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THE LAW OF MILITARY OCCUPATION AND THE ROLE OF DE JURE AND DE FACTO SOVEREIGNTY

Abstract

This article aims at defining the specific tenets of the doctrine of “military occupation” and assessing how it deals with the issue of “sovereignty,” looking at the problem from a historical perspective. Accordingly, after tracing the evolution of belligerent occupation as a legal institution of international law, attention is turned to the concepts of “effectiveness” and “temporariness” and the interplay between de jure and de facto sovereignty in the light of the “occupation zone model”, as it has been applied in the course of international practice.

Against this background the article discusses the hypothesis that the codification of the “laws of war” and evolution of the doctrine of military occupation as a temporary and limited regime, whose final aim is to restore legitimate sovereignty over the occupied territory, constitutes a paradigm which could and should apply to various unlawful territorial situations today which have arisen as a result of a misapplication of the law of military occupation.

INTRODUCTION

The reflections surrounding the 60th anniversary of the Geneva Conventions in 2009 have shed new light on the contentious application of international humanitarian law to the various crises affecting the international community.

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The acknowledgment that there is often a clash and contradiction between the law and politics is nowhere more clearly revealed than in the law of military occupation.¹

The present study aims at defining the specific tenets of “military occupation” and assessing how they deal with the issue of “sovereignty,” taking a historical perspective. In this light, the legal notion of belligerent occupation also encompasses the controversial question of the role of the concepts of *de jure* and *de facto* sovereignty in international law.

After sketching out the evolution of belligerent occupation as a legal institution in international law, attention will subsequently be paid to “effectiveness”, conceived of as a doctrine requiring a sequence of acts by an Occupant to validate its title to a territory. In this regard, it will be argued that traditional international law and classical scholarship have always considered “effectiveness” as a unique condition, characteristic of the phenomenon of occupation, emphasising the role of *de facto* sovereignty. However, it will be noted that the second tenet of military occupation, namely “temporariness”, has been recently recognised as being the foremost aspect of military occupation, reflecting the provisional nature of such an institution, which is meant to protect the *de jure* sovereignty of the occupied State.

Following this analysis, the article discusses the hypothesis that codification of the “laws of war” brought about a consolidation of the concept of military occupation as a temporary and limited regime. This conceptualisation, however, has suffered from a flagrant deviation in its practice in a number of 20th century conflicts. Many Occupying Powers have preferred to deny they are acting as “occupants”, supporting their actions through audacious theories based on the thesis of a legitimate territorial expansion over the occupied territories. This is the case in Israel’s current military occupation of Palestinian territories, which in this article is used as a key example of the difficulties involved in submitting a military occupation to the test of legality.

In the end, this study intends to demonstrate that only a truthful reconstruction of the doctrine of legitimate sovereignty, often misapplied in the chaos of war, can become the incubator for the swift realization of peace and security in many sensitive parts of the world.

¹ The most recent works on the law of belligerent occupation include: V. Koutroulis, *Le début et la fin de l'application du droit de l'occupation*, Pedone, Paris: 2010; Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law*, Nijhoff, Leiden: 2009; Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge: 2009; R. Kolb, *Le droit de l'occupation militaire: perspectives historiques et enjeux juridiques actuels*. Bruylant, Bruxelles: 2009; P. M. R. Stirk, *The Politics of Military Occupation*, Edinburgh University Press, Edinburgh: 2009.

1. THE ROLE OF *DE JURE* AND *DE FACTO* SOVEREIGNTY IN THE EVOLUTION OF THE LAW OF BELLIGERENT OCCUPATION

The most recent crises appearing on the international chessboard have revived some classical concepts of International Humanitarian Law (IHL), such as the old-fashioned concept of belligerent occupation. Ignored for many years as being outdated, since the war in Iraq (2003–2004)² it has recently evolved to encompass a variety of situations entailing effective control over a territory. Traditionally conceived of as “the effective control of a power (be it one or more states or an international organization, such as the UN) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory,”³ the legal concept of belligerent occupation represents the classic type of military occupation.⁴ It has been evolving to include situations where control over the territory is not necessarily exercised by a hostile power, but may stem from a coalition of States, as in the case of Iraq, or from an international organization or the United Nations,⁵ as in the cases of Kosovo and Afghanistan. Actually,

² See, UNSC Res. 1483 (2003), *The Situation between Iraq and Kuwait*, UN Doc. S/RES/1483 (2003), 22 May 2003. Although it did so indirectly, the Security Council qualified the United States (US) and the United Kingdom (UK) as “Occupying Powers”, requiring them to abide by the international law of belligerent occupation. See, E. Benvenisti, *The Security Council and The Law on Occupation: Resolution 1483 on Iraq in Historical Perspective*, 1 Israel Defence Forces Law Review 1 (2003), p. 19. As regards the application of the international law of belligerent occupation to Iraq, see, among others: R. Buchan, *International Community and the Occupation of Iraq*, 12(1) Journal of Conflict & Security Law 37 (2007); C. McCarthy, *The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq*, 10(1) Journal of Conflict & Security Law 43 (2005); R. Wolfrum, *Iraq – From Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference*, 9 Max Planck Yearbook of United Nations Law 1 (2005).

³ E. Benvenisti, *The International Law of Occupation*, 2nd ed., Oxford University Press, Oxford: 2004, p. 4; Y. Ronen, *Illegal Occupation and its Consequences*, 41(1-2) Israel Law Review 201 (2008), p. 202, suggests expanding the operational meaning of occupation to also include “any internationally-recognized territorial title, such as lease, trusteeship, or in the past, mandate.”

⁴ See, A. Roberts, *What is a Military Occupation?*, 55 British Yearbook of International Law 249 (1984), p. 261. F. Capotorti, *L'occupazione nel diritto di guerra*, Jovene, Napoli: 1949, p. 694 ff, proposed the tripartite typology entailing belligerent occupations, non-belligerent occupations, and *quasi* belligerent occupations.

⁵ With reference to the similarity of belligerent occupation to some UN operations involving the deployment of international military forces throughout a territory, see the extensive treatment in S. Vité, *L'applicabilité du droit international de l'occupation militaire aux activités des organisations internationales*, 86 (853) International Review of the Red Cross 9 (2004).

international law and classical doctrine have always considered “effectiveness” as the unique condition characteristic of the phenomenon of occupation, conceived of as a prelude to a sequence of acts by an Occupying State to validate its title to an occupied territory. “Temporariness”, on the other hand, is conceived of as a “state of affairs, which may end as the fortunes of war change, or else will be transformed into some other status through negotiations conducted at or soon after the end of the war,”⁶ and has only lately been recognised as the foremost aspect of belligerent occupation.

