

**THE INTERNATIONAL LAW
OF OCCUPATION**

With a new preface by the author

Eyal Benvenisti

Overview: The Phenomenon of Occupation

INTERNATIONAL LAW has sought since the nineteenth century to regulate the conduct of occupying forces. Rules were prescribed through military manuals, multilateral instruments, and state practice. These rules stemmed from the universally accepted principle that sovereignty may not be alienated through the use of force. The occupying power is thus precluded from annexing the occupied territory or otherwise changing its political status and is bound to respect and maintain the political and other institutions that exist in that territory. During the period of occupation, the occupant is responsible for the management of public order and civil life in the territory under its control.

The law of occupation developed as part of the law of war. Initially, occupation was viewed as a possible by-product of military actions during war,¹ and therefore it was referred to in legal literature as “belligerent occupation.” But the history of the twentieth century has shown that occupation is not necessarily the outcome of actual fighting: it could be the result of a threat to use force that prompted the threatened government to concede effective control over its territory to a foreign power;² occupation could be established through an armistice agreement between the enemies;³ and it also could be the product of a peace agreement.⁴ Moreover,

¹ One necessary element of belligerent occupation is the establishment of “authority,” of effective control, by the invading army over the relevant territory. Article 42 of the Regulations Respecting the Laws and Customs of War on Land, annex to the Convention (IV) Respecting the Laws and Customs of War on Land, signed at The Hague, October 18, 1907 [hereinafter Hague Regulations], defines the situation: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

Mere invasion does not amount to occupation. *See, e.g.*, 2 L. Oppenheim, *International Law* 434–35 (7th ed., by H. Lauterpacht, 1948); E. Feilchenfeld, *The International Economic Law of Belligerent Occupation* 6 (1942); M. Greenspan, *The Modern Law of Land Warfare* 213–14 (1959).

² Examples of this type of occupation are the German occupation of Bohemia and Moravia in March 1939, *see, e.g.*, *Anglo-Czechoslovak and Prague Credit Bank v. Janssen*, [1943–1945] AD Case no. 11, at 47 (Australia, Supreme Court of Victoria); and the German occupation during World War II of Denmark, *see, e.g.*, Ross, *Denmark's Legal Status during the Occupation*, 1 *Jus Gentium* 1 (1949).

³ For example, the “Armistice Agreement” that established Allied control over the Rhineland in Germany in 1918. On this occupation, *see infra* Chapter 2.

⁴ The Israeli occupation of the Gaza Strip did not change its status despite the 1979 Peace

because of many occupants' reluctance to admit the existence of a state of "war" or of an international armed conflict, or their failure to acknowledge the true nature of their activities on foreign soil, the utility of retaining the adjectives "belligerent" or "wartime" has become rather limited. Today the more inclusive term, "occupations," is generally used.⁵ The emphasis is thus put not on the course through which the territory came under the foreign state's control, whether through actual fighting or otherwise, but rather on the phenomenon of occupation. This phenomenon can be defined as the effective control of a power (be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory.

This movement toward a more encompassing definition of occupation is also reflected in the most important international instruments that prescribed the law of warfare, namely, the Hague Regulations and the 1949 Fourth Geneva Convention.⁶ Article 42 of the Hague Regulations linked occupation to war: "[t]erritory is considered occupied when it is actually placed under the authority of the *hostile army*" (my emphasis). In the Fourth Geneva Convention this link is attenuated: Article 2 provides that the convention shall apply even to an occupation that "meets with no armed resistance." The rationale for the inclusive definition of occupation is that at the heart of all occupations exists a potential—if not an inherent—conflict of interest between occupant and occupied. This special situation is the result of the administration of the affairs of a country by an entity that is not its sovereign government. The issues that this type of administration raise are characterized by this possible conflict of interest, and are largely independent of the process through which the occupant established its control.

The Hague Regulations assumed that upon gaining control, the occupant would establish its authority over the occupied area, introducing a system of direct administration.⁷ But this is more than a descriptive assumption: it is the law. There is a duty to establish such system of a government.⁸ In 1907 there was no need to emphasize this point: the estab-

Treaty with Egypt. Egypt controlled Gaza prior to the Israeli occupation of 1967. On the status of this occupation, see *infra* Chapter 5.

⁵ Adam Roberts gives a very thorough account of the variety of types of occupations. Roberts, *What Is Military Occupation?* 55 BYIL 249 (1985).

⁶ The Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.

⁷ This assumption is implicit, *inter alia*, in Article 43, which refers to the situation in which "[t]he authority of the legitimate power ha[s] in fact passed into the hands of the occupant" (my emphasis). On this assumption, see also Roberts, *supra* note 5, at 252.

⁸ See, e.g., *The Law of Land Warfare* at paragraph 362 (U.S. Army Field Manual, FM 27-

lishment of a system of administration by the occupant was widely accepted in practice and in the literature as mandatory. Today, however, such practice is the rare exception rather than the rule.⁹ Modern occupants came to prefer, from a variety of reasons, not to establish such a direct administration. Instead, they would purport to annex or establish puppet states or governments, make use of existing structures of government, or simply refrain from establishing any form of administration. In these cases, the occupants would tend not to acknowledge the applicability of the law of occupation to their own or their surrogates' activities, and when using surrogate institutions, would deny any international responsibility for the latter's actions. Acknowledgment of the status of occupant is the first and the most important initial indication that the occupant will respect the law of occupation. Such an acknowledgment is also likely to restrict the occupant's future actions and limit its claims regarding the ultimate status of that territory. This is a compelling reason for international law to stress what was self-evident not too long ago: the existence of the duty to establish a direct system of administration.¹⁰ In any case, the failure to do so does not relieve the occupant of its other duties under the law of occupation: after all, the definition of occupation is not dependent on the establishment of an occupation administration. This principle is asserted in Article 47 of the Fourth Geneva Convention, which provides that "the benefits under the Convention shall not be affected 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, nor by any annexation by the latter of the whole or part of the occupied territory."¹¹

The foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through the actual or threatened use of force. Effective control by foreign military force can never bring about by itself a valid transfer of sovereignty. From the principle of inalien-

10, 1956) ("Military government is the form of administration by which an occupying power exercises governmental authority over occupied territory.").

⁹ This issue and the consequences of failure to abide by the requirement to establish a direct administration are treated in Chapter 6.

¹⁰ In this respect, it is of little significance whether the occupant chooses to establish a system of military administration or a civil one, or a mixture of both. What is important is the establishment of a separate system by the occupant to execute the powers and duties allotted to it by the law of occupation. See (British) War Office, *The Law of War on Land, Being Part III of the Manual of Military Law* at 145, paragraph 518 (1958).

¹¹ Or as the British military manual, *id.* at paragraph 518(2), states: "The duties and constraints laid upon an Occupant cannot be circumvented by carrying out illegal acts through the instrumentality of a 'puppet government' set up in the occupied territory, or by a system of orders through local government officials operating in occupied territory."

able sovereignty over a territory spring the constraints that international law imposes upon the occupant. The power exercising effective control within another sovereign's territory has only temporary managerial powers, for the period until a peaceful solution is reached. During that limited period, the occupant administers the territory on behalf of the sovereign. Thus the occupant's status is conceived to be that of a trustee.¹² Changes over time have affected both the identity of the beneficiaries of this trust and the powers of the trustee, namely, the occupant. The occupant's powers have expanded through time to cover almost all the areas in which modern governments assert legitimacy to police, a far cry from the turn of the century laissez-faire conception of minimal governmental intervention. Other developments in the areas of political thought, namely, the emerging principles of self-determination and self-rule, were responsible for the shift in focus regarding the beneficiary of the trust: contemporary attention is paid more to the interests of the indigenous community under occupation rather than to the wishes of the ousted government. These two trends together form a striking departure from the Hague law, in which the emphasis was on the state elites as the primary beneficiaries and on minimal involvement of the occupant in the management of the affairs of the population under its temporary rule. These conceptual changes are reflected in the law of occupation, which came to recognize certain important modifications to the occupant's powers and duties.

In exploring the phenomenon of occupation, I was struck by the fact that most contemporary occupants ignored their status and their duties under the law of occupation. The examination of these cases and the motives for the occupants' positions (see Chapter 5) has led me to conclude that the tendency to avoid the recognition of the applicability of the law of occupation is not likely to disappear. This practice of occupants poses another decisive challenge that the law of occupation has to face in order to maintain its relevance.

This book sets out to explore the phenomenon of occupation. It examines the law of occupation as it was codified around the turn of this century in the Hague conferences, contrasting that law with the practice of occupants throughout the twentieth century and with more recent efforts to prescribe optimal standards of conduct. The object of this examination is to understand the arrangement that the international community has devised for settling the possible conflicts of interest between occupant and occupied and to assess the shortcomings and challenges of such a system.

¹² See Wilson, *The Laws of War in Occupied Territory*, 18 TGS 17, at 38 (1933) ("enemy territories in the occupation of the armed forces of another country constitute . . . a sacred trust"); Roberts, *supra* note 5, at 295 ("the idea of trusteeship is implicit in all occupation law"); G. von Glahn, *Law among Nations* 686 (5th ed. 1986) (the "occupant . . . exercises a temporary right of administration on a sort of trusteeship basis").

