FACTORS IN WAR TO PEACE TRANSITIONS

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Situations of international armed conflict regularly give rise to some misunderstandings with regard to the applicable law and its interpretation. This especially holds true if these misunderstandings are reinforced by statements of a purely political character. All too often some commentators, obviously considering such statements to be of higher relevance than the law, prefer to rely upon these statements rather than on a proper analysis of the relevant treaties. The situation in Iraq gives ample proof of legal evaluations that are, to say the least, based on an erroneous interpretation.[1]

It is the aim of the present paper to clarify what law applies as the transition from war to peace occurs. To do this, it must first be determined which situations qualify as wars or as international armed conflicts,[2] as distinguished from peace. Closely related to this determination are the different forms of terminating and of suspending an international armed conflict. Clarifications of such forms are prerequisites for the identification of the point in time at which the law of armed conflict ceases to apply. After these necessary preliminaries, it will be possible to deal with the rights and duties of an occupying power and with the legal validity of the measures taken by that power. Thus, the ground will be paved for a final determination of what law applies during the different phases marking the transition from war to peace.

I. WAR AND PEACE DISTINGUISHED

While a state of war may still be brought into existence by a

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1. For example, the claim by the U.S. of having "accomplished the mission" in Iraq has led to the misperception that the war in Iraq had been terminated. Accordingly, some international lawyers have stated that the law of armed conflict was not applicable to the situation in Iraq and that Saddam Hussein could not be made a prisoner of war.

2. The terms "war" and "international armed conflict" are used interchangeably, although the latter term has become more common.

declaration of war,[3] sometimes combined with an ultimatum,[4] there is currently a general agreement that the law of armed conflict applies to every situation of international armed conflict, even if a state of war does not exist or is not recognized.[5] An international armed conflict is defined as a situation, usually characterized by the use of the armed forces of one State against another State, that necessitates the application of the body of law aimed at the protection of victims of armed conflicts[6]—wounded, shipwrecked, sick, and captured members of the armed forces, the respective civilian population, and individual civilians—and regulating the methods and means of warfare.[7] The actual conduct of armed hostilities is, however, not a *conditio sine qua non*. According to common Article 2 of the 1949 Geneva Conventions, the Geneva Conventions "shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."[8]

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3. If not accompanied by armed hostilities, a declaration of war will produce a state of war in a technical sense only. *See, e.g.*, YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 9, 14-15 (3d ed. 2001).

4. For example, Operation Desert Storm was preceded by an ultimatum.

5. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 2, para. 1, 6 U.S.T. 3114, 3116, 75 U.N.T.S. 31, 32 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 2, para. 1, 6 U.S.T. 3217, 3220, 75 U.N.T.S. 85, 86 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, para. 1, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, para. 1, 6 U.S.T. 3516, 3518, 75 U.N.T.S. 287, 288 [hereinafter Geneva Convention IV]. These treaties on the law of armed conflicts are also compiled in DOCUMENTS ON THE LAWS OF WAR 171, 194, 216, 272 (Adam Roberts & Richard Guelff eds., 1986).

6. OSCAR M. UHLER ET AL., 4 GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR: COMMENTARY 20 (Jean Pictet ed., 1958) [hereinafter 4 GENEVA CONVENTION COMMENTARY]. "Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2." *Id.* For a similar definition, see DINSTEIN, *supra* note 3, at 15. For a functional approach, see Knut Ipsen, *International Law Preventing Armed Conflicts and International Law of Armed Conflict: A Combined Functional Approach, in* STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES 349 (Christophe Swinarski ed., 1984).

7. The rules regulating the conduct of hostilities are predominantly laid down in the Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 42, para. 1, 36 Stat. 2277, 3306, 205 Consol. T.S. 277, 295 [hereinafter Hague Regulations IV].

8. Geneva Convention I, *supra* note 5, art. 2, para. 2, 6 U.S.T. at 3318, 75 U.N.T.S. at 32; Geneva Convention II, *supra* note 5, art. 2, para. 2, 6 U.S.T. at 3220, 75 U.N.T.S. at 86; Geneva Convention III, *supra* note 5, art. 2, para. 2, 6 U.S.T. at 3318, 75 U.N.T.S. at 136; Geneva Convention IV, *supra,* note 5, art. 2, para. 2, 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

A. Occupation and "Cessation of Active Hostilities" or "General Close of Military Operations"

The *ratio legis* of the provision applying the law of armed conflict to an occupation, even if it meets no armed resistance, is obvious. According to Article 42, para. 1, of the 1907 Hague Regulations, "territory is considered occupied when it is actually placed under the authority of the hostile army."[9] The civilian population, one of the groups of protected victims, comes under the authority of the enemy's armed forces and thus is in need of continuing protection by the laws of armed conflict. Moreover, the presence of foreign forces on a State's territory, which in case of occupation will presumably be against that State's will, is to be considered a continuous use of military force by one State against another State.

This, by necessity, implies that any situation of occupation constitutes an international armed conflict, regardless of whether it meets armed resistance or not. As long as the "hostile army" is present and is exercising "authority" in the territory in question, the armed conflict has not come to an end. However, the mere fact that the occupying forces cease to effectively exercise such authority—whether they are forced to retreat or they are needed elsewhere—does not mark the end of the international armed conflict.[10] Hence, the beginning of an occupation may, but does not necessarily, fall together with the beginning of an international armed conflict. The same holds true for the end of an occupation that may, but does not necessarily, fall together with the termination of war. The end of an occupation is a question of fact. It will be brought about by any loss of authority over the territory in question. Only if accompanied by the "cessation of active hostilities,"[11] or by the "general close of military operations,"[12] or by any other form of terminating the war, will the end of the occupation also signify the end of an international armed conflict.

At first glance, this finding seems to be contrary to Article 3 of the 1977 Additional Protocol I, according to which "the application of the

9. Hague Regulations IV, *supra* note 7, art. 42, para. 1, 36 Stat. at 3306, 205 Consol. T.S. at 295.

10. *See* 4 GENEVA CONVENTION COMMENTARY, *supra* note 6, at 21-22.

11. Geneva Convention III, *supra* note 5, art. 118, para. 1, 6 U.S.T. at 3406, 75 U.N.T.S. at 224.

12. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 3, sec. b, 1125 U.N.T.S. 3, 8. [hereinafter Protocol Additional].

Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, *in case of occupied territories, on the termination of the occupation.*"[13] Seemingly, with the termination of an occupation, the law of armed conflict ceases to apply because there will no longer be an armed conflict. However, this provision has to be read in close conjunction with common Article 2 of the 1949 Geneva Conventions. According to the latter provision, an occupation is but one form of an international armed conflict that triggers the applicability of the law of armed conflict. If, besides the total or partial occupation, there exists no situation of "any other armed conflict," then the termination of the occupation may also mean the termination of the armed conflict.[14] If, however, the armed hostilities continue—in other words, if there is a need for the continuing application of the law of armed conflict because the situation may or does produce victims—then the termination of the occupation will certainly not lead to an end of the war.[15]

Accordingly, the mere fact of a silence of arms does not terminate war.[16] The exercise of authority by the armed forces on the enemy's territory is to be characterized as an international armed conflict. The termination of such exercise alone should not be equated with the "cessation of active hostilities," the "general close of military operations," or any other form of terminating an international armed conflict. Of course, occupation may constitute a first step towards peace if major fighting has come to a lasting end. This, however, can only be established ex post facto and will depend upon the circumstances of the concrete situation in question.

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13. *Id.* (emphasis added).

14. Geneva Convention I, *supra* note 5, art. 2, para. 1, 6 U.S.T. at 3116, 75 U.N.T.S. at 32; Geneva Convention II, *supra* note 5, art. 2, para. 1, 6 U.S.T. at 3220, 75 U.N.T.S. at 86; Geneva Convention III, *supra* note 5, art. 2, para. 1, 6 U.S.T. at 3318, 75 U.N.T.S. at 136; Geneva Convention IV, *supra* note 5, art. 2, para. 1, 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

15. *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 67-68 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON ADDITIONAL PROTOCOLS].

> The "general close of military operations" is the same expression as that used in Article 6 of the Fourth Convention, which, according to the commentary thereon, may be deemed in principle to be at the time of a general armistice, capitulation or just when the occupation of the whole territory of a party is completed, accompanied by the effective cessation of all hostilities.