The development of a proper legal system concerning the conditions and benchmarks for application of the law of military occupation has gradually affected international law since the 19th century, when it was first submitted to a codification. Broadly speaking, like other legal principles of international law, belligerent occupation is continuously in progress, evolving from its traditional primitive configuration and sensitive to various hypotheses for its further development from time to time as suggested by actual practice.

1.1. The concept of “effectiveness” and the origins of belligerent occupation

The concept of belligerent occupation, derived from the Latin expression “*occupatio bellica*”, evokes the primitive idea of exclusive possession, conceived of as one of the legal outcomes of a conflict. It traditionally emerged within the law of war as a practice related to the right of conquest over an enemy’s territory.⁷

As to the particular convergence between occupation by States and international territorial administration by international organizations, see, among others E. De Brabandere, *Post-conflict Administrations in International Law: International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice*, Martinus Nijhoff Publishers, Leiden: 2009; S. R. Ratner, *Foreign Occupation and International Territorial Administration: the Challenges of Convergences*, 16(4) *European Journal of International Law* 695 (2005).

⁶ A. Roberts, *Prolonged Military Occupation: the Israeli Occupied Territories since 1967*, 84(1) *American Journal of International Law* 44 (1990), p. 47; also published in a revised version in E. Playfair (ed.), *International Law and the Administration of Occupied Territories. Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, Clarendon Press, Oxford: 2003, pp. 25-86. See also, A. Kozłowski, *The Legal Construct of Historic Title to Territory in International Law – An Overview*, 30 *Polish Yearbook of International Law* 61 (2010).

⁷ For more on the origins and the historical evolution of belligerent occupation see, among others: E. Benvenisti, *The Origins of the Concept of Belligerent Occupation*, 26(3) *Law and History Review* 621 (2008); N. Bhuta, *The Antinomies of Transformative Occupation*, 16(4) *European Journal of International Law* 721 (2005); P. Haggenmacher, *L’occupation militaire en droit international: genèse et profil d’une institution juridique*, 79 *Relations Internationales* 285 (1994), p. 287, who correctly reminds the reader of the Latin etymology of the term “occupation”, composed by the preposition *ob* and the verb *capere*, with the

Based on the quasi-factual medieval distinction between *imperium* and *dominium*, European practice between the 17th and 18th century recognized the exercise of an “effective” control over a territory as a sufficient element to achieve full sovereignty there over. Effectiveness can be considered as “a measure of the relationship and congruence between a rule or legal situation and social reality.” In other words, such a concept must “correspond to the material, factual element of law.”⁸

This earliest interpretation significantly transposed the legal concept of occupation to warfare situations, which were conceived as one means to acquire sovereignty over a territory. The concept of belligerent occupation entailed the application to warfare of the old theory of Latin occupation, which did not distinguish occupation from conquest and the consequent annexation, owing to the rationale that military operations have as a final result the possession of parts of a hostile territory and, under specific circumstances, even the whole territory. Hugo Grotius, for instance, in its masterpiece *De jure belli ac pacis* asserted that “some sovereigns hold their power by a plenary right of property; when for instance it comes into their possession by the right of lawful conquest, or when a people, to avoid greater evils, make an unqualified surrender of themselves and their rights into their hands.”⁹ Occupation in its primitive conception was thus effected through two elements, the first being the intention to take possession of the land, i.e. “*animus occupandi*”, and the second the exercise of authority via activities over the occupied land, i.e. “*corpus possessionis*”.¹⁰

This approach, which survived at least until the Treaty of Utrecht of 1713 and persisted in part until the early years of the 19th century, governed European practice, where occupation involved *ipso facto* the immediate transfer of sovereignty to the invading power. Thus, whether or not the occupation was supposed to entail subjugation, the occupying force, as conqueror, had the absolute power to “devastate the country, appropriate all public and private property, kill the people, or take them prisoners, or make them swear allegiance to himself and force them to fight in his army against their old sovereign.” The conqueror “could even before the war was decided dispose of the territory by annexing it or ceding it to a third State.”¹¹ Two blatant examples of this theory can be found in the early 19th century

comprehensive meaning of taking exclusive possession and, therefore, gaining an exclusive right. See also, D. Appel Graber, *The Development of the Law of Belligerent Occupation, 1863-1914: a Historical Survey*, Columbia University Press, New York: 1949.

⁸ E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality And Legitimacy*, Nijhoff, Leiden, Boston: 2006, p. 21 ff.

⁹ H. Grotius, *De jure belli ac pacis, Libri Tres* (1625), book I, ch. III, para. XI.

¹⁰ Milano, *supra* note 8, p. 81.

¹¹ Appel Graber, *supra* note 7, p. 13.

case law of the US Supreme Court, which granted to the Occupying Power full sovereignty over the occupied territory.¹²

From this perspective, it could be argued that the occupation of a territory involved State succession, defined as change or transfer of sovereignty over a territory, there being no significant difference at that time between *de facto* and *de jure* sovereignty. When the concept of occupation directly stemmed from the right to conquer a territory, the result was that effective *de facto* sovereignty constituted the occupying power's *de jure* sovereignty over the occupied territory as well.

Thus, until the Congress of Vienna (1814–1815), the concept of occupation under international law was juridically inoperative, and for a long time it failed to meet any specific definition which would have given it autonomy as a legal branch of law.¹³

1.2. The changing concept of belligerent occupation and the role of *de jure* sovereignty

While at the end of the 18th century the concept of belligerent occupation was still associated with the traditional practice of the right of conquest, legitimizing the conqueror's acquisition of a territory by the use of force and thereby expanding its sovereignty, by the beginning of the 19th century attempts to mitigate the classical formulation began to appear. Events in this area unfolded on two planes, represented on the one hand by the principle of humanity, based upon the new conception of war presaged by Rousseau,¹⁴ and on the other hand by the principle of nationality,¹⁵ which found support in the 1789 French Revolution.

The “founding father” of this new theoretical approach in the law was Emerich de Vattel, who moulded the modern concept of belligerent occupation and, while not yet distinguishing occupation from conquest, introduced the principle that the occupied population and their respective goods and property were

¹² Such an orientation was first announced in the 1819 decision in the case *U.S. v. Rice*, which position was later confirmed by the 1859 decision in the case *Fleming v. Page*.

¹³ In this respect, H. Lauterpacht (ed.), *Oppenheim's International Law: a Treatise*, Vol. I – *Peace*, 7th ed., Longman, London: 1963, p. 344, dates the first application of the expression “belligerent occupation” back to the Treatise by the German jurist August Wilhelm Heffter, *Das Europäische Völkerrecht* (1844).

¹⁴ Jean-Jacques Rousseau, in *Le contrat social* (1762) expounded the theory that war is a relationship between States, while men become enemies by chance, not because they are citizens of belligerent States, but because they are soldiers. This disavowed the predominant conception, extensively codified in the treatise by the Prussian general Carl von Clausewitz, *Vom Kriege* (*On War*, 1838), that war ought to be conceived as a struggle involving the entire populations of belligerent States.

