WHAT IS A MILITARY OCCUPATION?*

By ADAM ROBERTS

I. INTRODUCTION

Although there is a substantial body of international law which relates to military occupation, the scope of application of this law has been perennially problematical. The foreign military involvements of States, not least in the post-1945 world, have taken place in a bewildering variety of circumstances, and have assumed an equally bewildering variety of forms. Many recent and contemporary cases—in eastern Europe, the Middle East, Namibia, northern Cyprus, the Western Sahara, East Timor, Kampuchea and Afghanistan—raise a difficult question: what exactly is a military occupation? Underlying this question are several others: are certain types of occupation, which differ in some respect from what was envisaged in the 1907 Hague Regulations or the 1949 Geneva Conventions, still subject to the rules laid down in these and other agreements? Who determines whether a particular situation is to be called an occupation? Can the relevant body of law be applicable even in situations where the term 'occupation', with all its emotional overtones, is rejected by one or another party? Is there one law of military occupation, or is there a combination of rules which may vary somewhat depending on the type of occupation?

Michel Veuthey has gone so far as to say that 'the concept of “occupation” is juridically inoperative or disputed in practically all contemporary conflicts, including those involving guerrilla warfare.' These are sobering words, and they raise doubts as to whether there is much merit in trying to define exactly what an occupation is, when one knows that in practice States will often disagree about the application of this label to particular situations. Might it not be more useful, as Veuthey suggests, to think rather in terms of basic humanitarian rules which apply to all situations, irrespective of arid academic distinctions and definitions?

Certainly there is no use worrying excessively about the definition of occupation. The core meaning of the term is obvious enough; but, as usually happens with abstract concepts, its frontiers are less clear. There sometimes is genuine difficulty in determining such questions as when an


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occupation can be said to have ended; and whether a particular situation—say the role of United States and regional forces in Grenada in late 1983—counts as an occupation.

A basic rule to follow when threading one’s way through such questions is not to get into definitional and legalistic quibbling if one can avoid it. This rule is increasingly accepted in matters relating to the scope of application of the humanitarian laws of war, especially so far as the definition of ‘war’ is concerned. Questions such as what exactly a war is, how it is declared, how many types exist, etc., while interesting from many viewpoints, are not of enormous significance so far as the basic issue of the applicability of this body of law is concerned: it has come to be widely accepted that when there is an actual armed conflict between two or more countries, the humanitarian laws of war are applicable. Similarly with occupations, the fact that these can be hard to define, can sometimes happen without being declared, and can have many different causes, characters and consequences, need not necessarily have an effect on the applicability of the relevant parts of the humanitarian laws of war. One might hazard as a fair rule of thumb that every time the armed forces of a country are in control of foreign territory, and find themselves face to face with the inhabitants, some or all of the provisions of the law on occupations are applicable.

The case for such an approach is especially strong in view of the fact that the law on occupations is not a totally discrete entity, different from all other law and applying solely and exclusively to military occupations. On the contrary: (a) many laws of war rules which apply in occupations also explicitly apply in other situations—for example, in combat areas, or in the territory of a party to the conflict; (b) the category of ‘crimes against humanity’ applies even more broadly, and depends neither on distinctions between ‘war’ and ‘peace’, nor on distinctions between what a State can do in its territory and what it can do in foreign or occupied lands; and (c) international conventions on human rights contain some provisions which are not subject to derogation in time of emergency, and are applicable in time of war and occupation.

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4 Perhaps the clearest example of rules of this kind is Articles 13 to 34 of 1949 Geneva Convention IV.

5 As far as conventions are concerned, the 1948 United Nations Genocide Convention is the main instrument in this area. Article I confirms that genocide ‘whether committed in time of peace or in time of war’ is a crime under international law.

6 Non-derogable provisions include the 1950 European Convention on Human Rights, Articles 2, 3, 4 (1) and 7; and the 1966 International Covenant on Civil and Political Rights, Articles 6, 7, 8 (1) and (2), 11, 15, 16 and 18. On human rights in armed conflicts and occupations see also Draper, ‘The Status of Combatants and the Question of Guerrilla Warfare’, this *Year Book*, 45 (1971), p. 218; Meron, ‘Applicability of Multilateral Conventions to Occupied Territories’, *American Journal of International
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Even if States dispute the formal applicability of the law on occupations in a particular situation, or challenge the labelling of a military intervention as 'occupation', they still sometimes decide to apply the provisions of the law on occupations—for example, on a de facto or ex gratia basis, as the most appropriate available outline of the rights and duties of the respective parties to use in the circumstances. Courts, too, have sometimes been guided by aspects of the laws of war, including the law on occupations, even in cases where the de jure applicability of the relevant convention was in doubt. International organizations too have sometimes taken a similar line.?

This article does not seek to attach any exaggerated importance to the question of how military occupations are either defined or classified. The application of quite basic practical and humanitarian rules cannot be made to depend on an endless series of definitional wrangles and legal niceties. Rather the aim here is to focus attention on a process whereby the law on occupations has come to be regarded as applicable in a wide variety of situations; and also, at the same time, to get away from the idée fixe that all occupations are essentially the same in their character and purpose. Even if the application of a single set of rules to a very wide variety of situations presents some difficulties, it is not necessarily absurd or impossible.

II. INDICATIONS IN THE CONVENTIONS

The various international conventions on the laws of war contain at least a framework of ideas as to what an occupation is. The most important indications are those in the Hague Regulations, in the 1949 Geneva Conventions and in the 1977 Geneva Protocol I.

(a) The 1907 Hague Regulations

The 1907 Hague Regulations, like those of 1899, appear to be based on an assumption that a military occupation occurs in the context of a war, and consists of direct control of one hostile State’s territory by a rival hostile State’s armed forces. Some of this is evident from the very title of the part of the Regulations which deals with the question of occupation: ‘Military Authority Over the Territory of the Hostile State’. The first article in this part of the Regulations—Article 42—establishes an apparently simple factual basis for determining what an occupation is:

Territory is considered occupied when it is actually placed under the authority of the hostile army.


7 Examples of such de facto applications of the law on occupations are mentioned below, pp. 268, 281-3 and 302-3.
The occupation extends only to the territory where such authority has been established and can be exercised.\(^8\)

The implicit assumption here, that an occupant exercises authority directly, through its armed forces, rather than indirectly, through local agents, is also evident in Article 43, which begins: 'The authority of the legitimate power having in fact passed into the hands of the occupant. . .' Direct control by the occupant also seems to be taken for granted in Articles 48, 49, 51-3 and 55. An open and identifiable command structure is thus a central feature of the Hague definition of military occupation.

(b) The 1949 Geneva Conventions

After the Second World War, the need was felt for a more adequate definition of the cases to which the laws of war, including the law on occupations, applied. As far as occupations were concerned, there had been many, especially in the period 1938-45, which differed in important respects from the implicit definitions of the Hague Regulations. Czechoslovakia and Denmark were leading examples. These occupations did not begin with war between the parties as envisaged at The Hague. Czechoslovakia had been invaded and occupied without military resistance and before the outbreak of the war, not as a consequence of war; and Denmark, which was invaded and occupied during the war, only put up minimum military resistance to the invasion. The forms of administration also differed from what was envisaged at The Hague. In both countries there were periods when the Germans exercised control partly through indigenous governments. Moreover, in Czechoslovakia there were additional complications, not least its purported abolition as a State in March 1939. A clarification was needed that the laws of war applied to these and other types of occupation.

The main result was the adoption of common Article 2 of the four 1949 Geneva Conventions. This states, in full:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their

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mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof. 9

The crucial first two paragraphs of the above article were the subject of surprisingly little discussion at the Diplomatic Conference. 10 This suggests that there was general agreement with their provisions, but it makes commentary difficult. However, two points about the first paragraph of the article should be briefly noted. First, the essential meaning of the paragraph is that declarations of war are of no real significance so far as the application of the laws of war is concerned. Technically speaking, the paragraph might be taken to mean that the Conventions are inapplicable in an armed conflict in which both parties denied the existence of a state of war, but any such interpretation of the paragraph is challenged by Pictet. 11 Draper is right to have said that the 1949 Conventions 'have reduced the importance of determining whether a legal state of war exists to vanishing point'. 12 Although the word 'occupation' only occurs in the second paragraph, it has been persuasively argued that the Conventions apply to most occupations by virtue of the first paragraph: only those types of occupation which are not opposed militarily (e.g. Czechoslovakia in 1938-9 and Denmark in 1940) are the subject of the second paragraph. 13

The broad terms of common Article 2 establish that the 1949 Geneva Conventions apply to a wide range of international armed conflicts and occupations—including occupations in time of so-called peace. But they do not thereby end all possibility of dispute about what military occupation is or to what situations the law on occupations is applicable.

In the 1949 Geneva Convention IV (the Civilians Convention), many other provisions besides Article 2 indicate that occupation is conceived of more broadly than in the Hague Regulations. The most notable such provisions are Article 6, which refers to occupations which continue after the end of military operations; and Article 47, which inter alia takes account of two possibilities, the first being an occupation in which the authorities of the occupied territory remain in post, and the second being an attempted annexation by the occupant of the whole or part of the occupied territory.

Since 1949 the various new international conventions with a specific

10 For evidence of the paucity of discussion of Article 2, paras. 1 and 2, see Final Record 1949 (n.d.), vol. II A, p. 620; and vol. II B, pp. 9-10, 128, 325.
12 Draper, op. cit. above (p. 250 n. 3), at p. 25.
13 Para. 2 'does not refer to cases in which territory is occupied during hostilities; in such cases the Convention will have been in force since the outbreak of hostilities or since the time war was declared. The paragraph only refers to cases where the occupation has taken place without a declaration of war and without hostilities, and makes provision for the entry into force of the Convention in those particular circumstances': Pictet, op. cit. above (n. 11), at p. 21.
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bearing on occupations have all echoed the terms of 1949 common Article 2.14

(c) The 1977 Geneva Protocol I

The most significant post-1949 development, so far as the scope of application of the law on occupations is concerned, is in the 1977 Geneva Protocol I, Article 1, paragraphs 3 and 4:

3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.15

The aim of paragraph 4 as quoted above seems to be to try to establish that certain armed conflicts, which might be viewed by some as essentially internal in character, are really international, and hence fully subject to the better developed legal regime governing international armed conflicts. As far as its specific reference to occupation is concerned, the paragraph does not concern itself directly with the definition or scope of "alien occupation"; and it adds little to the scope of application as spelt out in the 1949 Geneva Conventions themselves. All it really does is to close a tiny technical loophole in common Article 2 of the 1949 Geneva Conventions, by making a little clearer what was already widely accepted—namely, that the law on occupations is applicable even in situations (like the West Bank and Gaza) where the occupied territory was not universally viewed as having been part of "the territory of a High Contracting Party". As Bothe, Partsch and Solf say, it appears that the term "alien occupation" is "meant to cover cases in which a High Contracting Party occupies territories of a State which is not a HCP, or territories with a controversial international status, and to establish that the population of such territory is fighting against the occupant in the exercise of their right of self-determination."16

Another provision of the 1977 Geneva Protocol I—namely, Article 4—points in the same direction. It contains the statement: "Neither the


16 Bothe, Partsch and Solf, New Rules for Victims of Armed Conflicts (1982), pp. 51–2, support the view that this might mean in practice "the peoples of southern Africa and Palestine".
occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.' Thus the controversial international status of a territory would not be affected by the application of these accords: there would be no implication that it was 'the territory of a High Contracting Party'.

(d) *Other Conventions, etc.*

Other conventions and declarations, outside the laws of war framework, do not add any further general indications as to what an occupation is. Take, for example, various United Nations agreements. The United Nations Charter itself does not contain the word 'occupation'. The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations does refer to occupation of 'the territory of a State' but says little. \(^{17}\) The same is true of the 1970 Declaration on the Strengthening of International Security \(^{18}\) and the 1974 Definition of Aggression. \(^{19}\) However, in an *ad hoc* manner various United Nations resolutions dealing with particular territories (and mentioned later in this article) do provide some additional clues about the factual situations and types of status of territory which the term occupation can cover.

(e) *Occupation Essentially International in Character*

Taking the conventions as a whole, it is evident that the concept of military occupation remains essentially international in character. At the heart of almost all treaty provisions and legal writings about occupations is the image of the armed forces of a State exercising some kind of coercive control or authority over inhabited territory outside the accepted international frontiers of their State. However, the conventions are far from clear that the law applies to all possible situations of this type; moreover, they give rather few hints about its possible relevance in any analogous situations which may arise within a State. It will be necessary to turn to other sources, including State practice and judicial decisions, to illuminate these issues.

III. **Beginning and End of Occupation**

To the extent that there are clearly established factual criteria for determining when occupations begin and when they end, the question of what an occupation is becomes easier to answer. However, while the conventions as cited above do indicate certain criteria, these do not cover all cases.

\(^{17}\) Approved on 24 October 1970 in GA Res. 2625 (XXV).
\(^{18}\) Approved on 16 December 1970 as GA Res. 2734 (XXV).
\(^{19}\) Approved on 14 December 1974 in GA Res. 3314 (XXIX).
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(a) The Beginning of Occupation

In the great majority of cases, occupations are preceded by invasions. The rather technical issue of the precise moment when an invasion turns into an occupation is not always easy to determine. Invasion itself—the entry of military forces into country controlled by adversaries—is not occupation; and if it consists of a mere raid, or a simple passage across territory, it may not lead to occupation. Most sources follow the Hague Regulations, Article 42, in stating that occupation may be said to begin when the invader actually exercises authority, thus stressing that it is factual criteria that are important.20

Even before an occupation begins, relations between the invaders and the inhabitants are subject to numerous provisions of the laws of war, including many of those set out in the 1899 and 1907 Hague Regulations, and in the 1949 Geneva Convention IV. All that happens when an occupation begins is that in addition to the general provisions of the laws of war, the specific provisions relating to occupied territories (which constitute Section III both in the Hague Regulations and in the 1949 Geneva Convention IV) come fully into effect.

Pictet suggests that the Geneva rules governing occupations also apply in the preceding invasion phase:

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 Conventions 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 ... 21

Both the United States and United Kingdom military manuals take a similar view, stating that the rules which apply to occupied territory should also be observed as far as possible in areas through which troops are passing and even on the battlefield.22 All this is evidence of a more general tendency to think of the laws of war as a set of minimum rules to be observed in the widest possible range of situations, and not to worry excessively about the precise legal definition of military occupation. Further evidence of such an approach is to be found in the 1977 Geneva Protocol I, in which most provisions apply quite generally, and only a few are said to apply specifically to occupied areas.23

21 Pictet, op. cit. above (p. 253 n. 11), at p. 60.
23 In 1977 Geneva Protocol I, Articles 14, 63 and 69 (dealing respectively with medical units, civil defence, and basic needs) are the main provisions whose application is specifically in occupied areas.
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Making a proclamation of occupation, like making a declaration of war, may be considered the proper thing to do, but it is not absolutely essential. There is no formal requirement—in the Hague, Geneva or any other conventions in force—that the occupying forces have to issue a formal proclamation of a state of occupation. However, such proclamations are generally considered to be desirable, and are favoured by international practice.24

In some instances there may be occupations which do not begin with invasion. Foreign forces may be stationed in a territory by international agreement (with peacekeeping, defence or other specified functions), and then later go beyond that role. For example, from 1920 onwards South Africa's presence in Namibia was under the terms of an international mandate, terminated by the United Nations in 1966. Thereafter, and especially after the advisory opinion of the International Court of Justice in 1971, it was increasingly viewed as an occupation. This and some other possible examples of occupation beginning otherwise than by outright invasion are considered later in this article.