Id.

16. *See* DINSTEIN, *supra* note 3, at 9, 14-15; 4 GENEVA CONVENTION COMMENTARY, *supra* note 6, at 20; Ipsen, *supra* note 6, at 349-58; *see also* Hague Regulations IV, *supra* note 7, 36 Stat. 2277, 205 Consol. T.S. 277.

B. From War to "Negative" and "Positive" Peace

Before dealing with the different forms of terminating (and of suspending) an international armed conflict, it needs to be stressed that the end of a war merely means a return to peace insofar as the situation thus created is characterized by the absence of military operations, including occupation. This situation, often referred to as "negative peace," of course does not mean a return to normal or amicable relations between the former belligerents, often referred to as "positive peace."[17] The latter condition, while not apt for an abstract and comprehensive definition,[18] may be achieved through the exchange of diplomats and by the reestablishment of economic and cultural relations. There is, however, another aspect of this issue that is of importance in that context. A situation of "positive peace," which is, *inter alia*, based upon the principle of sovereign equality of States, regularly presupposes the reestablishment of the full sovereignty of all belligerents. While the termination of an international armed conflict implies that any further use of armed force not justified by the right of self-defense will be contrary to the fundamental prohibition of the use of force,[19] the existence of negative peace does not necessarily imply the return of the vanquished state to full sovereignty. While there may be an exchange of diplomats as well as other forms of establishing diplomatic relations, the situation may not be characterized as a return to, or the establishment of, positive peace so long as the State concerned has not regained its full sovereignty.

This was the case with Germany until its reunification because all questions relating to "Germany as a whole" had been made subject to the so called "Allied reservations," which meant that neither the Federal Republic of Germany nor the German Democratic Republic were allowed to autonomously decide on that core question of their respective sovereignty.[20] Moreover, Berlin remained under an

17. *See* Christian Tomuschat, *Article 33*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 586 (Bruno Simma ed., 2002).

18. This is due to the fact that some authors have a rather wide understanding of the concept of "positive peace" that, for example, is said to also include "sustainable development," full implementation of human rights, good governance, etc.

19. The use of force will, of course, also be justified if it can be based upon a decision of the U.N. Security Council under Chapter VII of the U.N. Charter. *See* U.N. CHARTER art. 39, para. 1, art. 41, para. 1, art. 42, para. 1.

20. Convention (with annex) on Relations between the Three Powers and the Federal Republic of Germany, May 26, 1952, art. 2, 6 U.S.T. 4251, 4254, 331 U.N.T.S. 327, 328-30.

occupational regime.[21] Only with the end of the Allied rights concerning Germany as a whole, including Berlin, did Germany and the Allies return to a situation of positive peace proper.[22]

II. TERMINATION AND SUSPENSION OF WAR

In the aftermath of World War II there was a rather extensive discussion about the appropriate way to terminate a state of war. While some believed a peace treaty to be essential, others considered the end of the military hostilities or the unconditional surrender by the German armed forces to have signified the end of the war.[23] That discussion was revived after the Korean conflict in 1953, after the end of Operation Desert Storm in 1991, and after the end of major military operations in Iraq in 2003. One of the main issues in those discussions was, and has been, the legal effects of an armistice and of a ceasefire, because the rules laid down in the 1907 Hague Regulations were no longer reflected by State practice. Moreover, the debate revealed that the exact meaning of the provisions of the Geneva Conventions and of Additional Protocol I, referring to the "cessation of active hostilities" or to the "general close of military operations," was far from settled. The same holds true for the ancient concept of *debellatio*.

A. Termination of War

As already stated above, a situation of "negative" peace presupposes the termination of war or international armed conflict and must be distinguished from a mere suspension of war. The main difference between the two situations is the legality of a resumption of hostilities under the *jus ad bellum*. In case of a mere suspension,

21. The status of Berlin was governed by the Quadripartite Agreement on Berlin, Sept. 3, 1971, T.I.A.S. No. 7551, at 2, 10 I.L.M. 895-903, and the Final Quadripartite Protocol, June 3, 1972, T.I.A.S. No. 7551, at 64, 11 I.L.M. 734-36.

22. *See generally* Frans G. von der Dunk & Peter H. Kooijmans, *The Unification of Germany and International Law*, 12 MICH. J. INT'L L. 510 (1991) (evaluating the process of German unification).

23. *See generally* Jost Delbrueck, *A European Peace Order and the German Question: Legal and Political Aspects*, 11 MICH. J. INT'L L. 897 (1990) (explaining steps taken directly after World War II to unify Europe through treaties); Krzysztof Skubiszewski, *The Great Powers and the Settlement in Central Europe*, 18 JARBUCH FÜR INTERNATIONALES RECHT [GER. Y.B. INT'L L.] 92 (1975) (describing bilateral agreements that emerged when a peace treaty with Germany did not materialize); Renata Sonnenfeld, *Succession and Continuation, A Study on Treaty Practice in Postwar Germany*, 7 NETH. Y.B. INT'L L. 91 (1976) (analyzing whether the formation of East and West Germany constituted a succession of states or a mere change in government).

recommencing hostilities is not to be judged under the *jus ad bellum* but, if at all, according to the terms of the agreement that has led to the suspension. Only in the case of a termination proper will the former belligerents again be protected by the prohibition of the use of force under Article 2 of the U.N. Charter.[24]

(1) Armistice—Then and Now

Armistices are dealt with in Articles 36 et seq. of the 1907 Hague Regulations. An armistice comes into effect by an agreement between the belligerent parties and, thus, it is based upon the highest political authority.[25] Regardless of whether an armistice is general or local,[26] according to Articles 36 and 37 of the Hague Regulations, it merely suspends military operations. Hence, the belligerents may properly resume military operations in the following situations:

(1)when the duration agreed upon ends;

(2)if the duration is not defined, "at any time" but after due warning;[27]

(3) in case of a serious violation of the armistice either:

(a) after a denunciation of the agreement, or,

(b) in cases of urgency, immediately.[28]

These provisions are, however, no longer reflected by state practice. The 1949 General Armistice Agreements,[29] as well as the 1953 Panmunjom Agreement,[30] give sufficient evidence that today an

24. This does not mean that the situation in question is not to be judged under the *jus ad bellum*, if, for example, one of the belligerents has proved to be the aggressor. It should, however, not be left out of consideration that the aggressor can be identified beyond doubt only if the U.N. Security Council has made a determination to that effect.

25. *See* Hague Regulations IV, *supra* note 7, art. 36, 36 Stat. at 2305, 205 Consol. T.S. at 295 ("by mutual agreement").

26. *See id.* art. 37, 36 Stat. at 2305, 205 Consol. T.S. at 295.

27. *See id.* art. 36, 36 Stat. at 2305, 205 Consol. T.S. at 295.

28. *See id.* art. 40, 36 Stat. at 2305-06, 205 Consol. T.S. at 295.

29. General Armistice Agreement, Feb. 24, 1949, Isr.-Egypt, 42 U.N.T.S. 251; General Armistice Agreement, Mar. 23, 1949, Isr.-Leb., 42 U.N.T.S. 287; General Armistice Agreement, Apr. 3, 1949, Isr.-Jordan, 42 U.N.T.S. 303; General Armistice Agreement, July 20, 1949, Isr.-Syria, 42 U.N.T.S. 327. For an in-depth analysis, see DINSTEIN, *supra* note 3, at 41.

30. Military Armistice in Korea and Temporary Supplementary Agreement, 4 U.S.T. 234, 1953 U.N.Y.B. 136, U.N. Sales No. 1954.1.15 ("Agreement between the Commander-in-Chief, United Nations Command, on the one hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, on the other hand, concerning a military armistice in [Panmunjom,] Korea.")

armistice is not merely a suspension of military operations, but rather, is a termination of the war.

As the Preamble and Article II of the Panmunjom Agreement clearly show, the effect of its entering into force was not restricted to a mere suspension of the military operations.[31] To the contrary, the parties agreed upon a "complete cessation of hostilities and all acts of armed force in Korea." The fact that they also refer to a "final peaceful settlement" does not justify a conclusion to the contrary. That reference merely makes clear that the parties were not prepared to return to a situation of "positive" peace. While they were not willing to reestablish normal or even amicable relations, they were determined to terminate the war.

