Part I
Military Occupation

1 The Scope of Application of the Status of Military Occupation

1.1 Hague Regulations, Article 42 and Customary International Law

The status of military occupation applies as a matter of fact and does not depend upon the consent of the occupant to be bound by occupation law.[1] The definition of military occupation is contained in Section III, Article 42 of the Regulations Respecting the Laws and Customs of War

1 Eyal Benvenisti, 'Occupation, Belligerent' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) paras 9-10.

on Land (The Hague Regulations).[2] This definition is part of customary international law.[3]

> **Hague Regulations**
>
> **Section III. Military Authority over the Territory of the Hostile State**
>
> **Article 42**
> (1) Territory is considered occupied when it is actually placed under the authority of the hostile army.
> (2) The occupation extends only to the territory where such authority has been established and can be exercised.

1.2 'Territory of the Hostile State'

1.2.1 The Scope of the Term 'Hostile State'

There are many ways for a territory to qualify under the term 'hostile State'. Arguably it even suffices that a territory is foreign to the occupying force.

The definition of occupation as contained in Article 42, Hague Regulations being part of customary international law, the term 'territory of the hostile State' encompasses not only signatory States, but all States.[4] Therefore, the territory of any State, even if it is disputed, can come under military occupation.[5] From the point of view of international law, there are many ways for an entity to be regarded as a State. Membership in the United Nations (The UN) is probably the least disputed proof of

2 Hague 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) (entered into force 26 January 1910), (authentic text: French).

3 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgement) (2005) para 172; Benvenisti, 'Occupation, Belligerent' (n 1) para 4.

4 n 3.

5 Benvenisti, 'Occupation, Belligerent' (n 1) para 10.

the existence of an entity as a State.[6] This is implicit in the nearly universal coverage of the surface of the Earth by UN Member States.[7] That UN membership should qualify an entity as a State even from an outside perspective, may also be due to the high legal plane on which the Charter of the United Nations[8] (The UN Charter) stands.[9] But the United Nations does not claim to be the only system of States.[10] The UN Charter explicitly recognizes the existence of further States that are not members of the UN. Article (2(6)) speaks of 'states which are not Members of the United Nations' and Article 2(4) contrasts UN Members with 'any State'. The question thus arises, when an entity qualifies as a State.

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6 See Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems: with Supplement* (Library of World Affairs no 11, FA Praeger 1951) 79.

7 This fact has lead many to assume universality on behalf of the UN (See Georges Abi-Saab, 'Whither the International Community?' (1968) 9(2) European Journal of International Law 248, 261; Georg Schwarzenberger, 'The Problem of International Constitutional Law in International Judicial Perspective' in Jost Delbrück, Ipsen Knut, and Dietrich Rauschning (eds), *Recht im Dienst des Friedens: Festschrift für Eberhard Menzel zum 65. Geburtstag am 21. Januar 1976* (Duncker & Humblot 1975) 242; Christian Tomuschat, 'International Law' in Christian Tomuschat (ed), *The United Nations at Age Fifty: A Legal Perspective* (Kluwer Law International 1995) 285; Georg Ress, 'The Interpretation of the Charter' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, C H Beck 2002) vol I para 34; Masahiro Igarashi, *Associated Statehood in International Law* (Kluwer Law International 2002) 300).
Naturally, the way international law itself came about and how it divided the world into its subjects is not free from criticism (see Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40(1) Harvard International Law Journal 1, 20ff. See also Onuma Yasuaki, *A Transcivilizational Perspective on International Law* (Martinus Nijhoff 2010) 270ff).

8 Charter of the United Nations (San Francisco, 26 June 1945) (entered into force 24 October 1945).

9 This is implicitly supported by the idea of the Charter as a world constitution (See Jean-Pierre Cot, 'United Nations Charter' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 66, for a summary of prominent references to this idea. See also Ress (n 7) paras 1-2).

10 See Ram P Anand, 'New States and International Law' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 1.

One way for an entity to be considered a State in international law is through recognition by other States.[11] If it is assumed that recognition of an entity as a State is not restricted by preconditions, such recognition is constitutive of the existence of a State from the perspective of the recognizing State.[12] By way of recognition, States thus create each other – including on occupied territory.[13] However, when a UN Member or any other State recognizes another entity as a State, this entity becomes a State only from the perspective of the recognizing State and not from the perspective of all UN Members or even all States.[14] In practice, entities regularly receive multiple recognitions as States before they become UN Members.[15] A State can recognize an entity as a State by explicit unilateral declaration, or implicitly by establishing a bilateral relationship on an equal footing.[16] Since the UN recognizes the existence of States outside its membership circle, there should be a threshold amount of

11 Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947) 74.

12 Dionisio Anzilotti, *Lehrbuch des Völkerrechts: Band 1: Einführung – Allgemeine Lehren* (Walter de Gruyter & Co 1929) 119-25. See also James Crawford, 'State' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 44.

13 Hans Kelsen, *Principles of International Law* (Rinehart & Company Inc 1952) 77. Meanwhile, the occupant himself does not legally acquire a territory through recognitions, if such acquisition has been the result of an illegal use of force (Martin Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford Commentaries on International Law, Oxford University Press 2010) 678-79. See however Rudolf L Bindschedler, 'Die Anerkennung im Völkerrecht' (1961-1962) 9 Archiv des Völkerrechts 377, 388).

14 See Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 88-89, who however rejects as a matter of principle that States should establish the competence of other States. It should be recalled however that this is how States created each other under modern international law in the first place (See Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (n 7) 40ff, 60, for a critique of recognition in the context of historic colonialism).

15 See eg James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 393.

16 See Jochen A Frowein, 'Recognition' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) paras 9, 17.

recognitions above which a State comes into existence with binding effect also upon those States that have not recognized it.[17]

The more established way for an entity to be considered a State in international law today is by fulfilling constitutive factual criteria of statehood.[18] The exact content of these factual criteria is disputed.[19] It has been argued that once an entity fulfils the relevant factual criteria, its existence as a State is binding upon all other States.[20] If States do indeed come into existence in this organic way, a recognition by other States is merely of declaratory nature.[21] An entity that has once fulfilled the criteria and thus became a State does not lose its statehood if it no longer meets one or more of the criteria due to military occupation.[22] A State may also come into existence in this organic way, while occupied.[23]

Arguably it is not even necessary that an entity be a proper State for it to fall under the definition 'territory of the hostile State', but only that its territory is foreign to the occupying force.[24] This also finds some support in the wording of the Hague Regulations. Granted, the title of their

17 That threshold should therefore be below the two thirds majority of UN Member States required for accession to the UN itself by Article 18(2) of the Charter. See also Frowein, 'Recognition' (n 16) para 10, who requires 'all or practically all States'.
See however James Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?' (1990) 1(1) European Journal of International Law 307, 309, who stated in 1990 that 'There is no rule that majority recognition is binding on third states in international law').

18 Crawford, 'State' (n 12) para 44.

19 See Crawford, 'State' (n 12) para 12ff.

20 See Lauterpacht (n 11) 63-66; Brownlie (n 14) 90.

21 William Edward Hall, *Treatise on International Law* (Pearce Higgins ed, 8th edn, Oxford, The Clarendon Press 1947) 103; Lauterpacht (n 11) 75.

22 Hollin K Dickerson, 'Some Legal Problems with Trusteeship' (1995) 28(2) Proceedings of the ASIL Annual Meeting 302, 336; Raoul Jacobs, *Mandat und Treuhand im Völkerrecht* (Universitätsverlag Göttingen 2004) 236; Andreas Zimmermann, 'Continuity of States' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) 10-11.
See however Kelsen, *Principles of International Law* (n 13) 75-76.

23 See John Quigley, 'The Israel-PLO Interim Agreements: Are They Treaties?' (1997) 30(3) Cornell International Law Journal 717, 724-29.

24 See PCA, *Eritrea-Ethiopia Claims Commission* (Partial Award: Central Front - Ethiopia's Claim 2, Decision) (2004) para 29; Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16(4) The European Journal of International Law 661, 686; Marco Sassòli, 'The Concept and the Beginning of Occupation' in Andrew Clapham, Paola Gaeta, and

Section III reads 'Territory of the Hostile State'. However, Article 55 of Section III describes the occupying force as 'occupying State', but the occupied territory merely as 'occupied country'. Further, Article 2 of Section I, Hague Regulations, speaks of an approaching 'enemy' and of a 'territory' without mention of a State. It could thus be argued that the Hague Regulations merely employ the term 'State' to contrast two foreign entities and do not mean to qualify these entities as States or even Member States. Any territory would thus qualify as 'territory of the hostile State' unless it belongs to the State whose occupying forces are invading.

To be certain that a territory belongs to one State and is therefore not foreign to the occupying forces of that State, territory needs to be delimited.[25]

1.2.2 Equal States as a Territorial Order

Equal States constitute territorial units.

The international legal order of States is based upon the principle of equality.[26] For equality to exist, there need to be entities. In international law, these equal entities have historically been understood to be land territories.[27] The UN Charter explicitly employs a territorial concept of States, by granting 'any state' its 'territorial integrity' (Art 2(4)). Because States have divided the world among themselves into territorial units vested with equality, all States potentially have a claim in the allocation of undelimited territory.[28]

Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (1st edn, Oxford University Press 2015) para 53.

25 See 1.2.3.1 Delimitation in General, 32ff.

26 The principle is part of customary law (Georg Schwarzenberger, 'The Principles of the United Nations in International Judicial Perspective' [1976] Year Book of World Affairs 307, 312 para 3; 33 para 6) or a general principle of international law (See Juliane Kokott, 'States, Sovereign Equality' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 15).

27 Onuma Yasuaki, *International Law in a Transcivilizational World* (Cambridge University Press 2017) 294.
Note that besides States, international law can vest other entities with specific legal rights relevant to territory (See 1.2.4 Self-Determination and Related Claims to Territory, 37ff, for the right of historic colonial peoples to territory).

28 1.2.3.1 Delimitation in General, 32ff.

To divide the land surface of the world into territorial units may or may not be the final world order.[29] The concept of equality in international law was influenced by the idea of equality of man.[30] The complete embodiment of this idea would therefore be a world where all humans share equal rights on all territory.[31] The surface of the world would be undelimited and an international law of States obsolete. But which rights and obligations exactly should be shared among all humans has been much debated to this day.[32] It is thus not clear if a single world entity would serve humanity better than several territorial units.[33] Meanwhile,

29 See Peter Vale, 'Engaging the World's Marginalized and Promoting Global Change: Challenges for the United Nations at Fifty' (1995) 36(2) Harvard International Law Journal 283, 291ff.
'Yet the question of the legitimacy of an international law without or with little anchorage to territory remains largely unanswered' (Enrico Milano, 'The Deterritorialization of International Law' (2013) 2(3) ESIL Reflections, 5).

30 For the origins of the idea of equality in international law and its establishment in the age of enlightenment, see Kokott (n 26) paras 9-10.

31 'The idea of a cosmopolitanism is not a fanciful and extravagant imagination of the law, but a necessary addition to the unwritten codex of public law and international law towards a public human right and therefore towards perpetual peace (...)' (Immanuel Kant, *Zum Ewigen Frieden* (first published 1795, Philipp Reclam jun Stuttgart 1984) 24).

32 'For the further development of international law the recognition of a juridico-political postulate arises, that only those rules of law can gain universal recognition whose content does not meet the resistance of special legal ideologies in individual legal civilizations, those which realize universally recognized values and interests' (Paul Guggenheim, 'What is Positive International Law?' in George A Lipsky (ed), *Law and Politics in the World Community: Essays on Hans Kelsen's Pure Theory and Related Problems in International Law* (University of California Press 1953) 30). See Abi-Saab (n 7) 264; Yasuaki, *A Transcivilizational Perspective on International Law* (n 7) 377ff; Cot (n 9) paras 84-88.
Finally, 'Premature international legalism takes normative development and sensible trade-offs out of the realm of both international and domestic politics without the necessary political deliberation' (J Patrick Kelly, 'Naturalism in International Adjudication' (2008) 18 Duke Journal of Comparative & International Law, 421).

33 On one hand, 'The striving for expansion – this economic monopoly on a territorial basis – causes a fundamentally hostile confrontation and locking up of States. War is, if not the constant, then at least the normal form of communication of these States' (Max Huber, *Die soziologischen Grundlagen des Völkerrechts* (Internationalrechtliche Abhandlungen, Verlag Dr Walther Rothschild 1928) 18).
On the other hand, the substitution of the territorial order with a global order governed by private economic interests is no proven guarantee for the peaceful

States, as enclosed territorial components of the world, each experience within themselves the difficulty of life as a community of diverse people.[34] Maybe this experience will eventually guide humanity towards the best model for a legal cosmopolitanism.[35]

1.2.3 The Territorial Delimitation of Equal States

1.2.3.1 Delimitation in General

A State can only make an exclusive claim to territory when its title to that territory is valid opposite all other States. Valid title results in a boundary and that boundary can only be drawn with the consent of all States concerned or by a competent legal forum.

To avoid being regarded as an occupant, a State might argue that a territory is not foreign, but its own.[36] Because States are equals as territorial units, they cannot unilaterally alter their own territorial expanse.[37] When one State seeks to add land to its territory, claims of other equal States to the same land may arise. This is the corollary to the *erga omnes* validity

coexistence of humanity (See Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (3rd edn, first published 1950, Duncker & Humblot 1988) 208-12).

34 Yasuaki, *A Transcivilizational Perspective on International Law* (n 7) 83-84.

35 CG Weeramantry, 'Cultural and Ideological Pluralism in Public International Law' in Nisuke Andō and others (eds), *Liber Amicorum Judge Shigeru Oda* (Kluwer Law International 2002) vol 2, 1492.

36 See Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd edn, Cambridge University Press 2019) 10-13. See also 1.2.1 The Scope of the Term 'Hostile State', 26ff.

37 'This principle of the stability of boundaries constitutes an overarching postulate of the international legal system and one that both explains and generates associated legal norms. It enshrines and reflects the need felt within the international legal and political system for a significant element of permanence and continuity with regard to the spatial configuration of the state in order to prevent as far as possible constant disruption based upon challenges to the territorial integrity of states' (Malcolm N Shaw, 'Boundary Treaties and their Interpretation' in Eva Rieter and Henri de Waele (eds), *Evolving Principles of International Law: Studies in Honour of Karel C Wellens* (Queen Mary Studies in International Law, Vol 5, Brill | Nijhoff 2012) 242). See 1.2.2 Equal States as a Territorial Order, 30f.

which a boundary has opposite all States.[38] Among the equal States that have a potential claim to the land, there can also be States which one or more of the parties to the dispute do not recognize as equal States. Such equal States may however exist as a matter of fact – including on occupied territory.[39] Because States are equals as territorial units, all disputed territory that is not delimited should be regarded as foreign – and therefore 'territory of the hostile State' for matters of military occupation – to all States until the conflicting claims are settled.[40]

If States fail to solve a dispute over a common boundary – be it as a matter of general title or precise delimitation – they must seek dispute settlement.[41] This obligation to resort to dispute settlement stems from the UN Charter (Arts 1(1), 2(3) and 33), as well as customary international law.[42] The competent legal forum determines if a boundary already exists

38 PCA, *Eritrea/Yemen - Sovereignty and Maritime Delimitation in the Red Sea* (Award of the Arbitral Tribunal in the First Stage - Territorial Sovereignty and Scope of the Dispute) (1998) para 153; Zdzislaw Galicki, 'Hierarchy in International Law within the Context of Its Fragmentation' in Isabelle Buffard and others (eds), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Brill | Nijhoff 2008) 58.
This is true even if the State in question does not abut on the disputed territory – such as in case of an island (See PCA, *Island of Palmas Case (or Miangas) (United States v Netherlands)* (Award) (1928) 10).
With respect to boundaries, the *erga omnes* validity and the concurrent interests of third States are especially relevant, since a boundary is permanent (Shaw, 'Boundary Treaties and their Interpretation' (n 37) 239-42. See also Art 62(2)(a), Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) (entered into force 27 January 1980) 1155 UNTS 331; ICJ, *Aegean Sea Continental Shelf (Greece v Turkey)* (Judgement) (1978) para 85).

