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INTRA-OCCUPIED TERRITORIAL POPULATION TRANSFER
AN ASSESSMENT UNDER ARTICLE 49 OF THE GENEVA CONVENTION IV(*)

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Abstract: This article focuses on the illegality of the intra-occupied territorial population transfer practice, within the framework the interpretation of the Geneva Convention IV (i.e., GC IV) through general principles of treaty interpretation and the Martens Clause. The article examines whether the humanitarian principles enshrined in Article 49 could also serve the protection of the demographic composition of the occupied territory. It is argued that the subsequent practice of the States Parties to the Convention demonstrates the illegality of the intra-occupied territorial transfer under Article 49 of the GC IV. Article 49 is analysed under the general principles of international law and IHL and it is suggested that there is a solid ground for considering the act unlawful. It is concluded that the protection of the demographic composition of the occupied territory is the common rationale behind Article 49 of the GC IV as a whole. The arguments are constructed as supplementary to each other and although some are articulated more in-depth than others, it is not submitted that one should be favoured over the another.

Keywords: Occupation, Population Transfer, Geneva Convention IV, Demographic Composition, Rules of Interpretation.

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İŞGAL ALTINDAKİ TOPRAKLAR ÜZERİNDE NÜFUS TRANSFERİ DÖRDÜNCÜ CENEVRE SÖZLEŞMESİ'NİN 49. MADDESİ KAPSAMINDA BİR DEĞERLENDİRME

Öz: Bu makale, IV. Cenevre Sözleşmesi'nin (CS IV), milletlerarası antlaşmaların yorumuna ilişkin genel ilkeler ve Martens Kaydı çerçevesinde yorumlanması yolu ile, işgal altındaki devletin sınırları içinde nüfus transferinin hukuka aykırılığına odaklanmaktadır. Makalede, CS IV'ün 49. maddesinde yer bulan insancıl ilkelerin, işgal altındaki toprakların demografik yapısını korunmasına hizmet edip edemeyeceği incelenmektedir. Sözleşme'ye taraf devletlerin uygulamalarının, CS IV'ün 49. maddesi uyarınca işgal altındaki toprak transferinin hukuka aykırılığını gösterdiği ileri sürülmektedir. 49. madde, Milletlerarası Hukuk ve Uluslararası İnsancıl Hukuk'un genel ilkeleri çerçevesinde incelenmekte ve fiilin hukuka aykırı sayılması için sağlam bir zemin bulunduğu ileri sürülmektedir. İşgal altındaki bölgenin demografik yapısının korunmasının, CS IV'ün 49. maddesinin ardındaki temel mantık olduğu bulgusuna ulaşılmıştır. Argümanlar birbirini tamamlayıcı olarak inşa edilmiştir ve bazıları diğerlerinden daha derinlemesine ifade edilse de birinin diğerine tercih edilmesi gerektiği öne sürülmemektedir.

Anahtar Kelimeler: İşgal, Nüfus Transferi, Dördüncü Cenevre Sözleşmesi, Demografik Yapı, Yorum İlkeleri.

I. INTRODUCTION

The prohibition on the transfer of the civilian population of the occupied territory is considered a part of customary international law[1] as well as to have *jus cogens* nature by some scholars[2]. The present paper will focus on the illegality of the transfer of nationals within the occupied territory, by the occupying power, under the positive framework of international humanitarian law. The scope, purpose, and importance of Article 49 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War ("GC IV" or "the Convention") will be examined, and it is argued that

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1 International Committee of the Red Cross, **The Customary IHL Database**, Rule 129, (Available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/home) (Access date: 16.09.2022).

2 FERRARO Tristan, **Occupation and Other Forms of Administration of Foreign Territory**, International Committee of the Red Cross Report of Expert Meeting, International Committee of the Red Cross, Geneva, 2012, p. 71.

the resettlement of the occupied state's nationals within the occupied territory by the occupying power is rendered unlawful under IHL. For the purpose of the argument, the consent of the occupied state's nationals will not be considered. The acts of deportation, understood as the inter-state transfer of civilians, and the evacuations on the necessity grounds will not be taken into account.

