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ARTICLE 43 OF THE HAGUE REGULATIONS OF 1907 REVISITED: THE PAST AND THE FUTURE OF BELLIGERENT OCCUPATION IN INTERNATIONAL LAW

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Abstract

From the mid-eighteenth century, international law gradually shifted away from the right of conquest to a right of provisional and conservationist administration by a belligerent, of enemy territory under the effective control of its army. The legal regime governing this belligerent right of military occupation was formally codified by the 1899 and 1907 Hague Peace Conferences. However, even at the beginning of the twentieth century, strict adherence by occupying powers of the rules governing belligerent occupation was notoriously lacking, a situation which grew increasingly worse. This necessitated a revision of the Hague Regulations by the 1949 Geneva Convention IV, principally, to enhance the protection of the civilian population in occupied territories. Although the right of conquest was by now clearly unlawful, State practice regarding occupations was far from strict in conformity with the conservationist regime of the Hague Regulations which for some time appeared to have fallen into desuetude—that is, until the beginning of the twenty-first century with the United States/United Kingdom occupation of Iraq. However, the avowed nation-building and regime-change purposes of this occupation cast doubt on whether the Hague Regulations, in particular article 43, were recoverable in pristine form. This paper examines aspects of the ensuing debate from the perspective of the function of the law of belligerent occupation, clarifies conceptual and doctrinal misconceptions, and concludes that no alternative regime that will serve the function well has been put forth.

> Article 43 was a pact between [European] state elites promising reciprocal guarantees of political continuity, and thus, at least to a certain extent, rendering the decision to resort to arms less profound.[1]

The legal regime of belligerent occupation first adopted by the 1899 Hague Peace Conference[2] and subsequently by the second Peace Conference of 1907,[3] completed the

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[1] Eyal Benvenisti, *The International Law of Occupation, 1st ed.* (Princeton: Princeton University Press, 1993), 29.
[2] See Geoffrey Best, "Peace Conferences and the Century of Total War: The 1899 Hague Conference and What Came After," *International Affairs* 75 (1999): 619-634; James L. Tryon, "The Hague Peace Conferences," *Yale LJ* 20 (1911): 470-485. See further, note 3 below.
[3] James Brown Scott, *The Hague Peace Conferences of 1899 and 1907* (Baltimore: John Hopkins, 1909), James Brown Scott, "The Work of the Second Hague Peace Conferences," *Am. J. Int'l L.* 2 (1908): 1-28; Joseph H.

codification of this branch of international law that began two decades earlier with the Brussels Declaration.[4] Almost immediately, and certainly before the outbreak of the First World War, the Hague Convention regime governing the exercise of military authority over hostile territory was generally accepted as declaratory of customary international law.[5] At the core of this regime is article 43 of the Regulations annexed to the Hague Convention IV concerning the Laws and Customs of War on Land,[6] which prescribes limits for the occupant or Occupying Power,[7] 'a mini constitution' of some sort.[8] During that war and the period immediately following, State practice was generally consistent with the Convention regime. However, from the 1930s through the Second World War, State practice widely diverged from the letter and spirit of article 43 and this continued in the post-war period in spite of the additional safeguards introduced by the Fourth Geneva Convention,[9] such that by the close of the twentieth century the article 43 regime had apparently fallen into desuetude. 'A topic of

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Choate, *The Two Hague Conferences* (Princeton: Princeton University Press, 1913); A. Pearce Higgins, *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War* (Cambridge: Cambridge University Press, 1909). The documents of the two conferences are collected in James Brown Scott, ed., *The Reports to the Hague Conferences of 1899 and 1907* (Oxford: Clarendon Press, 1916).

[4] Project of an International Declaration concerning the Laws and Customs of War (Brussels, 27 August 1874), a revision of which was one of the declared objectives of the 1899 Hague Peace Conference. For the official French text, see 65 British & Foreign State Papers 1005. An English translation is reproduced in Higgins, *Hague Peace Conferences,* 273-280, Dietrich Schindler & Jiri Toman, eds., *The Laws of Armed Conflict* (Dordrecht: Martinus Nijhoff, 1988), 27-34.

[5] This status was put beyond doubt by the Judgment of the International Military Tribunal of Nuremburg, September 30 and October 1, 1946, 65, reprinted in *Am. J. Int'l Law* 41 (1947), 172. See *Legality of the Threat of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, 257, para. 79 (along with Geneva Convention IV, they 'constitute 'intransgressible principles of international customary law.'); *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, para. 89.

[6] 36 Stat. 2277, 1 U.S.T.I.A. 631 (English translation); 100 British & Foreign State Papers 338 (official French text). Hans Kelsen called article 43 'the main principle' of the Hague Regulations belligerent occupation regime. Hans Kelsen, "The International Legal Status of Germany to be Established Immediately upon Termination of the War," *Am. J. Int'l Law* 38 (1944):689.

[7] 'Occupant,' 'Occupier,' and 'Occupying Power' are terms used in the literature for the forces (or State) exercising belligerent occupation over foreign territory. 'Occupant'/'occupying State' are used in the Hague Regulations while Geneva Convention IV uses 'Occupying Power' (which is in tune with the preferred term 'Power' in the Geneva Conventions and Protocols).

[8] Benvenisti, *Law of Occupation,* 9. The author says article 43's 'concise statement is the gist of the law of occupation,' 7.

[9] Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), August 12, 1949, 75 U.N.T.S. 287 (entered into force October 21, 1950).

the past…followed by a very small number of experts' is how a leading expert put it.[10] With the exception of Israel's occupation of Arab territories (other than East Jerusalem), there was almost no State practice. At any rate, no country was willing to wear the odious label of occupant, which on first appearance seems puzzling, as 'international law [is] far from stigmatizing belligerent occupation with illegality.'[11]

In the new century, just past the centenary of the extant Hague Convention, the United States/United Kingdom's acceptance of the application of the legal regime to their occupation of Iraq, as well the United Nations (UN) Security Council's explicit declaration of their status as occupants,[12] revived the article 43 legal regime[13] and its scholarship,[14] and it was even

[10] Philip Spoerri, "The Law of Occupation" in *The Oxford Handbook of the International Law of Armed Conflict*, eds. Andrew Clapham & Paola Gaeta (Oxford: Oxford University Press, 2014), 182-205.

[11] Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, 2009), 2. 'After WWII – possibly due to the odium attached to belligerent occupation by the appalling Nazi and Japanese record – there has been a considerable reluctance by States to admit that they were Occupying Powers. Excuses have been put forward, designed to show that a coercive imposition of effective control on a cross-border territory falls short of belligerent occupation.' Ibid. 10.

[12] S.C. Res. 1483 para. 5, U.N. Doc. S/RES/1483 (May 22, 2003).

[13] 'The occupation of Iraq required international lawyers to retrieve an old doctrine that during the last half century almost reached the stage of desuetude.' Eyal Benvenisti, "The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective," *IDF L.R.* 1 (2003): 19, 38; '[T]he Resolution rescued the law of belligerent occupation from oblivion…. [I]t resurrected the law of belligerent occupation from its deep slumber….' Jean L. Cohen, "The Role of International Law in Post-Conflict Constitution-Making: Towards a *Jus Post Bellum* for "Interim Occupation,"' *N.Y.L. Sch. L. Rev.* 51 (2006-2007): 497, 511. Bhuta credits the occupation of Iraq with 'revivifying a category of international law which had fallen from use in the language of state practice. …The Security Council resolution's declaration of the applicability of the law of occupation to the situation of Iraq returned the question of the content of *occupatio bellica* to the centre of international politics.' Nehal Bhuta, "The Antinomies of Transformative Occupation," *Eur. J. Int'l L*. 16 (2005): 721, 735.