39 1.2.1 The Scope of the Term 'Hostile State', 26ff.

40 n 28. Note that this does not require that all boundaries are determined in exact detail, as long as title to the territory is not contested in general (Brownlie (n 14) 120).

41 'The principle of the peaceful settlement of disputes occupies a pivotal position within a world order whose hallmark is the ban on force and coercion.' (Christian Tomuschat, 'Article 2(3)' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, C H Beck 2002) vol I para 2).

42 Or even from *ius cogens* (Cot (n 9) para 32; Schwarzenberger, 'The Principles of the United Nations in International Judicial Perspective' (n 26) 308, 316).
A dispute exists if tensions rise above the possibility to 'live together in peace with one another as good neighbours' as demanded by the Preamble of the Charter. And the obligation to seek dispute settlement applies 'as soon as a dispute has become such a serious problem for one of the parties involved that it has

between the parties per an explicit or tacit agreement.[43] When the legal forum is called upon to draw a new boundary itself, it considers if the actions of either one State on the undelimited territory give that State a better claim to the territory.[44] Such acquisition of territory between equals can only be effected by dispute settlement and not unilaterally.[45]

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formally addressed its opponent' (Tomuschat, 'Article 2(3)' (n 41) paras 17, 25; Preamble of the UN Charter (n 8) reprinted in 6.6.3.1 In the Light of Peace, 132.

43 See Steven R Ratner, 'Land Feuds and Their Solutions: Finding International Law beyond the Tribunal Chamber' (2006) 100(4) American Journal of International Law 808, 810.

44 'Actual continuous and peaceful display of state functions is in case of dispute the sound and natural criterium of territorial sovereignty' (*Island of Palmas Award* (n 38) 10).
Almost a century later it is still recalled that 'effective control of territory and its legitimizing logic (is what) the territorial order of today's international society is based (upon)' (Sookyeon Huh, 'Title to Territory in the Post-Colonial Era: Original Title and Terra Nullius in the ICJ Judgments on Cases Concerning Ligitan/Sipadan (2002) and Pedra Branca (2008)' (2015) 26(3) European Journal of International Law 709, 709. See also eg ICJ, *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Judgement) (2012) paras 66-84, with references to prior case law).
In fact, the idea of effectivity has been expounded already in the 18th Century (Emer de Vattel, *The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns: On the Law of War and Peace, Book 1* (Charles Fenwick tr, The Classics of International Law Ed 4, Vol 3, Ohio State University 1758) 84-85).
Weighing various State actions in the process of determining effective control is an operation of equity and should follow a topical approach that ultimately takes into consideration the legitimate expectations of the parties involved (See Thomas Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* (Cambridge University Press 2015) 630-31, 634-35). In the context of military occupation it may be worth noting that the increase, in the disputed territory, of a population affiliated with one party to the dispute, is not a topical factor relevant for the award of title over that territory (ICJ, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon Nigeria: Equatorial Guinea intervening)* (Counter-claims) (2002) para 221).

45 See PCA, *Eritrea - Ethiopia Boundary Commission* (Decision Regarding Delimitation of the Border) (2002) para 3.29; Brownlie (n 14) 86. See however Zimmermann, 'Continuity of States' (n 22) para 10. Original title – that is acquisition of *terra nullius* or acquisition irrespective of the will of the former title holder – is thus relegated to the exclusive domain of dispute settlement, once it is disputed.

When drawing a boundary between disputing parties, judicial authorities strive not to infringe upon the potential claims of third States.[46] This is an emanation of the rule that judicial awards are without prejudice to States that are not parties to the dispute.[47] A judicial authority should also be competent or even compelled to examine, if an entity exists – including on occupied territory – that has a potential claim to the disputed territory, even if that entity has not yet been recognized as a State.[48] In the same vein, an international dispute and the concurrent obligation to seek dispute settlement exists also between a State and an entity whose status as a State still has to be confirmed.[49]

Where two States agree upon a boundary, that boundary is not automatically binding upon all other States.[50] With each delimitation, the balance of power changes for all States, since they granted each other equality as confined – even if not delimited – territorial units and not beyond.[51] All equal States therefore have a potential claim when other States delimit territory by treaty.[52] It follows that an agreement is not valid if it disregards the claims of a third State to the same territory, even

46 '[T]he Court has always taken care not to draw a boundary line which extends into areas where the rights of third States may be affected' (*Nicaragua v Colombia Case* (n 44) para 228).

47 Art 59 Statute of the International Court of Justice (San Francisco, 26 June 1945) (entered into force 24 October 1945) (The ICJ Statute).

48 See n 20; Arbitration between Great Britain and Costa Rica, *Tinoco Case* (1923) 1 RIAA 369, 381; Brownlie (n 14) 87.
This idea has been supported already in the 19th century: 'The newly formed State has a right to join the international community and to be recognised by the other States if its existence is unquestionable and secure. It has this right because it exists and because international law unites the States of the world into a common legal order' (Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisirten Staten: als Rechtsbuch dargestellt* (2nd edn, C H Beck 1872) 74).

49 See Tomuschat, 'Article 2(3)' (n 41) paras 21-22; Christian Tomuschat, 'Article 33' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, C H Beck 2002) vol I paras 8-9.

50 Art 34 VCLT (n 38) (VCLT); *Island of Palmas Award* (n 38) 10; ICJ, *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua)* (Judgement) (2018) para 123.

51 n 37. See also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006) 302.

52 n 38. 'This special category of treaties (...) represents a legal reality which necessarily impinges upon third states, because they have effect *erga omnes*' (*Eritrea/Yemen, First Stage* (n 38) para 153).

if the parties to the agreement do not recognize that entity as a State.[53] A boundary agreement is equally invalid, if it has not been concluded with the competent *Zentralgewalt* but instead with a proxy, to eg effect a *Anschluss*.[54] Finally, the illegal use of force to obtain a boundary agreement bars its validity.[55]

1.2.3.2 Practical Scenarios

In all of the following scenarios, the territory in question remains foreign – and therefore a 'territory of the hostile State' for matters of military occupation – to the State that has no claim at all or no exclusive claim to that territory.

If one State seeks to acquire territory of another State by altering an existing boundary, it cannot do so unilaterally. The equal States with a claim to the territory need to agree to its re-allocation.[56] Even when a part or parts of the territory of a State become independent, a third State cannot unilaterally enforce claims to it, since a boundary is still in place.[57]

If two entities vie to be the legitimate State on any given territory, both have a claim to it, if they both are in fact States.[58] Neither of them can then acquire all or parts of the territory by unilaterally delimiting it opposite the other or opposite third States.[59]

If several States jointly administer a territory per a treaty without allocating its territory, no individual State can unilaterally acquire the territory.[60] If the territory has not been delimited opposite third States either, all equal States have a potential claim to it.[61]

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53 n 20.
54 See Art 7 VCLT (n 38).
55 Art 52 VCLT (n 38). See also 2.1 The Legality of Occupation, 51ff.
56 n 37.
57 1.2.4 Self-Determination and Related Claims to Territory, 37ff.
58 n 37; n 20.
59 1.2.3.1 Delimitation in General, 32ff.
60 See eg Art 4(2) The Antarctic Treaty (1 December 1959) (entered into force 23 June 1961) 402 UNTS 71, which explicitly excludes the establishment of claims to territory among the signatories. At the same time, the Vienna Convention on Succession of States (n 60) does not refer Antarctica to the common heritage of mankind (Victor Prescott and Gillian D Triggs, *International Frontiers and Boundaries: Law, Politics and Geography* (Martinus Nijhoff 2008) 402-03).
61 n 37.

If a new State succeeds a preceding State on the entire territory, historic claims of third States to the territory are not revived.[62] This is true although the existing boundary has been concluded with an equal State that no longer exists on the territory. Third States have no claim to the territory because they had granted equality to the preceding State as a territorial unit separate from their own.[63] The relationship between the new State and third States is regulated by the rules of State succession.[64]

1.2.4 Self-Determination and Related Claims to Territory

The right to self-determination in international law contains a right for some peoples to separate their territory from the parent State. Per that right, territory becomes foreign to the parent State and therefore 'territory of the hostile State' for matters of military occupation.

With its Resolution titled 'Declaration on the Granting of Independence to Colonial Countries and Peoples' (Resolution 1514), the General Assembly of the United Nations (The General Assembly) in 1960 proclaimed a right of former colonial peoples to become independent from their parent States.[65] This right has since become customary international law or even *ius cogens*.[66]

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62 See also n 77.

63 Art 11 Vienna Convention on Succession of States in respect of Treaties (23 August 1978) (entered into force 6 November 1996) 1946 UNTS 3; MN Shaw, 'Territory in International Law' (1982) 13 Netherlands Yearbook of International Law 61, 240. See also 1.2.2 Equal States as a Territorial Order, 30f.

64 See Andreas Zimmermann, 'State Succession in Treaties' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 4ff, for the difficulties surrounding that field of law.

65 Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514 (XV) (14 December 1960) UN Doc A/4684 (1961).

66 Robert T Vance Jr, 'Recognition as an Affirmative Step in the Decolonization Process: The Case of Western Sahara' (1980) 7 Yale Journal of International Law 45, 1; Mohammed Bedjaoui, 'Chapitre XI: Declaration Relative aux Territoires Non Autonomes: Article 73' in Jean-Pierre Cot and Alain Pellet (eds), *La Charte des Nations Unies: Commentaire article par article* (3rd edn, Centre de Droit international de Nanterre, Economica 2005) vol II 1765-66; Karl Doehring, 'Self-determination' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, C H Beck 2002) vol I para 57. See however Daniel Thürer and Thomas Burri, 'Self-Determination' in Rüdiger Wolfrum (ed), *The Max Planck*

Resolution 1514

> 'The General Assembly, (...) Solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations; And to this end Declares that: (...) 2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status (...) 4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.'[67]

Self-determination in international law thus contains a claim for colonial peoples to a part of the territory of their parent State.[68] They receive a 'right to complete independence' and 'integrity of their national territory' and thus a claim to unilaterally alter existing territorial units and to create their own.[69] A new entity thus created has the same claim to the territory as if it were an equal State – regardless if it is a State in fact or by recognition of other States.[70] The right to self-determination is therefore an exception to the territorial order of equal States, as it grants independence to a people as if they were a sovereign equal.[71] The right to self-determination, applying by virtue of *ius cogens*, overrules the claim of

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Encyclopedia of Public International Law (2nd edn, Oxford University Press 2013) para 45.

67 Res 1514 (n 65).

68 'The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.' (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV) (1970)).
For further, internal, aspects of the principle of self-determination, see eg Thürer and Burri (n 66) 33ff; Jamie Trinidad, *Self-Determination in Disputed Colonial Territories* (Cambridge Studies in International and Comparative Law, Cambridge University Press 2018) 243-44.

69 Ratner (n 43), 811. See Res 1514 (n 65) para 4.

70 See Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (n 7), 3. cf 1.2.1 The Scope of the Term 'Hostile State', 26ff.

71 The people thus receive the status of a subject of international law (Bedjaoui (n 66) 1760). See also Kelsen, *The Law of the United Nations: A Critical Analysis*

the parent State to its territorial unit.[72] This right of the colonial peoples to their own territory is not tied to conditions.[73] All former colonial territories therefore became foreign to their former parent States at the latest when the right to self-determination received *ius cogens* status and unless and until the peoples freely chose to remain with their parent States.[74]

Once independent, the peoples are free to join their territory to a third State.[75] Their territory is then no longer foreign to that State. Before they have freely chosen to do so, however, their territory remains foreign to the third State.[76] Historic claims of third States to the newly independent territory do not trump the *ius cogens* right to self-determination or even the existing boundary with the former parent State.[77] In practice, the ad-

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of Its Fundamental Problems: with Supplement (n 6) 559. cf 1.2.2 Equal States as a Territorial Order, 30f.

72 n 66. See Galicki (n 38) 55, for a detailed portrait of the priority treatment that norms of *ius cogens* are awarded in the application of international law. cf however Ulrich Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) vol 2 para 12, who argues that the right to self-determination is not linked with a right to independence in a peremptory fashion.

73 Res 1514 (n 65) para 4. See also Fastenrath, 'Chapter XI. Declaration Regarding Non-Self-Governing Territories' (n 72) para 13. Further evidence on this point is provided by the fact that the use of force against the right to self-determination is prohibited under Article 2(4) in connection with Article 1(2) of the UN Charter.

74 Res 1514 (n 65) paras 2, 4. The emphasis is on the free choice of the peoples, regardless of the outcome of their vote (Resolution on Question of Western Sahara, GA Res 64/101 (10 December 2009) UN Doc A/RES/64/101 (2009)).

75 Res 1514 (n 65) para 2.

76 Res 1514 (n 65) para 2 in connection with para 4. In practice, allegiances of the inhabitants can be split and therefore the question of who belongs to the people that is entitled to choose can be contentious (See eg Security Council Resolution 2494, SC Res 2494 (20 October 2019) UN Doc S/RES/2494 (2019), extending until 2020 the mandate of the United Nations Mission for the Referendum in Western Sahara (MINURSO), which had been established in 1991 by Security Council Resolution 690, SC Res 690 (29 April 1991) UN Doc S/RES/690 (1991). See also Ivor W Jennings, *The Approach to Self-Government* (Cambridge University Press 1956) 56; Trinidad (n 68) 241-43).

77 'Historic claims and feudal pre-colonial titles are mere relics of another international legal era, one that ended with the setting of the sun on the age of colonial imperium' (ICJ, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (Judgement, Intervention Procedure) (2001) Separate opinion of

ministrative boundaries from colonial times were regularly left in place opposite third States.[78]

The question arises, if the right to self-determination applies only to a historic category of colonial peoples or to all peoples that seek independence from their parent State. Resolution 1514 speaks of 'colonialism in all its forms and manifestations'. In its paragraph 2, Resolution 1514 grants the right to self-determination to 'all peoples'.[79] The same is true of Article 1(1) of the International Covenant on Civil and Political Rights (The ICCPR), which opens with 'All peoples have the right of self-determination'.[80] In its paragraph 6, however, Resolution 1514 cautions that 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'.[81] It is there-

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Judge ad hoc Franck, para 5. See also Thomas Franck, 'The Stealing of the Sahara' (1976) 70(4) American Journal of International Law 694, 695. See however Crawford, *The Creation of States in International Law* (n 15) 640-47).

78 This is a result of the application of *uti possidetis*, 'a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power' (ICJ, *Frontier Dispute (Burkina Faso v Republic of Mali)* (Judgement) (1986) para 20.).

Historic legal ties were therefore regularly rejected (See eg ICJ, *Western Sahara* (Advisory Opinion) (1975) para 162; Christine Gray, *International Law and the Use of Force* (4th edn, Oxford University Press 2018) 73-74). The rationale behind this was described as 'Any doctrine that authorizes the consolidation of inchoate "legal ties" into territorial sovereignty will prove, at the least, mischievous and at the most, calamitous for regional order' (Michael W Reisman, 'African Imperialism' (1976) 70(4) American Journal of International Law 801, 802). Nevertheless, the principle of *uti possidetis* 'lived always somewhat uneasily with the official ideology of decolonisation as a restoration of authentic communities' (Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43(2) International and Comparative Law Quarterly 241, 243).

79 Res 1514 (n 65) para 2.

80 International Covenant on Civil and Political Rights (New York, 16 December 1966) (entered into force 23 March 1976) 999 UNTS 171.

81 Res 1514 (n 65) para 6. And in 1970 the General Assembly even cautioned not to 'dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described

fore not entirely clear, if and when peoples – besides the historically colonial ones – have a claim to their own territory or if they need to respect the national unity and territorial integrity of their parent State.[82] In case of grave breaches of humanitarian law or human rights abuses against a people by its parent State, the question may arise more forcefully, if a people should be granted its separate territory.[83] Only for peoples who do enjoy the right to independence will their unilateral secession become binding upon the parent State. Their territory thus becomes foreign to the now former parent State for matters of military occupation.[84] The newly independent territory can join a third State or it will remain foreign to that State as well.[85]

1.3 'Hostile Army'

Any foreign force on 'territory of the hostile State' can qualify as 'hostile army'.