Hence, "in the current practice of States, an armistice chiefly denotes a termination of hostilities, completely divesting the parties of the right to renew military operations under any circumstances whatsoever. An armistice of this nature puts an end to war and does not merely suspend the combat."[32]

(2) Debellatio

Although *debellatio* is an ancient concept of international law,[33] there is no general consensus on its distinction from, and relationship to, other concepts like subjugation, conquest, and annexation.[34] Some define *debellatio* as the "extermination in war of one belligerent by another through annexation of the former's territory after conquest, the enemy forces having been annihilated."[35] This definition, under the contemporary *jus ad bellum*, would be rather problematic because annexation—the acquisition of foreign territory by the use of armed force—is no longer regarded as a valid legal title.[36] There is, however,

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[hereinafter Armistice Agreement].

31. The Preamble provides: "[In] the interest of stopping the Korean conflict, ... with the objective of establishing an armistice which will insure [sic] a *complete cessation of hostilities* and all acts of armed force in Korea until a final[,] peaceful settlement is achieved." *Id.* at pmbl., 4 U.S.T. at 236, 1953 Y.B. at 136. Article II states: "The Commanders ... shall order and enforce a *complete cessation of all hostilities in Korea by all armed forces* under their control, including all units and personnel of the ground, naval, and air forces ... ." *Id.* at art. 2, 4 U.S.T. at 239, 1953 Y.B. at 137(emphasis added).

32. DINSTEIN, *supra* note 3, at 39.

33. *See* Karl Ulrich-Meyn, *Debellatio, in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 969 (Max Planck Inst. for Comparative Pub. Law and Int'l Law ed., 1992) (defining *debellatio*).

34. *Id.* at 969.

35. 2 LASSA OPPENHEIM, INTERNATIONAL LAW: DISPUTES § 264, at 470-71 (Hersch Lauterpacht ed., 5th ed., Longman, Green and Co. 1963) (1905).

36. *See* Ulrich-Meyn, *supra* note 33, at 970.

agreement on the factual situation that is described by *debellatio*: One belligerent has been defeated so totally that its adversary, alone, is able to decide what the fate of the State's territory and of the State authorities will be. While *debellatio* is no longer a valid title to territory, it is used to describe a factual phenomenon, namely, the total defeat of one party to the conflict that has led to the extinction of most of that State's sovereignty. Even if the continuity of the defeated State as a subject of international law must be presumed, *debellatio* will regularly be accompanied by a temporary abolition of any form of effective government of the defeated State.

In view of the total character of the military victory, *debellatio* may be one form of terminating a war. Indeed, that would be the result if *debellatio* also meant the extermination of the defeated State as a subject of international law. It must be kept in mind, however, the old argument, that the annihilation of the defeated State automatically leads to a termination of the war,[37] is no longer valid. Rather, today the war will be brought to an end by *debellatio* only if the armed forces or other organs of the victorious State leave the territory concerned and do not continue to exercise any form of authority. In other words, if *debellatio* is followed by an occupation or some other form of exercise of authority by the victorious State, *debellatio* will not as such imply a termination of the war.

(3) Other Means of Terminating War

The preferable way of terminating a war will normally be the conclusion of some formal agreement because then there will be no room for doubt that the state of war has come to an end.[38] The belligerents may agree on an armistice or may conclude a treaty of peace (distinguishable from peace preliminaries).[39] This, however, does not mean that a peace treaty will necessarily have the effect of terminating the war. In most cases the peace treaty will merely be a declaration of the end of the state of war that has been achieved by other means.[40] If that is the case, the function of a peace treaty will not be restricted to reestablishing "negative peace," but will, rather, be the legal basis for the (future) establishment of normal and amicable relations and, therefore, of "positive peace."

37. *See* 2 OPPENHEIM, *supra* note 35, § 264, at 470-71.
38. *See id.* § 265, at 471.
39. For the distinction, see DINSTEIN, *supra* note 3, at 36.
40. *See, e.g., id.* at 33.

The validity of such agreements, whatever their denomination, object, or purpose, may not be doubted in view of the situation in which the vanquished party to the conflict may find itself. Of course, according to Article 52 of the Vienna Convention on the Law of Treaties, a "treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."[41] However, this does not mean that this provision equally affects all agreements between the victor and the vanquished. The defeated State may have no other choice but to agree with the terms more or less imposed upon him by the victorious State. It may be added that, in most cases, States will not meet on an equal footing. Still, it follows from the wording of Article 52 that only the *unlawful* use of force can bring about the nullity of a treaty.[42] The mere fact that the parties are not "equal" because one of them has proven to be militarily superior is not sufficient. Accordingly, Article 52 and the corresponding norm of customary international law[43] "invalidates solely those treaties [of peace] which are imposed by an aggressor State on the victim of aggression."[44]

A written agreement or a formal treaty is not the only means of terminating war. As already stated above, the "cessation of active hostilities" or the "general close of military operations" may also have that effect. According to Article 118 of the Third Geneva Convention, prisoners of war "shall be released and repatriated without delay after the cessation of active hostilities."[45] In that context, a formulation has regularly been referred to according to which hostilities have ceased if "neither side expects a resumption of hostilities."[46] This approach, exclusively based upon subjective assessment, is neither compatible with the wording of Article 118, nor is it very helpful. Article 118 expressly refers to the *cessation* of *active* hostilities, not to a possibility or expectation of their resumption. Certainly, the parties to

41. Vienna Convention on the Law of Treaties, May 23, 1969, art. 52, 1155 U.N.T.S. 331, 344.

42. IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 180 (2d ed. 1984).

43. *See, e.g.*, Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 4, 14 (Feb. 2) ("There can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void.").

44. DINSTEIN, *supra* note 3, at 38.

45. Geneva Convention III, *supra* note 5, art. 118, 6 U.S.T. at 3406, 75 U.N.T.S. at 224.

46. 1 GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 134 (1968).

the Panmunjom Agreement were (and still are) aware of such a possibility. Still, they have made abundantly clear that they consider the war terminated. If the definition depended solely upon the expectations of the (former) belligerents, the Korean War would probably still be in existence.

Others rather rely on an objective approach and would scrutinize the circumstances of each individual case in search of criteria indicating the lasting end of "active hostilities."[47] At first glance such objective criteria seem to provide the best evidence. This approach, according to which the subjective assessment of the (former) belligerents is irrelevant, however, neither reflects State practice nor rules out any doubts. By their conduct, States have shown that every termination of a war by necessity comprises a consensual element. They have never relied upon objective criteria alone—especially in view of their reluctance to recognize an obligatory third party dispute settlement mechanism.

It is, therefore, inevitable to start from an approach that combines, if necessary, the objective criteria and the subjective assessment of the States concerned. If, like in the Panmunjom Agreement, the parties have made sufficiently clear that they were prepared to establish negative peace and, if that is accompanied by a silence of arms, there is no room for doubt that the active hostilities have ceased. Therefore, it will not merely depend upon the factual situation—no further exchange of hostilities—but predominantly on an express or implied agreement between the former belligerents. If, for example, one belligerent has surrendered unconditionally and, if the other belligerent terminates, on his part, all armed hostilities, there will be a "cessation of active hostilities" based upon mutual implied consent terminating the war, unless it becomes clear from the circumstances surrounding the situation in question that, according to the implicit consent, the silence of arms is meant to be merely temporary. In other words, a "cessation of active hostilities" can be brought about only if there is a consensus to that effect. A mere factual situation is never sufficient because the States involved can uphold a state of war for a long period of time even if there is no exchange of armed hostilities whatsoever.[48]

The validity of these findings is underscored by the object and

47. *See* Horst Fischer, *Protection of Prisoners of War, in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 365 (Dieter Fleck ed., 1995).

