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<td><strong>Author(s)</strong></td>
<td>Azarova, Valentina</td>
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<td><strong>Publication Date</strong></td>
<td>2014-08-30</td>
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ILLEGAL TERRITORIALITY IN INTERNATIONAL LAW:

THE INTERACTION AND ENFORCEMENT OF THE LAW OF BELLIGERENT OCCUPATION THROUGH OTHER TERRITORIAL REGIMES

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May 2015
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Declaration Regarding the Work

I hereby certify that the thesis is all my own work, is not copied from any other person’s work (published or unpublished), and has not previously been submitted for assessment at the National University of Ireland or elsewhere.

Valentina Azarov, 30 August 2014
Summary of Contents

This work examines the place and function of the international law of belligerent occupation its interplays with other public international law regimes and argues that the co-application of these regimes, as well as an enforcement paradigm based on the duty of non-recognition of international law violations, can further the key objective of protecting the local population in occupied territory. The existence of an occupation is a matter of fact, yet many occupiers have pursued their self-interest in a manner that violates the rights of the local population and the ousted sovereign. Such actions call into question the legality of the continued presence of the occupying state in foreign territory. In a notable number of contemporary cases, it may be asked whether occupying states have, in effect, transformed belligerent occupations into illegal territorial regimes.

This is the first manuscript-length treatment of the interplay between the law of belligerent occupation and other, complementary regimes of territorial and foreign administration in international law. It shows that the co-application of these laws provides a standard for assessing the legality or illegality of an occupying state’s actions and of a belligerent occupation regime. The work demonstrates that the co-application of the laws of territoriality, inter-state use of force, self-determination of peoples, and human rights law can enhance the interpretation, application, and enforcement of the law of belligerent occupation. The work proposes a comprehensive approach to enforcing prohibitions of internationally unlawful acts in time of belligerent occupation. It identifies a category of illegal territorial regimes and charts an approach for operationalising the duty of non-recognition of these regimes’ violations through inter-state relations.
International practice has never treated specialized rule-systems as independent from the rest of the law. Somehow, the very idea of international law has implied a systemic view of the materials: the application of any one rule presumes the presence of principles about how to determine the rule’s validity, whom it binds, how to interpret it, and what consequences might follow from its breach.

[...] Through recourse to various well known professional techniques, conflicts between rules emanating from different regimes may be resolved, formal rules "deformalized" so as to adapt them to changing circumstances, and de facto ("imperial") power deferred to. Even in the absence of a formal constitution, a practice does exist of "constitutionalizing" international relations by constant adjudication between rules and rule-systems, deciding on institutional powers of international bodies, and formulating legal "principles" out of scattered materials.

- Martti Koskenniemi¹

CHAPTER I

INTRODUCTION:

DEFINING THE CHALLENGES OF BELLIGERENT OCCUPATION AND ITS RELATION TO ILLEGAL TERRITORIALITY

This work’s starting point is the contemporary normative framework for situations of belligerent occupation. This consists primarily of the legal instruments that make up the corpus of international humanitarian law, complemented by international human rights norms, as has been widely confirmed by international practice. The application of human rights norms in time of armed conflict and belligerent occupation is subject to the conflict-of-norms principle of lex specialis derogat legi generali, which provides for derogations and limitations.2 Although they have received limited scholarly attention, there are other, substantial interactions between the lex specialis on belligerent occupation and other bodies of public international law, beyond that of international human rights law. This work explores such interactions, and their relevance to the enforcement of international law.

The first coherent set of rules for the regulation of situations of belligerent occupation was codified in the 1907 Hague Regulations, at a time when colonial practices were common and the right to self-determination of peoples was merely nascent. Since then, developments in the laws on the regulation of territory, human rights, and self-determination have affected considerably the ways in which belligerent parties administer foreign territory. The 1949 Geneva Conventions reflect some of these developments, even as they maintain the de jure status of an occupying power in the foreign territory from the perspective of international law.

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Yet, notwithstanding developments since the mid-20th century, international law has been unable to respond adequately to predatory practices by occupying states. In fact, some occupying powers have effectively instrumentalised the international legitimacy provided by the law of occupation – namely, de jure status in foreign territory – to disguise unlawful practices. Contemporary and ongoing situations of belligerent occupation have included acts of de facto and de jure annexation, economic exploitation and political subjugation, and resulted in the establishment of new, permanent territorial and administrative regimes intended to irreversibly displace the ousted sovereign from the occupied territory. Clearly, however, many of the in casu effects of these practices and policies entail legal consequences under other territorial regimes in international law beyond that of the law of belligerent occupation: they trigger the application of the law on the self-determination of peoples, the law on territoriality and sovereignty, and the rules on the inter-state use of force, known as jus ad bellum.

In view of the “inescapably complex and varied character of military and political events”, this work asks whether the regulation of contemporary situations of belligerent occupation requires an integrated and comprehensive approach consisting of the application of other regimes of international law, in addition to lex specialis rules of international humanitarian law and their complementary relation with international human rights law. The interplay between the lex specialis of belligerent occupation and other, concurrently applicable legal regimes in international law differs in scope and extent in each case. This work examines the divergences and convergences between these overlapping and conflicting norms, found in different bodies of international law, and the ways in which their concurrent application could contribute to the interpretation, application and enforcement of the law of belligerent occupation, and the regulation of illegal territorial regimes in international law.

Notwithstanding the utility of these norms in the context of this analysis, the contentious status of the laws of war in the pre- and post-colonial framework, and the hegemonic nature of state and sovereignty, merit a note of caution. This work does not seek to vindicate sovereignty, territory, or statehood, or venerate them as lodestars of the international legal order; it does not assume the propriety of the law, or endorse the

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value system it purports to uphold. Rather, by examining the function of the law of belligerent occupation, and its interaction with other regimes of international law, the work seeks to account for the processes by which states have embedded their interests in law, international and domestic, and how these normative commitments have moulded states’ political reactions to violations of the law. Addressing contemporary challenges to the regulation of situations of belligerent occupation, the work undertakes to expose a process of international law enforcement that can be activated in so-called ‘frozen’ territorial conflicts, henceforth discussed as situations of belligerent occupation that may have turned into illegal territorial regimes.

1. Subject Matter: Belligerent Occupation and Other Territorial Regimes in International Law

This work argues that international law, which bestows a special status upon the law of belligerent occupation, defines its ultimate function as that of protection: to safeguard against predatory state practices intended to acquire territory, subjugate foreign populations, and exploit their economy and natural resources. Belligerent occupation consists of a condition in which a state’s army invades foreign territory and establishes control over it in a manner that allows the state to control political and civil life there. Dinstein notes that “once combatants stabilise along fixed lines, not coinciding with the original international frontiers, the cross-border areas seized and effectively controlled are deemed to be subject to belligerent occupation”. From the perspective of international law, the law of belligerent occupation regulates this state of affairs as a matter of fact,

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without passing judgment on the legal status of the occupying power in the foreign territory. Yet, the definition of a situation of belligerent occupation in international law has also meant that all other territorial regimes in time of war inconsistent with the rules of occupation law are, by implication, prohibited in international law.\(^6\)

Although military occupation was common before the mid-20\(^{th}\) century, the Geneva Conventions consolidated the *de jure* status of the regime for the regulation of belligerent occupation regimes in international law. Assuming a situation of international armed conflict, a *de jure* occupation is a legitimate state of affairs from the perspective of international law. An occupying power is presumed to be within its right to maintain its presence in the occupied territory so long as it can legally base its presence on genuine and imperative military needs. Roberts commented that although “it is a substantial body of law containing many elements of flexibility, the tendency to regard the law on occupations as applicable only on a *de facto* basis rather than *de jure*, or only partially through some of its provisions rather than as a whole, is bound to be viewed with some scepticism”.\(^7\) In the context of contemporary foreign territorial administrations, only in the case of Western Sahara was Morocco dubbed a *de facto* administrator of the non-self-governing territory, implying that it does not benefit from all the rights of a *de jure* occupying power in international law, but must fulfil duties of administration in accordance with the local population’s right to self-determination.

When applied en bloc, the limitations assumed by the *lex specialis* of belligerent occupation concern the temporal, spatial and administrative scope of authority the occupying power is permitted to exercise vis-à-vis the local population and the ousted sovereign’s territory. These same limitations underpin the new era in international law that crystallised throughout the second half of the 20\(^{th}\) century, in which the law sought to bring a formal and effective end to colonialism, conquest, and annexation.\(^8\) Any territorial regime that sought the pursuit of these acts was illegal under international law. (Accordingly, in this work, such forms of control

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\(^7\) Adam Roberts (1985) 305.

of foreign territory are henceforth termed ‘illegal territorial regimes’.) Yet, the adherence of state practice to these values did not come as promptly as the international system that enshrined them in law would have liked: the law and its intended effects remained worlds apart for decades. In 1985, reflecting on the inconsistent nature of state practice, Roberts stated that despite a substantial body of international law that applies to situations of occupation and other territorial regimes, its application has been “perennially problematical”.9

This work examines cases that exemplify the diversity of situations to which the law of occupation has been applied, in accordance with the international consensus concerning the definition of a situation as belligerent occupation, as determined by the United Nations, the European Union, and the International Committee of the Red Cross as well as other international actors and individual states. The work includes case-studies of contemporary situations of de jure and de facto belligerent occupation, including: Nagorno-Karabakh, South Ossetia and Abkhazia, Transnistria, northern Cyprus, Western Sahara, Iraq, Democratic Republic of Congo, East Timor, Namibia, the West Bank and Gaza Strip, and the Golan Heights. The work reviews doctrinal, historical and institutional developments in international law with regard to situations of belligerent occupation and other forms of administration of foreign territory.10

As these cases demonstrate, an administration of foreign territory can exist in time of armed conflict, but may also continue after the end of hostilities, or appear immediately following an invasion. In most of the contemporary belligerent occupations examined in this work, the occupying power’s continued presence and administration of foreign territory maintains only tenuous links with an ongoing armed conflict. By contrast, the doctrine of military necessity conditions the legality of all activities by a belligerent party in time of war on the requirement that they are undertaken for the purpose of gaining a military advantage. The transformation of an otherwise temporary, context-specific situation of belligerent occupation into a calm, quasi-civilian administration without a basis in military necessity calls for the application of a subset of rules from the law on international territorial administration relevant to de facto administrators’ use or threat of force.

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9 Adam Roberts (1985) 249.
10 The primary and secondary materials examined include relevant international law treaties and their travaux préparatoires, judgments and decisions of international and national courts, national legislation, the public policy positions of states and international institutions, as well as the writings of leading jurists and practitioners.
If and when an invading army that has established control over foreign territory rejects the en bloc application of the law of belligerent occupation and refuses to accept the de jure status of an occupying power, it is clear that the foreign power is neither willing nor able – often due to the positions taken by its executive or legislature – to respect the territorial rights and sovereign authority of the displaced, legitimate government. Such cases involve not only systemic violations of the lex specialis of belligerent occupation, but also serious breaches of concurrent legal regimes – territoriality, jurisdiction and sovereignty, the rules on the inter-state use of force, and the law on self-determination of peoples. While the 2012 ICRC report on the law of belligerent occupation does not explicitly discuss such situations, it raises concerns about the adequacy of the obligations and limits of authority placed on hostile powers administering foreign territory, particularly in prolonged occupations, and the potential legal consequences of prolonged foreign territorial administrations such as the “long-arm” occupation of Nagorno-Karabakh and the remote control occupation of the Gaza Strip.11

Roberts inquires whether situations of belligerent occupation have “become so broad that [the category] ceases to be either satisfactory as a factual description or useful as an indication that a particular body of law is applicable”.12 The international practice of belligerent occupation confirms, Roberts remarks, the need “to get away from the idée fixe that all occupations are essentially the same in their character and purpose”.13 He adds, however, that although the application of the same rules to all situations “presents some difficulties, it is not necessarily absurd or impossible”.14 Given these multifarious situations, which often resemble but do not fully align with a de jure situation of belligerent occupation, this work addresses whether and how the lex specialis rules of belligerent occupation can be applied coherently alongside equivalent norms in international law to regulate different types of belligerent occupation.

Despite an extensive record of violations by occupying powers, including in current occupations, and contemporary debates amongst experts and scholars, neither international practice nor the scholarship has addressed the regulation of situations of belligerent occupation and other administrations of foreign territory that take the form of an illegal territorial regime. Recent literature on the law of belligerent occupation has examined the rules regulating an occupying power’s authority in the

12 Adam Roberts (1985) 299.
13 Ibid, 251.
14 Ibid, 251.
occupied territory, the protection afforded to the civilian population, and the traditional bodies of enforcement of international humanitarian law through state and individual criminal responsibility.\textsuperscript{15} Some publications have addressed issues of *jus ad bellum* that may manifest in time of occupation,\textsuperscript{16} and the normative standing of a prolonged or transformative occupation – but these discussions have been limited primarily to the examination of the *lex specialis* of belligerent occupation.\textsuperscript{17} In an attempt to address the unlawful practices of occupiers, some publicists have contemplated the emergence of a new legal category: ‘illegal occupation’.\textsuperscript{18}

Other writings have focused on the regulation of international territorial administration,\textsuperscript{19} or the overall legality of territorial regimes maintained by states in foreign territory, but include only limited discussions of belligerent occupation law or other legal regimes concerning the regulation of government activities in foreign territory.\textsuperscript{20} The literature on colonialism and self-determination of peoples does not consider their normative interrelation with and manifestations in contemporary belligerent occupation regimes.\textsuperscript{21} Self-determination of peoples is commonly discussed as a human right rather than as a general principle of


\textsuperscript{20} See, e.g., Enrico Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Nijhoff, 2006); Yael Ronen (2011).

international law that provides a standard of good governance and political independence as it is considered in this work.\textsuperscript{22}

A number of recent monographs in the field of political science come closest to examining the objectives of occupiers and the nature of their abusive practices,\textsuperscript{23} including practices that seek to permanently transform the territorial status or government in the occupied territory in order to effectuate its political subjugation or economic exploitation. However, the legal consequences of these practices in the context of belligerent occupation have not been addressed by international law scholarship. This work seeks to address them, and on that basis, to propose an approach to operationalise the full and effective implementation and enforcement of international law in situations of belligerent occupation.

2. Methodological Parameters: Regime Interaction in International Law

This work does not presume that the \textit{lex specialis} of belligerent occupation is unable to normatively capture and deter unlawful actions by states maintaining control over or effectively administering foreign territory. It argues that its application in isolation from other international legal regimes may however produce absurd results, particularly when the practices of the occupying power result in the establishment, \textit{de jure} or \textit{de facto}, of an illegal territorial regime. The unlawful practices of occupiers, and the deficiencies in the current regulation of belligerent occupations in international law, underline the importance of the contribution made by concurrent legal regimes in international law to the \textit{lex specialis} of belligerent occupation. Utilising the methodologies adopted by scholarly works on regime interaction in international law, which have sought to resolve conflicts between norms and consider the overlaps and interactions between norms from disparate regimes,\textsuperscript{24} this work comprises a substantive, comparative, and conceptual analysis of the influence of other regimes of international law – particularly those concerning the status, rights and governance of territory, including those that came later in time – on the law of belligerent occupation. The key methodological parameter is

\textsuperscript{22} See generally, Nayef Al-Rodhan, \textit{Sustainable History and the Dignity of Man: A Philosophy of History and Civilisational Triumph} (Verlag, 2009).
the notion of “interplay” or “interaction”: the resolution of conflict, or the understanding of the overlaps between norms found in disparate bodies of law, but applied concurrently to a regime of belligerent occupation.

A comprehensive and integrated approach to the enforcement of international law is not new; nonetheless, it provides potential new responses, normatively and practically, to occupying powers whose policies and practices have effectively resulted in the subjugation of the local population and its political order and undertaken the exploitation of the natural resources of the occupied territory. Despite the potential pitfalls of over-theorising the interaction between different regimes, “in the default situation of diversity and concurrent activities,” Young notes, there is an urgent need for international lawyers to understand how different branches of the law interact on issues of global concern.25

Mapping the interactions between overlapping principles of international law may have beneficial, complementary and supplementary effects on the interpretation and application of the rules found in the specialised legal regime of belligerent occupation.26 Broadly, scholars have noted that “productive frictions and growth of set institutional and normative arrangements” contribute to the effectiveness of the function assigned to specific norms in the international legal order,27 and Stokke argues that international legal norms may be applied more effectively when “an international regime may confirm or contradict the norms upheld by another institution and thus affect its normative compellence.”28 Considering legal, historical, doctrinal and institutional forms of application and internalisation of specialised legal rules and their reflection in general principles of law, may also bring to light cases “where rules or programmes that are undertaken within one regime alter the costs or benefits of behavioural options addressed by another regime,” an interaction that Stokke calls “utilitarian interplay.” Yet, as Stokke remarks, the impact of regime interplay on the effectiveness of international law is “presumably affected by whether the actors involved are aware of the relationship and seek to influence it.”29

25 Margaret Young (2012) 1.
27 Margaret A Young (2012) 1-2. See also, Stephen D Krasner, International Regimes (Cornell, 1983).
29 Ibid.
30 Ibid, 11.
Unlike other specialised regimes – which, according to the ILC definition, consist of “the rules and principles that regulate a certain problem area” – the *lex specialis* of belligerent occupation is not only a subset of the special regime of international humanitarian law, but a hybrid body of law, comprised of the rules enshrined in the law of armed conflict as well as those found in the law on the administration of territory. It is a legal regime in its own right that consists of “special rules, including rights and obligations, relating to a special subject matter” that is both “geographical” and “substantive”.31

In practice, a belligerent occupation can exist in the context of an armed conflict, or supersede it. It follows that the original use of force that led to the armed conflict may not continue to justify the foreign army’s presence, and further, that the role of the invading army and its administration in the foreign territory may take on the form of a foreign administration, analogous to an international administration of territory, that lacks international recognition or *de jure* status in international law. While international humanitarian law has never prevented any state from maintaining its basic security prerogatives in times of crisis,32 the application of the law on the management and prevention of conflict shifts when the dimensions of the conflict are transformed by state interests deemed unlawful by international law. The concurrent application of the rules concerning foreign administration of territory, of which the law of belligerent occupation is a subset, affects the manner in which these rules are applied, by upholding a presumption in favour of the termination of the foreign presence.

A considerable number of monographs and review articles discuss the interaction between international humanitarian law and international human rights,33 refugee and criminal law.34 These scholarly efforts generally attempt to maximise the protection for civilian populations in

time of conflict by ‘humanising’ the conduct of hostilities and ensuring that victims of armed conflict have access to effective remedies and mechanisms to hold perpetrators of war crimes to account, so as to deter future violations. They have contributed to the enforcement of the law of occupation by tasking international and regional human rights bodies and courts with the regulation of state actions, not only vis-à-vis their own nationals and those under their sovereign jurisdiction, but with extraterritorial responsibilities and obligations vis-à-vis the population of a hostile power in the context of armed conflict.36

Dinstein and others have confirmed that the law of occupation, being part of *jus in bello*, precludes the co-application of principles of *jus ad bellum*, to the acts of an occupying power, due to the distinction maintained in international law between the two bodies of law, intended to ensure the protection of all civilians, regardless of affiliation. He refers to the term “illegal occupation” as a myth: occupation cannot be deemed an illegal regime since international law merely “recognizes its frequency and regulates its application.”37 The law of occupation does not provide a test for assessing the legality of the overall territorial regime established by a situation of belligerent occupation, since *jus ad bellum* is primarily tasked with the determination of the lawfulness of the initial use of force that led to armed conflict and occupation. Yet, irrespective of the legality of the initial use of force, the international law rules on the use of force apply to the acts of an occupying power or *de facto* administrator of foreign territory, insofar as its practices (in the course of belligerent occupation) result in the *de facto* or *de jure* acquisition of territory through the use of force, or may otherwise amount to an act of aggression against the territorial integrity or political independence of the ousted sovereign, as discussed in Chapter V.38

This work considers additional interplays between the *lex specialis* regime of belligerent occupation and other legal regimes of public international law concerning territory and good governance: the law on territoriality and sovereignty, the rules on the use of force, self-determination and human rights law. These interplays provide critical insight both on the underlying, functional purpose of the law of belligerent

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occupation, and reinforce the scope and content of the specific elements of the occupier’s rights and duties vis-à-vis the occupied territory. The law of self-determination of peoples, for instance, has been called a “revolutionary kernel of international law”39: a norm that safeguards a people’s political, social and economic order, and protects the rights bestowed upon their legitimate government. It is also part of the international law on good governance, which also includes the extraterritorial obligations of states under international human rights law. The law on territoriality, in turn, elucidates both the prescriptive scope of territorial rights, such as jurisdiction, and the prohibitive nature of acts such as annexation, conquest, and colonialism in all its forms (e.g. subjugation, domination and exploitation) in situations of foreign administration. Similarly instructive normative guidance and content is provided by the international law on the inter-state use of force, which can render the occupier’s continued use of force to maintain control over foreign territory unlawful, for instance, where it is intended to undertake territorial acquisition or regime change.

The coalescence of these interdependent regimes informs the protective reach of occupation law, provides concrete enforcement opportunities, and thus bolsters the law’s ability to deter abusive practices. To date, no dedicated monograph has comprehensively analysed the interplay between different international law regimes in situations of belligerent occupation, including the law on territoriality. By exploring these interactions, this work seeks to define the contours of a normative framework for the concept of illegal territoriality in international law. While the emergence and codification of the *lex specialis* of belligerent occupation formally validated the eradication of all other force-based foreign administrations, the development of international law and practice on territory, use of force and governance, particularly in the second half of the 20th century, has contributed significantly to the regulation of situations of belligerent occupation and the definition of corollary territorial regimes.40

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A number of recent developments underscore the significance of the interplay between the *lex specialis* of belligerent occupation and other legal regimes in international law that govern illegal territorial regimes. In terms of the interplay with human rights law, for instance, the European Court of Human Rights established that substantial legal and financial liability resulted from human rights violations committed during Turkey’s invasion and prolonged occupation of northern Cyprus: the just satisfaction judgement in the *Cyprus v Turkey* case rendered on 12 May 2014 required Turkey to pay remedies to individual claimants in the sum of 90 million Euros.\(^\text{41}\) Philippe Sands remarked that the case sent “a strong signal that the passage of time will not diminish the consequences or costs of illegal occupation,” and had “obvious relevance to the situation in Abkhazia and South Ossetia, which are occupied parts of Georgia, and Crimea, which is occupied Ukraine.”\(^\text{42}\) The *Cyprus* judgment provides an unequivocal bulwark against the “normative force of the factual.”\(^\text{43}\) Other recent examples relate to the interplay with law on territoriality, including jurisdiction authority and sovereign responsibility: in the *Ilașcu* case, for instance, the Court upheld that it takes a great deal more than a brief silence for a State to acquiesce in loss of territory, making it clear that the relaxation of Moldova’s protests did not relinquish its territorial rights.\(^\text{44}\) Essentially, the Court upheld the preservation of territorial rights by affirming that there is no rapid operation of acquiescence or prescription by virtue of a belligerent occupation turned into an illegal territorial regime.\(^\text{45}\)

Other recent occupations demonstrate the need for the enhanced enforcement of relevant international law. In Iraq, the occupying powers undertook a “transformative occupation” that contravened the law on self-determination of peoples, and violated the protections of the political independence and free will of the ousted sovereign, and flouted the ‘conservationist’ principle of the law of occupation. At the time of writing, the situation in post-occupation Iraq was degenerating, with organised resistance against the political regime set up by the previous occupying forces, which maintain a presence on Iraqi territory as well as notable influence over the country’s political and economic affairs. The emergence

\(^{41}\) *Cyprus v Turkey*, Application No 25781/94, Just Satisfaction Judgment, Grand Chamber, European Court of Human Rights, 12 May 2014.


\(^{44}\) *Ilașcu v Moldova*, Application No. 48787/99, European Court of Human Rights, 8 July 2004, para. 344.

of internal conflict represents a rupture with the unlawful transformative measures that were undertaken during the occupation. At present, there are no indications that former Iraqi Prime Minister Nuri al-Maliki and his fellow statesmen will be held accountable for violations of international law, or that the government of Iraq will be reconstituted based on the genuine popular will.\textsuperscript{46}

3. Purposive Analysis: International Law Enforcement and Illegal Territorial Regimes

Since many contemporary and ongoing belligerent occupations consist of predatory state practices, this work aims to maximise the assigned function of the law of belligerent occupation within the international legal order by analysing the manner in which it correlates with other rules and doctrines of international law that have a similar object and purpose. The integrated application of international law to situations of foreign administrations of territory, including belligerent occupations, validates appropriate interpretations of \textit{lex specialis} rules, even as it highlights the tensions between the \textit{lex specialis} of belligerent occupation and other international law norms. The coherent application of legal rules from different bodies of international law produces synergies that may further the effectiveness of international law in serving its principal aims: protecting the rights of individuals, peoples, states and non-state actors; upholding the rule of international law; and maintaining international peaceful and security.\textsuperscript{47}

The coordinated application of multi-sourced norms applicable to situations of belligerent occupation may further the proper interpretation and full implementation of the law of belligerent occupation, as well as the objectives of the international legal order. For instance, the principle of territoriality and the prohibition on the acquisition of territory by force, have been enforced through collective and unilateral countermeasures and internalised by domestic public policy. Similarly, the international community has responded with condemnation and at least soft measures of retorsion to instances of flagrant denial of the right to self-determination.


of peoples, subjugation of their political order, and exploitation of their natural resources.

By contrast, this work interrogates that insistence on respect for *jus in bello* in isolation has not only proven counterproductive and perilous to the function of the law of belligerent occupation, but also contradicts the widely-accepted view that public international law’s *lex generalis* continues to govern situations addressed by specific areas of international law, despite the latter’s ‘fragmentation’. Still, the apparently fragmented application of belligerent occupation law is evident from a variety of cases, including: Russia’s military offensive and occupation of Ukrainian territory in early 2014; Turkey’s illegal regime in northern Cyprus; Morocco’s administration of Western Sahara; and Israel’s administration of Palestinian and Syrian territories. These cases have been scrutinised primarily through the lens of Hague and Geneva laws of belligerent occupation in isolation from other international legal norms that regulate territorial and foreign administrative regimes. Yet the application of occupation law in isolation from applicable *lex generalis* limits the reach of international law, significantly undermining the protection afforded to the sovereign rights, political independence and territorial integrity of the peoples in the occupied territory and the territory’s ousted sovereign. The comprehensive and integrated application of multi-sourced international norms to situations of belligerent occupation provides additional incentive structures to comply with such norms, and reinforces the normative power of the *lex specialis* of belligerent occupation. This work demonstrates that the legal consequences that ensue from violations of the rules on the use of force, the prohibition of conquest and colonialism, and so on, can help expose, deter, and remedy illegal territorial regimes by triggering international and national law regulatory processes reserved for such internationally unlawful acts.

The systemic violations of international law and human rights abuses that characterize illegal territorial regimes derive from the foreign administration’s administrative and legislative acts, which provide a basis in law for its internationally unlawful exercise of sovereign authority. The primary mechanism for the regulation and enforcement of international law in this context is the international doctrine of non-recognition. An administrator of foreign territory that establishes an illegal territorial regime triggers the obligation of third party states and international actors

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not to recognise, aid or assist wrongful acts including serious breaches of peremptory norms of international law on territoriality, sovereignty and use of force, *inter alia*. The law and practice on non-recognition is inconsistent and essentially non-binding, due to its indeterminacy – and yet, as this work demonstrates, the hollow-shelled international duty of non-recognition finds concrete content in, and can be effectively operationalized through, the domestic regulatory processes and self-defined responsibilities of state and non-state actors.

The work focuses in particular on the experience of the EU and its Member States, which have internalised commitments to ensure respect for international law and to uphold public policy positions on the application of international law to (predicate) facts under the jurisdiction of another authority. These actors have found themselves obliged by their own internal commitments to procure compliance with international law by wrongdoing authorities in the context of their inter-state relations and engagements, including the compliance of private actors such as companies. The work examines the international law-based measures adopted by the EU and its Member States in the context of its external relations with Morocco, Turkey and Israel, to ensure that the internationally unlawful authority exercised by the occupying or administrator state is not given legal effect under the EU’s jurisdiction, nor allowed to benefit from EU privileged relations.

As Part IV discusses, the significance of the law on territoriality, use of force and self-determination of peoples to the enforcement paradigm proposed by this work, is not so much their supreme status in the international legal order, but their vigorous internalisation by national jurisdictions through the commitments states have undertaken through domestic public policy. Shaw observes that the prohibition on “[t]he acquisition of territory [in international law] has not reached the sophisticated, detailed form it has in national law.”[^50] Notwithstanding the evolution of human rights law, and the blurring of jurisdictional lines through economic globalisation and the combat of organised criminality, states’ decision-making with regard to compliance with international law continues to be driven primarily by political considerations. A realistic appraisal indicates inter-state engagements that trigger the enforcement of domestic laws are thus an important mode for the enforcement of international law-based positions.

With regards to the EU, this paradigm of enforcement has precedents and thus a predictive capacity. For instance, unlawful acts of

mass displacement of the local population, seizure and putative transfer of large amounts of property, and the permanent ousting of the legitimate sovereign appear to describe Russia’s recent trajectory in the Crimea.\textsuperscript{51} From the EU’s perspective, discussed in Chapter IX, the illegal territorial regime resulting from Russia’s annexation of the Crimea is comparable to the regime resulting from Israel’s actions in the Palestinian and Syrian territories: in both cases, the consequences of such acts necessitate appropriate adjustments in the economic, trade and financial relations with the Crimean peninsula. The EU’s intention is to ensure that Russia’s illegal territorial regime in the Crimea does not benefit from the EU’s privileged relations with Ukraine, and that EU Member States do not become enticed by Russian incentives for business and tourism in the territory, which it has unlawfully made the subject of its sovereign jurisdiction.\textsuperscript{52} On 27 June 2014, the EU signed Association Agreements with Moldova and Georgia, both of which have part of their territory under Russia’s military occupation. It may be expected that the EU will be required to make similar adjustments to these agreements, to reflect Ilascu and the EU’s measures vis-à-vis territories occupied by Israel and the Crimea, to ensure that no benefit arises for Russia from its unlawful acts in those territories.

Hard power measures to enforce international law are rare, inconsistent, and typically comprised of politically-driven sanctions or selective judicial pronouncements.\textsuperscript{53} By contrast, a process of inter-state enforcement based on the domestic international law enforcement paradigm laid out in Chapter IX, can bring about state socialisation: the wrongdoing state comes to accommodate its behaviour to international law standards in order to be conferred legitimacy and the ability to engage in


relations with bystander states.\textsuperscript{54} This process is driven by the interests of states that are exponents of a world order based on international-law standards, and by the interest of the wrongdoing state to maintain its external relations with them. Bystander states that promote a cause enshrined in international law are arbiters with the soft power to generate transformative effects: according to this theory of superordinate political change, law may be used to educate and socialise deviant actors.\textsuperscript{55} Hafner-Burton calls “stewards” states with strong human rights records at home and a foreign policy commitment to advance human rights overseas: “by deploying their power and other resources to advance where international law, on its own, won’t have much impact,” stewards provide giving wrongdoing states “a reason to act differently even where legal procedures don’t have much influence on their reasoning.”\textsuperscript{56}

The third party law-based mechanisms for international law enforcement, discussed in Chapter IX, are applicable in cases where third parties have internalized international law in their domestic legal orders or through public policy commitments. In these cases, enforcement is based on two key domestic regulatory principles: (i) the principle of consistency between domestic public policy and external relations, which requires that necessary provisions are made in public policy to account for territorial distinctions in accordance with international law; and (ii) the principle of full and effective implementation of domestic law in the context of privileged inter-state engagements, which precludes inappropriate reliance on internationally-unlawful state institutional and legal practices. These largely unexploited law enforcement processes potentiate the regulatory force of international law, which can be brought to bear on the conduct of occupying states that have established illegal territorial regimes in the occupied territory. International law norms can be concretised, operationalised and enforced more vigorously and effectively through domestic regulatory processes.


4. A Structural Overview

Part I begins by observing the formation of the object and purpose of the *lex specialis* of belligerent occupation as part of the laws of war, from the Lieber Code’s origins in American history through to the 1907 Hague Regulations and 1949 Geneva Conventions and their 1977 Additional Protocols. Chapter II of Part I considers the deliberations during the various drafting processes – a value map of the *grandes lignes* of the theoretical foundations of the law. Chapter III sets out the cardinal rules and normative underpinnings that crystallised in the codification of occupation law’s specialised legal instruments, including the ‘conservationist’ principle, the protection of sovereignty and national self-determination, and the temporariness and hostile character of the occupying power’s status in the occupied territory. Since these premises of the contemporary law of belligerent occupation responded to the emergence of a notion of national self-determination and equal sovereignty in the then law of nations, the chapter also illuminates several binaries: patriotism versus political order; the local population’s limited rights of resistance versus the occupier’s limited rights to revise order and compel obedience; human rights and the interests of the local population versus suppression of enemy.

A situation of belligerent occupation is exceptional, and the significance of the special territorial regime of belligerent occupation law was its prohibitive function: the law intended to safeguard against conquest, annexation, and forms of colonialism, in order to maintain the stability of borders and the sovereign equality of all states and peoples. Many of these broad principles had a juris-generative role in the crystallisation of what are known as the general principles and doctrines of international law. Parts II and III of the work are organized thematically to cover key bodies and norms of international law – territoriality, rules on the use of force, human rights law, and the law on self-determination – that apply concurrently with the *lex specialis* of belligerent occupation, and that overlap with its cardinal rules and underlying premises. Parts II and III also consider the conceptual framework, legal norms, and state practice concerning territorial and sovereign rights and duties that govern relations amongst states.

Part II examines the interplays between the law of belligerent occupation and the law on the regulation of territorial rights and extraterritorial conduct by governments, henceforth referred to as the international law on territoriality – a principal body of contemporary general international law for the regulation of inter-state relations, that is both prohibitive and prescriptive. Chapter IV explores the conceptual and
normative parameters of the ‘state of exception’ established by a regime of belligerent occupation and its distinct de jure status in international law, which distinguish it from illegal territorial regimes that violate international norms on territoriality, sovereignty and self-determination of peoples. The chapter analyses the application of these legal regimes to contemporary belligerent occupations, and identifies the regulatory function and scope of each regime, as well as its impact on the interpretation and application of the lex specialis of belligerent occupation. Chapter VII considers the relevance of jus ad bellum rules that regulate the legality of the inter-state use of force – a regime enshrined in the UN Charter and validated by extensive state practice on the prohibition of aggression – to a government’s activities in foreign territory. The chapter considers the international law objective to maintain international peace and security, the normative contributions of the law on sovereignty and jurisdiction, and the prohibitions on colonialism and conquest, which crystallised after the decolonisation era, and their contributions to the legal framework applicable to belligerent occupation regimes.

Part III analyses the interplays between the law of belligerent occupation and the laws on self-determination of peoples and international human rights law, respectively. Chapter VI observes the scope of application and function of the right to self-determination of peoples in time of occupation – both as a collective human right and a corollary of the prohibition of political subjugation, as a form of colonialism – and the principle of political independence. It examines the normative effects of secessionist claims, under the law on self-determination, on the rights and duties of the occupying power vis-à-vis the legitimate ousted sovereign. The emergent notion of ‘transformative’ or ‘humanitarian’ occupation, which seeks to edify and reform existing regimes, is considered in terms of its normative limits and practical fault-lines for foreign territorial administrations. The chapter concludes by reflecting on the standard of good governance, as found in the law on self-determination and international human rights law, as a test for the legality of territorial regimes maintained by a foreign power.

Chapter VII describes the interaction between the law of belligerent occupation and the corpus of international human rights law. While the complementarity between these bodies of law has been the subject of considerable debate, there has been limited discussion of common basic issues, such as the perpetual state of emergency or pervasive discrimination in the enjoyment of rights, in the context of illegal territorial regimes created by belligerent occupation. The chapter analyses the normative tensions between the limitations on the extraterritorial capacity
to ensure respect for rights and the ‘conservationist’ principle in the law of belligerent occupation, as well as the relevance of the law on self-determination of peoples. It equally discusses the inconsistent practice of international human rights bodies and courts in applying human rights to situations of belligerent occupation, which exemplifies the challenges posed by limitations on the identification of duty-bearers and the scope of their responsibilities.

Part IV of the work presents the results of the preceding chapters’ purposive analysis of the various interplays between these legal regimes on the operation, justiciability and enforceability of the international law on foreign territorial administration, of which the law of belligerent occupation is a subset. Chapter VIII provides an overview of international law enforcement mechanisms applicable to situations of belligerent occupation and examines the utilitarian contribution made by the doctrine of non-recognition to the regulation of illegal territorial regimes. It argues that the coherent, integrated application of the law of belligerent occupation in conjunction with other relevant legal regimes, including on territory and governance, can provide additional clout, as well as concrete grounds of legal necessity, for triggering the operation of inter-state enforcement processes, both internationally and nationally. Chapter IX examines the operation of the international doctrine of non-recognition on the domestic plane, by considering the mechanisms available in domestic law for the enforcement of international law obligations, given that the law on territoriality has been vigorously internalised by states. By analysing the manner in which states and international actors have undertaken to structure their relations with wrongdoing occupying states, the rigorous co-application of international legal regimes to situations of de jure or de facto occupation can propel not only international enforcement processes, but also internal and domestic regulatory processes in the jurisdiction of third states.

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CHAPTER II

EXCAVATING THE PAST: A GENEALOGY OF THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION

To lay the grounds for the principal inquiry embarked upon in this work, this chapter seeks to identify the underlying logic and function of the law of belligerent occupation as intended by its drafters. Was this legal framework as a safeguard against the practices of colonial powers? What were its founding principles and which state interests was it intended to protect? Such groundwork is critical for understanding the appropriate interpretation and full implementation of the contemporary law of belligerent occupation and the practice of states and international actors, and is the basis for the discussion in subsequent chapters on the interaction and concurrent application of this body of law with other norms of public international law, some of which crystallised after its initial codification.

Cassese notes that at the very initial stages of the development of international law, states “spontaneously and almost unwittingly” based their law-making on a few fundamental tenets from which they drew inspiration: the principles of freedom, equality, effectiveness, par in parem imperium non habet and ex injuria jus non oritur. The epiphanies arrived at throughout the history of international law, including a basic set of rules on the conduct of inter-state relations, were the foundation for the codification of the law of belligerent occupation at the turn of the 19th century. The development of a regulatory framework for the conduct of inter-state relations was also driven by a broadening of the definition of the subjects of international law, which for a long time excluded the colonised and so-called “uncivilised” world. The emergence of the law of belligerent occupation was a landmark in the development of international law, which consolidated the safeguards for the protection of the integrity and equality
of all States by seeking to protect weaker states. The architecture of this legal order was based on the understanding that “occupation is the anathema to the Charter’s standards governing order, and is inimical to its design for conducting the business of international peace and security.”

International law, as Gerhard von Glahn remarks, “recognises only one form of military occupation: belligerent occupation, that is, the occupation of part or all of an enemy’s territory in time of war.” In other words, the legal framework for belligerent occupation was intended to shield nations from forceful territorial revisions and transformative foreign administrations.

Concretely, the regulatory framework for belligerent occupation was made to ensure that the occupying state’s authority in the occupied territory is constrained: (i) by limiting the occupier’s ability to undertake changes that revise the political or social order in the occupied territory, especially with the intention of either politically subjugating or economically exploiting the resources of the territory, politically or economically; and (ii) by making, to the extent possible, the presence of an invading army in the occupied territory unsustainable and costly, politically and militarily, so as to bring about the invading army’s prompt evacuation and the legitimate government’s effective return to power. The legitimacy of a belligerent occupation was premised on the imperative nature of the military needs of the occupying state – a claim to a right to self-defence under *jus ad bellum*, pursued in accordance with the principles of necessity and proportionality.

By mapping the genealogy of the cardinal rules of the law of belligerent occupation, this part of the work, revisits some of the inceptive moments in the history of the emergence of this special legal regime and explores its drafting processes. Based on early state practice and judicial decisions, Chapter III distils and elucidates the key normative underpinnings of the *lex specialis* of belligerent occupation, outlining a matrix of guiding principles and precursors for the way this special legal regime interacts with other legal regimes in international law. By observing

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64 Gerhard von Glahn (1957) 27 (emphasis added).

65 See, on the application of *jus ad bellum* during belligerent occupation, Chapter V.
the historical debates and positions of states that took place during the drafting processes for this special legal regime, this chapter charts the evolution of the value system that propelled the formulation of a system of legal regulation with the occupying power as its subject. Without attempting to provide a comprehensive account of the legal history of all elements of the law of belligerent occupation, the travaux préparatoires of the Brussels, Hague and Geneva conferences, as well as the national codification initiatives and domestic regulatory acts, give an instructive overview of the premises for the law’s formulation, elaboration and intended object and purpose.


The first instrument to codify a basic set of rules on the conduct of war was the 1863 Instructions for the Government of the Armies of the United States in the Field, known as the Lieber Code, which was proceeded by the 1880 International Law Institute Oxford Manual, adopted by the United Kingdom, and Germany’s 1894 Manual. These important bases for the two formative international conferences in the Hague, but also the most widely disseminated instruments of that time, which were incorporated by European countries through the meetings at the 1874 Brussels Conference. The Lieber Code was the earliest legal instrument on the basic rules for the treatment by a foreign power of a civilian population subject to its control and administration. It declared that an occupying power is to be “strictly guided by the principles of justice, honor, and humanity,” which would provide both personal and collective guarantees of protection: religion, morality and private property of “the persons of the inhabitants, especially those of women” and the “sacredness of domestic relations,” were protected. The collective rights of a people, including the local system of government, legal order and institutional structures, would be protected from revisions by a foreign power, save for exceptional measures of “suspension, substitution or dictation” required by “military necessity.”

The Lieber Code consolidated the emerging view at the turn of the 19th century that conquest was prohibited, and "constructed a

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67 Gerhard von Glahn (1957) 8.
69 Lieber Code, Articles 5, 6, 31, 37 and 38.
70 Lieber Code, Article 3.
comprehensive, purposive system for the legal regulation of war in which humanity was both a guiding principle for the implementation of specific rules and an overall objective, at the same time, was consciously designed as an instrument of order."\(^7\) The Code suggests a fundamental limitation on the occupier’s scope of authority: a foreign power is to have no active role in either administering or regulating internal affairs, its presence should be of a temporary, military character. Article 2 of the Code provides that the authority of the legitimate sovereign is only suspended during such time,\(^7\) and “substitutes in its place the military authority of the occupying State.”\(^7\) This act of substitution is subjected to conditions that delimit the occupier’s sphere of influence to legitimate objectives of martial law.\(^7\) Article 10 of the Code mandates the occupier to concentrate on the “support and efficiency of the army, its safety, and the safety of its operations” — as opposed to having the role of a surrogate or temporary sovereign charged with the daily lives of the inhabitants.\(^7\) Lieber’s concept of military necessity ensured against the occupier’s infringement upon the continuous sovereign rights of the legitimate government, while permitting its exercise of authority in pursuit of legitimate war aims.\(^6\) This logic is cogently reflected in the Code’s concept of humanity: Lieber denoted that a state of occupation was not only like any other incident of war, but that it was instrumental to the belligerent’s war aims, and should therefore be vigorously scrutinised.\(^7\)

Notwithstanding these achievements, the Code has notable shortcomings, reflective of the state of international law at the time. While it highlights the “cardinal position assigned to the notion of order,”\(^7\) it also implies the inferior status of humanitarian values, including the rights of individuals.\(^9\) Although the Code provides that the “military rule and force” of the “occupying military authority” substitute “the domestic

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\(^7\) Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, Presented to both Houses of Parliament by Command of Her Majesty, 1874, Sec I, Chap I, para 1.


\(^7\) Rotem Giladi (2012) 106.

\(^7\) *Ibid.*

\(^7\) Rotem Giladi (2012) 106.


\(^7\) Rotem Giladi (2012) 105.
administration and government,” it treats the limits placed on the occupier’s authority in a relatively laconic and limited manner with little guidance on the proper contours of the relationship between the local government and the foreign power.80 Article 33 of the Code recognising the occupier’s recognised right to annex occupied territory by declaration, is further indicative of the gaps that remains in this regulatory framework:

> It is no longer considered lawful - on the contrary, it is held to be a serious breach of the law of war - to force the subjects of the enemy into the service of the victorious government, except the latter should proclaim, after a fair and complete conquest of the hostile country or district, that it is resolved to keep the country, district, or place permanently as its own and make it a portion of its own country.

Notwithstanding, the close association between Francis Lieber and Johann Bluntschli is further evidence of Lieber’s acute awareness of the need to limit the occupier’s authority by reversing the presumption that an occupier’s actions could be limitless, and even tantamount to those of a sovereign authority.81 These limitations enshrined in the Code represent an inceptive moment in the emergence of a regulatory framework for belligerent occupation and contribute to the law’s humanitarian mission, which emphasises the needs and rights of the local population vis-à-vis a foreign power.

2. The 1874 Brussels Declaration: Delimiting the Occupier’s Powers

Through the early 19th century, a belligerent that asserted its control over vanquished territory was, in principle, entitled to acquire sovereignty therein. For Kluber, a standard of “justness” could permit an occupier to acquire sovereign rights over occupied immovable property.82 The material fact of military presence was sufficient in itself to constitute its acquisition. Vattel was one of the first scholars to draw the distinction between the rights of a sovereign and the duties of an occupier.83 It was not until 1874,

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81 See, e.g., President Polk’s statement to the House of Representatives on the occupant’s fullest right of sovereignty; James D Richardson, Messages and Papers of the Presidents 1789-1897, 1897, IV, 595, cited in Doris Appel Graber (1968) 39, 41-42.
82 Johann-Ludwig Kluber, Droit des Gens Modern de l’Europe (Cotta, 1819).
83 Emer de Vattel, Le Droit de Gens (Londres, 1758).
when the Brussels Conference convened to embark on the Project of an International Declaration concerning the Laws and Customs of War,\(^{84}\) that the laws of war became the decisive parameters for assessing the legality of an invading army’s activities in the foreign territory.\(^{85}\) Its starting-point was the physical and material presence of an army in foreign territory “actually placed under the authority of the hostile army”\(^{86}\) and its sphere of influence “extends to the territory where such authority has been established and can be exercised.”\(^{87}\)

Russia’s project of the Brussels Code was intended to codify the practice of Western states on the conduct of war and belligerent occupation,\(^{88}\) elaborating upon the Lieber Code.\(^{89}\) Prince Gortchacow remarked that the Project had the object of elucidating a precise, definite and complete set of rules with potentially binding consequences,\(^{90}\) since, as the Russian government representatives remarked, “[b]y leaving things in the indefinite state, the relations between the occupier and the inhabitants of the country occupied […] will not thereby be improved.”\(^{91}\) The Protocols of the proceedings were intended as “evidence of a great moral value.”\(^{92}\) The principles reflected not only “a military point of view,” but were “governed by the political character of the constitution of the country [the Delegate] represents, as well as by the nature of the organisation of its armed forces.”\(^{93}\)

The final draft of the Protocol is based on a number of basic tenets. First, it was widely agreed that “the only legitimate object which states should have in view during war is to weaken the military forces of the enemy without inflicting upon him unnecessary suffering.”\(^{94}\) Colonel Count Lanza remarked that the law’s purpose was to ensure that “the occupier should exact nothing but what is positively necessary.”\(^{95}\) This was

\(^{84}\) An English translation of the Russian project for the Brussels Conference can be found in the American Journal of International Law, Vol 1 (1907), Supplement, 96.
\(^{85}\) Odile Debbasch (1962) 6.
\(^{86}\) Article 1, Brussels Declaration 1874.
\(^{87}\) Article 1, Brussels Declaration 1874.
\(^{89}\) Baron Jimini presiding over the conference stated that the conference was triggered by the Code. Alexander Pearce Higgins, *The Hague Peace Conferences: And Other International Conferences Concerning the Laws and Usages of War* (Cosimo Classics, 2010) 257.
\(^{90}\) Observations on the Dispatch from Lord Derby to Lord A Loftus', sent from the Foreign Office on 20 January 1875, by Prince Gotchacow to Count Shouvaloff, 8.
\(^{91}\) Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, printed to both Houses of Parliament by Command of Her Majesty (Harrison & Sons, 1874) 6.
\(^{92}\) Ibid, 8.
\(^{93}\) Ibid.
\(^{94}\) Ibid, 273.
\(^{95}\) Ibid, 273.
to be achieved by placing firm limits to what is “strictly required by the necessities of war,” and eliminating, to the extent possible, the “uncertainty, unforeseen events and the passions excited by the struggle.”

The following sections consider two key issues deliberated in the proceedings: (i) the definition of the legal status of the occupying state in the foreign territory; and (ii) the conservationist function of the law in protecting against extensive foreign interference in the internal affairs of the occupied territory.

2.1 Defining the Legal Status of Belligerent Occupation

The key issues addressed by the Brussels Conference can be divided twofold: those pertaining to the definition and legal status of belligerent occupation, and those to the specific authority and duties of the inhabitants of an invaded country. The discussions concerning the definition of belligerent occupation were dominated by two competing views. On the one hand, the German view maintained that if occupation, which “does not always manifest itself by visible signs,” is said to exist “only where the military power is visible, insurrections are provoked and the inhabitants suffer as a consequence.” As such, “[a] town left without troops must still be considered occupied” since “the occupying power is established as soon as the population is disarmed, or even when the country is traversed by flying columns.” The German delegate insisted that since it would be “impossible to occupy each and every point of the province, the expression ‘territory’ must, as regards occupation, be interpreted liberally.” The rationale for expanding the scope of the definition beyond situations of actual physical control to accommodate intermediary realities – in which the local authorities have lost control but the occupier has yet to make its authority felt – was intended to protect the occupier from local uprisings, as well as bind it to a basic standard of responsibility for the well-being of the population through the maintenance of the public order.

The British delegate, Sir Horsford, argued that occupation, being different from a blockade, should manifest through visible signs and

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96 Ibid, 273.
97 Ibid, Enclosure No 36, 272.
98 Ibid, 5.
99 Ibid.
100 Ibid.
101 Ibid.
include a requirement of physical presence. The group of delegates that supported this view held that occupation entails “the authority of the legitimate power being suspended and having in fact passed into the hands of the occupant.” The use of the term “in fact passed” was arguably intended as a description of an ensuing state of affairs: a local authority’s inability to access or assert control over a particular region or locality, is a negative consequence of the occupier’s ability to assume and maintain its control to the exclusion of the ousted sovereign’s authorities. Sir Horsford remarked that the “document does not really define what occupation really is”, nor the rights and duties it entails on occupier and occupied, given that “the effect of these clauses [...] appears to be to limit the action of the invader against the subjects of the occupied territory.” However, given that the only explicit requirement of the occupier was to maintain the laws in force in the occupied territory, save for exceptional instances, the limits of its authority remained unclear.

Another group of delegates emphasised that “greater power must not be accorded to the invader than he actually possesses.” To substantiate its control, the occupier “must always be in sufficient strength to repress an outbreak.” Baron Baude remarked that the phrase “authority established and exercised” refers to two distinct realities, which do not necessarily coincide in practice, given that authority may be proclaimed, but not actually exercised. If the conditions for effective exercise of authority are absent, he warned, “there will be a danger of reviving the same abuses which formerly attended fictitious blockades.” In support of this view, General de Voigts-Rhetz held that an occupation would commence either when the local population is disarmed, or the occupier establishes relations with the local authorities. Some of the delegates held that prohibiting an occupier from administering the internal

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103 Article 3, Brussels Declaration 1874 (emphasis added).
104 Sir A Horsford to the Earl of Derby (received Aug 7 1874), No 18 of the documents of the Brussels Conference. *Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare*, printed to both Houses of Parliament by Command of Her Majesty (Harrison & Sons, 1874) 23-24.
105 Ibid.
106 Ibid.
107 Ibid.
108 Ibid.
109 *Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare*, printed to both Houses of Parliament by Command of Her Majesty (Harrison & Sons, 1874) 238. See also, on the practical importance of maintaining the effectiveness of blockade, Lassa Oppenheim, *International Law: A Treatise* (Longmans, 1920) 523 et seq.
110 Ibid, 238.
affairs of the territory, while obliging it to allow local authorities to function, would further its withdrawal from the foreign territory once it has exhausted its imperative military needs.\textsuperscript{111} The Spanish delegate, Duc de Tetuan, remarked that “by suppressing the words ‘so long as’ great facilities are given to the occupier” that are likely to permit it to hold the country with fewer troops.\textsuperscript{112}

The deliberations resulted in the adoption of the language in Article 1 of the final text of the 1874 Brussels Declaration: “A territory is considered as occupied when it is actually placed under the authority of the hostile army. The occupation only extends to those territories where this authority is established and can be exercised.” Since the logic behind this provision appears to support a condition of occupation that is fully installed and excludes the authority of the ousted sovereign, it negates the possibility of partial, potential or remote occupation, while appearing to permit the emergence of covert forms of foreign domination and subjugation. A similar logic was adopted by the Institute of International Law in the Manual on the Laws of War on Land, also known as the 1880 Oxford Manual, which held that for a territory to be considered occupied the invading State must be the only one in a position to maintain order, in a time when the legitimate sovereign “has ceased, in fact, to exercise its ordinary authority therein.”\textsuperscript{113} In other words, while the sovereign’s rights and status remains unaltered, the occupier is in fact the sole administrator with effective, actual and ultimate control over all domains of daily life.

Perhaps the Conference’s most notable achievement was to affirm the position that by suspending the legitimate power’s authority, belligerent occupation does not result in the acquisition of title over territory.\textsuperscript{114} In doing so, the Brussels conference firmly abandoned the uncertainty in the Lieber Code concerning an occupier’s precise status in the occupied territory.\textsuperscript{115} These views were upheld in military manuals and scholarly works throughout the late 19th century. The prominent framer of the French military manual, Pradier-Fodere, maintained that since an occupier does not substitute the legal sovereign, “occupation does not change the political or non-political rights in the occupied territory or the rights of the national sovereign.”\textsuperscript{116}

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\textsuperscript{111} Ibid, 260.
\textsuperscript{112} Ibid, 260.
\textsuperscript{113} Article 41, The Laws of War on Land, Oxford, 9 September 1880.
\textsuperscript{114} Article 2, Brussels Project. See also, Doris Appel Graber (1968) 47.
\textsuperscript{116} Paul Pradier-Fodere, Traite de Droit International Public European et Americain, Vol VII (1897) 700-714.
\end{flushright}
Notwithstanding these notable achievements, considerable indeterminacies remained, for instance, with respect to the scope of an occupier’s administrative authority. As Karma Nabulsi remarks, “the sheer opaqueness of the nature of occupation” meant that while “all rules of normal social and political intercourse were suspended [...] what filled this vacuum was unclear to both sides.”117 The scope and temporal limits of its authority were even less clear in transitional situations, whereby the state authorities have ceased to exercise authority, but the occupier has yet to assume the position of complete control with an option to exclude the local authorities.118 The omission of any meaningful guidance on the occupier’s duties vis-à-vis the ousted sovereign and the legitimate government appears to embody the very position of neutrality, or at least subtle indifference, to the practices of colonial domination, exploitation and subjugation that remained commonplace at the time. The only provision that could potentially be read as an implied reference to the right of the local population to protect their sovereign status and independence is the absence of a duty of obedience, which was omitted from the document following contentious deliberations.

2.2 Resisting Foreign Domination, Conserving the Socio-Political Ecosystem

Resistance from the local occupied population accounts for the temporary presence of the foreign power, as well as the limits of the latter’s scope of authority, which was limited to legitimate requirements of military necessity. Nevertheless, the majority of delegates recognised the inevitable occurrence of patriotic action, with a favourable perspective on the rights of a people engaging in such acts. General de Voigts-Rhetz upheld the need to give the local population the option and right to resist the presence of a foreign power,119 while Baron Jomini remarked that it would be counter-intuitive for the occupier to place restrictions on the local population’s “right of defence”.120 The Belgium delegate stated that “[i]n States numerically weak […] the disadvantage as regards numbers can only be

117 Karma Nabulsi (2005) 64.
119 Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, printed to both Houses of Parliament by Command of Her Majesty (Harrison & Sons, 1874) 254.
120 Ibid, 256.
compensated by the moral effect of the spirit of patriotism, and, therefore, anything tending to weaken the action of this sentiment must be carefully guarded against.”

Despite prominent support for the recognition of a right to resist, some difference of opinion emerged on the appropriate definition of the authority and duties of the occupier vis-à-vis a population engaged in acts of resistance. A majority of Committee members “recognized that it was highly desirable, that without in any way interfering with, hampering or weakening a patriotic outburst, which is worthy of every consideration, the government might devise some means of preventing such dangerous consequences and of alleviating the horrors of war by regulating that evil.” It was agreed, however, that such rules should intend “to create an obligation for the occupier, instead of for the country occupied,” given that, as Federal Colonel Hammer remarked, “men who defend their countries are not brigands.” While General Voigts-Rhetz declared that the law should “regulate what armies may exact in an enemy’s territory,” Baron Lambermont warned against rules that would accord “to the enemy the exercise of rights which can only emanate from the nations,” which he proposed resolving by “creat[ing] an obligation for the occupier, instead of for the country occupied.” Belgium, the Netherlands, Spain, Portugal and Switzerland, with support from other delegates, held that an invaded country should be able to “have recourse to every aid that patriotism may proffer or suggest,” and that the local inhabitants should not be made to “have any duties whatever towards the invader.”

The Russian draft, wary of allowing the local population to entertain its patriotic spirit without limitations give the threat it poses to the occupier’s security and its effects on the public order, received significant criticism from several European states, including the British delegate who called the text a “Code of Conquest.”

121 Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, printed to both Houses of Parliament by Command of Her Majesty (Harrison & Sons, 1874) Doc No 32, 19 August 1874, 75-76.
122 Ibid, 258.
125 Ibid, 269.
127 Sir A Horsford to the Earl of Derby (received 10 August 1874), No 24, 43-44.
128 Ibid.
129 Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, printed to both Houses of Parliament by Command of Her Majesty (Harrison & Sons, London 1874), Protocol of the Session of the Commission delegated by the Conference, Session of 14 Aug, Inclosure No 33, Doc No 13, 17 Aug 1874.
to the Court of St James concurred, noting that “the measures seem to be calculated to guarantee conquering armies the advantages of their organization” and “diminish the means of defence of populations surprised by such invasions.”

The majority of delegates agreed that an occupier can neither demand, nor force the fidelity of the occupied population, since it is prohibited from becoming involved in local political affairs and is required, insofar as possible, to ensure that the administration of daily life is conducted under local laws and institutional structures. The assumption is that the local population should maintain their own form of political power, thereby restricting the occupier’s ability to recruit or coerce the local population, a formulation that appeared in the original Brussels draft: “so long as a province, occupied by the enemy, is not ceded to him by virtue of a Treaty of Peace, the inhabitants thereof cannot be forced either to take part in the operations of war against their legitimate Government, or in acts of such a nature as to further the prosecution of the objects of the war, to the detriment of their own country.”

Thus, the adopted text of Articles 36 and 37 of the Declaration provided that “[t]he population of an occupied territory cannot be compelled to take part in military operations against their own country”, and “cannot be compelled to swear allegiance to the enemy’s power.”

In other to prevent an occupier from subjugating the local population with the pretext of ensuring their obedience, delegates held that an occupier must allow for the normal function of internal affairs insofar as possible. Baron Blanc clarified that it would be unjust to place the patriotism of public officials “in collision with the sentiment of their moral obligation towards society […] by establishing that they shall remain in office by a kind of assignment on the part of the occupier.” Director Vedel warned against the detrimental effects of an occupier “introduc[ing] his own legislation into a country provisionally occupied.” As such, delegates agreed that “the obligations of the occupier not to disorganize the services which relate to social interest” must be clearly defined.

In serving its military needs, Baron Lambermont stated, the occupier should “have regard to the exigencies of the ordinary mode of

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131 Ibid.
132 Sir A Horsford to the Earl of Derby (received 10 August 1874), No 24, 43-44.
133 Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, 172.
135 Correspondence respecting the proposed Conference at Brussels on the Rules of Military Warfare, 269.
living (la vie publique).” With respect to the levy of payments on the occupied population, for instance, a balance was drawn between the interests of the population and the reasonable needs of the occupier: payments were required to be used “entirely to the advantage of the occupied territory” and, as suggested by the German delegate, on the basis of the laws and institutional practices “in force in the occupied territory.” Ultimately, Article 38 of the final text of the Declaration listed a basic set of rights that the occupier must respect: “[t]he honour and rights of the family, the life, and property of individuals, as well as their religious convictions, and the exercise of their religion.”

The proceedings resulted in a relatively restrictive set of provisions that prescribe the occupier’s limited duties and authorities vis-à-vis the local population: Article 2 provided that the occupier “shall take every step in his power to re-establish and secure, as far as possible, public safety and social order”, and Article 3 added that the occupier “will maintain the laws which were in force in the country in time of peace, and will only modify, suspend, or replace them by others if necessity obliges him to do so.” By construing the occupier’s authority in a manner that reinforces the temporariness of its presence, these provisions essentially defined the exceptionality of the state of affairs entailed by a situation of belligerent occupation. These hard-rule based provisions intended to set limits for the occupier’s administrative authority and ability to revise the laws and institutions of the occupied territory was the first set of specific rules intended to prevent the occupier from usurping power in a manner that may translate into sovereign claims.

3. Mending the Occupier’s Straitjacket: The Peace Conferences and the 1907 Hague Regulations

The 1874 Brussels Declaration was the basis for the development of the 1907 Hague Regulations, a process that was undertaken in two International Peace Conferences – the 1899 and 1907 Hague Conferences. The meetings were intended to reflect on the state of affairs of the international laws of war, identify their shortcomings and suggest potential

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137 Ibid, 246.
139 Ibid, 271.
140 Octave-Ch. Galtier, Des Conditions de l’Occupation de Territoires dans le Droit International Contemporain (These) (Imprimerie Lagarde et Sebille, 1901) 63-65.
areas for development. The deliberations led to the formulation of the Convention (IV) respecting the Laws and Customs of War on Land and its annex, the Regulations concerning the Laws and Customs of War on Land (hereinafter: the 1907 Hague Regulations). The main discussions concerning the rules on belligerent occupation were conducted during the 1899 Conference, presided by Martens, with two distinct groups of negotiating states: those in favour of protecting the occupying power and those concerned with the protection of the population in the occupied territory.

3.1 Maintaining the Occupied Country’s Legal and Institutional Status Quo

The group of occupied states succeeded in maintaining a strong front on the question of imposing the greatest possible restraints on the occupier, including by affirming a binding commitment to the conservation of the legal and political status quo in the occupied territory. As stated by the Austro-German delegate, Beernaert:

The idea that inspired them is wholly humanitarian, as is the case for that matter with the whole draft of [the Brussels Declaration of] 1874. It is a question of reducing the evils of an invasion as far as possible, by regulating it or rather outlining a path for it; but in order to attain this end it is desired that the vanquished shall recognize the invader in advance as having certain rights on his territory, and that populations be in some sort forbidden to mingle with the war.


144 Sixth Meeting, The Hague, 6 June 1899, 502.
Beernaert added that it should be a “sheer impossibility either to attribute powers to or to impose laws on victors in advance and by convention,” given that “there are certain points which cannot be the subject of a convention and which it would be better to leave, as at present, under the governance of that tacit and common law which arises from the principles of the law of nations.” Opting for a narrow reading of the concept of military necessity, Beernaert declared that the right of the occupant should be restricted to certain matters of a nature to serve its military operations.

Martens and Baron Bildt opposed this proposition, maintaining that uncertainty in the rules would allow occupying states to evade strict limitations, which “can only be to the advantage of the strong.” Martens also cautioned against entrusting to the “humanitarian sentiment of heads of armies the task of looking after the interests of the inhabitants [of the occupied territory].”

Despite a general sentiment that the assembly was looking to reconcile what some delegates perceived as inherently irreconcilable interests, unequivocal rules were necessary to inhibit the occupier’s conduct and minimise civilian casualties. A group of delegates acknowledged that when an occupied country “is placed under the law of the conqueror” it becomes the subject of “force and uncontrollable force at that”, which requires the rules to ensure that they do not “legitimate the use of this force and recognize it as law.” Beernaert emphasized the importance of drawing a balance between “admitting the reality of the invasion” and “curb[ing] by convention the unbridled license of the conqueror.”

Thus, a substantial number of delegates upheld the legitimate and lawful belligerent status of a local population that takes up arms to resist against an invading army. Sir Ardagh proposed an amendment providing denoting that “nothing in this chapter shall be considered as tending to lessen or abolish the right belonging to the population of an invaded country to fulfill its duty of offering by all lawful means, the most

150 Ibid.
151 Ibid, 297.
152 Ibid, 549.
energetic patriotic resistance against the invaders.” Colonel Kunzli affirmed this position by calling upon the delegates not to “punish love of country.” To avoid further discussion of such contentious matters, Martens recalled that the task of the conference was not “to codify the heroic acts of individuals or populations,” but rather to provide rules “to mitigate the evils of invasion” and “save the life and property of the weak, the unarmed, and the inoffensive.” It was implicitly assumed that if resistance from the local population is quenched, suspicion is raised that the occupier is usurping greater powers than are afforded to it by law.

3.2 Managing Public Life in Occupied Territory

To ensure some degree of political stability and provide for the basic needs of the local population, some delegates maintained that local public officials “might best perform their duty in a moral sense that is, towards their own people if they remained at their posts in the presence of the invader.” The local functionaries were the only remaining representation of “the interests of the populations” and are in the best position “to defend the rights and property of the populations as far as possible against the demands of the invader.” Martens declared that “[i]f the enemy does not find any functionary at hand, he has no means of being equitable and just” since “it is by virtue of their own country that the functionaries are the natural defenders and protectors of the inhabitants in their relations with the occupant.” The majority of delegates upheld that the occupant “shall take all steps in his power to re-establish and insure, as far as possible, public order […] while respecting, unless absolutely prevented, the laws in force in the country.”

To prevent the occupier from wielding unlimited powers and pursuing its self-interests, it was necessary to provide “legal rules to restrain as far as possible the absolute liberty of action that success in arms generally gave to an invader.” Colonel von Schwarzhoff maintained that

155 Ibid.
157 Ibid, 522.
158 Ibid.
159 Ibid.
while it was inadmissible to “forbi[d] making any change whatever in the state of affairs in the invaded territory,”\textsuperscript{162} the occupier should not be the sole authority entrusted with the well-being of the local population.\textsuperscript{163} By this token, the conservationist principle was meant to ensure that the domain of political administration remained unhampere\n
\textsuperscript{d}d on the basis that it was required to ensure the well-being of the population.\textsuperscript{164} A group of European states declared that, irrespective of the occupier’s good will, changes to local institutions “shall be limited to the extent and duration of the occupation.”\textsuperscript{165} The resultant provision, enshrined in Article 43 of the final text of the 1907 Hague Regulations, adopts middle-ground: “[the occupant] shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting unless absolutely prevented, the laws in force in the country.”\textsuperscript{166}

Overall, the two conferences considerably bolstered the object and purpose of the law to restrain the occupier’s purview and powers in the occupied territory. By elaborating on the Brussels Declaration’s treatment of the rights of occupied persons, including respect for their lives, honour, property, and religious convictions, the 1907 Hague Regulations essentially defended the imperative that these guarantees are not waived through “an appeal to ‘extreme circumstances’ as a legitimate defense on the part of the invader.”\textsuperscript{167} As the International Military Tribunal remarked several years later, the Hague conferences “represented an advance over existing international law at the time of their adoption.”\textsuperscript{168} While limited discussion was had of the ability to guarantee the genuineness of an occupier’s measures for the benefit of the local population, the stated intention of the drafting process was to formulate a manual “deem[ed] to be in conformity with the principles of international law.”\textsuperscript{169} It is therefore not unreasonable to suggest that the narrowly formulated rules intended to restrict the occupier’s scope of authority were couched in a manner that would render an occupier’s prolonged presence in the foreign territory both politically and legally onerous.

\textsuperscript{162} Ibid, 320.
\textsuperscript{166} Ibid, 260.
Given the contentious nature of the right to resistance and the difficulty in predetermining the nature of the relations between the occupier and the local population, in view of ongoing colonial-type practices, notable lacuna can be identified in the final draft. Yet, the absence of such provisions from the final text and its deficiencies in providing a detailed, comprehensive set of responsibilities for all types of situations does not necessarily imply a lax approach to the regulation of occupying powers, nor the inadequacy of the restraints placed on occupiers to avoid abuses of power. On the contrary, it can be said that it signals the importance of the interactions between the special legal regime of belligerent occupation and other rules and regimes of international law, which complemented and supplanted its provisions.


The project of the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereinafter: 1949 Fourth Geneva Convention) was aimed at strengthening a relatively scant set of guarantees for the population in the occupied territory. Its most valuable additions to the law of occupation arguably consist of the provisions on the treatment of civilians, including basic care and education for children, provision of food and medical supplies, maintain and ensure hygiene and public health, as well as prohibited acts such as deportation and forcible transfer, destruction of property and collective punishment. The Convention sought to ensure that the occupier’s use of military power is limited by a minimum of core obligations towards the local population, including its physical, economic and social wellbeing. Mr Dimitriu of Romania opined that although it was not the delegates task to draft provisions that “would be contrary to […] the protection of the civilian population”, Mr Robert Craigie of the UK and others, were aware of the need not to let sympathy with those people [in the occupied territory] blind us to two important facts: the first is that it is the duty of the Occupying Power under international law to maintain law and order in the occupied territory, and the second is that if such acts are not punished adequately at an early stage,

widespread disaffection might result which the Occupying Power must repress, with the result that the civilian population as a whole is made to suffer.\textsuperscript{172}

The difficult task of drawing this delicate balance was addressed by including a number of critical provisions, which were absent from the Hague Convention and Brussels Code, to clarify the presumptions based on the inherent power relations between occupier and occupied, and ensure against measures that may allow the occupier to further sovereign claims in the occupied territory.

4.1 Reinforcing the Law’s Conservationist Function

Perhaps the most instructive provisions in this regard are found in Articles 7, 8 and 47 of the final text of the Convention, which affirm the inviolability of the protection afforded to the local population and the continuity of the legal rights of the ousted sovereign, irrespective of any special agreements, as upheld in Article 47:

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any chance introduced, as the 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.

Having the principal function of securing the inviolability of the rights of protected persons, this provision was intended to ensure that the occupier does not establish local government institutions that function as its proxies, and provide a smokescreen for acts of the local population’s political subjugation and the territory’s economic exploitation.\textsuperscript{173} By providing a category of inviolable rights and prohibiting the occupying power from undertaking acts that would effectuate the \textit{de jure} or \textit{de facto} annexation of occupied territory, it sought to guarantee the protection of the sovereign

\textsuperscript{172} Ibid, 425.
rights of the local population and the territorial rights of the ousted legitimate government.