The general conservation rule of the law of occupation compels the occupant not to take any actions which would have long-lasting effects on the occupied territory. Setting aside the administrative or judicial changes that might be "necessary" for the benefit of the occupied state's nationals during a prolonged occupation, the *de facto* changes in the demographic composition cannot be legitimized by the principle of necessity, hence there should not be any ground for the claims of necessity for population transfer which would have permanent effects and that contradicts with the right to self-determination of the occupied state's peoples.

II. INTERPRETATION OF THE GENEVA CONVENTION IV

1. Object and Purpose of the Provision

This chapter will focus on the implications of general principles of treaty interpretation as found in the Vienna Convention on the Law of Treaties ("the VCLT")[3] and use the teleological method and the subsequent practice to argue that the intra-occupied territory population transfer by the occupant is unlawful under the GC IV. As stated in Article 31 of the VCLT, which is of a customary nature[4], the object and purpose of a treaty provide guidance on its interpretation.

The GC IV applies to the protected persons[5] that are in hands of the enemy during an armed conflict. The Law of Occupation derives its sources

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[3] UN General Assembly, **Vienna Convention on the Law of Treaties**, (adopted on 22 May 1969 and opened for signature on 23 May 1969, General Assembly resolutions 2166 (XXI) of 5 December 1966 and 2287 (XXII) of 6 December 1967, entry into force 27 January 1980), 1155 UNTS 331.

[4] International Court of Justice, **Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory**, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, p. 42, para. 94.

[5] The term *protected persons is used by Geneva Conventions* only in the context of international armed conflicts.The Geneva Conventions and their Additional Protocols protect **sick, wounded and shipwrecked persons not taking part in hostilities, prisoners of war and other detainees, civilians and civilian objects**.

from customary international law and human rights law and is codified in the Hague Regulations and later, in GC IV[6]. Article 49 of the GC IV is known to reflect the memory of the Nazi practice of deportations of civilians from and within the occupied territories during World War II. The International Court of Justice ("the ICJ") in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory ("the Wall Advisory Opinion") concluded that the drafters of the GC IV intended to protect the civilian population under, in whatever way, the authority of the occupying power, therefore the scope of the Convention is not limited to acts of the exact same kind[7]. While the Hague Regulations of 1907 have a dual perspective, e.g., regulating the rights of the occupant as well as the occupied state's nationals, the GC IV regulates the issue with special emphasis on the protection of the civilians, and this is the *raison d'être* of the Convention[8]. This finding obliges the interpreters and the practitioners to interpret and apply the Convention in good faith and in accordance with its main humanitarian goal. While this is the main object of the Convention as a whole, the interpretation of each provision should be consistent with this humanitarian rationale as well[9]. The humanitarian concerns behind the first five paragraphs of the Article 49 were embraced by the drafters, with some controversy on the wording, hence the forcibleness criteria[10]. In the Krstić Judgment of the International Criminal Tribunal for the Former Yugoslavia ("the ICTY"), the forcible transfer as stated in Article 49/1 of the GCIV is understood as the forcible transfer of the population within the same state[11]. The ICTY draws on the fact that any forced displacement is in itself a trau-

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6 GASSER Hans-Pieter, Protection of the Civilian Population' in Fleck, Dieter (ed), **The Handbook of International Humanitarian Law**, Second edition, Oxford University Press, Oxford, 2008, p. 271.

7 International Court of Justice, **Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory**, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, p. 175.

8 Ibid.

9 ARAI-TAKAHASHI Yutaka, **The Law of Occupation International Law in Japanese Perspective: continuity and change of international humanitarian law, and its interaction with international human rights law**, First edition, Martinus Nijhoff Publishers, Leiden, 2009, p. 340.

10 International Committee of Red Cross (ICRC), **Commentary of 1958 on Article 49 of the GC IV, Vol. IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War**, Geneva, edited by J.S. Pictet, 1958.

