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1

Introduction

1.1 The Concept

International law has sought since the nineteenth century to regulate the conduct of occupying forces. Rules were prescribed through military manuals, multilateral instruments, state practice, and judicial decisions. These rules stemmed from the developing norm within Europe that sovereignty may not be alienated through the use of force. The occupying power is thus precluded from annexing the occupied territory or otherwise unilaterally changing its political status and is bound to respect and maintain the political and other institutions that exist in that territory. During the period of occupation, the occupant is responsible vis-à-vis the local population, the ousted government, and third parties, for the management of public order and civil life in the territory under its control. The doctrine of occupation serves as a useful device to fill the “spatial problem”—the exercise of “foreign state power in the territory of a continuing sovereign state.”¹ The law of occupation operates as a gap-filler—in fact the only such gap filler²—assigning authority to one state to act in the territory of another state.

Indeed, as we shall see throughout this book, the law of occupation is intimately related to the law of sovereignty, and to a large extent serves as its mirror image: conflicts over title to territory lead contenders to regard their opponents as occupants, as in the dispute over sovereignty in the Falklands/Malvinas islands.³ More fundamentally, over the years the changing attitudes about sovereignty and about entitlement to sovereignty also modified the law on occupation, as the principles of self-determination, democracy, and human rights pierced the veil of national sovereignty. What limited the sovereign also affected the occupant, by modifying the restrictions on its obligations and its exercise of authority. The law

¹ CARL SCHMITT, *THE NOMOS OF THE EARTH* 207 (G. L. Green trans., 2003).

² SIOBHÁN WILLS, *PROTECTING CIVILIANS—THE OBLIGATIONS OF PEACEKEEPERS* 171 (2009) (pointing out “[i]nternational law recognizes no relationship of a general nature between the inhabitants of a territory in which a foreign military force is deployed, and the State or organization that has deployed the force.”)

³ While the UK government regarded the 74-day Argentinian invasion of the islands as occupation and refused to negotiate with Argentina, the latter regarded the British administration as illegal occupation which began in 1833. See most recently “G77 urges UK to return to Malvinas sovereignty negotiations with Argentina”, Mercopress, September 26, 2011, available at <http://en.mercopress.com/2011/09/26/g77-urges-uk-to-return-to-malvinas-sovereignty-negotiations-with-argentina>.



of occupation is not only a gap-filler but also a safeguard: it can be seen as indirectly defining the concept of sovereignty and protecting the sovereign's title just as tort law indirectly defined the common law private right to property by providing causes of action for trespass.

The law of occupation developed as part of the law of war, and so it was shaped not only by concepts of sovereignty and statehood but also by changing military needs. For example, the Brussels Declaration of 1874 allowed occupying armies to rely on the resources of the occupied population to sustain their war effort. When requisitioning private property the occupant was expected to issue a receipt, so that the dispossessed owner would be able to claim a refund from the ousted government.⁴ But with the modernization of military logistics in the late nineteenth century, armies were expected to rely more on their own resources, and therefore could agree to pay compensation "as far as possible," instead of issuing receipts (as is stipulated by the 1899 Hague Regulations), and later (in the 1907 Hague Regulations) even to commit to an actual reimbursement.⁵ Similarly, the status of irregular fighters in occupied territories, a hot issue in 1874 in light of French reliance on "*francs-tireurs*" during the Franco-Prussian war of 1870–71, became less important in 1899 and 1907 as their military significance had diminished by then,⁶ but in recent years has become pertinent again. "[t]he democratisation or privatization of the means of destruction."⁷

But the linkage between occupation and war is not indispensable. Initially occupation was viewed as a possible by-product of military actions during war,⁸ and therefore the topic was referred to in legal literature as "belligerent occupation," whereas occupation that received the consent of the sovereign was termed "pacific" occupation. But the history of the twentieth century has shown that occupation is not necessarily the outcome of actual fighting: it could be the result of a threat to use force that prompted the threatened government to concede effective control over its

⁴ 1874 Brussels Declaration, Arts 41 and 42 (stating that "[f]or every contribution, a receipt shall be given to the person furnishing it.")

⁵ The 1899 Hague Regulations introduced actual payment of compensation as the primary substitute (Art. 52: "The contributions in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged"), and the 1907 version made sure actual compensation was the occupant's obligation (Art. 52: "Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible").

⁶ DORIS APPEL GRABER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863–1914*, 291 (1949).

⁷ ERIC HOBBSBAWM, *AGE OF EXTREMES—THE SHORT TWENTIETH CENTURY 1914–1991*, at 560 (1993).

⁸ One necessary element of belligerent occupation is the establishment of effective control by the invading army. Article 42 of the Regulations Respecting the Laws and Customs of War on Land, annex to the Convention (IV) Respecting the Laws and Customs of War on Land, signed at The Hague, October 18, 1907 [hereinafter Hague Regulations], defines the situation: "Territory is considered occupied when it is actually placed under the authority of the hostile army." Mere invasion does not amount to occupation. See, eg, 2 LASSA OPPENHEIM, *INTERNATIONAL LAW* 434–5 (7th ed., by H. Lauterpacht, 1948); ERNST H. FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 6 (1942); MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 213–14 (1959). The phrase "belligerent occupation" is first explained by Colby due to the existence of war: Elbridge Colby, *Occupation under the Laws of War*, 25 *Columb. L. Rev.* 904, 905 (1925).

territory to a foreign power;⁹ occupation could be established through an armistice agreement between the enemies;¹⁰ and it could also be the by-product of a peace agreement.¹¹ South Africa found itself declared as “occupying [Namibia’s] territory without title”¹² once its mandate to administer that territory was revoked by the United Nations.¹³ Moreover, many of the more recent occupants were reluctant either to admit the existence of a state of “war” or of an international armed conflict, or failed to acknowledge the true nature of their activities on foreign soil. The unmooring of “occupation” from wartime situations is also reflected in the Fourth Geneva Conventions of 1949 (GCIV) that extends the regime of occupation “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.”¹⁴ Article 1(4) of Additional Protocol I (API) refers to “alien occupation” as a situation that did not constitute an international armed conflict but that the resistance to it could turn it into such.¹⁵ Moreover, the demise of “war” as a legal concept and the extension of the laws of war to cover armed conflicts defined by fact not by declarations, also imply that “belligerency” is not a qualifier of the occupation regime. For all those reasons, the utility of retaining the adjectives “belligerent” or “wartime” or even “military” has become rather limited, as the trigger for international regulation is not the mode of assuming control by the occupant but the temporary suspension of the sovereign’s authority. Today the more inclusive term, “occupations,” is generally used.¹⁶ The emphasis is thus put not on the course through which the territory came under the foreign state’s control, whether through actual fighting or otherwise, but rather on the phenomenon of occupation: the exceptional exercise of public power by one state in a foreign territory and over its inhabitants. This phenomenon can be defined as the effective control of a power (be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory. The rationale for the inclusive definition of occupation is that at the heart of all occupations exists a

⁹ Examples of this type of occupation are the German occupation of Bohemia and Moravia in March 1939, see, eg, *Argentine Czechoslovak and Prague Credit Bank v Janssen* [1943–1945] AD Case no. 11, at 47 (Australia, Supreme Court of Victoria); and the German occupation during World War II of Denmark, see, eg, Alf Ross, *Denmark’s Legal Status during the Occupation*, 1 *JUS GENTIUM* 1 (1949).