2

The Framework of the Law of Occupation

Article 43 of the Hague Regulations: A Profile of the Occupant's Role

Article 43 of the 1907 Hague Regulations states:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and [civil life], while respecting, unless absolutely prevented, the laws in force in the country.¹

This concise statement is the gist of the law of occupation. Very few words are used to describe both the nature of the occupation regime and the scope of the occupant's legitimate powers. These words represent the culmination of prescriptive efforts made throughout the nineteenth century by national courts,² military manuals,³ nonbinding international in-

¹ The official French version reads: "L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays." An identical version appeared in Article 43 of the Hague Regulations of 1899. As noted by Schwenk, *Legislative Power of the Military Occupant under Article 43, Hague Regulations*, 54 Yale L.J. 393 (1945), the first English translation of Article 43, which used the phrase "public order and safety" in lieu of "l'ordre et la vie publics," was incorrect. Schwenk suggested the use of the more comprehensive phrase used here, namely "public order and civil life." See also *infra* text accompanying notes 11–16.

² See, e.g., *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191 (1815); *United States v. Rice*, 17 U.S. (4 Wheat.) 246 (1819); *Fleming and Marshall v. Page*, 50 U.S. (9 How.) 603 (1850).

³ The most famous is the Lieber Code, the first attempt to codify the laws of war, which was prepared in 1863 by Francis Lieber to be used as the U.S. war manual during the Civil War. The text is reproduced in D. Schindler and J. Toman, eds., *The Laws of Armed Conflicts* 3 (2d ed. 1981). Other military codes following the basic principles are the Bluntschli Code, prepared in 1866 for the German army, and the French manual for officers prepared in 1893, as well as the manuals of the British, Italian, and Russian armies. See D. Graber, *The Development of the Law of Belligerent Occupation 1863–1914*, at 26–27, 114–15, 132–33 (1949).

The Lieber Code provides that an occupied area is put under martial law of the invading army, which "consists in the suspension . . . of the criminal and civil law, and of the domestic administration and government . . . and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation." Articles 1 and 3; see also Article 6.

struments,⁴ and many legal scholars.⁵ Article 43 was, in fact, a combination of Articles 2 and 3 of the Brussels Declaration.⁶ Accordingly, the text of Article 43 was accepted by scholars as mere reiteration of the older law,⁷ and subsequently the article was generally recognized as expressing customary international law.⁸

Among the two issues dealt with in Article 43 there is one which was not contested during the efforts to formulate the law of occupation. This is the notion that the occupation does not confer upon the occupant sovereignty over the occupied territory. In Article 43 this idea is expressed, quite vaguely, in the opening phrase: "The authority of the legitimate power having *in fact* passed into the hands of the occupant" (my emphasis).⁹

During the discussions at the second Hague Peace Conference in 1907, this basic premise served as the starting point for the more controversial

⁴ The Brussels Declaration of 1874 provides as follows: Article 2: "The authority of the legitimate power being suspended and having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety." Article 3: "With this object he shall maintain the laws which were in force in the country in time of peace and shall not modify, suspend or replace them unless necessary." The Oxford Manual on the Laws of War on Land of 1880, Article 6, provides: "No invaded territory is regarded as conquered until the end of the war; until that time the occupant exercises, in such territory, only a de facto power, essentially provisional in character." The texts of both codes appear in D. Schindler and J. Toman, *supra* note 3, at 26 and 35, respectively. On the background of these two codes see Graber, *supra* note 3, at 20–30.

⁵ See Graber, *supra* note 3, at 110–48.

⁶ On this issue, see *infra* notes 22–24 and accompanying text.

⁷ See Graber, *supra* note 3, at 143 ("Nothing distinguishes the writing of the period following the 1899 Hague code from the writing prior to that code.")

⁸ This view was expressed by the International Military Tribunal in Nuremberg. See *The Trial of the Major War Criminals* 253–54 (1947), also published in 41 AJIL 172, 248–49 (1947). See also, e.g., G. von Glahn, *The Occupation of Enemy Territory* 10–12 (1957). Municipal courts have also regarded the Hague Regulations as codified customary international law. Morgenstern, *Validity of Acts of the Belligerent Occupant*, 28 BYIL 291, 292 (1951).

⁹ This expression led von Glahn to say that "[t]he Hague Regulations give no clear-cut answer to the problem of sovereignty in occupied territory, inasmuch as there is only reference to a passage of de facto authority into the hands of the occupant." von Glahn, *supra* note 8, at 31. It is, however, quite clear that the framers of the Hague Regulations unanimously took the view that an occupant could not claim sovereign rights only because of its effective control over the occupied territory. Moreover, many authorities even went further, denying the occupant any legal right to control such territory. According to this latter view, Article 43 did not grant the occupant an entitlement to administer the territory; rather, it merely recognized the fact of its effective control, and set out to delimit it. For more modern reiterations of this view, see, e.g., Bothe, *Belligerent Occupation*, in 4 EPIL 65 (1982) ("International law does not grant rights to the occupying powers, but limits the occupier's exercise of its de facto powers."); Baxter, *The Duty of Obedience to the Belligerent Occupant*, 27 BYIL 235, 243 (1950). Compare this view with that of other commentators who do find international law as granting certain legal powers to the occupant. See, e.g., Morgenstern, *supra* note 8, at 296; J. Stone, *Legal Controls of International Conflicts* 724 (1954).

debate regarding the scope of the occupant's authority. In fact, this second issue was the subject of intense controversy even before the first Hague Conference of 1899. This debate, which was not resolved in the conferences, is reflected in the compromise formula of Article 43, which is sufficiently vague to carry various meanings. Indeed, the debate regarding the issue of the occupant's powers is still alive today, and the differences between the opposing views have grown. Since Article 43 is the cornerstone of the law of occupation in the twentieth century, it is pertinent to discuss this issue here.

Delimitation of the Occupant's Powers

Article 43, dealing with the general powers of the occupant, mentions both the obligations of the occupying power and its rights in the course of fulfilling these obligations. In this sense, Article 43 is a sort of miniconstitution for the occupation administration; its general guidelines permeate any prescriptive measure or other acts taken by the occupant.¹⁰

The obligations of the occupant are to "take all the measures in his power to restore and ensure, as far as possible, public order and [civil life]." It is required to do so "while respecting, unless absolutely prevented, the laws in force in the country." From the latter duty emerges the implicit recognition of the right of the occupant *not* to respect some of the local laws.

The Subjects of The Occupant's Legitimate Concerns: Public Order and Civil Life

The phrases in Article 43, "public order" and what should be translated as "civil life," delimit the scope of the occupant's powers and duties. They prescribe, however, only a vague and intuitive course. Moreover, these phrases are susceptible to changing conceptions regarding the role of the central government in society. Between 1874, when these terms were first coined, and the late twentieth century, the conceptions regarding the issues involved have changed dramatically. Indeed, they have become the focal point of deep ideological differences between nations.

¹⁰ Other articles deal with specific issues, such as collection of taxes (Article 48), requisitions (Article 52), and taking possession of various assets (Articles 46, 52–56). These specific grants of authority are in turn subject to the overriding delimiting principle of Article 43. See, e.g., *Abu-Aita et al. v. Commander of Judea and Samaria et al.*, 37 PD (2) 197, 260 (1983), translated in 7 *Selected Judgments of the Supreme Court of Israel* 1, 54 (1983–1987) (the powers and delimitations regarding taxation, as set by Article 48, are subject to those of Article 43).

To nineteenth-century politicians and legal scholars, there was nothing problematic about recognizing the occupant's power to prescribe measures for the purpose of restoring and ensuring public order and civil life. Based on the then-prevailing notions of the proper role of central governments and assumptions as to the short duration and nature of war, giving this power to the occupant did not seem to raise any grave concerns on the part of societies susceptible to occupations. In fact, these terms, which would later be used by occupants as justification for increased intervention in local affairs, were originally elaborated by the delegates of the weaker countries, those most susceptible to being occupied. They wanted to impress this duty upon occupants, who otherwise, they thought, might choose not to get involved in matters concerning the civilian population of an occupied territory.

In the debate over the Brussels Declaration of 1874, it was the Belgian delegate who suggested that "l'ordre public" meant "la sécurité ou la sûreté générale," while "la vie publique" stood for "des fonctions sociales, des transactions ordinaires, qui constituent la vie de tous les jours."¹¹ It seems safe to assume that the weaker parties to the convention, more than the major powers, wanted to enlarge the scope of the occupant's duty toward the local inhabitants, thus ensuring their ability to return as quickly and as much as possible to their regular daily life. It was not expected at that time that the occupant would have any self-interest in regulating those social functions. Consequently, no one raised the possibility of the occupant's intervention in these areas to further its own policies. International scholars still viewed the likely motives of the occupant to be short-term military concerns, not impinging upon the local civil and criminal orders.¹²

With the advent of the twentieth century and the ever-increasing regulation of the markets and other social activities by central governments, especially during and after hostilities, the duty imposed on the occupant turned into a grant of authority to prescribe and create changes in a wide spectrum of affairs. With the modern conceptions of the state, both in the Western world and in the socialist countries, it became "difficult to point with much confidence to any of the usual subjects of governmental action as being *a priori* excluded from the sphere of administrative authority conferred upon the occupant."¹³ Indeed, the term "l'ordre et la vie publics," in an interesting historical twist, was soon invoked by the occupants to justify

¹¹ See Ministère des Affaires Étrangères, Actes de la Conférence de Bruxelles de 1874 23 (1874), reproduced in Schwenk, *supra* note 1, at 398.

¹² The occupant was not expected to introduce legal changes in the civil and criminal laws. Military necessity, a recognized justification for legislation by the occupant, did not seem to be linked with those areas. See the description of the opinion of the numerous commentators of that period in Graber, *supra* note 3, at 123–25, 132–34, 143–45.