48. *See* DINSTEIN, *supra* note 3, at 9, 14.

purpose of Article 118. "In time of war, the internment of captives is justified by a legitimate concern—to prevent military personnel from taking up arms once more against the captor State."[49] If the States concerned are unwilling—explicitly or implicitly—to agree upon a lasting cessation of active hostilities, there will always remain the possibility of released prisoners of war resorting to armed hostilities as soon as they have returned to their homeland or units. Therefore, it is incorrect to state that "a ceasefire, even a tacit ceasefire, may be sufficient" because a ceasefire will not terminate a war.[50] A ceasefire will oblige the conflicting parties to release their respective prisoners of war only if that is expressly provided for in the respective agreement.[51]

The same considerations apply to the concept of the "general close of military operations" in Article 3 of the Additional Protocol I. While it is true that the "general close of military operations may occur after the 'cessation of active hostilities,'"[52] neither factual situation will terminate the war without an implicit or explicit agreement to that effect.[53]

(4) Preliminary Conclusions

According to the above findings a state of war or of an international armed conflict is terminated by the following acts:

(1) an armistice brought into effect by an agreement between the parties to the conflict;

(2) *debellatio*, if not followed by an occupation or some other exercise of authority by the organs of the victorious State;

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49. Geneva Convention III, *supra* note 5, art. 118, 6 U.S.T. at 3406, 75 U.N.T.S. at 224, *reprinted in* JEAN PICTET, GENEVA CONVENTION III—COMMENTARY 547 (1960).

50. COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 15, at 68.

51. *See* Geneva Convention III, *supra* note 5, art. 109, para. 2, 6 U.S.T. at 3400, 75 U.N.T.S. at 228.

> Throughout the duration of hostilities, Parties to the conflict shall endeavour, with the cooperation of the neutral Powers concerned, to make arrangements for the accommodation in neutral countries of the sick and wounded prisoners of war .... They *may*, in addition, conclude agreements with a view to the direct repatriation or internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity.

Id. (emphasis added).

52. COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 15, at 68.

53. Contrary to the *Commentary on Additional Protocols*, the general close of military operations does not mean "the complete cessation of hostilities between all belligerents, at least in a particular theatre of war." *Id.* Especially the last part of the *Commentary* has no basis in either the wording or the object and purpose of Article 3. *See id.*

(3) a peace treaty, if that treaty is constitutive for the establishment of negative peace;

(4) the "general close of military operations" and the "cessation of active hostilities," if the States concerned explicitly or implicitly agree that the silence of arms is to be of a lasting character.

Again, an occupation—being one form of an international armed conflict—does not imply either the "general close of military operations" or the "cessation of active hostilities" and, thus, does not terminate war.

B. Suspension of War

While the termination of war presupposes some form of agreement between the belligerents, the same holds true for a suspension of an international armed conflict.

1. Local and General Cease-fire

Currently, a ceasefire has the same effects as an armistice under the 1907 Hague Regulations.[54] Ceasefires can be general or local. General ceasefires suspend the military operations of the belligerent States everywhere. They will, in principle, be concluded in a formal manner and, in view of their scope of applicability, they are dependent upon the respective governments' approval. Local ceasefires are restricted to certain parts of the belligerent armed forces and to a "fixed radius."[55] They can be concluded by authorized commanders on the spot. A ceasefire will regularly serve a specific purpose, for example, the exchange of prisoners of war[56] or, as provided for in Article 15 of the Geneva Convention I, "the removal, exchange and transport of the wounded left on the battlefield."[57] While a general ceasefire may in fact be a first step towards terminating the war, that effect is reserved to an armistice or some other agreement between the conflicting parties.

54. *See* Hague Regulations IV, *supra* note 7, art. 36, 36 Stat. at 2305, 205 Consol. T.S. at 295; *see also supra* text accompanying note 25.

55. *See* Hague Regulations IV, *supra* note 7, art. 37, 36 Stat. at 2305, 205 Consol. T.S. at 295.

56. For the practice of cartels see 2 OPPENHEIM, *supra* note 35, § 125, at 301.

57. Geneva Convention I, *supra* note 5, art. 15, para. 2, 6 U.S.T. at 3124, 75 U.N.T.S. at 40.

2. Cease-fire Ordered by the U.N. Security Council

In view of its primary responsibility for world peace and international security, the U.N. Security Council may, at all times, make use of its powers under Chapter VII of the U.N. Charter and, with regard to an ongoing armed conflict, decide upon a ceasefire.[58] According to Article 25 of the U.N. Charter, that decision is binding upon the parties to the conflict.[59] If, nevertheless, one of the belligerents recommences the hostilities, that belligerent will violate its obligations under the U.N. Charter. However, if according to the respective resolution, the ceasefire is made dependent upon the fulfillment of certain conditions and if one of the belligerents has not complied with those conditions, then the other belligerent is entitled to resume hostilities.

This is due to the fact that a ceasefire, even if ordered by the U.N. Security Council, is merely suspending—not terminating—the armed conflict, unless the Security Council has expressly made clear that it intended otherwise. A ceasefire thus ordered will, in any event, merely suspend the armed conflict if the Security Council has made the silence of arms dependent upon the fulfillment of certain conditions. That was, for example, the case with U.N. Security Council Resolution 687 of April 3, 1991. The end of the military presence of the Allied forces had been made subject not only to the deployment of the U.N. Observer Unit, but also to a comprehensive disarmament and full compliance with further parts of the resolution on behalf of Iraq.[60] Since Iraq had been in material breach of the obligations imposed on it by Resolution 687, the allied forces regularly resumed armed hostilities in order to induce Iraq to comply with its obligations under the Security Council resolutions. Because that compliance was a precondition for the ceasefire, the allied forces were entitled to recommence the hostilities. It may be added that, in that context, the extent and scale of armed force used in response to the breach of a ceasefire is immaterial. Because the armed conflict had not been terminated, the allied forces were allowed to use whatever degree and kind of military force they considered appropriate and necessary. Obviously, in the spring of 2003 they

58. For an analysis of the U.N. CHARTER art. 24, see J. Delbrück, *Article 24, in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 17, at 397.

59. *Id.*

60. *See* S.C. Res. 687, U.N. SCOR, 47th Sess., 2981st mtg. at 13, U.N. Doc. S/INF/47 (1991).

allied forces decided that small-scale operations were no longer sufficient to achieve the overall goal of restoring security in the area.[61]

(3) The Special Nature of Capitulation

A capitulation must be distinguished from all forms of terminating or suspending an international armed conflict. "Capitulations are conventions between armed forces of belligerents stipulating the terms of surrender of fortresses and other defended places, or of men-of-war, or of troops."[62] Their character and purpose is restricted to a stipulation of the conditions for abandoning resistance that has proved futile. "Therefore, whatever may be the indirect consequences of a capitulation, its direct consequences have nothing to do with the war at large, but are local only, and concern the surrendering force exclusively."[63]

III. REESTABLISHING THE RULE OF LAW AND EFFECTING CHANGES INTO THE GOVERNMENT OF A VANQUISHED STATE

Whether and to what extent the victorious belligerent is entitled to interfere with the political, administrative, and legislative system of the vanquished State depends on the rules and principles of the law of armed conflict governing military occupation. That law is codified in the 1907 Hague Regulations, in Geneva Convention IV, and, in the 1977 Additional Protocol I, which in some parts, although indirectly, supplements the Hague and Geneva rules. For reasons of convenience, the following synopsis is provided:

Subject	HR Arts. 42-56	GC IV Arts. 27-34, 47-78	AP I (Art. 69)
Definition of occupation	42	(Art. 2 para. 2)	-
Public order	43	64 ff.	-

61. This formulation was used by the Security Council in S.C. Res. 678, U.N. SCOR, 46th Sess, 281st mg. at 27-28, U.N. Doc. S/INF/46 (1990) (authorizing the States cooperating with Kuwait to use "all necessary means").

62. 2 OPPENHEIM, *supra* note 35, § 226, at 430. Note that a simple surrender does not qualify as a capitulation because there will be no agreement stipulating the terms of the surrender.

63. *Id.* at 431.

Information, allegiance, enlistment, forced labor	44, 45	31, 51	72 ff.
Fundamental individual rights	46	27, 32, 47, 53, 55, 56, 65 ff.	72 ff., 75
Pillage	47 (28)	33 Abs. 2	-
Forcible transfers and deportations	-	49	
Protection of children	-	50	77 f.
Status of public officials	-	54	-
Taxes, dues, money contributions	48, 49	(-)	-
General penalty	50	33 para. 1	75 para. 2 lit. (d)
Contributions, requisitions	51, 52	51	-
Capture of movable State property	53	(-)	52 (indirectly)
Submarine cables	54	(-)	-
Immovable State property	55	53	52 (indirectly)
Property of municipalities	56	53	52 (indirectly)

Whether and to what extent those rules also apply to cases of *debellatio* is far from clear in view of the absence of State practice since 1952 or 1954, respectively.[64]

A. Occupation

Before elaborating on the rights and duties of an occupying power, it should be stressed that the Hague Regulations and Geneva Convention IV are based on the assumption that any form of military authority over foreign territory does not extinguish the occupied State. For example, Article 55 of the Hague Regulations provides that the "occupying State shall be regarded only as administrator and usufructuary."[65] Geneva Convention IV, in view of the experience of

64. While the occupation regime established in Germany ended in 1954, it continued in Berlin until the reunification of Germany. *See* Quadripartite Agreement on Berlin, *supra* note 21.