¹⁰ For example, the “Armistice Agreement” that established Allied control over the Rhineland in Germany in 1918. On this occupation, see Chapter 2.

¹¹ The Israeli occupation of the Gaza Strip did not change its status despite the 1979 Peace Treaty with Egypt. Egypt controlled Gaza prior to the Israeli occupation of 1967. On the status of this occupation, see Chapter 5.

¹² *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep. 16, at para. 118, p. 54.

¹³ This was also the case with Guinea-Bissau, declared as under Portugal’s “illegal occupation” by the UN General Assembly (GA Res 3061 (XXVIII) November 2, 1973).

¹⁴ The Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, Art. 2(2).

¹⁵ 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.

¹⁶ See also MICHAEL J. KELLY, *RESTORING AND MAINTAINING ORDER IN COMPLEX PEACE OPERATIONS* 111 (1999); Adam Roberts gives a very thorough account of the variety of types of occupations. Adam Roberts, *What Is Military Occupation?* 55 *BYIL* 1984 249 (1985).

potential—if not an inherent—conflict of interest between occupant and occupied. This special situation is the result of the administration of the affairs of a country by an entity that is not its sovereign government. The issues that this type of administration raises are characterized by this possible conflict of interest, and are largely independent of the process through which the occupant established its control.

The 1907 Hague Regulations (“Hague Regulations”) assumed that upon gaining control, the occupant would establish its authority over the occupied area, introducing a system of direct administration.¹⁷ But this is more than a descriptive assumption: it is the law. There is a duty to establish such a system of government, which is based not on a legal right to govern, but *on the fact* of occupation, as the opening phrase of Article 43 underlines: “the authority of the legitimate power having *in fact* passed into the hands of the occupant” (emphasis added).¹⁸ In fact, the Hague Regulations insisted that this direct government be military, as the territory, per Article 42, was to be “placed under the authority of the hostile *army*.”¹⁹ The military character was necessary, per Schmitt, “to circumscribe a purely military sphere separate from all others . . . [which] emphasiz[es] the merely provisional character of this situation.”²⁰ In 1907 there was no need to emphasize this point further: the establishment of a system of administration by the occupant was widely accepted in practice and in the literature as mandatory. Today, however, such practice is the rare exception rather than the rule.²¹ The extension of the scope of occupation law beyond wartime occurrences renders the insistence on military administration less crucial, as long as the exceptional nature of the administration and its formal independence of the occupying state are maintained. In this respect, “it is of little consequence whether the government imposed by the invader is called military government or civil government,”²² or a mixture of both. What is important is the establishment of a separate system by the occupant (as distinct

¹⁷ This assumption is implicit, *inter alia*, in Art. 43, which refers to the situation in which “[t]he authority of the legitimate power ha[s] in fact passed *into the hands of the occupant*” (emphasis added). On this assumption, *see also* Roberts, *id.* at 252.

¹⁸ Article 43 does not grant the occupant an entitlement to administer the territory; rather, it merely recognizes *the fact* of its effective control, and sets out to delimit it: *see*, eg Michael Bothe, *Belligerent Occupation*, 4 EPIL 65 (1982) (“International law does not grant rights to the occupying powers, but limits the occupier’s exercise of its *de facto* powers”); Richard Baxter, *The Duty of Obedience to the Belligerent Occupant*, 27 BYIL 235, 243 (1950).

¹⁹ *See*, eg, *The Law of Land Warfare* at para. 362 (US Army Field Manual, FM 27–10, 1956) (“Military government is the form of administration by which an occupying power exercises governmental authority over occupied territory”).

²⁰ Schmitt, *supra* note 1, at 207–9.
²¹ This issue and the consequences of failure to abide by the requirement to establish a direct administration are treated in Chapter 6. On past practice *see* Colby, *supra* note 8 at 909–10. On contemporary conduct *see* Chapters 7–11.

²² The (British) War Office, *The Law of War on Land, Being Part III of the Manual of Military Law*, at 145, para. 518 (1958). Christopher Greenwood, *The Administration of Occupied Territory in International Law*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 241, 246 (Emma Playfair ed., 1992) (“international law actually imposes upon an occupant a duty to provide for the government of the occupied territory.”) *The Oxford Manual on Land Warfare (1880)* (Institut de droit international, Session d’Oxford (1880); *Manuel des lois de la guerre sur terre* (Rapporteur: M. Gustave Moynier) (rep. in http://www.idi-iil.org/idiF/resolutionsF/1880_oxf_02_fr.pdf) called for an early announcement of the institution of an occupation regime (Art. 42: “It is the duty of the occupying military authority to inform the inhabitants at the earliest practicable moment, of the powers that it exercises, as well as of the local extent of the occupation”).

from the sending state or states) to execute the powers and duties allotted to it by the law of occupation. The Coalition Provisional Authority in Iraq is a good case in point for an authority that is based on the army's control, is exceptional but is not necessarily of a military nature.²³

Article 43 emphasizes that the authority belongs to the "occupant" as opposed to the "occupying State." This is not a coincidence. The *travaux préparatoire* of the Brussels Declaration reveal that the initial proposition for Article 2 (upon which Hague 43 is partly based) referred to the "occupying State" as the authority in power,²⁴ but the delegates preferred to change the reference to "the occupant."²⁵ This insistence on the distinct character of the occupation administration should also be kept in practice. The acknowledgment by the occupant upon assuming control of its authority that is distinct from its sovereign and subject directly to international law can serve as an initial indication that the occupant is likely to respect the law of occupation. Such an acknowledgment is also likely to restrict the occupant's future actions and limit its claims regarding the ultimate status of that territory.²⁶

Contemporary occupants came to prefer, for a variety of reasons, not to establish such a direct administration. Instead, they would purport to annex or establish puppet states or governments, make use of existing structures of government, or simply refrain from establishing any form of administration. In these cases, the occupants would tend not to acknowledge the applicability of the law of occupation to their own or their surrogates' activities, and when using surrogate institutions, would deny any international responsibility for the latter's actions. Therefore, the acknowledgment by the occupant of its status, and impliedly of its responsibilities under international law, is the first and the most important initial indication that the occupant will seek to respect the law of occupation. This is a compelling reason for international law to stress what was self-evident not too long ago: the existence of the duty to establish a direct system of administration.²⁷ In any case, the failure to do so does not relieve the occupant of its other duties under the law of occupa-

²³ See Chapter 9.

²⁴ The text of the President presented at the session of August 11, 1874 (see Annex XII, in *Actes de la Conférence réunie à Bruxelles, du 27 juillet au 27 août 1874, pour régler les lois et coutumes de la guerre*, rep. in G. FR. DE MARTENS, *NOUVEAU RECUEIL GÉNÉRAL DE TRAITÉS*, Deuxième Série Tome IV, at p. 58 (Göttingue 1879–80): "L'autorité du pouvoir légal étant suspendue de fait par l'occupation, l'Etat occupant prend toutes les mesures qui dependent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publique."