¹³ M. McDougal and F. Feliciano, *Law and Minimum World Public Order* 746 (1961).

their extensive use of prescriptive powers.¹⁴ The duty was transformed into a legal tool extensively invoked by occupants in those areas in which they wished to intervene. Article 43 proved an extremely convenient tool for the occupant: if it wished, it could intervene in practically all aspects of life;¹⁵ if it was in its interest to refrain from action, it could invoke the "limits" imposed on its powers.¹⁶

The Objects of the Occupant's Action: "Restore and Ensure"

The need to "restore" public order and civil life arises in the wake of hostilities that disrupt them. The restoration process includes immediate acts needed to bring daily life as far as possible back to the previous state of affairs. The occupant's discretion in this process is limited. It is the other term, the command "to ensure," that poses some difficulties. At issue is the extent to which the occupant must adhere to the *status quo ante bellum*. This question becomes more pressing as the occupation is protracted. A strict reading of "ensure," as the preservation of the status quo,¹⁷ could well mean the freezing of the economic infrastructure and stagnation in the occupied territory. Starting with the cessation of actual hostilities, a new era begins, which could continue for many years before the occupation is ended. During this period, "human existence requires organic growth, and it is impossible for a state to mark time indefinitely. Political decisions must be taken, policies have to be formulated and carried out."¹⁸ Could all these decisions be regarded as "ensuring" public order and civil life?

Many occupants during this century answered this question affirmatively. In implementing the duty "to ensure," they often created a whole

¹⁴ See, e.g., *Grahame v. Director of Prosecution*, [1947] AD Case no. 103, at 228, 232 (Germany, British Zone of Control, Control Commission Court of Criminal Appeal) ("[L] 'ordre et la vie publics' [is] a phrase which refers to the whole social, commercial and economic life of the community."). The Israeli High Court of Justice has also subscribed to this view. See, e.g., *Abu-Aita*, *supra* note 10 (concerning the introduction of a new value-added tax). For other decisions of Israeli courts in this direction, see *infra* Chapter 5.

¹⁵ McDougal and Feliciano, *supra* note 13, at 747 ("Occupants did in fact intervene in and subject to regulation practically every aspect of life in a modern state which legitimately sovereigns themselves are generally wont to regulate."); O. Debbasch, *L'occupation militaire* 172 (1962) ("L'occupant . . . a souvent tenté d'accroître exagérément sa compétence réglementaire et de prendre des mesures que seul le souverain aurait du normalement décider.")

¹⁶ This has been the position of the British occupation government in post-World War II Tripolitania, where the former denied desperate requests of the local inhabitants to ameliorate their conditions. For a discussion of that occupation, see *infra* Chapter 4.

¹⁷ This interpretation was suggested in the early period of the Israeli occupation by Justice H. Cohn, in a minority opinion in *The Christian Society for the Sacred Places v. Minister of Defence et al.*, 26(1) PD 574 (1972).

¹⁸ M. Greenspan, *The Modern Law of Land Warfare* 225 (1959).

cycle of events: new policies brought about new outcomes, which in their turn necessitated multiple other social decisions, and so forth. Since “ensuring” is linked to the wide spectrum of social activity—the “public order and civil life”—it does not take too long after the occupation administration is established for the command “to ensure” to connote not much less than full discretionary powers, amounting to those of a sovereign government.¹⁹ This latitude that Article 43 entrusts to occupants is not a simple matter. My analysis of occupations shows—and this should not be surprising—that social decisions taken and implemented in occupied territories were never incompatible with outcomes sought by occupants. Often these outcomes proved detrimental to the occupied country. This brings us to the second part of Article 43, which tries to strike a balance between stability and change, between the interests of the occupant and those of the occupied population.

Stability versus Change: “While Respecting, Unless Absolutely Prevented, the Laws in Force in the Country”

The second part of Article 43 was a separate article in the 1874 Brussels Declaration, linked to the duty of the occupant to restore and ensure public order and safety.²⁰ Implicit in this duty is the recognition of the occupant’s power to prescribe laws or otherwise act in ways not in conformity with the legal system that was laid down by the sovereign government. This implicit recognition was the only issue regarding Article 43 that was contested during the 1899 Hague Peace Conference.²¹ Beernaert, the delegate of Belgium, and den Beer Portugael, of the Netherlands, opposed the inclusion of Article 3 of the Brussels Declaration in the proposed Hague Regulations. Beernaert explained that he did not want officially to sanction such a power: “The country invaded submits to the law of the invader; that is a fact; that is might; but we should not legalize the exercise of this power

¹⁹ Mossner, *Military Government*, in 3 EPIL 269, 273 (1982) (after more than a decade of Israeli occupation, “it is questionable as to whether [the Hague Regulations] prohibit any changes in economic, legal, and cultural affairs whatsoever”); Liszt, *Das Völkerrecht* 491 (12th ed. 1925) (“The longer the occupation lasts, the more comprehensive will be the interference with the administration and legislation of the occupied country for its own sake” (translated in Schwenk, *supra* note 1, at 399 n.25)). On long-term occupations and international law, see *infra* Chapter 5.

²⁰ Article 3 of the Brussels Declaration: “With this object [expressed in Article 2, the occupant] shall maintain the laws which were in force in the country in time of peace, and shall not modify, suspend or replace them unless necessary.”

²¹ See, e.g., W. Hull, *The Two Hague Conferences and Their Contributions to International Law* 243–45 (1908).

in advance, and admit that might makes right.”²² Several formulations were put forward, trying to satisfy the strong and the weak countries alike.²³ The compromise that was finally agreed upon, suggested by Bilhourd, the French delegate, probably seemed more acceptable to the representatives of the weaker states, because “respecting” and “unless absolutely prevented” seemed more restrictive than the phrases “maintaining” and “unless necessary” in the Brussels Declaration.²⁴ In retrospect, this change of tone proved of little value. From the point of view of the occupants, the meaning of “unless absolutely prevented” remained conveniently vague. The Belgians, on the other hand, did not consider themselves hindered by this article from claiming that the German occupant of their land during World War I (or any other occupant, for that matter) had no power to enact legally binding laws.²⁵

The requirement to “respect” the existing laws “unless absolutely prevented” has no meaning of its own, since the occupant is almost never absolutely prevented, in the technical sense, from respecting them.²⁶ This phrase becomes meaningful only when it is linked to the considerations that the occupants are entitled or required to weigh while contemplating the desirability of change vis-à-vis the interest in stability and respect for the status quo. But delineating the legitimate concerns of the occupant is not enough. One must also determine the proper balances: the desired balance between stability and change in general, and the balance between the conflicting considerations that the occupant faces in a particular matter. Thus, if general emphasis should be laid on maintaining the status quo, then no conflicting acts would be permitted unless (for example) the public order had deteriorated significantly. More particularly, if the occupant’s security interests merit no more deference than does the welfare of the population, then not all changes that may promote its army’s needs would be deemed lawful. The interpretation of the vague phrase “unless absolutely prevented” is therefore critical: if the general emphasis is on change

²² Reprinted in *id.* at 244.

²³ A succinct description of the suggestions exists in Graber, *supra* note 3, at 141–43, and Schwenk, *supra* note 1, at 396–97.

²⁴ The linkage between the duty concerning legislation (to respect local laws unless absolutely prevented) and the duty to restore and ensure public order and civil life, which existed in the Brussels Declaration is retained in Article 43. It is, nevertheless, widely accepted that the duty to respect local laws is a general principle, which is not limited to issues related to public order and civil life. There is no freedom to disregard local law in other matters, Schwenk, *supra* note 1, at 397.

²⁵ This was essentially a reiteration of the argument of their delegate to the 1899 Hague Peace Conference. On the later Belgian claims with respect to the 1914–1918 occupation, see *infra* notes 58 and 60, and Chapter 7, text accompanying notes 13–21.

²⁶ E. Feilchenfeld, *The International Economic Law of Belligerent Occupation* 89 (1942); Schwenk, *supra* note 1, at 400.

and not on stability, then this phrase would merely create a rebuttable presumption in favor of the preoccupation law. If this is the case, the question of whether or not to enact new laws will not be very different from the same question posed to any sovereign government contemplating new policies.

It seems that the drafters of this phrase viewed military necessity as the sole relevant consideration that could “absolutely prevent” an occupant from maintaining the old order.²⁷ As was mentioned earlier, under the prevailing laissez-faire view, the occupant was not expected, during the anticipated short period of occupation, to have pressing interests in changing the law to regulate the activities of the population, except for what was necessary to the safety of its forces. The only relevant question under this restrictive view would therefore be whether or not the occupant could—in the technical sense—accommodate its security interests with the existing laws. However, as early as World War I, this test proved to be insufficient as it could not properly conform with the occupant’s duty to protect the interests of the local population, interests that at times could be best met by amending the local laws.

Scholars in the post–World War II period already conceded other legitimate subjects for the occupant’s lawmaking. Von Glahn contended that the occupant might lawfully enact laws for nonmilitary goals. In his view, “the secondary aim of any lawful military occupation is the safeguarding of the welfare of the native population, and this secondary and lawful aim would seem to supply the necessary basis for such new laws that are passed by the occupant for the benefit of the population and are not dictated by his own military necessity and requirements.”²⁸ McNair and Watts drew three grounds for legitimate lawmaking: “the maintenance of order, the safety of [the occupant’s] forces and the realization of the legitimate purpose of his occupation.”²⁹ Debbasch mentioned “la sécurité de l’armée et l’ordre public local” as the two lawful grounds for changing the law.³⁰ In

²⁷ See the many citations in Schwenk, *supra* note 1. See also Greenspan, *supra* note 18, at 224 (“if demanded by the exigencies of war”), but Greenspan adds that “[t]hose exigencies may, in fact demand a great deal,” and gives as an example the elimination of undemocratic and inhumane institutions. Bothe, *supra* note 9, at 66, is a modern voice advocating this strict interpretation.

