Chapter 4

The Legislative Competence of the Occupying Power under the Fourth Geneva Convention

1. Introduction

As stated in Article 154 GCIV, the Geneva law is not purported to replace the Hague law but to supplement it. However, Benvenisti refers to three major differences in approaches and underlying objectives. As recognized in the ICRC Commentary, the first such difference is the shift in emphasis from the military advantage of the ousted sovereign to the protection of inhabitants under an enemy’s hands.\(^1\) Benvenisti even asserts that the GCIV “delineates a bill of rights for the occupied population, a set of internationally approved guidelines for the lawful administration of occupied territories”.\(^2\) Along the same line, Kolb argues that:

\[\ldots\text{la Convention de Genève IV n’est pas fondée sur l’optique inter-étatique. En toute logique, elle s’oriente vers l’octroi de garanties individuelles selon le modèle d’un Bill of Rights. L’optique est individuelle. Ce n’est pas par hazard si l’on a très tôt rapproché la Convention IV du droit des droits de l’homme, estimant que les deux relevaient d’une souche commune, que la Convention IV relevait, en fait, d’une approche des droits de l’homme.}^3\]

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\(^1\) The ICRC Commentary notes that “the Hague Regulations codify the laws and customs of war and are intended above all to serve as a guide to the armed forces, whereas the Fourth Convention aims principally at the protection of civilians”: ICRC Commentary to GCIV, at 614.


Second, the structure of the occupying power’s duties and powers under the GCIV is very much different from the Hague rules. The GCIV requires the occupying power to assume the role of regulator of socio-economic issues and of provider of services to meet needs of local population. The duties on the occupant are not merely of negative nature, but also of positive nature encompassing the duty to prevent and protect inhabitants from inhumane treatment. As such, the list of duties incumbent on the occupant under GCIV is very much expanded.

Third, under the Geneva law the primacy given to private property under the Hague law, which largely reflects the prevailing laissez-faire philosophy of the late nineteenth century, has undergone a substantial overhaul in the Geneva law, reflecting the concern of the western occupying powers to rebuild post-World War II economies in occupied territories along the New Deal thinking.

The outcome of the first two fundamental changes in the nature of belligerent occupation is that a broader mandate of legislative power is granted to occupying powers under Article 64 GCIV. This can be recognised by comparing a categorical prohibition of prescriptive powers as seen in the phrase “unless absolutely prevented” under Article 43 Hague Regulations, with the more nuanced phrase “may subject . . . to provisions which are essential to enable . . .” under Article 64 GCIV. At least on the matter of the prescriptive power of the occupying power, the Hague Regulations are replaced by the rules under GCIV. The ICRC’s Commentary indicates that “when a State is party to the Fourth Geneva Convention of 1949, it is almost superfluous to enquire whether it is also bound by the Fourth Hague Convention of 1907 or the Second of 1899”.

2. Article 64 of GCIV and the Necessity Exceptions

2.1. Article 64 of GCIV

Article 64 of GCIV reads that:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring

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4 Benvenisti (2003), supra n. 2, at 29.
6 Ibid., at 102.
7 ICRC’s Commentary to GCIV, at 614.