11 **Prosecutor v. Radislav Krstić (Trial Judgement)**, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 August 2001, available at: https://www.refworld.org/cases, ICTY, 414810d94.html (Access date: 30.10.2022), para. 521.

matic experience for the displaced and causes psychological and peculiar damage[12]. This judgment emphasizes the humanitarian purpose of the prohibition on population transfer while focusing on the effects of the transfer on the people that were subjected to this practice.

On the other hand, Article 49/6 is arguably serving a different purpose. As was expressed in the XVIIth International Red Cross Conference, this paragraph was drafted to prohibit the colonization or annexation of the occupied territory[13]. It was also suggested that Article 49/6 should be a separate article due to its different object and the lack of the requirement of force element[14]. The humanitarian aspect of Article 49/6 is that even though it is not directly about the obligations of the occupant ***vis-à-vis*** the occupied state's nationals, it does protect the unique social ambience of the occupied territory that would change inevitably through the transfer of the population of the occupant state. In the Wall Advisory Opinion, the ICJ interpreted Article 49/6 to include "any measures taken by an occupying power in order to organize or encourage transfers of parts of its own population into the occupied territory"[15]. While discussing various consequences of the construction of the Wall, the ICJ stressed the possible "alterations to the demographic composition of the Palestinian territory" as a breach of the "obligation to respect the right to self-determination of Palestinian people"[16]. The ICJ drew attention to the possible "voluntary" migration of the Palestinian people from the areas that would be affected by the construction of the Wall and its associated regime[17]. These considerations imply that the prohibition of the annexation of the occupied territory was no longer the sole object of Article 49/6, as it was at the time of the drafting of the Convention. The ban on the transfer of the occupying state's nationals to the occupied territory serves to protect the social balance and cultural context of the occupied territory as well as the economic and political rights of its inhabitants, as they find their expression through the right to self-determination, of the occupied state's nationals.

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12 **Prosecutor v. Krstić, Judgment of Trial Chamber**, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 August 2001, IT-98-33-T, para. 523.

13 ICRC, **Commentary of 1958 on Article 49 of the GC IV.**

14 Ibid.

15 **Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory**, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, para. 120.

16 Ibid., para. 184.

17 Ibid., para. 122.

Although there is no need to deny the humanitarian object of the first five paragraphs of the Article, as is the case with the whole convention, there is likewise no reason to argue that the first five paragraphs cannot also serve the purpose of protecting the demographic composition and cultural balance of an occupied territory. As Kretzmer argues, the forcible transfers as prohibited in the first paragraphs could be utilized by the occupying power to perform demographic engineering just as much as the transfer of its own population to the occupied territory[18]. The distinction seen between the Article 49/6 and the rest of the Article can also be refuted by the fact that the Article 6/3 of GC IV[19], which is perceived as defining the "core" rules of occupation, does not distinguish between Article 49/6 and the first five paragraphs of the Article 49.

2. Subsequent State Practice relative to the Prohibition

Article 31/3-b of the Vienna Convention on the Law of Treaties sets down the role of the subsequent practice of the States Parties on the application of a treaty in its interpretation. Although it is argued by the Israeli Supreme Court that Article 49 of GC IV does not categorically prohibit the transfer within the occupied territory[20], the subsequent practice of the States Parties to the Geneva Convention leaves room for a plausible argument that states otherwise.

Article 147 of the GC IV holds that the "unlawful deportation or transfer" of protected persons is a grave breach of the Convention. This provision and the ICRC Commentary of 1958 distinguish between deportation and transfer, the former meaning inter-state and the latter meaning intra-state forced movement of the protected people[21]. Since any provision of the Con-

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18 KRETZMER David, "The Advisory Opinion: The Light Treatment of International Humanitarian Law", **American Journal of International Law**, S. 99, 2005, p. 94, footnote 43.

19 **Article 6/3 of GC IV** read as follows: "In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143."

20 ARAI-TAKAHASHI Yutaka, **The Law of Occupation International Law in Japanese Perspective: continuity and change of international humanitarian law, and its interaction with international human rights law**, First edition, Martinus Nijhoff Publishers, Leiden, 2009, p. 339.