[14] The literature generated by the development include the following that consider the international law contexts, mostly the law of occupation: Andrew George, "We had to Destroy the Country to Save It: On the Use of Partition to Restore Public Order during Occupation," *Va. J. Int'l L.* 48 (2007): 187-210; Adam Roberts, "Transformative Military Occupation: Applying the Laws of War and Human Rights," *Am. J. Int'l L*. 100 (2006):580-622; James Thuo Gathii, "Foreign and other Economic Rights upon Conquest and under Occupation: Iraq in Comparative and Historical Context," *U. Pa. J. Int'l Econ. L.* (2004): 491-556; Tristan Ferraro, ed., *Occupation and other Forms of Administration of Foreign Territory* (Geneva: ICRC, 2012); Jean L. Cohen, "The Role of International Law in Post-Conflict Constitution-Making: Towards a *Jus Post Bellum* for "Interim Occupations,"' *N.Y.L. Sch. L. Rev.* 51 (2006/2007): 498-532; John Yoo, "Iraq Reconstruction and the Law of Occupation," *U.C. Davis J. Int'l L. & Pol'y* 11(2004): 7-22; Marco Sassoli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers,"*Eur. J. Int'l L.* 16 (2005): 661-694; Kristen E. Boon, "Obligations of the New Occupier: The Contours of Jus Post Bellum," *Loy. L.A. Int'l & Comp. L. Rev.*, 31(2009): 57-84; Hilary Charlesworth, "Law after War," *Melb. J. Int'l L*, 8 (2007): 233-247; Melisa Patterson, "Who's Got the Title? or, The Remnants of Debellatio in Post-Invasion Iraq," *Harv. Int'l L.J.* 47 (2006): 467-488; Hamada Zahawi, "Redefining the Laws of Occupation in the Wake of Operation Iraqi Freedom," *Cal. L. Rev.*, 95 (2007): 2295-2352; Ebrahim Afsah, "Limit and Limitations of Power: The Continued Relevance of Occupation Law," *German L.J.* 7 (2006): 563-590; Grant T. Harris, "The Era of Multilateral Occupation," *Berkeley J. Int'l Law* 24 (2006): 1-78; Bhuta, "Transformative Occupation"; Susan Power, "The 2003-2004

suggested that, the UN 'mandate' 'will help relieve the doctrine on "occupation" of its derogatory connotation.'[15] However, the practice of the Iraq Occupation may have also ironically confirmed the demise of the classical legal regime. This paper discusses the evolution and contemporary significance of article 43 and defends it against its detractors, in particular the claims that it has lost its relevance in contemporary armed conflict or at least, nation-building oriented interventions; and that the implementation of far-reaching social and political objectives by occupants is lawful (or should be legitimized)- the so-called transformative occupation. The discussion is typically framed as a choice between the Scylla of conservationist virtue and the Charybdis of an unrestrained occupying power in governance of the occupied country. It is mistaken to assume that article 43 was necessarily intended to place an occupant in a straitjacket. Hence article 43 in contemporary critiques is mostly a straw man. While the military and political context at the close of the nineteenth century is without doubt far removed from today's world, even the original text in the Brussels Declaration anticipated that within the conservationist framework of the legal regime transformative measures may be justified or even necessary.

The following discussion is largely confined to article 43, which though central to the legal regime, is one of fifteen articles in the 1907 Hague Convention and several more in Geneva Convention IV comprising the legal regime.[16] A brief introduction to the evolution of belligerent occupation is provided in Part I. The critical factual threshold for application of

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Occupation of Iraq: Between Social Transformation and Transformative Belligerent Occupation," *J. Conflict & Sec. L.*, 19 (2014): 341-380; Conor McCarthy, "The Paradox of the International Military Occupation: Sovereignty and the Reformation of Iraq," *J. Conflict & Sec. L.*, 10 (2005): 43-74; Mahmoud Hmoud, "The Use of Force Against Iraq: Occupation and Security Council Resolution 1483," *Cornell Int'l L.J.*, 36 (2004): 443; David J. Scheffer, "Beyond Occupation Law," *Am. J. Int'l L.*, 97 (2003): 842-860; Michael Ottolenghi, "The Stars and Stripes in Al-Fardos Square: The Implications for the International Law of Belligerent Occupation," *Fordham L. Rev.*, 72 (2004): 2177; Peter G. Danchin, "International Law, Human Rights and the Transformative Occupation of Iraq," in *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations*, eds. Brett Bowden, Hilary Charlesworth & Jeremy Farrall, (Cambridge: Cambridge University Press, 2009), 64-89; Gregory H. Fox, "The Occupation of Iraq," *Geo. J. Int'l L.*, 36 (2005): 195; Gregory H. Fox, *Humanitarian Occupation* (New York: Cambridge University Press, 2008), 259-272.

[15] Benvenisti, *Law of Occupation*, 38.

[16] Hague Regulations, arts. 42-56; Geneva Convention IV, arts. 27-34, 47-78; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 (entered into force December 7, 1978), arts. 3-4.

the occupation law regime is explained in the next Part. The 'classical' legal regime as defined by article 43 is explored in Part III. The initial life of article 43 ended in 1949 with the Fourth Geneva Convention, in particular article 64. Part IV considers the complementary significance of the Geneva Convention IV for the Hague article 43. Critics of the Hague Regulations all accept the enduring relevance of the purpose of the Convention, protection of the civilian population in occupied territories, and there is as well a general clarity on the effect of the Convention on the Regulations. Part V discusses the most significant challenge to the extant legal framework- 'transformative occupation.' Its pedigree is considered in light of precedents of transformative occupation, especially post-WWII. Next, moving from the past to the future of belligerent occupation, Part VI concludes this paper with an assessment of radical critiques of article 43. Although their objectives are by no means uniform, the demand for a separate 'nation-building'/'regime change' legal framework for occupation confuses *jus ad bellum* for *jus in bello*, and at any rate fails to identify the specific legal regime that should govern 'routine' military occupation of enemy territory in place of article 43. On the other hand, the call for that regime to be collapsed into a *jus post bellum* misses the point that belligerent occupation is a chapter of the law of war, not peace. Its most distinctive feature is that it is an interim arrangement while belligerency lasts. *Belligerent* occupation is not the only form of military occupation of foreign territory. The paper therefore begins with a conceptual clarification.

I. BELLIGERENT OCCUPATION IN INTERNATIONAL LAW

'Rarely has the enforcement of occupation law been severely tested'[17] than by the United States/United Kingdom occupation of Iraq which lasted from April 16, 2003[18] to June 28,

[17] Scheffer, "Beyond Occupation Law," 856.

[18] This is the date of the Coalition military commander, General Tommy Franks' 'Freedom Message to the Iraqi People,' in which he announced the creation of the occupation government, the Coalition Provisional Authority (CPA). However, before this formal proclamation of occupation, by the terms of art. 42 of the Hague Regulations, the United States and the United Kingdom respectively were technically already progressively in occupation of Iraq after March 20, 2003 as ground operations took territory from Iraqi forces. As to the legal

2014.[19] Belligerent occupation (*occupatio bellica*) is military occupation of foreign territory associated with armed conflict,[20] which usually occurs during hostilities (*flagrante bello),* or, during armistice (*nondum cessante bello).* It may also be the case that an occupation actually triggers armed conflict.[21] However, the term excludes *ante bellum* or *post bellum* occupation and the occupation of foreign territory by consent **(*occupation bellica*)**, such as under a peace treaty. Hyde is perhaps the first writer to use the term 'belligerent occupation' in English language international law literature.[22] Maine,[23] Wheaton,[24] Halleck,[25] Hall,[26] Spaight,[27] Westlake[28] and apparently everyone else[29] before Hyde used the more general term 'military

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regime's distinction between the invasion and the occupation phases, see Part II of this paper. Australia and Poland participated in the invasion; twenty-eight other countries provided troops while Japan and others provided non-military assistance to support the occupation. However, it is the United States and the United Kingdom that wrote the President of the Security Council (S/2003/538) on 8 May 2003 undertaking to abide by applicable international law. In fact, UNSC Res. 1483 (n 12) did not deem all countries providing support during the occupation occupying powers. By the terms of the resolution, it would seem that either only the United States and the United Kingdom were deemed to be the occupants by the Security Council, or all the States under the unified military command were, in which case the United States and the United Kingdom were still the principal occupants.

[19] As the continued presence of Coalition forces (renamed the 'Multinational Force Iraq') in Iraq after June 28, 2005, when the CPA relinquished power to the Interim Government of Iraq, it was by the 'consent' of the responsible Iraqi authorities. Thus, it could no longer be considered belligerent occupation, even though some may still consider it occupation. See Adam Roberts, "The End of Occupation: Iraq 2004," *Int'l & Comp. L.Q.* 54 (2005) 27, 43-44. For UN validation of the arrangement, see S.C. Res. 1546, paras. 9-12, UN Doc. S/RES/1546 (June 8 2004). For a background to the occupation, see Nora Bensahel, et al, *After Saddam: Pre-war Planning and the Occupation of Iraq* (Rand Corp, 2008) [study sponsored by the U.S. Army]; Michael R. Gordon & Bernard E. Trainor, *Cobra II: The Inside Story of the Invasion and Occupation of Iraq* (Knopf Doubleday, 2006); Larry Diamond, *Squandered Victory: The American Occupation and the Bungled Effort to Bring Democracy to Iraq* (Macmillan, 2007)

[20] Dinstein, *Belligerent Occupation*, 31-34.

[21] '[B]elligerent occupation may constitute the sole manifestation of a state of war between State *A* and State *B*. Once a territory belonging to State *A* is coercively seized by State *B*, there is automatically a state of war in the material sense between these two Parties (even if State *A* remains completely passive and offers no resistance to the occupation). …It ensues that, just as belligerent occupation may be fomented by war, war can also be ignited by belligerent occupation." *Ibid*. 32.

[22] Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, Vol. 2, 1st ed. (Boston: Little, Brown and Co., 1922), 361. He gave credit for the term to J.W. Conner. Ibid. 361n. Cf. Oppenheim, who dates the first usage to the 1844 treatise of the German publicist Wilhelm Heffter. See L. Oppenheim, *International Law: A Treatise, Volume 2: War, Peace and Neutrality* (ed. H. Lauterpacht, 5th ed., 1935), 344, cited in Bhuta, "Transformative Occupation," 725. See also, Doris Graber, *The Development of the Law of Belligerent Occupation 1863-1914*: *A Historical Survey* (Columbia University Press, 1949), 18.