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above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.' (Friendly Relations Declaration (n 68)).

82 Helen Quane, 'The United Nations and the Evolving Right to Self-Determination' (1998) 47(3) International and Comparative Law Quarterly 537, 537. See also Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (n 78) 242ff.
In 1997 it has been argued that the rationale behind the principle of *uti possidetis* (n 78) may apply outside the historic colonial context as well (Malcolm N Shaw, 'Peoples, Territorialism and Boundaries' (1997) 8(3) European Journal of International Law 478, 503). In 2006 it was held that 'States are still under no general duty to consult or act according to the wishes of the population of a disputed territory with respect to its future status' (Ratner (n 43), 811). In 2010, the ICJ was of the view that the right to independence apply to 'peoples subject to *alien* subjugation, domination and exploitation' (emphasis added) (ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) (2010) para 79).

83 See Willem Van Genugten, 'Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems' (2010) 104(1) American Journal of International Law 29, 39ff.

84 See 1.2.1 The Scope of the Term 'Hostile State', 26ff.

85 See 1.2.3.1 Delimitation in General, 32ff.

The Hague Regulations employ the term occupying 'State' in Article 55, where they lay out the obligations that apply during occupation.[86] However, in Article 42, which contains the definition of occupation, the Hague Regulations describe the occupying force merely as 'hostile army' without mention of a 'State' and Article 45 speaks of the 'hostile Power' and does not mention a 'State' either.[87]

It seems reasonable to follow that the occupying force does not have to be the designated army of a State in order for that State to qualify as the occupier. The force merely needs to be attributable to any one foreign State.[88] Any force attributable to a foreign State qualifies as a 'hostile army' or 'hostile power' and not merely as a security force or the like, if it is capable to establish military authority.[89] A joint force – such as a coalition – qualifies as 'hostile army' if it consists of troops attributable to at least one State.[90] A UN force likewise qualifies as 'hostile army', while its troops are attributable to one or more foreign Member States and not just to the UN itself.[91]

86 Art 55 Hague Regulations (n 2) reprinted in 3.2 Administration of Property (Usufruct), 66.

87 Article 42 of the Hague Regulations reads 'Territory is considered occupied when it is actually placed under the authority of the hostile army' and Article 45 says 'It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power'.

88 This is the case when the force is 'placed under a command that is responsible to (a) party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognized by the adverse party' (Art 43 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) (entered into force 7 December 1978) 1125 UNTS 3).

89 'The definition in Art 43 Additional Protocol I (n 88) is now generally applied to all forms of armed groups who belong to a party to an armed conflict to determine whether they constitute armed forces. It is therefore no longer necessary to distinguish between regular and irregular armed forces' (Jean-Marie Henckaerts, 'Armed Forces' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) para 12).
The definition likewise encompasses paramilitary and armed law enforcement agencies, when the facts are met (Henckaerts (n 89) para 14). See 1.4.1 Instances of Authority, 43ff, for the definition of 'military authority'.

90 See Sassòli, 'The Concept and the Beginning of Occupation' (n 24) para 24.

91 See Henckaerts (n 89) 19. See also 1.4.1 Instances of Authority, 43ff.

The Hague Regulations use the word 'hostile' for both parties – 'hostile army' in Article 42 refers to the occupying force, while 'hostile State' in the title of Section III means the occupied territory. The word 'hostile' therefore merely indicates that the two parties are foreign to each other and disputing.[92]

1.4 'Military Authority'

1.4.1 Instances of Authority

The status of military occupation applies when military authority has been established and while it lasts. Military authority is a question of fact, regardless of the reasons behind the foreign presence.

Forces that still actively maintain their presence on foreign territory as a result of hostilities have established military authority there.[93] This is reflected in the separation of the Hague Regulations into three Sections of which Section I is titled 'On Belligerents', Section II 'Hostilities' and Section III 'Military Authority over the Territory of the Hostile State'.[94]

The conduct of hostilities is, however, not a precondition for the establishment of military authority.[95] A State namely does not have to offer armed resistance to be considered occupied.[96] A territory must merely

92 Konstantinos Mastorodimos, 'How and When Do Military Occupations End?' (2009) 21(1) Sri Lanka Journal of International Law 109, 119. This follows also from the fact that the status of military occupation does not depend upon the prior conduct of hostilities. (1.4.1 Instances of Authority, 43ff).

93 *Armed Activities Case* (n 3) Dissenting opinion of Judge Kooijmans, paras 45, 49, with reference to Article 41 The Laws of War on Land (Oxford Manual) (Institute of International Law 9 September 1880) as well as US and UK law of war manuals. See however Benvenisti, 'Occupation, Belligerent' (n 1) para 5, for the debate if it is sufficient for the occupant to be regarded as such if he is merely in a position to establish military authority or if he must actually replace the local authority with his own structures.

94 See Adam Roberts, 'Termination of Military Occupation' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 9.

95 Emily Crawford and Alison Pert, *International Humanitarian Law* (Cambridge University Press 2015) 147.

96 Art 2(2) Geneva Convention (IV) Relative to the Protection of Civilian Persons in Times of War (12 August 1949) (entered into force 21 October 1950) 75 UNTS 287 (GCIV).

find itself under a situation of coercion.[97] Lack of consent to the foreign armed presence is sufficient.[98] Military authority has been established from the moment a foreign army exercises sufficient control to enforce their rights and duties under the law of occupation.[99] It therefore does not matter if the foreign army invaded the territory or if it had been invited onto it.[100] When the forces of a State turn to coercion on foreign territory to protect its interests there, or, if they lack consent by the host State for their presence, they exercise military authority and become occupying forces.[101] When a territory has chosen independence in a legally valid fashion, military authority applies if the former parent State or a third State remains on or enters the territory without consent.[102]

The presence of UN forces, absent consent, equally amounts to coercion and therefore military authority applies.[103] This is true, regardless

97 Dinstein, *The International Law of Belligerent Occupation* (n 36) 38-39. Various kinds of pressure qualify as coercion, including threats and intimidation (Christopher C Joyner, 'Coercion' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 1). Accordingly, 'It is generally accepted that it is sufficient that the occupying force can, within reasonable time, send detachments of troops to make its authority felt within the occupied area' (Benvenisti, 'Occupation, Belligerent' (n 1) para 8).

98 Sassòli, 'The Concept and the Beginning of Occupation' (n 24) para 53. See Georg Nolte, 'Intervention by Invitation' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) para 26, regarding the fragility of consent with respect to transitional governments.

99 cf International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Report of the 32nd International Conference of the Red Cross and Red Crescent (International Committee of the Red Cross 10 December 2015) 11.

100 See *Armed Activities Case* (n 3) paras 173-78; Sassòli, 'The Concept and the Beginning of Occupation' (n 24) para 32; Dinstein, *The International Law of Belligerent Occupation* (n 36) 42.

101 Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing 2008) 230. See also 1.3 'Hostile Army', 41f, for the threshold to qualify as a hostile army of the foreign State.

102 n 98. See Crawford, *The Creation of States in International Law* (n 15) 147-48; 1.2.4 Self-Determination and Related Claims to Territory, 37ff; 6.5.2 Historic Colonies, 116ff.

103 Sassòli, 'The Concept and the Beginning of Occupation' (n 24) para 54. See also 1.3 'Hostile Army', 41f.

if the UN forces are led by States or by the UN itself.[104] The UN Charter provides no cause to assume that an intervention by UN forces under a mandate of the Security Council of the United Nations (The Security Council) be its own type of authority and military occupation therefore not applicable.[105]

Military authority, and therefore occupation, applies only in those areas 'where such authority has been established and can be exercised.'[106] There is no prescribed spacial threshold and therefore occupation applies also when military authority is exercised on very confined land, such as a facility.[107] Similarly, there is no threshold of duration and therefore occupation applies immediately, even in case of only a momentary instance of military authority, such as during a raid.[108]

Since occupation is a consequence of the fact of military authority, the status of military occupation ends when the foreign military authority has ceased.[109]

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104 cf Keiichiro Okimoto, *The Distinction and Relationship Between Jus Ad Bellum and Jus in Bello* (Hart 2011) 185ff; Marten Zwanenburg, 'United Nations and International Humanitarian Law' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) paras 6, 27.

105 See Geoffrey S Corn and others, *The Law of Armed Conflict: An Operational Approach* (Wolters Kluwer 2019) 385. See also Roberts, 'Termination of Military Occupation' (n 94) paras 50-51; Tristan Ferraro (ed), ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (International Committee of the Red Cross 2012) 79; Dinstein, *The International Law of Belligerent Occupation* (n 36) 41, who however requires that the UN itself become a belligerent party – either under a Chapter VII enforcement action or in the course of a peacekeeping operation gone awry.

106 Art 42(2) Hague Regulations (n 2). Similarly, Article 2(2) GCIV (n 96) provides that the Convention applies to both 'partial or total occupation of the territory of a High Contracting Party.'

107 See ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (n 105) 39; Sassòli, 'The Concept and the Beginning of Occupation' (n 24) para 21.

108 Sassòli, 'The Concept and the Beginning of Occupation' (n 24) para 20. See however Dinstein, *The International Law of Belligerent Occupation* (n 36) 46.

109 A withdrawal of troops is the most common case, but the conclusion of a valid treaty without the threat or use of force may transform the former military occupation into a consensual presence (Eyal Benvenisti, 'Occupation, Pacific' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn,

1.4.2 The Relationship to Peace

While occupation lasts, peace is precluded.

One instance in which peace is breached is at the start of hostilities.[110] During hostilities, a hostile army may be able to establish military authority on the territory of the foreign State. This in turn is when military occupation starts.[111]

Peace is also breached when a State that had been invited onto foreign territory transforms its presence there into military authority without the conduct of hostilities.[112] The moment the foreign forces lack consent, they turn to coercion and the military occupation begins.[113] In this case, the start of military occupation coincides with the breach of peace.

Peace can only be restored when military occupation has ended.[114] The formal conclusion of peace alone does not end occupation and therefore does not restore actual peace.[115] Only the cessation of military authority ends occupation and thus enables peace.[116]

1.4.3 The Relationship to Sovereign Equality

The sovereign equality of a State is suspended from the moment a foreign army exercises military authority on the territory. Although its equality is suspended, an occupied State does not lose the claim to its territory.

A State is equal as a territorial unit opposite other territorial units.[117] The UN Charter employs the term 'sovereign equality' to describe the relationship of co-existence among its Member States.[118] To complement

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Oxford University Press 2017) para 6; Roberts, 'Termination of Military Occupation' (n 94) paras 20, 27).

110 See Michael Wood, 'Peace, Breach of' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) paras 11, 14, with reference to the pertinent SC practice.

111 n 93.

112 Kolb and Hyde (n 101) 230.

113 1.4.1 Instances of Authority, 43ff; 1.3 'Hostile Army', 41ff.

114 cf Kolb and Hyde (n 101) 230.

115 See Roberts, 'Termination of Military Occupation' (n 94) para 9.

116 See n 93.

117 1.2.2 Equal States as a Territorial Order, 30f.

118 Abi-Saab (n 7), 257. Art 2(1) UN Charter (n 8).

the term 'equality' with the word 'sovereign' emphasises the idea that an equal State is the only governing authority within its own territorial unit, subject only to international law.[119] Strictly speaking, the meaning of 'sovereign' is already contained in the term 'equality', since two territorial units are only equal precisely because the one cannot decide over the territory of the other, without consent.[120] The analogy can be made to the idea of equality of human beings, which means not just their plain co-existence as bodies, but their freedom to command their bodies with the same rights and obligations as all other human beings.[121]

Among equal States, rights and obligations cannot be presumed, but have to be consented to by the States concerned, through agreement or customary law.[122] With each agreement, States stipulate their right to exclusive government on their own territory without entirely forfeiting their sovereign equality.[123]

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119 This is as close as it gets to the meaning of the term 'sovereign' in an international law context (*Oxford Dictionary of Law* (9th edn 2018) 469; Hans Kelsen, 'The Pinciple of Sovereign Equality of States as a Basis for International Organization' (1944) 53(2) Yale Law Journal 207, 208; Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Legal Aspects of International Organizations, Vol 51, Brill | Nijhoff 2009) 111).
Perhaps naturally, the term 'sovereign' or 'sovereignty' is still subject to much discourse, even after adoption of the UN Charter (See Bardo Fassbender and Albert Bleckmann, 'Article 2(1)' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) vol 2 paras 71-73).

120 See Crawford, 'State' (n 12) paras 5-7. See also 1.2.2 Equal States as a Territorial Order, 30f.

121 n 30. See also n 573.

122 'Between independent persons there can be no imposition of law; otherwise these persons would not be independent, but rather subjected to the sway of some higher subject. Conversely, these persons may agree among themselves as to what the law should be. The agreement is the vehicle *par excellence* of some law-creation in a decentralized society'; with customary law itself being a form of tacit agreement (Robert Kolb, 'Politis and Sociological Jurisprudence of Inter-War International Law' (2012) 23(1) European Journal of International Law 233, 233f). PCIJ, *The Case of the SS "Lotus" (France v Turkey)* (Judgement) Serie A, No 10 (1927) 18; Kokott (n 26) para 30. See also ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgement, Merits) (1986) para 269.

123 Thus, while sovereignty is still 'the point of departure in settling most questions that concern international relations' (*Island of Palmas Award* (n 38) 8) it may '(no longer) serve as a reliable starting point for deductions about the law',

Per the Hague Regulations, the Geneva Conventions and customary international law, equal States are suspending their own equality by ceding their exclusive right to govern on their own territory in the event of military occupation.[124] But although the sovereign equality of an occupied State is suspended by the foreign military authority, the occupied State does not lose the claim to its own territorial unit.[125] An equal State has merely ceded its right to govern exclusively for as long as the foreign military authority lasts.[126] How far the foreign government reaches in terms of its material legal scope is determined by the law applicable to the status of military occupation.[127] Because the status of occupation

(Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (n 51) 303) in the sense that sovereignty is 'not a synonym for limitless, absolute power' (Jost Delbrück, 'International Protection of Human Rights and State Sovereignty' (1982) 57(4) Indiana Law Journal 567, 570).
'Entering into international engagements is an attribute of State sovereignty' and not an abandonment thereof (PCIJ, *Case of the SS "Wimbledon" (Britain et al v Germany* (Judgement) Serie A, No 1 (1923) 25).

124 Article 6(3) GCIV (n 96) provides that '(The Occupying Power) exercises the functions of government in such territory, by the provisions (of the Convention)'. See 3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations), 59f.

125 See Zimmermann, 'Continuity of States' (n 22) para 10; Roberts, 'Termination of Military Occupation' (n 94) paras 38-40; Eric De Brabandere, *Post-Conflict Administrations in International Law: International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice* (Martinus Nijhoff 2009) 120. See however Kelsen, *Principles of International Law* (n 13) 75-76, arguing that a State goes out of existence if its own government disintegrates completely during occupation.
While most writers seem to agree that the claim to territory is not lost during occupation, they do use differing terminology to describe the relationship between the temporary suspension of sovereign equality and the permanent claim to the territorial unit – such as possession and ownership; concrete ownership and abstract ownership; sovereignty to prescribe and title; or *de facto* sovereignty and *de iure* sovereignty (See Robert Y Jennings, *The Acquisition of Territory in International Law* (Manchester University Press 1963) 4-6; Brownlie (n 14) 106-07; Dinstein, *The International Law of Belligerent Occupation* (n 36) 58).

126 See Marcelo Kohen, 'Conquest' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2017) para 3; Brownlie (n 14) 107. See also 3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations), 59ff.

127 See 3 The Applicable Law Pertinent to the Economy, 59ff.

does not affect claims to territory, an entity can develop into a State on that territory, even while it is being occupied.[128]

128 n 13; n 20. See however Crawford, *The Creation of States in International Law* (n 15) 148.