²⁸ According to von Glahn, the view confining lawmaking to military necessity “fails to take cognizance of the fact that there are certain categories of laws which may be necessary during the course of belligerent occupation but which nevertheless have nothing to do with military necessity in the strict sense of the term.” von Glahn, *supra* note 8, at 97. But still, in von Glahn’s view, military necessity remains the primary grant of prescription, well before the “public order”: the welfare of the native population is “a secondary aim” of the lawful occupation. *Id.*

²⁹ Lord A. McNair and A. Watts, *The Legal Effects of War* 369 (4th ed. 1966).

³⁰ Debbasch, *supra* note 15, at 172.

addition, especially in light of the oppressive laws that the occupants found in Nazi Germany, some scholars have argued that at times moral arguments, and not only technical difficulties, could be considered as preventing an occupant from respecting local laws and, in fact, requiring change.³¹ With the enlargement of the legitimate subjects for changes came a more positive view regarding change in principle. Scholars in that postwar period, all writing from a Western perspective, were less averse to changes to be introduced by the occupant. Thus, some interpreted “absolutely prevented” as meaning “absolute necessity,”³² or just “necessity.”³³ Ernst Feilchenfeld suggested the test of “sufficient justification” to change the law.³⁴ Still another approach was to use the “reasonableness” test.³⁵

This recognition of broader powers for changing the legal landscape of the occupied territory implied more discretion for the occupant, and less formal constraints on its measures. Realizing that occupants could invoke the needs of the civilian population as grounds for legislation under Article 43, while “there [was] no objective criterion in practice for drawing a distinction between sincere and insincere concern for the civilian population,” Yoram Dinstein suggested a simple rule for such “sincerity”: the test for the legality of such legislative changes would generally be “whether or not the occupant is equally concerned about his own population.”³⁶ Thus the existence of a law in the occupant’s own country will generally serve as evidence of the occupant’s lawfulness in introducing a similar law in the occupied territory. This is a practical test, and as such could serve as a useful compass in evaluating occupation measures. However, this cannot be viewed as the ultimate test for lawfulness. First, the social and economic conditions in the two areas could be different, and therefore communal needs may vary. Second, if the sincerity of the occupant is at issue, the use of similar laws cannot allay the concerns involved, since different implementations of the same texts can yield disparate outcomes. Finally, the test

³¹ See, e.g., McDougal and Feliciano, *supra* note 13, at 770 (The Allied occupants of Germany “may fairly be said to have been ‘absolutely prevented’ by their own security interests from respecting, for instance, the German laws with respect to the Nazi Party and other Nazi organizations and the ‘Nuremberg’ racial laws.”); similarly, Greenspan, *supra* note 18, at 225 (“If, in those circumstances [of complete German surrender], the victors are not ‘absolutely prevented’ . . . from respecting those institutions, then those words have no sensible meaning.”). See also the British Military Manual, *supra* Chapter 1, note 10, at paragraph 510 n.1.

³² See, e.g., Schwenk, *supra* note 1, at 401 (“It is therefore submitted that the term ‘empêchement absolu’ means nothing but ‘absolute necessity.’”).

³³ Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 IYHR 104, 112 (1978) (“absolute prevention means necessity”).

³⁴ Feilchenfeld, *supra* note 26, at 89.

³⁵ McDougal and Feliciano, *supra* note 13, at 767; Debbasch, *supra* note 15, at 317; Greenspan, *supra* note 18, at 224 (“International law allows a reasonable latitude in such circumstances.”).

³⁶ Dinstein, *supra* note 33, at 113.

seem to open the door wide enough to allow almost any law to be duplicated in the occupied territory; consequently, it might be abused as an excuse for the assimilation of the legal landscape of the two regions, which could well be a de facto annexation of the occupied territory.³⁷

The various scholarly efforts to explore the limits of the occupant's power and duty to modify the legal landscape of the occupied territory can provide no more than general guidelines. No a priori formulation can furnish concrete rules for the specific circumstances of every occupation. Ultimately there is no general formula that could substitute for the process of analyzing each and every act, taking note of all the relevant interests at stake and the available alternatives.

Having said that, it should be added that certain specific issues have been addressed in greater detail by scholars, and some specific rules have gained wide acceptance. One of these is the rule that occupants may suspend the operation of laws concerning conscription to military service and granting licenses to carry weapons, as well as laws relating to political activity in the territory, such as laws concerning elections to national institutions. Another generally expected act, often required by military necessity, is the suspension of certain civil liberties, such as freedom of speech and freedom of movement.³⁸ Considerable agreement exists among scholars with respect to the occupant's power to regulate the local currency and determine exchange rates.³⁹ Scholars also generally agree that the indigenous court system should be left intact if it is operative.⁴⁰ Other specific issues have received special attention, but no consensus has been formed, for example, regarding the occupant's powers to introduce changes in fiscal laws (including custom duties).⁴¹ Besides the discussion concerning the scope of

³⁷ For a similar critique of this test, see Meron, *Applicability of Multilateral Conventions to Occupied Territories*, 72 AJIL 542, 550 (1978); Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories since 1967*, 84 AJIL 44, 94 (1990).

³⁸ See, e.g., von Glahn, *supra* note 8, at 98–99; Schwenk, *supra* note 1, at 403–4.

³⁹ See Feilchenfeld, *supra* note 26, at 70–83; K. Skubiszewski, *Pieniadz na Terytorium Okupowanym* [Money in Occupied Territories] (1960) (in Polish, summary in English at 360–83); A. Nussbaum, *Money in the Law* 495 (1950); F. Mann, *The Legal Aspect of Money* 485–91 (4th ed. 1982); Stone, *supra* note 9, at 718.

⁴⁰ E. Wolff, *Municipal Courts in Enemy-Occupied Territory*, 29 TGS 99 (1944); Stone, *supra* note 9, at 701; von Glahn, *supra* note 8, at 106.

⁴¹ The specific article dealing with such laws is Article 48 of the Hague Convention. On taxation, see, e.g., Feilchenfeld, *supra* note 26, at 49; Stone, *supra* note 9, at 712–13; Greenspan, *supra* note 18, at 229; McNair and Watts, *supra* note 29, at 386. On custom duties see, e.g., Feilchenfeld, *supra* note 26, at 83; Stone *supra* note 9, at 712 n.118; Greenspan, *supra* note 18, at 228; Schwenk, *supra* note 1, at 404; E. Castrén, *The Present Law of War and Neutrality* 224 (1954). Of special interest would be the decision of the Israeli Supreme Court in the case of *Abu-Aita*, which sanctioned the introduction of the Value Added Tax into the Israeli-occupied territories, and also approved the free passage of goods across the borders

the authorized legislation by the occupant, two issues exist with respect to the relevant portions of the local legal system that the occupant should respect: Does the duty to respect “the laws in force” extend not only to primary legislation but also to secondary legislation and maybe even court precedents? And what weight should be given to the term “the laws in force in the country”? Do these laws include new laws introduced by the sovereign government subsequent to the commencement of the occupation, and enforced in the unoccupied part of the country?

Only a very narrow and technical reading of Article 43 can support a claim that the occupant has no duty to respect prescriptions that are not embedded in primary legislation. Public order and civil life are maintained through laws, regulations, court decisions, administrative guidelines, and even customs, all of which form an intricate and balanced system. Even in democratic societies, which differentiate between the legislative powers of the elected parliament and the delegation of authority to other lawmaking bodies, it is accepted that all the prescriptive functions are equally important.⁴² Schwenk argued that the legislature, by delegating its legislative authority to other branches, has a priori implicitly consented to any changes made by the occupant and therefore such changes do not have to pass the muster of international law.⁴³ But this opinion overlooks the fact that by delegating its authority, the legislature did not waive its power to intervene and correct abuses made by the delegated power. That opportunity to react to abuses or misuses of authority is, of course, lacking under occupation. Hence, the occupant's duty to respect the laws under Article 43 should be construed as including the duty to respect nonstatutory prescriptions,⁴⁴ and even the local administration's interpretation of the local statutes and other instruments. Any deviation from such an interpretation should not be justified as a “fresh reading” of the interpreted instrument, but rather by the necessity to deviate from the former operative interpretation, necessity that must be justified under Article 43.

More complicated is the second question, regarding subsequent legislation by the ousted government. Occupants,⁴⁵ some national courts,⁴⁶ and

between Israel and the territories. *Abu-Aita*, *supra* note 10; see also *infra* Chapter 5, text accompanying notes 179–80.

⁴² But cf. von Glahn, *supra* note 8, at 99, arguing that “administrative regulations and executive orders are quite sharply distinct from the constitutional and statute law of a country and . . . they do not constitute as important or as vital a part of the latter's legal structure.”

⁴³ Schwenk, *supra* note 1, at 408.

⁴⁴ See, e.g., De Visscher, *L'occupation de guerre d'après la jurisprudence de la Cour de cassation de Belgique*, 34 LQR 72, 80 (1918); K. Strupp, *Das Internationale Landkriegsrecht* 99 n.2 (1914).