[23] Henry Sumner Maine, *International Law* (London: John Murray, 1890) Lect. X.

[24] Coleman Phillipson, *Wheaton's Elements of International Law, 5th English ed.* (1916) 519-544.

[25] H.W. Halleck, *Elements of International and Laws of War* (Philadelphia: Lippincott, 1874) Ch. XXXII; Sherston Baker, *Halleck's International Law*, Vol. 2, *3rd ed.* (1893) Ch. XXXIII.

[26] William Edward Hall, *A Treatise on International Law, 3rd ed.* (1884) Pt. III, Ch. IV.

[27] J.M. Spaight, *War Rights on Land* (London: MacMillan, 1911) Ch. XI.

[28] John Westlake, *International Law: Part II. War* (Cambridge University Press, 1907) Chap. IV, Sect. III.

occupation.' Hyde correctly observed, 'occupation by a military force after a treaty of peace is essentially a military occupation, yet one differing vitally from that existing while war ensures.'[30]

Hyde defines belligerent occupation as 'that stage of military operations which is instituted by an invading force in any part of an enemy's territory, when that force has overcome unsuccessful resistance and established its own military authority therein.'[31] Although the term is not used in the Hague Regulations, the applicable provisions are placed under the rubric 'Military Authority over Hostile Territory,'[32] suggesting the essentially belligerent character of this form of military occupation. Eyal Benvenisti has however suggested that the initial association of occupation with war is no longer the case, as 'the history of the twentieth century has shown that occupation is not necessarily the outcome of actual fighting.'[33] This, with respect, begs the question of whether the same legal regime, specifically Hague Convention IV, applies to all forms of military occupation. That is clearly not the case. Hence it remains useful to separately characterize occupation associated with armed conflict. Belligerent occupation, as Colby put it, 'is a belligerent act, maintained by belligerent methods and for belligerent purpose,…an incident of war [and] a means of carrying on war.'[34] It is worth remembering that common article 2 of the Geneva

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[29] See, e.g. Marshall CJ., *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828). Cf. Thomas Erskine Holland, *The Laws of War on Land* (Oxford: Clarendon, 1908) Sect. IX, whose annotation of the Hague Regulations avoids the term military occupation altogether.

[30] Hyde, *International Law as Interpreted*, 361-62. For a taxonomy of 'military occupation', see Adam Roberts, "What Is a Military Occupation," *Brit. Y.B. Int'l L.* , (1984), 249.

[31] Hyde, *International Law as Interpreted*, 361. The definition, however, simply identifies the state of belligerent occupation. As a legal regime, it is defined as one that regulates the relationship between the occupying power and the occupied state and its inhabitants. See Hans-Peter Gaser, 'Protection of the Civilian Population' in *The Handbook of International Humanitarian Law, 2nd ed., ed.* Dieter Fleck, (Oxford University Press, 2008) 271.

[32] Art. 42 states, 'Territory is considered occupied when it is actually placed under the authority of the *hostile* army.'

[33] Benvenisti, *Law of Occupation*, 3. See also, e.g., McCarty, "Paradox of Military Occupation," 44.

[34] Elbridge Colby, "Occupation under the Laws of War I," *Colum. L. Rev.*, 25 (1925): 904, 910, 915. '[T]here is an inextricable tie between [belligerent occupation] and inter-State war (*bellum*)' Dinstein, *Belligerent Occupation*, 31. As Kelsen noted, belligerent occupation 'presupposes a state of war exists in the relationship between the occupant state and the state whose territory is under belligerent occupation.' Hans Kelsen, "The

Conventions of 1949 defines armed conflict as encompassing partial or total occupation of territory even if it meets no armed resistance. Under the Hague Regulations, such territory will also be considered occupied because it is 'under the authority of the hostile army.'

It is hardly necessary to look earlier than the time of Vattel[35] for the evolution of belligerent occupation as a legal regime.[36] By the nineteenth century, this regime had become sufficiently well-defined that by the close of that century it had become codified by treaty, crowning a process already begun with national[37] and private[38] codification. The essential significance of the emergent regime is a curtailed right of conquest and a recognition of the occupant's right to temporarily administer the territory for the duration of the occupation. Even by 1890 Henry Maine was able to observe that 'it is now not easy to find territory held by the rights arising from simple conquest.'[39] Yet, '[t]his refusal of sovereignty to an

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Legal Status of Germany According to the Declaration of Berlin," *Am. J. Int'l L.*, 39 (1945): 518. Michael Bothe is also categorical that, 'Belligerent occupation is as necessary an ingredient of armed conflict as is fighting.'

> Therefore, the balance of interest between an occupying power and a partly or wholly occupied State is a traditional issue of the law of armed conflict as it has developed since the legal civilization of war in the 18th century. It is in this context that the law of belligerent occupation has developed as a specific area within the law of armed conflict. …The occupation that the authors of the Hague Regulations had in mind develops where there is an armed conflict: the forces of one party advance and drive the forces of the other party out of parts of their territory.

Michael Bothe, "'Effective Control': A Situation Triggering the Application of the Law of Belligerent Occupation," in Ferraro, *Administration of Foreign Territory*, 36.

[35] Vattel's main contribution was his statement affirming the provisional character of territorial conquest. Emer de Vattel, *The Laws of Nations* [1758] (Indianapolis: Liberty Fund, 2008) Bk. III, §197 ('Immovable possessions, lands, towns, provinces, etc. become property of the enemy who makes himself master of them: but it is only by the treaty of peace, or the entire submission and extinction of the state to which those towns and provinces belonged, that the acquisition is completed, and the property become stable and perfect.')

[36] For the history, see Bhuta, "Transformative Occupation," 722-733 (stating that, 'no characterization of "belligerent occupation" as a distinct legal category emerges until the end of the Napoleonic Wars and…the Congress of Vienna in 1815.' Ibid. 725); Eyal Benvenisti, "The Origins of the Concept of Belligerent Occupation," *Law and History Review*, 26 (2008): 621. Literature provides convenient milestones of the evolution of the concept. For example, Robert Phillimore, *Commentaries upon International Law* Vol. III (Philadelphia: Johnson & Co., 1857), on war and neutrality, has nothing on the subject. So also, Henry Wheaton, *Elements of International Law* (ed. William Lawrence, 2nd annotated ed., 1864), published before the Brussels project, had no section on occupation in spite of four chapters and nearly 300 pages covering the law of war. Yet, Halleck, *International Law*, though published in 1874 but completed in May 1866 going by the date of the preface, included a chapter on military occupation).

[37] 'Instructions for the Government of Armies of the United States in the Field' (prepared by Francis Lieber), promulgated as General Orders No. 100 by President Lincoln, 24 April 1863, reproduced in Schindler & Toman, *Laws of Armed Conflict*, 4-23.

[38] 'Oxford Manual on the Laws of War on Land,' reproduced in Schindler & Toman, *Laws of Armed Conflict*, 37-48 (arts. 42-60 related to occupied territory).

[39] Maine, *International Law*, 178.

occupant is a notable victory,' Spaight noted, 'won with difficulty and but yesterday, for the principles of legalism and nationalism combined over the rule of might, and it is strongly supported by considerations of humanity and of general convenience.'[40] Occupation replaced the right of conquest for the most part, although, as we shall see in Part V, some elements of the latter survived. Gains and losses in the battle field awaited confirmation by a peace treaty between the belligerents. In effect, 'the Hague Regulations think of an occupation [as] a phase of an as yet undecided war.'[41]

The 1874 Brussels Conference made a major advance by agreeing on 'a project of an International Declaration concerning the Laws and Customs of War,'[42] applicable to land warfare. Although never ratified, it was assigned to the Second Commission on the Laws and Customs of War on Land of the 1899 Hague Peace Conference as the basic text for drawing up a convention on the subject.[43] Articles 1-8 of the Brussels Declaration concerning belligerent occupation became, with some modifications, articles 42-56[44] of the regulations annexed to the Convention on the Laws and Customs of War 1899.[45] The second Hague Peace Conference in 1907 reproduced these provisions, again with modifications, in the extant Hague Convention IV of 1907.

The following table captures the evolution of the text of article 43 (including the authoritative French text of the 1907 version).

[40] Spaight , *War Rights on Land*, 322.
[41] John H.E. Fried, "Transfer of Civilian Manpower from Occupied Territory," *Am. J. Int'l L.* ,40 (1946), 303, 327.
[42] See note 4.
[43] Scott, *Reports to the Hague Conferences*, 137.
[44] Arts 49-52 replaced Brussels arts. 36-39. See *ibid*. 149-154.
[45] See Scott, *Reports to the Hague Conferences*.