By recognising that effective control does not necessitate direct control over all government functions and could be exercised through proxies, the 1949 Fourth Geneva Convention arguably presumes that the occupying power’s degree and means of control could be less apparent and more covert than what was envisaged by previous instruments. It acknowledges that the protective framework of the law of belligerent occupation provides a set of essential guarantees that cannot be frustrated by the occupier that attempts to undertake otherwise internationally unlawful acts. The occupier remains accountable for its obligations under the law of belligerent occupation, while ensuring the de jure continuity of the ousted sovereign’s rights.174 The incorporation of an explicit provision that prohibits alterations to the socio-political order or revisions of the occupied territory’s status, not only bridged the conceptual gap between the law of occupation and developments in other international laws that occurred during the early to mid 20th century, but also affirmed the applicability of these concurrently applicable rules to the acts of predatory occupying states.175

By explicitly recognising and addressing the conflict of interests between the occupier and the local population, as Quentin-Baxter of New Zealand affirmed, the rules can also ensure “that the Courts and the institutions of an occupied territory shall be preserved and shall not be interfered with more than the minimum necessary degree.”176 While the US delegate Speranskaya held that such explicit rules and references to internationally prohibited acts were intended to deter the occupier from acting in an arbitrary manner.177 Dutch delegate van Rosenthal and others maintained, “the rights of the Occupying Power should be defined at a higher level, that is, by an international Convention independent of the will of that Power and that of the occupied territory,”178 declaring that “[i]t would be a mistake to set up a legal system in such a way that the power of an authority depended on regulations drawn up by a subordinate body”

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177 Ibid, 462.
178 Ibid, 430.
such as the local authorities, particularly when the latter are subject to the ultimate coercion of a foreign power.\textsuperscript{179}

Article 64 of the final text of the 1949 Fourth Geneva Convention widened the parameters of the occupier’s law-making powers “to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention.”\textsuperscript{180} Benvenisti remarks that “the predominance of Hague 43 has been maintained in both subsequent scholarship and judicial practice,” despite the drafter’s intention to remove some of the restraints on the occupier’s through Articles 27 and 64 of the Fourth Geneva Convention.\textsuperscript{181} While the focus of Geneva law on the protection of the civilian population may, according to Wolfrum and Arai-Takahashi, justify the adoption of measures otherwise prohibited by Hague law,\textsuperscript{182} weaker and smaller states emphasized the importance of maintaining the rigid language in Article 43.\textsuperscript{183} Although it was agreed that the Geneva Convention become “supplementary to Sections II and III of the Hague Regulations,”\textsuperscript{184} as upheld by General Schepers of the Netherlands, “should any contradiction arise between the effect of the Hague text and that of our Convention, the interpretation should settle the difficulty in accordance with accepted legal principles, in particular in accordance with the rule that in law, the latter supersedes the earlier.”\textsuperscript{185} Given these nuances, it is not unreasonable to conclude that while Article 64

\textsuperscript{179} Ibid.


\textsuperscript{184} Final Record of the Diplomatic Conference of Geneva of 1949, iiA, 846.

\textsuperscript{185} Ibid, 164, 787.
“introduced innovative elements” in the occupier’s law-making powers, it did so with the view that they be exercised to ensure the wellbeing of the civilian population by being strictly limited to measured that ensure the occupier’s security and enable it to fulfil its obligations under the Convention. Wood’s submission to the United Kingdom’s Foreign & Commonwealth Office concerning Iraq aptly maintains that “while changes to the legislative and administrative structures” were deemed “permissible if they are necessary for security or public order reasons, or in order to further humanitarian objectives, the occupant should not undertake more wide ranging reforms of governmental and administrative structures.”

4.2 Addressing Tensions in the Institutional Order and Civic Life

This persistent tension between occupier and occupied, and the potential for the escalation of violence through resistance by the population in the occupied territory, guided the deliberations. The British delegate, Sir Robert Leslie Craigie, asserted that the Convention would fail if it did punish those whose acts disrupt normal life in the occupied territory, in addition to providing the occupier with the right to try civilians for certain types of offenses to deter “illegal acts by a hostile population against the soldiers of the Occupying Power,” and “retaliation and revenge-kilings by soldiers of the Occupying Power whose safety has been jeopardised or whose comrades have been assassinated.”

The occupier’s role in defining the scope of such offenses and determining the appropriate means and methods of law enforcement remained unclear; especially, given the occupier’s obligation to respect local laws and institutions. The occupier’s judicial and legislative authority was ultimately prescribed in extremely narrow terms and restricted to limited domains, as it was intended to operate in parallel to the core jurisdictional powers of local institutions, and, as provided in Articles 55 and 58 of the draft text of the Convention, the “courts in the occupied territory which continue to have jurisdiction in respect of certain

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189 Michael Wood, Memorandum by the FCO to the Committee on Foreign Affairs of the House of Commons, April 2003.
191 Occupation courts must be “non-political”; Article 66, 1949 Fourth Geneva Convention.
The task of ensuring normal life and preserving public order was to be shared between the occupier and the local authorities. The scope of the right to free expression granted to the local population is a further indicator of the effects of disseminated information and materials to provoke uprising on the occupier’s safety. Danish delegate Cohn emphasized that free expression is "one of the most important and fundamental principles concerning the protection of civilian populations" and their ability to maintain a degree of autonomy and self-subsistence, even under foreign domination. The test devised for assessing the overall effects of an occupier’s activities in the occupied territory on civil life and public order was intended to ensure that only the most serious kind of threat to the occupier’s security would warrant a concerted response that may entail changes to the public order. US delegate Clattenburg declared that imperative – and as such exceptional – military needs would also permit the use of the supplies or resources of the occupied territory. To protect against abusive practices, Canadian delegate Weshof remarked, “it is necessary to strike a balance between the needs of the suffering people of the occupied territory and the legitimate needs of an honest Occupying Power, because it is the honest Occupying Power that is going to pay attention to this Convention.”

In the absence of an effective international regulatory mechanism, the interpretation of the rules is left to the occupier’s discretion, and may be susceptible to disingenuous readings. Neither did the provisions of Hague and Geneva law, as Roberts stated, “end all possibility of dispute about what military occupation is or to what situations the law on occupations is applicable.” Addressing the normative lacunae in previous instruments, the Convention contributes to the delimitation of the test for the end of occupation by extending the application of the law to situations where the occupying state exercised control through proxy authorities subject to its coercion. While Article 47 of the adopted text of the Fourth Geneva Convention appears to acknowledge the continued occurrence of annexation, its authoritative Commentary maintains that a situation of occupation does not “depriv[e] the occupied Power of neither its statehood

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194 Final Record of the Diplomatic Conference of Geneva 1949 Vol II, Section A, Remarks by Mr Haksar of India, 479.
195 Ibid, 420.
196 Ibid, 420-421.
nor its sovereignty; it merely interferes with its power to exercise its rights,” and affirms that “the reference to annexation in this Article cannot be considered as implying recognition of this manner of acquiring sovereignty.” It follows, albeit implicitly, that the establishment of a new government in the occupied territory would be considered unlawful, not only due to its effects on the occupied state’s legitimate government, but also the prolongation of the occupier’s control over the occupied territory. As such, the provision in Article 47 incorporates into the law of belligerent occupation the international norms emerging at the time concerning the prohibition of conquest and the right to self-determination of peoples.

Discussions that took place at the diplomatic conferences of Geneva between 1974 and 1977, which led to the adopted of the 1977 Additional Protocols to the Geneva Conventions, also considered the applicability of the laws of war to situations of belligerent occupation. Article 1(4) of Additional Protocol I maintained that armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

By affirming the applicability of the law of belligerent occupation to such situations, this development highlights the importance of the normative contributions made by the decolonisation era of the 1960’s and 1970’s – a critical turning-point in the recognition of the rights of peoples engaged in a struggle for self-determination. As discussed in the following chapter, the notions of national sovereignty and self-determination of peoples, including their corollary prohibition on the acquisition of territory through force and on colonialism, provide crucial complementary and supplantry normative guidance on the application of the law of belligerent occupation. By substantiating the proposition that a situation of belligerent occupation does not affect the legal status of the occupied territory, or the legal rights of its indigenous population without foreign interference, the Geneva

Conventions had effectively paved the way for the normative cross-fertilisation that is the subject of this work.

5. Concluding Observations on the Genealogy of the Law of Belligerent Occupation

Despite harbouring an inherent tension between the self-interests of predatory occupiers – including conquerors – the law of belligerent occupation has attempted to draw a balance between competing interests in the context of an inherently hostile, exceptional situation. The drafting process of the law of belligerent occupation, which started with the American history of the laws of war and led to the adoption of the Geneva Conventions, demonstrates the monumental developments that occurred through this trajectory in terms of the conceptualisation of the status of an occupying state in foreign territory and the regulatory function of international law, more broadly. The law of belligerent occupation gradually recognised and incorporated the notion of the sovereign equality of states and the right to self-determination of peoples into the restraints it sought to place on the ability of states to acquire territory through force, or to exploit the resources and subjugate the population in foreign territory through invasion and military might.201

While the deliberations that led to the adoption of the 1874 Brussels Declaration, as well as those that took place during the 1899 and 1907 Peace Conferences, may have laid the grounds for the eradication of coercive, belligerent practices of territorial acquisition and regime change, they did not prohibit them explicitly. It was not until after World War II that the 1949 Geneva Conventions embedded a conservationist principle by substantiating the rules concerning the preservation of the institutional and legal status quo in the occupied territory. The majority of state delegates at the 1949 diplomatic conference openly discussed concerns about the abuse of power by occupiers, which led them to engage in acts that were prohibited under other international laws that had been codified since the Hague conference. The emergence of the prohibition on conquest and the principle of equal sovereignty, which were consolidated during the decolonisation era in the 1960’s and 1970’s, prompted the drafters of the 1949 Geneva Conventions to strengthen the protection afforded in time of belligerent occupation to the rights of the ousted sovereign and the legal and institutional structures of the occupied territory.

While much of the normative content of the international law prohibition on conquest and colonialism as well as the law on self-determination was consolidated after the effective codification of the law of belligerent occupation, the latter was arguably an important occasion for their institutionalisation and operationalisation in the specific situations. The provisions in Articles 7, 8 and 47 of the 1949 Fourth Geneva Convention effectively aligned the provisions of the special legal regime with the international law prohibitions on the territorial acquisition and regime change. In order to secure its ability to regain effective control over the territory at the end of belligerent occupation, the legitimate government of the occupied territory was precluded from waiving its rights or conceding to any changes to the status or government in the occupied territory. In turn, an occupier was prohibited from undertaking measures that may affect the status of the territory and the rights of its local population in a manner that would prevent the reversion of control to the legitimate sovereign.

Despite the efforts to account for the complexity of the reality of prolonged belligerent occupations and foreign territorial administrations, it was not until the proceedings of the diplomatic conference on the 1977 Protocols that the majority of delagates emphasized “the need for ensuring the unity of international law and refused to accept or to maintain a humanitarian law which did not take into account existing general international law.” As a result, during the conference “reference was made to the Charter of the United Nations, the International Covenants on Human Rights, and to resolutions of the United Nations General Assembly, especially to Resolutions 1514 (XV), 2625 (XXV), and 3103 (XXVIII).” The influence of general international law on the evolution of the law of belligerent occupation, and the importance of aligning the rules regulating occupying powers with certain international law rules was critical to enabling their proper function in the broader context of the international legal order.

This cursory deontological survey has demonstrated the manner in which the formulation of a special legal regime for belligerent occupation became a stepping-stone in the harmonisation of “normatively

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203 Karma Nabulsi (2005) 158-174. See, on the emergence and content of these principles, Chapters IV and V.
206 Ibid.
incongruent” state practices, which had been based on the “tacit dichotomy between the legal regime of occupation applied among ‘civilised nations and the system of colonialism imposed upon ‘uncivilised’ nations.”207 It has also distilled a value system that embodies the national interests presented by delegates through the various diplomatic conferences, which is in itself an important body of fact for the elucidation of the normative underpinnings and cardinal rules of the law of belligerent occupation, discussed in the following chapter. While some of the rules that crystallised during the second half of the 20th century were arguably initially envisaged by the provisions of Geneva law, and some even by Hague law, others have since become crucial peripheral normative forces in the application of the lex specialis of belligerent occupation. The cross-references by provisions of the special regime to other rules of general international law, discussed in subsequent chapters, guide the need to engage in an analysis of the interactions between the law of belligerent occupation and other regimes, norms and doctrines of international law and their contribution to the proper regulation and coherent enforcement of correlative international laws.

The previous chapter discussed the positions states took at diplomatic conferences on the function of the law of belligerent occupation and the purpose of its specific rules. The interests represented in these deliberations are critical to understanding the function entrusted to this special legal regime and its rules -- accepted even by powerful, occupying states -- concerning the scope of authority and duties of armies when they invade, occupy and administer foreign territory.

The normative foundation that underlies this regulatory framework provides a basis to operationalize the rules enshrined in the *lex specialis* of belligerent occupation: i.e. to compel occupying states to abide by these provisions in safeguarding their own national interests, and to bolster their compelling legal force in bringing state conduct into conformity with norms that reflect state public policy commitments. Subsequent chapters elaborate the interactions between the core rules and presumptions of the law of belligerent occupation law and other legal regimes and doctrines of international law.

In light of the deliberations during the codification of the law of occupation, this chapter examines the emergence of the law’s cardinal rules, and the peripheral normative forces that were instrumental and causal to its codification – namely, other state initiatives intended to place limits on the conduct of war. The cardinal rules provide the normative underpinnings for the contemporary law of belligerent occupation, its purpose and function as a principal mechanism for the regulation of international relations. The correlative concepts of sovereignty and national self-determination, which emerged at the turn of the 19th century, are important to the interpretation and application of occupation law’s protection of the sovereign rights of the local population. This chapter addresses, in particular: (i) the effects of the temporal and exceptional status accorded to a situation of belligerent occupation; (ii) the function of the concept of trusteeship, considered through the binary of the legal
purposes of belligerent occupation and the rights guaranteed to the local population; and (iii) the significance of the ‘conservationist’ principle, as a fundamental premise for the specific rules and prescriptive duties enshrined in the law of belligerent occupation.

Ultimately, the chapter seeks to shed light on the function of the special legal regime for belligerent occupation, as regards the eradication of the right of conquest and the institutionalization of the prohibition of colonialism in all its forms. The de jure status of belligerent occupation was intended to conserve the territorial integrity of weaker occupied states and safeguard them against the predatory practices of powerful occupying states. In view of the historical context of the law of occupation’s emergence, and its coherence and normative interaction with other international norms and doctrines, the law is not only a set of specific rules that govern the conduct of an invading army vis-à-vis the foreign territory, but also has a normative dimension as a result of its special status in international law, distinct from other territorial regimes and foreign administrations.

1. The Normative Core: Sovereignty and National Self-Determination

The normative core of the contemporary law of belligerent occupation can be traced to the elaboration of the notions of sovereignty and self-determination of peoples. These safeguards against predatory state practices, including territorial acquisition and regime change through the use of force, were consolidated after the second half of the 19th century. They led to the re-understanding of the protection afforded by sovereign rights, and the duties incumbent upon states to ensure respect for sovereignty and the national self-determination of peoples, as essential parameters for international affairs.

1.1 Sovereign Rights and Guarantees

The contemporary international law of belligerent occupation was significantly influenced by the evolution of the concept of sovereignty, particularly the inalienability of sovereignty through military force. These developments, driven by the growing importance of law in international society, are precursors of the key provisions in Geneva Law that
substantiate the conservationist principle, intended to protect the government and institutions of the occupied territory and impose stringent limitations on the occupier’s powers and the extent of the changes it is authorised to undertake. The process, rationale and causal link of the adoption of these key provisions is no less important to understanding their function and role in the international legal system.

Until the mid-19th century, the prevailing view among European powers was that sovereignty, as a “gift of civilization,” did not extend beyond the sphere of “civilized”, primarily Christian, nations. The concept of “occupation of terra nullius” effectively served as the basis for acquiring sovereignty over the non-Christian world. It was commonly held that, “by the laws and usages of nations, conquest is a valid title, and the victor maintains the exclusive possession of the conquered country.” The patrimonial wars, which took place throughout the 19th century, focused on the annexation of land and natural resources: contemporary interpretations of Roman law, for instance, allowed for the acquisition of territory through occupation, by transposing Grotius’ private law concept of possession assurée into international law. The occupier could gain sovereign title over territory by undertaking its annexation or incorporation, which was deemed a rightful manifestation of an intention to retain the territory as its own. The transfer of sovereignty, in these instances, did not require the conclusion or entry into force of a treaty: it manifested itself at the moment when the annexing power effectively exercised sovereign authority over the territory.

The development of the concept of sovereignty in international law changed the understanding of its operation. Two further, linked developments were also critical: respect for the sovereign equality of all nations, and protection for civilian populations in time of armed conflict. These concepts were coupled with a growing recognition of the legal

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208 See, on Pasquale Fiore’s approach to international law, Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge, 2001) 54–57. See also, on the deliberations of the 1949 Fourth Geneva Convention, Section 4, Chapter II.
equality of all objectives for the waging of war, which meant that discrimination in favour of one cause over another was contrary to the concept of sovereignty. 217 The increasing popularity of this theory of sovereignty necessitated a more stringent approach to the delimitation of an occupier’s authority. 218

Grotius promoted the norm that occupation could not earn title – an understanding that crystallised at the turn of the 19th century, and was ultimately responsible for the emergence of the rule on non-annexation. 219 That rule derived from the maxim *occupatio non mutat dominium*, which in turn originated in the maxim *pirate non mutat dominium*, concerning the challenge to formal possession of property in a seized piratical vessel. 220 Vattel was amongst the first scholars to argue that sovereignty over territory acquired through war did not become final without the execution of a peace treaty; hence, a conquering power should not exercise dominion until it formalises its rights. 221 State practice of European countries demonstrated that peace agreements usually assigned sovereignty to occupiers over territory they gained during war, permitting victors to effectively acquire “definitive possession.” 222

In the aftermath of World War II, as Dinstein remarks, a “myriad of aspects of the policy and practice of the occupying power were put to the test and were found wanting.” 223 It was too often the case that the “reluctance by States to admit that they were occupying powers” resulted in their adoption of the position “that a coercive imposition of effective control on a cross-border territory falls short of belligerent occupation.” 224

The continued application of the law of occupation, even following the surrender and disappearance of the local government in the occupied territory, was deemed necessary to regulate relations between the occupier and the population in the occupied territory.

Benvenisti notes that “occupation indirectly defined sovereignty just as tort law defined the common law private right to property by

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222 Ibid, 632.
224 Ibid, 10.
avoiding issues of action for its violations.” An effective end to the blurring of the distinction between occupation and annexation, and to attempts to eschew the law of occupation through the doctrine of debellatio, ultimately occurred only with the entry into force of the UN Charter in 1945, which affirmed the equal sovereignty of all states, the prohibition on territorial acquisition through force, and the right of peoples to self-determination.

1.2 National Self-Determination and Protection of Civilians

The increasing power of theories linking national sovereignty to the self-determination of peoples potentiated the need to ensure stability and certainty in inter-state relations, also drove the consolidation of the principle of sovereignty and the prohibition on its acquisition by force. The process by which binding legal norms were formulated to effectively preempt and regulate abusive practices by occupying states, was linked to the emergence of the concept of national self-determination and its effect on the conduct of international affairs in the early stages of decolonisation.

During the national wars at the turn of the 19th century, a series of socio-economic developments hastened a shift in common perceptions of the modern state’s function as being political and territorial equalisation – states had equal rights under international law, including to their own territory – and led to the consecration of the uniqueness of peoples through the advancement of the nation state and the principle of nationality. These developments in legal doctrine were propelled by the French Revolution, the scourges of the Napoleonic Wars and the deliberations that took place at the Congress of Vienna. In 1791, the First French Constitution enshrined the concept of national self-determination in terms of the “indivisibility” of the “kingdom”, or nation, and the “liberty of all people” therein. Following the Napoleonic wars, a number of European countries sought to secure, as a common interest, the prohibition of annexation. In the aftermath of the Franco-Prussian War and the German attempt to annex Alsace, states increasingly realised that the uncontested legitimacy of acts of conquest

226 Articles 1(2) and 55, UN Charter. See also, on the interaction between the law on the interstate use of force and the lex specialis of belligerent occupation, Chapter V.
230 See also, Proceedings of the Congress at Vienna (Hansard, 22 May 1815).
was bound to increase the incentive to initiate wars.\textsuperscript{231} Still, although scholars such as Heffter maintained that “[f]rom a legal perspective, the defeat of the enemy does not immediately bring about the complete subjugation of the enemy’s state authority,”\textsuperscript{232} until the mid-19th century, most scholars did not believe that the occupier was obliged “to respect the bases of power of the ousted government under the principle of minimum harm,” and “did not subscribe to the French understanding of the consequences of the principle of national self-determination, that treaties of cession are not a legitimate way of ending wars.”\textsuperscript{233}

Concurrently, however, a concerted humanitarian project sought to consolidate international humanitarian law in order to alleviate the suffering of individuals, regardless of the underlying causes of war.\textsuperscript{234} Benvenisti recalls that “the actions of private entrepreneurs that stirred public outcry against the scourges of war”\textsuperscript{235} contributed to the push for the elaboration of the concepts of human rights and self-determination. Even in time of war, “a just prince, while laying hands, in the enemy’s country, on all that belongs to the public, respects the lives and goods of individuals: he respects rights on which his own are founded.”\textsuperscript{236}

International law’s definition of occupation as a form of governance distinct from conquest was seen as a counterforce against practices of conquest and colonialism, including political subjugation: “the emerging European order of nation-states and the notion of national sovereignty necessitated a new theory that would delineate and provide the rationale for more stringent limits on the occupant’s powers.”\textsuperscript{237} Since belligerent occupation was intended to be a temporary factual condition brought about by an international armed conflict,\textsuperscript{238} which is terminated following the exhaustion of military necessity by the effective handover of authority to the ousted sovereign, it followed that most attempts of territorial cession to the aggressor, including by peace treaty, should be deemed illegal.\textsuperscript{239} In the 20th Century, the need to prohibit acts that would infringe upon the

\begin{itemize}
\item \textsuperscript{231} Andrien de Montluc, ‘Le droit de conquete’, 5 Revue de Droit International et de Legislation Compare 581 (1873). See also, Eyal Benvenisti (2012) 38.
\item \textsuperscript{232} August Wilhelm Heffter, Das Europa\~nische Volkerrecht (Schroder, 1861) 220–21; cited in Benvenisti (2008) 630.
\item \textsuperscript{233} Eyal Benvenisti (2008) 631.
\item \textsuperscript{234} Robert Kolb, Sylvian Vite (2009) 25-27.
\item \textsuperscript{235} Eyal Benvenisti (2008) 634.
\item \textsuperscript{237} Eyal Benvenisti (2008) 628.
\item \textsuperscript{238} Article 2, 1949 Fourth Geneva Convention: the Convention applies 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.”
\item \textsuperscript{239} Yoram Dinstein (2009) 50-52.
\end{itemize}
people’s right to self-determination, found further support in the experience of the Allied occupations of World War II, which, Arai-Takahashi comments, “furnished experimental grounds for competing economic and political ideologies” predicated on the Instrument of Surrender.\textsuperscript{240} The consolidation of international norms on self-determination and human rights further shaped the law of belligerent occupation “by modifying the restrictions on the occupant’s exercise of authority.”\textsuperscript{241}

Ultimately, the contemporary law of belligerent occupation came to impose two obligations on an invading army that seizes control of foreign territory: “the obligation to protect the life and property of the inhabitants and the obligation to respect the sovereign rights of the ousted government”, effectively endorsing “the concept of sovereignty as a nation’s claim for exclusive control over its territory and nationals.”\textsuperscript{242}

2. The Underlying Premises of the Law of Belligerent Occupation

The preponderance of evidence concerning the object and purpose of the law of belligerent occupation, including its consecration of the concepts of sovereign equality and self-determination, shows that the specific cardinal rules of the contemporary law of belligerent occupation, enshrined in Hague and Geneva law, function as part of an overall mechanism intended to safeguard against predatory state practices. This section, accordingly, analyses three of occupation law’s foundational principles: belligerent occupation is temporary and exceptional; it is distinct from the concept of trusteeship; and the occupier must respect the limits set by the conservationist principle. These principles provide operational guidelines for ensuring that the \textit{lex specialis} rules are correctly interpreted in accordance with the purpose of the law: they prescribe the manner in which an occupying state may lawfully administer the occupied territory and the extent to which its derogation from specific \textit{lex specialis} rules may affect its ability to abide by the law.

\textsuperscript{241} Eyal Benvenisti (2008) 623.
\textsuperscript{242} \textit{Ibid}, 622.
2.1 A Temporary State of Exception

The law of belligerent occupation defines occupation as a *de jure* factual condition, without a normative dimension. The belligerent premise of the occupier’s presence in the occupied territory assumes the former’s legitimate and imperative military needs, as opposed to the ousted sovereign’s genuine and effective consent. For Birkhimer, the local population becomes “subject to the laws of the conqueror, and are not for the time being subject to the laws of the displaced state or its mandates,” but as Colby remarks, any putative allegiance between the local population and the foreign occupier is prescribed “by compulsion and not by choice.” However, the application of the law of occupation is not dispositive as to the legal status of the territorial regime installed in foreign territory. In fact, insofar as occupation is a means of warfare intended to subdue the military offensive of a belligerent by placing its territory under the effective control of an enemy power, the criterion of temporariness is essential to the validity of such conditions and their *de jure* status, as subsequent chapters discuss. This underlying premise of occupation law can be explained by considering three specific subsets of rules enshrined in Hague and Geneva law.

First, as an essential function of the law of occupation is to limit the occupier’s authority as *de facto*, temporary administrator of foreign territory, the language and logic of Article 43 of the 1907 Hague Regulations permits the occupier only “to restore, and ensure, as far as possible, public order and safety.” The prescriptive provisions concerning the occupier’s administrative powers make clear that the occupier has no right to assume all functions of government in the territory, nor carte blanche to change the system of government. The intention is not only to prescribe a negative obligation not to impinge upon “normal life” in anticipation of the sovereign’s return, but also to preempt, to the extent possible, the emergence of conflicts of interest between the foreign administrator and the population of a hostile party. For instance, given the likelihood that sweeping institutional reforms may lead to rebellion by the

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244 Eldrige Colby (1926) 149.


local population, the possibility of renewal of hostile relations should be considered “too high a price for the benefit of possible humanitarian adjustments.” During the Allied administration of Germany post-1945 under the Bonn Administration, German jurists maintained that despite Germany’s post-surrender status and the end of belligerent occupation, the law of occupation continued to protect the local population from broad legislative and structural changes, especially those geared towards the suppression of nationalist sentiment, which would amount to illegal interference in German internal affairs.

Secondly, at the time that the contemporary law of belligerent occupation emerged, within the framework of the laws of war, in the late 19th century, its provisions were clearly intended to safeguard against the economic exploitation or political subjugation of the occupied territory and its population. A predominant theme of the 1899 Peace Conference and the resultant 1899 Hague Convention, which led to the formulation of the 1907 Regulations, was the provisional and exceptional character of a condition of belligerent occupation. The ousted power’s authority was placed in a state of abeyance, but it was to retain sovereignty, while the occupier’s activities were subject to strict red lines intended to conserve sovereign rights, including the people’s right to self-determination. The occupier’s limited mandate authorized it to provide for a minimum core of rights that would “allow for the survival of the population of an occupied land under the extreme circumstances of military occupation.” The occupier should structure the activities it undertakes to fulfill its obligation to provide minimum protection for the civilian population, so as to ensure the ability of the local authorities to maintain the function of government institutions. The presumption that belligerent occupation is an extraordinary measure that can be justified only by its temporariness is reaffirmed by recent critiques, discussed in Chapter VI, of the inherent contradictions of so-called “humanitarian” occupations: while the law of occupation is fixated on preserving the status quo ante bellum, “humanitarian” occupation sets out

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250 Gerhard von Glahn (1957) 283.
254 Ibid, 232.
to “remake institutions along liberal democratic lines” by “agents of political and social change.”

A third premise that governs the operation of the lex specialis of belligerent occupation forecloses the occupier from effectuating any change in the status of the occupied territory. The occupied state’s sovereign existence continues even while actual control over the exercise of its sovereign powers is subject, temporarily and to a limited extent, to the authority of the occupying forces. Article 42 of the 1907 Hague Regulations requires that for occupation to be established the government functions of the legitimate sovereign come under the authority of the occupier. This provision assumes that the occupier’s degree of control and regulation of internal affairs in the occupied territory should allow it, at the minimum, to make its authority felt: whether to guarantee the security of its forces in a reasonable and proportionate manner, or to comply with its legal obligations towards the occupied territory and its population, e.g. under Article 43 of the 1907 Hague Regulations.

It is generally acknowledged that a state of occupation can persist despite the occupier having only remote, potential control over the territory; “as long as the latter has the ability to make his will felt everywhere in the territory within a reasonable time, military occupation exists in a legal point of view.” During the negotiations of the Hague Regulations in 1899 and 1907, the understanding was that although authority should be exercised directly and have a visible command structure, occupation could continue

257 Lauterpacht and most other publicists rejected the notion that the state of Germany ceased to exist during occupation, and maintained that Germany’s international legal personality as an independent, sovereign state had been placed in a state of suspension, until its functioning governmental organs were re-established. Gerhard von Glahn (1957) 284-285, 281. Cf. Hans Kelsen, ‘The International Legal Status of Germany to be Established Immediately Upon the Termination of the War’, American Journal of International Law, Vol 38 (1944) 692; Hans Kelsen, ‘The Status of Germany according to the Declaration of Berlin’, American Journal of International Law, Vol 39 (1944) 518-526.
259 The principles of necessity and proportionality also apply to an occupier’s actions through jus in bello; Judith Gardam, Necessity, Proportionality and the Use of Force by States (Cambridge, 2004) 1-19.
without such concrete manifestations of authority.\textsuperscript{261} Articles 47 and 6(3) of the 1949 Fourth Geneva Convention confirm that an occupation may gradually change its appearance, e.g. through the establishment of local government, but that it does not end without an effective withdrawal.\textsuperscript{262} However, situations of long-arm or remote control are likely to manifest in unaccountable abuses by the occupier under the guise of the local authorities, which also entrench and prolong the occupier’s control, by entailing long-term revisions to the sovereign status of the territory.

Cumulatively, these underlying premises – namely, the occupier’s limited authority vis-à-vis political and civil life, the obligation to provide for a minimum core of rights of the civilian population, and the non-acquisition or revision of the territory’s sovereign status – underpin the condition of occupation as a temporary ‘state of exception’. As aptly summarised by Sutherland, the occupier’s authority derives “from the necessity of the case”:

in order that anarchy may be prevented, lawlessness restrained, private property protected, and the lives and liberties of the inhabitants safeguarded, the military commander of the successful armies must have power to maintain temporarily such government as the exigencies of the situation may require.\textsuperscript{263}

Lest the law of belligerent occupation loses its raison d’être, the need to ensure the firm\textsuperscript{264} and rigorous application of its narrowly-defined, prescriptive provisions is critical to guarantee the temporariness of the exceptional status quo created by the presence of a foreign territorial administration.

\textsuperscript{263} George Sutherland, \textit{Constitutional Power and World Affairs} (Columbia, 1919) 79. See also, Eldrige Colby (1926) 146.
\textsuperscript{264} Eldrige Colby (1926) 147.
2.2 Trust Matters and Belligerent Foreign Administrators

Whether or not an occupying power overtly undertakes to exploit or subjugate the occupied territory and its population, the very condition of belligerent occupation results in the latter’s foreign domination through at least the partial suspension of “normal life” and the function of government authority. As a legal framework that seeks to manage the tensions arising from such conditions, the law of occupation undertakes to restrain the scope of the occupier’s administrative authority, under the presumption that a hostile foreign power cannot be fully entrusted with the wellbeing of the population of an enemy belligerent party. It follows that a presumption is in order against the good faith of the occupier’s activities in the occupied territory, in terms of their effects on the wellbeing of the local population. For Gerson, the restrictive character of certain provision of the law of belligerent occupation is given “not because certain activities could not be honestly done, but because of the extreme difficulty of proving them to have been dishonest.”265 Judicial dictum affirms: “an enemy conqueror is not a very likely person [sic] in whom to repose the trust of administering the occupied territories.”266 The law of belligerent occupation intended to preclude an occupier from pursuing anything but its imperative military needs267 – an operational premise that is essential to the prospects for peaceful reconciliation between the belligerents.268

2.2.1 Remits of the Occupier’s Authority

The law’s conception of the occupier’s status in the occupied territory is clear from the limits it assigns to the scope of the occupier’s legislative and administrative authority in its role as a de facto, temporary administrator. Although the displaced sovereign retains de jure sovereign title to the territory, it remains subject to the whims of the occupier, which could choose to suspend any political process or annul any decisions adopted by the legitimate sovereign.269 The task of the law of belligerent occupation is to balance the prohibition against an occupier from acting illegally in furtherance of its own interests, against the occupier’s obligations toward the occupied population – including to prevent economic collapse, ensure

265 Allen Gerson (1977) 538.
267 Ibid, 530.
268 Ibid, 527.
269 Christopher Greenwood, Administration of Occupied Territory in International Law, in Christopher Greenwood (ed.), Essays on War in International Law (Cameron May, 2006).
good economic governance, provide for a minimum humanitarian standard of living, as well as maintain and ensure “civil life”\textsuperscript{270} and public order.\textsuperscript{271}

In practice, however, the ability of the law to affect the activities of military governments is wanting. Wilson, who spent over six years creating and operating the British civil administration of Iraq between 1914 and 1918, maintained that the 1907 Hague Regulations had no practical value.\textsuperscript{272} Almost all occupiers have promoted their own national interests and extended their control over the daily life of the local population. State practice demonstrated that belligerent occupation, with or without hostilities, has always exacted a heavy price on the local population and, \textit{a fortiori}, the ousted legitimate government.\textsuperscript{273} Many occupiers have formally refused to acknowledge their status as an occupying power, and rejected the application of the law of belligerent occupation \textit{en bloc} – indicating unwillingness to respect the principles of temporariness and conservationism as well as an intention to further sovereign claims over the territory. Occupiers have also indicated their intentions by refusing to recognize the sovereign status of another power over the occupied territory, or, irrespective of such recognition, by adopting practices or policies seeking either the acquisition of occupied territory or the political subjugation of its governmental institutions.

Occupiers that have usurped power from the local authorities by expanding their control of daily life,\textsuperscript{274} have sought to avoid responsibility for doing so by citing exceptions in belligerent occupation law, such as military necessity or the benefit of the local population,\textsuperscript{275} or sought to invoke a different legal basis for their actions\textsuperscript{276} by undertaking to establish of a new \textit{de facto} local government.\textsuperscript{277} The latter maneuver has facilitated occupiers’ ability to act outside the limits of the law of occupation, albeit in a manner that often preempts direct conflict with the local population.\textsuperscript{278} An occupier that establishes a “collaborator government” effectively seeks to absolve itself of its duties and obligations under the law of belligerent occupation, while maintaining control under the guise of the pseudo-

\textsuperscript{270} The authoritative French version of the 1907 Hague Regulations uses the term ‘public order and civil life’, as opposed to the ‘public order and safety’.

\textsuperscript{271} Gerhard von Glahn (1957) 180-183.


\textsuperscript{273} See generally, David E Edelstein (2008).

\textsuperscript{274} Odile Debbasch (1962) 11.

\textsuperscript{275} \textit{Ibid}, 193.

\textsuperscript{276} \textit{Ibid}, 193.

\textsuperscript{277} \textit{Ibid}, 195.

\textsuperscript{278} \textit{Ibid}, 195, 211.
autonomous administration. Scholars such as Debbasch maintain that to deter sweeping institutional revisions, the occupying power should be held to account for the acts of local governmental institutions it set up, which should be considered part of its own structures and organs. There are pragmatic reasons to support de facto recognition by occupation law of the occupier’s ultimate authority over all functions of government: after all, “even a government by hostile soldiers is better than no government at all.” Wilson emphasized the importance of “elasticity in administrative arrangements,” and of ensuring that those entrusted with such tasks are fluent in the local language, familiar with the local commercial, judicial, and administrative law systems. Nonetheless, as Wilson noted, the de facto authority in the occupied territory “must not attempt to do for the system what the brain does for the body, namely, direct and co-ordinate all functions,” but should rather “inspire independent brain centres at all important points.” Importantly, as Wilson aptly notes, the administration of occupied territory is a “wasteful machine,” since upon termination of occupation the ousted sovereign is free to decide whether to be bound by the occupier’s measures. Occupation law sharply distinguishes military rule intended to obtain a military advantage over the enemy, from a regime intended to develop and exploit natural resources, control government institutions, and further economic interests.

2.2.2 A Duty of Obedience?

It is sometimes argued that the local population has a duty of obedience to the occupying power. The allegiance of the local population to the legitimate sovereign is said to be in abeyance during occupation, and the duty to obey the occupier is said to derive indirectly from the occupier’s

280 See, e.g., the Greek Supreme Court recognised the administrative and legal acts of the Tsolacoglou government established by the German powers in occupied Greece; Ibid, 198-199.
281 Elbridge Colby (1926) 161.
284 Ibid, 21.
286 Ibid, 162.
authority to demand and enforce compliance with its orders and to maintain normal life in the occupied territory.

Gerhard von Glahn opined that the obedience of the inhabitants should be “at the most equal to that given by them before the occupation to the order and authority of their own government, and at the least to the obedience an occupant could enforce through his military supremacy.” ⁵²⁻⁸ Von Glahn warned, however, that “if the occupant promoted his own aims, then the native inhabitants might disregard his orders insofar as they could reasonably do so.” ⁵²⁻⁸ Such delimitations suggest the importance of maintaining a balance between the role of local officials and the military commander by issuing “rules having the force of law, upon matters falling within [the military commander’s] competence.” ⁵²⁻⁹ Some commentators, going much further, even declared that members of the local population could be subject to prosecution for treason by the ousted sovereign upon termination of the occupation, if they do more than “merely submit to superior and more immediate power.” ⁵²⁻⁰

Scholars considered the threat of rebellion against the occupier’s administration by the local population insufficient as a justification for the establishment of a “puppet” government, due to its disproportionate effect in severing ties between the local population and its legitimate ousted sovereign. ⁵⁻¹ Only a few publicists supported an approach based on the *inter arma silent leges* maxim, according to which “interest and fear must silence patriotism and the sense of right in the hostile population.” ⁵⁻² Others have, by contrast, noted an implicit recognition of the operation of armed bands of the ousted sovereign operating in occupied territory. ⁵⁻³

Contemporary occupation law partly resolves the inconsistent practice concerning a duty of obedience of the local population: Article 45 of the 1907 Hague Regulations provides that an occupier “is forbidden to compel the inhabitants of occupied territory to swear allegiance to the Hostile Power.” ⁵⁻⁴ The inhabitants owe no such allegiance, as they are “in effect only under the temporary control of the latter’s military authorities in charge of the occupation.” ⁵⁻⁵

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²⁸⁷ Gerhard von Glahn (1957) 46.
²⁸⁸ Ibid, 50-51.
²⁸⁹ Ibid.
²⁹¹ Allen Gerson (1977) 538.
²⁹² Munroe Smith, *Militarism and Statecraft* (Putnams, 1918) 176-177.
²⁹³ Gerhard von Glahn (1957) 50-51.
²⁹⁴ Ibid.
²⁹⁵ Ibid.
the occupier’s administration from the provisions of the law of belligerent occupation\(^\text{296}\) can plausibly be interpreted as intended to safeguard against encroachment by the occupier on the political and civic “morale of the local population.”\(^\text{297}\)

Contemporary law does not, in short, explicitly require the inhabitants of occupied territory to abide by the administration of an occupier, especially if the latter exceeds the legal limits ascribed under the law of belligerent occupation. It has been argued that a corollary to the absence of a duty of obedience is the local inhabitants’ right to rise in arms against the occupier.\(^\text{298}\) The inclusion of situations of armed conflict in which “peoples are fighting against colonial domination and alien occupation” in the scope of application of the 1977 Additional Protocols I to the Geneva Conventions is arguably further confirmation of this being the case.\(^\text{299}\)

### 2.2.3 A Valediction to Trusteeship

During the occupation of Mesopotamia in 1914, the British Forces created a “sacred trust” intended “to be administered as such, on behalf of the legitimate Sovereign or of his successors in title duly recognised by International Law,” which led to the installation of King Faisal on the throne of Iraq.\(^\text{300}\) Since then, the concept of trusteeship has been applied primarily to cases of international territorial administration – most commonly exercised by a coalition of states with the mandate of an international organization, and often with at least the implicit consent of part of the local population.\(^\text{301}\) According to Wilde, the objects of trusteeship are “first, to care for the ward; and second, to exercise tutelage

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\(^{299}\) Article 1(4), 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.

\(^{300}\) Arnold Wilson (1932) 29.

\(^{301}\) Odile Debasch (1962) 91-92.
of the ward to ensure that it can mature and eventually care for itself."  

The legal concept of trust is not strictly applicable to an occupying power’s relation to the occupied territory and its population, yet the notion of the trustee-occupier retains some currency, because it is seen to support the project of humanising the conduct of belligerent occupation – particularly so, when occupation may occur outside or continue beyond a situation of active hostilities.  

Yet it is inappropriate to consider the occupier as a “trustee” of the territory. The suspension of the ousted sovereign’s authority and its replacement by a limited mandate for an invading army may be expected to result in an administrative vacuum, in terms of the allocation and fulfillment of duties for the maintenance of public order and civil life. Theoretically, the occupier is called upon to act in the interests of the local population, and, albeit indirectly, also those of the ousted sovereign. In practice, however, the occupier’s status in the occupied territory disturbs daily life and suspends the ability of the legitimate government to conduct the territory’s internal and external affairs. Vattel’s comparison of the legal status of members of the local population of the occupied territory who have “submitted to the enemy and have sworn or promised allegiance to him” vis-à-vis the foreign power, to the situation of “prisoners of war who have given their parole” is instructive.  

If the condition of belligerent occupation is considered under the framework of the classical international law notion of trusteeship, an occupier is presumed to have consummate powers to ensure the wellbeing of the population. Yet such a conception of the condition of belligerent occupation opens the door for the occupier’s potential arbitrary use and abuse of power, which the law of occupation otherwise restricts it to wield only in as far as is imperatively required to achieve its military objectives.  

Like Wilde, who conceives of a situation of belligerent occupation as a form of trusteeship, Benvenisti maintains that “the occupant administers the territory on behalf of the sovereign” under a status

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“conceived to be that of a trustee.” Yet these scholars’ arguments are arguably based primarily on the status of the occupier as a “temporary right of administration” operating to positively ensure and maintain the welfare state elements of public order and civil life “until the occupation ceases.” In other words, the objective promoted by using the term trust or trusteeship is that of progressively obliging the occupier to act on behalf of and for the benefit of the rights and interests of the local population and ousted sovereign. Despite apparent similarities, a critical distinction must be maintained between an internationally-authorised territorial administration premised on trust and mutual cooperation, and situations of belligerent occupation based on coercion through the use of military force.

Given that the provisions concerning the inviolability of protected persons’ rights were intended to protect the civilian population from coercion and abuse by the occupier, occupying states are generally precluded, legally and arguably politically, from adopting any measures – except as narrowly and strictly required to ensure respect for the Geneva Conventions – based on a claim that they are for the benefit of the local population. The inherent conflict of interests between the occupier and the local population suggests that a less active administration of an occupying power is more likely to safeguard these guarantees: the narrower the occupier’s scope of activity, the less likely it is to try to justify sweeping measures that infringe upon the sovereign rights of the ousted authority under a claimed benefit for the local population. The concept of trusteeship is fundamentally incongruous with the underlying rationale for belligerent occupation, and the limited legal mandate given to occupying powers.

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306 Eyal Benvenisti (2012), 5–6. See also, Eyal Benvenisti, ‘Sovereigns as Trustees of Humanity’, Tel Aviv University Law Faculty Papers, No 139 (2012).
307 Gerhard von Glahn (1957) 668.
309 See, on the interaction between the law on territoriality and the law of belligerent occupation, Chapter IV.
311 See, e.g., the practices undertaken by Morocco, Israel, Russia and Armenia, inter alia, discussed in Chapters III and IV.
2.3 The Conservationist Principle: Protective Purpose, Prescriptive Function

A key premise of the law of belligerent occupation and many of its specific provisions is that an occupier is foreclosed from acquiring any sovereign rights over the territory, including by exercising authority indirectly through a local government subject to its ultimate control. The occupier is charged with maintaining the public order and civil life, but may do so only insofar as its activities are necessary to maintain its control over the territory in pursuit of legitimate military aims; its administrative authority is minimal and subject to the cardinal rule known as the “conservationist” principle.

2.3.1 The Remits of the Conservationist Principle

The Italian jurist Pasquale Fiore was one of the first to refer to conservationism, based on the “law of postliminium, which, according to our doctrine, is founded on the principle that the fact of war is not sufficient to destroy legitimate rights and that these rights may not be lost without the consent of the individuals to whom they belong, applies to private relations as well as to public relations.” According to the law of postliminium, Vattel states, if the sovereign reconquers territory formerly occupied by an enemy, it recovers all its rights and is, indeed, “bound to reestablish them in their pristine condition.” It is closely aligned with the underpinnings of the conservationist principle, which, for Stone, was intended to regulate the “contrast between the fullness and permanence of the sovereign power and the temporary and precarious position of the Occupant.” Hence, the position that it was a duty, and not a right, of the occupier to act as de facto administrator of the occupied territory was widely upheld.

The conservationist principle acts as a preservative: the condition of belligerent occupation is not permitted to lawfully bring about any

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315 Julius Stone, Legal Controls of International Conflict (Stevens & Sons, 1954) 694.
316 Odile Debbasch (1962) 345.
alterations to the legal status of a territory, nor the territorial and administrative rights of its ousted sovereign.\(^{317}\) An explicit codification of the law’s operative provision in Article 43 of the 1907 Hague Regulations that enshrines the factuality, conservation through restoration, and prescription through respect of the local laws in force:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

This “mini-constitution,” as it was dubbed by Benvenisti, implies that peaceful coexistence between occupied and occupier can neither be assumed, nor expected; the Article is intended to warn states that becoming an occupying power is a liability they should endeavour to avoid.\(^{318}\) It aims to limit the permitted territorial, administrative, and jurisdictional scope of the occupier’s authority, and emphasises the duty to maintain and restore existing institutional structures and enforcement mechanisms, as opposed to curing their potential deficiencies. The provision implies a prohibition on the occupier’s exercise of administrative, executive or legislative jurisdiction, including the revision or enactment of laws in a manner that would give effect to permanent changes.\(^{319}\)

There are differing interpretations of the extent of the occupier’s legislative authority under Article 64 of the 1949 Fourth Geneva Convention,\(^{320}\) but when it is read in conjunction with Article 43 of the 1907 Hague Regulations,\(^{321}\) the prescriptive character of these provisions is clear. They ensure against sweeping measures by requiring that each measure have a specific basis in military necessity or in the occupier’s need to comply with obligations under the Geneva Conventions.\(^{322}\) In addition, Article 47 of the 1949 Fourth Geneva Convention establishes a *standard minimum imperat*if and precludes the conclusion of agreements that may


\(^{319}\) Odile Debbasch (1962) 341.

\(^{319}\) See generally, Marco Sassòli (2005) 661–694.

\(^{320}\) See, e.g., *Z v K* (France, Court of Appeal of Colmar) (1951) International Law Reports 608; *Quaglia v Ca’iselli*, Italian Court of Cassation (1952) International Law Reports 615; *Cobb v United States*, United States Court of Appeal, Ninth Circuit (1951) International Law Reports 555-556; *Re Condarelli*, Italy, Court of Cassation (1952) International Law Reports 609-610; *Ho Tung and C v The United States*, 42 Ct. Cls. (1928) 227-228. See also, Doris Appel Gräter (1949) 134.
diminish the protection afforded to the civilian population under international humanitarian law and the present system of governance in the territory.\textsuperscript{323} Charleville affirmed that the authority prescribed to the occupier by the law’s provisions were foreseen as applying to “orders on important matters made with a provisional character and destined to terminate, from the moment that the situation created by occupation comes to an end.”\textsuperscript{324} Hence, the general rule upholds the presumption that such measures are prohibited and should be spared to the extent possible.

The occupier’s right to revise, annul, or enact laws and administrative regulations has been contested by the ousted sovereign authorities of occupied territories. The Court of Nancy affirmed, on 24 July 1951, that all French legislation remained in force despite Germany’s annexation of territory during their occupation of Alsace and Lorraine.\textsuperscript{325} The French national committee denounced the application of German law as an act of “international brigandage” undertaken by the Vichy government.\textsuperscript{326} Similarly, the Court of Paris ruled in 1953 that the relevant law during the occupation of Poland by Germany was Polish law, despite the Germany’s purported annexation of the latter.\textsuperscript{327} The Norwegian Supreme Court upheld, on 9 August 1945, that no act of the occupier could preclude the territory from being regulated by the law of the occupied territory.\textsuperscript{328}

Given the requirement that each adopted measure last only for the duration of occupation\textsuperscript{329} and be reversible by the legitimate sovereign thereafter, any decision to maintain measures adopted by the occupier after the end of occupation required sovereign consent – for instance, the 1883 Treaty of Ancon, concluded in the aftermath of the War of the Pacific, gave validity to all acts of the Chilean occupying forces,\textsuperscript{330} and a 1908 treaty

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\textsuperscript{323} Robert Kolb (2002) 313.

\textsuperscript{324} Charleville, La Validité Juridique des Actes de l’Occupant en Pays Occupé (Pedone, 1902) 45.

\textsuperscript{325} Association nationale de la meunerie francaise c. Fritz, Nancy (1951), cited in Odile Debbasch (1962) 212.

\textsuperscript{326} Ibid.

\textsuperscript{327} Domaines de la Seine c. Dame Sorkin, Paris (1953) cited in Odile Debbasch (1962) 213.

\textsuperscript{328} Odile Debbasch (1962) 342.

\textsuperscript{329} See, e.g., Centrale Onderlinge Insurance Company v State of the Netherlands (1952) ILR 600. See also, Allen Gerson (1977) 535.

between the US and Cuba authorised the maintenance of all acts of the US occupying forces.³³¹

The conservationist principle also prohibits interference by the occupier with the function of local public institutions, unless the institution poses a direct threat to the occupier’s security, or constitutes “an obstacle to the application of the present [Geneva] Convention” within the meaning of Article 64(1).³³² The local population should be allowed to maintain its functionaries in the posts assigned to them before the occupation, to the extent that it so desires, and those functionaries in office should be permitted to maintain their loyalty to the ousted sovereign.³³³ Scholars such as Debbasch confirmed that the occupier may undertake to remove specific officials or suspend the operation of specific public bodies only when absolute necessity so requires.³³⁴ Captain Lubrano-Lavadera maintained that although the occupier had the inherent ability to control internal affairs, each of its measures must be vetted according to the need to maintain public order or provide for the security of the occupier.³³⁵ The condition of belligerent occupation should not disrupt or frustrate ongoing processes or institutional structures, including by suspending them: when such a measure is adopted under the permitted exceptions, it must ensure the possibility of returning to the status quo ante bellum.³³⁶

2.3.2 Relations with the Ousted Sovereign in Partial Occupations

All occupations entail the partial suspension of the function of the local system of government and sever some of the links between the local population and the legitimate government.³³⁷ In cases of belligerent occupation of part of the ousted sovereign’s territory, the authorities of the occupied country should be able to continue to perform the majority of the competences of the state, save for the specific domains in which they are absolutely prevented from doing so, as the Permanent Court of

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³³³ Gerhard von Glahn (1957) 132 et seq.
³³⁴ Odile Debbasch (1962) 345.
³³⁶ See generally, Christopher Greenwood (2006).
³³⁷ See, e.g., on German certificates of citizenship issued to French citizens of German origin residing in the occupied province of Lorraine, Gerhard von Glahn (1957) 56.
International Justice upheld in 1934 in the Affaire des Phares case. Cases of partial occupation place a duty of due diligence on the occupying power to ensure that its activities in the foreign territory are not only limited in scope and effect according to the exceptions set out above, but that they are required to permit the administration of the local population under the laws and institutions of the occupied country, unless military necessity dictates otherwise in specific instances.

The law of belligerent occupation assumes that a belligerent party that obtains an initial advantage over defending forces will maintain its control in the invaded country only temporarily – and that one of the means to bring occupation to an end is for defending military forces to drive the occupier out. In practice, however, invading states have invoked political agreements and diplomatic arrangements with the authorities of the invaded country or, more often, with local residents in the occupied part of the country, to justify their presence or their ultimate control over certain domains of the territory’s internal and external affairs. Such arrangements are highly problematic, as discussed in Chapter VI: while the legitimate authorities of the occupied country are either coerced to agree or forcefully excluded from the territory, the occupying state uses the arrangements to claim that its activities fall outside the framework of the law of belligerent occupation, and thus to bring about permanent regime change.

Even early conceptions of belligerent occupation recognised that despite an invading army declaring itself the administrator of the territory, the de jure authorities of the legitimate sovereign retain all core functions of government. When France entered the Ruhr region in 1945, the US noted “the relinquishment of power to the occupant and the act of depriving the local sovereign of power result directly from obtaining actual control,” and maintained that nonetheless, “[s]overeignty over foreign territory is not transferred by such occupation.” The “relinquishment” did not imply

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339 See, on the shared responsibility of the occupying power and occupied state under human rights law, Chapter VII.
341 The War Council of Brabant correctly upheld the validity of a legal decree published in Belgium stating that the occupying power cannot annul the sovereignty of a country in its occupied parts; Court of Appeal of Brussels, De Brabant and Gosselin v. T.& A. Florent, 22 July 1920 (1919–1922) 1 AD 463, No. 328.
343 Law of Belligerent Occupation, Judge Advocate General’s School, Ann Arbor, Michigan, JAGS Text No 11, 19.
actual delegation – even though the US made its position clear, that France should “able to exercise, without objection from foreign states, the fullest administrative powers,” and as such, restore normal life by “fix[ing] the conditions under which foreign trade may be conducted.”

The conservationist principle underscores the temporary character of a condition of belligerent occupation, during which the hostile power is barred, as a rule, from exercising legislative or administrative authority, in order to avert practices that amount to de facto annexation. Although states have interpreted the occupier’s powers too broadly, and wrongly viewed limitations on those powers as a matter of discretion rather than law, it is nonetheless clear that the ensuing (cumulative) effect of any measures taken by the occupier may not entail the permanent substitution of the authority of the legitimate government. Although most occupying powers introduce measures that unreasonably and disproportionately intrude upon the jurisdictional and administrative rights of the ousted sovereign’s executive, legislative and judicial institutions, the occupier’s jurisdictional authority must be strictly interpreted as being exceptional, as opposed to residual, and remain limited to matters that concern its imminent security.

The sole exceptions to the conservationist principle are the occupier’s military needs; and its ability to comply with the law of belligerent occupation, or at the very least the 1949 Fourth Geneva Convention. Even in these exceptional cases, as Fox notes, “given that occupation law creates a presumption of normative continuity, changes in existing law cannot be the path of first resort.” If the occupier seeks in good faith to remedy a deficiency in local laws or institutional structures, the limitations to its authority in law should be seen as restricting it to measures needed to prevent egregious conduct. The utilisation of provisions under international humanitarian and human rights law as a

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344 Ibid.
346 Jacob Elon Conner (1912) 34.
347 See, e.g., during the occupation of Rhodes, Italian legislation was seen as Ottoman legislation; Odile Debbasch (1962) 343.
348 Ibid, 344.
350 Ibid, 240.
basis to justify sweeping reforms may quickly become a mere pretext for the occupier’s “wholesale replacement of government institutions.”

3. The Conservationist Principle: An Antidote to Conquest

By conserving the status and rights of the ousted sovereign and maintaining the function of its legitimate authorities, the conservationist principle became an antidote to subjugation and exploitation. Already during the 16th and 17th centuries, some states adhered to a policy of non-exploitation and endeavoured, through the issuance of ordinances and laws, to regulate their armies’ conduct with the purpose of minimising human suffering in war. Even Roman law, which notoriously bestowed upon occupiers a right of conquest and permitted the acquisition of good title to property through force, prohibited military commanders from arbitrarily seizing immovable property, private or public, or engaging in acts of plunder, unless it was reasonably intended for the benefit of the army and not a single individual. The conservationist principle, combined with the presumption that belligerent occupation was temporary and that the relations between the occupier and local population were hostile, struck a blow against practices of conquest and colonialism, before they were fully eradicated through other bodies of international law.

3.1 Early Restraints on Occupiers’ Usurpation of Sovereignty

Until the mid-19th century, the right to conquest was still an acceptable mode of acquisition of territory, and most belligerent occupations entailed some degree of annexation or incorporation of the occupied territory by the occupying state. However, the land could not be brought *intra presidia* until the end of the conflict. This legal construct was based on the idea that title to immovable property was suspended from the overthrow of the original sovereign to the reestablishment of its authority, or superseded by that of the new sovereign. Roman jurists dubbed this condition of suspension usurpation (*usurpatio*). Section 39 of Henry V’s Ordinances of War – regarding “wastours of vitaille” – permitted commandeering “wyne” and

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352 Jacob Elon Conner (1912) 16-17.

353 See, on the interaction between the prohibitions of conquest and colonialism and belligerent occupation law, Chapter IV.

354 Jacob Elon Conner (1912) 19.
foodstuffs on grounds of necessity, but barred wanton destruction of property, and Section 26 ensured respect for the sovereignty of the local population over its territory is protected. In 1621, during the Thirty Years War, Gustavus Adolphus of Sweden ordered the preparation of a series of military regulations called “Articles of War,” condemning the use of plunder and pillage: “I declare withal that I would rather rise with out boots than make myself the richer by the plunder and the ruin of these poor people.”

France took a restrictive view of the occupier’s activities permitted by the law of belligerent occupation. Its state institutional and legal practice was arguably a crucial impetus for the recognition of the principle of inalienability of sovereignty in European circles. Fiore, the Italian scholar, affirmed that the recognition of the equal and autonomous standing of all nations implied that territorial title could not be usurped through force. Belgian jurist Rolin-Jaequemyns, a co-founder of the Institut de Droit International, also formulated a set of rules for the regulation of occupation, which included a prohibition on the occupier’s self-enrichment through the exploitation of the natural resources of the occupied territory. According to the 1791 Constitution, invading French armies were directed to refrain from acts of *de jure* unilateral annexation or the conclusion of cession treaties. The French Cour de Cassation affirmed, in 1815, that the defeat of the enemy does not automatically result in the complete subjugation of the enemy’s authority, nor constitute the transfer of legitimate title.

The United Kingdom and United States of America’s positions differed considerably from those of European countries: neither distinguished between the premises underlying belligerent occupation from those of conquest, and neither limited an occupying power’s acquisition of title over territory or exercise of sovereign authority. As Benvenisti notes, at the International American Conference of 1889–1890, all states, with the exception of the United States, supported a text...
declaring: “the principle of conquest shall never hereafter be recognized as admissible under American public law.”  

The United States’ position concerning the protection of sovereign rights of the legitimate government is perhaps most evident from General Taylor’s proclamation to the people of Mexico on 4 June 1846: “[w]e come to overthrow the tyrants who have destroyed your liberties [...]”  

By the same token, in 1815, the US Supreme Court upheld that although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them.

In the 1819 case, United States v Rice, the Supreme Court maintained that the surrender of Castine, in Maine, to Britain, meant that its inhabitants were “under a temporary allegiance to the British Government and were bound by such laws and such only, as it chose to recognize and impose.”  

Francis Lieber allowed for the possibility of conquest and annexation in certain cases, unilaterally based on the occupant’s ability to control territory. The acceptance amongst some states of a right to conquest and the absence of explicit provisions to the contrary in general international law, meant that powerful states maintained the option of resorting to arms to resolve their disputes by exercising permanent and unrestrained control over the territory of another state.

The wars of the 20th century provided many examples of “premature annexation” in the context of military occupation, as Von Glahn remarked; subjugation was inevitable in occupations of conquest, where the conqueror’s acts were geared towards the eradication of organised resistance and the disintegration and eventual disappearance of

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363 13 U.S. 9 Cranch 191 (1815) para. 1143. See also, Gerhard von Glahn (1957) 32.

364 17 U.S. (4 Wheat.) 246. See also, Gerhard von Glahn (1957) 32.


367 See, e.g., the Italian-Turkish annexations of Tripolitania and Cyrenaica in 1911, as well as the annexation of districts of western Poland by German decree in 1939 and the German annexation of Alsace and Loraine.
the local government. The International Military Tribunal at Nuremberg, however, upheld that the annexation of territory by an invading state was particularly inadmissible when the sovereign’s army is actively seeking to restore the occupied territory to its rightful owner.

3.2 The Effects of Banning Conquest on Belligerent Occupation

It was not until the mid-20th century that most writers concurred that the temporary nature of occupation implied that the occupier could not legally annex territory, nor divide it into separate districts. It was deemed illogical, as well as contrary to principles of international law, which were later enshrined in the UN Charter, that a right as exclusive and absolute as sovereignty would be subject to transfer and acquisition through force. In 1945, when the UN Charter codified the prohibition on the acquisition of territory through the use of force, what was once common practice in the aftermath of occupation became an unlawful act prohibited by a peremptory norm of international law (jus cogens).

This rule was widely transposed by state domestic legal orders, including their military manuals. The United States Army Rules of Land Warfare, for instance, provided that the condition of occupation “does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty”; the occupier’s powers merely “result from the established power of the occupant and from the necessity of maintaining law and order.” For the duration of its presence in the foreign territory, when the legitimate government’s authority and sovereignty is “suspended,” the occupier is considered a de facto administrator with no de jure rights or authority.

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368 See, e.g., Germany’s military forces surrendered to the Allies in May 1945; Gerhard von Glahn (1957) 275.
370 Odile Debbasch (1962) 333.
371 Adam Roberts (2009) paras. 36-37. See also, on the interaction between the law on the use of force and the law of belligerent occupation, Chapter V.
The Geneva law provisions concerning non-annexation and the protection of government institutions bestow the civilian population in the occupied territory with inviolable rights, and protect them from erosion by a foreign power. These limitations responded to cases where the administration of belligerent occupation pursued transformative objectives that risked the displacement or usurpation of the indigenous population’s legitimate sovereign authorities and their title over territory. An occupying power that pursues the conquest of the occupied territory could not absolve itself of the obligations incumbent upon it by virtue of the law of belligerent occupation, but would, by contrast, place itself in a position where might be unable to respect its legal obligations. The prohibition of conquest arguably also rendered illegal extensive institutional reforms undertaken by an occupying power, which according to von Glahn, could only have been deemed legal if “the Hague regulations were inoperative.”

Despite these legal developments, virtually all contemporary regimes of belligerent occupation have consisted of practices *ultra vires* of the limits of the law of occupation. This state of affairs has led some publicists to question whether prolonged or intrusive occupations should be deemed to be inherently contrary to the uses of military force in the context of armed conflict, and to require adjustments in the interpretation of the rules applicable to situations of occupation. An occupier that disproportionately prolongs its presence in foreign territory, and creates a relation of dependency and permanent coercion with the local authorities, particularly by restricting the existing governmental system or installing a new one, in effect circumvents the law of belligerent occupation.

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374 Ibid.
376 Odile Debbasch (1962) 339.
377 See, on the normative dimension of the condition of belligerent occupation as a territorial regime, Chapter V.
378 The reforms undertaken by occupiers during World War II could not be justified, nor were they permitted under any interpretation of the 1907 Hague Regulations, as supplanted by the 1949 Fourth Geneva Convention. Gerhard von Glahn (1957) 276.

As the foregoing discussion demonstrates, the regulatory framework of belligerent occupation was codified when situations of colonial rule were common, particularly in non-European countries, but was later mobilised to eradicate and protect against the acquisition of territory through the use of force and the atrocities that practice entailed. The distinction between conquest and occupation hinges on a set of external or peripheral norms that form the pillars of the international system as set out by the law of the UN Charter, including the principles of self-determination of peoples, territorial integrity and equal sovereignty of all nations.

In the 19th century, belligerent occupation was considered a temporary state of affairs, but remained an admissible means for the acquisition of title to territory. Hague law emphasized the importance of preserving the status quo in the occupied territory -- its fabric of daily life and political order; yet from the perspective of contemporaneous state practice and scholarly debate, it remained possible to transfer sovereign and territorial rights to the occupying power in the course or upon termination of occupation. The status and obligations of an occupying power vis-à-vis the sovereign and territorial rights of the indigenous population were viewed, on pragmatic grounds, as falling outside the material scope of the acts governed by the law of belligerent occupation. The Geneva Conventions partly closed the gap between developments in general international law concerning the conduct of government activities in foreign territory and the inter-state use of force, but not hermetically.

The occupier’s status in the occupied territory has been variously defined as that of de facto administrator, trustee, usufruct and foreign military government. Most publicists agree that the underlying purpose of these denominations is to limit the occupier’s scope of authority, in terms of the temporal scope of its control over foreign territory and of the prospective effects of its activities on the function of the governmental institutions of the occupied territory and the rights of the ousted sovereign. Baxter, for instance, notes that the 1907 Hague Regulations were not intended “to create rights against the population of an occupied territory; they merely limit the de facto authority of the occupant.” Given that the security of the occupier’s forces is expected to be its paramount concern

381 Richard Baxter (1950) 257.
and interest, Wilson commented, an occupier should aim “to upset as little as possible the normal life of the inhabitants.”

The law of belligerent occupation is essentially intended to shield the local population from the detrimental and excessive effects of the occupier’s acts of military necessity; but it remains ambivalent or even moot on the relation between the occupying power and the ousted sovereign. According to von Glahn, “the occupant is regarded as being totally independent of the constitutional and other limitations that might have restricted the legitimate sovereign,” and acts under a right granted by international law. The legitimate sovereign is allowed to “legislate for an occupied portion of his territory, provided that his laws do not conflict with the powers of the occupant as outlined in conventional international law.”

Due to the detrimental effects of the occupier’s presence on the function of government and daily life in the occupied territory, the law of occupation prohibits the occupier from permanently altering the rights and status of the legitimate government. Given that belligerent occupation is a phenomenon of war, and that it would be unwarranted to assume good faith between enemies in wartime, no commonality of interest should be presumed to exist between the occupier and the occupied population.

By prescribing a minimum core of permitted activities and duties vis-à-vis the local population, the law of belligerent occupation adopted a functional approach to the regulation of such tensions. The occupier’s activities are to be measured both by the potential permanence of their effects and by the extent to which they allow local authorities to continue to function. The law ensures that an occupying state may not pursue self-interests that trump the interests of the local population, and that an occupation should come to a reasonably prompt end with the return of the ousted sovereign. The abundant examples of occupying states that administer foreign territory beyond the context of hostilities, discussed in subsequent chapters, attest to the importance of the protective function assigned by Hague and Geneva law to the law of belligerent occupation, and to the need to co-apply complementary provisions of general international law, including territoriality, use of force, self-determination and human rights law.

Ibid, 263-264.

See, e.g., the Belgian-German Mixed Arbitral Tribunal in 1922 on the Belgian decree of 1916 that prohibited trade between Belgian and German citizens having no effect in the sovereign’s absence; Herwyn v. Muller, Rec. TAM, II (1922). See also, Auditeur Militaire c. G. Van Dieren, Belgium (1919) See also, Gerhard von Glahn (1957) 35.


Gerhard von Glahn (1957) 35.
Considering the deficient enforcement of international law, the functional approach to the law of belligerent occupation is preferable to the perils of positivism and over-formalistic approaches. These provisions of international law were drafted to tie the hands of the occupier – a colossal task – yet the very status of belligerent occupation as a legitimate military tactic has provided the occupying state with a shield, or rather, a mask. The long history of belligerent occupation as a means to pursue practices that have since been de-legalized, like annexation and colonialism, means that a functional application of the law of belligerent occupation should limit the occupier’s powers of governance, take full account of the inherent legal and political tension between the occupier and the ousted sovereign’s rights, and insist on the occupation’s temporariness and effective termination.

The practices of contemporary occupiers have in some cases amounted to contemporary manifestations of conquest, annexation, subjugation and exploitation. It is necessary, therefore, to avoid an overly formalistic approach to occupation law, and to elaborate the regulation of situations classified as belligerent occupation, concretize the appropriate legal framework, and bolster enforcement mechanisms. To elaborate this functional approach to the regulation of belligerent occupation, it is essential to examine its relation to the international law norms explicitly relevant to occupation law’s premises and cardinal rules. The origins of belligerent occupation law are closely linked to subsequent developments in international law – e.g. the laws on sovereignty, territoriality and self-determination. The relation between these legal regimes is critical to understanding the development and proper interpretation of occupation law, and to a constructive critique of its under-enforcement. This chapter attests to the unmistakable interrelation of belligerent occupation law and other regimes in international law. Subsequent chapters elaborate the importance of these interactions to a functional, comprehensive approach to the determination of the responsibilities of an occupying state.
CHAPTER IV

BELLIGERENT OCCUPATION AND TERRITORIALITY IN INTERNATIONAL LAW

The international law relating to territory consists of a set of prescriptive and prohibitive norms for the conduct of orderly relations amongst states in the interests of stability, peace and security – including the principles of territorial integrity, political independence, non-interference in domestic affairs, and the prohibition of conquest and of annexation. By virtue of these principles, some of which consolidated in the wake of the codification of the law of belligerent occupation, the latter provides a detailed normative framework for assessing the legality of infringements on sovereignty, in the context of war and invasions by foreign forces, whether or not the invasion is resisted, as well as situations of remote or indirect foreign control of government authorities and economic institutions.

As a temporary situation resulting from invasion or armed conflict, “[o]ccupation was initially perceived as being a matter of inter-State relationships”, yet “neither causing nor implying any devolution of sovereignty.” 386 Although the law of belligerent occupation remains the principal body of lex specialis applicable in time of occupation, international law norms on sovereignty and territoriality are significant peripheral normative forces that have contributed to its development and application: they provide a basis for the local population’s claim to enjoy the right to self-determination in the occupied territory, and they assist in the determination of violations of the principles of political independence and non-interference in domestic affairs of the legitimate government. 387

This chapter examines the convergences and divergences between the hard-rule based provisions of the law of belligerent occupation and the general principles of international law concerning territory and sovereignty. While every belligerent occupation regime entails in practice some degree of violation of the international law relating to territory and sovereignty, violations of the lex specialis of belligerent occupation which result in breaches of the aforesaid general principles of international law

can contribute to bringing about the end of occupation by attracting international contestation and retorsion measures and, in some cases, stripping the occupying power of its *de jure* status and rights of administration. The conceptual interplays between the rules that delimit the occupying power’s authority and the principles that govern the conduct of inter-state relations contribute to the determination of rights and duties of relevant actors in time of occupation, including third parties, in a manner that enhances the overall protection afforded in law to the local population and the ousted sovereign.