65. Hague Regulations IV, *supra* note 7, art. 55, 36 Stat. at 2309, 205 Consol. T.S. at 297.

World War II, emphasizes this by reaffirming and specifying the duties of an occupying power. Against that background it becomes clear that the rules of occupation are, to a certain extent, a compromise between the security interests and other military exigencies of the occupying power on the one hand, and of the "dormant" sovereignty of the occupied State on the other hand.

(1) Rights and Obligations of an Occupying Power

As seen, Article 42 of the 1907 Hague Regulations defines "occupation" as the actual placement of the territory of one belligerent "under the authority of the hostile army."[66] Whether that authority has really been established, and whether it can be exercised, is a question of fact. However, neither the Hague Regulations nor Geneva Convention IV require an absolute and uncontested authority. Hence, the fact that the occupying forces meet resistance does not rule out the effectiveness of the occupation. Otherwise, the Hague and Geneva rules referring to the security interests of the occupying forces would not make sense.

As soon as the occupying forces have established and are exercising their authority, they are obliged to "take all the measures in [their] power to restore, and ensure, as far as possible, public order and safety."[67] This implies the duty to take effective measures against those parts of the civilian population who are, for example, committing acts of pillage or who are destroying specially protected objects like cultural monuments and museums. It should be noted in that context, however, that the duty to restore and maintain public order is subject to the capabilities of the occupying forces.

According to Articles 55 et seq., the occupying power has the duty of ensuring the availability of food and medical supplies of the civilian population. If the means available to it are insufficient, the occupying power is obliged to "agree to relief schemes on behalf of the said population, and shall facilitate them by all means at its disposal."[68] Further obligations with regard to relief consignments are laid down in Articles 60 et seq. of Geneva Convention IV. For the

66. *Id.* art. 42, para. 1, 36 Stat. at 2306, 205 Consol. T.S. at 295.

67. Hague Regulations IV, *supra* note 7, art. 43, 36 Stat. at 2306, 205 Consol. T.S. at 295. *See also* 4 GENEVA CONVENTION COMMENTARY, *supra* note 6, at 337 ("[The occupying force] will have the right to enact provisions necessary to maintain the 'orderly government of the territory' in its capacity as the Power responsible for public law and order.").

68. Geneva Convention IV, *supra* note 5, art. 59, 6 U.S.T. at 3556, 75 U.N.T.S. at 326.

other obligations see the synopsis above. At the same time, the occupying power is entitled to take all measures rendered necessary by military operations, or for the safety of the occupying forces, or which are essential to the fulfillment of its obligations under Geneva Convention IV.[69]

(2) Reestablishing the Rule of Law and Effecting Changes into the Government?

Hence, as expressly recognized in Article 47 of Geneva Convention IV, the occupying power may introduce changes, "as the result of the occupation of a territory, into the institutions or government of the said territory."[70] While such changes are subject to the considerations and necessities mentioned above, they may involve not only all measures necessary for the security of the occupying forces, including the promulgation of penal laws by the occupying force (Articles 64 et seq.), but also the removal of public officials from their posts (Article 54, para. 2). Moreover, the occupying forces are entitled to take all measures necessary for the maintenance of "the orderly government of the territory" (Article 64, para. 2).[71] This may imply the establishment of government structures or the appointment of reliable nationals of the occupied State as public servants. Whether and to what extent the occupying power may interfere with the political and social structures in an occupied territory will, however, depend upon the circumstances of the individual situation, and is, thus, a question of fact. In any event, if the rules refer to the security interests involved, the occupying power will have a considerable margin of discretion when it comes to the determination of the necessary measures.

However, if there is no necessity for such changes the occupying force is obliged to leave the institutions and the legal order of the

69. Geneva Convention IV provides for these exceptions in the following Articles: 49, para. 2, 6 U.S.T. at 3548, 75 U.N.T.S. at 318 (evacuation of the civilian population of a given area), 51, para. 2, 6 U.S.T. at 3550, 75 U.N.T.S. at 320 (compulsion to work), 53, 6 U.S.T. at 3552, 75 U.N.T.S. at 322 (destruction of property), 54, para. 2, 6 U.S.T. at 3552, 75 U.N.T.S. at 322 (removal of public officials), 55, para. 2, 6 U.S.T. at 3552-54, 75 U.N.T.S. at 322-24 (requisition of foodstuffs, etc.), 57, 6 U.S.T. at 3554, 75 U.N.T.S. at 324 (temporary requisition of civilian hospitals), 62, 6 U.S.T. at 3556, 75 U.N.T.S. at 326 (prohibition of individual relief consignments), 63, 6 U.S.T. at 3558, 75 U.N.T.S. at 328 (measures against national Red Cross societies), 64, 6 U.S.T. at 3558, 75 U.N.T.S. at 328 (promulgation of penal laws). *See also* 4 GENEVA CONVENTION COMMENTARY, *supra* note 6, at 280, 293-98, 300-02, 308, 311-12, 316-17, 328-37.

70. Geneva Convention IV, *supra* note 5, art. 47, 6 U.S.T. at 3548, 75 U.N.T.S. at 318.

71. 4 GENEVA CONVENTION COMMENTARY, *supra* note 6, at 337.

occupied territory intact. This is expressly laid down in several Articles of the 1907 Hague Regulations: Article 43 ("while respecting, unless absolutely prevented, the laws in force in the country"); Article 64 (penal laws remain in force, tribunals of the occupied territory "shall continue to function"); Article 54 (no alteration of the status of public officials or judges); and also Articles 50 and 56 Geneva Convention IV, which provide for a cooperation with the "national and local authorities," which implies that those authorities will regularly continue to perform their functions even if the territory has come under the rule of the occupying power.[72]

(3) Conclusions Regarding Rights and Duties in Cases of Occupation

Accordingly, the rights and duties of an occupying power can be summarized as follows:

(1) it may provide for its own security;

(2) it must restore and maintain public order, safety, and the orderly government of the territory;

(3) it must take all measures feasible for safeguarding the supply of the civilian population with food and medical services;

(4) it must respect certain fundamental rights of the individual;

(5) it may, in as much as this is essential for its security, for the performance of its obligations under the law of occupation, or for the maintenance of an orderly government, interfere:

(a) with the legal order of the occupied State,

(b) with the national or local institutions and authorities, or

(c) with the status of public officials and judges;

(6) it may not change the entire political, economic, social, or cultural system of the occupied territory.

B. Debellatio

Occupation law is based on the premise that the occupied State

72. *See id.* at 284, 312.

continues to exist and that, on its territory, there still exists functioning political, legal, and administrative institutions, authorities and structures. While the national or local authorities will be considerably restricted in the exercise of their functions, they continue to be representatives of the sovereignty of the occupied State. That sovereignty is not abolished, but is merely superposed by the authority of the occupying force. Accordingly, the latter is not entitled to enact comprehensive changes to the political, legislative, administrative, and social structures in the occupied territory.

(1) Occupation and Debellatio *Distinguished*

Neither the Hague Regulations nor Geneva Convention IV seem to have anticipated a situation of *debellatio*. The delegates to the Geneva Conference were unwilling to deal with that phenomenon in view of the practice of World War II and, probably, in view of the illegality of annexation under the U.N. Charter. It is, by all means, correct to neglect *debellatio* if it is viewed as a legal title to territory. No use of force, whether justified or not, may any longer be considered a legitimate means of acquiring foreign territory or of extinguishing another State. Therefore, even in cases of a "total" victory, the presumption of the continuing existence of the vanquished State will prevail.[73] For that very reason, *inter alia,* in Resolution 1511,[74] the U.N. Security Council has underscored "that the sovereignty of Iraq resides in the State of Iraq" and that, thus, "the exercise by the Coalition Provisional Authority (Authority) of the specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in resolution 1483 (2003)" is of a temporary nature only and "will cease when an internationally recognized, representative government established by the people of Iraq is sworn in and assumes the responsibilities of the Authority."[75]

Still, it would be incorrect and certainly counterproductive to ignore the factual situation brought into existence by *debellatio*. As seen, *debellatio* is characterized by the totality of the military defeat, especially by the extinction of functioning government structures. Hence, in such a situation the basic assumption of the Hague and

73. Note that Oppenheim is not prepared to apply this finding to cases of subjugation (*debellatio*) followed by annexation. *See 2* OPPENHEIM, *supra* note 35, §§ 264, 281, at 470-71, 486-87.