⁴⁵ The German occupation government in Belgium during World War I, the Allied forces in World War II, and the Israeli administration in 1967 did not recognize these laws as applicable. See Stein, *Application of the Law of the Absent Sovereign in Territories under Belligerent*

some scholars⁴⁷ have rejected any duty to respect legislation made outside the occupied area. The majority of post-World War II scholars, relying also on the practice of various national courts, have, however, agreed that with respect to those issues in which the occupant has no power to amend the local law, the absent sovereign government is entitled to legislate and expect the occupant to respect its dictates.⁴⁸ Even if the occupant does not respect such new legislation, it is nevertheless valid, and could be invoked retroactively upon the conclusion of the occupation.⁴⁹

Occupation: The Schio Massacre, 46 Mich. L. Rev. 341, 352–53 (1948); see also The U.S. Judge Advocate General's School, *Legal Aspects of Civil Affairs* 104 n. 10 (1960), which states that "the belligerent occupant is under no legal obligation to apply laws promulgated by the absent sovereign subsequent to the occupation." The Israeli view is pronounced in Proclamation Concerning Law and Administration (no. 2) of June 7, 1967.

⁴⁶ The U.S. Supreme Court held this view with respect to territories occupied by U.S. forces. *Thirty Hogsheads of Sugar v. Boyle*, *supra* note 2; *United States v. Rice*, *supra* note 2. But cf. the opinion of the U.S. Second Circuit with respect to legislation by the exiled Dutch government in *State of the Netherlands v. Federal Reserve Bank of New York*, 201 F.2d 455 (2d Cir. 1953) ("The legitimate Government should be entitled to legislate over occupied territory insofar as such enactments do not conflict with the legitimate rule of the occupying power.").

⁴⁷ See 3 C. Hyde, *International Law* 1886 (2d ed. 1945), arguing: "The possession by the belligerent occupant of the right to control, maintain or modify the laws that are to obtain within the occupied area is an exclusive one. The territorial sovereign driven therefrom can not compete with it on an even plane." Dinstein, *supra* note 33, at 113–14, and Stein, *supra* note 45, at 362, suggest that although the occupant has no duty to do so, it might be expedient to respect the new laws in certain circumstances. E. Wolff, *supra* note 40, at 109, mentions operative difficulties: "from a practical point of view such a division of the legislative power between the legitimate government and the occupant would meet with the greatest difficulties. It is hardly possible to draw the border line between measures dictated by 'absolute necessity' and other measures. . . . The second doubt concerns the promulgation. The legitimate government will not be able to comply with the provisions contained in its constitutional law about the promulgation of legislative measures."

⁴⁸ See Feilchenfeld, *supra* note 26, at 135, asserting that "one goes too far in assuming, as has been done by various authorities, that an absent sovereign is absolutely precluded from legislating for occupied areas. The sovereignty of the absent sovereign over the region remains in existence and, from a more practical point of view, the occupant may and should have no objection to timely alterations of existing laws by the old sovereign in those fields which the occupant has not seen fit to subject to his own legislative power." For similar views, see McNair and Watts, *supra* note 29, at 446; von Glahn, *supra* note 8, at 34–36; Debbasch, *supra* note 15, at 229–33.

⁴⁹ "[T]he rule [respecting the local laws] freezes the local law for the period of the belligerent occupation. The dispossessed sovereign cannot, and the Occupying Power may not [with the exception of the necessities of war], interfere with the *status quo ante bellum*. . . . In [matters that are not the legitimate legislative concern of the occupant], the legislation of the dispossessed sovereign is merely ineffective while the occupation lasts, . . . [and] retroactive application of such legislation [upon the return of the sovereign] is compatible with international law." 2 G. Schwarzenberger, *International Law—The Law of Armed Conflict* 201–2 (1968). "So far as the inhabitants of the occupied territory are concerned, they can invoke legislation-in-exile only in the courts of the restored sovereign after the occupation." Mc-

The Scope of Article 43: Its Applicability to the National Institutions of the Occupying Country

The limitations on the occupant are not restricted to the temporary occupation institutions established to handle the affairs of the occupied territory. They also extend to the national institutions of the occupying country. The occupant may not surpass its limits under international law through extraterritorial prescriptions emanating from its national institutions: the legislature, government, and courts. The reason for this rule is, of course, the functional symmetry, with respect to the occupied territory, among the various lawmaking authorities of the occupying state. Without this symmetry, Article 43 could become almost meaningless as a constraint upon the occupant, since the occupation administration would then choose to operate through extraterritorial prescription of its national institutions. Thus every prescription of policy regarding the occupied territory, every grant of power to act with respect to that area, every general prescription which applies also to the area, and every extension of the courts' jurisdiction will all be subject to the delimiting principle of Article 43.

Support for this proposition is found in one of the earliest decisions of the Israeli Supreme Court.⁵⁰ In this case the Court considered whether the national legislature of the occupant state was entitled under international law to prescribe directly with respect to the occupied territory, or whether such a prescription should be promulgated by the occupation administration. The Court approved the arrogation of the powers of the occupant under Article 43 to the occupant's legislature in these words:

As to the argument that it should have been the military commander and not the State of Israel who legislated for the area, I am of the opinion that if international law recognizes that the military commander has certain powers of legislation, *a fortiori* such power is vested in the legislature of the occupant from which the military commander derives his own authority. . . . Accordingly there is no substance in the assertion that the laws [that were applied to the occupied

Dougal and Feliciano, *supra* note 13, at 771–73. The Swiss Federal Tribunal has held that the enactments of an exiled government were immediately valid in the occupied territory. The court did not qualify this assertion by subjecting it to the legitimate prescriptive powers of the occupant: "Enactments by the [exiled government] are constitutionally laws of the [country] and applied *ab initio* to the territory occupied . . . even though they could not be effectively implemented until the liberation. . . ." *Ammon v. Royal Dutch Co.* 21 ILR 25, 27 (1954).

⁵⁰ *Attorney General for Israel v. Sylvester*, [1948] AD Case no. 190 (February 8, 1949). Despite this Israeli precedent of 1948, during the Israeli occupation of the West Bank and Gaza, many important policies were prescribed and applied by the Israeli legislature, government, and even courts, without regard to the delimitations imposed by the Hague Regulations. On these policies see *infra* Chapter 5.

territory] are invalid because they were issued by the State of Israel and not by the military commander of the occupying forces.⁵¹

If the national institutions of the occupying army have powers similar to those of the latter, then they are equally bound by the same constraints on the use of such powers. Indeed, this equation stems from the bureaucratic fact that the occupying force is not an actor independent of its own national institutions; rather, it is an implementing arm of those institutions. There is no point, and no legal basis, for differentiating between them.

Nationals of the Occupying Power: An Exception to the Rule?

A familiar case in which laws are extraterritorially prescribed to the occupied territory occurs with the extension of such laws over nationals of the occupant who are present in the territory. In this regard, an exception to the principle of limited prescriptive powers of Article 43 has been recognized in practice and in the literature: the occupant is not bound by the Hague Regulations in prescribing the internal legal relationships among the members of its forces and the nationals who accompany the troops insofar as this does not impinge upon indigenous interests.⁵² There is no international obligation to apply the territorial law of the occupied territory (and hence Article 43) to transactions these nationals have concluded among themselves, and thus the national law would often be the applicable law.⁵³ In practice, the occupant would usually also prevent the local courts

⁵¹ *Israel v. Sylvester*, *supra* note 50, at 575. The same reasoning is applicable also to undertakings of the occupying state arising under multilateral conventions. Meron, *supra* note 37.

⁵² See, e.g., *The Law of Land Warfare* (U.S. Army Field Manual, FM 27-10, 1956), which states in Section 374: "Military and civilian personnel of the occupying forces and occupation administration and persons accompanying them are not subject to the local law or to the jurisdiction of the local courts of the occupied territory unless expressly made subject thereto by a competent officer of the occupying forces or the occupation administration." *But cf.* Greenspan, *supra* note 18, at 254-56 (the troops will not be subject to local law and jurisdiction, but accompanying civilians may be subject to the local law to be applied by the military tribunals).

According to the British Foreign Marriage Act of 1947, a British ceremony of marriage will be administered abroad if at least one of the parties is a member of the army. The Law Commission proposed in 1985 that the same arrangement be extended to civilians who accompany the forces. See Cheshire and North, *Private International Law* 565 (11th ed., P. North and J. Fawcett, eds., 1987).

⁵³ Thus acts of marriage between members of Allied occupation forces in occupied Germany and Italy have been held valid by the British Probate Court, which preferred the nationality law on the otherwise applicable *lex loci celebrationis*. See, e.g., *Merker v. Merker*, [1963] P 283, [1962] 3 All E.R. 928; *Preston v. Preston*, [1963] P 411, [1963] 2 All E.R. 405 (here the husband was a member of the occupation forces while the wife, a civilian, lived in the same army camp).

of the occupied territory from adjudicating claims regarding those nationals.⁵⁴

With regard to nationals of the occupant who are not related to the latter's forces, the legal situation is not as clear. Some authorities support the territorial principle.⁵⁵ From the point of view of the law of occupation, it would seem that the test should be whether the application of the national law would have, directly or indirectly, adverse effects on the local public order and on short- and long-term indigenous interests. Usually the application of the nationality principle, in both civil and criminal matters, would not impinge on those concerns, and thus it is arguable that in those cases the nationality principle could replace the territorial principle. But if such measures are liable to affect the indigenous population of the occupied territory, then they ought to pass the scrutiny of international law, including Article 43 of the Hague Regulations. One such external outcome of an application of the nationality principle might be the encouragement of nationals to emigrate to the occupied territory. Such an outcome might impinge on the local "public order and civil life" and therefore be proscribed by international law, particularly by Article 43.