This chapter neither endeavours to undertake a comprehensive survey of the doctrine of sovereignty, nor aspires to survey in detail the emergence or scope of the prohibitions on colonialism, conquest and annexation, but rather seeks to underscore some of the areas in which public international law has influenced the development of the law for the regulation of belligerent occupation, and elucidate the manner in which concurrent legal principles and doctrines of international law – including territoriality, use of force, self-determination and human rights law – serve to enhance its implementation and enforcement. The law on the inter-state use of force, which is directly related to acquisition of territory is considered separately in Chapter V, due to its legal character as peremptory rules of international law, enshrined in the UN Charter, and the special relations between *jus ad bellum* and *jus in bello*.

Although many of the general principles of international law are part of customary law they are arguably of lesser legal value than the hard-rule based law of belligerent occupation in determining specific actions and prescribing concrete duties and regulating the conduct of an occupying state. However, they provide an important backdrop to and explanatory content regarding the syllogistic origins of the hard rules of occupation law, as well as instructive guidance on their implementation, in accordance with a functional interpretation.\(^{388}\) By mapping the overlaps and practical interplays between violations of the laws of belligerent occupation and those of international law norms concerning territory and sovereignty – hereinafter referred to as the law on territoriality – this chapter demonstrates the importance of the protection of territorial and sovereign rights in time of occupation.

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Given the pejorative connotation given by some states to the concept of occupation, the normative contribution made by the law on territoriality as a legal regime tasked with the protection of the fundamental rights of sovereigns supplants, and to some extent also reaffirms, the normative underpinnings of the law of belligerent occupation. The chapter examines in turn the interplays between the law of belligerent occupation and the positive rights and inalienable powers prescribed to all sovereigns (Section 1); the prohibition on the conduct of states in relation to colonialism, annexation and conquest, as corollaries to the protection of sovereign rights (Section 2); and the limits on territoriality and illegal territorial regimes (Section 3).

1. Prescriptive Territoriality: Rights of Sovereignty and Independence

The role of sovereignty in the governance of relations between nations was, from the outset, intended to perform a peripheral function in ensuring that international laws respect the equal rights of states. In this sense, the purpose of the doctrine of sovereignty was to determine the creation and existence of subjects of international law – states and certain non-state actors that maintain a territorial link enjoy rights and duties that flow from their international legal personality and capacity to represent the rights and interests of the population in that territory. By bestowing a subject with the territorial exclusivity that flows from its sovereignty over a specific territory, international law seeks to protect the subject and its ensuing rights from interference and dispossession.

Sovereignty is also closely related to concepts of validity, legitimacy and reciprocity in international law and practice. Falk describes the concept as one of “conceptual migration” because of its interplay with a variety of legal norms and its contribution to their development.

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section discusses the divergences and convergences between the law of belligerent occupation and the sub-set of prescriptive rights concerning territory in international law, including the principles of sovereign equality, territorial integrity, political independence and non-interference in domestic affairs, as well as the concept of the exclusive domain in the international law on jurisdiction.

1.1 Sovereignty and the Antibidy of Occupation

Like the concept of statehood, the concept of sovereignty and the birth of the concept of territorial integrity date back to the 1555 Peace of Augsburg, which coined the concept of sovereign equality, and to the consecration of the Treaty of Westphalia in 1648.\(^{394}\) Brierly maintained that sovereignty defines “the nature of rights over territory” and is “the convenient way” to describe “the fullest rights over territory known to the law.”\(^{395}\) Sovereignty became the engine for the function of international law, which in turn developed to limit and partially curtail sovereign rights for the greater good of international society.\(^{396}\) The original purpose of international law was to secure the rights of the state, whereas “the principles of conduct between states simply followed as a description of what was required to safeguard the anterior liberties.”\(^{397}\) Such liberties, according to one theory, were not to be determined by the state itself, but according to an objective determination in international law.\(^{398}\) By contrast, a “pure fact approach”, premised on the qualities and competences of a specific entity,\(^{399}\) held that sovereignty was a power exercised by government officials and institutions for the benefit of the people, as its ultimate beneficiaries.\(^{400}\) In sum, the continuity of the exercise of actual sovereignty depends both on the sovereign ruler’s ability to uphold its reign and the people’s refusal to be subjected to foreign rule.\(^{401}\)

The relation of the foundational core of public international law, insofar as the latter is premised on the principles of sovereignty, territorial


\(^{395}\) Ibid, 162.

\(^{396}\) The Lotus (France v Turkey) PCIJ Series A No 10. The Wimbledon, Government of His Britannic Majesty v German Empire, PCIJ Series A No 1. See also, Ian Brownlie, Principles of Public International Law (Oxford, 2008) 289.


\(^{399}\) Ibid, 231-232.


\(^{401}\) Peter M R Stirk (2012) 148.
integrity and sovereign equality, to the law of belligerent occupation, is not merely correlative, but causal. The concept of sovereignty played a key role in the emergence of the normative regime for the regulation of belligerent occupation, which sought to account for and ensure the continuity of the sovereign rights of the ousted legitimate government of the territory by restraining the occupier in its exercise of authority over the population and territory.402

Yet in practice, occupying states have effectively blurred the lines between de facto temporary administration and legitimate sovereign authority: they have enacted laws ultra vires and established administrative bodies including puppet governments403 that exercise de facto sovereign authority in an attempt to substitute the legitimate government with an indirectly-controlled local authority subject to the occupying power’s ultimate will.404 In this sense, the regime of belligerent occupation is a limited set of antibody intended to attenuate the atrocious impact of warfare on the civilian population under foreign control, and build up the international legal system’s immunity to prohibited forms of activity as diverse as they were ingenuous for their attempts to exploit legal indeterminacy. Where occupiers adopted annexationist policies and practices, the concept of sovereignty was intended to safeguard against appeals to political pragmatism or expediency, in favour of the continuity of rights.405

Before the codification of the law of belligerent occupation, and long after the adoption of Hague law, non-Western peoples were perceived as having no ability to enjoy rights in international law, and therefore were not entitled to either the rights of sovereigns or to the protection afforded to peoples and their legitimate governments under the laws of war.406 This classification of the ‘other’ came from ‘civilised’ nations who needed to ensure their ability to continue to engage in colonial practices through war.407 Violence by Western states against non-Western states was seen as the manifestation of sovereign prerogative, which sought to justify any amount of harm caused in combating the grave threat to their colonial pursuits, based on the primacy of the normative status of the principles

403 See, on the Vichy government set up by the General Assembly of France, as opposed to northern France occupied by Nazi Germany, and its claim to sovereignty through a pseudo-constitutional basis, Peter M R Stirk (2012) 155-156.
404 Ibid, 152.
that violence putatively sought to protect.\textsuperscript{408} International law developed to provide a balance in this regard by recognising the representational rights and functional capacities of governments-in-exile, which maintain formal rights over the territory until the end of occupation.

In turn, the occupying power was brought under an obligation to consult and solicit the participation of the local population and, where possible, its authorities in the adoption of measures that affect public order and civil daily life.\textsuperscript{409} Naturally, the activities of governments-in-exile were often intended to disrupt the policies of the administration of the occupying state, despite possible hardship caused to the local population.\textsuperscript{410} Regardless of the effectiveness of the occupier’s policies in revising the structures of government, sovereign title over the territory would remain vested in its indigenous peoples.\textsuperscript{411} Hence, the act of consultation would not absolve an occupying power of a violation of the conservationist principle, unless, Greenwood notes, “there is a basic willingness to co-operate on both sides”.\textsuperscript{412}

By the same token, an occupier was prohibited from undertaking broad transformative policies such as the constitution of new governing institutions and the purported transfer of sovereign authority to such newly-established bodies.\textsuperscript{413} While sovereignty in abeyance is an intolerable condition from the perspective of international law and practice, an occupying power that seeks to fill the void left by the ousted sovereign – either by replacing it with its own sovereign authority or establishing a puppet government – will be considered to be engaged in acts of annexation and subjugation.\textsuperscript{414} As an epiphenomenon of the law on sovereignty, the \textit{lex specialis} of belligerent occupation limits the occupier’s \textit{de facto}, temporary administrative role to the conservation of the existing

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\textsuperscript{408} See, e.g., killings in the colonised territories were conducted under the banner of maintaining public order; \textit{Ibid}, 5, 30.
\textsuperscript{409} See, on the need to consult the local population to respect the right to self-determination of peoples, Yutaka Arai-Takahashi (2009) 131. Marco Sassòli (2005) 677. See also, on the application of principles from the law on self-determination in time of occupation, Chapter V.
\textsuperscript{410} Eyal Benvenisti (2012) 23.
\textsuperscript{411} \textit{Ibid}, 95.
\textsuperscript{413} Security Council Resolution 1511, adopted on 6 October 2003 provides that the Iraqi Governing Council “embodies the sovereignty of the State of Iraq … until an internationally recognised, representative government is established.” See also, Remarks by President Bush and Prime Minister Blair on transfer of Iraqi Sovereignty, Press Release (28 June 2004), quoted in Peter M R Stirk (2012) 167.
\textsuperscript{414} Peter M R Stirk (2012) 168.
public order and civil life and political structures.  To remedy the inadmissible condition in which sovereignty and effective governance are suspended, the concept of sovereign continuity becomes the antibody to ensure the comprehensive and integrated protection of the local population and their ousted sovereign.

It follows that the legality of the continued presence of an occupying state in foreign territory should be assessed based on its efforts to end the occupation and restore functional sovereignty to the peoples and their ousted government. The law on sovereignty complements the law of occupation by providing a formalistic backdrop, or *nudum jus*, which maintains the latent sovereignty that is ousted and suspended in the interim, as an assurance that more than a hollow-shell of sovereignty is returned to the legitimate government come the end of occupation.

To be effective, the principle of sovereignty, which provides the basis for the conservationist principle, should be applied rigorously in conjunction with the cardinal rules of the law of belligerent occupation, by regularly monitoring the tensions between the governance powers of the local authorities in occupied territory and assessing the medium and long-term effects of the occupier’s actions on local sovereign rights. Such an assessment would complement the obligations prescribed to an occupier by the law of belligerent occupation, including the Article 43, 1907 Hague Regulations obligation to “maintain civil life and public order” and the Article 64, 1949 Fourth Geneva Convention obligation “to maintain the laws [and institutions] in place.”

Even a prolonged occupation, which the occupier intends, *bona fide*, to maintain in accordance with the law of belligerent occupation, would become increasingly untenable by virtue of its disproportionate infringement upon the principles of sovereign equality, territorial integrity and political independence. The prohibition against invasive measures and irreversible changes by the occupier neutralizes its *de jure* rights to remain indefinitely in foreign territory, especially if occupation no longer serves a military purpose following the end of hostilities.

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416 *Auditeur Militaire v G Van Dieren*, Annual Digest 1 (1919-1922) 446. See also, Peter M R Stirk (2012) 154.
1.2 Sovereign and Jurisdictional Powers under Foreign Domination

A further attribute of state sovereignty is the right to exercise jurisdiction – a *de jure* right that is based on the *de facto* capacity of the local government, in its judicial, executive and legislative bodies, to exercise authority over territory to the exclusion of other states. Essentially, “the international law of jurisdiction mirrors the international legal order and its guiding principles”, which determine the territorial boundaries of a state’s public order and the operational jurisdiction of its public authorities. A state’s jurisdictional rights are its *domaine réservé*, and are the basis for its authority to manage daily life through regulations, and to “impact upon people, property and circumstances.”

A corollary guarantee intended to protect against infringements of sovereign jurisdictional rights is the principle of non-intervention in another sovereign’s domestic affairs. Despite the proliferation of international regulatory norms and mechanisms, the deterrent effect produced by the internalized public policy commitment of states to non-intervention in each others’ domestic affairs is one of the strongest forces regulating inter-state relations. Even in cases of governmental breakdown or prolonged institutional crisis, the presumption of sovereignty is often stronger than the right of enforcement of such international norms. The rationale behind this presumption is the need to maintain the stability of borders and the peaceful coexistence of states through international cooperation and peaceful dispute resolution. Accordingly, sovereign consent to interference is a critical prerequisite for a state’s ability to lawfully and peacefully undertake activities in foreign territory.

The limited exceptions to the sovereign rule comprise the doctrine of extraterritorial jurisdiction. Such jurisdiction may be exercised by the agents of a state over territory or a specific matter under the jurisdiction of

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418 Ibid, 314.
another *de facto* or *de jure* authority in the course of the state’s military occupation. State practice has exceptionally permitted the exercise of extraterritorial jurisdiction in cases entailing the protection of the state’s nationals or that otherwise constitute matters of imperative public interest or national security.\(^{425}\) Some states have invoked the doctrine of extraterritorial enforcement to justify the claimed need to act against serious economic repercussions from abroad under the banner of the “effects doctrine”, as well as the protective principle\(^{426}\) and humanitarian protection.\(^{427}\) Regrettably, states have often instrumentalised such claims in order to subvert and re-engineer the institutions and policies of weaker governments, to the advantage of the invading state’s economic and political interests, in what are referred to as ‘transformati\n’ occupations.\(^{428}\)

The law of belligerent occupation protects against such subversions of the law on jurisdiction. The interplay between the law of occupation and the law on jurisdiction can be observed in the fundamental requirement for determining the existence of occupation – effective control, in Article 42 of the 1907 Hague Regulations. Effective control is often understood as having both physical and jurisdictional dimensions, in terms of the ability of the occupier to exercise government-like authority in the territory under its control. Experts at the ICRC’s meetings on occupation law largely agreed that the occupier’s exercise of jurisdiction – or its equivalent, the potential to make the occupier’s authority felt – is sufficient to meet the effective control test.\(^{429}\)

The law of occupation gives the occupier’s military authorities and courts, where they exist, precedence in the exercise of jurisdiction over matters concerning its national security. However, such judicial jurisdictional powers should be narrowly construed and may not extend to domains of civil and political life that are only tangentially relevant to the occupier’s limited domain of legitimate authority.\(^{430}\) The occupier’s


\(^{428}\) See also, Section 4.2, Chapter VI.

\(^{429}\) Tristan Ferraro (ICRC, 2012) 111.

effective or potential exercise of jurisdictional rights is also relevant to the
determination of the extent to which the occupier has undertaken to control
daily and political life, as well as its obligations vis-à-vis the civilian
population under the corpus of international human rights law.

An occupying power is expected to exercise executive jurisdiction in
the course of its law enforcement operations to ensure public order and
maintain the rule of law, based on the laws in force in the occupied
territory. However, international humanitarian law, as the lex specialis for
situations of belligerent occupation, places constraints on the occupier’s
exercise of jurisdictional rights in terms of its ability to prescribe legislation
and regulations, adjudicate matters in courts, and enforce law. The only
positive obligation concerning the exercise of jurisdiction is the occupier’s
obligation to “maintain civil life and public order” through adequate law
enforcement.

While the law on jurisdiction does not necessarily provide such
precise distinctions on the limits of the occupier’s jurisdictional powers, it
reinforces and complements at least three key rules enshrined in the law of
occupation: (1) the occupation extends only to the territory where such
authority has been established and can be exercised; (2) the local laws in
the occupied territory shall remain in force, unless they must be made to
accommodate the application of the Geneva Conventions or the imperative
needs of the occupying power; and (3) the political structures in the
occupied territory must remain intact and public officials should not be
removed from their posts save for reasons of imperative security.

The authorities and rights prescribed by the law of belligerent
occupation should be narrowly construed and interpreted, as with any
other body of lex specialis, in line with the general principles of international
law. Similarly, the rationale and normative force of the law on jurisdiction
affirms that the exercise of powers in foreign territory not provided for in
international law, or otherwise consented to by the host state – which is
precluded from waiving its sovereign rights under the coercion of the

431 Article 6, 1949 Fourth Geneva Convention.
434 Ibid, 46.
436 Article 42, 1907 Hague Regulations.
437 Article 64, 1949 Fourth Geneva Convention.
occupier’s threat and use of force – is proscribed. In accordance with the law on jurisdiction, the occupier is prohibited from *de jure or de facto* extending its domestic jurisdiction into the occupied territory,438 and must maintain its separate existence by establishing an administration that is distinct and separate from its domestic institutions.439

An occupier’s domestic legislature cannot promulgate laws that extend to the occupied territory, nor can the occupier’s executive extend the operational jurisdiction of ministries and public institutions to include any part of the occupied territory.440 It must ensure that its military administration of the occupied territory is kept separate from its domestic affairs, and is exercised only by the military authorities, in accordance with the powers prescribed by the law of belligerent occupation.441 Failure to ensure the separation of the two systems runs the risk of amounting to *de facto* annexation – as has been the case with East Timor, Western Sahara, South West Africa, the West Bank, including East Jerusalem, and the Golan Heights.442

A law promulgated by the occupier which either extends its domestic jurisdiction or is *ultra vires* of the subject matter jurisdiction of the occupier in the foreign territory, which is limited to matters of security and public order, may be deemed unlawful by virtue of its contravention of the limitations on the exercise of jurisdiction, both in the *lex specialis* of occupation law and in general international law. The very fact of having a legislative act that either mandates or can justify the application of domestic law to the occupied territory or certain population groups therein, would arguably result in a violation by the occupying state of its international law obligations.

For example, Israel’s Area of Jurisdiction and Powers Ordinance No 29 of 1948 mandates that “[a]ny law applying to the whole of the State of


Israel shall be deemed to apply to the whole of the area including both the area of the State of Israel and any part of Palestine which the Minister of Defence has defined by proclamation as being held by the Defence Army of Israel.” 443 The provision provides an effective basis for the Israeli authorities to extend the application of domestic laws to territory under their military administration. Similarly, although the British Mandate Emergency Regulations of 1945, adopted by the Israeli Parliament (Knesset), which consolidate the law enforcement system between the territory of Israel and the West Bank, may be applied lawfully in time of peace, depending on the consent of the legitimate Palestinian authority in the West Bank, the law of occupation prohibits the detention of protected persons outside the occupied territory, rendering it unlawful.444

In so far as occupation law regulates the concurrent and conflicting jurisdictions of the occupied and occupying state authorities, if the occupier’s government authorities in occupied territory perform administrative or legislative activities ultra vires of their authority under the law of belligerent occupation, these activities would also amount to breaches of the rules concerning jurisdiction, and as such deemed null and void from the perspective of international law. After the end of occupation, the effects of their annulment on private entities that had legitimately relied on their validity would be mitigated; nonetheless, for the duration of the occupation, the authorities of third states should not afford de jure status to such activities, in accordance with international law as well as the domestic law and public policy of some third states.445

Although the law of occupation provides concrete provisions concerning the legitimate domain for the occupier’s exercise of jurisdictional powers, the international law on jurisdiction, including in particular the presumption of the occupied state’s exclusive jurisdiction, is essential to protect the ousted sovereign. The law on jurisdiction further narrows and restrains the occupier’s ability to undertake legislative and administrative changes in a manner that encroaches on the rights of the legitimate government to freely conduct its domestic affairs.

444 See, e.g., HCJ 2690/09, Yesh Din – Volunteers for Human Rights et al v IDF Commander in the West Bank et al, Supreme Court of Israel, judgment of 28 March 2010.
445 See, on the incorporation of international law, including the principle of territoriality into the domestic law, Section 1.1, Chapter IX.
1.3 Territorial Integrity and Political Independence under Occupation

The principles of territorial integrity and political independence are intended to safeguard the State’s territorial and jurisdictional rights to freely administer political affairs and civil life in its internationally-recognised territory. The principle dates back to Woodrow Wilson’s Fourteen Points, which emphasized the importance of “affording mutual guarantees of political independence and territorial integrity to great and small states alike.” It was also expressed in Article 10 of the League of Nation’s Covenant, which undertook “to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League.”

An unlawful intervention can consist of the adoption of extraterritorial coercive measures, short of the use of armed force, that encroach upon or deprive a sovereign of its authority. Under the UN Charter, the prohibition on such measures is assimilated with the principles of territorial inviolability and the non-interference in the domestic affairs of other states – which were merged under the Article 2(4) and (7) provisions and recalled in numerous General Assembly resolutions and declarations.

The inviolability of a state’s territory and its sole prerogative to conduct its domestic affairs has precluded interference by other states, even with the declared intention of preventing serious misconduct by the state’s authorities; therefore the legal basis for the doctrine of humanitarian intervention, emergent in recent years, remains at best a matter of contention. The principle of territorial integrity is premised on the


448 The Declaration on Principles of International Law concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, 121, annex, principle 5(7), General Assembly Resolution 2625, UN Doc. A/RES/2625, 24 October 1970. The ICJ held the Declaration to be reflective of customary law, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010, 141, para. 80. See also, the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples; and the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.


450 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1986, 14, para. 268. Simon Chesterman, Just War or Just Peace (oxford,
stability of an international order, whereby mutually agreed upon borders and internationally-recognised territorial entities benefit from near absolute protection from encroachment on their jurisdictional rights, and, *a fortiori*, their sovereign and territorial rights. In cases of occupation, the occupying power may only re-allocate such rights and authorities in accordance with the principles of territorial integrity and political independence, if its actions are to stand the test of international legality.

1.3.1 The Scope of Non-Interference in Political Affairs

The two most prevalent forms of unlawful intervention in a state’s domestic affairs in time of occupation include: (1) political interference, either through the occupier’s spread of anti-state propaganda for war and political uprising, with the intention to permanently remove the ousted government of the legitimate sovereign from power; and (2) economic interference through the occupier’s coercive measures for economic exploitation and subjugation, e.g. sanctions, boycott and embargoes. Other instances of unlawful interference in the domestic affairs of an ousted sovereign in time of occupation include the provision of arms to rebels and separatist groups, as well as the maintenance of foreign troops in support of the permanent ousting of the local government. The ICJ affirmed in the *Case Concerning Armed Activities on the Territory of the Congo* that Uganda violated the principle of non-intervention not only by

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452 United States Secretary of State Stimson’s Note from 1932 refuses recognition to any treaty between China and Japan that “may impair the rights of the United States...including those which relate to sovereignty, the independence or the territorial and administrative integrity of the Republic of China”; Identic Notes from the Unites States Secretary of State to the Chinese and Japanese Governments, 8 January 1932, cited in Samuel KN Blay, ‘Territorial Integrity and Political Independence’, *Max Planck Encyclopedia of Public International Law* (March 2010).


455 See, e.g., the Soviet protest against the presence of British troops in Greece (1946); the presence of Russian troops in Ossetia and South-Abkhazia, protested by Georgia and others, since 2008; and the presence of Syrian troops on Lebanese territory, protested by a number of states and condemned by Security Council Resolution 1559 (2004), 2 September 2004.
invading Congo, but also by providing military, financial and logistical support to anti-government rebels operating in Congo’s country.\textsuperscript{456}

As opposed to the limitations imposed on the occupier’s authority, in cases where a people is struggling in pursuit of its internationally-recognised right to self-determination, the people’s right to lawfully seek and receive political, financial, military or other assistance from states in support of their struggle has been granted by the General Assembly; yet, not without contention.\textsuperscript{457} The 1977 Additional Protocol I to the Geneva Conventions, transformed armed struggles based on self-determination of peoples under colonial or racist rule and foreign occupation into international armed conflict.\textsuperscript{458} Such cases include resistance struggles against foreign occupation and domination, particularly in prolonged occupations whereby the occupier seeks to acquire, exploit or dispossess the local population of its sovereign and territorial rights.\textsuperscript{459}

Regardless of its motivation and political rationale, an intervention on foreign territory, which entails effective actual or potential control over territory by foreign troops, would trigger the application of occupation


\textsuperscript{457} General Assembly Resolution 3314 (XXIX), Definition of Aggression, 14 December 1974, Article 7. The Declaration of Principles of International Law Concerning Friendly Relations (General Assembly Resolutions 2625, 1970) stated that in their actions against, and resistance to forcible efforts to deprive them of their right of self-determination, “peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter”. General Assembly Resolution 3070 (1973), adopted by consensus, reaffirmed the legitimacy of “all available means, including armed struggle” and called for “moral, material and any other assistance to all struggling” for self-determination. See also, Philip Kunig, ‘Prohibition of Intervention’, Max Planck Encyclopedia of Public International Law (April 2008) 4-5. Antonio Cassese, Self-Determination of Peoples (Oxford, 1996) 199 et seq. Brad R Roth, Governmental Illegitimacy in International Law (Oxford, 1999) Chapter 6.


law.\textsuperscript{460} In cases short of occupation, but that nevertheless constitute violations of the territorial integrity of the sovereign entity, the general principles of non-interference and political independence ensure the protection of the rights of the invaded sovereign. Similarly, in such cases, the policies and motivations of a foreign government’s act of interference, political or military, in the affairs of another state, are pertinent to the assessment of the legal status of its acts under the rules on the inter-state use of force, \textit{jus ad bellum}, which apply in time of peace. The combined function of \textit{jus ad bellum}, the prohibition on the acquisition of territory, and the principles of territorial integrity through the use or threat of force, is to protect the ability of entities to fully enjoy and exercise their sovereign and territorial rights,\textsuperscript{461} as a necessary precondition for upholding the entity’s political and economic independence.\textsuperscript{462}

Some experts at the ICRC’s consultations on occupation law raised the need to rename “occupation” as “effective control” or “extra territorial administrative responsibilities”, because states have cited the term’s present-day pejorative connotations as a justification for rejecting this denomination and the application of occupation law.\textsuperscript{463} To assess this proposal would require a close examination of the occupier’s relation to the invaded territory’s government and the evidence regarding its measures to seek the termination of its control in a specific context.\textsuperscript{464} In any case, the beginning of an occupation clearly triggers the application of both the law of occupation and the principles of territoriality and political independence. The consequences and legal effects of those principles have not been adequately brought to bear on the application and enforcement of the rules concerning termination of belligerent occupation, which are the subject of vigorous debate.\textsuperscript{465}


\textsuperscript{461}See also, on the interaction between the right to permanent sovereignty over natural resources and the law of belligerent occupation, Section 1.2, Chapter VI.


\textsuperscript{463}Tristan Ferraro (ICRC, 2012) 28.

\textsuperscript{464}Occupation is established “even if [it] meets with no armed resistance”, such as the occupation of Czechoslovakia in 1938-1939; Tristan Ferraro (ICRC, 2012) 97. See also, discussion of the gradual transfer of authority in a ‘transformative’ occupation such as Iraq post the 2003 Security Council resolutions, in Section 4.2, Chapter VI.

The notion of autonomy is often used to determine the extent of an entity’s functional political independence. Autonomous entities are usually understood to possess an international legal personality short of a State, akin to that of a sub-state entity within a federal State, whose territory or jurisdictional powers are confined by a set mandate.\(^\text{466}\) Though limited self-government by the population in the occupied territory is commonplace during occupations, being both “a matter of expediency and conservation of resources” for the occupier,\(^\text{467}\) for as long as the occupation continues, such a semi-autonomous local authority – as an agent of the occupier – cannot wield the type of powers attributable to functionally independent sovereign states. Hence, responsibility for “the treatment accorded to [protected persons] by [the] agents” of the occupying power, remains with the occupying State.\(^\text{468}\)

Transfers of authority by the occupier to a quasi-autonomous body as part of a transition from belligerent occupation to a peace settlement, absent the ability of the autonomous authority to enjoy full territorial integrity, have had varying results.\(^\text{469}\) The UN’s 2002 Peace Plan for the Self-Determination of the Western Sahara effectively enabled Morocco to continue to exercise de facto sovereign authority over the territory, obstructing the ability of the Saharawi people to exercise their right to self-determination.\(^\text{470}\) A similar situation resulted from the 1995 PLO-Israel Interim Agreements,\(^\text{471}\) which gave formal consideration to the principle of self-government while entrenching foreign domination in practice.\(^\text{472}\)


\(^{469}\) Abdelhamid El Ouali (2012) 356 et seq.


\(^{471}\) Framework for Peace in the Middle East Agreed at Camp David (Israel-Egypt), signed 17 September 1978, entered into force 17 September 1978, 1138 UNTS 39.

Occupiers have often sought to benefit from such arrangements by absolving themselves from de facto responsibility for the local population in the occupied territory, while prolonging their occupation and furthering the occupier’s economic interests through ultimate control over the allocation and use of land and other natural resources in the occupied territory. By embedding notional autonomy in a local government, often consisting of some of the occupier’s own nationals, that is in fact subject to the coercion and ultimate control of the occupier – e.g. the Israeli-controlled Palestinian Authority, the Turkish-controlled authorities in northern Cyprus and the Russian-controlled local authorities in Abkhazia, South Ossetia and Transnistria – the transfer of authority often becomes a smokescreen for the occupier’s continued presence and control over internal affairs.

Occupying powers have also established quasi-autonomous authorities in occupied territory, in order to further the claim that they have obtained consent from the local authorities to conduct activities in the foreign territory—activities that would otherwise be deemed ultra vires of their authority under the law of belligerent occupation and, therefore, in breach of the principle of non-interference. Since the very existence of a regime of belligerent occupation precludes the ability of the occupier to obtain the free and genuine consent of the ousted sovereign, the occupier is prohibited from activities in the occupied territory that exceed what is required, both substantively and temporally, for its imperative military needs.

The inadequacy of consent as a criterion to assess the legality of an occupier’s activities in the foreign territory may be observed in the case of the Governing Council of Iraq. Established by the Coalition Provisional Authority, its limited authority was expanded to allow it to hold elections and convene a government, which proceeded to give its consent to the continued presence of foreign armies in Iraqi territory. While the occupiers portrayed these initiatives as means to further Iraq’s political independence, the overwhelming circumstantial coercion, resulting from

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473 See generally, Raja Shehadeh (1997).
the continued presence of foreign forces, meant that the local authorities were susceptible to the pressure and guidance of foreign governments in matters concerning Iraqi economic and political affairs.\textsuperscript{477} Despite Security Council decisions that required the Coalition Provisional Authority’s activities to accord with applicable international laws,\textsuperscript{478} the coercive power and indirect control of foreign governments over the activities of the newly-formed Iraqi authorities amounted to violations of the principles of non-interference, territorial integrity and political independence. These conclusions should complement an assessment of the legality of the CPA’s activities under belligerent occupation law.

In other cases, e.g. the Russian occupations of the Georgian territories of South Ossetia and Abkhazia and the Turkish occupation of northern Cyprus, an occupation regime seeks to be subsumed and legitimized under the banner of secessionist self-determination.\textsuperscript{479} Russia’s support for separatist movements in South Ossetia and Abkhazia has provided its occupation with a façade of political legitimacy, blurring the lines between its initial acts of aggression against Georgia, and its subsequent purported support for a liberation struggle.\textsuperscript{480} The Russia-supported and controlled government of Abkhazia is an even starker example of this power relation camouflaged as consent.\textsuperscript{481} In 2014, the Russian government sought to portray its military and political control over Ukrainian territories as legitimate support for secessionist movements and the protection of Russian national minorities, in Ukrainian territory.\textsuperscript{482} Turkey created the authorities it controls in northern Cyprus under a pretext of secessionist claims – which were preceded by Turkey’s forcible mass displacement of Greek Cypriots and the settlement of the territory by Turkey’s citizens.\textsuperscript{483}

In both Cyprus and Georgia, the violations of territorial integrity and political independence by occupying states and the separatist groups

\textsuperscript{477} Marco Sassoli (2005) 683.
\textsuperscript{478} See, on the transformative character of the occupation of Iraq, Section 4, Chapter VI.
\textsuperscript{479} See, e.g., on human rights violations by the Russia-controlled de facto authorities in Abkhazia and South Ossetia, US Department of State, 2012 Country Report on Human Rights Practices – Georgia, 19 April 2013, 3. See also, Section 2, Chapter VI.
\textsuperscript{482} ‘Ukraine says Russia follows pre-Georgia war scenario in Crimea’, Reuters, 28 February 2014. See also, Uri Friedman, ‘Putin’s Playbook: The Strategy Behind Russia’s Takeover of Crimea’, The Atlantic, 2 March 2014.
\textsuperscript{483} See, e.g., Core document forming part of the reports of States parties, Cyprus, UN Doc. HRI/CORE/CYP/2011, 2 September 2011, para. 66.
they support have proven decisive in determinations that Russia and Turkey’s actions are unlawfully intended to secure permanent remote control and, in the case of Crimea, to undertake the de facto annexation of foreign territory. Systematic and grave violations of the cardinal rules of the lex specialis of belligerent occupation concerning the protection of the sovereign rights of the occupier may also give rise to breaches of the principles of territorial integrity and political independence, which in turn would entail broader and more exacting legal consequences on the part of states and international organisations, as discussed below.

1.3.3 Converging Legal Consequences?

A critical difference between belligerent occupation and the law on unlawful governmental activities on foreign territory is the legal consequences that ensue from the internationally wrongful acts in each case. In the former case, an occupying power that violates the lex specialis of belligerent occupation may entail both state and individual responsibility—depending on the act—but the occupier would most likely not, on that basis alone, be required to withdraw from the territory. In the latter, absent consent, the occupying state would be required to immediately withdraw its troops, terminate all other forms of control and support for the authorities in the territory, provide guarantees of non-repetition, and potentially pay reparations. Similarly, if the foreign authority breaches the terms of an agreement for its activities in the territory of the host state—an agreement concluded between two functionally-independent sovereign in time of peace—international law would require the wrongdoing state’s withdrawal, and its continued presence in the host state would probably constitute an act of aggression.

It may be impractical for occupiers to withdraw from occupied territory; nonetheless, when occupiers systemically violate their international law obligations creating long-lasting harms to political and civil life in the occupied territory, an obligation to withdraw is squarely in

486 The ICRC’s position is that consent is a matter of fact, based on a government’s current position. Revocation of consent needs to reach the threshold of turning the foreign state into a belligerent against the then consenting state. Tristan Ferraro (ICRC, 2012) 98.
line with the normative standards enshrined in the principles of territorial integrity, political independence and non-intervention. This was affirmed by the General Assembly’s affirmation of the “imperative need for all foreign forces engaged in military occupation, or acts of interference in the domestic affairs of another state, to be completely withdrawn to their own territories.” The rarity of such withdrawals is indicative of a potential deficiency in the effectiveness of international law in addressing such situations. It is important to employ these public international law principles when assessing an occupier’s continued presence in the occupied territory during ‘calm’ occupations, where hostilities have either come to a close, or significantly decreased, and the local or ousted sovereign is able to conduct international relations on behalf of the territory. If an occupier is victorious, the occupation may indeed last more than a year, but “stringent measures against the civilian population will no longer be justified.”

Moreover, as the European Court of Human Rights recalled in Loizidou, if a third state exercises effective (remote) control over foreign territory through a local administration, the situation is likely to entail unlawful governmental activities on foreign territory in violation of the principles of territorial integrity, political independence and non-intervention. For instance, the foreign state could extend its territorial laws into the occupied territory, impose restrictions on economic activities such as trade, including economic exploitation under the guise of the private sector, or introduce abusive regulations of movement and residency to facilitate settlement by its own civilian population. Such acts must pass the test of being lawful in both nature and purpose: some acts might be “lawful in the abstract, but might have an unlawful purpose in casu.”

The ICRC 2012 report on occupation proposes two tests for the applicability of the law of belligerent occupation: one based on territorial control, and the other on the relationship between the occupier and the occupied population, including acts that had a “compelling effect on the local government and civilian population” by preventing them from “carrying out tasks and responsibilities related to the administration of the territory.” Some experts, including Roberts, favour the application of the

489 Jean Pictet (ICRC, 1958) 63.
490 Ibid.
491 Loizidou v Turkey, Application No. 15318/89, Judgment, European Court of Human Rights, 18 December 1996, para. 52.

In any given situation it may be difficult to discern the territorial scope of occupation\footnote{Tristan Ferraro (ICRC, 2012) 39.} or the extent of a foreign authority’s interference. The normative presumptions enshrined in the general principles of territorial integrity and political independence provide important guidance as to the legality of such activities and their relation with the law of belligerent occupation. As long as foreign forces remain capable of interdicting or preventing an independent government from functioning, the obligations set out in the law of occupation should be presumed to continue to take effect.\footnote{Ibid, 18.}

## 2. Prohibitive Territoriality: Colonialism and Annexation

The largely prescriptive norms on territoriality discussed above are complemented by a further set of prohibitive norms regulating the presence of armed forces and the conduct of government activities on foreign territory. The number of wars and acts of aggression intended to serve the territorial expansion of states has drastically declined over the last half-century, but the number of military interventions and government activities on foreign territory in the late 20\textsuperscript{th} and early 21\textsuperscript{st} centuries remains significant.\footnote{See generally, Mark W Zacher (2001).} At the same time, the UN and other international and regional organizations have contributed to the consolidation of state rights and obligations for the maintenance of international peace and security.\footnote{Samantha Besson (2011) 8.}

International norms and practices that developed in the second half of the 20\textsuperscript{th} century have contributed to the crystallization of the contemporary concept of sovereignty, by linking it to the self-determination of peoples, human rights, democracy, and rule of law. These normative standards have been universally accepted and widely applied through state and international practice, including treaty-making and standard-setting initiatives.\footnote{James L Brierly, \textit{The Law of Nations: An Introduction to the International Law of Peace} (Clarendon, 1963) 9.}

Taking account of developments in the concept of sovereignty, this section discusses the international normative framework that defines
prohibited territorial acts, including colonialism, conquest and annexation. It considers the scope of application of these norms in time of occupation and their interplay with the *lex specialis* of belligerent occupation. It surveys the manifestations in time of occupation of policies and practices by the occupying power that amount to de facto and de jure annexation, as well as forms of colonialism, including subjugation of the local population and economic exploitation of its natural resources. It concludes by discussing the legal consequences of violations of the sovereign rights of the ousted government and of the prohibitions on colonialism, conquest and annexation, as well as the contribution that their concurrent application provides to the comprehensive regulation of situations of belligerent occupation.

2.1 Eradicating Colonialism, Misplacing Trusteeship

The ultimate violation of sovereignty is an act of acquisition of territory through the threat or use of force. Historically, this act was known as colonialism: a form of conquest involving alien domination, subjugation and exploitation. The prohibition of colonialism, which emerged at the turn of the 19th century, crystallised as a norm of international law at the time of the establishment of the UN: the world organisation was tasked with the eradication of colonialism through the trusteeship system. While changing the face of the international order, both politically and legally, this transformative process has not completely eradicated predatory state practices, many of which can still be seen in the acts of occupying powers, even though the regime of belligerent occupation is the only legitimate contemporary form of foreign territorial domination.

Colonial European states that explored and surveyed “new” territory considered indigenous communities as objects, as opposed to subjects, of the law on sovereignty, which only applied amongst Western nations. Although in many cases colonial powers did not subjugate territory through war, in the absence of international laws, colonial powers amalgamated both local and foreign laws to suppress local dissent and subjugate and exploit local labour forces and natural resources. Such

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503 General Act of the conference respecting the Congo, signed 26 February 1885, entered into force 19 April 1886 (1885) 165 CTS 485. Kammerer denotes that this humanitarian
exploitation was the objective of most colonial missions – which were often driven by political or religious convictions – achieved by subjugating political structures as needed.

In line with the distinction between transfers of sovereignty and transfers of property rights, colonial powers obtained ownership of land principally through the enactment of property laws. Although the right to conquer and dominion over people and territory was treated as a corollary of the sovereign right to wage war, the exploitation of the colony was based on the coloniser’s use of its own laws to grant rights and entitlements that excluded the local population while securing control over civil and political affairs to secure the benefit of the colonising state.

2.1.1 From Trusteeship to Belligerent Occupation

As early as 1918, the British and Americans proposed that “backwards,” “barbarian” people would require external political, social and economic administrations managed by the League. The League’s trusteeship regime was tasked with supporting “peoples not yet able to stand by themselves under the strenuous conditions of the modern world” as a “sacred trust of civilization”. Under conditions set by the League’s Council, the execution of mandates was entrusted to nations including former colonial powers responsible for past abuses.

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509 Article 22(4), League of Nations, Covenant of the League of Nations, 28 April 1919.

510 Article 22(8), League of Nations, Covenant of the League of Nations, 28 April 1919.
The trusteeship concept, however, was gradually emptied of content by the abusive practices of prominent mandatory powers, many of whom were benefiting from the exercise of broad powers over what were considered, in all but name, colonial possessions.\textsuperscript{511} Due to deficiencies in supervision and enforcement, the weak and politicised League was unable to effectively combat these practices.\textsuperscript{512} With the establishment of the UN system, the regulation of inter-state relations was replaced, almost entirely, with the legal regime on the use of force, and the emergent law on the self-determination of peoples, discussed in Chapter VI. The UN trusteeship system, which sought an end to colonialism, set out to “promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence.”\textsuperscript{513} The new system placed the burden on the invader to exercise restraint in line with the prohibitions of colonialism and the right of conquest, the principle of sovereign equality of states became a “fundamental concept of international law”\textsuperscript{514}, and the international system was charged with the protection of its inviolability. Statehood became a protected status in international law, which meant, as Crawford remarks, that “sovereignty once achieved is entrenched.”\textsuperscript{515} The prohibition on the use of force against the sovereign and territorial rights of another state was enshrined in Article 2(4) of the UN Charter\textsuperscript{516} and promoted in a long list of UN resolutions.\textsuperscript{517}

It was in this context that the 1949 Geneva Conventions made their contribution to the rules on belligerent occupation: they permitted armed forces in foreign territory to act only as needed to provide for the military needs of the invading army, in accordance with the restraints on the use of force in the conduct of hostilities set out in international humanitarian law. An occupying power was expressly prohibited from altering the demographic and territorial status of the occupied territory, restructuring

\textsuperscript{512} Ibid, paras. 46-47.
\textsuperscript{513} Article 73(b), Charter of the United Nations, 24 October 1945, 1 UNTS XVI. According to Roth, Chapter XI of the UN Charter “set the stage for the collapse of the distinction between Non-Self-Governing and Trust Territories and for the eventual fruition of the right to self-determination.” See also, Brad R Roth, \textit{Governmental Illegitimacy in International Law} (Oxford, 2000) 208.
\textsuperscript{514} Daniel P O’Connell, \textit{International Law} (Stevens & Sons, 1970) Vol I, 403. See also, Robert Y Jennings, \textit{The Acquisition of Territory in International Law} (Manchester, 1963) 87.
\textsuperscript{517} See, on the customary status of the norm, Grigori I Tunkin (1965) 101.
its political institutions, rewriting its laws, and exploiting its natural resources or labour forces. Exceptions to some rules were premised on the imperative military needs of the occupying army and its ability to comply with its legal obligations under Hague and Geneva law. The law explicitly prescribed limitations on the occupier’s authority in the foreign territory, leaving no room for expansive or dynamic interpretations. The law affirmed the prohibition of conquest by providing, as summarised by Oppenheim, that occupation does not yield so much as “an atom of sovereignty in the authority of the occupant.”

Yet, the ambiguous formulation of some provisions of the law of belligerent occupation, which entrusts the occupier with the maintenance of public life and civil order and the well-being of the local population, are inauspiciously reminiscent of the trusteeship system. The inadequacy of this system as a premise for belligerent occupation law cannot be overstated: how can a hostile aggressor be entrusted with the protection of the sovereign rights of another state, let alone with the well-being of its population? The predatory practices and policies of occupiers reveal, in this regard, the indeterminacies of the law of belligerent occupation. To deter such abuses, the law should require an occupier to account for violations of the lex specialis of belligerent occupation, and for the breaches of other international norms entailed by its unlawful acts of territorial acquisition, exploitation or prolonged subjugation, without military necessity.

A coherent and comprehensive assessment of the legality of an occupying power’s acts should account also for the in casu effects of specific measures, carefully examining the statements and policies of political echelons. It should seek to correct the disingenuous normative construct by virtue of which former colonial aggressors were transformed, from the perspective of international law, into de facto administrators. By endowing great powers with the prerogative to administer foreign territory – despite the intention to provide narrowly construed, stringently applied criteria – the trusteeship system has essentially been replaced by the de jure regime of belligerent occupation.

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520 Eyal Benvenisti, ‘Sovereigns as Trustees of Humanity’, Tel Aviv University Law Faculty Papers, No 139 (2012).

2.1.2 Colonialism and Belligerent Occupation

Demands for the eradication of colonialism and colonial practices pertained to all forms of “alien subjugation, domination and exploitation.” The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples addressed cases of “trusts or non-self-governing territories or all other territories which have not yet achieved independence”, including territories under belligerent occupation. The objective was, as affirmed by the US representative, “to transfer all powers to the peoples of those territories […] in order to enable them to enjoy complete independence and freedom.” In 1974, the Charter on Economic Rights and Duties of States called on states “to eliminate colonialism, apartheid, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination.” Ten years later, the 1986 Declaration on the Right to Development referred to regimes of “racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty.” Foreign occupation is mentioned by all documents as intolerable, despite its de jure status as the only permissible situation when a government may undertake activities in foreign territory without the consent of its sovereign.

Despite wide state support and concerted international action, the struggle for decolonization continues: contemporary quasi-colonial contexts include Western Sahara, Cayman Islands, British Virgin Islands, Falkland Islands, Virgin Islands, New Caledonia, Guam, Pitcairn and

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Bernhard Knoll, *The Legal Status of Territories Subject to Administration by International Organisations* (Cambridge, 2008) 54.


See, on the application of the Declaration to all territories irrespective of legal status, Majorie M Whiteman, *5 US Department of State Digest of International Law* (1965) 82.

Article 5, 1960 Declaration on Granting of Independence to Colonial Countries and Peoples. This was also affirmed by the ICJ in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, notwithstanding *Security Council resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 31, para. 52.

States engaged in such practices are “economically responsible […] for the restitution and full compensation for the exploitation and depletion of, and damages to” natural and other resources of those countries; Article 16, *Charter of Economic Rights and Duties of States*, General Assembly Resolution 3281, 12 December 1974.

Palestine, inter alia.\textsuperscript{528} Contrary to Gray’s position that decolonization “does not have great practical significance today, except in the context of the struggle of the Palestinians for self-determination to end the illegal occupation by Israel,”\textsuperscript{529} these colonial-type situations may be formally governed by the law of belligerent occupation, but arguably also call for the application of the prohibition on colonialism.

Colonial missions donned varying mantles, including humanitarianism, edification, economic exploitation, as well as military necessity both in the context of armed conflict or a campaign to overthrown and reform an abusive regime. Yet, violations of the law of belligerent occupation have seldom been classified or normatively aligned with colonial practices of subjugation, exploitation and domination, under the apparent presumption that the latter’s contemporary application would be deemed anachronistic. Indeed, as Shaw remarked, self-determination and territorial integrity were considered by some states, including Canada, to be applicable only in colonial situations.\textsuperscript{530}

While colonialism is no longer a commonly used legal category in international law, the term colonialism can still be applied and attract legal consequences, to certain policies and practices of occupying powers. Virtually all occupations since the mid-20\textsuperscript{th} century have had a component of economic exploitation, annexation or regime change, including through the establishment of a puppet government in the occupied territory. In many cases, the occupier has sought to annex territory, acquire permanent sovereignty over natural resources and exploit them for its own benefit,\textsuperscript{531} and transfer its civilian population into the territory with the purpose of entrenching its stronghold over territory and demography, as well as ultimately also government.\textsuperscript{532} By changing the denomination of peoples

\textsuperscript{528} ‘Malawi presses UN to renew efforts to advance process of decolonization’, UN News Service, 27 September 2011.


\textsuperscript{531} See, on Israel’s privatisation of natural resources in occupied territory, B’Tselem, Dispossession and Exploitation: Israel’s Policy in the Jordan Valley and Northern Dead Sea (May 2011); B’Tselem, Acting Landlord: Israel’s Policy in Area C, the West Bank (June 2013). See, on Morocco’s policies in Western Sahara, Western Sahara Resource Watch, Dirty Green March: Morocco’s Controversial Renewal Energy Projects in Occupied Western Sahara (August 2013). See, on natural resources in Iraq, Section 4, Chapter VI.

under occupation from objects to protected persons, Khan remarks, neither the laws of war nor general international law has effectively precluded sovereigns from exploiting natural resources and subjugating the local population to its administrative regime. The civilising mission, Anghie argues, has and continues to shape international affairs.

Occupiers have sought to entrench their ability to enjoy property rights and exploit natural resources in a variety of ways, including litigation reminiscent of the colonial era. Occupiers have exercised sovereign rights by establishing new administrative divisions of territory, a process sometimes euphemized as “political enrichment”. While the General Assembly “resolutely supported” the rights of peoples under “foreign occupation in their struggle to regain control over their natural resources,” it has effectively failed to act against the privatization of natural resources by foreign private and public companies operating under the aegis of belligerent occupation regimes such as Iraq, northern Cyprus, Western Sahara, the West Bank, Gaza Strip and Golan Heights.

Moreover, belligerent occupation regimes have been unreasonably prolonged due to the occupier’s failure to earnestly contribute to peace efforts and conduct negotiations in good faith. In 1973, the General Assembly resolved that the continued Israeli occupation of Arab territories was illegal, because “the occupation was not entitled to delay a peaceful

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535 See, e.g., on the Israeli Supreme Court’s review of cases from the occupied Palestinian territory, David Kretzmer, Occupation of Justice: The Israeli Supreme Court and the Occupied Palestinian Territories (SUNY 2002).
536 Yutaka-Arai-Takahashi, The Law of Occupation (Nijhoff, 2009) 143. See also, V v O (Italy in the Corfu case), Greece, Criminal Court of Heraklion (Crete), (1947) 14 AD 264, Case No 121, 265. See also, Nisuke Ando, Surrender, Occupation and Private Property in International Law (Oxford, 1991).
538 See, on involvement of private actors, Section 2.4, Chapter IX.
solution to the conflict.”

In cases such as the West Bank, Gaza Strip and Golan Heights, the occupying power’s intention to maintain its control led to the subjugation and foreign domination of the local population and permanent denial of the sovereign’s territorial and administrative rights. Notwithstanding the semantic differences between colonialism and occupation, the policies that de jure occupying powers have pursued have entailed legal consequences under the prohibition of colonialism, including foreign domination, exploitation and subjugation.

While the decolonization era contributed to the eradication of these practices, it has arguably not resulted in their desuetude. Colonial practices that emerged in the context of belligerent occupation regimes should result in the classification of such regimes as illegal, on grounds of their violation of the prohibition on colonialism. Contemporary forms of colonial practices, which have not been internationally redressed, include541 Turkish domination of northern Cyprus through an illegal regime, Morocco’s subjection of Western Sahara to its sovereignty and exploited its agricultural land and other natural resources, Israel’s establishment of civilian settlements in Palestinian and Syrian territories, and Armenia’s support for the local authorities in Nagorno-Karabakh, inter alia.

The concept of internationally unlawful foreign domination and occupation 542 is defined in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States: “[t]he territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter.”

The Declaration seeks to establish a normative standard to assess the factual condition of belligerent occupation in international law: a government whose activities in foreign territory entail the pursuit of internationally unlawful acts such as territorial acquisition or regime change, should be subject to legal consequences under the UN

540 The 1977 Additional Protocols, applicable to situations of “armed conflicts in which peoples are fighting against colonial domination and alien occupation […] in the exercise of the right to self-determination”, were meant to close the gap for situations where the occupied territory was not part of “the territory of a High Contracting Party.” Tristan Ferraro, Occupation and Other Forms of International Territorial Administration (ICRC, 2012) 43. See also, Michael Bothe, Karl J Partsch, Waldemar A Solf (eds.), New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Additional Protocols to the Geneva Conventions of 1949 (Nijhoff, 1982) 51-52. Eyal Benvenisti (2012) 245.


Charter’s rules on the use of force, as well as its prohibitions on conquest and colonialism.544

2.2 Belligerent Occupation and the Prohibitions on Conquest and Annexation

The contemporary prohibitions on conquest and annexation are enshrined in the prohibition on the acquisition of territory through the threat or use of force. The prohibition on the use of force in the UN Charter was intended to eradicate war as an instrument of national policy and ensure that perpetrators of unlawful wars, including wars of conquest and annexation, do not benefit from their illegal conduct, as per the maxim ex injuria jus non oritur. Predatory practices of annexation and conquest primarily occur outside of armed conflict; in addition, these prohibitions may be concurrently applied to cases of belligerent occupation, in which jus in bello is also applicable. Doing so does not disturb the distinction between jus ad bellum and jus in bello.545

2.2.1 Annexation and Conquest in International Law

During the 18th century the idea of war was profoundly influenced by Rousseau’s concept of it as a contention between state armies, as opposed to peoples.546 It followed that people’s rights should be protected against the predatory practices of states. With the repudiation of Russia’s imperialist regime in 1917, the Russian Provisional Government announced that “Free Russia does not aim at dominating other nations, at depriving them of their national patrimony or at occupying by force foreign territories; … its object is to establish a durable peace on the basis of the rights of nations to decide their own destiny.”547 President Wilson affirmed the same year that “no right exists anywhere to hand peoples about from sovereignty to sovereignty as if they were property.”548 State practice, however, did not immediately follow suit: acquisitions of territory were

544 See, on the consequences in international law of illegal territorial regimes, Section 2, Chapter V.
545 See, on the operation of the jus ad bellum-jus in bello distinction in belligerent occupation, Section 1, Chapter V.
admitted as compensation for war losses or justified penalty against the aggressor, under a broader punitive logic of self-defense, even following World War I.\footnote{Sharon Korman, \textit{The Right to Conquest in International Law} (Clarendon, 1996) 165.}

The contemporary prohibition on annexation maintains that a state may not acquire legal title to territory through the threat or use of force.\footnote{See also, 1983 Lima Declaration on Non-Recognition of the Acquisition of Territory by Force. Security Council Resolution 242, 22 November 1967, 8. The Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV), UN Doc. A/8028, 26 October 1970. Article 5(3), Definition of Aggression, General Assembly Resolution 3314 (XXIX), UN Doc. A/RES/3314(XXIX), 14 December 1974. See also, Article 52, Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331.}
The very definition of annexation, as Korman notes, conflicted directly with the right to self-determination of peoples.\footnote{Sharon Korman, \textit{The Right to Conquest in International Law} (Clarendon, 1996) 139.}


Lauterpacht remarked that but for the disclaimer of annexation, the assumption by Allied Forces of full control and authority over Germany, enshrined in the 1945 Berlin Declaration, was indistinguishable from subjugation.\footnote{Lassa Oppenheim, \textit{International Law} (Longmans, 1955) 567.}

Article 47 of the 1949 Fourth Geneva Convention, which prohibits the deprivation of protected persons rights by way of annexation of occupied territory,\footnote{The reference to annexation was intended for states to be “better armed to meet it”; Jean Pictet (ICRC, 1952) 275-276.} made the law of belligerent occupation into a safeguard against annexation. The Geneva Conventions prohibit transfers of sovereignty irrespective of surrender through conclusion of a peace
treaty, even if the occupying power had fought a lawful war. Transfer of title over territory can be achieved lawfully “only by agreement in favour of the victim of aggression.”

Hence, the law of occupation, in line with the prohibitions on annexation, colonialism, and the use of force, deems any attempt to alter the status of the territory or its structures of local government null and void, or “legally stillborn.” Further, the requirement that third parties must not recognize any such unlawful attempt was to have ethical, political and juridical value. The international legal order sought to prevent such attempts from being effective in order to provide a basis and timeframe for the restoration of the situation that preceded them. It follows that to ensure the ability to return to the status quo ante, adequate practice and mechanisms were required to keep an inventory of unlawful changes.

Though the law of occupation discriminates in favour of the weaker party in a conflict and of preserving the rights of the ousted government, it has not prevented states from furthering their annexationist and exploitative policies by using indirect forms of coercion. Korman concludes that the only contemporary exception to the prohibition of conquest is where an aggressor state has ceased to exist and the population in the occupied territory wishes to be brought under the jurisdiction of the occupying power. In practice, however, the wishes of the local population have either remained secondary to those of the occupier, or have been distorted and misrepresented in the form of “consent” given by local authorities under the occupier’s ultimate control. Despite principled statements affirming the illegality of Indonesia’s annexation of East Timor, “considerations of international legality were clearly overshadowed by constraints of realpolitik” concerning the threat that East

557 Ibid, 50.
559 The doctrine of non-recognition of unlawful territorial changes served as the legal basis for the continuity of Czechoslovakia, Austria, Poland, Ethiopia and the Baltic states; Ibid, 481.
562 See, e.g., statements by Australia’s Senator Evans, then Minister of Foreign Affairs and Trade, reprinted from Hansard, 18 December 1990, in Australian Foreign Affairs and Trade: The Monthly Record (December 1990) 879.
Timor’s history posed in the context of the Cold War.\(^{563}\) By contrast, in the cases of India’s re-conquest of Goa from Portugal\(^ {564}\) and Argentina’s attempt to re-conquer the Falkland Islands from the British, the international community held, virtually unanimously, that re-conquest was not an admissible form of decolonization.\(^ {565}\)

This inconsistent practice is also demonstrated by contemporary regimes of belligerent occupation, including in northern Cyprus, Transnistria, Abkhazia and Nagorno-Karabakh. In these cases, construed acts of consent by the local authorities in the occupied territory have often contravened not only the territorial rights of the ousted sovereign, but also the rights of the interests of the local population, which was either largely displaced or subjugated by a settler population that benefits from the protection and support of the occupying power.\(^ {566}\) In the recent case of Crimea, Russia invoked its rights and needs to protect a group of Russian ethnic nationals and citizens in Ukrainian territory and proceeded to re-engineer local political structures in the territory, in furtherance of its \textit{de facto} annexation.\(^ {567}\)

\(^{563}\) Sharon Korman (1996) 289.


While these cases do not indict any particular ineffectiveness of the legal framework of belligerent occupation, given the difficulties with the enforcement of almost all international law, they are certainly indicative of the manner in which some foreign administrations of territory have been deficiently scrutinised through the sole application of the law of belligerent occupation in isolation from other regimes of international law.

2.2.2 Annexationist Practices of Occupying Powers

The ultimate functional purpose of the law of belligerent occupation was to provide an alternative normative framework for the administration of foreign territory in a post-colonial era. However, the prohibitions on conquest and annexation complements the normative lens for determining the legal status of an occupier’s exercise of authority, and the ensuing effects of its actions on the status of the territory and ousted sovereign therein.568

Although the hard-rule based law of belligerent occupation largely superseded them, the prohibitions on forcible alterations of territorial boundaries and conquest, annexation and colonialism, remain relevant to the assessment of practices of contemporary occupiers. Foreign invasions that commenced as military occupations have often transformed into regimes characterized by colonial practices.569 Occupiers have sought to establish and maintain their control over foreign territory through practices that resulted in the permanent displacement of the ousted sovereign and in perpetual foreign domination, under various justifications: military needs, war loss compensation, and secessionist claims demanding the right to self-determination.

Russia’s control over local authorities in South Ossetia, Abkhazia, Transnistria, and recently Crimea has led to their integration into Russia’s economy 570 and direct or indirect control by the Russian political echelons.571 In a similar manner, the Armenian belligerent occupation of Nagorno-Karabakh and Turkey’s occupation of northern Cyprus facilitated the establishment of local authorities with close ties with the occupying

569 See, on British presence in Egypt from 1884 until 1954 resulting in political subjugation, David M Edelstein (2008) 4.
570 Luc van den Brande, Mátéyás Eorsi, War Between Georgia and Russia: One Year After, Doc. 12010, B.IV, para. 31 (Council of Europe Monitoring Committee, 2009). International Crisis Group, South Ossetia: the Burden of Recognition (June, 2010) 7.
state.\textsuperscript{572} By contrast, Russia’s actions in Crimea were from the outset intended to facilitate its ultimate annexation by Russia.\textsuperscript{573}

Moreover, Russia, in the occupied Georgian and Moldovan territory, and to a different extent in the Crimea, has conferred Russian citizenship and political rights in a manner intended to undermine local political institutions’ representative role in governing daily life. Weis remarks that “by conferring its nationality on the national of another state the naturalising state purports to deprive the other state of its right of protection.”\textsuperscript{574} Thus, for instance, Russia’s application of its Law on Citizenship on Georgian territory amounts to infringement on the latter’s territorial sovereignty that resulted in the \textit{de facto} annexation of territory by managing civil affairs and tying the local population to the occupier’s domestic public institutions.\textsuperscript{575}

If the law of belligerent occupation is to be both coherent and effective, the actions of occupying powers should only stand the test of legality if they are based on genuine security needs, which is unlikely to be the case with the laws on citizenship and residency. For instance, “the issue of new laws, the abolition or alteration of old ones […] are to be avoided if they are not excused by imperative consideration of war.”\textsuperscript{576} Occupying powers have interpreted the “imperatives of war” very broadly on the basis of purported military or security needs to alter the occupied territory’s political and economic structures.

The practice of viewing situations of foreign territorial control exclusively through the lens of occupation law has had severe consequences. Korman argues that in effect, contemporary international law, which ostensibly rejects the right to conquest and accepts the right to self-determination of peoples as a shield for territorial claims by predatory


\textsuperscript{574} See generally, Paul Weis, \textit{Nationality and Statelessness in International Law} (Brill, 1979) 101.


\textsuperscript{576} John H Morgan, \textit{The German War Book} (Murray, 1915) 139. See also, Gerhard von Glahn (1957) 94-95.
states, offers a new *casus belli* for the expansion of borders.⁵⁷⁷ Political analysts have held that the coercive strategies adopted by occupying powers seeking to subjugate the local population have only produced more local resistance,⁵⁷⁸ which has in turn led to widespread violations of the rules of international law concerning the prohibitions of conquest and annexation. Edelstein remarks that an occupier should be committed from the outset to vacating the territory and returning control to the indigenous government, as soon as the underlying military advantage sought by the occupation has been achieved.⁵⁷⁹ A shift from conquest to intervention in the mid-²⁰th century, according to Fazal, increased the foreign administration of failed states.⁵⁸⁰ By replacing the presumption against conquest with a presumption of legality of intervention to assist failed states in preventing civil unrest and bringing about peace and security, interventions of this kind have effectively given rise to a wave of regime change campaigns under the guise of ‘humanitarian’ occupation, in the context of which states have sought to pursue their economic and political interests.⁵⁸¹

2.3 Modes of Territorial Acquisition and Belligerent Administration of Foreign Territory

The prohibitions of annexation and conquest, which include the acquisition of territory through the use of force as well as the unlawful exercise of sovereign authority in violation of another state’s territorial integrity and political independence, turned international sovereignty from a mere source of law into a hard rule against predatory or exploitative state conduct. During a belligerent occupation, these guarantees are complemented by the *lex specialis* of occupation law that protects the territory, its local population and the ousted sovereign against demographic changes, acquisition or transfer of title to land and property, mass annulment of local laws, or re-engineering of political institutions.⁵⁸² Although international law is not always able to regulate the production of

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⁵⁷⁹ See, on the distinction between colonialism and occupation, David M Edelstein (2008) 3.
⁵⁸¹ *Ibid*, 229. See also, on ‘transformative’ and ‘humanitarian’ occupation, Section 2, Chapter VI.
legal facts in the domestic arena, the international law applicable to belligerent occupation is intended to ensure that changes resulting from unlawful exercises of administrative or legislative authority by an occupying power are not given legal effect and can be reversed, to the extent possible, to their status quo ante.

2.3.1 Barriers to the Acquisition of Territory

Traditionally, there are several modes by which sovereign title over territory can be lawfully acquired. The methods commonly enumerated include: conquest, acquisition of territory by force of arms; cession of territory by treaty or agreement; occupation, different from belligerent occupation, entailing possession with intent to control to the exclusion of others terra nullius; possession outside the context of international armed conflict; and prescription through possession with intent to control to the exclusion of others.

Whereas most of these modes have been outlawed, or fallen into desuetude, prescription remains of potential relevance to some cases of prolonged occupation. This mode of acquisition takes place through the passing of time since conquest, during which other states could protest the acquisition and prevent it from becoming formally entrenched. In all cases, for title to be obtained by prescription, it must be non-adverse and uncontended, absent competing claims by other states, as well as entrenched through effective measures demonstrating the administration of the possessing State.

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583 See, e.g., on Nigeria’s occupation of the Bakassi and Lake Chad areas, Gleiger I Hernandez, ‘Effects of Territorial Changes’, Max Planck Encyclopedia of Public International Law (September 2010) 6.
584 See, on the weaknesses of non-recognition in international law enforcement, Yael Ronen (2011) 320.
587 Ibid, 148-150.
In order to legally acquire control over territory by prescription, a state needs to physically demonstrate its ability to control the territory: effective possession must be “followed by action, such as, in a simple case, the planting of a settlement or the building of a fort, which shows that the state not only desires to, but can and does control the territory claimed.” In 1933, the Permanent Court of International Justice held, in the *Legal Status of the Eastern Greenland* case, that the international recognition for Denmark’s legislative and administrative measures in the territory of Greenland, it was considered to have obtained title over the territory through occupation. Prescription may be allowed for territory where actual control thereover arose from an unlawful act of aggression or foreign interference, leading to the conclusion of a treaty of cession signed under duress.

Further, prescription may occur even where “possession in the first place being wrongful, the legitimate proprietor has neglected to assert his rights, or has been unable to do so.” In the 1962 *Temple Vihear* case, the Court found that Thailand (then Siam) had acquiesced in Cambodian sovereignty by failing to express protest against a map placing the Temple under Cambodian sovereignty. According to Shaw, international courts have been satisfied with “very little in the way of actual exercise of sovereign rights, provided that the other state could not make out a superior claim.” Critically, however, prescription requires a continuous non-belligerent occupation and the absence of competing claims emanating from an established, organised state authority. In the *Island of Palmas Arbitration* case, acquisition of territorial title was said to occur by way of “the continuous and peaceful display of territorial sovereignty.”

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593 See, on the operation of the doctrines of estoppel, acquiescence and non-recognition, Sharon Korman (1996) 230 et seq.
598 *Island of Palmas Case (or Miangas)*, United States v Netherlands, Award, (1928) II RIAA 829, ICJ 392 (PCA 1928), 4th April 1928, Permanent Court of Arbitration [PCA]. See also, James L Brierly (1963) 168.
Anglo-Norwegian Fisheries case, in 1951, the ICJ held that “long possession in order to have the effect of extinguishing a prior title to sovereignty must be continuous, public and peaceful.”

2.3.2 Belligerent Occupation and Transfers of Sovereignty

The law of occupation imposes limits on claims to title over territory or to adjustments and transformations of the political system of the occupied territory, and prevents such modifications from having effect in international law. An occupying power therefore cannot acquire territory either during or in the wake of belligerent occupation. Indeed, the \textit{de jure} condition of belligerent occupation is premised on ensuring the continuity of ousted sovereign’s legal rights over territory, in the capacity of its sole legitimate international representative, and conserving the government’s structures. It further provides for the protection of the ousted sovereign or any local authorities in the occupied territory from ceding sovereign rights or title to the occupying power.

While the law absolutely prohibits territorial transactions during occupation, in order to preclude transactions under the occupier’s coercion, occupiers may seek to terminate the occupation or sequence the transaction in order to evade, even if temporarily, this barrier to acquiring territory. However, due to the inherent state of aggression neither a \textit{de jure}, nor a \textit{de facto} occupying power could lawfully overcome the barrier of coercion and obtain genuine, free-willed consent from the ousted sovereign to obtain title by cession. Further, in the event that an occupying power refuses the \textit{en bloc}, \textit{de jure} application of the law of belligerent occupation, it remains subject to the principles of good faith and equity to be able to procure title through non-belligerent prescription. In general, the requirement of non-belligerency as a basis for maintaining and exercising actual control over territory precludes not only situations that entail the \textit{de jure} application of the law of belligerent occupation, but also any other foreign intervention based on the threat or use of force.

\textit{Anglo-Norwegian Fisheries} (United Kingdom v Norway) ICJ Reports 1951, 18 January 1951, 130. \textit{District United States Cable Co. v Anglo-American Telegraph Co.} (1877), 2 AC 394. See also, James L Brierly (1963) 170.
\textit{Articles} 7, 8 and 47 of the 1949 Fourth Geneva Convention.
\textit{See also,} on the application of the law on self-determination in time of occupation, Chapter VI.
In addition to prohibiting any territorial transactions by occupying powers and invading states, the law of occupation entails international legal obligations on third party states to ensure the non-recognition of unlawfully obtained or title or authority. Russia’s expansionist tactics, using protectorate treaties to secure direct administration and proceed to annex foreign territory, were met by fierce diplomatic protests by third states, successfully defeating Russian claims over the Baltic States. Similar imperialist claims were recorded by Japan and European powers. The international reaction to Iraq’s aggression and territorial claims in Kuwait is a contemporary example of the legal consequences of territorial acquisition and regime change by force. Such reactions are less likely to arise from violations of the *lex specialis* of belligerent occupation in cases when it is applied in isolation from the international law norms concerning illegal territoriality.

While the politicization of international institutions has often limited the enforcement of these commitments, the ability of territorial norms to attract consequences of non-recognition from third states, can compel measures by law-abiding states to uphold their domestic public policy and rule of law, as discussed in Chapter IX. In the Azerbaijani territory of Nagorno-Karabakh, for instance, where Armenia maintains a ‘long-arm’ occupation, its relegation of control to local authorities claiming independence has not attracted international recognition for the newly-created entity in the occupied territory. Notably, when the Armenia-supported local authorities organized diplomatic visits to the territory without Azerbaijan’s permission, Azerbaijan legislated to criminalise entry into the region without prior permission from its authorities.

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3. Interplays between Territoriality and the Law of Belligerent Occupation

Important interplays between belligerent occupation law and the law on territoriality in international law remain largely unchartered. The law of territoriality, consisting of both prescriptive rights and prohibitive norms enshrined in the law of the UN Charter as well as a myriad of authoritative declarations and resolutions, can undoubtedly benefit from normative reinforcement. In the context of belligerent occupation regimes, the hard-rule based lex specialis of belligerent occupation performs this very function, while relying, substantively and operationally, on the rules and consequences assigned to violations of the law on territoriality in international law.

The interplay between the laws on territoriality, sovereignty and belligerent occupation offer opportunities for operationalizing the normative exchange between these bodies of international norms. Such a practice could fill gaps in the definition and scope of application of an international legal regime intended to regulate belligerent occupation, and reinforce the obligations and rights of third states and international actors vis-à-vis a foreign administration of territory that entails wide-ranging and serious violations of international law.

3.1 Territoriality in Time of Occupation

Belligerent occupation stands in contravention, both politically and legally, with the founding principles of international law concerning the protection of the sovereignty, territorial integrity, political independence and exclusive jurisdiction of all states and state-like entities. While the prohibitions of acquisition of territory, annexation and interference in domestic affairs underscore this regulatory framework, the hard-rule based law of belligerent occupation prescribes the rights and duties of de jure internationally-recognised occupying powers, based on a temporary, conservationist premise. Foreign administrations of territory, either by de facto or de jure occupiers, that threaten or breach the sovereign rights of the ousted legitimate government are tolerable only to the extent that they adhere to the lex specialis of belligerent occupation.

Acts that exceed the occupier’s authority and seek to further claims of sovereignty through changes to the economic, legal, political and demographic character of the occupied territory amount to serious violations of general international law, in addition to their status as
breaches of international humanitarian law, and are as such considered null and void.\textsuperscript{608} The force of their illegality as violations of the laws on sovereignty and jurisdiction flows from their non-recognition by other states and international actors. The concept of sovereignty and its corollary principles in international law are crucial for the coherent and vigorous regulation of occupying powers seeking to acquire permanent, direct or indirect, control over the territory, by either annexing it or administering it through a puppet regime subject to its ultimate authority.