2 The Use of Force and Military Occupation

2.1 The Legality of Occupation

The question if military occupation came about by legal or illegal use of force does not affect the application of occupation law.

The prohibition of the use of force relevant to the exercise of military authority is contained in the UN Charter and starts out at its Article 2(4):

> **Article 2 UN Charter**
>
> (...)
>
> 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or *in any other manner inconsistent with the Purposes of the United Nations*.
>
> (...)[129]

Article 2(4) is informed by Article 1(1) of the Charter, containing the purposes of the United Nations:

> **Article 1 UN Charter**
>
> *The Purposes of the United Nations are:*
>
> 1. *To maintain international peace and security*, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for *the suppression of acts of aggression or other breaches of the peace*, and to bring about by peaceful means, and in conformity with the principles of justice and

129 Emphasis added.

> international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
> (...)[130]

In turn, both Articles 1 and 2 are restrained by Article 51 of the Charter:

> **Article 51 UN Charter**
>
> *Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs* against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[131]

The prohibition of the use of force is directed against attacks, not against self-defence.[132] This follows from the fact that the UN Charter prohibits 'acts of aggression or other breaches of the peace'[133], but lets nothing impair the 'inherent right of individual or collective self-defence if an armed attack occurs'.[134] Additionally, use of force which has been autho-

130 Emphasis added.
131 Emphasis added.
132 Georg Schwarzenberger, 'The Principles of the United Nations in International Judicial Perspective' [1976] Year Book of World Affairs 307, 317, 333; Christopher Greenwood, 'Self-Defence' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2017) paras 9, 52.
133 Art 2(4) in connection with Art 1(1) Charter of the United Nations (San Francisco, 26 June 1945) (entered into force 24 October 1945).
134 Art 51 UN Charter (n 133); See ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgement, Merits) (1986) para 195; Yoram Dinstein, 'Aggression' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2017) paras 7, 19, 27, 33.
Note at this point that while the prohibition of the use of force is 'probably the single most important obligation' imposed upon the Member States its exact

rised by the Security Council as 'necessary to maintain or restore international peace and security' is not considered an act of aggression.[135] The Security Council has authorized action also in case of humanitarian situations that concerned only national and not international peace and security and it may be argued that a pertinent duty exists.[136] An overriding responsibility to protect, which would allow States to use force unilaterally against another State that violates *ius cogens* norms on its own territory has not yet been established.[137]

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scope is highly disputed and it is therefore also 'probably the most controversial obligation' (Jean-Pierre Cot, 'United Nations Charter' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 33).

135 Art 51 in connection with Art 42 UN Charter (n 133). Dinstein, 'Aggression' (n 134) para 19.

136 See Ian Johnstone, 'The UN Charter and Its Evolution' in Simon Chesterman, David M Malone, and Santiago Villalpando (eds), *The Oxford Handbook of United Nations Treaties* (Oxford University Press 2019) 29-30; Gareth Evans, 'The Evolution of the Responsibility to Protect: From Concept and Principle to Actionable Norm' in Ramesh Thakur and William Maley (eds), *Theorising the Responsibility to Protect* (Cambridge University Press 2015) 34-37.
Some also call for a duty to intervene, if necessary by force, to support independence movements (Mohammed Bedjaoui, 'Chapitre XI: Declaration Relative aux Territoires Non Autonomes: Article 73' in Jean-Pierre Cot and Alain Pellet (eds), *La Charte des Nations Unies: Commentaire article par article* (3rd edn, Centre de Droit international de Nanterre, Economica 2005) vol II 1766).

137 Andreas Zimmermann, 'The Obligation to Prevent Genocide: Towards a General Responsibility to Protect?' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011) 637; Nigel Rodley, "Humanitarian Intervention" in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (1st edn, Oxford University Press 2015) 793-94; André De Hoogh, 'Jus Cogens and the Use of Armed Force' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (1st edn, Oxford University Press 2015) 1185-86. See also Christian Henderson, *The Use of Force and International Law* (Cambridge University Press 2018) 401-06, for the uncertainties surrounding the responsibility to protect in its evolution as a legal norm.
Some at least concede that 'In the rare event where there is a humanitarian emergency, and where most States agree that intervention is needed but the UN is unable to act (...), States may be willing to accept humanitarian considerations in mitigation of the occasional violation of the prohibition of the use of force and limit their response accordingly' (Vaughan Lowe and Antonios Tzanakopoulos, 'Humanitarian Intervention' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max*

The question arises, if an occupant has breached the peace illegally or exercised legal self-defence.[138] The Security Council has the competence to determine if an act of aggression indeed occurred.[139] No other legal authority has compulsory jurisdiction to do so.[140] It thus remains unanswered if the use of force was illegal when the Security Council stalls due to a veto.[141]

Even if it is established that peace was breached by an illegal attack, this has no bearing upon the right of either party to establish military authority and thus become the occupant.[142] During war, the same rights

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Planck Encyclopedia of Public International Law (Oxford University Press 2017) para 47).

138 See also 1.4.2 The Relationship to Peace, 46f.

139 Art 39 UN Charter (n 133). See Michael Wood, 'Peace, Breach of' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) para 11.

140 Even when vested with jurisdiction, the ICJ referred to the Security Council with respect to the finding that the occupation of Namibia by South Africa was illegal (ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion) (1971) paras 115, 119 with reference to Security Council Resolution on The Situation in Namibia, SC Res 276 (30 January 1970) UN Doc S/RES/276 (1970) paras 2, 5).

141 'This is the gap in the Charter' (Philip C Jessup, *A Modern Law of Nations: An Introduction* (The Macmillan Company 1950) 203. See also Dinstein, 'Aggression' (n 134) paras 10, 32; Christine Gray, *International Law and the Use of Force* (4th edn, Oxford University Press 2018) 121-22).

'It must always be borne in mind that the veto may be exercised not only when one of the permanent members of the Security Council is a party to a dispute, but also in any case in which such a member desires to block action, perhaps because of sympathy with one of the parties' (Jessup (n 141) 203; See also Ian Johnstone, 'When the Security Council is Divided: Imprecise Authorizations, Implied Mandates, and the 'Unreasonable Veto'' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (1st edn, Oxford University Press 2015) 227ff.

In practice, it therefore still remains true that each State is its own judge on the question of who started (See Immanuel Kant, *Zum Ewigen Frieden* (first published 1795, Philipp Reclam jun Stuttgart 1984) 18).

142 Eyal Benvenisti, 'Occupation, Belligerent' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) para 20. See also Orna Ben-Naftali, Aeyal M Gross, and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23(3) Berkeley Journal of International Law 551, 553, 559, 608, who consider an occupation

and obligations attach to an original attacker as to a defender.[143] The definition of military authority does not distinguish between attacker and defender.[144] Consequently, the rights and obligations that follow from the establishment of military authority apply to all parties equally.[145] The question of legality of the breach of peace thus has no influence upon the rights and obligations from occupation law, which apply to an occupant during military occupation.[146]

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illegal only if it is maintained in a manner that defeats the prospect of its termination.

143 This non-differentiation between attacker and defender in the course of war, including during occupation, is a result of the exclusionary distinction between the realms of *ius in bello* and *ius ad bellum* (See Tristan Ferraro (ed), ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (International Committee of the Red Cross 2012) 4; Keiichiro Okimoto, *The Distinction and Relationship Between Jus Ad Bellum and Jus in Bello* (Hart 2011) 14ff; Keiichiro Okimoto, 'The Relationship Between *Jus ad Bellum* and *Jus in Bello*' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (1st edn, Oxford University Press 2015) 1214, 1215).

144 1.4.1 Instances of Authority, 43f.

145 See Security Council Resolution 1483, SC Res 1483 (22 May 2003) UN Doc S/RES/1483 (2003) point 5. See Allan Gerson, 'War, Conquered Territory, and Military Occupation in the Contemporary International Legal System' (1977) 18(3) Harvard International Law Journal 525, 541-42, for the rationale behind the equal application of the law of occupation to attacker and defender.
Note that a breach of the rights and obligations under occupation law that is found to be illegal does not render the occupation illegal *per se* (See ICJ, *Legal Consequences of the Construction of a Wall* (Advisory Opinion) (2004)). See however Ben-Naftali, Gross, and Michaeli (n 142), 552-53, for a critique of the strict separation of the two spheres.

146 'International Law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject' (United States Military Tribunal, Nuemberg, *The Hostages Trial (Trial of Wilhelm List and Others: Case No 47)* (1948) 8 Law Reports of Trials of War Criminals: Selected and prepared by the United Nations War Crimes Commission 369, 59); Benvenisti, 'Occupation, Belligerent' (n 142) para 20; Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd edn, Cambridge University Press 2019) 2. See however Resolution on Situation in Namibia resulting from the illegal occupation of the Territory

2.2 The Prohibition to Acquire Territory by Force

The prohibition of the use of force precludes that territory can be acquired during military occupation.

To acquire foreign territory, a State would have to be able to establish a valid new boundary, by altering an existing one or drawing a new one.[147] When foreign territory belongs to an equal State,[148] a boundary cannot be established unilaterally,[149] even though equality has been suspended during occupation.[150] This is due to the prohibition of the use of force which not only bans illegal breaches of the peace, but also the use of force against the 'territorial integrity' or the 'political independence' of 'any State'.[151] 'Territorial integrity' means that the boundaries of the territory of a State are to be preserved and the territorial unit of a State to remain unaltered.[152] 'Political independence' means that the same territorial unit shall remain in existence as an equal State.[153] 'Political independence' thus protects States also from the re-allocation, by force, of their entire territory, or of an island or overseas territory to a new State entity whereby no alteration of boundaries occurs. This protection of the permanent existence of a State within its own territorial unit expresses the nature of equality as a right which can only be suspended but not permanently lost.[154]

While the breach of peace through the use of force may be justified by self-defence,[155] the acquisition of territory by force lacks this justification

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by South Africa, GA Res 41/39A (20 November 1986) UN Doc A/RES/41/39A (1986).

147 1.2.3.1 Delimitation in General, 32ff.

148 See 1.2.1 The Scope of the Term 'Hostile State', 26ff for the question when a State and therefore a claim to territory in fact exists.

149 1.2.3.1 Delimitation in General, 32ff.

150 See Ben-Naftali, Gross, and Michaeli (n 142), 570ff; See also 1.4.3 The Relationship to Sovereign Equality, 46f.

151 Art 2(4) UN Charter (n 133) (reprinted in 2.1 The Legality of Occupation, 51).

152 See Robert Y Jennings, *The Acquisition of Territory in International Law* (Manchester University Press 1963) 54. See also 1.2.2 Equal States as a Territorial Order, 30f; 1.2.3.1 Delimitation in General, 32ff.

153 See John Westlake, *International Law: Part I – Peace* (Cambridge University Press 1910) 321. See also 1.4.3 The Relationship to Sovereign Equality, 46f.

154 See 1.4.3 The Relationship to Sovereign Equality, 46f.

155 2.1 The Legality of Occupation, 51ff.

under the Charter.[156] The Charter allows self-defence when an armed attack occurs.[157] Yet self-defence is also limited to countering that armed attack.[158] To counter an armed attack, it may be necessary to establish military authority on a foreign territory, but to alter that territory is going much further.[159] Also, per the Charter, the exercise of self-defence 'shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take *at any time* such action as it deems necessary in order to maintain or restore international peace and security.'[160] To alter a territory unilaterally certainly affects international peace and security – for better or worse – and thereby interferes with the authority of the Security Council, even if the Security Council may be stalling.[161] Unilateral acquisition of occupied territory is therefore not covered by self-defence.[162]

Without the legally valid establishment of a new boundary, territory remains foreign and therefore occupied.[163] Although claims to foreign territory can be developed over time,[164] the use of force still bars such

156 Gray (n 141) 164; Ben-Naftali, Gross, and Michaeli (n 142) 571-72. See also Dinstein, *The International Law of Belligerent Occupation* (n 146) 59.

157 Art 51 UN Charter (n 133) (reprinted in 2.1 The Legality of Occupation, 51).

158 Johanna Friman, *Revisiting the Concept of Defence in the Jus ad Bellum* (Hart 2017) 93.

159 Jennings (n 152) 55; Stephen M Schwebel, 'What Weight to Conquest? (Editorial Comment)' (1970) 64(2) American Journal of International Law 344, 344. The general statement thus seems accurate that 'No territorial acquisition resulting from the threat or use of force shall be recognized as legal' (Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV) (1970). See also Security Council Resolution 242, SC Res 242 (22 November 1967) UN Doc S/RES/242 (1967)).

160 Art 51 UN Charter (n 133) (emphasis added) (reprinted in 2.1 The Legality of Occupation, 51).

161 The wording 'at any time' in Article 51 UN Charter (n 133) should be taken to imply that a hanging veto does not cancel the authority or responsibility of the SC.

162 n 156. Neither can the Security Council take measures to alter a boundary (Rüdiger Wolfrum, 'Purposes and Principles' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, C H Beck 2002) vol I para 19).

163 1.2.3.1 Delimitation in General, 32ff.

164 n 44.

acquisition.[165] In any case, acquisition via the passage of time would not take effect unilaterally but would have to be decided upon by a competent legal forum.[166]

165 See Marco Pertile, 'The Changing Environment and Emerging Resource Conflicts' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (1st edn, Oxford University Press 2015) 1082; Marcelo Kohen, 'Conquest' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2017) paras 5, 12 – the latter author makes an exception for the case of *debellatio*, while the former does not.
An analogy with Roman law would suggest that acquisition be barred under the institute of *usucapio* as a consequence of the use of force – regardless of its legality, and therefore not dependent upon the application of yet another ancient principle, that of *ex iniuria ius non oritur* (See Nicholas Barry, *An Introduction to Roman Law* (Oxford University Press 1962) 122. See however Rudolf L Bindschedler, 'Die Anerkennung im Völkerrecht' (1961-1962) 9 Archiv des Völkerrechts 377, 388, 392).

166 1.2.3.1 Delimitation in General, 32ff. See also Victor Prescott and Gillian D Triggs, *International Frontiers and Boundaries: Law, Politics and Geography* (Martinus Nijhoff 2008) 188.

3 The Applicable Law Pertinent to the Economy

3.1 The General Scope of Authority

3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations)

Article 43 of the Hague Regulations outlines the material legal scope of occupation. It grants the occupant far-reaching authority to take measures for public order and safety.

Article 43 of the Hague Regulations is part of customary international law.[167] It contains the general clause for the applicable law under the status of military occupation.[168]

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167 ICJ, *Legal Consequences of the Construction of a Wall* (Advisory Opinion) (2004) para 89.

168 See Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press 2004) 9; David Kretzmer, 'The Law of Belligerent Occupation in the Supreme Court of Israel' (2012) 94(885) International Review of the Red Cross 207, 218.

Hague Regulations

Article 43

> 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.

To take measures for 'public order and safety' is at the same time a right and an obligation.[169] The occupant must not leave the territory in a desolate or hazardous state that endangers the inhabitants.[170] In turn, the occupant enjoys expansive regulatory leeway regarding economic transactions in the territory.[171] The wording that the 'legitimate power' has 'passed into the hands of the occupant' expresses this regulatory leeway.[172] The occupant is now the governing authority in the territory.[173]

169 See Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing 2008) 232.

170 See Timothy Mccormack and Bruce M Oswald, 'The Maintenance of Law and Order in Military Operations' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (1st edn, Oxford University Press 2010) 457-59; Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd edn, Cambridge University Press 2019) 104.

171 The authentic French words are 'l'ordre et la vie public'. The provision thus entails 'the entire social and commercial life of the community'; or, in other words, 'every transaction that makes daily life possible in a country' (Coleman Phillipson, *International Law and the Great War* (T Fisher Unwin, Ltd 1915) 219; Lindsey Cameron, 'Does the Law of Occupation Preclude Transformational Developments by the Occupying Power?' [2005] (34) Collegium: Special Edition – Proceedings of the Bruges Colloquium: Current Challenges to the Law of Occupation 60, 63). See also Benvenisti, *The International Law of Occupation* (n 168) 9-11.

