inhumane act (such as murder) as long as it was committed as part of a broader attack.

274 AP I, Arts. 48, 50, 51, 52(2), and 57. As Art. 57(2) states, everything feasible must be done to ensure that attacks are not directed at civilians or civilian objects.

275 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977, opened for signature 12

largely reflected in the different doctrine, training, and equipment of police forces and military forces.²⁷⁶

Both police and military forces may be employed in situations governed by law enforcement or hostilities norms and can be confronted with threats emanating from either end of the conflict spectrum. Many of those threats will comfortably fit within the normative structure of law enforcement or conduct of hostilities respectively. However, in line with the complexity of the security situation, the two normative frameworks will at times intersect and even overlap. The threat may initially appear to be one arising in a law enforcement context, but may in reality be related to the ongoing armed conflict. For example, as occurred in Iraq, security personnel may be employed on checkpoint duty, which is often viewed as a law enforcement function. Those security personnel, civilian or military, must be trained and required to use force associated with law enforcement in order to deal with persons who are not members of organized armed groups or civilians taking a direct part in hostilities. In those situations, force must be used in the last resort, proportionately and primarily in self-defence.

However, such duties can be contextually nuanced. The checkpoint may be guarding a military base or access to an area of military operations rather than being a traffic-style vehicle checkpoint. While the default position will be to apply law enforcement norms, the escalation in the use of force associated with those norms (verbal and visual warnings, warning shots, etc.) can act as a discriminator for screening out and identifying more serious threats than those posed by ordinary criminals. In this respect, the necessity to operate in this merged security environment where insurgents hide among the population lends itself to Rules of Engagement (ROE) that reflect both human rights and humanitarian norms rather than using separate ROE cards for law enforcement and conduct of hostilities respectively. Once it becomes evident that the threat is emanating from a member of an organized armed group or a civilian taking a direct part in hostilities, such as by

December 1977, U.N.T.S. 609, Art. 1(2). These examples found in the Protocol are widely accepted as being indicative of criminal activity.

276 The doctrine, training, and equipment for both military and police forces generally match the primary roles that they are assigned in counter-insurgency. For military forces, that role includes offensive operations against insurgents and the maintenance of a 'defensive cordon around areas largely cleared of insurgent violence'. D. H. Bayley and R. M. Perito, above note 83, p. 53. See also *Counterinsurgency Manual*, above note 115, pp. 60–66, paras 2-19–2-22, for an outline of the range of offensive, defensive, and stability operational roles assigned to US armed forces. This can be contrasted with the police role, which is focused on law enforcement and dealing with subversion within the established cordon. D. H. Bayley and R. M. Perito, above note 83, p. 53. This does not mean that the military force will not be required to perform law enforcement functions, particularly in the absence of an effective police force, or when tasked with stability operations. However, military forces must be equipped and trained to conduct full-spectrum operations. In contrast, while the police may become involved in counter-insurgency operations, their primary role is, and should be, that of core policing (*ibid.*, pp. 75–76). The different nature of the policing role is reflected in training provided in 2006 to police forces in Iraq. That training focused on democratic policing, criminal investigation, anti-terrorism, survival skills, defensive tactics, and firearms (*ibid.*, p. 106). The difference in police training is also practically reflected in the *Counterinsurgency Manual*, above note 115, p. 232, para. 6–99, where it is indicated that when military forces are tasked to train local police it is the military police who are especially suited to teach basic policing skills: higher-level skills, 'such as civilian criminal investigation procedures, antiorganized crime operations, and police intelligence operations – are best taught by civilian experts'.

means of a vehicle-borne IED, then the conduct of hostilities framework would apply at law. In that situation, the use of force is not limited by law enforcement, although such norms would continue to govern the use of force against civilians who are not direct participants in hostilities.²⁷⁷ When the soldier or police personnel reasonably believe²⁷⁸ that the threat is directly linked to those engaged in hostilities, the force used is governed by humanitarian law principles such as distinction, proportionality, and not causing unnecessary suffering or superfluous injury.