Three normative interchanges between the law of territoriality and the \textit{lex specialis} of belligerent occupation are important. Firstly, the law of territoriality is often considered as having been fully incorporated in the \textit{lex specialis} of belligerent occupation,\textsuperscript{609} given the unique function that occupation law was intended to perform with respect to the protection of territorial rights from acquisition, revision or encroachment. It serves primarily to prohibit an occupier from undertaking any kind of activity in the occupied territory that exceeds its limited authority.

Equally, the international prohibitions on annexation and colonialism and the principles of territorial integrity and sovereign equality provide a test for the lawfulness of the duration and administration established by an occupier. Their concurrent application in time of occupation provides important normative guidance for assessing the legal character of an occupation regime,\textsuperscript{610} as well as a legal basis for challenging unlawful territorial administrations, including ‘long-arm’ occupations short of direct acquisition of title over the territory.\textsuperscript{611}

Secondly, the \textit{de jure} application of the law of belligerent occupation grants the occupying state a seal of international recognition, which in turn requires the occupier to administer foreign territory within the limits of the law and to terminate its presence once its reasonable, imperative military needs have been fulfilled. Notably, Hague law could apply in some cases where there is not an international armed conflict, and where the occupied territory does not belong to a sovereign state – based on the presumption that the effective control of the foreign territory would trigger obligations


\textsuperscript{609} See also, Section 2, Chapter III.

\textsuperscript{610} See also, Chapter V.

\textsuperscript{611} Tristan Ferraro (ICRC, 2012) 45.
of *de facto* administration. While the hard law of occupation was intended to remedy some of these indeterminacies by providing a standard of behavior to be upheld by administrators of foreign territory, the indeterminacy of some the *lex specialis* rules of the law of belligerent occupation has been abused by predatory powers.612

Although international law on sovereignty and territoriality alone is ambiguous and does not lend itself to self-execution,613 its conjunctive application with the *lex specialis* of belligerent occupation illuminates the legal status and objectives behind the occupying state’s continued presence and exercise of authority in the occupied territory. Higgins has maintained that it is crucial to ensure “the protection of common values rather than the invocation of state sovereignty for its own sake.”614 In this case, the invocation of state sovereignty functionally serves precisely to ensure such protection.

Thirdly, while the law on territoriality makes an exception for the *de jure* emergence of situations of belligerent occupation, it also provides a legal basis for assessing foreign occupation regimes that do not enjoy a *de jure* internationally recognized status, due to the occupier’s attempts to redefine the status of the territory or re-engineer its government. In other words, when a government’s activities in foreign territory violate the principles of non-intervention and territorial integrity – as is the case with Russia’s conduct in Georgian, Moldovan and Ukrainian territories, Turkey’s conduct in northern Cyprus or Israel’s in the Palestinian and Syrian territories – it cannot evade its obligations under the law of belligerent occupation by disguising its *de facto* annexation or subjugation of the territory in claims that it is supporting a secessionist struggle or supporting a local administration, often run by its civilians unlawfully transferred into the occupied territory.

Essentially, the application of the law on sovereignty and territoriality removes the veneer of legitimacy and legality of measures that otherwise appear to conform to the *lex specialis* of belligerent occupation, when they are undertaken by an occupying power whose *de jure* status is under question due to the illegal character of the effects of its exercise of authority in the occupied territory on the rights of the ousted sovereign. It provides a basis for formulating an international position on the non-recognition of the occupier’s exercise of authority in the occupied territory

612 Martti Koskenniemi (2005) 246-249.
due to it being based on unlawful administrative and legislative acts, effectively producing an illegal territorial regime, as discussed in Chapter V.

The battered idea of sovereignty is shorthand for a bundle of normative prerogatives and limitations on the rights of governments in their internationally-recognised borders, as well as the limits on their permitted conduct outside of their exclusive domain. Yet, as Koskenniemi remarks, “the principles of conduct between states followed as a description of what was required to safeguard the anterior liberties.”

Currently, the legal fiction of sovereignty is merely a generic description of the particular rights, liberties and competences bestowed upon peoples and executed by their legitimate state authorities. The task of managing, protecting and conserving these rights in time of armed conflict and military invasion was entrusted to the law of belligerent occupation, which incorporates the international law on territoriality and sovereignty to protect a population under belligerent occupation from the occupier’s predatory policies, including the acquisition of their sovereign territory or their subjugation to a foreign regime, maintained or supported by the occupying state. The interplays and concurrent application of the law on territoriality and sovereignty with the lex specialis of belligerent occupation is critical for ensuring the effectiveness of each body of law respectively as well as their concomitant coherence in the international legal order.

3.2 Operationalising Normative Convergences

Classifying a territorial regime as a de jure belligerent occupation not only bestows rights to be claimed by the residents of the occupied territory, but also provides an objective test for third states and international actors to assess the compliance by the occupier with its rights and obligations under international law. Since most compliance with international law continues to be premised on state consent – due to the political nature of the operation of international law enforcement mechanisms, as discussed in Chapter VIII – an occupying state’s compliance with the lex specialis of belligerent occupation will depend on its readiness to recognize its own status as an occupying power and to apply the law of occupation en bloc, with its underlying premises and normative underpinnings. The occupier’s rejection of this legal status and refusal to accept the rules of the law of occupation as the sole legitimate basis for its authority in foreign

616 Tristan Ferraro (ICRC, 2012) 4. See also, Chapter III.
territory is evidence of the internationally unlawful character of the occupying state’s activities in and claims vis-à-vis the occupied territory.

The interplay between the two bodies of law seeks to resolve the tension between two competing principles, that of ex injuria jus non oritur (unjust acts cannot create law) and that of ex factis jus oritur (existence of facts creates law), by requiring the occupier to effectively withdraw from the occupied territory. In discussing the impact of the international principle of effectiveness on the constitution and recognition of illegal territorial regimes, Milano remarks that the international law on territoriality “has been most of the times diminished by ad hoc solutions influenced by effective situations on the ground, which have not taken fully into account the legal entitlements of the subjects under occupation.”617 Yet it is precisely for this reason that he nevertheless maintains that the language of “sovereignty and territorial integrity”, rather than “being in radical opposition to the language of effectiveness […] tends to enhance the role of the latter in the way international law ‘regulates’ – or, sometimes, does not regulate - territorial issues.”618

Indeed, the ability of law to function as “law”, instead of a set of soft rules that guide but do not constrain or effectively prescribe the behavior of third states and international actors, is premised on the application of law as a comprehensive system. The legal consequences of illegality entailed by the different areas of law considered in this chapter should therefore be applied coherently to the set of facts resulting from a situation of an illegal territorial regime. By assessing the legality of a situation through a framework that combines general international law rules with the hard-rule framework of occupation law – probably the last universal bulwark against unacceptable abuses in situations of foreign domination619 – the effectiveness of international law and its regulatory role can be significantly enhanced. Thus, the enforcement of the law against unlawful occupation regimes goes beyond measures required to restrain the discretion of the occupier to the scope of permitted authority to administer, or to stigmatise the condition of occupation as a vehicle for the occupier’s claims of sovereignty over the territory. The practice of non-recognition of infractions on the sovereignty of other states and entities allows third states and international actors to rein the occupying power in and affirm the underlying regulatory premise in which the law of occupation is embedded and on which it relies to ensure good faith compliance by occupying States.

618 Ibid.
619 See generally, Peter Maurer (2012).
By invoking breaches of the law of territoriality and sovereignty, the occupied state can enhance its ability to claim respect for international law by the occupying state, as well as call for measures that restrict the occupier’s ability to dispose with the territory and population as it wills. Irregardless of the occupying state’s acceptance of the *de jure* application of the law of belligerent occupation, it will be required to apply, and most probably consider itself bound by, the international law on territoriality and sovereignty, which have been widely accepted by state practice, are enshrined in the UN Charter, and are binding in times of peace and armed conflict on all UN member states.

If the international community were to adopt a position calling on all states not to recognise the unlawful claims to sovereignty, it would strengthen its ability to prevent an occupying power from running roughshod over the rights of the ousted sovereign, despite an otherwise sophisticated, set of security-disguised measures that the occupier seeks to justify on the basis of its interpretations of the applicable law. A comprehensive application of international law to situations of belligerent occupation would escape from the traditional preoccupation with specific acts and measures in the context of the *lex specialis* applicable thereto, reinstate the very function that was initially entrusted in the law of belligerent occupation, and add a normative dimension to its regulation as a territorial regime.\(^{620}\)

The strength of the law of territoriality as a means to further claims in time of belligerent occupation, is reinforced by the vigorous assimilation and internalization by third-state domestic legal and political orders of their non-recognition obligations. These include commitments to make the necessary territorial distinctions between an occupier’s sovereign territory and the territory it occupies: such commitments ensure the stability and certainty of the rule of law, including international law, and the maintenance of a peaceful environment for the conduct of international relations. In turn, an occupying power’s *de facto* extension of its domestic jurisdiction and exercise of sovereign authority over the occupied territory can have far-reaching consequences on the ability of third states and international actors to maintain many types of inter-state relations with the wrongdoing occupying state. The EU’s relations with Turkey, Morocco and Israel are cases-in-point for the operationalization of this mode of enforcement, discussed in Chapter IX. They exemplify the commitment of

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third states to the law on territoriality and the critical function it plays in the shaping and regulation of state relations with illegal territorial regime.
CHAPTER V

BELIGERENT OCCUPATION AND JUS AD BELLUM: INTER-STATE USE OF FORCE AND ILLEGAL TERRITORIALITY

From the moment that ‘effective control’ over territory by a foreign power can be ascertained,\(^{621}\) the \textit{lex specialis} of belligerent occupation, i.e. \textit{jus in bello}, is applied, as distinct from the law on the inter-state use of force, or \textit{jus ad bellum}. This applies to all situations of occupation, whether or not an unlawful use of force was involved, as affirmed by a US Military Tribunal at Nuremberg: “International law makes no distinction between a lawful and unlawful occupant in dealing with the respective duties of occupant and population in occupied territory.”\(^{622}\) The rights and obligations of the occupier are the same, regardless of the legality of the force used to start the armed conflict \(^{623}\) : the normative framework of international humanitarian law is seen to exclusively determine the legality of the occupying power’s actions. Ensuring the separation between \textit{jus ad bellum} and \textit{jus in bello}, moreover, has functional value for ensuring the protection of the civilian population independently of the righteousness of any party’s acts, by maintaining the equal application of the laws of war to all parties.\(^{624}\) Indeed, the distinction between two bodies of law is intrinsic to


However, the law on territoriality and sovereignty, as well as the law on self-determination, discussed in Chapter VI, respectively complement the law of belligerent occupation, bolstering its \textit{lex specialis} provisions against the occupier’s interference in the political order and sovereign rights of the invaded state. Hence, a ‘transformative’ occupation intended to extensively reform a political order, amounts to an illegal territorial regime – by virtue of the illegitimate authority of the administration and the illegal effects it ensues on the territorial and sovereign rights of the legitimate government.\footnote{See, on the denial of legitimacy to an effective government authority in situations of territorial illegality emergent from illegal foreign interference, Jure Vidmar, ‘Human Rights, Democracy and the Legitimacy of Governments in International Law: Practice of States and UN Organs’, in Carlo Panara, Gary Wilson (eds.), \textit{The Arab Spring: New Patterns for Democracy and International Law} (Nijhoff, 2013) 59-60.} The illegality of these measures would be no more acceptable if the occupier claimed they were necessary to support a secessionist self-determination struggle. An occupation regime that pursues permanent territorial or administrative changes in the sovereign status or government of the occupied territory may be responsible for violations of international law that go beyond the \textit{lex specialis} of belligerent occupation to include the principle of self-determination of peoples, and the prohibition on territorial acquisition through the use of force or on aggression. Such legal consequences may derive from the initial use of force, at the very outset of the armed conflict, or from a new shift in the \textit{casus belli} amid an ongoing armed conflict and belligerent occupation. The latter case is likely to emerge when the purpose of the occupying power’s use of force to maintain its control over foreign territory exceeds that permitted by the \textit{lex specialis} of belligerent occupation, i.e. lawful military necessity and the maintenance of public order.

Most commentators have asserted that legal consequences and responsibilities concerning the objectives of the occupying power and the legality of its initial act of extra-territorial use of force, should be distinguished from the question of the applicability of the \textit{lex specialis} of belligerent occupation to specific facts in the context of an otherwise \textit{de jure}
occupation regime. Yet it is not necessary, in order to maintain this distinction in the determination of legal responsibility, to exclude international norms on territoriality and self-determination, *inter alia*, from the law-ascertainment processes that may determine the interpretation and application of *lex specialis* rules. Despite the evident interaction between these bodies of international law, limited attention is paid to the application of legal regimes that regulate state conduct in order to ensure the protection of sovereign and territorial rights to the *lex specialis* of belligerent occupation. As this chapter demonstrates, the integrated effect of these different legal mechanisms can ensure coherence in the application of multi-sourced equivalent norms of international law, and significantly contribute to enforcement of international law.

1. The Relevance of *Jus ad Bellum* to the Regulation of Belligerent Occupation

By contrast to other situations of international armed conflict, the distinction between *jus in bello* and *ad bellum* in time of belligerent occupation has at least two dimensions. One legal assessment under *jus ad bellum* determines the legality of the initial use of force, in light of the *casus belli* underlying the military intervention that resulted in the international armed conflict and produced a condition of belligerent occupation. Another analytically distinct assessment, based on a subsequent set of facts, would result from the occupier’s use of force to maintain its control over the foreign territory.

The latter body of law imposes crucial limitations. For instance, although the foreign government would be deemed an occupying power for the duration of its control over foreign territory, parties other than the occupier and ousted sovereign could seek to capitalize on the sovereign’s absence to further secessionist claims, *inter alia*. Yet, the very intention behind the special regime of belligerent occupation is to foreclose any permanent changes to the territorial status or administrative and governmental structures of the ousted sovereign. Due to the unique character of the protective shield of this *lex specialis*, forcible regime change and territorial revisions under the banner of consent, invitation, protection

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or support for secessionist movements would not be permitted; the law provides an occupier only with a narrowly-defined authority to ensure public order and the basic functioning of existing public institutions.\(^{630}\)

Similarly, *jus ad bellum* also imposes limitations that should be maintained alongside the *jus in bello* regime. For instance, a belligerent party may claim that its intervention in foreign territory is intended to bring an end to human rights abuses, which may be interpreted as a military threat to its security,\(^{631}\) and on that basis, maintain its presence beyond the moment whereby the threat is neutralized.\(^{632}\) Yet in doing so, it would essentially exceed the lawful remit for the use of force in international relations. The concept of a ‘humanitarian’ occupation purports to amend the manner in which the *lex specialis* of belligerent occupation is applied in at least three ways: it expands the scope of acts undertaken by international organisations, with authorisation from the Security Council; it permits changes to the *status quo ante bellum*; and it justifies recourse to force by the occupying State.\(^{633}\) The attempt to expand the pattern of facts that calls for the application of the special territorial regime of belligerent occupation to situations that offend its cardinal rules opens the door for abuses of the prescriptive rights it affords to occupying powers, and for the maintenance of administrations of foreign territory that otherwise amount to illegal territorial regimes in international law.\(^{634}\)

As demonstrated in the following discussion, it is thus important to account for the risk of a shift in the *casus belli* underlying the maintenance of a particular territorial regime, be it a *de jure* belligerent occupation or another type of administration of foreign territory, by including *jus ad bellum* rules in the applicable international legal framework. *A fortiori*, a foreign power whose measures result in the permanent exclusion of the legitimate sovereign, or in the acquisition of rights over territory, would cease to be entitled to the benefits afforded to a *de jure* occupying power in


international law, as discussed below, while also attracting legal consequences that mandate its withdrawal.635

1.1 Independent Co-Application of Jus ad Bellum and Jus in Bello

Traditionally, *jus ad bellum* rules are applied to determine the legality of the initial use of force concomitant with the invasion of foreign territory. This moment is often contemporaneous with the beginning of belligerent occupation, which triggers the application of its *lex specialis* to the territory and to domains of daily life under the invading army’s control. To this extent, the application of *jus ad bellum* rules is only pertinent to assessing the *casus belli* that led to the invasion of the territory; its application to situations that emerge in time of occupation is effectively foreclosed. Yet the rationale underlying the distinction between *jus in bello* and *jus ad bellum* is inadequate to address and ensure the legal regulation of complex and diverse contemporary situations of belligerent occupation. If applied exclusively, the special legal regime for belligerent occupation renders international law unable to adequately regulate and protect against the predatory self-interests of occupying States.

To disambiguate the regulatory function performed by *jus ad bellum* rules in the context of contemporary belligerent occupations, we must first unpack the classic distinction with *jus in bello*. The literature considers *jus ad bellum* to be applicable to the initial use of force by a belligerent party before the time that the armed conflict is triggered. The law’s main concern is the prohibition on the use of force as a means for resolving inter-state disputes, subject to two narrowly-defined exceptions: the right to self-defence defined in Article 51 of the UN Charter, or Security Council authorisation.636 In conjunction with the relevant *lex specialis* of belligerent occupation, *jus ad bellum* rules also pertain to a government’s activities in foreign territory in so far as they relate to the status of that territory, the right to territorial integrity of the ousted sovereign, or the future political independence of its legitimate government.637

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635 Gregory Fox (2008) 221.
Measures taken by the occupier that permanently revise the status of the territory and the ousted sovereign’s rights therein, may also bear on the occupier’s *de jure*, internationally-recognised rights of administration, and the legality of its continued presence in the occupied territory. By perpetrating acts that amount to violations of the prohibition of annexation, amongst other rules on illegal territorial regimes in international law as discussed in Chapter IV, an occupying state risks becoming a conqueror or colonizer and incurring the legal consequences entailed by the gravity of such acts.\(^{638}\) An occupier involved in unlawful acts would not only be stripped of its international recognition as *de jure* administrator of foreign territory, but might also trigger retorsion measures under the collective security regime to terminate the presence of its troops in foreign territory.\(^{639}\)

Secondly, an occupying power that exercises its administrative authority in the occupied territory *ultra vires* of the limitations and prescriptive rights granted to it by the *lex specialis* of belligerent occupation, in a manner that jeopardises the full exercise of the right to self-determination by the local population after the end of occupation, may gradually lose its inherent right to maintain its control over the foreign territory to the exclusion of the ousted sovereign. Such a loss of rights is in line with a cornerstone rule of the laws of war: even if the occupier has a lawful reason for having fought and occupied another sovereign’s territory, *jus ad bellum* cannot be invoked to justify violations of *jus in bello* during the subsequent occupation. This principle is explicitly stated in the fifth preambular paragraph of the First Additional Protocol to the Geneva Conventions,\(^ {640}\) and affirmed through extensive state practice and international jurisprudence.\(^ {641}\) Experts at the 2012 ICRC meetings on the

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639 Yoram Dinstein (2011) 303 *et seq*.

640 First Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 17512 UNTS 7. See also, Articles 1-2, Geneva Conventions, 970 UNTS, 32 (First Geneva Convention). See also, Jean Pictet (ICRC, 1952) 27, 32.

law of occupation accepted that the prescriptive rights in the law of occupation were restrictive and should be applied in accordance with the international law prohibitions on interference in domestic affairs and assaults against the territorial integrity of another sovereign. Further, since the internal composition of a state, its distribution of power and constitution are not of direct concern for international law, the protection granted to the sovereign rights of the ousted government through their suspension and reversion at the end of occupation is an unconditional minimum guarantee against potential abusive practices by the occupying power. Accordingly, sweeping radical changes that entail the complete restructuring of the administrative, legal and judicial system in the occupied territory are considered unlawful under occupation law. An expert at the 2012 ICRC meetings noted: “if a transformation of political institutions was, exceptionally, to take place, it should at least be regulated by jus ad bellum or jus post-bellum, and the legal basis for it should not be sought in jus in bello.” It is thus legally feasible to apply jus ad bellum in time of occupation as a standard for regulating the occupier’s activities in foreign territory, without disturbing the classic jus ad bellum-jus in bello distinction. Its application is also desirable from a regulatory standpoint to ensure that an occupier does not exploit its de jure status under jus in bello to perpetrate acts that are otherwise unlawful in international law.

Third, the distinction between jus ad bellum and in bello is not as relevant to force-based territorial administrations as it may be to other situations that arise from armed conflict, due to the special de jure administrator status granted to occupying powers in international law. Although an occupier’s conduct can be seen as crudely measured by the military advantage it continues to obtain from maintaining its control over the foreign territory, the legal framework applicable to its conduct is not limited to the rules of international humanitarian law concerning the


642 Cf., Tristan Ferraro (ICRC, March 2012) 111. See also, for a discussion of these principles, Sections 1.2 and 1.3, Chapter IV.


644 Tristan Ferraro (ICRC, March 2012) 70.

645 Ibid, 71.

646 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, 226, para. 42.
Conduct that may not be clearly unlawful under the *jus in bello* applicable to belligerent occupation, may independently constitute a violation of *jus ad bellum*. The laws of war, including the rules that govern the duties and limitations placed on the occupier, continue to apply ‘after the close of general hostilities’, but the conduct of the occupier, as an international administrator of foreign territory, particularly in the context of a ‘calm occupation’, is also governed by the law applicable to foreign administrations of territory under the authority of another sovereign. An occupier that prolongs its occupation of foreign territory after the diminution of prevailing military necessity – the only legitimate basis both for its continued presence – would breach *jus ad bellum*, due to the disproportionate and unnecessary nature of its continued act of self-defence. As Chesterman and others have maintained, “occupation where it does occur as a matter of fact, should be limited both in time and in its impact on the relevant territory.”

Exaggerating the distinction between *jus ad bellum* and *in bello* fails to appreciate the diversity of *jus ad bellum* rules – such as the acquisition of territory through force, necessity and proportionality of self-defence – and superimposes a one-size-fit-all approach to the regulation of complex, evolving situations of foreign control. While *jus ad bellum* cannot justify violations of *jus in bello*, the opposite is also true – *jus in bello* cannot justify or foreclose legal consequences entailed by violations of *jus ad bellum*. In any case it is important to recognize that the *lex specialis* of belligerent occupation has a relatively narrow function in the international legal order; it appears self-evident that territorial regimes illegal under *jus ad bellum* would also lose their *de jure* status and legitimacy under the *jus in bello* of belligerent occupation. The law of belligerent occupation was intended as a special lawful regime of foreign control over territory based on the use of

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648 Article 6, 1949 Fourth Geneva Convention.


force. It would be disingenuous to maintain that an occupying power whose conduct results in violations of the broader set of jus in bello rules, including the prohibitions on territorial acquisition and regime change, is immune to the concomitant applicable jus ad bellum. Applying the lex specialis of belligerent occupation to contemporary cases, without also applying important protections provided by jus ad bellum, would effectively permit ongoing abuses of the latter, and risk rendering ineffective the role of international law in such situations.

1.2 Violations of Jus ad Bellum and Belligerent Occupation: Means of War or Acts of Aggression?

A foreign power whose presence in and conduct vis-à-vis the occupied territory is intended to bring about long-lasting changes to the status and rights of the population, ousted sovereign and future political constitution and independence of a legitimate government, resembles an archetypical act of aggression more than the conduct of an occupying power under the intended parameters of the lex specialis of belligerent occupation. Having said that the law of belligerent occupation should be co-applied, though independently, with rules of jus ad bellum, the questions that ensue concern the effects this co-application entails: does the condition of occupation as a legitimate means of war turn unlawful, requiring that the belligerent party occupying foreign territory withdraw its troops? Does it alter the application of specific lex specialis rules of belligerent occupation, found in Hague and Geneva laws? Does the de jure status of the territorial regime change into an illegal territorial regime due to the legal consequences entailed by the unlawful pursuits of territorial acquisition that flow from violations of jus ad bellum?

By the time of the broad definition of aggression found in Article 3 of the 1974 United Nations General Assembly Resolution 3314 (XXIX), state practice on the non-recognition of territory acquired by aggression was firmly established in the international arena, as well as internalised by domestic legal doctrine and foreign policy. An act of aggression is defined as an instance of the use of force by a state in contravention with the treaty and customary rules on the inter-state use of force, including: (i) any military occupation resulting from the invasion of foreign territory; (ii) any annexation by the use of force of the territory of another state; or (iii)

any use of force in the territory of another state in contravention of the
terms of an agreement therewith.\footnote{Article 3, paragraphs (a) and (e), General Assembly Resolution 3314 (XXIX), 14 December 1974.} Article 5 of Resolution 3314 (XXIX) holds that no consideration, “whether political, economic, military or otherwise” can justify an act of aggression, and that “no territorial acquisition or other special advantage resulting from aggression” would be recognised as lawful.

The law and practice of the 1998 Rome Statute of the International Criminal Court provide further guidance on the scope of acts of aggression. The Statute draws on Resolution 3314 (XXIX) and grants the Court, by 2017 at the earliest,\footnote{Article 15 bis, para. 3, Rome Statute of the International Criminal Court 1998. See also, Article 16, Draft Code of Crimes against the Peace and Security of Mankind 1996. James Crawford, Brownlie's Principles of Public International Law (Oxford, 2012) 761.} the jurisdiction to prosecute an “act of aggression” defined as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”\footnote{Article 8 bis, para. 2, Rome Statute of the International Criminal Court 1998.} It further includes acts entailing “[t]he invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.”\footnote{Ibid.} It follows that an act of aggression, which may attract both state and individual responsibility in international law,\footnote{Antonio Cassese, The Oxford Companion to International Criminal Justice (Oxford, 2009).} may arise in the context of an ongoing administration of foreign territory, before or after the close of hostilities, as a result of a substantial change in circumstances brought about either by a regime change forced by the occupier or its unilateral annexation of occupied territory; regardless of the legality initial use of force.\footnote{See, e.g., Security Council resolutions 541 (1983) and 550 (1984).} Thus, an occupier that purports to acquire parts of the occupied territory or undertake sweeping reforms of the government structures will be considered as perpetrating an act of aggression against the territorial integrity of the ousted sovereign.

The prohibition of aggression was intended to prohibit the use of war as an instrument of state policy or a means for the resolution of disputes. Therefore, it seeks to ensure that a “war of aggression” does not allow either the aggressor state or its allies to benefit from its unlawful acts, in line with the principle of \textit{ex injuria jus non oritur}: a wrongdoing state should not be able to “assert belligerent rights arising out of his [sic] own
wrongdoing.” The law of occupation provides a mirror-image of this prohibition. An expert at the 2012 ICRC meetings on the law of occupation noted, that while *jus ad bellum* is “an important set of rules for determining the legal framework that would govern the use of force in occupied territory […] in order to use force in occupied territory, the occupying power had to find an enabler norm.” This means that the occupying power’s authority to maintain law and order in the occupied territory for the benefit of its own security must accord with the remits of the enabling norm enshrined in the *jus in bello* rules for belligerent occupation.

It follows that if the occupier’s positions and practices concerning the legal status of its authority vis-à-vis the ousted sovereign’s rights entail claims of sovereignty and prospective permanent acquisition of occupied territory, the otherwise normative neutrality of the *lex specialis* of belligerent occupation with regards to the legality of such situations is affected, albeit indirectly, by the forfeiture of a lawful basis under *jus ad bellum* for the occupier’s use of force to maintain its military control. While the framework of the law of occupation provides a static set of parameters for assessing the legality of the scope of an occupier’s activities in foreign territory – a yardstick for measuring the extent of warranted infringements on the political independence and territorial integrity of the ousted sovereign, by virtue of the occupier’s military needs – the legal consequences that flow from the occupier’s acts of aggression, including territorial acquisition and regime change, can essentially frustrate the occupier’s inherent right to maintain the occupation. Notably, such determinations are not limited to cases where the original *casus belli* is unlawful: a lawful war of self-defence, for instance, does not entitle a state to annex territory. The doctrine of humanitarian intervention, which has manifested through state practice, oftentimes “as a cloak for episodes of

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imperialism”, has been condemned on a similar basis, for having “no basis in the UN Charter or in international law.”

The International Court of Justice has maintained that during belligerent occupation, the occupying state is precluded from relying on the *jus ad bellum* right to self-defence to respond to threats from within the occupied territory, because its control over that territory obliges it to prioritise the use of non-lethal measures of law enforcement. In relation to Israel’s occupation of the Gaza Strip, the ICRC 2012 expert meetings also maintained that the applicability of the law of belligerent occupation forecloses the state’s ability to lawfully exercise such a right. The *jus ad bellum* right to self-defence thus converges with *jus in bello* rules afforded an occupier by occupation law proper: namely, the provisions permitting the occupier to take measures to maintain public order and provide for its own security, essentially limiting, albeit not altogether excluding the inherent right to self-defence in *jus ad bellum*. By the same token, an occupier whose presence in foreign territory triggers legal consequences under other regimes of international law should, in the interim, be precluded from fully availing itself of all *jus in bello* rights and authorities: the obligation to maintain public order in the interests of its own security, *inter alia*, will be contingent on the need to bring about the occupying power’s withdrawal, as promptly as possible.

The position that opposes the applicability of *jus ad bellum* to the activities of an occupying power, maintained by prominent commentators, could result in oversights, given that maintaining a distinction between the right to use force in self-defence and the manner in which it is used can become highly artificial in cases of belligerent occupation *qua* illegal territorial regimes. In the cases of Armenia’s occupation of Azerbaijani territory or Turkey’s occupation of Cypriot territory, the subjugation and exploitation is undertaken through a ‘rogue’ regime established and supported by the occupying power. Since the

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663 James Crawford (2012) 753.


666 See, e.g., Tristan Ferraro (ICRC, 2012) 133.

667 Jeff McMahan (2009) 118. See also, Alejandro Chehtman (2013) 22 et seq.


669 See, e.g., the position of the US occupier in Santo Domingo in 1907; Philippe Marshall Brown, ‘The Armed Occupation of Santo Domingo’, *American Journal of International Law*
assessment of the proportionality and necessity of the measures taken in self-defence depends on the extent of the threat, albeit a moving target, it assumes an interaction between the objective of self-defence and the in casu effect of specific measures taken in its name, i.e. the means that justify the ends. Whether or not a state currently occupying foreign territory had originally invaded that territory lawfully, that state should be deprived of its lawful status as temporary administrator if it purports to instrumentalise its control to indefinitely subjugate the territory to its political will and economic interests, inter alia. It is therefore functionally undesirable and perhaps also paradoxical to permit an occupying state to continue to rely on an existing right to self-defence, when the in casu effects of the means adopted under its banner, i.e. its policy and practices vis-à-vis the occupied territory, would be deemed unlawful.

2. Belligerent Occupation and Illegal Territorial Regimes

The rules on the inter-state use of force were intended not only to prevent the use of force as an instrument of national policy, but also to provide for the determination of illegal territorial regimes: those in which the ends behind the use of force amount to unlawful acts that offend against the territory, sovereignty or administrative authority of another sovereign. Given the illegitimacy and uncertain legality of a notable number of enduring contemporary occupations – including the situations of northern Cyprus, Western Sahara, Palestine, Golan Heights, South Ossetia and Abkhazia, Transnistria, Nagorno-Karabakh and, most recently, Crimea – and the inconsistencies in the legal framework applicable to each, it is critical that the international legal order address the multitude of legal concerns such cases raise. Such cases call for a legal and political response by the international community, both collectively and by individual state and non-state actors, that would disincentivise illegal regimes established by predatory occupying States by raising the costs for their remaining in the occupied territory. Tellingly, however, most prolonged contemporary occupations have not been met with resistance adequate to maintain the integrity of international law. By contrast, the absence of a comprehensive response in the case of Timor Leste, for example, actually resulted in the

670 Yoram Dinstein (2011) 76-79.
territory’s annexation by Indonesia becoming effective through international acquiescence, and UN pragmatism.672

A situation of belligerent occupation that does not pass the test of either the cardinal rules of its lex specialis or the peremptory norms of international law that co-apply independently and interact with the former – e.g. the prohibition of annexation and conquest and the people’s right to self-determination – gives rise to a territorial regime that has, unlike belligerent occupation, a normative character, one that is prohibitive from the standpoint of international law. The criteria of legality for foreign territorial administrations, which also define the category of illegal territorial regimes, include both the subset of lex specialis rules for belligerent occupation and the international law norms on territoriality, discussed in the preceding chapter, both of which respectively measure the effects of foreign administration on the sovereign rights of the territory’s legitimate government.

The following sections observe the effects of territorial regimes based on the pursuit of violations of jus ad bellum in time of belligerent occupation – hereinafter referred to as situations of illegal territoriality, or illegal territorial regimes – and analyse the manner in which the cumulative and concurrent application of the aforementioned criteria of legality define and seek to regulate the legal status of such cases of belligerent occupation in international law. They also consider how international practice has fallen short of accounting for the interaction between these legal regimes, despite their immediate relevance to past and contemporary belligerent occupations.

2.1 Identifying Illegal Territorial Regimes

The law of belligerent occupation is a specific subset of rules under the general corpus of international law on the administration of territory by states and international organizations, including both military administrations established in part of a state’s own sovereign territory, as well as by one state in another state’s sovereign territory.673 Therefore, the application of the lex specialis of belligerent occupation in isolation would

create a gap in the capacity of international law to address predatory state practices.

Three main regimes of international law concurrently applicable in the context of belligerent occupation include the international law of territoriality (discussed in Chapter IV), the law of self-determination of peoples (discussed in Chapter VI), and the corpus of international human rights law (discussed in Chapter VII). In light of the practice of occupying powers, and the overlaps between *jus ad bellum* rules on territoriality with the law of occupation, the international law litmus test for the legality of a territorial regime created by a situation of belligerent occupation has several important elements.

Firstly, the occupier must abide by the law of territoriality, which requires it to ensure that in all its activities in the occupied territory, it confines its authority according to the *lex specialis* of belligerent occupation. That law is intended to ensure respect for the rights of the ousted sovereign, including the principle of territorial integrity; the principles of political independence and non-intervention in the domestic affairs of the occupied country, including the prohibition on re-engineering political and legal institutions, *inter alia*; and the prohibitions of conquest, annexation and colonial practices of subjugation and exploitation, which correlate to the principle of permanent sovereignty of states over their natural resources. These principles should be interpreted and applied independently of, but in a manner complementary to, the interpretative guidance on the specific derogations permitted under the *lex specialis* of belligerent occupation.674 In short, a measure adopted by the occupier that exceeds the strict remits of its mandate under the *lex specialis* of belligerent occupation may also attract the occupying state’s responsibility for violations of *jus ad bellum*.675

Unfortunately, while the policies and practices of contemporary occupying powers on the status of the occupied territory vary considerably, many of these positions are incompatible with the underlying ‘conservationist’ premise and temporariness criterion that underpins occupation law. Such incompatibility is decisive in determining the illegality of a territorial regime established in the context of belligerent occupation. Most occupying states refuse the en bloc application of the law of occupation, and either claim that the status of the occupied territory is

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674 Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Amongst States in accordance with the Charter of the United Nations, annexed to General Assembly Resolution 2625 (XXV). Yael Ronen, *Transition from Illegal Regimes under International Law* (Cambridge, 2011) 3. See also, Chapters II and III.
sui generis, e.g. Morocco, Indonesia and Israel, or support secessionist claims made by movements within the occupied territory and seek to assist in the separation of the territory from that of the rest of the ousted sovereign’s territory, e.g. Armenia, Russia and Turkey. Notably, in the former case, the occupying State maintains that it alone has sovereign discretion to decide how the territory is administered, and which parts of the territory are under its permanent sovereignty, in some cases by subjecting the foreign territory to the occupier’s municipal legislation.

Occupiers have in practice dissected the law of occupation into a set of discrete rules and applied only those elements that do not conflict with their own interests; instead, occupier powers have applied the law of military administration, which allows them to apply their domestic administrative law. For instance, Israel’s sovereign authority, jurisdictional and administrative, is entrenched in Israeli law and prevails over the discretion of any military, state or judicial official. The Israeli Supreme Court’s jurisprudence has referred to customary principles and rules enshrined in occupation law, without accepting the de jure, en bloc application of that law. The threat of annexation emanating from the occupier’s application of its domestic laws to occupied territory, was at stake when experts at the ICRC 2012 meetings on occupation law declared that such domestic laws are inadequate as a standard for determining the legality of the occupier’s use of force or exercise of authority to bring the local authorities in the occupied territory to comply with an externally imposed public order.

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680 Area of Jurisdiction and Powers Ordinance No 29 of 1948, Article 1: “Any law applying to the whole of the State of Israel shall be deemed to apply to the whole of the area including both the area of the State of Israel and any part of Palestine which the Minister of Defence has defined by proclamation as being held by the Defence Army of Israel.” See also, Emergency Regulations (Judea, Samaria and Gaza Areas – Adjudication of Offences and Legal Aid) 5727-1967, amending and transposing the Defence (Emergency) Regulations 1945. HCJ 2690/09, *Yesh Din et al. v IDF Commander in the West Bank et al.*, judgment of 17 March 2010, para. 4.
The *jus cogens* right to self-determination of peoples, discussed in Chapter VI, is another gear in the mechanism that regulates the legality of foreign territorial administrations. Insofar as a belligerent occupation regime cannot lawfully result in a transfer of title over territory to the occupying state, occupiers are also precluded from undertaking regime changes that foreclose the ability of the local population to self-determine their political, social and economic orders. A belligerent occupation regime can violate the right to self-determination in two principal ways: (i) where a foreign regime adopts measures that result in changes to political, economic and legal institutions, such as Morocco’s exercise of authority over Western Sahara, or the ‘transformative’ occupation of Iraq; and (ii) where the foreign regime furthers or supports secessionist movements in the occupied territory and assists in their *de facto* secession. The latter scenario includes cases such as the Turkey-supported regime in northern Cyprus, the Abkhazia and South Ossetia regimes supported by Russia and the Nagorno-Karabakh regime installed and supported by Armenia. In both sets of cases, the objectives pursued by the occupiers are incompatible not only with specific rules of occupation law, but also the long-term ability of the local population to exercise their right to self-determination, both the occupied part of the ousted sovereign’s territory, as well as in the non-occupied part, as is the case in the Russian-occupied parts of Georgia, *inter alia*.

While a state of belligerent occupation entails inevitable infringements on the sovereign and territorial rights of the ousted government and its people’s right to self-determination, the law of occupation is intended to protect against any effects on the legal title or future ability of the local population and ousted sovereign to exercise these rights, by suspending the right of the people to renounce them and affirming the temporariness of occupation. Accordingly, while Israel’s violations of international humanitarian law in Palestinian territory “did not suffice for the Court to declare the occupation illegal,” the ICJ 2004 *Wall* Opinion denoted that the changes to territory and sovereignty undertaken through the construction of the Wall and settlements regime “create a ‘fait accompli’ on the ground that could well become permanent

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684 *Case Concerning East Timor* (*Portugal v Australia*) 1995 ICJ Reports 90, 102. See also, Yoram Dinstein (2011) 182.


in which case [...] it would be tantamount to de facto annexation." In a similar vein, Judge Elaraby’s separate opinion in the Opinion recalled the “territorial integrity injunctions” in Security Council Resolution 242 (1967):

The withdrawal and the territorial integrity injunctions are based on Security Council resolution 242 (1967) which is universally considered as the basis for a just, viable and comprehensive settlement. [...] the resolution contained two basic principles which defined the scope and the status of the territories occupied in 1967 and confirmed that occupied territories have to be "de-occupied": resolution 242 (1967) emphasized the inadmissibility of acquisition of territory by war, thus prohibiting the annexation of the territories occupied in the 1967 conquest.  

These principles are relevant to acts of occupiers in addition to Israel’s building of the “Wall” and civilian settlements; for instance, after Morocco annexed Western Sahara in 1976, it constructed a 1,700 miles long berm in the territory, which was extended and fortified in six stages, cordonning off more territory each time.  

The adoption of sweeping and transformative measures vis-à-vis the existing system of government, law and economy, or status of the territory, can rupture the de jure state of affairs characterized by the law of belligerent occupation and constitute a territorial and administrative regime that is deemed illegal in international law. Notwithstanding repeated assertions, including by the ICTY, that the applicability of the law of occupation is based on factual considerations, an occupation regime can be attributed a normative dimension that results in the creation of an illegal territorial regime both “‘substantively’, i.e. infringing the fundamental tenets of the law of occupation; and ‘structurally’, i.e. in terms of the international legal order.” Ronen’s description affirms that an illegal territorial regime has an “objective status” in international law due

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688 Ibid, Judge Nabil Elaraby, Separate Opinion, 252, para. 2.4.
691 Orna Ben-Naftali et al. (2005) 608.
to the *erga omnes* effect of its violations of peremptory norms of international law.\(^{692}\)


\(^{694}\) Ibid, 16-17.

\(^{695}\) Orna Ben-Naftali et al. (2005) 554.


**2.2 Jus ad Bellum and Belligerent Occupation: A Homogenous Normative Framework?**

The World War II occupations were some of the first instances where state advisors and political analysts invoked the term of art, “illegal occupation”.\(^{693}\) Due to the hybrid politico-legal nature of such references, even an aggressive occupier was not deprived of its rights and duties under the law of occupation – the *de jure* status of the regime remains unaffected.\(^{694}\) The *lex specialis* of belligerent occupation was arguably intended to perform two functions: (i) to distinguish between order and chaos, as a mechanism of conflict prevention; and (ii) to disambiguate orders, by regulating and managing in an orderly manner an existing conflict, as a ‘state of exception’.\(^{695}\) Under the *lex specialis* of belligerent occupation, the *in casu* effects of the occupier’s measures vis-à-vis the foreign territory may, in political terms, sever the international legitimacy of the occupier’s status as administrator, without depriving it of its *de jure* rights under the *lex specialis* of belligerent occupation. Whereas the measures undertaken by these occupying powers encroach upon the sovereign rights of the ousted legitimate government and should formally preclude their continuity, the international community continues to consider situations such as Nagorno-Karabakh, South Ossetia, Abkhazia and northern Cyprus, *inter alia*, as belligerent occupations. It merits asking whether this consideration also means that in these cases, a state of belligerent occupation has morphed from a transitory factual situation into an illegal territorial regime, with a normative dimension.\(^{696}\)

Despite widely differing views on the occupier’s scope of legislative and administrative powers, the clear standard in the law of belligerent occupation is that these measures must be restricted to the maintenance of
public order and defined narrowly in accordance with the military needs of the occupation army. As Lord Goldsmith QC informed Prime Minister Blair, the occupation of Iraq would be illegal once hostilities had come to an end, and “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 the administration depart from the main objective, the more difficult it will be to justify the lawfulness of the occupation.” Ben-Naftali et al. affirm this position by commenting that the legality of occupation is “to be measured by its exceptionality: once the boundaries between the normal order (i.e., sovereign equality between states) and the exception (i.e., occupation) are blurred, an occupation becomes illegal.” Indeed, in some cases, occupying powers have established an illegal regime in the occupied territory simply by undertaking the mundane administration of daily affairs in the territory.

A notable, unlawful institutional practice of occupying powers is to further their own national interests through the adoption of unlawful administrative and legislative acts that encroach on the ousted sovereign’s powers and reform the political order in the territory. For instance, occupiers that extend elements of their domestic legislation to the occupied territory, as in the case of the West Bank or Abkhazia, seek to effectively deprive the ousted sovereign of being able to exercise effective control over the territory. Similarly, Israel’s Ordinance of Powers and Jurisdiction No. 29 of 1948, which defines the relationship between the state of Israel and any part of the territory of mandatory Palestine, namely the West Bank, forms the basis for Israel’s treatment of the West Bank as part of its

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697 Kaiyan Homi Kaikobad (2005) 256-257.
698 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’).
701 Orna Ben-Naftali et al. (2005) 551 et seq.
702 See, e.g., the Russia-supported regime initiated to deprive local residents of the right to acquire real estate and grant that right to Russian nationals transferred unlawfully into the territory; Inal Khashig, ‘The Joint Border-protection Agreement – reactions from Abkhazia’, Caucasus Analytical Digest No 07/09 <http://www.css.ethz.ch/publications/pdfs/CAD-7-11-12.pdf>.
sovereign territory. The Ordinance is not referenced actively by Israel, or noticed by the international community, but its very existence prejudices the ability of the Palestinian sovereign to regain control over the territory, and precludes the de jure application by Israeli authorities of the law of occupation. The potential effect of such measures is indicated in the Polish Supreme Court’s obiter from 1957: “The unlawfulness of the assumption of any authority whatsoever by the Third Reich in Polish territory involves the invalidity of all legislation introduced by the invader.”

Since such legislative and administrative acts have no legal effect in international law, the accumulated effect of the policies and practices of an occupying power is to trigger the application of the international prohibition on territorial acquisition, which may also constitute an act of aggression. The unlawful casus belli of annexation may shift throughout an occupation as a result of such measures, and even result in the establishment of an illegal territorial regime in the occupied territory; yet the international response and the effects of these changes on the applicable legal framework, including the de jure status granted by the law of occupation remains unclear.

It is submitted that a presumption against the good faith of the occupier in the exercise of its authority to maintain public order and civil life in the occupied territory is in order. It is appropriate to require that the rights afforded to an occupier under the law of occupation, should depend upon its lawful administration of a belligerent occupation. Protection should be afforded to a civilian population that innocently relies on an occupier’s measures; yet, some seemingly-lawful acts such as the establishment of a local government regime should be deemed unlawful, if done to maintain prolonged control over the territory through coercion and threat of force, due to the unlawful basis for that threat of force – namely, the ultra vires character of the authority and the near-permanent affect it has on the ability of the local population to fully enjoy their right to self-determination. The rationale for preventing an abusive occupying power

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703 See, e.g., Israel’s institutional and legal practice considering the Palestinian territory as part of Israel; Law for Prevention of Damage to State of Israel through Boycott 2011 (Unofficial English Translation) <http://adalah.org/upfiles/2011/boycott_law.pdf>.

704 B v T (1957) 24 ILR 962, 965 (emphasis added). See also, N v B (1957) 24 ILR 941.


706 See, e.g., the Ko Maung Tin case, where the High Court of Burma held that the Japanese Military Authorities acted in excess of their powers in issuing a system of currency parallel to the currency established by the lawful Government of Burma; 14 ILR 233, 234. Kaiyan Homi Kaikobad (2005) 259. See also, Jenna C Borders (2011) 700.
from availing itself of both the *jus ad bellum* right to self-defence, as part of the need to maintain the occupation, as well as the *jus in bello* prerogatives to administer the territory,\textsuperscript{707} according to the Nuremberg tribunal, is that such behavior violates “every principle of the law of military occupation”, and possibly every basic human right of the local population.\textsuperscript{708}

The concurrent application of international norms on self-determination and territoriality with the *lex specialis* of belligerent occupation reinforces the doctrine of continuity of legal rights, and the protection that international law provides against installations of transformative and exploitative territorial regimes. It is in line with previous jurisprudence, such as the Polish Supreme Court’s decision in the *Municipality of Kielce* case, upholding that “Under Hague Convention No. IV of 1907, the Occupant was not empowered to change the organisation of local government in an occupied country, nor had he the right to make payments out of the treasury of a municipality.”\textsuperscript{709} As Kaikobad notes, a distinction should be maintained “between *direct positive acts* of government and […] the *facilitation of plans and efforts* of the nationals of the occupied territory for the development of governmental institutions.”\textsuperscript{710} A similar test should apply to occupiers seeking to prolong and extend their scope of authority by undertaking reforms under the banner of promotion of democracy, since a right to use force in pursuit of democracy is neither part of international law, nor established state practice.\textsuperscript{711}

International practice on the right to use force in a self-determination struggle, other than in pursuit of decolonization, is notably scarce and opaque.\textsuperscript{712} However, the right to engage in a struggle against colonial domination – a purportedly anachronistic corollary of the right to self-determination – may arguably be invoked in contemporary cases of belligerent occupation, which consist of territorial acquisition or regime change with dimensions of economic exploitation and political subjugation. Under a restricted definition of a colonial regime – limited to territories classified as mandates by the League of Nations – Gray remarks that the


\textsuperscript{709} 52 ILR 718.

\textsuperscript{710} Kaiyan Homi Kaikobad (2005) 260. See also, FAC Tenth Report, ‘Foreign Policy Aspects of the War Against Terrorism’, Written Evidence, Memorandum from the Foreign Commonwealth Office, 13 and 22 May 2003.


\textsuperscript{712} Christine Gray (2010) 620.
only remaining struggle in the context of colonization is that of Palestine. Yet, comparable practices by occupiers are found in the Golan Heights, Western Sahara, northern Cyprus, Abkhazia/South Ossetia, Transnistria and Crimea. Given this pattern of unlawful practices, it is important to preclude abuses of the regulatory framework of belligerent occupation – whether under the guise of supporting self-determination claims from within the territory or the humanitarian needs of the civilian population – to justify disproportionate infringements of the ousted sovereign’s rights. Serious and systemic violations of the lex specialis of belligerent occupation and the policy implications of the in casu effects of the occupier’s activities should be vigorously examined and, where appropriate, attract legal consequences under jus ad bellum.

2.3 The Relevance of Jus Post Bellum, the Law of Peace to Illegal Territoriality

Emerging theories on jus post bellum are aimed at regulating the transition from conflict and transformative occupation, to internationally-supported post-conflict reconstruction and peacekeeping initiatives. Boon remarks that jus post bellum has four pillars: “accountability, good economic governance, stewardship, and proportionality in intervention and result.” The general presumption requiring the occupier to relinquish control to the ousted sovereign and cede all decision-making powers to the local population upon the end of occupation, means that the principal function of jus post bellum in the final phase of occupation is to ensure the occupier’s non-interference with, and independence of such decision-making regarding the process of post-conflict reconstruction, to the extent possible. Jus post bellum thus anticipates the end of belligerent occupation

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713 Ibid.
and seeks to phase out the occupier’s control, while also providing safeguards against interference in the people’s right to self-determination or in its future political independence and territorial integrity.\footnote{Kristen E Boon (2009) 24.}

However, there is a discrepancy in the ways that the law of occupation and the objectives of jus post bellum relate to the status quo ante. The law of occupation assumes that the occupier has no right to interfere in aspects of the public order and civil life that do not pertain to its imminent security – and both past and contemporary occupation governments demonstrate the perils of a ‘risk-management’ approach that grants the occupier more governance rights than those that are narrowly prescribed by the ‘conservationist’ premise of occupation law. The centrality of coercion and structural violence in belligerent occupation\footnote{Bernhard Knoll, The Legal Status of Territories Subject to Administration by International Organisations (Cambridge, 2008) 53 et seq. See also, on the follies of most contemporary humanitarian intervention-type occupations, James Gannon (2008) 10 et seq. Peter Stirk (2012) 203 et seq. See, discussing the organizational theory of hierarchy in international relations, Alexander Cooley, Logics of Hierarchy: The Organisation of Empires, States, and Military Occupations (Cornell, 2005).} reaffirm the importance of closely scrutinizing the actions of an occupier that “derives its power not from international law as such but from the successful projection of military superiority.”\footnote{Christopher Greenwood (1992) 251. See also, Conor McCarthy, ‘The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq’, Journal of Conflict & Security Law, Vol 10, No 1 (2005) 46-47.} And, yet, the occupation of Iraq, inter alia, demonstrates the continuing relevance of the notion of stewardship\footnote{Kristen E Boon (2009) 2425.} – which originates in the UN trusteeship system, with its colonial overtones – in the context of foreign occupations, particularly of less-prosperous and political unstable regions.

The objective of jus post bellum and jus ad pacem is to secure a durable and just peace, based on accountability for past atrocities and the facilitation of actual and full enjoyment of both individual and collective rights by the local population in the occupied territory.\footnote{See, for a discussion of the developing legal framework for peacekeeping, Inger Osterdahl, Esther van Zadel, ‘What Will Jus Post Bellum Mean? Of New Wine and Old Bottles’, Journal of Conflict & Security Law, Vol 1 (2009) 1-33.} Almost every situation of belligerent occupation is based on an aggressive intervention, and it is not unlikely that it will produce a threat to international peace and security. Moreover, insofar as the regime of belligerent occupation was intended to limit the duration of the occupier’s presence and the scope of

authority in the foreign territory, it is inappropriate to extend its application to post-conflict reconstruction. In many cases, entrusting an occupying power with the wellbeing of the local population, let alone the undertaking of reforms intended to support the administration of justice and further accountability for past atrocities under the banner of a peace-building mandate, may put at risk the very objectives of *jus post bellum*.

The implicit duty of an occupying power to facilitate the end of the conflict, hand over authority, and terminate its foreign presence on the earliest possible occasion, as discussed in Chapter III, is arguably not different from a belligerent party’s duty to end hostilities when military necessity is exhausted. According to Benvenisti, an occupier “holding out in bad faith, refusing to negotiate for its withdrawal in return for peace” – so as to allow the population in the occupied territory to exercise its right to self-determination by freely choosing its own system of government without foreign interference – “might taint its continuing presence in the occupied territory with illegality.” Oppenheim affirms that an occupying power is not entitled to “impress upon the enemy the necessity of submitting to terms of peace.” Regardless of the post-occupation policies that the occupying State may adopt, the occupying power is obliged to end the occupation itself, given the inherent incompatibility of its authority with the opinions of the local population.

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When the threat emanating from the occupied territory is effectively neutralized, the situation turns into a ‘calm’ occupation731 – but this calm increases the tension, from the perspective of international law, between the occupier’s right to lawfully maintain its presence in the foreign territory, and the exigency of the need to ensure the ability of the local population and legitimate government to exercise their sovereign and self-determination rights by phasing out the occupation.732 This tension can even rupture the legality of the occupying power’s practices when those practices are clearly intended to acquire parts of the occupied territory or undertake regime changes entailing political subjugation or economic exploitation, since these constitute acts of aggression.733 Such practices could turn an otherwise lawful jus ad bellum act of self-defence, which produced a de jure state of belligerent occupation, into an unlawful use of force under jus ad bellum, rendering the occupying army’s continued presence in the occupied territory an unlawful act in itself.

There are good reasons to conclude that a “tripartite conception of the law of armed force”734 – including jus ad bellum, in bello and post bellum – would help ensure the appropriate, simultaneous application of different bodies of law to certain facts. Insofar as jus post bellum remains a nascent law in flux,735 it is critical to ensure that the special international regime of occupation law is not misappropriated by occupying powers, situational subjects of international law. Notwithstanding the inconsistencies and lacunae in emerging international doctrines such as the ‘Responsibility to Protect’, ‘humanitarian’ intervention and occupation, and post-conflict reconstruction missions (e.g. through the Peacebuilding Commission), it is clear that occupiers, whose authority is based on their ability to maintain a


3. \textit{Jus in Bello} and \textit{Jus ad Bellum}: The Normative Dimension of Belligerent Occupation

This chapter argues the possibility of attributing a normative dimension to the otherwise factual regime of belligerent occupation in international law. Many scholars have argued the opposite. Yet, although it is generally assumed that merging \textit{jus in bello} and \textit{jus ad bellum} would unjustifiably conflate different legal and policy rationales, it is also uncontroversial to note that these bodies of law are “sometimes competing, sometimes complementary”\footnote{See, e.g., Nathaniel Berman, ‘Privileging Combat? Contemporary Conflict and the Legal Construction of War’, Columbia Journal of Transnational Law, Vol 43 (2004) 6.}. The condition of belligerent occupation, in particular, represents a special overlap, where the two rationales coexist, and may call for their concurrent, albeit independent application. In this regard, Giladi aptly recalls that only by “tak[ing] cognizance of the overall normative context in which occupation functions” can international law effectively
regulate situations of belligerent occupation by ensuring the protection of the civilian population in the hands of the occupier and maintaining international peace, security and stability of borders.

Most occupying States either deny the application of the law of occupation outright or manipulate and even instrumentalise its provisions. It follows that an occupying power that perpetrates unlawful acts should be closely scrutinised by international institutions and third state bystanders to adequately respond to policies and practices that amount to acts of aggression vis-à-vis the occupied territory. On the basis of an assessment of the occupying state’s agenda in the occupied territory, state and non-state actors can undertake collective and unilateral responses, including precautionary measures, to ensure that they do not recognise the acts of an illegal territorial regime. This comprehensive approach to the regulation of the occupying state’s activities in foreign territory is critical for enabling international law to effectively capture and deter the unlawful in casu effects of foreign occupation and domination.

3.1 Jus ad Bellum and Illegal Territoriality

The complex practice of contemporary belligerent occupation includes significant violations of the law on territoriality, discussed in the preceding chapter, which arguably threaten the effectiveness of the occupation law. Despite a presumption that the occupier’s right to maintain its presence in foreign territory is conditioned on military necessity, and the fact that “the rights and obligations of the belligerent occupier are carefully balanced to inculcate the use of force,” occupiers have not been deterred from exercising authority ultra vires of their narrow mandate, as defined by occupation law. Every belligerent occupation entails the exercise of so-called de facto elements of sovereign authority, which are intended to be temporary and without permanent effect. A belligerent occupation can be justified, as Cassese remarks, for as long as it is “of a minimal duration or is solely intended as a means of repelling, under Article 51 of the UN Charter, an armed attack initiated by the vanquished Power and consequently is not protracted.” As Ruys notes, “small-scale attacks” fall within the purview of Article 51, but the correct approach to assessing the lawfulness of

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defensive action in such cases is to apply the criteria of necessity and proportionality.\textsuperscript{743}

In practice, most belligerent occupation regimes have violated occupation law, impinged on and often sought to permanently erode the rights of the ousted sovereign. Since the legal consequences of contemporary situations of belligerent occupation exceed the \textit{jus in bello} rationale of conflict management, “it stands to reason that the scope of powers exercised by the Occupant must be considered with care and caution.”\textsuperscript{744} Given that the effects of an occupying power’s acts of territorial acquisition, amongst other forms of aggression through the subjugation and exploitation of the foreign territory, exceed the immediate concerns addressed by the \textit{lex specialis} of belligerent occupation, the legal consequences of \textit{jus in bello} violations in a situation of belligerent occupation do not in themselves provide a legal basis to bring about the withdrawal of the troops of the occupying state, nor can the international reaction they potentiate effectively sever the structures of ‘long-arm’ control it maintains through a local authority.

Considering the developments in international law since the codification of the law of occupation and the evolving practice of predatory states, it is no surprise that the distinction between \textit{jus ad bellum} and \textit{in bello} has been threatened.\textsuperscript{745} \textit{Jus ad bellum} rule-based arguments have been invoked by the ousted sovereign and third states to seek condemnation of the occupying state’s acts, as well as by the occupying states to justify their actions.\textsuperscript{746} Yet, ongoing protracted belligerent occupation regimes indicate that the prohibitions on the use of force and annexation and the right to self-determination of peoples enshrined in the UN Charter, which crystallised after the codification of the Hague and even Geneva law, have not yet been fully internalized in the regulation of abusive occupation regimes that act in bad faith, \textit{de facto} annex territory, in cases of political subjugation and protracted foreign domination.

How can an illegal territorial regime established in the context of a belligerent occupation be effectively ended? To this effect, the International Court of Justice has held: “The qualification of a situation as illegal, does not itself put an end to it. It can only be the first necessary step in an

\textsuperscript{743} Tom Ruys, \textit{Armed Attack and Article 51 of the UN Charter} (Cambridge, 2010) 175 et seq.
\textsuperscript{744} Kaiyan H Kaikobad (2005) 264.
\textsuperscript{745} Marco Sassoli, ‘\textit{Ius ad Bellum} and \textit{Ius in Bello} – The Separation between the Legality of the Use of Force and Humanitarian Rules to be Respect in Warfare: Crucial or Outdated?’, in Michael Schmitt, Jelena Pejic (eds.), \textit{International Law and Armed Conflict: Exploring the Faultlines} (Nijhoff, 2007) 257-263.
\textsuperscript{746} Marco Sassoli (2007) 249-250.
endeavour to bring the illegal occupation to an end.” To bring an “illegal occupation” or illegal territorial regime established in the context of a belligerent occupation to an end, it is necessary, first, to ensure the vigorous application of the *lex specialis* of occupation law in concurrence with other relevant legal regimes of international law. As part of an initial phase, an adequate normative determination based on the application of a comprehensive legal framework would render the occupier’s ability to maintain its presence and control over the foreign territory exceedingly costly for its economy, political and legal order due to the reactions the gravity of such acts would compel from the international community.

An important aspect of warring parties’ struggle for legitimacy, has been the internalization and abuse by occupying states of international humanitarian law rules to justify their actions in time of armed conflict, resulting in the increase of the overall level of violence and in the pursuit of unlawful acts. The risk of allowing an occupying state to exploit the analytical distinction between its conduct in the context of an international armed conflict and the unlawful consequences of its acts under *jus ad bellum*, is that the occupier could then exempt itself from the legal consequences that arise from violations of either of these concurrently applicable international norms. Such a situation would also risk the perversion of the *raison d’être* and function of the occupation law, by effectively encouraging states to engage in belligerent occupation to pursue predatory wants.

### 3.2 Balancing the Consequences and Effects of Jus ad Bellum Violations

Already in 1957 Gerhard von Glahn held that “certain benefits accruing to lawful belligerent occupations under present rules should be denied to an aggressor-occupant.” A situation of belligerent occupation, as Crawford

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549 Gerhard von Glahn (1957) 23.
notes, does not affect the continuity of the rights of the legitimate government: governments-in-exile have been consistently recognised as the sole legitimate representative of the people in the occupied territory, whereas authorities established with the support of the occupying state are denied such recognition.750 By the same token, since prescription is based on “considerations of good faith and the need to preserve international order and stability,”751 rights flowing from prescription are denied to aggressors.752 The means of control over foreign territory used by an occupying power may remain largely lawful, when assessed under the lex specialis of belligerent occupation, but if an occupier’s control over foreign territory is maintained in order to seek unlawful ends, the legitimacy and legality of its right to remain in the foreign territory may nonetheless be frustrated. Although practice is inconclusive, departures from the distinction between jus ad bellum and in bello are theoretically possible and practically desirable to salvage the effectiveness of international law in regulating foreign administrations in situations premised on the threat or use of force.

The criteria for such departures should be defined cautiously:753 a “nuanced approach”754 should neither result in the erosion of rights and guarantees provided to the civilian population by international humanitarian law, nor render null and void all measures adopted by the occupier, especially where such steps would exact a price on individuals and other innocent third parties. Thus the non-recognition of acts of de facto authorities administering an illegal territorial regime should be measured against the need to ensure respect for fundamental human rights. The ICJ has held that the ex injuria jus non oritur maxim is not “so severe as to deny that any source of right whatever can accrue to third persons acting in good faith”755 where those actions are “unrelated to the political ends” of the unlawful administration.756 Although internationally-unlawful acts do not produce legally valid norms or factual revisions to the territorial status or governmental structures of the occupied territory, in exceptional cases,

751 James Crawford (2012) 242-244.
754 Ibid, 294 et seq.
they may trigger good faith expectations by third parties and entail an enforceable right, as Benvenisti remarks, that create new circumstances that make it “impossible, unjust or undesirable” to return to the status quo ante.

The need to take the rights of third parties into account was affirmed in the case concerning the rights of the Turkish-supported authorities in northern Cyprus to establish air-links with the UK, under the EU-Cyprus Civil Aviation Agreement, whereby the UK High Court found that “the grant of permits sought would render the United Kingdom Government in breach of its duty not to recognise the TRNC […] unless the acts could be regarded as regulating the day to day affairs of the people within the territory in question and can properly be regarded as essentially private in character.” Whereas the northern Cyprus property board’s authority to resolve property claims was questionable, “the minimum standard of rights to which [the inhabitants of the occupied territory] are entitled” was guaranteed. Similarly, the Venice Commission maintained that although Georgia’s Law on the Occupied Territories considers that the acts of the de facto regimes of the territories of South Ossetia and Abkhazia are “invalid and shall not lead to any legal consequences,” Georgia’s refusal to accept basic personal status documents, such as birth or death certificates, would result in unjustifiable violations of human rights. The Commission upheld that “practical problems arising in this regard should be solved in a pragmatic way.” A similar position was adopted by the International Court of Justice in its Advisory Opinion on South Africa’s presence in Namibia: “while official acts […] are illegal and invalid, the invalidity cannot be extended to those acts, such as, for instance, the

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760 Cyprus v Turkey, European Court of Human Rights, Application No 25781/94 (2001) paras. 96, 98.
763 Ibid, para. 44.
registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.”

Accordingly, the operation of the doctrine of non-recognition, which is entailed by the gravity of the unlawful acts of an “aggressor-occupant”, should ensure that unreasonable injury is not incurred by individuals and entities that have legitimately and involuntarily relied on internationally unlawful legislative and administrative acts in the occupied territory, which is the subject of an illegal territorial regime. The establishment of an illegal territorial regime in the occupied territory would thus have three consequences: (i) the occupying state is stripped of its de jure status and international recognition as administrator of that territory; (ii) the ousted sovereign, third states and international institutions are availed of the right to enforce the occupying state’s responsibility for jus cogens violations by way of collective and unilateral channels, while being placed under an obligation, under international and in some cases domestic law, to ensure that facts emerging under the aegis of an illegal territorial regime are not recognized as lawful; but (iii) nonetheless, the occupying power is not absolved of its obligation to provide for the welfare of the civilian population.

In assessing the legality of the authority and acts of the foreign government in the occupied territory, consideration should be given to the purpose, necessity and proportionality of the force it uses, including the very need to maintain its presence and control over foreign territory. The principle of proportionality in jus ad bellum is based on a conservationist logic: “even if [the use of force] is more intensive than [required by the casus belli] it is “permissible so long as it is not designed to do anything more than protect the territorial integrity or other vital interests of the defending party.” The same logic permits non-violent unilateral measures, including soft countermeasures or retorsion by third states, that are intended to bring the wrongdoing state to restrain its activities to what is imperatively required by its “vital interests [as] a defending party”, while being absolutely prohibited from perpetrating acts of aggression, in line with the needs of third party actors to uphold the integrity of the international legal order. As considered in the chapters that follow, the limits on the inter-state use of force and the purposes it is used to pursue in

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the context of belligerent occupation and foreign territorial administration
also include criteria of legality from the law on self-determination peoples
and human rights law.
CHAPTER VI

BELLIGERENT OCCUPATION AND THE LAW ON SELF-DETERMINATION OF PEOPLES

The present and the following two chapters examine the interaction between the special legal regime for belligerent occupation and the broadly defined category of international law concerning good governance in administration of territory, a subset of which is applicable to foreign territorial administration through force in the context of belligerent occupation. The main bodies of international law that define this standard are founded on the norms on self-determination of peoples and human rights, essentially providing that the legality of the actions of an occupying power should be assessed according to: (1) the administrative status that the occupier assumes vis-à-vis the foreign territory, either directly or indirectly; (2) the temporariness of the measures taken by the occupier; and (3) the in casu effects and objectives that can be attributed to the occupier’s measures. In each case the co-application of the law on self-determination furthers the object and purpose of occupation law.

The International Court of Justice recognised the principle of self-determination as “one of the essential principles of contemporary international law”. Self-determination in international law is multi-sourced and polycentric: it is both a legal principle in its own right, and an umbrella framework providing interpretative guidance for other international law norms. The law on self-determination ascribes at least three basic criteria of legality for assessing an administration of territory: those relating to territoriality, political governance, and economic independence. Drew remarks, “the law of self-determination has always

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767 ICJ Wall Opinion, 2004 ICJ Reports, para. 1071; and Judge Higgins, paras. 1062-1063.
769 Gehard von Glahn (1957) 668. Ralph Wilde (2008) 101. See also, for a discussion of trust matters, Chapter III.
770 Case concerning East Timor (Portugal v Australia), 1995 ICJ Reports 90, 102.
been bound up more with notions of sovereignty and title to territory than what we traditionally consider to be ‘human rights’,”

Nonetheless, all three criteria, which have the status of standalone general principles of international law, also underpin the application of a number of contemporary specialised legal regimes, including international humanitarian and human rights law. Self-determination law thus has multiple convergences with other legal norms relevant to the administration of territory: for instance, collective human rights, such as the right to a healthy environment or to development, and the principles of territorial sovereignty and political independence, \textit{inter alia}, converge with the objectives promoted by, as well as the limits ascribed to, foreign administrations and missions tasked to support the emergence of structures and processes necessary for a people’s self-determination.

Higgins describes two principal phases in the development of the intended function of the law on self-determination: first, to bring about the effective independence of peoples from colonial rule; and second, to guarantee a standard of human rights protection in the conduct of internal affairs by the established government. As regards the relations between states and peoples under a colonial regime, the law was preoccupied with the promotion of “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,” as set out in Article 2(1) of the 1945 UN Charter. Such tasks were enshrined in the mandate of the UN’s ECOSOC, as per Article 55 of the UN Charter, to promote higher standards of living, health and social services and universal respect for human rights. As for the second phase, the general principles of sovereign equality, territorial integrity and political independence in international law, were seen as requiring the supplementary development of governance structures that give due regard to the political aspirations of peoples, as affirmed by Article 73(b) of the UN Charter. In practice, self-determination law came to be understood as relating to a territorial right to self-governance, free from colonial or other

\begin{footnotesize}
\begin{itemize}
\item[775] Rosalyn Higgins (1994) 111-114.
\item[776] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
\end{itemize}
\end{footnotesize}
forms of foreign domination. By 1966 self-determination was consecrated in common Article 1 of the two human rights covenants as a right of peoples “to freely determine their economic status, and pursue their economic, social and cultural development.”

Self-determination is an all-encompassing master-value, which operates as a necessary prerequisite to enable a people to fully and effectively enjoy virtually all specific civil and political as well as economic social and cultural rights guaranteed by international human rights law. This complex legal category is effectively tasked with the conservation of the organic processes of development of civil and political life, regardless of their cultural characteristics. Higgins aptly describes self-determination as “difficult, extraordinarily intertwined with other norms of international law, controversial, topical,” and notes that it also “illustrates the complexities of the law-creating process.” Under contemporary law and practice, the right is both procedural and substantive: it provides for a participatory and transparent process for decision-making concerning political and civil life, and a presumption that a people should be able to manage and administer their affairs freely and without foreign interference.

The crystallisation of the international law norms on the self-determination of peoples, and the efforts of the decolonisation era of the 1960’s and 70’s, contributed to the delimitation of an occupying power’s scope of authority and obligations. It complemented the duty to maintain and ensure normal life under Article 43 of the 1907 Hague Regulations, for instance, with a duty to effectively allow the organic development of public and civil life, and also reaffirmed the presumption that broad and sweeping revisions of legislative and political structures are deemed illegal. An occupying power’s authority is limited to acts required to maintain and, where necessary, restore the local fabric of life. Self-determination law affirms that if an occupying power is to act for the benefit of the local

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777 General Assembly Resolution 2625 (XXV), Declaration on Friendly Relations, UN Doc A/RES/25/2625, 24 October 1970. See also, Antonio Cassese (1995) 72-76.
780 Rosalyn Higgins (1994) 111.
population, it should conduct broad and regular consultations with the local population and account for the effects of its measures. Given the tensions inherent to belligerent occupation, these requirements are unlikely to be respected. By the same token, the right to self-determination underscores the discordance between a condition of belligerent occupation and the local population’s ability to fully enjoy human rights, suggesting that the only way to achieve full respect and enjoyment of rights is by bringing about the occupying power’s withdrawal.