¹⁵ See, Benvenisti, *supra* note 7, p. 622 ff.

entitled to legal protection.¹⁶ This theoretical construction concerning the protection of non-belligerents, the treatment of private property, legal seizures, and the general administration of an occupied territory, represents the axis around which, a century later, the law of belligerent occupation came to be codified within the framework of IHL.

It was only, however, at the end of the 19th century that the legal category of belligerent occupation began to constitute an autonomous legal doctrine. Henry Wager Halleck laid the groundwork in 1861 when he introduced the distinction between those rights stemming from a military occupation only, and those which would be recognised in the case of complete conquest.¹⁷ In contrast to *debellatio*, “*occupatio bellica* was viewed as an intermediate status between invasion and conquest,”¹⁸ characterized on the one hand by the maintenance of the constitutional and legal order in force in the occupied territory, and on the other hand by effective control exercised by the Occupying Power based upon its military capacity to exercise administrative functions rather than sovereign rights.¹⁹

At this point and from this perspective, a crucial distinction arises between *de facto* and *de jure* sovereignty, with only the latter constituting legal title to possess a territory. *De jure* sovereignty was conceived of as the right of a State to exclude incursions or actions by any other State in its own territory, by virtue of the circumstance that the sovereign State essentially and effectively exercises its authority over a definite territory. As a result “legal sovereignty implies that each State has the legal competence to, *inter alia*, participate in the international system on an equal footing with other states, conclude treaties on the basis of consent, exclude other states from interfering in its internal affairs, govern the affairs of its

¹⁶ See, E. de Vattel, *The Law of Nations or the Principles of Natural Law* (1758), in particular Book III, Ch. 13, para. 200, also available at: www.lonang.com/exlibris/vattel/vatt-313.htm (accessed February 20, 2012). In line with the theory expressed by Samuel von Pufendorf, *De Jure Naturae et Gentium, Libri Octo* (1688), de Vattel claimed (paras. 197–198) that only by a peace treaty closing the hostilities could the sovereign of an occupied territory cede its sovereign rights to the occupying power.

¹⁷ H. W. Halleck, *International Law; or, Rules Regulating the Intercourse of States in Peace and War*, 1861.

¹⁸ Bhuta, *supra* note 7, p. 726.

¹⁹ *Ibidem*. Contra, N. Haupaïs, *Les obligations de la puissance occupante au regard de la jurisprudence et de la pratique récentes*, 111(1) *Revue générale de droit international public* 117 (2007), p. 120, argues that “Le régime de l’occupation n’est pas défini par la mise en place d’une administration militaire, mais par le fait que l’armée ennemie ou ses supplétifs sont en mesure de contrôler un territoire ... En ce sens, le régime juridique de l’occupation n’est porteur d’aucun droit d’organisation politique et administrative; seul peut être conçu un devoir d’exercer des fonctions d’autorité, dans le but de maintenir et de restaurer l’ordre public sur le territoire occupé.”

domestic territory, and control its borders.”²⁰ Max Huber, the sole arbitrator in the 1928 Award in the *Island of Palmas case* argued that “sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”²¹

In contrast, the essential condition to determine the existence of a military occupation may be identified as the effective exercise of a stable authority over an occupied territory. This approach has been recently confirmed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v. Naletilić and Martinović*, where the Tribunal set forth guidelines to define the existence of a military occupation, including:

- (a) the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly; (b) the enemy’s forces have surrendered, been defeated or withdrawn... (c) the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt; (d) a temporary administration has been established over the territory; (e) the occupying power has issued and enforced directions to the civilian population.²²

Such a legal status entails the commitment to establish a “balance between the security interests of the Occupying Power and the presumed interests of the population of the occupied state by preserving the *status quo ante*.”²³ This new theory is based on a gradual development in international law through two complementary stages, characterized by the interaction of two principles: the inalienability of sovereignty, the title to which was delivered to the people by the French revolution, and the principle of sovereign equality among Nations, representing one of the pillars of international law. Earlier, the case law of the French Cour de Cassation in various decisions in the early years of the 19th century applied the theory that the occupation of a hostile territory, unlike annexation, does not involve a transfer of sovereignty. This orientation notably influenced the doctrine of the time, which started to pay more attention to the principle of preservation of sovereignty.²⁴

²⁰ R. H. Steinberg, *Who Is Sovereign?*, 40(2) *Stanford Journal of International Law*, 329 (2004), p. 329.

²¹ PCA, *Island of Palmas case (Netherlands v. USA)*, 4 April 1928, R.I.A.A., vol. II, p. 838

²² ICTY, *Prosecutor v. Naletilić and Martinović*, Trial Judgement, Trial Chamber I, 31 March 2003, IT-98-34-T, para. 214, available at: www.un.org/icty/cases-e/index-e.htm [hereinafter *ICTY Naletilić case*].

²³ Wolfrum, *supra* note 2, p. 8.

²⁴ As noted by Benvenisti, *supra* note 7, p. 624 ff., the French courts, in a decision of April 30, 1812, stated that the French authorities which occupied the Papal States had not abided by the legislation promulgated by the Kingdom of Naples, which had formerly

Therefore, it is possible to accept that the origin of the legal category of belligerent occupation dates back to the changes in the conduct of hostilities following the declaration of the French National Assembly of May 1790 to consider that all territories occupied by the French troops were not annexed to France, but rather that the French representatives had to act as “tutors” with limited powers. Restrictions on the Occupying Authorities directly stemmed from the principle of sovereign equality among States, which formed the foundation for the law of belligerent occupation. Just as the forces of occupation could not interfere with the private property of the occupied population, so too they could not interfere with the property of “Nation” itself, because it belongs to the people.

Later, the principle of the retention of *de jure* sovereignty by the occupied State and the exercise of only a *de facto* provisional authority by the Occupying Power was attested to by the 1925 historical Award in the *Affaire de la Dette Publique Ottomane*, where it was clearly stated that, whatever may be the possible effects of the regime of occupation over a territory, it cannot involve the transfer of sovereignty to the Occupying Power.²⁵

The theoretical doctrine developed between the 17th and 18th centuries not only contributed to defining the modern interpretation of the concept of belligerent occupation, but also made the international system receptive to the new discipline. Thus the current regulation in this area is the result of a slow and gradual process of normative sedimentation, hinged on the attempt to purge the legal basis of belligerent occupation from its confused and often conflicting ideological background.

occupied the same territories, because such a Kingdom did not gain any sovereignty over them. By another decision of January 22, 1818, the Cour de Cassation stated that the French occupation of Catalonia did not convert it into a French territory, an act which, as the Court noted, may only originate as a consequence of a public act of unification. The same approach, finally, was later followed in the decision of February 1, 1837, when, following the British occupation of Martinica, the Court stated “la suspension temporaire de la possession à la suite de l’occupation ne comporte pas l’invalidité de la législation française sur le territoire occupé,” an orientation confirmed again by the same Court in its decision of March 16, 1841, where it was stated that occupation by itself could not repeal the legislation in force in the occupied territory.

