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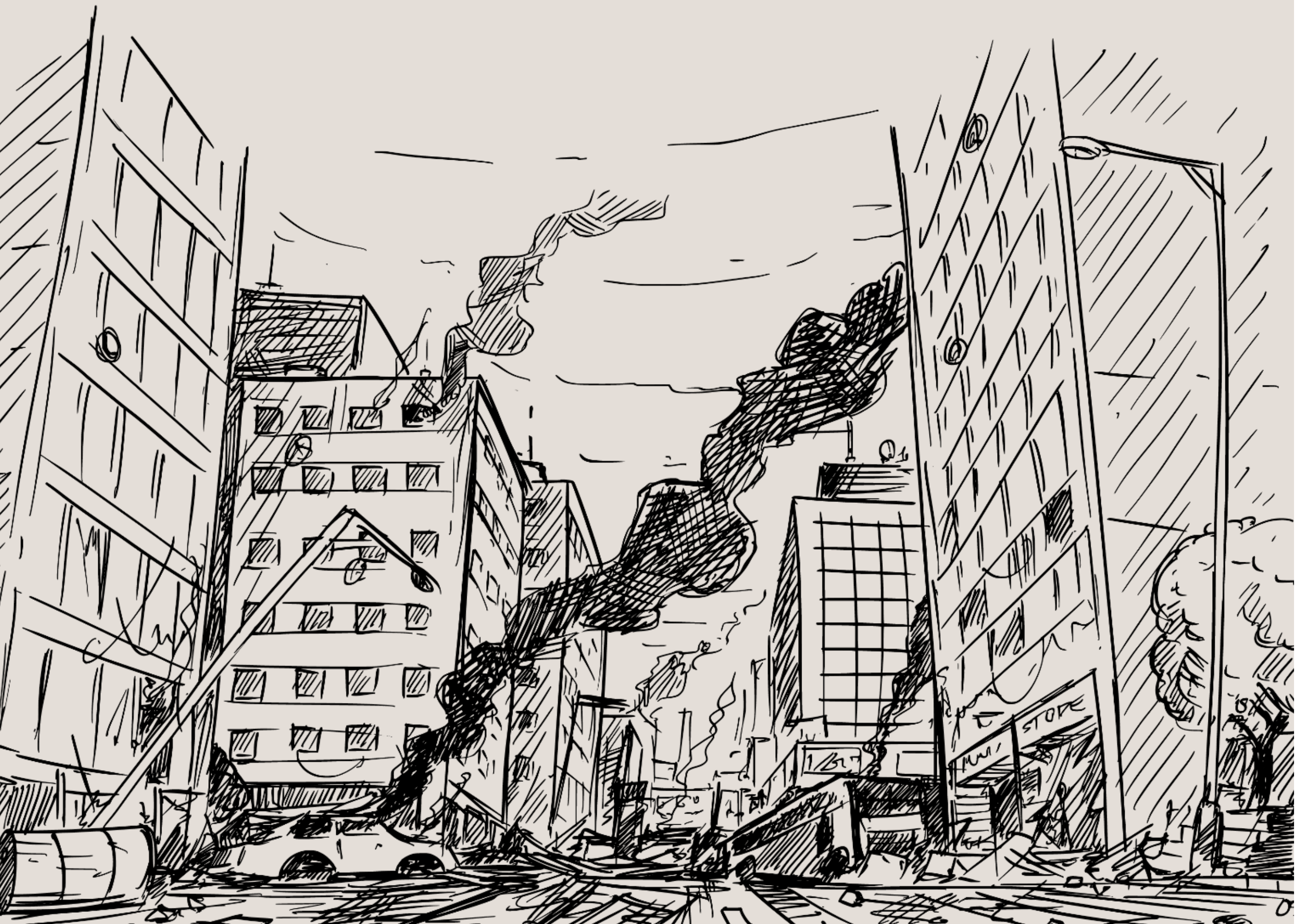
THE EVOLUTION OF THE LAW OF OCCUPATION

Nimra Mansoor



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THE EVOLUTION OF THE LAW OF OCCUPATION

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1. Executive Summary

The law of occupation developed in the late nineteenth century alongside evolving concepts of war, sovereignty, and the rights of local populations. The 'conservationist' principle of the law of occupation prohibits the occupant from altering local laws and administrative authorities, unless absolute necessity dictates otherwise. This principle was consolidated in key legal texts such as the Lieber Code, the Brussels Declaration, the Oxford Manual, and the Hague Regulations. It aimed to protect the lives and properties of individuals while preserving local laws and government structures.

The Hague Regulations of 1899 and 1907 introduced a provision that the occupying power could not suspend the rights of citizens of occupied territories, and it was agreed upon that the occupied population's participation in military operations against their own country came under coercion. These regulations framed the internationally enforceable law of occupation that introduced a two-pronged approach: the 'conservationist' principle as the primary rule, and exceptions based on 'necessity.' The concept of necessity has been subject to much scholarly debate and has been used by occupying powers to justify their actions. *The key question remains: what parameters does 'necessity' stretch to?*

The Fourth Geneva Convention of 1949 was the most comprehensive international law instrument addressing the protection of civilians during armed conflicts, including occupations. It solidified the 'conservationist' principle, and in Article 64 allowed occupying powers to repeal or suspend local penal laws that threatened the security of the application of the Convention, thereby embodying the 'necessity' clause. While the Convention has established a 'bill of rights' for civilians in occupied territories, it reflects a shift towards prioritising the occupying power through the benefits of the 'necessity' clause, granting substantial authority to the occupant.

This article addresses four case studies, each showcasing the illegality of the occupation, the adherence to the law of occupation, and the extent to which the occupied territory's rights have been protected. It is clear through the analysis of each case study that the 'necessity' clause has facilitated the gains of occupying powers at the expense of the occupied population. Trickling through the loopholes of the law of occupation, it raises questions about whether it is outdated for the realities of modern occupation. The law is often overlooked as states do not wish to acknowledge their role as an occupying power, owing to the many obligations incumbent on them under this regime. *While the law of occupation aims to prevent transformative occupations in which the ousted sovereign's interests are set aside and the occupied population is not protected, this is only possible for short-term occupations*. It is not a feasible framework for a prolonged occupation, which requires the occupier to pass laws for the welfare of the occupied population. *While it may be an onerous task to determine when the occupied population's interests are being upheld over the occupier's, there is still an immense need for an oversight mechanism besides the occupying power itself.* Without catering to this new reality of modern-day prolonged occupations, the law of occupation will truly be outdated.

2. Origins of the Law of Occupation

The international law of occupation[1] was formulated over the course of contemplations between European governments during the latter half of the nineteenth century.[2] At first, there was no distinction between conquest and occupation. The discussions between representatives of European governments regarding occupations took place in the conferences in Brussels in 1874, and The Hague in 1899. The aim was to codify the laws of war under an international agreement. This resulted in the introduction of **The Hague Regulations of 1899** which became the basis for civilian protection under an occupying power, while also preserving the interests of the ousted government. This evolution of the law of occupation was gradual, moulded by changing perceptions of war and sovereignty, growing simultaneously with the emerging balance of power in Europe.

It was in the 1899 Hague Regulations that the law of belligerent occupation was first codified, imposing two obligations on an occupying army that takes control of enemy land. The first was the obligation to protect the lives and properties of the inhabitants, and the second was the obligation to respect the sovereign rights of the ousted government.[3] The first principle was derived from an earlier distinction between combatants and non-combatants, highlighted by Vattel and Rousseau in the second half of the eighteenth century.[4] The second principle was a product of the final stages of sovereignty being solidified as a concept, coinciding with a nation's claim for exclusive control over its territory and nationals.

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[1] The concept of occupation was applied in the context of both just and unjust wars. Accordingly, nations have allowed conquest a lawful title.
[2] Benvenisti, The Origins of the Concept of Belligerent Occupation, 621
[3] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) 187 CTS 429 (1899 Hague Convention II)
[4] Lassa Oppenheim, International Law, A Treatise; Benvenisti

These obligations emerged as a result of evolving national identities in Europe. The concept of occupation as a temporary regime and not an acquisition of sovereignty was refined. In fact, the concept of occupation evolved simultaneously with the development of sovereignty as a notion. Similar to the ways in which principles of self-determination and democracy could supersede national sovereignty, the law of occupation too put restrictions on the occupying power's legislative authority. By the late twentieth century, the occupant was required to respect the rights of the local occupied population since the indigenous inhabitants were entitled to promote their own interests against an oppressive authority. In this way, the law of occupation's development carved the definition of the concept of sovereignty.

Due to transforming political realities of the world in the nineteenth century, a variety of notions arose alongside the evolution of belligerent occupation. Initially, this was a **European Project** of the 1800s. During this time, other parts of the world referred to 'occupation' differently. Colonial powers outside of Europe maintained the previous conception of 'occupation' which did not differentiate between conquest and occupation, allowing the acquisition of absolute sovereignty over 'uncivilised' people by the occupant. In the United States, the concept of 'occupation' was such that an occupied land became American. The diverging understanding of 'occupation' has created ambiguity in the literature concerning the transformation of the law of occupation. This article will address the different meanings and distinguish them.

2.1 Intellectual Roots of the Doctrine

There are two principles that helped shape the concept of belligerent occupation in the mid-nineteenth century. The first is the principle of humanity, the basis for distinguishing between combatants and civilians as targets of warfare. The second is the principle of nationality, inspired by the French Revolution.[5]

2.1.1 The Principle of Humanity

The **'principle of humanity'** is the obligation on the occupying power to protect the property of civilians. This personal aspect of the law of belligerent occupation is derived from the differentiation between combatants and non-combatants. There is a long tradition of sparing non-combatants, going back to biblical times as suggested by Grotius.[6] However, in 1758 Vattel proposed to extend this immunity granted to civilians to cover their property too.[7] At this point, there was a significant distinction drawn between the conqueror's rights overtaken from the former ruler, and its limited authority over the local population.[8] This proposition was limited to the **'principle of personal protection'** for civilians and their property, and did not address the transfer of sovereignty in occupation. Therefore, in the case where an occupant replaced the ousted prince, Vattel assumed that the occupant would gain valid sovereignty too.[9]

It was in 1762 that Jean-Jacques Rousseau wrote 'The Social Contract' which further developed the principle of personal protection, and claimed that *war was a concept that took place between two governments alone*.[10] Due to this, a distinction

[5] Benvenisti, 624
[6] Hugo Grotius, De Jure Belli ac Pacis, The Rights of War and Peace, 1625, chap 11, paras 9,10; Benvenisti 624
[7] Vattel, The Law of Nations, para 200
[8] Sharon Korman, The Right of Conquest, 1996, 29-40
[9] Vattel, "The Law of Nations," para 195.
[10] Rousseau, 'The Social Contract,' Chapter 2: Free Societies of Men, ("War then is a relation, not between man and man, but between State and State")

was created between public and private property, offering immunity to the private property of civilians.[11]

During the first half of the nineteenth century, ideas of French jurist Portalis and Talleyrand gained much recognition. Influenced by the French Revolution with notions of self-determination, Portalis claimed that: "It is a relationship between objects, not between individuals, which constitutes war."[12] Talleyrand was the first to formally turn this distinction into a legal doctrine: as long as individuals were uninvolved in the war, they were to be protected. This was then added to military manuals as well.[13]

2.1.2 Occupation Distinguished from Conquest

The principle of humanity protected individuals and their properties, but did not provide any basis to disallow an occupying power from imposing its own governmental structures on the indigenous people. Moreover, the principle did not provide any explanation as to why annexations[14] should be illegal, and sovereignty was a notion that was developing. It was after the French Revolution that a new concept was introduced: **national self-determination**, which asserts the sovereignty of the people. This concept restricted the authority of the occupant. Most significantly, it clarified that the territory of the state is not a possession of the king, but rather its people.

The prohibition of unilateral annexation helped bring stability in the **Congress of Vienna** in 1815. At this point, the European

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[11] David Siroky, "Principle and Prudence: Rousseau on Private Property and Inequality," University of Chicago Press Journals.
[12] Benvenisti, 626.
[13] Bluntschli, "Das Beuterecht," s 64-69.
[14] Before the notions of sovereignty and the principle of self-determination were established, annexations simply referred to the possession of territory from another state.

balance of power emerged, and the concept of national self-determination led to a new theory that further increased the limits of the occupying power. This new theory differentiated between 'conquest' and 'occupation,' and had two tiers. *The first was the recognition that sovereignty could not be ceded through force, and the second was recognising what Gregory Fox labelled the **'conservationist' principle**.* This principle protects the previous government's bases of power, imposing limitations on the occupant's authority to manage public property and alter legislation.[15]

In accordance with the **1791 Constitution of France**, invading French armies were disallowed from annexing territories or seeking cession of sovereignty from defeated enemies. Treaties for cession to legitimise holdings were also refrained from and considered void.[16] For a 'reunion' of land, local assemblies of occupied properties would have to enable it. In a renowned decision of 1818, the Cour de Cassation decided that French occupation "had not communicated to the inhabitants of Catalonia the title of the Frenchman, nor to their territory the quality of French territory; this communication could result only from an act of union emanating from the public authority, which never existed."[17] The Cour de Cassation's assertions were further conceptualised by German scholar August Heffter. In his **1844 Treatise of European International Law**, he suggested that occupation should be regarded as temporary control that does not amount to the acquisition of sovereignty: "From a legal perspective, the defeat of the enemy does not immediately bring about the complete subjugation of the enemy state's authority."[18]

The second tier of the theory that distinguished 'occupation' from 'conquest' was the introduction of the 'conservationist'

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[15] Gregory Fox, "The Occupation of Iraq," Georgetown Journal of International Law (2005), 195-297; Benvenisti 268

[16] Benvenisti

[17] Halleck, International Law, 1861, 775.

[18] Benvenisti, 630; Heffter.

principle, framed by Italian jurist Fiore.[19] By establishing that the system of international law applied to the 'nation' rather than the state, Fiore provided the theoretical analysis for the 'conservationist' principle. By putting forward the notion of all nations being equal and autonomous, he implied that a nation's sovereignty could not be taken by force.[20] Through this bridging analysis, Fiore limited the occupying power's authority and differentiated between 'occupation' and 'conquest.' Just as interfering with the property of individuals was restricted by the principle of humanity and personal protection, the 'conservationist' principle restricted the occupying power from interfering with the property of the *nation:* sovereignty.

The contributing factors for the formation of the two tiers of this legal doctrine were many. The aftermath of the French Revolution and the subsequent **Napoleonic Wars** fuelled the growth of national identities, and the Congress of Vienna established the balance of power in Europe. This new doctrine was the basis of a new political order: one of nation-states, instead of private feuds.

2.2 Transformation: Idea to Doctrine

The evolution of the concept of belligerent occupation from a European Project to a legal doctrine was gradual. It took many shapes until it was eventually included in the Hague Regulations of 1899. Initially, this doctrine did not have the status of customary international law but rather pertained only to signatories.[21]

[19] Martti Kiskenniemi, The Gentle Civilizer of Nations.
[20] Benvenisti, 633
[21] These signatories were mainly European states.