1874 (Brussels)	**1899 Hague**	**1907 Hague**
Article 2 The authority of the legitimate Power being suspended and having in fact passed into the hands of the occupants, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety. Article 3 With this object he will maintain the l**a**ws which were in force in the count**r**y in time of pe**a**ce, and will o**n**ly modify, suspend or repl**a**ce them by others if necessity obliges him to do so.	Article 43 The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.	Article 43 The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. [*L'autorité du pouvoir légal ayant passé de fait entre les mains l'occupant, celui-ci prendra toutes les measures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigeur dans le pays.*]

The Hague Regulations on belligerent occupation were updated by the Geneva Convention IV relative to the Protection of Civilian Persons in Time of War,[46] making the legal regulation of belligerent occupation comprehensive, with enhanced protection of the civilian population. The experience of brutal abuse of the civilian population under occupation during the World War II and the period immediately before, exposed a major inadequacy of the Hague Regulations which mostly protected the interest of the displaced sovereign and the security of civilian property.[47] While continuing to maintain that an occupying power does not by the fact of occupation acquire sovereign title over the territory,

[46] See note 9, arts. 27-34, 47-78.

[47] There was instant general pessimism over the efficacy of the protection of civilians in the Hague Regulations. Writing before World War I, Spaight, for example, felt art. XLVI ('Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated') was 'dead from the waist down. …So, today, the provisions of Article XLVI are rather an ideal, a theoretical standard of conduct, than an actual living rule to which the practice of war conforms.' Spaight, *War Rights on Land*, 374. The imperative to improve the protection civilians under occupation was also because occupations are increasingly characterized by tension between the occupying power and the civilian population.

the emphasis of the legal regime thus shifted from preserving the interests of the displaced ruler to administering the occupied territory for the benefit of the local population.[48] The Hague Regulations were effectively given a new lease of life, and 'remain the keystone of the law of belligerent occupation.'[49] The revision gave the legal regime significantly more mileage. 'After the entry into force of the 1949 Geneva Conventions,' wrote Roberts, 'it became doubtful whether a claim could ever again be made that an occupation fell outside the framework of the laws of war, or would not be subject to certain conservationist provisions.'[50] The specific effect of this revision on the Hague Article 43 regime is discussed in Part IV below.

The legal regime of belligerent occupation was thus well-established in conventional and customary international law long before the Iraq Occupation, and it was this regime that was referred to in Security Council Resolution 1483's admonition that, the occupying powers should 'comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.'[51] The challenge, however, was whether the avowed transformative enterprise of the powers was reconcilable with the strictures of the legal regime. An associated difficulty is that belligerent occupation 'is frequently misconceived or misunderstood, to a degree that shrouds it in many a myth.'[52] Scholars are divided on whether the occupation legal regime, in particular art. 43 of the Hague Regulations, was applicable to this occupation. Variety of reasons are given for inapplicability, including the doctrine of *debellatio* or subjugation, which classical

[48] Benvenisti, *Law of Occupation*, 105-6.
[49] Dinstein, *Belligerent Occupation*, 6. Article 43 of the Hague Regulations 'does not become in any way less valid because of the existence of the new Convention, which amplifies it so far as the question of the protection of civilians is concerned.' Jean S. Pictet, ed., *Commentary on Geneva Convention Relative to the Protection of Civilians in Time of Wa*r (Geneva: ICRC, 1958) 273-4.
[50] Roberts, "Transformative Military Occupation," 603.
[51] See also S.C. Res. 1472, U.N. SCOR, 58th Sess., 4732d mtg. 1, U.N. Doc. S/RES/1472 (2003) (requesting all parties concerned to strictly abide by their obligations under international law, in particular the Geneva Conventions and the Hague Regulations.').
[52] Dinstein, *Belligerent Occupation*, xiii.

international law considered as pre-empting occupation;[53] the supposed existence of a discrete Post-World War II alternative legal regime of transformative occupation; or simply that the Hague occupation regime is outdated and is especially unsuited for nation-building oriented and multilateral occupation.[54] Those who insist on the applicability of the established occupation regime are equally divided as to whether the 'classical' regime unqualifiedly remains law,[55] or is not qualified by human rights law,[56] or whether the UN Security Council may modify the regime at will by mandating occupation regimes outside traditional law.[57] This traditional regime is explained in Parts III and IV followed by an assessment of possible legal justifications of an alternative regime in Part V. These discussions, however, must abide a brief exploration of the outer boundaries of the occupation regime in the following Part.

II. TRIGGERING THE ARTICLE 43 REGIME: *RATIONE MATERIAE* AND *RATIONE TEMPORIS* OF THE LAW OF BELLIGERENT OCCUPATION

'[T]he question as to whether an occupation is established or not,' Philip Spoerri has noted, 'is central for the application of occupation law and must be answered before any substantive questions can be addressed. Hence, this question is of fundamental importance.'[58] Occupation results where the forces of one State cross the boundary of another State and forcibly seize control of a part or the whole of the territory of that other State, or where a State in control of a part of the territory of another with its consent retains control adverse to the lawful authorities of the affected State. It is immaterial whether possession is acquired or retained by

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[53] Patterson , "The Remnants of Deballatio."

[54] See Scheffer, "Beyond Occupation Law"; Zahawi, "Laws of Occupation"; Harris, "Era of Multilateral Occupation." This was already suggested before the Iraq Occupation. See, Davis P. Goodman, "The Need for Fundamental Change in the Law of Belligerent Occupation," *Stan. L. Rev*, 37 (1985): 1573.

[55] See Power, "Transformative Belligerent Occupation"; and **Fox, "The Occupation of Iraq."**

[56] Roberts "Transformative Military Occupation,".

[57] See Sassoli, "Occupying Powers," 680-82, McCarthy, "Paradox of Military Occupation," 68, Afsah, "Relevance of Occupation Law," 567, and Roberts "Transformative Military Occupation,"622.

[58] Spoerri "The Law of Occupation," 187. See Ferraro, *Administration of Foreign Territory*, 17-26, Michael Siegrist, *The Functional Beginning of Belligerent Occupation* (Geneva: Graduate Institute, 2011); Tristan Ferraro, "Determining the Beginning and End of an Occupation under International Humanitarian Law," *Int'l Rev. Red Cross*, 94 (2012): 133.

overwhelming any resistance, or if it meets no resistance at all. Adverse possession is the test of occupation, and, as Hall put it, is 'the foundation of special belligerent rights.'[59]

'It is said,' Hyde wrote, 'that an invasion is not necessarily occupation, although preceding it and frequently coinciding with it.'[60] Invasion translates to occupation once possession is established. That, 'possession is the true test of occupation' is as true today as it was in the time of Maine.[61] However, it is a mistake to suppose that the invasion phase is neatly marked off from the occupation phase.

> Whether an invasion has developed into an occupation is a question of fact. The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied.[62]

Article 42 of the Hague Regulations is clear on the point as well. It reads:

> Territory is considered occupied when it is actually placed under the authority of the hostile army [*Un territoire est considéré comme occupé lorsqu'il se trouve placé de fait sous l'autorité de l'armée ennemie*].
>
> The occupation extends only to the territory where such authority has been established and can be exercised.

Although not the actual language of the article, it is generally accepted that what is required to establish as well as maintain occupation is effective control.[63] The second paragraph makes it clear that the territorial extent of an occupation is the space over which effective control is maintained. Occupation is therefore co-extensive with the force required to exercise effective control over a given territory. The rationale for this was provided long ago

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[59] Hall, *Treatise on International Law*, 423.
[60] *Ibid.*
[61] Maine, *International Law*, 179. In the quaint language of Spaight, 'If invasion is trespass which is constantly accompanied by assault and battery, occupation is trespass *plus* undisputed possession. Invasion ripens into occupation when the national troops have been completely ousted from the invaded territory and the enemy has acquired control over it.' Spaight, *War Rights on Land*, 321 [emphasis original]. See also, Day, J. in *MacLeod v. United States*, 229 U.S. 416, 33 S.C. 955.
[62] *Hostages* case (Wilhelm List & Ors) VIII Law Rep. War Cr. Tr. 34, 55-56 (American Military Tribunal, Nuremberg).
[63] 'Effective control is the *conditio sine qua non* of belligerent occupation.' Dinstein, *Belligerent Occupation*, 43.

by Hall.[64] Accordingly, occupation cannot be presumptive[65]- justified simply by a mere proclamation ('paper' occupation), or even by control of the airspace over the territory[66] or the adjacent maritime territory.[67]

It was clear from the beginning that the Article 42 benchmark for occupation requires that the occupying power must have successfully established its authority (control) over the affected territory, displacing the legitimate government, and must also have the *ability* to exercise that authority.[68] The actual exercise of the authority is, however, not a relevant consideration, although an occupying power cannot avoid the legal obligations automatically accruing to that status by choosing not to exercise the authority. Given the century-old clarity of Article 42, it is a little surprisingly that the International Court of Justice muddled up the test in determining whether Ugandan forces were in occupation of certain areas of the Democratic Republic of Congo (DRC) where they were present. According to the Court,

> In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an "occupying Power" in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and *exercised* by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that

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64 Rights which are founded upon mere force reach their natural limit at the point where force ceases to be efficient. They disappear with it; they reappear with it; and in the interval they are non-existent. If moreover neither the legitimate sovereign of a territory nor an invader hold a territory as against the other by the actual presence of force, so that in this respect they are equal, the presumption must be that the authority of the legitimate owner continues to the exclusion of such rights as the invader acquires by force. As a matter of fact, except in a few cases which stand aside from the common instances of extension of the right of occupation over a district, of which part only has been touched by the occupying troops, the enforcement of those rights through a time when no troops are with such distance as to exercise actual control, and still more the employment of inadequate forces, constitute a system of terrorism, grounded upon no principle, and only capable of being maintained because an occupying army does not scruple to threaten and to inflict penalties which no government can impose upon its own subjects.
Hall, *Treatise on International Law*, 444.