²⁵ Protocol of session 12 August, at p. 23. The final text of Art. 2 reads: "L'autorité du pouvoir légal étant suspendue et ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publique." Curiously, there was little awareness to the use of the term "occupying State" in the proposed article dealing with the obligation to manage public property (Art. 7), and this reference was retained in the final text and persisted also in Art. 55 of the Hague Regulation.

²⁶ Dinstein believes that the government must be military, but this is probably because he refers to "belligerent" occupation only (at 56). Such an acknowledgment can also influence the expectations of individuals and hence shape their rights in the post-occupation phase (see Chapter 11).

²⁷ In this respect, it is of little significance whether the occupant chooses to establish a system of military administration or a civil one, or a mixture of both. What is important is the establishment of a separate system by the occupant to execute the powers and duties allotted to it by the law of occupation. See (British) War Office, *The Law of War on Land, Being Part 111 of the Manual of Military Law*, at 145, para. 518 (1958).

tion: after all, the definition of occupation is not dependent on the establishment of an occupation administration. This principle is asserted in Article 47 of the GCIV, which provides that the obligations of the occupant toward the inhabitants:

shall not be affected by any change introduced, as a result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.²⁸

The foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through unilateral action of a foreign power, whether through the actual or the threatened use of force, or in any way unauthorized by the sovereign. Effective control by foreign military force can never bring about by itself a valid transfer of sovereignty. Because occupation does not transfer sovereignty over the territory to the occupying power, international law must regulate the inter-relationships between the occupying force, the ousted government, and the local inhabitants for the duration of the occupation. From the principle of inalienable sovereignty over a territory springs the basic structural constraints that international law imposes upon the occupant. The occupying power is thus precluded from annexing the occupied territory or otherwise unilaterally changing its political status; instead, it is bound to respect and maintain the political and other institutions that exist in that territory for the duration of the occupation. The law authorizes the occupant to safeguard its interests while administering the occupied area, but also imposes obligations on the occupant to protect the life and property of the inhabitants and to respect the sovereign interests of the ousted government.

Because occupation does not amount to sovereignty, the occupation is also limited in time and the occupant has only temporary managerial powers, for the period until a peaceful solution is reached. During that limited period, the occupant administers the territory on behalf of the sovereign. Thus the occupant's status is conceived to be that of a trustee.²⁹ Changing perceptions about the nature of sovereignty have affected both the identity of the beneficiaries of this trust and the powers of the trustee, namely, the occupant. The occupant's powers have expanded through time to cover almost all the areas in which modern governments assert legitimacy to police, a far cry from the turn of the century *laissez-faire* conception of minimal governmental intervention. Other developments in the areas of political thought, namely,

²⁸ Or as the British military manual, *id.* at para. 518(2), states: "The duties and constraints laid upon an Occupant cannot be circumvented by carrying out illegal acts through the instrumentality of a 'puppet government' set up in the occupied territory, or by a system of orders through local government officials operating in occupied territory." Similarly, the US Army Field Manual, *supra* note 19 states in para. 366: "The restrictions placed upon the authority of a belligerent government cannot be avoided by a system of using a puppet government, central or local, to carry out acts which would be unlawful if performed directly by the occupant. Acts induced or compelled by the occupant are nonetheless its acts."

²⁹ See Arnold Wilson, *The Laws of War in Occupied Territory*, 18 TGS 17, at 38 (1933) ("enemy territories in the occupation of the armed forces of another country constitute... a sacred trust"); Roberts, *supra* note 16, at 295 ("the idea of trusteeship is implicit in all occupation law"); GERHARD VON GLAHN, *LAW AMONG NATIONS* 686 (5th ed. 1986) (the "occupant... exercises a temporary right of administration on a sort of trusteeship basis").

the emerging principles of self-determination, of human and minority rights, were responsible for the shift in focus regarding the beneficiary of the trust: contemporary attention is paid more to the interests of the indigenous community under occupation rather than to the wishes of the ousted government. These two trends together form a striking departure from the Hague law, in which the emphasis was on the state elites as the primary beneficiaries and on minimal involvement of the occupant in the management of the affairs of the population under its temporary rule. These conceptual changes are reflected in the law of occupation, which came to recognize certain important modifications to the occupant's powers and duties.

1.2 Challenges to the Law of Occupation

Occupation nowadays retains the same conceptual foundation—that mere foreign control does not bestow sovereignty over a certain territory—but for all other purposes it is significantly different from what it stood for during the days of its inception. The differences stem from the evolving socio-political and legal landscape and from changes in military technology. Chapter 2 reviews the birth of the concept in Europe during the eighteenth and nineteenth centuries, culminating in the text of the 1899 Hague Regulations. This Section offers a brief overview of the major factors that have influenced the evolution of the law since its inception, in order to set the stage for the critical analysis of contemporary doctrines on occupation.

The efforts to delineate the regime of occupation always suffered from the inherent gap between the strong and the weak. This gap persisted over the years but the content of the gap was transformed. In the nineteenth century, occupation was seen as a boon for occupants, having “realised a very important aim of warfare.”³⁰ First, occupation terminated the right of the indigenous resistance fighters to use force against the occupant with impunity: “the inhabitants... [are] under [the occupant's] sway and have to render obedience to his commands.”³¹ While neither the Brussels nor the Hague texts explicitly prohibited resistance in occupied territories, they mention only the spontaneous *levée en masse* against an invasion, not against an established occupation.³² The occupant was entitled to demand obedience from the local population, and was authorized to punish—summarily execute—civilians who opposed its rule (or their neighbors).³³

Second, occupation authorized the occupant to requisition private property, to demand payments and services from the inhabitants, and to utilize public

³⁰ 2 LASSA OPPENHEIM, *INTERNATIONAL LAW: WAR AND NEUTRALITY*, 167 (1906). ³¹ *Id.* at 174.

³² STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS* 206–10 (2005).

³³ According to the German delegate to the Brussels Convention, every military commander was at the time expected to punish an insurrection in occupied territories: Protocol no. X of session August 12, 1874, in *Actes de la Conférence réunie à Bruxelles*, *supra* note 24, at p. 73 (the German delegate warned that if the right of insurrection of the inhabitants is acknowledged, it is they who will become its victims. The Russian delegate who chaired the sessions noted that the weak are those who would ultimately suffer from the impasse (*id.* at 72); see also session XIII August 17, 1874, *id.*, at p. 104. See also concluding observations, Session of 26 August, Protocol of the plenary n. XIV, *id.*, at pp. 170–2.) See also the positions of the Belgian and Swiss delegates, Protocol no. XVIII of session of 22 August, at p. 159

property.³⁴ The requisitioning of property was subject to indemnity, if it pleased the occupant, and if not the occupant would provide a receipt, with which the dispossessed owner would be able to claim reimbursement from the ousted government upon its return (as part of the reparations that government would pay the occupant).³⁵ These economic benefits were deemed crucial for sustaining the occupant's continuing war effort. As the 1870–71 war revealed, the Prussian military strategy hinged on supplying the troops from the resources of the occupied territory and its inhabitants. As Geoffrey Best details, the Prussian military doctrine would have designated “feeding areas” for each brigade before an attack.³⁶

Finally, and no less importantly, the occupant would hold the territory “as a pledge of his military success, and thereby impress upon the enemy the necessity of submitting to terms of peace.”³⁷ The terms of peace, at the time, would usually include ceding the occupied area to the occupant and the payment of huge sums as reparations.³⁸

The emerging doctrine of occupation did not preclude unilateral changes made by successful armies that managed to defeat the enemy totally. The doctrine of *debellatio* asserted that if the enemy state had totally disintegrated and no other power was continuing the struggle on behalf of the defeated sovereign, then occupation transferred sovereignty.³⁹ Occupation could then be the first phase, to be followed by complete subjugation.