²⁵ See, *Affaire de la Dette publique ottomane*, Arbitral Award, 18 April 1925, R.I.A.A., vol. I, pp. 529–624, “quels que soient les effets de l’occupation d’un territoire par l’adversaire avant le rétablissement de la paix, il est certain qu’à elle seule cette occupation ne pouvait opérer juridiquement le transfert de souveraineté.”

2. THE CODIFICATION OF THE LAW OF MILITARY OCCUPATION AND THE QUESTION OF SOVEREIGNTY

Although international legal doctrine acknowledged the existence of the concept of belligerent occupation from the 16th century onward, the legal perspective failed to provide any early systematic appraisals of existing practice. This delay seems to stem from the circumstance that, in conformity with the progressive acceptance of the prohibition on the use of force, international law only relatively recently took into account the need to protect the population under occupation within the framework of IHL. Likewise, the question of preserving *de jure* sovereignty has subsequently become an overriding tenet of military occupation, thereafter considered as a temporary and provisional status based upon the exercise of *de facto* sovereignty by an Occupying power.

2.1. The early stage of codification

The first attempts to provide a written elaboration assigning a specific relevance to the category of belligerent occupation in the field of international practice corresponded to the general attempts to codify the rules of armed conflict. In particular, in 1863 during the American Civil War a set of 150 articles was published, titled “Instructions for the Government of Armies of the United States in the Field”, redacted by Francis Lieber, a German jurist who had emigrated to America, on the demand of the US President Abraham Lincoln, who subsequently approved the articles as General Order No. 100. The Lieber Code codified the customary rules which the armies in America and Europe conventionally abided by. It was promulgated as domestic law for the American army and represented the prototype for the military manuals which flourished in Europe between the 19th and 20th centuries.²⁶ These constituted a milestone for the later Hague conferences of codification. The Lieber Code codified the modern principle of temporariness of military occupation, and the section concerning military authority over a hostile territory was later incorporated in a “Projet d’une Déclaration internationale concernant les lois et coutumes de guerre”, which represented the very first international codification of the laws of war. It was approved on July 27, 1874 during an international conference held in Brussels, summoned on the initiative

²⁶ In this period the military manuals of many European countries were promulgated, in particular: the Netherlands (1871), France (1877), Serbia (1879), Spain (1882), Portugal (1890), and Italy (1896). See, Dinstein, *supra* note 1, p. 8 ff., see also, M. Zwanenburg, *The Law of Occupation Revisited: The Beginning of an Occupation*, 7 Yearbook of International Humanitarian Law 99 (2007), p. 101.

of the Russian Czar Alexander II.²⁷ Even though the Brussels Declaration was not incorporated in any conventional agreement or formal treaty, it marked a breakthrough in the legal development of belligerent occupation, appearing “more human and respected the rights of the peaceful population to a greater degree than the Lieber code.”²⁸ Further, with reference to the obligations of the occupying power, Article 2 acknowledged the role of *de facto* sovereignty as a substitute for a *de jure* sovereignty in abeyance, reading that “the authority of the legitimate Power being suspended and having in fact passed into the hands of the occupants, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety.”

The normative archetype of the Brussels Declaration was developed by the Institut de Droit International, which wished to support the editing of draft articles to be included in military manuals. The activity of the eminent Institute led to a two-fold outcome: the 1880 Manual of the Laws and Customs of War, which basically repeated and complemented the provisions of the Brussels Declaration;²⁹ and the *Projet de déclaration internationale relative aux occupations de territoires*, a document approved in Lausanne on 7 September 1888, listing, in just ten articles, a series of guarantees of protection for the fundamental rights of the occupied population, without however defining the institution of belligerent occupation.³⁰

²⁷ Delegates from the sixteen main European States participated in the Brussels Conference, to wit: Austria-Hungary, Belgium, Denmark, France, Germany, Britain, Greece, Italy, the Netherlands, Norway, Portugal, Russia, Spain, Sweden, Switzerland and Turkey. However, despite the success achieved in Brussels, the Declaration was never ratified. Nonetheless, it notably influenced the development of the next stage of codification of the law of war.

²⁸ Appel Graber, *supra* note 7, p. 26.

²⁹ Known as the “Oxford Manual”, from the name of the place where the special committee, entrusted by the Institut de Droit International during the Geneva Session of 1874 to elaborate the Draft, concluded its work. The Manual was not followed by any international agreement.

³⁰ This Declaration Relating to Occupied Territories stated that: “l’occupation d’un territoire à titre de souveraineté ne pourra être reconnue comme effective que si elle réunit les conditions suivantes: 1. La prise de possession d’un territoire enfermé dans certaines limites, faite au nom du gouvernement; 2. La notification officielle de la prise de possession”, also pointing out that “... La prise de possession s’accomplit par l’établissement d’un pouvoir local responsable, pourvu de moyens suffisants pour maintenir l’ordre et pour assurer l’exercice régulier de son autorité dans les limites du territoire occupé. Ces moyens pourront être empruntés à des institutions existantes dans le pays occupé,” while “La notification de la prise de possession se fait, soit par la publication, dans la forme qui, dans chaque Etat, est en usage pour la notification des actes officiels, soit par la voie diplomatique. Elle contiendra la détermination approximative des limites du territoire occupé.”

2.2. The law of military occupation from The Hague Regulations to the Geneva Conventions

The normative and methodological axis generated by the various attempts to codify the law of belligerent occupation and the law of war represented the antecedent to the two Hague codification conferences of 1899 and 1907 respectively. There the doctrine of belligerent occupation, following the development of the law of war, the limitation on the use of force, and rejection of the right of conquest,³¹ finally became positive international law, as codified in provisions under Section III of the Regulations, first annexed to The Hague Convention II of 1899 and later to The Hague Convention IV of 1907.³²

The relevance of the set of rules included in these international documents was later confirmed by the judgments issued by the International Military Tribunals of Nuremberg and Tokyo³³, and recently by ICJ³⁴ and ICTY.³⁵ Their continuing relevance stems from the declaratory effect of customary international law, and as a result from the subsequent *erga omnes* binding effectiveness, regardless of whether a State is or is not a High Contracting Party.

³¹ See, R. Giladi, *The Jus Ad Bellum/Jus In Bello Distinction and the Law of Occupation*, 41(1-2) *Israel Law Review* 246 (2008), p. 273 ff.

³² See, Hague Convention (II) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, July 29, 1899, entered into force on September 4, 1900; 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, October 18, 1907, entered into force on January 26, 1910 [hereinafter: Hague Convention IV Regulations]. The second Hague Conference of 1907 was summoned to revise the weak system elaborated during the earlier codification in 1899. This purpose resulted in the adoption of thirteen "Regulations", regulating different aspects of the law of war, as well as the law of belligerent occupation. For further references see, among others, Dinstein, *supra* note 1, p. 5 ff.