(b) The Ending of Occupation

Most legal writings indicate that an occupation ends when the troops leave. As Oppenheim put it, 'Occupation comes to an end when an occupant withdraws from a territory, or is driven out of it'.25 In many cases such a statement poses no problems. But the occupant has not necessarily withdrawn at the end of all occupations, especially of the post-surrender type, a category to which, in any case, the application of the law on occupations has in the past often been contested.26

1. Military withdrawal

One post-war example of an occupation which did end with a complete withdrawal of all the occupying forces (in this case by agreement) is Austria. The occupation by the USSR, USA, UK and France, which lasted for more than ten years, was wound up in accord with the Austrian State Treaty, signed by these four countries on 15 May 1955. Later the same day the Austrian foreign ministry published the text of a resolution on Austria's permanent neutrality to be placed before the national legislature. The last Allied troops left Austria on 24 October 1955, and on 25 October Austria became a completely free and sovereign country.27

This date of the formal ending of the occupation is not necessarily the same as the date of re-emergence of the Austrian State. Clute has persuasively argued that 28 June 1946—the date of a new agreement

25 Oppenheim, op. cit. above (p. 256 n. 20), at p. 436.
26 On post-surrender occupations, see below, pp. 267-71.
27 Keesing's Contemporary Archives, pp. 14193-8 and 14561.
concluded by the four occupying powers—can be interpreted as the real date of 'the re-emergence of the Austrian State and a government capable of acting on its behalf . . . '. The 1955 Austrian State Treaty 'merely confirmed the existence of an independent Austrian State and contributed to its stability by creating the conditions for a termination of the occupation, but did not create or re-establish the Austrian State'.

Another example of an occupation ending with a negotiated withdrawal by the occupying forces was the Israeli occupation of Sinai which had begun in 1967, and which was concluded with a phased evacuation between 1979 and 1982 in accord with the terms of the Egypt–Israel Peace Treaty signed in Washington in March 1979.

2. Continued presence of foreign forces

However, there are instances where an occupation is declared or widely presumed to have ended, but the occupant's forces remain in the country. This can happen, for example, if a treaty ending an occupation is accompanied by another one permitting the presence of foreign forces. Alternatively it may happen in a less formal way.

In Japan on 28 April 1952 a Peace Treaty ending the United States military occupation of the country took effect, and simultaneously a Security Treaty came into force, providing for a continued United States military presence.

Likewise in West Germany on 5 May 1955 a number of agreements took effect simultaneously, including one which ended the last vestiges of the three-power occupation, one which provided for the continued presence of the same three countries' forces in West Germany, and others which provided for the entry of West Germany into the North Atlantic Treaty Organization and the Western European Union.

As for East Germany, a Soviet Government statement of 25 March 1954 ended the Soviet 'supervision of the activities of the German Democratic Republic', and also specified that the Soviet Union would retain in East Germany its functions connected with guaranteeing security.

The city of Berlin meanwhile remains frozen in the time-warp of the four-power occupation. Although the powers of the Allies are minimal

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30 For texts of these two treaties, both of which had been signed on 8 September 1951, see United Nations Treaty Series, vol. 136, pp. 46, 216.
31 For details of the agreements on West Germany see B. Ruhm von Oppen, Documents on Germany under Occupation 1945-1954 (1955), pp. 600-48. Most of the occupants' powers of intervention in West German domestic affairs had already been abolished in the Convention on Relations Between the Three Western Powers and the Federal Republic, signed on 26 May 1952. Text in ibid., pp. 616-17.
32 Ibid., pp. 597-8. In 1955 several further steps were taken, including the opening of diplomatic relations between the USSR and GDR on 26 September. However, West German official publications continued for many years thereafter to refer to East Germany as the 'Soviet Occupation Zone'.
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and residual, Berlin is a reminder that occupations can assume some very strange forms, and can last for an astonishingly long time.33

In some instances, there may have been no formal statement that an occupation has ended, and no withdrawal of the occupying troops, yet the territory ceases to be viewed as occupied. The situation in Hungary after the Soviet suppression of the 1956 Hungarian uprising affords a possible example. A United Nations General Assembly resolution in November 1956 referred to 'the Soviet army of occupation in Hungary'; and a resolution in 1957 said 'the USSR has violated its obligations under the Geneva Conventions of 1949'.34 However, as events moved on and Kadar consolidated his leadership, there were no more designations of Hungary as an occupied territory, despite the continued presence of Soviet forces.

The possibility that an occupation might gradually fade away was allowed for in 1949 Geneva Convention IV, Article 6, which specified that in occupied territory the Convention shall cease to apply one year after the general close of military operations, but that 'the Occupying Power shall be bound, for the duration of the occupation, to the extent that such power exercises the functions of government in such territory, by the provisions of the following Articles ... ', which are then enumerated. The current status of this provision is discussed later in this article.35

3. Other types of ending

An occupation can also end without a departure of troops if there is a legitimate transfer of sovereignty. The treaty transfer of territory from Turkey to Greece after the Balkan Wars of 1912–13 is an example. The Permanent Court of International Justice's award in the Lighthouses case in 1934 was based on a distinction between the period when Greece was occupant, and later sovereign, of the Ottoman territories concerned.36

There have been instances in which some have ceased to view a territory as occupied, not because the situation has stabilized, but rather because resistance has become so widespread that the invader, although he has not withdrawn, is presumed to have lost capacity to exercise authority. This

33 The legal status of Berlin is the subject of the four-power agreement of 3 September 1971, but this nowhere mentions the word 'occupation', nor indeed the word 'Berlin'. For one earlier assessment of the legal status of Berlin see the chapter by Bishop in Stanger (ed.), West Berlin: The Legal Context (1966).


35 On occupations one year after the end of military operations see below, pp. 271–3.

36 PCIJ, Series A/B, vol. 62, pp. 4–20. The territories in question had been transferred from Turkey to Greece under the terms of the unratified Treaty of London of 30 May 1913 (Parry, The Consolidated Treaty Series, vol. 218, p. 159); the Treaty of Athens of 14 November 1913 (ibid., vol. 219, p. 21); and the Treaty of Lausanne of 24 July 1923 (League of Nations Treaty Series, vol. 28, p. 12). On the eventual settlement of the dispute over the lighthouses see the Permanent Court of Arbitration's decision of 24 July 1956 in the Lighthouses arbitration between France and Greece (23 ILR 659–81). Another case relating to Greece's acquisitions of territory in the period of the breakup of the Ottoman Empire, and similarly depending on a distinction between a period of occupation and subsequent transfer of sovereignty, was the Ottoman Debt arbitration: see below, p. 266 n. 58.
was a significant issue in a number of trials following the Second World War, affecting as it did the question whether the relevant body of law was that which relates to combat or that which relates to military occupations. Different decisions on the matter were reached in different cases, reflecting at least in part the different factual circumstances and issues involved.\textsuperscript{37}

The preceding brief survey of the beginning and ending of occupations has suggested that the question of when an occupation can be said to have begun, or ended, is sometimes easy to answer but is by no means always so. Even when it can be answered with confidence, there may still be many gradations between direct foreign military control on the one hand and complete independence and freedom from foreign military forces on the other.

IV. Different Types of Military Occupation

The genus 'military occupation' can be classified in many different ways, depending on the particular purpose for which the classification is made. The principal concern here being the applicability or otherwise of the law on occupations, the types or categories of occupation which appear on the following table are ones which raise different issues as to the applicability of such provisions as those contained in the 1907 Hague Regulations and the 1949 Geneva Convention IV. The question arises as to whether any of these types of occupation is subject in any way to a different international legal regime.

These types or categories of occupation are not mutually exclusive: a given occupation might well fit into two or more of the categories at the same time, and/or at different times. For example, the Allied occupation of the Rhineland at the end of the First World War was a multilateral occupation; and it could additionally in successive periods be fitted into three other categories (first belligerent, then armistice, then peacetime occupation by consent)—a reminder of the artificiality of these categories.

The list is neither exhaustive nor definitive: authorities are not agreed on the exact terms to be applied, and it represents just one attempt at distillation and improvisation. Each type of occupation listed is discussed separately under the relevant heading below.

\textsuperscript{37} See, e.g., two cases before the United States Military Tribunals at Nuremberg. In the Hostages case (USA v. Wilhelm List et al.), United States Military Tribunal V ruled on 19 February 1948 that the German armed forces were able to maintain control of Greece and Yugoslavia until they evacuated them in 1944: \textit{Trial of War Criminals before the Nuremberg Military Tribunals}, vol. 11 (1950), pp. 1243-4. In the Einsatzgruppen case (USA v. Otto Ohlendorf et al.), United States Military Tribunal II ruled on 8-9 April 1948 that in parts of the Soviet Union occupied by Nazi Germany 'the so-called partisans had wrested considerable territory from the German occupant, and ... military combat of some dimensions was required to reoccupy those areas ... In reconquering enemy territory which the occupant has lost to the enemy, he is not carrying out a police performance but a regular act of war ...'. ibid., vol. 4 (1950), pp. 492-3. See also the substantial discussion of this issue as it had arisen in the post-war French case of \textit{In re Bauer and Others}: United Nations War Crimes Commission, \textit{Law Reports of Trials of War Criminals} (1947-9), vol. 8, pp. 18-19.
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Seventeen Types of Occupations

(a) Wartime and post-war:

1. Belligerent occupation
2. Occupation of neutral territory
3. Occupation of allied territory
4. Armistice occupation
5. Post-surrender occupation
6. Occupation one year after military operations

(b) Peacetime:

7. Forcible peacetime occupation
8. Peacetime occupation by consent

(c) Other possible categories:

9. Occupation of territory whose status is disputed or uncertain
10. Occupation with an indigenous government in post
11. Subsequent occupation
12. Multilateral occupation
13. Occupation by United Nations or similar forces
14. Occupation of territory for which the United Nations is responsible
15. Occupation by a non-State entity
16. 'Illegal occupation'
17. 'Trustee occupation'

(a) Wartime and Post-War

The following types of occupation occur during or directly after wars. The word 'war' is used in a factual sense here, to refer to significant (and in this case international) armed conflict.

1. Belligerent occupation

This is the classic type of military occupation. It is sometimes known as *occupatio bellica*, and is more or less synonymous with another commonly used term, 'occupation of enemy territory'. When the term 'belligerent occupation' is used in its strict sense, its key distinguishing characteristics are that it is (a) by a belligerent State, (b) of territory of an enemy belligerent State, (c) during the course of an armed conflict, and (d) before any general armistice agreement is concluded. However, the term

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38 In past centuries, the term *occupatio bellica* sometimes carried a more extreme meaning, even implying full acquisition of sovereignty by the occupant.
sectiontext

2. Occupation of neutral territory

This is the occupation by a belligerent of all or part of the territory of a State which has been neutral in a particular armed conflict. Usually this is but one form of belligerent occupation, because such States normally cease to be neutral at the moment when they are attacked and resist such attack. As Oppenheim has said:

41 Von Glahn, op. cit. above (p. 261 n. 39), at p. 27. However, this restrictive view is not evident on p. 20 (where he quotes 1949 Geneva Convention IV, Article 2); p. 273; and p. 281, where the Convention's application to post-surrender occupations is well discussed.
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Hostilities against a neutral on the part of either belligerent are acts of war, and not mere violations of neutrality. Thus the German attack on Belgium in 1914, to enable German troops to march through Belgian territory and attack France, created war between Germany and Belgium. In minor instances—for example, when a neutral State wards off a frontier incursion—such a transformation of neutrality into belligerency cannot in every case be taken for granted.

The Hague Regulations are generally accepted as applying to occupations of neutral territory. As Feilchenfeld said in 1942:

Section III of the Hague Regulations applies expressly only to territory which belongs to an enemy and has been occupied without the consent of the sovereign. It is, nevertheless, usually held that the rules on belligerent occupation will also apply where a belligerent, in the course of the war, occupies neutral territory, even if the neutral power should have failed to protest against the occupation.

The applicability of the Hague Regulations to the Axis occupations of neutral States in the Second World War was accepted in principle by both prosecution and defence at the International Military Tribunal at Nuremberg, and at other post-war trials where the issue arose.

The 1949 Geneva Conventions, in accord with the broad terms of common Article 2, quite clearly apply to occupations of neutral territory.

3. Occupation of allied territory

This can occur in a number of circumstances. Its usual form is the recapture of all or part of the territory of an ally from an enemy who has been a belligerent occupant of the territory in question. Such an occupation may be of short duration, pending the return of the legitimate sovereign or the establishment of an indigenous government and administration. In most cases it is likely to be governed by some prior agreement between the occupying power and the government of the occupied State, thus falling into the category of occupation by consent: any such occupation has a special legal character, not only because of its separate legal basis (the particular agreement), but also because the indigenous authorities may be entrusted with wider powers than in a belligerent occupation.

Is the law on occupations applicable in such cases? There has been little writing about this, partly no doubt because relatively fewer problems are anticipated than in other types of occupation. In the writing that exists, broadly similar views are expressed as to the applicability of the law on occupations of allied territory.

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43 Oppenheim, op. cit. above (p. 256 n. 20), at p. 685.
44 'The fact of a neutral Power resisting, even by force, attempts to violate its neutrality can not be regarded as a hostile act': 1907 Hague Convention V on Neutrality in Land War, Article 10.
45 Feilchenfeld, op. cit. above (p. 261 n. 39), at p. 8. Von Glahn takes a similar view in op. cit. above (p. 261 n. 39), at p. 12. Oppenheim, op. cit. above (p. 256 n. 20), at p. 241, states that in certain circumstances an occupant of neutral territory 'does not possess such a wide range of rights with regard to the occupied country and its inhabitants as he possesses in occupied enemy territory'.
occupations. Von Glahn has said: 'Unless regulated in advance by treaty with the government involved, the occupant would appear to be bound by the provisions of the Hague Regulations and subsequent international lawmaking treaties.'\textsuperscript{46} He does not specify what the continuing role of the Hague Regulations, etc., might be in the event that there is such an agreement or treaty with the government concerned. The British military manual is sceptical about the applicability of the law on occupations to occupations of allied territory, except in those cases where it is not possible to conclude a 'civil affairs' agreement before liberation of that territory: in such cases the law on occupations ought to apply as a minimum standard.\textsuperscript{47} Greenspan takes much the same line.\textsuperscript{48}

In practice, most occupations of allied territory have been governed by what have come to be known as civil affairs agreements, and not explicitly by the law on occupations, though the former often reflect the language and concepts of the latter. Towards the end of the Second World War the Allies made agreements for strictly temporary military authority over civil administration in France, Belgium, Luxembourg, the Netherlands, Norway, Denmark, French Indo-China and the Netherlands East Indies.\textsuperscript{49} As Donnison has said apropos of these occupations:

In the case of forces operating in friendly territory the legal position is not so clear. There is a conflict between two principles, the one, the continuance or the revival, if the territory has been recovered from enemy occupation, of the sovereignty of the friendly government concerned, the other, the principle of military necessity under which the military commander is entitled to take any measures necessary to the success of his operations. There is not the same body of international law and usage to regulate such a situation as there is in the case of operations in enemy territory.\textsuperscript{50}

Much the same view—that in an occupation of allied territory the Hague Regulations are not applicable—was advanced in several Polish judgments after the Second World War so far as the activities of Soviet forces on Polish territory were concerned.\textsuperscript{51}

However, in at least one post-war occupation of what was technically allied territory the laws of war appear to have been viewed as applicable. This was in Java, a part of the Netherlands East Indies occupied by Japan in the Second World War and then liberated by the Allies in September 1945 after Japan's surrender. The situation in Java was complicated by the fact that there was tension between local political forces seeking

\begin{itemize}
\item \textsuperscript{46} Von Glahn, op. cit. above (p. 261 n. 39), at p. 27.
\item \textsuperscript{47} UK Manual, op. cit. above (p. 256 n. 20), at pp. 146-1 n. See also US Manual, op. cit. above (p. 256 n. 20), at p. 139.
\item \textsuperscript{48} Greenspan, op. cit. above (p. 262 n. 42), at pp. 211-12, 235-40.
\item \textsuperscript{49} Donnison, \textit{Civil Affairs and Military Government: Central Organisation and Planning} (1966), pp. 121-3. He points out that in the cases of Denmark, France and French Indo-China, agreements were only concluded after the arrival of the Allied forces.
\item \textsuperscript{50} Id., \textit{Civil Affairs and Military Government: North-West Europe 1944-46} (1961), p. 37.
\item \textsuperscript{51} See esp. \textit{Jakub L. v. Teofil B.}, a 1946 case about a cow which changed hands, 26 ILR 730.
\end{itemize}
independence, and the Allied occupants who were working in conjunction with the Netherlands, the (absent) colonial power in the area. In the case of Public Prosecutor v. X. (Eastern Java), a Temporary Court Martial at Surabaya held on 9 January 1948:

The Commanders of an Allied Military Force occupying a territory which it had reconquered from the common enemy did not derive their powers to issue military Ordinances for such a territory from the ordinary laws in force there, but directly from the generally recognized principles of war according to which those who de facto exercise authority in such liberated countries are entitled to issue the necessary military regulations. 52

There may be a case for saying that 1949 Geneva Convention IV is applicable to occupations of allied territory, as it is to the other situations covered in the broad terms of common Article 2. However, in many cases the Convention’s application is likely to be restricted because of the provision in Article 4, paragraph 2, that nationals of a co-belligerent State ‘shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are’. Commenting on this, Pictet says: ‘It is assumed in this provision that the nationals of co-belligerent states, that is to say, of allies, do not need protection under the Convention.’ 53

A quite different form of occupation of allied territory is that which occurs against the will of the occupied State—for example, when the senior partner in an alliance intervenes to prevent his co-belligerent opting out of a war. Typical cases are the German Army’s take-overs in northern Italy following the announcement on 8 September 1943 that the Italian Government had surrendered; and in Hungary in March 1944. It was particularly on account of the case of Italy that Article 4, paragraph 2, of 1949 Geneva Convention IV contained the above-mentioned condition that there should be normal diplomatic representation. 54 Where normal diplomatic relations have been broken off, the inhabitants are to be regarded as protected persons. Thus coercive occupations of the territory of co-belligerents are covered by 1949 Geneva Convention IV.