In mapping the convergences and divergences between the \textit{lex specialis} of belligerent occupation and the contemporary law and practice on self-determination of peoples, this chapter focuses on four main situations and areas in which complementarity is evident between both equivalent and conflicting norms: (1) the occupying power’s human rights obligations vis-à-vis the local population and the effects of self-determination law on their implementation; (2) limitations on the occupying power’s authority to exploit the natural resources of the occupied territory and the principle of permanent sovereignty over natural resources as well as the self-determination right to freely dispose of resources; (3) the operation of separatist movements in occupied territory and the effects of their self-determination based claims to secession; and (4) the emerging phenomena of ‘transformative’ and ‘humanitarian’ occupations.

\textbf{1. Self-Determination and the Law of Belligerent Occupation}

Prolonged foreign territorial administrations classified as belligerent occupations invoke the application of international law norms on the self-determination of peoples, which complement the applicable \textit{lex specialis} of belligerent occupation. Self-determination law complements the underlying premises and cardinal rules of the \textit{lex specialis} of belligerent occupation, discussed in Chapter III: both bodies of law are tasked with the protection of the rights of the civilian population and its legitimate sovereign. Self-determination law maintains a near-absolute presumption

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\item \textsuperscript{782} Yutaka Arai-Takahashi (2009) 131. See also, Marco Sassoli (2005) 677.
\item \textsuperscript{785} Tristan Ferraro (ICRC, 2012) 69.
\end{itemize}
in favour of the ultimate decision-making powers of the legitimate institutions of the local population, as opposed to those imposed externally by the occupying state and remain subject to its coercion, hence requiring the deferral of certain key decisions, in virtually all situations of belligerent occupation, until after the termination of occupation and the effective return of the ousted sovereign. Decisions adopted by the occupying power having an effect on the political, social or economic order in the occupied territory, are also at least implicitly prohibited by belligerent occupation law, e.g. Article 47 of the 1949 Fourth Geneva Convention precludes changes to governmental institutions, and the conservationist principle requires that all legislative and administrative measures be temporary and specific. By virtue of the temporary and exceptional status of the occupying power’s administration, it follows that long-term occupation would inevitably result in the political subjugation of the local population and authorities to the will of the occupying state, and as such amount to the systematic and flagrant denial of the people’s right to self-determination.

In addition to reinforcing the presumption against permanent changes to the political, economic or social system in the occupied territory, the criteria of legality in international law concerning self-determination of peoples also complement the specific provisions of Hague and Geneva law. If the occupying power seeks to exceptionally adopt a measure that may have substantial effect on daily life, it may not do so without consulting and in some cases ensuring the effective participation of local representatives – including political party representatives, social or spiritual leaders, planning institutions, representatives from the education system, and experts on the protection of cultural heritage and property. This requirement is reinforced by another: the administration of foreign territory is to be undertaken from a vernacular perspective, as evinced by the experience of implementing human rights as culturally-relative norms, discussed in Chapter VII.

Elements of the law on self-determination of peoples, as discussed below, were an underlying premise of Hague and Geneva law; to a degree

786 See also, Chapter III.
787 Tristan Ferraro (ICRC, 2012) 75-76.
these elements are internal to the *lex specialis* of belligerent occupation. At the same time, self-determination law also provides an external complement to these provisions of occupation law, as a norm of international human rights law, and a general principle of international law closely linked to the concepts of national sovereignty, territorial sovereignty, and political independence. The right to self-determination is inherently curtailed by belligerent occupation, through the exclusion of the ousted sovereign and suspension of the proper function of legitimate government institutions. Due to this inherent conflict of norms, the legality of an occupying state’s derogations from the general law of self-determination hinges on the state’s respect for the *lex specialis* of belligerent occupation. Moreover, the longer an occupying state maintains its presence and control over daily life in occupied territory, to the exclusion of the ousted sovereign, the greater the concern that its actions exceed its narrowly-prescribed authority and the legitimacy of acts justified by military necessity. Due to its predictable effects on public and civil life in the occupied territory, the presumption should be that prolonged occupation flagrantly denies the right of the local population to self-determination. This broader appreciation of the legal standards governing the conduct and status of an occupying power, its relations with the local population and potential contribution to the regulation of hostile government activities in foreign territory are discussed in the following sections.

1.1 Converging Norms of the Law on Self-Determination

Drew outlines an instructive list of the substantive entitlements prescribed by the law of self-determination of peoples: “(a) the right to exist – demographically and territorially – as a people; (b) the right to territorial integrity; (c) the right to permanent sovereignty over natural resources; (d) the right to cultural integrity and development; and (e) the right to economic and social development.” The entitlements to the right to exist as a people and to territorial integrity affirm equivalent norms enshrined in the law on territoriality; these, and their interactions with belligerent occupation law, are discussed in Chapter IV. The entitlements to cultural integrity and socio-economic development, including the right to

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790 Catriona Drew (2001) 663.
permanent sovereignty over natural resources, are discussed below as elements of the international standard on good governance in foreign territorial administrations.

1.1.1 Socio-Economic Development and the Law on Self-Determination

The concept of socio-economic development consists both of specific individual as well as collective rights. The emerging concept of a right to development and the established right to an adequate standard of living, enshrined in Article 11(1) of the 1966 International Covenant on Economic, Social and Cultural Rights, can be seen as key elements of the compounded notion of socio-economic development. The right to development – a concept subject to notable critique – is defined by the UN General Assembly’s Declaration on the Right to Development, which provides instructive guidance on the relation between self-determination, human rights and development. The Declaration asserts that “the right to development is an inalienable human right,” the substantive element of which aims to ensure that each person is able to “participate in, contribute to, and enjoy economic, social, cultural and political development.”

The measure of the level or degree of development is subject not to a value-based orientation, but rather to a procedural standard of popular participation in each specific case, based on its vernacular facets, as the proper manner by which “all human rights and fundamental freedoms can be fully realized.”

The Declaration further holds that the right to development “implies the full realization of the right of peoples to self-determination” as well as


794 Ibid, Article 1(1).

795 Ibid.
“the exercise of their inalienable right to full sovereignty over all their natural wealth and resources,” while calling on states to “take resolute steps to eliminate the massive and flagrant violations” resulting from situations of “colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity.” It follows that not only are the concepts of development and self-determination correlative, they constitute interdependent prerequisites for the full realisation of all human rights. Where the conditions for “the full realisation of all human rights” are suspended by virtue of foreign domination, neither the right to self-determination nor civil, political or economic, social and cultural rights can be fully enjoyed.

Both the right to self-determination and the right to development comprise the notion of economic rights, including the principle of permanent sovereignty over natural resources. The premise of this notion is that economic independence can only be guaranteed if a people are able to freely “possess, use and develop their natural wealth.” General Assembly Resolution 1803 (XVII) from 1962 affirms that “[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people.” Since the management of natural resources is essentially an attribute of sovereignty, the occupier’s authority in exploiting or disposing of resources, must respect the will and interests of the local population and the political institutions of the ousted sovereign, to the extent that the latter continue to function.

The right to permanent sovereignty over natural resources is arguably protected by the usufruct rule, enshrined in Article 55 of the 1907 Hague Regulations, which assigns limited authority to the occupier in

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796 Ibid, Article 1(2) (emphasis added).
797 Ibid, Article 5.
798 Subrata Chowdhury, Erik Denters, Paul de Waart (eds.), The Right to Development in International Law (Nijhoff, 1992) 411.
802 General Assembly Resolution 1803 (XVII), Permanent sovereignty over natural resources, adopted on 14 December 1962.
803 Iain Scobie (1997) 252.
administering public property.\textsuperscript{804} The Regulations thus seek to facilitate the continuation of the exploitation of natural resources, to a similar extent as it occurred before occupation, and prevent disruption of economic affairs by allowing for the use of its fruits \textit{only} to the extent required to support economic, social and cultural life and, exceptionally, to provide for the reasonable expenses of the occupation army.\textsuperscript{805} The occupying power is prohibited from setting up permanent economic structures for the management and distribution of resources or investment in the natural resource sector of the occupied country. In the cases of the Golan Heights, Western Sahara and Iraq, where Israel, Morocco and the United States have issued exploitation licenses to domestic or foreign companies while seeking to benefit their own respective private economies, these occupying states have been considered to act in violation not only the usufruct rule in the \textit{lex specialis} of belligerent occupation, but also of the right to economic development, as a component of the local population’s right to self-determination.\textsuperscript{806}

Any economic development introduced by the occupying power is contingent on its respect for and maintenance of indigenous institutional structures that provide for economic, social and cultural human rights. \textit{Lex specialis} provisions intended to protect and ensure the welfare of the local population – including the rights to family life, religion, food, shelter, education and property\textsuperscript{807} as well as the general duty to maintain and ensure civil life in Article 43 of the 1907 Hague Regulations – should be considered as part of a broad assessment of the occupying state’s compliance with the principle of military necessity.\textsuperscript{808} Since the duty of the occupier to maintain civil life subsidiary to its military necessity to remain in the territory, the enactment of laws or installation of institutions to meet an unmet need is likely to flout the occupier’s obligation to allow the local

\textsuperscript{804} See generally, Antonio Cassese, ‘Powers and Duties of an Occupant in Relation to Land and Natural Resources’, in Antonio Cassese (ed.), \textit{The Human Dimension of International Law} (Cambridge, 2008) 250 \textit{et seq.}

\textsuperscript{805} Ibid.


\textsuperscript{808} Yutaka Arai-Takahashi (2009) 144.
population to freely determine the conduct of civil affairs by returning control over the territory to the institutions of the ousted sovereign. Given that the occupier is tasked primarily – and arguably under the *lex specialis* conservationist principle, also exclusively\textsuperscript{809} – with ensuring respect for a set of relatively minimalist obligations to respect and in some cases protect human rights, the suspension of the function of public institutions and the limited resources of the occupying army,\textsuperscript{810} implies that the ability of a people to progressively realise their economic, social and cultural rights through development is frustrated by belligerent occupation.

In view of the special position of a foreign administrator vis-à-vis the territory and its ousted sovereign, the administrator’s obligations under international human rights law are limited, at least, to ensuring respect for existing rights, or at best, to facilitating the rehabilitation of basic infrastructure to such effect.\textsuperscript{811} Due to continuing practices of economic exploitation by powerful states against resource-rich territories, during and outside of armed conflict, often through the coercion of local authorities into forcibly accepting arrangements regarding the management and distribution of resources, it is critical that initiatives for economic or social development are deferred until after the end of occupation when the government institutions regain their full, independent function.\textsuperscript{812}

1.1.2 Political and National Integrity and the Law on Self-Determination

The concept of self-determination developed from a political slogan into a rule that underpinned the efforts for decolonisation as a legal basis for the exercise of authority by the indigenous population of the former colony, previously the object of exploitation and domination. There is an inherent contradiction, legally and politically, between a regime of belligerent occupation and the conditions precedent that are necessary for the full enjoyment of self-determination. For instance, the existence of functioning state institutions is a *sine qua non* for the adequate protection of human rights, yet the occupier’s replacement of such institutions with its own,

\textsuperscript{809} See also, Chapter III.


even where it seeks to justify this action as necessary to guarantee civil and political rights, is likely to grant special privileges to certain groups that are underwritten by the occupier or to those through which the occupier seeks to maintain its control.\footnote{Edmund Schwenk, ‘Legislative Power of the Military Occupant under Article 43, Hague Regulations’, \textit{Yale Law Journal}, Vol 54 (1944-1945).}

An essential canon of self-determination law is the protection of diversity and the promotion of equality amongst nations and, as such, the right of each to determine its own political system and values.\footnote{Karen Knop (2004) 109-211.} Any attempt by an occupying power to introduce permanent reforms or changes to the existing administrative structure should arguably be presumed to be a violation of the law of belligerent occupation, and of the principle of self-determination.\footnote{Yutaka Arai-Takahashi (2009) 141.} Even if a prolonged occupation was conducted by a \textit{bona fide} occupying power, it would become increasingly difficult for the occupier to reconcile the increasing needs of the local population with the stagnancy and de-development of the economic and political order that predictably result from the condition of prolonged occupation. Even if an occupier undertakes through considerable efforts to provide for the needs of the local population – e.g. by minimising infringements on the local population’s participatory rights, conducting regular consultations and allowing for the operation of political parties and public bodies – the threat of force emanating from its continued control, actual or potential, over the territory’s affairs to the exclusion of the ousted sovereign, is at odds with the sovereign rights of the state.\footnote{Jorge Cardona Llorens, ‘Le Principe du Droit des Peuples a Disposer D’eux-Memes et L’Occupation Etrangere’, in Jean Salmon (ed.), \textit{Droit du Pouvoir, Pouvoir du Droit} (Bruylant 2007) 872-873.}

It follows that the full and effective implementation of self-determination law is at odds with foreign domination, which is a form of interference with the political independence and territorial integrity of the government in the occupied territory.\footnote{Hurst Hannum, ‘A Principle Response to Ethnic Self-Determination Claims’, in Gudmundur Alfredsson, Maria Stavropoulou (eds.), \textit{Justice pending: indigenous people and other good causes} (Nijhoff, 2002) 267.} Moreover, the legal restraints imposed by self-determination law, coupled with the \textit{lex specialis} conservationist principle, prevent an occupying power from imposing a foreign political or social system, irrespective of a \textit{bona fide} intention to provide for the well being of the local population. Kolb and Vite argue that for an occupier to take measures that irreversibly limit or prejudice the
form of the political and social order, would run roughshod over the *jus cogens* principle of self-determination.818

Unsurprisingly, state practice in situations of occupation has suspended political life to some degree, including restrictions on the existence or establishment of certain political parties and associations; limits on the conduct of elections, open political debates and campaigns; and measures to suppress dissent against the occupation. In the occupied territories of Abkhazia, South Ossetia and northern Cyprus, the local population is required to leave and travel to the territory still controlled by the ousted sovereign to vote in Georgian and Cypriot elections. In the Western Sahara and in Palestine, the Moroccan and Israeli occupiers exercise *de facto* sovereign authority, by excluding and regulating the operation of local political groups, and precluding political accountability.819 In some situations of foreign domination, the local population was brought under the occupying state’s domestic order through naturalization, as was the case with Russia’s policies in South Ossetia and Abkhazia.820 More often, however, in cases including northern Cyprus, Palestine and Western Sahara, occupations have entailed large-scale displacement of the indigenous population and mass transfers of the occupier’s civilians into the territory.821

Changes to the political order of the occupied territory adopted by the occupying power, and arguably any authority set up by the occupier in the absence of the sovereign, are likely, subject to considerations of equity and estoppels in individual cases,822 to be null and void from the perspective of international law. When the occupier’s actions unequivocally exceed the limits imposed on the occupier by occupation law, the resulting international legal consequences may lead to the occupying state losing its internationally recognized *de jure* status, as a result of the *jus ad bellum* violations entailed by its continued military presence in the foreign territory.823 For Ben-Naftali *et al*, “[occupation] law itself becomes infected” when it is implicated in the shaping of an illegal

822 See, on the individual exception to the duty of non-recognition, Section 2.1, Chapter VIII.
823 See also, Section 3, Chapter V.
regime, in which case the law is “likely to operate in a manner that will defy its normative purpose on both the individual and systemic level.”

The perpetual violation of human rights, including the right to self-determination of peoples may not, in view of the desuetude – arguably prematurely – of the international mechanisms for the repudiation of colonialism, result in collective international action. However, the violation of territorial and sovereign rights, likely to ensue from the occupier’s progressive replacement of legitimate government institutions and revision of the political order, should constitute sufficient grounds to be considered as illegal. The enactment of sovereign-like acts by an occupying power constitutes an unequivocal violation of the sovereign rights of the legitimate government. It follows that the legal basis and type of authority implied by the scope and extent of the human rights-based measures adopted by an occupying power’s administration should be scrutinised in line with the people’s right to freely-determine and develop their affairs, in order to ensure that such measures do not excessively and irreversibly intervene in the conduct of the territory’s internal affairs and its ability to regain its political independence.

1.2 Permanent Sovereignty over Natural Resources under Belligerent Occupation

The principle of permanent sovereignty over natural resources, closely related to the international law concerning sovereignty discussed in Chapter IV, has the object of ensuring that the local population and its legitimate representatives are solely charged with the management and development of their country’s economic future. In addition to being an attribute of state sovereignty, the right to control, own and exploit natural resources is a facet of the collective right of peoples to development, applicable in the regulation of international investment. These principles are enshrined in Articles 73 and 76 of the 1945 UN Charter, on non-self-governing territories and trusteeship mandates, respectively, intended “to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development

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towards self-government or independence.”827 The principle has been incorporated into numerous other bilateral and multilateral treaties.828

General Assembly Resolution 626 (VII) provided for the right of each country to “freely use and exploit its natural wealth,” while the 1962 Declaration on Permanent Sovereignty over Natural Resources held that such sovereignty “must be exercised in the interests of [...] national development and of the well-being of the people of the State concerned.”829 To provide for the exercise of permanent sovereignty, Resolution 2158 (XXI) of 1966 upheld: “it is essential that their exploitation and marketing should be aimed at securing the highest possible growth rate of the developing countries.”830 It considered that these aims would be optimally achieved “if developing countries are in a position to undertake themselves the exploitation and marketing of their natural resources.”831 While the principle was primarily intended to regulate inter-state economic relations in time of peace, it has become increasing relevant to foreign interventions and belligerent occupations aimed at gaining control and exploiting natural resources.832

1.2.1 Permanent Sovereignty over Natural Resources and the Law of Belligerent Occupation

The principle and right to permanent sovereignty over natural resources clearly converge with provisions in the lex specialis of belligerent occupation. The occupying power’s obligations include the duty to protect public property in the occupied territory,833 “safeguard the capital of these

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827 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
829 General Assembly Resolution 1803 (XVII) of 14 December 1962, para. 1.
830 General Assembly Resolution 2158 (XXI) 25 November 1966, para. 5 of Preamble.
831 Ibid, para. 6 of Preamble.
properties, and administer them in accordance with the rules of usufruct”\(^{834}\) by protecting them from dissipation, destruction or permanent alienation.\(^{835}\) The occupying power is thus obliged to ensure good economic governance and financial management of the natural resources of the occupied territory.\(^{836}\) While an occupying power may defray some of the costs of the occupation from the economy of the occupied territory, it may do so only “on condition that this does not outweigh the expenses that the local economy is expected to sustain, in particular, taking into account the needs of the population of the occupied territory.”\(^{837}\)

Moreover, international human rights law implicitly includes the right to freely dispose of natural resources in the right to self-determination of peoples, which is enshrined in Article 1 common to the human rights covenants.\(^{838}\) An explicit reference to permanent sovereignty over natural resources as part of the right to self-determination of peoples was contemplated during the drafting of the Covenants.\(^{839}\) Instead, Articles 47 and 25 of the ICCPR and ICESCR respectively were made to provide that “Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.”\(^{840}\) The principle of self-determination of peoples plays a pivotal role in defining the underlying purpose of these rules, in line with the concepts of permanent sovereignty and economic development: it is a precondition for the coherent and cogent application of its \textit{lex specialis} in line with general international law on territoriality, self-determination and human rights law.\(^{841}\)

\(^{834}\) Article 55, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907. See also, Lieber Code, Article 31; Brussels Declaration, Article 7; Oxford Manual, Article 52.


\(^{838}\) See also, Chapter VII.

\(^{839}\) The language of the first draft refers to permanent sovereignty, which was later removed; General Assembly, ‘Annotations on the text of the draft International Covenants on Human Rights’, UN Doc. A/2929 (1955), 15, para. 21. See also, Jeremie Gilbert (2013) 322.


A correlative of a people’s right to unhindered social and economic development\(^{842}\) is the right to freely-determine the management and allocation of natural resources.\(^{843}\) To safeguard against exploitation and abuse in situations of belligerent occupation, the criteria of prior and informed consent by the local population,\(^{844}\) and the allocation of sufficient means for their subsistence,\(^{845}\) should be applied vigorously in conjunction with the *lex specialis* rules on usufruct and custodianship. In the *Armed Activities on the Territory of the Congo* case,\(^{846}\) the International Court of Justice held that Uganda was under a duty to prevent looting and plundering by armed groups and private commercial entities, in line with its obligation to respect the local population’s right to permanent sovereignty over natural resources.\(^{847}\)

Similarly, the 1943 Declaration against Acts of Dispossession committed in Territories under Enemy Occupation or Control, adopted by seventeen state delegates and the French National Committee in the wake of the rampant looting and pillaging that took place during the World War II occupations, condemned practices of “cunningly camouflaged financial penetration” with an intention “to seize everything of value that can be put to the aggressor’s profit” and “bring the whole economy of the subjugated countries under control so that they must slave to enrich and strengthen their oppressors.”\(^{848}\) The states affirmed the need to eradicate such practices


\(^{845}\) Jeremie Gilbert (2013) 326 et seq.


in time of occupation and armed conflict and remarked the abhorrent and reprehensible nature of such acts of plunder.\textsuperscript{549}

Given the equivalence of the specific purposes of these norms, the general international law principle of permanent sovereignty over natural resources reinforces and complements the underlying premises of the \textit{lex specialis} of belligerent occupation, and provides guidance on the scope and normative content of the limitations it sets out. A compound test for determining the legality of the occupying power’s exploitation of natural resources, based on these multi-sourced equivalent norms, can be distilled as a set of prescriptions: (i) the local population should not be deprived of substantial gains of such exploitation; (ii) the occupier’s domestic economy and civilians cannot be the beneficiaries of such activities, while the military government may defray its costs from the revenue of the occupied territory’s resources only in a reasonable and proportionate manner; and (iii) the legitimate representatives of the occupied territory should be permitted, where possible, to participate in the decision-making process concerning the management and allocation of resources.

In all cases, the economic and social interests of the local population must be accounted for in accordance with the people’s right to freely self-determine the management and allocation of their natural resources. The occupying power must avert not revise the policies and laws enacted by the ousted sovereign, in accordance with the conservationist principle. To avoid economic regression in situations of prolonged occupation, in line with the abovementioned duty to ensure good economic governance, decisions on the management of resources should arguably also take into account, to the extent possible, international sustainability standards and follow adequate environmental assessments. \textsuperscript{850} Decisions about the distribution of natural resources and the involvement of foreign investors and companies must be designed primarily to serve domestic needs and economic opportunities.

\textbf{1.2.2 Natural Resources and Self-Determination Law}

The conjunctive application of self-determination law along with the law of belligerent occupation provides a means to assess the presumption, implicit in the latter, that the occupying power’s management and exploitation of

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\textsuperscript{549} \textit{Ibid}, paras. 5-6.
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natural resources in the occupied territory is undertaken in accordance with local laws, economic policies and with the participation of the relevant local authorities. The exploitation and management of oil and gas in Iraq is a case-in-point for the effects of the violation of this presumption. The US-backed Iraqi Hydrocarbon Law of 2007 was intended to facilitate large profits, long-term investments and production contracts and share agreements, without bids, with priority given to US and European multinational companies.\textsuperscript{851} Despite notable debate on the status of Iraqi territory following the 2003 invasion, UN Security Council resolution 1483,\textsuperscript{852} appears to give the coalition forces a mandate that goes beyond the law of belligerent occupation, in administering the territory and “consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future.”\textsuperscript{853} While the United States and United Kingdom were afforded broad powers, others states were required to continue “to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.”\textsuperscript{854} Notwithstanding, the administration of the territory remained subject to the provisions of general international law limiting the ability of foreign authorities to determine the distribution and exploitation of Iraqi natural wealth without the Iraqi people’s participation in key decision-making processes or genuine consent.\textsuperscript{855}


\textsuperscript{854} Distinguishing the Authority from others states; S/RES/1483 (2003), 22 May 2003, para. 4-5

This rule is also applicable, albeit by transposition, to *de facto* administrators of non-self-governing territories, such as the contemporary situation of the Western Sahara, where Morocco exploits natural resources including phosphates, other mines, fisheries and oil, and a significant agricultural sector that exports to European countries. Morocco’s private sector conducts these activities under the aegis of Moroccan laws and domestic institutions, with the involvement of foreign companies. The 1975 ICJ Advisory Opinion on Western Sahara and the European Parliament’s legal opinion on Morocco’s exploitation of the natural resources of the Western Sahara affirmed that the legality of Morocco’s conduct as *de facto* administrator of the non-self-governing territory required it to ensure the participation of the local population in decision-making regarding the management and allocation of natural resources, with the purpose of securing the local population’s benefit.

The New York Bar Association’s opinion stated that insofar as Morocco’s use of the natural resources of the Western Sahara was not “in consultation with and to the direct benefit of the people of Western Sahara”, its activities in foreign territory contravened international law. The EU-Morocco Association Agreement and the European Union Commission’s position implied an expectation that Morocco ensure that the Agreement benefit the local population in the Western Sahara territory; yet, the EU has arguably fallen short of achieving legal certainty in this regard.

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856 EU Commission position is that “Western Sahara is considered a ‘non-self-governing territory’ and the Kingdom of Morocco its *de facto* administering power”; Parliamentary Questions, Answer given by Mr Çioloş on behalf of the Commission, 29 August 2012.


858 See, e.g., about 60,000 tons of fruit and vegetables were exported in 2010 from Western Sahara; Written Question, Subject: Label and Liability — stolen tomatoes from Western Sahara, EU Parliamentary Questions, 21 January 2012.

859 Toby Shelley, ‘Natural resources and the Western Sahara’, in Claes Olsson (ed.), *The Western Sahara conflict the role of Natural Resources in Decolonization* (Nordiska Afrikainstitutet, 2006).


861 European Parliament, Answer given by Answer given by Mr Çioloş on behalf of the Commission, Parliamentary Questions, 29 August 2012. See also, on EU-Morocco relations, Chapter IX.
Turkey’s regime in northern Cyprus has similarly supported the establishment of commercial sectors in the fields of agriculture, industry, tourism and fisheries, inter alia. The growth and sustainability of its economy is supported by a significant export regime for agricultural produce, foreign tourism, financial institutions and banks, as well as a significant private real-estate market, all under the aegis of the illegal regime established and maintained by Turkey. Similarly, Israel’s settlement policies in the occupied West Bank and Golan Heights, have attracted a large number of Israeli and foreign companies and homebuyers, resulting in considerable financial gains for Israel’s domestic economy; the farming, stone-quarrying and water sectors have prospered through generous economic incentives and benefits provided under Israeli domestic arrangements for settlement-based “national priority zones.” Under an analogous economic program, Russian companies operating in Abkhazia and Transnistria, in receipt of Russian state incentives and benefits, have come to control the steel and energy sectors, including virtually all distribution of gas, in these occupied territories.

Occupying powers and foreign administrators have interfered with local political and economic systems in order to profit, either by securing control over local authorities charged with the administration of economic affairs, acquiring ownership of companies and industrial sectors, or appropriating the land and natural resources and bringing them under the administration of the occupier’s domestic order. Given that such

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862 According to the Turkish-managed Yaga agency, the economy in Northern Cyprus has an incrementally higher annual average growth rate than a score of European countries, and more than double that of the southern part of Cyprus. ‘Economy in Northern Cyprus’, Yaga Turkish Cyprus Turkish Investment Development Agency <http://www.investinnorthcyprus.org/>; ‘Agriculture Sector Overview’, Yaga Turkish Cyprus Development Agency <http://idbgbf.org/assets/2012/5/2/pdf/41bf40-25a5-4d8f-8bd7-748db6689401.pdf>. The Cypriot Ministry of Agriculture has published that “Turkish forces occupied the most fertile land, which accounted for 48% of agricultural exports”; Ministry of Agriculture, ‘Natural Resources and Environment’, Republic of Cyprus, Nicosia (2005) 8.

863 See, on Turkey’s regime in northern Cyprus, Section 2.2, Chapter IX.


arrangements have benefited from the cover of belligerent occupation, in so far as the occupying state has either invoked military economic needs or the service of a benefit of the local population,\textsuperscript{866} the rigorous co-application of the right to permanent sovereign over natural resources and the principles of the law on self-determination to complement the \textit{lex specialis} rules of belligerent occupation on the use and management of natural resources could notably enhance the deterrent effect against such practices of economic exploitation in international law.

2. Secessionist Claims in Time of Belligerent Occupation

In time of armed conflict and belligerent occupation, which entail the suspension of the ousted sovereign’s normal conduct of domestic affairs and precludes its ability to make its will felt, a distinction should be maintained between an invading army that occupies foreign territory to obtain a military advantage in the context of an armed conflict, and an army whose actions amount to interference in another sovereign’s domestic affairs by furthering an internal regime change.\textsuperscript{867} Secessionist movements from within occupied territory have in a number of cases sought to further their objectives by joining forces with and espousing the demands of an invading army. In turn, occupying states such as Russia, Armenia and Turkey have lent support to separatist movements in occupied territories in order to permanently exclude the legitimate sovereign and to effectively revise the status of the territory.

The occupying state’s interference in an internal conflict is illegal if it precludes the legitimate sovereign’s recourse to proper means of dispute settlement in the resolution of its internal dispute with the separatism movement. Such situations are as complex legally as they are politically: the mandate or authority of the occupying power, and the right of the ousted sovereign from whose internationally-recognised territory the secessionist movement is operating, are both considered to be unalterable. This section examines the effects of self-determination-based claims for secession arising from the ousted sovereign on the application of the \textit{lex specialis} of belligerent occupation, and the status in international law of measures by the occupier to support the initiatives of a separatist movement in the occupied territory.

\textsuperscript{866} Jean Pictet (1958) 43.
2.1 The Status of Secessionist Claims under Belligerent Occupation

The concept of “long-arm” or “remote-control” belligerent occupation describes the enduring effective control and ultimate authority of an occupying state over de facto local government in the occupied territory.\textsuperscript{868} The ICRC’s 2012 report uses the term in reference to the belligerent occupation of Nagorno-Karabakh by Armenia, where the quasi-autonomous authorities, appealing for international recognition as an independent state, remain fully subject to the political control of and are dependent on financial support from the Armenian government, which belligerently occupied the territory and sought to permanently exclude Azerbaijan, its internationally-recognised legitimate sovereign.\textsuperscript{869} Similar cases include the Turkish-controlled regime in northern Cyprus, the Georgian territories of South Ossetia and Abkhazia, and the Transnistrian regime in the territory of Moldova, with the latter two controlled by Russia. As an exception to such cases, the Indian intervention in 1973 to assist in the creation of Bangladesh was, as Benvenisti remarks, “the first, and so far the paradigmatic, case of successful secession” ensuing from foreign intervention and occupation, largely due to the “genuine and widely recognised claim for Bangladeshi self-determination.”\textsuperscript{870}

In such cases, most occupying states have instrumentalised the claims of separatist movements to establish de facto authorities charged with the administration of the separated territory’s internal affairs – but with substantial political, military and economic support from the occupier. Since such situations amount to belligerent occupation, acts seeking the permanent displacement of the legitimate sovereign are considered illegal. Legal bases for intervention in the self-determination struggle of another state are exceptional, and no right to interfere in an internal conflict to further secession exists in international law to justify the erosion of the rights and status of an internationally-recognised sovereign. The bona fide status of either the separatist claims to secession, short of unanimous and collectively endorsed international recognition, or the invading state’s intentions to support the self-determination struggle, as opposed to further its self-interests through economic profit and political subjugation, are inconsequential in this regard.

The status of secessionist claims is not explicitly evident in the lex specialis of belligerent occupation. Given, however, that the conservationist principle is considered as one of the law’s cardinal rules, an occupying

\textsuperscript{869} Tristan Ferraro (ICRC, 2012) 23.
\textsuperscript{870} Eyal Benvenisti (2012) 188-191.
power that actively furthers a local group’s secession from the ousted sovereign would certainly be responsible in international law for ousting the legitimate government institutions of the territory and pursuing the acquisition of territory through force on behalf of the separatist authorities under its ultimate control. Self-determination based claims cannot trump the limitations placed on an occupying power, especially not in a manner that entails the combined revision of the status of the territory and its government institutions. Certainly in the majority of cases, the *casus belli* for the invading state’s armed conflict with the occupied territory’s ousted sovereign often precedes and is distinct from the union between the occupying power and the separatist movement to further the latter’s secession.871

Notwithstanding ambiguities in the law on self-determination and the reluctance of states to methodically redress circumstances that obstruct the enjoyment of self-determination,872 states and experts widely concede that there is no self-executing right to secession.873 By this token, General Assembly Resolution 2625 (XXV) affirmed, “nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign or independent states.”874 No extent of discrimination and oppression automatically produces a right of peoples to secession and statehood as a self-determination unit. A people with an internationally-recognised right to self-determination may appeal to the international community to facilitate their exercise of self-determination through whatever measures necessary.875 Indeed, some might say that a claim to unilateral secession is governed by other contemporary international legal regimes and its practice and operation have, consequently, fallen into desuetude.876

The tactic of supporting secessionist regimes’ international appeals for recognition of their self-determination unit, has effectively provided

871 See, e.g., Security Council Resolution 822 (adopted on 30 April 1993, para. 1) calls for Armenia to ensure the “immediate withdrawal of all occupying forces from the Kelbadjar district and other recently occupied areas of Azerbaijan”; Security Council Resolution 353 (adopted on 20 July 1974, para. 3) demands an “immediate end to foreign military intervention in the Republic of Cyprus”.

872 Matthew Saul (2011) 643.


874 *Ibid*, 128. See also, UN General Assembly Resolution 1514 (XV), Declaration on the Granting of Independence to Colonial Peoples, 14 December 1960, Principle 5.


876 Since 1945, there have been few separations of a constituent part of a state’s territory without the latter’s consent, e.g. Slovenia, Croatia, and arguably former Yugoslavian republics and Kosovo; James Crawford (2006) 415.
contemporary occupying powers with a disguise of legality, which they used to obtain political and economic benefits from a *de facto* sham government under their control. The *de facto* government authorities of the secessionist movement effectively entrench the occupying power’s control over the territory and its population. In some cases, such as northern Cyprus and Nagorno-Karabakh, the *de facto* authorities are subservient to the occupier’s economic and political interests, under the guise of close ‘inter-state’ coordination and relations, in both external and internal affairs. The enduring effective control maintained by the foreign government over the territory and its affairs, as well as the former’s potential ability to substitute its authority for that of the ‘puppet’ government at any time, means that the occupying state remains bound by obligations under the law of occupation.\(^\text{877}\)

Yet, many of these putative self-determination-based arrangements have also led to grave abuses of other international law norms. In particular, the Armenia-backed *de facto* authorities in Nagorno-Karabakh have proved unwilling to fulfill fundamental international obligations, including respect for the rights of ethnic groups that were forcibly expelled from the territory, who in some cases were replaced by large numbers of the occupier’s civilian population.\(^\text{878}\) There is evidence of illegal settlements of Armenians in occupied Nagorno-Karabakh intended to permanently alter the demographic character of the territory.\(^\text{879}\) Similarly, the Russian-backed regime in Transnistria, presided over by a Russian citizen, is authoritarian in nature, being based on the suppression of even the slightest form of dissent.\(^\text{880}\) Not only would such acts amount to grave violations of the *lex specialis* of belligerent occupation, they attract consequences under the law of self-determination, and in some cases also under *jus ad bellum*.

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\(^{880}\) See, e.g., claims to independence in Transnistria have been largely based on the prevalence of the Russian language; Nicu Popescu (2006) 7-9.
2.2 Self-Determination as Protection of the Ousted Sovereign

Belligerent occupation, which entails the temporary suspension of the function of legitimate government institutions, is intrinsically antithetical to the ability of the local population to fully self-determine and enjoy certain civil, political, and socio-economic rights. The law however requires an occupying power to ensure that its activities do not excessively disturb, distort or change the institutional and public order as it was before the occupation. In this sense, the occupying power’s mandate entails a negative obligation not to revise or disturb development processes and institutional structures, especially where there is no concrete military advantage to its operations. Concretely, Articles 7, 8 and 47 of the 1949 Fourth Geneva Convention render invalid any changes to the governmental institutions or the status of the occupied territory that deprives protected persons of their inviolable rights, including the right to freely-chose their system of governance.881

The unequivocal object of the occupation law provisions conserving the institutions of the legitimate sovereign and protecting them from permanent displacement or partial erosion is to deter occupying states from the political subjugation or economic exploitation of the occupied territory. The age-old US position on the function of the law of occupation is instructive: “we come to overthrow the tyrants who have destroyed your liberties; but we come to make no war upon the people of Mexico, nor upon any form of free government they may choose to select for themselves.” 882 For Benvenisti, it is “national self-determination” that effectively restrains the power of the occupier.883 By the same token, it is widely accepted that the territorial changes entailed by the unilateral secession of the Nagorno-Karabakh region of Azerbaijan or of northern Cyprus, *inter alia*, brought about through the use of force, contravene international law.884

The notion of self-determination is a condition precedent for ensuring respect for a plethora of human rights,885 as well as a safeguard against measures that may prejudge the future exercise of the right by

884 See, e.g., General Assembly Resolution 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (24 October 1970).
885 UN Human Rights Committee (HRC), CCPR General Comment No. 12: Article 1 (Right to Self-determination) 13 March 1984.
protecting the existing ecosystem in the occupied territory, including the system of government and civil life, from sweeping changes, regardless of the legal or political viability of such measures. In addition to the guarantees of internal self-determination incorporated in the lex specialis of belligerent occupation, the principle of self-determination also upholds the sovereignty, territorial integrity and political independence of the people subject to foreign domination.

The intervention in an internal conflict of a powerful third party state intent on making one party prevail over the other is likely to aggravate the nature of the internal dispute and may prejudice the parties’ positions. Thus, international law prioritises the peaceful settlement of inter-state disputes in line with the international prohibition on the use of force. Claims by an occupying power to support the struggle for self-determination by a secessionist group would, in any case, be difficult to adjudicate amid a multi-partied armed conflict. A situation whereby claims to secessionist self-determination from within the occupied territory contravene the restrictive lex specialis provisions of belligerent occupation law is likely to be resolved according to a presumption in favour of the ousted sovereign. Such a hierarchy is arguably consistent with the international law doctrine on dispute settlement, the objective of conflict management mechanisms, as well as the legal and political consequences assigned to acts of threat or use of force in pursuit of territorial acquisition or regime change.

A first-in-time rule can be applied to the interaction between belligerent occupation and self-determination law: claims based on the right to self-determination should await the end of occupation before being adequately and justly addressed. The ousted sovereign must regain full effective control over the territory and its internal and international affairs, before considering and addressing the self-determination claim by a

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886 Ronen’s survey of the reversion of illegal regimes argues that pragmatic approaches have given way to continuity with respect to some violations, particularly residency and property rights; Yael Ronen (2011) 185, 190-191, 251. See also, Quincy Wright (1931) 609-610. Georges Kaeckenbeeck, ‘The Protection of Vested Rights in International Law’, British Yearbook of International Law, Vol 17 (1936) 8-9.

887 James Crawford (2012) 719 et seq.


people’s from within its sovereign territory. The International Court of Justice affirmed in its 1975 Advisory Opinion on the Western Sahara that “it is for the people to determine the destiny of the territory and not the territory the destiny of the people.” The application of self-determination law fully in conjunction with the conservationist principle of occupation law affirms the sovereign rights of the population of the occupied state to make such determinations without foreign interference: a foreign intervention in furtherance of secession by part of that state’s population should therefore be considered an illegal act of regime change and territorial acquisition.

2.3 Regime Change and Remote-Control Belligerent Occupation

A situation of belligerent occupation, as a matter of fact, is established when an occupier maintains effective control, actual or remote, over the territory and has replaced the authority of the sovereign at its will. Attempts at secession and internal conflict between state and non-state actors in the occupied territory, other than the occupying power, may affect the temporal scope of belligerent occupation -- at least in theory. If there is a devolution of governmental authority from the sovereign to a de facto authority that, in turn, is able to gain international recognition as an independent entity, and the new government consents to the occupier’s presence, it could be argued that the situation no longer amounts to one of belligerent occupation. Yet, if the occupier remains the real power in the territory, notwithstanding the newly-recognized secessionist government, the occupation would be considered to persist. Given that a secessionist regime’s ability to maintain control is often supplanted by the occupying power’s threat or use of force it is unlikely to be recognised as independent. As Akande remarks, “the criteria for the establishment of occupation may not be the same as the criteria for the maintenance of occupation […] even in cases where a former occupying power no longer exercises the level of control that would justify the establishment of occupation, if it exercises

892 Advisory Opinion on the Western Sahara (1975) ICJ Reports 12, Judge Dillard, Separate Opinion, 122.
893 Adam Roberts (1985) 256-257.
such control as to prevent another power from exercising full control, the occupying power remains in occupation.”

The International Criminal Tribunal for the former Yugoslavia originally used an “overall control test” for defining a situation of occupation, which included situations where territory was controlled by a non-state armed group that was itself under the overall control of another state. In Naletilić, the ICTY revised this criterion, and held that the “overall control test” was applicable to the determination of the existence of an international armed conflict, but not to that of occupation, which requires “[a] further degree of control.” In contrast, two years later, the International Court of Justice in Armed Activities in the Territory of the Congo, discussing the manner in which the invading army’s authority is “established and exercised”, accepted that the substitution of the ousted sovereign’s authority could result from the invading army’s “indirect administration” of the territory through armed groups. Judge Kooijmans further observed that the establishment of a military administration by an occupying power was not as common: “[o]ccupants feel more and more inclined to make use of arrangements where authority is said to be exercised by transitional governments or rebel movements or where the occupant simply refrains from establishing an administrative system.” In his view, requiring the substitution of the occupying power’s authority for that of the occupied was an “unwarranted narrowing of the criteria of the law of belligerent occupation as these have been interpreted in customary law since 1907.” He considered “irrelevant from a legal point of view whether it exercised this authority directly or left much of it to local forces or local authorities.” In the case of Uganda’s presence in the DRC, “As long as it effectively occupied the locations which the DRC Government would have needed to re-establish its authority, Uganda had effective, and thus factual, authority.”

Under the law of state responsibility, effective control may continue for the purpose of human rights law even if the occupying state operates

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898 Armed Activities case (2005) para. 44.
899 Ibid, para. 49.
through proxies such as insurgents, separatist movements, or a de facto authority intended to permanently replace the authority of the ousted sovereign.\(^{900}\) The position maintained by the European Court of Human Rights in the case of Ilascu established, inter alia, that Russia – due to its political and military support to the Transnistrian secessionist authorities – exercises effective control in the region.\(^{901}\)

Commenting on the end of occupation, Sassoli remarks that “[m]any would make that end depend on the (democratic) legitimacy of a new national government, given that, taking into account the right of the local people to self-determination, a democratic election cannot be considered as a change introduced by the occupying power, even if it was held under the latter’s initiative and supervision.”\(^{902}\) However, he adds, “the legitimacy of the new government is often controversial, as is the question of whether the new government’s consent to the continued presence of foreign troops is freely given.”\(^{903}\) For other commentators, like Roberts, foreign troops may exceptionally be permitted to maintain their presence “if a treaty ending an occupation is accompanied by another one permitting the presence of foreign forces.”\(^{904}\) However, Dinstein cautions that mutual agreement between the displaced sovereign and the occupying power is required for the transfer of title over occupied territory, even with a basis in self-determination law, and “since protected persons are in a precarious position, there is a high potential of engineering of consent.”\(^{905}\) Roberts further affirms, that “[i]n many cases, the end of occupation is a process, not a moment” – occupation can end when “despite the continued presence of foreign forces, legitimate indigenous government is established or re-established within a territory.”\(^{906}\)

International law defers to state continuity and to the imperative of denying the legitimacy of illegal administrative revisions.\(^{907}\) The Security

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\(^{900}\) **Prosecutor v Blaskic**, Case No IT-95-14-T, Judgment, 3 March 2000, 149-150. Cf., the ICJ decided that according to the general test of ‘overall control’ Ugandan forces could not control local rebels. ICJ *Armed Activities on the Territory of the Congo*, paras. 160, 177. See also, Eyal Benvenisti (2012) 61-62.


\(^{903}\) Marco Sassòli (2005) 683.

\(^{904}\) Adam Roberts (1985) 258-259.

\(^{905}\) See, e.g., on the agreement between Jordan and Israel over the West Bank and Egypt’s similar arrangements for the Gaza Strip in the 1978 Camp David Framework Agreements; Yoram Dinstein (2009) 51-52, 82.

\(^{906}\) Adam Roberts (2012) para. 56.

Council maintained this position by affirming that the Coalition Forces in Iraq had only a temporary mandate and no right to adopt decisions that would affect Iraq’s future beyond the interim period.\textsuperscript{908} For Wolfrum, the transition of Iraq from the former government via the authority of the occupying forces was guided by the law on self-determination.\textsuperscript{909} Moreover, international recognition of the new regime and the granting of legal effect to unlawful changes to the rights and status of the ousted sovereign under the situation of belligerent occupation, would contravene the principle of \textit{ex injuria jus non oritur}.\textsuperscript{910}

Similarly, the international law rule confirming the continued legal existence of an illegally severed state applies to situations of occupation, in which the ability of the new government established in the occupied territory to secure its control to the exclusion of the ousted sovereign is often premised on the threat of force maintained by the occupying state against the ousted sovereign’s territorial integrity.\textsuperscript{911} In the cases of South Ossetia, Abkhazia, Transnistria, as well as Crimea, Russia has claimed the right to intervene in order to protect its nationals through force.\textsuperscript{912} In March 2014, the General Assembly adopted a resolution calling on all states not to recognise the illegal annexation of the Crimean territory by Russia, which remained under Ukrainian sovereignty from the perspective of international law.\textsuperscript{913} Similarly, in the case of Nagorno-Karabakh, Armenia’s armed forces have maintained a threat of force to ensure the exclusion of the Azerbaijani sovereign.\textsuperscript{914} According to the “TRNC constitution”, which is the basis for the “laws” that govern the area administered by Turkish Cypriot authorities, “Turkish Cypriot security forces” are ultimately under the operational command of the Turkish military.\textsuperscript{915}

\begin{footnotesize}
\begin{itemize}
\item Security Council Resolution 1511 (2003), UN Doc. S/RES/1511, 16 October 2003, Preamble para. 2(1).
\item Rudiger Wolfrum (2005) 43.
\item See on Armenian assistance to Nagorno-Karabakh’s economy, military force; Andriy Y Melnyk (2009) paras. 8-10.
\item Article 10, TRNC Constitution, cedes responsibility for public security and defense “temporarily” to Turkey; Cyprus, Human Rights Report (US State Department, 2012) 42.
\end{itemize}
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The international responsibility of the invading state for acts taking place in foreign territory continues until such time that it effectively turns over control to the ousted sovereign. An occupier that maintains its control through a “long-arm” occupation under the guise of self-governance or a sham local government does not thereby evade the application of the law of occupation, but rather attracts international responsibility for illegal acts of regime change and violations of the territorial and sovereign rights. To ensure that such regimes are denied legal effectiveness and to prevent the occupying power and the de facto authorities subject to its control from benefiting from such wrongful acts by seeking to engage in inter-relations on the territory’s behalf, the new regimes and the territorial and sovereign revisions they entail, should be the subject of collective and unilateral non-recognition by states and international organizations.

3. Transformative Occupation and the Law of Belligerent Occupation

The law on self-determination of peoples precludes an occupying state from undertaking sweeping changes with long-term effects on the governmental system of the occupied territory, and also requires the occupier to ensure that basic aspects of daily life, including economic, social and cultural affairs, continue unimpeded. Given that the only legitimate reason for its continued presence in the occupied territory is a real military need, the occupier has the right to undertake only “pragmatic tasks of orderly administration.” When decisions are taken on matters likely to affect daily life beyond the temporal scope of occupation, the population and its local legitimate authorities should be given a genuine right to participate, be consulted and in some cases even veto certain

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921 The British Attorney General advised on the Iraq war: “while some changes to the legislative and administrative structures may be permissible if they are necessary for security or public order reasons, or in order to further humanitarian objectives, more wide-ranging reforms of governmental and administrative structures would not be lawful”; Memorandum from the Right Hon. Lord Goldsmith, QC to the Prime Minister, 26 March 2003, reprinted in John Kampfner, Blair Told it would be illegal to occupy Iraq, New Statesmen, 26 May 2003, 16-17. See also, Gregory Fox (2008) 236.
substantial decisions. The legality of structural transformations undertaken in the absence of such consultations should be questioned, as should the legality of the authority exercised by the occupying state. The rationale for such scrutiny is the need to protect the local population from the occupier’s abuse of power, based on a long history of occupiers’ practices of ideological control and social engineering, assimilation, re-education, culturation and re-constitutionalisation.922

In view of these restrictions, the emergent category of ‘transformative’ or ‘humanitarian’ occupation regimes, which aim to assist a population under oppressive rule,923 appears incompatible with the cardinal rules of the law of belligerent occupation. The invasion of another sovereign’s territory to undertake reforms of its political system and governmental institutions has no basis in international law.924 The occupation of Iraq is an example of the effects of a concerted campaign for democratization undertaken through foreign intervention on the political, social and cultural ecosystem of the occupied territory.925 Similar practices of regime change, albeit with differing objectives, have been implemented by Turkey in northern Cyprus, Morocco in the Western Sahara, Armenia in Nagorno-Karabakh and Russia in South Ossetia, Abkhazia and Transnistria. This chapter considers the application of the lex specialis of belligerent occupation and the law on self-determination to assess the status and consequences of transformative foreign interventions justified on humanitarian grounds.

3.1 Transformative Occupation: An Antidote to Conservation

In view of the limited exceptions to the ‘conservationist’ principle,926 Fox asserts, even the “humanitarian character” of the law of belligerent occupation -- the object of which “is to safeguard human beings and not to

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923 Peter M Stirk (2009) 203 et seq.
protect political institutions and government machinery of the State as such”927—prohibits an occupier from implementing a reform agenda under the banner of human rights.928 The limited exceptions to the conservationist principle are based on the same protective rationale: a law or institutional practice of the local authorities put in place by the ousted sovereign can be repealed or cancelled by an occupier due to its flagrant disregard for the human rights of the population, but only if it is manifestly discriminatory in its effects on the actual lives of the local population.929 To prevent an occupier from transposing its subjective view of a just social order into the occupied territory, the threshold for such annulments is exceptionally high. Given the limitations placed on an occupying power by the law on self-determination, a foreign state genuinely concerned for the well-being of the population subject to an abusive regime should seek to ameliorate such abuses by way of the least intrusive means and barring irreversible changes.930

The purported objectives of ‘humanitarian’ interventions are often based on a democratic standard of governance and rule of law—which are often contended to be conditions precedent for respect for human rights. Some have claimed that the influence of Western nations on international affairs has contributed to the emergence of democratic principles and popular suffrage as a measure for international standing and legitimacy.931 For Bowers, “[o]ccupying powers must respect those human rights, which are entrenched in international law insofar as is required by the relevant instruments” and hence also “pay attention to the sometimes mooted

931 Stefan Talmon (2001) 152 et seq.
'emerging right' to democracy.” Yet, Russian international law scholars, amongst others, have argued that the principle of state sovereignty should, as a general rule, trump the right of peoples to self-determination, which should be interpreted to allow for sufficient diversity amongst equal sovereigns and peoples. While an occupier is under no obligation to blindly respect the institutional structures in the occupied territory, according to Feilchenfeld, it also “has no right to transform a liberal into a communist or fascist economy; except so far as military or public-order needs should require individual [specific] changes.” For Vidmar, the acceptance of a competing authority’s legitimacy and right to represent the state “only happens through an international response to the situation.”

The consequences of the ‘transformative’ occupation of Iraq indicate the importance of narrowly interpreting the conservationist principle and disallowing extensive transformations. The establishment of the Coalition Provisional Authority in May 2003 entrusted the United States and United Kingdom, as de facto administrators of foreign territory, with “powers of government” including “all executive, legislative and judicial authority necessary to achieve its objectives.” The CPA remodeled the Iraqi political order in its entirety: the “De-Ba’athification of Iraqi society” disestablished and eliminated the sole political Party’s structures, barred its members from future employment in the public sector, and dissolved more than twenty governmental bodies and military organizations; and

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935 See, e.g., Soviet Russia’s transformation of the Baltic countries into Soviet republics, Germany’s transformation of the Norwegian economic structure into a totalitarian system of the Nazi type as well as its abolition of fascism in Sicily and the occupied provinces of Italy; Ernest H Fielchenfeld, International Economic Law of Belligerent Occupation (Columbia, 1942) 90. Antonio S de Bustamante, Derecho Internacional Publico (1937) para. 1067, 324. AC Davidsonis, ‘Some Problems of Military Government’, American Political Science Review, Vol 38, No 3 (1944) 467.

936 Jure Vidmar (2013) 74-75.


938 Coalition Provisional Authority Regulation No 1, CPA/REG/16May2003/01, 16 May 2003, section 1(2).

939 De-Ba’athification of Iraqi Society, Coalition Provisional Authority Order No 1, CPA/ORD/16May2003/01, 16 May 2003.

940 Dissolution of Entities, Coalition Provisional Authority Order No 2 CPA/ORD/23May2003, 23 May 2003.
extensive economic reforms established new financial institutions and enacted the controversial foreign investment law permitting foreigners to own up to 100 percent of an Iraqi enterprise. Fox remarks that the Iraqi example demonstrated how “an occupier’s reforms may become so sweeping and far-reaching that inhabitants lose the opportunity to make important choices about the nature of their own society.”

Relevant UN resolutions placed explicit limits on the CPA, including by reiterating the applicable provisions of international humanitarian law. Fox remarks that Resolution 1483 “echoes [a] schizophrenia” between requiring strict compliance with occupation law so as to enable the “creation of conditions in which the Iraqi people can freely determine their own political future”, and “a prospective blank check” for sweeping reforms. The Security Council, for its part, failed to effectively redress such sweeping practices: the preponderance of commentary has critiqued the Council’s lack of both substantive and procedural guarantees and recalled the politicisation of its decisions by militarily and economically powerful states. The effects of these measures not only alarmingly contradicted the conservationist principle of the law of occupation, and eroded the local population’s future ability to enjoy the right to self-determination by seeking install long-term changes that would outlive the foreign administration.

The emerging doctrine of transformative occupation may create practical perils as well as pose normative challenges to the lex specialis of belligerent occupation. However, applying occupation law in conjunction with the principles of self-determination may reinforce the international law presumption against regime change and help prevent the repetition of abusive practices. Other alternatives appear dangerous, including to the international legal order, such as accepting that the Security Council has become a legislator on matters of foreign territorial administration in situations of armed conflict, in a manner that provides waivers concerning state compliance with both Article 103 of the UN Charter and the lex specialis of belligerent occupation. Granting states that are occupying

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943 Coalition Provisional Authority Regulation No 1, CPA/REG/16May2003/01, 16 May 2003, section 1(2).
946 Ibid, 303.
948 Gregory Fox (2008) 269- 270.
powers such waivers, as Fox aptly remarks, is likely to open the way for practices of subjugation, assimilation and exploitation of weaker, and even tyrannical regimes, taking the international order back to colonial times.\textsuperscript{949} By the same token, as Wilde remarks, such practices are ample proof that the civilising mission of the trusteeship regime has never fully gone away.\textsuperscript{950}

3.2 Transformative Occupation and the Law on Self-Determination

Stirk observes that the practice of contemporary occupiers signals an adjustment in the strategy of predatory states: they generally refrain from acts of formal annexation and direct subjugation, but engage in less overtly intrusive tactics of regime transformation and political engineering, often under the banner of human rights, to bring about economic gain and political influence.\textsuperscript{951} If the occupier’s intention to undertake a reform agenda becomes a war aim in its own right,\textsuperscript{952} legal consequences would arise not only from the rules applicable in time of occupation, but also the foundational doctrines and general principles of the international legal order, enshrined in the UN Charter and widely-established through \textit{opinio juris}. The dangers of the doctrine of self-help have long been recognised, and the doctrine itself was arguably eradicated through the establishment of the UN.\textsuperscript{953}

The effects of self-help measures undertaken by individual states to correct the misconduct of other states,\textsuperscript{954} moreover, are also contrary to the cardinal rules of the law of belligerent occupation, which derive from a


\textsuperscript{952} Adam Roberts (2006) 100.


long history of abuses by occupiers\textsuperscript{955}—including the conservationist principle, and the limited, temporary nature of the occupier’s authority and control.\textsuperscript{956} There can be little doubt that the implementation by the occupier of proactive reform policies may enable it to secure at least indirect influence over the territory.\textsuperscript{957} Such arrangements are antithetical to the protective function of the law of occupation and its foundational assumption that the foreign presence in occupied territory is limited and temporary, and that the violations of sovereignty and self-determination that inevitably result from its perpetuation, should be brought to an expedient end. In other words, a foreign administration established and maintained through force would be hard put to either claim \textit{bona fide} support for oppressed groups struggling for self-determination, or genuine humanitarian concern, to justify sweeping externally imposed administrative and legislative reforms. Given that, as Leyda comments, “only the occupied population is legally entitled to decide and legislate on its own economic transition process and economic policy, which cannot be imposed by outsiders (even if it is for the alleged benefit of the administered population),”\textsuperscript{958} the local population should retain the future right to be able to decide, without prejudice, on their “self-transformation”\textsuperscript{959} or “self-imagining”.\textsuperscript{960}

Given the tension between competing interests of the occupying power and the local population resulting from such situations, the principles of \textit{nemo dat quod non habet}, or no one can give what he does not have, and of \textit{ex injuria jus non oritur}, are applicable\textsuperscript{961} an occupying power cannot lawfully transfer to a people under its control, rights or authorities that it does not itself lawfully possess or enjoy. Similar principles are enshrined in the body of law concerning state succession: a predecessor state may only transfer to a successor state the extent of its own territorial

\textsuperscript{955} See, e.g., the British occupation of Egypt, based on the “defensible element of consent”, and the challenged from the Egyptian people in 1919; the French occupation of the Rhineland dubbed by some as a colonial offensive against the local population, for its extensive institutional transformations; in Kosovo and East Timor, systematic uncertainty over title to property, resulted in measures by occupiers for its own benefit; Peter M Stirke (2009) 208-210, 219-220.


\textsuperscript{957} \textit{Ibid}, 211.

\textsuperscript{958} Jose Alejandro Carballo Leyda (2012) 214.


\textsuperscript{961} James Crawford (2012) 213, 217.
authority,962 or, as O’Connell maintains, “acquire from another only so much territory as that other possessed.”963 Hence, attempts to transfer such rights and authority to third parties could be challenged on the grounds of their infringement on the rights of the people to freely-determine their social, economic and political order.

While the nemo dat quod non habet principle, in practice, primarily concerns the transfer of title over territory,964 the same rationale can be transposed to the acts of an occupier seeking to undertake revisions to local laws or governmental institutions without the local population’s genuine consent.965 For Orakhelashvili, genuine consent “must be so clearly evidenced, both in terms of the relevant instruments and circumstances, as to dispel any possible or actual doubts.”966 To claim, in the case of the Crimea, for instance, that the population, either in the occupied territory or in other parts of the Ukrainian territory, could freely express consent while being the subject of a belligerent threat, would result in denying the circumstantial coercion intrinsic to belligerent occupation. In the cases of Crimea, Abkhazia, South Ossetia, and Transnitria, Russia’s extensive changes to the institutions of the ousted sovereign have made the survival of its newly established regime in the occupied territory depend on its continued military aggression against the ousted sovereign.967 Where a population renders its obedience under duress, there is no question that the coercive authority may not assert rights, sustain responsibility and confer immunities in their right.968


963 Daniel P O’Connell, State Succession In Municipal and International Law (Cambridge, 1967), Vol I, 3. See also, Island of Palmas case (Netherlands, USA), Reports of International Arbitral Awards, 4 April 1928 Vol II (1928) 829-871.

964 See, on the status and content of the rule, Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Nigeria v Cameroon) ICJ Reports 1957, Judgment of 10 October 2002, paras. 194-209.


The most effective basis in international law for countering the illegal effects of transformative occupation is – as evident from responses to the regimes established in northern Cyprus, Western Sahara, and the Palestinian and Syrian territories\(^\text{969}\) – their non-recognition by third party actors, when those third parties preclude, both the proxy authorities in the occupied territory and the occupying state, from participating in international relations.\(^\text{970}\) Due to the internationally unlawful basis for their exercise of authority, and indirectly the violations of the law of self-determination and territoriality they entail, the authorities charged with such illegal territorial regimes must not become the subject of the very system of international law that their creation undermines.\(^\text{971}\) Concurrently, acts of non-recognition uphold the continuity of the legal rights of the local population’s ousted sovereign, in line with the principle of equal rights of all nations and peoples.\(^\text{972}\)

4. Assessing the Interaction between Belligerent Occupation and Self-Determination in International Law

The principal areas of interaction between occupation and self-determination law pertain to the protection and preservation of the ecosystem of civil and public life in the occupied territory. Given the inherent conflict of norms and the tension between the divergent interests of the two bodies of law, an occupying power that claims to support the right to self-determination of the local population should be viewed with suspicion and closely scrutinised for abusing this body of law to pursue its self-interests. The law on self-determination reinforces the presumption in favour of a narrow reading of the *lex specialis* rules of belligerent occupation that outline the occupier’s mandate and authority, particularly the extent of the rights that derive from its duties to ensure and maintain the public order and civil life. The law on self-determination is also a ground for

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\(^{969}\) See, on the operationalisation of the duty of non-recognition in the context of the European Union’s relations with the occupying states in these territories, Chapter IX.

\(^{970}\) See generally, Enrico Milano (2010).

\(^{971}\) *US Restatement of the Law* (Third), paragraph 202(2): “A State has an obligation not to recognize or treat as a state an entity that has attained the qualification for statehood as a result of a threat or use of armed force in violation of the United Nations Charter.” See also, Marcelo G Kohen, *Secession: International Law Perspectives* (Cambridge, 2006) 196.

assessing the legality of an occupier’s continued control over life in the occupied territory.973

4.1 Self-Determination under Belligerent Occupation: Fig Leaf or Normative Oxymoron?

The consolidation of the law on self-determination, following the decolonization era, contributed to the elaboration of legal norms on a people’s right to development, the evolution of the notion of interdependence of human rights – and also, as Saul remarks, to the enhancement of the “legal protection of sovereign rights by adherence to the law of occupation,” with such adherence deemed to be “in the interest of international peace.”974 While the exercise of self-determination is clearly suspended during belligerent occupation, it is equally clear that the two bodies of law share similar functional objectives, and that their co-application can be mutually reinforcing and function to preclude abuses and misinterpretations.

State practice on the enforcement of self-determination as a legal right remains wanting; some jurists have argued that the amorphous and impalpable nature of the concept of self-determination has posed an obstacle to its justiciability.975 The law of belligerent occupation, as a subset of the law on the administration of foreign territory, operationalises the concept of self-determination as a set of concrete, rather than aspirational norms.976 As Ratner notes, occupation law should be enforced as a “detailed doctrinal web of obligations as opposed to some general principles that would need to be fleshed out in practice.”977 In particular, the law of belligerent occupation complements the right to self-determination – as well as the principle of territorial stability and the corollary prohibitions of conquest and annexation978 -- in its prescriptions on the inalienability and continuity of sovereign rights.979 Occupation law prohibits a de facto administrator of foreign territory from revising laws or institutional

976 Ibid.
978 See, on the law on sovereignty and belligerent occupation, Chapter IV.
structures or adopting other measures that would permanently dispossess the ousted sovereign or irreversibly revise its system of government. Thus, occupation law provides specific safeguards against the occupier’s excessive exercise of authority in a manner that would prejudice the people’s future right to self-determination.

Similarly, the application of provisions of occupation law, which function to prevent changes that are unwarranted by military necessity or otherwise incompatible with the rights of the local population, can preempt the abuse of self-determination claims by occupying powers. Occupying powers have supported a people’s right to self-determination as a fig leaf for their self-enrichment or political subjugation of the territory and its population. As is evident from the cases of South Ossetia, Abkhazia, Nagorno-Karabakh, Transnistria, northern Cyprus, and Crimea, by invoking the law on self-determination the occupying state has furthered the entrenchment of its foreign domination to the exclusion of the territory’s legitimate sovereign. Given that the existence of a belligerent occupation inevitably involves the suspension of rights, freedoms, and function of local government, the proposition that an occupier is capable of ensuring that its presence in foreign territory conforms to the local population’s right to self-determination is arguably oxymoronic. As Roberts remarks, the law of belligerent occupation was not established as a mechanism to reconcile the interests of the parties, but rather as a stick for beating the occupier.

The co-application of self-determination law may, by the same token, help to preempt the misinterpretation and instrumentalisation of occupation law by predatory states. Self-determination law’s object and purpose are clearly consistent with those of the lex specialis of belligerent occupation law, particularly with regards to the protection of the future rights of the local population and ousted sovereign; self-determination norms thus provide guidance as to the interpretation and application of the conservationist principle. Since most provisions of the law on belligerent occupation were codified well before the consolidation of the law of self-determination, the co-application of the two bodies of law complements the

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981 See generally, Adam Roberts (2005).
protection afforded in the law of belligerent occupation to the rights of the local population in the occupied territory to freely-choose and decide upon their social, economic, cultural and political development, without foreign interference, both during and after the end of occupation.\footnote{Matthew Saul (2011) 630.}

4.2 Assessing the Legality of Foreign Territorial Administrations

While self-determination law does not prescribe any specific guidance with respect to the character of administrative institutions and outcomes, aside from the procedural requirement that they be engineered and managed by the local population, in the context of belligerent occupation and foreign (including international) territorial administrations, it also functions as a test for the legitimacy of governmental institutions – namely, whether they have been established through consultation and with the participation of the indigenous population and are meant to serve their genuine interests.\footnote{James Crawford (2005) 65-66.} An occupier’s primary duty under the law of self-determination is thus a negative obligation to ensure that its measures do not unreasonably disturb the function of public institutions, and endeavor to restore control to the ousted sovereign on the earliest possible occasion.\footnote{James Anaya, ‘The Contours of Self-Determination and Its Implementation: Implications of Developments concerning Indigenous Peoples’, in Gudmunder Alfredsson, Maria Stravropoulou (eds.), Justice Pending: Indigenous Peoples and Other Good Causes (Kluwer, 2002) 11.} An occupying power that pursues humanitarian measures must ensure that any actions undertaken for the benefit of the local population, such as the overthrowing of an abusive regime, do not entail installing a new regime by the foreign power in a manner that presents an obstacle to the effective implementation of the law on self-determination.\footnote{James Anaya (2002) 8-9.}

Hence, once an abusive regime has been overthrown, decision-making processes should be turned over to the local population and its genuine representatives, potentially with foreign logistical support, but without prejudice to the independence and ultimate authority of a legitimate government constituted and accountable to the local population.\footnote{Ralph Wilde (2008) 104.} Such support, which operated through the UN Trusteeship Council’s system, which fell into desuetude, was arguably transposed into the legal regime for regulating belligerent occupation,\footnote{See generally, Ralph Wilde (2009).} which, by eliminating the concept of trusteeship, restricting and narrowly-defining an
occupier’s mandate, was intended to safeguard against the usurpation of sovereign rights through the use of force.\textsuperscript{990} States that undertook to establish and control such regimes also entailed international responsibility for the creation and maintenance of the illegal territorial regime.

As regards the temporariness of an occupation, the fact that a condition of belligerent occupation effectively suspends the people’s right to self-determination, including their ability to fully enjoy human rights that are hinged on the unhindered economic, social and political development of life, render prolonged occupations legally untenable. State practice demonstrates that the longer an occupier remains in foreign territory, the likelier it is to undertake extensive revisions that disproportionately infringe upon the local population’s ability to fully enjoy its right to self-determination. Judge Elaraby stated that “[o]ccupation, as an illegal and temporary situation, is at the heart of the whole problem” of denial of self-determination, and hence “[t]he only viable prescription to end the grave violations of international humanitarian law is to end occupation.”\textsuperscript{991}

Finally, it is important to assess the \textit{in casu} effects of an occupation in terms of the applicable law, not to change the applicable law based on these effects. A state that invades another state and exploits its natural resources does not cease to be an occupier by virtue of acts that infringe the right to self-determination and to permanent sovereignty over natural resources.\textsuperscript{992} A state that seeks to revise through force the status of territory internationally-recognised as belonging to another sovereign, remains an occupier whose conduct vis-à-vis the territory should be the subject of non-recognition. As the International Court of Justice clarified in its Advisory Opinion on the Kosovar declaration of independence, the illegality or invalidity of such a declaration would be based on a serious breach of certain fundamental norms of international law, “stemm[ing] not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (\textit{jus cogens}).”\textsuperscript{993}

As developments in early 2014 regarding the Ukraine’s territory of Crimea demonstrate,  

\textsuperscript{990} Christine Bell (2008) 234.  
\textsuperscript{991} ICJ Wall, Advisory Opinion, Judge Nabil Elaraby, Separate Opinion, para. 3.1.  
\textsuperscript{993} Accordance with \textit{International Law of the Unilateral Declaration of Independence in Respect of Kosovo}, Advisory Opinion, ICJ Reports 2010, 403, 22 July 2010, para 81.

Beyond the constraints it imposes on an occupying power’s status and mandate vis-à-vis the occupied territory, the application of an integrated and comprehensive legal approach to belligerent occupation by co-applying the law on self-determination provides a basis for assessing the legality of an administrative regime created by the occupier. Similar to the function of \textit{jus ad bellum} in time of belligerent occupation, discussed in the preceding chapter, the law on self-determination provides an important normative safeguard against illegal territorial regimes that result in the denial of the people’s right to freely determine their internal affairs, by calling into question the legality of the administrative authority exercised by the occupying power or its proxies.
CHAPTER VII

THE LAW OF BELIGERENT OCCUPATION AND INTERNATIONAL HUMAN RIGHTS LAW

The often-addressed interaction between the corpus of international human rights law and international humanitarian law, particularly in relation to belligerent occupation, is characterized by tensions between different sets of practical and doctrinal assumptions and limitations. The basis for such legal tensions is evident from McCarthy’s observation concerning military occupation scenarios in general forming “a factual crucible for various intersecting legal regimes because of the nature and number of issues in tension or conflict.”

As a general rule, the co-application of more than one body of law is addressed by the principle of lex specialis derogat legi generali: specific rules of international humanitarian law are presumed to take precedence over other concurrently applicable bodies of law, such as human rights, in determining the appropriate manner of addressing the parties’ rights and obligations in time of an armed conflict. Given that belligerent occupation may ensue from a situation of armed conflict but produce a long-term situation of foreign territorial administration, the lex specialis rules of belligerent occupation are not only complemented or supplanted by international human rights law, but also relativised and in some cases put to rest by the various obligations of a de facto administrator under human rights law. A multitude of terms has been used to describe the co-application of these two bodies of law, including parallel applicability, convergence, complementarity, cross-fertilization, harmonization, renvoi and merger.