Article 43 and the Duty of the Ousted Government

Ought the ousted government acquiesce to measures taken by the occupant that are deemed lawful under Article 43? Does the law of occupation require it to respect the occupant's valid laws when it resumes authority over the territory? Before reaching these two questions, we have to ask a preliminary question: why are these two questions important to the understanding of the powers and duties of the occupant during the occupation? The occupant has a strong interest in ensuring that its prescriptions and the allocation of entitlements provided by those prescriptions remain effective even after its departure. This probability enhances the inhabitants' incentive to comply with its orders during its rule. A stability in expectations is more likely under such conditions. Moreover, if the occupant's pre-

⁵⁴ See, e.g., Greenspan, *supra* note 18, at 255.

⁵⁵ See *Madsen v. Kinsella*, 93 F. Supp. 319, 323 (S.D. W. Va. 1950), *aff'd*, 188 F.2d 272 (4th Cir. 1951), *aff'd*, 343 U.S. 341 (1952). The case involved a conviction under the German Criminal Code of an American for the murder of her husband. At the relevant time, both had been living in the U.S. occupation zone in Germany, where the husband served as an army officer. Said the court of first instance: "When an American citizen (not a member of the Armed Forces) enters a foreign country, he becomes amenable to the laws of that country, and is triable by its courts. . . ." See also *In re Friess and Ronnenberger*, [1947] AD Case no. 80 (decision after World War II by the French Court of Cassation applying French criminal law to acts of two civilians of German nationality who had resided in France during the occupation).

scriptions that conform with Article 43 are expected to be honored by the ousted government, then the occupant's incentive to comply with Article 43 is strengthened, and this in turn will benefit the occupied population. Conflicting prescriptions by exiled governments (or foreseeable conflicting legislation after liberation) may thus have a substantial adverse impact on civil life during the occupation. Therefore international law recognizes the duty of ousted governments to refrain from issuing prescriptions that would conflict with the occupant's lawful measures,⁵⁶ although, of course, such measures are not immune to prospective modifications by the returning government.⁵⁷ This standpoint withstood the two world wars, despite the contrasting state practice that accumulated during that period.⁵⁸

Actual practice varies from the proposition endorsed by most scholars. The ample evidence of the conduct of exiled governments and returning governments during and immediately after the two world wars shows that by and large those institutions did not conceive themselves as bound by the international legality test,⁵⁹ nor did they always find it expedient to respect the lawful measures of the occupation authorities. Most of the exiled governments issued decrees that conflicted with the policies implemented by the occupants;⁶⁰ most of the returning governments sought to

⁵⁶ L. Oppenheim, *International Law* 342 (2d ed. 1912), and 3 A. Mérignhac, *Traité de droit public international* 410 (1912), were the first to assert this principle.

⁵⁷ Some post-World War II governments held the view that the termination of the occupation implies the automatic lapse of all the occupant's enactments. See the views of the French government (with respect to the German but not the Vichy orders) in Delaume, *Enemy Legislation and Judgments in France*, 30 JCLIL 32, 33 (1948); of the Norwegian government in Stabel, *Enemy Legislation and Judgments in Norway*, 31 JCLIL 3, 4 (1949); of the British government with regard to the island of Jersey in Aubin, *Enemy Legislation and Judgments in Jersey*, 31 JCLIL 8, 9. This opinion is not supported by the behavior of other returning governments or by the jurisprudence cited *infra*, which supports the argument that the abrogation of valid occupation laws must be formally expressed.

⁵⁸ L. Oppenheim, *International Law* 618 (7th ed., by H. Lauterpacht, 1948); Stone, *supra* note 9, at 721 n.176; Schwarzenberger, *supra* note 49, at 346-47; Greenspan, *supra* note 18, at 213 n.16; Hyde, *supra* note 47, at 1885; J. Spaight, *War Rights on Land* 366-67 (1911); Morgenstern, *supra* note 8, at 299; Feilchenfeld, *supra* note 26, at 147; Debbasch, *supra* note 15, at 176. This overwhelming accumulation of authorities, all concurring in principle, has set aside two other doctrinal propositions. The one, advocated by Belgian authorities and scholars and hence called the Belgian school, denied any legal validity to occupation orders, and conceded to the ousted sovereign absolute power to legislate even retroactively. Thus, when the occupation ends, the occupation orders expire by themselves. I. A. Rolin, *Le droit moderne de la guerre* 438 (1920). For more on this school, see *infra* Chapter 7, text accompanying notes 13-21. The opposite view required the returning sovereign to refrain from retroactive annulment of even illegal orders. A. Pillet, *Les lois actuelles de la guerre* 255-56 (2d ed. 1901).

⁵⁹ The first pronouncement of this test was made by Feilchenfeld, *supra* note 26, at 146. Its most conspicuous advocate was Morgenstern, *supra* note 8, at 291.

⁶⁰ Many exiled governments warned their occupied constituencies in advance that only their own prescriptions would be effective upon their return. The king of Belgium made an

undo the outcomes of those policies, whether immediately or gradually.⁶¹ It is difficult to trace any implicit recognition of an international duty to respect lawful occupation measures. Enactments of governments in exile were aimed at disrupting occupation policies regardless of possible hardships caused to the population; enactments of returning governments were intended to reestablish control over resources, to return swiftly to normal life, and to correct injustices. The endorsement of indigenous expectations based on occupation measures was not deemed a consideration commensurate to those goals.⁶² The measures of the returning government were

announcement to that effect on April 8, 1917 (see *infra* Chapter 3, text accompanying note 66). During World War II, the Inter-Allied Declaration of January 5, 1943, regarding the validity of acts of dispossession committed in Axis-occupied areas, failed to mention that the occupant had legal authority to modify the law. In that declaration the parties "reserve all their rights to declare invalid any transfers of, or dealings with property, rights and interests of any description. . . ." U.S. Dep't of State Bull., January 9, 1943, at 21. This warning "applie[d] whether such transfers or dealings ha[d] taken the form of open looting or plunder, or transactions apparently legal in form, even when they purport[ed] to be voluntarily effected." *Id.* Some exiled governments also took unilateral initiatives in this respect. On January 10, 1941, the Belgian government provided that all the occupant's measures, those already taken as well as prospective ones, "sont nuls et non avenues." La bulletin législatif Belge, Arrêtés de Londres 18. See also the official interpretation of that decree-law by the Belgian cabinet, *id.*: "[Cet Arrêté-loi] proclame la nullité radicale de toutes mesures que prendraient les autorités allemandes d'occupation en Belgique, qu'elles touchent au droit public, à l'organisation administrative, à l'ordre social ou aux droits privés et aux intérêts des citoyens." (This decree-law proclaims the absolute nullity of all measures issued by the German authorities in Belgium, whether they affect public law, the organization of the administration, the social system, or private rights and citizens' interests.)

⁶¹ The exiled Belgian government proclaimed on May 5, 1944, that most of the measures that had been taken by the Belgian secretaries general who acted within the occupied area were to be considered null and void. La bulletin législatif Belge, Arrêtés de Londres 157-60. The Dutch government prescribed from London on September 17, 1944, an elaborate order distinguished among various occupation orders, according to principles that seemed to have no correlation with either Article 43 or international law in general. 9 J. Verzijl, *International Law in Historical Perspective* 229 (1978). Other decrees, providing for retroactive annulment of occupation enactments on a general basis, were promulgated by the provisional government of France headed by de Gaulle. Delaume, *supra* note 57, at 33-34. Certain important legislative measures of the Vichy government were explicitly validated. Constitutional acts in Greece after the occupation gave the Greek legislature authority to declare occupation orders void *ab initio*, and the latter made quite an extensive use of this power. Zepos, *Enemy Legislation and Judgments in Liberated Greece*, 30 JCLIL 27, 30-31 (1948). The Norwegian reaction was milder: the relevant law of transition abrogated parts of the occupant's legislation only prospectively, see Stabel, *supra* note 57, at 4; the validity of the occupant's laws during the occupation was a matter left to the courts, who were also granted jurisdiction to reopen and revise any court decision that had been rendered during the occupation pursuant to an unlawful enactment, *id.* at 5-6.

⁶² Cf. McDougal and Feliciano, *supra* note 13, at 744, stating that "the balance between maintaining stability in expectations by honoring acts of the occupant, and permitting the restored territorial sovereign to protect its legitimate exclusive interests which were substantially affected by such acts, tends in many contexts to shift toward the latter."

generally upheld by the local courts, which refrained from scrutinizing their national institutions for conformity with Article 43.⁶³

The discrepancy between the demand for sovereigns' respect for the law of occupation, a demand to which the bulk of authorities subscribe, and the actual practice of national institutions may be partly explained by the peculiar circumstances of World War II. But the Belgian government reacted in much the same way during World War I, when the Germans did claim to rule in accordance with the Hague Regulations. The crux of the problem lies in the fact that ousted governments often tend to prefer the protection of their bases of power over the expectations of the population. On the basis of this experience, it would be safe to anticipate similar conduct by other returning sovereigns, motivated by similar goals.

When national courts in liberated territories were asked to determine the validity of a former occupant's prescriptions (lacking clear instruction from the returning government), they did use Article 43 as the test for legality. It seems, however, that this test was so popular largely because of its convenient ambiguity, which provided opportunities to implement policies that served the postoccupation societies. In fact, these decisions stood more for such policies as ensuring market stability in the postoccupation period and preventing unjust enrichment due to the occupation than for the delimitation of the occupant's powers. The courts used this test to solve immediate problems, rather than to redefine the legitimate powers of future occupants. Thus these postoccupation decisions contribute more to the understanding of this transitory period than to the study of the lawfulness of occupation measures: these courts at that period were simply indifferent to the question of international lawfulness.