In other words, occupation and the law of occupation were at that time far from a neutral institution designed to create a zone of stability to protect civilians. They were, rather, key components in the hostile army's strategic tools in the quest for victory. As we will see in Chapter 2, the weaker states acquiesced to this regime only because it offered them a formal retention of sovereignty. They could not bargain for more.

But shortly thereafter many occupants lost interest in the law of occupation. During the nineteenth century the law of occupation remained an internal European project. Beyond Europe the law of occupation had little appeal to those colonial powers bent on territorial expansion. The Americans refrained from adhering to this law in their neighborhood, the British ignored it in the Boer War, and Russia found a way to evade the central obligations of the law in its occupa-

³⁴ As mentioned *supra*, over the years the regime of requisitioning was modified significantly, reflecting the waning dependence of the occupant on the resources in the occupied territory. While the Brussels Declaration of 1874 stipulated that “[f]or every contribution, a receipt shall be given to the person furnishing it” (Arts 41, 42), the 1899 Hague Regulations introduced actual payment of compensation as the primary substitute (Art. 52: “The contributions in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged”), and the 1907 version made sure actual compensation was the occupant's obligation (Art. 52: “Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible”).

³⁵ GEOFFREY BEST, *HUMANITY IN WARFARE* (1983), at 188–9; KARMA NABULSI, *TRADITIONS OF WAR* 26 (1999).

³⁶ Best, *supra* note 35, at 184–90.

³⁷ Oppenheim, *supra* note 30, at 167.

³⁸ Neff, *supra* note 32, at 210–14; Best, *supra* note 35, *id.*

³⁹ On *debellatio* see Feilchenfeld, *supra* note 8, *id.*; JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICTS* (1954), at 696 n. 13; GEORG SCHWARZENBERGER, *INTERNATIONAL LAW—THE LAW OF ARMED CONFLICT* (1968), at 167, and *see further* Chapter 3 at notes 76–8 and accompanying text; Chapter 6 at notes 18–20, 141–51, and accompanying text.

tion of Bulgaria in 1878.⁴⁰ Later, during the twentieth century, and despite the “Europeanization” of international law, the law of occupation was often honored by its breach. Many occupants either failed to recognize the applicability of the law of occupation or implemented it in ways that promoted their own interests at the expense of those of the occupied. The occupations by the Axis powers before and during World War II were bent on establishing new orders in Europe and South East Asia, imposed through cruel ruthlessness. Soviet aims during that war were also far removed from the parameters of the law of occupation. Most ousted governments, from exile or upon their return, also accorded little respect to the law, refusing to acknowledge the validity of acts that the occupant had enacted. Another type of challenge emerged during the post-Cold War era by the United Nation post-conflict administration regimes such as in Kosovo and East Timor (1999), or multilateral regimes endorsed by the United Nations such as in Somalia (1992), none of which acknowledged the applicability of the law of occupation to their missions (except for the Australian unit in Somalia).⁴¹

Since the adoption of GCIV which imposed on occupants extended obligations over civilians in occupied territories, and later with the adoption of several human rights conventions that added to those obligations, occupants found little interest in asserting their status as such. This entailed significant positive obligations toward the occupied population. The derogatory connotation that the term “occupation” has gained particularly during the second half of the twentieth century added to this reluctance. Moreover, the outlawing of war provided incentives for invaders to act through proxies and deny their responsibility. In the early twenty-first century occupation has become for the occupant an unnecessary liability. The growing demands of the law to protect the inhabitants from the occupant’s arbitrary power and the constraints imposed on the use of domestic resources reduce whatever incentive remains for assuming public authority over the foreign population. With technology that can control foreign territories from afar, many armies can secure their military needs without having actual “boots on the ground” and without exposing their soldiers to risk.

After World War II, then, the status of an occupant has become a liability for most occupants, except on rare occasions where the law of occupation offered a convenient pretext for foreign domination deemed temporary and neutral, such as with the restoration of the colonial regimes and other dependent territories in the South East Asia colonies, which had attained “independence” during the Japanese occupation. There, the Hague law explained why the Europeans could return to those colonies as sovereigns whose titles remained intact.⁴² For Israel, the

⁴⁰ Chapter 2. ⁴¹ See Chapter 10 at note 5 and accompanying text.

⁴² In the wake of the Japanese retreat and before the Allies could resume authority, new indigenous nationalistic governments declared their independence: the Republic of Indonesia (August 17, 1945), and the Republic of Viet Nam (August 18, 1945): see Chapter 6, text accompanying note 163. Moreover, the law of occupation proved very useful to the reoccupants, who invoked it in order to allow the military administrations wide discretionary powers unencumbered by constitutional restraints. See, eg, Donnison’s account of the British decision to apply the law of occupation as the legal basis for their authority in Burma, FRANK S. V. DONNISON, *BRITISH MILITARY ADMINISTRATION IN THE FAR EAST 1943–46* (1956), at 35–40.

temporary nature of the occupation, while initially comported with its indecision concerning the future of the territories it occupied in 1967, enabled it to deflect accusations of illegal foreign domination of others' land.⁴³ For the Coalition forces in Iraq in 2003, an occupation regime was set up because they were unable to rely on an indigenous administration.⁴⁴

In those instances where occupation law was invoked by the occupant, it demonstrated critical design flaws. At around the time at which the International Military Tribunal in Nuremberg described these rules as being declaratory of customary international law,⁴⁵ most occupants devised claims for the law's inapplicability or stretched its prescriptions thereby reducing constraints on their discretionary powers. It became clear that it was no longer possible to expect the occupant to perform the function of the impartial trustee of the ousted sovereign or the local population; it was no longer feasible to demand that the occupant pay no heed to its own country's interests (as opposed to the legitimate interests of the occupation forces). The expectations—to the extent that there were such—that occupants would serve as trustees of the occupied population could not materialize. How could an occupant who was certain to prevail in a conflict be prompted to faithfully balance its interest against those of the occupied population? With the advent of governmental involvement in the market and their ever-increasing scope for regulation, especially during and after hostilities, the occupant's duty to maintain public order and civil life in the occupied territory was transformed into a broad grant of authority to transform the occupied economy, the landscape, even local institutions. The late twentieth century's conception of the role of the state, both in the Western world and, during the Communist era, in the socialist countries, made it "difficult to point with much confidence to any of the usual subjects of governmental action as being a priori excluded from the sphere of administrative authority conferred upon the occupant."⁴⁶ With the cessation of actual hostilities, a new era begins, "human existence requires organic growth, and it is impossible for a state to mark time indefinitely. Political decisions must be taken, policies have to be formulated and carried out."⁴⁷ Indeed, the term "l'ordre et la vie publics," in an interesting historical twist, was soon invoked by the occupants to justify their extensive use of prescriptive powers.⁴⁸ The welfare of the population was deemed a worthy goal for the occupant to pursue.⁴⁹ The duty was transformed into a legal tool extensively

⁴³ Chapter 8. ⁴⁴ Chapter 9.