³³ See, International Military Tribunal for Germany, *The Law Relating to War Crimes and Crimes Against Humanity (Judgement)*, included in the Avalon Project archive (www.avalon.law.yale.edu/imt/judlawre.asp), "the rules of the land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But...by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war."

³⁴ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, 9 July 2004, para. 89, available at: www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm [hereinafter ICJ 2004 *Israeli Wall Advisory Opinion*]; *Case concerning Armed Activities on the Territory of the Congo (Congo v. Uganda) (Jurisdiction)*, 19 December 2005, para. 217, available at: www.icj-cij.org/docket/files/116/10455.pdf [hereinafter *Armed Activities in Congo*].

³⁵ ICTY, *The Prosecutor of The Tribunal v. Duško Tadić*, IT-94-I-T, Opinion and Judgement of Trial Chamber II, 7 May 1997, para. 580, available at: www.icty.org/x/cases/tadic/tjug/en/tad-ts/70507JT2-e.pdf.

The 1907 Hague Regulations invigorated the two essential tenets of belligerent occupation, confirming its transitory nature which, albeit total, can involve neither the extinction of the occupied State nor the transfer of its sovereignty to the Occupying Power,³⁶ and the attribution of specific obligations to the Occupant. This provision was definitively included in Article 43 of the 1907 Hague Convention IV Regulations, considered the linchpin of the law of belligerent occupation, which imposes two diverse obligations on the Occupying Power: “to restore, and ensure, as far as possible, public order and safety” and to respect “unless absolutely prevented, the laws in force in the country.”³⁷

However, these obligations were not conceived of as absolute. The first one binds the Occupying Power’s executive and judicial branches to impose adequate measures to adhere to the former state of affairs, but only “as far as possible” and not unconditionally. The applicability of this obligation becomes problematic when an occupation is protracted, as in the case of Palestine, because it would mean freezing the economic, political, social and cultural organization of the “state” for an indefinite period.³⁸ The second obligation binds the Occupying Power’s legislative branch to desist from repealing or suspending the existing legislation, except in cases of necessity:³⁹ the sole justified derogation from the laws of the occupied state are those laws aimed at maintaining order and the security of the occupying troops, and furthermore any legislation promulgated by the Occupying Power in the name of necessity only applies insofar as a situation of occupation persists.⁴⁰ Because occupation is an outcome of a war, it cannot deal with general aspects of civil society. In fact,

³⁶ See the overall wording of Sec. III “On military authority over hostile territory” of Hague Convention IV Regulations. In this respect Article 42 defines a territory as being occupied “when it is actually placed under the authority of the hostile army”, specifying that “the occupation extends only to the territory where such authority has been established and can be exercised.”

³⁷ See, Hague Convention IV Regulations, Article 43, which contains in one article the two features included in Articles 43 and 44 respectively of the Oxford Manual. For a general outline of the Occupant’s obligations, see, Haupt, *supra* note 19, pp. 117–146; see also, K. Watkin, *Maintaining Law and Order during Occupation: Breaking the Normative Chains*, 41 (1-2) *Israel Law Review* 175 (2008), pp. 175-200; and M. Sassoli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16(4) *European Journal of International Law* 661 (2005).

³⁸ Benvenisti, *supra* note 3, p. 12 ff.

³⁹ This is evident from the reference to Article 3 of the 1874 Brussels Declaration, reading “A cet effet, il maintiendra les lois qui étaient en vigueur dans le pays en temps de paix, et ne les modifiera, ne les suspendra ou ne les remplacera que s’il y a nécessité.”

⁴⁰ Y. Dinstein, *Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peace-building*, Occasional Papers Series, 1/2004, Harvard University Program on Humanitarian Policy and Conflict Research, available at: www.hpcrresearch.org/pdfs/OccasionalPaper1.pdf (accessed February 20, 2012).

any intervention in this field, such as alteration of the economic system, is likely to exceed the extremely temporary nature of belligerent occupation.

Although the 1907 Hague Convention IV Regulations represent a keystone for the law of belligerent occupation, their provisions seemed to be impermeable to human rights, which would not find a proper development until the Universal Declaration of Human Rights.⁴¹ In fact it was the horrible experiences of the two World Wars which highlighted the inadequacy of the 1907 Hague Convention IV Regulations to provide the occupied civil population with effective guarantees for the protection of their fundamental rights, since the Hague Convention provisions were mostly focused on safeguarding the occupied State's interests.⁴² Furthermore, the practice of military occupation during the Second World War also highlighted the fact that the Occupants failed to apply the 1907 Hague Convention IV Regulations over their occupied territories. This set of rules, in fact, was subject to different challenges,⁴³ because the balance between the Occupant's duty to fill the vacuum created by the ousting of the domestic government and the occupied population's duty to abide by the Occupant's provisional exercise of authority produced conflicts in numerous instances.

This twofold dimension of the law of military occupation, aimed both at preserving the sovereign rights of the occupied State which had provisionally lost control over its own territory, and protecting any person under the authority of the Occupying Power, represents the general design which inspired the four Geneva Conventions, elaborated by the International Committee of the Red Cross, which since 1934 had made a comprehensive attempt to revise the law of belligerent occupation. Among these international instruments, which moved from a phase concerned with the rights of sovereigns to a "humanitarian" phase, where "the belligerent occupant becomes a trustee of the population, charged to administer the territory in view of the interests of the inhabitants,"⁴⁴ Geneva Convention IV constitutes the real novelty, despite the fact that its universal application as customary international law has not been as widely accepted as was intended.⁴⁵

⁴¹ UNGA Res. 217 (III), UN Doc. A/Res/217, 10 December 1948.

⁴² This acknowledgement is confirmed by the detailed regulations, included in Articles 46–56 of the Hague Regulations, concerning the Occupant's obligations in the economic field. For a valuable analysis of these provisions, see, S. Silingardi, *Occupazione bellica e obblighi delle potenze occupanti nel campo economico*, 89(4) Rivista di Diritto Internazionale, 990 (2006), p. 990 ff.

⁴³ Benvenuti, *supra* note 3, p. 59 ff.

⁴⁴ M. Koskeniemi, *Occupied Zone – "A Zone of Reasonableness"*, 41(1-2) Israel Law Review 31 (2008), p. 31.