⁶³ Lawmaking by exiled governments during the occupation period has been recognized after that period as having been immediately applicable within the occupied area in all reported jurisdictions except for Greece. This was the case in Belgium, see *infra* Chapter 7 on post-World War I cases; see *In re Hoogeveen*, [1943-1945] AD Case no. 148 (Court of Cassation, November 6, 1944) for a post-World War II decision, the Netherlands, *Rotterdam Bank Ltd. (Robaver) v. Nederlandsch Beheers-instituut*, [1949] AD Case no. 154 (Supreme Court, January 13, 1950); *Damhof v. State of the Netherlands*, [1949] AD Case no. 155 (Court of Appeal of The Hague, March 3, 1949), Norway, *Public Prosecutor v. Reidar Haaland*, [1943-1945] AD Case no. 154 (Supreme Court, August 9, 1945) (legislation regarding treason); *Public Prosecutor v. Lian*, [1943-1945] AD Case no. 155 (Supreme Court, November 14, 1945), Italy, *Ferrovie dello Stato v. S.A.G.A.*, [1946] AD Case no. 147 (Court of First Instance, Venice, June 21, 1946), and Malaya, *Dominic v. Public Prosecutor*, [1948] AD Case no. 179 (Malayan Union, Court of Criminal Appeal, March 24, 1947). The different jurisprudence of the Greek courts, *Occupation of Cavalla Case*, [1929-1930] AD Case no. 292 (Court of Thrace, 1930); *In re X.Y.*, [1943-1945] AD Case no. 147 (Conseil d'État, 1945), is probably because during the World War II occupation, two distinct bodies, one sitting in London and the other in Cairo, claimed to be the Greek government in exile. The retroactive validation of all enactments of the legal Greek government in exile was finally prescribed in a Constitutional Act of February 8, 1946. Zepos, *supra* note 61, at 31.

The most evident policy of these courts has been the validation of transactions, provided that no unfair advantage could be taken of such validation. Thus, for example, the issuance of new currency by the occupant was generally held to be valid.⁶⁴ But when inhabitants tried to take advantage of the steep devaluation of the occupation currency by repaying debts in these valueless notes, the courts intervened on behalf of the payees; by using the international legality test, they held that the introduction of new currency was unlawful and thus void.⁶⁵ The consequence of these two applications of the test was, of course, conflicting decisions in different jurisdictions. The policy of validation is evident in two Greek decisions upholding contracts drawn under Bulgarian law during the Bulgarian annexation of parts of Greece.⁶⁶ The same policy of validation, with the exception of unfair advantage, was also implemented in questions of status, when courts in various jurisdictions upheld marriage ceremonies conducted under occupation law.⁶⁷ The trend to validate commercial and personal transactions

⁶⁴ Two such cases were decided by the Philippines Supreme Court. *Haw Pia v. China Banking Corp.* [1951] AD Case no. 203, at 657; *Gibbs et al. v. Rodriguez et al.*, [1951] AD Case no. 204.

⁶⁵ This was the position of the Burmese courts in *Taik v. Ariff Moosajee Dooply*, [1948] AD Case no. 191 (High Court), *aff'd*, *Dooply v. Chan Taik*, [1951] AD Case no. 202, and of the Supreme Court of Hong Kong in *Tse Chung v. Lee Tau Chu*, [1951] AD Case no. 200. The district court of Luxembourg reached a similar result in *G. v. B.*, [1951] AD Case no. 198 (emphasizing the unreal exchange rate between occupation and local currency). Cf. *Ko Maung Tin v. U Gon Man*, [1947] AD Case no. 104 (decision of the High Court of Burma declaring occupation currency illegal regardless of specific considerations of unfair advantage).

⁶⁶ The requirement under Greek law that a contract for the sale of immovable property be drawn by a Greek notary (not required under the Bulgarian law) was held to be immaterial in those circumstances, and the contracts were declared valid. *L. v. N.*, [1947] AD Case no. 110 (Bulgarian occupation of Greece); *Thrace (Notarial Services) Case*, [1949] AD Case no. 167. Similarly, a will made according to Bulgarian law was held to be valid. *In re P. (Komotini Case)*, [1948] AD Case no. 187.

⁶⁷ See the following Belgian decisions, regarding marriage in the annexed parts of Belgium. In *Krott v. Merckens*, [1947] 3 Pasirisic Belge 10 (Tribunal Civil de Verviers, December 9, 1946), *digested in* [1946] AD Case no. 148), despite the illegal annexation and introduction of German laws, a marriage between a Belgian woman and a German man was held valid. The court seemed concerned by the ramifications of a decision to the contrary. It reasoned that the Belgian Decree-Law of 1941 (promulgated by the exiled king) did not intend to render all marriages in these areas during 1940-1944 null and void, and emphasized the fact that such a ceremony was voluntary. As the legal tool for reaching the result, it used the conflicts rule of *locus regit actum*, the law being the German one, that of the temporary de facto sovereign. The same result was reached in *Bourseaux c. Kranz*, [1948] AD Case no. 171 (Court of Appeal of Liège, June 24, 1948). The Belgian law of May 5, 1944, annulling acts "based on the modification of Belgian territory by the enemy" had formally annulled the marriage. Nevertheless, the court held that the couple, in their internal relationship, were precluded from invoking this argument, since the Belgian Civil Code prevented spouses from invoking minor procedural defects for the purpose of relieving themselves of duties related to their status. In the liberated Netherlands East Indies (Indonesia), the court upheld a divorce

was also apparent in cases where the claimant relied not on the occupation laws but on the nonavailability of preoccupation institutions.⁶⁸ The policy of validation, as well as judicial expedience, were the considerations that led to the upholding of court decisions from the occupation period, including the decisions of courts that had been set up by the occupant.⁶⁹

In conclusion, the inconsistent application of Article 43 by ousted governments during and after occupation cannot be said to have contributed to the stability of the expectations of the population under occupation. The tendency of local courts after liberation⁷⁰ has been to uphold expectations, but only when they would not be required to apply the government's specific laws. The message to the occupant is that Article 43 will not be the sole factor in determining future respect for its laws: the ousted government might not respect lawful acts, and the courts might uphold even illegal acts in the name of stability.

The Concept of Occupation According to Article 43: Past and Present

Early Attitudes

From the exploration of Article 43 and its intellectual environment emerges a picture of the concept of occupations that prevailed at the turn of the century. This concept has been completely changed since.

decree despite the fact that the decree was illegally pronounced in the name of the Japanese commander-in-chief. *Mr. P. (Batavia) v. Mrs. S. (Bandoeng)*, [1947] AD Case no. 118 (Netherlands East Indies, 1947).

⁶⁸ Thus a testament that lacked one of the formal requirements under the local law (an approval by a notary) was enforced, since under occupation it was impossible to fulfil the formalities. *In re Will of Josef K.*, [1951] ILR 966 (Poland, Supreme Court, 1949). A marriage ceremony performed clandestinely according to local tribal rites was held valid, *Lee v. Lau*, [1964] 2 All E.R. 248, where the validity of marriage celebrated in Hong Kong during the Japanese occupation was examined under the local customary forms, because the civil form was inapplicable during the occupation. Contracts for the transfer of immovable property between Polish nationals during the German occupation were held valid even though they had not been approved by a notarial act (required under Polish law but impossible under occupation). *B. v. T.*, [1957] I.L.R. 962 (Poland Supreme Court, 1949).

⁶⁹ See *Mr. P. (Batavia) v. Mrs. S. (Bandoeng)*, *supra* note 67 (the court upheld changes in the judicial organization of the country, which the Editor's Note refers to as "the overthrow of the entire judicial system of Indonesia"); *The King v. Maung Hmin*, [1946] AD Case no. 139 (Burma, High Court, 1946); *Krishna Chettiar v. Subbiya Chettiar*, [1948] AD Case no. 178, at 539-40 (Burma, High Court, 1947); *Woo Chan Shi ad Pak Chuen Woo v. Brown*, [1946] A.D. Case no. 156 (Hong Kong Supreme Court, 1946); *Cheang Sunny v. Ramanathan Chettiar and Others*, [1948] AD Case no. 194 (Singapore Supreme Court, 1948); *Endricci v. Eisenmayer*, [1946] AD Case no. 152 (Italy, Court of Appeal of Trent, 1946); *Procurator v. X (Incest Case)*, [1946] AD Case no. 154 (Holland, District Court Almelo, December 1944).

⁷⁰ On the practice of these courts during occupation, see *infra* Chapter 7.

The delegates to both Hague Peace Conferences conceived occupation as a transient situation, for the short period between hostilities and the imminent peace treaty, which would translate wartime victories into territorial concessions by the defeated party. The 1870-1871 Franco-Prussian War probably provided a prototype of the envisaged occupation: military victories led to the occupation of French territory, part of which was conceded to the Prussians in the subsequent peace treaty of 1871. This conception was part of a more general theory of war in the nineteenth century, in which war was seen as a legitimate means to achieve national goals. War, in the context of the then-prevailing political theory of social Darwinism, was the means by which the fitter party defeated the weaker, and therefore less worthy, party.⁷¹ War was seen as a match between governments and their armies; civilians were no more than the cheering fans of the fighting teams. Thus the civilians were left out of the war, and kept unharmed as much as possible, both physically and economically. This was the message of the Rousseau-Portales doctrine, which found a succinct expression in the famous statement of King William of Prussia on August 11, 1870: "I conduct war with the French soldiers, not with the French citizens." The limited scope of war implied limited exhaustion of resources. True, during the last decade of the nineteenth century the military budgets of the European Powers increased substantially.⁷² Nevertheless, it was still thought that the victor could recoup its expenses from the vanquished party through the forthcoming peace treaty.⁷³

This entrenched conception of war was combined with the political and economic philosophy of that period: laissez-faire was the prevailing economic and even moral theory, shared by all the powers. This theory implied minimal intervention of the government in economic life. There were minimal regulatory mechanisms of transactions and other uses of private rights, and the initial entitlements were the ultimate factor in social and economic activity, inspiring a deep reverence, especially by the state, for vested rights.