In reaching that belief, the soldier is entitled to consider a number of factors, including available intelligence, feasible steps taken to warn the oncoming vehicle, the reaction or failure to react by the driver of the vehicle, the location of the checkpoint, what is being guarded (if anything), and the propensity of insurgents to use that method of warfare. The situation may result in force being applied in the same way as might have occurred under the law enforcement construct when reacting to a threat in self-defence. In this situation, the soldier may only have time to act in the face of an immediate threat. However, that will not always be the case, and the force permitted, at law, to counter an IED or suicide bomb by members of organized armed groups or a civilian taking a direct part in hostilities is governed by conduct of hostilities norms. For example, the soldier may be aware from information provided by aerial surveillance, human intelligence, other observation posts and checkpoints, or perhaps even the observation of certain tactics and procedures, that an attack is about to take place. That soldier does not have to wait until the attack is imminent, or the attacker is physically in close proximity and ready to set off explosives, before taking action to remove the threat. In addressing that threat, the soldier can use force governed by conduct of hostilities norms.

The setting off of bombs in crowded markets and urban areas during armed conflict is a significant threat to civilians and security personnel. It has been equated to acts of warfare.²⁷⁹ That threat can be met with overwhelming force and not solely the type of proportionate force contemplated by law enforcement norms. It is not the activity such as maintaining a checkpoint that is the overriding determinant of which norms apply. When the threat is presented by members of the organized resistance movement or civilians taking a direct part in hostilities,

277 See N. Melzer, above note 219, p. 44, who suggests that opening fire against a car for failing to stop at a checkpoint is normally governed by human rights law applicable to police operations and concludes that 'any reaction against the car approaching the checkpoint must aim to minimize, to the greatest extent possible, the use of lethal force and may involve killing of the driver only where strictly necessary to protect the operating soldiers or others from an imminent threat to life'. However, this conclusion is based on 'forcible measures specifically directed against persons or objects protected from direct attack'. See also M. Sassòli, above note 11, p. 666, who suggests that, in a checkpoint situation, 'the law enforcement officials must try to arrest the offender without using firearms and minimize damage and injury'.

278 ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment, Trial Chamber, 5 December 2003, para. 58.

279 Roger Trinquier, *Modern Warfare: A French View of Counterinsurgency*, Praeger Security International, Westport, CT, 2006, p. 21, n. 1, where Yassef Saddi, chief of the Autonomous Zone of Algiers, is quoted as stating after his arrest: 'I had my bombs planted in the city because I didn't have the aircraft to transport them. But they caused fewer victims than the artillery and bombardments of our mountain villages. I'm in a war, you cannot blame me.'

the response can be governed by conduct of hostilities norms regardless of the activity being performed by the security forces at the time. This same blending of hostilities and law enforcement can arise where insurgents fire from among a crowd of rioters.

However, this does not mean that the response will always be an extremely violent one. A soldier's response when guarding a checkpoint or dealing with rioters is not restricted to law enforcement norms when attacked by insurgents. However, the use of deadly force against the insurgents in such situations can carry with it the potential for significant collateral civilian casualties. As happened in Iraq, such collateral deaths or injuries to civilians can have an adverse impact on the counter-insurgency campaign.²⁸⁰ As a result, while humanitarian law may provide for a robust response and even permit collateral civilian casualties, commanders may choose in the ROE, as a matter of policy, to limit the force that can be used.²⁸¹

A further example of the necessary nuanced application of the law is that, even when force is considered under humanitarian normative rules, the result may not be a 'kinetic' one, such as that involving the use of firearms, artillery, or aerial delivered ordnance. The law, and therefore any resulting force, must be contextually applied. As occurred in Fallujah, the tactical situation may be such that the conflict between the security forces seeking to enter a city and an organized armed group dug into defensive positions resisting that operation could result in the use of both direct and indirect fire (artillery or air power).²⁸² In another circumstance, such as when targeting an unarmed low-level member of an armed group hiding in a built-up area, a commander may determine, after applying the targeting precautions, that the relative military advantage to be gained from a kinetic attack is outweighed by the potential collateral death of, injury to, or damage to civilians.²⁸³ In seeking to avoid or minimize the collateral impact on civilians, attempting to capture the individual may be the legally appropriate option under the circumstances. However, a more important target may change the military advantage to be gained from

280 Such a situation occurred in April 2003 in Fallujah, Iraq. See T. E. Ricks, above note 80, pp. 138–142; B. West, above note 99, pp. 12–13. However, in *Iraq: Violent Response: The U.S. Army in al-Falluja*, Vol. 15, No. 7 (E), June 2003, p. 2, Human Rights Watch took the view that the riot was a law enforcement situation requiring the use of those means. A similar incident occurred in Mosul, Iraq. See Linda Robinson, *Masters of Chaos: The Secret History of the Special Forces*, Public Affairs, New York, 2004, pp. 337–338.