The richness and depth of the normative content found in the corpus of international human rights law provides important guidance and guarantees concerning the administration of the fraught relations between an occupying power, the local population in the occupied territory and the ousted sovereign, including the regulation of tensions between individual rights and measures taken in pursuit of public order. Although the practice of states, judicial authorities and non-judicial mechanisms, such as the UN human rights bodies, regional and international, has contributed to the operationalisation of these interactions, some ambiguities remain. Considering the differing normative premises and practical consequences of the respective bodies of law, the particularities of situations of belligerent occupation and foreign territorial administration through force merit further consideration.

This chapter examines the manner in which convergences and divergences can be productively resolved to better protect all parties in situations of belligerent occupation. It considers the effects of these interactions on the delimitation of the authority of an occupying power vis-à-vis the population in the occupied territory and highlights the perils of applying human rights law without appropriate regard for the restrictions placed on the occupier’s authority and limited mandate under the law of belligerent occupation. It further assesses the potential effects of measures adopted under the banner of human rights protection on the sovereign, territorial and self-determination rights of the local population. The effects of the co-application of human rights and international humanitarian law on the scope of specific legal norms and the underlying premises of the law of belligerent occupation enhance deterrence against predatory state practices.

The vigorous application of the body of international human rights law, in a manner that is compatible with the underlying premises of the lex specialis restrictions on the authority of an occupying power, creates normative synergies that fortify the international law constraints on prolonged belligerent occupation and foreign territorial administration based on the threat or use of force. From the interaction between belligerent occupation and human rights law may be deduced a test for the legality of territorial regimes and administrative authorities.

1. Basic Tenets for Applying Human Rights in Time of Occupation

The threshold for triggering the application of human rights law in time of belligerent occupation is “effective control,” of persons or territory, by virtue of which the occupying power brings daily life and the operation of local authorities under its jurisdiction and authority.\(^99\) The International Covenant on Civil and Political Rights (ICCPR), applicable in time of war, obliges state parties to respect the enumerated rights of “all individuals within its territory and subject to its jurisdiction” (Article 2.1). The International Court of Justice expanded this rationale to the scope of application of all human rights conventions in \textit{Congo v Uganda}, where it held that a state’s human rights obligations commence and end with occupation, under a rationale of affording utmost protection to the inhabitants of the occupied territory.\(^100\) The European Court of Human Rights in \textit{Loizidou} affirmed that the “effective control” test is sufficient to give rise to human rights obligations as a “consequence of military occupation.”\(^101\)

As Darcy remarks, holding that the existence of belligerent occupation is sufficient to trigger the application of human rights treaties extra-territorially, appropriately prevents occupying states from reducing the number of troops they maintain in the foreign territory in an attempt to absolve themselves of their obligations.\(^102\) At the same time, it is generally the case that in assessing the ability of a foreign administrator to guarantee human rights, the scope of its obligations are limited according to its mandate and authority under the law of occupation.\(^103\)

The following sections consider two basic principles underlying the application of international human rights law, and their limitation by the concurrently applicable rules of the \textit{lex specialis} of belligerent occupation.


\(^101\) \textit{Loizidou v Turkey}, Application No 15318/89, European Court of Human Rights, Judgment (Merits), Court (Grand Chamber), 18 December 1996, 528.


\(^103\) \textit{Case Concerning Armed Activities on the Territory of the Congo} (Congo v Uganda) ICJ Reports 2005, 317.
The first is the mechanism of derogation, and the category of non-derogable rights, which is similar in legal value and standing to “intransgressible” norms of international humanitarian law.\textsuperscript{1004} The second is the principle of non-discrimination, both as a human right and as a general principle of international law, and its operation in situations of belligerent occupation and illegal territoriality where the occupying state has displaced the local population and transferred its own civilians into the occupied territory. The following analysis shows that in order to avoid applying the two bodies of law incongruently, they should both be interpreted according to the underlying premises of belligerent occupation law.

1.1 Perpetual ‘States of Emergency’ and Non-Derogable Rights in Occupied Territory

In “time of public emergency that threatens the life of the nation,” a state may take specific measures that derogate from its human rights obligations “to the extent strictly required by the exigencies of the situation.”\textsuperscript{1005} Such derogations, in other words, may be taken only in emergencies. Even so, they must be consistent with a state’s other obligations under international law, including with the prohibition of discrimination.\textsuperscript{1006} The state must ensure the compatibility of its derogations under human rights law with international humanitarian law as well as other international norms, such as self-determination of peoples.

By contrast, a situation where the occupying power’s presence leads to the suspension of the function of the public institutions of the occupied territory, amounts to a pernicious, seemingly-permanent “state of emergency”\textsuperscript{1007} that flouts the obligation to maintain and ensure the public order and civil life in the territory. The inability of public institutions and private entities to function in a secure, rule of law-based environment, results in systematic violations of human rights. Whether or not a “state of emergency” is formally declared – as has been the case in colonial contexts\textsuperscript{1008} – the invalidity of the disproportionate effects and unjustifiably
prolonged nature of such conditions is compounded by the legal consequences of a prolonged belligerent occupation under international humanitarian law, the law on sovereignty, and self-determination, discussed in preceding chapters.

While the condition of occupation may lead to the creation of a state of emergency, it has often been the occupied state has used emergency provisions in reaction to the occupier’s legislative enactments, while being stationed outside its territory. The legitimate sovereign may lawfully take emergency measures in response to unlawful territorial actions by a foreign power. Georgia thus explained the Order issued in August 2008 by its Parliament, declaring a state of war in the entirety of the territory of Georgia and a state of emergency in the occupied Abkhazia and South Ossetia regions, in its fourth periodic report to the Human Rights Committee: “[t]he Order was necessitated to avoid destabilization in the region, suppress armed attacks and violence against [the] civilian population and ensure protection of human rights and freedoms.” With the Order, Georgia sought to ensure the protection of the human rights of individuals subject to the administration of an occupying state seeking to permanently exclude the sovereign from exercising jurisdiction over its nationals.

While the Human Rights Committee has widened the scope of non-derogable rights, in practice most states have derogated from them in circumstances of war, with or without formal notification. Nonetheless, even in wartime, there is a preponderance of international and regional practice concerning the definition of the non-derogable status of certain rights, including the prohibition of torture, the right to be free from slavery and servitude, and basic procedural safeguards and judicial guarantees. The status of economic, social and cultural rights is less clear: despite the lack of a derogation clause in the Covenant, limitations that entail certain practical measures of “one-off restrictions” have been permitted under a functional interpretation of the Covenant.

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1009 See, e.g., the case of the king of Belgium’s decrees under emergency powers giving them the status of Belgian law; Kauhelen Case [1919-22] AD Case No 323. See also, Eyal Benvenisti, The International Law of Occupation (Oxford, 2012) 118-119.
1010 Human Rights Committee, Georgia’s Fourth Periodic Report, UN Doc. CCPR/C/GEO/4, 1 November 2012, para. 55.
The *lex specialis* of belligerent occupation was intended, in Dinstein’s phrase, as a “prism filtering human rights law during occupation.” 1014 The standard of human rights in time of belligerent occupation is – from the perspective of the law of belligerent occupation – pegged to the conservationist principle, charged with ensuring that the interests of the local population are safeguarded. Yet, contemporary belligerent occupiers have reorganised daily life in the occupied territory to serve broadly-defined military and security needs that often facilitate ulterior motives, such as re-engineering the demographic characteristics of the territory. 1015 An occupying power’s mandate certainly includes, at a minimum, an obligation to maintain existing local authorities, except insofar as a specific action undertaken by a local institution poses a concrete threat to the occupier’s security. As a rule, the occupier should permit local institutions – apart from those that perform a political function – to function in a self-sufficient and largely independent manner in order to provide for the welfare of the civilian population and the economy of the occupied territory, and should allow the local social-political ecosystem to grow organically in accordance with the people’s right to self-determination. 1016

By the same token, the occupying power should respect individual rights critical to the ability of the local population to conduct their normal daily affairs. A case in point is the human right to freedom of movement, including the right to choose one’s place of residence, and the special rules in belligerent occupation law mandating the occupier to ensure respect for family life and private property. 1017 The prohibition of the forcible transfer of protected persons, as it is codified in Article 49 of the Fourth Geneva Convention of 1949, Chetail comments, may appear to be “circular reasoning: a forced transfer of the population is prohibited regardless of its motive, unless that motive is the necessity of subduing the enemy.” 1018 Yet


1014 Yoram Dinstein (2009) 86.

1015 See, on transformative occupations and occupiers’ support for secessionist movements, Chapter VI.

1016 See, on the conservationist principle in the law of belligerent occupation, Section 2.3, Chapter III.


this supposed contradiction is resolved by the requirement that military reasons that justify evacuation must be “imperative”\textsuperscript{1019} and that the occupier must ensure that displaced protected persons are “transferred back to their homes as soon as hostilities in the area in question have ceased.”\textsuperscript{1020}

In times of peace, and within a state’s sovereign territory, permissible limitations on specific human rights are assessed under a “balancing” test based on the proportionality principle, amongst other considerations, if the derogation that limits a right is also necessary to protect a collective benefit such as the public order.\textsuperscript{1021} However, entrusting an occupier with extensive decision-making powers that allow it to determine the nature and scope of the interests of the local population, arguably runs counter to the occupier’s limited mandate and the underlying purpose of the law of belligerent occupation. Moreover, unlike derogable rights under human rights law, the duties placed upon an occupier by international humanitarian law are intransgressible, and intended to preclude the occupier from undertaking measures that entail, for instance, changes to government institutions of the occupied territory.

Where international humanitarian law is the \textit{lex specialis}, violations of its cardinal rules contravene the “intransgressible principles of international customary law”, and may also result in violations of human rights law as well as the \textit{jus cogens} prohibition on territorial acquisition.\textsuperscript{1022} Given that humanitarian law is the \textit{lex specialis}, which determines the

\textsuperscript{1019} According to the ICRC Commentary to AP I: “[t]he situation should be scrutinized most carefully as the adjective “imperative” reduces to a minimum cases in which displacement may be ordered”; Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), \textit{Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949} (ICRC & Nijhoff, 1987) 100, fn. 28.


\textsuperscript{1022} The “cardinal principles” of international humanitarian law are “intransgressible principles of international customary law,” however do not necessarily constitute \textit{jus cogens}; ICJ, \textit{Nuclear Weapons case}, Advisory Opinion, para. 179. Pierre-Marie Dupuy, ‘Between the Individual and the State: International Law at a Crossroads’, in Laurence Boisson de Chazournes, Philippe Sands (eds.), \textit{International Law, the International Court of Justice and Nuclear Weapons} (Cambridge, 1999) 456. See also, on the interaction of the \textit{lex specialis} of belligerent occupation with \textit{jus ad bellum}, Chapter V.
remits of permissible limitations on human rights, a violation of humanitarian law is likely to entail a violation of human rights law. However, a measure adopted by an occupying power without an explicit legal basis in international humanitarian law – e.g. in the absence of military necessity or in breach of an explicit prohibition – may not necessarily entail a violation of human rights law, but would nevertheless infringe the sovereign rights of the local population. Since the scope of authority of an occupying power differs significantly from that of the territory’s legitimate sovereign, its actions may entail a breach of international law if they violate an absolute prohibition of international humanitarian law – including actions putatively taken in order to protect human rights, if they entail extensive legal and institutional reforms. In fact, in the context of prolonged belligerent occupation and foreign domination, far-reaching and long-term reforms have often entailed the establishment of an unjustifiably bifurcated, separate-and-unequal legal regime for two separate groups of the population.

1.2 Non-Discrimination, Displacement and Settler-Colonial Practices

A derogation that discriminates on the grounds prohibited by the ICCPR, and analogous provisions in regional human rights conventions, is never lawful. The principle of non-discrimination functions as a rule governing the application of many human rights norms, and is also a principle of general international law. Yet discrimination on grounds of nationality or political opinion, which is particularly relevant in time of belligerent occupation, is not explicitly prohibited by the Covenant, despite being prohibited by customary law.

The principle of non-discrimination is particularly relevant to cases where the occupier, through its relations with the local authorities or proxy authorities in the occupied territory, seeks to change the governmental institutions or territorial status of that territory. Such situations have

1026 See, e.g., under Article 10 of the TRNC constitution, local authorities remain under the ultimate command of the Turkish army; Nagorno-Karabakh is under indirect control by Armenia, including through financial, military assistance and political support; Report of
been referred to as a “long-arm” belligerent occupation by the ICRC,\textsuperscript{1026} including the cases of the Russian controlled authorities in Transnistria, South Ossetia, Abkhazia and Crimea,\textsuperscript{1029} and the Armenian-controlled separatist authorities in Nagorno-Karabakh.\textsuperscript{1030} Occupiers that have sought to exclude the ousted sovereign through the threat or use of force, have also adopted sweeping changes to the demography of the territory through mass forced displacement of the indigenous population and its substitution with members of the civilian population of the occupying power, as well as the creation of two segregated legal and administrative regime for the two population through respective acts of discrimination.\textsuperscript{1031}

The protection against forced displacement under human rights law is inferred from a wide range of basic rights,\textsuperscript{1032} but it is not nearly as absolute as the prohibition on forcible transfer in international humanitarian law. Human rights law prohibits expulsion of nationals,\textsuperscript{1033} but does not preclude expulsions of non-nationals, subject to the state’s immigration laws.\textsuperscript{1034} By contrast, occupation law protects all “protected persons” who “at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”\textsuperscript{1035} This definition, however, is less encompassing than that under human rights law, which applies to all person’s under the occupying State’s jurisdiction.

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\textsuperscript{1026} The ICRC expert meetings refer to the occupation of Azerbaijan’s internationally-recognised territory of Nagorno-Karabakh as a “long-arm” occupation by Armenian troops, due to the remote control of the territory and indirect involvement of Armenia in daily affairs; Tristan Ferraro (ICRC, 2012) 23.
\textsuperscript{1029} Human Rights Committee, Georgia’s Fourth Periodic Report, UN Doc. CCPR/C/GEO/4, 1 November 2012, paras. 3, 111.
\textsuperscript{1030} See e.g., Agence France-Presse, ‘Two dead in fresh Karabakh border clashes’, Global Post, 13 July 2014.
\textsuperscript{1031} See, e.g., ‘Human Rights Committee Considers Report of Georgia’, UN Office in Geneva, 11 July 2014. See also, Georgia’s national strategy and action plan on internally displaced persons, Georgia’s Fourth Periodic Report, UN Doc. CCPR/C/GEO/4, 1 November 2012, para. 30.
\textsuperscript{1033} See, e.g., Protocol No 4, European Convention on Human Rights (Article 3); American Convention on Human Rights (Article 22(5)); and Arab Charter of Human Rights (Article 27(2)).
\textsuperscript{1034} Despite a large margin of appreciation granted to states in determining admission into their sovereign territory, the principle of non-discrimination safeguards against arbitrary practices; Daniel Moeckli, Human Rights and Non-Discrimination in the ‘War on Terror’ (Oxford, 2008).
\textsuperscript{1035} Article 4(1), Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.
The ICTY’s Tadic and Delalic cases wrote out the nationality requirement, and the ICC has since followed suit. Similarly, derogations from human rights law could permit cases of removal and displacement from one region to another within the same territory, whereas occupation law strictly prohibits the forcible transfer of protected persons. An occupying power is also precluded from establishing a new immigration system in the territory that would result in the exclusion of individuals from the local population who maintain links with the territory and were lawfully staying or residing therein before the occupation. The control of entry and stay in the territory by the occupying power must accord, to the extent possible, with local laws and administrative practices concerning immigration, in a manner that does not alter the demographic characteristics of that territory.

Measures taken by occupying powers have often resulted in the discriminatory treatment of the ousted sovereign’s nationals and harmed their ability to enjoy basic human rights. In South Ossetia and Abkhazia, northern Cyprus and Nagorno-Karabakh, as well as the occupied Palestinian and Syrian territories, the occupying powers have segregated their own civilian population from the indigenous population in the occupied territory. In the cases of the West Bank and Abkhazia, the occupying power’s extension of the application of its domestic law to its citizens in the occupied territory on grounds of personal jurisdiction, has created two parallel legal regimes that in effect discriminate between individuals based on nationality, race and ethnic origin.
Some occupiers, by excluding the indigenous population from economic, social and political life in the occupied territory, annexed or separated, have created circumstances that have resulted in the indirect forcible transfer of members of the indigenous population.\textsuperscript{1041} In northern Cyprus, the Turkish-supported authorities – which remain under the ultimate control of the Turkish armed forces\textsuperscript{1042} – have systematically restricted the rights of Greek Cypriots and Maronite residents, including by barring them from participating in Turkish Cypriot “national elections” and subjecting them to extensive violations of private property rights.\textsuperscript{1043} In Western Sahara, only Moroccan citizens participate in local municipal and Moroccan parliamentary elections.\textsuperscript{1044} Some entrenched discriminatory regimes, including northern Cyprus, Nagorno-Karabakh, Western Sahara and the Palestinian and Syrian territories, have arguably acquired a colonial character, and even come to embody elements of an apartheid system, in terms of the stark differences in the civil rights afforded to indigenous residents and citizens of the occupying state.\textsuperscript{1045}

The UN Sub-Commission on the Prevention of Discrimination and Protection of Human Rights has observed that “movements [of civilians of the occupying state into occupied territory] may be carefully planned and aimed at ensuring that a disputed or occupied territory becomes de facto

\textsuperscript{1041} See, e.g., Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik, Mission to Israel and the Occupied Palestinian Territory, UN Doc. A/HRC/22/46/Add.1, 24 December 2012. Israel’s military laws and administrative practice on building and planning in 62% of the occupied territory of the West Bank, is “discriminatory” and “has severely and negatively impacted the development and growth of Palestinian towns and villages”; Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan, Report of the Secretary-General, UN Doc A/66/364, 16 September 2011.

\textsuperscript{1042} See, e.g., Extra-territorial Jurisdiction of ECHR States, Factsheet, (European Court of Human Rights Press Union), December 2011.


an integral part of the State responsible for inducing or acquiescing in such movement.”

It described the effects of population transfer as follows:

Policies and practices of population transfer may be aimed specifically at denying a meaningful implementation of the right to self-determination, for instance, by altering the relevant unit of self-determination through demographic manipulation, or policies which have that effect. Instances include the implantation of settlers and settlements in occupied or disputed territories and the concurrent, induced dispersal of the original inhabitants, changing the demographic compositions of the territory to extend control or annex the territory, thereby undermining a legitimate exercise of self-determination by its people.

Given the gravity of such unlawful administrative and legislative acts, where they form the basis of the occupying power’s regime, neither the occupying state’s administration nor its proxy authorities can be deemed able or willing to respect the basic human rights of the indigenous local population. Following this logic, in response to the effects of the “discriminatory policy of the Russian Federation and its proxies against the remaining ethnic Georgians,” the Georgian government adopted a “policy aimed at ensuring full enjoyment of the rights provided in the [ICCPR] for the entire State population.” In addition to the use of “human centric documents” to provide Georgians in Abkhazia and South Ossetia with social benefits provided to other nationals of Georgia, Georgia’s State Strategy on Occupied Territories: Engagement through Cooperation is aimed at promoting engagement with the territories through “economic relations, infrastructure and transportation, education, healthcare, people-to-people interactions, cultural heritage, legal and administrative measures, as well as human rights protection.”

Occupying powers or proxy authorities may claim to provide for the rights of both indigenous and settler populations, but in practice, take a zero-sum approach to the rights of the two groups. The Israeli Supreme

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1048 Georgia’s fourth periodic report to the Human Rights Committee, November 2012, para. 4.
1049 Ibid.
1050 Ibid, para. 8-9.
Court has adjudicated cases arising from the occupied territory in a manner that essentially ignored the abovementioned presumptions. The Court’s prioritisation of human rights law in the occupied Palestinian territory has effectively replaced the en bloc application of the law of occupation with a bifurcated rights regime for two peoples in the territory – a regime that, as Gross comments, ruptures the special protection regime reserved exclusively for the local population in the occupied territory. Ben-Naftali shows that the Israel Supreme Court has approved a myriad of measures that entrench Israel’s sovereign authority in the occupied territory through a “sophisticated reading of the law, resort to ‘dynamic’ interpretations and to ‘pick and choose’ interpretative methodologies,” acquiring what she labels an “alchemical quality” in turning the universality of human rights into an “invitation to recognize the human rights of settlers.”

2. The Parameters of the Relationship between Belligerent Occupation and Human Rights Law

International human rights law provides a set of criteria for addressing a range of legal issues that arise in the context of an administration of occupied territory by a foreign power: the administration of justice; law enforcement and the proper function of public institutions; adequacy and legality of existing domestic laws; and a standard for assessing public order and civil life. The corpus of rules on belligerent occupation is often assumed to include international human rights law; the consensus on the harmony between these rules is widely accepted by states and international institutions, including the International Court of Justice. This section discusses the critical divergences between the law of

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1053 Orna Ben-Naftali (2011) 177.
occupation and human rights law, as well as the productive synergies of consolidated protection provided by the application of an integrated legal framework to the assessment of the effects of the actions of a foreign administrator on the human rights of the local population.

The limited mandate of the occupier restricts its role in protecting and providing for the human rights of the population. Many analyses of the interaction between these bodies of law are guided, appropriately, by the underlying premises of the law of occupation, which seek to balance the occupier’s needs and its obligation to maintain the civil and public order in the occupied territory, by limiting any changes to laws or public institutions to minor, reversible measures that are absolutely necessary, including those that required to implement the occupier’s obligations under the Geneva Conventions, as complemented by human rights law.

Yet contradictions between the two bodies of law remain under-examined in case law and scholarship. Analyses may overlook the fact that the scope and breadth of some human rights obligations conflict with an occupying power’s international humanitarian law obligations. The occupier’s obligations under occupation law may be both more limited and more absolute than its human rights obligations. A state’s obligations under the ICESCR, for instance, are based on the concept of progressive realization, which accounts for resource availability but may not necessarily have to be gradual; though the Covenant does explicitly grant discretion to developing countries to determine the extent to which non-nationals benefit from these rights. By contrast, the obligations of an occupying power in Articles 55 and 56 of the 1949 Fourth Geneva Convention to facilitate food and medical supplies and services have immediate effect.

The aim of human rights law is to protect the individual against the arbitrary or abusive actions of its state through proper accountability. Yet in the absence of a functioning state apparatus, and in cases where the occupier has suspended the full operation of local administrative law and institutions, the principal, sovereign human rights duty-bearer is unable to

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1058 Benvenisti argues that in view of its travaux préparatoires, Article 64 is not overly restrictive; Eyal Benvenisti (2012).
provide for the full enjoyment of human rights. Nonetheless, human rights standards can usefully highlight the occupier’s normative and political status vis-à-vis the occupied territory and its ousted sovereign. In addition to complementing specific international humanitarian law rules, discussed above, human rights standards contribute to the assessment of the effects of prolonged belligerent occupation or foreign domination on the local population’s human rights – which may reasonably be expected to deteriorate, in the prolonged absence of functioning indigenous public institutions.

2.1 Agency-Dependent Rights and Foreign Interference

As Amartya Sen remarked, “rights are entitlements that require correlated duties” and “so long as no agency-specific duties have been characterized, these rights cannot really ‘mean’ very much.” Yet in contexts of belligerent occupation, the question arises as to whether it is proper to task the occupier with such duties. Human rights law and belligerent occupation law were intended to regulate and adjudicate different power relations, and their assumptions differ significantly. Human rights law essentially mediates between the individual and the state, holds the latter accountable for defaults in governance – and presumes that the governing administration is that of a sovereign, or at least a legitimate administrator with some form of popular accountability. By contrast, belligerent occupation law, primarily tasked with the management of an existing conflict, is meant to limit the purposive and temporal parameters of a foreign territorial administration that is not assumed to serve, espouse, or be accountable to the needs and wants of the people.

A critical area of normative conflict between human rights-based guarantees and international humanitarian law is that of agency-dependent rights, where enforcement hinges on the function of public bodies, and may require legal and institutional reform.

Article 27 of the Fourth Geneva Convention obliges the occupying power to respect certain fundamental rights: (1) respect “for the person,” “lives of persons”, “honour,” and “humane treatment”; (2) “respect for

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1061 See, e.g., Human Rights Committee, Georgia’s fourth period report, November 2012, para. 3.
religious convictions and practices” and for “manners and customs”; and (3) “family honour and rights” and “private property”. The first category pertains to the right to life and personal integrity, the second to collective rights, the public order and institutions, and the third relates to the family unit and home, as well as property generally. These provisions are formulated to assert the rights to which “protected persons are entitled, in all circumstances.” These minimal human rights-based guarantees are agnostic as to the political and social characteristics of public and civil life in the occupied territory. The law does not exhaustively describe the scope of obligations prescribed by these rights, but requires occupiers to ensure only “minimum humanitarian standards” based on the extent of their actual control over specific domains of daily life, and emphasizes the importance of local customs and practices.

Moreover, the occupying power’s obligations are subsidiary to its own military requirements: for instance, paragraph 3 of Article 27 provides, “Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.” Hampson and Lubell distinguish “between the fact of the exercise of jurisdiction outside national territory and the scope of the jurisdiction exercised.” Lord Brown’s obiter dictum in Al-Skeini concerning acts that seek to reform an arcane system by introducing a foreign body of rules, notes that such rules are unlikely to be “reconcilable with the customs of the resident population,” adding that “the occupants’ obligation as one of respecting ‘the laws in force’ is one of refraining from introducing any changes to the existing system where these are not absolutely necessary for the occupier’s security. For instance, where the provisions of Sharia law

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1066 Article 27(1), Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.
1069 The Commentary to Article 6(2) of the Fourth Geneva Convention states, “the Occupying Power would only be bound by it in so far as it continued to exercise governmental functions”; Jean S Pictet (ICRC, 1952) 62-63.
1070 Article 27(3), Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.
1071 Georgia v. Russia (II), Application No 38263/08, Amicus Curiae Brief Submitted by Professor Françoise Hampson and Professor Noam Lubell, para 4 <http://repository.essex.ac.uk/9689/1/hampson-lubell-georgia-russia-amicus-01062014.pdf>. See also, Ilascu & others v. Moldova & Russia, Application No 48787/99, Grand Chamber, Judgment of 8 July 2001; Al Skeini & others v. UK, Application No 55721/07, Grand Chamber, 7 July 2011.
1072 Al-Skeini and Others v Secretary of State for Defence [2007] UKHL 26 (QB), para 129.
are concerned, an occupier’s imposition of human rights guarantees that exceed the “minimum humanitarian standard”, including non-derogable human rights, would clearly be incompatible with the local laws in the occupied territory. The ICRC Commentary affirms that the occupying power’s authorities may not change local legislation “merely to make it accord with their own legal conceptions,” or arguably even to accord with international human rights standards.

It follows that it is not always desirable to interpret broadly the scope of human rights obligations of occupying powers. Some state obligations under international human rights conventions require transposition into municipal law so as to protect against horizontal violations of rights by one individual or private entity against another and to ensure that state authorities are given a mandate to facilitate the enjoyment of socio-economic rights. However, considering the inherent tensions between the condition of belligerent occupation and the sovereignty, independence and self-determination of the local population, it may be preferable to presume that the occupier is obligated to respect, but not, in most cases, to ensure or to fulfill, all human rights of the population in the occupied territory. Accordingly, administrative, legislative, judicial or budgetary measures adopted by the occupier under the banner of fulfilling or promoting human rights should be the subject of close scrutiny, given their potential to have *ultra vires* effects, and even to further the occupying state’s ulterior motives.

Limiting the human rights obligations of the occupier is, in some cases, supported by aspects of the right itself. A case-in-point is the human right to education, enshrined in Article 50 of the 1949 Fourth Geneva Convention, which obliges the occupier to “facilitate the proper working” of all educational institutions “in cooperation with the local authorities”,

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1074 Jean Pictet (ICRC, 1952) 336.
1076 See, on state obligations under CERD to enact legislation and take appropriate measures to combat racial discrimination, Rene Provost (2002) 59-60.
1077 See, e.g., on negative obligations such as refraining from targeting objects indispensable to the survival of the civilian population, Article 14, Additional Protocol II to the Geneva Conventions. See also, Rule 54, *ICRC Customary International Humanitarian Law Study* (ICRC, 2005). See also, on the distinction between an obligation to respect, to protect and to fulfill human rights, Asbjorn Eide, Right to adequate food as a human right (Studies Series No. 1) (New York: United Nations, 1989) paras. 66-71. Committee on Economic, Social and Cultural Rights, General Comment 15, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc E/C.12/2002/11, 20 January 2003, para. 22.
unless those authorities are “inadequate”, in which case the occupier must ensure that education is conducted “if possible by persons of their own nationality, language and religion.”

Human rights law provisions complement the limited nature of these duties, by requiring education programs to be formulated in an “unbiased and objective way, respectful of the freedoms of opinion, conscience and expression” as well as the “religious and philosophical convictions” of the child’s parents.

A similar presumption in favour of local customs and manners is found in the obligation to maintain normal life, under Article 43 of Hague law, the duty to respect local customs and religious practices, under Articles 46 of Hague and 27 of Geneva law, and the cardinal conservationist principle. To fulfill its duties with regards to the right to education, even in a prolonged occupation the occupying power must, as a rule, maintain the educational system in place, and allow for its development by the local population, based on their needs, manners and customs.

By contrast, von Glahn argues for the education of the populations of totalitarian states, once they have been defeated, “away” from fascism and towards democratic thought.

Yet the politicisation of education systems has become common amongst contemporary occupiers. Such cases include the activities of the occupied territories of Transnistria, South Ossetia, Abkhazia, Nagorno-Karabakh, the West Bank and Golan Heights. Given that the occupier’s power with respect to the function of the educational system in occupied territory is limited to basic procedural support such as financial resources, facilities and other infrastructure, it is prohibited from interfering, correcting or otherwise revising what it may perceive as deficiencies while enabling it to continue to function and develop organically.

The rule here is relatively clear-cut, most scholars

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1079 Kjeldsen v Denmark, Application No 5095/71, 5920/72 and 5926/72, (Merits) 1976, Series A, No 23, p 27, para. 53. See, on how education must promote the child’s other rights, Committee on Economic, Social and Cultural Rights, General Comment 13, UN Doc. EC/12/1999/10, 8 December 1999.


1081 Kotschnig, Slaves Need No Leader, 185-210, cited in Gerhard von Glahn (1957) 62.


1084 See, e.g., German’ys Bellot Rules, in occupied Belgium, during the First World War and Poland during the Second World War, allowing for the removal of a teacher who “violated the prohibition against the discussion of political questions”; and Russian regulations for controlling schools in occupied Lemberg in Poland in 1914; Gerhard von Glahn (1957) 64-66.
agree: an institution that does not “endanger the military interests of the occupant or threaten the public order” should be allowed to continue its ordinary activities.

An analogous presumption of non-interference operates in the case of the right to food and the corollary obligation to ensure respect by “proactively [engaging] in activities intended to ensure people’s access to and utilization of resources and means to ensure their livelihoods including food security.” Positive obligations to pursue such proactive measures go beyond the duty to respect, as well as the occupier’s obligations not to hamper humanitarian relief or deprive the population of its livelihood. While the occupying power may be expected to adopt discrete positive measures to prevent inflation, its obligations concerning economic life in the occupied territory are largely negative: to ensure that military control measures, including restrictions on the use of property and movement of goods and persons, do not interfere with local production processes and trade relations, so as, for instance, not to produce food shortages that would need to be redressed through humanitarian aid. Similar to other socio-economic rights, the progressive realisation of the right to food is not strictly included in the obligations of an occupier. Most members of the local population may be outside the occupier’s immediate sphere of control, and it would be difficult for the latter to provide them directly with basic necessities or means of production. Accordingly, the only reasonable obligation that can be enforced against an occupying state is one of maintaining and helping conserve local nutritional preferences and the indigenous ecosystem of production, procurement, preparation, allocation, and consumption of food.

In practice, the extent of an occupier’s measures and the diversity of its activities in the occupied territory usually depend on the scope of its control of various domains of daily life. However, the law of occupation

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forecloses the occupier’s claim to a right to develop and implement programs that cater to the social, cultural, political and economic needs and wants of the local population. The law presumes that an occupier’s status vis-à-vis the local population and the ousted sovereign is characterized by a lack of trust, indifference, and illegitimacy.\textsuperscript{1091} It follows that an occupying power’s obligations do not include progressive realization of rights or sweeping policy decisions. If an occupier wishes to advance progressive rights, its efforts must be made through close consultation with and in some cases direct participation by public authorities and local representatives, and should defer policy decisions, as a rule, until the return of the legitimate sovereign.

\subsection*{2.2 Human Rights-Based Measures and the Conservationist Principle}

The co-application of the humanitarian law duties to maintain public order and civil life together with the human rights law obligations to ensure respect for rights requires a delicate balancing act.\textsuperscript{1092} Not all human rights duties are compatible with the restraints placed on the occupier, but the standards set out by human rights law in domains like food security, economic development, and social and cultural rights nonetheless provide an instructive set of negative obligations that may help ensure minimum respect for rights in accordance with the law of belligerent occupation, and help avoid an irreversible impact on the development and growth of certain sectors of society in the foreign territory. Yet, an unequivocal negative obligation not to interfere with the enjoyment of rights as they are locally defined and enjoyed should not necessarily preclude the occupier from adopting measures intended to maintain, conserve and preserve the socio-political ecosystem and fabric of life in the occupied territory.

An occupying power’s measures and their effects on institutional and public life must, in accordance with occupation law’s conservationist principle, not alter excessively the status quo ante bellum. Abusive or long-lasting institutional, demographic or territorial revisions are thus presumptively unlawful. Articles 7, 8 and 47 of the 1949 Fourth Geneva Convention prohibit the occupier from changing “the institutions or government of the said territory” where such changes may “deprive the population of the benefits of the Convention.” The commentary on Article

\textsuperscript{1091} Vaios Koutroulis (2012) 178.
\textsuperscript{1092} Ibid.
47 emphasizes the importance of the principles of territorial sovereignty, political independence and self-determination of peoples:

Of course the Occupying Power usually tried to give some colour of legality and independence to the new organizations, which were formed in the majority of cases with the cooperation of certain elements among the population of the occupied country, but it was obvious that they were in fact always subservient to the will of the Occupying Power. Such practices were incompatible with the traditional concept of occupation (as defined in Article 43 of the Hague Regulations of 1907) according to which the occupying authority was to be considered as merely being a de facto administrator.1093

The commentary implies that radical changes to the laws and institutions of the occupied territory are at best unlikely to reflect the full interests and benefit of the local population and, at worst, are intended to benefit the occupying state and prejudice the rights of the ousted sovereign. By forging a relation of dependency or prejudging the ability of the population and its legitimate sovereign to implement its policies in the territory, the cumulative effect of such measures in the long-term is likely to weaken the local population’s position vis-à-vis the occupying state.1094

The differences between the obligations to maintain and ensure public order and civil life, and to respect human rights law, can produce absurd results that undermine one or the other bodies of law. An occupier could abuse its mandate under the law of belligerent occupation to seek to justify draconian measures that harm the human rights of the local population – e.g. legislative or administrative acts intended to prohibit certain forms of political dissent in derogation from the freedoms of expression, association or assembly. In the alternative, the occupier could introduce sweeping reforms that did not derive from a concrete military imperative or to maintain public order under the guise of implementing its human rights law obligations.1095 Such reforms would violate occupation

1093 Jean Pictet (ICRC, 1952) 273.
law, and most probably also be deemed arbitrary for failing to comply with
the principle of legality, which is a *sine qua non* for occupation law’s full
implementation.\(^{1096}\)

To avoid such absurd results, the application of human rights law
in time of belligerent occupation should be based on the presumption that
the occupier has a particularly narrow margin of appreciation, permitting it
to adopt only “exceptional measures of review.”\(^{1097}\) An occupier’s
purported application of human rights law should be closely scrutinized to
determine if it exceeds the limited authority granted to it under the law of
belligerent occupation, as well as the law of sovereignty and jurisdiction.\(^{1098}\)
Any other approach could dangerously signal to occupying states that they
wield unrestrained power to introduce broad legislative and institutional
reforms, and enforce the local population’s obedience to them, so long as
the reforms can be justified through creative interpretations of human
rights law.\(^{1099}\)

To guarantee the legal validity of its measures, an occupying power
must ensure their compliance with three tenets or safeguards: (i) they
respect the inalienability of the people’s sovereign rights and the ousted
sovereign’s ability to reassert its control after the termination of occupation,
are not irreversible and do not purport to derive from or extend sovereign
authority; (ii) they manage the public order and civil life in accordance
with the relevant principles of self-determination law, ensuring that the
local population is the genuine beneficiary of the occupier’s administration;
and (iii) they respect the temporary character of the occupier’s
administration by acting with due diligence and adequate caution to
ensure that the measures it undertakes do not result in permanent
changes.\(^{1100}\)

While the 19th Century theory that the occupier does not have any
right to change the laws in force and can only enforce commands or


\(^{1097}\) Eyal Benvenisti (2012) 104.

\(^{1098}\) Edmund H Schwenk (1944-1945) 395.

281. See also, the German-Belgian Arbitration Tribunal rejection of a German decree as
neither militarily necessary, nor required for the maintenance of public life; *Ville d’Anvers v etat allemand*, German-Belgian Mixed Arbitral Tribunal, 19 October 1925, (1925) 5 *Recueils des
Decisions de Tribunaux Arbitraux Mixtes* 712. Leurquin, ‘The German Occupation of Belgium
and Article 43 of The Hague Convention of 18 October 1907’, *International Law Notes*, Vol 1
(1916) 55. Cf. Lassa Oppenheim, ‘The Legal Relations between an Occupying Power and the

\(^{1100}\) Orna Ben-Naftali (2011) 134-135.
temporary provisions\textsuperscript{1101} has arguably been rendered obsolete by state practice, it has also become increasingly relevant to situations of contemporary prolonged and “long-arm” belligerent occupation, especially when the public order has at least partially reverted to some form of legitimate local authorities following the cessation of general hostilities, and the occupier cannot easily invoke the imperative of military necessity. In such cases, an occupier will be hard put to justify acts intended to gain or maintain control over specific domains of daily life, and should arguably be required to demonstrate that it is willing to cede control and gradually commence to withdraw its presence.\textsuperscript{1102}

Since occupation law’s object and purpose is arguably to provide a minimalist set of guarantees for protected persons, including at least a negative obligation to respect a core of human rights, rather than protect the integrity of governmental institutions, a functional interpretation of the relevant occupation law provisions, which accords with the principle of systemic integration that seeks to ensure coherence between the various bodies of international law applicable to a particular situations or set of facts,\textsuperscript{1103} would preclude an occupier from furthering its interests by prolonging the occupation or gaining further control of daily life under the guise of caring for the human rights of the local population.\textsuperscript{1104} Given that specialised human rights treaties often require legislative measures and adequate administrative procedures to be put in place to ensure the full implementation of the substantive and procedural elements of the right, e.g. to prevent discrimination (CEDAW) and prohibit torture (CAT), conflicts are guaranteed to arise between these normative requirements and the humanitarian law limitations placed on the occupier, e.g. Article 43 of the 1907 Hague Regulations. Such conflicts may limit the extent to which a long-term occupying power can satisfy both international humanitarian and human rights law. This limitation may not require a reassessment of


\textsuperscript{1104} Yoram Dinstein (2009) 120.
the interaction of the two bodies of law so much as a reassessment of the legality of long-term occupations.

3. International Practice on the Application of Human Rights Law in Belligerent Occupation

The enforcement of human rights law in the context of an occupation regime has suffered from an inconsistent practice by international, regional and national judicial and non-judicial bodies. Such inconsistencies have led to considerable deficiencies in the overall practice of human rights enforcement. The problems experienced by regional human rights courts and UN human rights bodies in applying human rights standards to belligerent occupations can be ascribed to a lack of familiarity with the cultural, social and political order in the occupied territories; and a general lack of expertise, or constraints in the mandates of human rights-based mechanisms in applying international humanitarian law and the *lex specialis* of belligerent occupation.\(^{1105}\) Yet productive synergies arise from the co-application of multi-sourced, overlapping limitations on the implementation of certain human rights obligations during occupations. The concurrent and complementary application of human rights-based obligations with the relevant provisions of international humanitarian law provides for recourse to a remedy for individual victims.\(^{1106}\)

The practice of international and regional human rights bodies on situations of belligerent occupation is limited, although regional human rights courts and national judiciaries have repeatedly affirmed the rule that the conduct of officials abroad should be governed by respect for human rights and the rule of law.\(^{1107}\) However, regional human rights mechanisms seeking to define the scope of responsibility of the occupying power have also created a shared-responsibility framework that dissects the specific elements of personal and subject matter jurisdiction exercised by the


authorities of the occupier and the occupied state. Yet applying human rights law according to the shared-responsibility approach faces a significant challenge: limited access to facts concerning the extent and manner in which the occupying state exercises control over daily life, including indirect and covert forms of political subjugation of proxy authorities, and the restrictions placed on the function of the legitimate sovereign’s institutions in the occupied territory. The following sections critically appraise contemporary practice of applying human rights by regional human rights bodies and by the UN’s human rights system.

3.1 Regional Human Rights Court Jurisprudence on Situations of Occupation

The approach adopted by the European Court of Human Rights to situations of belligerent occupation, bases the attribution of responsibility for violations of the European Convention on Human Rights on the extent of the foreign power’s control and the ability of the authorities or representatives of the ousted sovereign to ensure respect for rights. By adopting a practical standard for assessing the effects of belligerent occupation, as a form of foreign domination and interference with the domestic affairs of the occupied state, the Court established a baseline for a detailed analysis of the extent and scope of the authority exercised by state and non-state actors in the particular territory.

In undertaking this analysis, the European Court has upheld a presumption that the legitimate sovereign continues to exercise jurisdiction throughout the whole of its territory, with limitations only in exceptional situations such as belligerent occupation:

This presumption may be limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory. That may be as a result of military occupation by the armed forces of another State which effectively controls the territory concerned […], acts of war or rebellion, or the acts of a foreign State supporting the installation of a separatist State within the territory of the State concerned. […] It is not necessary to determine whether a Contracting Party actually

1108 This accords with the principle of interpretation in Article 31(3)(c) of the Vienna Convention on the Law of Treaties 1969, whereby account should be taken of “any relevant rules of international law applicable in the relations between the parties.”
exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned.\textsuperscript{109}

It added that “[i]n order to be able to conclude that such an exceptional situation exists, the Court must examine on the one hand all the objective facts capable of limiting the effective exercise of a State’s authority over its territory, and on the other the State’s own conduct.”\textsuperscript{11\textsuperscript{10}} Based on such criteria, the Court thus held Georgia responsible for the unlawful detention of the former mayor of Batumi in the “Ajarian Autonomous Republic” in Assanidze.\textsuperscript{11\textsuperscript{11}} In other cases, a state is actually prevented from exercising its authority in part of its territory. Thus, in the case concerning violations by Russia’s proxy Transnistrian separatist authorities in Moldova’s sovereign territory, the Court found that the applicants’ unlawful detention violated Russia’s human rights obligations under the Convention, by virtue of its military, economic, financial and political support to the separatist regime.\textsuperscript{11\textsuperscript{12}}

Crucially, and consistent with the premise that a situation of belligerent occupation is a temporary and exceptional state of affairs, the Court emphasizes the continuity of the rights of the sovereign state and the underlying basis for the responsibilities of its agents vis-à-vis the local population:

[E]ven in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.\textsuperscript{11\textsuperscript{13}}

By this token, the Court found that Moldova was also responsible under the Convention, since the Moldovan authorities had themselves failed to take sufficient steps to ensure that the applicants were released. For Grant, this holding is, “at least in a general way, in accord with the rule under

\textsuperscript{109} Ibid, paras. 312, 315.
\textsuperscript{110} Ibid, para. 313.
\textsuperscript{111} Assanidze v. Georgia, Application No 71503/01, Judgment of 8 April 2004. See also, Concurring Opinion of Judge Loucaides.
\textsuperscript{112} Ilaşcu and Others v. Moldova and Russia, Application No 48787/99, Judgment of 8 July 2004.
\textsuperscript{113} Ibid, paras. 331, 351.
which the injured State, too, is obliged not to recognize or aid in the consolidation of a situation created by a gross breach of a fundamental rule.”\footnote{1114}

A similar duty of due diligence was invoked by the Court in \textit{Sargsyan v Azerbaijan}, concerning the applicants’ displacement from their village in the Armenian occupied territory of Nagorno-Karabakh.\footnote{1115} Azerbaijan denies that it has effective control over the area in question (which is de jure within its territory), which it affirmed in a declaration attached to the instrument of ratification of the Convention it deposited on 15 April 2002: “The Republic of Azerbaijan declares that it is unable to guarantee the application of the provisions of the Convention in the territories occupied by the Republic of Armenia until these territories are liberated from that occupation.”\footnote{1116} The applicants in the case claim that irrespective of the territory being subject to foreign occupation, there were positive obligations the state could adopt to further respect for human rights guaranteed by the Convention.

The Court has not, however, always found it necessary to address the question of the existence of a belligerent occupation, or, seemingly, appreciated the importance of the question. For instance, while upholding the rights of Cypriot property owners and affirming their violation by the Turkish forces, the European Court did not enter a discussion of the legal status of the regime maintained by Turkey in the territory.\footnote{1117} In \textit{Loizidou}, the Court stated in obiter that the Turkish military presence at the material time did not establish a belligerent occupation.\footnote{1118} In May 2001, as a result of an application launched by Cyprus, the European Court of Human Rights rejected the Turkish argument that the "TRNC" is an independent state, ruling that it is "a subordinate local administration of Turkey operating in northern Cyprus,"\footnote{1119} and that Turkey was responsible for violations of human rights in Cyprus stemming from the 1974 Turkish
military intervention. Similarly, while upholding Russia’s responsibility for human rights violations in the Moldovan territory of Transnistria, the Court only briefly remarked that this “may be as a result of the military occupation by the armed forces.”

Notwithstanding the benefits of its joint-responsibility approach in some cases, in others, the Court’s failure to determine whether or not a belligerent occupation exists left open the question of the extent of the occupier’s ultimate responsibility. In the case of Moldova, the Court’s approach blurred the distinction between Moldova’s ultimate jurisdictional rights over its sovereign territory and the obligations for which it cannot be held responsible due to Russia’s continuing control over daily life in the territory. In some cases, the Court arguably should have sought to clarify the legal criteria that formed the basis for its judgments, including by substantiating the factual analysis of the specific administrative structures in the occupied territory in question, to build a foundation for the obligations it imposes on the occupying and occupied state respectively, while also endeavoring to provide concrete guidance to occupied states on measures that could further the protection of their nationals in the hands of a foreign power. It could be argued that such determinations should be left to another international authority, such as the principal bodies of the UN or even the ICRC, yet as discussed below, they also experience difficulties in ensuring consistency and regularly reviewing the legal and factual analyses that form the basis for determining the status and responsibilities of the different parties in different territorial situations, including illegal territorial regimes.

3.2 The UN System and Human Rights in Belligerent Occupation

The UN human rights system may also have limited access to critical information, and lack the relevant expertise to determine the extent of an occupying power’s human rights obligations vis-à-vis a non-national population in foreign territory, or the rights obligations of the ousted sovereign. In addition to the complexity of the legal issues arising out of

1124 See, on the difference between the mandate based restrictions of UN human rights bodies by comparison to regional human rights courts; Noam Lubell (2005) 743.
the implementation of human rights law in time of belligerent occupation, UN human rights treaty bodies have also shied away from directly determining and calling upon the responsible parties to comply with their obligations. In the case of Nagorno-Karabakh, for instance, despite a 1993 Security Council Resolution calling for the withdrawal of all Armenian troops from the internationally-recognised territory of Azerbaijan, reports and concluding observations issued by UN human rights bodies failed to call on the Armenian government to comply with its obligations as a Contracting Party given its close political links, and military and other economic support to the separatist authorities in Nagorno-Karabakh. By the same token, UN treaty bodies have not attributed violations taking place in Azerbaijan’s territory to the separatist or Armenian authorities.\textsuperscript{1125}

In the cases of Georgia’s occupied territories of South Ossetia and Abkhazia, some UN human rights bodies have sidestepped Russia’s obligations as occupying power.\textsuperscript{1126} By contrast, the Human Rights Committee’s Concluding Observations on Georgia in July 2014 expressed concern at “the slow progress in investigating, identifying and prosecuting perpetrators of human rights violations committed during or in the immediate aftermath of the 2008 armed conflict, including cases […] that may constitute war crimes and crimes against humanity.”\textsuperscript{1127} Given that alleged perpetrators and the victims included potential Georgian nationals, it recommended that Georgia do its part in ensuring that all such allegations “are effectively, independently and impartially investigated, that perpetrators under the jurisdiction of the State party, including, in particular, persons in positions of command, are prosecuted […] and that victims are provided with effective remedies, including compensation.”\textsuperscript{1128} Similarly, in its 2009 report on Russia, the Human Rights Committee held that “the territory of South Ossetia was under the de facto control of an organized military operation of the State party, which therefore bears responsibility for the actions of such armed groups,”\textsuperscript{1129} but did not elaborate on the specific violations and obligations arising from such responsibility.

\textsuperscript{1125} Human Rights Committee, Concluding observations of the Human Rights Committee, Azerbaijan, UN Doc CCPR/C/AZE/CO/3, 13 August 2009, para. 18.

\textsuperscript{1126} List of Issues to be Taken Up in Connection with the Consideration of the Third Report of Georgia, UN Doc. CCPR/C/GEO/Q/3, 15 August 2007, paras. 3, 14.

\textsuperscript{1127} Concluding observations on the fourth periodic report of Georgia, Human Rights Committee, Advance Unedited Version, 24 July 2014, para. 10.

\textsuperscript{1128} Ibid.

\textsuperscript{1129} The Committee recommended that Russia “conduct a thorough and independent investigation into all allegations of involvement of members of Russian forces and other armed groups under their control in violations of human rights in South Ossetia” and “ensure that victims of serious violations of human rights and international humanitarian
In the case of Moldova, in 2009 the Committee took note of the fact that “its inability to exercise effective control over the territory of Transnistria continues to impede the implementation of the Covenant in that region.”\textsuperscript{1130} In view of Moldova’s “continuing obligation to ensure respect for the rights recognised in the Covenant in relation to the population of Transnistria within the limits of its effective power”,\textsuperscript{1131} the Committee requested information from Moldova on “its efforts to resolve the impediments to the implementation of the Covenant in Transnistria.”\textsuperscript{1132} While the request could have become an occasion to examine the specific areas of Russia’s control and assess the obligations entailed on Russia as occupier, the Committee did not proceed to undertake an analysis of the responsibilities of the Contracting Parties with respect to Moldova’s nationals in Transnistria.

Regarding Turkey’s obligations vis-à-vis the indigenous population of northern Cyprus, in 1994, the Committee for the Elimination of Racial Discrimination held that “Turkey has been systematically enforcing in the occupied part of Cyprus a policy of racial segregation, thus flagrantly violating relevant international law relating to human rights.”\textsuperscript{1133} It held that Turkey was responsible for preventing some 200,000 Greek Cypriots, forcibly expelled from the occupied area since 1974, from returning to their homes.\textsuperscript{1134} Yet the Committee did not conduct a factual analysis of the areas of Turkish control over Cypriot territory, or the impediments these created for the legitimate Cypriot authorities to provide for its nationals’ ability to enjoy human rights. Neither did the Committee consider whether or not the legitimate authorities of the Republic of Cyprus had flouted their duty of due diligence to provide protection for their nationals.\textsuperscript{1135}

Despite the limits of their mandates, the work of international human rights bodies indicate the potential importance of their contribution to the protection of human rights by all parties, including local or separatist

\textsuperscript{1130} Human Rights Committee, Concluding observations on Republic of Moldova, UN Doc. CCPR/C/MDA/CO/6, 24 November 2009, 2.

\textsuperscript{1131} Ibid.

\textsuperscript{1132} Ibid.

\textsuperscript{1133} Ibid.

\textsuperscript{1134} See, on Turkey’s displacement of persons from northern Cyprus, CERD, Thirteenth periodic reports of States parties due in 1994: Cyprus, UN Doc. CERD/C/263/Add.1, 5 May 1994, para. 51.

\textsuperscript{1135} In the absence of a consistent practice for determining the competing obligations of multiple state and non-state actor, it is more probable, however, that this omission was not intentional.
authorities, in situations of belligerent occupation.\textsuperscript{1136} The January 2014 report of the Office of the High Commissioner for Human Rights on the human rights situation in Cyprus appears to be one of the first public UN documents to discuss the challenges of implementing human rights in the context of a prolonged illegal territorial regime. It found that Cyprus is “unable to ensure the practical realization of women’s rights in areas not under its control,” and “remained concerned that the political situation continued to hinder the implementation” of human rights.\textsuperscript{1137} The report noted the problems of implementing the CERD and investigating allegations under CAT, mentioned by the Committee in the list of issues concerning Turkey’s implementation of its Contracting Party obligations.\textsuperscript{1138} As a general standard, the report declared that “States parties must respect and ensure the rights laid down in international human rights treaties to anyone within the State party’s power or effective control, even if not situated within the territory of that State party,”\textsuperscript{1139} and also affirmed that “non-State actors that exercise government-like functions and control over a territory are obliged to respect human rights norms […] regardless of [their] international recognition and international political status.”\textsuperscript{1140}

\textsuperscript{1138} \textit{Ibid}, paras. 7-8.
\textsuperscript{1139} \textit{Ibid}, para. 11. See also, Human Rights Committee, General Comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10.
Similarly instructive guidance on the potential role of human rights bodies in addressing specific contexts of prolonged belligerent occupation can be gleaned from the Core Common Documents submitted by states “to provide each respective treaty body with a comprehensive understanding of the implementation of the relevant treaty by the State.”\(^{1141}\) In its Core Document, Cyprus asserts the status and effects of the part of its territory subject to foreign occupation by Turkey:

> Despite the changes in the international landscape since the 1974 Turkish invasion and occupation of 36.2 per cent of Cyprus, the nature of the political problem remains intact. It is a problem of use of force against a sovereign state, invasion, forcible division resulting from foreign aggression and occupation, massive and persistent violations of human rights, destruction of religious and cultural property, unlawful colonization and change of demography, usurpation and illegal exploitation of property, forcible segregation of the population, and continuing secessionist efforts to project the existence of a separate illegal entity in the occupied area.\(^{1142}\)

Cyprus’s document declares: “Due to the continuing Turkish occupation, it is evident that the Government of the Republic of Cyprus is prevented by armed force from exercising its authority and control, and ensuring implementation and respect of human rights in the occupied area.”\(^{1143}\) Moldova’s report, without explicitly mentioning Russia’s occupation of its Transnistrian region, recounts in passing that Moldova’s Government Commission for the Reintegration of the Country is charged with the coordination of “actions aimed at identifying solutions for problems related to the Transnistrian dispute and ensuring their implementation.”\(^{1144}\)

By contrast, occupying states, in their respective Core Documents, have included assertions that the foreign territory under their control was not ‘occupied’ but subject to their sovereignty, thereby indicating that their policy vis-à-vis the status of the occupied territory is contrary to

\(^{1141}\) Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties, UN Doc. HRI/GEN/2/Rev.6, 3 June 2009, para. 32, pp 8-15.

\(^{1142}\) Core document forming part of the reports of States parties, Cyprus, UN Doc. HRI/CORE/CYP/2011, 2 September 2011, paras. 116, 60-63, 66-67.

\(^{1143}\) Ibid, para. 76.

\(^{1144}\) Common core document forming part of the reports of States parties, Republic of Moldova, UN Doc. HRI/CORE/MDA/2011, 24 September 2012, para. 180(i).
international law. Morocco’s Core Document mentions its establishment of the Royal Advisory Council on Saharan Affairs “to assist in all cases concerning the defence of the territorial integrity of the Kingdom, achieving the economic and social development of the southern provinces and maintaining their cultural identity.” 1145 Israel’s Core Document maintains that “Israel is divided into several geographical regions, including the highly populated Mediterranean coast and coastal plain, the Judean Hills surrounding Jerusalem to the east, and the mountainous regions of the Galilee and Golan in the north.”1146 Due to the absence of a procedure or practice to review and challenge the Core Common Documents submitted by states, either at the Human Rights Council or treaty-body level, these positions, which contravene the occupying state’s obligations to ensure the human rights of the local population in the occupied territory in a manner that accords with the local system of governance, as discussed above, are a potential but unaddressed basis for the deficient implementation of human rights obligations by occupying states.

3.3 Enhancing the Enforcement of Human Rights in Belligerent Occupation

While the examples cited are not comprehensive, they indicate that human rights bodies’ legal and factual analysis of the obligations of various duty-bearers in time of belligerent occupation is often limited. One reason is that these bodies may face difficulties obtaining information from the occupying or occupied state about limitations or measures undertaken to provide protection for human rights. Indeed, there is scarce documentation and reporting by local and international human rights groups on the complex realities and violations occurring in Nagorno-Karabakh, South Ossetia and Abkhazia, Transnistria and northern Cyprus. In its fourth periodic report to the Human Rights Committee, in 2012, Georgia noted, tellingly, that it “is actively advocating for the involvement of international organizations in human rights and security monitoring in occupied regions to monitor existing human rights.” 1147 The work of leading non-

1145 Common Core Document forming part of the reports of States parties, Morocco, UN Doc. HRI/CORE/MAR/2012, 10 October 2012, para. 32 (emphasis added).
1146 It adds that it borders with the “the Palestinian Authority and some disputed areas to the east” as reference to the occupied Palestinian territory of the West Bank; Core Document Forming Part of the Reports of States Parties, Israel, UN Doc. HRI/CORE/ISR/2008, 21 November 2008, paras. 2-3.
1147 Georgia’s fourth periodic report to the Human Rights Committee, 1 November 2012, para. 6.
governmental organisations such as Human Rights Watch, Amnesty International and the International Crisis Group has raised concerns about human rights violations occurring in these contexts, but the rights groups’ reports seldom provide a contextualised account of the structures and institutions that control domestic and external affairs in the territory, and none of these NGOs typically addresses the relevance of other bodies of international law beyond that of human rights law.

Most human rights violations, including those that occur in time of occupation, lend themselves to individual complaints that can be adjudicated by a body specialising in certain rights – such as participation in political life, religious rights and events, and property rights. In terms of adjudicating widespread rights abuses in contexts of occupation, the European Court of Human Rights has paved the way by examining not only individual violations, but also, in 2014, enforcing the long-term costs of occupation through its satisfaction award to Cyprus, totaling in 90 million euros of Turkish debt. At the time of writing, the pending cases of Georgia v Russia and Hassan v. UK – concerning the detention of an Iraqi national by British forces in southern Iraq and his subsequent release and death – present an opportunity for the Court to articulate a clear and systematic approach to the interaction between international humanitarian and human rights law, and, in the case of Hassan, to address the extent of extraterritorial derogations under the European Convention.

Core Documents, treaty bodies and the Universal Periodic Review are important fora for assessing the obligations of competing actors in the context of belligerent occupation. But the inconsistency of current practice

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1149 See, e.g., in relation to the Turkish-occupied territory of northern Cyprus, the CERD committee reported that the Greek Cypriots who were forcibly expelled from their homes continue to be arbitrarily deprived of their properties in the occupied areas, and such properties continue to be illegally distributed by the Turkish occupation forces.
1150 Turkey contended that the respondent should be the TRNC as it was the rightful sovereign over the territory; Loizidou v Turkey, Application No 15318/89, Judgment of 18 December 1996, para. 43. The following declaration by Turkey upon accession to CERD, was rejected by UK and Sweden for being in effect a reservation: “The Republic of Turkey declares that this Convention is ratified exclusively with regard to the national territory where the Constitution and the legal and administrative order of the Republic of Turkey are applied.”
indicates the need for a more coherent and systematic approach is required to ensure the effectiveness of the implementation of human rights law.\textsuperscript{1152} The case of Kosovo demonstrated the need for an international review mechanism that would examine complaints against international administrations of foreign territory.\textsuperscript{1153} A similar need exists for a mechanism that would apply a comprehensive framework of international rules that includes human rights law with respect to other foreign territorial administrations, including the \textit{de jure} regime of belligerent occupation. Given that examples of best practices by occupied states, such as the measures adopted by Georgia’s authorities to provide its nationals in the occupied territories with benefits and services available to all other Georgian nationals, remain limited, such a mechanism should also further the obligations of an occupied state, which is not entirely absolved of responsibility for its nationals.

4. Assessing Interplays between Occupation and International Human Rights Law

An approach to the application of international law that seeks synergies between human rights and humanitarian law norms has the potential to further the full and effective implementation of international law. As a first step it should address the uncertainty and incoherence of the international practice of occupying states and of international institutions, which have obscured the limits appropriate to a foreign power’s human rights obligations. The process of balancing rights and assigning responsibility to the occupying and occupied states should account for the temporary and limited nature of the foreign power’s status and authority; the inherently adversarial relations between the occupier and its proxy authorities, and the local population; and the factual complexity of such cases. The ground-norm applicable to such cases, to borrow from Sen, is that “people have to be seen [...] as being actively involved [...] in shaping their own destiny.”\textsuperscript{1154}


\textsuperscript{1153} The Venice Commission suggested, as an interim solution, that UNMIK and KFOR establish advisory panels that the inhabitants of Kosovo could address; Georg Nolte, ‘Towards a Human Rights Mechanism for Kosovo: The Proposals of the Venice Commission of the Council of Europe’, in Pierre-Marie Dupuy et al. (eds.), \textit{Festschrift fur Christian Tomuschat} (Engel, 2006).

\textsuperscript{1154} The state’s role is one of support and not of “ready-made delivery”; \textit{Ibid}, 53.
4.1 Whither Human Rights in Belligerent Occupation?

Given the complex interaction between the *lex specialis* of belligerent occupation and human rights law, it would be mistaken to presume that states have created two legal regimes that merge harmoniously. Convergences and divergences should be managed with a degree of flexibility – a pragmatic approach should prevail even to the humanisation of the laws of war\textsuperscript{1155} – guided always by the goals of ensuring the wellbeing of the local population and the prompt handover of full administrative control to the institutions of the legitimate sovereign. The occupying power’s acts should be the subject of close scrutiny, to ensure that it is not strategically abusing its superior status by reforming the public order and civil life so as to maintain its control and further its self-interests.\textsuperscript{1156}

Human rights and occupation law and their respective regulatory mechanisms have broadly similar objects and purposes,\textsuperscript{1157} yet the former is preoccupied with the political, cultural and social needs of communities and peoples – under the working presumption that the duty-bearer is a legitimate authority accountable to the people – while the latter is preoccupied with the management of the conflict and the imposition of restrictions on the use of force to gain specific military advantages. The application of human rights law to specific situations of belligerent occupation must maintain critical distinctions, in terms of the recognition and treatment of different sets of facts as pertinent, and the differing results of the evaluation of the same sets of facts under the respective bodies of law. In cases of co-application, the interaction of the two bodies of law should be derived from other relevant principles of general international law.\textsuperscript{1158}

Be it an occupying power’s administration or that of a proxy authority under the ultimate, remote control of an occupying state, the

\textsuperscript{1155} See generally, Marco Milanovic (2010).

4.2 Sovereign Rights: Self-Determination and Human Rights

While the sophisticated and all-encompassing nature of human rights norms broaden and enrich humanitarian law norms,\footnote{1160 Sylvain Vité, ‘The interrelation of the law of occupation and economic, social and cultural rights: the examples of food, health and property’, International Review of the Red Cross, Vol 90, No 871 (2008) 650-651.} they also add to the dilemmas faced by an occupying power with respect to the limits of its authority and its obligations. Legal and institutional revisions in the occupied territory may be lawful so long as they are for the benefit of the population, and do not entail the occupier exercising sovereign authority so as to permanently exclude the legitimate government or ensure its political subjugation. General rules of international law, in particular the law of self-determination of peoples – a corollary of the principles of sovereignty, territorial integrity and political independence – should be applied in conjunction with specific human rights-based guarantees, including under humanitarian law, as an interpretative guide to delimit the scope of the occupier’s obligations vis-à-vis the local population.\footnote{1161 See, on the interaction between self-determination law and the lex specialis of belligerent occupation, Chapter VI.}

The special legal regime for belligerent occupation was intended to restrain an occupier’s exercise of authority, not to mandate sovereign-like measures for the public interest of an enemy’s population. Nonetheless, the greater the incompatibility of specific provisions of the domestic order in the occupied territory with fundamental human rights guarantees, the likelier it is that an occupier would try to justify changes to the status quo. Given that these are, however, exceptional situations – which could arguably be reversed by the people or ousted sovereign at the end of occupation – the application of human rights law needs to be subject to case-by-case determinations, while ensuring that the overall purpose of the administrative regime maintained through belligerent occupation is not to reform the governmental institutions in place.

The equivalent norms enshrined in the conservationist principle underlying the law of belligerent occupation, the doctrine of national self-
determination, and the prohibition of acts on foreign territory, discussed in preceding chapters, were intended to counterpoise colonial-type foreign territorial administrations – effectively turning them into acts of illegal territoriality, or illegal territorial regimes. These prohibitions against the establishment of illegal territorial regimes mutually reinforce the rules that a state administering foreign territory should not infringe on the national self-determination of the local population and the sovereign and territorial rights of the ousted sovereign. Given that the ability of the local population to enjoy their right to self-determination is a precondition for the ability of a people to fully enjoy all human rights, the standard for assessing human rights protection should include a prospective test regarding the foreign power’s intentions and actions intended to further the effective and complete reversion of control to the legitimate authorities of the ousted sovereign.

The pitfalls of an all-or-nothing approach to the application of human rights law in time of belligerent occupation, and the limits placed on foreign administrators of territory in international law, reflected in the limited mandate assigned to an occupier by the *lex specialis* of belligerent occupation, add necessary nuance to an overly-simplistic position that human rights are a standard applicable to all occupying states. By the same token, an occupying state’s presence in foreign territory should be contingent on a continuing basis in military necessity to ensure that its activities in foreign territory conform with the international law on territoriality and use of force, as discussed in Part II. Accordingly, acts adopted by the occupying state under the banner of human rights should be limited to the basic needs of the local population and the imperative military needs of its occupying army, and strictly respect both the conservationist principle and the law on self-determination.

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CHAPTER VIII

INTEGRATED ENFORCEMENT OF INTERNATIONAL LAW IN SITUATIONS OF BELLIGERENT OCCUPATION: THE ROLE OF NON-RECOGNITION

Previous chapters have considered the normative overlaps and interactions between belligerent occupation law and international norms on territoriality, self-determination, and the use of force, and examined the ways that these interplays reinforce the function of the law of belligerent occupation, in casu as well as in the broader context of the international legal order. The prevalence of abusive state practices during occupations shows that it is important to maintain these interplays in the application of the special body of rules developed for the regulation of situations of occupation, because of the significant legal consequences that could be triggered by a comprehensive approach to the regulation of such territorial regimes. The conflict of interests between the occupier and the local population, which often escalates tensions the longer an occupation is maintained, calls for a rigorous set of standards and mechanisms to be applied, and for external scrutiny and supervision by the international system, including individual states.

Yet, the process of enforcement of international law is, in the main, limited to the consent-based mechanisms of international courts, and condemnations by the UN and other international bodies, which often remain discursive, failing to compel the wrongdoing state to alter its unlawful conduct. Mechanisms for the enforcement of international humanitarian law and the normative regimes that apply in concurrence with belligerent occupation are limited by the will of those states charged with their establishment. Cases where a state’s persistent failure to comply with international law has led to collective countermeasures are a rarity. Similarly, any decision of a third party to seek the compliance of a

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wrongdoing state with international law will be subject to political considerations and foreign policy interests.

This chapter discusses the existing international enforcement mechanisms that might operate in situations of belligerent occupation and the challenges entailed in bringing about their full and effective implementation, as well as new enforcement opportunities resulting from the interplays explored in previous chapters. The provisions of the law of belligerent occupation interact with those of other international legal norms that aim to conserve and protect the territorial, sovereign and self-determination rights of the local population and their ousted sovereign. Moreover, the norms on territoriality and self-determination are not only important for the coherence and proper operation of the international legal order, they have resonated in the legal orders of law-abiding states, which are able to compel enforcement and guarantee compliance.

Hence, these interplays represent a rare opportunity where the enforcement of the law of belligerent occupation can be potentiated through the internalised elements of international law found in domestic legal orders. These domestic orders provide a concrete legal basis for the operationalisation of the third state duty of non-recognition, aid or assistance – an otherwise vague duty, found in the customary body of the international law on state responsibility. The place and function of non-recognition in the domestic regulatory processes of states derives from an accumulated state practice not to give legal effect to the unlawful acts occurring under the de jure or de facto jurisdiction of a third country. The public policy commitments made by third states concerning the legal status in international law of facts occurring under the jurisdiction of another state, set the standard both for the implementation of domestic law and for the state’s conduct of inter-state relations, in accordance with the principles of consistency and legal necessity.

Some discussions of the function of the law on recognition in rejecting unlawful title and refusing recognition of administrative authority that ensues from and is intended to perpetuate unlawful acts, have concluded that its scattered practice has made only a limited contribution to enforcement.¹¹⁶⁴ However, these analyses have not considered the opportunities that exist for the enforcement of international law on illegal

territoriality through the domestic regulatory processes of third states.\footnote{1165} The incorporation of international law criteria by national law and the enforcement of domestic law through vigorous institutional practices and regulatory mechanisms provide a basis for triggering not only the non-recognition by the third state of wrongful acts abroad, but also in some cases, its need to bring about the wrongdoing state’s compliance. Such a need exists if the relations between the law-abiding state and the wrongdoing state are such that they require the latter to conform its behaviour to allow their continuation. In cases where these relations entail the law-abiding state giving legal effect to the wrongdoing state’s unlawful acts under its own legal order, it will be required to obtain guarantees of compliance by the wrongdoing state with certain legality criteria, including those in international law, to enable it to continue these relations. In the cases at hand, these criteria are the principle of territoriality and the limits and duties placed on the occupier by international humanitarian law.

This chapter reviews existing enforcement mechanisms for the law of belligerent occupation, and finds that the mechanisms provided by international criminal justice and non-judicial accountability mechanisms\footnote{1166} are limited and often subject to political discretion. The chapter explores the added enforcement value of a different paradigm, based on the co-application of legal regimes on territoriality, self-determination, and use of force, in conjunction with the law of belligerent occupation (Section I). The chapter considers the enforcement value of co-applying these international legal regimes by focusing in particular on the function of the doctrine of non-recognition (Section II). It concludes that adopting such a comprehensive approach to the regulation of territorial regimes in international law can significantly enhance opportunities for the enforcement of the law of belligerent occupation. This paradigm of enforcement may solidify mechanisms for monitoring, supervising and enforcing the law of belligerent occupation that are otherwise lacking or malfunctioning.\footnote{1167} It may also contribute to the vigorous and exigent compliance with international law rules that are indispensable and fundamental to the existence of the inter-state system, by upholding the ultimate function of the law of occupation: safeguarding the sovereign equality of states and international peace and security.