65 Spaight, *War Rights on Land*, 327.

66 Dinstein, *Belligerent Occupation*, 48.

67 Ibid., 47 (citing art. 88 of the 1913 Oxford Manual of Naval War).

68 Spaight stated it correctly: 'As defined in Article XLII, two distinct ideas underlie the juristic meaning of occupation: (a) the invader must have established his authority; and (b) he must be in a position to enforce it.' Spaight , *War Rights on Land*, 328. Writing a century later, Dinstein is unable to improve on it. See Dinstein, *Belligerent Occupation*, 42.

> they had substituted their own authority for that of the Congolese Government. In that event, any justification given by Uganda for its occupation would be of no relevance; nor would it be relevant whether or not Uganda had established a structured military administration of the territory occupied.[69]

On first appearance it would seem the Court narrowed the category of occupation to only where the foreign forces actually exercise authority over the territory, not merely that they successfully established their authority therein. That would constitute a significant revision of how Article 42 has been understood for a hundred years. On the other hand, this may have been a slip, as the concluding phase actually reaffirms the traditional view. Nevertheless, the passage was found troubling by experts. The International Committee of the Red Cross (ICRC) Expert Meeting on Occupation concluded that,

> The experts unanimously expressed their disagreement with the test proposed by the ICJ, stating that such an interpretation would be too narrow and would not reflect *lex lata*. For the experts, the ICJ's judgment, by emphasizing actual over potential control, represented a significant change of course with regard to the interpretation and application of the test laid down in Article 42 of the Hague Regulations. The experts asserted that while the ICJ's focus on actual exercise of authority could introduce more certainty as to whether an area was occupied or not, it would also facilitate the creation of more legal black holes that would remain beyond the scope of responsibility of any authority, resulting ultimately in a protection gap for the individuals trapped in such areas. Therefore, most of the experts supported a test based on the *ability* of enemy foreign forces to exert authority over a specific area.[70]

It does not necessarily follow that the separation of the invasion and occupation phases totally excludes the invasion phase from the legal regime governing occupations. The highly influential ICRC *Commentaries* states that the word 'occupation' as used in article 6 of the Fourth Geneva Convention of 1949 has a wider application than it has in article 42 of the Hague Regulations. As a result, it is argued, the protection of civilians under the former does not depend on the existence of occupation meeting the requirements of the latter. Instead, the Geneva Convention applies once an invading force makes contact with civilians

[69] *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p.168, 230 para. 173 [emphasis supplied].
[70] Ferraro, *Administration of Foreign Territory*, 19 [emphasis in original].

in the territory. According to this so-called 'Pictet Theory' (after the general editor of the *Commentaries*),

> There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Convention in its dealings with the civilians it meets. When it withdraws, for example, it cannot take civilians with it, for that would be contrary to Article 49 which prohibits the deportation or forcible transfer of persons from occupied territory. The same thing is true of raids made into enemy territory or on his coasts. The Convention is quite definite on this point: all persons who find themselves in the hands of a Party to the conflict or an Occupying Power of which they are not nationals are protected persons. No loophole is left.[71]

This passage has supporters and opponents.[72] Those who disagree claim the argument is flawed because it effectively conflates the invasion and occupation phases and replaces control over persons with Hague Regulations' article 42's requirement of control over territory. Some others have taken a middle ground. Dinstein, for instance, though denying that there is no intermediate period between the invasion phase and the establishment of an occupation,[73] concedes that,

> certain safeguards conferred on protected persons in the Geneva Convention may become applicable already in the course of an invasion or a raid (when conditions have not yet matured for a fully-fledged belligerent occupation). …During the invasion phase, it is necessary to appraise whether the local inhabitants actually fall in the hands of the invading armed forces, in which case some of the Geneva Convention's provisions usually relating to occupation may become applicable.[74]

In contemporary literature, the 'Pictet theory' has given rise to the concept of 'functional beginning' of occupation law.[75] However, it is not altogether clear why this is applicable only to the Geneva Convention aspect of the law. The non-applicability of the Hague Regulations occupation regime to the invasion phase is too easily taken for granted.

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[71] Pictet, *Commentary on Geneva Convention IV*, 60.
[72] The pertinent issues are debated in Marten Zwanenburg, Michael Bothe, and Marco Sassoli, "Is the Law of Occupation Applicable to the invasion Phase?" *Int'l Rev. Red Cross,* 94 (2012): 29.
[73] Dinstein, *Belligerent Occupation*, 41.
[74] *Ibid*. 40, 41-42.
[75] See literature cited in note 58.

Perhaps this is not necessarily correct. Writing immediately following the adoption of the 1907 Hague Convention IV on land warfare, Professor Holland observed, without explanation, that 'It should be noted that all restrictions imposed upon an occupant apply, and *with greater force*, also to an invader of territory who is not yet in occupation.'[76] In fact, if one turns to the 1899 Hague Peace Conference itself, this is a clue. The Second Commission on the Laws and Customs of War on Land reported that,

> A general observation should be made on the subject of all the articles comprised in Section III. This is that the restrictions imposed on the liberty of action of an occupant apply a-fortiori to an invader when an occupation has not yet been established in the sense of Article 42.
> Thus Articles 44 and 45 apply to the invader as well as to the occupant, and either of them will necessarily be forbidden to force the population of a territory to take part in military operations against its own country or to swear allegiance to the hostile Power.
> As to the collection of contributions and requisitions or to the seizure of materiel, it is understood that an invader shall stand in these matters in the same position as an occupant.[77]

III. THE CLASSICAL ARTICLE 43 REGIME

Hague Convention's article 43 embodies 'the traditional concept of occupation.'[78] Its rather laconic text was a patchwork compromise to break a deadlock at the 1899 Hague Peace Conference. Essentially, the article combines articles 2 and 3 of the Brussels Declaration.[79] The recognition of the authority of the invading forces to legislate for the occupied territory by Article 3 of the Declaration was problematic for small countries, whose concern was captured in the statement of the Mr. Beernaert, first delegate of Belgium, that the effect of the provision 'was expressly to legalize the rights of a victor over the vanquished, and thus organize a regime of defeat.'[80] He preferred instead a provision that merely admits the fact of

[76] Holland, *Laws of War*, 52 [emphasis supplied].
[77] Scott, *Reports to the Hague Conferences*, 154.
[78] Pictet, *Commentary on Geneva Convention IV*, 273.
[79] See table in Part I of this paper for the text of articles 2 and 3 of the Brussels Declaration and article 43 of the Hague Regulations.
[80] Scott, *Reports to the Hague Conferences*, 139.

defeat without recognizing a right in the victor.[81] The solution accepted was to abandon the controversial article but at the same time incorporate its spirit[82] in the text of Brussels article 2 to become article 43 of the Hague Regulations. The compromise was reported by the Second Commission on the Laws and Customs of War on Land as follows:

> Article 43 condenses into a single text Articles 2 and 3 of the Brussels Declaration. The new wording was proposed by Mr. Bihourd, the Minister of France at The Hague and one of the delegates of his Government. The last words of Article 43, where it is said that the occupant shall restore or ensure order 'while respecting, unless absolutely prevented, the laws in force in the country', really give all the guaranties that the old Article 3 could offer and do not offend the scruples of which Mr. Beemaert spoke in his address, referred to at the beginning of this report, which had led him to propose at first that Article 3 be omitted.[83]

The result is that, "it seems Article 3 of the Declaration of Brussels retained its character as a general principle even though it became attached to Article 2, which dealt only with the duty of the occupant to restore public and civil life."[84] As Benvenisti observed rightly, "in retrospect this change of tone proved of little value.'[85] First, the new phase appended to the text of Brussels article 2 ('unless absolutely prevented'), was soon recognized as in no way different from 'necessity' in Brussels article 3. Second, "the ensuing syntactic amalgamation of Brussels Articles II and III into a single Hague Regulation 43 was not designed to disrupt the substantive duality of the concepts involved."[86] Thus, the two separate duties encompassed in Hague Regulation 43 mirror the obligations in Brussels articles 2 and 3 respectively.