2.2.1 United States of America

The legal doctrine on occupation arrived in the United States as a product of territorial expansion. The American doctrine was then founded by two diverging approaches: the evolving European doctrine which entailed notions of sovereignty and the 'conservationist' principle (albeit only for 'civilised states')[22], and the British position – divergent from the majority European discourse - which did not discriminate between conquest and occupation.[23]

The British influence was reflected in the United States Supreme Court. During the occupation of Mexico, Chief Justice Taney reaffirmed that "conquest is a valid title, while the victor maintains exclusive possession."[24] However, American jurists were influenced by European legal literature. Betsy Roben revealed that there was an informal group of American and European international lawyers who exchanged scholarship. This group included scholars like Heffter and Bluntschli, representative of the Europeans, and Halleck and Lieber, American jurists.

The American position on the law of occupation gradually reformed. In 1846, General Taylor made statements influenced by the Rousseau Portalis doctrine. In 1889, President McKinley commented on the occupation of Santiago de Cuba, "the municipal laws of the conquered territory. . . are considered as continuing in force, so far as they are compatible with the new

[22] Oppenheim, International Law, 1:31; E. Benvenisti, 635.
[23] The class of The Foltina, I Dodson 450, 451 (1814) "No point is more clearly settled in the Courts of Common Law than that a conquered territory forms immediately part of the King's dominions."
English Courts did not differentiate between conquest and occupation, but the majority of Europe had begun to differentiate when it came to 'civilised states.'
[24] *Fleming v. Page*, 9. How 603, William Birkhimer, Military Government and Martial Law, 1914, 54-58; Benvenisti 637.

order of things."[25] Hence, the 'conservationist' principle was reiterated by President McKinley.

During the **International American Conference of 1889**, all participants supported the inadmissibility of conquest - except the United States. They agreed upon a compromise under a treaty of arbitration that did not come into effect. The occupations of Hawaii, Puerto Rico and the Philippines were all products of the same American view of unlimited authority as an occupant. As the occupying power itself, the United States made little contribution to the international doctrine on occupation.[26] By the time the United States ratified the Hague Regulations of 1907, the doctrine had already been framed.[27]

2.2.2 Europe

In Europe, debates over the law of occupation were intense. Russia produced a draft code on the basis of the Lieber Code, which set military orders that could be enforced by penalties of military justice.[28] While most of Europe responded well, Britain was reluctant to accept the Russian proposal, and highlighted this in the *Pall Mall Gazette* by claiming that the 'professional fighting men' would 'humanize war.'[29] By 1884, Britain produced a Manual on Military Law, and many other publications followed. In The Hague and Brussels, the Heffterian concept of occupation being distinct from conquest was accepted without dispute.[30] However, there was debate over the occupant's degree of authority at the 1874 Brussels Conference.[31] A gap existed between Heffter's

[25] John Moore, 'A Digest of International Law,' (1906) 7:273
[26] Benvenisti, 642
[27] *Ibid.*
[28] Peter Stirk, 'A History of Military Occupation from 1792 to 1914', Codification of the Law of Occupation, 226
[29] Stirk, 227
[30] Benvenisti, 644
[31] *Ibid.*

permissive approach, and Fiore's limiting stance.[32] The initial Russian draft granted the occupying power expansive autonomy, whereas the final draft of the **Brussels Declaration** reflected a limiting approach: "The occupant shall take measures in his power to restore and ensure, as far as possible, public order and safety and shall maintain the laws which are in force in the country in peacetime."[33]

It was the belligerent occupation of France in the **1871 War** by the Prussian Army that propelled Europe into examining the prospects of increasing limitations on the law of occupation. Edgar Loning highlighted that Heffter's approach was implemented by the Prussian Army, which kept French law in place. The intent of the Prussian government to annex Alsace Lorraine raised questions on the law of occupation. While Bismarck argued that the demand for Alsace-Lorraine was not a 'conquest' but rather a 'restoration,' both sides made accusations that the other had violated international law.[34] Thereafter, the occupation of Bulgaria by Russia between 1877-78 too put the occupant's powers to the test. Following this, it was a Russian initiative which led to a further discussion of these notions in the Hague Peace Conference.[35] Private initiatives were set up to generate scholarship and put forward ideas. Societies such as the International Law Association and the IDI[36] were formed too. By 1899, Fiore's notion won out in The Hague Regulations.

[32] Fiore had argued for the occupying power's duty to respect the power bases of the previous government.
[33] Brussels Declaration, Article 2
[34] André Merquiol, Les occupations étrangères en France au XIXme siècle, 1944, 51-53.
[35] Stirk, 229
[36] IDI stands for: International Society for Military Law and the Law of War (ISMLLW).

3. Concept of the 'Conservationist' Principle

Under the 'conservationist' principle, the occupant cannot alter local laws or administrative authorities.[37] However, if an occupying power is "absolutely prevented" from following local laws, then the concept of 'necessity' comes into play, as addressed later.[38]

The origin of the 'conservationist' principle can be found through assessment of classic treatises. Benvenisti and Lauterpacht suggest that it was **Heffter's 1855 Treatise** that refined the 'conservationist' principle by stating that sovereignty could not be transferred through force. It was after the Congress of Vienna in 1815 that the conservationist principle was introduced, since it was absent from the treatise then.[39] Many scholars agree that it was in the mid-nineteenth century that the tenets of the 'conservationist' principle, such as the restrictions on an occupant to change local legislation or implement altered governmental structures, were recognised.[40]

In the political context of nineteenth century Europe, the 'conservationist' principle became a tool for powerful states and emerging nation-states, both of which were favourable to the idea of protecting the lives and properties of their citizens while also maintaining their local laws and government structures.[41] From the mid-nineteenth century, the principle of preservation[42] of laws coincided with the interests of the

[37] Gregory H. Fox, 'The Occupation of Iraq', in Georgetown Journal of International Law, Vol. 36, No. 1, 2005, p. 195
[38] Yutaka Aria Takashi, "Preoccupied with occupation: critical examinations of the historical development of the law of occupation", 2012
[39] N. Bhuta, above note 11, 726–727.
[40] Ibid
[41] Benvenisti, above note 6, 634
[42] Minimum disturbance

bourgeoisie and the laissez-faire philosophy. As stated by Nabulsi, the conservationist principle of the law of occupation was consolidated by mainstream international lawyers who drafted key legal texts in the second half of the nineteenth century,[43] such as the **Lieber Code**, the **1874 Brussels Declaration**, the **1880 Manual on the Laws of War on Land** (the Oxford Manual), and **The Hague Regulations of 1899** and **1907**.

[43] K. Nabulsi, above note 9, 158–174

4. The Hague Regulations of 1899 and 1907

A significant innovation in these instruments was the provision that the occupying power could not suspend the rights of citizens of the occupied states. However, there was much debate around Article 44 of the 1899 text which forbade the use of the occupied population to take part in military operations against its own country.[44] Germany, Austria, and Russia supported a narrow view, compelling individuals from occupied populations to undertake a variety of activities, while other countries favoured a restrictive interpretation. Eventually, those who defended coercion lost the debate.[45] After the ratification of the Hague Regulations, an internationally enforceable law of occupation was consolidated.

The Hague Regulations of 1899 and 1907 entailed a two-pronged approach as represented by **Article 43**: the 'conservationist' principle as the first tier, and the notion of **'necessity'** as the grounds for exceptions to the former. The precursors for Article 43 can be found in the two incongruous provisions of the Brussels Declaration. Article 2 of the Brussels Declaration stated that when the occupant is in control, it should take all measures to restore public order and security. Article 3 of this discarded treaty stated that local laws should be maintained unless necessary. These clauses seem inconsistent, with Article 2 limiting the occupant's legislative authority, and Article 3 creating exceptions on the vague basis of 'necessity.'

These two clauses were integrated to form a single article in The Hague Regulations of 1899 after the First Peace Conference severely disputed Article 3 of the Brussels Declaration. Instead, it was proposed that Article 3 should be aborted, and Article 2 should include its spirit: "respecting,

[44] Stirk, 244
[45] *Ibid.*

unless absolutely prevented, the laws in force in the country."[46] Regardless, the difference was only semantic. *Using the notion of 'necessity,' many occupying powers have attempted to validate their occupation as an exception* to the conservationist principle, using historical and social contexts to support annexation. Hence, this concept has been the centre of much scholarly debate.

[46] At the 8th session, held on 10 June 1899, unanimity was achieved with respect to the compromise clause proposed by Mr. Bihourd; ibid., 126–127

5. The Law of Occupation: World War I

In World War I, many occupations challenged the implementation of Article 43 of The Hague Regulations. In the case of Belgium, there was much confusion. The two radically opposed positions were: German occupying powers establishing their own laws during the war, and Belgium invalidating these new laws. German authorities had disregarded The Hague Regulations and decided to execute a change in the legal and government structures of Belgium. The justification provided was that Article 43 of The Hague Regulations legitimised the expansion of legislative authority on the basis of 'necessity.'[47]

Moreover, the regulation for protecting citizens under occupation was vague and inadequate with regards to the deportation of civilians from Belgium to France during WWI. For this reason, the International Committee of the Red Cross (ICRC) prepared the Tokyo draft to facilitate the protection of refugees, which was later used as a foundation for the Fourth Geneva Convention in Part III of 'Status and Treatment of Protected Persons.'[48] Post-World War I, Belgian courts deemed all laws passed by the German occupying forces to be illegal. In the aftermath, the Allies occupied the Rhineland and used the Treaty of Versailles as the legal basis for 'non-belligerent' occupation. Despite deviations taking place from the general rules on the law of occupation, the normative framework remained. Hence, the hardening of The Hague Regulations into customary law took place between 1899-1939. It is difficult to specify the exact point at which this took place. [49]

[47] Michael Ottolenghi, 'The Stars and Stripes in Al-Fardos Square: the implications for the international law of belligerent occupation', in Fordham Law Review, 2003–2004, p. 2177, 2188

[48] 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," ICRC, Geneva, 1958, 4–5.

[49] Benvenisti, above note 52, 8; G. von Glahn, above note 4, 10–12

6. The Law of Occupation: Aftermath of World War II

In the aftermath of World War II, the occupations of Axis countries by the Allies laid the foundation for competing ideologies during the Cold War. This provided fuel to discard the Hague Regulations' 'conservationist' principle, according to Bhuta.[50] The occupations of Japan, Germany and Italy were the first prototypes of 'transformative occupations' aimed towards democratisation, as fascist laws were rescinded and Nuremberg laws were discarded.[51] The occupation of Japan by the United States entailed many powers, and enforced reforms on Japan's militaristic legacies without consideration to the 'conservationist' principle of The Hague Regulations.

The justifications offered were based on the notion of 'necessity,' with arguments such as aims for denazification in West Germany being used. The Allies also insisted on 'unconditional surrender' so that they could be exempt from the obligations of The Hague Regulations. As Koskenniemi stated, while sovereignty remained with the German population, 'sovereign rights' were exercised by the Allied powers.[52] Other justifications included the aim to remove Nuremberg race laws and other Nazi legislation that was harmful for the security of the occupants.[53] However, scholars have argued that the Allied occupation of Germany is an example of *debellatio* (absolute subjugation) considering that the Allied armed forces had absolute control.[54]

Post-World War II, *debellatio* became obsolete. As argued by Benvenisti, it was considered inconsistent with the notions of

[50] Bhuta, above note 11, 734
[51] Yutaka Arai-Takahashi, Preoccupied with occupation: critical examinations of the historical development of the law of occupation
[52] Koskenniemi, above note 13, 34
[53] von Glahn, above note 4, 276–285
[54] Dinstein, above note 5, 32–33.

self-determination and sovereignty that were embodied by the United Nations Charter.[55] Moreover, Common Article 2(2) of the four Geneva Conventions deliberates the implementation of the 'conservationist' principle without any exceptions. Hence, the occupation of Germany post-1949 would have been regulated by the Fourth Geneva Convention, making *debellatio* an unlikely outcome.[56]

[55] Adam Roberts, "What is a military occupation?" in British Yearbook of International Law, Vol. (1985) pp. 249, 270
[56] Benvenisti, above note 52, 95–96

7. The Fourth Geneva Convention: 1949

The **Fourth Geneva Convention of 1949** is the final codification to date of the law of occupation. It is the most comprehensive instrument of international humanitarian law that specifically addresses the protection of civilians living under armed conflict, including an occupation, and the responsibility of the occupying power towards the occupied population. Used as a complement to Article 43 of The Hague Regulations, **Article 64** of the Fourth Geneva Convention cements the notion of 'necessity' while also propagating the 'conservationist' principle: "The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention."[57] According to Joyce Gutteridge, Article 64 of the Fourth Geneva Convention is 'an amplification and clarification' of The Hague Regulations, broadening the power of the occupant by pushing objectives under the umbrella of 'necessity.'[58]

One of the most significant outcomes of this treaty has been to generate a 'bill of rights' for civilians, highlighting a shift towards favouring the rights of the local populace. This shift can be viewed as simultaneous to the evolution of international human rights law, and the subsequent rise of welfare states in Europe. Moreover, the Fourth Geneva Convention states that the "High Contracting Parties undertake to apply the provisions of the present Convention to the persons referred to in Article 4, without any adverse distinction based on the nature or origin of the armed conflict."[59]

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[57] GCIV, Article 64

[58] Dinstein, above note 5, 112–116; Yoram Dinstein, "Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding."

[59] Benvenisti, 105

The Fourth Geneva Convention essentially changed the beneficiaries of the 'necessity' clause from the political and military elites, to the occupied population upon whom sovereignty was bestowed.[60] The laws of the ousted sovereign could only remain if they were not a threat to the application of the Hague Regulations, which outlined the rights given to locals. Article 27 stated that: "protected persons are entitled to respect for their persons, their honor, their family rights, their religious convictions and practices," while Article 32 prohibited corporal punishment or torture causing "physical suffering" to the occupied population.[61] *However, the option to alter legislation by the occupying power if the local laws were a 'threat to its security' gave substantial authority to the occupant, and made the occupying power a beneficiary of the 'necessity' clause too.*

[60] Eyal Benvenisti, above note 52, 105.
[61] GCIV, Article 27, Article 32

8. The Law of Occupation Crystallised

Under Article 42 of the Hague Regulations 1907, an occupation is defined as: "territory is considered occupied when it is actually placed under the authority of a hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." *To qualify as an occupation, three requirements have to be fulfilled: possession of territory, presence of a hostile army, and the enforcement of authority.* Hence, an occupation is based on the occupying power ousting the sovereign without consent, and enforcing 'effective control' over the territory. This definition is contingent upon the lack of consent by the host state and its ability to exercise a sufficient amount of control over the territory. The legality of the law is known as *jus ad bellum*, and once a situation amounts to an occupation factually, the law of occupation applies regardless of whether the occupation is considered lawful.[62]

These requirements are balanced in light of the competing interests of the occupant, the occupied population, and the ousted sovereign. This is seen in most provisions of the law.[63] For instance, Article 43 states that the occupant is to "take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." This highlights the discretionary nature of occupation, signifying the 'conservationist' character of the law. Secondly, it showcases that the law treats occupations as temporary. Due to this, sovereign title is not awarded to the occupant, but rather it is the mere responsibility to restore public order and safety that is given. The occupying power holds the territory in

[62] ICRC, *"Occupation and international humanitarian law: questions and answers"*, 2004

[63] Andreas Th. Muller, 'Promoting the Rule of Law of Occupation? An Uneasy Relationship' (2018) 9 Goettingen J Int'l L 143

trust for the ousted government.[64] Therefore, it is a hostile notion that the occupant can alter the legal status of the territory beyond its temporary public safety duties.