4. Armistice occupation

This is an occupation under the terms of an armistice between belligerents. It is sometimes known as mixed occupation, or occupatio mixta—bellica pacifica; 55 and is quite widely viewed as one form of

52 Annual Digest, 15 (1948), Case no. 176, p. 535. On the background, see Donnison, British Military Administration in the Far East 1943–46 (1956), pp. 422–4. However, a 1945 Belgian case indicated that an allied occupying power operating under the terms of a specific agreement may have very restricted rights: below, p. 305 n. 197.
53 Pictet, op. cit. above (p. 253 n. 11), at p. 49.
54 Ibid.
belligerent occupation. The territory concerned may have been under belligerent occupation in the pre-armistice period, or it may be newly occupied.

An armistice can be defined as an agreement (which may be general or local) between belligerents on the suspension of hostilities. It may be of a temporary nature, like a truce or cease-fire, or it may involve a complete cessation of hostilities. The term is now most often used in the latter sense. An armistice is distinct from (though it may precede) a definite treaty of peace.

At the end of the First World War there were many armistice occupations by forces of the Allied powers. For example, Western Thrace, which had been assigned to Bulgaria in 1913 under the terms of the 1913 Treaty of Bucharest, was occupied by the Allied Powers at the end of 1918 following the Armistice Convention of Prilep of 29 September 1918. Subsequently, in accordance with the Peace Treaty of Neuilly of 27 November 1919 (which entered into force on 9 August 1920), the territory was ceded to the Allied Powers—which meant in effect Greece. Other examples in the same period were the occupation of part of Hungary by Serbian troops from November 1918 to August 1921; and the occupation of the left bank of the Rhine under the terms of the Armistice of 11 November 1918 until a more permanent agreement was concluded on 28 June 1919.

During the two world wars, such armistice agreements as provided for occupations usually contained a clause stipulating that the occupant had all the rights of an occupying power, but they also provided for support and co-operation from the occupied country. As Bothe has indicated, this

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67 However, some armistices may put an end to a state of conflict or war. See McNair and Watts, The Legal Effects of War (4th edn., 1966), p. 15.

68 The status of Western Thrace between 1918 and 1920 was one of the matters considered in the Ottoman Debt arbitration (1925). The Swiss arbitrator, Professor E. Borel, ruled that these were occupied territories up to 9 August 1920, and that no transfer of sovereignty took place before that date: Reports of International Arbitral Awards, vol. 1, pp. 554-6. Similarly in the Thrace (Validity of Wills) case (1925), a Greek court viewed Thrace as having been occupied (and hence Bulgarian law as having been still applicable) during the period when it was controlled by inter-allied troops, and in particular in early 1920: Annual Digest, 3 (1925-6), Case no. 364, p. 477.

69 On the Austrian occupation of part of Hungary, see the case of I. Vétek v. N. Dürnbacher & Co. in Annual Digest, 4 (1927-8), Case no. 386, p. 566.

On the armistice occupation of the Rhineland see the excellent discussion of legal aspects in Fraenkel, op. cit. above (p. 262 n. 42), at pp. 183-9. Note particularly his disquiet (p. 188) at the German view which down-played the applicability of the law of belligerent occupation. For a text of the 1918 armistice see Parry, The Consolidated Treaty Series, vol. 224, p. 286.
may suggest that the rights and duties of an occupying power can be determined by two different sources—the law on occupations, and the terms of the armistice. He expresses some scepticism as to whether the status of foreign forces was in fact different in each of these cases.60

Since the Second World War, the various armistice agreements which have been concluded have not specifically provided for occupations of territory, although some (for example, after the 1973 Middle East war) were followed by a continuation of an already existing occupation.61

It is widely accepted that the Hague Regulations apply to armistice occupations. Some modifications might be included in the armistice agreement, but the Hague Regulations remain important, at the very least, as a set of minimum standards.62

The 1949 Geneva Conventions are clearly applicable to armistice occupations.63 They set some limits to the modifications which can be contained in any agreement (including an armistice agreement) between the parties.64 However, if an armistice involved a general close of military operations, and lasted for more than one year, then under Article 6 some provisions of Convention IV could cease to apply.65

5. Post-surrender occupation

This is defined here as the occupation of a country which after taking part in an armed conflict has surrendered completely, and neither continues to maintain armed forces in the field, nor has any allies fighting to redress the situation.66 It may have a less precarious and temporary character than belligerent occupation. A number of particular types of occupation can be regarded as variants of post-surrender occupation. They include occupation subsequent to unconditional surrender; and post-debellatio occupation, which can be said to occur when at the end of a war a country is so completely defeated that it has virtually ceased to exist as a State.67

61 Ibid., pp. 63-4.
62 Spaight, op. cit. above (p. 262 n. 42), at pp. 245-8; Feilchenfeld, op. cit. above (p. 261 n. 39), at pp. 6, 110-14; von Glahn, op. cit. above (p. 261 n. 39), at p. 28; UK Manual, op. cit. above (p. 256 n. 20), at p. 130.
63 Under the first paragraph of common Article 2 of the 1949 Conventions: Pictet, op. cit. above (p. 253 n. 11), at pp. 20-2, 62, 63, etc.
64 That special agreements may not undermine the principles of the 1949 Geneva Convention IV is spelt out clearly in Article 7; Article 11, para. 5; and Article 47. For an explanation of Articles 7 and 47, confirming the Convention’s relevance to armistice occupations, see ibid., pp. 67 and 274-5. See also Castrén, The Present Law of War and Neutrality (1954), p. 214.
65 Pictet is explicit that Article 6 applies to amistices: op. cit. above (p. 253 n. 11), at p. 63. This article is discussed further below, pp. 271-3.
66 Von Glahn calls this ‘hostile occupation’: op. cit. above (p. 261 n. 39), at p. 27.
67 The term debellatio, which is the same as 'subjugation', is not always used quite consistently. Schwarzenberger points to its basic meaning when he suggests that it is the process whereby ‘armed conflicts are terminated unilaterally by the destruction of a party to the conflict as an independent and organized entity’: International Law as Applied by International Courts and Tribunals, vol. 2 (1968),
Where a State's forces surrender, but there are still allies who continue the struggle, there is an ordinary belligerent occupation, not a post-surrender occupation as discussed here. In cases where there is an actual instrument of surrender or of capitulation, the legal framework of a post-surrender occupation is likely to be significantly influenced by its terms.

A country's defeat and collapse does not necessarily lead to occupation; or it may lead to occupation of a rather special kind. At the end of the First World War, events at the time of the collapse of the Austro-Hungarian Empire raised the question of whether, within a disintegrating State, and before the entry into force of the various peace treaties, any new political or military entities which emerged within the former empire could be considered in any sense the occupants of the territory which they held, or could at least be subject to the application by way of analogy of the law on occupations. Some cases arising from these events indicate a tendency to view at least part of section III of the Hague Regulations as applicable to the new authorities exercising power in one part or another of the former empire. See particularly the decision in the Danube Shipping arbitration (1921), in which it was held that although the situation in the former territory of the Hapsburg Empire at the end of the First World War was not an occupation in the normal sense, and the letter of the Hague provisions did not apply, Articles 46 and 53 should be examined 'to see if they furnish a useful analogy'. However, in the event, the arbitrator decided that the character of the vessels concerned was such that they did not fall within the scope of these articles of the Hague Regulations.

The Allied occupations of Germany and Japan after the Second World War provide much clearer examples of post-surrender occupations, and also of reluctance to be formally bound by the Hague Regulations. Here, as well as elsewhere, the victors desired to exercise their power freely, and in particular to make drastic political and other changes in the defeated States. The basic character of these occupations raised issues to which relatively little attention had been paid by international lawyers. Previously, it had sometimes been assumed that the normal consequence of a State's surrender was its subjugation or possibly even annexation by the
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victor; but this did not happen in the bulk of German or Japanese territory at the end of the Second World War, nor in a number of other instances at that time of post-surrender occupations. What took place instead, especially in Germany and Japan, were occupations which went beyond the letter of the Hague Regulations, yet fell short of annexation or assumption of sovereignty.

With respect to the occupation of Germany which began in 1944-5, a legal memorandum to the Foreign Office in March 1945 set out the basic problem:

The truth is that the Allies are dealing with a situation without previous parallel; they are proposing to exercise their authority with respect to Germany in order to expel the Nazi system and its manifestations completely and utterly, and to continue this process indefinitely until it has succeeded. These objects, far ranging as they are, do not necessarily amount to annexation and the positive and complete transfer of sovereignty whether by cession or by conquest. But they do undoubtedly go far beyond the exercise of military occupation as limited by previous international law.71

After the Germans accepted unconditional surrender on 7 May 1945, Germany was completely occupied by the Allies. What then was the position so far as the application of the Hague Regulations was concerned?72 On this point Jennings, in his authoritative 1946 article ‘Government in Commission’, argued persuasively that the law of belligerent occupation had been designed to serve two purposes: first, to protect the sovereign rights of the legitimate government of the occupied territory, and secondly, to protect the inhabitants of the occupied territory from being exploited for the prosecution of the occupant’s war. Neither of these purposes had much bearing on the situation the Allies faced:

Thus the whole raison d’etre of the law of belligerent occupation is absent in the circumstances of the Allied occupation of Germany, and to attempt to apply it would be a manifest anachronism.73

Friedmann adopted a very similar position:

Nor could even the widest interpretation of the rules of warfare bring the powers claimed and exercised by the allies in Germany within the scope of belligerent occupation . . . Even the most elastic interpretation could not bring the wholesale abolition of laws, the denazification procedure, the arrest of thousands of individuals, the introduction of sweeping social reforms, the expropriation of industries, and above all the sweeping changes in the territorial and constitutional

72 The position before 7 May 1945 is widely viewed as one of normal belligerent occupation. However, as some anti-Nazi measures taken early in the belligerent phase show, there was not a completely sharp distinction between the two stages of the occupation of Germany.
73 This Year Book, 23 (1946), pp. 135–6.
structure of Germany within the rights of belligerent occupation. These are symbols of sovereign government, yet it is of the essence of belligerent occupation that it does not claim such powers.

... It is not... surprising that International Law—inadequate to cope with many problems of our days—should not be fully equipped to deal with an entirely unprecedented situation.\(^7^4\)

The majority of court decisions took the line that the Allied occupation of Germany after its surrender was not subject to the Hague Regulations.\(^7^5\) For example, in *Dalldorf and Others v. Director of Public Prosecutions* a Control Commission Court of Appeal in the British Zone of Germany ruled on 31 December 1949 that Section III of the Hague Regulations was not applicable to the Allied occupation of Germany after unconditional surrender.\(^7^6\)

These views as to the legal status of Germany after surrender were by no means uncontested.\(^7^7\) Nor did such views mean that there was a complete international legal vacuum. Even the post-surrender phase may be said to have been subject to 'such rules of international law as limit the right of any Government to commit acts which constitute crimes against peace and crimes against humanity'.\(^7^8\)

The 1949 Geneva Conventions appear to have substantially changed the situation. Under common Article 2 it would seem that they are applicable to post-surrender occupations, at least for as long as a state of war between the parties continues—i.e. until there is a proper treaty of peace.\(^7^9\) In these occupations, as in others, there are limits to the modifications which can be contained in any agreement between the parties.\(^8^0\) However, under Article 6, which is discussed further below, the application of 1949 Geneva Convention IV may be modified in occupied territory one year after the general close of military operations.

Writers have increasingly inclined to the view that post-surrender occupations have been brought within the scope of the law on occupations. True, in 1952 Oppenheim's *International Law* still took the view that post-surrender occupations are not subject to the customary and conventional rules relating to occupations.\(^8^1\) Von Glahn agrees with Oppenheim that the Hague Regulations were not applicable to Germany after 1945, but suggests that in future cases the 1949 Geneva Convention IV would be


\(^{75}\) For a brief listing of cases see Greenspan, op. cit. above (p. 262 n. 43), at p. 216 n.

\(^{76}\) Annual Digest, 16 (1949), Case no. 159, p. 435.

\(^{77}\) See the excellent survey of the various theories as to the legal status of Germany from 1945 by Theodor Schweisfurth, in *Encyclopaedia of Public International Law*, vol. 3 (1982), pp. 196–7.

\(^{78}\) Ibid.

\(^{79}\) Pictet, op. cit. above (p. 253 n. 11), at p. 22.

\(^{80}\) 1949 Geneva Convention IV, Articles 7, 47, etc.

\(^{81}\) Oppenheim, op. cit. above (p. 256 n. 20), at pp. 216, 552-4, 602-5. In none of these passages is there any mention of the 1949 Geneva Convention IV, although it has a bearing on the matter.
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applicable. The United Kingdom military manual, and also Greenspan, take a similar line on the applicability of 1949 Geneva Convention IV. Schwarzenberger suggests that in international customary law the only limitations on a victor's discretion are those imposed by the standard of civilization; but he goes on to suggest that even an instrument of unconditional surrender may not free a party from such multilateral engagements as the 1949 Geneva Convention IV, or even possibly the Hague Regulations.

In summary, there have been two main schools of thought about the application of occupation law to post-surrender occupations. The first is that such occupations are quite different in character from belligerent occupations, particularly because they may involve making fundamental and permanent changes altering the whole character of the defeated State. Hence the law on occupations is seen as largely irrelevant. The second view is to accept that post-surrender occupations are bound to be different from belligerent occupations, but nevertheless to urge the applicability of the law on occupations, which is after all capable of being adjusted to a wide variety of circumstances. The facts that 1949 Geneva Convention IV adopts such an approach; that certain derogations can sometimes be permitted (as in the 'unless absolutely prevented' proviso in Hague Regulations Article 43); and that there is some room for special agreements between the parties, all tend to reinforce the second view.

6. Occupation one year after military operations

Some occupations continue for a very long time after the end of the fighting, invasion, etc., with which they began. Lengthy occupations of this kind can give rise to special problems, both practical and legal. Also, certain provisions of occupation law—particularly those based on a presumption of a continuing armed conflict—may lose their relevance.

The 1949 Geneva Convention IV, Article 6, paragraph 3, provided that in occupied territory the Convention shall cease to apply one year after the general close of military operations: after that time, to the extent that the occupying power exercises the functions of government in occupied territory, it is only obliged to observe a list of forty-three articles of the 159-article Convention. However, these forty-three articles do include no less than twenty-three of the thirty-two articles of that part of the Convention—section III—which deals most specifically with occupied territories. The forty-three articles which remain in force are important, covering as they do such matters as the humane treatment of protected persons.

82 Von Glahn, op. cit. above (p. 261 n. 39), at pp. 281, 283. On p. 27 he says of post-surrender and other types of occupation: 'Unless regulated in advance by treaty with the government involved, the occupant would appear to be bound by the provisions of the Hague Regulations and subsequent international lawmakers treaties.'