172 See Hanne Cuyckens, *Revisiting the Law of Occupation* (Brill | Nijhoff 2018) 127.

173 'The occupier does not derive public authority from the people it governs but from the fact of effective control' (Gilles Giacca, 'Economic, Social, and Cultural Rights in Occupied Territories' in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (1st edn, Oxford University Press 2015) para 94). See also 1.4.3 The Relationship to Sovereign Equality, 46f.

The basic right an occupant has under occupation law is to maintain the occupation.[174] This results from the fact that all warring parties are equally entitled to establish military authority and that no specific end to military authority is prescribed.[175] To maintain military authority may require the regulation of economic transactions.[176] For instance, military authority could be jeopardized if a third State or the inhabitants gained economic control in the territory.[177] Measures to maintain military authority must, however, never go as far as to diminish the rights which the inhabitants enjoy under occupation law.[178] The general right to main-

174 '(The occupying power's) legitimate interest is to control the territory for the duration of the occupation' (Marco Sassòli, Antoine A Bouvier, and Anne Quintin, *How Does Law Protect in War? : Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (3rd edn, vol 1, International Committee of the Red Cross 2011) pt 1, ch 8, 21). 'The occupying power is entitled to take all measures rendered necessary by military operations, or for the safety of the occupying forces' (Wolff Heintschel von Heinegg, 'Factors in War to Peace Transitions' (2004) 27(3) Harvard Journal of Law & Public Policy 843, 860). See also Geoffrey S Corn and others, *The Law of Armed Conflict: An Operational Approach* (Wolters Kluwer 2019) 382-83.

175 n 142. According to the definition of occupation in the Oxford Manual, '(...) the invading State is alone in a position to maintain order there. The limits within which this state of affairs exists determine the extent and duration of the occupation' (Art 41 The Laws of War on Land (Oxford Manual) (Institute of International Law 9 September 1880)). See however Orna Ben-Naftali, Aeyal M Gross, and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23(3) Berkeley Journal of International Law 551, 612, who argue that the right to maintain military authority is forfeited if the occupation itself becomes illegal.

176 'The *de facto* authority, which is the characteristic of occupation, implies that the Occupying Power has at least the ultimate control of that administration' (Michael Bothe, 'The Administration of Occupied Territory' in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (1st edn, Oxford University Press 2015) para 42).

177 'In any event, if the rules refer to the security interests involved, the occupying power will have a considerable margin of discretion when it comes to the determination of the necessary measures' (Heintschel von Heinegg (n 174), 860).

178 Article 47 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Times of War (12 August 1949) (entered into force 21 October 1950) 75 UNTS 287 provides that '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 change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by

tain the occupation is complemented by specific rights of the occupier to have his military efforts supported and to administer property in the territory.[179]

Taking measures for public order and safety, the occupant must respect the laws in force in the country 'unless absolutely prevented'.[180] At the outset it should be noted that this limitation concerns the measures for public order and safety and not those measures taken in the exercise of more specific rights and obligations under occupation law.[181] With respect to the measures for public order and safety, an occupant is 'absolutely prevented' from respecting the laws in force in the country, if this would mean a threat to his security or an obstacle to the application of the international law of occupation.[182] With respect to the security of the occupant, there exists a priority over the laws in force in the country, if military necessity demands it.[183] The occupant is thus free to take measures that serve the maintenance of his military authority and to exercise

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'. Bothe (n 176) para 18.

179 3.2 Administration of Property (Usufruct), 66ff; 3.3 Rights and Duties to Support the Military Authority, 71ff.

180 In the original French text of the Hague Regulations, the relevant term reads '*sauf empechement absolu*' (Art 43 Hague 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) (entered into force 26 January 1910), (authentic text: French)).

181 n 179. See however Tobias Ackermann, 'Investments Under Occupation: The Application of Investment Treaties to Occupied Territory' in Katia Fach Gómez, Anastasios Gourgourinis, and Catharine Titi (eds), *International Investment Law and the Law of Armed Conflict* (Springer 2013) 75, and the references to the negotiating history of Article 43 there.

182 See Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16(4) The European Journal of International Law 661, 670, 675; Occupation and International Humanitarian Law: Questions and Answers: A series of questions and answers by the ICRC's legal team on what defines occupation, the laws that apply, how people are protected, and the ICRC's role (International Committee of the Red Cross 4 August 2004) 57.

183 See Benvenisti, *The International Law of Occupation* (n 168) 14.

his rights under occupation law.[184] This leaves ample room to regulate economic transactions irrespective of contrary laws in force.[185]

The term 'laws in force in the country' in Article 43 of the Hague Regulations encompasses rights and obligations of international law that apply in the occupied territory.[186] The priority of occupation law thus applies also opposite international law which binds the occupied country, such as an international investment treaty.[187] This can be taken to follow from the wording of the Hague Regulations as well as the Hague Convention to which the Regulations are annexed: The titles of the Hague Convention and the annexed Regulations read 'laws' ('*lois*') and customs of war on land.[188] Since the Convention and its Regulations concern matters of international law, the word 'laws' ('*lois*') in Article 43 of the Regulations should also include international law and not only national law.[189] Further, Article 10 of the Hague Regulations – which concerns national laws – speaks of 'the laws of their country'.[190] Article 43, however, employs the broader term 'laws in force in the country' and thus should encompass not only the proper laws of the country but all rights and obligations that apply in the country, including by virtue of international law.

If no other rights and obligations from occupation law, nor laws in force in the country apply, the authority of the occupant again falls back to his competence to regulate the economy by measures for public or-

184 Some even allow deviation from the laws in force under 'a case-specific assessment (which) will evolve depending on the situation concerned' (Cuyckens (n 172) 145. See also Benvenisti, *The International Law of Occupation* (n 168) 16).

185 Giacca, 'Economic, Social, and Cultural Rights in Occupied Territories' (n 173) para 57. See n 171. See also 3.1.2 New Legislation and Existing Laws, 64ff; 3.2 Administration of Property (Usufruct), 66ff.

186 Bothe (n 176) 97. In the authentic French text the relevant term reads *'les lois en vigueur dans le pays'* (Art 43 Hague Regulations (n 180)).

187 cf 184.

188 Hague Regulations (n 180).

189 Today, the body of international law is to a large part – such as through custom – in force in a State regardless if that State maintains a monist or a dualist tradition (See Ackermann (n 181) 73-74).

190 Or '*les lois de leur pays*' in the authentic French text (Art 10 Hague Regulations (n 180)).

der and safety.[191] The term 'public order and safety' invites considerable discretion.[192] The regulation of previously unregulated economic activity inevitably falls under that discretion.[193] This discretion may even include the capacity to enter into treaties concerning the territory.[194]

3.1.2 New Legislation and Existing Laws

An occupant enjoys considerable leeway to enact new legislation.

Article 43 of the Hague Regulations authorizes the occupant to 'take all the measures in his power' to restore and ensure public order and safety.[195] These measures encompass also the modification of existing laws and the enactment of new laws for the duration of occupation.[196]

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191 Public order and safety gives the occupant 'a wider scope for change in its administration of the occupied territory than "military necessity"' Cameron (n 171), 64).

192 'It includes all aspects of public or civil life' (Kretzmer, 'The Law of Belligerent Occupation in the Supreme Court of Israel' (n 168), 219. 'Whether and to what extent the occupying power may interfere with the political and social structures in an occupied territory will (...) depend upon the circumstances of the individual situation, and is, thus, a question of fact' (Heintschel von Heinegg (n 174), 860).

193 To ensure public order expresses concern 'for providing a future system of public order, regardless of whether one existed before the conflict' (Davis P Goodman, 'The Need for Fundamental Change in the Law of Belligerent Occupation' (1985) 37(6) Stanford Law Review 1573, 1578).

194 It may be inferred from the judgment of the ICJ concerning the Timor Gap Treaty that only *unlawful* occupants are precluded from entering into treaties that dispose over the natural resources of a territory (ICJ, *Case Concerning East Timor (Portugal v Australia)* (Judgement) (1995) paras 13-15, 34-35. See n 143 and n 145, for the question if occupation is lawful). For the ongoing debate, see Tristan Ferraro (ed), ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (International Committee of the Red Cross 2012) 59ff.

195 Art 43 Hague Regulations (n 180) reprinted in 3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations), 59.

196 Corn and others (n 174) 378. Note that it has even been argued that the legislative power of the occupant is not limited to restoring and ensuring public order and safety (See Cuyckens (n 172) 140-41). And some finally want to allow the transformation of the laws and institutions of an occupied territory if the intervention had been justified for humanitarian reasons (See Robert D Sloane, 'The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and

Article 43 of the Hague Regulations is complemented by Article 64(3) of the Fourth Geneva Convention (GCIV).[197] Article 64(3) GCIV contains an explicit right to legislate:

> **GCIV**
>
> **Article 64**
>
> (...)
> (3) The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration
> (...)

The right to legislate per Article 64(3) GCIV pertains to all fields of law.[198] Support is found in the fact that Article 64(3) GCIV speaks of 'provisions' only, while in all other relevant instances the Convention employs the term 'provisions' always in connection with notions of penal law.[199] The term 'provisions' is more comprehensive than the term 'penal laws.'[200] An occupant may even enter into treaties regarding the territory.[201]

Similar to his competence to legislate per Article 43 of the Hague Regulations to restore and ensure public order and safety, the occupant can legislate under Article 64(3) GCIV 'To fulfil (his) obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power (...)'. But in contrast

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Jus in Bello in the Contemporary Law of War' (2009) 34 The Yale Journal of International Law 47, 108. See also n 136).

197 Art 154 GCIV (n 178); Cuyckens (n 172) 145-47.

198 Emily Crawford and Alison Pert, *International Humanitarian Law* (Cambridge University Press 2015) 150; Cuyckens (n 172) 147-48. See also Jean S Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary – IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross 1958) 337.

199 See Art 64ff GCIV (n 178).

200 See also Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (n 182), 669-70; Dinstein, *The International Law of Belligerent Occupation* (n 170) 111.

201 See Bothe (n 176) 98.

to Article 43 of the Hague Regulations, the occupant is not bound by the laws in force in the country under Article 64(3) GCIV.[202] Unlike Article 43 of the Hague Regulations, Article 64(3) GCIV does not mention the laws in force.[203] An occupant thus enjoys greater legislative leeway under the Geneva Convention than under the Hague Regulations.[204] His right to legislate is only limited by the rights which the inhabitants enjoy under occupation law.[205] Where no rights and obligations from occupation law are concerned, the occupant can legislate not only for his military interests, but for the orderly government of the territory.[206] This includes legislating with respect to economic policy.[207]

3.2 Administration of Property (Usufruct)

Administration of property grants the occupant broad benefits from the use of land and infrastructure.

Customary international law according to Rule 51 as identified by the ICRC,[208] as well as Article 55 of the Hague Regulations prescribe that

202 Dinstein, *The International Law of Belligerent Occupation* (n 170) 112.

203 cf Art 43 Hague Regulations (n 180) reprinted in 3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations), 59.

204 See Cuyckens (n 172) 150.

205 Art 47 GCIV (n 178) reprinted in n 178.

206 See Cuyckens (n 172) 150; Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (n 182), 673.

207 An occupant can thus largely transform the economy of an occupied territory, as long as the changes are temporary (n 171).
Recall that 'Belligerent occupiers are either fighting to change the government and the fundamental structure of the occupied territory's society, or the occupiers find substandard structures or no structures at all (Goodman (n 193), 1591).
It has been argued that changes to legislation should be allowed if the same situation is regulated similarly in the metropolitan territory (Dinstein, *The International Law of Belligerent Occupation* (n 170) 133). But this test still allows for economic transformation (Benvenisti, *The International Law of Occupation* (n 168) 15-16). It was also argued that legislative change needs to stay close to local economic traditions, but it is hard to invoke a sound legal basis for this other than the transitory nature of occupation (See Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (n 182) 678-79).

208 Jean Marie Henckaerts and others, *Customary International Humanitarian Law* (vol 1, Cambridge University Press 2005) (ICRC Rules).

the occupier functions as administrator of public property in accordance with the rule of usufruct:

> **ICRC Rule 51**
>
> **Public and Private Property in Occupied Territory**
>
> In occupied territory:
> (a) movable public property that can be used for military operations may be confiscated;
> *(b) immovable public property must be administered according to the rule of usufruct*; and
> (c) private property must be respected and may not be confiscated;
> except where destruction or seizure of such property is required by imperative military necessity.[209]

> **Hague Regulations**
>
> **Article 55**
>
> The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

Administration under the rule of usufruct vests the occupant with rights and duties.[210] As administrator, the occupant enjoys the right to use public property according to his needs.[211] The most direct benefit to the occupant lies in the use of the proceeds from public real estate – such as natural resources and the produce of the land.[212] Among the proceeds from public infrastructure are products or rent payments, including li-

209 Emphasis added.
210 See Bothe (n 176) para 86.
211 See Cuyckens (n 172) 135; Corn and others (n 174) 403, 405.
212 See Anicée Van Engeland, 'Protection of Public Property' in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (1st edn, Oxford University Press 2015) para 27; Hans-Georg Dederer, 'Enemy Property' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) para 33; Corn and others (n 174) 405.

censing fees.[213] The rule of usufruct does not prescribe the specific use of these proceeds.[214] The occupant can sell the proceeds.[215] He may keep the profits or reinvest them.[216] The occupant benefits not only from the direct proceeds of existing economic operations on public real estate, but also from free use of the land.[217]

If the status of ownership of a property is unclear, a property is likely presumed to be public during occupation.[218] Property of strategic value

213 See Sylvain Vité, 'The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights: The Examples of Food, Health and Property' (2008) 90(871) International Review of the Red Cross 629, 647; Dinstein, *The International Law of Belligerent Occupation* (n 170) 232.

214 See Dinstein, *The International Law of Belligerent Occupation* (n 170) 232-33. Some however want to limit the use of the proceeds to the needs of the army and administration of occupation (Bothe (n 176) para 86) or to the defraying of the costs of occupation (Corn and others (n 174) 405) or to finance the expenses *connected with* the occupation (Vité (n 213), 648, conceding also that 'treaty-based law does not state it explicitly').

215 Corn and others (n 174) 405.

216 See Vité (n 213) 647; Dinstein, *The International Law of Belligerent Occupation* (n 170) 232-33.

217 Article 55 of the Hague Regulations speaks of 'real estate' and ICRC Rule 51 speaks of 'immovable public property'. See Dinstein, *The International Law of Belligerent Occupation* (n 170) 229, 232. Public land also includes indigenous lands and common lands (See Hans-Peter Gasser, 'Protection of the Civilian Population' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2008) 261). See however Van Engeland (n 212) para 15, who regards State ownership of common and indigenous lands to be an issue for discussion.

218 Pro: Van Engeland (n 212) para 9; Dinstein, *The International Law of Belligerent Occupation* (n 170) 230-32; UK Joint Service Manual of the Law of Armed Conflict (2004) (UK Ministry of Defence 2004) 304-05; US Department of Defense Law of War Manual (2015, updated 2016) (Office of General Counsel of the Department of Defense 2016) 792.
Contra: Antonio Cassese, 'Powers and Duties of an Occupant in Relation to Land and Natural Resources' in Emma Playfair (ed), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip: The proceedings of a conference organized by al-Haq in Jerusalem in January 1988* (Clarendon Press 1992) 437-38, arguing that the only sound reason for such a presumption would be to avoid the effect of last-minute privatizations by States on the brink of being occupied.
See also Bothe (n 176) para 83, who argues that the public nature of property should be determined by the laws in force in the country – noting that according to the law in many countries, minerals in the ground are public property.

is probably at least partly owned by the State and therefore subject to administration by the occupant.[219] Similarly, a State might nationalize key properties and facilities in the course of war, when the threat of occupation is still perceived unlikely.[220] In addition to public property, administration could also apply to some privately owned real estate.[221] The wording of the Hague Regulations lends itself to this conclusion. Article 55 enumerates 'public buildings, real estate, forests, and agricultural estates belonging to the hostile State'. The term 'real estate' already encompasses agricultural estates. The fact that agricultural estates are mentioned separately can be taken to mean that they alone receive the qualification of 'belonging to the hostile State', while 'real estate' refers to all land regardless of its owner. Excluded from administration would thus be only private agricultural estates. This seems also in line with Article 46(1) of the Hague Regulations which urges to respect 'family honour and rights, the lives of persons, and private property, as well as religious convictions and practice'. This wording indicates that what is concerned is the right to privacy of the inhabitants.[222] Private real estate which does not fall within the sphere of privacy – such as land on which nobody lives – would therefore not be covered by Article 46(1) of the Hague Regulations. Such property is only barred from confiscation.[223] Administration is however not confiscation,[224] and thus private real estate arguably also

219 '[H]eavy concentration of national wealth in state or socialized enterprises perhaps subjected to enemy administration much that would otherwise have been protected by the "private property" clause' (Jacob Robinson, 'Transfer of Property in Enemy Occupied Territory' (1945) 39(2) The American Journal of International Law 216, 218).