⁴⁵ International Military Tribunal in Nuremberg, *The Trial of the Major War Criminals* 65 (1947). The International Military Tribunal for the Far East (1948) viewed the Hague Regulations as "good evidence" of customary international law. *In re Hirota* [1948] AD Case no. 118, at 366.

⁴⁶ MYRES MCDUGAL & FLORENTINO FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 746 (1961).

⁴⁷ Greenspan, *supra* note 8, at 225.

⁴⁸ The occupation of Belgium by Germany in 1914–18. *See, e.g., Grahame v Director of Prosecution*, [1947] AD Case no. 103, at 228, 232 (Germany, British Zone of Control, Control Commission Court of Criminal Appeal) ("L'ordre et la vie publics' [is] a phrase which refers to the whole social, commercial and economic life of the community"). The Israeli High Court of Justice has also subscribed to this view. On the decisions of Israeli courts in this direction, *see* Chapter 8.

⁴⁹ LORD ARNOLD D. McNAIR & ARTHUR D. WATTS, *THE LEGAL EFFECTS OF WAR* 369 (4th ed. 1966), at 30 and ODILE DEBBASCH, *L'OCCUPATION MILITAIRE* (1962) at 172.

invoked by occupants in those areas in which they wished to intervene.⁵⁰ At the same time, if it was in the occupant's interest to refrain from action, it could invoke the "limits" imposed on its powers.⁵¹ Many, if not most, occupants during the twentieth century did not live to the perhaps naïve assumption of the law of the impartial occupant.

My analysis of occupations shows—and this should not be surprising—that social decisions taken and implemented in occupied territories were never incompatible with outcomes sought by occupants. Often these outcomes proved detrimental to the occupied country. The account of the major occupations immediately before and during World War II shows that all the major powers failed to apply the Hague Regulations in most of the foreign territories that came under their control. The ousted governments, from exile or upon their return, also accorded little respect to the law of occupation.

1.3 Legal Sources

Given the inherent asymmetric character of occupations, there was little hope that occupants and occupied would conform on clearly defined norms or agree on robust enforcement mechanisms. There was also little hope that the occupant would obey the law and actually rise to the role of the impartial and effective trustee as envisioned by the law. Subsequent treaties, court decisions, and reports of committees have sought to update the law and impress compliance on the occupants. Section 1.3 provides a brief overview of the applicable law in occupations.

1.3.1 Laws of international armed conflict

Being an integral part of international armed conflicts, the main source of law that regulates occupations is the law of international armed conflict, namely the Hague Regulations, the GCIV, and Additional Protocol 1, as well as customary international law. The Hague Regulations differ from the subsequent treaties in their emphasis. The Hague Regulations reflect the realities in nineteenth-century Europe: War was limited in scope, civilians were left out of the war and kept unharmed as much as possible, both physically and economically. The occupation was to be short-lived, leading to territorial concessions by the defeated side. During that brief period, the occupant was expected to preserve the defeated party's bases of power but there was no felt need for it to intervene substantially in the daily life of the local population. The GCIV (and later API) reflects a fundamentally different effort. Perhaps

⁵⁰ McDougal & Feliciano, *supra* note 46, at 747 ("Occupants did in fact intervene in and subject to regulation practically every aspect of life in a modern state which legitimate sovereigns themselves are generally wont to regulate").

⁵¹ This was the position of the British occupation government in post-World War II Cyrenaica and Tripolitania, where the former denied desperate requests by local inhabitants to ameliorate their conditions. For a discussion of that occupation, see Chapter 6 at notes 74–85 and accompanying text.

exasperated with questions of formal title over disputed territories, the focus of attention shifts to secure the protection of the population in the enemy's hands, rather than to safeguard the interests of the ousted regime. These two instruments delineate a rudimentary bill of rights for the occupied population, a set of internationally approved guidelines for the lawful administration of occupied territories.

A more specific matter addressed by other treaties is the issue of cultural property. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954, requires a party that occupies another party's territory to support the competent national authorities of the occupied country in safeguarding and preserving its cultural property and, where necessary, to take measures to preserve cultural property situated in occupied territory and damaged by military operations.⁵² The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) regards as "illicit" "[t]he export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power,"⁵³ while the Second Protocol to the 1954 Hague Convention from March 26, 1999 prohibits "any illicit export, other removal or transfer of ownership of cultural property" in occupied territory, as well as "any archaeological excavation, save where this is strictly required to safeguard, record or preserve cultural property [and] any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence," and further requires the occupant to "closely co-operate" "with the competent national authorities of the occupied territory" when conducting "[a]ny archaeological excavation of, alteration to, or change of use of, cultural property in occupied territory."⁵⁴ The International Committee of the Red Cross Study on Customary International Humanitarian Law regards these obligations, including the obligation of "return[ing] illicitly exported property to the competent authorities of the occupied territory" as having customary law status.⁵⁵

1.3.2 Human rights law

The law of occupation, like international humanitarian law in general, is informed by the wish and the obligation to protect human rights. Concern for the humane treatment of the enemy's combatants and civilians has always been one of the scales that the law of war sought to balance.⁵⁶ But the direct reliance on human rights law in the context of occupation was crucial to expand the scope of the occupant's obligations, and perhaps even more importantly it was necessary for opening up avenues for the review of occupation measures by human rights treaty bodies and the European Court on Human Rights (ECtHR).

⁵² Article 5. ⁵³ Article 9. ⁵⁴ Article 11. ⁵⁵ ICRC Study, Rule 41.

⁵⁶ Yoram Dinstein, *Military Necessity* 3 EPIL 274 (1982) ("The laws of war are all based on a subtle balance between two opposing considerations; military necessity, on the one hand, and humanitarian sentiments, on the other"). For the growing convergence of humanitarian and human rights norms, see THEODOR MERON, *HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION* (1987).

Initially there was a debate about the formal applicability of the general body of laws on human rights to occupations. Some have claimed that when armed conflict erupts, most “peacetime” human rights are temporarily superseded by the humanitarian laws of war.⁵⁷ But the opposite position ultimately gained the upper hand.⁵⁸ This position has been espoused by the UN General Assembly⁵⁹ and the Secretary-General,⁶⁰ the UN Human Rights Committee,⁶¹ the ECtHR,⁶² and the Inter-American Commission for Human Rights,⁶³ and was ultimately confirmed by the International Court of Justice (ICJ).⁶⁴

⁵⁷ See, eg, Yoram Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law*, in HUMAN RIGHTS IN INTERNATIONAL LAW 345, 350–2 (T. Meron, ed., 1985) (most human rights exist in peacetime but may disappear completely in wartime); JEAN S. PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 15 (1975). During the drafting of the Fourth Geneva Convention of 1949 (GCIV), the majority rejected a Mexican proposal to include “a wording to the effect that the Occupying Power could only modify the legislation of an occupied territory if the legislation in question violated the principles of the ‘Universal Declaration of the Rights of Man’”, 2A *Final Record of the Diplomatic Conference of Geneva of 1949*, at 671.