21 ICRC, **Commentary of 1958 on Article 147 of the GC IV.**

vention should be interpreted in relation to its whole, it can be said that the contextual interpretation does not give any reason to argue that the intra-occupied territory is prohibited under IHL.

Bearing in mind the lack of some states' signatures and ratifications, including Israel which is significant due to its position whereby the prohibition's vitality for the occupied Palestinian territories, the Additional Protocol I of 1977 ("the AP I") Article 85/4 states *inter alia* that the transfer within the occupied territory in violation of GC IV would constitute a grave breach of the AP I[22]. The ban on intra-occupied territorial transfer as expressed in this rule with reference to Article 49 of GC IV is not constitutive but assertive of the prohibition on intra-occupied state transfer[23]. The popular opinion on the assertive nature of Article 85/4 of the AP I demonstrates the general understanding of Article 49/1 as forbidding the intra-occupied territorial population transfer[24].

There is no consensus on the legal consequences of the findings of the international judicial bodies' interpretations of treaties *per se* as subsequent practice according to the VCLT and their attributiveness to the parties of a treaty as subsequent practice[25]. However, given its far-reaching role in the interpretations of international treaties, the ICJ's wide interpretation in the Wall Advisory Opinion of Article 49/6 of GC IV, by stating "Lastly, the construction of the wall and its associated regime, by contributing to the demographic changes, contravene Article 49/6" could provide some guidance.[26] As pointed out by Kretzmer, the limited acts prohibited should not be widened with the purposeful interpretation of Article 49/6[27]. He argues that, with the possible individual criminal responsibility that may be incurred, the

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[22] ICRC, **Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)**, 8 June 1977, 1125 UNTS 3.

[23] SOLF Waldemar and CUMMINGS Edward, "A Survey of Penal Sanctions under Protocol I to the Geneva Conventions of August 12, 1949", **Case Western Reserve Journal of lnternational Law**, S. 9, 1977, p. 205.

[24] ICRC, **Commentary of 1987 on Additional Protocol I Article 85.**

[25] HERDEGEN Matthias, "Interpretation in International Law", **Max Planck Encyclopedia of Public International Law**, Encyclopedia Entry. https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e723?rskey=RBI6nj&result=2&prd=MPIL (Access date: 16.09.2022), para. 19.

[26] **Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory**, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, para. 134.

[27] KRETZMER David, "The Advisory Opinion: The Light Treatment of International Humanitarian Law", **American Journal of International Law**, S. 99, 2005, p. 91.

ICJ's wide interpretation of Article 49/6 to render "any acts of the occupying power" as unlawful should be dealt with vigilantly[28]. Although the legality principle must be respected in international criminal law, in the case of intra-occupied territorial transfer under IHL, the transfer act is already prohibited in the first paragraph of Article 49, which means that the contextual interpretation whereby the intra-occupied state transfer prohibition is unlawful would not be of law-making nature but a mere interpretation of the GC IV through the subsequent practice of the States Parties.

III. CUSTOMARY NATURE OF THE PROHIBITION

There is an ongoing discussion as to the customary nature of the GC IV, since its drafting period until today[29]. According to the ICRC, the prohibition on the forcible displacement of the civilian population from the occupied territory as finds expression in Article 49 of GC IV is of customary nature and so is the transfer of the occupying state's own population[30]. The customary concomitant of the prohibition on the transfer of the civilian population under IHL deals with internally displaced people as well as internationally displaced people[31]. The rule derives from various binding and soft-law instruments, starting from the Lieber Code and the Rome Statute of the ICC to the United Nations General Assembly Resolutions[32].

The case of Israel and its interpretation of Article 49 is a noteworthy example of occupying State practice, due to it being the occupying power for decades over the Palestinian territories and the interpretation of the Israeli Supreme Court, whereby it concluded that the GC IV does not prohibit the transfer of civilians within the occupied territory[33,34].

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28 Ibid.