74. S.C. Res. 1511, U.N. SCOR, 58th Sess., 4844th mtg., U.N. Doc. S/RES/1511 (2003).

75. *Id.* at 2.

Geneva rules on occupation is no longer reflected by reality. The occupying forces would, if they remained bound by an unmodified occupation law, have no choice but to retreat from the territory and to abandon its population to its fate. Whether the United Nations would be capable of handling that situation is more than doubtful.

(2) Rights According to Debellatio

Accordingly, the rights and duties of the victorious power that decides to establish and maintain an occupation regime have to be adapted to the special situation of *debellatio*. The occupying forces may, unless the U.N. Security Council decides otherwise, take all measures necessary to install functioning administrative, juridical, legislative, and social structures that are a prerequisite for the "orderly government" of the territory concerned.

Therefore the U.N. Security Council, with regard to the situation in Iraq, has not confined itself to "call upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907."[76] Rather, Resolution 1483 gives sufficient proof that the Security Council also acknowledges the right of the occupying force to go beyond the traditional rules of occupation law. The said resolution starts with recognizing the United States and the United Kingdom under unified command as "the Authority" that is called upon "to promote the welfare of the Iraqi people through the effective administration of the territory, including, in particular, working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future."[77] The Authority is the main institution to assist the Iraqi people in forming a transitional administration.[78] Among other rights and tasks, the Authority is entitled, in consultation with the Iraqi interim administration, to direct how the funds in the Development Fund for Iraq shall be disbursed.[79]

With Resolution 1500, the Security Council has established a "representative Governing Council,"[80] which is considered the

76. S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg. at 2, U.N. Doc. S/RES/1483 (2003).

77. *Id.*

78. *See id.* at 3-4.

79. *See id.* at 6.

80. S.C. Res. 1500, U.N. SCOR, 58th Sess., 4808th mtg. at 1, U.N. Doc. S/RES/1500 (2003).

"principal body of the interim administration of Iraq,"[81] and which "embodies the sovereignty of the State of Iraq during the transitional period."[82] This, however, does not mean that the Security Council has curtailed the rights of the occupying forces ("the Authority") previously recognized. Of course, in Resolution 1511, the Security Council reemphasizes the temporary character of the exercise of authority over Iraq.[83] Still, the Security Council continues to recognize that the occupying force is entitled to take measures that clearly go beyond what the traditional law on occupation provides for. Resolution 1511:

> *Determines* that the provision of security and stability is essential to the successful completion of the political process as outlined in paragraph 7 above and to the ability of the United Nations to contribute effectively to that process and the implementation of resolution 1483 (2003), and *authorizes* a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme as well as to contribute to the security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure.[84]

The multinational force, according to that section of the resolution, is not the main actor with regard to the "maintenance of security and stability," but is clearly confined to a "contribution."

(3) Conclusions with Regard to Rights and Duties in Case of Debellatio

The factual situation created by *debellatio* calls for a modification of the traditional rules of occupation law if the victorious power decides not to retreat, but rather, to establish an occupation regime in the territory. Accordingly, the following applies to the victorious power:

(1) it may provide for its own security;

(2) it must restore and maintain public order, safety, and the orderly government of the territory;

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81. S.C. Res. 1511, *supra* note 74, at 2.
82. *Id.* at 2.
83. *See id.*
84. *Id.* at 3.

(3) it must take all measures feasible for safeguarding the supply of the civilian population with food and medical services;

(4) it must respect certain fundamental rights of the individual;

(5) it may take all necessary measures aiming at the establishment and maintenance of security and stability and at a return to an orderly government, including:

(a) the reestablishment of the rule of law;

(b) effecting changes into the government;

(c) effecting changes into the economic and social system; and

(d) interference with regards to the status of public officials and judges.

C. Validity of Measures Taken by the Victorious Belligerent

It follows from the temporary nature of the measures taken by an occupying power, including cases of *debellatio*, that they can be abrogated as soon as sovereignty has been fully reinstalled. If the people of the territory concerned decide, either directly or by elected representatives, that they want to change the rules and the system installed by the occupation authority, this will have to be considered a matter of domestic jurisdiction. This does not, however, affect the validity of the measures taken by the foreign authority, which are to be judged according to the doctrine of *postliminium*.

(1) Postliminium

According to Hugo Grotius, *postliminium* is a "right which arises from a return to the threshold, that is, to the public boundaries."[85] Under public international law the concept indicates "the fact that territory, individuals, and property, after having come in time of war under the authority of the enemy, return, either during the war or at its end, under the sway of their original sovereign."[86] Thus, at first glance, *postliminium* seems to imply that the legal validity of the measures taken by an occupying power ceases as soon as the

85. 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 701 (Francis W. Kelsey trans., Clarendon Press 1925) (1646).

86. 2 OPPENHEIM, *supra* note 35, § 279, at 486.

sovereignty of the occupied State has been fully reinstalled.

Oppenheim, however, rightly states that the concept of *postliminium* leaves unaffected those acts of the former occupying power "connected with the occupied territory and with the individuals and property thereon" if they were in conformity with the applicable law.[87] Oppenheim therefore concludes, "[i]ndeed, the State into whose possession such territory has reverted must recognise these legitimate acts, and the former occupant has by International Law a right to demand this.... However, this only extends to acts done by or under the authority of the occupant *during the occupation*."[88]

The correctness of this statement is—indirectly—recognized by Security Council Resolution 1511. Having affirmed that "the administration of Iraq will be progressively undertaken by the evolving structures of the interim administration," the Authority is called upon, in this context, "to return governing responsibilities and authorities to the people of Iraq as soon as practicable."[89] Hence, the measures taken by the occupying power aiming at reestablishing the rule of law and functioning structures are endorsed by the Security Council. While these arrangements can be changed "when an internationally recognized, representative government established by the people of Iraqis is sworn in and assumes the responsibilities of the Authority,"[90] this will be without prejudice to their legal validity.

(2) Postliminium *and* Debellatio

According to Hugo Grotius, the doctrine of *postliminium* is not applicable to cases of *debellatio*. Grotius states:

> But if the population, which formed the state, has been dispersed, I think it more correct not to consider the people as the same, nor to restore their property by postliminy in accordance with the law of nations, for the reason that a people, like a ship, obviously perishes by the dissolution of its parts, since its whole nature consists in perpetual union.[91]

Obviously, Oppenheim is prepared to share this view when he states that:

> No case of postliminium arises when a territory, ceded to the

87. *Id.* § 282, at 487.
88. *Id.*
89. S.C. Res. 1511, *supra* note 74, at 2.
90. *Id.*
91. GROTIUS, *supra* note 81, at 707.

> enemy by the treaty of peace, or conquered and annexed without cession at the end of a war terminated through simple cessation of hostilities, later on reverts to its former owner State; or when the whole of the territory of a State which was conquered and subjugated regains its liberty, and becomes again the territory of an independent State.[92]

Accordingly, the validity of the measures taken by the victorious State could not be questioned under the doctrine of *postliminium* because of the interim disappearance of the vanquished State.

This was certainly true as long as *debellatio* and annexation by force were considered legally valid titles to territory. Today, however, in view of the prohibition of the use of force, that position has no foundation in modern international law. The function of *debellatio* is restricted to merely describing a special situation and, if necessary, vesting the victorious power with rights exceeding those provided for by traditional occupation law. Hence, the doctrine of *postliminium* remains applicable in cases of *debellatio*. If, however, the measures taken by the victorious State are in conformity with the rules of international law applicable to such a situation, their validity is not affected by *postliminium*.

IV. LAW APPLICABLE TO THE DIFFERENT PHASES IN THE TRANSITION FROM WAR TO PEACE

Having identified the different phases marking the transition from war to peace, including the rules of international law that must be observed during a military occupation, it seems that now the ground has been paved for an answer to the question as to what law applies. However, there remains a final problem that still has to be solved.