⁵⁸ YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 69 (2009); RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW (2002); Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR L. REV. 17 (2003–04); Jochen Abr. Frowein, *The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation*, 28 IYHR 1 (1998); Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AJIL 78 (1995); Eyal Benvenisti, *The Applicability of Human Rights Conventions to Israel and to the Occupied Territories*, 26 ISR. L. REV. 24 (1992); Adam Roberts, *supra* note 16; *id.*, *Prolonged Military Occupation: The Israeli-Occupied Territories since 1967*, 84 AJIL 44, 72 (1990); John Quigley, *The Relation between Human Rights Law and the Law of Belligerent Occupation: Does an Occupied Population Have a Right to Freedom of Assembly and Expression?*, 12 BOSTON COL. INT’L AND COMP. L. REV. 1 (1989); Davis P. Goodman, *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1539, 1600 (1985).

⁵⁹ *Basic Principles for the Protection of Civilian Population in Armed Conflicts*, General Assembly Resolution 2675 (XXV) December 9, 1970. The first “basic principle” for the protection of civilian population states: “Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.” The vote was 109 to 0, with eight abstentions. Specific resolutions with respect to the Israeli occupation have also affirmed the applicability of human rights norms. See, eg, Resolution 2727 (XXV) of December 15, 1970, reprinted in United Nations Yearbook 1970, at 526–7, which called upon Israel to comply with the Universal Declaration of Human Rights.

⁶⁰ *Respect for Human Rights in Armed Conflict: Report of the Secretary General*, 24 UN GAOR, Supp. no. 61, at 12, UN Doc. A/7720 (November 20, 1969).

⁶¹ See the Human Rights Committee’s Concluding Observations concerning the Israeli report, 18/08/98 (available at <http://www1.umn.edu/humanrts/hrcommittee/israel1998.html>): “10. . . . the Committee emphasizes that the applicability of rules of humanitarian law does not by itself impede the application of the Covenant or the accountability of the State under article 2, para. 1, for the actions of its authorities. The Committee is therefore of the view that, under the circumstances, the Covenant must be held applicable to the occupied territories and those areas of southern Lebanon and West Bekaa where Israel exercises effective control.” See also, in the same vein, Benvenisti *supra* note 58.

⁶² *Loizidou v Turkey (Preliminary Objections)*, App. no. 15318/89 (March 23, 1995) (the European Convention on Human Rights applies to occupied Cyprus). See also *Ilascu and Others v Moldova and Russia*, App. no. 48787/99 (2004).

⁶³ See, eg, with respect to the US invasion of Panama, *Salas and others v the United States*, Case no. 10.573, Report No. 31/93, OEA/Ser.L/V/II.85 Doc. 9 rev. at 312 (1994).

⁶⁴ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep. 226, 240; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ Rep. 136, at para. 106. Recently the Israeli Court of Justice accepted this proposition too: HCJ 9594/03 *Bselem v Military Judge Advocate* (Judgment of August 21, 2011),

The position that general and regional human rights treaties apply in occupied territories results from two propositions. The first is that the protection offered by human rights conventions does not cease in cases of international armed conflict. The second proposition is that the territorial scope of state parties' obligations under most human rights treaties encompass areas "under their jurisdiction" which means under their "effective control," and occupied territories would be included under that definition.⁶⁵ Specifically, and despite some textual difficulties,⁶⁶ the ICJ has in 2004 opined that the major human rights treaties, including the 1966 Covenant on Civil and Political Rights (ICCPR), and the 1966 Covenant on Economic, Social and Cultural Rights (ICESCR) applied in occupied territories.⁶⁷ A similar position has been taken, among others, by the ECtHR, with respect to the applicability of the European Convention on Human Rights (ECHR) to occupied territories within Europe and also outside Europe (Iraq).⁶⁸ The ECtHR has also confirmed that the test of "effective control," for the applicability of the ECHR, is a factual test, no different than the one relevant for the applicability of the law of occupation,⁶⁹ and even applied the ECHR in situations where a party had "overall control" over local proxies who had effective control,⁷⁰ or where agents of the state exercised control over individuals.⁷¹

That human right law may complement the law of occupation in specific issues is by now an unchallenged proposition,⁷² to which the US and Israel may be regarded

at para. 9 (President Beinisch: "The right to life is enshrined in international conventions of human rights and is given to inhabitants protected by the laws of war and occupation").

⁶⁵ Frowein, *supra* note 58, at p. 6 (the restrictive interpretation concerning the applicability of the ICCPR in occupied areas is "clearly contrary to the object and purpose of human rights treaties").

⁶⁶ The territorial scope of the ICCPR encompasses "all individuals within its territory and subject to its jurisdiction" (emphasis added) (Art. 2(1)); the ICESCR does not include a reference to its territorial scope.

⁶⁷ *Legal Consequences*, *supra* note 64, at paras 108–13.

⁶⁸ *Al-Skeini and others v United Kingdom*, App. no. 55721/07 (Grand Chamber, July 7, 2011), paras 138–49.

⁶⁹ *Al-Skeini, id.*, at para. 139. This claim is one that was put forward by the British government regarding Iraq. See Letter of Adam Ingram MP, UK Armed Forces Minister, to Adam Price MP (April 7, 2004), cited in Ralph Wilde, *The Applicability of International Human Rights Law to the Coalition Provisional Authority (CPA) and Foreign Military Presence in Iraq*, 11 ILSA J. INT'L & COMP. L. 485, 488–9 (2004–2005) ("although the U.K. Armed Forces are an occupying power for the purposes of the Geneva Convention, it does not follow that the U.K. exercises the degree of control that is necessary to bring those parts of Iraq within the United Kingdom's jurisdiction for the purposes of article 1 of the Convention").

⁷⁰ Case of *Ilascu and Others v Moldova and Russia*, App. no. 48787/99 (2004) (finding Russia in "overall control" over the self-proclaimed "Moldavian Republic of Transdniestria" that had effective control over a part of Moldova); see also *Loizidou v Turkey (Preliminary Objections)* (March 23, 1995), Series A No. 310; *Loizidou v Turkey (Merits)* (December 18, 1996, Reports of Judgments and Decisions 1996-VI, No. 26 (finding Turkey in control of northern Cyprus).