29 ARAI-TAKAHASHI Yutaka, **The Law of Occupation International Law in Japanese Perspective: continuity and change of international humanitarian law, and its interaction with international human rights law**, First edition, Martinus Nijhoff Publishers, Leiden, 2009, pp. 333-337.

30 ICRC Customary Law Database, Rule 129.

31 Ibid.

32 ICRC Customary Law Database, Rule 129, Related Practice.

33 Supreme Court of Israel in H.C., 302/72, Sheikh Suleiman Abu Hilu et al. v. State of Israel et al., 27(2) Piskei Din 169, as excerpted in (1975) 5 Israel YbkHR 384, p. 387 (cited in ARAI-TAKAHASHI Yutaka, **The Law of Occupation International Law in Japanese Perspective: continuity and change of international humanitarian law, and its interaction with international human rights law,** First Edition, Martinus Nijhoff Publishers, Leiden, 2009, p. 339).

In practice, Israel is the objector persistent for the customary nature of the Article 49 of GC IV. Similarly, Dinstein argues that the GC IV as a whole cannot be said to have a customary nature even until recently[35]. When reflecting on the discussion as to the customary nature of Article 49 of GC IV, Dinstein argues that the Nazi experience caused the drafters to include this provision in the Convention in order to prevent similar crimes from being conducted in the future[36]. Dinstein claims that this intention gives the article a cutting-edge nature, let alone being declaratory of existing rules[37]. Paradoxically, Dinstein suggests that these very acts were already prohibited at the time they were carried out by the Nazi regime, mentioning the Nürnberg Charter[38] and the subsequent convictions of the perpetrators of these acts by the *ad hoc* body of the International Military Tribunal[39]. This discrepancy needs further elaboration: if the acts of transfer and deportation were already unlawful before the adoption of the GC IV, how can the Convention be seen as innovative and not declaratory? As stated above, the prohibitions of the Article 49 of GC IV were not to be found in the Hague Regulations. In the same paragraph, Dinstein emphasizes the widespread and systematic nature of the Nazi deportations as well as the motivation behind the deportations, e.g., slave labour[40]. The explicit prohibition of individual transfers and the lack of the motivation element in Article 49 indicates that the Nazi-like behaviour was not intended to be the delimitation of the provision.

The universal nature of the United Nations General Assembly ("the UNGA") and its widely favoured resolutions on the unlawfulness of Israeli practices uphold the customary nature of Article 49 to include transfer of the civilian population within the occupied state's territory. Although it must be borne in mind that the states can vote in favour of the resolutions in as much as they are non-binding, the abundance of the UNGA resolutions, the consis-

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[34] Supreme Court of Israel in H.C., 413/13, 1039/13, Muhammad Musa Shihadah Abu 'Aram et 107 al, The Association for Civil Rights in Israel Mahmoud Yunes et 42 al., (4 May 2022).

[35] DINSTEIN Yoram, 'The Israel Supreme Court and the Law of Belligerent Occupation: Deportations", **Israel Yearbook of Human Rights,** 23, 1993, p. 13.

[36] Ibid., 14.

[37] Ibid., 13.

[38] Charter of the International Military Tribunal; https://ihl-databases.icrc.org/en/ihl-treaties/nuremberg-tribunal-charter-1945?activeTab=undefined.

[39] Ibid., 14.

[40] Ibid.

tency thereof, and the high number of votes in favour imply the existence of the *opinio juris*[41] in terms of Article 49.

The Rome Statute of the International Criminal Court, despite its lower ratification number compared to the Geneva Conventions, renders the transfer within the occupied territory as a crime against humanity and a war crime under serious violations of customs of war[42]. The provision of Article 8/2-b(viii) caused discussion on its wording due to the inclusion of the "direct and indirect" transfer of the occupying state's nationals, as it was seen as filling the gap that is in the Article 49 by covering the indirect population transfer, allegedly because the drafting committee of the Rome Statute had the Israeli practice in mind[43]. It is argued that the inclusion of the word "indirect" caused further problems in interpreting the scope of the prohibited acts[44]. One of the final drafts[45] of the Statute for this provision envisaged four options:

1. Prohibiting the transfer of the occupying state's nationals to the occupied territory without forbidding the intra-occupied territorial transfer,
2. Explicitly prohibiting the establishment of the settlements alongside the transfer of the occupying power's population and any acts aimed at changing the demographic composition of the occupied territory, as well as forbidding the intra-occupied territorial transfer (in two separate paragraphs),
3. Not regulating this issue, and
4. The agreed-upon version of Article 8/2-b(viii).