84 Schwarzenberger, op. cit. above (p. 267 n. 67), at pp. 318–19.
The ‘one year after’ provision was much debated at the 1949 Diplomatic Conference. Pictet states that in drawing up this provision ‘the delegates naturally had in mind the cases of Germany and Japan’. The curtailment of the application of parts of the Convention seems to have derived from a reasonable, though hardly infallible, belief that after the cessation of hostilities a time would come when the full application of the Convention was no longer justified, especially if most of the governmental and administrative duties carried out at one time by the occupying power had been handed over to the authorities of the occupied territory. For example, Pictet defended those provisions of Article 6 on the grounds that

... if the Occupying Power is victorious, the occupation may last more than a year, but as hostilities have ceased, stringent measures against the civilian population will no longer be justified.

The 1977 Geneva Protocol I abrogates the ‘one year after’ provisions as outlined above. Article 3 simply states that ‘the application of the Conventions and of this Protocol shall cease . . . in the case of occupied territories, on the termination of the occupation . . .’. Both, Partsch and Solf say of this abrogation:

Article 6 (3) of the Fourth Convention . . . was a special ad hoc provision for certain actual cases, namely the occupation of Germany and Japan after World War II. There is no reason to continue to keep in force such provisions designed for specific historic cases. In 1972 the majority of government experts expressed a wish to abolish these time limits.

The abrogation of the ‘one year after’ rule may reflect in part the proper desire of the international community to maintain the full applicability of the law on occupations to areas occupied by Israel since 1967. However, the idea that the law on occupations—or major parts of it—can remain applicable more or less indefinitely, leaves open some disturbing possibilities. For example, one or another party to a conflict might refuse to negotiate a peace treaty, and at the same time seek to have aspects of the status quo within occupied territory preserved. According to Israeli interpretations, this is what Arab States have sought to do in the Middle East since 1967. In this view, the law on occupations is being invoked as an enduring safety net against the consequences of diplomatic immobilism. On the other hand, Israel may see some advantage in the continuation of the status of occupied territory, because this arrangement provides a legal basis for treating the Arab inhabitants of the territories entirely separately.

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84 Pictet, op. cit. above (p. 253 n. 11), at p. 62.
85 Ibid., p. 63. Pictet goes on to suggest that in cases where there has been no military resistance, no state of war and no armed conflict, the Convention would remain fully applicable as long as the occupation lasts. However, it is far from clear (a) whether this was the intention of the negotiators; and (b) what the logic is in treating such occupations differently.
86 Bothe, Partsch and Solf, op. cit. above (p. 254 n. 16), at p. 59. See also p. 57.
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from the citizens of Israel: such a view suggests that the law on occupations could potentially pave the way for a kind of apartheid. Whatever the views on such matters, it remains the case that occupations of exceptional length do expose certain inadequacies in a body of law essentially intended for much briefer and more precarious periods of foreign military control.

(b) Peacetime

The dividing line between war and peace has never been easy to identify: armed conflicts have often occurred between States without any formal declaration of war, and military interventions have often occurred without the kind of hostilities we associate with the word 'war'. Since 1945 the dividing line between war and peace may have become less significant than it was before, owing partly to the use of the more widely applicable phrase 'use of force' rather than 'war' in the United Nations Charter and subsequent treaties.

Although the types of occupation discussed below belong mainly to peacetime, it is obvious that they may occur shortly before a war, or in its aftermath; or indeed these (or closely analogous types of occupation) could occur in a particular territory or country at the same time as other States are involved in some wider war or armed conflict. Moreover, some 'peacetime' occupations may be very reasonably viewed as crimes against peace, threats to the peace or acts of war.

Two main types of peacetime occupation can be identified, namely, forcible peacetime occupation and peacetime occupation by consent—i.e. resulting from an agreement between the parties. Sometimes the term pacific occupation (occupatio pacifica) is applied to both these types of peacetime occupation, sometimes exclusively to the latter type.

Although peacetime occupations have varied particularly widely, and have arisen from a variety of legal bases, some more or less common features may be identified. Examining various nineteenth- and early twentieth-century peacetime occupations, Jones suggested that they often

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88 For a wealth of supporting evidence see Maurice, Hostilities Without Declaration of War: An Historical Abstract of the Cases in Which Hostilities Have Occurred Between Civilized Powers Without Declaration of War or Warning (1883); Grob, The Relativity of War and Peace: A Study in Law, History, and Politics (1949).

89 For an excellent discussion see Brownlie, op. cit. above (p. 259 n. 3), at pp. 84–8, 211–12, 384–400. Note particularly the judgment of 14 April 1949 in US v. Weizsaecker and Others, also cited below (p. 276 n. 102).

90 Robin, Des Occupations militaires en dehors des occupations de guerre (Paris, 1913), pp. 9–11, 719–20, etc. For the most part this work is more interesting for its wealth of historical material than for its sometimes eccentric legal classifications.

91 'Pacifica occupation is based on a special agreement or treaty covering the rights and duties of the occupant': Fraenkel, op. cit. above (p. 262 n. 42), at p. 183.
last for a very long time: they may be provisional but they are not necessarily precarious. He further said:

In the case of pacific occupation it is clear that the rights of the occupant are very much curtailed as compared with those of a belligerent occupant. In the latter case the occupant is an enemy, and has to protect himself against attack on the part of the forces of the occupied State, and he is justified in adopting measures which would justly be considered unwarranted in the case of pacific occupation . . . Belligerent military occupation is now largely regulated by the provisions of the Hague Convention, 1907, and obviously a pacific military occupant can have no powers more extensive than those laid down in the Articles of this Convention. 94

Analysing judgments arising from military occupations in peacetime, or during an armed conflict not amounting to a war, McNair and Watts indicate that 'there seems to have been a tendency to act upon a basis broadly analogous to that of a belligerent occupation during a war'. 95 The terms of the 1949 Geneva Conventions, and particularly common Article 2, must reinforce such a tendency. They apply to an occupation arising from an armed conflict not constituting a war, and also to other cases of occupation of a territory of a party, even if the occupation meets with no armed resistance. 96

7. Forcible peacetime occupation

This is the occupation of all or part of the territory of a State without the previous consent of the government, but also without causing the outbreak of an armed conflict with that State. Usually it is because the invader has made an implicit or explicit threat to use force, and military resistance against invasion appears hopeless, that this kind of invasion is militarily unopposed. Such interventions have been quite common in the twentieth century and have occurred in a variety of circumstances.

The Hague Regulations have been widely viewed as applicable to forcible peacetime occupations. Since such occupations are by definition not governed in advance by any specific bilateral agreement between occupant and occupied, there has naturally been a strong tendency to apply to this type of occupation the existing body of international law governing belligerent occupations. As regards the invasion of Bulgaria by the Romanian army in 1913, which was a military operation without

94 Jones, loc. cit. above (p. 265 n. 55), at pp. 159–60. On the general issue of international rules applicable to peacetime occupations see also Robin, op. cit. above (p. 273 n. 91), at pp. 13–15, 630, 722, 731–2; Feilchenfeld, op. cit. above (p. 261 n. 39), at p. 116; Castrén, op. cit. above (p. 267 n. 64), at p. 214; Debbasch, L'Occupation militaire: pouvoirs reconnus aux forces armées hors de leur territoire national (1962), pp. 1, 85–7, etc.

95 McNair and Watts, op. cit. above (p. 266 n. 57), at p. 423. Many of the judgments which they examined in the preceding pages arose from what are here included under the heading of 'peacetime occupations'.

96 The 1947 Conference of Government Experts had been even more explicit that the Conventions should be applicable to 'cases of occupation of territories in the absence of any state of war': Pictet, op. cit. above (p. 253 n. 11), at p. 18.
any fighting, Grob (discussing the matter hypothetically) favoured the applicability of the Hague Regulations.\textsuperscript{97}

Courts have generally supported such a view of forcible peacetime occupations. Thus in a case during the Franco-Belgian occupation of the Ruhr area of Germany in 1923–5, it seems to have been accepted by both German and French parties that the Hague Regulations were applicable, even if there was some inevitable disagreement about how they should be interpreted.\textsuperscript{98}

The \textit{locus classicus} of the applicability of the Hague Regulations to forcible peacetime occupation is the German occupation of Bohemia and Moravia, which had started in March 1939, six months before the outbreak of the Second World War. The International Military Tribunal at Nuremberg said in its judgment in 1946 that the rules of land warfare (including of course the Hague Regulations) applied to the occupation of Bohemia and Moravia, because ‘these territories were never added to the Reich, but a mere protectorate was established over them’.\textsuperscript{99}

Although the Nuremberg judgment did thus assert the applicability of the Hague rules in Bohemia and Moravia, it did not solve all problems relating to the status of territories occupied in peacetime. For example, the IMT did not explicitly spell out what the status of Bohemia and Moravia had been between the invasion in March 1939 and the outbreak of war in September, a question which was not essential to the case before it. A reasonable inference is that the Hague rules were applicable from the start of that occupation. Such a view on the status of occupied Czechoslovakia had already been taken in August 1943 by the Supreme Court of Victoria, Australia, in the case of \textit{Anglo-Czechoslovak and Prague Credit Bank v. Janssen}, in which the court expressed the view that the same rules applied in a military occupation in time of peace as in a belligerent occupation.\textsuperscript{100}

The matter of the legal status of Austria, occupied by Germany on 12 March 1938, is complicated by several facts, including: (a) that there was a last-minute telegram of invitation, though only from the Interior Minister, and it hardly disguised the reality that Austria was in the process of yielding to brute force; and (b) on 13 March Austria was declared a part of the German Reich. There have been several legal theories about this occupation. Clute has expressed scepticism as to whether post-Anschluss Austria is properly viewed as a case of belligerent occupation, and has said that none of the terms applied to this situation seems adequate.\textsuperscript{101} It may

\textsuperscript{97} Grob, op. cit. above (p. 273 n. 89), at pp. 280–1.

\textsuperscript{98} See the report of the cases of \textit{In re Thyssen and Others} and \textit{In re Krupp and Others}, in \textit{Annual Digest}, 2 (1923–4), Case no. 191, pp. 327–8. A critical journalist’s account of these two cases is Gedye, \textit{The Revolver Republic} (1930), pp. 192–3.

\textsuperscript{99} \textit{The Trial of German Major War Criminals} (London, 1946–51), vol. 22, p. 467. For a text of Hitler’s proclamation of 16 March 1939 on the legal and constitutional status of Bohemia and Moravia, see Keeling’s \textit{Contemporary Archives}, p. 3486.

\textsuperscript{100} \textit{Annual Digest}, 12 (1943–5), Case no. 11, p. 47.

\textsuperscript{101} Clute, op. cit. above (p. 258 n. 28), at p. 21.
be that it should have been categorized as an occupation, but in fact it was not widely so viewed, and to the extent that there was not the sharp conflict of allegiance characteristic of most occupations there would have been little point in such a categorization. Post-war decisions indicate an understandable reluctance to view Austria as having been an occupied country. The question of the applicability of the Hague Regulations was not directly tackled by the International Military Tribunal at Nuremberg, but it did come up in other cases. A post-war United States Military Tribunal ruled that the Hague Regulations were not applicable to Austria 1938-45, but added:

In so ruling, we do not ignore the force of the argument that property situated in a weak nation which falls a victim to the aggressor because of incapacity to resist should receive a degree of protection equal to that in cases of belligerent occupation when actual warfare has existed. 102

Whatever uncertainties there may be in relation to some past episodes, the present situation is clearer. In accordance with its common Article 2, second paragraph, 1949 Geneva Convention IV is applicable to forcible peacetime occupations. As Bothe has said, 'the notion of "pacific" coercive occupation as distinguished from belligerent occupation does not have any current practical significance'. 103

The Soviet-led occupation of Czechoslovakia beginning on 20–1 August 1968 was a fairly clear example of forcible peacetime occupation, but the application of the Geneva Conventions was little discussed in that case—no doubt partly because the Czechoslovak governmental and legal system continued to function effectively (albeit under obvious constraints) in the months and years after the invasion. 104

8. Peacetime occupation by consent

The idea of 'peacetime occupation by consent' raises problems: if foreign forces are in a country in peacetime, in accordance with an agreement with its government, there is bound to be a presumption against using such terminology to describe the situation: a troop stationing agreement does not create an occupation. 105 In addition, there are bound to be doubts about the relevance of the law on occupations, essentially a

102 US v. Krauch and Others, judgment of 29 July 1948, Annual Digest, 15 (1948), Case no. 218, p. 672. However, see also the judgments in US v. Weizsaecker and Others, in which it was held that the German invasions of Austria and Czechoslovakia 'were tantamount to, and may be treated as, a declaration of war': ibid. 16 (1949), Case no. 118, p. 347; and in US v. Uhl, in which evidence of United States recognition of the consolidation of Austria with Germany was presented: ibid. 12 (1943–5), Case no. 8, pp. 23–9.
103 Encyclopaedia of Public International Law, vol. 4, p. 68.
104 For a characterization of the Czechoslovak situation as a 'Soviet-led invasion and occupation', see the statements of United States Representative Herbert Reis in the United Nations Committee on Principles of International Law, published in Department of State Bulletin, 14 October 1968, pp. 394–401.
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part of the laws of war, to a situation characterized both by the absence of armed conflict and by the positive fact of an agreement between the parties.

However, the idea of peacetime occupation by consent is not entirely devoid of meaning or practical importance. It has long been recognized as a distinct type. Sometimes, as noted above, the term 'pacific occupation' (occupatio pacifica) has been applied exclusively to this type. Others have preferred the rather more specific term 'conventional occupation'; or, where it is intended as a means of safeguarding the withdrawal of armed forces from foreign territory following the conclusion of a peace treaty, it may be called an 'evacuation occupation'. Whatever term is used, a key distinguishing feature of such an occupation is that it takes place on the basis of a valid agreement or treaty, not obtained by duress against the negotiators, in which the States provide in advance for the occupation of all or part of the territory of one of them. Such an occupation may sometimes be intended as a guarantee that the State whose territory is occupied will execute the terms of a treaty. It will normally only be considered an occupation to the extent that there is an identifiable foreign military command structure actually exercising authority in the territory.

As with other types of occupation involving an element of consent, the invitation, agreement or treaty which brings such an occupation into being is likely to be an important means of stipulating the terms of that occupation, and is likely to vary greatly according to different circumstances. Some writers have gone so far as to suggest that the agreement in question is the only basis for determining the terms of a peacetime occupation by consent.

Peacetime occupations by consent are now fairly rare. One often-cited example is the occupation of the left bank of the Rhine by the Allied and Associated Powers under the terms of the Versailles Treaty signed on 28 June 1919 and of the separate Rhineland Agreement of the same date. This is hardly a paradigmatic example, as it was the continuation of an already existing armistice occupation. The purpose of continuing this occupation of part of Germany was largely to ensure Germany's fulfilment of the provisions of the Treaty of Versailles. The applicability of the Hague Regulations to this occupation was the subject of different interpretations. There was a tendency to argue as to whether the Rhineland Agreement, or the Hague Convention, was the source of the occupants' authority, with the Germans wanting the occupants to have fewer powers than those laid down in the Hague, and the French wanting as many or more. The

106 Both these terms are used by Robin, op. cit. above (p. 273 n. 91), at pp. 10, 11, 15; and by von Glahn, op. cit. above (p. 261 n. 39), at p. 27.
107 Robin comes fairly close to this position: op. cit. above (p. 273 n. 91), at pp. 13, 15, 722, etc. Schwarzenberger argues this line on general grounds, without at this point citing cases or authorities: op. cit. above (p. 267 n. 67), at p. 321.
108 Fraenkel, op. cit. above (p. 262 n. 42), at pp. 100, 184, 192, 199. The text of the Rhineland Agreement is in an Appendix.
Hague Regulations were still important in a number of specific ways. First, they had assisted in working out the terms of the initial agreement: indeed, Article 6 of the Rhineland Agreement explicitly referred to the 1907 Hague Convention. Thereafter they were useful as a stopgap, in matters where problems arose which were not covered by the initial agreement.109 Courts took the line that the rules drawn up at The Hague were valid not only in regard to an occupation 'based solely on force and on disregard of treaties', but also, a fortiori, in regard to an occupation 'which was carried out in virtue of a treaty...'.110

A very different type of peacetime occupation by consent derives from the practice of sending troops into a country on the basis of an invitation from a host government, and thereafter taking over important administrative or leadership functions in that country. Although those directly involved are likely to find other terms for the situation, the end result may be so similar to a foreign occupation that it might reasonably be so viewed, and the law on occupations might reasonably be regarded as applicable. Take, for example, a deeply divided and weak country, facing civil war. It has an unpopular government with a clear external ideological orientation, which invites in a sympathetic superpower ally. That ally then largely dominates indigenous political developments, and there are even allegations that it had complicity in the assassination of the embarrassingly unpopular head of the government which had invited it in. It also gets deeply involved in counter-insurgency operations against the regime’s opponents. This is a rough approximation of the situation in Afghanistan since the Soviet intervention of December 1979.111 It also bears some similarities to the situation of South Vietnam at the time of United States involvement between the mid-1950s and 1973. The international element in such conflicts appears to be so marked that the better developed body of international law governing international armed conflicts and occupations may well be viewed as applicable.