Third, there is no doubt that the occupying power acquires all the powers of government of the displaced regime, not simply with respect to the subjects mentioned in article 43, and is not bound by any extant constitutional constraints. This was the pre-Hague

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[81] Ibid.
[82] Edmund H. Schwenk, "Legislative Power of the Military Occupant under Article 43, Hague Regulations," *Yale L.J*. 54 (1945): 393-416, 397.
[83] Scott, *Reports to the Hague Conferences*, 149.
[84] Schwenk, "Legislative Power of the Military Occupant," 397.
[85] Benvenisti, *Law of Occupation*, 13.
[86] Dinstein, *Belligerent Occupation*, 90.

Regulations customary international law, as the older writers understood it,[87] and is consistent with the clear language of the opening phrase of article 43, "The authority of the legitimate power having in fact *passed* into the hands of the occupant." This does not, however, mean, as is sometimes supposed, that the sovereignty of the displaced government over the occupied territory is suspended for the duration of the occupation,[88] although the path of any legislation by the displaced government is strewn with legal and practical challenges.[89]

The first of the two obligations of an occupying power encompassed in article 43 is the duty, as rendered in the unofficial English translation, to "take all the measures in his power to restore and ensure, as far as possible, public order and *safety*." There is a significant gap in this translation: the word 'safety' is not in the authoritative French text. The mistranslated phrase from the French text is "*l'ordre et la vie publics*," which is "public order and public (civil) life." As explained at the Brussels Conference, the phrase "civil life" (*la vie*

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[87] Halleck stated that, an occupant "has all the powers of a de facto government and can, at pleasure, either change existing law, or make new ones.' Halleck, *International law*, 332 (Of course, the free hand of the occupying power to modify existing laws is now constrained by Hague Regulation 43, but no subject is in principle beyond his competence.) This view is retained in the 3rd edition, 438. Hall as well stated as follows:

> If occupation is merely a phase in military operations, and implies no change in the legal position of the invader with respect to the occupied territory and its inhabitants, the rights which he possess over them are those which in the special circumstances represent his general right to do whatever acts are necessary for the prosecution of his war; in other words he has the right of exercising such control, and such control only, within the occupied country as is required for his safety and the success of his operations. But the measure and range of military necessity in particular cases can only be determined by the circumstances of those cases. It is consequently *impossible formally to exclude any of the subjects of legislative or administrative action from the sphere of the control which is exercised in virtue of it; and the rights acquired by an invader in effect amount to the momentary possession of all ultimate legislative and executive power*.

Hall, *Treatise on International Law*, 430 [footnote omitted; emphasis added]. Modern experts are of the same mind. See, e.g. Sassoli, "Occupying Powers," 664 ("…if necessary, all functions of government must be provisionally assumed by the occupying power in order to guarantee normal life for the civilian population.")

[88] *Public Prosecutor v. Haaland* (Norway Supreme Court, 1945), 12 ILR 444, 445.

[89] See Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Vol. II. The Law of Armed Conflict* (London: Stevens, 1968) 196-207 (discussing 'the legislative powers of the disseised sovereign'); Egon Schwelb, "Legislation for Enemy-Occupied Territory in the British Empire," *Transactions Year* (Grotius Society) 30 (1944): 239-259; Dinstein, *Belligerent Occupation*, 108 ("It must be discerned that the displaced sovereign has the full right to continue to legislate for the occupied territory even after the occupation begins. However, the Occupying Power is not bound to respect any laws enacted by the displaced sovereign during the occupation," as Hague Regulation 43 creates only an obligation to respect the laws in force (*en vigueur*) at the moment of occupation).

publics) encloses all that pertain to social and commercial life.[90] Although there is no equivalent word in English language, "safety" is a poor, if misleading, substitute. This slip in translation has been left uncorrected for over a century, even though the most eminent international law publicists of the period immediately spotted the error.[91]

The alternative expressions 'restore and ensure' are the two sides of the obligation to maintain public order and civil life in the occupied territory. But in either case, the occupying power is only required to take action "as far as possible" in the circumstances.

> While the occupant can restore public order and civil life only when they have been disrupted, he may legislate to ensure them in the absence of any disturbance. Hence the terms "restoration" and "ensurance" are used alternatively rather than jointly.[92]

The other obligation of an occupying power under article 43 is the duty to respect the laws in force in the occupied territory "unless absolutely prevented" (*sauf empêchement absolu*) from doing so. We have already seen that this obligation is derived from Brussels article 3. Indeed, *sauf empêchement absolu* was almost immediately understood to be no more than necessity, the term used in Brussels article 3,[93] and it is the occupying power that

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[90] The record of the Brussels Conference contains a statement by the Belgian delegate Baron Lambermont that, the expression "*vie publique"* means "*des fonctions sociales, des transactions ordinaires, qui constituent la vie de tous les jours* [social functions, ordinary transactions which constitute daily life]." Ministère des Affaires Etrangères, *Actes de la Conférence de Bruxelles de 1874* (Paris, 1874) 23, cited in Schwenk, "Legislative Power of Military Occupation," 393.

[91] See, e.g., Westlake, *International Law: War*, 84 ("The word 'safety' used in the official English translation, does not adequately render the *vie publique* of the original, which describes the social and commercial life of the country").; Wheaton, *Elements of International Law*, 522 ("The words 'public order and safety' do not represent exactly the meaning of the original '*l'ordre et la vie publics*,' which refer also to the entire social and commercial life of the community.").

[92] Schwenk, "Legislative Power of Military Occupation," 398.

[93] Benvenisti is almost alone among experts in the view that *sauf empêchement absolu* sets the bar at *military* necessity. Benvenisti, *Law of Occupation*, 14 ("It seems that the drafters of this phrase viewed military necessity as the sole relevant consideration that could 'absolutely prevent' an occupant from maintaining the old order."). Interestingly, Schwenk, one of the sources cited by him (no specific page indicated though) for this opinion, actually expressly rejected that position. See Schwenk, ibid. 400-401 (…a construction which confines the term '*empêchement absolu*' to the military interest of the occupant seems too narrow, if not incorrect."). Schwenk's position instead was that the term "means nothing but absolute necessity." Ibid., 401. However, as Schwarzenberger has stated (citing the Belgo-German Mixed Arbitral Tribunal), "the word 'absolutely' in the exception clause of Article 43 of the Hague Regulations must not be construed in any literal sense. It is as relative as any other supposed absolute in international law." Schwarzenberger, *International Law,* 193.

determines whether a legislative measure is necessary, [94] especially where the measure taken is for the sake of its military interests in the occupied territory.

However, where a legislative measure is purportedly for the sake of the welfare of the civilian population, assessing its necessity may be problematic. In 1972, Dinstein suggested a controversial and much-criticized litmus test, which seems to emphasize desirability of the legislation over its necessity.[95] As restated most recently,

> …a litmus test for distinguishing between genuine and contrived concern for the welfare of the civilian population—under Regulation 43—lies in the Occupying Power's show of similar concern for the welfare of its own population. In other words, if the Occupying Power enacts a law—say, introducing an obligation to install safety belts in motor vehicles in an occupied territory—the decisive factor should be the existence of a parallel statute back home. In the absence of parallel legislation, the ostensible concern for the interests of the civilian population in the occupied territory loses credibility. [96]

Dinstein clarified that, "Parallel does not mean identical. Variations in details of the legislative measures adopted are not of major import. What counts is the legal nucleus of the legislation."[97] Though conceding to his critics that a common measure for determining suitability of legislation between what may be vastly different climes may be problematic,[98] Dinstein insists,

> Still, barring extreme circumstances revealing clearly that a similar legislation in both jurisdiction would be inappropriate—or even insinuating ulterior motives on the part of the Occupying Power—[he] is confident that the litmus test ought to prove efficacious.[99]

In summary, the article 43 regime permits an occupying power to modify the laws in force in the occupied territory for the purposes of the safety of its forces and the prosecution

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[94] Sassoli, "Occupying Powers," 674.

[95] "Under article 43, reforms could only be justified according to their necessity, not their desirability. However, the line between necessity and desirability is often a difficult distinction to draw." McCarthy, "International Law of Military Occupation," 65.

[96] Dinstein, *Belligerent Occupation*, 121-122.

[97] Ibid. 122.

[98] "The occupation authorities cannot abrogate or suspend the penal laws merely to make it accord with their own legal conceptions." Pictet, *Commentaries on Geneva Convention IV*, 336. "The commands of the Fourth Geneva Convention do not, for example, direct the occupant to treat the occupied people with standards similar to the ones employed for its own nationals." Benvenisti, *Law of Occupation*, 105.

[99] Dinstein, *Belligerent Occupation*, 122.

of their operations, and for the purpose of restoring and ensuring pubic order and civil life in the territory respectively.

IV. GENEVA CONVENTION IV: SUPPLEMENTARY OR AUTONOMOUS REGIME?

The scant text of article 43 unfortunately cannot provide an exhaustive guide for occupation forces. As Benvenisti put it, "the mandate 'to restore and ensure public order and civil life' has become at best an incomplete instruction to the occupant."[100] Perhaps it was hoped that State practice would fill in the details.[101] But this proved to be forlorn hope. One of the objectives of the Diplomatic Conference of 1949 was to revise the Hague Regulations. Section III (Occupied Territories) of Convention IV, articles 47-78, secured two important achievements: enlargement of the prescriptive power of an occupying power and enhancement of the protection of civilians. The core provision on the prescriptive power of an occupying power is article 64.