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41 TREVES Tullio, "Customary International Law", **Max Planck Encyclopedia of Public International Law**, Encyclopedia Entry. https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1393?rskey=QRXB2d&result=1&prd=MPIL (Access date: 16.09.2022), para. 44.

42 The **Rome Statute** of the International Criminal Court, Article 7/1-d and Article 8/2-b(viii).

43 KRETZMER David, "The Advisory Opinion: The Light Treatment of International Humanitarian Law", **American Journal of International Law,** Vol. 99, 2005, p. 91.

44 DAU Corinna, "Israeli Settlements and Unlawful Population Transfer into Occupied Territory - with Special Focus on 'Indirect Transfers' According to the Article 8(2)(b)(viii) of the ICC Statute", **Humanitäres Völkerrecht: Journal of International Law of Peace and Armed Conflict**, Vol.. (2) 1/2, 2019, 67-88, p. 67.

45 **Report of the Preparatory Committee on the Establishment of an International Criminal Court**, **Addendum**, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June-17 July 1998, 14 April 1998, UN Doc. A/Conf.183/2/Add.1.

As can be seen easily, a compromise was made by not specifically mentioning Israel's settlement policy but at the same time adding the words "directly or indirectly" to the Statute to possibly include such acts in the Statute.

The debate being limited to the indirect transfer can be considered as a proof that the prohibition of the direct transfer within the occupied territory was a customary norm by the time the Rome Statute was drafted, between 1992-1998, hence Article 8/2-b(viii) of the Statute is simply a declaration of this prohibition. Although eliminated in further negotiations, the fact that demographic composition was seen as the common rationale behind Article 49 of the GC IV during the drafting of the Statute, and 7 years before the Wall Advisory Opinion, illustrates the customary nature of the ban on intra-occupied territorial population transfer as an attempt to change the demographic composition of the occupied territory.

IV. MARTENS CLAUSE

International Humanitarian Law is a body of "prohibitive" laws, it forbids some acts rather than authorizing others[46]. It was perhaps no surprise that the Martens Clause ("the Clause") emerged initially from a discussion on the law of belligerent occupation when taking into consideration the historically selective nature of the non-application of this part of IHL to colonized territories by the European states[47]. To develop the argumentation of this paper, the author takes the views of the great lawyer Cassese on the legal nature of the Clause as an interpretative tool specifically for international humanitarian law and a factor in determining the customary nature of IHL rules[48].

Cassese argues that when instrumentalized as an interpretative tool for IHL treaties and customs, the two elements expressed in the Clause should be derived from international human rights law ("the standards of humanity") and the practice of representative international bodies ("the public con-

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[46] SOLF Waldemar and CUMMINGS Edward, "A Survey of Penal Sanctions under Protocol I to the Geneva Conventions of August 12, 1949", **Case Western Reserve Journal of International Law**, Vol. 9, 1977, p. 206.

[47] ARAI-TAKAHASHI Yutaka, "Preoccupied with occupation: critical examinations of the historical development of the law of occupation", **International Review of the Red Cross**, Vol-No: 94-885, 2012, p. 51.

[48] CASSESE Antonio, "The Martens Clause: Half a Loaf or Simply Pie in the Sky", **European Journal of International Law,** Vol.. 11, 2000, p. 212.

science")[49]. Even if it is endorsed that the intra-occupied territory is not prohibited in Article 49 of the GC IV and is furthermore not a customary rule, the corresponding human rights rule, which is asserted in Article 12 of the International Covenant on Civil and Political Rights ("the ICCPR"), requires attention while interpreting Article 49 of the GC IV[50]. The universal nature of the ICCPR and other various regional human rights treaties, as well as the constitutional sets of rights all around the world[51], reflect a standard that the occupant's acts must meet during occupation.