A central difficulty of applying the law on occupations to situations of this type is likely to be the argument to the effect that the conflict is basically internal, and that foreign forces, acting by invitation, are supposedly not occupants. So far as 1949 Geneva Convention IV is

109 See, e.g., Feilchenfeld, op. cit. above (p. 261 n. 39), at pp. 118-19.
110 Judgment of the Military Court of the Belgian Army of Occupation in the Rhineland in the case of In re Boulanger, 19 April 1923. See also the same court’s earlier judgment in the case of Auditeur Militaire v. Reinhardt and Others: ‘Legally there can be a military occupation even in cases where there is no war properly so-called; there is nevertheless an occupatio bellica’: Annual Digest, 2 (1923-4), Case no. 239, pp. 441, 442.
111 The situation in Afghanistan has been criticized in successive United Nations resolutions as one of ‘foreign armed intervention’, without the actual word ‘occupation’ being used. See, e.g., GA Resolutions 36/34 of 18 November 1981, and 37/37 of 29 November 1982. However, many governments have referred to this situation as an occupation. For example, on 13 July 1982 the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote that Britain and China ‘have similar views on such international issues as the Soviet occupation of Afghanistan and the Vietnamese occupation of Cambodia’: this Year Book, 53 (1982), p. 353.
concerned, there are two possible answers to this problem. First, Articles 7 and 47 establish that any special agreements (for example, between the authorities of the occupied territories and the occupying power) may not adversely affect the situation of protected persons. It appears that these articles can refer to agreements concluded before as well as during hostilities; and presumably, therefore, before an occupation also. A second and less legalistic answer might be to assert that the Convention embodies important general rules for the protection of civilians from a foreign military power in whose hands they are, and these rules should be faithfully observed irrespective of whether the situation is designated as an 'occupation' or as something else.

(c) Other Possible Categories

The types of occupation discussed below can occur in wartime or in peacetime. In every case the actual historical examples mentioned could also fit into one or more of the eight categories already considered.

9. Occupation of territory whose status is disputed or uncertain

Many invasions and occupations take place in territories whose previous status was something less than full and internationally accepted sovereignty. It is sometimes claimed that the law on occupations is not formally applicable to such cases, on the grounds that the Hague and Geneva Conventions talk about the occupation of the territory of a hostile State, or of a high contracting party. What if the status of the territory is more confused, or is the subject of competing claims? Throughout this century territorial disputes have often preceded or accompanied military occupations, as illustrated by the cases mentioned earlier of the Greek occupation of Ottoman territories after 1912-13 and the Allied occupation of Western Thrace in 1918-20. In the contemporary world, four principal forms of occupation-cum-territorial dispute may be noted.

First, it may simply be asserted by a State with irredentist claims that the territory which is the subject of dispute is occupied. For example, Japanese leaders of all political persuasions have for a long time, and especially since the early 1970s, called for the return of some or all of four islands at the southern end of the Kuril chain—namely, the Habomais, Shikotan, Kunashir and Iturup—which were occupied by the Soviet Union between 29 August and 4 September 1945. A 'Northern Territories Day' has been marked in Japan by rallies every year since 1981. Often the islands are referred to in Japanese political statements as occupied. However, since 20 September 1945 the Soviet Union has viewed these islands as an integral part of its territory; these islands are the subject of exceptionally tangled territorial disputes; and no Japanese live there now, because the 17,000 Japanese residents had all fled or been forcibly

112 Pictet, op. cit. above (p. 253 n. 11), at pp. 67-8, 274-5.
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'repatriated' to Japan proper by 1949. Thus, whatever the position was in 1945, the law on occupations—which in any case has little to say which is relevant to the actual current situation on the islands—is bound to be viewed by the USSR as inapplicable today.\textsuperscript{113}

Secondly, States sometimes invade territory which they have long claimed, and then find themselves in the position of occupant of what they assert to be their own territory. For example, there had been a long-standing dispute between the United Kingdom and Argentina over title to the Falkland Islands before the Argentine invasion of 2 April 1982 and the consequent Argentine occupation. The Argentine authorities saw their action as a reclaiming of national territory: but there does not appear to have been any claim that the laws of war (including the law on occupations) were not applicable. The facts that the inhabitants were clearly foreign so far as the Argentines were concerned, and that a struggle for the territory was continuing, strengthened the case for viewing this as an occupation.\textsuperscript{114}

A third and quite distinct kind of situation can arise in territories where a colonial power has embarked on withdrawal. Sometimes, before a new indigenous authority has been able fully to consolidate its position or get its statehood recognized, the territory has been invaded by a neighbour.

Perhaps the clearest example of this was Indonesia’s invasion of East Timor on 7 December 1975. Indonesia appears to have had no previous claim to the territory. However, it expressed alarm at the prospect of a revolutionary government there, and intervened to support a coalition of political parties which favoured integration with Indonesia.\textsuperscript{115} The ensuing occupation, marked by numerous acts of brutality, was opposed locally by Fretilin guerrillas,\textsuperscript{116} and was repeatedly criticized in United Nations General Assembly resolutions, which continued to assert the population’s right to self-determination.\textsuperscript{117}

A somewhat similar case, at roughly the same time, was the Moroccan intervention in Western Sahara. With Spain, the colonial power, on the

\textsuperscript{113} The best account of the dispute concerning the ‘northern territories’ claimed by Japan is in Stephan,\textit{ The Kuril Islands: Russo-Japanese Frontier in the Pacific} (1974), pp. 151–247. He is critical of Japan’s handling of the dispute. Other useful sources include Keesing’s\textit{ Contemporary Archives}, pp. 7732, 7418, 27599, 28292; Whyman, ‘Japan Steps up Fight for Return of Lost Islands’,\textit{ The Guardian} (London), 8 February 1984.


\textsuperscript{115} For a fine critical survey see Clark, ‘The “Decolonization” of East Timor and the UN Norms on Self-Determination and Aggression’,\textit{ Yale Journal of World Public Order}, 7 (1980), pp. 2–44.

\textsuperscript{116} Amnesty International statement of 2 September 1983 to United Nations Decolonization Committee; and reports in\textit{ The Guardian} (London), 25 June and 20 July 1983. ‘Fretelin’ is short for Frente Revolucionaria de Timor Leste Independente.

\textsuperscript{117} GA resolutions on East Timor have included 3485 (XXX) of 12 December 1975; 33/39 of 13 December 1978; 36/50 of 24 November 1981; and 37/30 of 23 November 1982. The word ‘occupation’ does not appear in these resolutions: only ‘military intervention’, ‘continuing critical situation’ and ‘the humanitarian situation prevailing in the territory’.
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brink of departure, an advisory opinion of the ICJ, delivered on 16 October 1975, said that the population of the area had a right to prior consultation about the future of the territory.\textsuperscript{118} Morocco, however, asserted its claim to the territory in early November with the ‘Green March’, in which some 350,000 unarmed Moroccans entered the area. On 14 November a tripartite agreement was announced in which Spain agreed to hand over control to Morocco and Mauritania. In December 1975 and January 1976 Moroccan troops occupied the main towns, and the last Spanish troops left on 12 January 1976. Since then Morocco has extended its control, including areas first held by Mauritania. It has been opposed locally by the Polisario Front (supported \textit{inter alia} by Algeria and Libya), and its policy has been heavily criticized in regional organizations and in the United Nations. For example, a 1979 General Assembly resolution referred to the ‘inalienable right of the people of Western Sahara to self-determination and independence’, supported the Polisario Front as ‘the representative of the people of Western Sahara’, and deplored ‘the continuing occupation of Western Sahara by Morocco and the extension of that occupation to the territory recently evacuated by Mauritania’.\textsuperscript{119}

Fourthly, a belligerent occupation, arising almost as a by-product of a larger international war, may be of territory whose status is not completely clear. For example, Israel had not before 1967 made any territorial claims to the West Bank and Gaza, but nor had it accepted that these territories were part of Jordan or Egypt. When it found itself in control of these territories, Israel argued that the 1949 Geneva Convention IV was not formally applicable. In support of this argument Israel repeatedly referred to the second paragraph of common Article 2, which says the Convention applies to ‘occupation of the territory of a High Contracting Party’. It contended that the previous status of the occupied territory had been less clear than that, but said that it would apply the ‘humanitarian provisions’ of the Convention on a \textit{de facto} basis, as well as offering to co-operate fully with the International Committee of the Red Cross.\textsuperscript{120} The Israeli military courts likewise frequently referred to the second paragraph.\textsuperscript{121}


\textsuperscript{119} The quotations are from GA Res. 34/37, adopted on 21 November 1979. A similar resolution, 35/19, was approved on 11 November 1980. ‘Polisario’ is short for Frente Popular para la Liberacion de Saguiay el-Hamra y de Rio de Oro.


\textsuperscript{121} For a typical reference by a court to the second paragraph of Article 2 of the 1949 Geneva Convention IV, see the judgment of the Military Court sitting in Bethlehem on 11 August 1968 in the
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The Israeli interpretation of the second paragraph of Article 2 of the 1949 Geneva Convention IV seems excessively legalistic and has been almost universally rejected. Sometimes it has been rejected on grounds of general principle. However, most of those who have been critical of Israel in this matter of the applicability of the Civilians Convention have, like the Israeli authorities themselves, argued their case with reference to the second paragraph of Article 2. As a result the whole debate on the matter may have been on the wrong foot from the beginning. As noted above, it is in fact the first paragraph which applies in cases of belligerent occupation. However, this does not necessarily change things greatly. Shamgar argues that even if one accepts the thesis that it is the first paragraph that applies, one still cannot disregard the reference in the second paragraph to 'the territory of a High Contracting Party', since there would be no logic in an occupation which does not meet with armed resistance being alone subject to this restrictive definition. He therefore indicates that in strictly formal terms the 1949 Geneva Convention IV is not applicable. The weakness of his argument on this point is that he nowhere mentions the existence of a custom of viewing the laws of war, including the law on occupations, as formally applicable even in cases which differ in some respect from the conditions of application as spelt out in the Hague and Geneva Conventions. As far as the Israeli occupation of the West Bank and Gaza is concerned, the majority of the international community, and of international legal opinion, has not accepted that Geneva Convention IV is not formally applicable just because the previous status of the territories may have been slightly different from what those who negotiated the 1949 Geneva Convention IV may have had in mind. The 1977 Geneva Protocol I further clarifies that the 1949 Geneva Convention is applicable in such territories.

122 Of the very many GA resolutions affirming the applicability of 1949 Geneva Convention IV in the Israeli-occupied territories, one which is limited to that issue, and can thus be presumed to serve as an indication of the position taken by States on the matter, is 35/122A of 11 December 1980. The voting was 141 for, 1 against (Israel) and 1 abstention (Guatemala): Yearbook of the United Nations, 34 (1980), p. 430.

123 The ICRC has taken the view, relevant to the Israeli and also to other cases, that there is an occupation (and hence the Civilians Convention is applicable) whenever during an armed conflict 'territory under the authority of one of the parties passes under the authority of an opposing party': Israel Yearbook on Human Rights, 1 (1971), p. 260; and International Committee of the Red Cross, Annual Report for 1968, 1973, 1975, 1976, 1977, 1978, etc.

124 Of the many writings asserting the applicability of the 1949 Geneva Convention IV to the areas occupied by Israel since 1967 on the basis of the second paragraph of Article 2, see particularly one by a legal adviser of the United States State Department specializing in Middle Eastern affairs, Stephen M. Boyd, 'The Applicability of International Law to the Occupied Territories', Israel Yearbook on Human Rights, 1 (1971), pp. 258–61. On p. 258 he indicates that he is relying on the second paragraph of Article 2; this is confirmed in the subsequent discussion on pp. 366–7.

125 See the text of Article 2 and the reference to Pictet's commentary on it, above, pp. 252–3.

126 Shamgar, op. cit. above (p. 281 n. 120), at p. 40.

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A number of Israeli writers have argued that it does not matter whether the 1949 Geneva Convention IV is formally applicable or not, as Israel in any case observes the 'humanitarian provisions' of this Convention. However, formal applicability versus *de facto* application is not always a distinction without a difference. This is for two reasons. First, there has never been a full clarification as to whether 'humanitarian provisions' means all of the provisions, or just those which Israel decides to apply. Secondly, the rejection of formal applicability has been frequently referred to in Israeli court proceedings, and has been one factor occasionally making the courts reluctant to base their decisions directly on 1949 Geneva Convention IV. (Another quite separate consideration influencing Israeli courts has been the argument that the courts are bound by customary international law, in which category they have come to include 1907 Hague Convention IV; but not by conventional international law, in which category they include all, or at least some, of 1949 Geneva Convention IV.)

Another possible case of an occupation of a territory whose status is uncertain (at least in the sense that it has never been a sovereign State) is the South African occupation of Namibia, discussed later in this article.

Even from the few cases cited, it is evident that in the contemporary world the previous status of occupied territory tends to be more muddled and complex than the status which appears to have been envisaged in the provisions of the main conventions. However, this does not necessarily prevent the applicability of the law on occupations. The 1977 Geneva Protocol I, Article 4, further confirms that the law is applicable even in cases where there is doubt about the legal status of the territory in question.

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128 See, e.g., the foreword by Haim H. Cohn to the booklet *The Rule of Law in the Areas Administered by Israel* (Israel National Section of the International Commission of Jurists, Tel Aviv, 1981), pp. vii–viii.
129 See, e.g., the statement of Judge Landau of the Supreme Court in the *Beth-El* case, judgment given 15 March 1979, reprinted in Shamgar, op. cit. above (p. 281 n. 120), at p. 387.
130 See, e.g., the articles by Nathan and Hadar in ibid., pp. 125–49 and 172–5. Also the judgments in the *Beth-El* case, ibid., pp. 377–81 and 388–90; and in the *Elon Moreh* case, ibid., pp. 419 and 438. The *Elon Moreh* case, judgment given on 22 October 1979, illustrates the potential significance of relying on the Hague rather than the Geneva rules. On the basis of Article 52 of the Hague Regulations (which deals with requisitions) the Supreme Court declared an Israeli civilian settlement near Nablus in the occupied West Bank to be illegal. It took this line mainly because there was sharply conflicting Israeli official evidence as to whether the settlement was needed for security reasons. It did not base its decision on the at least apparently relevant provision of 1949 Geneva Convention IV, Article 49, sixth paragraph: 'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.' Thus the Elon Moreh decision had little bearing on such other Israeli settlements as (a) did not involve requisitions, or (b) were declared by the Israeli authorities to be needed for security. In fact the settlement of Elon Moreh was built. It stands impressively, not far from its original site, on a hill close to and visible from Nablus.
131 Below, pp. 291–2.
132 Bothe in *Encyclopaedia of Public International Law*, vol. 4, pp. 64–5.
10. Occupation with an indigenous government in post

Although the prevailing image of military occupation is of direct and overt foreign rule, in practice occupants often work through indigenous political forces and institutions. They may leave in power the already existing government of the occupied territory; or set up a new but still indigenous government; or even assist the creation of a new supposedly sovereign State.

The first approach—permitting the existing government to remain in post and exercise the functions of government—was followed, though very imperfectly, in German-occupied Denmark between April 1940 and August 1943; in the Soviet and British occupation of Iran from 1941 to 1946; and in Czechoslovakia after the Soviet-led invasion of August 1968. Sooner or later in all these cases there were significant changes in the leadership of the State, government or ruling party, but these change were not necessarily in themselves unconstitutional. For example, when Dubcek was removed from the post of First Secretary of the Czechoslovak Communist Party in April 1969, and replaced by Husak, the change was achieved by procedures which had every appearance of formal propriety.