Article 64 allows similar changes in that it states that "the penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention." The ICRC's commentary states that the occupying power is allowed to pass laws to apply the Convention such as in the areas of child welfare, labour, food, hygiene, and public health. Moreover, it can legislate to maintain public law and for its own security. While some like Boon have argued that this involves suspending laws to allow for the right to free speech, that seems to go beyond what would maintain 'law and order.'

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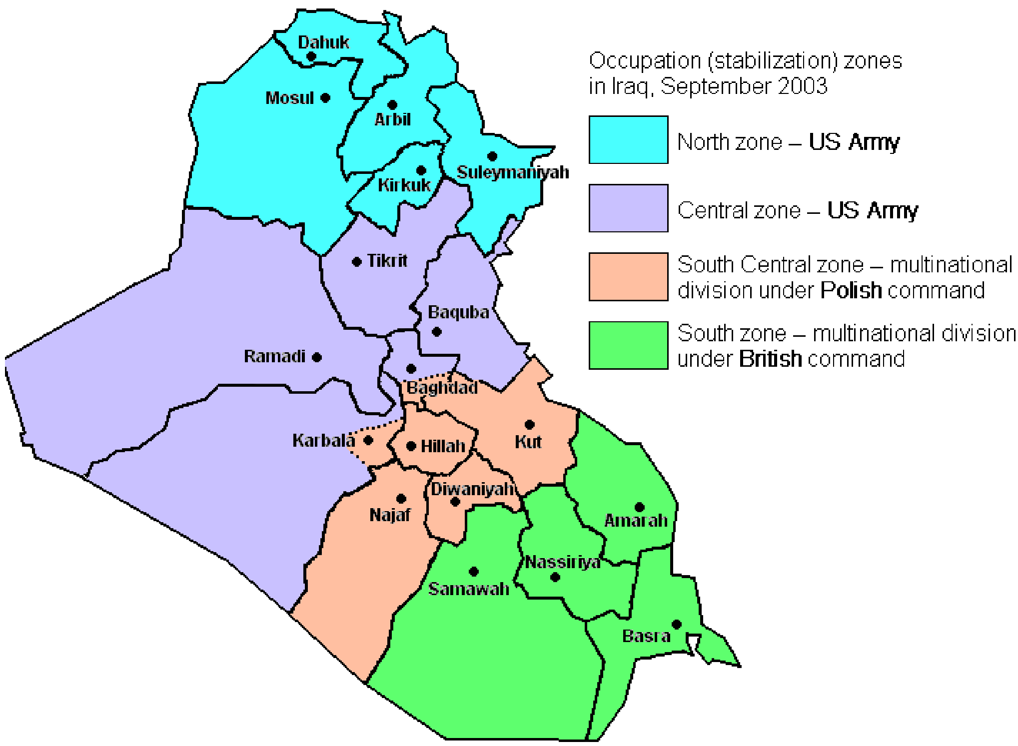
[64] Breven C. Parsons, 'Moving the Law of Occupation into the Twenty-First Century' (2009) 57 Naval L Rev 1

9. Case Study: Iraq Conflict



9.1 Brief History

Iraq was occupied from March 20, 2003 and the invasion and subsequent occupation was initiated with the stated aim of removing Saddam Hussein from power due to the danger of his weapons of mass destruction (WMDs).[65] In 2002, weapons inspectors returned to Iraq after a period of four years as Security Council Resolution 1441 stated that Iraq was in 'material breach' of its obligations, and gave the country a 'final opportunity' to disclose all of its stockpiles.[66] The occupation officially ended on June 28, 2004, having lasted for around fourteen months.

Responsibility was taken by two actors: the UN Security Council, where the occupiers' authority was addressed through a series of resolutions, and the American-led Coalition Provisional Authority (CPA), the body that exercised day-to-day affairs in the capacity of a governing power. The CPA was announced in a letter to the Security Council on May 8, 2003.[67] The Security Council remained very silent on the question of the CPA's authority in making policy for a country it had occupied. The CPA gave itself the powers to be "vested with all executive, legislative and judicial authority necessary."[68] The second force was a multi-national entity which the Security Council authorised in Resolution 1511 to "take all necessary measures to contribute to the maintenance of security and stability in Iraq."[69] Although the coalition was claimed to have been

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[65] President's Address Before a Joint Session of the Congress on the State of the Union, 40 Weekly Comp. Pres. Doc. 94 (Jan. 20, 2004).
[66] S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002).
[67] Letter Dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the President of the Security Council U.N. Doc. S/2003/538 (2003).
[68] Coalition Provisional Authority Regulation No. 1, CPA/REG/16 May 2003/01
[69] S.C. Res. 1511, (2003), 4844th mtg, RES/1511(2003)

supplied by forty-eight states, this was a rhetorical statement since the United States and Britain supplied over 90% of foreign forces in Iraq.[70]

The United States decided that an Iraq liberated from Ba'ath Party rule would be one which followed democratic and free market principles for the supposed welfare of its people. It was left unsaid that this would also be good for foreign companies looking to invest. On April 9, 2003, General Tommy Franks, commander of the coalition forces, stated that the Americans had "come as liberators, not occupiers."[71] What followed was a transformative occupation that involved disbanding the entire Iraqi military, the installation of new laws and codes, and even a new intelligence service. The economic reforms were most far-reaching, transforming banking by a new Bank Law, allowing foreign companies to operate in Iraq without paying tax, and for foreign corporations to become eligible to serve as Iraqi corporate founders, shareholders, and partners.

9.2 Legality of the Occupation

The sources of law that the United States derived its authority as an occupying power were from the United Nations Security Council's resolutions. The use of force against Iraq was premised on a 'revivalist' argument based on the original 1991 authorisation to use force against Iraq when the country had invaded Kuwait during the first Gulf War. The Security Council had issued a number of resolutions on the matter including Resolution 678 (1990) which authorised member states to use "all necessary

[70] In July 2004, 133,000 foreign soldiers were stationed in Iraq. U.S. and U.K troops constituted most of these, with 112,000 being American. BBC News, Coalition Troops in Iraq

[71] Nir Rosen, When a Liberator Is an Occupier, ASIA TIMES, 4 December 2003

means" to enforce Iraq's withdrawal from Kuwait.[72] The term 'all necessary means' is generally understood to mean that force will be used. After coalition forces conducted their ground and air assault against Iraq, Resolution 687 was passed which directed Iraq to dismantle their WMDs and allow the UN to monitor and inspect their weapons production facilities.[73] Iraq accepted these demands.

When the US and coalition forces invaded Iraq again in 2003 during the second Gulf War, they did not receive authorisation from the Security Council. Instead, on November 8, 2002, Resolution 1441 was passed which found Iraq to be in 'material breach' of its obligations and afforded it a final opportunity to comply with them.[74] While the Security Council convened again to discuss Iraq's non-compliance on February 5, 2003, it refused to authorise force without more evidence.[75] The United States started its ground offensive, called Operation Iraqi Freedom, on March 19.[76] The war was pretty much over by April 14 when they took control of Baghdad.[77] The ensuing occupation lasted just over fourteen months, ending on June 28, 2004. *Inspections which took place in 2003 found that there were no ballistic missiles and no conclusive evidence of WMDs.*

The UK Attorney General's advice to then Prime Minister Tony Blair of 7 March 2003 stated the following;[78] "that the

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[72] S.C. Res. 678, U.N. SCOR, 2963rd mtg., U.N. Doc. S/22033 (1990).
[73] S.C. Res. 687, U.N. SCOR, 2981st mtg., U.N. Doc. S/RES/687 (1991).
[74] S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002).
[75] Security Council, Press Release, 4709th meeting, February 18, 2003, SC/7665. 18/02/2003.
[76] Contemporary Practice of the United States Relating to International Law: Use of Military Force to Disarm Iraq, 97 AM.J. INT'L L. 419, 421-25 (Sean D. Murphy ed., 2003).
[77] Ibid, 426-427
[78] The full text of the advice about the legality of war with Iraq given by the attorney general, Lord Goldsmith, to the prime minister, Tony Blair, on March 7 2003, available at: https://www.theguardian.com/politics/2005/apr/28/election2005.uk

Security Council Resolution 1441 determined that the conditions of the ceasefire established pursuant to UNSCR 687 had been materially breached; it further gave Iraq a "final opportunity" to comply with the conditions established in UNSCR 687 and supplemented in subsequent resolutions including UNSCR 1441; failing Iraqi compliance with those conditions, had the effect of 'reviving' the authorisation on the use of force set out in UNSCR 678, without requiring either a further Security Council authorisation for the use of force, or a further determination by the Security Council of Iraqi non-compliance".[79]

This was criticised as a Resolution which allowed for the use of force in 1991 and was relied on to justify the invasion of Iraq in 2003 under a 'revivalist' doctrine for which there is no basis. The resolution could not have justified the use of force so many years later. Moreover, if they did actually believe that this 'revivalist' argument held any weight, they would not have continued to struggle to obtain further grants of authority from the Security Council. As it stood, under the *jus ad bellum*, the use of force was an illegal one. However, illegality under the *jus ad bellum* has no impact on the *jus in bello*. An occupation remains a question of fact and the occupying state must then comply with the law of occupation.

9.3 Scope of the Occupation

The CPA entirely changed the Iraqi state, its political, legal and economic structure. In the pursuit of this aim, a massive programme of reform was conducted in which many Iraqi institutions were remade in the guise of

[79] Text from: Mills, Alex and Trapp, Kimberley Natasha, Submission to the Chilcot Iraq Inquiry on the Legal Basis for the 2003 UK Use of Force Against Iraq (September 6, 2010). International Law Submissions to the Chilcot Iraq Inquiry, 2010.

Western ones, primarily those founded on neoliberal economics. This remodelling meant a sweeping aside of a diametrically opposite political system in place in Iraq which had been dominated by one-party rule and a centrally planned economy. [80]

The following legal and institutional reforms were undertaken:

1) De-Ba'athification - the Ba'ath Party was disestablished and all of its members were removed from their posts, and also prohibited from being employed in government service in the future. This was heavily criticised as it deprived the Iraqi state of many capable people the country required in the aftermath of the invasion and it also ignored the fact that many had to join the party out of necessity, rather than because they agreed with the Ba'ath party or Saddam Hussein.[81]

2) Security and Military Reforms - the military was disbanded and the coalition created a new Iraqi Army[82] along with a new Code of Military Discipline.[83] Military codes and laws which already existed were rescinded, including those which predated the Party. Two additional entities were also established, the Facilities Protection Service and the Civil Defense Corps, to perform security duties which the new Army could not undertake as they were not allowed to engage in domestic law enforcement. A new Iraqi National

80 Summarised from Gregory H. Fox's brilliant article: The Occupation of Iraq (September 1, 2004).
81 Faleh A. Jabar, U.S. Inst. For Peace, Post Conflict Iraq: A Race For Stability, Reconstruction, And Legitimacy (May 2004).
82 Creation of a New Iraqi Army, Coalition Provisional Authority Order No. 22, CPA/ORD/ 7 August 2003/22 (Aug. 7, 2003).
83 Creation of a Code of Military Discipline for the New Iraqi Army, Coalition Provisional Authority Order No. 23, CPA/ORD/7 August 2003/23 (Aug. 7, 2003).

Intelligence Service was also created by the CPA which replaced the old service which it dissolved.

3) Human Rights Reforms - a Ministry of Human Rights was created which would make new institutions or reform existing ones.[84] Other changes were also made to Iraq's criminal law apparently because the CPA believed they were deficient "with regard to fundamental standards of human rights". The CPA also "prohibited torture, suspended the imposition of capital punishment, and prohibited discrimination on a wide variety of grounds by all persons holding public office".[85] Laudable acts it seems if they were taken in isolation and not along with the entire gamut of reforms made in almost every other sphere of the Iraqi state.

4) Criminal Law and Law Enforcement Reforms - the Governing Council was authorised to create an Iraqi Special Tribunal 'to try Iraqi nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws.'[86] A new Central Criminal Court was also established for which the CPA Administrator decided which cases were heard and which judges were appointed.[87] The CPA also took over control of all detention facilities[88] while suspending existing prison regulations.[89]

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[84] Ministry of Human Rights, Coalition Provisional Authority Order No. 60, CPA/ORD/19 February 2004/60 (Feb. 19, 2004).
[85] Fox, Gregory H., The Occupation of Iraq (September 1, 2004).
[86] Delegation of Authority Regarding an Iraqi Special Tribunal, Coalition Provisional Authority Order No. 48, CPA/ORD/3June2003/48, § 1 (1) (June 23, 2003).
[87] The Central Criminal Court Of Iraq, Coalition Provisional Authority Order No. 13, Cpa/Ord/X 2004/13
[88] Management of Detention and Prison Facilities, Coalition Provisional Authority Order No. 10, CPA/ORD/8 June 2003/10 (June 5, 2003).
[89] Ibid.

5) Economic Reforms - the most comprehensive reforms were economic.[90] Administrator Paul Bremer announced that economic reform was the coalition's "most immediate priority" and called the Ba'athist-era economy a "closed, dead-end system".[91] The reforms were enormously advantageous to foreign companies wanting to invest in the country and also converted the economy by virtue of its neoliberal policies:

i. Banking - a new Bank Law which opened the banking sector to foreign ownership. Before the invasion and the CPA's transformation of Iraq's laws, only Arab banks were permitted to operate in Iraq.[92]

ii. Taxation - a tax holiday was issued for almost all levies from the start of the occupation until the end of 2003.[93] A 5% 'reconstruction levy' was also applied on imported goods, although humanitarian goods were exempted from this. Foreign companies which operated in Iraq were to pay a 15% tax on their earned income.[94]

iii. Foreign Trade - significantly, the CPA passed a foreign investment law 'that would make the country one of the most open in the world.'[95] Foreigners could own up to 100% of an Iraqi entity except those involved in oil, banking, and

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[90] Fox, Gregory H., The Occupation of Iraq (September 1, 2004), page 215.
[91] Ambassador L. Paul Bremer III, Chief Administrator in Iraq, Address at the World Economic Forum (June 23, 2003).
[92] Bank Law, Coalition Provisional Authority Order No. 40, CPA/ORD/19 September 2003/40 (Sept. 19, 2003), Banking Law of 2004, Coalition Provisional Authority Order No. 94, CPA/ORD/6 June 2004/94 (June 7, 2004).
[93] Tax Strategy for 2003, Coalition Provisional Authority Order No. 37, CPA/ORD/19 September 2003/37
[94] Tax Strategy of 2004, Coalition Provisional Authority Order No. 49, CPA/ORD/19 February 2004/49, § 3(3) (Feb. 19, 2004).
[95] United Nations/World Bank, Joint Iraq Needs Assessment 11 (Oct. 2003).

insurance.. Foreign investors were also allowed 'national treatment', in that they could conduct business on as favourable terms as those which were owned by Iraqis. Moreover, there were no requirements that any foreign investors use local products or services. This is in stark contrast to Iraq's laws prior to the occupation which precluded foreigners from owning real property.

iv. Private economic transactions - foreign persons and corporations could now be Iraqi corporate founders, shareholders, and partners with the CPA stating that "some of the rules concerning company formation and investment under the prior regime no longer serve a relevant social or economic purpose, and.., such rules hinder economic growth".[96]

v. Securities regulation and trading - a new Iraqi Stock Exchange was created and all government oversight over the Exchange was done away with.[97]

A little after the US invasion, General Tommy Franks, commander of the coalition forces, declared that they had "come as liberators, not occupiers".[98] The reforms undertaken suggest otherwise and as an American serviceman later admitted, "[t]here is no liberation law, only occupation law".[99] However, their actions and the wide ranging reforms they undertook in Iraq also violated the law of occupation.