281 *Counterinsurgency Manual*, above note 115, p. 54, para. 2–4.

282 Another example is the NATO airstrikes in Tripoli during the campaign in support of Libyan rebels seeking to take control of that country. See 'Nato air strikes hit Tripoli in heaviest bombing yet', in *The Guardian*, 24 May 2011, available at: <http://www.guardian.co.uk/world/2011/may/24/nato-airstrikes-tripoli-heaviest-bombing-libya> (last visited February 2012). This bombing did not occur in the context of an occupation; however, it highlights that air power may be used in urban areas, particularly in light of the concentration of opposing forces operating among the population in such areas.

283 The example of an unarmed insurgent located in peaceful civilian-filled surroundings is often provided when considering the use of force under IHL or human rights law. For example, see the *Interpretive Guidance*, above note 194, p. 81; M. Sassòli, above note 227, p. 85; and C. Droegge, above note 227, p. 529. However, the outcome of the application of conduct of hostilities and law enforcement norms in situations such as these may not be as different as is sometimes believed.

conducting an operation, thereby providing justification for the strike once appropriate precautions are taken.

Given the complexity of the situation on the ground and the diversity of the threats inherent in a belligerent occupation, it is inevitable that there will be both interface and overlap in the application of the two legal regimes. The challenge for courts, tribunals, state legal advisers (both military and civilian), and legal analysts will be to avoid formalistic assessments of the law that do not address the complexity of the threat and the capabilities or tactical limitations of the security forces involved. However, what is clear is that the maintenance of public order and safety in occupied territory under IHL is primarily and predominantly a law enforcement function. This is the situation regarding ordinary dealings with civilians in the occupied territory,²⁸⁴ and extends to law enforcement activity that is an essential part of a counter-insurgency effort designed to counter criminal acts by insurgent groups. In this respect, the Occupying Power is in a similar position to that of the displaced government if it was dealing with an insurgency during an internal conflict. The activity performed by either police or military forces must conform with the widely accepted human rights norms governing law enforcement, regardless of whether a humanitarian or a human rights law framework is applied to determine accountability for the use of any force. It points to a default position of applying human-rights-based law enforcement norms in meeting the Occupying Power's humanitarian law mandate to maintain order, unless the security situation engages the conduct of hostilities framework.²⁸⁵

Conclusion

As this analysis has demonstrated, belligerent occupation – such as occurred in Iraq from 2003 to 2004 – can present a complex and violent security challenge to the Occupying Power. The obligation to restore and maintain public order and safety, as far as possible, has long made the Occupying Power responsible for policing the inhabitants of the occupied territory. At the same time, the Occupying Power may be engaged in hostilities with those wishing to participate in the ongoing international armed conflict. Inevitably, the maintenance of security involves an integration, and at times an overlap, of effort between law enforcement and military forces. This arises from the requirement to police the population and the predominate role that police forces play in countering an insurgency.

Human rights norms associated with law enforcement activity, such as the right to life, are an integral part of IHL. This is consistent with the obligations on the

284 Elbridge Colby, 'Occupation under the laws of war II', in *Columbia Law Review*, Vol. 26, 1926, p. 151.

285 There will continue to be a requirement to separate policing governed by human rights norms and the conduct of hostilities. See René Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2002, pp. 349–350, who notes that 'while there is indeed space for enlightened cross-pollination and better integration of human rights and humanitarian law, each performs a task for which it is better suited than the other, and the fundamentals of each system remain partly incompatible with that of the other'.

Occupying Power to maintain order established in that body of law. These rights are also applicable under human rights law as a matter of treaty or customary international law. As a result, the two bodies of law substantively overlap in terms of the normative structure placed over security forces engaged in carrying out law enforcement duties. There are numerous advantages in applying that protection under the framework of humanitarian law. This includes the existence of parallel normative frameworks and attendant accountability structures that enhance the protection provided to the civilian population. That said, regardless of whether human rights norms are applied as a matter of humanitarian law or of human rights law, there will remain limits on the scope of each body of law in effectively addressing the complex security situation during occupation. In this respect, the norms applicable to the threat being faced will ultimately govern the force permitted at law.