The second approach—encouraging the advent to power of new indigenous governmental authorities—is also quite common. The classic example is the Quisling regime in Norway between 1 February 1942 and the end of the war in 1945: this regime was the instrument of the Germans who had invaded the country in April 1940. A more recent example, in a totally different political context, occurred in Kampuchea after the Vietnamese invasion of December 1978, which promptly replaced the genocidal Pol Pot regime with a more acceptable one. Such authorities established under the wing of an occupying power may be mere 'puppet governments', but they may in some cases enjoy a measure of independence, legitimacy or popular support.

The third approach is the encouragement by the occupant of the creation of new purportedly sovereign States, sometimes called 'puppet States'. Examples include the 'State of Manchukuo', set up by the Japanese in Manchuria in 1932; the 'Slovak State', set up after the Germans occupied the bulk of Czechoslovakia in March 1939; and Croatia, after the German occupation of Yugoslavia in April 1941. But these are extreme cases of new 'States' whose claims to be anything...
more than the agent of the occupant were extremely weak. Other cases of
the emergence of new States during foreign military occupations are not
so easily dismissed. The two Germanies, already mentioned, have estab-
lished their credentials as States. In Korea, following thirty-five years
of Japanese rule there, United States and Soviet forces occupied the
southern and northern parts of the country respectively in 1945. After the
failure of various talks aimed at unification, new States were eventually
proclaimed in the two halves of Korea in August and September 1948.
The United States wound up its military government in the South, and in
the North all Soviet forces were withdrawn by the end of the year. 136

Where there are indigenous authorities in post in any of the several
fashions indicated above, does the law on occupations apply? The clearest
treaty provision on the matter is 1949 Geneva Convention IV, Article 47,
which states that protected persons shall not be deprived of the benefits of
the Convention 'by any change introduced, as a result of the occupation of
a territory, into the institutions or government of the said territory, nor
by any agreement concluded between the authorities of the occupied
territories and the Occupying Power'. Pictet comments:

It will be noted that the same clause applies both to cases where the lawful
authorities in the occupied territory have concluded a derogatory agreement with
the Occupying Power and to cases where that Power has installed and maintained
a government in power. 137

Where there is both an occupying power and an indigenous govern-
ment, whose job is it to ensure the implementation of the law on
occupations? Common sense suggests that this is a shared responsibility.
However, the applicability of the law to occupations where indigenous
authorities exercise control can present some special problems. Three are
indicated below.

First, there is sometimes a risk that an occupying power will allow,
or fail to prevent, the indigenous authorities from acting in a manner
contrary to the law on occupations. This risk is particularly great in those
cases where an occupant permits local leaders of sectional groups (whether
regional, ethnic or sectarian) to exercise power. Yugoslavia under the Axis
occupation in the Second World War provides a classic example of the
disasters which can ensue: the carve-up of the country, the wielding of
power by irresponsible gangs, communal violence and massacres.

Echoes of such problems arose in Lebanon following the June 1982
Israeli invasion of southern Lebanon. In contrast to their practice in areas
occupied in the June 1967 war, where they promptly set up systems of
military administration, in Lebanon the Israelis acted largely through
local paramilitary forces of one kind or another. This policy led straight to

136 On the occupation of Korea, see esp. Soon Sung Cho, Korea in World Politics 1940-1950: An
137 Pictet, op. cit. above (p. 253 n. 11), at p. 275.
disaster in the shape of the massacres at Sabra and Shatilla camps in Beirut in September 1982. This was not just the result of operating indirectly, through local paramilitary forces (a policy which in itself was particularly questionable in a country as bitterly divided as Lebanon), but also of failing to make clear that all the provisions of the law on occupations were fully applicable to the situation.\textsuperscript{138} Subsequently there was still a comparative lack of authoritative and clear guidance from the Israeli Government on the legal situation in the occupied areas. However, the Israeli Supreme Court confirmed in several decisions the view that Israel was the occupying power. As it said in 1983 in the \textit{Ansar Prison} case,

A military force may invade or enter an area in order to pass through it to its intended goal and it may leave that area without establishing any effective control. But if the military force has taken control of the area in an effective and workable manner, then even though its presence in such area is limited in time or its intention is to set up no more than a temporary military control, the situation thereby created is one to which the rules of warfare dealing with belligerent occupation apply. Furthermore, the application of the third chapter of the Hague Rules or of the parallel instructions in the Fourth [Geneva] Convention are not conditioned upon the establishment of a special organizational framework in the form of a Military Government . . .

Allowing the former government to act does not alter the fact that the military force is maintaining an effective military control in the area, nor does it relieve the occupant from the responsibilities for the consequences of such acts as far as the rules of warfare are concerned.\textsuperscript{139}

A second and somewhat different problem of indirect control is that, in some occupations at least, there may be room for doubt as to whether international law should seek to govern a wide range of aspects of the relations between indigenous authorities and their own subjects. Such involvement is likely to be dismissed by the authorities as ‘impermissible interference’.

For example, following the Turkish invasion of northern Cyprus in July–August 1974, the situation could properly be viewed as one of military occupation; and it was so viewed by the Government of Cyprus and by the United Nations General Assembly.\textsuperscript{140} However, the facts that

\begin{itemize}
\item \textsuperscript{138} The Kahan Report, published in early 1983, the \textit{Final Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut}, contains an authoritative account of these events. It refers on p. 54 to ‘the lack of clarity regarding the status of the State of Israel and its forces in Lebanese territory’, but does not try to resolve this issue. The report bases its criticisms of certain Israeli actions mainly on a concept of public morality and on the book of Deuteronomy. Relevant international agreements such as the 1949 Geneva Convention IV are not mentioned, even though many Articles (e.g. 4 and 144) were applicable to the situation in the camps, and urgently needed to be implemented.
\item \textsuperscript{139} Judgment delivered 13 July 1983. Telex transcript, pp. 13, 16.
\item \textsuperscript{140} GA Resolutions 33/15 of 9 November 1978 and 34/30 of 20 November 1979 deplored ‘the continued presence of foreign armed forces and foreign military personnel on the territory of the Republic of Cyprus and the fact that part of its territory is still occupied by foreign forces’. Resolution 37/253 of 13 May 1983 deplored ‘the fact that part of the territory of the Republic of Cyprus is still occupied by foreign forces’ and demanded ‘the immediate withdrawal of all occupation forces from the Republic of Cyprus’.
\end{itemize}
the declared aim of this operation was to protect the Turkish minority living in Cyprus from the Greek majority, and that a new political entity (the Turkish Federated State of Cyprus) was set up in 1975, gave this occupation a special colour. Not surprisingly, the Turkish Cypriot authorities did not appreciate the application of the term ‘occupation’ to their situation. On 15 November 1983 their elected assembly went so far as to claim the status of a sovereign State by approving a Declaration of Independence and proclaiming the ‘Turkish Republic of Northern Cyprus’—a move which did not win the hoped-for international recognition. Irrespective of the validity of this last act, an argument could be made that not all aspects of the law on occupations were designed for a situation such as this; and in particular that the prohibitions of making extensive legal and political changes may sometimes be of limited relevance where the desire both of the occupants and of most of the inhabitants of the area actually occupied is precisely to make certain changes. On the other hand, in the Cyprus v. Turkey cases before the European Commission of Human Rights, the Government of Cyprus vigorously asserted that violations of human rights by Turkey in the Turkish-occupied areas (including the detention or murder of some 2,000 missing Greek Cypriots and the refusal to allow more than 170,000 Greek Cypriot refugees to return to their homes) were contrary to the European Convention on Human Rights, and were matters of legitimate international concern. The applications of the Government of Cyprus were ruled admissible by the European Commission of Human Rights on 26 May 1975 and 10 July 1978—a significant recognition in principle of the applicability of international human rights law to occupied territories.

Thirdly, where there are indigenous authorities in post, occupants often seek to buttress any claims that the situation is not one of occupation at all by using a particular device—a subsequent treaty with the ‘host’ government for the stationing of foreign armed forces. This happened in Iran, where, following the Anglo-Soviet military intervention on 25 August 1941, a Treaty of Alliance between the UK, USSR and Iran was signed at Teheran on 29 January 1942. Article 4 said:

The Allied Powers may maintain in Iranian territory land, sea and air forces in such number as they consider necessary ... It is understood that the presence of these forces on Iranian territory does not constitute a military occupation and will disturb as little as possible the administration and the security forces of Iran, the economic life of the country, the normal movements of the population and the application of Iranian laws and regulations.

141 Nedjatigil, The Cyprus Conflict: A Lawyer’s View (1981), p. 75. The author, a senior Turkish Cypriot official, asserts that the situation is not one of occupation, partly it would seem on the grounds that the Turkish invasion was sanctioned under the 1960 Treaty of Guarantee, and partly on the grounds that the Turkish forces ‘are present in Cyprus to assist the security forces of the Turkish Federated State of Cyprus’. Such considerations may affect one’s view of the occupation, but do not necessarily change the fact of its being an occupation of part of the territory of the Republic of Cyprus.

142 62 ILR 5 at pp. 5–10, 82–3.

Similarly, following the Soviet interventions in Hungary in October and November 1956 and in Czechoslovakia in August 1968, treaties on the temporary stationing of Soviet troops were concluded. Both treaties specified that they did not affect the sovereignty of the host State, and that the forces involved would not interfere in its internal affairs.  

In theory, such agreements have no more power than any other agreement to affect the application of the 1949 Geneva Convention IV: the provisions of Articles 7, 8 and 47 seem unambiguous. However, the awkward question may be raised: could an agreement on the stationing of armed forces mean that a given situation could no longer be properly regarded as an occupation at all? Whatever the answer to this question, it may well be the case in particular instances that such agreements limit the role of foreign forces so stringently that many of the potential points of friction between the inhabitants and the occupant, which are addressed in the law on occupations, are unlikely to arise in practice. To the extent that this is so, the situation may bear some resemblance to a more normal basing of foreign forces in peacetime.

In general, there does seem to be a tendency in the contemporary world to operate through indigenous political forces, rather than to impose direct external control. The fact that all the major powers subscribe to anti-colonial ideologies or principles of one kind or another has undoubtedly reinforced this tendency. So far as the applicability of the law on occupations is concerned, this tendency poses problems, but they are not insuperable. Even if in some instances the authorities reject any categorization of the situation as occupation, they may still apply the relevant rules; and the international community may put pressure on them to do so.

11. Subsequent occupation

This is an occupation by one belligerent which follows an occupation of the same region by another belligerent. In such a case the Hague Regulations and the Geneva Conventions apply without difficulty, except in regard to the continuation or modification of measures adopted by the earlier belligerent occupant. Article 43 of the Hague Regulations, obliging the occupant to respect 'unless absolutely prevented, the laws in force in the country', may not be so relevant in such circumstances. There is a risk that this Article could be used to maintain in force any and every piece of draconian legislation enacted by previous domestic or foreign rulers. Such a possibility may be indicated by Gaza, where various rules from the

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145 Below, pp. 297-8.

146 The term was first used by Feilchenfeld, op. cit. above (p. 261 n. 39), at p. 7.
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period when the territory was occupied by Egypt remain in force (as, incidentally, do some laws from the period of the British mandate), alongside more recent Israeli laws and orders.\textsuperscript{147}

12. Multilateral occupation

A territory may be jointly occupied by several States which are allied to each other, and are perhaps under a unified command system. There have been many such occupations in this century, because of the tendency of States, for many reasons, to use armed force on a multilateral basis. Where a region is so occupied, 'the regular rules on belligerent occupation will then apply, but the jurisdictional relationships between the allies will have to be determined'.\textsuperscript{148} In a few cases such occupations have resulted in (or been a disguised form of) division of a country into separate parts.

13. Occupation by United Nations or similar forces

Forces acting under the aegis of the United Nations could conceivably be in occupation of all or part of the territory of a State, either in the course of an enforcement action, or in the course of an armed peacekeeping operation. In addition, other international peacekeeping forces (perhaps on the lines of the multinational force in the Lebanon 1982–4) could theoretically find themselves in the role of occupant if, for example, the government which had invited them in collapsed totally, without any successor, and the force stayed on to maintain order.

The general question of whether the laws of war apply to United Nations forces has been much discussed. The United Nations itself is not a party to any international agreements on the laws of war, and these agreements do not expressly provide for the application of the laws of war by United Nations forces. However, it is widely held that the laws of war remain applicable to such forces. The great majority of writers have taken such a view, although with some differences of emphasis on the issue as to whether United Nations forces are bound by every provision of the laws of war, or mainly by customary rules, or by some distillation or adaptation of rules which is relevant to a United Nations force's special character and

\textsuperscript{147} However, Israel has taken the view that the rules of international law do not prohibit the liberalization of punitive measures, and in all the territories occupied in 1967 it quite promptly abolished the mandatory death penalty previously imposed by Egypt, Jordan and Syria for a wide range of offences: Shamgar, op. cit. above (p. 281 n. 120), at pp. 45 and 52.

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The United Nations Organization itself has in practice accepted the applicability of the general laws of war to its own forces and to those of its adversaries both in enforcement actions and in peacekeeping operations. In the Korean War, despite some ambiguities, forces under the United Nations claimed no exemption from the laws of war; and the fact that the United Nations force in Korea consisted of national contingents voluntarily contributed to a unified command under the delegated operational responsibility of one member State underlined the point that the application of the laws of war was a responsibility of States as well as of the United Nations Organization itself. In subsequent operations, for example in the Middle East, Congo and Cyprus, the United Nations has instructed forces under its authority to observe ‘the principles and spirit of the general international Conventions applicable to the conduct of military personnel’. In these operations, too, States have retained a responsibility for their contingents with reference to matters relating to the application of the laws of war. This tendency to stress the responsibility of States may in part be due to the existence of some practical difficulties in implementation of the laws of war by the United Nations as such. Any rule which presumes, for example, that the State applying it has territory of its own, or which depends on the application of a State’s own national standards, would create a difficulty because the United Nations lacks these characteristic features of statehood. In this connection it may be noted that the United Nations has never as such assumed custody of prisoners of war.

The more specific question of whether United Nations forces could be considered occupants has been less extensively discussed. It is uncontroversial that in an enforcement action United Nations forces could well find themselves in belligerent occupation of territory, and that most or all of the customary and conventional laws of war would then apply. As for


153 Bowett, op. cit. above (n. 149), at pp. 490-1; Seyersted, op. cit. above (n. 149), at pp. 281-3. Both discuss briefly whether United Nations forces might be in a privileged position vis-a-vis certain rules. On the essentially American (as distinct from United Nations) character of military government activities during the Korean War, see Kyre, Military Occupation and National Security (1968), pp. 43, 69.
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United Nations peacekeeping forces, where these act within one State on the basis of status of forces agreements between the United Nations and the host State (such as the United Nations Emergency Force in Egypt in 1956–67) they would not be in occupation of the territory as the term has been traditionally used in international law. It is just conceivable, however, that in different circumstances a peacekeeping force could find itself organizing some kind of ‘occupation by consent’. Moreover, if central authority in the host State were to collapse, a peacekeeping force might find itself extending its authority and taking full charge of such matters as public order and safety.

The situation in the Congo during the United Nations operation 1960–4 affords one example illustrating the possibility of a United Nations peacekeeping force finding itself in a role closely analogous to that of an occupant. At the outset, the United Nations Secretary-General, Dag Hammarskjöld, stated that the force, which was ‘under the exclusive command of the United Nations’, was ‘not under the orders of the Government nor can it ... be permitted to become a party to any internal conflict . . . ’. But Congolese political developments made it unclear for a time who was the constitutional government, and there was United Nations intervention in administrative activities and in internal conflict beyond what had originally been envisaged.

14. Occupation of territory for which the United Nations is responsible

The possibility of a State’s occupation of territory which is under the legal responsibility of the United Nations is indicated by the South African presence in Namibia. In 1966 South Africa’s mandate (dating from 1920) was terminated by the United Nations General Assembly, which reaffirmed that the territory had ‘international status’ and decided that it came henceforth ‘under the direct responsibility of the UN’.

145 The Summary Study on the experience of UNEF which the Secretary-General prepared in 1958 defined its functions in a manner distinguishing it rather clearly from an occupying power. Para. 15 stated: ‘The Force has no rights other than those necessary for the execution of the functions assigned to it by the General Assembly and agreed to by the country or countries concerned. The Force is paramilitary in character and much more than an observer corps, but it is in no sense a military force exercising, through force of arms, even temporary control over the territory in which it is stationed; nor does it have military objectives, or military functions exceeding those necessary to secure peaceful conditions on the assumption that the parties to the conflict will take all the necessary steps for compliance with the recommendations of the General Assembly’: Higgins, op. cit. above (p. 290 n. 151), at pp. 485–6.