The chapter describes the paradigm of enforcement based on non-recognition and sets out its principal conceptual elements in view of established principles of international relations (Section III). It then examines the emergent practice by the European Union (EU) and its Member States in terms of their external relations with Morocco, Turkey and Israel, with regards to the territorial regimes maintained in Western Sahara, northern Cyprus and the West Bank and Golan Heights (Section IV). In these cases, the EU’s duty of non-recognition has been triggered by the unlawful acts undertaken by occupying State in foreign territory that resulted in the establishment of an illegal territorial regime that infringes on the sovereign rights of the local population and perpetrates violations of international law. To conclude, some observations are made on the effectiveness of international law and its potential to drive a process of socialisation and obedience training for wrongdoing states, based on the conditionality that is premised on the needs of third party, state or non-state actors.

1. Enforcement Mechanisms for the Law of Belligerent Occupation

A myriad of international, regional and national institutions and mechanisms, judicial and non-judicial, have interpreted, applied and enforced international humanitarian and human rights law in time of occupation. These mechanisms and enforcement processes have varied considerably in their results, due to the political constraints inherent to enforcing states’ compliance with international law. Voluntarism and state consent remain at the centre of the day-to-day function of international law; proactive measures by the Security Council or other UN mechanisms depend heavily on the political will of a small number of nations. Cases where the UN and the ICJ agree on the illegality of the regime and proceeded to adopt concerted sanctions, such as Namibia, are few and far between.1168

Overall, the enforcement of the law of belligerent occupation is not impartial, prompt, or effective: states often choose not to comply with international law in this regard, and the nature and exigency of the forms and guarantees of compliance are inadequate. The implementation and function of the law of belligerent occupation as a protective framework

against predatory state practices has suffered, resulting in conflict, dispossession, and exploitative practices, which the international community sought to eradicate years ago.\textsuperscript{1169} This section provides an overview of the institutionalised forms of enforcement for belligerent occupation law and proceeds to consider a different process of international law enforcement based on the incorporation of international law norms in domestic law and public policy.

\textbf{1.1 Institutionalised Enforcement Mechanisms}

Since most positions taken by states are the subject of their free, sovereign consent, both the creation of law and the state’s binding commitment to legal criteria under international law take place under the watchful eye of the state’s political authorities.\textsuperscript{1170} Orakhelashvili points out that existing law can be subjected to political considerations that make extra-legal considerations a part of the legal process; importantly, however, policy concepts also constitute part of established legal concepts.\textsuperscript{1171} By committing themselves in their domestic public policy to positions in accordance with international law, states undertake to comply with their obligations in good faith, in accordance with the international law principle of \textit{pacta sunt servanda}, and cannot excuse non-compliance with international law through reference to domestic law.\textsuperscript{1172}

By contrast, state authorities have employed a variety of avoidance techniques to evade their international law obligations: for example, the tactic of excessive deference to the executive branch when it comes to the implementation of national law in accordance with international law, such as when courts argue that a matter is non-justiciable due to a conflict with foreign policy or other state interests. Ferraro argues that domestic courts, notwithstanding their ability to gather information and the doctrine of exhaustion of remedies, do not provide an adequate course of action against the internationally unlawful administrative and legislative


\textsuperscript{1172} Article 26 and 27, Vienna Convention on the Law of Treaties 1969.
measures of an occupying power. Perhaps a greater problem presented to international law in the context of its application by state authorities, is the inconsistency and unpredictability of its interpretations by those authorities, particularly domestic courts. Domestic criminal trials and internal military disciplinary measures have not, in many cases, resulted in effective alterations in the wrongdoing state’s policies or overall political objectives in a manner that would guarantee bona fide respect for international law.

International fact-finding missions and enforcement by UN bodies and the ICRC have been the primary means for disseminating information about violations and for holding states and non-state actors accountable. These mechanisms – concerned principally with the responsibility of states as opposed to their individual officials – have depended on the wrongdoing state’s voluntary consent to cease violations and provide reparations, without the threat of legal or political consequences. Nonetheless, international non-judicial mechanisms such as those of the UN and regional organisations, including the political organs of the European, African and Inter-American systems, have made important contributions to the interpretation, development and enforcement of international humanitarian law, and its embedded and concurrently applicable normative regimes of territoriality and self-determination law.

Moreover, in isolated cases, these mechanisms have also provided an indirect form of remedy to victims through compensation to their government by the wrongdoing state, such as the United Nations Compensation Commission’s decision to hold Iraq liable for all damage or loss resulting from its unlawful invasion and occupation of Kuwait, including both jus in bello and jus ad bellum breaches. The UN’s response to the acts of aggression in the context of the Korean and the Persian Gulf wars are notable instances, amongst others, of the use of collective countermeasures. However, the increasing politicization of the principal

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In addition to the largely non-judicial scrutiny of supervisory UN bodies, regional mechanisms, and the ICRC and civil society, the laws of war, including complementary elements of international human rights law, have been enforceable by international criminal justice mechanisms since the mid-20th century.\footnote{See generally, Kevin Jon Heller, The Nuremberg Military Tribunals and the Origins of International Criminal Law (Oxford, 2011); Charles Anthony Smith, The Rise and Fall of War Crimes Trials: From Charles I to Bush II (Cambridge, 2012); Kevin Jon Heller, Gerry Simpson (eds.), The Hidden Histories of War Crimes Trials (Oxford, 2013); Shane Darcy, Judges, Law and War: The Judicial Development of International Humanitarian Law (Cambridge, 2014).} Yet examples of judicial enforcement in the international arena remain a rarity, and those that exist have been restricted: international tribunals have been bestowed with specialized and geographically-limited mandates and the ICC has worked for its first decade on a humble list of relatively narrowly-tailored cases, compared to the number of alleged international crimes and the deluge of evidence and files received by the court.\footnote{See, on the contribution of international tribunals to the development of international humanitarian law, Shane Darcy, Judges, Law and War: The Judicial Development of International Humanitarian Law (Cambridge, 2014).}

responsibility for occupiers or private actors that become complicit in its acts — given that some unlawful acts, such as pillage and the transfer of the occupying power’s civilians into occupied territory that continue to await deliberation — most classical international law enforcement mechanisms, despite ample progress, to borrow from Benvenisti, continue to “prevent the formation of a coherent, impartial and effective response to the challenges of contemporary occupations.” The law of belligerent occupation has become an important standard for judging the conduct of occupying states, but it remains devoid of the rigour and gravity of the response necessary to bring international law to bear on the illegal acts of such states and their permeating effects on the rights and condition of the population in the occupied territory.

1.2 Internalised State Commitments and Soft Power Enforcement

The role of law in international society has gained considerable weight as a result of the growing norm-setting practices of states, as well as the increasing meticulousness and harmonization efforts in the regulation of state and non-state actors, both domestically and, in contexts such as the EU, regionally. Moreover, inter-state relations have produced both sporadic and unregulated self-help, and contemporary forms of retorsion, such as soft contestation methods including withdrawal of diplomatic presence or suspension of relations, often short of severance. Other


1184 See, on the bias in the adjudication of the acts of occupying states by third party courts, international tribunals and international non-judicial bodies, Eyal Benvenisti (2012) 347.


instances include intervention, either by way of display of military force or, in extreme cases, military intervention to protect the state’s nationals under the jurisdiction of another state from injury. Yet forceful enforcement measures in international law have been described as the “rule of the strong”. By contrast, only on the domestic level have states taken measures due to the need to uphold the integrity of a legal order by enforcing law as law.

The efficacy of international law continues to depend heavily on state compliance. It is therefore encouraging that an increasing number of states are incorporating international rules into their domestic legal orders – which a growing number of treaties require. It follows that a state’s internationally-unlawful conduct should also attract consequences under the domestic legal orders of such third states. Third states engaged in interstate, or even ad hoc proximity relations between the nationals or private entities based in the third state with those operating under the aegis of the wrongdoing authority, will be unable to rely on or extend comity to unlawful legal and institutional practices of the wrongdoing authority. In such cases, the third state is driven by its own need, based on internal legal necessity and public policy commitments, to ensure that its relations with the wrongdoing state do not entail its recognition of internationally-unlawful acts as though they were lawful. The basis for enforcing international law, for these states, shifts from the realm of international relations to the domestic level.

Many states have internalized the basic premises of the international law norms concerning non-aggression, territorial acquisition and regime change – which are expressed in the lex specialis of belligerent occupation, particularly in its Geneva body of law – through domestic public policy commitments. Therefore, in these states, respect for these positions in international law is of concern to those state authorities entrusted with upholding the integrity of the domestic legal order.

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1189 Ibid, 92.
The primacy of the international law norms on territory, self-determination of peoples and inter-state use of force, is based on their role in maintaining the stability of borders and the peaceful coexistence of states. The premise of the hard-rule based law of belligerent occupation – which is based on these international law principles, but is more explicit in terms of the scope of the obligations it prescribes – is that states mutually benefit from its regulatory function and from its close ties with broader issues of international law. The codification of the law of belligerent occupation, as discussed in Chapter II, was the result of a long process of scrupulous formulation of norms that enshrine the commitments of states to the rule of law in time of occupation. As its Geneva law provisions affirm, belligerent occupation law was intended to maintain the integrity and equality of states in the international order – an intention that is representative of normative and structural developments in the international order during the early phases of the decolonization era. Yet as discussed in preceding chapters, the abusive practices of occupying states – including cases of either territorial transformation or prolonged foreign control – not limited to situations of prolonged occupation, have transformed de jure internationally-recognised territorial regimes of belligerent occupation into illegal territorial regimes.

Given the irregular record of traditional international law enforcement mechanisms, which continue to have limited impact on state compliance, the modus of inter-state enforcement based on the commitments and domestic law-based obligations provides an important alternative. This will be the case where a third state that has undertaken such commitments and obligations, nonetheless gives legal effect to another state’s unlawful acts due to its inappropriate reliance on the other state’s authorities to comply with international law. The third state may be required to exigently correct the resulting deficiency in the implementation of its domestic law, if that state has made a public policy commitment concerning the legal status of predicate facts in third countries.

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Though not often discussed, this avenue for the operation of international law may affect the common understanding that it should be treated not as “a free-standing discipline or system of rules guided by its own imperatives as a legal system, but as a side aspect of international politics”. International law’s very dependency on domestic legal orders and on the self-defined responsibilities of states – which align with and seek to further political as well as inherent legal interests – may in some cases be used to help its enforcement. By seeking to ensure the proper operation of their domestic legal orders, law-abiding states in effect provide a domestic basis for the operationalisation of their respect for international law, which can translate to soft enforcement measures that seek to counter unlawful territorial, political and demographic revisions undertaken by predatory occupying states.

2. Non-Recognition of Illegal Territorial Regimes

Aside from the politicised mechanisms of the UN and other regional organizations, the principal means for challenging prohibited state practices of territorial acquisition and regime change has been a practice of non-recognition of unlawfully constituted states and authorities. Some of the first codifications of the international doctrine of non-recognition are found in the 1933 Anti-War Treaty of Non-Aggression and Conciliation and the 1933 Convention on the Rights and Duties of States. Over a decade later, in 1945, it was also enshrined in the UN Charter’s Article 2(4) concerning the prohibition on the use of force to acquire territory, and in the 1948 Bogota Charter. In 1970, the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States, adopted by General Assembly resolution 2625 (XXV), reaffirmed that “[n]o territorial acquisition resulting from the threat or use of force

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shall be recognized as legal.” Further affirmations of the emergence of a strong consensus on non-recognition of illegal regimes include the 1974 Definition of Aggression, the 1975 Helsinki Final Act of the Conference of Security and Cooperation in Europe, and the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations.

In 1982, it was codified as part of the international law on state responsibility in the first public version of the ILC Draft Articles on State Responsibility for Internationally Wrongful Acts. Articles 16, 40 and 41 of the 2001 version of the Draft Articles – widely considered as an authoritative codification of customary rules, despite never having been opened for signature by states – set out the obligations of third states not to recognize, aid or assist in serious breaches of peremptory norms, or jus cogens. In particular, Article 41 of the ILC Draft Articles, provides, “without prejudice to other consequences”, that in response to “a serious breach by a State of an obligation arising under a peremptory norm of general international law”, all third states shall not “recognise as lawful a situation created by a serious breach […] nor render aid or assistance in maintaining that situation.” The ICJ Advisory Opinion on Nuclear Weapons affirms that “a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person or elementary considerations of humanity”, that “they constitute intransgressible principles of international customary law.” The prohibition of acquisition of territory through the use of force and the flagrant denial of the right of self-determination of peoples are, by comparison, unequivocally considered to be peremptory norms of international law.

The drafters of the 1949 Geneva Conventions incorporated a similar, yet notably more ambitious, principle in Common Article 1 to the 1949 Conventions, as well as Article 146(3) of the 1949 Fourth Geneva

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1203 Ibid, 115.
1204 ICJ Reports 1996 (1) 8 July 1996, para. 79. See also, Corfu Channel (United Kingdom v Albania), Merits, 1949 ICJ Reports 4, 22 (Judgment of April 9).
1205 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004 131 (9 July), para. 39.
Convention and Article 89 of the 1977 Additional Protocol I to the Conventions, providing that states “respect and ensure respect” of the Conventions and, in certain cases, also adopt “measures necessary for the suppression” of “grave breaches” of the Conventions. Three points of distinction between the 2001 ILC Draft Articles and the Common Article 1 principles are, however, of note. First, the normative status of the legal rules differs. Whereas *jus cogens* norms entail *erga omnes* obligations, which are closely related to the rationale behind the doctrine of non-recognition, non-recognition in Common Article 1 arguably has a broader application to include all serious breaches of the Geneva Conventions.

Second, the obligation “to ensure respect” appears to go beyond non-recognition and into the realm of procuring respect by non-compliant states. The provision in Common Article 1 has a unique status for being, at once, a covenant-type obligation embedded in a hard-rule based body of law, and a contractual obligation by virtue of the signatories to the Convention being High Contracting Parties. Third, the fora in which these norms have been invoked differ. Whereas Common Article 1 has been invoked mainly by the ICRC and the Conventions’ High Contracting Parties, the normative premise for the ILC Draft Articles can be found as a basis for collective condemnations and measures taken largely by UN bodies and other intergovernmental organisations.

States have often deferred to politically-driven multilateral processes and relied on the adoption of collective measures to counter violations of the narrowly-defined *jus cogens* as well as a broader set of international humanitarian law norms. The operation of the two sets of norms thus reveals the insufficient guidance provided by international law on the scope and extent of the measures states should take to ensure non-recognition and endeavour to end violations. The basis for the doctrine

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1207 States have adopted legislative and administrative measures to prevent private persons from participating in acts contrary to the Conventions, e.g. military manuals of Russia, Switzerland and Kenya; Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law, Vol I: Rules* (ICRC, 2005) 496.


of third state responsibility is the logic of communitarian accountability, an important pillar of the international system intended to accommodate the interests of humanity and upholding common values, and yet state practice of non-recognition and cooperation has not followed suit.\textsuperscript{1211} The following two sections examine the material scope of the rights and duties of states, and survey state practice relevant to situations of belligerent occupation and illegal territorial regimes.

\section*{2.1 The Scope and Substance of the Duty of Non-Recognition}

The duty of non-recognition requires states and international actors to refrain from recognising, aiding or assisting an internationally-unlawful act in a manner that gives it legal effect, contributes to or maintains it.\textsuperscript{1212} Essentially, non-recognition seeks to ensure that “no state can accrue international rights or obligations from the illegal status quo, nor can it benefit from the application to the territory in question of existing treaties with the wrongdoer,”\textsuperscript{1213} without disproportionately affecting innocent persons or indicting an authority.\textsuperscript{1214} The law of occupation and the doctrine of non-recognition are intertwined. The cardinal rules and normative underpinnings of the law of belligerent occupation – including, predominantly, the inalienability of territory through conquest and the prohibition of regime change – derive from the doctrine of non-recognition of a conqueror’s title and rights.\textsuperscript{1215} In situations of belligerent occupation, Morgenstern notes, “third states must deny recognition and enforcement to acts of the occupant which are contrary to international law.”\textsuperscript{1216}

However, scholars have not expressly addressed and state practice has not clarified the course of action or measures that the duty prescribes for third state authorities. Save for a general standard not to bestow rights on wrongful titles in the case of an unlawful annexation or declaration of


\textsuperscript{1212} See, Quincy Wright (1937) 687.

\textsuperscript{1213} See, on Articles 40 and 41, James Crawford, \textit{The International Law Commission’s Articles on States Responsibility: Introduction, Text and Commentaries} (Cambridge, 2002) 250.

\textsuperscript{1214} See, for a discussion of the Namibia exception, Enrico Milano (2006) 182 et seq.


statehood, in accordance with the principle of *ex injuria jus non oritur*, Stefan Talmon remarks that the responsibility required by the duty of non-recognition lacks real substance.\(^{1217}\) Hans Blix, who coined the term “non-recognition as legal,” explained that states are left to “determine for themselves – in the absence of collective action by the United Nations – to what extent they would allow practical cooperation and courtesies without any formal admission of the legality of the situation.”\(^{1218}\)

As for the scope of Common Article 1 of the 1949 Geneva Conventions, which requires High Contracting Parties to ensure respect for the rules set out in the conventions and bring about respect by other states, international bodies, jurists and states have given differing interpretations. By and large, the obligation has been implemented through diplomatic action, public denunciation, and the use of domestic laws on universal jurisdiction to try alleged perpetrators of international crimes.\(^{1219}\) Kessler classified measures under Common Article 1 into four categories: (1) repressive action against a violation; (2) assistance to enable another State to fulfil its obligations; (3) control; and (4) prevention.\(^{1220}\) The ICJ’s Advisory Opinion on the Wall held that Common Article 1 entails “obligations,” and commentators have suggested that it is a cardinal, “quasi-constitutional” pillar of international humanitarian law.\(^{1221}\)

The High Contracting Parties to the Geneva Conventions, however, adopted a more cautious position: states should “make every effort” to ensure respect for the Conventions, while remaining mindful of the

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principle of non-intervention and the adequacy and proportionality of their response. Kalshoven dubbed the provision as nothing more than a moral duty to endeavour to ensure universal respect, and Cassese noted that if the obligation were “universally accepted” every conflict would elicit firm responses. Zych remarks that state practice favours action only “if public pressure at home is such that to act seems wiser than to run counter to public opinion.” Nonetheless, even though the duty may not prescribe a particular course of action, let alone mandate an obligation of result, Levrat notes that it implies a negative obligation to abstain from recognition of and assistance to unlawful actions, and to endeavour to bring about compliance by other states.

The duty to abstain from recognition extends to any legislative or administrative acts of the wrongdoing authority that are responsible for creating or maintaining the illegal situation. This duty is binding on all authorities of a third state or international actor, including judicial, legislative and executive bodies. In cases of occupation, third states cannot lawfully conduct dealings with an occupying power or the entities under its jurisdiction that would extend recognition to its unlawful acts in the occupied territory, including those that infringe upon the sovereign rights of the legitimate government and local population. Any judicial, administrative or executive act of an occupying power ultra vires of the limited authority granted to it under the law of belligerent occupation – and thus in breach of the international law on territoriality, self-determination and inter-state use of force – should not be treated as lawful

1227 See, e.g., US courts’ non-recognition of German military control of Holland and its annexation of parts of Czechoslovakia or the Baltic states; Eyal Benvenisti (2012) 245.
under the laws and by the authorities of a third state or international actor. In particular, when a wrongdoing state attempts to conduct dealings with a third state, on behalf of territory or rights therein that it unlawfully acquired, so as to benefit from its wrongdoings, neither the wrongdoing state’s authority nor the rights it claims to have in the territory can be accepted as lawful by a third state.\textsuperscript{1229} Third states may abstain from recognition of such acts in the context of diplomatic relations, treaty negotiations, or other forms of inter-state cooperation and relations, including ad hoc cooperation and business relations between private entities in the third state with those under the wrongdoing state’s jurisdiction.\textsuperscript{1230}

Despite a lack of guidance in international law and practice on the scope of the duty not to recognize and of a prohibition on recognition,\textsuperscript{1231} there are some indicators of the limits of permissive recognition of territorial and administrative rights. For instance, an act is likely to be considered internationally-unlawful if the wrongdoing authority applies certain domestic legal criteria to acts and situations under its jurisdiction in the occupied territory, in violation of the standard of the law of belligerent occupation. In many cases of belligerent occupation, the wrongdoing state imposes a legal order in the occupied territory that is equivalent to that of its domestic authorities, which purport to administer the territory as the sole legitimate sovereign, and extends its domestic legislative and administrative jurisdiction into the foreign territory. In such cases, engagements between a third state and the \textit{de facto} authority in the occupied territory would be deemed unlawful from the perspective of international law if they result in giving legal effect to or assisting in the unlawful acts of the wrongdoing authority.

Areas where non-recognition could preclude relations with the occupying state include trade, investment, as well as forms of economic, cultural, scientific and social cooperation. A public or private entity of a third state that may be operating in or supporting entities that operate under the aegis of the occupying power’s unlawful administrative and legislative acts would be recognising as lawful an internationally illegal territorial regime.\textsuperscript{1232} Exceptionally, it might be justifiable to coordinate humanitarian assistance operations for the benefit of the local population.

\textsuperscript{1229} Stefan Talmon (2005) 117-119.
\textsuperscript{1230} Yael Ronen (2012) 73-78.
\textsuperscript{1232} Stefan Talmon (2005) 125.
with the *de facto* authority of the occupying state, even where it may not otherwise be recognised as having *de jure* status.

The differing interpretations of the normative and operational parameters of the duty of non-recognition highlight the difficulty in operationalizing that duty. The law on non-recognition aspires to promote compliance through inter-state relations such as those intended to avoid the ‘normalisation’ of a territory’s unlawful status, and aims also to bar relations that benefit the authorities responsible for or involved in the unlawful conduct. Yet the decision to adopt such measures, as with any act of compliance with international law, depends on the third state’s political discretion. Further, even when third states adopt retorsion measures, they may not be sufficient to bring the wrongdoing state to conform its behaviour to international law, *bona fide*, and provide guarantees to this effect by restructuring, to the extent necessary, its legal and institutional practice. Stefan Talmon opines, given the political content given by states to the “obligation” of non-recognition, that “it is doubtful that such rules will ever be developed.”

### 2.2 Assessing State Practice on Non-Recognition of Unlawful Acts

The state practice of non-recognition has been developed in the main by international organizations, in the context of which states cooperate to collectively condemn and impose sanctions on illegal regimes and internationally wrongful acts. Collective pronouncements by international institutions have played an important role in identifying, condemning and prescribing an overall framework for state relations with illegal regimes.

The United Nations has called upon states not to recognise as legal *inter alia* the State of Rhodesia, the South African Bantustans, the Turkish Republic of Northern Cyprus, the annexation by Israel of East Jerusalem and the Golan Heights, the annexation of Kuwait by Iraq, the legality of the

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1233 Ibid, 125.
presence and administration of South Africa over Namibia and the authorities responsible for the administration of Namibia. The International Court of Justice has also condemned Israel’s annexation of Palestinian territory by the Separation Wall, Morocco’s annexation of the Western Sahara and the illegality of South Africa’s continued presence in Namibia.

States responding to international law violations have often relied on a lawful basis in international law to justify such measures, especially in situations entailing the unlawful acquisition of territory or other widely-condemned violations of international law, if not always explicitly. In discussing the recognition of governments, Roth submits that international law “requires according legal recognition to such authority as legitimately represents the state to which obligations are owed, and denying legal recognition to would-be usurpers.” When examining a third state’s obligation to recognise and give legal effect to the acts of a putative government, at least two principal legal ramifications are at play: (i) the authority’s ability “to determine the exercise or waiver of the state’s legal rights”; and (ii) its capacity “to incur international legal obligations binding on successor governments and to engage in legally effective transactions on behalf of the state.” In sum, the right or obligation to recognise the acts of a foreign authority are hinged on the conformity of the legal consequences arising from the foreign authority’s acts with international law.

Yet, in most state practice of specific instances of non-recognition, it is difficult or impossible to discern the basis or underlying rationale for the decision to take the measures. Some were politically motivated, others sought to punish wrongful acts, and still others were adopted on the basis

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1240 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ 131 (9 July) para. 37.
1241 Western Sahara, Advisory Opinion, ICJ Reports 1975, 68, para. 162.
1244 Roth affirms, “This imperative must inform any effort to elaborate the doctrinal context within which recent recognition controversies need to be assessed”; Brad Roth, Governmental Illegitimacy in International Law (Oxford, 2000) 121 et seq.
1245 Ibid.
of a risk-management rationale to disassociate the third state from an illegal regime. Reactions to the invasion of Kuwait, for instance, were relatively consistent among states, yet remain difficult to attribute to a specific legal basis, making it misleading and “over-optimistic” to hold that they were adopted in compliance with *erga omnes* obligations.\textsuperscript{1247} Similarly, the European Community’s suspension of its agreement with Yugoslavia, during hostilities in 1983, was based on its concerns for the precarious state of affairs in the foreign territory, its ability to ensure the proper functioning of the state’s institutions and maintenance of its rule of law, rather than being an act of compliance with *erga omnes* obligations.\textsuperscript{1248}

A procedural approach to the duty of non-recognition has also been recorded. Australia maintained that recognition of Indonesia’s actions did not signify approval of the circumstances surrounding its acquisition of East Timor,\textsuperscript{1249} noting that in the absence of new Security Council or General Assembly resolutions, the existing ones were dated and could not be relied upon as having indefinite effect.\textsuperscript{1250} It further argued that an international body must first make a determination on the illegality of Indonesia’s occupation of East Timor before Australia can adopt a position on non-recognition of Indonesian sovereignty.\textsuperscript{1251} Following Russia’s annexation of Crimea in March 2014, a communiqué issued at a G-7 summit in Brussels in June, including representatives from Britain, Canada, France, Germany, Italy, Japan and the United States declared “Russia’s illegal annexation of Crimea, and actions to destabilize eastern Ukraine are unacceptable and must stop,” and upheld a commitment “to intensify targeted sanctions and to implement significant additional restrictive measures to impose further costs on Russia should events so require.”\textsuperscript{1252} Japan appears to have sought to align its acts with this position in statements it made before Ukrainian officials to sign an agreement to provide aid loans to the Ukrainian government.\textsuperscript{1253}

\textsuperscript{1247} Ibid.
\textsuperscript{1248} Ibid, 228.
\textsuperscript{1250} Portugal v Australia, Oral Pleading of Australia CR 95/14, 16 February 1995, 10.
\textsuperscript{1251} Portugal v Australia, Oral Pleading of Australia CR 95/8, 7 February 1995, 55.
\textsuperscript{1253} See, e.g., Japanese Foreign Minister, Fumio Kishida, declared: “Japan will never tolerate any attempt to alter the status quo by force” and has “consistently called for respecting the rule of law, Ukraine’s sovereignty and territorial integrity”; ‘Japan condemns Russia’s annexation of Crimea’, *Kyodo News International*, 17 July 2014 <http://www.globalpost.com/dispatch/news/kyodo-news-international/140717/japan-condemns-russias-annexation-crimea>.
Countermeasures taken in response to grave violations of international law have similarly varied in their form and extent.\textsuperscript{1254} One of the first coherent manifestations of the practice of non-recognition was the Stimson doctrine, established by the US Secretary of State through his refusal to recognise any \textit{de facto} situation or treaty impairing China’s territorial integrity or political independence by Japan.\textsuperscript{1255} At the time, only seven countries ignored the appeal and entered into treaty and diplomatic relations that gave legal effect to Japan’s claims to Manchukuo.\textsuperscript{1256} Decades later, in 1978, the US government prohibited exports and imports from Uganda in order to “dissociate itself from any foreign government which engages in the international crime of genocide.”\textsuperscript{1257} In 1981 the US and other Western countries suspended treaties for landing rights with the Polish government, for imposing martial law, suppressing demonstrations and detaining dissidents.\textsuperscript{1258} States that took measures against South Africa for its intensification of closures and extension of the state of emergency in 1986 arguably went well beyond the economic boycott mandated by the Security Council to include a variety of countermeasures short of military force.\textsuperscript{1259}

Still other cases have exposed relatively ineffective responses, in terms of the refusal to give legal effect to internationally-wrongful acts, such as the case of Turkey’s unlawful administration of the Turkish Republic of Northern Cyprus (TRNC) and the latter’s declaration of independence. Despite a Security Council resolution holding that Turkey’s use of force against Cyprus in 1974 was “legally invalid” and calling on states to avoid any dealings with the Turkish authorities that would lend it recognition as lawful,\textsuperscript{1260} a number of states continue to engage in trade and

\begin{itemize}
\item \textsuperscript{1256} John Dugard, \textit{Recognition and the United Nations} (Cambridge, 1987).
\item \textsuperscript{1257} Uganda Embargo Act, Public Law 95-435, 10 October 1978, United States Statutes at Large 1978, xcii, pt 1 (1980) 1051–1053.
\item \textsuperscript{1260} Security Council Resolution 541, 18 November 1983, UN Doc. S/RES/541.
\end{itemize}
other relations with northern Cyprus. Similarly, in its judgment in *Cyprus v Turkey* from May 2001, the European Court of Human Rights noted that “the obligation to disregard acts of de facto entities is far from absolute.”

Similarly, Judge Onyeama held in the ICJ Opinion on Namibia that although there was an obligation for third States not to recognise the legality of South Africa’s presence, this did not include “refusing to recognise the validity of South Africa’s acts on behalf of or concerning Namibia in view of the fact that the administration of South Africa over Namibia (illegal though it is) still constitutes the de facto government of the territory.” Nonetheless, the Court ruled that UN member states must refrain from invoking or applying existing treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia, which entail active intergovernmental cooperation.

3. Domestication of International Law Norms and the Non-Recognition of Illegal Regimes

Before the proliferation of international criminal and political accountability mechanisms, bilateral acts of non-recognition were one of the principal ways for states to contest unlawful acts by foreign authorities. When such an authority exceeds the parameters of its otherwise limited administrative authority as a belligerent occupier, or non-sovereign administrator of the territory, “non-recognition can operate in a factual situation that also takes the form of a legal claim.” Yet, such practices remained largely inconsistent, to the extent that instances of non-recognition affirm the voluntarism entailed in the adoption of such measures. Indeed such measures are often considered as acts of retorsion – a form of sanction with punitive affect on the wrongdoing authority –

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1261 See, on the non-recognition of Turkey’s unlawful acts in northern Cyprus, Section 2.2, Chapter IX.
1262 *Cyprus v Turkey*, Application no. 25781/94, European Court of Human Rights, judgment of 10 May 2001, para 96. See also, the Court’s just satisfaction decision awarding 90,000,000 EUR to families of missing persons; *Cyprus v Turkey*, Application No 25781/94, Judgment (Just Satisfaction), 12 May 2014.
1264 Ibid.
1265 Stefan Talmon (2005) 125.
rather than an act compelled by legal obligation intended to uphold the rule of law as a duty to the international community as a whole.\textsuperscript{1266}

The duty of non-recognition’s doctrinal foundations consist of the prohibited acts set out in the law of state responsibility – aiding, assisting or giving legal effect – intended, at least indirectly, to propel measures of inter-state enforcement. Yet the international practice, scope, and content of the duty is not limited to formally codified and institutionalized legal processes. In fact, the doctrine and its practice are significantly complemented by the institutional practices and criteria of legality incorporated into the domestic law and public policy of law-abiding states, intended to reflect the logic of the doctrine. Since the very act of recognition, or non-recognition, is premised on state bilateralism, it is also based on a decision adopted on the basis of international norms that “work their influence through the filter of domestic structures and domestic norms.”\textsuperscript{1267}

As the discussion in the previous section showed, it may be hard to discern the operation of international norms that become widely accepted by state actors within their own domestic legal orders -- including the prohibition on sovereignty, conquest, colonialism and the right to self-determination, as well as internationally criminalised conduct such as war crimes and crimes against humanity, \textit{inter alia}. Yet precisely such “domesticated” international law norms are most arguably viroigious and promising at bringing about compliance with the specific legal criteria enshrined in international law.\textsuperscript{1268} This is the case, for instance, with the measures adopted by states against individuals and entities suspected of being involved in transnationally criminal conduct embedded in states’ immigration control laws intended to protect their public order.\textsuperscript{1269}

These intersections between domestic and international law, which remain under-explored both in practice and in the international law


\textsuperscript{1268} Ibid, 904.

scholarship, can thus provide both content to and an operational basis for the international duty of non-recognition. In other words, a third state or international actor may be necessitated to adopt specific measures in order to ensure that it is not implementing domestic law, including inter-state relations and agreements, in a manner that is inconsistent with its own public policy commitments regarding the application of international law to predicate facts under the jurisdiction of another state. If the third state’s domestic law does not provide a basis for excluding those unlawful acts, the third state may find itself obliged to amend that law accordingly.

In some cases where third states or non-state actors have maintained relations with public or private entities operating under an illegal territorial regime, the third state has adopted risk-aversive measures to ensure the non-contamination of its domestic legal order by the unlawful conduct of a foreign authority, and, more concretely, to protect persons under its jurisdiction from undue harm, either direct or indirect, as a result of their unwarranted reliance on the institutional practice of the wrongdoing authority. A discussion of such measures and the rationale behind their adoption by domestic jurisdictions is the subject of the following chapter. When, due to the extent of inter-state relations, the legal effects of the wrongdoing state’s acts permeate the legal order of the third state, the latter may be required to bring about the conformity of the wrongdoing state with international law norms, or to abandon its inter-state relations therewith, since maintaining them would risk the deficient implementation of domestic law.1270 In this sense, as Finnemore and Sikkink have remarked, “there is a two-level norm game occurring in which the domestic and the international norm tables are increasingly linked.”1271

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CHAPTER IX

NON-RECOGNITION, DOMESTIC LAW AND INTERNATIONAL LAW ENFORCEMENT

From the perspective of international law, the duty of non-recognition “operates in a self-executory way” and “the absence of any direction by an international organization does not relieve any state from the duty of non-recognition.” Yet in virtually all cases, a state’s decision to respect and comply with international law – let alone bring another state to comply – is balanced, absent sanctions prescribed by the United Nations, against other, political considerations. In practice, as discussed in the previous chapter, it is unlikely that a court reviewing the legality of the occupier’s exercise of authority in occupied territory, or a state authority that is asked to assess a situation in a foreign jurisdiction, will have the authority to override domestic political considerations in the name of international law. This power dynamic changes, however, if a nexus can be established with national law that in turn would trigger the operation of domestic regulatory processes based on the internal legal necessity of the state’s public order.

As noted in preceding chapters, domestic jurisdictions have increasingly internalized elements of international law through domestic public policy. In such cases, a state’s positions on the application of international law to facts occurring under the jurisdiction of another state become the standard for its implementation of domestic law to predicate facts under the aegis of the other state – including the acts of an occupying authority whose unlawful acts in foreign territory have created an illegal territorial regime. Similarly, in such cases, a state’s public policy commitments may also become the basis for the way the state structures its relations with a foreign authority, and the standard in accordance with which the state’s regulatory authorities are required to implement domestic law. Since the proper implementation of domestic law and public policy

is part of the existential need of states to uphold the integrity of their legal orders, a deficiency in the implementation of domestic law that may ensue from that state’s inappropriate reliance on the wrongdoing foreign authority may translate into demands on a foreign authority, with which the third state is engaged in inter-state relations, or require the state’s exclusion of predicate facts occurring under the third state’s jurisdiction.

These novel modes of enforcing state compliance with international law hinge the operationalisation of the otherwise hazy content of the duty of non-recognition in international law. They may be elaborated to provide states with concrete criteria that would ensure that violations by foreign authorities do not become the basis for the implementation of their domestic law. Moreover, this approach also provides an exigent and vigorous enforcement mechanism for ensuring the state’s compliance with the duty of non-recognition, and even, in some cases, for requiring the wrongdoing authority to conform its conduct with international law in order to maintain relations with a third state.

1. Non-Recognition and the Domestic Law-Based Enforcement Paradigm

The paradigm set out in the following sections is applicable when three elements are present. First, a state adopts public policy positions that have the effect of internalizing international law in its domestic law. Second, the law-abiding state enters into proximity relations with a wrongdoing authority that entail the law-abiding state’s reliance or extension of comity to the practices of the wrongdoing authority, where these same relations also require the law-abiding state to apply legal criteria, including international law, to the third state. Such relations can take different forms, including economic, trade or social and cultural cooperation, either treaty-based or ad hoc. Third, a law-abiding state’s authorities are obliged to implement domestic law fully and effectively, and thus in accordance with its public policy commitments on the application of international law to specific facts and situations in third countries. The state’s internal need to maintain the integrity of its rule of law, as discussed below, can also require the third state to demand that the wrongdoing authority guarantee conformity to allow relations the continuation of relations.1274

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1.1 Predicate Facts and ‘Internalised’ International Law Norms

In the course of applying its domestic legislation, a state is often required to assess the conformity of situations or activities taking place under the jurisdiction of another state or de facto authority, as predicate facts. Such conformity assessments consider predicate facts and situations under criteria set out in domestic law and public policy, which includes positions taken by the state executive on the application of international law. While such political positions can promote compliance with international law, technically, they also set a standard for the full and effective implementation of domestic law, which is based on a hard, factual legal test and is enforced in accordance the administrative obligation of state authorities to maintain the rule of law. In the case of the EU, the detection and resolution of deficient implementation of EU law caused by external relations with wrongdoing authorities is the work of the European External Action Service, which is charged with maintaining consistency between EU activities and policies, in accordance with the EU’s Common Foreign and Security Policy. On this basis, the EU and its Member States have, for instance, upheld the illegality of the northern Cyprus regime, of Israel’s acts in Palestinian and Syrian territory, and of Russia’s acts in Georgian and Ukrainian territory.

International laws are regularly applied by states in the formulation of their public policy. In many cases, states have also internalized international law as part of domestic laws. Examples include trade, origin and certification laws, including product safety standards, banned substances and good manufacturing regulations; data protection laws; money laundering laws; and corporate governance laws, including those providing for the protection of consumers, procurers and investors. These

domestic laws internalise elements of international human rights law, the law of belligerent occupation, the prohibition of territorial acquisition by force, and respect for the self-determination of peoples and its corollary prohibition on regime change. When the third state sets out positions and commitments recognising its own obligations under international law, it renders those obligations internally enforceable: such domestic laws require state authorities to assess predicate facts occurring under the jurisdiction of a third country, including an occupying state in the occupied territory, in accordance with domestic public policy on the application of the law of belligerent occupation and other international law.

In the case of the EU and its Member States, international law is a general principle that regulates the exercise of powers by state regulatory authorities. Moreover, the EU’s institutions have also internalised the general commitment to respect both treaty-based and customary international law obligations in good faith by incorporating these obligations in internal laws in a range of legal and policy instruments. For instance, the Treaty of the EU and the EU’s Common Foreign and Security Policy enshrine its institutional commitment to respect “human rights and fundamental freedoms” and the “rule of law,” and the obligation to “ensure respect for international law in the exercise of its powers.” In line with these commitments, the EU’s political organ, the Council, has published Guidelines on the Promotion of Compliance with International Humanitarian Law, including in the EU’s external relations.

The incorporation of international law into internal or domestic law can be direct, in cases where treaty-based obligations are transposed into specific laws, or indirect, such as where the state’s commitment to uphold international law is based on specific public policy positions it adopted concerning the legal status of the acts of foreign authorities. The indirect form of incorporation is often overlooked as a basis for the enforcement of international law in the internal or domestic realm. Yet states and

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1279 Article 49, Consolidated Version of the Treaty on European Union, Articles 2 and 49, 2010 OJ C 83/01.
international actors typically endeavor to maintain consistency between their public policy positions and the manner in which state regulatory authorities apply domestic laws, when required to do so on the basis of extra-territorial predicate facts.\textsuperscript{1282} The Treaty of the EU explicitly sets out the principle of ensuring consistency between EU policies and activities, entrusting it to the mandate of the EU’s External Action Service.\textsuperscript{1283}

The basis on which law-abiding states and international actors such as the EU implement their internal legislation in accordance with their public policy is an existential need to maintain the coherence, predictability and integrity of the domestic political and legal order. In other words, the executive and foreign office are charged respectively with a duty to protect the domestic legal order from contamination by internationally-unlawful acts occurring extra-territorially, since such acts endanger and create risks for entities operating under the state’s jurisdiction if they become the basis for the implementation of these entities’ domestic law obligations.

\section*{1.2 Comity and Reliance in Inter-State Relations}

States act on their imperative need to implement domestic law and public policy correctly and coherently – in accordance with the abovementioned principle of consistency – when they engage in inter-state relations.\textsuperscript{1284} In many cases, a state must ensure that it can rely on foreign authorities to apply legal criteria, including those originating in international law, in a manner that is at least functionally equivalent to that state’s own institutional and legal practice. Since the third state has no control over the predicate acts under the responsibility of the third country, or over the manner in which the foreign authority assesses and applies specific legal criteria, it must be able to guarantee the latter’s functional equivalence in order to continue inter-state relations in a manner that does not detrimentally affect its ability to ensure consistency and legal certainty by upholding its public policy commitments in the implementation of domestic law. This form of reliance, inherent to the doctrine of comity, is the basis for operationalising the third state duty of non-recognition, as well as a source for potential inter-state measures of enforcement, as discussed below.

\textsuperscript{1283} Article 21(3), Treaty of the European Union.
Domestic regulatory authorities often not only apply domestic law on the basis of predicate facts that occur under the jurisdiction of a foreign authority, but also rely on the correct and equivalent assessment of facts by that authority. For example, the collection of customs duties by the customs authorities of a third state is predicated on a determination of the place where the product was in fact produced. Some domestic customs laws, often based on bilateral trade agreements or public policy considerations, require duty to be collected on products produced in certain locations as opposed to others, and at varied rates depending on the location of production, assembly or packaging. To properly implement these domestic laws and apply the correct regime of duty recovery and customs tariff, a customs official, under a direct responsibility to recover duties correctly, must rely on the determination of the foreign authority and its definition of the status of the territory in which the product was produced. The predicate act, in this case, is the place of production of the product, a fact that is often provided by an entrusted foreign authority with which the third state may have concluded a trade agreement. Similarly, EU data protection laws require the relevant EU authority to rely on a foreign authority, from which information is received, to apply the EU’s standards of data protection.

A state is required under domestic law to ensure the adequate assessment of the institutional practice of a foreign authority in cases where it concludes inter-state agreements and conducts relations with a foreign authority, or permits private entities subject to its jurisdiction, e.g. corporate nationals, to engage in relations with private entities under the foreign authority’s jurisdiction. Such assessments to guarantee

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1288 Commission decides that Israel’s adequacy to EU norms for the purposes of personal data protection is limited to Israel’s pre-1967 borders. Commission decision Nr. 2011/61/EU, adopted 31 January 2011, OJEU L-27, 1 February 2011, 39-42.

1289 A similar mechanism of adequate reliance applies to international organisations, e.g. Israel’s OECD accession required a commitment by the Israeli General Office of Statistics to submit to the OECD disaggregated statistical data distinguishing between Israel’s pre-1967 borders and the occupied territories; The instruments of Israel’s OECD accession: Statement by the Government of the State of Israel concerning the acceptance by the State of Israel of
appropriate reliance on a third country’s institutional and legal practice are required in order for the state to guarantee its own ability to implement its obligations under its domestic laws. In cases where the state is law-abiding and has incorporated international law into its domestic law, it may also require the foreign authority’s assessment of predicate facts to conform to international law. Essentially, the foreign authority itself is being relied on to ensure the proper application of the state’s domestic legislation.

This rationale is embodied in the private international law doctrine of comity, intended to resolve conflicts of laws. The doctrine provides that a state’s courts and regulatory authorities will apply foreign law or limit their own jurisdiction out of respect for foreign sovereignty. The doctrine is premised on the recognition one nation affords within its own territory to the legislative, executive or judicial acts of another nation, having due regard both to international law and the convenience of the forum, and to the rights of its own citizens or of other persons who are under its protection.

The doctrine of comity in international relations is based on the assumption that where the state is circumstantially required to rely on a foreign authority’s assessment of facts, it may require the latter, when necessary, to ensure at least functional equivalence of such determinations. Since the state’s authorities cannot be held responsible for ensuring the adequate equivalence of a foreign authority’s practice of applying criteria of legality, nor control or conduct assessments of acts occurring under the foreign jurisdiction, if it becomes overwhelmingly evident that the institutional and legal practice of a foreign authority contravene international law – as well as the third state’s public policy position with respect to the status of such practices under international law – the third state’s authorities would be legally necessitated to refuse its equivalence by

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internal regulatory processes, in order to uphold the integrity of their domestic legal order.\textsuperscript{1293} A foreign authority that is notorious for its deficient application of international law should be presumed to act in a manner that would fall short of the standard required to allow a law-abiding state to appropriately rely on its determinations to implement its own law.

As discussed below, countries including Morocco, Turkey and Israel, which conduct trade and cooperation relations with the EU, have adopted policies and enacted domestic legislation that contravene peremptory norms of international law. If the EU is to continue its external relations with these wrongdoing authorities, it must guarantee that it is not implementing these cooperation agreements in a manner that gives legal effect to internationally unlawful acts. Such cases of non-equivalence in the assessment of predicate facts under the jurisdiction of a foreign authority – especially when the law-abiding third state is not in a position to make the determination itself – may result in the third state authority being rendered unable to correctly implement its domestic law and public policy.

In most cases a state’s decision to refuse recognition of equivalence is conditioned on political considerations.\textsuperscript{1294} Yet as discussed above, if the foreign authority’s wrongful assessments threaten the third state’s ability to fully implement its laws, the third state would become compelled by the need to protect its own legal order to provide guidance and set standards in law for the non-recognition of acts under the foreign authority’s jurisdiction. Third state authorities have, for instance, circulated industry advisories to warn businesses of the “clear risks related to […] financial transactions, investments, purchases, procurements as well as other economic activities (including in services like tourism) in Israeli settlements or benefiting Israeli settlements.”\textsuperscript{1295} Moreover, in cases where third states have adopted positions on the legality of certain acts by the executive branch of another state, the third state’s courts may be required to ensure the enforcement of those positions. For instance, the Jerusalem District Court refused to recognise a degree conferred by the proxy authorities of the Turkish occupier – the Turkish Republic of Northern Cyprus (TRNC) –


\textsuperscript{1294} Hersch Lauterpacht, Recognition in International Law (1948) 50-51.

\textsuperscript{1295} See, e.g., UK Foreign Office warning that activities “entail legal and economic risks stemming from the fact that the Israeli settlements, according to international law, are built on occupied land and are not recognised as a legitimate part of Israel’s territory.” Guidance, Overseas Business Risk – the Occupied Palestinian Territories, 3 December 2013, <www.gov.uk/government/publications/overseas-business-risk-palestinian-territories/overseas-business-risk-palestinian-territories>.
because it was not regulated by the competent authorities of the territory, as required under Israel’s public policy position; the court deemed that the competent authorities should have been the authorities of the Republic of Cyprus.  

Similarly, in the case of Artesa Trading v Credit Bank of Moscow, the Larnaca District Court found that a company had no legal personality and therefore no standing to sue, because it was an assignment of another company registered in the TRNC. In other cases, states have enacted domestic legislation that precludes their authorities from giving legal effect to unlawful acts. Article 4(5) of the EU Green Line Regulation on the movement of goods and persons to and from the regime in northern Cyprus, for instance, provides that “Goods shall be accompanied by a document issued by the Turkish Chamber of Commerce, duly authorized for that purpose by the Commission in agreement with the Republic of Cyprus.”

1.3 Internal Legal Necessity and Demands for Conformity by Third Countries

In several cases discussed in this chapter, third states have proactively responded to unlawful acts by foreign authorities in order to uphold their own legal and policy commitments. These instances tend to involve third states’ reliance on a foreign authority, where such reliance is at odds with their need to uphold public policy positions on international law; the EU, for instance, promotes and urges compliance with international law generally due to its own perceived public interest. Such third states may find themselves confronted simultaneously with situations and facts under the jurisdiction of a foreign authority, and the need to ensure the correct implementation of domestic law, such that it does not give legal effect to facts that the executive does not recognize as lawful, including the foreign authority’s territorial claims and unlawful administration of territory it occupies. In such cases, an occupying power’s extension of its domestic legal, executive or operational jurisdiction into the occupied territory, in contravention to the law of occupation and international law rules on territoriality, produce legislative, administrative and executive acts by that

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authority that are internationally unlawful and as such cannot be recognised as lawful by a law-abiding third state’s legal order.\textsuperscript{1299}

If a third state discovers that it is engaged in relations with a wrongdoing authority and is unable to extend comity to the authority’s practices due to their non-equivalence with the third state’s positions, the third state is placed under an obligation to ensure that its legal order is not contaminated by unlawful acts: it is put on notice to review its relations with the wrongdoing authority. In the course of such review, it may be required to place demands and obtain appropriate guarantees from the foreign authority to ensure its willingness and ability to conform its practice to certain legal criteria, including international law. If the third state acts indifferently and fails to prevent the wrongful acts from systematically altering or determining the implementation of its internal or international law obligations, the result will lead to the deficient implementation of its domestic law\textsuperscript{1300} – a threat to the integrity of its legal order.

A state that reacts effectively in these conditions by ensuring that internationally unlawful acts are not lent recognition should neither impose a heavy burden on itself to accommodate business-as-usual with the wrongdoing foreign authorities, nor allow for a high degree of fallibility whereby it risks the deficient application of its domestic law and public policy. In most cases where deficiencies in relations with a wrongdoing authority have been exposed, the law-abiding state has demanded guarantees of conformity, to require the wrongdoing authority to provide evidence of its revision of institutional and legal practices that were the basis for its unlawful acts. For instance, the wrongdoing authority may be required to ensure that a specific exported product is not contaminated in a manner that breaches the domestic laws of the third state, and to effectively revise its institutional practice and law to guarantee that no exported product is contaminated.

Similarly – as was the case in the negotiation of a cooperation agreement between Europol and Israel discussed below – if the domestic authorities of the occupying state extend their domestic jurisdiction into occupied territory, the third state would be required to ensure with certainty that the occupying state will guarantee that its practice conforms


to the definition of the territory under the sovereign authority of the wrongdoing state, including by signing an agreement that explicitly does not cover the whole of the territory the wrongdoing authority considers to be placed under its administration as a sole sovereign. Territorial clauses in bilateral agreements and unilateral declarations, whether by the third state or the wrongdoing authority, are often insufficient to ensure that a third state that has adopted a position concerning the facts occurring under the foreign authority’s jurisdiction in its domestic public policy will be able to comply with the duty to uphold these commitments, including by ensuring the consistent implementation of its domestic laws. The only feasible solution in many cases is to place the burden on the wrongdoing foreign authority and require it to make the necessary institutional changes to guarantee that the necessary distinctions and proper interpretations of the relevant legal criteria are ensured in all cases.

2. EU External Relations with Illegal Territorial Regimes and the Role of Non-Recognition

The EU is not only a prominent regional and international actor with extensive and varied external relations: it also governs and regulates its external actions with an exceptionally developed set of internal legal and administrative acts, which incorporate as a general principle the EU’s obligation to respect international law. EU internal law commits its institutions to respect and promote international law in the exercise of their powers, including through external relations. This obligation is set out in the EU’s Common Foreign and Security Policy, and its constitutive Treaty. The EU has committed itself to “develop and consolidate democracy and the rule of law, and respect for human rights and

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1301 Agreements not covering the whole of a state’s territory is permitted under customary international law; Article 29, Vienna Convention on the Law of Treaties between States 1969.
1302 See, e.g., for commitments placing the burden on the wrongdoing authority: 1972 agreement on the US-Israel Binational Science Foundation / BSF (signed by Yitzhak Rabin as Israeli ambassador in Washington); 1976 agreement on the US-Israel Binational Industrial Research and Development Foundation / BIRD; Agreement on the establishment of a German-Israeli Foundation for Scientific Research and Development.
fundamental freedoms” in the course of its external relations. It further obliges itself to promote “democracy, rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.” The promotion of the rule of law includes maintaining the integrity of the international legal order as one of its key objectives. In the case of Racke v. Hauptzollamt Mainz, the European Court of Justice held that the EU is required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions, granted by virtue of an agreement with a third country.

Moreover, the 1991 European Commission Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, provide that “the Community and its Member States will not recognise entities which are the result of aggression.” The 2009 Commission adopted the Guidelines on Promoting Compliance with International Humanitarian Law – an instrument of internal soft law – which commit the EU to promote these legal criteria in their external relations through a set of operational guidelines, including by making determinations and taking firm positions concerning situations and acts under the jurisdiction of foreign authorities with which it concludes relations, in accordance with international law. While they do not in themselves prescribe an obligation of result to procure effective compliance by other states, they require EU institutions to take reasonable measures to fulfill an obligation of due diligence. Cumulatively, the Guidelines and their antecedent in the Treaty of the European Union form the basis for the EU’s internal obligation to promote compliance by third countries with international law through their mutual relations and adopt restrictive measures to this effect, where appropriate.

In some cases, the EU has structured contractual relations with third states in a manner that gave legal effect to internationally unlawful acts. Due to oversights, these relations mandated both parties to implement

1306 Ibid, Article 21.
1310 Ibid.
agreements in accordance with their respective national laws – which in the case of wrongdoing authorities permit internationally unlawful acts. Nonetheless, the EU has also committed itself to ensure consistency between its policies and activities. Accordingly, the EU and its Member States need to structure their external relations with foreign authorities whose institutional practice entails internationally unlawful acts so as to ensure the non-recognition of such acts. If the EU’s relations with a foreign authority already require the latter’s compliance with these criteria of legality, the EU must ensure that the foreign authority brings its practice into conformity so as to guarantee its functional equivalence with EU law and public policy, including incorporated elements of international law. Due to the extent and importance of its beneficial relations with third countries, the EU is in a unique position to use its normative power to generate compliance pull with international law. The EU’s relations with Morocco, Turkey and Israel, discussed below, are illustrative of the EU’s practice of non-recognition in its inter-state and proximity relations between both public and private entities.

2.1 EU-Morocco Relations and Morocco’s Annexation of Western Sahara

The EU’s relations with Morocco have fallen short of ensuring the EU’s non-recognition of the Moroccan authorities’ internationally unlawful acts in the territory of Western Sahara, despite EU public policy commitments in this regard. Despite having documented a sufficient number of breaches by Morocco’s authorities of the terms of the agreement, some of which the Commission has been reticent to share publicly, the EU has yet to ensure that its cooperation relations with the Moroccan government are structured in a manner that precludes it from recognizing activities conducted by the Moroccan authorities that contravene Morocco’s international law.

1311 EU-Israel Association Agreement, Annex III.
obligations vis-à-vis the local population of the Western Sahara, in accordance with its duties as a *de facto* occupying power.

In a 1975 Advisory Opinion, the ICJ affirmed the Sahrawi people’s right to self-determination in the territory of Western Sahara, confirming that Morocco had no legal claims to the territory. With Spain’s withdrawal in 1976, Morocco proceeded to conquer the territory: about 300,000 Moroccans moved into Western Sahara, as part of the so-called “Green March” in November 1975. In February 1976, the Frente Polisario, the Polisario Front – the Popular Front for the Liberation of Saguia al-Hamra and Rio de Oro – declared the establishment of the Sahrawi Arab Democratic Republic (SADR), which was later admitted to the Organization of African Unity and recognised by scores of countries.

The international community considers the Western Sahara a non-self-governing territory that is *de facto* administered by Morocco. The UN has referred to the territory as occupied, and to the Moroccan government as being bound by the law of belligerent occupation in its activities in the occupied territory. The UN General Assembly “[d]eplore[d] the aggravation of the situation resulting from the continued occupation of Western Sahara by Morocco”, and urged “Morocco to join in the peace process and to terminate the occupation of the territory of Western Sahara”. The ICRC’s 2012 report on *Occupation and Other Forms of Administration of Foreign Territory* held that the continued presence of external Moroccan armed forces in Western Sahara means that the occupation continues. The Moroccan authorities administering the territory of Western Sahara have maintained that they are the sole sovereign administrator in the territory.

Morocco’s invasion of the Western Sahara in 1975 constitutes an act of aggression on two grounds: the use of force by a state in any manner inconsistent with the UN Charter, and the explicitly prohibited use of force

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1314 ICJ Advisory Opinion on *Western Sahara*, ICJ Reports 1975, 12.
1316 General Assembly Resolution 34/37, 21 November 1979; General Assembly Resolution 35/19, 11 December 1980. UN Commission on Human Rights, The right of peoples to self-determination and its application to peoples under colonial or alien domination or foreign occupation - Denial to the people of Western Sahara of its right to self-determination and other fundamental human rights, as a result of the occupation of its territory by Morocco, 6 March 1981, UN Doc. E/CN.4/RES/12(XXXVII).
in order to acquire the territory of another state or part thereof.\textsuperscript{1318} Morocco’s use of force also violates two elements of the Sahrawis’ right to self-determination: the procedural right to freely determine their political status, and substantive right to permanent sovereignty over natural resources. A 2006 report of the Mission of the Office of the High Commission for Human rights to the Western Sahara found that, “almost all human rights violations and concerns with regard to the people of Western Sahara, whether under the de facto authority of the government of Morocco or of the Frente Polisario, stem from the non-implementation of the right to self-determination.”\textsuperscript{1319} Morocco’s exploitation of natural resources -- such as fish, sand and phosphates -- is carried out “in disregard of the needs, interests and benefits of the people of that territory,”\textsuperscript{1320} in violation of the right of the Saharawi people to permanent sovereignty over their natural resources. There are no indications that Morocco consults with the Polisario or takes decisions “in collaboration with the peoples of the territory in accordance with their wishes in order to make a valid contribution to the socio-economic development of the territory.”\textsuperscript{1321} The prolonged \textit{jus ad bellum} violations by Morocco are such that it does not benefit from the de jure status and rights of an occupying power: the occupying power’s obligations apply, but not such rights as to temporarily infringe on the right to self-determination, since Morocco is considered to be maintaining an illegal regime that flagrantly and permanently denies the Sahawari people their right to self-determination.

The EU’s position vis-à-vis the Moroccan annexation of Western Sahara, as stated by the Fisheries Commissioner, “does not question


\textsuperscript{1320} Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, UN Doc S/2002/161, 12 February 2002.

\textsuperscript{1321} General Assembly Resolution 52/72, 10 December 1997; General Assembly Resolution 53/61, 3 December 1998; General Assembly Resolution 54/84, 6 December 1999; General Assembly Resolution 55/138, 8 December 2000; and General Assembly Resolution 56/66, 10 December 2001. The Polisario has opposed Moroccan exploitation of natural resources, including its contracts with foreign companies to exploit those resources; Letter by the Polisario/SADR to Island Oil and Gas plc, an Irish company, from 14 October 2006; Letter by Polisario/SADR to Kosmos Energy LLC, a United States company, 16 June 2006; Announcement of Western Sahara Oil and Gas Initiative of 5 May 2005.
international law.” 1322 Yet, the 1988 EU-Morocco Fisheries Agreement applied to the waters under Moroccan sovereignty as well as those off of Western Sahara, both of which were referred to as “waters under the sovereignty or jurisdiction of Morocco.” 1323 The agreement’s preamble stated, without clearly distinguishing between the territories, that “Morocco has established an exclusive economic zone extending 200 nautical miles from its shores within which it exercises its sovereign rights for the purpose of exploring, exploiting, conserving and managing the resources of the said zone.” 1324 A renewed agreement, signed in 1992, included the Western Sahara port of Dakhla as one of the Moroccan ports that would receive technical visits. 1325 The 1995 version of the agreement also included Western Sahara’s waters, by stating that it “provides fishing opportunities for Community fisherman in waters over which Morocco has sovereignty or jurisdiction,” 1326 without making any provisions for the rights of the population of Western Sahara.

An internal legal opinion by the Legal Office of the European Parliament, dated 13 July 2009 and later obtained by rights groups, found that the agreement unequivocally held that EU vessels would be authorised to fish in the waters of the occupied territory, but that there was no proof that “the EC financial contribution is used for the benefit of the people of Western Sahara,” 1327 and noted that the Legal Office had not been consulted


in relation to the former EU fisheries agreement in Western Sahara.\textsuperscript{1328} It concluded that “[i]n the event that it could not be demonstrated that the FPA [Fisheries Partnership Agreement] was implemented in conformity with the principles of international law concerning the rights of the Saharawi people over their natural resource […] the Community should refrain from allowing vessels to fish in the waters off Western Sahara.” The European Parliament’s Legal Service’s previous opinion from February 2006 adopted a more nuanced position: the agreement grants “full discretion” to the Moroccan authorities to comply with its international law obligations, but it “would be useful […] to receive indications from the Commission and/or from the Council” about the extent to which the implementation of the agreement foresees a benefit for the Western Sahara people.\textsuperscript{1329} The agreement established a joint committee, intended to monitor Morocco’s implementation vis-à-vis Western Sahara, which could seek the agreement’s suspension if the agreement recognised violations of international law by Morocco.\textsuperscript{1330} Both legal opinions held that the principles of self-determination and of sovereignty over natural resources must be respected by Morocco and that the EU would consider the suspension of the agreement if Morocco disregards the interests of the people of Western Sahara.\textsuperscript{1331} However, these oversight mechanisms have not effectively prevented violations by Morocco, which have been widely documented by the UN, as well as local and international rights groups.\textsuperscript{1332}

The agreement itself neither excludes nor includes the Western Sahara territory under the sovereignty of Morocco, but defers the application of international law mandated by Morocco’s internationally unlawful administrative and legal practice.\textsuperscript{1333} Even if it is argued that deferring the matter to the Moroccan authorities was the sole manner to

\textsuperscript{1328} Fish Elsewhere, Morocco rejects visit from European Parliament, 4 June 2010 <http://www.fishelsewhere.eu/a140x1143>.

\textsuperscript{1329} Legal Opinion, re: proposal for a council regulation on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco – compatibility with the principles of international law, SJ-0085/06, 20 February 2006 (on file with author) 9.

\textsuperscript{1330} Ibid.


arrive at a *modus vivendi* that would not sacrifice their fishing interests in the area,\textsuperscript{1334} the EU failed to act with the proper due diligence to ensure its ability to rely on Morocco’s respect for international law in good faith, and its non-recognition of violations of peremptory norms of international law.\textsuperscript{1335} By taking the open-ended, risk-prone approach of including Western Sahara waters under Morocco’s jurisdiction in the agreement, without adequate provisions to ensure Morocco’s conformity with international law, the EU recognised Morocco’s practices as equivalent to its own, permitting them to form the basis for the implementation of EU law.\textsuperscript{1336} The problem is two-fold. First, the *modus vivendi* violates EU law, which should refuse to recognise both licenses issued by the Morocco Fisheries Department in the Western Sahara without involvement of the local authorities, and Morocco’s extension of its domestic jurisdiction into foreign territory in violation of the prohibition of annexation. Second, it violates the EU’s commitment to ensure non-assistance in Morocco’s exploitation of the territory’s natural resources for its own, virtually exclusive benefit.

On 24 July 2013, a new EU Protocol was adopted that includes a reference to the respect of democratic principles and fundamental human rights, in conjunction with a suspension mechanism in cases of violations of these principles.\textsuperscript{1337} In practice, however, it does not require the Moroccan authorities to provide guarantees, or evidence attesting to their ability to guarantee compliance.\textsuperscript{1338} Moreover, by entrusting Morocco to report on its use of the EU’s financial contribution for the fisheries sector, including the economic and social benefits it provides on a geographical basis, the Protocol essentially extended EU comity to Moroccan institutional practices. It is highly unlikely that a mechanism of self-reporting by the wrongdoing authority can provide certainty in the application of EU

\textsuperscript{1334} See, e.g., the US-Morocco Free Trade Agreement covering only the internationally-recognised territory of Morocco, excluding Western Sahara; Morocco Free Trade Agreement, Office of the US Free Trade Representative <http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta>.


\textsuperscript{1337} Draft European Parliament Legislative Resolution, on the draft Council decision on the conclusion, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco (14165/2013-C7-0415/2013-2013/0315(NLE)), 29 November 2013, Explanatory Note.

\textsuperscript{1338} ‘Western Sahara and the Protocol to the EU-Morocco Fisheries Partnership Agreement 2013’, Legal Opinion, signed by 21 Jurists, coordinated by Western Sahara Research Watch, 2 December 2013.
legislation in accordance with the EU’s internal legal obligation to respect international law. Despite establishing a human rights mechanism concerned primarily to monitor the practical and concrete benefit provided to the local population, the agreement nevertheless lends recognition to Morocco’s unlawful exercise of sovereign authority in the Western Sahara by including the territory in its scope of application.

The 2000 EU-Morocco Association Agreement, another instrument of inter-governmental cooperation between the parties, provides in its protocol on origin rules that proofs of origin certifying products as “originating in the Kingdom of Morocco” will be provided in accordance with the legislation of the exporting country. Since Moroccan law and practice have long treated the Western Sahara as part of Morocco’s sovereign territory, the EU made the agreement in full knowledge that Morocco would apply it to products originating in the Western Sahara.

Yet EU regulations require “the approval [by third countries prior to import to the Union] may only apply to products originating in the third country concerned.” The EU improperly relies on Morocco to apply international law equivalently to the EU – a standard necessary to ensure the EU’s ability to correctly implement its own law and maintain

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1343 See, e.g., Netherlands publicly affirming that products originating from Western Sahara should not benefit from preferential trade; Antwoorden, mede namens de staatssecretaris van EL&I, van Dr. U. Rosenthal, minister van Buitenlandse Zaken, op vragen van het lid van Bommel (SP), DAM-582/2012, 20 August 2012 <http://www.wsrw.org/files/dated/2012-08-29/dutch_statement_20.08.2012.pdf>.
consistency between its policies and activities. The EU-Morocco agreements necessarily lead to the deficient implementation of EU law and public policy, including the long-standing position of the EU and its Member States that the Western Sahara is not part of Morocco’s territory.

Even if Morocco is considered to have sufficient administration rights to be able to enter agreements on behalf of the Western Sahara territory, any such agreement must respect the will and rights of the Saharawi people to dispose of their natural resources, and ensure the non-recognition of the extension of Moroccan jurisdiction into the occupied territory, in pursuit of its de jure annexation. By contrast, any agreement that mandates Morocco to implement its administrative provisions in accordance with its national legislation – which enshrines administrative acts the EU considers to be unlawful, and which Morocco upholds as the standard for the implementation of international agreements – will result in the EU giving effect in EU law to internationally unlawful acts. Such an agreement thus triggers the need of the EU Commission to correcting it, so as to refuse recognition of Morocco’s unlawful exercise of sovereign authority in foreign territory, in order to ensure the integrity of its own legal order.1345 Aside from constituting a breach of the EU and its Member States’ respective duties of non-recognition, as incorporated and defined in EU law, the deficient implementation of these agreements may provide a strong ground for a Member State to call for Community action with threat of suspension.1346

2.2 EU-Turkey Relations and Turkey’s Illegal Regime in Northern Cyprus

Turkish troops invaded northern Cyprus in 1974 in response to a coup by Greek Cypriots who favoured a union of Cyprus and Greece, and in an effort to preempt any UN involvement. Turkey’s pretext was that it was merely exercising its rights under the 1960 Treaty of Guarantee, to which it was a party. The Turkish army’s invasion of the territory facilitated the transfer and maintained the presence of hundreds of thousands of Turkish Cypriots – 80% of whom lived in closed militarized communities between 1963 and 19741347 – and led to the establishment of the TRNC in 1983.1348

1345 See, on the right to compensation against the EU arising from the agreement’s acquiescence in the unlawful exploitation of Saharawi natural resources, Enrico Milano (2006) 416.
1346 See also, Articles 307, 177(3) Treaty of the European Union.
Turkey’s military invasion of the territory and the establishment of the TRNC were considered unlawful acts by the international community. Turkey is the only state in the world that recognises the TRNC, whereas the international community considers the Republic of Cyprus to be the only legitimate sovereign with *de jure* status in the whole of the island.

Following the issuance of the TRNC declaration of independence in 1983, Security Council resolutions 541 and 550 called on states to respect the “sovereignty, independence, [and] territorial integrity” of the Republic of Cyprus, and not to recognize or assist the entity of the TRNC. The Commonwealth Heads of Government “condemned the declaration […] to create a secessionist state in northern Cyprus, in the area under foreign occupation” and subsequently “denounced the declaration as legally invalid and reiterated the call for its non-recognition and immediate withdrawal.” The European Community issued a similar declaration condemning the offense on the sovereignty and territorial integrity of the Republic of Cyprus, and “call[ed] upon all interested parties not to recognise this act.” UN and other international efforts to assist in the resolution of the conflict remain at a standstill. Importantly, the 1999 Annan Plan and other political initiatives have affirmed that they are without prejudice to “the status of the relevant authorities in international law.”

Presently, all Turkish and local TRNC authorities administering daily life in northern Cyprus are authorised by the illegal regime established and maintained through Turkey’s unlawful continuous use of military force. Since Cyprus’s accession to the EU in 2004, the European *acquis communautaire* remains suspended in parts of the island where the government of the Republic of Cyprus does not maintain effective control. In 1994, the European Court of Justice ruled that “cooperation is prohibited with the authorities of an entity such as that established in the northern part of Cyprus, which is recognised neither by the Community nor by its

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1350 Issued on 29 November 1983, cited in *Loizidou v Turkey* (Merits), European Court of Human Rights, 23.
1352 The European Community lent its support to the 1999 Annan Plan to settle the Cyprus question through the establishment of a United Cyprus Republic, which was rejected by the 2004 referendum; *International Crisis Group, Divided Cyprus: Coming to Terms on an Imperfect Reality*, Europe Report No 22914 (March 2014).
Member States; the only Cypriot State they recognise is the Republic of Cyprus.”

A number of EU Member States adopted risk-aversive measures to protect their citizens and companies from operating under the aegis of the unlawful administrative and legislative acts adopted by the authorities in the northern part of the island. The UK Foreign Office issued advice to property buyers regarding the 2006 amendment to the Cyprus criminal code, applicable to purchases in the north, that made the “buying, selling, renting, promoting or mortgaging a property without the permission of the owner [as registered in the Republic of Cyprus Land Registry] […] a criminal offence.”1354 In 2009, the UK High Court refused recognition of permits granted under the EU-Cyprus Civil Aviation Agreement by the Turkish Cypriot authorities, stating that “a legal duty exists whereby the Government of the United Kingdom is obliged not to recognise the TRNC or its Government.”1355 There are no direct flight connections or postal links with northern Cyprus. Turkish Cypriots are banned from taking part in international sporting events, denied access to the international financial markets, and are unable to export agricultural products to the EU.1356

Under the EU’s Plant Health Directive for agricultural products to be eligible for import into the EU, they must be accompanied by a plant health certificate issued in the plants’ country of origin by authorities “empowered for this purpose […] on the basis of laws or regulations of the [exporting] country.”1357 After the EU directive was issued, however, the UK, Germany and several other Member States continued to accept plant health certificates for citrus fruit, issued by the Turkish Cypriot Chamber of Commerce. Greek Cypriot owners of agricultural land in northern Cyprus – whose land titles and rights are under threat of being frustrated by the TRNC regime’s non-recognisable administrative authority1358 – lodged an

1357 Council Directive 2000/29/EC of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community, Article 13(1)(b).
application to the European Court of Justice to stop agricultural imports from northern Cyprus to Member States, challenging the validity of certificates issued by the Turkish Cypriot authorities. A British firm arranged for an indirect export route, whereby ships carrying produce to the EU from northern Cyprus would dock in Turkey and the Turkish authorities would issue new certificates and origin proofs labeling the goods as originating from Cyprus. The UK Advocate-General held in February 2000 that cooperation with the authorities issuing the proofs of origin for imported produce was not possible, due to the non-recognition of the authorities in northern Cyprus.