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[96] Amendment to the Company Law No. 21 of 1997, Coalition Provisional Authority Order No. 64, CPA/ORD/29 February 2004/64 (Feb. 29, 2004).

[97] Interim Law on Securities Markets, Coalition Provisional Authority Order No. 18, CPA/ ORD/18 April 2004/74, pmbl. (Apr. 18, 2004).

[98] Nir Rosen, When a Liberator Is an Occupier, Asia Times, Dec. 4, 2003 (quoting General Tommy Franks), at http://www.atimes.com/atimes/Middle East/EL04Ak04.html.

[99] ibid.

9.4 Compliance with the Law of Occupation

The Security Council passed Resolution 1472 on March 28 in the midst of war and it "requested [ed] all parties concerned to strictly abide by their obligations under international law, in particular the Geneva Conventions and the Hague Regulations."[100] While this statement does not explicitly acknowledge the existence of an occupation, the references to applicable humanitarian law could mean little else.

John Yoo, a lawyer at the US' Department of Justice, has attempted to justify America's dismantling of the Iraqi legal framework.[101] He argues that the Security Council resolutions and the international law of occupation (especially Article 43 of the Hague Regulations 1907) provided the US with broad discretionary powers to establish a new Iraq constitution, claiming that it provides for fundamental human rights to be protected by democratic institutions. He cites the Iraqi government's purportedly abysmal record in human rights: "it routinely tortured Iraqis, with beatings, rape, the breaking of limbs, and the denial of food, water, and medical treatment being commonplace. Needless to say, the regime did not tolerate political dissent, other political parties, or freedom of religion. It also displayed an utter disregard for the welfare of Iraqi women and children. Given the barbaric nature of the Hussein regime, the United States must eliminate the institutions of the Hussein government to carry out all of the duties placed upon it by Geneva IV and to protect the basic human rights given to the Iraqi people".[102]

[100] S.C. Res. 1472, U.N. SCOR, 58th Sess., 4732d mtg. 1, U.N. Doc. S/RES/1472 (2003).
[101] John Yoo, 'Iraqi Reconstruction and the Law of Occupation' (2004) 11 U C Davis J Int'l L & Pol'y 7
[102] ibid.

He further relied on US domestic law and the case of *MacLeod v. United States*, in which the US Supreme Court said in the context of the American military occupation of the Philippines that:

> "[t]he right to . . . occupy an enemy's country and temporarily provide for its government has been recognized by previous action of the executive authority, and sanctioned by frequent decisions of this court. The local government being destroyed, the conqueror may set up its own authority, and make rules and regulations for the conduct of temporary government, and to that end may collect taxes and duties to support the military authority and carry on operations incident to the occupation"[103]

Furthermore, he also cited the Court in *Dooley v. United States* where it held regarding the American occupation of Puerto Rico that "[u]pon the occupation of the country by the military forces of the United States, the authority of the Spanish Government was superseded .... The government must be carried on, and there was no one left to administer its functions but the military forces of the United States .... The right of one belligerent to occupy and govern the territory of the enemy while in its military possession, is one of the incidents of war, and flows directly from the right to conquer. We, therefore, do not look to the Constitution or political institutions of the conquerer, for authority to establish a government for the territory of the enemy in his possession".[104]

However, to argue that the US merely ensures that 'government must be carried on' is far too much of a stretch. In all six substantive areas of reform (de-

[103] Macleod v. United States, 229 U.S. 416, 425 (1913).
[104] Dooley v. United States, 182 U.S. 222, 230-31 (1901) (quoting 2 HENRY HALLECK, INTERNATIONAL LAW 444).

> Ba'athification, security and military institutions, human rights, criminal law and law enforcement, the economy, and good governance) significant changes were made to institutions, laws, regulations, and personnel. Some entities, such as the Iraqi military, were abolished altogether. Other areas, such as foreign investment, banking, and securities regulation, were reformed in ways that radically altered the guiding ethos of pre-existing law. Still others, such as the judicial system and the penal laws, were modified in ways claimed to ameliorate violations of international legal principles. A literal interpretation of Article 43 of the Hague Regulations, prohibiting change to the laws in force 'unless absolutely prevented' from doing so, would find these reforms unlawful.

The British Attorney General, Lord Goldsmith, appeared to believe this too as he gave his opinion to Tony Blair prior to the occupation of Iraq and stated the following:

> "(a) Article 43 of the Hague Regulations imposes an obligation to respect the laws in force in the occupied territory 'unless absolutely prevented'. Thus, while some changes to the legislative and administrative structures of Iraq may be permissible if they are necessary for security or public order reasons, or in order to further humanitarian objectives, more wide-ranging reforms of governmental and administrative structures would not be lawful.
>
> (b) Geneva Convention IV prohibits, subject to certain limited exceptions, any alteration in the status of public officials or judges (although officials may be removed from post in certain circumstances).
>
> (c) Geneva Convention IV also requires that the penal laws of the occupied territory must remain in force except where they constitute a threat to security or an obstacle to application of the Convention. In addition, the courts of the occupied territory must be allowed to

> continue to function. There are limited exceptions allowing the Occupying Power to promulgate its own laws in order to fulfil its obligations under the Convention and to maintain security and public order, but in principle, the existing structures for the administration of justice must remain in place.
>
> (d) Apart from rules on the collection of taxes (which must as far as possible be in accordance with existing local law), there are no specific provisions in Geneva Convention IV or the Hague Regulations dealing with the economy of the occupied territory. However, the general principle outlined in (a) above applies equally to economic reform, so that the imposition of major structural economic reforms would not be authorised by international law."[105]

While it is arguable that an occupier has a positive duty to allow for fundamental human rights, as per Article 64 of the Fourth Geneva Convention which states that an occupier may "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." This provision, as per the International Committee of the Red Cross (ICRC), "means that when the penal legislation of the occupied territory conflicts with the provisions of the Convention, the Convention must prevail."[106] However, to argue that the reforms highlighted above can be justified under Article 64 would be stretching that clause almost to breaking point. This is especially so when the laws are economic and allow for very favourable terms for foreign direct investment. There are no

[105] Memorandum from the Right Hon. Lord Goldsmith, QC to the Prime Minister (Mar. 26, 2003), reprinted in John Kampfner, Blair Told It Would Be Illegal to Occupy Iraq, New Statesman, May 26, 2003, at 16-17.

[106] International Committee Of The Red Cross, Commentary On The Iv Geneva Convention Relative To The Protection Of Civilian Persons In Time Of War 335 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958) at 336

obligations under the Fourth Geneva Convention which allow an occupying force to remake a country in its own image.

9.4 An Occupation which Transformed

Fox argues that the CPA remade almost every aspect of Iraqi economic life transforming it from a centrally-planned economic system in which the state exerted much control to a free market, neoliberal model.[107] The justification given for this by Yoo was based on the law of occupation but one which involved a complete reworking of how that law was supposed to operate. The law of occupation does allow for the occupying power to take measures to restore public order and to ensure that it fulfils its obligations under Geneva law even if that means overriding an occupied territory's penal laws. However, the occupation of Iraq cannot possibly be justified on those two bases. The law of occupation does not allow for changes to the law in occupied territory unless 'absolutely prevented'. The laws of banking, investment, taxation, trade, and even the security and military reforms undertaken by the CPA cannot be reconciled with the circumscribed caveats allowed under the law of occupation. This law does not allow for economic reforms and does not allow for foreign ownership of a country to be facilitated legally. In fact, it ensures the very opposite. Allowing such a transformative occupation is against the very heart of what the law of occupation seeks to protect; the ousted sovereign's interests, balanced with the local population's and the occupying power's.

The occupation of Iraq challenged the conservationist principle by pursuing social reforms which were so far away from the objectionable Nazi practices that resulted in the international community including individual rights when drafting the Geneva Conventions. While some human rights reforms, such as the prohibition of torture and discrimination

[107] Fox, Gregory H., The Occupation of Iraq (September 1, 2004).

can be reconciled with these aims, almost all of the others detailed above cannot be. Even those establishing supervisory human rights bodies cannot be reconciled with the Fourth Geneva Convention as they are procedural and not substantive. Therefore, the CPA's occupation of Iraq is inconsistent with the doctrinal heart of the law of occupation which is to keep the laws as they are unless you cannot. The CPA did all it could to ensure Iraq was open for business, violating the treaty texts in almost every edict they passed.

10. Case Study: Israel-Palestine Conflict

Source: NAFBA[108]

[108] History of Palestine and Israel, Northampton Al-Bireh Palestine Friendship Association

10.1 Brief History

In 1948, the British Mandate over Palestine expired, and the state of Israel was declared. A day after Israel's creation, the state was invaded by Arab countries, resulting in a three-way partition: Israel, the West Bank occupied by Jordan, and the Gaza Strip occupied by Egypt. Despite the fact that Egypt retained authority over the Gaza Strip after the British Mandate expired, it never annexed the territory and the international border between Israel and the Gaza Strip was maintained.

In June 1967, Israel began its expansion in the aforementioned occupied territories. The Israeli Defence Force (IDF) occupied the Sinai Peninsula and the Gaza Strip from Egypt, the West Bank from Jordan, and the Golan Heights from Syria. Subsequently, peace treaties were signed between Israel, and both Jordan and Egypt.

To this day, the Gaza Strip and the Golan Heights remain occupied. Although it is rare for a state to recognise its control of the territory of another state as 'occupation,' the Israeli Supreme Court has accepted its position as an occupant of the West Bank.[109]

10.2 Legality of the Occupation

Discourse surrounding the Israeli-Palestinian conflict has mostly addressed Israeli violations of obligations as an occupying power, rather than the legality of the occupation

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[109] Ajuri v. The Commander of IDF Forces in the West Bank, HCJ 7015/02; Beit Sourik Village v. The Government of Israel and the Commander of the IDF Forces in the West Bank, HCJ 2056/04; Arai-Takahashi, "The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law,"(2009) 4; Kretzmer, D., "The Law of Belligerent occupation in the Supreme Court of Israel," International Review of the Red Cross, (2012) 213.

itself. There has been a greater emphasis placed on Israeli actions within the occupation, distinct from the legality of the occupation itself.[110] According to Ben-Naftali, Gross and Michaeli, this is because the Israeli occupation is accepted as factual, instead of a normative occurrence. While occupations are accepted as fact under international humanitarian law, their legality is derived from the law of occupation.

Ben-Naftali, Gross and Michaeli have concluded that the occupation by Israel is indeed illegal due to the lack of adherence to three legal principles of occupation. They argued that the sovereignty of an occupied territory cannot be taken by force by the occupant because of the principle of inalienability of sovereignty. International law states that sovereignty is vested in the people, based on the rule of self-determination.[111] Secondly, the occupying power should be entrusted with managing public order in a way that the people under the occupation are not subjugated. Lastly, the occupation must be temporary to be legal.[112] An examination of these principles, particularly the last one, highlights the illegality of the occupation.[113]

If it is to be agreed that the Palestinian people have sovereignty, then force alone cannot take away their inalienable right of self-determination, making the occupation illegal on the first account. Secondly, reports of subjugation are widespread, and a 213-page report by Human Rights Watch details the degree to which subjugation is strategically occurring in the form of land

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[110] O. Ben-Naftali, A.M. Gross and K. Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory", Berkeley J. Int'l Law (2005) 552; International Court of Justice, "Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory."
[111] O. Ben-Naftali, A.M. Gross and K. Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory", Berkeley J. Int'l Law (2005), 554
[112] O. Ben-Naftali, A. Gross and K. Michaeli, "Illegal Occupation: Framing the Occupied Palestinian Territory", Berkeley J. Int'l Law (2005), 555.
[113] Ibid.

confiscation, banning building permits, and freezing family reunification.[114] Lastly, Israel has shown clear intent to maintain domination. This is a stated aim of the Israeli government, and the Knesset passed a law in 2018 affirming that forming a 'Jewish settlement' is of national value.[115] This makes the occupation illegal on all three fronts. To this day, the Supreme Court of Israel has avoided passing judgments regarding these settlements.[116]

On the other hand, Benvenisti has argued that an occupation is legal unless abused by the occupier as an indefinite grant of power alongside a refusal to negotiate withdrawal.[117] This limited take on the legality of occupation is supported by Security Council Resolution 1483 of 2003, which enabled the occupation of Iraq without addressing the lawfulness of the invasion by the United States and the United Kingdom.[118] Dinstein echoed similar views, claiming that international law recognised belligerent occupation without labelling it illegal. His approach is supported by Resolution 1483 as well, as the Security Council referred to the occupants in Iraq without referring to them as illegal. Though a Security Council resolution which did label the occupation as illegal would inevitably have been vetoed by the UK and the US as permanent members of the body.

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[114] *"A Threshold Crossed Israeli Authorities and the Crimes of Apartheid and Persecution"*, Human Rights Watch, 27 April 2021

[115] Ibid.

[116] D. Kretzmer, "The Law of Belligerent occupation in the Supreme Court of Israel," International Review of the Red Cross (2012), 213.

[117] Eyal Benvenisti, "The Security Council and The Law on Occupation: Resolution 1483 on Iraq in Historical Perspective", IDF Law. Review (2003), 33.

[118] *Ibid*, 33; F. Kirgis, "Security Council Resolution 1483 on the Rebuilding of Iraq," (2003) American Society of International Law

10.3 Israeli Supreme Court

The Israeli Supreme Court has played a pivotal role in addressing petitions relating to acts of the Israeli authorities in the occupied territories. The Court has declared that it has jurisdiction over all acts of governmental authorities, including the Israeli Defence Force. However, it is to be noted that the Israeli Supreme Court is the only avenue that residents from occupied territories can access to file petitions, despite it being a court of the occupying power.