Despite this resolution, South Africa continued to administer the territory. In 1968 the United Nations General Assembly, in deplored South Africa’s refusal to withdraw from the territory, passed the first of many resolutions describing the situation there as one of ‘foreign occupation’ and ‘illegal occupation’.\textsuperscript{158} In 1971 the International Court of Justice, in an advisory opinion, stated that ‘the continued presence of South Africa in Namibia being illegal, South Africa is under an obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the territory’. It also said that some multilateral conventions ‘such as those of a humanitarian character’ may be viewed as binding so far as Namibia is concerned.\textsuperscript{159} Since then, numerous United Nations resolutions have expressed concern at the continued illegal occupation of Namibia by South Africa.\textsuperscript{160}

There is much room for disagreement as to the exact status of Namibia and the exact extent of the United Nations’ responsibility. Sagay has argued that the United Nations Council for Namibia has the full powers of statehood and is the de jure government of the territory.\textsuperscript{161} Others have suggested that, in view of the limited nature of the United Nations’ personality, the organization cannot assume the role of territorial sovereign, but does have a capacity to administer territory.\textsuperscript{162} Differences on such points do not necessarily affect the validity of the view that Namibia is under foreign occupation.\textsuperscript{163}

### 15. Occupation by a non-State entity

Sometimes in armed conflicts the forces of an organized body which is not recognized as the government of a sovereign State (it may, for example, be a ‘liberation movement’) may occupy territory of a neighbouring State—for example, with the aim of securing supply routes, base areas or sanctuary. Without entering at all into specifics, the possibility of such a type of occupation is indicated by the entry of Yugoslav partisans into Trieste in the closing phase of the Second World War; the role of forces of the National Liberation Front of South Vietnam in frontier areas of Cambodia up to 1975; and the activities of forces of the Palestine Liberation Organization in parts of Lebanon in the 1970s and early 1980s.

\textsuperscript{158} GA Resolutions 2372 (XXII) of 12 June 1968 and 2403 (XXIII) of 16 December 1968.

\textsuperscript{159} ICY Reports, 1971, advisory opinion of 21 June 1971, pp. 58, 55.


\textsuperscript{161} Sagay, The Legal Aspects of the Namibian Dispute (1975), pp. 271–81.

\textsuperscript{162} Brownlie, Principles of Public International Law (3rd edn., 1979), pp. 175–9.

\textsuperscript{163} British Government statements in 1982 indicated that the United Kingdom views Namibia as ‘under unlawful occupation by South Africa’, but does not accept that Namibia is a sovereign State, and considers that ‘the UN General Assembly acted beyond its competence in setting up the UN Council for Namibia with the powers with which it purported to endow it’: Marston, ‘UK Materials on International Law 1982’, this Year Book, 53 (1982), pp. 391–3.
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The general applicability of the laws of war to certain liberation movements is clear enough. However, the specific possibility of a liberation movement occupying the territory of another State does not appear to have been discussed either at the 1949 or the 1974-7 diplomatic conferences at Geneva—perhaps because liberation movements are widely viewed as underdogs, not overlords. One may hazard the opinion that the law on occupations ought to be applied fully in the event of an occupation by a non-State entity, but some provisions might be hard to implement in cases where the occupant lacks some of the resources which a State enjoys.

16. ‘Illegal occupation’

Many military occupations have been called, usually by their critics, ‘illegal occupations’. This term is almost invariably used to refer to an occupation which is perceived as being the outcome of aggressive and unlawful military expansion, or as being maintained in defiance of authoritative pronouncements by international bodies calling for a withdrawal. South Africa’s ‘illegal occupation’ of Namibia, as it was called in the 1971 advisory opinion of the International Court of Justice, is the clearest contemporary example.

Do the same international legal provisions apply to such an illegal occupation as apply to an occupation which is, say, a by-product of fighting a defensive war? There has long been a minority tendency, especially strong in some countries which suffered frightful losses under German occupation in the Second World War, to deny that an aggressor occupant has any rights under the Hague or any other conventions. A number of Soviet writers have taken such a view. Some post-war judgments in Polish courts inclined in the same direction. A number of publications and statements of the Palestine Liberation Organization have also adopted this approach.

However, the view that the laws of war apply equally to all occupations, even to those created by illegal acts of aggression, is persuasive and

164 1949 Geneva Convention III, Article 4A (2); 1977 Geneva Protocol I, Articles 1 (4) and 96; Veuthey, op. cit. above (p. 249 n. 2), passim.

165 Above, pp. 291-2.


167 See the judgment of the Supreme National Tribunal of Poland in In re Greiser on 7 July 1946: Annual Digest, 13 (1946), p. 388; and also the different decisions of the court of first instance, the District Court and the Supreme Court (the latter on 13 April 1948) in the case of N. v. B., which concerned the ownership of a mare which had been confiscated and auctioned by the German occupation authorities: 24 ILR 941-3.

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undoubtedly represents the bulk of legal opinion. The International Military Tribunal at Nuremberg unequivocally affirmed the applicability of the 1907 Hague Convention in occupied territory, and referred explicitly to the occupant's rights to collect taxes and make requisitions in kind. A number of other post-war judgments strongly supported the view that international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. This view has been supported by the great majority of writers. However, some writers do envisage that in certain very restricted spheres (for example, in considering title to property) there may be some room for applying a principle of discrimination against aggressor occupants, at any rate after the cessation of hostilities.

The applicability of humanitarian rules to all occupations, whether 'legal' or 'illegal', is indicated by the wording of common Article 2 of the 1949 Geneva Conventions, referring as it does to 'all cases of partial or total occupation ...'. Furthermore, the preamble of the 1977 Geneva Protocol I reaffirms 'that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict ...'.

17. 'Trustee occupation'

This questionable term was advanced by Allan Gerson in 1973. He indicated that not all the provisions of the law on occupations need necessarily apply in cases (such as the Jordanian occupation of the West Bank from 1948 to 1967 and the Israeli occupation thereafter) characterized, it would seem, by the following features: (a) the previous legal status of the territory was not one of full sovereignty; (b) the occupation is allegedly 'lawful' rather than 'unlawful'—i.e. is not the result of a war of aggression; and (c) the occupant seeks positively to develop the territory in some way—for example, politically or economically. He suggested:

169 The Trial of German Major War Criminals (London, 1946-51), vol. 22, pp. 457, 467. Although the Soviet member of the IMT, General I. T. Nikitchenko, delivered a long dissenting opinion (pp. 531-47), he did not raise any question about the applicability of the Hague Regulations.


171 See, e.g., Lauterpacht, 'The Limits of the Operation of the Law of War', this Year Book, 30 (1953), p. 220; Stone, op. cit. above (p. 250 n. 3), at p. 695; Brownlie, op. cit. above (p. 250 n. 3), at pp. 406–8; McNair and Watts, op. cit. above (p. 266 n. 57), at pp. 371–2.

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Israel should replace Jordan as trustee-occupant for the indigenous Palestinian Arabs. As such, Israel should be held responsible for fostering the political and economic self-determination of the region, unburdened by the traditional restraints imposed by the law of belligerent occupation against alteration of the status quo ante.¹⁷³

The problem to which the concept of ‘trustee occupation’ is addressed is real enough. There are often occasions when it is unrealistic or undesirable to stick strictly to a policy of preserving the status quo ante. Such occasions may indeed arise in many occupations with features quite different from those indicated by Gerson and outlined above.

However, Gerson’s advocacy of the term suffers from several defects. He appears to assume that the 1949 Geneva Convention IV applies only to ‘belligerent occupation’ fairly narrowly defined, even though Article 2 clearly makes the Convention much more broadly applicable. Secondly, he bases his argument on the claim, which is not properly substantiated, that in occupation law there is a significant distinction between ‘aggressor-occupants’ and ‘lawful-occupants’.¹⁷⁴ Thirdly, he appears to neglect the extent to which the idea of ‘trusteeship’ is implicit in all occupation law anyway. The idea that all occupants are in some vague and general sense trustees is nothing new. Sir Arnold Wilson suggested in 1932 that ‘enemy territories in the occupation of the armed forces of another country constitute (in the language of Article 22 of the League of Nations Covenant) a sacred trust, which must be administered as a whole in the interests both of the inhabitants and of the legitimate sovereign or the duly constituted successor in title’.¹⁷⁵ The Hague Regulations and the 1949 Geneva Convention IV can be interpreted as putting the occupant in a quasi-trustee role. Von Glahn refers to occupants as exercising ‘a temporary right of administration on a sort of trusteeship basis’.¹⁷⁶ All this diminishes still further any case for regarding ‘trustee occupation’ as a separate category of occupation.

V. CASES DISTINCT FROM MILITARY OCCUPATION

Although military occupations are very varied, they are not endlessly so. Not every advance of armed forces into inhabited territory amounts to an occupation, or brings into play the law on occupations. Two possible areas of exception are: (a) occupation of one’s own territory; and (b) stationing of foreign military forces by agreement. In addition (c) some other cases distinct from military occupation are briefly enumerated.


¹⁷⁴ Gerson, loc. cit. above (previous note), p. 3.


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(a) Occupation of One’s Own Territory

In conflicts of various kinds, both international and internal, governments sometimes exercise direct military control within the accepted international frontiers of their State in a manner similar to that of a military occupant. For example, in the course of an international war a State may liberate part of its own territory (or what it views as such) which was previously occupied by an enemy, and then set up a system of military government there pending the re-establishment of the institutions of civil government: this happened, for example, at the end of the Second World War, when the United States reasserted control briefly in the Philippines, and likewise when the British returned to Malaya.

The applicability of the law on occupations to such situations has been the subject of different opinions. A footnote in the British military manual says that military control in such a situation ‘is a matter for the domestic law of the belligerent concerned and is not regulated by international law’.177 The wording of the various international conventions regarding their scope of application tends to support this view. However, in practice there have been instances in which at least some parts of the law have been viewed as applicable, especially where there was a continuing war, and also (as in some colonial territories) a degree of conflict between the returning forces and the inhabitants.178 For example, the Philippines Supreme Court ruled on 6 October 1949 in Tan Tuan v. Lucena Food Control Board, which related to a seizure of black market goods on 14 June 1945:

This phase of the case is controlled by the laws of war . . .

The fact that this was not foreign territory did not deprive the United States Army of the status of belligerent occupant. Military government may be established not only in foreign territory occupied or invaded in time of war, but also domestic territory in a state of rebellion or civil war.179

In civil wars, too, the law on occupations may sometimes be applied. For example, when armed forces are sent to a particular area of their own State to exercise control, the authorities may implicitly or explicitly observe provisions of the law on occupations, even if they are not formally obliged to do so. The fact that the Lieber Code, which contains many provisions on occupations, was issued to Union forces in the American Civil War is an illustration of the possibilities of applying the laws of war to civil as well as international wars. However, when an ‘occupation’ is within a single sovereign State, the rules of international law which the parties are formally obliged to observe are rather few. They include common Article 3 of the 1949 Geneva Conventions, which relates to ‘armed conflicts not of

177 UK Manual, op. cit. above (p. 256 n. 20), at p. 141 n. One of the two cases cited in this footnote of the manual is Public Prosecutor v. X (Eastern Java). But that case was in fact about occupation of allied territory, and the court asserted the applicability of the laws of war in such circumstances. See above, p. 265.

178 On the somewhat analogous situation in the Falkland Islands after 2 April 1982 see above, p. 280.

179 18 ILR 591. For a similar view see also US Manual, op. cit. above (p. 256 n. 20), at p. 10.
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an international character' and establishes short but clear principles relating to persons taking no active part in hostilities, including members of armed forces who have laid down their arms, the sick, the wounded, etc. For those States which are bound by it, the rather minimal terms of the 1977 Geneva Protocol II (on non-international armed conflicts) are also applicable. So too is some human rights law. But the question of the law applicable in such essentially internal conflicts is not pursued here.

In internal conflicts which do not amount to a full-blown civil war it is particularly unlikely that the designation of 'occupation' will be accepted. The United Kingdom's role in Northern Ireland is called an occupation by some of its adversaries, but this is not the view taken of it by the British or Irish Governments, or by other States. However, even in this case the relevance of some standards derived from the laws of war as well as other international legal norms came to be accepted.

In most circumstances, however, governments are not only reluctant to be viewed as maintaining an occupation in their own territory or in that with which they are constitutionally linked, but are also likely to reject the application of the law on occupations. In United States v. Vargas, before a United States District Court in Puerto Rico in January 1974, sixteen defendants of Puerto Rican origin, who objected to being conscripted, cited 1949 Geneva Convention IV, Article 51, in their defence. The judgment in the case stated that Puerto Rico could not be characterized as an occupied territory, and recalled the reaffirmation of Commonwealth status by plebiscite in 1967. The Convention was therefore viewed as not applicable.

(b) Stationing of Foreign Military Forces by Agreement

The stationing of foreign military forces on the territory of a State in accordance with the terms of a prior agreement is in most cases

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180 Article 3 was stated by Mr Plinio Bolla, the Swiss delegate at the 1949 Diplomatic Conference, to cover the cases of civil war, wars of resistance and wars of liberation, but not banditry or riots: Final Record 1949, vol. IIB, p. 335. This approach is formalized in 1977 Geneva Protocol II, Article 1(2). For a study of Article 3 see Elder, 'The Historical Background of Common Article 3 of the Geneva Convention of 1949', Case Western Reserve Journal of International Law, 11 (1979), pp. 37-69.


182 The United Kingdom has fairly consistently taken the view that the situation in Northern Ireland is essentially internal, and has regarded the principles in common Article 3 of the 1949 Geneva Conventions as applicable: see, e.g., Report of the Committee of Privy Counsellors Appointed to Consider Authorized Procedures for the Interrogation of Persons Suspected of Terrorism, Cmnd. 4901 (1972), pp. 1, 14-15, 23. However, Lord Gardiner's minority report, which was accepted by the Government, is an interesting example of asserting the wider relevance of certain international legal standards, including some from the 1949 Geneva Conventions, in an internal conflict: ibid., pp. 17-22. On the relevance of human rights law to Northern Ireland, see the materials from the case of Ireland v. United Kingdom in Publications of the European Court of Human Rights, Series B, vols. 231-2311 (1980-1).

fundamentally different from military occupation. This is especially so where the functions of the foreign military forces are limited to the manning of certain bases, or defence against an external adversary; but even if the functions do (as in some peacekeeping operations) involve an element of exerting authority over society or maintaining public order, they do not ipso facto become occupations.

The legal framework within which foreign forces operate in a country is generally outlined in the particular agreement concerned. The law on occupations is seldom relevant. Debbasch has expressed a contrary view. She has said that a military occupation occurs whenever armed forces are outside their own national territory, and that ‘military bases constitute today in peacetime a living example of the idea of military occupation’. This stretches the meaning of the term ‘military occupation’ to breaking-point. Although she recognizes a distinction between belligerent occupation and the maintenance of military bases in peacetime, her suggestion that both these situations are subject to a common international legal regime is not persuasive.

There are circumstances in which the stationing of foreign forces by agreement may bear some resemblance to a military occupation. This may be so in cases where the agreement was achieved through duress against the negotiators of the receiving State; where the agreement was concluded after an invasion and occupation had already begun; or where the foreign forces, whose functions were initially presented as limited, come to exercise much more extensive powers. To the extent that such situations do present the types of practical problems addressed in the law on occupations, then the provisions of this body of law may well be viewed as applicable.

(c) Other Cases Distinct From Military Occupation

There are many other cases which, despite some superficial verbal or physical similarities with military occupation, are both in law and in fact entirely distinct. For example, in the context of consideration of title to terra nullius, the term 'occupation' has a specific meaning which is nothing to do with the concept of 'military occupation' as addressed in the laws of war conventions.
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Some writers have drawn attention to the possibility of fictitious military occupations, in which an invader declares certain areas to be occupied without in fact taking any steps to exercise control there. Clearly these are not military occupations at all, as the factual test of occupation advanced in Article 42 of the Hague Regulations remains important.¹⁸⁹

Many territories have a status which is less than total independence and sovereignty, but is distinct from occupation not least because of the nature of the constitutional or international legal framework. Examples might include certain colonial possessions, non-self-governing and trust territories, autonomous regions and so on.