A. Applicability of Human Rights in International Armed Conflict, Especially in Case of Occupation (and of Debellatio*)?*

Not only the current situation in Iraq, but especially the conflicts in Northern Cyprus and in the former Yugoslavia have triggered an enduring discussion about the relationship between the law of armed conflict on the one hand and the international protection of human rights on the other hand.[93]

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92. 2 OPPENHEIM, *supra* note 35, § 284, at 488 (citation omitted).

93. *See, e.g.*, Wolff Heintschel von Heinegg, *The Non-International Armed Conflict: Fusion or Co-Existence of International Human Rights Law and International Humanitarian Law Symposium held in Kiel (Germany) 19-22 September 2002, Introductory Remarks*, 45 GER. Y.B. INT'L L. 55 (2002).

(1) The Law of Armed Conflict as Lex Specialis

According to the traditional view, during an international armed conflict, the law of armed conflict applies exclusively. The same holds true, according to that position, for non-international armed conflicts as long as the law applicable to such internal conflicts provides special rules. The proponents of the traditional view would only recognize the applicability of human rights in a non-international armed conflict if the applicable law did not provide special rules and if the guarantees of human rights treaties have not been derogated by declarations of a state of necessity.[94]

Here is not the forum to discuss the situations in non-international armed conflicts. However, the traditional view has recently been challenged also with regard to situations of international armed conflicts. Some maintain that human rights remain applicable in such situations and, thus, the armed forces will continue to be bound by human rights even if they are fighting a war abroad.[95] They argue that the use of force against foreign territory is to be considered an exercise of jurisdiction, and the fact that such jurisdiction is exercised on or against foreign territory does not free the members of the armed forces as organs of their State from the obligations under human rights law.

This argument is not at all convincing if it is accepted that international law is consensual in character. After the adoption of The Universal Declaration of Human Rights in 1948 and of the two United Nations Pacts in 1966, States have not only reaffirmed the law of armed conflict but they have also progressively developed it. This justifies the conclusion that, according to the consensus of States, the law of international armed conflict is *lex specialis* and, thus, prevails over human rights law. It should also be kept in mind that the law of international armed conflict is a rather sophisticated and detailed body of law that, *inter alia*, provides for far reaching protection of victims of such conflicts and hence for the protection of the individual human being. Moreover, the law of international armed conflict is especially

94. *Id.*

95. Heike Krieger, *Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslandseinsatz*, 62 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [GERMANY'S RESPONSIBILITY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS FOR ITS ARMED FORCES DEPLOYED ABROAD] 669 (2002); Ulrike Froissart, *Legal and Other Factors in Nation-Building in Post War Situations: Example Iraq*, *in* KRISENSICHERUNG UND HUMANITARER SCHUTZ [CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION] 99 (Horst Fischer et al. eds., 2004).

designed to serve as a binding guideline for the armed forces engaged in combat operations. Hence, it would not make much sense to complicate the situation by demanding they also submit to the obligations provided for by human rights instruments.

(2) The Jurisprudence of the European Court of Human Rights

Against allegations to the contrary, the proponents of the view that human rights apply in all situations of international armed conflict cannot rely upon the jurisprudence of the European Court of Human Rights. In the *Loizidou* case,[96] Turkey had taken the position that the European Convention on Human Rights was not applicable to the Turkish armed forces deployed in Northern Cyprus because the applicant had not come under the jurisdiction of Turkey according to Article 1 of the Convention. The Court rejected that argument by referring to the fact that the concept of "jurisdiction" had been chosen deliberately, and thus the Convention's scope of applicability could not be limited to the respective territory of the contracting parties. Rather, the Court continued, it followed from the object and purpose of the Convention that:

> [T]he responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[97]

The decision in the *Loizidou* case has served as a reference for the argument that in a case of military occupation, not only the law of armed conflict applies, but also the international agreements on the protection of human rights because the authority exercised by an occupation power has to be characterized an exercise of "jurisdiction" in the sense of those agreements. It is self-evident that this argument was claimed to be valid for every situation of armed conflict in view of the fact that occupation is but one form of an international armed conflict. Accordingly, the exclusive priority of the law of armed conflict over international human rights was alleged to have become obsolete.[98]

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96. Loizidou v. Turkey, 1996-VI Eur. Ct. H.R. 2216.

97. Loizidou v. Turkey (Preliminary Objections), 310 Eur. Ct. H.R. (ser. A) at 24 (1995).

98. Froissart, *supra* note 95, at 110-11.

Actually, the applicants in the *Banković* case[99] put forward exactly that argument when claiming a violation of their human rights by the air attacks conducted by the eight NATO countries against targets in the former Yugoslavia.[100] They also referred to the Court's decision in the *Loizidou* case. Still, the Court was not prepared to share their position. While it conceded that an occupying power could be "found to [have been exercising] jurisdiction in that territory, at least in certain respects," the subsequent practices of the States, which were parties to the Convention, have not indicated "a belief that its extraterritorial actions involved an exercise of jurisdiction within the meaning of Article 1 of the Convention by making a derogation pursuant to Article 15 of the Convention."[101] Moreover, the Court took the opportunity to examine its findings in the *Loizidou* case and made clear that "[i]n keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention."[102]

Such an exceptional case, according to the Court, only exists if otherwise there would be "a regrettable vacuum in the system of human rights protection."[103] Therefore, the Court came to the conclusion that, "[a]ccordingly, the desirability of avoiding a gap or vacuum in human rights protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention."[104] For these reasons, the Court decided that the air attacks could not be characterized an exercise of "jurisdiction" and dismissed the claims as inadmissible.

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99. Banković v. Belgium, 2001-XII Eur. Ct. H.R. 333.

100. The Court stated:

> As to the admissibility of the case, the applicants submit that the application is compatible *ratione loci* with the provisions of the Convention because the impugned acts of the respondent States, which were either in the FRY or on their own territories but producing effects in the FRY, brought them and their deceased relatives within the jurisdiction of those States. They also suggest that the respondent States are severally liable for the air strikes despite their having been carried out by NATO forces, and that they had no effective remedies to exhaust.

Id. at 345.

101. *Id.* at 352-53.

102. *Id.* at 354.

103. *Id.* at 358 (quoting Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 1, 25).

104. *Id.* at 359.

Hence, the jurisprudence of the European Court of Human Rights does not serve as a reference for the applicability of human rights to all cases of an international armed conflict. The same holds true for partial or complete military occupations. According to the findings of the Court, the European Convention will apply to those situations only if the occupied territory is one that "would normally be covered by the Convention."[105] If that is not the case, there is no room for the simultaneous application of the law of armed conflict and of international human rights. The fact that some States (whose legal advisers may have misinterpreted the decisions of the European Court of Human Rights) are nevertheless prepared to apply, for example, the European Convention in case of a military occupation is therefore to be characterized as a self-imposed restriction that is due to political considerations rather than to the applicable law.[106]

(3) Establishing the Relationship

In view of the above findings, there are good and convincing arguments for an exclusive application of the law of armed conflict during any situation constituting an international armed conflict proper. That body of law is designed to protect innocent victims of such conflicts by obliging the belligerents to take all feasible measures to spare them from the detrimental effects of armed hostilities. This especially holds true for the population of an occupied territory. The rules of that body of law are a reasonable compromise between considerations of humanity on the one hand and considerations of military necessity on the other hand. The law of armed conflict is an order of necessity insofar as it contains obligations that States must comply with even if they are unwilling or unable to refrain from the use of military force in their international relations. In view of that special character, such rules, by necessity, enjoy priority over international human rights.[107] Obviously, the Security Council has endorsed this position in its resolutions on

105. *Id.*

106. The British armed forces in Iraq do indeed apply the European Convention on Human Rights. It should be noted, however, that the U.K. has become rather sensitive about human right issues because it has suffered a number of defeats before the European Court.

107. This view is affirmed by G.A. Res. 3319, U.N. GAOR, 29th Sess., Supp. No. 31, at 147, U.N. Doc. A/9631 (1974), which in its title refers to "[r]espect for human rights in armed conflicts." In its operative part, however, it refers to the law of armed conflict alone. *Id.*

Iraq.[108] Finally, it may not be left out of consideration that the law of armed conflict is, in most of its parts, addressed to the members of the armed forces. If they were obliged to also comply with human rights, the applicable law would become rather complicated and, in many cases, inoperable.