After the war in 1967 ended, Palestinian residents petitioned the Supreme Court of Israel to challenge the Israeli military authorities in occupied regions. These petitions challenged the military authorities on the basis of the Fourth Geneva Convention, using provisions applicable to belligerent occupation to support their arguments. Despite the fact that Israel did not ratify Additional Protocol 1 to the Geneva Conventions, the Supreme Court of Israel has acknowledged the use of the Protocol's provisions in the *Targeted Killings*[119] case, as well as the *Fuel and Electricity*[120] case as part of customary law.[121] While the International Court of Justice stated in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* that Israel must apply human rights treaties along with the law of belligerent occupation, the Supreme Court avoided the formal implementation of these treaties. In a few cases, provisions have been used from human rights treaties unofficially through claims that they come under the blanket of the law of belligerent occupation.[122]

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[119] HCJ 769/02, P*ublic Committee against Torture in Israel v. Government of Israel*.
[120] HCJ 9132/05, *Ahmed. v. Prime Minister*.
[121] Y. Dinstein, "The International law of Belligerent Occupation," (2009), 8.
[122] HCJ 3239/02, *Marab v. IDF Commander in the West Bank*.

The Supreme Court has often avoided the application of the law of occupation. Instead, the Court has mostly made use of Israeli Administrative Law. The approach of the Court is such that the government is granted broad discretion. For instance, in the *Afu* case, the Fourth Geneva Convention was interpreted to minimise restriction on the state's sovereignty, despite the fact that this interpretation goes against the spirit of international conventions which concern human rights and offer protection. Concerning the exercise of power in occupied territory, the Court has ruled that the military commander must regard two factors foremost: ensuring that military/security needs are met, and ensuring the welfare of the local population.[123] Through this, the Court has given broad discretion to military authorities. This can be demonstrated by the *Beth El* case, concerning the requisition of private land for the establishment of a settlement in the name of defence.[124] The Court relied on Article 52 of The Hague Regulations, which states that: "Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation." This was interpreted such that the requisition of property was enabled for the needs of the occupant's army. The petitioners demanded that this broad understanding had to be narrowed so as to put limitations on the expansion of the occupant without accountability.[125]

More recently, a dispute broke out concerning the legality of a 1980 order issued by the Israeli Defence Forces that declared an area of 7500 acres as a "closed military firing

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[123] HCJ 393/82, *Jami'at Ascan v. IDF Commander in Judea and Samaria*; HCJ 2056/04, *Beit Soerik Village Council v. The Government of Israel*.
[124] HCJ 606/78 *Ayyub v. Minister of Defence*
[125] D. Kretzmer, "The Law of Belligerent occupation in the Supreme Court of Israel," International Review of the Red Cross (2012), 217.

zone."[126] In *Abu Aram v. Minister of Defence*,[127] (May, 2022) the petitioners based their argument on Article 49 of the Fourth Geneva Convention: The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies, and argued that they were prevented from entering territory in which they owned land for farming and grazing.[128] The judgment rejected the petitioner's claims, and the petition was denied. Justice Mintz argued that the Fourth Geneva Convention is not part of customary international law, and is inapplicable to the case. Further, he stated that even if Article 49 of the Geneva Convention had been applicable, it would not have supported the petitioners' case since the article was designed to prohibit mass transfers only for the sole purpose of destruction, forced labour, or political purposes. This is a highly inaccurate interpretation of Article 49, as it clearly prohibits *all* transfers, "regardless of their motive."[129] Hence, Mintz's misconstrued perception of Article 49 deviates from its actual wording, and the only exception offered for the article is that of evacuation under security reasons - an explanation he did not even address. Finally, it was Mintz's claim that Article 49 is superseded by conflicting provisions of Israeli legislation that highlighted the exact position the Israeli Supreme Court is taking. Despite the Israeli Defence Forces' power of regulating the West Bank emanating from international law and not Israeli legislation, this judgment brings to light the degree of legislative authority that the Supreme Court accords to Israeli law over international law provisions.[130]

The Supreme Court of Israel gave its decision for the civil appeal of the case *Anonymous v. Ministry of Defence and*

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[126] Amichai Cohen, Yuval Shany, "Israel's Supreme Court Issues Regressive Judgment on West Bank Deportations", Lawfare Blog, 19 May 2022
[127] HCJ 413/13 Abu 'Aram v. The Minister of Defense
[128] *Ibid.*
[129] Article 49, GCIV
[130] Cohen and Shany, 2022

the Knesset[131] on July 5, 2022 which increased state immunity from tort claims by arguing that Gaza is "enemy territory" and the blockage of tort claims concerning the conflict in Gaza is constitutional.[132] Many debates have emerged regarding the scope of the Israeli Defence Force's "act of war" immunity from tort claims, which is derived from a growingly polarised interpretation of Section 5 of the 1952 Civil Torts Law. In a principal judgment of 2002, the Supreme Court of Israel had distinguished the act of war immunity to only apply to involvement in active hostilities - not policing activities.[133] However, it was made more challenging to file a tort claim against the Israeli Defence Forces arising from the West Bank and the Gaza Strip by shortening the period of limitations on tort cases to two years instead of seven, and demanding claimants to first notify military authorities of the incident in which they were harmed within 60 days of occurrence.[134] The latter was justified as a means to preserve evidence by the Israeli Defence Forces. However, *if the source of harm is the same as the avenue the harm has to be reported to* (the Israeli Defence Forces), it raises questions of the degree to which an alleged offender would preserve evidence of a claim that accuses them. Through the judgment in the case *Anonymous v. Ministry of Defence and the Knesset*,[135] it is evident that immunity given to the Israeli Defence Forces is unassailable.

Increasingly, the Supreme Court of Israel is repealing laws that protected the Palestinian population. In 2017, the Regulation Law enabling Israeli settlements in the West Bank was rejected by 8 of the 9 justices on the panel,

[131] CrimFH 7048/97 *Anonymous v. Ministry of Defence*
[132] Yuval Shany, Amichai Cohen, "*Moving Toward Blanket Immunity: Israeli Supreme Court Blocks Gaza Tort Cases*", Lawfare Blog, 26 July 2022
[133] *Ibid.*
[134] *Ibid.*
[135] CrimFH 7048/97 *Anonymous v. Ministry of Defence*

referring to it as "unconstitutional."[136] In a turn of events, *on the 21 March 2023, the Supreme Court struck down the 2005 law that dismantled four Israeli settlements in the West Bank,*[137] and went back on a decision previously deemed unconstitutional. The new provision allows Jewish residents to return to their prior settlements, and highlights the Supreme Court's growing inclination to adhere to political pressures. The head of the Israeli parliament's Foreign Affairs and Defense Committee hailed the decision as: "the first and significant step towards real repair and the establishment of Israel in the territories of the homeland that belongs to it."[138]

10.4 Compliance with the Law of Occupation

Article 43 of The Hague Regulations outlines the responsibilities of an occupant towards the local population, and is considered a mini-constitution of an occupying regime.[139] It is stated that the occupying power must take all measures to restore public order and to respect the laws in the occupied territory unless absolutely prevented from doing so. The restoration of public order has been interpreted broadly according to the Court, as it includes, "conducting a proper administration on all its branches accepted nowadays in a well-functioning country, including security, health, education, welfare, quality of life, transportation."[140]

Since the Israeli occupation is a long-term endeavour, with Israeli settlers present within the occupied territories, it is

136 https://jewishwebsite.com/featured/israels-supreme-court-overturns-settlement-regulation-law/56914/

137 "*Israeli government lifts ban on return to West Bank settlements*", Reuters, 22 March 2022

138 Ibid.

139 E. Benvenisti, "The International law of Occupation," 9.

140 HCJ 202/81, *Tabeeb v. Minister of Defence*.

difficult to assess the attitude of the Court and the degree to which it carries out its duty. While the Supreme Court of Israel has stated hat no military government can create projects for military purposes that are intended to exist after the termination of military rule,[141] this principle is inapplicable when the project benefits the needs of the population, even if it is a long-term project. More discourse is needed to establish how the Court can determine whether a project is benefitting the local population, or the Israeli Armed Forces. *It is particularly challenging since attempts to fit the laws of occupation to the Israeli occupation lead to incoherence - international norms for belligerent occupation were written for short-term occupations.*

A clear example of the incoherence in the Supreme Court of Israel's application of the law of occupation is the question of settlements and the protection offered to the local population. Under Article 49 of the Fourth Geneva Convention: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies". The establishment of settlements breaches this Article entirely. However, the Court has ignored the notion of 'protected persons' defined by Article 4 of the Fourth Geneva Convention when considering who is included in the local population.[142] Instead, Israeli settlers are accepted as a part of the local population, as in the *Hebron Electricity* case, and this position has been maintained.[143] *Arguments by the occupying power's authorities have been made that whatever decision benefits the settlers, also benefits the local Palestinian population*.[144] However, this statement begs the question: to what extent

[141] 66 HCJ 390/79, Dweikat v. Government of Israel.
[142] D. Kretzmer, "The Law of Belligerent occupation in the Supreme Court of Israel", International Review of the Red Cross (2012), 222.
[143] 0 HCJ 256/72, Electricity Company for Jerusalem District v. Minister of Defence.
[144] D. Kretzmer, "The Law of Belligerent occupation in the Supreme Court of Israel", International Review of the Red Cross (2012), 223.

can the interests of a settler and a local inhabitant coincide?

A clash of these interests can be highlighted in the *Beit Hadasa* case, wherein *the Court explicitly put the interest of the settlers above that of the local Palestinians*. It was claimed by the Court that the authority of the commander of the occupied territory is broad, and extends to permanent and new residents.[145] Despite the Israeli Supreme Court's clear inclination towards Israeli settlers, it has also used the concept of proportionality to grant a degree of protection to the local population. In the *Abu Safiyeh* case, the Court decided against a complete ban on Palestinian vehicles, even though many attacks on Israeli vehicles had taken place on the road.[146] It is to be noted though that granting locals the use of their own vehicles is hardly representative of fair treatment.

More recently, the Court has been making use of the three-pronged proportionality test developed by German public law.[147] This test has three elements: *suitability*, *necessity*, and *proportionality stricto sensu*. A measure has to be deemed 'suitable' for attaining its aim by judicial review, and is the first filtering element of legislation. The second element is of 'necessity.' It requires the administrative authority to choose the least restrictive while being equally effective action, and is based on factors such as the nature of rights to be protected and the effect of interference on individuals. The last element is the notion of proportionality considered narrowly. It demands a balance between the injury to an individual, and the public interest

[145] HCJ 72/86, Zalum v. Military Commander.
[146] HCJ 2150/07, Ali Hussein Mahmoud v. Minister of Defence; D. Kretzmer, "The Law of Belligerent occupation in the Supreme Court of Israel," International Review of the Red Cross (2012), 225.
[147] The three questions raised are: whether there is a rational connection between the administrative act and its legitimate purpose, whether it is the least invasive way of achieving that purpose and whether the benefit outweighs the harm caused to the interest of others.

in the course of an administrative measure.[148] This test is the general principle that restricts decisions that rely on military necessity alone, and could have the potential to limit the power of the military by keeping in mind injuries incurred by local inhabitants from the Israeli occupation. However, evidence regarding the application of this test is limited.

10.5 The International Legal Status of Palestine

Legal states are regulated by general international law, and for a new state to be created, it must meet the criteria under the Montevideo Convention.[149] According to Article 1, the state must have a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.[150] Although recognition of statehood is not necessary for the creation of a state, a collective recognition from a majority of states can tip the balance in favour of meeting the criteria of statehood, even if the criteria is imperfectly fulfilled.

It has been debated intensely whether Palestine meets the criteria of statehood. The recent decision of the United Nations General Assembly to elevate the status of Palestine from 'observer entity' to 'observer state' does show that it is recognised to a degree. While the change has done little in terms of impacting the legal framework, it does affect the question of the statehood of Palestine in international law. Indeed, an 'observer state' implies recognition as a state by virtue of its title, while its role as a mere observer attributes more to its contribution to the

[148] Y. Takahashi, "Proportionality - A German Approach," Amicus Curiae, Issue 19, July (1999)
[149] Montevideo Convention on the Rights and Duties of States, (1933) Article 1; J. Cerone, "The UN and the Status of Palestine – Disentangling the Legal Issues," American Society of International Law, (2011), 26
[150] *Ibid.*

United Nations, instead of being representative of its limitations. *The admission of Palestine's 'observer state' status highlights that a majority of states do regard it as a state.*[151]

If Palestine were to be recognised as a state, it would be a critical turning point since Palestine would then be entitled to all the rights and duties of a state under international law.[152] In that case, Palestine and its officials would be granted immunity and protection from the use of force by other states, and the notion of sovereignty of the Palestinian people would no longer be debatable. Moreover, the right to self-defence in the event of an armed conflict would be legitimate, alongside jurisdiction over its own territory, and membership in intergovernmental organisations. Further to that, statehood would enable access to justice in international courts such as the International Court of Justice and the International Criminal Court. This would be of great significance due to the fact that currently the only avenue for justice that the local population of the occupied territories possess is of the Israeli Supreme Court.

The president of the Palestinian Authority, Mahmoud Abbas, filed an application for Palestine to be admitted to the United Nations as a Member State in 2011. This demand was vetoed by the Security Council, and there seems to be little progress on that front. The Office of the Prosecutor of the International Criminal Court released a statement in 2012 maintaining that it would not consider allegations of crimes committed in Palestine due to its lack of status by the United Nations General Assembly.[153] However, on 20

[151] Palestine was granted the status of "observer state" in a Resolution voted on 29 November 2009, with support from 138 of the 193 Security Council members.
[152] J. Cerone, "The UN and the Status of Palestine – Disentangling the Legal Issues", American Society of International Law, (2011), 28.
[153] J. Cerone, "The UN and the Status of Palestine – Disentangling the Legal Issues", American Society of International Law, (2011), 30.

December 2019, the new Prosecutor, Fatou Bensouda, announced an investigation into war crimes allegedly committed in Palestine by Israeli personnel or members of Hamas and other Palestinian armed groups.[154] She also requested a ruling from the Pre-Trial Chamber I on whether the jurisdictional criteria had been met - that of a crime being committed on the territory of a state party. On 5 February 2021, Pre-Trial Chamber I decided, by majority, that the Court's territorial jurisdiction in the Situation in Palestine extends to the territories occupied by Israel since 1967, namely Gaza and the West Bank, including East Jerusalem.[155] It found that “Palestine is a State Party to the Statute”. Subsequently, on 3 March 2021, the Prosecutor announced the opening of her investigation into the Situation in Palestine.[156]

This move has been heavily criticised by some states, including Israel, Austria, the USA, and Germany, given that none of them recognize Palestinian statehood and thus deny the Court’s jurisdiction. However, it is an important step towards recognising Palestine as a state and the rights under international law which flow from acquiring that status.