⁴⁵ This argument is particularly hard to uphold when the applicability of the Geneva Conventions as customary law concerns countries where treaties need the enactment of a domestic law in order to take effect. This is the case in Israel, which considers Geneva

Three relevant features can be considered to mark the difference between Geneva Convention IV and the former 1907 Hague Convention IV Regulations. The first relates to the overall focus of Geneva Convention IV,⁴⁶ which was primarily aimed at protecting the population under alien occupation, instead of the ousted regime's interests. A second difference concerns the plethora of duties imposed upon the Occupying Power, which "is no longer the disinterested watch guard, but instead a very involved regulator and provider."⁴⁷ The final difference lays in the lack of any reference in the Geneva Convention IV to the treatment of public property, even though an adequate protection for private property is provided for. Geneva Convention IV specifically prohibits the Occupant from destroying "real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations", unless such a destruction could be justified by military necessity.⁴⁸

On the whole, the overriding breakthrough accomplished with regard to the law of belligerent occupation relates to the changeover from a set of rule, based upon the general inhibiting principle under Article 43 of the 1907 Hague Convention IV Regulations, to a body of law emanating from the provisions of Article 47 of Geneva Convention IV, focused on the principle 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 [...] Convention." The same provision underscores the principle of the inalienability of *de jure* sovereignty through the use of force, which has constituted the cornerstone for further developments in the law of

Convention IV wholly conventional. For a more extensive treatment, see, T. Meron, *The Geneva Conventions as Customary Law*, 81(2) American Journal of International Law 348 (1987).

⁴⁶ Geneva Convention IV sets forth the law of belligerent occupation in two groups of articles, included in Part III - Status and treatment of protected persons, Sec. I - Provisions common to the territories of the parties to the conflict and to occupied territories (Articles 27-34), and Sec. III - Occupied territories (Articles 47-78). For a comprehensive commentary on the Convention, see J. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. IV. ICRC, Geneva: 1958.

⁴⁷ Benvenisti, *supra* note 2, p. 31. According to Geneva Convention IV, the occupying authority is required to ensure the humane treatment of protected persons, and to "facilitate the proper working of all institutions devoted to the care and education of children" (Article 50); provide specific labour conditions (Articles 51-52); "ensure the food and medical supplies of the population" (Article 55); "ensure and maintain, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory" (Article 56); "The Occupying Power shall permit ministers of religion to give spiritual assistance to the members of their religious communities" (Article 58); and "agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal" (Article 59).

⁴⁸ See, Geneva Convention IV, art. 53.

belligerent occupation, especially within the UN. While the UN Charter does not contain any specific provisions on belligerent occupation, it indirectly condemns the occupation of territories resulting from the use of force.⁴⁹ The resort to force, not based any longer on wars of conquest but on humanitarian interventions and struggles for self-determination, has become instead the *extrema ratio* to protect the most cherished values of the international community.⁵⁰

The most significant outcome of the course embarked on has been the approval of two Additional Protocols to the Geneva Conventions, whose Additional Protocol (I) and Relating to the Protection of Victims of International Armed Conflicts extends the law of occupation to “territories with a controversial international status.”⁵¹

3. THE INTERPLAY BETWEEN *DE JURE* AND *DE FACTO* SOVEREIGNTY IN THE OCCUPATION ZONE MODEL THROUGH THE LENS OF INTERNATIONAL PRACTICE

As has been demonstrated, the codification of the “laws of war” involved the consolidation of the doctrine of belligerent occupation into a temporary and limited regime. Nevertheless, the Hague and Geneva rules were not applied very stringently, and sometimes hardly at all, throughout the practice which reigned during the armed conflicts in the 20th century. Many occupying powers preferred to simply deny that they were acting as “occupants” in order to avoid having to abide by the obligations imposed by the law of military occupation. Such is the case as regards Israel’s military occupation of Palestinian territories, which will later used as a key example in order to submit the law of military occupation to the test of legality. But in addition to Israel, a number of territorial situations under a regime of occupation have demonstrated, in contemporary international law, echoes of the traditional antinomy between *de jure* and *de facto* sovereignty, creating interpretation problems over the legitimacy of different states of affairs and undermining some important values of international law, including the right to self-determination of peoples and other principles concerning the lawful means to acquire title to territory.⁵²

⁴⁹ See, UNGA Res. 2625 (1970), *Declaration on Principles of International Law on Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, UN Doc. A/5217, 24 October 1970.

⁵⁰ M. Maxine, *Humanitarian Intervention without Borders: Belligerent Occupation or Colonization?*, 25(1) *Houston Journal of International Law* 113 (2002), p. 113 ff.

⁵¹ Roberts, *supra* note 4, p. 254.

⁵² See, Milano, *supra* note 8, p. 42 ff.

Even in cases involving the territorial administration by international organizations, like in Afghanistan or Kosovo, where the question of sovereignty is not openly at issue (since the international mission has only a limited and functional sovereignty which can only complement and support the legitimate *de jure* sovereignty), the hypothesis of a State-Occupant is still problematic, since the co-existence of two sovereignties is imposed over the same territory. In fact, such cases highlight that in the development of international practice the Occupying power may fail to meet some legal obligations which arise when the effectiveness of its *de facto* sovereignty is used as a pretext impose its own *de jure* sovereignty, confusing the issue of the current state of legal title to the occupied territory.

3.1. *De jure* sovereignty “in abeyance” and the principle of self-determination of peoples

In accordance with the principle of sovereignty, the legal restrictions imposed on the Occupying Power by the law of belligerent occupation stem from the acknowledgment that it is up to the occupied society “to determine its own political, economic and social order, according to its own practices and procedures of governance, rather than having these kinds of decisions determined by a foreign power in the course of an occupation.”⁵³ The question of identifying a legitimate sovereign with the capacity to assert effective control is an overriding matter, representing the essence of the principle of self-determination. Under the administration of Iraq by the Coalition Provisional Authority (CPA), *de facto* sovereignty was exercised by a coalition led by the US and UK in order “to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future”⁵⁴ until June 2004, to be followed by the return of governmental functions to the Iraqi Interim Government.⁵⁵

De jure sovereignty in military occupation regimes finds its utmost legal basis in the principle of self-determination, the customary nature of which has been

⁵³ McCarthy, *supra* note 2, p. 47. As noted by J. Cardona Llorens, *Le principe du droit des peuples à disposer d’eux-mêmes et l’occupation étrangère*, in *Droit du pouvoir, pouvoir du droit. Mélanges offerts à Jean Salmon*, Bruylant, Bruxelles: 2007, p. 869, “la Puissance occupante ne peut cependant pas exercer arbitrairement ses compétences. Si tout État doit faire une utilisation ‘raisonnable’ et ‘utile’ de sa souveraineté territoriale, il est clair que, dans le cas d’une occupation, l’exercice de ces compétences par la puissance occupé doit être beaucoup plus limité.”

⁵⁴ Wolfrum, *supra* note 2, p. 20.