Interpreting the rules of IHL in light of the public conscience could take into consideration the classification of some acts by the States via the UNGA. On many occasions, the intra-occupied transfer of the occupied state's nationals was seen as an unlawful practice of the occupying power[52]. The abundance of UNGA resolutions, military manuals, and national criminal codes denouncing and forbidding the internal displacement of civilians indicates the conscious stance of the international public.

According to Israel and some scholars, intra-occupied territorial transfer is not prohibited by Article 49 of the GC IV. The Martens Clause, as an interpretative tool for IHL, renders it difficult to support this argument. Even if it is agreed that interpreting the article through the provisions of the VCLT does not result in the existence of the prohibition, the Clause considers this act to be illegal under the laws of humanity and public conscience.

Another salient implication of the Clause, according to Cassese, is its effect on the significance of *opinio juris* in the creation of customary rules exclusively for the body of IHL[53]. Because of its very nature, the emergence of customary international law has a two-way relationship with its application[54]. In conjunction with the *opinio juris* element; more broadly it is im-

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49 Ibid.

50 UN General Assembly, International Covenant on Civil and Political Rights (adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976), 999 UNTS 171, Article 12.

51 ICRC Customary Law Database Rule 129, Related Practice.

52 Among many: UNGA RES. 61/25, 1 December 2006 (157 votes in favour); UNGA RES. 61/119, 14 December 2006 (157 votes in favour).

53 Supra note 41, p. 214.

54 TREVES Tullio, "Customary International Law", **Max Planck Encyclopedia of Public International Law**, Encyclopedia Entry. https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1393?rskey=QRXB2d&result=1&prd=MPIL (Access date: 16.09.2022), para. 3.

plemented, more normative a rule it becomes. Cassese argues that by operating within international law and not being a separate source of law itself, the Clause gives superiority to the *opinio juris* over state practice in the creation of customary law concerning the laws of war[55]. He justifies this stance by emphasizing the importance of IHL norms, particularly those protecting civilians during wartime[56].

If the state practice of the biggest powers or the states whose interests are at stake the most is required and waited for, this would mean, at least for the customary rules of humanitarian law, that the biggest powers can create a loophole to refrain from the application of customary international law to them. Furthermore, the unprecedented and complex cases that IHL would be applicable to will never be regulated because of the need to wait for a state practice that has never been or will never be seen again due to the unique nature of the case. As Christian Wolff wrote on the question of the killing of hostages during a conflict and Grotius' affirmative answer to the question: 'He *(Grotius)* does not distinguish the customary law of nations from the voluntary. The former contains errors, nor does it give a true right to the one acting, but only an absence of punishment'[57].

Waiting for wrongful state practices to change in order to establish the normativity of the *opinio juris* leads to acceptance of a state's unlawful acts and the continuation of impunity for atrocities. The formalistic approach to rules and insistence on state will and practice, while seemingly advocating for legality in international law, causes vague principles such as the Martens Clause and even more unforeseeable and cacophonous court decisions (from domestic cassation level courts to the ICJ).

V. SELF-DETERMINATION

The concept of self-determination of people has a relatively short but weighty history that emerged during the American and French revolutions

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55 SOLF Waldemar and CUMMINGS Edward, "A Survey of Penal Sanctions under Protocol I to the Geneva Conventions of August 12, 1949", Case Western Reserve Journal of lnternational Law, S. 9, 1977, p. 214.

56 Ibid., p. 215.

57 WOLFF Christian**, Jus Gentium Methodo Scientifica Pertractatum (The Law of Nations Treated According to the Scientific Method)** (Drake, Joseph H. tr, Ahnert, Thomas ed), First Edition, libertyfund, Indiana, 2017, p. 397.

followed by the decolonization era in the 20th century[58]. In addition to the principle's distinct political gravity, from the legal perspective, it is known to have a *jus cogens* nature. The legal meaning and the scope of legal applicability of the principle are still a matter of controversy. For the ambit of this paper, the present author will favour the existence of the right to self-determination of the occupied state's peoples under international law and focus on the normative hierarchy between the principle as a norm of *jus cogens* nature and the GC IV.