> 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. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.
> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

There is no consensus on whether the provision was intended to affect civil as well as penal laws, especially as the context would appear to associate the provision with application

[100] Benvenisti, *Law of Occupation*, 30

[101] Alwyn V. Freeman, 'War Crimes by Enemy Nationals Administering Justice in Occupied Territory' *Am. J. Int'l L.* 41 (1947): 579, 587 ("Article 43 could only trace the broad theoretical principles, no matter how phrased. It remained for state practice to breathe more definite meaning into its provisions.").

of penal laws in occupied territories.[102] However, the liberal position taken in the ICRC *Commentaries* is almost universally accepted:

> The reason for the Diplomatic Conference making express reference only to respect for penal law was that it had not been sufficiently observed during past conflicts, there is no reason to infer *a contrario* that the occupation authorities are not also bound to respect the civil laws of the country, or even its constitution.[103]

No specific entry in the record of the conference is cited for this. The original ICRC draft article 55 (which became article 64 in the Convention), adopted at the XVIIth International Red Cross Conference 1948 (the 'Stockholm text'),[104] submitted to the Diplomatic Conference had the same two-paragraph structure with "penal laws" and "provisions" used in paragraphs one and two respectively. In proposing the present text, Committee III (which was assigned the draft Civilian Convention) appended the following comment:

> The Committee, while approving the principle expressed in the first paragraph of Article 55 of the Stockholm text, have considered it desirable to make provision in the Article to cover certain situations which arose during the second World War. They have accordingly provided that the penal laws of an occupied territory may be repealed or suspended in the following two cases…. In the second paragraph the Committee have provided that *in addition to promulgating penal provisions* necessary to ensure its security, an Occupying Power may subject the population to provisions which are essential to enable it to fulfil its obligations under the Convention (e.g. in particular Articles 46, 49, and 50) and to maintain an orderly government.[105]

According to its terms, therefore, the first paragraph of article 64 is intended to permit the occupying power to *suspend or repeal* only penal laws for the purposes of its security or in order to remove any obstacle to the application of Convention IV[106] while the second

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[102] The first paragraph of the article is expressly concerned with penal law. Although the second paragraph uses the more general term "provisions," the articles of Section III following article 64 are all concerned with penal law, and in particular article 66 refers to "a breach of penal provisions promulgated by the occupying power in virtue of the second paragraph of article 64."

[103] Pictet, *Commentaries on Geneva Convention IV*, 335.

[104] See *Final Record of the Diplomatic Conference of Geneva of 1949* Vol.1 (Federal Political Department, Berne), 122.

[105] See *Final Record of the Diplomatic Conference of Geneva of 1949* Vol. I1A (Federal Political Department, Berne), 833 [emphasis added].

[106] In fact, as the ICRC Commentary puts it, "This means when that when the penal legislation of the occupied territory conflicts with the provisions of the Convention, the Convention must prevail." Pictet, *Commentaries on Geneva Convention IV*, 336.

paragraph enables it to *promulgate* legislation necessary ("essential") to fulfil its obligations under Convention IV (and, by implication, other norms of international humanitarian law or indeed international law generally),[107] maintain orderly government, and to ensure its security, subject, in the case of penal laws, to the safeguards stipulated in articles 65-78.[108]

Although Benvenisti argues that Convention IV introduces innovative elements in the prescriptive power law of an occupation power,[109] most scholars are more conservative in their assessment, and he concedes that this innovation is lost on most international scholars, who see essentially as a rehash of Hague Regulation 43.[110] Schwarzenberger, for example, stated that, "in drawing up the list the Conference of 1949 took it for granted that it had not extended the traditional scope of occupation legislation."[111] However, the Hague article 43 negative formula "unless absolutely prevented" is now understood in more functional terms by virtue of article 64 of Convention IV,[112] which, as the ICRC *Commentary* puts it, "expresses in more precise and detailed form" the former rule.[113]

> The main advantage of Geneva Article 64 over Hague Regulation 43 is that, instead of a mere reiteration of the original Hague phrase '*empêchement absolu*'—or even a bland use of the portmanteau expression 'necessity'—we find in the Geneva text an elucidation of the circumstances in which the Occupying Power may have recourse to legislation.[114]

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[107] Dinstein, *Belligerent Occupation*, 113.

[108] However, Dinstein maintains notwithstanding, "the three categories of necessity as enumerated in Article 64 cannot be regarded as all-inclusive. The concept of necessity is elastic enough to go beyond all three subdivisions mentioned in the text, and allow additional legislation that is reasonably required by the conditions of occupation. For example, nobody can question an amendment of the laws in force in an occupied territory, designed to sever subordination of the local courts to appellate bodies operating in a non-occupied region retained by the displaced sovereign." Dinstein, *Belligerent Occupation*, 116.

[109] Benvenisti, *Law of Occupation*, 101.

[110] Interestingly enough, the provisions of the Fourth Geneva Convention regarding occupation have not been regarded as innovative. Rather, it has been generally held that the Geneva rules were in essence little more than a repetition of the Hague Regulations. Municipal courts that adjudicated matters concerning occupied territories continued to refer only to the Hague Regulations. Probably because of poor formulation of Article 64, its relevance was lost on international scholars, and Article 43 of the Hague Regulations continued to provide the framework for discussing the occupant's prescriptive powers.
Ibid., 106.

[111] Schwarzenberger, *International Law*, 194.

[112] Ibid., 193.

[113] Pictet, *Commentaries on Geneva Convention* IV, 335.

[114] Dinstein, *Belligerent Occupation*, 112.

Although the Stockholm draft provided that Convention IV was to replace the Hague Regulations in matters covered, this was found problematic at the Diplomatic Conference.[115] The final result, article 154, was that the Convention was made supplementary to Sections II and III of the Hague Regulations.[116] The proper relationship between these two sources of occupation law was correctly identified by Marco Sassoli as *lex specialis derogate legi generali*.

> …Article 64 certainly provides a *lex specialis* regarding situations in which an occupying power is absolutely prevented from respecting penal law. In addition, there are good reasons to consider it a more precise, albeit less restrictive formulation of when an occupying power is "absolutely prevented" from applying existing local legislation.[117]

In summary, in spite of the Stockholm draft, Geneva article 64 did not supercede the Hague Regulation 43 regime, nor does it constitute an autonomous regime. It has certainly elaborated the Hague regime, as was intended by the Diplomatic Conference of 1949, but the Hague article 43 remains the primary reference point for defining prescriptive powers during occupation.

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[115] See *Final Record* Vol. I1A, 672, 675 (19th meeting), 787 (46th meeting).

[116] See ibid., 787, where it is recorded that, the Committee dropped the wording of the Stockholm text, which stated that the Convention will "replace" the Hague Convention, in favour of a formulation suggested by Professor Castberg, according to which the Civilians Convention would "be supplementary to" Sections II and II of the Hague Regulations.

> That wording did not attempt to define the respective fields of the Conventions, nor to establish a hierarchy; the Conventions remained on an equal footing. Certain points which had been merely touched upon in the Hague Convention had been dealt with more fully and defined more exactly in the Civilian Convention. In case of divergencies in the interpretation of the two texts, the difficulty should be settled according to recognized principles of law, in particular according to the rule that a later law superseded an earlier one.

Nevertheless, Benvenisti argues, "…despite these efforts, the Hague Regulations were replaced, at least with respect to the prescriptive powers of the occupant, by the new Geneva rules." Benvenisti, *Law of Occupation*, 103. It is difficult to accept this, as the fundamental conservationist framework of Hague article 43 is implicit in Geneva article 64. For instance, "The idea of the continuity of the legal system" mentioned in the ICRC *Commentary* under Geneva article 64 is directly from Hague Regulation 43. See Pictet, *Commentaries on Geneva Convention* IV, 335.

[117] Sassoli, "Occupying Powers," 670-71.

V. THE PEDIGREE OF TRANSFORMATIVE OCCUPATION

Transformative occupation is defined as "an operation whose main objective was to overhaul the institutional and political structures of the occupied territory, often to make them accord with the occupying power's own preferences."[118] This situation is distinguished from where the occupying power merely embarks on transformative measures without major institutional changes. Such radical changes are inconsistent with the conservationist tenor of belligerent occupation (the so-called Fauchille doctrine[119]). An occupying power is not permitted to change an occupied territory from republic to a monarchy, for example.

> If Cuba occupied Switzerland it may not introduce a communist economy, and if Switzerland occupied France it may not introduce federalism, although both countries are certainly convinced that their system is best for the maintenance of civil life.[120]

Beginning with Scheffer,[121] some scholars have attempted to establish a legal basis for transformative occupation in international law. With the Iraq occupation, these voices reached a crescendo,[122] such that Adam Roberts was able to suggest that transformative occupation may have "emerged as a more honourable, but deeply controversial, successor to annexation."[123] There are in fact only two well-established exceptions to belligerent occupation in international law by which an occupying power may lawfully undertake extensive institutional transformation of an occupied territory: *debellatio* and United Nations Security Council mandate.