⁵⁵ UNSC Res. 1546 (2004), *The situation between Iraq and Kuwait*, 8 June 2004, UN Doc. S/RES/1546 (2004), in fact welcomed “... the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq by 30 June 2004.”

recurrently confirmed by the International Court of Justice (ICJ).⁵⁶ Furthermore, in the Court's judgment on the case of East Timor it "indeed made it clear that the right of peoples to self-determination is today a right *erga omnes*."⁵⁷ From this perspective the principle imposes obligations "toward the international community as a whole" that, by nature, would constitute "the concern of all States." The Court designated these as *erga omnes* obligations, according to which, taking into consideration "the importance of the rights involved, all States can be held to have a legal interest in their protection."⁵⁸ Likewise, the peremptory value of the principle of self-determination can no longer be subject to dispute. *Jus cogens* is characterized as embodying the fundamental beliefs and values of the entire international community in terms of political and moral ethics. Thus, the principle of self-determination is not only an *erga omnes* obligation, but also a peremptory norm, with its *raison d'être* enshrined in the protection of the international community's fundamental interests, which are in turn protected by *jus cogens*.⁵⁹

The principle of self-determination works, in fact, as the "preservative" of *de jure* sovereignty which, during the period of military occupation, remains "in abeyance." Self-determination is the fulcrum for any claims to statehood for those peoples who, being subject to a regime of alien occupation, have a legitimate right to a given territory. This is a right that Palestine, for instance, has been always entitled to, as "the population... is fighting against the occupant in the exercise of their right of self-determination,"⁶⁰ fulfilling the conditions to be identified as a "people", such as a common historical tradition and territorial connection, and a cultural, racial and linguistic homogeneity, together with the consciousness and the willingness to be identified as a people.⁶¹ However, owing to the persisting

⁵⁶ ICJ, *Legal Consequences for States of the continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion), 21 June 1971, ICJ Reports 1971; *Western Sahara* (Advisory Opinion), 16 October 1975, ICJ Reports 1975.

⁵⁷ ICJ, *East Timor (Portugal v. Australia)*, 30 June 1995, ICJ Reports 1995, para. 29.

⁵⁸ ICJ, *Barcelona Traction Light and Power Co., Ltd.*, 5 February 1970, ICJ Reports 1970, para. 33.

⁵⁹ On the interplay between *erga omnes* obligations and *jus cogens*, see, P. Picone, *La distinzione tra norme internazionali di jus cogens e norme che producono obblighi erga omnes*, 91(1) *Rivista di diritto internazionale* 5 (2008), p. 7 ff.

⁶⁰ L. C. Green, *Is There a 'New' Law of Intervention and Occupation?*, 35 *Israel Yearbook on Human Rights* 71 (2005), p. 71 ff.

⁶¹ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), 9 July 2004, I.C.J. Reports 2004, [hereinafter "ICJ 2004, *Israeli Wall Advisory Opinion*"], at para. 118. As regards the concept of "people" cf., UNESCO-International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, *Final Report and Recommendations*, Paris, 27–30 November 1989, SHS-89/CONF. 602/7, para. 22.

Israeli occupation and the subsequent lack of *de facto* independence and effective authority, the Palestinian right to sovereignty continues to linger in “a *de jure* suspension”, until such time as the twofold criterion of independence and effectiveness can be met.⁶² In other words, *de jure* sovereignty is vested in the Palestinian people, to be exercised once they achieve their independence. This was made clear by Judge McNair’s separate opinion in the *Western Sahara* case, explaining that “sovereignty over a mandated territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent state ... sovereignty will revive and rest in the new state.”⁶³

3.2. *De facto* sovereignty and the unlawfulness of occupation

As has been argued, “the main pillar of the law of belligerent occupation is embedded in the maxim that occupation does not affect sovereignty,” since “the displaced sovereign loses possession of the occupied territory *de facto* but it retains title *de jure*.”⁶⁴ The law of military occupation, in fact, is aimed at the restoration of the legitimate sovereignty over an occupied territory and population, and may not constitute a claim to title to obtain full sovereignty. However, not all territorial situations falling within the ambit of “an occupation zone model” contain a clear interplay between *de jure* and *de facto* sovereignty.

Unsurprisingly, the prolonged Israeli occupation is strongly illustrative of such a state of affairs.⁶⁵ In fact, there is no better example than the prolonged Israeli occupation for observing “that the law on occupations could be so used as to have the effect of leaving a whole population in legal and political limbo”,⁶⁶ meeting only the occupant’s own interests. Despite some eminent theories based upon the need to modernise the occupied territory,⁶⁷ under the current state of law

⁶² Ch. Bassiouni, *Self-determination and the Palestinians*, 65(4) *American Journal of International Law* 32 (1971), p. 32 ff.

⁶³ ICJ *Western Sahara Advisory Opinion*, para. 10.

⁶⁴ Dinstein, *supra* note 1, p. 49.

⁶⁵ For an extensive analysis of the historical territorial titles to Palestine, see, F.L.M. van De Craen, *The Territorial Title of the State of Israel to “Palestine”: An Appraisal in International Law*, 14 *Revue Belge de Droit International* 500 (1978-79), pp. 500–538; for updated references see, C. Hauswaldt, *Der Status von Palästina. Eine völkerrechtliche Untersuchung des territorialen Status*, Nomos, Baden-Baden: 2009.

⁶⁶ Roberts, *supra* note 6, p. 47 ff.

⁶⁷ *Ibidem*, where it is asserted that “while there may be some dangers in regarding ‘prolonged occupation’ as a special category, there are also very good reasons for doing so. During a long occupation, many practical problems may arise that do not admit of mere temporary solutions based on the idea of preserving the status quo ante: decisions may have to be taken about such matters as road construction, higher education, water use, electricity generation and integration into changing international markets. Such decisions, although they involve radical and lasting change, cannot be postponed indefinitely.”

it is not possible to convert a limited and provisional *de facto* occupation regime into full sovereignty over an occupied territory. The legal foundation of military occupation since its acceptance into contemporary international law has been aimed at protecting *de jure* sovereignty over a territory, conceived as the linchpin of the modern international community. Conversely, prolonged occupation and its maintenance in violation of international law can represent a specific ground for illegality, as it undermines the principles of inalienability of sovereignty and territorial integrity.⁶⁸

Thus, even though belligerent occupation represents a lawful branch of international law, the test of its legality can become crucial with reference to the peculiarity of some territorial situations, such as the long-lasting Israeli occupation over Palestine. In order to test its legality, assessments need to be made of its compliance with the two essential tenets of military occupation, i.e. the inalienability of the legitimate sovereignty over the occupied territory, and the temporariness of occupation. The prevailing doctrine has identified some legal standards to determine the unlawfulness of territorial situations involving infringement of the core principles of territorial integrity: the prohibition against the use of force as a means to acquire title to a territory; the principle of *uti possidetis juris*, for a long time considered as a stabiliser of international relations, positing that “new States will come to independence with the same boundaries that they had when they were administrative units within the territory or territories of one colonial power;”⁶⁹ and the aforementioned principle of self-determination.⁷⁰

With respect to the prohibition against the use of force as a means to acquire title to a territory in the event of military occupation, in the *Israeli Wall Advisory Opinion* the International Court of Justice reaffirmed the customary norm, stipulating that neither the acquisition of territory resulting from the threat or use of force nor any occupation of territory resulting from the threat or use of force in contravention of international law will be recognized as legal acquisition or occupation. The Court leaves no room for the replacement of the *de jure* Palestinian sovereignty in abeyance with Israeli *de facto* sovereignty.