⁷¹ *Issa v Turkey*, App. no. 31821/96, ECtHR, para. 73 (November 16, 2004); *Öcalan v Turkey*, App. no. 46221/99, 2005-IV ECtHR 131, para. 91 (2005). See, in this context also the positions of the UN Human Rights Committee: *Burgos v Uruguay*, Comm. No. 52/1979, UN Doc. CCPR/C/13/D/52/1979, para. 12.3 (1981); *Celiberti v Uruguay*, Comm. No. 56/1979, UN Doc. CCPR/C/13/D/56/1979, para. 10.3 (1981) (see also Hum. Rts. Comm., General Comment 31, 2004, at para. 10); and of the Inter-American Commission of Human Rights: *Coard et al. v United States*, Case No 10,951, IACHR, Report No. 109/99, EA/Ser.L./V/II.106, doc. 3 rev., para. 37 (1999); *Alejandre v Cuba*, Case 11,589, IACHR, Report No. 86/99, OEA/Ser.L./V/II.106 Doc. 3 rev. at 586, para. 23 (1999).

⁷² On the interaction between these two bodies of law see Chapter 4.

as persistent objectors.⁷³ Probably due to strong resistance to this proposition by the US, Resolution 1483 concerning the occupation of Iraq stopped short of referring explicitly to the occupation authorities' human rights obligations.⁷⁴

Note that the occupant may be subject to human rights treaties by virtue of the fact that the occupied state had become party to such treaties. This principle derives from two different sources. The law of occupation demands that the occupant comply with the laws in force in the occupied territories, and this includes international treaties that are in force in the country.⁷⁵ The same outcome is derived from human rights law, according to the principle of the continuity of obligations, as endorsed by the UN Human Rights Committee, and applied most effectively in Kosovo:

the rights guaranteed under the [International Covenant on Civil and Political Rights] belong to the people living in the territory of a State party, and that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding changes in the administration of that territory.⁷⁶

The application of human rights law to occupations is on one level beneficial to holding the occupant to account for an enlarged scope of duties toward the occupied population. At the same time, however, the treatment of the occupant as “exercise[ing] some of the public powers normally to be exercised by a sovereign government,”⁷⁷ runs the risk of “normalizing” what is inherently a temporary, exceptional regime that should remain inherently suspect due to its foreignness.⁷⁸

1.3.3 Law on the use of force, sovereignty, and self-determination: The “illegal occupation”

Conceptually, occupation is neutral. It connotes an authority and a responsibility. It does not bestow any superior rights on the occupant vis-à-vis the occupied,

⁷³ On the US position see Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation* 99 AJIL 119 (2005). The Israeli position is demonstrated in its refusal to report on the occupied territories to the human rights treaty bodies.

⁷⁴ Resolution 1483 did not call upon the occupation authorities to protect human rights in the occupied area, but instead to “promote the welfare of the Iraqi people” “consistent with the Charter of the United Nations and other relevant international law” (Art. 4).

⁷⁵ On this Article obligation see Chapter 4.

⁷⁶ Human Rights Committee, Concluding Observations of the Human Rights Committee Kosovo (Republic of Serbia), at p. 2, para. 4, UN Doc. CCPR/C/UNK/CO/1 (August 14, 2006), available at [http://www.unhchr.ch/TBS/doc.nsf/7cec89369c43a6dfc1256a2a0027ba2a/58c3c45e32382c0fc1257220003e967b/\\$FILE/G0643691.doc](http://www.unhchr.ch/TBS/doc.nsf/7cec89369c43a6dfc1256a2a0027ba2a/58c3c45e32382c0fc1257220003e967b/$FILE/G0643691.doc). On its application to Kosovo see Chapter 10.

⁷⁷ *Al-Skeini*, *supra* note 68, at para. 149.

⁷⁸ The emphasis on the exceptional status as crucial for protecting the sovereignty of the state is Schmitt's concern (*supra* note 1). The greater concern is that the occupant and its courts will use the rhetoric of “balancing” and “proportionality” to disguise the inherently tilted legal field in which they operate: Martti Koskenniemi, *Occupied Zone—“A Zone of Reasonableness”?*, 41 ISR. L. REV. 13 (2008). For another critical view see Aeyal M. Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?*, 18 EJIL 1 (2007). On the influence of the human rights law on the occupant's authority see Chapter 4, at Section 4.1.3.

nor does it connote a negative status akin to that of an aggressor. The drafters of the Hague Regulations took pains to emphasize that the regime of occupation is a *de facto* regime that conveys to the occupant only circumscribed rights and obligations for the limited duration of the occupation, namely until a peaceful settlement is reached. As part of the *jus in bello*, the lawfulness of the occupation regime or its authorities did not depend on the *jus ad bellum* issues that led to the invasion and the occupation. The neutrality of the regime created a fundamental difficulty: was it lawful to resist the occupant by force? During the deliberations in Brussels (1874) this issue proved a serious stumbling block. The weaker countries susceptible to occupation—Belgium, the Netherlands, and Switzerland—argued against a linkage between the occupant’s duty to protect the rights of enemy citizens and the right of the citizens to obey and not undermine the occupant. The Dutch delegate, Mr. de Landsberge argued that public opinion would not accept limits on the citizens’ sacred duty to protect the homeland with all means at their disposal.⁷⁹ The potential occupants refused to accept that enemy citizens would have rights against the occupant but no duties, including the duty to obey the occupation administration.⁸⁰ This debate ultimately precluded the signing of an agreement, reducing the document to a mere declaration.⁸¹ The outcome kept silent on the question whether it was lawful for local resistance to challenge the occupant after the establishment of an occupation regime as opposed to a situation of *levée en masse* against advancing troops. The same debate threatened to jeopardize the 1899 Hague Peace Conference. It was impossible to resolve this question, but ultimately a solution was found to dodge it. It is not surprising that it was the Belgians who initiated the saving formula. It is also not surprising that they did not want to claim ownership over the formula, which became known as the Martens Clause. Martens himself thought the clause bearing his name was full of “empty phrases.”⁸² What this impasse actually meant was that resistance to the occupant was not a war crime, but the occupant was entitled to regard resistance fighters—later regarded as “Protected Persons” under the GCIV regime and entitled to basic rights—as criminals.⁸³

Changes in general international law over the second half of the twentieth century had a significant impact on the law of occupation. First, the outlawing of the use of force except for self-defense raised the question of the status of occupation which resulted from an illegal use of force.⁸⁴ Although being part of the *jus in bello*, and given the separation between *jus ad bellum* and *jus in bello*, the

⁷⁹ Protocol no. X of session August 12, 1874, in *Actes de la Conférence réunie à Bruxelles*, *supra* note 24, at p. 71; *see also* the positions of the Belgian and Swiss delegates, Protocol no. XVIII of session of 22 August, *id.*, at p. 159

⁸⁰ *See supra* note 33.

⁸¹ Peter Holquist, *Were the Boxers “Legitimate Combatants”? Imperial Russia’s Role in Codifying the Hague Conventions on Land Warfare and the Conduct of its Army during the Boxer Rebellion, 1900–1901*, Paper presented to “The Early History of International Law of Occupation: A Workshop” Columbia University, November 18, 2005, at 13.

⁸² *See* Holquist, *id.*, at 17, citing Martens’ diary, entry for July 8–12, 1899.

⁸³ On this question *see also* Baxter, *supra* note 18; Lassa Oppenheim, *The Legal Relations between an Occupying Power and the Inhabitants*, 33 L. Q. Rev. 363, 368 (1917).