10.6 Just War Theory

The just war theory is an ethical framework for military action, weighing a balance between militarism and

[154] “Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court’s territorial jurisdiction”, International Criminal Court
[155] “ICC Pre-Trial Chamber I issues its decision on the Prosecutor’s request related to territorial jurisdiction over Palestine”, International Criminal Court
[156] “Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine”, International Criminal Court

pacifism.[157] It outlines a set of principles for war. War can only be undertaken by a legitimate authority for a legitimate cause, and a state may only go to war in response to an attack by another state. All reasonable means of conflict must be exhausted before this option is resorted to, and hostilities should cease once the war is over. There is great emphasis on the principle of right intention.[158]

Kuo has argued that the just war theory should be extended to cater to the moral challenges presented by occupations. According to him, three critical issues are overlooked regarding occupation and just war theory.[159] Firstly, an occupation may not always be a result of military superiority, but could also reflect an effective ideological campaign. Secondly, the new influences of control through the occupant's administrative policies could have military purposes. Lastly, the occupying power's authorities can pursue a series of projects within the occupied territories that may be harmful to the local population's interests, but could be obscurely presented as a way to restore public order. For instance, the construction of the Separation barrier, also known as the Israeli West Bank barrier, is claimed to restore order by preventing Palestinian suicide bombings. However, it restricts access to resources such as education and healthcare facilities, and caused displacement of thousands of Palestinians. 11,000 Palestinians are now trapped between the Separation Barrier and the Green Line.[160] There is a lack of assessment of the ethical confines of such projects.[161]

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[157] R. Kuo, "Occupation and the Just War", International Relations (2008), 299.
[158] Kuo, 301.
[159] Ibid.
[160] "The Separation Barrier," The Israeli Information Centre for Human Rights in the Occupied Territories, Israeli Information Center for Human Rights in Occupied Territories, 2017
[161] R. Kuo, "Occupation and the Just War", International Relations (2008), 307.

Occupation introduces new economic and social instruments to pursue military objectives, and the consequences of these have to be viewed with regard to the clash of interest between the occupant and the occupied. International law may dictate that the occupier should put an administrative system in place, but the structural violence that may be propagated has to be weighed keeping the local population in mind.[162] In the case of Palestine and Israel, Israel's establishment of settlements is not supported by international law, and yet the Israeli political regime has enabled them under its own administrative structure.[163] To curb the guerrilla attacks of the Palestinian population, Israel has employed several strategies including widespread censorship, imposition of curfews, restrictions on protests and active land confiscation. *Focusing on military engagement alone is inadequate in addressing the totality of control that an occupying power possesses*, and the just war doctrine is insufficient in addressing the ethical issues pertaining to occupation.

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[162] *Ibid.*

[163] It is to be noted here that the Israeli Supreme Court is silent on the matter of settlements.

11. Russia-Ukraine Conflict

Source: BBC[164]

[164] "Ukraine in maps: Tracking the war with Russia", BBC

11.1 Brief History

On 27 February 2014, the government institutions on the Crimean Peninsula were seized by armed individuals.[165] They were referred to as "little green men" due to their camouflage attires that lacked emblems, and called themselves 'Crimea's Armed Self-defence.' However, it was discovered that these individuals belonged to Russia's newly formed Special Operations Command.[166] On 1 March, the Russian Federation supplemented this force by approving the use of Russian troops in Crimea too.[167]

Shortly after, the Republic of Crimea issued a declaration of independence, with the popular vote being brought forward to 16 March.[168] An overwhelming majority of 95 percent was found to be in favour of independence and a subsequent reunification with Russia, an outcome that is highly contested internationally.[169] The Accession Treaty was signed shortly after, and within three weeks the Ukrainian state of Crimea was dismantled and integrated into Russia.

Despite 22,000 Ukrainian soldiers being stationed in Crimea, there was minimal resistance against Russian forces.[170] It is speculated that this was due to the chaos that followed after the Maidan revolution, and Ukraine had yet to appoint a Minister of Defence when the "green men" first arrived at the border. The invasion was unexpected,

[165] Lawrence Freedman, Ukraine and the Art of Strategy, OUP, (2019), pages 85-90.
[166] Mark Galeotti, Armies of Russia's War in Ukraine, Osprey Publishing, (2019) page 11
[167] "Federation Council Approves Putin's Request for Troop Deployment in Ukraine," The Moscow Times, (2014)
[168] "Postponing the Referendum in Crimea is Linked to the Fact that the Conflict Left the Limits of Reason," (2014)
[169] "Crimea Referendum: Voters Back Russia Union," BBC, (2014)
[170] Mark Galeotti, Armies of Russia's War in Ukraine, Osprey Publishing, (2019), page 7.

and allegedly no orders from Kyiv arrived, leading to inaction.[171] Due to this, there were practically no casualties from the takeover.[172]

11.2 Crimea: Illegal Occupation or 'Consensual' Reunification?

The United Nations General Assembly does not recognise changes to the territorial integrity of Ukraine. Hence, from the perspective of international law, the status of Crimea remains that of an occupied territory.

The application of the framework of occupation hinges upon The Hague Regulations, since the Fourth Geneva Convention does not contain its own definition of occupation. Rather, it refers to The Hague Regulations (Article 154 GC IV). In accordance with The Hague Regulations, territory is considered to be occupied "when it is actually placed under the authority of the hostile army." However, 'authority' has not been defined, and this provision has caused much ambiguity. Today, there is consensus that a state needs 'effective control' over a territory in order to have authority, and in turn be an occupant, as described in Article 42 of The Hague Regulations.[173]

Under belligerent occupation, 'effective control' alludes to the level of control a foreign army possesses over territory for it to be called an occupying power. What does it mean to have 'effective control' in concrete terms? This may vary from case to case, depending on the population density, terrain, and other factors.[174] The ICTY developed the

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[171] *Ibid.*
[172] M. Gumuchian and V. Butenko, "Ukraine Orders Crimean Troop Withdrawal as Russia Seizes Naval Base" CNN, (2014)
[173] Benvenisti, 45–47.
[174] Y. Dinstein, "The International Law of Belligerent Occupation," 43.

formula that "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," for an occupant to have 'effective control.[175] It is not essential to have personal control over each citizen, as stated in Article 42 of The Hague Regulations, occupation merely requires territorial control.[176] According to the ICRC, the occupying force has to enforce its will by the presence of its troops, and most experts agreed that the test for an occupation should be a question of "which of them had the military capability by virtue of their presence in a given area to impose their authority and prevent their opponent from doing so, and eventually be in effective control of that area."[177] This has been reinforced by the European Court of Human Rights where it was argued that "occupation is not conceivable without boots on the ground," in the case of *Sargsyan v. Azerbaijan*.[178]

On the other hand, the ICJ's decision in 2006 in the case of *Democratic Republic of Congo (DRC) v. Uganda* stated that the qualification of an occupation demanded the exercise of actual authority by foreign forces, meaning that the foreign troops had to substantiate their authority in the region. The ICRC rejected this criterion based on the example of Germany's occupation of Denmark in WWII, wherein German armed forces had military supremacy, but chose not to exert it by allowing the Danish government to do so instead. According to the ICJ's requirement, Germany would not have been said to occupy Denmark, and would allow legal black holes that would result in a protection vacuum for local inhabitants of occupied territories. *Hence, the ICRC's experts established that the*

[175] IT-98-34-T, *The Prosecutor v. Mladen Naletilić and Vinko Martinović*, Trial Chamber Judgment, ICTY.
[176] Benvenisti, 51–53.
[177] Benvenisti, 53–54.
[178] ECtHR - Case of Sargsyan v. Azerbaijan, Application no. 40167/06, 16 June 2015.

requirement of an occupation is based on the ***ability*** *of the foreign forces to exert authority over a specific area***.** It may be that 'effective control' may exist only in certain parts of a country, and the Geneva Conventions refer to occupation as 'partial or total,' not requiring a complete takeover of a nation for it to be considered an occupation.

In addition to having 'effective control' through military prowess, the occupying power has to present itself against the will of the sovereign for the territory to qualify as an occupation. Three requirements have to be fulfilled for Crimea to be considered an occupation: the former government has to lose its authority over the territory, the occupying power has to replace this authority's 'effective control' and enforce its own will, and finally, the substitution of power has to be non-consensual.

The first requirement was fulfilled when Russia incorporated Crimea within its territory through the Accession Treaty, causing the Ukrainian government to lose authority. There is little debate with regards to the first requirement. The second requirement is met too - as Russia enforces 'effective control' over Crimea as defined by Article 42 of The Hague Regulations. Even before the incorporation was conducted, Russia had assumed control over all centres of power. While there had been initial denial of the 'green men' being on duty, Putin later admitted that orders to deploy forces in Crimea had been given since February 2014.[179] While the Russian forces amounted to 2000 in the first few days, their number rose to 20,000 before the official incorporation on 18 March 2014. Crimea became listed as a new subject in the Russian constitution, and the ruble became the official currency.[180] Hence, it can be established that Russia does exercise 'effective control' over Crimea and enforces its own will.

[179] "Putin Admits Russian Forces Were Deployed to Crimea," Reuters (2014)
[180] "Russian Ruble Becomes Only Legal Currency in Crimea" AA (2014)

The notion of substitution of power being non-consensual is challenged heavily by Russia. *According to Moscow, the former Ukrainian President, Viktor Yanukovych, invited Russian troops to intervene after the 'coup' in Kyiv*.[181] After Yanukovych recognised his failure in maintaining control, he fled Ukraine on 21 February.[182] While the Parliament voted to remove him the next day, the necessary majority was not received. In a UN Security Council meeting, the Russian representative brought forward a letter dated 1 March, the contents of which entailed Yanukovych allegedly inviting Putin to "re-establish the rule of law, peace, order, stability and to protect the people of Ukraine," through a military takeover.[183] Russia's argument remains that due to Yanukovych's position as the *de jure* President of Ukraine of the time, the invasion of Crimea was consented to.[184] A claim can be made that Yanukovych represented a legitimate government in exile, and despite being displaced from its country of origin, maintains the position of the rightful government of Ukraine. According to this argument, Yanukovych retains the legal and moral authority to represent Crimea, and the consequent discretion to invite foreign troops. However, this argument dismisses the basic fact that Yanukovych was in no position to invite a foreign military takeover as he was not ousted but rather fled, and left behind a power vacuum. Having fled the nation days before the letter was sent, he was not a representative of the government. As Marxsen and Fox have argued, only an effective government would have been in a position to do so.[185]

[181] UN Security Council, 7125th meeting, UN Doc S/PV.7125 (2014), 3.
[182] Putin: Russia Helped Yanukovych to Flee Ukraine' (BBC, 24 October 2014)
[183] L. Charbonneau, "Russia: Yanukovich Asked Putin to Use Force to Save Ukraine," Reuters, (2014) .
[184] UN Security Council, 7125th meeting, UN Doc S/PV.7125 (2014), 3.
[185] C. Marxsen, "The Crimea Crisis- an International Law Perspective" (2014), 374; G. Fox, "Ukraine Insta-Symposium: Intervention in the Ukraine by Invitation," (2014)

The second argument made by Russia for the 'consensual' occupation of Crimea is that through the referendum, the people of Crimea willingly expressed their desire for reunification with Russia.[186] *Under domestic law, the referendum violated the Ukrainian constitution, since territorial changes could not take place without a nationwide referendum.*[187] Moreover, Crimea could not make use of a right to secede under international law either because such a right may not be deduced from the principle of 'self-determination of peoples' under Article 1(2) of the United Nations Charter. *Even if we are to consider the Crimean population a 'peoples,' the principle of self-determination only translates into a desire for an independent state, not an amalgamation with an existing one.* This is because the UN General Assembly Resolution 2625 (1970) states that the right to self-determination should not be taken as, "authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity of political unity of sovereign and independent States."[188]

While there is debate over whether the substitution of power in Crimea was non-consensual, it is clear that Crimea represents a case of belligerent occupation. Not only are the first two requirements fulfilled with ease, the debate over whether the 'will of the sovereign' makes it a consensual does not stand in terms of international law, and has been countered on multiple fronts. Organisations such as the UN High Commissioner for Human Rights, United Nations Educational, Scientific and Cultural Organization (UNESCO), and the Parliamentary Assembly of the Organization for Security and Cooperation in Europe (OSCE PA) have condemned the occupation of Crimea.

[186] Bowring, 'Who Are the "Crimea People" or "People of Crimea"?' (n 1023) 35.
[187] Article 73, Constitution of Ukraine.
[188] A/RES/2626 UNGA Resolution 2625, "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations."

Russia's closest allies, such as Belarus, also initially refused to recognise Crimea as a Russian subject.[189] Recently, Belarus' deteriorating political standing with Ukraine has caused a "u-turn," wherein the latest claim made by Belarus' leader Lukashenko is "Crimea is de facto Russian."[190]

11.3 Russia's Denial

The Kremlin seeks to evade the legal classification of belligerent occupation. On 14 November 2016, the ICC labelled the situation in Crimea as an occupation: "The law of international armed conflict would continue to apply after 18 March 2014 to the extent that the situation within the territory of Crimea and Sevastopol factually amounts to an on-going state of occupation."[191] Moreover, multiple United Nations General Assembly Resolutions have referred to Crimea as a Russian occupation: UNGA Resolution 68/262 affirmed the referendum held in Crimea was invalid, and UNGA Resolution 71/205 called for the respect of Ukraine's sovereignty.[192] In retaliation, Russia declined to ratify the Rome Statute to highlight its disdain for the ICC as it "did not live up to its expectations."[193] At the fifth anniversary of the Minsk Agreements in 2019, the German representative brought forward that "Crimea is

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[189] "Belarusian President Says Crimean Annexation 'Bad Precedent", Radio Free Europe, 2014.

[190] "*Belarus leader, in U-turn, says annexed Crimea is legally Russian*", Reuters, 30 November 2021

[191] Report on the Preliminary Examination of Activities, International Criminal Court, 2016.

[192] UNGA Resolution 28/262 (2014); UNGA Resolution 71/205 (2016); There have been various other UNGA Resolutions that refer to Crime as an occupation: UNGA Res 72/190 (2017), UNGA Res 73/194 (2018), UNGA Res 74/17 (2019). However, these resolutions are non-binding and do not have the force of the law.

[193] "Ministry of Foreign Affairs Announced the Refusal of Russia to Ratify the Rome Statute of the ICC]," Tass (2016).

still occupied," to which Russia abstained from making any legal statements. Instead, the response skirted the topic by adding: "It turns out that all of Ukraine's woes and misfortunes are the legacy of Russia's occupation of Ukraine."

Many arguments have been brought forward by Russia for the Crimean case. It has argued that the military action was required to protect its nationals and the Russian-speaking population.[194] Secondly, Russia has claimed that the annexation of Crimea was 'historical justice.' These arguments fail to recognise that the violation of Ukraine's sovereignty belongs to the realm of *jus ad bellum*. Hence, the substitution of authority ("effective control") by the occupying power against the will of the sovereign makes it a violation under the *jus ad bellum.*

Russia has countered this by claiming that Crimea had the right to secede from Ukraine, and that the Ukrainian President sent an invitation to Russian troops as a cry for help. If these claims are to be considered legitimate, the violation under the *jus ad bellum* would be lifted. However, the Ukrainian President had fled at the point the letter is dated from - no longer representing the effective government of Ukraine, Crimea broke the domestic law for secession since a nation-wide referendum is required for territorial changes, and under international law the joining of another state is not supported by the principle of self determination.