⁶⁸ O. Ben-Naftali, A. M. Gross, K. Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 Berkeley Journal of International Law 559 (2005), p. 559, also published in V. Kattan (ed.), *The Palestine Question in International Law*, British Institute of International and Comparative Law, London: 2008. p. 575 ff.

⁶⁹ M. N. Shaw, *The Heritage of States: The Principle of Uti Possidetis Juris Today*, 67 British Yearbook of International Law 97 (1996), p. 97.

⁷⁰ See also: Milano, *supra* note 8, p. 101 ff.; J. Castellino, *Territorial Integrity and the ‘Right’ to Self-Determination: An Examination of the Conceptual Tools*, 33(2) Brooklyn Journal of International Law 503 (2008), p. 507 ff.

Nevertheless, despite the relevance of such norms, the UN has only in few cases straightforwardly declared an occupation to be illegal. The situation of Palestine appears symptomatic, as the Court in the 2004 *Israeli Wall Advisory Opinion* went only so far as to find that “the construction of the wall and its associated regime create a ‘fait accompli’ on the ground that could well become permanent, in which case... it would be tantamount to de facto annexation.”⁷¹ This conclusion leaves open to question a finding of an illegal occupation “in the event that a finding is made on a veiled annexation having taken place.”⁷²

Previously, in 1971, the ICJ Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia* provided the correct guidelines for measuring the legality of South-African occupation, confirming that infringement of the principle of self-determination put the stamp of illegality on South Africa’s presence in Namibia, and that its status was that of an Occupant;⁷³ since that time the UN Security Council and General Assembly have referred to Namibia as “illegally occupied”, and to the situation as one of “illegal occupation”, although “as political organs, they were perhaps less restrained in their use of terminology than the Court.”⁷⁴ The case of Namibia persists as the sole court case, having regard to the issue of “illegal occupation,” with a legitimate *locus standi* in international law. Conversely, the ICJ 2004 *Israeli Wall Advisory Opinion* had little legal effect in this regard, being limited to a statement that in the construction of the wall the occupant, namely Israel, and its associated regime, are acting contrary to international law and “constitute breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.”⁷⁵

Finally, the crucial contribution of the Geneva Conventions to the law of war consists in their focus on human rights, the normative profile of which, much like other peremptory norms of international law such as the principle of self-determination, may constitute a corollary of the occupant’s obligation to ensure “public order and safety” and an additional criterion to measure the legality of a military occupation. Thus, an occupation that fails to respect the human rights obligations

⁷¹ ICJ 2004 *Israeli Wall Advisory Opinion*, para.121.

⁷² Ronen, *supra* note 3, p. 221, argues that the violations of IHL “did not suffice for the Court to declare the occupation illegal”.

⁷³ See, ICJ 1971 *Advisory Opinion on the Continued Presence of South Africa in Namibia*, para. 118. The Court did not use the expression “illegal occupation”, limiting itself to stating that “maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities.”

⁷⁴ Cf., Ronen, *supra* note 3, pp. 213-214.

⁷⁵ See, ICJ 2004 *Israeli Wall Advisory Opinion*, para. 137.

imposed on it is inherently illegal on a twofold ground: “substantively”, i.e. infringing the fundamental tenets of the law of occupation, as well as “structurally”, i.e. in terms of the international legal order.⁷⁶

Although far from establishing the category of “illegal occupation” yet, the above-mentioned rulings contribute to consolidation of the principle of the temporariness of *de facto* sovereignty over an occupied territory, postulating that military occupation ought to be a provisional regime, the final aim of which is to restore the legitimate sovereignty. A truthful determination of and reconstruction of *de jure* sovereignty is thus required in order to prevent any abuses in the temporary exercise of *de facto* sovereignty by an Occupying power.⁷⁷

CONCLUSION

The historical survey on the codification of the law of military occupation confirms the temporariness of this legal institution, which represents one of the few branches of international law based on the role of *de facto* sovereignty. Any final appraisal must thus confirm the functional approach of international law to *de facto* sovereignty which, while recognized, cannot substitute itself for the legitimate sovereignty over an occupied territory. A State, in fact, cannot deliberately exert its own jurisdiction over another State without infringing the principle of sovereign equality, enshrined in a plethora of international law instruments and widely corresponding to customary international law.

Although it has been argued, mainly with reference to the CPA’s role in Iraq, that “customary international law no longer requires adherence to the principle that an occupier is a mere trustee, without authority to transform the occupied state’s form of government and economy to reflect democratic values, particularly when the transformative goals are authorized by the UN Security Council,”⁷⁸ it is nonetheless difficult to determine a factual basis that would enable an Occupant to exercise *de jure* sovereignty in order to provide protection for other overriding values and rules governing the international community, such as democracy or human rights.

⁷⁶ Ben-Naftali et al., *supra* note 68, p. 608.

⁷⁷ Ibidem, claiming that “the time has come for the international community to promulgate clear time limitations for the duration of an occupation.”

⁷⁸ N. F. Lancaster, *Occupation Law, Sovereignty and Political Transformation: Should the Hague Regulations and the Fourth Geneva Convention Still be Considered Customary International Law?*, 189 *Military Law Review* 52 (2006), p. 52.

On the contrary, the occupation zone model confirms that a State asserting some rights to exercise powers of administration, legislation and jurisdiction over a territory always has some elements of *de facto* sovereignty,⁷⁹ but that by and large the State's exercise of *de facto* sovereignty does not affect the *de jure* sovereignty in abeyance. While international practice has frequently highlighted cases of blatant unlawful territorial situations and "illegal" occupations, combined with the abuse of *de facto* sovereignty, the aim of re-establishing full sovereignty over an occupied territory, which represents the core of the law of military occupation, cannot be considered at issue anymore. This acknowledgement finally confirms the inherent relevance of sovereignty in international law as an overriding value, the role of which is influenced by State power politics in an attempt to mould an "anarchic" international system into one where "the doctrine on occupation, just like its mirror-image, the doctrine on sovereignty, continues to be shaped by the ideas of the day and by political realities."⁸⁰

⁷⁹ Cf., I. Brownlie, *Principles of Public International Law*, 7th ed., Oxford University Press, Oxford: 2008, p. 110.

⁸⁰ Benvenisti, *supra* note 7, p. 632.