The minimalist conception of war and the war effort made possible a conception of a laissez-faire type of government even in wartime. The assumption was that the separation of governments from civilians, of public from private interests, would also hold true in times of war. There was not supposed to be any unmanageable conflict between the French citizens and the Prussian king. It was this conception that made the solution of Article

⁷¹ See Mossner, *The Hague Peace Conferences of 1899 and 1907*, in 3 EPIL 204, 205 (1982).

⁷² Mossner cites this phenomenon as the background for the convening of the two Hague conferences. *Id.* at 205.

⁷³ On the payment of reparations secured in a peace treaty, see, e.g., Oppenheim, *supra* note 58, at 592-95. Characteristically, an all-new Article 3 of the 1907 (IV) Hague Convention provided that states may be liable to indemnify the other side under certain circumstances.

43 seemingly possible: the peaceful cohabitation of the local population with the enemy's army, with the minimal necessary interaction between them, and with the continuous immunization of the former's private interests from intervention by the latter.⁷⁴ The almost complete separation between governmental and private activity could produce an arrangement that satisfied both stronger states and those weaker ones whose citizens were likely to experience temporary foreign rule. The separation of interests provided room for a simple balancing principle of disengagement: the occupant had no interest in the laws of the area under its control except for the security of its troops and the maintenance of order; the ousted sovereign was ready to concede this much in order to ensure maintenance of its bases of power in the territory against competing internal forces and in order to guarantee the humane treatment of its citizens. This solution was not only well founded in theory; it was supported by the practice of the nineteenth-century occupations. These occupations were of relatively short duration, during which occupants, by and large, retained existing legislation as much as possible.⁷⁵

It has been repeatedly pointed out that the administration of the occupied territory is required to protect two sets of interests: first, to preserve the sovereign rights of the ousted government, and second, to protect the local population from exploitation of both their persons and their property by the occupant.⁷⁶ A more detailed analysis of the relationship between the interests of the ousted government and those of the local population reveals that in a possible case of conflict, the occupant was supposed to prefer the interests of the government. Thus, it also had the duty to protect local institutions against indigenous forces that might call for structural changes in the internal body politic.⁷⁷ The occupant was expected to fulfil a positive role by filling the vacuum created by the ousting of the local government, and by maintaining its bases of power until the conditions for the latter's return were mutually agreed upon. The local population was similarly under a duty to abide by the occupant's exercise of authority.⁷⁸ This point

⁷⁴ A vestige of this approach is the separate treatment of the occupant's power to collect taxes (Article 48 of the Hague Regulations) and the immunity of private property from confiscation (Article 46).

⁷⁵ Graber, *supra* note 3, at 268–70. The author mentions the pledge made by the Prussians during their occupation of France to reestablish the prewar order and not to modify existing legislation unless military necessity required otherwise. The author also cites both German and French textbooks that affirm that the Prussians abided by their pledge. *Id.* at n.37.

⁷⁶ See, e.g., Jennings, *Government in Commission*, 23 BYIL 112, 135 (1946).

⁷⁷ This point is emphasized in A. Gerson, *Israel, the West Bank and International Law* 9–10 (1977): “fundamental institutional reform [by the occupant] might be used to stir indigenous rebellion against the ousted sovereign.”

⁷⁸ Similarly the occupant was granted the power to possess and administer property belonging to the occupied state, subject to the duty to “safeguard the capital of these properties,

was extremely important to the elites of the more powerful participants in the Hague Conferences, such as Austro-Hungary, Russia, the Ottoman Empire and the colonial powers. Indeed, the predominant aspect of this concern is underlined by the one exception to the duty to establish a regime of occupation: the situation of *debellatio*. The doctrine of *debellatio* asserts that if the enemy state has totally disintegrated and no other power is continuing the struggle on behalf of the defeated sovereign, then occupation transfers sovereignty.⁷⁹ The exception of *debellatio* vividly illustrates the fact that the only relevant political interests (as opposed to economic and social interests) in the Article 43 regime were those of the state elites, not of its citizens. In this sense, Article 43 was a pact between state elites, promising reciprocal guarantees of political continuity, and thus, at least to a certain extent, rendering the decision to resort to arms less profound.

Contemporary Perspectives

Even by the time of the first Hague Conference of 1899, the principles underlying the law of occupation had already been on the decline. Toward the end of the nineteenth century the national governments of some European countries began to show more involvement in their countries' economic and social life. These were the first signs of what would be later termed the welfare state. The armies at the turn of the century had also expanded beyond mid-nineteenth-century proportions: their maintenance demanded vast human and material resources, and the civilian population was called upon to provide those resources. Thus, the distinction between soldier and citizen, between private activity and wartime effort, was gradually eroded.⁸⁰ These developments were intensified by World War I, which was the first “total war,” by the rise of competing national ideologies concerning the proper functions of the national government in both internal and international affairs, and last, but not at all least, by the advent of the claim for self-determination of peoples and the complementary idea that sovereignty lies in the people and not in its government. Moreover, as

and administer them in accordance with the rules of usufruct.” Article 55 of the Hague Regulation. As much as this article prevents the occupant from destroying or depleting national resources, it tries to keep other indigenous aspirants from making use of them.

⁷⁹ See, e.g., Feilchenfeld, *supra* note 26, at 7 (“If one belligerent conquers the whole territory of an enemy, the war is over, the enemy state ceases to exist, rules on state succession concerning complete annexation apply, and there is no longer any room for the rules governing mere occupation. . . . [But] a phase of mere occupation persists as long as the allies of the conquered state continue to fight. . . .”); Stone, *supra* note 9, at 696 n.13; Schwarzenberger, *supra* note 49, at 167.

⁸⁰ See Feilchenfeld, *supra* note 26, at 17–21; Stone, *supra* note 9, at 727–32.

it became more difficult to reach accord on the transfer of sovereignty as a result of war, the periods of occupation became longer than before.

As a result of these factors, the balancing mechanism of Article 43 was put under tremendous strain. These factors did not erase the fundamental difference between occupant and sovereign, but the theoretical peaceful coexistence between the former and the local population could not be realistically expected any longer. More and more issues gradually became the objects of unbridgeable conflicts of interest, as the occupant sought to intervene in the affairs of the territory under its control, and at the same time its acts had the potential of causing profound effects in both the public and the private sectors. It was no longer possible to expect the occupant to perform the function of the impartial trustee of the ousted sovereign or the local population; it was no longer feasible to demand that the occupant pay no heed to its own country's interests. As soon as most societies recognized the necessity of some regulation of social and economic activities, policies and goals had to be decided upon and implemented by the central institutions. Thus the mandate to "restore and ensure public order and civil life" has become at best an incomplete instruction to the occupant. Even the simplest function of restoring public order, at a minimal level of intervention, became a profound policy decision, potentially resulting in stagnation of the local economy. Almost every occupation involved a conflict of interests between the occupant and the ousted sovereign, a conflict over policies and goals. Moreover, in some occupations the conflict of interests was further complicated by the appearance of a conflict between the ousted elite and the indigenous community: Article 43's bias in favor of the former was challenged by the emerging principles of self-determination and self-rule. As I will show in the following chapters, relying on the comparative study of occupations and emerging legal principles, these developments contributed to the decline of Article 43's commanding authority.⁸¹

In the scholarly debate that ensued concerning the legality of occupation measures from World War I until the present, Article 43 was invariably invoked by the advocates of occupants and occupied alike, by impartial tribunals and jurists, by institutions of the occupied entities, and by some—although not the majority—of the occupants. This scholarly debate has by and large sustained Article 43 to this day as the cornerstone of the law of occupation,⁸² despite the challenges to the contents of Article 43,

⁸¹ Feilchenfeld, in 1942, called the doctrine "a seeming legal paradise." *Supra* note 26, at 24. His concerns were not shared by many others. Only Stone, writing in 1954, reiterated Feilchenfeld's views, adding that the Fourth Geneva Convention had not provided the necessary reform. *Supra* note 9, at 727.

⁸² Feilchenfeld and Stone represent a significant minority of scholars who admonished against the precariousness of the status of the Hague law. *Supra* note 81. A recent article expressed similar concerns: Goodman, *The Need for a Fundamental Change in the Law of Bel-*

despite many occupants' disregard of the law of occupation, and despite the introduction of Article 43's successor, Article 64 of the 1949 Fourth Geneva Convention.⁸³ All these developments contributed to the demise of Article 43, but surprisingly have not been fully acknowledged in legal literature.

ligerent Occupation, 37 *Stan. L. Rev.* 1573 (1985). McDougal and Feliciano, *supra* note 13, have also injected a more realistic view into the study of this issue.

⁸³ All of these developments will be discussed in later chapters. For the conduct of occupants, *see infra* Chapters 3–6; for Article 64 of the Fourth Geneva Convention, *see infra* Chapter 4; for the other emerging principles of self-determination and human rights, *see infra* Chapter 6.