220 'Thus the shift from private to public ownership presents another of the problems which will harass those who continue to think within the Hague framework' (Robinson (n 219), 218).

221 See however Loukis G Loucaides, 'The Protection of the Right to Property in Occupied Territories' (2004) 53(3) The International and Comparative Law Quarterly 677, 685.

222 cf Art 17(1) International Covenant on Civil and Political Rights (New York, 16 December 1966) (entered into force 23 March 1976) 999 UNTS 171; Art 8 European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) (entered into force 3 September 1953) 213 UNTS 221; Art 11 American Convention on Human Rights 'Pact of San José, Costa Rica' (22 January 1969) (entered into force 18 July 1978) 1144 UNTS 123.

223 Art 46(2) Hague Regulations (n 180); ICRC Rule 51(b).

224 Avril McDonald and Hanna Brollowski, 'Requisitions' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The*

falls under the rule of usufruct of Article 55 of the Hague Regulations and ICRC Rule 51(b).

Under the rule of usufruct the occupant must safeguard the capital of the properties.[225] Harvesting is thus generally only allowed if the stock of the resource can recover to the same level.[226] For instance, fishing and timber harvesting are allowed, but over-fishing and deforestation are not.[227] But to safeguard the capital of properties also means to retain their value. The occupant must therefore maintain the usability of real estate and infrastructure.[228] In the case of a mine or an oil field, for example, this can require the maintenance of production at existing levels.[229] In such cases, the occupant can continue extraction of non-renewable natural resources, even despite the depletion of their stock.[230] Finally, an occupant can assign his rights and duties as administrator to third parties, such as through licenses.[231]

Max Planck Encyclopedia of Public International Law (1st edn, Oxford University Press 2017) para 19.

225 Corn and others (n 174) 405.

226 See Vité (n 213), 647.

227 See Dinstein, *The International Law of Belligerent Occupation* (n 170) 233. See however Bothe (n 176) para 83, who excludes living resources from public property.

228 Van Engeland (n 212) 1541-42; Dinstein, *The International Law of Belligerent Occupation* (n 170) 233.

229 Bothe (n 176) para 85. But probably not the opening of new extraction fields or areas (Bothe (n 176) para 85). See however Dederer (n 212) para 33, who calls this issue debatable.

230 See Bothe (n 176) para 85; Dederer (n 212) para 33. See also Van Engeland (n 212) 21, noting the uncertainty surrounding the precise meaning of the principle of usufruct – with respect to natural resources – as transported from Roman law into civil law and international law.

231 See Dinstein, *The International Law of Belligerent Occupation* (n 170) 232.

3.3 Rights and Duties to Support the Military Authority

3.3.1 Taxes

The occupant can maintain the existing taxation systems in place in the occupied territory and use the revenues towards the costs of his administration.[232] He can also raise existing taxes or introduce new ones.[233]

3.3.2 Contributions for the Needs of the Army

The inhabitants of an occupied territory are under several obligations to support the needs of the occupying army.

Article 49 of the Hague Regulations grants a direct way to fund the occupation by allowing the occupant to levy 'other money contributions in the occupied territory (...) for the needs of the army or of the administration of the territory in question.'[234]

During war, all parties are legally entitled to establish and maintain military authority.[235] To maintain military authority is therefore a legitimate need of the army. The term 'needs of the army' – as employed by the provisions discussed here – thus entails requisitioning to maintain military authority over the territory.[236]

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232 Article 48 Hague Regulations (n 180) says 'If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.' Crawford and Pert (n 198) 150; Corn and others (n 174) 409.

233 Raising taxes may be warranted due to changing needs, such as in instances of prolonged occupation (See Dinstein, *The International Law of Belligerent Occupation* (n 170) 137; Bothe (n 176) para 94. See also n 3.4.2). New taxes may be subject to Article 49 Hague Regulations (n 180) and therefore to the requirement of the needs of the army or administration (See Vité (n 213), 649; Cuyckens (n 172) 136. See also 3.3.2 Contributions for the Needs of the Army, 71f.

234 Art 49 Hague Regulations (n 180). Vité (n 213), 649; Corn and others (n 174) 409-10.

235 n 175.

236 '[T]he needs of the army of occupation (...) may include the needs of the occupation administration' (Bothe (n 176) 105. See also Ingo Venzke, 'Contribu-

Under Article 52(1) of the Hague Regulations, the occupant can request requisitions in kind from the inhabitants to support his military authority.[237] These requisitions must be in proportion to the resources of the country.[238] Article 52(3) of the Hague Regulations cautions that 'Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.'[239] However, the amount of compensation due is not specified.[240] Requisitions in kind include movable as well as immovable private property.[241] While the occupant has at least possessory use rights over private *immovable* property, he acquires ownership of the requisitioned private *movable* property.[242] Finally, confiscation of private property may be allowed if the local law provides for such confiscation by the State and if the occupant adheres to the same conditions that the State was bound by.[243]

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tions' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) paras 1, 6). Some also seem to suggest that requisitions are guided by economic necessity (McDonald and Brollowski (n 224) para 1). But requisitions may not be used to cover the needs of the inhabitants and the economy in the home territory of the occupant (United States Military Tribunal, Nuemberg, *The Krupp Trial (Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others: Case No 58)* (1948) 10 Law Reports of Trials of War Criminals: Selected and prepared by the United Nations War Crimes Commission 69, 135-37; McDonald and Brollowski (n 224) para 7). Note also that any seizure of property beyond the necessities of war constitutes a war crime per Article 8(2)(b)(xiii) of the Rome Statute of the International Criminal Court (17 July 1998) (entered into force 1 July 2002) 2187 UNTS 3.

237 ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (n 194) 103. The right to requisition is part of customary law (McDonald and Brollowski (n 224) para 1).

238 Art 52(1) Hague Regulations (n 180).

239 Art 52(3) Hague Regulations (n 180).

240 See also Dinstein, *The International Law of Belligerent Occupation* (n 170) 249.

241 See Dinstein, *The International Law of Belligerent Occupation* (n 170) 246-47; Yutaka Arai-Takahashi, 'Protection of Private Property' in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (1st edn, Oxford University Press 2015) 25-27.

242 Arai-Takahashi (n 241) para 24; Dinstein, *The International Law of Belligerent Occupation* (n 170) 249.

243 Dinstein, *The International Law of Belligerent Occupation* (n 170) 244. Further, 'The occupying power may, of course, avail itself of the occupied State's exist-

Finally, the occupant can request services from the inhabitants. Under Article 52(1) of the Hague Regulations, such work must be for the 'needs of the army'. Under Article 52(2) GCIV, however, the occupier may compel persons to work not only for the needs of the army of occupation but also for the maintenance of public operations.[244] Workers shall be paid a fair wage and the work shall be proportionate to their physical and intellectual capacities.[245] The occupant may also recruit workers who actively seek employment.[246] In result, workers may be protected from outright exploitation, but the occupant enjoys leeway in administering the public utilities and land – from which he owns the profits.[247]

3.3.3 Confiscation of Munitions of War

The occupant can confiscate or destroy munitions of war in the occupied territory.

Under Article 53(1) of the Hague Regulations and ICRC Rule 51(a), the occupant may confiscate movable public property that can be used for military operations.[248] The collective term is 'munitions of war' or '*munitions de guerre*' in the original French text of the Hague Regula-

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ing expropriation laws from which it may deviate for reasons of necessity (...) (Dederer (n 212) para 37. See also n 267).

244 Art 51(2) GCIV (n 178). Work that may be requested includes that for 'ensuring the continuous functioning of public utility services such as postal, telegraphic, and telephone services; industrial and agricultural production; and mining' (McDonald and Brollowski (n 224) 15). See Giacca, 'Economic, Social, and Cultural Rights in Occupied Territories' (n 173) para 42; Corn and others (n 174) 407-08.

245 Art 51(3) GCIV (n 178).

246 Corn and others (n 174) 409. The occupant must however not create conditions of unemployment to induce the population to work for him (McDonald and Brollowski (n 224) para 16).

247 See Corn and others (n 174) 406. See also 3.2 Administration of Property (Usufruct), 66ff.

248 'An army of occupation can only take possession of (...) depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.' (Art 53(1) Hague Regulations (n 180)).
'Movable public property that can be used for military operations may be confiscated' (ICRC Rule 51(a), reprinted in 3.2 Administration of Property (Usufruct), 66).

tions.[249] The confiscation of public munitions of war results in ownership.[250] Article 53(2) of the Hague Regulations allows confiscation of munitions of war even if they belong to private individuals.[251] However, they must be 'restored and compensation fixed when peace is made'.[252] Under ICRC Rule 51 confiscation of privately owned munitions of war is allowed even without compensation, but only in case of military necessity.[253]

The term 'munitions of war' encompasses all movable property that can be used for military operations.[254] The definition is broad and the distinction between civil and military purposes is difficult to make.[255] Minerals like crude oil are arguably not munitions of war before they have been extracted or produced, but are instead part of immovable property.[256] If they are considered immovable, they fall under the rule of usufruct as applicable to the administration of property.[257]

3.3.4 Spoils of War

The occupant can confiscate cash, funds, and realizable securities under Article 53(1) of the Hague Regulations, if they are public property.[258] Article 53(1) is silent with respect to the disposition of these properties.

249 See Arai-Takahashi (n 241) para 28.
250 Van Engeland (n 212) para 33.
251 'Depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made' (Art 53(2) Hague Regulations (n 180)).
252 n 251.
253 ICRC Rule 51, reprinted in 3.2 Administration of Property (Usufruct), 66. See Corn and others (n 174) 406-07. See also 3.4.1 'Imperative Military Necessity', 75f.
254 n 248; n 251.
255 '[M]ost movables may be directly or indirectly used for military purposes' (Dederer (n 212) para 34. See also Dinstein, *The International Law of Belligerent Occupation* (n 170) 238). 'The list of movable property is non-exhaustive, and there is indeed the possibility of an extended understanding as to what falls under 'military purpose' (Van Engeland (n 212) para 31).
256 The debate is ongoing (See Arai-Takahashi (n 241) para 28; Van Engeland (n 212) para 28; Dinstein, *The International Law of Belligerent Occupation* (n 170) 252-53.
257 3.2 Administration of Property (Usufruct), 66ff.
258 n 248.

This contrasts with money contributions by the inhabitants, which must be for the needs of the army.[259] Under Article 53(1), the occupant can thus use the confiscated public funds at his discretion.[260]

3.4 Exceptions

3.4.1 'Imperative Military Necessity'

To save his military authority, the occupant can confiscate or destroy all property – public or private, movable or immovable.

'Imperative military necessity' presents the occupant with an exception that allows for the destruction or seizure of property per ICRC Rule 51.[261] A similar exception can be found in Article 23(g) of the Hague Regulations, which forbids to 'destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.' It should be noted, however, that the exception of 'necessities of war' per the Hague Regulations pertain to the conduct of hostilities and not to occupation *per se*.[262] Article 23 appears in Section II of the Hague Regulations, which concerns hostilities, while the rules on military occupation are contained in Section III. The exception of 'military necessity' per ICRC Rule 51, on the other hand, applies explicitly to occupation as indicated by the title of Rule 51 which reads 'Public and Private Property in Occupied Territory'.[263] Seizure of immovable public property is the exception to the rule of administration contained in paragraph (b) of ICRC Rule 51.[264] In case of 'imperative military necessity', the occupant can seize immovable public property and is not bound to administer it

259 n 234; Arai-Takahashi (n 241) para 29.

260 Dinstein, *The International Law of Belligerent Occupation* (n 170) 238. 'It seems that Article 53 of the Hague Regulations indeed transfers ownership of title to the occupying authorities' (Van Engeland (n 212) para 33). See however Corn and others (n 174) 405, who argue that these funds can only be used towards military operations or the costs of administering the occupied territory.

261 ICRC Rule 51 reprinted in 3.2 Administration of Property (Usufruct), 66.

262 *Wall Opinion* (n 167) para 124. Cf however Arai-Takahashi (n 241) paras 11-13.

263 ICRC Rule 51 reprinted in 3.2 Administration of Property (Usufruct), 66.

264 See also Yoram Dinstein, 'Military Necessity' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) paras 8, 14.

according to the rule of usufruct.[265] He can thus dispose of the property at will.[266] The same is true of private property, since the exception of 'imperative military necessity' also overrides the prohibition to seize movable and immovable private property as contained in paragraph (c) of ICRC Rule 51.[267]

The occupant is legally entitled to maintain his military authority.[268] An 'imperative military necessity' thus certainly exists when the military authority of the occupant is immediately threatened.[269] But to maintain "military authority" can also require the control of economic transactions.[270] Ultimately, considerations of security are notorious for discretionary interpretations, absent an arbiter.[271]

265 See Sigrid Redse Johansen, *The Military Commander's Necessity: The Law of Armed Conflict and its Limits* (Cambridge University Press 2019) 360. cf 3.2 Administration of Property (Usufruct), 66ff.

266 n 214.

267 ICRC Rule 51 reprinted in 3.2 Administration of Property (Usufruct), 66. See also Dinstein, 'Military Necessity' (n 264) paras 8, 14.

268 n 142; n 175.

269 'As war by itself is a venture of allocating and applying certain means to achieve certain ends, the notion of necessity connotes to a 'for what" (Johansen (n 265) 401).
Already the Lieber Code stated that 'Military necessity, as understood by modern civilized nations, consists of the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war' (Art 14 Lieber Code: Instructions for the Government of Armies of the United States in the Field (24 April 1863) (Adjutant General's Office; General Orders No 100, prepared by Francis Lieber 1863). Note that the provision was 'motivated by considerations of humanity (...) to limit the use of violence' (Dietrich Schindler, 'J.C. Bluntschli's Contribution to the Law of War' in Marcelo G Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law: Liber Amicorum Lucius Caflisch* (Brill 2007) 445)).

270 See n 177. 'In the modern age of total war, an occupier can change or destroy the entire infrastructure of the occupied territory without violating the limits established by "military necessity"' (Goodman (n 193) 1592). The call for a principle of proportionality to apply to security measures is accompanied by the caveat that 'proportionality is a difficult principle' and 'The balancing process it implies involves uncertainties' (Bothe (n 176) para 102). Note also that only the 'Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly' constitutes a war crime per Article 8(2)(a)(iv) of the Rome Statute (n 236).

271 See n 282. 'It is left to the Occupying Power to decide when military necessity is 'absolute" and 'The occupier becomes the judge and the party' (Van Enge-

3.4.2 Prolonged Occupation

When occupation persists over a certain period of time, the occupant can take economic measures that go beyond the strict rights and obligations from occupation law.

The theory of prolonged occupation assumes that the longer occupation lasts, the more the economic needs of the inhabitants increase and that the obligations of the occupant under occupation law no longer serve the welfare of the population.[272] A couple of years may suffice to call an occupation prolonged.[273] In the name of the welfare of the population, an occupant can take economic measures that would not otherwise have been allowed under occupation law or considerably stretch the latter.[274] This includes the enacting of legislation.[275] It also includes the possibility to increase taxes.[276] Finally, a long-term occupant can exploit

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land (n 212) paras 38-39, with reference also to the failure of the ICJ to define absolute military necessity).
'The discretionary power authorized by the law of occupation in defense of the occupant's security becomes, in the hands of a prolonged occupying power with territorial ambitions, the door through which an entire cart and horses of colonial apparatus can be driven' (Dirk A Moses, 'Empire, Resistance, and Security: International Law and the Transformative Occupation of Palestine' (2017) 8(2) Humanity: An International Journal of Human Rights, Humanitarianism, and Development 379, 382).