From the onset of the intervention in February 2022, Russian officials have been masking the invasion under a banner of 'denazification.' In a speech by Putin, he stated that "we will seek the demilitarisation and denazification of

[194] *"Putin's letter on use of Russian army in Ukraine goes to upper house",* Tass, 1 March 2014

Ukraine. "[195] While there is little evidence of a Nazi-inspired government in Ukraine prior to the 'little green men' intervening, there are allegations of the presence of far-right sentiment. The Azov Brigade is a formation of the National Guard of Ukraine, and has drawn controversy over alleged association with far-right groups possessing neo-Nazi ideology.[196]

The battalion allegedly had neo-Nazi leanings, and was particularly active in 2014. CNN teams in the area have reported that Azov embraced neo-Nazi insignia, and when the US Congress attempted to label it as a terrorist organisation, the Minister of Internal Affairs defended the unit. Russia's ambassador to the United Nations blamed the Azov regiment for blocking an evacuation corridor in the port city, claiming they were using "citizens as human shields." On the other hand, Azov has made opposing views.[197] When the Mauripol theatre was sheltering civilians and children, the ground on either side had 'children' written in Russian to protect it from attacks. After it was bombed, the Russian Defence Ministry placed the blame on the Azov battalion. *Hence, Russia claims it was curbing Azov's influence by conducting 'denazification.'* Using this, Russia has denied that Crimea is occupied, but rather, that it willingly reunified with Russia.

The premise of 'denazification' is not a new one, as similar claims have been used before by occupying powers to defend their actions. During the defascification of Italy, the Allies presented similar defences when reforming the local

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[195] Tara John and Tim Lister, *"A far-right battalion has a key role in Ukraine's resistance. Its neo-Nazi history has been exploited by Putin"*, CNN, 30 March 2022.

[196] Marco Roscini, *"Russia Has Not Breached the Jus Contra Bellum in 2022; It Did in 2014"*, Voelkerrechtsblog, 2022

[197] Tara John and Tim Lister, "A far-right battalion has a key role in Ukraine's resistance. Its neo-Nazi history has been exploited by Putin", CNN, 30 March 2022.

legislation.[198] The idea that 'denazification' and defascification allow the occupying power to alter the law in force was popular post-World War II, and among contemporary scholars. These opinions were argued on the basis that such legislations could be a threat to the public order of the occupied territory, as well as a threat to the occupying powers. *Thus,'denazification' became a strategy to push the boundaries of permitted alterations to the law in force of the occupied territory.*

The legal foundation for this is derived from Article 64(II) of the 1949 Geneva Convention, and Article 43 of the 1907 Hague Regulations. Through this, an occupying power may introduce new legislation if it is essential to maintain order, and to ensure the security of the occupant (occupying forces of administration: their property, establishments, and the lines of communication). *This exception of 'necessity' to the 'conservationist principle' is exemplified by the case of Russia using 'denazification' to justify occupying Crimea.*

Historically, this loophole of 'necessity' has been used multiple times. In the authoritarian regime of the Pol Pot in Cambodia (then Kampuchea), genocide took place. Subsequently, when Vietnam invaded occupied Cambodia in 1978, there was no condemnation for changing the local laws. In fact, these changes were seen as beneficial.[199] It was during the occupation of Iraq in 2003 when the question first arose - to what extent can the justification of the alteration of local legislations be allowed under the ambit of the law of occupation? Debaathification was propped up on the need to purge the legislation of Iraq from association with Saddam Hussein's Ba'ath party.[200]

[198] Civil Affairs: Soldiers Become Governors, AMGOT, Proclamation 7, 1943; Ploscowe.
[199] Benvenisti, 186,
[200] Coalition Provisional Authority, Order 1, 16 May 2003; Carcano 206-211; Fox

However, the massive reforms went beyond what Article 43 of the 1907 Hague Regulations, or Article 64 of the Fourth Geneva Convention allowed. While the changes to the local laws were undertaken with the UN Security Council's approval, the authority of the UN Security Council to override the law of occupation is sceptical at best, and raises many questions. Who decides whether these alterations are beneficial or harmful? What are the limitations to the alterations and the notion of 'necessity'? *Is the United Nation's disapproval the only difference between the United States' intervention in Iraq, and the Russian Federation's takeover of Crimea?*

11.4 Compliance with the Law of Occupation

To comply with the law of occupation, the occupying power has to manage public order in a way that the local people under the occupation are protected, the local law is not altered, and the substitution of power is temporary. Under Article 43 of the 1907 Hague Regulations, the occupying power "shall take all measures in his power to restore, and ensure, as far as possible, public order and [civil life], while respecting, unless absolutely prevented, the laws in force in the country." This provision provides the basis of the 'conservationist' principle that aims to prevent the occupant from altering the legislation and administration of the occupied territory.

The regime of occupation entails many obligations for the occupant. As outlined by the Fourth Geneva Convention, the occupying power must restore public order, [201] is responsible for the treatment of protected persons,[202] is

[201] Article 43 GC IV
[202] Article 27 GC IV

prohibited from hostage-taking,[203] and the protection of civilian interests is mandatory.[204]

Russia has not complied with the law of occupation and has also denied any responsibility as an occupying power in Crimea.[205]

Not only has the Kremlin avoided all inquiries on the status of Crimea, it has also refused to respond to claims of violations of provisions of the law of occupation. The local population of Crimeans has been subjected to compulsory military service, violating Article 51 of the Fourth Geneva Convention. The status of judges has been altered, in contradiction with Article 54. The Russian administrative, penal, and tax system has been imposed alongside Russian citizenship, violating Article 64 of the Fourth Geneva Convention and Article 48 of The Hague Regulations. There has also been a crackdown on Crimean Tartars, violating Article 27 and Article 71 of the Fourth Geneva Convention.[206]

The UN General Assembly adopted a resolution in 2016 which urged the Russian Federation to respect Article 51 of the Fourth Geneva Convention, which prohibits the induction of a person from an occupied territory to serve in its armed forces.[207] Moreover, General Assembly's resolutions 72/190 and 73/263 emphasised the illegality of "the imposition and retroactive application of the legal system of the Russian Federation," and how it "is contrary to international humanitarian law, including the Geneva

[203] Article 34 GC IV
[204] Article 79-141 GC IV
[205] ECtHR, Hurbain v Belgium, (Case no. 57292/16), June 22, 2021
[206] OSCE/ODIHR, "Report of the Human Rights Assessment Mission on Crimea" (2015) 82.
[207] UNGA 71/205, UN Doc A/RES/71/205 (2017).

Conventions."[208] Russia's response has been to vote against these resolutions, and avoid making any comments.

Most importantly, Russia has made no claims of the 'occupation' being temporary. Contrarily, Russia's denial of it being an occupation implies that Crimea's takeover as a Russian 'subject' should be considered permanent. Hence, Russia has rejected compliance with the obligations of the law of occupation on all accounts.

11.5 Recent Annexations of Ukraine by Russia

On 20 September 2022, the Donetsk People's Republic and the Luhansk People's Republic (collectively known as the Donbas region) announced referendums for joining Russia. On 21 February 2022, Russia officially recognised the two as independent states, instead of Ukrainian territory. Three days later, the Russian Federation undertook an invasion of Ukraine, during which Kherson and Zaporizhzhia Oblasts were formally annexed as well. On 30 September, Putin signed accession treaties with the four pro-Russian leaders of the regions. Russian officials claimed that the accession in Zaporizhzhia Oblast gained an overwhelming majority of 93.1% in favour of joining Russia.[209]

Ukraine launched a counter-offensive, and there was a shuffle of territories. Presently, the Russian Federation has possession of Luhansk, Donetsk, Mariupol. Melitopol, and Crimea, while Lyman, Kherson and Bakhmut are

[208] UNGA 72/190, UN Doc A/RES/72/190 (2017), The disallowance of altering the legislation of the occupied territory can be found in Article 47, 54, 64 of the Fourth Geneva Convention, and Article 43 of The Hague Regulations.
[209] A. Schreck, "Pro-Mosco Officials Say 4 Occupied Areas of Ukraine have Voted to Join Russia," PBSO NewsHour, (2022)

points of conflict.[210] Western officials claim that an estimate of 20,000 to 30,000 Russian troops have been injured or killed in and around Bakhmut. In the South, artillery strikes continue around Kherson.[211] A year into the invasion, Ukraine is presently in control of Kherson, and has largely contained the Russian advance in the East.[212]

With reference to the latest annexations, the three requirements to qualify as an occupant are fulfilled by Russia: possession of territory, presence of a hostile army, and the enforcement of authority. The first requirement is fulfilled by virtue of the invasion itself, as displayed by the aforementioned current holdings by Russia. The consistent struggle by Ukraine against the Russian troops highlights that the intervention is conducted by a hostile army, and the enforcement of authority is proven by Russian acceptance of accession treaties that have made the annexations a part of Russian territory. *Russia's denial of its role as an occupying power does not negate the fulfilment for its criterion.*

The Russian Federation has argued that Ukraine was 'committing genocide' against Russians in Donetsk and Luhansk, using this as a justification for the invasion.[213] However, there is no evidence that Ukraine attempted to destroy a national, ethnic, racial, or religious group under the definition offered by the Genocide Convention.[214] Moreover, neither the Genocide Convention nor the United Nations Charter authorise an invasion to remedy acts of

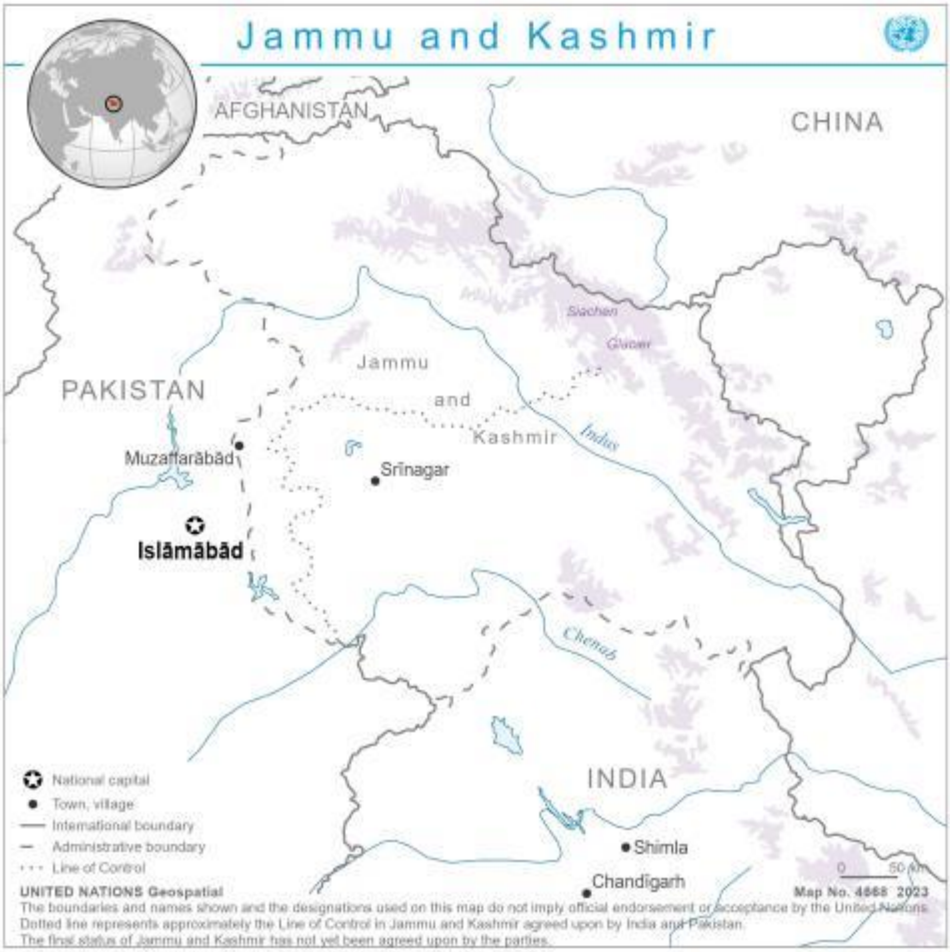
[210] "Ukraine in maps: Tracking the war with Russia", BBC
[211] *Ibid.*
[212] *Ibid.*
[213] John B. Bellinger III, *"How Russia's Invasion of Ukraine Violates International Law"*, Council of Foreign Relations, 2022
[214] UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277

genocide.[215] Secondly, Russia's recognition of Donetsk and Luhansk as independent states goes against notions of sovereignty that a state possesses. A national referendum for secession did not take place to enable the independence of these regions lawfully under domestic Ukrainian law. Under international law, the territorial integrity of each state has to be respected, and the UN General Assembly Resolution 2625 (1970) states that the right to self-determination should not be taken as, "authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity of political unity of sovereign and independent States."[216] Similar to the case of Crimea, the recent occupations are unlawful under the law of occupation, and the compliance under the law of occupation is limited since they are being transformed legislatively and administratively.

[215] John B. Bellinger III, *How Russia's Invasion of Ukraine Violates International Law*, Council on Foreign Relations, 2022

[216] A/RES/2626 UNGA Resolution 2625, "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations."

12. Kashmir Conflict



Source: United Nations[217]

[217] UN Geospatial, Jammu and Kashmir, April 1, 2023

12.1 Brief History

Under British rule, Jammu and Kashmir was a princely state. The Indian Independence Act 1947 gave princely states the right to choose independence, or accede to either India or Pakistan.[218] While Jammu and Kashmir was a Muslim-majority state, its ruler Maharaja Hari Singh was Hindu. He chose to remain independent, and did not accede to either sovereign nation at the point of Partition in August 1947.

Shortly after, the Maharaja signed a 'Standstill Agreement' with Pakistan, transferring certain administrative duties such as post, telegraph and railways to Pakistan.[219] No similar agreement was signed between Kashmir and the state of India. Until October 1947, this remained the status-quo. However, conflict within the state caused Maharaja Singh to flee to Srinagar, and subsequently an 'Instrument of Accession' to the Dominion of India was allegedly signed on 26 October 1947.[220] As a response by the Governor General of India, the accession was accepted on 27 October 1947.[221]

A consequent armed conflict broke out between Pakistan and India, and the United Nations was referred to by both states.[222] In response, the Security Council produced Resolution 39 on 20 January 1948 which established the United Nations Commission on India and Pakistan (UNCIP)

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[218] Memorandum on States from the Cabinet Mission Plan; Section 7(1)(b) of the Indian Independence Act,1947

[219] The Status of Jammu and Kashmir under International Law, RSIL, 2019.

[220] A. Lamb, "Excerpts From 'The Myth Of Indian Claim To Jammu & Kashmir – A Reappraisal" (2019); RSIL 2019

[221] 'Text of Lord Mountbatten's Letter Dated 27 October, 1947 To Signify His Acceptance Of The Instrument Of
Accession Signed By The Kashmir Maharaja' (mtholyoke.edu, 2019)
<https://www.mtholyoke.edu/acad/intrel/kasmount.htm>

[222] J. Braithwaite and B. D'costa," Cascades of Violence, War, Crime and Peacebuilding Across South Asia," ANU Press (2018)

to uncover the doings of both nations within Kashmir.[223] The Security Council adopted Resolution 47 on 21 April 1948 which recommended the removal of troops from contested territory, and the installation of an interim government.[224] Neither state agreed to demilitarisation, putting the condition on the other to withdraw first. Hence, an impartial referendum could not take place.[225]

In January 1957, a separate Constitution for Jammu and Kashmir was made, and the entirety of the state was integrated as an 'integral part of the Union of India.'[226] Over the course of 50 years, 260 of the 395 Articles of the Indian Constitution were imposed upon Jammu and Kashmir. India's political control over Kashmir became concrete, despite its initial role as a temporary moderator.