On 4 July 2000, the European Court of Justice ruled that member states engaged in determining whether a certificate complied with the requirements of the Health Directive should not concern themselves with the legitimacy of the authorities in the plant’s country of origin, so long as the objective of the Directive – to protect the Community from introduction and spread of organisms harmful to plants – was being attained. The acceptance of certificates not issued by the competent authorities of the Republic of Cyprus not only denied any possibility of checks or cooperation, as required to ensure the full implementation of EU law, but resulted in the inability of the EU and its Member States to fully implement public policy, adopted in accordance with the EU’s obligation to respect international law, by ensuring non-recognition of the administrative acts of the TRNC regime. In cases where coordination was a condition precedent for the ability of Member States to fully implement EU law, they were indeed required to ensure that they do not give legal effect to the TRNC authorities’ administrative acts, so long as they did not thereby interfere in Turkey’s internal affairs. The principle was also extended to the application of the EC-Cyprus Association Agreement, whereby non-recognition of the TRNC authorities meant that none of the products

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1364 Stefan Talmon (2001) 743.
exported from northern Cyprus were eligible for preferential treatment under the Agreement.1365

Talmon argues, that since “cooperation is excluded only in so far as it implies recognition,”1366 the EU’s refusal to conduct dealings with the TRNC authorities, notwithstanding the European Court’s dicta, results only indirectly from the non-recognition of their legitimacy under international law.1367 Be it as it may, Talmon comments, the position adopted by the EU regarding non-cooperation with the TRNC authorities as a matter of law not only exceeded some Member States’ practice of non-recognition, but also prescribed a requirement – namely, the positive obligation of result not to give legal effect to such acts – that does not exist in international law.1368 The de facto cooperation maintained by some Member States with the TRNC authorities, and the bypass liaison arrangements with the Turkish authorities, have arguably not fallen short of ensuring the effective non-recognition of the authorities or account for Turkey’s international responsibility for maintaining the illegal territorial regime in northern Cyprus.

The rationale underlying the EU’s need to ensure the non-recognition of illegally-constituted authorities is its need to ensure compliance with internal EU law: in so far as EU legislation, e.g. on origin proofs and phytosanitary certificates, requires Member State authorities to formally address and coordinate with a foreign authority with illegal status under international law (i.e. whose administrative acts cannot be recognised as lawful), as upheld by EU public policy on the status of the Republic of Cyprus as the sole legitimate sovereign. This paradigm and the correction mechanism is not limited to trade relations: many examples and opportunities are abound. To mention but one of potential relevance to the TRNC: take the effects of the administrative and legislative framework that governs the production process under an illegal regime, based on laws enacted in violation of jus cogens, and the effect of their recognition, e.g. through private trade relations, on the ability of Member State authorities to respect domestic laws.

1365 See, on the administrative procedures and intergovernmental cooperation that occurs under the EC-Republic of Cyprus Association Agreement, The Queen v. Minister of Agriculture. Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd., and others, Case C-4329/92, ECR 1994, p. I-3087, at I-3120, paras. 7-8 and I-3132, para. 43.
1366 Stefan Talmon (2001) 743.
1367 Ibid, 749-750.
1368 See, on the German customs authorities’ de facto cooperation with the TRNC, Ibid, 743.
2.3 EU-Israel Relations and Non-Recognition

Throughout its belligerent occupation of the West Bank, Gaza Strip and Golan Heights since 1967, Israel has been “playing on principle” by refusing the en bloc, de jure application of the Geneva Conventions to these occupied territories. It has also refused the application of human rights instruments extra-territorially to its activities in the occupied Palestinian territory altogether, in contravention of the ICJ 2004 Advisory Opinion on Israel’s construction of a Separation Wall in the occupied territory. The international community has repeatedly affirmed the Palestinian people’s right to self-determination in the territory defined by the pre-1967 borders with Israel, and confirmed the de jure application of the law of belligerent occupation. The UN, along with virtually all states, have deemed unlawful and refused recognition of Israeli actions intended to change the legal status and demographic composition of the territory, including Israel’s de jure annexation of East Jerusalem and the Golan Heights; extensive appropriation of land and forcible transfer of Palestinian communities; construction of Israeli settlements and transfer of Israeli civilians into the occupied territory; and exploitation of Palestinian natural resources, including land, water, and stone quarries.

Israel’s definition of the territories of the West Bank and Golan Heights as part of Israel, as per official government positions, domestic laws and institutional practice, extends the operational jurisdiction of Israeli state authorities into the occupied territory. Israeli public and private entities, and their foreign partners, can be established and operate in the occupied territory under Israeli laws. These practices have required third states and international actors to ensure that Israel does not benefit from its unlawful acts through its privileged relations with them. Examples

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of necessary provisions to ensure non-recognition are found in the 1957
UK-Israel Social Security Convention,\(^{1373}\) as well as the 1972 US-Israel
Binational Science Foundation Agreement.\(^{1374}\) Both agreements restrict their
territorial application to areas that Israel does not administer as the
occupying power.

The EU’s relations with Israel span more than sixty areas of
coopera
\(^{1375}\)
While mindful of Israel’s practices, the EU has not labeled
Israel a candidate for reform, and has compromised its own ability to
ensure the full and effective implementation of EU law and public policy
by guaranteeing that its reliance on Israeli institutional practices is
appropriate. Since 2009, however, EU institutions have come to realise that
comity had wrongfully been extended to Israel’s practices, and sought to
make the necessary corrections by re-negotiating its relations with Israel, in
accordance with established commitments under its Common Foreign and
Security Policy. By February 2011, at the Tenth Meeting of the EU-Israel
Association Council meeting, the EU demanded that “The necessary
provisions are made for the correct territorial application of this and other
instruments.”\(^{1376}\) In May 2012, the European Council Conclusions on the
Middle East Peace Process hinged the EU’s need to uphold commitments to
observe international law as a matter of external policy with its internal
legal necessity “to fully and effectively implement existing EU
legislation.”\(^{1377}\)

These political statements confirm the EU’s need to restructure the
instruments of privileged relations with Israel, and in some cases even
correct its legislation, to ensure the EU’s appropriate reliance on Israeli
institutional practices in the determination of predicate facts in a
functionally equivalent manner to that of the EU to ensure the correct
implementation of EU law. The following sections discuss three illustrative

\(^{1373}\) Article 1(1), Convention on Social Security Between the United Kingdom of Great Britain

\(^{1374}\) In an exchange of letters following the Agreement, then US Assistant Secretary of State
Sisco, sought and obtained Israel’s confirmation that cooperative projects “may not be
conducted in the geographic area that came under the administration of the Government of
Israel after June 5, 1967”; Letter from US Assistant Secretary of State, and Confirmation
letter by Ambassador of Israel, both dated 27 September 1972.

\(^{1375}\) EU-Israel relations consist of at least 60 different programs and cooperation
engagements; EMHRN, APRODEV, <i>Eu-Israel Relations: Promoting and Ensuring Respect for International Law</i> (February 2012).

\(^{1376}\) Tenth Meeting of the EU-Israel Association Council Statement of the European Union
(22/02/2011), Statement of the European Union, para. 38.

\(^{1377}\) See, Council of the European Union, Statement of the European Union, Eleventh Meeting
of the EU-Israel Association Council, Brussels, 24 July 2012.
examples of areas of EU-Israel engagement whereby the exposure of inconsistencies between EU policies and activities and the deficient implementation of EU self-defined responsibilities and legislation resulted in the EU’s adoption of ‘corrective measures’. The EU found itself required to ensure its non-recognition of Israel’s internationally unlawful acts in the context of EU-Israel trade relations and origin rules, the negotiations of a EUROPOL-Israel Cooperation Agreement, and Israel’s participation in the EU’s research and development programme. The extensiveness and regularity of EU-Israel relations create significant for compliance pull vis-à-vis Israel: the EU could put significant pressure on Israeli authorities to conform their practices to international law.

2.3.1 EU-Israel Trade Relations and Origin Determination

Under the EU’s Marketing Standards for fresh fruit and vegetables, the EU and its Member States cannot accept conformity certificates issued by a third country covering products that were not wholly obtained or grown in that country’s territory.\(^{1378}\) Israel’s public authorities operate in the occupied territory, including in settlements, under its domestic laws and institutions – which leads to acts that the EU and its Member States cannot recognise as lawful.\(^{1379}\) Despite Israel’s institutional practice, which entailed the application of legal criteria to predicate facts relevant to the implementation of EU law in a manner that is not equivalent to that of the EU, in 2003 the Commission effectively committed an error by extending comity to Israel’s internationally-unlawful legal and institutional practice of issuing certificates for produce originating from Israeli settlements in occupied territory, as functionally equivalent to that of European institutions and Member State authorities.\(^{1380}\)

In the absence of a binding commitment on the part of Israel to conform its institutional practice to legal criteria from international law, the Israeli authorities were in fact obliged by Israeli law to continue to

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\(^{1379}\) Case C-140/02, Regina on the application of the SP Anastasiou (Pissouri) Ltd. and Others v. Minister of Agriculture, Fisheries and Food, ECR 2003, I-10635; Case C-219/98, Regina v. Minister of Agriculture, Fisheries and Food, ex parte SP Anastasiou (Pissouri) Ltd. and Others, ECR 2000, I-5241; Case C-432/92, The Queen v. Minister of Agriculture, Fisheries and Food, ex parte SP Anastasiou (Pissouri) Ltd. and others, ECR 1994, I-3087.

\(^{1380}\) Commission Regulation (EC) No 606/2003 of 2 April 2003 approving operations to check conformity with the marketing standards applicable to fresh fruit and vegetables carried out in Israel prior to import into the Community, OJ L 86/46, 3 April 2003.
implement the territorial scope of the agreement in accordance with Israel’s definition of its territory, contrary to both international and EU law. This oversight by the EU, when it concluded its agreement with Israel, gave legal effect to Israel’s internationally unlawful extension of its domestic jurisdiction into occupied territory. As a result, EU Member States have been obliged to accept Israel’s certificates with regards to fruit and vegetables grown in the occupied territory as originating from Israel. In other words, the EU and its Member States’ authorities were forced to implement EU legislation in accordance with internationally-unlawful Israeli laws and institutional practices: they assigned Israeli origin to agricultural produce grown in Israel’s settlements, in recognition of the internationally unlawful administrative and legislative acts that form the basis for the establishment of settlement-based agricultural enterprises.

Similarly, Israel’s deficient institutional practice of de facto extension of its domestic jurisdiction into occupied territory resulted for many years in the granting of preferential treatment by Member State customs authorities to products originating from Israel’s settlements in the occupied territory. In 2004, Israel proposed a workaround: Israel would provide the EU with a list of postal codes to identify localities in the occupied territories, and Israeli exporters would indicate these localities on their proofs of origin.1381 This solution effectively placed the burden to ensure correct implementation on Member State authorities. In February 2010, following the exposure of remaining deficiencies in the implementation of the EU-Israel Association Agreement by large importing Member States, including Germany1382 - due to Israel’s unwillingness to provide complete and transparent information concerning the location of production facilities – the European Court of Justice rendered its ruling the Brita case.1383 The Court confirmed the territorial scope of application of the EC’s agreement with Israel, and that of its separate agreement with the PLO, which included the West Bank; the court ruled, in consequence, that “products obtained in locations which have been placed under Israeli administration since 1967 do not qualify for the preferential treatment provided for under

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1382 See, e.g., the UK government’s inquiries concerning the mislabeling of products coming from Israeli settlements as ‘made in the West Bank’; Tim Franks, ‘Concern Over EU-Israel Trade Abuses’, BBC Radio Four, 1 November 2008.

[the EC-Israel Association Agreement].” 1384 As such, the court refused recognition of the claimed “Israeli” origin of settlement produce, and affirmed its position on the internationally unlawful administrative acts upon which the operation of businesses in settlements is based.

Yet the limitation of the territorial scope of the EC-Israel Association Agreement, as affirmed by the Court, has proved insufficient to guarantee the full implementation of EU law, because Israel continued to implement the agreement in accordance with its national legislation and institutional practice, which extend Israeli domestic jurisdiction into the occupied territories. 1385 Israel’s unlawful acts flouted the correct implementation of the nomination and acknowledgement procedure in the EU-Israel Agreement on Conformity and Acceptance of Industrial Products (ACAA): 1386

When Israel nominates a Responsible Authority it [must state the "territory" covered by its authority and] must also state whether it will apply limitations on that authority with regard to "territory" in conformity with Article 9(1) ACAA […] the Commission on behalf of the European Union should be in a position to know which territorial areas are covered by that authority before acknowledging it. […] Terms which are not specifically defined in the Protocol, or in the Association Agreement, (e.g. the "territory of the State of Israel") are defined by each Party in accordance with its own laws.

If Israel nominates the Responsible Authority (for example, the Israeli Ministry for Health) to be competent in the whole of Israel, which in Israel’s definition of territory includes territories which came under Israeli administration in 1967, then the Commission is not in a position to acknowledge that nomination, but may request that the nomination clearly limits the competence of the nominated Responsible

1386 Article 9(1), Agreement Between Israel And The Eu On Conformity Assessment And Acceptance Of Industrial Products, Questions and Answers (2013).
Authority so as not to cover those territories. The Commission is obliged to clarify the issue and follow the case-law of the European Court of Justice.\textsuperscript{1387}

The European Council issued a unilateral interpretative declaration on the EU’s position concerning Israel’s nomination – namely, that it is without prejudice to the EU’s position on the status of the occupied territory and that the EU is relying on Israel to ensure the correct implementation of the territorial scope of the Agreement in accordance with this position\textsuperscript{1388} – indicating that the EU realised it could not rely on the information or mutual cooperation of the Israeli authorities. As such, it was required to obtain sufficient guarantees from the Israeli authorities as to their ability and willingness to make the territorial distinctions in the determination of predicate facts in accordance with international and EU law. The EU has also found it necessary to place the burden on the Israeli authorities to ensure the correct implementation of their obligations under EU and international law. On 22 June 2013, the Commission published a set of regulations on marketing standards that precludes the recognition of the Israeli authorities’ certification of fresh fruit and vegetables from Israeli settlements in the occupied territory.\textsuperscript{1389} Moreover, in a letter to the European Commission dated 8 July 2013, the EU High Representative Ashton also recalled the ongoing drafting of comprehensive guidelines on the labeling of settlement products, which would prevent the labeling of agricultural produce, cosmetics and wines from settlements as originating in Israel, and require Israeli entities to cooperate in applying these distinctions correctly.\textsuperscript{1390}

\textsuperscript{1387} Legal Opinion, Proposal for a council decision on the conclusion of an additional protocol to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States and the State of Israel, on an Agreement between the European Community and the State of Israel on Conformity Assessment and Acceptance of Industrial Products, 16 March 2012, SJ-0173/12.

\textsuperscript{1388} Commissioner De Gucht restated the position of the European Commission but failed to obtain the necessary guarantees from Israel to limit the scope of competence of its responsible authority to its internationally-recognised; Commissioner de Gucht in INTA, 3 July 2012. See also, Draft Recommendation on the draft Council decision on the conclusion of a Protocol to the Euro Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel of the other part, on Conformity Assessment and Acceptance of Industrial Products, Committee on International Trade (05190/2010 – C7-0126/2010 – 2009/0155(NLE), 7 March 2012.


2.3.2 Negotiating a Europol-Israel Operational Cooperation Agreement

The negotiations between Europol, the EU law-enforcement agency, and Israel are exemplary of the way EU engagement with third countries can also extend to legal criteria from international human rights law, in addition to the application of the principle of territoriality as discussed above. Europol’s regulatory framework in EU law requires that it exclude both information originating from outside the borders of a third country with which it concludes a cooperation agreement, including that which results from that country’s extraterritorial law enforcement activities, and also information which is likely to have been obtained in violations of human rights and international law.1391 As an EU agency, Europol is also bound by the obligation to ensure consistency between its activities and EU public policy, which includes respect for international law and human rights. To guarantee its ability to implement EU legislation fully, effectively and consistently with EU policies, it must ensure appropriate reliance on the third country with which it seeks to conclude an Operational Cooperation Agreement.1392

With regards to many criminal matters, the Israeli National Police carries out activities in occupied territory, under the authority of the Israeli military commander, on the basis of the de facto extension of Israeli domestic law and the operational jurisdiction of Israeli domestic law enforcement authorities into the occupied territory.1393 Additionally, the practice of some Israeli authorities, in particular the General Security Service, is known for its use of coercive interrogation methods, some amounting to torture, and for using the ‘necessity defense’ – which under Israeli law is a defense to criminal prosecution for torture in cases of suspected imminent attacks against civilians, which has often been used to

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1391 EU institutions and agencies have obligations under the European Convention on Human Rights in Europol’s internal legislation not to process any information received from third parties that has “clearly been obtained in obvious violation of human rights”; Article 20(4), Council Decision 2009/934/JHA of 30 November 2009.


1393 The Israeli police in the West Bank, operates under the ministry for internal public security under Israeli law; Police Ordinance 1971, Ministry of Public Security, Israel Police, <http://mops.gov.il/POLICINGANDENFORCEMENT/Pages/Police.aspx>.
foreclose virtually investigations into allegations of torture – as a way of justifying derogations from the prohibition of torture. Accordingly, Europol could not recognise Israel’s legal and institutional practice in gathering information and conducting law enforcement activities in the territories it occupies, nor could Europol rely on Israeli authorities to ensure that the information it transmits conforms to Europol’s criteria of legality.

The initial negotiating draft of the Europol–Israel Operational Cooperation Agreement issued following the 2009 Justice and Home Affairs’ Council decision to draw up such an agreement, had overlooked these elements of deficient Israeli legal and institutional practice, resulting in the inappropriate reliance of the agency and the EU more broadly on Israel and hence the deficient implementation of EU law. The agreement, intended to facilitate the exchange of data between the two partners, needed to be revised to enable Europol to exclude information transmitted by Israel that did not conform to Europol’s criteria of legality. The Commission acknowledged that the revised agreement would need to ensure that any “exchange of data would occur only in compliance with the legal framework governing Europol, including Art. 23 of the Council decision establishing Europol,” and to “ensure that the content of the draft agreement is consistent with the EU position on the Middle East Peace Process, including the Council Conclusions of 10 December 2012,” on the requirement to apply the principle of territoriality. Under the terms of a revised agreement, similarly, “information obtained in obvious violation of human rights shall not be processed.” Some Member States, in short, insisted on corrections to the agreement, as were necessary to guarantee that Europol could comply with its data protection standards and implement its own activities consistently with the EU law.

A proposal was made to introduce a notification procedure that would be activated by Israel regarding information it transferred to Europol that “related to individuals residing in territories brought under Israeli administration after 1967 or when information is stemming from

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1394 HCJ 5100/94 Public Committee Against Torture in Israel et al. v. The State of Israel et al., judgment of 6 September 1999.
1395 Police and Judicial Cooperation, Justice and Home Affairs Council decision, 6 April 2009. See also, EMHRN, EU-Israel Relations: Promoting and Ensuring Respect for International Law (February 2012).
1396 Answer to Parliamentary Question, Ms Malmstrom on behalf of the Commission, 24 July 2013, OJ C 46 E, 18 February 2014.
1397 Ibid.
activities of Israeli authorities in these territories.” However, the proposal was deemed insufficient to allow the EU to rely on Israeli institutional practices, determined by domestic laws that are based on a differing interpretation of the status of the 1967 territory. The Commission, in turn, proposed that the parties “only process information […] which has been obtained in accordance with their obligations under international law and international human rights law”, and that Israel “shall only supply information to Europol that was collected, stored and transmitted in accordance with applicable law.” Yet this option, based on a unilateral EU position, would have been without effect on Israel’s institutional practice – such that the burden of implementing it could have fallen on the EU, obliging Europol to conduct resource-intensive procedures to verify conformity of information received from Israel. The option put at risk the EU’s ability to guarantee compliance with EU law, unless Israel provided additional guarantees of conformity of its practices in the context of the implementation of the agreement.

Due to the wide-ranging differences between EU and Israeli practices of law enforcement, concerning the application of both territorial and human rights criteria of legality, appropriate reliance could only be achieved by introducing provisions that would guarantee Israel’s application of these criteria in a manner that was functionally equivalent to that of the EU. While risk-aversive provisions could be adopted to guarantee Europol’s ability to apply these criteria on the basis of factual information supplied by Israel, in all cases, Europol would need to require Israel to provide guarantees and evidence of the structural and procedural changes it plans to undertake to enable its institutions to make the necessary determinations regarding the eligibility of information for transmission to Europol, in accordance with the latter’s interpretations of the application criteria. Since the transfer of information to Europol is intended to be regular and constant, such adjustments to Israel’s institutional practice have presented a considerable barrier to the agreement’s conclusion.

1399 Article 7(4) and (5), Draft EUROPOL-Israel Operational Cooperation Agreement.
Since 1999, Israel’s participation in three consecutive EU Framework Programs for the funding of research and development\textsuperscript{1400} has allowed Israeli entities based or operating in the occupied territories to receive grants and prizes and to benefit from EU financial instruments.\textsuperscript{1401} The origin of this problem was a deficiency in the program’s participation rules as set out in its underlying financial instrument, which did not provide a basis for rejecting applications based on the place where the funded research activities were carried out. Israel’s participation in the program resulted in the implementation of EU legislation in contravention to the EU’s general principles of law, including the obligation to respect international law, and EU public policy commitments on the status of the occupied territories.

In 2011, when the EU became generally aware of its inappropriate reliance on Israeli institutional practices, it initiated an inquiry of its funding partners under the current framework program, and found that it had been funding Israeli entities either based or operating in the occupied territories. As a result, the EU found itself required to amend the participation rules in the financial instrument to ensure the non-admission of Israeli entities operating in the occupied territories, taking account of the applying entity’s place of establishment and of its operations. The instruments for the new round of the program – Horizon 2020, which commenced in January 2014 – were amended from previous versions to provide a basis for exclusion of non-conforming Israeli applicant entities; however, these instruments were still short of guaranteeing the EU’s ability to fully implement its obligations. To ensure the proper implementation of the legislative amendments, in July 2013, the Commission issued Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU. The Guidelines clarified the eligibility of Israeli entities applying for program funding, and required entities in receipt of funding to make a “declaration on honour” guaranteeing that not even one Eurocent was allocated to activities in the occupied territories. As a final, necessary measure of risk-aversion, in late 2013 the EU and Israel

\textsuperscript{1400} Israel has received the second-highest number of grants amongst its associate members and EU member states between 2007-2013; European Research Council, ‘Statistics’, <http://erc.europa.eu/statistics-0>.

\textsuperscript{1401} See, e.g., EU Seventh Framework Program (FP7) for research awarded over a million Euros to Ahava, a cosmetics company operating in a settlement, and to the Israeli Antiquities Authority, headquartered in occupied territory; Israel-Europe R&D Directorate, ‘About and Statistics’, <http://www.iserd.org.il/default.asp?id=354>.
signed a Memorandum of Understanding to enable the mutual reliance of the parties in the guidelines’ implementation.\textsuperscript{1402}

While the requirements directly concern Israeli participation in a single EU program of grants, prizes and financial instruments, similar legal-necessity-based measures could and, in some cases, should be adopted by Member States who maintain bilateral research and development agreements with Israel.\textsuperscript{1403} As part of the Guidelines’ ripple effect, in August 2013, reports from Israeli ambassadors said that preliminary warnings were issued by at least five European countries to corporations domiciled in their jurisdiction, not to engage in business in Israeli settlements due to the risks that doing so would violate both domestic and international law.\textsuperscript{1404} The EU’s corrective measures and restructuring of its engagements with Israel to ensure appropriate reliance on Israel’s institutional practice, have led an increasing number of private sector companies from across Europe to terminate operations, or divest from companies that maintain or support activities, in Israel’s illegal settlements in the occupied territories. These and other examples of the effects of non-recognition on the obligations of corporate actors domiciled in a law-abiding third state are discussed below.

2.4 Corporate Involvement in Illegal Territorial Regimes and Non-Recognition

Although the duty of non-recognition in international law is addressed to states, its scope of application extends to public as well as private entities within the states’ jurisdiction. The internal legal necessity-based paradigm for non-recognition provides instructive guidance on the content and scope


\textsuperscript{1403} See, research cooperation agreements with Israel that do not provide limitations on their territorial scope of application to exclude the territories that came under Israel’s administration after 5 June 1967, e.g. Bilateral Research and Development Agreement between Israel and Italy signed in Bologna on June 13th, 2000; Bilateral Research and Development Agreement between Israel and France 26 November 1992; and Agreement on Bilateral Cooperation in Industrial Research and Development Between the Government of Canada and the Government of the State of Israel, 10 July 2011.

of a third state’s responsibilities as defined in its domestic law and public policy. These responsibilities include the state’s obligations concerning the regulation and enforcement of activities of its nationals, including corporations that violate international law, domestically and abroad. The state duty of non-recognition, as a matter of internal legal necessity and full implementation of domestic law, is closely linked with the “State duty to Protect” against wrongdoing by corporate nationals, which is a fundamental pillar of the UN Guiding Principles on Business and Human Rights.

Many domestic laws and administrative regulatory processes, particularly in European as well North American countries, incorporate criteria of legality from international law, both directly and indirectly. Direct incorporations include the transposition by domestic laws of the 1949 Geneva Conventions and the 1998 Rome Statute of the International Criminal Court, as a basis for criminal and civil liability suits. Examples of indirect incorporation may be found in domestic laws whose implementation requires the assessment of predicate facts in third countries in accordance with international law and domestic public policy. These areas of internal regulation may have a variety of goals -- such as ensuring good corporate governance, economic stability, and certainty of commercial transactions to protect investors, procurers and consumers – and pertain to investment, pension funds, public and private


1408 See, e.g., UK Pensions Regulator, operating under the UK Pensions Act 2004, mandated to ensure that its trustees do not invest in companies that fail to uphold a standard of socially responsible investment; Article 11A(a), Amendment Regulations, Occupational Pension Schemes (Investment, and Assignment, Forfeiture, Bankruptcy etc.) 1999. The following financial institutions have removed Israeli companies from their portfolios based on human rights concerns: Luxembourg sovereign fund FDC, Dutch private fund PGGM, Denmark’s Danske Bank and Norway’s Government Pension Fund Global (GPFG). See also, Radu Mares, The Dynamics of Corporate Social Responsibilities (Nijhoff, 2008) 208-209.
procurement, consumer protection from deceptive commercial practices and laws concerning money laundering and proceeds of crime.

National regulatory authorities charged with the enforcement of these laws must ensure that corporate nationals involved in international law violations abroad, including those benefiting or operating under the internationally unlawfully legislative and administrative acts of an occupying power or de facto administrator, do not give legal effect to these acts under domestic law. If a country’s corporate nationals are found to be widely involved in internationally unlawful acts, either through contribution or mere benefit and indirect support, national regulatory authorities may be required to undertake both company-specific and industry-wide enforcement and risk management measures. The UK’s Trade and Investment authority issued such a risk management-based advisory in December 2013 cautioning all UK and EU companies that:

Financial transactions, investments, purchases, procurements as well as other economic activities (including in services like tourism) in Israeli settlements or benefiting Israeli settlements, entail legal and economic risks stemming from the fact that the Israeli settlements, according to international law, are built on occupied land and are not recognised as a legitimate part of Israel’s territory. This may result in disputed titles to the land, water, mineral or other natural resources which might be the subject of purchase or investment.

1409 See, e.g., for domestic public and private procurement laws that provide for the exclusion of companies involved in unlawful activities, “grave misconduct” exclusion basis in Article 23(4)(e) of the Public Contracts Regulations 2006.
1411 Such domestic laws prohibit benefit from unlawfully procured or obtained factors of production, which could implicate both upstream suppliers to settlement business, and downstream importers, retailers, or other purchasers of such products, e.g. UK Proceeds of Crime Act 2002.
Similarly, Norway adopted a position of discouraging investment with respect to Western Sahara: “In order to prevent trade, investment, resources and other forms of business that are not in accordance with the local population and consequently may be in violation of international law, the Norwegian authorities discourage such activities.” 1413 The Dutch government’s advisory to businesses operating in Western Sahara notes the challenges of guaranteeing proper labeling and certification of origin for products from Western Sahara, and the legal risks for companies that may be deemed to have received benefits unlawfully.1414

National authorities may also be required to demand the routine cooperation of foreign authorities in providing information to ensure the accuracy of their own risk assessments. It follows that a corporate national would itself be placed under an obligation not to give legal effect to unlawful acts in order to ensure its compliance with its domicile-country’s domestic laws; in addition to the company’s duty as a subject of international law to ensure that its commercial activities do not contribute to or benefit from international human rights and humanitarian law violations.1415

Such measures are capable of achieving exigent enforcement based on legal consequences under the corporation’s domicile-country’s domestic law and public policy, resulting in the company’s need to end or otherwise limit its wrongdoing activities to ensure that it does not give legal effect to internationally unlawful acts. The company’s divestment from the economy of an illegal territorial regime also entails indirect effects on the wrongdoing foreign authority’s legal and institutional practice, by exerting increasing economic pressure to require it to conform to criteria of legality


1415 An increasing number of companies has included human rights commitments in their voluntary codes of conduct and multi-stakeholder initiatives, e.g. the Extractive Industries Transparency Initiative, the Voluntary Principles on Security and Human Rights, and the UN Global Compact. Olivier de Schutter, ‘The Challenges of Imposing Human Rights Norms on Corporate Actors’, in Olivier de Schutter (ed.), Transnational Corporations and Human Rights (Hart, 2006) 1-17.
from international law to facilitate the operation of foreign businesses, without them risking involvement in unlawful acts. This socialisation effect, which may be produced by such inter-state and private sector-driven measures, predicts positive results when a third state or non-state international actor uses its normative power to ensure that its engagements or relations do not give legal effect to unlawful acts, while placing demands on the wrongdoing authority to conform its practice to international law.\textsuperscript{1416}

3. Concluding Observations: State Socialisation through International Law

Due to the limitations on the use of force in inter-state relations, the political nature of the adoption of countermeasures, and the voluntarism and need for consent by states to enforce international law, compliance with international law has long suffered. Cheng aptly remarks: “international law creates a morality of obligation, but not much of a morality of aspiration” by “leav[ing] wide discretion to decision-makers to decide themselves what to do to promote preferred values.”\textsuperscript{1417} Even in cases where international law is seen to have compelling effect, this is arguably due more to a body of rules that “mirrors the interests of powerful states” as “an epiphenomenon of underlying power,”\textsuperscript{1418} than to the belief of states that international law is law. Both internal and external inducements for compliance, as Louis Henkin notes, are often subject to a “national interest” mindful of the absence of authoritative and impartial enforcement mechanisms; in consequence, “the system promotes a culture of peaceful settlement rather than compliance with the law.”\textsuperscript{1419} The model of enforcement proposed by Austin, placing the burden of enforcement on


the “shoulders of states,” as opposed to international institutions, is becoming increasingly relevant to the stagnancy of international law and practice due to the bluntness of its instruments of enforcement.

Notwithstanding the predominance of self-serving and selective acts of state compliance with international law, opportunities for exigent and vigorous law enforcement abound in the context of inter-state relations. To be pursued effectively, this modality of enforcement needs to faithfully account for the distinctive features of international society, including the dynamic application of international law by states on the basis of their own political interests and legal needs, which include commitments to respect and promote human rights and international law. The EU’s actions provide examples of this modality of enforcement: for instance, its extension of privileged Community treatment to entities established on the unlawful basis of Morocco’s exercise of sovereign power in the Western Sahara, or the EU’s relations with Turkey, which carries out administrative cooperation with state authorities giving legal effect to unlawful administrative acts of its unrecognized, unlawful regime in northern Cyprus. Due to varying oversights, the EU concluded agreements and undertook relations that mandated the implementation of EU law in accordance with internationally unlawful acts. The exigency of internal legal necessity, in turn, was awakened when the EU realised that it was inadequately relying on the legal and institutional practice of a foreign authority to fully implement its internal law and public policy.

The manifestation of this enforcement paradigm is most common in the contexts of territorial regimes, where the wrongdoings state is engaged in the unlawful exercise of administrative authority in a manner that cannot be recognised or given legal effect under a third state’s or international actor’s legal order. In such cases, the operationalization of the international duty of non-recognition is hinged on the third state or international actor’s determination of what it cannot recognise as lawful,

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due to its own standard for observing international law.\footnote{Herald Koh, ‘Review Essay: Why Do Nations Obey International Law?’, \textit{Yale Law Journal}, Vol 106 2599 (1997) 1639.} States take positions, through policy and law, that apply certain criteria of legality from international law to facts and situations under a foreign authority’s jurisdiction, and that they must uphold to ensure the integrity of their internal legal order. If a foreign authority engaged in inter-state relations with the third state applies law differently, the third state needs to take measures to ensure consistency with its own assessments of predicate facts as affirmed in its public policy. The act of enforcement, which manifests in the context of inter-state relations with a wrongdoing foreign authority, is an instance of compliance with the international customary duty of non-recognition, as well as a basis for the adoption of indirect countermeasures to protect the domestic legal order from contamination by internationally unlawful acts.

This international-law enforcement paradigm is consistent with a theory of state socialization to international law, as it derives from the insistence on conformity and accommodation that arises in the context of regular inter-state engagements.\footnote{Thomas Risse-Kappen, \textit{Cooperation Among Democracies} (1997). See also, Ryan Goodman, Derek Jinks, \textit{Socializing States: Promoting Human Rights through International Law} (Oxford, 2013) 167-171.} Although an occupying power that unlawfully exercises sovereign rights in the occupied territory, in pursuit of its acquisition or economic exploitation, is likely to attempt to maintain a separate regime that ensures compliance for the purpose of its inter-state engagements, while continuing to violate international law in its domestic affairs, the regularity and extensiveness of the demands of a third state for its conformity with international law are likely to render the maintenance of separate systems increasingly cumbersome. As Finnemore and Sikkink remark, similar to the engine of integration in Europe, extensive and regular relations between states “ultimately create predictability, stability, and habits of trust” which “would become internalized, and internalized trust would, in turn, affect change among the participants.”\footnote{Martha Finnemore, Kathryn Sikkink, ‘International Norm Dynamics and Political Change’, \textit{International Organization}, Vol 52, No 4 (1998) 905.} This makes the “engine of integration” both “indirect and evolutionary.”\footnote{Ibid.}

As demonstrated by the case of EU-Israel relations, the more regular a wrongdoing state’s engagements with a strong normative law-abiding state or international actor, the more vigorous, exacting and extensive the demands on the wrongdoing authority to conform its institutional and legal practice to international law. As it is increasingly
obliged to socialize its actions, a wrongdoing authority will be led to see the costs entailed by its unlawful activities. Thus, subject to the normative power of the EU and its Member States, its partners – including Turkey, Morocco and Israel – have become increasingly wary of the risks to their political goals to maintain these relations, and also increasingly affected by the compliance pull these relations have generated.¹⁴²⁸

Moreover, since the operative component of this enforcement paradigm is not the hard power of the third state or international actor, but the rationale behind the demands it makes, it is possible and even likely that the wrongdoing authority would find an objective, greater good for its conformity to international law: action leads thought.¹⁴²⁹ To borrow from Koh, “compliance grows more fundamentally from techniques of persuasion resting on the power of norms”, than from hard power-based modes of coercion.¹⁴³⁰ The proposed enforcement paradigm is also consistent with accounts of the social mechanisms that make international law matter, including both “patterns of acculturation” and a pull “to assimilate with a higher normative standard.”¹⁴³¹ Koh describes a “complex process of institutional interaction whereby global norms are not just debated and interpreted, but ultimately internalized by domestic legal systems,” and notes: “This overlooked process of interaction, interpretation, and internalization of international norms into domestic legal systems is pivotal to understanding why nations ‘obey’ international law rather than merely conform their behavior to it when convenient.”¹⁴³²

The proposed paradigm’s doctrinal logic is that of an inherent need for reciprocity in an international system¹⁴³³ and the recognition of the value of effectiveness.¹⁴³⁴ Further, actions that impinge on a state’s ability to implement its own legislation could be said to amount to unacceptable infringements of that state’s sovereign rights. By capitalising on the notion of national sovereignty and the need to protect public and national

¹⁴²⁹ See generally, Michaela Raab, ‘Could cognitive theory enhance development practice?’, Development in Practice, Vol 18, No 3 (June 2008).
interests,\footnote{See generally, Mary Ellen O’Connell (2011).} states can demand that another country and its nationals respect the state’s need to implement its own legislation correctly.

Traditional methods for the enforcement of the law of belligerent occupation are not obsolete, despite needing considerable reform. Benvenisti and Ben-Naftali have called for the development of a blueprint for an early intervention body that would monitor, review and facilitate the enforcement of the law of occupation and concurrent regimes of international law through a myriad of mechanisms and channels.\footnote{See generally, Orna Ben-Naftali, ‘Belligerent Occupation’, in Antonio Cassese ed., \textit{Realizing Utopia: The Future of International Law} (Oxford, 2012).} Considering the prospects of inter-state enforcement and their relevance to abusive belligerent occupation and illegal territorial regimes, such processes should also seek to conduct risk assessments that could activate modes of enforcement based on inter-state and private actor relations with a wrongdoing occupying power, which may wrongfully extend recognition and give legal effect to its internationally unlawful acts in the law-abiding state’s domestic law. Such a mechanism for the enforcement of the law of belligerent occupation, which incorporates states’ deep-seated need to ensure the integrity of their internal legal orders, would be relatively more insulated from state political interests, a necessary condition to ensure its independence and impartiality as well as guarantee its effectiveness in bringing about compliance with international law.
CHAPTER X

CONCLUSION: ANALYSING AND REDRESSING ILLEGAL TERRITORIALITY

International law on the regulation of territoriality, including invasion, administration of foreign territory and territorial acquisition, has not been the subject of extensive scholarly analysis in relation to situations of belligerent occupation. Yet, as this work demonstrates, most contemporary belligerent foreign territorial administrations, which are typically classified as and principally regulated by the *lex specialis* of belligerent occupation, also trigger the application of these other legal regimes of international law, largely due to the unlawful character of the acts perpetrated by the foreign administrator. Many of these unlawful acts are prohibited by the *lex specialis* of belligerent occupation - intended to define and delimit the scope and nature of a lawful situation of foreign territorial administration resulting from situations of armed conflict. Others, however, are prohibited by the international legal regimes that apply in concurrence with the *lex specialis* of belligerent occupation, and that arguably tip the balance between military necessity and humanity in favour of the latter.\(^\text{1437}\)

This work’s analysis of the interactions between the Hague and Geneva laws of belligerent occupation and other bodies of international law – including the law on territoriality, the rules on the use of force, the law on self-determination of peoples and human rights law – demonstrates the productive synergies resulting from the interaction between these bodies of law. These synergies argue in favour of a comprehensive and coherent approach to the application of international law to situations of foreign territorial administration, including belligerent occupation, so as to adequately comprehend and effectively prohibit situations of illegal territoriality created in the context of administration and control of foreign territory and government.

This work addresses two main issues arising from the challenges of enforcing international law in situations of belligerent occupation and foreign domination: the manner in which international law applicable to

foreign territorial administrations, including belligerent occupation, defines the parameters of their legality; and the effects and potential consequences of the illegality of such territorial regimes on the obligations of third state and international actors. The degree of convergence and divergence varies between different and equivalent norms in different legal regimes applicable to situations of belligerent occupation and foreign administration. Overall, however, the co-application of these norms makes a critical contribution to understanding and applying the specific rules of the lex specialis of belligerent occupation, to the normative status of the overall regime of foreign administration, and to the regulatory effectiveness of international law.\textsuperscript{1438} The work’s argument culminates in the discussion in Part IV of the legal consequences of the violations of peremptory norms of international law: the jus ad bellum prohibition on the acquisition of territory through the use of force and the right to self-determination of peoples, and the rights and obligations of third states under international and domestic law and public policy vis-à-vis the illegal territorial regimes and the unlawful acts of the responsible authorities.

1. Addressing the Phenomenon of Illegal Territorial Regimes

The term ‘illegal occupation’ has yet to become a legal category stricto sensu. Yet the frequent use by states of this political ‘term of art’ to describe a foreign territorial administration that contravenes international law – including in Moldova,\textsuperscript{1439} Cyprus,\textsuperscript{1440} Georgia,\textsuperscript{1441} and Palestine\textsuperscript{1442} –


\textsuperscript{1439} The Moldovan parliament repeatedly called on Russia “to put an end to the illegal occupation of the Republic of Moldova”; \textit{Ilašcu and Others v. Moldova and Russia}, Application No 48787/99, Judgment (Merits and Just Satisfaction), Grand Chamber, 8 July 2004, para. 32.


\textsuperscript{1441} Georgia’s 2008 Law on the Occupied Territories refers to the occupation of Abkhazia and South Ossetia as an “illegal military occupation” and the Russia-supported regime as “illegal authorities”; Law of Georgia on Occupied Territories, 23 October 2008.

\textsuperscript{1442} Palestinian President Mahmoud Abbas, in in September 2011, stated that Israel’s “[s]ettlement activities embody the core of the policy of colonial military occupation”; Statement by H.E. Mr. Mahmoud Abbas President of the State of Palestine Chairman of the
indicates the need to review the criteria of legality that regulate the activities of a government in foreign territory. Professor John Dugard, then UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, raised a key question in August 2007: “what are the legal consequences for the occupied people, the occupying Power and third States […] of a prolonged occupation that has acquired some of the characteristics of apartheid and colonialism and has violated many of the basic obligations imposed on an occupying Power.” In November 2010, Dugard’s successor as rapporteur, Professor Richard Falk, called for the development of a new legal framework: “The Palestinian experience suggests the need for a new protocol of international humanitarian law, some outer time limit after which further occupation becomes a distinct violation of international law, and if not promptly corrected, constitutes a new type of crime against humanity.”

The need to properly regulate territorial regimes that acquire an illegal character due to the changes they create and seek to make permanent, is evident in situations as diverse as Turkish-controlled northern Cyprus, Armenian-controlled Nagorno-Karabakh, and Russian-controlled Abkhazia, South Ossetia and Transnistria. The common denominator is the negative effect of foreign intervention on the permanent status of the territory and the rights of the ousted legitimate government. As well, occupation has detrimental short- and long-term effects both on the security and protection of the population and the ability of the belligerent parties to achieve a resolution of the conflict. Several occupiers have purported to support one side in an internal struggle in the occupied territory – and yet, instead of delivering the promised prospects of independence, such foreign interventions in the domestic affairs of another state, through occupation and long-lasting control, have condemned foreign-controlled territorial entities and their indigenous and settler populations to isolation, marginality, and dependence. Without international rights or recognition, such regimes often exist in a kind of

Executive Committee of the Palestine Liberation Organization President of the Palestinian National Authority before United Nations General Assembly, Sixty-sixth Session, New York, 23 September 2011, 2.


1445 Wood notes, “countries that gained independence by acting like independent states first, and then getting recognition -- is small, and the few examples of partial success (Kosovo is stuck on 63 recognizing countries, Taiwan on 23) suggest Limbo is a permanent condition when it is not a fatal one.” Graeme Wood, ‘Limbo World’, Foreign Policy, 4 January 2012.
limbo. Wood describes such entities as consigned to “second-class statehood, with uncertain rights and responsibilities in the international system, that diplomacy was designed over the last several centuries to avoid.”

Such regimes also often abuse the local population, or part thereof. The Russian-controlled Georgian territory of Abkhazia has seen a dire deterioration in overall development, despite extensive financial support from Russia, as well as systematic violations of human rights. The foreign-controlled regimes in northern Cyprpus, Abkhazia, South Ossetia, Transnistria, and Crimea share, to varying degrees, the characteristics of colonial rule, including acts of conquest, foreign domination and political subjugation, economic exploitation, as well as systematic discrimination against the indigenous population for the benefit of people whom the foreign power co-opted or forcibly settled in the territory.

In the Palestinian and Syrian territories and the Western Sahara, the occupying Israeli and Moroccan authorities’ objective has been to exercise sovereign rights, in what resembles an attempt to acquire territory through prescription, yet actually amounts to its creeping de facto annexation under the pretext of persistent military and security needs. Chapter IV demonstrates that although the laws on colonialism and conquest are often considered to have been replaced by the prohibition of annexation, contemporary situations of belligerent foreign administration and prolonged foreign domination resemble supposedly anachronistic practices, and should be closely examined according to their prohibition.

Acts that amount to the acquisition of territory through the use of force should be assessed, Chapter V argues, independently from the jus ad bellum and in bello analyses arising from the situation of armed conflict proper. Such an approach would neither disturb the classic distinction between the two bodies of law, nor allow for absurd results that may otherwise ensue from situations that give credence to the occupying power’s military needs and the de jure legitimacy of a situation based on an armed conflict.

2. Productive Synergies and Pragmatic Value of Regime Interaction

This work proposes a means to assess the overall legality of the territorial regime constituted by the presence and activities of the occupying state in foreign territory. The assessment should be based on a comprehensive

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1446 Ibid.
regime of international legal rules relevant to governance, the legal consequences entailed by a state’s violations of the law on territoriality, *jus ad bellum* and self-determination of peoples, and the obligations enshrined in the law of the UN Charter. A rigorous analysis of the interactions between the *lex specialis* of belligerent occupation and other bodies of international law, including those that superseded the codification of belligerent occupation law, can make a normative and pragmatic contribution to international law and its enforcement. A comprehensive approach to regulating factual scenarios has several advantages:

1. Terminological clarity and accuracy: contributing to adequate definition and determination of the illegality of acts and situations;
2. Conceptual coherence: contributing to ensuring the holistic integrity of the international rule of law and the ability of international mechanisms to address illegal acts and situations, coherently and comprehensively;
3. Functional interpretation and development of norms: contributing to the evolutionary application of norms to contemporary situations in a manner that preserves their intended object and purpose; and
4. Effective and exigent enforcement of international law: contributing to the ability of international law to compel compliance, as well as deter and provide accountability and effective redress for violations.

The cardinal rules of belligerent occupation, discussed in Part I, indicate the manner in which certain peremptory norms of international law underpin the *lex specialis* of belligerent occupation, which bestows *de jure* status upon occupying powers. The legal regime for belligerent occupation was established to proscribe all other types of force-based foreign territorial administrations, *ultra vires* of the limited mandate assigned to an occupying power, so as to protect people from being used as proxies by powerful states and finding themselves internationally isolated due to the legally dubious nature of illegal territorial regimes. The condition of belligerent occupation is a tightly regulated legal regime for foreign administration of territory in the context of an armed conflict, subject to regulation by a detailed set of hard-rule based instruments. Yet this body of rules, applied in isolation, has proven inadequate to deter and

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redress acts of aggression, territorial acquisition, and forced regime change by foreign powers. These abuses by occupying states have not been stymied, either, by the law on the inter-state use of force, or thwarted by the classical distinction between *jus ad bellum* and the rules on the conduct of hostilities.1448

The interaction between the *lex specialis* of belligerent occupation and other legal regimes, this work suggests, can significantly enhance the legal restraints on the occupying power embedded in *lex specialis*, and provide legal bases for occupied states and individuals in the occupied territory to pursue claims and operationalise international and domestic law-based enforcement mechanisms against the occupier. Examination reveals significant normative convergences, as well as tensions, between the *lex specialis* of belligerent occupation and other international legal regimes, that are highly relevant to the effectiveness of international law in regulating the acts of occupying states in foreign territory. Notable normative synergies are produced by the interaction between belligerent occupation law and what Sir Michael Wood called “the two greatest achievements of international law over the last century […] the restrictions on the use of force” and “human rights”, including the law on self-determination of peoples.1449

Unlike a *de jure* territorial administration in time of armed conflict, known as belligerent occupation, Chapter V demonstrates that *de facto* administrators that maintain control over foreign territory through the threat or use of force with the intention of permanently displacing the legitimate sovereign have classically been defined as colonisers and conquerors – under a body of international law that might appear anachronistic due to the extensive efforts undertaken for the eradication of such acts during the late 20th century. Yet the prohibitive elements of colonialism are embedded in elements of the law on territoriality, discussed in Chapter IV, and the law on the inter-state use of force (*jus ad bellum*), discussed in Chapter V; these precursors of the era of decolonisation have arguably not completely disappeared. Both bodies of law complement specific rules in the *lex specialis* of belligerent occupation, and provide additional compliance pull by enhancing the determinacy and coherence of the rules governing certain state conduct.1450 Ultimately, these interactions

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1448 Christine Gray (2010) 615. See, on the parameters and limits of the distinction, Chapter V.
provide needed reinforcements for the underlying premise of the legal framework governing belligerent occupation: to ensure that peace is restored between the occupying and occupied state and control reverts to the ousted sovereign. Otherwise an ‘aggressor occupier’ seeking to acquire title in foreign territory, discussed in Chapter V, is likely to subject the people and territory to foreign domination, political subjugation and often also economic exploitation.

Similarly, allowing the people to freely determine and develop their social, political and cultural order, without foreign interference, can help close protection gaps resulting from the application of the lex specialis of belligerent occupation in isolation from other legal regimes, as Chapter VI demonstrates. Those protection gaps may be overlooked due to the common assumption that occupation law simply incorporated the prohibitions maintained in those other bodies of law. Another such gap is the fact that the occupying state or its proxies (i.e. foreign-controlled authorities) – whose situation in the occupied territory may be precarious – are often unable to guarantee respect for human rights. Many human rights are agent-dependent: their full enjoyment is conditional on the ability of individuals to hold relevant duty-bearing public authorities to account. Yet, as is shown in Chapter VII, the relationship between right-holders and duty-bearers that human rights law assumes, is intrinsically at odds with the effects of a belligerent occupation regime on the function of the socio-political order in the occupied territory, and with the limitations imposed upon the legitimate government’s ability to exercise control over daily life.

Chapters VII and VIII analyse the interaction between contemporary international law on self-determination of peoples and human rights, the lex specialis of belligerent occupation, and international law on territoriality. Applied in a coherent and integrated manner, these bodies of law affirm the presumption that certain criteria of legality should be upheld to ensure the protection of the local population and the rights of the ousted sovereign, and deter predatory state practices. Those criteria should in addition be communicated as a clear warning to all existing and potential occupying states about the potential legal consequences of their acts. By contrast, a situation in which the interpretation of the law of belligerent occupation is effectively left up to occupying states, without clear guidance on the interaction of its provisions with other rules of international law, such as the peremptory norms enshrined in the law of the UN Charter, creates the hazard that the occupying power will
instrumentalise its belligerency rights under the laws of war, as well as its military might, to illegally further its self-interests.\textsuperscript{1451}

Cumulatively, the interactive application of legal regimes to situations of belligerent occupation may require the adjustment of the \textit{de jure} status of an abusive occupation regime, due to the absence of a basis of military necessity for its legitimate continuation, and the fact that the occupying power’s control over foreign territory is intended to maintain an illegal territorial regime. If the occupier’s internationally-recognised status as \textit{de facto} administrator were challenged, the collective response to the occupier’s illegal presence in foreign territory would need to be adequate to require its withdrawal.

The relevance of these interactions to the political resolution of so-called ‘frozen’ territorial conflicts is beyond the scope of this work, but it is worth noting that the purpose of restoring international peace and security by upholding the rule of international law is based on the presumption that such law is the only manner to guarantee a just and durable resolution of inter-state disputes. There is evidence for that presumption. The border clashes and intermittent fighting between separatist groups in the context of the “long-arm” occupations in the Caucasus region, including the fighting at the time of writing in eastern Ukraine, indicate the limited success of measures other than insistence on compliance with international law – for instance, the diplomatic initiatives of the OSCE in relation to Abkhazia and South Ossetia and the Minsk Group in Nagorno-Karabakh.\textsuperscript{1452} As US Government advisor Philip Gordon stated in July 2014, in another context, for Israel to continue “indefinitely” its military occupation “is not only wrong but a recipe for resentment and recurring instability”.\textsuperscript{1453}

\section*{3. Analysing Illegal Territoriality as a Legal Category}

Only rarely has there been an international response that adequately addressed and remedied acts of occupying powers that violated concurrently applicable international law norms beyond the \textit{lex specialis} of belligerent occupation, whether in the occupied territory or vis-à-vis the ousted sovereign. In most cases, states and international organizations have

\textsuperscript{1451} See also, Rotem Giladi (2008) 296.
\textsuperscript{1453} Remarks as Prepared by White House Coordinator for the Middle East, North Africa, and the Gulf Region Philip Gordon at the Ha’aretz Israel Conference for Peace, The White House, Office of the Press Secretary, 8 July 2014.
focused almost exclusively on violations of international humanitarian law, leading to an overall weakness in international law enforcement.\textsuperscript{1454}

The activities of a government in foreign territory must be based on genuine military necessity to remain within the normative parameters of a \textit{de jure} belligerent occupation, and its declared or implicit motives and policies vis-à-vis the foreign territory must thus accord with the conservationist principle. By contrast, an occupying power that purports to act as a trustee or sovereign poses a threat to the distinction between the body of international law intended to govern situations of hostilities, and that intended to govern relations between a sovereign and its subjects.\textsuperscript{1455} Wilde cautions that cases in which foreign belligerent powers were entrusted with the authority to administer or even to reform daily life, have led to the resurrection of the ‘civilising mission’, along with the colonial abuses that it attracts.\textsuperscript{1456} When the occupying power acts \textit{ultra vires} of its limited mandate, it may lose international recognition of its presence in the territory; moreover, egregious acts that violate peremptory norms of international law may be subject to the appropriate legal consequences.

To preserve the contemporary international legal order’s integrity, and consistent with its purpose of eradicating all colonial-like relations, the practical consequences of the threat and use of force by the occupying power must be closely scrutinised and subject to sanctions. To that end, the clarity provided by a comprehensive international law framework is particularly important in the face of the justifications put forward by contemporary occupiers. Relatively powerful states, such as Russia, Turkey and Armenia, have espoused the struggle of separatist movements in foreign territory, in order to then undertake the \textit{de facto} annexation of territory.\textsuperscript{1457} As Chapter VI demonstrates, the transformative occupations of Iraqi, Cypriot, Azerbaijani and Georgian territory redefined relations between the occupier and the local population in a manner that exceeds the limits of belligerent occupation. Some post-Cold War theorists, who argue in favour of an activist foreign policy that furthers Western values and places “rogue states” along a normatively ranked spectrum, deny that foreign administrations should maintain the status quo in occupied

\begin{itemize}
  \item \textsuperscript{1454} See, on the effects of the application of the law of occupation on the referendum and attempted annexation, Human Rights Watch, ‘Questions and Answers: Russia, Ukraine, and International Humanitarian and Human Rights Law’, 22 March 2014.
  \item \textsuperscript{1455} See generally, Jens David Ohlin (2015).
  \item \textsuperscript{1456} See generally, Ralph Wilde (2008).
  \item \textsuperscript{1457} See, e.g., Nagorno-Karabakh and its 1991 declaration of independence are recognised only by its fellow regimes of Abkhazia, South Ossetia and Transnistria; “TRNC” regime is to-date recognised only by Turkey. Thomas de Waal, ‘Nagorno-Karabakh: Crimea’s doppelganger’, \textit{Open Democracy}, 13 June 2014.
\end{itemize}
territory – erasing the distinction between unlawful practices, as Fox and Wilde point out, and the temporary suspension of a state’s autonomy through an internationally-ascribed mandate of state reforms, or limited, lawful institutional rehabilitation imposed during belligerent occupation.

The phenomenon of transformative occupations is only one example of problematic state practices taking place in the context of contemporary belligerent occupations; some occupying powers have gone as far as to either seek to annex the territory, or to permanently exclude the ousted sovereign by supporting separatist authorities and controlling them as a vassal for its political and economic interests. With varying degrees of success, occupying states that have abrogated the state of peace, in which aggression is prohibited, and resorted to the threat or use of force, have disguised the ultimate purpose of their activities in foreign territory and sought to evade responsibility for otherwise internationally unlawful acts. The occupiers’ attempts to force certain acts to be assessed solely under the law of belligerent occupation would, if successful, damage the effectiveness not only of that law, but of other international relevant legal regimes, including the rules on self-determination and sovereignty, in restraining the acts of foreign powers.

A comprehensive and integrated legal framework that includes both the legal consequences ensuing from *jus ad bellum* and other peremptory rules of international law should be applied to assess the acts of an occupying state in foreign territory. Such an approach would capture the effects of predatory acts on the territorial rights of the legitimate ousted sovereign, consider the extent to which such acts result in the establishment of a permanent illegal territorial regime in the context of a belligerent occupation, and thus ensure that the *de jure* status of that regime is not at cross-purposes with the fundamental aim of the contemporary

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1459 Gregory Fox (2008) 305-308.

1460 The tributary vassal state remains under the suzerainty of the more powerful state, which controls its foreign affairs while allowing the former limited domestic autonomy; Charles H Alexandrowicz-Alexander, ‘The legal position of Tibet’, *American Journal of International Law*, Vol 48, No 2 (1954) 265-274.
international legal order to effectively deter all forms of foreign domination, subjugation, exploitation and annexation.

By mapping the relevant rules and doctrines of international law applicable to foreign administrators and occupying powers, Parts II and III propose an analytical checklist, according to criteria of international legality, for assessing acts that give rise to suspicion of a situation of illegal territoriality:

(1) Direct and implicit claims of sovereignty vis-à-vis foreign territory, whether by public officials or institutional and legal practices of state authorities seeking the territory’s acquisition through threat or use of force;
(2) Exercise of jurisdictional rights over persons and subject matter occurring in foreign territory ultra vires of the limited mandate set out by the law of belligerent occupation;
(3) Political, legislative or economic integration of the territory, through legislative and administrative acts, regardless of the ostensible benefit of such measures to the local population or public life;
(4) Establishment of a proxy-government, dependent on the support and under the ultimate control of the foreign power and intended to permanently exclude the ousted sovereign;
(5) Prolonged foreign administration and interference in internal and external affairs of the ousted legitimate government resulting in the flagrant denial of the people’s right to self-determination and development – e.g. through re-engineering education and cultural life, imposing restrictions on freedom of expression, the press and association; and
(6) Prolonged suspension or long-lasting reforms of public order and civil life, including with a transformative or humanitarian pretext, resulting in systematic violations of human rights.

The conceptualisation and consistent application of a coherent international legal framework – consisting of multi-sourced equivalent norms enshrined in different legal regimes – can support the effective regulation of an occupying power whose acts fall outside the factual remits envisaged for their context-specific role. This framework should account for the interaction between the lex specialis of belligerent occupation and other legal regimes, as well as the interaction between those regimes, in time of belligerent occupation and other belligerent foreign territorial administrations. An act that violates the law on territoriality and the rules on the use of force, on the one hand, is also likely to violate the law on good
governance and administration, as applicable to foreign administrators. Acts by an occupying power seeking to reform the government in foreign territory may not only systematically violate human rights but also flagrantly deny the indigenous population’s rights to political independence, development, and self-determination. The consideration of the interaction between legal regimes and norms is a first step to building the conceptual links needed to close protection gaps resulting from the incoherent and inconsistent international practice in regulating illegal territorial regimes.

4. Illegal Territorial Regimes and the Function of International Law

In the cases of contemporary prolonged belligerent occupation and foreign domination examined in this work – including northern Cyprus, Western Sahara, the West Bank, Gaza Strip and Golan Heights and the so-called ‘frozen’ conflicts of the Caucasus, with Crimea being a recent addition – there is an overwhelming consensus that the occupying powers’ presence has resulted in systematic violations of international law and should be brought to an end. Yet, the terminology used to describe such regimes and the measures undertaken to redress them have varied, and remained largely ineffective in exacting legal and political consequences on wrongdoing state and non-state actors.

Enforcement mechanisms in the law of occupation, examined in Chapter IV, are limited and politically fraught. The Security Council, charged with the “primary responsibility for the maintenance of international peace and security”1461 including “any threat to the peace, breach of the peace, or act of aggression,”1462 is subject to political stalemate. The operation of international humanitarian and criminal law enforcement through state and individual responsibility, domestically and internationally, is available only for a small number of cases, not least because of the high threshold of evidence, as Chapter VIII discussed. The International Criminal Court’s jurisdiction, for instance, is limited by “gravity” and subject matter, and by its own vested institutional and political interests in retaining positive relations with major powers.1463

Neither the Security Council nor the ICC has yet effectively addressed the

1462 Ibid, Article 24.
overall illegal character of a foreign territorial administration established in
time of belligerent occupation. The very diffusion of responsibility through
multilateralism may, as Chesterman remarks, “remove pressures on a
national actor to conclude its obligations quickly in order to satisfy
domestic political imperatives.”

The international law enforcement doctrine of non-recognition is
intended to deter and redress violations of peremptory norms: third states
and international actors are required to ensure that they do not recognise as
lawful, nor aid or assist in internationally unlawful acts of another state or
non-state actor. Acts that cannot be recognised as lawful or given legal
effect by other states include the legislative and administrative acts that
form the basis for a government’s direct or indirect exercise of authority in
foreign territory, as well as the specific effects of its acts vis-à-vis the status
and rights of the territory’s indigenous population and legitimate
sovereign. Chapter VIII demonstrated that state practice on refusing
recognition of an authority due to the illegal status of its acts is
inconsistent, and appears to rest mainly on political considerations.
Moreover, the international doctrine is lacking in guidance on the concrete
form and substance such non-recognition measures should take. National
efforts by occupied states – such as Georgia’s 2009 Occupied Territories
Law and Azerbaijan’s Resolution 279(XII) condemning acts by the
Armenian authorities in the territory of Nagorno-Karabakh – have not
propelled an adequate and concerted international response, which often
amounts to mere rhetorical condemnation or political posturing.

The alternate model of inter-state enforcement outlined in Chapter
IX is proposed in light of the otherwise-limited, politically-discretionary
means for bringing international law to bear on the illegal acts of predatory
states. This paradigm of enforcement is based on the self-defined
responsibilities of law-abiding states and non-state actors under
international law, as it is incorporated into their domestic law and public
policy. It is thus possible to operationalise those responsibilities through
internal regulatory processes, and to require exigent and effective action
and reaction to unlawful acts by other states, on the basis of a state’s
internal legal necessity. Slaughter and Burke-White argue that “the future
of international law lies in its ability to affect, influence, bolster, backstop
and even mandate specific actors, actions and outcomes in domestic
politics.”

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A degree of legal necessity unusual in international law can be identified in cases where there is a nexus between international law obligations, and domestic law and public policy concerning the legality of predicate facts under international law. In such cases, an exigent domestic legal basis may exist to require a wrongdoing actor to conform with international law, either because it is engaged in inter-state relations with the law-abiding state or because the nationals of the law-abiding state are involved in activities under the aegis of the wrongdoing authority. By placing demands on the wrongdoing state to conform to criteria of legality from international law, the proposed paradigm initiates a process of practical approximation and ultimately political adaptation by the wrongdoing actor through gradual adjustments of its institutional practice to ensure that it is not excluded from international society.

Chapter IX highlights the instructive examples of the European Union’s external relations with wrongdoing states responsible for the establishment and maintenance of illegal territorial regimes, including Turkey, Morocco and Israel. In these cases, the European Union and its Member States, which have incorporated international law into their internal legal orders and public policy, had to ensure that inter-state and private relations with actors operating under the aegis of what are essentially illegal territorial regimes, are structured in a manner that does not give legal effect to internationally-unlawful acts. EU institutions were obliged to condition their relations with wrongdoing authorities on the conformity of the latter’s specific acts with international law, and to undertake risk-aversive protection measures to ensure that EU-based private actors and individuals were not exposed to legal and economic risks by relying on or becoming involved in the internationally unlawful acts.1466

The European Union’s role as a global actor – in Ian Manners’ term, “Normative Power Europe” – may be uniquely characterized by “a type of international action” based on “the use of persuasion, argumentation, deliberation, based on norms which others can see have greater validity beyond simply national interest or European values.”1467 Yet European examples of non-recognition of illegal territorial regimes are representative of the processes of self-preservation and internal regulation undertaken by all states with strong, developed legal orders and public policies – which can also be used to bring about respect for international law. States and international actors beyond the European Union have sought to harmonise

their foreign policies and external relations to ensure their conformity with international law. Such developments reflect a paradigmatic shift in the function performed by international law in the domestic realm, propelled by states’ awareness of the risks to the coherence and integrity of their internal legal orders posed by internationally unlawful acts of illegal territorial regimes.

In a plea for the establishment of an international supervision mechanism for belligerent occupation regimes, Ben-Naftali remarks that occupation law’s main shortcoming is the lack of a limit on the duration of occupation, as well as the contradiction between self-determination, the conservationist principle, and emerging ‘transformative’ occupations. Such a mechanism, which is indeed sorely needed, should ensure that such ostensible normative weaknesses in the lex specialis of belligerent occupation are addressed by the complementary interaction between other contemporary international legal norms when applicable in concurrence. Comprehensively invoking multiple norms, including those of a peremptory character, can significantly increase opportunities to redress illegal territoriality in the context of a belligerent occupation. In time of belligerent occupation, rules such as self-determination and political independence complement the cardinal rules and conservationist principle of occupation law, and reinforce the presumption in favour of non-interference in the internal affairs of the occupied state; and territorial acquisition through the threat or use of force trigger the legal consequences of UN Charter violations and require third state and international actors to align their relations with the wrongdoing actor to ensure the non-recognition of its authority.

The proposed approach to international law enforcement in the context of occupations that amount to illegal territorial regimes, seeks to take into account, and indeed is based on an awareness of the profound quandaries that ensue from international law’s as-yet uncertain function and limited transformative force. Charlesworth has called international law a discipline of crisis, the practice of which, regrettably, often assumes that “the elements of the crisis are uncontroversial” and “leads us [scholars and practitioners] to rediscover an issue constantly,” so much so that “it is

difficult to observe any real progression of thought or doctrine.”

Preoccupied by great crises, international lawyers have forgotten “the politics of everyday life” and, as a result, steered international law “clear of analysis of longer-term trends and structural problems.”

A real-life approach to the regulation of illegal territoriality is particularly needed given contemporary “transformative” and “humanitarian” belligerent occupations and territorial administrations – carried out under the guise of furthering self-determination claims or disseminating democratic values, yet in some cases recalling colonial practices of domination, subjugation and exploitation. Such practices govern the everyday life of populations, whose urgent protection needs are lost in the maze of routine legal analyses that fail to examine assumptions about the sole applicability and scope of the lex specialis of belligerent occupation.

It is necessary to take a step back from the particularism and formalism – as well as misappropriation and reinterpretation, which Koskenniemi describes as obstacles to “effective action” – that characterize the application of specific substantive international norms on occupation, and to consider their function, as understood by their exponents and in the context of the complex needs of contemporary international society. The prohibition on the use of force in pursuit of colonial-type practices is a case-in-point: while the law is often assumed to be anachronistic, such practices continue to characterise the everyday life of a considerable number of societies the world around. For David Koller, depicting the rhizomatic nature of international law “highlight[s] the processes of control imposed by any pre-determined method and [fosters] new potential connections across the entirety of human consciousness, thereby unleashing law’s (and not-law’s) creative potential.”

To address the exigent need to counter this process, he adds, international law academics “should not only solidify and reinforce arborescent structures of international law, whether dominant or critical, but should also lead the way in challenging these structures and giving life to the rhizomatic nature of international law.”

The multi-dimensional nature of the concept of illegal territoriality and the analysis of illegal territorial regimes, bridges

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1470 Ibid, 389.
1473 Ibid.
the isolated categories of contemporary international law, and challenges
the premature finality of the situational applications of narrowly-focused
legal regimes to defined issue-areas – an instance of the phenomenon of
fragmentation.1474

By accounting for a broader scheme of rules and practices, a
comprehensive approach to the regulation of situations of belligerent
occupation and contemporary foreign administrations moves away from a
binary, linear conceptualization of such situations, and the short and long-
term condition to which it subjects groups of individuals and entire
societies. It takes a more dynamic, circular and “rhizomatic” approach to
regulation and enforcement – allowing for multiple, non-hierarchical entry
and exit points in data representation and interpretation.1475 As regards a
new approach to international law enforcement, a domestic law-based
paradigm is premised on the rationale that in order to invoke law
effectively in a legal dispute, the determination and analysis of the facts
under a particular body of laws should be outcome-determinative. Deleuze
and Guattari echo this purposive role: “when one writes, the only question
is which other machine the literary machine can be plugged into, must be
plugged into in order to work.”1476 Similarly, in the words of Deleuze and
Guattari’s translator, “[a] concept is a brick. It can be used to build the
courthouse of reason. Or it can be thrown through the window.”1477

The potential legal consequences entailed by the comprehensive
legal framework for the regulation of the phenomenon of illegal territorial
regimes are grave. An occupying state may be forced to incur legal and
political consequences for its unlawful acts in foreign territory: third states
and international actors could restrict their relations on the basis of non-
recognition of such acts, and impose risk-aversive, internally-necessitated
countermeasures. These facts are raising concerns amongst the legal
services of several occupying states, as in the case of Israel.1478 The

1474 See generally, Martti Koskenniemi, ‘Constitutionalism as Mindset: Reflections on
Kantian Themes About International Law and Globalization’, Theoretical Inquiries in Law, Vol
8, No 1 (2006).
1475 Gilles Deleuze, Félix Guattari, A Thousand Plateaus: Capitalism and Schizophrenia (Brian
1476 Ibid, 5. See also, Martti Koskenniemi, ‘Letter to the Editors of the Symposium’, American
(Minnesota, 2004) xviii.
1478 See, e.g., Israeli official describes EU directive ensuring non-application of EU-Israel
relations to occupied territory as an “earthquake”; Harriet Sherwood, ‘EU takes tougher
Ya’alon limits EU projects in West Bank, Gaza’, Haaretz, 26 July 2013
<http://www.haaretz.com/news/diplomacy-defense/premium-1.538051>. See also, Daniel
combined effect of international condemnations, countermeasures and measures of inter-state enforcement has considerable potential to enhance the deterrence effect of specific rules in the *lex specialis* of belligerent occupation, trigger more vigorous responses to violations, and favourably alter the wrongdoing actor’s cost-benefit analysis of its actions and political interests.\footnote{Jack Goldsmith, Eric A Posner, *The Limits of International Law* (Oxford, 2005) 90. See also, on the obstacles to Turkey’s EU membership resulting from its regime in north Cyprus, Cengiz Aktar, ‘Cyprus after 40 years of division’, *Al-Jazeera*, 20 July 2014.}
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