272 See Edmund H Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations' (1945) 54 Yale Law Journal 393, 400-01; ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (n 194) 72.

273 Adam Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967' (1990) 84(1) American Journal of International Law 44, 47, 95 calls for a requisite duration of 5 years.

274 See Cuyckens (n 172) 155; ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (n 194) 73-74.

275 See Dinstein, *The International Law of Belligerent Occupation* (n 170) 128-32 with reference to the case law of Israel.

276 Recall that taxes can be used to cover the administration (n 232). Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (n 182) 680; Bothe (n 176) para 94; Corn and others (n 174) 409, 410. '[I]f the occupation lasts through several years the lawful sovereign would, in the normal course of events, have found it necessary to modify tax legislation. A complete disregard of these realities may well interfere with the welfare of the country and ultimately with "public order and safety" as understood in Article

the capital or stock of a resource to increase the proceeds contrary to the rule of usufruct.[277]

The catch is that the needs of the population might have been raised precisely because the occupant inhibited their free choice of economic transactions in the first place.[278] Under the theory of prolonged occupation an occupant is thus allowed to solve a problem without remedying what created it.[279] Generally, notions of welfare grant room for subjectivity.[280] Under the notion of welfare, an occupant may apply his own standard of economic prosperity, regardless of the subjective needs of the population.[281] There is namely no arbiter with regard to the necessity of measures to be taken.[282] An occupant is thus free to transform the local economy to eg more economically productive activities.[283] Any eco-

43 (Ernst H Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Carnegie Endowment for International Peace 1942) 49).

277 See Dinstein, *The International Law of Belligerent Occupation* (n 170) 233-34. cf also 3.2 Administration of Property (Usufruct), 66ff.

278 See Benvenisti, *The International Law of Occupation* (n 168) 11-12. See also 3.1 The General Scope of Authority, 59ff; 3.2 Administration of Property (Usufruct), 66ff.

279 'To achieve (welfare), the scope of authority vested in the Occupying Power must be commensurate with the objective need – accelerating the longer the occupation lasts – to enact new legislation, to introduce new development projects, and to consider new schemes of socio-economic reform' (Dinstein, *The International Law of Belligerent Occupation* (n 170) 310).

280 See Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40(1) Harvard International Law Journal 1, 55-57. '[T]his criterion is not without risk of being abused since some very wide-ranging transformations can be adopted under the disguise of the preoccupation for the welfare of the population' (Cuyckens (n 172) 155).

281 See Benvenisti, *The International Law of Occupation* (n 168) 15; ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (n 194) 75.

282 Rotem Giladi, 'The Jus Ad Bellum/Jus In Bello Distinction and the Law of Occupation' (2008) 41(1-2) Israel Law Review 246, 291-92; Cuyckens (n 172) 159. See also ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (n 194) 75-76.

283 'Even if the economy of the occupied territory had not been growing prior to occupation, it should be the duty of any government, even a temporary one, to facilitate the betterment of the populace' (Goodman (n 193), 1603). '[A]n occupying State may choose to implement changes to the economic structure of the occupied territory – to include infrastructure – in order to enhance the economic situation of the local population' (Corn and others (n 174) 385-86).

nomic transformation of an occupied territory could serve the agenda of an occupant just as much as it does the welfare of the population.[284]

'The authority of a military administration applies to taking all measures necessary to ensure growth, change and development. Consequently, a military administration is entitled to develop industry, commerce, agriculture, education, health, welfare, and like matters which usually concern a regular government, and which are required to ensure the changing needs of a population in a territory under belligerent occupation' (Justice Barak, cited in Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967' (n 273), 93).

284 'A professed humanitarian concern may camouflage a hidden political agenda, and it may be prudent to guard the inhabitants from the bear's hug of the Occupying Power' (Dinstein, *The International Law of Belligerent Occupation* (n 170) 132).

4 The Relationship of Occupation Law to Other International Law Pertinent to the Economy

4.1 Human Rights

Human rights lack the clear capacity to curb the economic control that an occupant exerts under occupation law.

Two sets of human rights come into question in times of occupation: those that apply to the occupied territory directly as laws in force there,[285] and those to which an occupant is bound by his own accord or customary law.

The application of human rights to which an occupant is bound by his own accord faces two initial hurdles. The first one is that of extraterritorial application. The ICCPR, for instance indicates that it applies only in the territory of the signatory State.[286] Despite affirmative recent case law

285 See 3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations), 59ff.

286 Article 2(1) International Covenant on Civil and Political Rights (New York, 16 December 1966) (entered into force 23 March 1976) 999 UNTS 171 says that a State is bound by these human rights opposite all individuals 'within its territory and subject to its jurisdiction'. The word 'and' indicates that the two criteria are cumulative (Michael J Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99(1) The American Journal of International Law 119, 122). The extraterritorial application of International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) (entered into force 3 January 1976) 993 UNTS 3 (ICESCR) is similarly disputed (See Dennis (n 286) 127-29).

it is therefore still debated if, in occupied territory, an occupant is bound by the same human rights that bind him in his own territory.[287] The second hurdle is presented by the derogations allowed under human rights instruments.[288] In case of a derogation from human rights obligations, the law applicable falls back to occupation law.[289]

Those human rights which apply as 'laws in force in the country' step back behind the rights of the occupant under occupation law.[290]

Both the above sets of human rights face the obstacle that if they are in fact capable of conflicting with occupation law, the latter enjoys priority as *lex specialis*.[291] Note that the application of the principle of *lex specialis* does not suspend human rights law *in toto* but only gives way to the

287 Contra: US Department of Defense Law of War Manual (2015, updated 2016) (Office of General Counsel of the Department of Defense 2016) 24-25; Dennis (n 286), 122.
Pro: ICJ, *Legal Consequences of the Construction of a Wall* (Advisory Opinion) (2004) para 111, with respect to the ICCPR; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgement) (2005) paras 178-80, with respect to the general corpus of human rights law; European Court of Human Rights, *Case of Loizidou v Turkey* (Judgement (Merits)) (1996) VI ECHR 2227 para 52, with respect to the European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) (entered into force 3 September 1953) 213 UNTS 221; Loukis G Loucaides, 'The Protection of the Right to Property in Occupied Territories' (2004) 53(3) The International and Comparative Law Quarterly 677, 694; Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 112-13, with respect to treaties in general, if the territory is under effective control. See also Tristan Ferraro (ed), ICRC Expert Meeting Report: Occupation and Other Forms of Administration of Foreign Territory (International Committee of the Red Cross 2012) 61-63, for an excerpt of the ongoing debate.

288 See Art 27(1) American Convention on Human Rights 'Pact of San José, Costa Rica' (22 January 1969) (entered into force 18 July 1978) 1144 UNTS 123; Art 15(1) European Convention on Human Rights (n 287) – both explicitly allowing derogations in times of war. See ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) para 25; Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd edn, Cambridge University Press 2019) 81-82 – regarding derogations under the ICCPR in times of war. See *Wall Opinion* (n 287) para 106, regarding derogations from human rights conventions in general in times of war.

289 Loucaides (n 287), 682.

290 3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations), 59ff.

291 *Nuclear Weapons Opinion* (n 288) para 25; *Wall Opinion* (n 287) para 106; Wolff Heintschel von Heinegg, 'Factors in War to Peace Transitions' (2004) 27(3) Har-

law of occupation when and where the two prescribe opposing rights or obligations.[292] For example, the obligation to respect property is ousted in those instances where the occupant enjoys a right to expropriate under occupation law.[293] Human rights would only prevail against conflicting rules of occupation law, if they possessed the quality of *ius cogens* norms, and that is not the case with economic rights, apart from the most basic ones that are already covered by the obligation to provide for public order and safety under occupation law.[294]

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vard Journal of Law & Public Policy 843, 868; Dinstein, *The International Law of Belligerent Occupation* (n 288) 95, 97, 309. See Jochen A Frowein, 'The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation' (1998) 28 The International and Comparative Law Quarterly 1, 11.

292 This relationship has been described as one of complementarity (Dorota Marianna Banaszewska, 'Lex Specialis' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law* (1st edn, Oxford University Press 2017) para 12). See Silvia Borelli, 'The (Mis)-Use of General Principles of Law: Lex Specialis and the Relationship Between International Human Rights Law and the Laws of Armed Conflict' in Laura Pineschi (ed), *General Principles of Law - The Role of the Judiciary* (Springer International Publishing 2015) 3; Claire Landais and Léa Bass, 'Reconciling the Rules of International Humanitarian Law with the Rules of European Human Rights Law' (2015) 97(900) International Review of the Red Cross 1295, 1307; Danio Campanelli, 'The Law of Military Occupation Put to the Test of Human Rights Law' (2008) 90(871) International Review of the Red Cross 653, 660-62.

293 'With regard to property (...) International humanitarian law proves to be more complete and more detailed than the law of human rights. There is no complementarity, as the latter is superseded by the former by virtue of the principle of speciality. Irrespective of whether it applies to the short term or to the long term, the prevailing legal regime is the law of occupation' (Sylvain Vité, 'The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights: The Examples of Food, Health and Property' (2008) 90(871) International Review of the Red Cross 629, 651).
'[N]otions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law' (International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgement) (2001) para 471). See n 241; n 267 – for the expropriations allowed under occupation law. See also 3.2 Administration of Property (Usufruct), 66ff, with regard to the administration of private real estate.

294 n 170. See Gilles Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (Oxford University Press 2014) 261.

4.2 Measures of UN Administration

If measures decided by the UN Security Council were to prevail over occupation law, they would be a tool that cuts both ways.

It is assumed that military authority always triggers occupation law, even when covered by a Security Council or General Assembly Resolution and exercised by UN troops or third States.[295] A conflict can thus occur between the measures prescribed by the Security Council and occupation law.[296] In conflict with occupation law, the Security Council measures face the obstacle that occupation law has its source in treaties and customary international law.[297] It is still debated if measures prescribed by Security Council resolution should enjoy the priority awarded

295 n 91; n 105. '[T]he question of the applicability of the law of occupation to UN Territorial Administration is a question of fact. In other words, if the definition of occupation is in fact met, then the law of occupation will apply to UN Territorial Administration' (Hanne Cuyckens, *Revisiting the Law of Occupation* (Brill | Nijhoff 2018) 95). 'Relevant principles of international humanitarian law will apply to an occupied territory regardless of Security Council action' (David J Scheffer, 'Beyond Occupation Law' (2003) 97(4) American Journal of International Law 842, 851). See Jaume Saura, 'Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations' (2006-2007) 58(3) Hastings Law Journal 479, 480. See however Lindsey Cameron, 'Does the Law of Occupation Preclude Transformational Developments by the Occupying Power?' [2005] (34) Collegium: Special Edition – Proceedings of the Bruges Colloquium: Current Challenges to the Law of Occupation 60, saying 'if the Security Council does derogate from the law of occupation, it must do so explicitly.'

296 Note that the General Assembly granted itself the capacity to act within the sphere of competence of the Security Council when the latter stalls (Resolution on Uniting for Peace, GA Res 377(V) (3 November 1950) UN Doc A/RES/377(V)A (1950)). Resolutions of the General Assembly are however not binding (n 517; DHN Johnson, 'The Effect of Resolutions of the General Assembly of the United Nations' (1957) 32 British Year Book of International Law (1955-1956) 97, 121-22).

297 Or even *ius cogens* (See Vera Gowland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility' (1994) 43(1) The International and Comparative Law Quarterly 55, 93; Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16(4) The European Journal of International Law 661 681).

by Article 103 to substantive UN Charter obligations over obligations from occupation law.[298]

If it were assumed however that Security Council Resolutions can govern the administration of territories instead of occupation law, those territories would be at the mercy of the Security Council.[299] Generally, measures prescribed by the Security Council could expand the rights of the inhabitants opposite the administering power but they could also vest the administration with even more economic control than occupation law does.

298 '[T]he Security Council is not entitled to free the belligerents from their obligations (...) under the law of armed conflict (Heintschel von Heinegg (n 291), 873). See Keiichiro Okimoto, *The Distinction and Relationship Between Jus Ad Bellum and Jus in Bello* (Hart 2011) 125-29. See however ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* (Provisional Measures, Order of 14 April 1992) (1992) paras 37, 39; Philip Spoerri, 'The Law of Occupation' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 197; Michael Bothe, 'The Administration of Occupied Territory' in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (1st edn, Oxford University Press 2015) para 117. See also Robert Kolb, *An Introduction to the Law of the United Nations* (Hart Publishing 2010) 162, suggesting that 'Article 103 should not apply to those actions that are not undertaken in the collective interest, but only for the particular interests of one State' and that Article 103 should be barred from overriding *ius cogens* (Kolb, *An Introduction to the Law of the United Nations* (n 298) 163).

299 It may be noted in this instance that 'legitimacy on behalf of international organizations cannot be assumed' and 'international administration will never be fully legitimate or supportable on a normative level due to the tensions that are inherent in using outside rule to bring about internal change' (Hollin K Dickerson, 'Assumptions of Legitimacy and the Foundations of International Territorial Administration' (2006) 100 Proceedings of the ASIL Annual Meeting 144, 194).

4.3 International Investment Law

4.3.1 Foreign Direct Investment

Occupation law takes precedence over the rights and obligations from investments in foreign territory and grants the occupant sweeping benefits from these properties.

Two categories of investments in foreign territory should be distinguished according to the origin of their ownership: Those from the occupant and his nationals and those from third States and their nationals.

The occupant can take over the administration of his own investments and those of his nationals in accordance with occupation law, if these investments concern immovable public property or real estate.[300] As administrator, the occupant benefits from the proceeds of his own investments, and from those of his nationals.[301] The occupant can even confiscate his own investments under the conditions of occupation law and in this event is no longer bound by the rules of administration – such as the obligation to preserve the stock of a natural resource.[302] International investment agreements yield to occupation law, because the former are 'laws in force in the country'[303] and because occupation law is *lex specialis*.[304] Within the ambit of occupation law, the investments of the occupant are now free from the rights which the occupied territory had enjoyed in them as the host State.[305] The economic interest of the occupant in his own investments and those of his nationals can thus improve during military occupation.

The situation is similarly beneficial to the occupant with respect to investments from third States and their nationals. Public properties with partial foreign investments and real estate come under administration by the occupant or can be confiscated under the conditions prescribed by occupation law.[306] The occupant is not bound by investment agree-

300 3.2 Administration of Property (Usufruct), 66ff.
301 See n 212; n 218.
302 n 265; n 277.
303 n 187.
304 n 291.
305 How an occupant proceeds with the property from direct investments of his own nationals is a matter of his domestic laws, including his human rights obligations (See n 287).
306 3.2 Administration of Property (Usufruct), 66ff; 3.3.2 Contributions for the Needs of the Army, 71ff; 3.4 Exceptions, 75ff.

ments in force between the occupied territory and third States,[307] and, as 'laws in force in the country', these agreements yield to occupation law.[308] But the question arises, if the occupant is bound in occupied territory by the investment treaties he concluded himself with third States. Generally, treaties apply only on the proper territory of the respective contracting party, either explicitly or by way of Article 29 VCLT.[309] There may however be a tendency to regard occupied territory as territory of the occupant for matters of compensation under investment treaties.[310]

Since investment agreements yield to occupation law,[311] the occupant may preclude new investment activity by third States, within his rights and obligations from occupation law.[312]

4.3.2 Permanent Sovereignty over Natural Resources (PSNR)

PSNR grants peoples and nations the claim to their resources. This claim is however suspended during occupation.

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307 Art 34 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) (entered into force 27 January 1980) 1155 UNTS 331.