⁸⁴ On “illegal occupation” in the context of World War II occupations *see* Chapter 6, at Section 6.1.6.

aggressive occupant was not precluded from invoking the law of occupation, even though it was referred to in some instruments as the “illegal occupant.”⁸⁵ But it could no longer use the occupation “to impress upon the enemy the necessity of submitting to terms of peace,”⁸⁶ because the law now provided that “[t]he territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.”⁸⁷ Moreover, the subjection of the right to self-defense to the necessity requirement, to the extent that it is in fact justified, could imply that the occupation becomes an act of aggression when it no longer serves the initial purpose of defending against the aggressor who has been defeated.⁸⁸

During the 1970s, in the context of the wave of de-colonization and assertions on the right of self-determination of peoples, foreign occupation has been likened by several UN General Assembly documents, including the Charter of Economic Rights and Duties of States,⁸⁹ to colonialism and other forms of foreign aggression preventing the exercise of this right. Similar reference to “alien occupation” as tantamount to colonialism and apartheid is found in Article I (4) of A.P.I. These negative references should be viewed more as assertions addressing the Israeli occupation of the West Bank and Gaza, at the time the only contemporaneous situation in which the occupant invoked the law of occupation, rather than as reflecting the rejection of the regime of occupation. In view of this context, it seems that these texts referred to situations where the authors believed that the occupant was holding out in bad faith, refusing to negotiate for its withdrawal in return for peace. Indeed, such an occupant abuses its powers and might justify its continuing presence in the occupied territory with illegality.⁹⁰ It must be stressed that the law of occupation is not incompatible with the right to self-determination. It is not a violation of the right to self-determination as much as it is not a violation of the ousted government’s sovereignty. In so-called “humanitarian” or “transformative” occupations, the occupant

⁸⁵ On illegal occupation as an act (and crime) of aggression see Chapter 12 at Section 12.1.3.

⁸⁶ Oppenheim, *supra* note 30, at 167.

⁸⁷ The Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations (1970), Art. 1(11) (General Assembly Resolution 2625 (XXV) of October 24, 1970); Art. 5 of The Declaration on the Strengthening of International Security, Art. 5 (Resolution 2734 (XXV) of December 16, 1970); Vienna Convention on the Law of Treaties, Art. 52.

⁸⁸ Lord Goldsmith QC (UK Attorney General), Memo of March 26, 2003 “Iraq: Authorisation for an Interim Administration” (reproduced by John Kampfner, “Blair was told it would be illegal to occupy Iraq”, available at <http://www.informationclearinghouse.info/article3505.htm#warning>). The memo explained why a new Security Council authorization to act in Iraq was necessary: “it must be borne in mind that the lawfulness of any occupation after the conflict has ended is still governed by the legal basis for the use of force . . . the longer the occupation of Iraq continues, and the more the tasks undertaken by an interim administration depart from the main objective, the more difficult it will be to justify the lawfulness of the occupation.” The same logic could apply to the legality of continuing occupation that began as an act of self-defense.

⁸⁹ The Charter of Economic Rights and Duties of States of December 12, 1974, Art. 16(1) (General Assembly Resolution 3281 (XXIX) of December 12, 1974), General Assembly Resolution 3171 (XXVIII), Section 2, 28 UN GAOR, UN Doc. A/9400 (December 17, 1973).

⁹⁰ For an elaboration of the concept of illegal occupation as determined by the general policies of the occupant see Orna Ben-Naftali, Ayal M. Gross, & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT’L L. 551 (2005).

may in fact be instrumental in facilitating the exercise of this right if the state it occupied was not constituted according to the principle of self-determination, and the occupied people who are entitled to exercise such a right are willing to do so.⁹¹

1.3.4 The law on state responsibility

As stated by the ICJ in its Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*,⁹² “[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.” Therefore, the fact that the occupant has no title over the territory “does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory.”⁹³ The occupant is also internationally responsible for acts of local public institutions, such as the local police, which the occupant directs and controls.⁹⁴

This principle yields international responsibility of the occupant on a variety of issues regulated by international law. For example, the occupant is responsible toward neighboring countries for environmental harms arising from activities in the occupied territory according to the prevailing international norms on environmental protection.

1.3.5 Additional sources

The UN Security Council, acting under Chapter VII, may issue resolutions that would overcome the generally applicable norms and would subject the occupant to certain additional obligations or provide it with specific grants of authority. A case in point is the occupation of Iraq which was (between May 2003 and June 2004) the subject of several Security Council Resolutions determining the beginning and termination of occupation, the identity of the authorities exercising control there, and the scope of their powers (see Chapter 9). Obviously, to the extent that such resolutions are beyond the mandate of the Security Council or violate *jus cogens* norms, they would not affect the law. As is argued in Chapter 4, in the context of occupation, there are issues related to the preservation of the sovereignty of the occupied state and of self-determination that would be protected from Security Council fiat.

The normative order of the occupying country will also be a source for delimiting the powers of the occupant. For example, the Israeli military government in the occupied West Bank and Gaza was subjected by the Israeli Court of Justice to Israeli administrative law.⁹⁵ Other occupants may be subjected to their internal military legal order, as was the case for the occupants of Iraq in 2003.

⁹¹ More on that in Chapter 9 concerning Iraq.

⁹² *Advisory Opinion* [1971] ICJ Rep. 16, at p. 54, para. 118. ⁹³ *Id.*

⁹⁴ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, YBILC, 2001, vol. II, Part Two, p. 68.

⁹⁵ See Justice Barak’s reasoning in HCJ 393/82 *Jama’it Askan Alma’amun v Commander of IDF Forces* [1983] Isr. S.C. 37(4) 785, 810 (“Every Israeli soldier carries in his backpack the

1.4 Conclusion

Despite the myriad exculpatory assertions made by occupants, and the evolution of new normative frameworks such as the law on self-determination or human rights law, the law of occupation retained its relevance and significance. Preserving this body of laws was necessary for a legal system that insisted on safeguarding the distinction between occupation and annexation and the protection of individuals who are in the hands of foreign powers. The law of occupation maintained its viability because its basic principles proved flexible enough to adapt to the changing circumstances and the evolving norms of general international law.

This book sets out to explore the phenomenon of occupation. It examines the law of occupation as it was conceived and later codified during the nineteenth century and evolved through state practice, judicial findings, and scholarly writings. The object of this examination is to understand the arrangements that the international community has devised for settling the possible conflicts of interest between occupants and occupied and to assess the shortcomings and challenges of such a system.

customary rules of public international law relating to the laws of war, as well as the basic rules of Israeli administrative law”). On the extraterritorial applicability of national constitutions see Galia Rivlin, *Constitutions Beyond Borders: The Overlooked Practical Aspects of the Extraterritorial Question*, Boston U. Int'l L. J. (forthcoming, 2012); see also Chapter 12, text to note 55. On the extraterritorial applicability of the labor laws of the occupying state see Amir Paz-Fuchs & Yael Ronen, *Occupational Hazards: Labor Law in the Occupied Territories*, 30 Berkeley J. Int'l L. (forthcoming, 2012) and Chapter 8, notes 181–2 and accompanying text.