VI. GENERAL ISSUES AND CONCLUSIONS

(a) The Rationale for the Concept of ‘Military Occupation’

The evidence from conventions, practice, judgments and writings all points unambiguously to the conclusion that the generic term ‘military occupation’ (or just ‘occupation’), though by no means infinitely elastic, is a very broad one. Has it become so broad that it ceases to be either satisfactory as a factual description or useful as an indication that a particular body of law is applicable?

The breadth of the concept of occupation is indicated not so much by showing how many categories can be incorporated in a single typology, but rather by looking at the historical cases themselves, each one unique in purpose, character and outcome. If the term ‘occupation’ has come to refer to far more types of situation than the classic belligerent occupation indicated in the Hague Regulations of 1899 and 1907, this is not because of any intellectual fashion or progressive legal development, but rather because of the inescapably complex and varied character of military and political events. Indeed, one can say of military occupation, as Clausewitz said of war, that it is not a totally independent phenomenon, but ‘a continuation of political intercourse, with the addition of other means’.¹⁹⁰

Facts (HMSO, May 1982), pp. 3–4. The question of what body of principles or law should govern relations between the occupiers of terra nullius and any indigenous inhabitants was of great importance at the time of European colonial expansion: for a classic exposition see particularly the work of the sixteenth-century Spanish professor of theology, Franciscus de Victoria, esp. his De Indis, first published in his Relectiones Theologicae (1557). However, this question is of much more restricted significance today because there is virtually no terra nullius in the contemporary world. In recent cases of invasions of inhabited territory whose status is unclear (e.g., East Timor and Western Sahara), the international community has tended to view it not as terra nullius, but as territory whose sovereignty, although yet to be exercised, is vested in the inhabitants, whose wishes regarding forms of statehood or union should be determined by appropriate internationally agreed procedures.

¹⁸⁹ On ‘so-called constructive occupation’ and ‘so-called fictitious occupation’, see Oppenheim, op. cit. above (p. 256 n. 20), at p. 435; von Glahn, op. cit. above (p. 261 n. 39), at p. 28. On the significance of effective control as a test of occupation see also McNair and Watts, op. cit. above (p. 266 n. 57), at pp. 368, 372–80. Fictitious ‘occupations’ occur rarely if at all. The opposite problem—of an area being occupied in fact, but being said to be not occupied—is much more common.

¹⁹⁰ Von Clausewitz, On War (Howard and Paret translation, 1976), Book viii, chapter vi.
Occupations may be distinguished from each other not merely by the criterion of the kinds of legal or other circumstances in which they occur (the main approach adopted in this article), but also by the criterion of motive or purpose. Here too there are extreme variations. Even within one single type of occupation discussed earlier there could be any of several completely different motives, and views about these will strongly colour attitudes to any particular given episode. Occupations may be an almost accidental by-product of hostilities, or they may be the main aim of military operations. They are initiated, or later maintained, for a wide variety of ostensible purposes: to implement territorial claims; to put pressure on an adversary either to perform obligations under an already existing treaty, or else to negotiate a peace treaty; to prevent the use of the occupied territory as a military base, including for guerrilla or other attacks against the occupying State; to punish an unfriendly act, with a view to securing reparation for the act complained of; to prevent political or economic developments which cause concern to the intervening power; to re-establish order and stability in a case where government has collapsed or is in danger of so doing; to protect a given area or section of the population against internal disturbances or against foreign attack; or to enable the occupant himself to establish military bases. Other motives, justifications or excuses for occupations are not hard to find.

Faced with such bewildering varieties of types and motives of occupation, what common elements remain? Does occupation have a chameleon-like character, able to assume many different faces, forms and colours, or does it rather consist of many entirely different species?

Within the diversity there is a rationale for the concept of 'occupation'. There are important common features. At the heart of treaty provisions, court decisions and legal writings about occupations is the image of the armed forces of a State exercising some kind of domination or authority over inhabited territory outside the accepted international frontiers of their State and its dependencies. It is above all to this kind of activity that the modern law on occupations applies. Even in specific cases differing in some respects from the most classic forms of occupation, there are some markers which may help to indicate the existence of an occupation, or may suggest the need for the law on occupations to be applied. These include: (i) there is a military force whose presence in a territory is not sanctioned or regulated by a valid agreement, or whose activities there involve an extensive range of contacts with the host society not adequately covered by the original agreement under which it intervened; (ii) the military force has either displaced the territory's ordinary system of public order and government, replacing it with its own command structure, or else has shown the clear physical ability to displace it; (iii) there is a difference of nationality and interest between the inhabitants on the one hand and the forces intervening and exercising power over them on the other, with the former not owing allegiance to the latter; (iv) within an overall framework
of a breach of important parts of the national or international legal order, administration and the life of society have to continue on some legal basis, and there is a practical need for an emergency set of rules to reduce the dangers which can result from clashes between the military force and the inhabitants.

(b) The Designation of Territory as ‘Occupied’

There are often disagreements about applying a politically and emotionally laden term such as ‘occupation’ to a particular situation. Parties involved—especially those on the side of the intervening forces—are often and understandably reluctant to use the word ‘occupation’ at all. This may be because of a fear of having to apply the full range of the law on occupations. However, the nexus of rights and duties described in that law is by no means necessarily disadvantageous to the occupant. There may be a much simpler reason for reluctance to use the word ‘occupation’: the adverse connotations of the word itself. To many, ‘occupation’ is almost synonymous with aggression and oppression.

Thus there has been widespread use of terms with a supposedly better ring: protectorate, fraternal aid, rescue mission, technical incursion, peacekeeping operation, military administration, civil administration, liberation and so on. Sometimes these terms are used in addition to the term ‘occupation’, in order to qualify it, to highlight the special features of a situation, and to clarify the purpose of the military action in question. Sometimes, and perhaps more often, these terms are used in total substitution for ‘occupation’. Occasionally there may be some merit in not classifying a situation as an occupation: the maintenance of a fiction that a country retains its independence may act as a lever for gradually reasserting independence as a fact.

The question thus arises: who determines whether a particular situation is designated as an occupation? This answers itself in clear cases (such as some of the Second World War occupations) but not in all. The Hague and Geneva Conventions do not provide for a body to determine the circumstances in which they are applicable. Sometimes there is bound to be an element of genuine uncertainty, or of political predilection, in the designation of the status of territory. Where one or other of the parties involved disputes the term ‘occupation’, it is still open to other States and bodies to make clear that they consider the territory in question to be occupied, and to judge the occupant by the standard of the law on occupations. United Nations General Assembly and Security Council resolutions have often been a main means of expressing such a view. Regional organizations such as the OAU have also played a role in such

191 Territories designated by the General Assembly as occupied, and mentioned earlier in this article, have included Hungary (in a resolution in late 1956), the Israeli-occupied territories (consistently since 1967), Namibia (consistently since 1968), northern Cyprus (since 1978), Western Sahara (1970–80) and Kampuchea (1982).
designations. The ICRC has often expressed a clear view that a given territory was occupied, and that the parties were obliged to observe the relevant provisions of 1949 Geneva Convention IV, etc. In the case of Namibia, the ICJ said in 1971 that it viewed the territory as occupied.

(c) Does the Application of the Law Depend on Such Designation?

It is clear that there has long been a tendency to regard the law on occupations as applicable (whether on a de jure or de facto basis) to many situations, even where these differ in some important particulars from the picture of occupation presented in the relevant conventions. The question is, could the law be applied even in situations where the very designation of ‘occupation’ is rejected or disputed? Can one leap-frog the emotive issue of name-calling, and just get on with observing basic humanitarian rules? The additional fact that there have been some clear cases of occupations (including the post-1945 ones in Germany and Japan) to which the law on occupations was not at the time considered applicable could conceivably be a further reason for separating the issues of what a situation is called on the one hand, and what law is applicable on the other. Another consideration is that sometimes there is de facto observance of many provisions without any mention being made at all of the law on occupations. Thus in Czechoslovakia after August 1968, although Soviet spokesmen neither used the term occupation nor made any public reference to the Hague or Geneva Conventions, the Warsaw Pact forces on the whole acted with restraint.192

Both the ICRC and the United Nations have on numerous occasions asserted the applicability of international humanitarian law to particular situations, irrespective of the issue as to whether they count as international armed conflicts and/or occupations. For example, in 1968–9 the United Nations General Assembly urged that the 1949 Geneva Conventions III and IV be applied in conflicts in the territories under Portuguese administration;193 in Southern Rhodesia after its unilateral declaration of independence;194 and in southern Africa generally.195 (Conversely, in at least one case mentioned earlier in this article, northern Cyprus, the General Assembly described a territory as occupied, but it did not in so many words call for the implementation of these conventions there.)

The tendency to focus on the substantive issue of observance of the law, rather than on the seemingly more semantic issue of the legal designation of a territory, could possibly be strengthened by seeking international

192 However, in April 1969 Soviet representatives were reported to have threatened further military action in the cities if Dubček was not dismissed from his post as First Secretary of the Czechoslovak Communist Party. In the first month of the occupation over seventy Czechoslovak citizens had been killed: Windsor and Roberts, Czechoslovakia 1968 (1969), p. 123 n.
193 GA Res. 2395 (XXIII) of 29 November 1968.
194 GA Res. 2508 (XXIV) of 21 November 1969.
195 GA Res. 2547 (XXV) of 11 December 1969.
agreement (e.g. through a United Nations resolution) to the effect that the law applies in all cases of military occupation or of any other situation where armed forces move in and exercise domination or authority outside the internationally accepted frontiers of their State and its dependencies. Some such wording could provide a parallel, so far as occupations are concerned, for what common Article 2 of the 1949 Geneva Conventions already does for international armed conflicts. That is to say, it could help ensure the application of the law irrespective of formal declarations and designations—whether of war or of occupation. However, such a formula still leaves the application of rules dependent on the outcome of complex arguments—not least about recognition of frontiers. An escape from this problem would probably require general acceptance of the idea that certain rules apply equally in internal and international conflicts. Evidence that such an idea is gaining ground can be found: but so far as occupations are concerned there are difficulties in accepting that a set of rules designed for administering foreign territories with their own institutions and laws can really be viewed as equally applicable in all internal conflicts.

The idea of applying the law on occupations on a purely de facto basis and irrespective of how a territory is designated has some point, but it also poses some problems. One is that the law may be only applied in part. A possible example is the Israeli application of ‘the humanitarian provisions’ of the 1949 Geneva Convention IV in the West Bank and Gaza. Such an approach can provide a basis for a State to limit the applicability of the Convention in one way or another. There is sometimes merit in asserting clearly that a given territory is subject to the full range of occupation law. A further consideration is that the formal designation of territory as occupied does have substantial practical and legal consequences. For example, the question of responsibility for war crimes often hinges on whether an area is considered to have been occupied. So too do questions relating to the applicability of the existing law of the territory concerned, and to the validity of actions by the ousted sovereign in respect of the occupied territory. For all these reasons, the importance of the designation ‘occupation’ is not likely to disappear.

(d) Can a Single Set of Rules be Applied in Different Situations?

Granted that occupation can assume many different forms, that the concept is fuzzy at the edges, and that the law relating to occupations is sometimes even applied in situations where the label ‘occupation’ is contentious or rejected, a major question remains. Can a single set of rules really be relevant to a very wide variety of different situations? Is it not a triumph of legal presumptuousness over common sense to assert that the same rules apply to, say, the Nazi occupation of Poland after 1939, the Turkish invasion of Cyprus from 1974 and the Vietnamese role in Kampuchea since 1978?
WHAT IS A MILITARY OCCUPATION?

An intellectually tempting but in the end impractical way of tackling this problem might be to say that the law on occupations should revert to its formal diplomatic origins of 1899 and 1907, and should only be viewed as applicable in belligerent occupations—i.e. those in which one belligerent occupies the territory of another during a war. Many writers have implied, but with greater or lesser emphasis, that the rules apply mainly to belligerent occupation quite strictly defined; and legal writings have focused mainly on this category. As Feilchenfeld said in 1942:

There are, of course, other kinds of occupation, and even other phases and types of belligerent occupation. However, the central body of international law governing occupation problems did not grow up around them; the special rules applying to them are invariably incomplete and controversial, and depend usually on deductions from and modifications of Section III [of the Hague Regulations]; most of them, it will appear, have not been hitherto studied and properly analyzed.196

However, any approach which tends to limit the application of the law simply to cases of belligerent occupation has many disadvantages: (a) it goes against a large body of practice and court opinion; (b) it would leave many activities of armed forces outside their own country in something of an international legal limbo; and (c), in any case, belligerent occupations themselves vary enormously in their character and purpose, so such an approach would not only be artificial and arbitrary, but would also still leave us with the original problem that one body of law is applicable to many very different cases. The idea that there is a standard case should not be readily abandoned, and some contemporary occupations (for example, the West Bank and Gaza) are in some ways very close to it. However, a recognition that there is a standard case is not incompatible with an acceptance that the classical conception of belligerent occupation is too rigid, and does not correspond to real life.

A better approach, it is suggested, is to accept that the law on occupations is formally applicable to, and capable of being applied in, a wide variety of situations. Two considerations particularly point to such a course. First, to a large extent the nexus of rights and duties it describes is a body of minimum rules, which any power should be able to follow at any time. Secondly, within the law on occupations there is some allowance for the application of different combinations of rules in different circumstances. For example, the Hague and Geneva conventions contain many provisions permitting the occupant to take certain measures in connection with military operations, or on account of real security needs: where there is no continuing war, or the security situation is more stable, such measures would not be justified. Many other provisions for adjusting the applicable rules to the particular situation may be noted. Some provisions

196 Feilchenfeld, op. cit. above (p. 261 n. 39), at p. 6. See also von Glahn, op. cit. above (p. 261 n. 39), at p. 28.
which restrict an occupant's freedom of action quite conspicuously, such as the Hague requirement to respect the existing laws of an occupied country, are subject to reasonable provisos of one kind or another allowing for exceptional circumstances.

The adaptability of the law on occupations is further indicated by the scope which exists for special agreements of various kinds between occupant and occupied. While there is obviously a risk that special agreements may (contrary to 1949 Geneva Convention IV) derogate from the rights of the inhabitants, this is by no means always the case. The legal framework negotiated at The Hague and Geneva is not so perfect that it cannot be improved upon, and it is hardly surprising that in some occupations, especially those of allied territory, there have in fact been significant improvements.\(^{197}\)

Indeed, while it is certainly based on some clear minimum standards, there is an extent to which it is wrong to conceive of the law on occupations as a single set of rules. True, its basic principles and provisions are set out in concise form in the Hague Regulations and the Geneva Civilians Convention, but to these must be added many other elements, involving State practice, case law and writings, as well as other conventions of a more general character. In addition, the parallel stream of the international law of human rights has not only influenced the recent development of the laws of war in the shape of 1977 Geneva Protocol I, but has also been increasingly recognized as having some applicability to occupations in its own right.\(^{198}\)

Granted that it is a substantial body of law containing many elements of flexibility, the tendency to regard the law on occupations as applicable only on a \textit{de facto} basis rather than \textit{de jure}, or only partially through some of its provisions rather than as a whole, is bound to be viewed with some scepticism. Even the fact that in special cases some States may feel justified in ignoring or violating some provisions of the law on occupations does not necessarily mean that the law is wrong or useless. In municipal law, and indeed in ethical systems, norms are sometimes violated (occasionally even for good reasons), but they can still be important yardsticks by which the activities of individuals and States may be guided at the time and evaluated later. The condition of international society being what it is, the practical need for a body of law derived largely from the law of war, and providing such a yardstick for the activities of armed forces \textit{vis-à-vis} the inhabitants of foreign territories, is likely to remain.

\(^{197}\) In the case of \textit{Ministère Public v. Saelens} a Belgian Court Martial held on 25 October 1945: 'The military police of an allied occupying power is not competent to resort to domiciliary search for the purpose of investigating and repressing offences subject to Belgian law ... On the contrary, the Convention concluded on May 16, 1944 in London between the Belgian Government and allied Governments provided that Belgians who have committed crimes or delicts against allied armies shall be summoned before Belgian Courts Martial ...': \textit{Annual Digest}, 13 (1946), Case no. 36, pp. 85-6.

\(^{198}\) Above, pp. 250, 287.