Still, it should not be forgotten that the law of armed conflict, especially insofar as its rules are addressed to States, contains a number of rather vague clauses. For example, the 1949 Geneva Conventions contain repeated references to "tribunals" without defining the term. In view of the function international human rights serve, namely, guaranteeing certain minimum standards for the individual, such terms must be interpreted and defined in light of the well established principles and standards provided by international human rights.

B. The Applicable Law

As for the law applicable to the different phases of the transition from war to peace, it follows from the foregoing findings that from the beginning of an international armed conflict until its termination proper the law of armed conflict applies. A war is not terminated by the end of major military operations, but continues if an occupation regime is established. The law of armed conflict needs to be modified and adapted to the exigencies of the concrete situation, especially in case of *debellatio* followed by a military occupation. As long as the measures taken are in conformity with the (modified) law of armed conflict, their validity is not affected by the doctrine of *postliminium.*

The belligerents may, at all times, conclude special agreements, including ceasefire and armistice agreements, whose scope of applicability may be restricted to the time of war or, for example, in case of a treaty of peace, may be extended to the time following the termination of the armed conflict.

Human rights will merely serve a subsidiary function in specifying certain concepts of the law of armed conflict that are rather vague and, thus, in need of a specification. After the termination of the war, human rights will, of course, be fully applicable again in the relationship between the citizens and their government.

108. S.C. Res. 1483, *supra* note 76, expressly mentions the Geneva Conventions and the Hague Regulations but not human rights instruments. The reference at 8(g) to the promotion of the protection of human rights is restricted to the Special Representative for Iraq. *Id.*

The existence of an international armed conflict leaves unaffected the domestic legal order of the belligerents. In principle, that also holds true in case of occupation. However, the occupying power is entitled to modify or even abrogate and replace the domestic law if that is necessary for the security of its armed forces, for the fulfillment of its obligations under occupation law, or for the establishment and maintenance of an orderly government of the occupied territory. Again, the validity of these measures is not affected by the doctrine of *postliminium*.

Finally, in view of its primary responsibility for peace and international security, the U.N. Security Council may, during all phases of the transition process, make use of its powers under Chapter VII of the U.N. Charter. Because of their binding effects, such decisions will then supplement or even modify the applicable law. However, the Security Council is not entitled to free the belligerents from their obligations (in contrast to rights) under the law of armed conflict.

V. CONCLUSION

Public international law is a most dynamic legal order that may change within a rather short period of time. This characteristic does not, however, justify calls for a modification of international law as soon as its application to a given situation creates problems. Further, it does not justify allegations that are based on the impatience of some international lawyers who are prepared to equate what they consider (politically) opportune with the law in force rather than on a proper analysis of the existing law.

In most cases, such an analysis will produce operable solutions. However, it should not leave out of consideration treaties in force and concepts of international law that may have been established a long time ago but that still continue to govern international relations. It may be that the results thus produced will create inconveniences when it comes to their application in a concrete situation, but that is a typical side-effect of every legal order.

If international lawyers cease to remember one of their main tasks, specifically, the identification of rules and principles of international law as expressions of the consensus of States, public international law will lose its credibility and, most of all, its legally binding force. International lawyers must, therefore, continue to state the law as it stands even if that is politically inopportune or if their findings are not welcomed by the political leaders of the world.

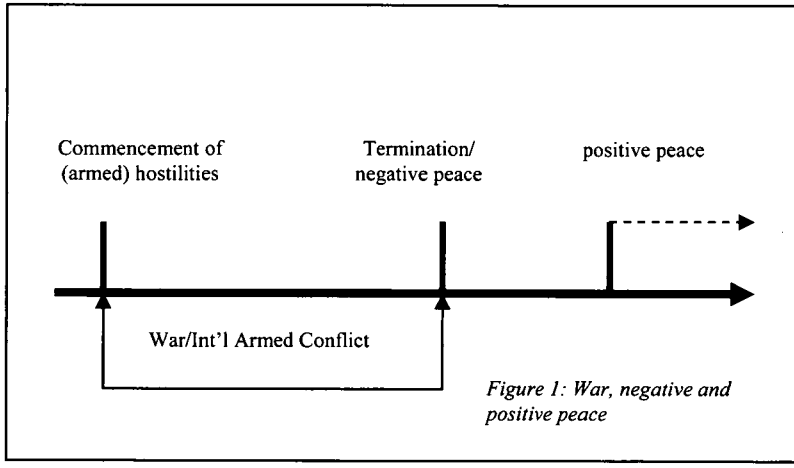

Figure 1: War, negative and positive peace

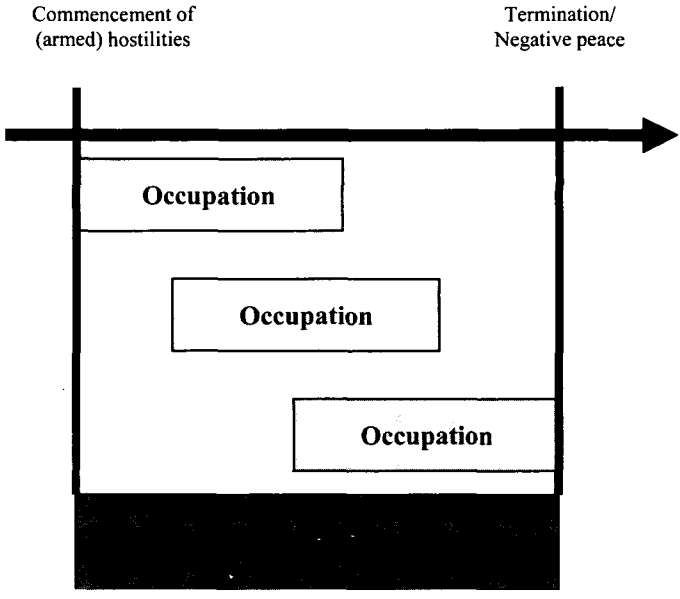

Figure 2: Occupation and Beginning/Termination of War

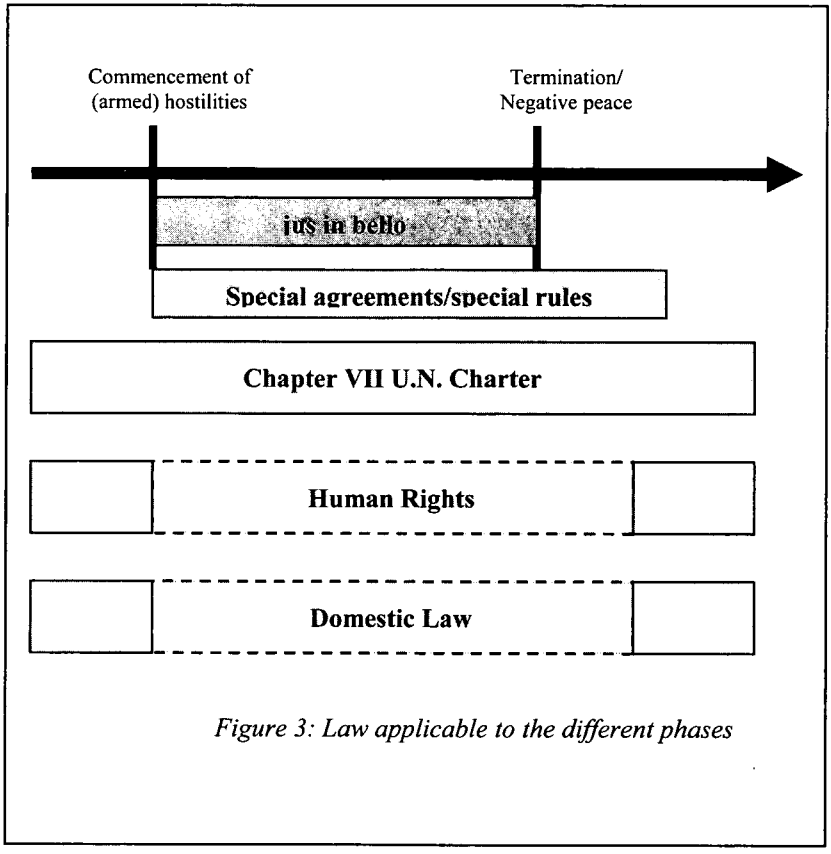

Figure 3: Law applicable to the different phases