308 cf n 303. See however Tobias Ackermann, 'Investments Under Occupation: The Application of Investment Treaties to Occupied Territory' in Katia Fach Gómez, Anastasios Gourgourinis, and Catharine Titi (eds), *International Investment Law and the Law of Armed Conflict* (Springer 2013) 76ff, for a more detailed approach. For the question of liability of the occupied territory itself opposite third States see eg Suzanne Spears and Maria Fogdestam Agius, 'Protection of Investments in War-Torn States: A Practitioner's Perspective on War Clauses in Bilateral Investment Treaties' in Katia Fach Gómez, Anastasios Gourgourinis, and Catharine Titi (eds), *International Investment Law and the Law of Armed Conflict* (Springer 2013).

309 cf n 287.

310 See Swiss Federal Tribunal, *4A_396/2017* (Judgement of 16 October 2018) (2018) para 4.3.2; Ackermann (n 308) 80ff. See also Richard Happ and Sebastian Wuschka, 'Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories' (2016) 33(3) Journal of International Arbitration 245). This approach is not in line with the prohibition to acquire territory by force and may run the risk of turning occupation into a *fait accompli* (See n 125; n 165; Ackermann (n 308) 89).

311 n 291; n 187.

312 n 171; n 207; n 177.

The General Assembly in 1962 adopted a resolution called 'Permanent Sovereignty over Natural Resources' (Resolution 1803).[313] Per Resolution 1803, PSNR means that every State is free to enter into agreements that concern the disposition of its natural resources.[314] A State is equally entitled to withdraw from such agreements via nationalization, expropriation or requisitioning, under certain conditions.[315] The addition of the word 'permanent' to the term 'sovereignty' should be read to indicate that the claim of a State to its natural resources persists despite its temporary disposition – just like the claim of a State to its territory does.[316] In the same vein, PSNR grants a *people or nation* a claim to their natural resources.[317] Like the claim to territory, the claim to natural resources is

313 Resolution on Permanent Sovereignty over Natural Resources, GA Res 1803 (XVII) (14 December 1962) UN Doc A/RES/1803/(XVII) (1962) With Resolution 1803 the General Assembly declares that:
'1. The 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 of the State concerned.
2. The exploration, development and disposition of such resources (...) should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.
3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. (...)
4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest (...) In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.
(...)'.

314 GA Res 1803 (n 313) nos 2-3. See also DE Vielleville and BS Vasani, 'Sovereignty Over Natural Resources Versus Rights Under Investment Contracts: Which One Prevails?' (2008) 5(2) Transnational Dispute Management, 7.

315 GA Res 1803 (n 313) no 4. See M Sornarajah, *The International Law on Foreign Investment* (4th edn, Cambridge University Press 2017) 102-03, for the emergence of this entitlement in the context of decolonization.

316 n 125; Peter Orakhelashvili and Michael Barton Akehurst, *Akehurst's Modern Introduction to International Law* (8th edn, Routledge 2019) 381.

317 See Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge Studies in International and Comparative Law, Cambridge University Press 1997) 311. See also Emeka Duruigbo, 'Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law' (2006) 38

temporarily suspended within the ambit of occupation law but is fully revived when occupation ends.[318] This permanent claim to natural resources may be seen as a corollary to the right to self-determination.[319]

PSNR further contains the obligation that the right of the peoples of a State to its natural wealth and resources be exercised in their interest.[320] The wording of this function of PSNR is that of a human right, or collective human right, against contrary State interference.[321] As a human right, it steps back behind occupation law.[322] The rights of a people or nation to freely dispose of their natural resources thus yields to the rights which the occupant enjoys by way of administration, requisition and confiscation.[323]

George Washington International Law Review 33, 43-51, who agrees and provides an extensive review of the debate if PSNR applies to States or to peoples. This debate may raise questions as to the exact quality of PSNR as a legal norm (Dinstein, *The International Law of Belligerent Occupation* (n 288), 236.

318 cf n 126.

319 cf n 69; Orakhelashvili and Akehurst (n 316) 380-81. Where a people enjoys the right to self-determination, the ensuing claim to their natural resources under PSNR may be counted as *ius cogens* (See Brownlie (n 287) 511; Martin Dawidowicz, 'Trading fish or human rights in Western Sahara? Self-determination, non-recognition and the EC–Morocco Fisheries Agreement' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013), 273. cf n 66).

320 GA Res 1803 (n 313), no 1.

321 See Robert Dufresne, 'The Opacity of Oil: Oil Corporations, Internal Violence, and International Law Symposium Issue: Oil and International Law: The Geopolitical Significance of Petroleum Corporations' (2003-2004) 36 New York University Journal of International Law and Politics 331, 356-57; ICCPR General Comment No 12: Article 1, The Right to Self-Determination of Peoples (13 March 1984) (UN Human Rights Committee 1984) para 5.
cf also Articles 26 and 27 of the United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295 (13 September 2007) UN Doc A/RES/61/295 (2007), which contain essentially the same rights as PSNR and are worded like human rights opposite State behavior.

322 n 287; n 291. See also *Armed Activities Case* (n 287) para 244, holding generally that PSNR does not apply in occupied territory. This may be an indication that the Court followed the *lex specialis* approach between the laws of war and human rights of peacetime (Phoebe N Okowa, 'Natural Resources in Situations of Armed Conflict: Is there a Coherent Framework for Protection?' (2007) 9 International Community Law Review 237, 256. See n 291).

323 See 3.2 Administration of Property (Usufruct), 66ff; 3.3.2 Contributions for the Needs of the Army, 71ff; 3.4.1 'Imperative Military Necessity', 75ff; 3.4.2 Prolonged Occupation, 77ff.

4.4 International Trade Law

The rights of an occupied territory to trade freely are largely eliminated during occupation.

Two sets of rights should be distinguished: The rights which an occupant must grant on occupied territory to third States; and those which an occupant must grant on his own territory to the occupied State. The first set of rights can further be distinguished into those flowing from trade agreements concluded by the occupant for his own territory and those in force in the occupied territory.

In occupied territory, the first obstacle to free trade is the priority which occupation law enjoys over trade law, because the former is *lex specialis*.[324] The rights and obligations from occupation law thus take precedence where they collide with rights and obligations from trade agreements.[325] The second obstacle is the issue of extraterritoriality which comes into play on foreign territory. Those international trade agreements that were entered into by the occupant for his own territory may also bind the occupant only on his own territory and not on occupied territory.[326]

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324 n 291.

325 n 292.

326 cf n 287. Some trade agreements refer to the territory of the contracting parties, others, like the agreements relevant to the World Trade Organization (WTO) do not. In both cases, Article 29 VCLT applies (cf n 309). Note that the VCLT does not provide a definite answer but merely lays down a residual rule: a treaty is binding upon each party in respect of its entire territory, 'unless a different intention appears from the treaty or is otherwise established' (Art 29 VCLT (n 307); Anthony Aust, 'Treaties, Territorial Application' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) para 3).

Recall however that the extension of agreements to occupied territory may imply recognition of title over that territory on behalf of the occupant and should therefore be treated cautiously (n 310; Dawidowicz, 'Trading fish or human rights in Western Sahara? Self-determination, non-recognition and the EC–Morocco Fisheries Agreement' (n 319) 273-74, with reference to State practice of Switzerland). The European Court of Justice denied application of a trade agreement between the European Community and Israel to 'locations which have been placed under Israeli administration since 1967', arguing that agreements do not confer rights and obligations upon third parties (European Court of Justice, *C-386/08 Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*

If rights from trade agreements apply in the occupied territory, the occupant still does not have to grant them to full effect. This is true for trade agreements concluded by the occupant for his own territory as well as for trade agreements concluded by the occupied territory. The former yield to the *lex specialis* of occupation law.[327] The latter are laws in force in the country and therefore yield to occupation law.[328] Under occupation law, an occupant can take measures or enact legislation which limit economic activity in the territory.[329] Free trade could strengthen the economic presence of third States in the territory and empower them or the territory itself to challenge the authority of the occupant. An occupant can therefore curb trade in the occupied territory to maintain his military authority.[330] Only beyond this lawful purpose do additional security measures need to meet the standards prescribed by the international trade instruments that apply as laws in force in the country.[331] The rights that a territory would normally enjoy from free trade agreements are also inhibited by the exercise of the specific rights of an occupant under occupation law. Under occupation law, an occupant enjoys wide discretion to make use of business operations and real estate that he administers or confiscates.[332] Accordingly, the occupant controls which goods or services these enterprises consume and produce, import and export. As administrator, he is not obliged to obtain the products or services of the territory or of third States, even if they are more competitive than his own.[333]

In his own territory, the occupant is bound by the rights and obligations from the mutual bilateral or multilateral trade agreements in force with the occupied territory. Here, the occupant cannot invoke occupa-

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(Judgment of the Court (Fourth Chamber)) (2010) I ECR 1289 paras 52, 53, 64).

327 n 325.

328 n 187.

329 n 171; n 207.

330 See n 177.

331 Eg Article XXI of the General Agreement on Tariffs and Trade 1994 (April 15, 1994): Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (entered into force 1 January 1995) 1867 UNTS 187.

332 3.2 Administration of Property (Usufruct), 66ff; 3.3.2 Contributions for the Needs of the Army, 71ff; 3.4.1 'Imperative Military Necessity', 75ff; 3.4.2 Prolonged Occupation, 77ff.

333 Occupation law contains no rules regarding, for example, the public procurement pertaining to the public utilities under administration by the occupant.

tion law to curb international trade, since occupation law applies only on foreign territory.[334] An occupant therefore must treat imports from the occupied territory into his own territory in accordance with his obligations under the applicable trade agreements. To invoke an exception for reasons of his own security, he would need to abide by the rules of the respective trade agreements.[335] Factually, however, an occupant can drastically reduce the benefit of the rights which the occupied State enjoys in the territory of the occupant. By his own administration, an occupant can largely control the exports from the occupied territory into his own territory.[336]

334 1.2.1 The Scope of the Term 'Hostile State', 26ff.
335 n 331.
336 See n 332.

5 Concluding Summary of Part I

As soon as the forces of a State use coercion on foreign territory, that State becomes the occupant. It does not matter if coercion was preceded by hostilities or if the foreign State came onto the territory peacefully – such as to look after its economic interests there.[337] Coercion applies as soon as forces attributable to a State establish military authority in all or parts of foreign territory.[338] Territory is foreign for the intervening forces wherever they are not within the legally valid boundaries of their own State.[339]

Existing boundaries cannot be altered unilaterally.[340] An exception applies only to some peoples who can separate their territory from the parent State and thus become foreign to it.[341] Undelimited territory remains foreign to all forces, so long as more than one State has a potential claim to it.[342] Which entities do count as equal States and therefore have a valid claim does not lie in the discretion of the beholding State.[343] To settle the opposing claims to a particular territory, there needs to be a consensus between all entitled States or else, adjudication.[344]

During occupation, the occupied territory is governed by the foreign State whose forces have established military authority on it.[345] The occupied State therefore no longer enjoys equality of its territory opposite the occupant or third States. Equality is suspended for the period of occupation but only to the extent of the scope of occupation law.[346] At the same time, a State does not lose the claim to its own territory because of an occupation.[347]

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337 1.4.1 Instances of Authority, 43ff.
338 1.3 'Hostile Army', 41f; 1.4.1 Instances of Authority, 43ff.
339 1.2.3.1 Delimitation in General, 32ff. See also 1.2.2 Equal States as a Territorial Order, 30f.
340 1.2.3.1 Delimitation in General, 32ff.
341 1.2.4 Self-Determination and Related Claims to Territory, 37ff.
342 1.2.3.1 Delimitation in General, 32ff.
343 1.2.1 The Scope of the Term 'Hostile State', 26ff.
344 1.2.3.1 Delimitation in General, 32ff.
345 See 3.1 The General Scope of Authority, 59ff.
346 1.4.3 The Relationship to Sovereign Equality, 46f.
347 1.4.3 The Relationship to Sovereign Equality, 46f; 2.2 The Prohibition to Acquire Territory by Force, 56ff.

The question if the occupation came about legally or not, regularly remains unanswered but regardless has no effect upon the legal conduct of the occupation. The occupant enjoys his rights from occupation law irrespective of whether his military authority was the result of an act of legal self-defence or illegal aggression.[348]

Under occupation law the occupant can request the inhabitants to support his military authority through the provision of funds, property and manpower.[349] He can confiscate or destroy munitions of war;[350] he can freely dispose of the public funds of the occupied State;[351] and he can confiscate or destroy property, if his military authority is threatened.[352]

Part I has presented the wide reading available to the occupant, under traditional occupation law, with respect to his economic rights. In Part II, this will be contrasted with the regime of UN Charter Chapter XI, which benefits the inhabitants and not the occupant.[353] Generally, under traditional occupation law, the occupant can take economic measures to maintain his military authority in the occupied territory.[354] He can therefore assert control over the local economy against the influence of rivalling third States or the inhabitants.[355] Occupation law prevails over other instruments of international law.[356] The economic freedom which the inhabitants enjoyed during peacetime are largely nullified.[357] The occupant can sever the economic ties of a territory and isolate it from foreign commercial influence.[358] His own investments in the territory remain intact and the benefits from them may even increase under occupation law.[359]

Occupation law also enjoys priority over the laws in force in the territory.[360] The occupant can legislate within the ambit of his rights under

348 2.1 The Legality of Occupation, 51ff.
349 3.3 Rights and Duties to Support the Military Authority, 71ff.
350 3.3.3 Confiscation of Munitions of War, 73f.
351 3.3.4 Spoils of War, 74.
352 3.4.1 'Imperative Military Necessity', 75f.
353 10 Concluding Summary of Part II, 173ff.
354 3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations), 59ff.
355 See 3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations), 59ff.
356 3.1 The General Scope of Authority, 59ff.
357 See 4 The Relationship of Occupation Law to Other International Law, 81ff.
358 See 4.4 International Trade Law, 90ff; 4.3.1 Foreign Direct Investment, 86ff.
359 4.3.1 Foreign Direct Investment, 86ff.
360 3.1 The General Scope of Authority, 59ff.

occupation law. He can raise taxes.[361] Where no obligations from occupation law exist and the laws in force have not regulated, the occupant is free to apply his own economic measures and legislation in the name of public order.[362] In case of a prolonged occupation, the occupant can disregard even occupation law itself and expedite economic activity in the territory as he deems necessary for the general welfare.[363]

An occupant can gain extensive economic benefits through the administration of immovable public property and real estate. He can keep the proceeds, reinvest the profits or use them at his discretion.[364] Besides the direct profits, an occupant enjoys free use of public property and land.[365]

In sum, occupation law enables the occupant to form an economy of his own vision in the occupied territory and to cement ties with his own economy. Occupation law thus presents an incentive for States to stay in foreign territory. A State that invested in foreign territory can turn to coercion to enforce expectations from its investments, such as to avoid nationalization.[366] A warring party is incentivized to remain in the territory after hostilities or even to invade it in the first place.[367] The longer an occupant remains, the more he can get invested in the territory and the stronger the incentive becomes to stay. This legal situation would change, if Chapter XI were applied to military occupations.[368]

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361 3.3.1 Taxes, 71.

362 3.1.1 Measures for 'Public Order and Safety' (Article 43 of the Hague Regulations), 59ff.

363 3.4.2 Prolonged Occupation, 77ff.

364 3.2 Administration of Property (Usufruct), 66ff.

365 3.2 Administration of Property (Usufruct), 66ff.

366 Such nationalization could, for example, be based on a resurgent claim of 'unequal treaty' (See Yaël Ronen, 'Territory, Lease' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) paras 3, 18-20; Anne Peters, 'Unequal Treaties' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, Oxford University Press 2013) paras 4-7, 34ff).

367 Recall that 'Disputes arise because resources are scarce'; and the right to 'indulge in rapacious resource exploitation was left unhampered by (the Hague and Geneva Conventions)' (Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006) 302; Daniel-Erasmus Khan and Wilhelm Grewe, 'Drafting History' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, C H Beck 2002) vol I para 22).

368 10 Concluding Summary of Part II, 173ff.