In August 2019, a security lockdown began in Kashmir. Pilgrimages were cancelled, a communication blackout was experienced nation-wide,[227] and 38,000 additional troops were introduced into the region. The Presidential C.O. 272 was issued by the President of India, enabling the annulment of Article 35-A which protected Kashmiris from displacement, and prevented demographic changes by not allowing residency within Jammu and Kashmir. Moreover, the Indian Parliament passed the Jammu & Kashmir Reorganisation Bill which divided the state into two regions of 'Ladakh' and Jammu & Kashmir. *Currently the region remains divided and occupied.*

[223] S/RES/39 UN Security Council Resolution "The India-Pakistan Question," (1948)
[224] S/726 United Nations Security Council Resolution (1948)
[225] J. Howley, "Alive and Kicking: The Kashmir Dispute Forty Years Later," Dick. J. Int'l L. (1991)
[226] "A Timeline Of Key Events That Shaped The Unique Identity Of Kashmir Within India," qz.com (2019); RSIL, 2019
[227] "India revokes disputed Kashmir's special status with rush decree," Al Jazeera (2019)

12.2 Jammu and Kashmir: Unlawful Annexation?

An occupation is defined by Article 42 of The Hague Regulations 1907 as territory that is under the authority of a hostile army.[228] While India and Pakistan are both not a party to the Fourth Hague Convention to which the Hague Regulations of 1907 are annexed, it has been made clear through a judgment of the International Military Tribunal of Nuremberg that The Hague Regulations apply to all states.

For a territory to be considered an occupation, three requirements have to be fulfilled. The first is that the occupant is not entitled to the territory under international law, secondly the occupant has to be a hostile army, and lastly, the occupying power has to have 'effective control' over the authority. It is clear that all three fit in the case of Kashmir.

Since the 'Instrument of Accession' was signed between a fleeing leader and India, it is as void as the Accession Treaty signed between Yanukovych and the Federation of Russia. Not only does a leader that flees not have the right to give control to another state, the sovereignty of a people cannot be given away in an 'Accession Treaty.' In fact, the lack of a referendum further cements its status as an occupation since no legal title under international law was passed. The Security Council rejected India's efforts to change the status of Jammu & Kashmir, as highlighted by multiple United Nations Security Council Resolutions: 47 of 1948, 80 of 1950, 91 of 1951, 98 of 1952, 122 of 1957, 123 of 1957, and 307 of 1971. Hence, India was not entitled to the territory under international law.

The illegality of the annexation is backed by the principle of international law which dictates that an occupant does not

[228] 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, 18 October 1907

have the right to annex occupying territory.[229] The law of occupation recognises the occupant as a temporary administrator of the territory, one that cannot alter the status of the region.[230] In changing Kashmir's political status and integrating it within the Indian Constitution, India has committed an unlawful annexation which breaches the law of occupation.

This is highlighted by the Simla Agreement of 1972 which pledged that:

"Pending the final settlement of any of the problems between the two countries, neither side shall unilaterally alter the situation and both shall prevent the organization, assistance or encouragement of any acts detrimental to the maintenance of peaceful and harmonious relations."[231]

The Simla Agreement showcases that 'unilaterally' altering the situation breaches the pledge. By dividing Kashmir into two 'Unions,' and integrating Jammu & Kashmir in the Dominion of India, India contradicted the Simla Agreement entirely.

Another basis for which India is not entitled to Jammu & Kashmir under international law is, ironically, the 'Instrument of Accession' itself. *The clauses within it state that the 'Instrument of Accession' does not "affect the sovereignty in and over this State."*[232] Hence, the channel used to occupy Jammu & Kashmir itself defies taking the

[229] "Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967," (2017) Doc.A/72/556.
[230] Article 47 GCIV
[231] Clause 1(ii) of the Agreement Between the Government of India and the Government of the Islamic Republic of Pakistan on Bilateral Relations (Simla Agreement): Simla, 2 July 1972.
[232] Instrument of Accession of Jammu & Kashmir, 1947 by Maharaja Hari Singh, found here: <https://cjp.org.in/wp-content/uploads/2019/08/instrument_of_accession_of_jammu_and_kashmir_state.pdf>

sovereignty of the people, since it was never Maharaja Hari Singh's to give.

The second condition for Jammu & Kashmir to qualify as an occupation of India would be if it were a 'hostile army' takeover. The argument brought forward by India is that its troops were invited into Jammu & Kashmir by Maharaja Hari Singh in 1947. However, the 'Instrument of Accession' is deemed void before international law, and renders the Indian forces hostile. Hence, the Indian Army's occupation of the territory fulfils the second requirement.

Lastly, the establishment of 'effective control' can be showcased in multiple ways. According to the ICRC, 'effective control' is displayed when the occupying force enforces its will by the presence of its troops.[233] Even before the events of August 2019, the unlawful integration of Jammu & Kashmir into the Indian Constitution, the further extension of 260 Articles to its territory, and the enforcement of Indian laws in the territory through Indian troops, all fulfil the third criteria for occupation.

It was in 2019 that the Presidential Issue of the Constitutional Order 272 was issued by India, through which Jammu & Kashmir was annexed. Article 35-A that protected native Kashmiris from displacement was annulled, and the people of Kashmir lost the status of 'permanent residents.' Moreover, abrogating Article 370 became easier once the President changed the 'Constituent Assembly' of Jammu & Kashmir to the 'Legislative Assembly.' The Indian government sidestepped all objections from the Indian Supreme Court[234] and the Jammu & Kashmir High Court, ensuring that Jammu & Kashmir comes directly under the rule of a governor appointed by the President of India. The

[233] Benvenisti, 53–54
[234] Bench of judges Adarsh Goel and R Nariman on a petition filed by Kumari Vijayalakshmi Jha (2018) News Report

separation of the two 'Union Territories' displays the degree to which Indian control was established, and the subsequent unlawful communications blackout further highlights India's role as an occupying power.

12.3 Demographic Changes

An occupying power does not have the authority to transfer civilians in or out of occupied territory under international law. This clarifies that shifting locals from the occupied territory outside of the region or allowing residency within the occupied area are both unlawful. The transfer of civilians by the occupant is prohibited under Article 49 of the Geneva Conventions because the transformation of an occupied territory undermines its sovereignty. *The changing of demographics could subdue the voices of the occupied population, and diminish their ability to exercise the right of self-determination.*[235]

When the population of Jammu & Kashmir was given special status through Article 35-A of the Indian Constitution, it restricted the permanent settler status to the natives alone and protected their demographic. However, the removal of this Article and the division of territory into 'Unions' indicates an active breach of Article 49 of the Geneva Conventions. *Up to 25,000 people have been given domicile certificates as citizenship rights to reside in Kashmir.*[236] Moreover, it was announced by the electoral officer of Indian-administered Kashmir that 2.5 million voters were to be added to the 7.6 million native voters.[237] This 30% increase in non-native voters will have

[235] "Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967," (2017), Doc.A/72/556
[236] '*Kashmir Muslims fear demographic shift as thousands get residency',* Al Jazeera, 28 June 2020.
[237] Daniyal Wali, 'India's Move to Bring Demographic Changes in the Disputed Kashmir Valley', CRSS

a far-reaching effect on a future plebiscite, quelling the occupied population's right to choose. There is an evident parallel between this action, and that carried out by Israel in allowing settlers within Palestine.

Presently, Kashmir remains the only Muslim majority area, since Ladakh has a Buddhist majority, and Jammu a Hindu majority. *It is apparent from the repealed Article 35-A that India is attempting to alter the demographics in hope to squash the possibility of a referendum.*

12.4 Compliance with the Law of Occupation

To comply with the law of occupation, the occupying powers have to abide by the 'conservationist' principle, and cannot alter the local legislation or administration of the occupied territory. Secondly, the subjugation of the occupied population is impermissible. Lastly, if an occupation is not intended to be temporary, and the occupied power attempts to play a role other than that of a temporary administrator, it too would be considered a breach of the law of occupation.

It is evident that India has not complied with the law of occupation in the first regard. By inculcating Kashmir within the Indian Dominion and enforcing its own constitution, it has altered the legislation present within Jammu & Kashmir. Moreover, by dividing Kashmir into 'Unions' and stripping it of its special status, India has altered the occupied territory fundamentally. Moreover, the enabling of settlements within Kashmir to alter the demographics of the region is contradictory to the compliance of the law of occupation.

It could be argued that the clause of 'necessity' was invoked by India to circumvent the 'conservationist' principle, similar to the alteration of Iraq's legislation during its occupation. The defence presented by India is that there is an alleged presence of 300 militants within Kashmir, of which General Dwivedi has accused 82 to be Pakistani.[238] In response, Pakistan has denied these claims as "unfounded, frivolous and baseless."[239] This back and forth between the two nations, and the claim of countering terrorism, has been India's justification for using the clause of 'necessity' to alter Kashmir's laws, divide it into 'Unions,' and remove its special status.

The subjugation of the occupied population is carried out through the multiple operations carried out continually within Jammu & Kashmir. Section 4 of the AFSPA 1990 has enabled personnel to use force in the case of self-defence, or even against those defying Indian legislation.[240] Moreover, the assembly of five or more persons too is prohibited, and can be used as a basis to violate the right to life of the occupied population.[241]

Violence against locals opposed to Indian rule is common. Operation Rakshak has been on-going since 1990, and uses the banner of counter-insurgency to deploy troops. In 2016, Operation Calm Down was launched following unrest within the region, and the Indian Army's actions resulted in 90 civilians being killed.[242] Schools, shops and roads were lost. There were allegations that troops used 'excessive force' against protestors as they fired bullets, CS gas, and metal pellets into the crowd.[243] Claims were made that over 500 individuals suffered pallet injuries in the eyes, and over

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[238] Fayaz Bukhari, *'Around 300 militants active in Indian Kashmir, Indian military official says'*, Reuters, Fayaz Bukhari
[239] *Ibid.*
[240] "Developments in the Indian State of Jammu & Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu & Kashmir and Gilgit-Baltistan,"OHCHR (2018)
[241] *Ibid.*
[242] Muhammad Ashraf, " *'Operation Calm Down' achieves the opposite'"*, The Citizen is Hopeful, 29th September 2016
[243] "Kashmir: India troops use 'excessive force,'' BBC, 13 July 2016

3000 were arrested under a law called 'Public Safety Act.'[244] Under this Act, India has enjoyed complete impunity, and has not required evidence to detain an alleged 'terrorist.' In fact, Chapter IV, Act 18 has enforced that under the Public Safety Act, detention cannot be modified or revoked unless the government of India decides to do so.[245] In Operation Sarp Vinash (Snake Destroyer), assertions were made by Indian officials that 63 terrorists were killed in the operation. However, there is no evidence that those who lost their lives were involved in terrorism, and all the information released is from the Indian army due to limited mobility allowed within the region.

Under these operations, there are reported cases of human rights violations which highlight the extreme subjugation of the occupied people. Evidence of cases of torture, use of indiscriminate weapons, and rape can be found. Methods such as drowning, pouring petrol into anuses, and amputating limbs of suspects before feeding them their own flesh have all been evidenced.[246] In 1996, a human rights lawyer, Jalil Andrabi, was allegedly shot with his eyes gouged out.[247] There are 143 documented cases of alleged sexual assault between 1989 and 2017,[248] and about 3000 people have sustained eye injuries due to pellets in the retina causing blindness.[249]

There is now evidence of India's intent to militarise the region further by creating local militias.[250] Not only does it seem contradictory and counter-productive to arm locals

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[244] *Ibid.*
[245] India: Act No. 6 of 1978, Jammu and Kashmir Public Safety Act, 1978
[246] M. Waheed, "India's crackdown in Kashmir: is this the world's first mass blinding?" , The Guardian, 2016; 'The Status Of Jammu & Kashmir Under International Law' RSIL, 2019
[247] *Ibid.*
[248] 'The Status Of Jammu & Kashmir Under International Law' RSIL, 2019
[249] "Injured baby refuels India Kashmir pellet gun debate," BBC, 2018
[250] *"India Is Arming Villagers in One of Earth's Most Militarized Places",* NY Times, 8 March 2023

in an area of such unrest, it is concerning that only Hindu groups are being armed. Earlier, less than 3 percent Muslims were involved in village defence committees, and now that number has been reduced to zero.[251]

Lastly, India's integration of Kashmir in its constitution, bifurcation of the region into 'Unions,' and unilateral removal of its special status, all highlight a lack of intent for the occupation to be temporary. While calls for a referendum have been made by Pakistan continually,[252] there is little evidence of India addressing these. Demilitarisation in the area has been rejected, and the role of India has been far from that of a mere temporary administrator. The law of occupation has been breached severely in this regard.

[251] *Ibid.*

[252] Asad Hashim, *"Pakistan PM: We would give Kashmiris 'right to independence'"*, Al Jazeera, 5 February 2021

13. Conclusion

In the period between the late eighteenth century to the present day, the foundation of the law of occupation was gradually set, and then developed. The principle of humanity and notions of self-determination inspired the development of doctrines like the Lieber Code and the Rousseau-Portalis doctrine, which were further refined by The Hague Regulations, and then the Fourth Geneva Convention. The 'conservationist' principle was to be implemented for the protection of the sovereignty of the occupied people, but the exception of 'necessity' has co-existed, rendering it penetrable.

This can be witnessed in the case of Iraq where the United States superseded the law of occupation through Security Council resolutions, and altered the legislation in alleged search for WMDs. In Palestine, Israel's ability to regulate legislation as an occupying power is absolute, and the Israeli Supreme Court has autonomy to dictate the doings in the occupied territory. Despite the establishment of accession treaties signed between the occupied territory and the occupying power being null, both Crimea and Kashmir are examples of occupations that took place through that channel. It is clear that the compliance with the law of occupation is limited, and begs the question: *is the law of occupation ineffective in holding occupying powers accountable?*

With the law of occupation catering to short-term occupations, there is a great need for oversight when it comes to modern-day prolonged occupations in which the occupying power passes laws continually under the guise of welfare for the occupied population. *The need for an oversight mechanism to determine when an occupier's interests are being upheld above the occupied population's is an essential element needed to cater to current realities.* With the aforementioned revision, the law of occupation can cater more effectively to present-day occupations.

Further, the widened parameters of the 'necessity' grounds under Article 64 of the Fourth Geneva Convention are likely to sustain the general rule on the occupant's legislative authority. *For this reason, more discourse of the law of occupation is required to clarify the conditions for 'necessity,' so as to disallow vague justifications that may act as loopholes to the 'conservationist' principle.* In essence, the legal regime of occupation is a social construct that is reliant on diverging social realities. While it has evolved tremendously, more discourse would refine it further, and a revision keeping in mind present political contexts would allow for more effective application of the law of occupation.

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