Classical international law recognized that a total military defeat, or subjugation, of a State may lawfully result in the extinction of that State and its annexation by the conquering State. *Debellatio*, as it is known, was universally acknowledged by publicists as an exception to belligerent occupation, even after the Hague Conventions of 1899 and 1907 established

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[118] Ferraro, *Administration of Foreign Territory*, 67.
[119] P. Fauchille, *Traité de droit international public* (1921).
[120] Sassoli, "Occupying Powers," 694.
[121] Scheffer, "Beyond Occupation Law," 859.
[122] See literature cited in note 14.
[123] Roberts, "Transformative Military Occupation," 585.

occupation regime firmly in international law. This was the legal justification offered for the transformative occupation of Germany after its defeat in 1945.[124] *Debellatio* pre-empts belligerent occupation. The distinction is drawn as follows.

> It is this fact of the complete disintegration of the government in Germany, followed by an unconditional surrender and by occupation of the territory, which explains and justifies the assumption and exercise of supreme governmental power by the Allies. The same fact distinguishes the present occupation of Germany from the type of occupation which occurs when, in the course of actual warfare, an invading army enters and occupies the territory of another State, whose government is still in existence and is in receipt of international recognition, and whose armies, with those of its Allies, are still in the field. In the latter case the occupying power is subject to the limitations imposed upon it by the Hague Convention and by the laws and customs of war. In the former case (the occupation of Germany) the Allied Powers were not subject to these limitations.[125]

Although modern writers continue to recognise it,[126] it is by no means clear that *debellatio* remains an exception to belligerent occupation, especially in light of the Geneva Conventions[127] and the United Nations Charter and the prohibition of the annexation of conquered territories.[128] Indeed, if anything, Resolution 1483 established that in present-day international law, even the smashing defeat and total collapse of the Iraq regime leads to belligerent occupation regulated by the Hague Convention.

It is generally accepted that the United Nations Security Council is competent to grant a mandate beyond the Hague Regulations to an occupying power in furtherance of its

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[124] The unconditional surrender of Germany and the Allied Declaration of Berlin of June 5, 1945 were considered as indicating the subjugation of Germany and a legal justification of Allied occupation of the territory outside the limits of belligerent occupation. See Freeman, "War Crimes by Enemy Nationals," 603; Kelsen, "Legal Status of Germany," R.Y. Jennings, "Government by Commission," *Brit. Y.B. Int'l L*. 23 (1984): 112-141. See also, Hans Kelsen, "The International Legal Status of Germany to be Established upon Termination of the War," *Am. J. Int'l L*. 38 (1944): 689-694.

[125] *Justice* case 29.

[126] See, e.g., Schwarzenberger, *International Law*, 172 ("The primary consequence of prohibition of the annexation of enemy territory by an Occupying Power is to 'freeze' for all practical purposes the territorial *status quo* until either *debellatio* or the restoration of peace."), Dinstein, *Belligerent Occupation*, 2.

[127] By common article 2 of the Conventions, occupation is regarded as a state of armed conflict. Article 6 of Convention IV stipulates that the Convention shall continue to apply in an occupied territory for one year after the general close of military operations, and indefinitely by virtue of Protocol I of 1977.

[128] Benvenisti, *Law of Occupation*, 94-96.

responsibility to maintain international peace and security.[129] However, the Council cannot authorize an intervention that violates *jus cogens*.

VI. TOWARDS A NEW *JUS POST BELLUM*?

If the literature is any measure, the recent revival of Hague Regulations' article 43 has been as much welcomed by experts as it has been regretted by sceptics. This mixed reception mirrors the UN Security Council resolution 1483's Kafkaesque affirmation of the obligations of the Hague Regulations and at once authorization of the occupiers of Iraq to take measures far exceeding their competence under international law of belligerent occupation.[130] Yet, the case for the obsolescence of article 43 is overstated. Whatever state practice may have been, the binding status of the Hague Regulations (as supplemented by Geneva Convention IV) was affirmed by the International Court of Justice[131] as well the International Criminal Tribunal for the Former Yugoslavia.[132] Leading experts remain convinced that the doctrine of belligerent occupation is showing every sign of vitality.[133] Indeed, as one of them put it, with a bit of clairvoyant indulgence, "the notion that belligerent occupation will be rendered obsolete in foreseeable future is no more than utopian dreaming."[134]

The sceptics would prefer belligerent occupation to be replaced by a new liberal occupation regime,[135] or absolved into[136] a *jus post bellum*—a legal regime by definition

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[129] Sassoli, "Occupying Powers," 680-82-

[130] The Janus face of Res. 1483 has enabled sceptics argue that, for example, "Invocation of the law of occupation in Resolution 1483 is best viewed as a strategic act rather than a breath of new life for that moribund doctrine." Harris, "Era of Multilateral Occupation," 59.

[131] *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p.168; *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136.

[132] For example, *Prosecutor v Naletilic and Martinovic*, Case No. IT-98–34-T, Judgment, para. 587 (ICTY Trial Chamber, 31 Mar. 2003).

[133] Roberts, "Transformative Military Occupation," 580 ("This survey suggests that the law on occupation remains both viable and useful, and has proved reasonably flexible in practice."); Dinstein, *Belligerent Occupation,* 287 ("The law as it stands has not lost its vitality and it has much merit.); Fox, "The Occupation of Iraq," 296 ("The conservationist principle [of article 43] still resonates with values fundamental to contemporary international law.")

[134] Dinstein, *Belligerent Occupation,* 296.

[135] E.g., Harris, "Era of Multilateral Occupation."

applicable *after* war. Harris claims that, "a de facto law of occupation is emerging to replace the de jure international law of occupation in conferring legitimacy on and regulating the new model occupation."[137] The function of either regime, of course, is to release the strictures of the Hague Regulations in order to fit the need of transformative occupation. These proposals are problematic in many respects. First, adverse (non-consensual) occupation outside armed conflict is antithetical to well-established norms of international law prohibiting the threat or use of force against the territorial integrity or political independence of a State,[138] and in particular, the occupation of one State by another.[139] Even Harris is forced to admit that his "de facto" occupation doctrine has no standing in international law.[140] Belligerent occupation cannot be disassociated from its belligerent nexus, and remains governed by *jus in bello,* not *jus post bellum*. Secondly, as the proposal is after all a justification for use of force, it confuses *jus ad bellum* for *jus in bello,* which is characterized by neutrality and equal application to all parties. Third, proponents of the claim that the traditional law of belligerent occupation has become obsolete and, as Harris argues, been displaced by an emergent "de facto" occupation law, have not suggested an alternative regime to govern control of enemy territory during armed conflict, as it obviously cannot be the case that a belligerent occupant is released from the conservationist obligation even during short term occupation while hostilities last. That will completely erode the purely provisional character of this form of occupation, its defining mark since the mid eighteenth century. Georg Schwarzenberger identified this as one of the two functions of the law of belligerent occupation. [141]

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[136] Cohen, "Interim Occupations," 498 (The relevant international law of *jus post bellum* is the law of belligerent occupation codified in two key treaties: the 1907 Hague Regulations Respecting the Laws and Customs of War on Land and the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, and in the Additional Protocols I and II of 1977.)

[137] Harris, "Era of Multilateral Occupation," 45.

[138] UN Charter, art. 2(4).

[139] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A Res. 2625 (XXV), at 123–24, U.N. GAOR, 24th Sess., Supp. No. 28, U.N. Doc. A/5217 (Oct. 24, 1970).

[140] Harris, "Era of Multilateral Occupation."

[141] Schwarzenberger, *International Law*, 163.

A leading scholar opened his recent book on the subject observing that, "a study of the legal regime of belligerent occupation must begin with the observation that it is frequently misconstrued or misunderstood, to a degree that shrouds it in many a myth. The most persistent myth is that the occurrence of belligerent occupation is an anomaly or even an aberration."[142] It is not so much the fact of military occupation that is an anomaly or an aberration as is the applicable legal regime.

On the eve of the one hundred and fiftieth anniversary of the Brussels Declaration, it is certainly remarkable that the patch work compromise of European elites of a long gone age lives on, at least in the form it was adopted in the Hague Conventions relating to the Laws and Customs of War. Rather than decline, let alone become desuetude, by the beginning of the twenty-first century it experienced a strong revival. Perhaps the ambivalence of the legal regime and its austere and deliberately vague text of article 43, far from being a weakness has been its strength. Hence it is unnecessary and perhaps even dangerous, to graft unto this regime a nebulous doctrine of transformative occupation. The extant regime is deliberately flexible enough to accommodate legitimate social, economic and even non-imperialistic political reform without the need to invent a new justification in international law.

[142] Dinstein, *Belligerent Occupation*, 1.