Within the normative hierarchy of international law, a treaty that conflicts at the time of its conclusion with a norm of *jus cogens* nature is rendered void[59]. As in the case of GC IV, the right to self-determination of people was not recognized as a right at the time of its drafting, let alone being a *jus cogens* norm. Nevertheless, after the emergence of a *jus cogens* norm, the interpretation of treaties should comply with the higher norm that confers rights and duties on the legal subjects to avoid the annulment of the norm. This necessity is also a requirement of the general interpretation rule of "good faith" as stated in the Vienna Convention on the Law of the Treaties Article 31/1.

The main duty bearer of the right to self-determination, in addition to being *erga omnes*, would clearly be the occupying power as a direct result of its effective control over the occupied territory. The question for the holder of the right to self-determination concerning the occupied state's nationals is at least two-dimensional: the right of the "nationals" of the occupied state as a whole and the right of nationals belonging to other ethnic/religious groups than the majority on the occupied land. As argued above, one of the core interests that are protected by Article 49/6 of the GC IV is the demographic composition of the occupied territory, as asserted by the ICJ in the Wall Advisory Opinion[60].

The right mostly imposes a negative obligation on the duty-bearer, namely the obligation to respect its exercise and refrain from interfering

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58 THÜRER Daniel and BURRI Thomas, "Self-Determination", **Max Planck Encyclopedia of Public International Law**, Encyclopedia Entry. https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873?rskey=cUKIwA&result=1&prd=MPIL (Access date: 16.09.2022), para. 1.

59 Vienna Convention on the Law of Treaties, Article 53.

60 ICJ Wall Advisory Opinion, 9 July 2004, ICJ Rep. 2004, para. 122.

with it. This negative obligation alone creates a sphere for the exercising of the right where the occupying power should not operate. Added to that, the population transfer within the occupied territory can be assumed to have deteriorating effects on the social, economic, and political balance of the territory as a whole. If done for political reasons to change the *status quo* in favour of the occupying power's interests, the existing structural inequalities can worsen with regard to the minorities and vulnerable groups within the occupied territory. As scrutinized under the higher norm of *jus cogens*, Article 49/6 can only be interpreted and implemented as including the prohibition on intra-occupied territorial population transfer with respect to the right to self-determination.

As a norm of *jus cogens* nature, the right to self-determination can provide guidance with regards to the Martens Clause, as understood above. The fact that the right to self-determination can be found in many binding treaties and soft-law instruments including the UN Charter, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights confirms that the "laws of humanity and public conscience" forbids the actions which may violate the right to self-determination specifically under the body of IHL.

VI. CONCLUSION

This paper discusses Article 49 of the GC IV as a legal ground for the illegality of the population transfers under existing rules of IHL by the occupying power within the occupied territory, which is a practice on the rebound in contemporary conflicts and not only aggravating the pressures on civilians during armed conflicts, but also which has become an emerging title as of the early 1990s by changing the composition of the geographies, firing other Human Rights issues and initiating discussions on legal and policy terms.

Understanding the shortcomings of the existing norms can assist the officials and legal professionals to develop further policies and regulations to minimize the grave effects on the civilians and manage such humanitarian crises timely and properly to enable protected persons to return to their home territories. Therefore, the general principles of treaty interpretation, customary international law, the Martens Clause, and the *jus cogens* norm of the right to self-determination are used to develop the discussion and these are not mutually exclusive. They are supplementary to each other to hold

various actors with differing legal positions accountable on the subject. As the lack of ratification of some of the legal instruments or the adopted formalistic doctrine in this regard, as well as the consistent unlawful practices which fly under the radar cause grave breaches in this regard and require international law to activate existing mechanisms and legal tools to protect civilian populations from any IHL and human rights violations they may face under the occupying powers' discretion.

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